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

RESPONSE IN OPPOSITION TO APPLICATION FOR A STAY

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 10, 2025

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STATEMENT PURSUANT TO RULE 29.6

Respondents Texas Top Cop Shop, Inc., Data Comm for Business, Inc., Mustardseed Livestock, LLC, the Libertarian Party of Mississippi, and the National Federation of Independent Business, Inc., are entities as set out in the papers. None have any parent corporation and no publicly held companies own more than 10% of any entity's stock. Respondent Russell Straayer is an individual.

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Plaintiffs-Respondents, several small businesses, a local political party and the National Federation of Independent Business, and its approximately 300,000 members, respond in opposition to the United States' application to stay the district court's preliminary injunction.

INTRODUCTION

The Corporate Transparency Act imposes a first-of-its-kind reporting mandate on more than 30 million domestic entities merely because they exist, without reference to any activity at all. That is plain on the face of the statute, which simply defines a category of "reporting companies" and then regulates them. *See* 31 U.S.C. § 5336. The only precedent for this mandate is the health insurance mandate that *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), held unsupported by the Commerce Clause. That explains why, in this case, the government has proposed a whole grab bag of powers that the CTA's reporting mandate might effectuate, from the "international relations" power, to the tax power, to (of course) the Necessary and Proper Clause. *See* Appl. at 13-23. In reality, it effectuates none of them, which led the district court to block the Act's initial reporting compliance deadline for existing companies (Pet. App. at 19a), and the Fifth Circuit ultimately to deny the government's stay request. Pet. App. at 2a.

The government's applying to this Court for a stay would be surprising but for its timing. The CTA was enacted in 2021 and allowed the Financial Crimes Enforcement Network (FinCEN) to decide when its reporting mandate would take

effect. *See* 31 U.S.C. §§ 5336(b)(1)(B), (b)(5). Nothing prevented FinCEN from rushing the Act into force by 2022, if that was warranted by law enforcement or national security needs. It evidently was not: the agency instead chose to wait another three years, setting a January 1, 2025 reporting deadline for existing companies. Faced with the prospect of the Fifth Circuit taking three months or so to decide its expedited appeal, the government now claims that a brief delay threatens vitally important interests. Appl. at 2-3. A more likely explanation for its newfound urgency is that the incoming administration might delay the deadline, which would be feasible only if it hasn't yet passed. Thus, the charge to bring the mandate into force. Once existing companies have been forced to disclose their beneficial owners, the bell cannot be unrung.

The government's calculations speak directly to the equities. The harm to the government of pausing the compliance deadline of this unprecedented reporting regime is minimal, especially in light of its own three-year delay. By contrast, mandating compliance during review would plainly cause irreparable injury to those forced to report, in the forms of unrecoverable compliance costs—which the government estimates to be in the tens of billions—and constitutional injury to their First and Fourth Amendment rights from being compelled to disclose their associations and other private information. The district court and Fifth Circuit were correct to preserve the status quo against imposition of a never-before-implemented reporting regime and thereby preserve the district court's jurisdiction to decide Plaintiffs-Respondents' constitutional claims.

Finally, the government's complaints about the object and the scope of the preliminary relief entered by the district court are misplaced. Most of all, they largely overlook that the district court stayed FinCEN's implementing regulations as authorized by Section 705 of the Administrative Procedure Act, 5 U.S.C. § 705, which is hardly a novelty and raises no serious concerns. *See* Pet. App. at 97a. The government also disregards that the CTA's reporting mandate does not apply of its own force but was brought into force by those regulations, such that the injunction does not block the federal government from effectuating a statute so much as a regulation. And, in any event, the statute allows an additional year, beyond the date that FinCEN set, for the reporting deadline. *See* 31 U.S.C. § 5336(b)(1)(B). Ultimately, the district court's relief was a sound exercise of its equitable discretion, warranted by the facts, and independently justified as "appropriate process to postpone the effective date," 5 U.S.C. § 705, of the CTA's implementing regulation. This case does not cleanly present any question regarding "universal injunctions."

The government's request for a stay should be denied.

STATEMENT OF THE CASE

A. The Corporate Transparency Act

Enacted in January 2021, the CTA generally mandates that any "reporting company" report its "beneficial ownership information" to FinCEN. 31 U.S.C. § 5336(b)(1)(A). The statute does not impose this mandate directly but instead provides that it will come into force pursuant to "regulations prescribed by the Secretary of the Treasury" setting initial compliance dates. *Id.* at § 5336(b)(1).

A "reporting company" is an entity "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 companies employing more than 20 people and generating more than $5,000,000 per year in gross revenue, publicly traded companies, most financial businesses, and many nonprofits. *Id.* at § 5336(a)(11)(B).

But the CTA covers far more than just the tens of millions of small entities that operate as commercial businesses. The definition covers countless homeowners' associations, neighborhood pool clubs, personal LLCs that own a single private home, innumerable private and family trusts, and a vast number of charitable organizations and nonprofits that had no need to secure federal tax-exempt recognition because they do not rely heavily on tax-preferred donations. *See, e.g.*, Amicus Curiae Brief of the Community Associations Institute, Resp. App. at 307a ("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 … serving more than 75.5 million homeowners who live in more than 365,000 community associations in the United States."). Many of these entities have never engaged in any business transactions after their formation or only engage in incidental, localized activity for the betterment of family members or the community.

The "beneficial ownership information" (BOI) that companies must report to FinCEN consists of the identities of their "beneficial owners" and, for each beneficial owner, a full legal name, date of birth, current address, and "acceptable" photo identification. *Id.* at §§ 5336(b)(2), (a)(1). The term "beneficial owner" is defined broadly, to include 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 § 5336(a)(3). Companies that have filed reports must file updates when their BOI changes. *Id.* at §§ 5336(a)(2), (b)(1)(D). Violations of the reporting mandate are subject to substantial civil and criminal penalties. *Id.* at § 5336(h)(3).

FinCEN must disclose BOI 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 § 5336(c)(2)(B). The CTA also authorizes the Treasury to permit disclosure "to financial institutions and regulatory agencies." *Id.* at § 5336(c)(2)(C).

As noted, the CTA directs FinCEN to bring its reporting mandate into force through regulations. It requires that regulations be promulgated within a year of its enactment and set an "effective date" that, in turn, affects the Act's compliance deadlines. *Id.* at § 5336(b)(5). Companies in existence prior to the effective date "shall … submit" reports to FinCEN "not later than 2 years after the effective date." *Id.* at

§ 5336(b)(1)(B). And companies formed after the effective date must file BOI reports at the time of formation. *Id.* at § 5336(b)(1)(C). Notwithstanding those provisions, the CTA leaves it entirely to "FinCEN to determine the effective date." 86 Fed. Reg. 69920, 69945 (December 8, 2021).

FinCEN issued its implementing regulations, known as the "Reporting Rule," on September 30, 2022—missing the statutory deadline by over nine months. *Beneficial Ownership Information Reporting Requirements*, 87 Fed. Reg. 59498. The Rule set an effective date more than a year in the future, on January 1, 2024. *Id.* at 59498. And it provided that existing companies would have to comply with the reporting mandate an additional year after that, on January 1 2025—a full year short of the two-year maximum allowed by the statute. *Id.* at 59592.

FinCEN justified the years-long delay in reporting—beyond the year or so timeline that would have been feasible under ordinary rulemaking procedures—based on a number of "practical factors," including "allowing reporting companies, and small businesses in particular, sufficient time to receive notice of and comply with the new rules." *Id.* at 59547. It similarly cited "the burdens imposed on reporting companies to identify beneficial ownership information" to justify the additional year before reporting would begin for existing companies. *Id.* at 59511. It repeated essentially the same rationale—the need to allow "entities additional time to understand the new reporting obligation and collect the necessary information" when it subsequently extended the reporting deadline for newly formed entities just weeks before it was due to come into force. 88 Fed. Reg. 83499, 83500 (Nov. 30, 2023).

B. The CTA's Burden on the Public and Plaintiffs

As FinCEN recognized, the CTA and 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. Compliance in the first year alone would take 126.3 million hours and impose costs of $22.7 billion. *Id.* at 59585-86. The estimated burden hours include filing initial reports, reviewing information and complying with ongoing duties to update them when information changes. *Id.* at 59581. FinCEN also recognized that small entities would face different regulatory burdens depending on the complexity of their "beneficial ownership structure." *Id.* at 59574, 59576.

The time and expense of compliance was not the CTA's only burden. "Many … commenters expressed concerns that the proposed regulations … would create privacy and security concerns with respect to personally identifiable information." 87 Fed. Reg. at 59509. FinCEN acknowledged "the privacy concerns associated with disclosure and retention of identity information." *Id.* at 59520. But it did nothing about them, instead pointing to "statutory restrictions on the sharing of BOI," and FinCEN's duty "to promulgate appropriate protocols for protecting the security and confidentiality of that information." *Id.*

Plaintiffs are among those affected by the Reporting Rule. One plaintiff, the National Federation of Independent Business, Inc., is a membership organization with nearly 300,000 member businesses. Pet. App. at 30a. While NFIB is exempt from

the CTA, most of its members, including plaintiffs Texas Top Cop Shop, Inc. and Data Com For Business, Inc., must comply. *Id.* As the district court observed, "Every individual Plaintiff filed a Declaration in which they swore that they would incur these costs should the CTA and Reporting Rule remain in force. Similarly, NFIB filed a Declaration in which it swore that if the CTA and Reporting rule are not enjoined, its members would incur compliance costs and legal expenses associated with fulfilling its obligations under the CTA and Reporting Rule. The Government stipulated that the Plaintiffs would have testified to the same at the Court's October 9 hearing should they have testified." Pet. App. at 42a.

Plaintiffs' injuries go beyond the costs of compliance. For instance, the Libertarian Party of Mississippi is an existing political organization that must comply with the CTA. Pet. App. at 29a. It receives donations from individuals and entities, which it uses to promote political candidates for state office and policies affecting Mississippi residents. *Id.* Under its bylaws, no individual owns the entity or its assets, but it is controlled by its members, officers, delegates, volunteers, and major donors. Resp. App. at 39a. 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.* Thus, its beneficial owners include these key party members and donors. *See id.*

To date, none of the plaintiffs have filed BOI reports.

C. Proceedings Below

1. The Reporting Rule took effect at the start of 2024, and Plaintiffs brought suit in May, more than 7 months in advance of the Rule's reporting deadline for existing companies. Resp. App. at 1a. They alleged that the CTA and Reporting Rule exceed the scope of enumerated federal powers, burden associational rights in violation of the First Amendment, and violate the Fourth Amendment by compelling disclosure of private information. They quickly moved for a preliminary injunction of enforcement of the CTA and Reporting Rule. Resp. App. at 34a. In a response filed in June 2024, the government argued that Plaintiffs' motion was *premature* because "[t]he parties . . . have more than six months to resolve this case through dispositive motions before any injury could be deemed imminent." *Id.* at 83a. At a hearing on Plaintiffs' motion, Plaintiffs proposed, as an alternative to a nationwide injunction, a limited injunction extending only to Plaintiffs and NFIB's members. *Id.* at 109a, 168a. The government, however, argued that relief would infeasibly "frustrate the goals and aims of the CTA" and amount to "effective nationwide relief." *Id.* at 160a.

2. On December 3, 2024, the district court enjoined the CTA and Reporting Rule and stayed the Rule's "compliance deadline" under APA § 705. Pet. App. at 97a. It determined that the "CTA is likely unconstitutional as outside of Congress's power. Because the Reporting Rule implements the CTA, it is likely unconstitutional for the same reasons." *Id.* At the same time, the court held, the plaintiffs "have met their burden to show that the CTA and Reporting Rule threaten substantial, imminent, non-speculative, and irreparable harm" "[b]ecause Plaintiffs . . .will suffer

unrecoverable compliance costs absent emergency relief," and "because the CTA and Reporting Rule substantially threaten their constitutional rights." *Id.* at 49a-50a.

The injunction was widely covered in the news and law-firm client alerts informing regulated parties that the January 1 deadline was off. *See* Resp. App. at 174a. FinCEN itself published a notice stating that "reporting companies are not currently required to file [CTA reports] and are not subject to liability if they fail to do so[.]" *Id.*

3. Over a week later, the government sought a stay of the injunction—first from the district court and then, two days later, from the Fifth Circuit. The district court denied the request as "any interest the Government has in preserving its efforts in furtherance of the CTA are superseded by the CTA's grave constitutional flaws." Pet. App. at 17a-18a.

A divided motions panel of the Fifth Circuit, however, entered a stay and expedited the appeal, causing it to be immediately assigned to a merits panel. *Id.* at 9a.[1] Having sought and obtained a stay on the basis that any delay in the reporting deadline would gravely injure the government and public interest, the government announced just hours later that it was extending the reporting deadline to January 13, 2025. *See* FinCEN, Beneficial Ownership Information, fincen.gov, https://www.fincen.gov/boi [Updated Dec. 25, 2024].

[1] Judge Haynes, dissenting in part, would have denied a "temporary stay" as to Plaintiffs, including NFIB's members, and granted a "temporary stay…pending decision on the merits panel" as to non-parties. *Id.* at 4a n.1.

4. On December 26, 2024, the merits panel *sua sponte* vacated the stay "to preserve the constitutional status quo while the merits panel considers the parties' weighty substantive arguments." Pet. App. at 2a. The panel also set an expedited briefing schedule and scheduled oral argument for March 25, 2025. *Id.*

Five days later, the government applied for a stay from this Court.

ARGUMENT

The Court should deny the requested stay to preserve the status quo against the constitutional injury that would inevitably result should the CTA's never-before-implemented reporting mandate for existing companies be allowed to take effect. To prevail in an application for a stay, an applicant "must carry the burden of making a 'strong showing' that it is 'likely to succeed on the merits,' that it will be 'irreparably injured absent a stay,' that the balance of the equities favors it, and that a stay is consistent with the public interest." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). The government satisfies none of these factors. It cannot make a "strong showing" of likelihood of success because the mandate's only precedent is the individual health-insurance mandate held unsupported by the commerce power because it likewise sought to "justify federal regulation by pointing to the effect of inaction on commerce." *NFIB*, 567 U.S. at 552. The government's dire claims of harm are contradicted by its own years-long delay in bringing the CTA's mandate into force. And for all the government's heated rhetoric, it is hardly unusual for a court to stay a compliance

deadline set by regulation, as the district court did, and the Fifth Circuit tentatively approved.

Unconfident of how its request would fare under the principles ordinarily applicable to stay requests, the government pleads for leniency, citing a "presumption" that federal statutes remain in force pending review. Appl. at 10. This argument is misplaced, twice over. First, the CTA's reporting mandate does not operate of its own force but had to be brought into force by regulation. The function and effect of the district court's injunction is to suspend that regulation, the Reporting Rule, thereby preserving the status quo that prevailed prior to the Rule's implementation of the reporting mandate. *See* Pet. App. at 95a. Second, the government's argument overlooks that, in addition to the injunction, the district court stayed the Reporting Rule's compliance date, as Congress authorized it to do in 5 U.S.C. § 705. *See id.* This Court has exercised that same power in the same fashion. *See Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 595 U.S. 109 (2022); *West Virginia v. EPA*, 577 U.S. 1126 (2016) (staying nondiscretionary rule).

In any event, a presumption is not dispositive. This Court has upheld preliminary injunctions concerning federal statutes. *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

I. THE GOVERNMENT'S CONSTITUTIONAL RATIONALIZATIONS COME NOWHERE NEAR THE "STRONG SHOWING" REQUIRED TO JUSTIFY A STAY

The CTA's reporting mandate is unlawful because it exceeds the federal government's limited, enumerated powers.

A. *NFIB v. Sebelius* Forecloses the Government's Commerce Clause Rationalization

The CTA's unprecedented scope crosses a line long reserved for the states by regulating an entity's *status* instead of its *actions*. In *NFIB v. Sebelius*, this Court rejected a Commerce Clause justification for the Affordable Care Act's individual mandate, holding that it "compel[led] individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." 567 U.S. at 552 (emphasis in original). The CTA suffers the same defect: it "compels" reporting companies to file beneficial ownership reports with the federal government "on the ground that their failure to do so affects interstate commerce." *See id.* The district court correctly concluded that "construing the Commerce Clause to permit Congress to regulate companies precisely because the Government does not know who substantially benefits from their ownership would similarly 'open a new and potentially vast domain to congressional authority.'" Pet. App. at 62a (quoting *NFIB*, 567 U.S. at 552).

1. That the CTA regulates no activity is apparent on its face. It defines a class of "reporting companies," 31 U.S.C. § 5336(a)(11), and then requires them, based on their mere existence, to file reports, *id.* § 5336(b)(1)(A). Quoting the vacated motions panel opinion, the government claims that the CTA "regulates an economic activity: the 'anonymous ownership and operation of businesses.'" Appl. at 14 (quoting Pet. App. at 5a). But the statute does not regulate or prohibit any transaction and

does not require that anyone "operate" a business; it does not even refer to or describe any transaction, which is why the government is unable to quote any statutory language doing so. *See* Appl. at 14–15. In any event, ownership of a entity is no more an activity than ownership of a wallet; such ownership might lead to financial transactions, but they are not themselves commercial activity. The statute regulates entities based on their existence, not any activity that they undertake.

In regulating *inactivity* based on mere existence, the CTA's reporting mandate is indistinguishable from the ACA's insurance mandate. The insurance mandate compelled the uninsured to purchase health insurance, which the government justified "on the ground that their failure to do so affects interstate commerce." 567 U.S. at 551. Specifically, the ACA required "*individuals who are not exempt* and do not receive health insurance through a third party" to purchase "'minimum essential' health insurance coverage." *Id.* (citing 26 U.S.C. § 5000A) (emphasis added). Likewise, the CTA requires non-exempt entities to disclose beneficial-ownership information to the federal government, on the ground that their "anonymous existence" (as the government put it below, Pet. App. at 61a) affects interstate commerce. But *NFIB* squarely rejects the proposition that Congress may "justify federal regulation by pointing to the effect of inaction on commerce." 567 U.S. at 552; *see also id*. at 657 (joint dissent).

The government points out (Appl. at 14) that Congress made "formal findings" regarding the CTA's "effects on interstate commerce," but it made even more of them in support of the ACA's insurance mandate. 42 U.S.C. § 18091. No matter: under

NFIB, it is irrelevant that inactivity may affect interstate commerce because it is not, in itself, commerce regulable as such.

2. *NFIB* also forecloses the government's argument (Appl. at 15) that it is enough that corporations have the "authority to conduct economic transactions" and may "go on to exercise that authority." That argument runs headfirst into *NFIB*'s rejection of the "proposition that Congress may dictate the conduct of an individual today because of prophesied future activity." 567 U.S. at 557. After all, it was taken as given that every individual would "engage in a health care transaction" at some point, but "that does not authorize Congress to direct them" into action. *Id*. "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." *Id*. That holds specifically in this context: "Every State in this country has enacted laws regulating corporate governance," but *federal* power reaches only "transactions" that implicate constitutionally enumerated federal interests. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89-90 (1987).

The government's observation (Appl. at 16) that the CTA exempts some entities that may not be involved in "active business" is beside the point. The Act's fundamental flaw is that it does not regulate *activity*, and thereby commerce, at *all*. That Congress refrained from extending the CTA's reach to even more entities than the tens of millions that it did, does not alter that.

3. For essentially the same reasons, *NFIB* also disposes of the government's defense (Appl. at 15, 20–23) of the CTA as part of a broader regulatory

scheme. To be sure, the Court's cases do recognize that Congress may, under the Commerce Clause together with the Necessary and Proper Clause, "regulate purely intrastate activity that is not itself 'commercial'" where failure to do so would "undercut the regulation of the interstate market *in that commodity*." *Gonzales v. Raich*, 545 U.S. 1, 18 (2005) (emphasis added). But, as *NFIB* holds, that logic does not extend to the regulation of *inactivity*, which would be anything but "incidental" to the exercise of the Commerce power and therefore not a "proper" means of executing it. NFIB, 567 U.S. at 560; *see also id*. at 657 (joint dissent).

The premise of the government's argument is also wrong. Unlike prohibiting home non-commercial intrastate cultivation of marijuana, which facilitated the interstate-commerce ban in *Raich*, the CTA is in no way integral to any direct regulation of interstate commerce. Confirming as much is FinCEN's years-long delay in implementing the CTA's reporting requirement, which is at odds with the claim that inability to mandate that reporting would "frustrate" regulation of any "interstate market in that commodity." *See Raich*, 545 U.S. at 18-19. Indeed, the government cannot explain how the CTA's reporting mandate is integral to any provision of the principal statutory scheme it identifies (Appl. at 15), the Anti-Money Laundering Act. That's because the Act is not an integrated whole but an omnibus that pulled together disparate legislative proposals. *See generally* CRS Report R47255, at 1 ("AMLA spans 59 provisions, including a distinct title known as the Corporate Transparency Act.").

There is no support for the government's suggestion (Appl. at 23) that a different set of constitutional principles applies to "reporting obligations." It cites (Appl. at 20–21) two cases that involve the regulation of commerce. The first, *Interstate Commerce Commission v. Brimson*, upheld a provision authorizing the Interstate Commerce Commission to enlist the aid of the courts in obtaining testimony and evidence against the claim that it exceeded the "judicial power." 154 U.S. 447, 457 (1894). Although the Commission's power "to summon witnesses and require…production" was "not disputed," the Court observed that it was "plainly adapted" to the regulation of a commercial activity, the transportation of "property or persons…from one State to another." *Id.* at 472. The CTA, by contrast, is not. The second case, *Electric Bond & Share Co. v. SEC*, upheld a direct regulation of interstate commerce that forbade public utility holding companies from "use of the mails and the instrumentalities of interstate commerce" unless they registered and filed reports with the Securities and Exchange Commission. 303 U.S. 419, 427 (1938); *id.* at 428 n.3 (reciting provisions). Again, this scheme regulated activity, unlike the CTA.

The government adopts as its refrain *Electric Bond*'s observation that "requiring the submission of information" is a "familiar category" of regulation, *id.* at 437, but its own authorities confirm that such requirements must be firmly tethered to the exercise of an enumerated power. The CTA's requirement is not.

4. Finally, the government does not dispute that the CTA marks an unprecedented incursion into a domain that has been, until now, the exclusive

province of the states. "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations." *CTS Corp.*, 481 U.S. at 89. "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). To this day, "state law governs in the corporate area," while federal law remains "significant but secondary." *Id.* at 1056. The CTA interposes federal regulation into the formation of business entities by states, displacing the states from their exclusive role. The mere formation and existence of entities has never been considered to be federally regulable commerce, and to interpret the commerce power so broadly "has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *NFIB*, 567 U.S. at 676 (joint dissent) (quotation marks omitted).

B. The Government's Rationalization that the CTA's Mandate is Necessary & Proper To a Grab Bag of Other Powers Fails

As a fallback to its interstate commerce argument, the government (Appl. at 18) contends that the CTA is a necessary and proper measure to implement Congress's taxing, foreign affairs, and foreign commerce powers. The Necessary and Proper Clause authorizes measures "which are appropriate, which are plainly

adapted to [carrying into execution an enumerated power], which are…consist[ent] with the letter and spirit of the constitution." *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819). The measure must be "derivative of, and in service to" a congressional regulation issued pursuant to an enumerated power. *NFIB*, 567 U.S. at 560. Here, the CTA is not "derivative of, and in service to" a tax or regulation of foreign commerce or affairs, nor is it "plainly adapted" and "appropriate" to execute any such law.

1. To start with, the CTA does not fall within Congress's taxing power, as augmented by the Necessary and Proper Clause. The government does not even attempt explain how the CTA's reporting requirements are "plainly adapted" to tax collection.

The government (Appl. at 18) cites the general congressional finding 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, including … serious tax fraud." CTA § 6402(3), 134 Stat. 4604. But CTA reports are to be collected and maintained in a database by the U.S. Department of the Treasury's Financial Crimes Enforcement Network, not the IRS. IRS officers, along with other federal law enforcement officials, merely may "obtain access to beneficial ownership information" should they wish. CTA § 6503(c)(5), 134 Stat. 4614. Moreover, the government fails to identify *any* tax to which the CTA connects. The government cannot cite a single case upholding a regulatory measure on these grounds "when the statute at issue does not, in some way, generate some revenue." Pet. App. at 89a.

The government argues (Appl. at 20) that "[t]his Court has determined that such reporting requirements are necessary and proper for the collection of taxes," citing *Sonzinsky v. United States*, 300 U.S. 506 (1937), and *United States v. Kahriger*, 345 U.S. 22, 31 (1953). *Sonzinsky* upheld a special tax and an IRS registration requirement on dealers of firearms. 300 U.S. at 511. *Kahriger* upheld a special tax and an IRS registration requirement on persons engaged in the business of accepting wagers. 345 U.S. at 23. As the district court recognized, neither case suggests "that Congress may legislate in an unbridled manner simply because it might make some tax, someday, easier to collect." Pet. App. at 89a; *id.* ("The cases above all have one thing in common: the regulation being attacked is attached to an underlying tax. The same is not true of the CTA.").

The stark distinction between the registration requirements at issue in *Sonzinsky* and *Kahriger* and the CTA underscores the CTA's fundamental infirmity. *See Nat'l Small Bus. United v. Yellen*, 721 F. Supp. 3d 1260, 1288 (N.D. Ala. 2024) ("[T]he cases relied on by the Government illustrate that providing access to the CTA's database for tax administration purposes is not enough to establish a sufficiently close relationship here."). As the district court explained, "[t]he CTA is not 'derivative of' the taxing power simply because the Government points to some potential tax purpose the CTA might serve someday." Pet. App. at 90a. "To hold otherwise would be to unleash a slippery slope that could wreak havoc on the structure of our government." *Id.* It is difficult to imagine, if the CTA passes muster, what information the government could not demand citizens to disclose: their assets,

friends and romances, travel, and more—all might someday prove "highly useful" to the tax collector. Appl.16 (quotation marks omitted); *see also Nat'l Small Bus. United*, 721 F. Supp. 3d at 1289 ("Read that way, the Necessary and Proper Clause would sanction any law that provided for the collection of information useful for tax administration and provided tax officials with access. All Congress would have to do to craft a constitutional law is simply impose a disclosure requirement and give tax officials access to the information."). Yet, as with the information demanded by the CTA, none of these are in service of any particular tax. And the power to compel such disclosure is by no means an "incidental" one—to the point that it violates the Fourth Amendment.

2. The CTA also does not fall within Congress's implied foreign affairs power, as augmented by the Necessary and Proper Clause.

As an initial matter, it is clear that the CTA does not fall within the foreign affairs power. The "powers of external sovereignty" are truly international, including the power "to declare and wage war, to conclude peace, to make treaties, [and] to maintain diplomatic relations with other sovereignties." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316, 318 (1936). This Court has made clear that the foreign affairs power does not enlarge federal power over domestic matters. The "Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue." *Zivotofsky v. Kerry*, 576 U.S. 1, 21 (2015). 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, 857, 859–60 (2014).

The CTA clearly regulates a matter of "internal affairs" and not foreign affairs. *See Curtiss-Wright*, 299 U.S. at 316. The CTA applies exclusively to entities that register with domestic officers or agencies: "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); Pet. App. at 77a–78a ("The CTA, by its very language, does not regulate any issue of foreign affairs. It regulates a domestic issue: anonymous existence of companies registered to do business in a U.S. state and their potential conduct."); *Nat'l Small Bus. United*, 721 F. Supp. 3d at 1276 ("[T]he CTA is not authorized by Congress' foreign affairs powers, because those powers do not extend to purely internal affairs, especially in an arena traditionally left to the States.").

The CTA also is not necessary or proper for carrying into execution any congressional regulation of foreign affairs. The government fails to cite a *single* congressional regulation of foreign affairs that the CTA is necessary to support. The government instead cites Congress's general findings that "collecting ownership information would 'better enable critical national security, intelligence, and law enforcement efforts to counter' … 'illicit activity." Appl. at 19 (citing CTA § 6402(5)(D), 134 Stat. 4604). But, as the district court explained, "[t]he Government has not provided any support—and there appears to be no support—for the proposition that Congress may legislate in arenas traditionally controlled by the states simply because

it has made findings that make passing mention to an international impact." Pet. App. at 83a.

The government "seems to argue that regulation of purely internal affairs may be necessary and proper to effectuate Congress' foreign affairs powers if foreign actors (or enough foreign actors) participate in those internal affairs to illicit ends." *Nat'l Small Bus. United*, 721 F. Supp. 3d at 1275. Not only is there no support for that position, the government's argument has no limiting principle. If the CTA's sweeping reporting mandate is necessary and proper to exercise Congress's foreign affairs power, then there is no limit to the information that the government could demand its citizens to report. That is fatal, because the Clause is confined to "incidental powers" and "does not license the exercise of any great substantive and independent powers beyond those specifically enumerated." *NFIB*, 567 U.S. at 559 (cleaned up). In short, a *possible* international effect of a domestic statute is not a magic escape valve for all limits on federal authority. *See Bond*, 572 U.S. at 883 (Scalia, J., concurring).

3. The CTA does not effectuate the foreign commerce power for the same reason it does not effectuate the power to regulate interstate commerce: the constitutional language "regulate commerce," on its own or in combination with the Necessary and Proper Clause, does not reach inactivity. *See supra* § I.A.3.

C. A Statute that Exceeds Congress's Powers Is Necessarily Facially Invalid

Finally, the government's view that Plaintiffs' facial challenge to the CTA falls short because the CTA targets at least some entities that are "'engaged in business

operations affecting interstate commerce'" is mistaken. Appl. at 26 (quoting Pet. App. at 7a). The CTA's defect is that it does not regulate any activity whatsoever, and that is true as to every single application of the statute. That Congress could enact an entirely different statute regulating the activities of some of the entities that are subject to the CTA is irrelevant.

Moreover, even statutes that regulate a class of activities, *some of which are undoubtably economic*, are not evaluated under a wooden standard requiring a challenger to "establish that no set of circumstances exists under which the Act would be valid." *See* Appl. at 25 (citation omitted). That's because this Court has effectively eliminated "as applied" challenges to this category of enumerated powers claims, instead considering them as a type of overbreadth challenge. *See* Michael E. Rosman, *Facial Challenges and the Commerce Clause: Rethinking* Lopez *and* Morrison, 4 Faulkner L. Rev. 1, 29 (2012). Consider how this Court resolved *Wickard v. Filburn*, 317 U.S. 111 (1942), "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *United States v. Lopez*, 514 U.S. 549, 560 (1995). There, "the Court famously upheld a federal penalty imposed on a farmer for growing wheat for consumption on his own farm." *NFIB*, 567 U.S. at 552. "The Court rejected the farmer's argument that growing wheat for home consumption was beyond the reach of the commerce power" because "the farmer's decision to grow wheat for his own use allowed him to avoid purchasing wheat in the market," and "when considered in the aggregate along with similar decisions of others, [it] would have had a substantial effect on the interstate market for wheat." *Id.*; *see also Wickard*, 317 U.S.

at 125 ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"). In other words, when looking to whether Congress acted within its enumerated power, this Court evaluates the entire "class of activity" under other principles, and any individual's activity is not relevant.

This means, however, that those engaged in some commerce are also free to show that the entire class regulation is unconstitutional. After all, Alfonso Lopez was to be paid $40 for delivering the gun he had in his possession. *See United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993). That was undoubtedly commerce, but the statute under which he was charged regulated possession of a gun in a school zone, which is why that transaction could not save the statute. *See* 514 U.S. 549 (1995); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 Va. L. Rev. 1435, 1456 (Nov. 2013) ("[B]oth *Lopez* and [*United States v. Morrison*, 529 U.S. 598 (2000)] yielded facial invalidations of the statutes being challenged. In neither case did the Court even entertain the possibility of disaggregating the challenged provision into valid rules and invalid rules."); Gillian E. Metzger, *Facial Challenge and Federalism*, 105 Colum. L. Rev. 873, 907-908 (Apr. 2005) (similar); Matthew D. Adler and Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 Va. L. Rev. 1105, 1154 (Oct. 2003) (describing the Commerce Clause as an "existence condition" for federal power, which requires facial consideration). The government's attack on Plaintiffs' facial challenge is misplaced.

* * *

At bottom, the government's arguments boil down to a vague assertion that Congress may exercise plenary authority, irrespective of the limits of its enumerated powers, in any field it has legitimately entered. If that were so, then Congress's longstanding regulation in the healthcare field would have supported the ACA's insurance mandate. That it did not is the reason why the government cannot make the "strong showing" of likelihood of success on the merits necessary to justify a stay.

II. The Equities Weigh Heavily Against Rushing a Burdensome and Intrusive First-of-Its-Kind Mandate Into Force

A. The Government's Claims of Injury Are Contradicted By Its Own Implementation Decisions and Congress's Judgment on Timing

The government's potential injury from a slight delay in the CTA's compliance deadline is much different than the dire statements that pepper its application to this Court. Conflating the CTA's hoped-for benefits with entitlements, the government contends that the "district court's injunction subjects the government to serious and irreparable harm," "by prohibiting the enforcement of a statute that seeks to protect national security." Appl. at 26. But the CTA has not taken effect, so, even if the law could, as the government claims, "prevent terrorists and other illicit actors from raising, hiding, or moving money in the United States through anonymous shell or front companies," *id.* at 26-27, a mere delay of the putative solution to this problem hardly *creates the problem*. And while the government may have a legitimate interest in the CTA's goals, our nation has made do for its entire history so far. Any benefits

that could inure from an immediate compliance deadline, rather than one set off by a few months, are surely marginal at best.

Indeed, the government's dire claims of injury are belied by its own delay in implementing the CTA's reporting mandate. Congress left it up to FinCEN entirely as to when its implementing regulations would go into effect and thereby bring the mandate into force. No provision of the CTA or any other law blocked FinCEN from expeditiously bringing the mandate into force within a year, by January 1, 2022, at the latest, if it determined that the benefits to national security, foreign policy, and the other interests the government now cites warranted that. Instead, FinCEN set an effective date for the Reporting Rule of January 1, 2024, and then allowed an additional year—which the statute did not require it to do—for existing companies to file their initial reports. *See* 87 Fed. Reg. at 59592.

The *agency* therefore chose to delay the compliance deadline for **over three years**. It did so based on its weighing of "the benefit to law enforcement and national security agencies" against "the burdens imposed on reporting companies." *Id.* at 59511. And even then it left the door open to providing further "extensions to the filing periods for initial, updated, or corrected reports." *Id.*; *see also* 88 Fed. Reg. at 83500 (justifying 90-day extension of related CTA reporting deadline based on compliance burdens). This outright contradicts the government's claims of urgent necessity, which, in any instance, rest on speculation about the CTA's ultimate value should it ever go into full force. *See* Appl. at 15.

The CTA's timing provisions also vitiate the government's claim (Appl. at 26) that a pause of the reporting mandate pending review causes it special injury by preventing it from "effectuating" a statute. The statute pointedly *does not* set any deadline for implementation of its reporting mandate, leaving that to FinCEN's discretion. *See* 31 U.S.C. §§ 5336(b)(1)(B), (b)(5). The only thing not being effectuated at this time is the compliance deadline that FinCEN set through its implementing Reporting Rule. And it was and is FinCEN's choice to maintain that deadline in the face of legal uncertainty, given that no provision of the CTA blocks FinCEN from amending the Reporting Rule to set a later effective date, while the APA specifically authorizes the agency (in addition to a court) to "postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705.

The government presents no authority for its strange argument (Appl. at 28) that its publicity campaign weighs in favor of staying an injunction of a likely unconstitutional statute. Even if FinCEN has "devoted major resources" to "educating the public" about the CTA's requirements, there is no indication that its efforts achieved much of anything. The government itself has admitted that "more than two-thirds of the CTA-reporting entities had not filed their required reports with less than one month left before the deadline." *See* Amicus Curiae Brief of the Small Business Association of Michigan, Resp. App. at 290a (citing FinCEN); *see also* Amicus Curiae Brief of the Wholesaler-Distributers Network, Resp. App. at 268a ("As a recent survey reveals, nearly half of small-business owners are entirely unaware of their new reporting obligations under the CTA. 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."). This is yet another instance of the government conflating inputs with results, when the latter are lacking.

The government's claim of urgency is also undercut by its leisurely pace in seeking relief. *See Beame v. Friends of Earth*, 434 U.S. 1310, 1313 (1977) ("The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm") (Marshall, J., in chambers). It waited over a week to seek a stay in the first instance. Then, when the Fifth Circuit initially granted its request, it proceeded almost immediately to extend the CTA's reporting deadline by two weeks—inflicting what it now calls a "stark" injury on itself, *see* Appl. at 26, and giving up the January 1, 2025, deadline that it told the Fifth Circuit must be held at all costs. These are not the actions of a party suffering harm at every moment that passes.

B. A Stay Would Irreparably Injure Plaintiffs and Others Subject to the CTA's Reporting Mandate

Even as it conjures unlikely claims of injury for itself, the government largely overlooks the obvious irreparable injuries that a stay would impose on Plaintiffs. Those include not only non-recoupable compliance costs, but also deprivation of constitutional rights and potential mootness of their legal claims. And then there is the prospect of utter chaos if the deadline springs back. This is especially true given that many small businesses subject to the CTA's reporting requirements do not know they must report. *See* Resp. App. at 268a.

1. Plaintiffs, including the hundreds of thousands of NFIB member businesses, face significant nonrecoverable costs as a part of the CTA's first-year $28 billion cost. An irreparable harm is one for which there is no adequate remedy at law. *See Heckler v. Day*, 467 U.S. 104, 124 (1984). As this Court has long recognized, when a plaintiff is an object of a regulation "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992)). Conversely, the APA only affords relief "other than money damages." 5 U.S.C. § 702. Thus, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring, joined by Thomas, J.); *accord Florida v. HHS*, 19 F.4th 1271, 1313 (11th Cir. 2021); *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016).

Should the Court grant the government's request to reinstate the CTA's compliance deadline, Plaintiffs would face substantial nonrecoverable costs. They include not only filing the required reports, but incurring "the cost of legal services related to reviewing relevant filings." *See* Pet. App. at 42a. That is more than just filing the relevant form—includes verifying the information is comprehensive and accurate, particularly for complex business arrangements, and consistent with the complicated and confusing statutory and regulatory terms. Indeed, CTA compliance "is a tall task," involving 11 steps, each of which "takes considerable time and attention." Amicus Curiae Brief of the National Retail Federation, *et. al.*, Resp. App.

at 236a-237a. Even FinCEN recognizes that the cost of compliance can extend into the thousands of dollars and will total, in the first year alone, tens of billions of dollars. 87 Fed. Reg. at 59574, 59576, 59581. Plaintiffs' ownership structures run the gamut of complexity, and all face the prospect of non-recoupable compliance costs. *See* Pet. App. at 42a.

2. Above and beyond their Tenth Amendment claim, *cf. Bond v. United States*, 564 U.S. 211, 222 (2011) (recognizing "an injured person's standing to object to a violation of a constitutional principle that allocates power within government"), Plaintiffs also face the prospect of additional constitutional injury. As they pleaded in their complaint, the CTA 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, and 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. *See* Resp. App. at 27a-30a (citing *Americans for Prosperity v. Bonta*, 594 U.S. 595, 605-08 (2021) (plurality op.) and *City of L.A. v. Patel*, 576 U.S. 409, 421 (2015)). Because the district court ruled in Plaintiffs' favor on their 10th Amendment claim, it was unnecessary to reach these other grounds. Pet. App. at 97a. At this stage of litigation, this Court must presume that injury arises from Plaintiffs' other well-pled claims. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . ."). After all, even though these claims have been properly raised, granting the

government's request to reinstate the CTA now would potentially moot them entirely without addressing their merits.

These constitutional injuries are serious. The injury to Plaintiffs' associational rights under the First Amendment posed by the CTA's forced disclosure of their anonymous membership is plainly irreparable and one of substantial gravity. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("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."). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.). And even when a law or regulation merely "threaten[s]" First Amendment rights, a plaintiff suffers an irreparable injury. *See id.* at 373–74.

Plaintiffs are all entities or individuals with First Amendment interests in maintaining anonymity of their membership. *See Americans for Prosperity v. Bonta*, 594 U.S. 595 605-08 (2021). Indeed, one plaintiff is a local political party that advocates positions on a wide range of public issues, including the protection of constitutional rights threatened by the CTA. *See* Resp. App. at 39a. Other plaintiffs have also been engaged in advocacy targeted at the CTA itself, using their corporate form. *See* Pet. App. at 28a-29a. Nevertheless, under its expansive definition of beneficial ownership, the CTA compels them to disclose to FinCEN, and potentially to state and local law enforcement and federal regulators, key personnel, such as their

directors, officers, influential members, or even donors. *See* 31 U.S.C. § 5336 (a)(3)(A); Pet. App. at 28a-29a. The First Amendment guarantees their right to refuse to disclose this information. *See Americans for Prosperity*, 594 U.S. at 610 (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); *NAACP*, 357 U.S. at 462. Yet if the government's demand to immediately reinstate the CTA is granted, Plaintiffs will face the prospect of criminal punishment as a consequence of exercising their First Amendment rights, without consideration of their claim by any court. Preliminary relief like the district court's injunction exists to prevent that. *See Elrod*, 427 U.S. at 373 (affirming preliminary injunction).

Then there is the Fourth Amendment injury caused by the CTA's requirement that reporting companies disclose beneficial ownership information with no precompliance process and no individualized suspicion. *See City of Los Angeles v. Patel*, 576 U.S. 409, 421 (2015). Indeed, the Act itself recognizes the privacy interest in BOI, providing that it "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 the CTA's disclosure requirements are significantly more intrusive than blanket disclosure of hotels' guest lists, as was at issue in *Patel*, 576 U.S. at 419. Again, interim relief such as the district court entered is warranted to prevent this injury while Plaintiffs' claims are adjudicated. *See Maness v. Meyers*, 419 U.S. 449, 460 (1975) (discussing "necessity" of expedited appellate review of compelled disclosure of private

information claims "because appellate courts cannot always 'unring the bell' once the information has been released").

3. A stay pending appeal risks mooting Plaintiffs' First and Fourth Amendment claims because it would compel them to make the disclosures that form the basis of these claims. Plaintiffs' First and Fourth Amendment claims both assert constitutional protection from *disclosure* of protected information. The district court's mere delay of the final regulatory compliance date, which still allows any non-objecting entities to file voluntarily, ensures that Plaintiffs will not be forced to submit their information anyway and potentially moot their other constitutional objections. It would be inequitable to deny Plaintiffs adjudication of their First and Fourth Amendment rights simply because the district court ruled in their *favor* on a different ground.

4. Finally, the government has not wrestled with the practical consequences of suddenly reinstating the CTA's compliance deadline. Tens of millions of business entities are subject to the CTA's reporting mandate, and the injunction and its effect have been widely publicized by the media and FinCEN itself. *See* Resp. App. at 174a-175a. Despite the extraordinarily rapid proceedings below, dozens of amici urged the Fifth Circuit to maintain the injunction *and not a single outside party* supported the government's request. The practical and constitutional burdens on ordinary Americans are astounding. *See* Amicus Curiae Brief of the National Retail Federation, *et. al.*, Resp. App. at 236a-237a. If the deadline springs back into force, the result will be utter chaos, as those responsible for reporting scramble to

understand and fulfill obligations that the government informed them only weeks ago had been postponed.

C. The Scope of the Injunction Is Appropriate

The government presents its application as an opportunity to address the "propriety of universal injunctions," but this case does not present that issue cleanly. While the district court did enter an injunction, it also entered an utterly unremarkable stay of the Reporting Rule's deadlines pursuant to Section 705 of the APA. The stay encompasses the full sweep of the relief entered by the district court, given that the CTA's reporting mandate was only carried into legal force through its implementation by the Reporting Rule. The injunction was an appropriate exercise of the district court's discretion in the circumstances of this litigation, but even were it not, the Section 705 stay serves the same purpose.

1. The government's claim (Appl. at 31) that the district court's injunction was "vastly overbroad," and should be modified "to cover only respondents and the members of NFIB who were identified in respondents' complaint," is at odds with longstanding precedent and Section 705's postponement remedy.

"[T]he Administrative Procedure Act instructs a reviewing court to 'hold unlawful and set aside' agency rules and orders that it deems unlawful or unconstitutional." Jonathan Mitchell, *The Writ of Erasure Fallacy*, 104 Va. L. Rev. 933, 1012 (Sept. 2018) (citing 5 U.S.C. § 706). "Unlike judicial review of statutes, in which courts enter judgments and decrees only against litigants, the APA … go[es] further by empowering the judiciary to act directly against the challenged agency

action." *Id.* at 1013. "That the *effect* of the judgment is to set aside a rule universally does not create a *standing* problem." Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1181 (Sept. 2020). Whether or not that accords with traditional equity practice, Congress undoubtedly has the power to confer that authority on the courts, *see Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 329 (1999) (noting that this Court "leaves any substantial expansion of past [equity] practice to Congress"), and it did so. The APA therefore avoids the "question of whether a district court, after holding that a law violates the Constitution, may nonetheless enjoin the government from enforcing that law against non-parties to the litigation" as a matter of its inherent authority. *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 2 (2023) (Kavanaugh, J., concurring).

2. Section 705 is one step *further* removed from this debate because it sets out the specific relief at issue in this case. It provides: "On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may 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 review proceedings." 5 U.S.C. § 705.

That power tracked then-prevailing equity practice. Four years before the APA's enactment, *Scripps-Howard Radio, Inc. v. FCC*, held that the "power to stay the execution" of an agency rule "in order to preserve the status quo pending appeal"

"has always been held" to be a "part of its traditional equipment for the administration of justice." 316 U.S. 4, 9 (1942). The case involved a radio broadcaster's challenge to an FCC order applicable to a nonparty competitor. *Id.* at 5–6. No matter: "an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong." *Id.* at 9. Thus, the power to enter a stay "pending the outcome of an appeal," the Court concluded, "is part of its traditional equipment for the administration of justice." *Id.* at 9.

In turn, the "relevant legislative history" of Section 705, "indicates that it was primarily intended to reflect existing law under the *Scripps-Howard* doctrine." *Sampson v. Murray*, 415 U.S. 61, 69 n.15 (1974). Just so:

> Section 705 was intended to authorize reviewing courts to 'maintain the status quo' pending judicial review, a power that Representative Walter described as but a statutory codification of what 'has generally been regarded as an essential and inherent right of the court.' There is no question that this judicial power to preserve the status quo was understood to encompass the power to suspend a rule on a wholesale basis: as the Senate Judiciary Committee explained, section [705] 'authorizes courts to postpone the effective dates of administrative judgments or rules in cases in which, as by subjection to criminal penalties, parties could otherwise have no real opportunity to seek judicial review except at their peril.'

Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. at 1159 (citations omitted).

Importantly, in these circumstances the Court isn't trying to bind parties beyond its jurisdiction, it is merely *staying the hand of an agency as a litigant*. "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would

be an idle ceremony if the situation were irreparably changed before the correction could be made." *Scripps-Howard*, 316 U.S. at 10. In other words, "the relief sought here would simply suspend administrative alteration of the status quo." *Nken v. Holder*, 556 U.S. 418, 430 n. 1 (2009).

3. Judicial postponements of administrative rules have been a common feature of administrative practice since agencies began issuing rules. *See* Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. at 1158 n. 188 (collecting authorities). Sometimes this means delaying a rule even when Congress orders an agency to act in a set period of time. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting in part) (arguing in favor of "a stay that remains in effect pending judicial review" under Section 705, even though underlying statute "imposes a 3-month limit on stays pending agency reconsideration"). Many courts apply a presumption that invalid agency action is subject to nationwide vacatur, and because the agency "acted without authority; [it] should bear the burden of justifying a stay." *See Marin Audubon Soc'y v. FAA*, 121 F.4th 902, 919 (D.C. Cir. 2024).

Recent examples abound. *E.g.*, *MCR Oil Tools, L.L.C. v. United States DOT*, No. 24-60230, 2024 U.S. App. LEXIS 14297, at *18 (5th Cir. June 12, 2024); *Marin Audubon Soc'y*, 121 F.4th at 919, *Airlines for Am. v. DOT*, 110 F.4th 672, 674, 677 (5th Cir. 2024); *Calumet Shreveport Ref., L.L.C. v. United States EPA*, Nos. 22-60266, 22-60425, 22-60433, 22-60434, 2023 U.S. App. LEXIS 17368, at *7, *12-13 (5th Cir.

Jan. 27, 2023). Each case postponed a final rule pending appeal, without the government seeking emergency relief from this Court.

The relief accorded by the district court follows the well-trod path of postponements under Section 705. Having already determined that Respondents, including the nearly 300,000 members of NFIB, met their burden of demonstrating the unconstitutionality of the CTA, delaying the *regulatory* compliance date was the only logical solution.

4. Practical considerations likewise determined the scope of the injunction entered by the district court. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 579 (2017). The equities of this case clearly support the district court's injunction. Having already determined that Plaintiffs, including the roughly 300,000 members of NFIB, met their burden of demonstrating the unconstitutionality of the CTA, delaying the *regulatory* compliance date was the only logical solution. And practical considerations likewise determined the scope of the injunction: "At the Court's hearing, Plaintiffs suggested that they sought an injunction on behalf of only the Plaintiffs before the Court, including the approximately 300,000 members of NFIB. The Government responded that if the Court were to enjoin the CTA and Reporting Rule, the scope of which included NFIB's members, then the Court would, in practical effect, enter a nationwide injunction. The Court agrees with the

Government's point. A nationwide injunction is appropriate in this case." Pet. App. at 92a-93a.

5. The government attack (Appl. at 35–36) on the district court's application of well-established principles of associational standing flies in the face of precedent and is, at the very least, misplaced at this stage. There is literally no authority for the government's position that members of an association suing on their behalf must be "identified in the complaint." The Court has long held that "an association may have standing solely as the representative of its members" and seek relief that "will inure to the benefit of those members." *Warth v. Seldin*, 422 US 490, 511 515 (1975). It is enough that a plaintiff organization "establish[] that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992) (holding organizations were required to show that "one or more of [their] members" had standing). The government seeks to overrule this well-established doctrine, which is inconsistent with its burden at this stage of demonstrating a "strong showing" of likelihood of success on the merits. *See Whole Woman's Health*, 141 S. Ct. at 2495.

Perhaps most tellingly, the government's nonsensical position that not even NFIB's members should benefit from an injunction is at odds with how it is *currently* treating similar litigants in challenges to the CTA. In March 2024 another district court permanently enjoined enforcement of the CTA "against the plaintiffs in that action: Isaac Winkles, reporting companies for which Isaac Winkles is the beneficial

owner or applicant, the National Small Business Association, *and members of the National Small Business Association* (as of March 1, 2024)." UPDATED: Notice Regarding *National Small Business United v. Yellen*, No. 5:22-cv-01448 (N.D. Ala.), *available at* https://www.fincen.gov/news/news-releases/updated-notice-regarding-national-small-business-united-v-yellen-no-522-cv-01448 (emphasis added). Even though that injunction continues to remain in effect for the roughly 65,000 members of NSBA, the government has *not* asked this Court to intervene, much less on a purportedly emergency basis the night before enforcement was set to begin.

III. THIS CASE IS A POOR VEHICLE TO CONSIDER THE LAWFULNESS OF "UNIVERSAL INJUNCTIONS"

Finally, this case is not a promising vehicle for a referendum on "the lawfulness of universal injunction." App. at 36. As discussed above, the injunction entered by the district court does not stand alone but is accompanied by a stay under Section 705 of the APA. That congressionally authorized postponement remedy raises no constitutional issue. *See Griffin*, 144 S. Ct. at 2 (Kavanaugh, J., concurring). And even if it did, the government has already identified a superior vehicle to address that question. *See* Appl. at 38 n. 2.

The government, however, is correct to suggest (Appl. at 13) that the underlying constitutional issues presented in this case do merit this Court's review. If the Court does grant the government's request for certiorari before judgment on the question of universal injunctions, it should also take up the merits question of the CTA's validity. That is an important question of national significance in its own right.

CONCLUSION

The government's application for a stay should be denied. If this Court deems review appropriate, it should grant a writ of certiorari before judgment concerning the underlying constitutionality of the CTA and set this matter for expedited briefing and argument.

DATED: January 10, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Caleb Kruckenberg, a member of the bar of this Court, hereby certify that on this 10th day of January, 2025, a courtesy copy of the foregoing response was served by electronic mail upon:

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