No. 25-1201

In the

Supreme Court of the United States

NATIONAL SMALL BUSINESS UNITED, DBA NATIONAL SMALL BUSINESS ASSOCIATION, *ET AL.*,

Petitioners,

v.

SCOTT BESSENT, SECRETARY OF THE TREASURY, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM; MANHATTAN INSTITUTE; AMERICANS FOR PROSPERITY FOUNDATION; EAGLE FORUM; AND LIBERTY JUSTICE CENTER; IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the CTA's regulation of corporations merely because they exist under state law exceeds Congress' Commerce Clause authority.

2. Whether the CTA's suspicionless and warrantless searches to further a generalized interest in expedient law enforcement violate the Fourth Amendment.

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom from arbitrary power.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes American prosperity depends on ordered liberty and self-government.[3] AAF files this brief on behalf of its 155,355 members nationwide.

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. MI has historically sponsored scholarship and filed briefs supporting constitutional limits on congressional power and Fourth Amendment protections against broad invasions of privacy.

Amici Americans For Prosperity Foundation; Eagle Forum; and Liberty Justice Center believe, as did America's Founders, that compliance with the

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[1] All parties received timely notice of the filing of this amicus brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

[3] Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at https://advancingamericanfreedom.com/aaff-independence-index/.

Constitution's limits on government power is essential for the preservation of American freedom.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Corporate Transparency Act ("CTA") requires "designated reporting companies," certain entities incorporated under state law, to "disclose information about 'each beneficial owner' and 'each applicant' to the Department of the Treasury's Financial Crimes Enforcement Network [(FinCEN)]." App.4. Under the statute, a beneficial owner is "an individual who exercises substantial control over an entity or otherwise controls at least twenty-five percent of its ownership interests." *Id.*

Despite numerous exceptions, including for "entities that employ more than twenty employees and make more than $5,000,000 in annual gross sales," *id.*, most new corporations would fall within the ambit of the CTA's reporting requirement. This massive collection and storage of private information is not within the ambit of congressional power and is therefore unconstitutional.

The CTA asserts power over corporations based on their status rather than their activity. As such, the law resembles the Affordable Care Act's original insurance mandate that also regulated people based on status (not being insured) rather than activity. This Court accepted that distinction in *National Federation of Independent Business v. Sebelius*: an individual's mere status of being uninsured was not sufficient for Congress to assert Commerce Clause authority over him, even when paired with the Necessary and Proper

Clause. 567 U.S. 519, 549-61 (2012). It should extend that reasoning to the instant case.

Incorporation, by itself, is not an economic activity. The Eleventh Circuit "assume[d] without deciding" that the "'isolated, discrete act' [of incorporation] is not itself commercial in character[.]" App.12. Yet the panel concluded that the CTA regulates "only what entities must do after they are registered to do business." *Id.* But activity after registration is not what triggers the CTA. The Constitution only confers limited and enumerated powers on the federal government. One of those powers is to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The original meaning of the clause is clear. Commerce meant trade and among the states meant—well—among the states. A broader reading turns much of the rest of the Constitution, including the Tenth Amendment, on its head.

Similarly, the original meaning of the Necessary and Proper Clause confers on Congress only the power to carry out the powers vested in the federal government. Article I empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. As Alexander Hamilton assured the public while it considered ratification, the Necessary and Proper Clause vested in Congress no independent substantive power but only those powers which would have been inherent in

Congress's other authorities.[4] The Necessary and Proper Clause thus does not empower Congress to demand and collect the information it seeks in through the CTA.

Finally, the CTA resembles already existing government databases which have repeatedly exposed Americans' personal information to the prying eyes of malign actors, state and non-state.

Because no enumerated power vests Congress with authority to pass the CTA, the Court should grant the petition for certiorari.

ARGUMENT

I. The Commerce Clause is a Limited Delegation of Power, not a Grant of General Police Power.

The CTA regulates the noncommercial, wholly intrastate activity of incorporation under state law. The district court correctly found that the CTA is outside even the Court's broad interpretation of Congress's Commerce Clause power. However, the Eleventh Circuit reversed, holding that the CTA as a valid exercise of Congress's power under the Commerce Clause, App.2-3, which delegates to Congress power to "regulate Commerce . . . among the several States," as well as with foreign nations and Indian tribes. U.S. Const. art. I, § 8, cl. 3.

During much of the twentieth century, the Court failed to enforce the original meaning of the Commerce Clause, instead allowing Congress to exercise expansive power over even wholly local activity.

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[4] The Federalist No. 33, at 158 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

Infamously, the Court stepped aside as Congress expanded its reach to regulate such minutia as a man's growing of wheat for use on his own farm. *Wickard v. Filburn*, 317 U.S. 111 (1942).

The Court has, however, found limits to that power in recent decades. In *United States v. Lopez*, the Court found that the Gun-Free School Zones Act of 1990 was beyond the power of Congress to enact under the Commerce Clause. 514 U.S. 549 (1995). As the Court concluded, to allow Congress the power to regulate even the intrastate possession of a handgun without showing some greater relation to interstate commerce, the Court "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 568. The Court found three areas over which Congress has regulatory authority under the Commerce Clause: "(1) the channels of interstate and foreign commerce, (2) the instrumentalities of, and things and persons in, interstate and foreign commerce, and (3) activities that have a substantial effect on interstate and foreign commerce." *Id.* at 558-59. The CTA's claimed authority based on state incorporation falls into none of those categories.

More importantly, however, the CTA falls outside of the narrower Commerce Clause power actually granted to Congress in the Constitution. While the application of this narrower meaning is not determinative in this case, courts' "duty to . . . say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), requires attention to the Constitution's original meaning.

A. The text of the Commerce Clause, understood according to its original meaning, grants to Congress only the ability to regulate interjurisdictional trade.

The original meaning of the Clause is simple: Congress may "regulate the buying and selling of goods and services trafficked across state lines." *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (Thomas, J., dissenting) (citing *Lopez*, 514 U.S. at 586-89 (Thomas, J., concurring)). This understanding of "commerce" as trade was common not only to the drafters of the Constitution but to the general public, including those who ratified it. *Id.* (citing Randy Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 857-62 (2003)).

"[W]hen Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably." *Lopez*, 514 U.S. at 586 (Thomas, J., concurring). Commerce did not include, on the other hand, agriculture and manufacturing, which were wholly intrastate activities. *Gonzales*, 545 U.S. at 58 (Thomas, J., dissenting) ("Commerce, or trade, stood in contrast to the productive activities like manufacturing and agriculture."). In fact, "the term 'commerce' was used in contradistinction to" such "productive activities." *Lopez*, 514 U.S. at 586.

"Throughout founding-era dictionaries, Madison's notes from the Constitutional Convention, the Federalist Papers, and the ratification debates, the term 'commerce' is consistently used to mean trade or exchange—not all economic or gainful activity that

has some attenuated connection to trade or exchange." *Gonzales*, 545 U.S. at 58 (Thomas, J., dissenting) (citing *Lopez*, 514 U.S. at 586-87 (Thomas, J., concurring); (quoting Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 112-25 (2001)). Of thirty-four appearances of the term "commerce" in Madison's notes on the constitutional convention:

> Eight of these are unambiguous references to commerce with foreign nations which can only consist of trade. In every other instance, the terms "trade" or "exchange" could be substituted for the term "commerce" with the apparent meaning of the statement preserved. In no instance is the term "commerce" clearly used to refer to "any gainful activity" or anything broader than trade.[5]

Similarly, "[i]n none of the sixty-three appearances of the term 'commerce' in *The Federalist Papers* is it ever used to unambiguously refer to any activity beyond trade or exchange."[6] One helpful example of the use of "commerce" comes in Federalist 35. Hamilton asks, "Will not the merchant understand and be disposed to cultivate, as far as may be proper, the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?"[7] Further, in the reports of the ratification debates, "commerce"

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[5] Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 114-15 (2001).

[6] *Id*. at 116.

[7] *Id*.

"was uniformly used to refer to trade or exchange, rather than all gainful activity."[8]

"Commerce . . . among the several states" means today what it meant more than two hundred years ago when the Constitution was ratified: trade across state lines. It does not empower Congress to touch all economic activity, much less all activity that might have some attenuated effect on interstate trade. The textual evidence is clear. It is also buttressed by contextual evidence that shows that those who ratified the Constitution did not believe themselves to be granting Congress power over the minutiae of intrastate life.

B. The Context of the Commerce Clause makes clear that the Clause grants to Congress only the ability to regulate interjurisdictional trade.

Not only is the evidence supporting the narrow meaning of the term "commerce" overwhelming, but the historical and constitutional context also demand a narrow interpretation of the power granted by the Clause. An interpretation of the Commerce Clause that grants Congress power over more than interstate trade is inconsistent with the purpose of the federal government as it was understood by the Founding generation.

The Antifederalists were deeply concerned that the federal government would swallow up states' authority over internal affairs, inducing *The Federalist Papers'* assurances that the general

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[8] *Id.*

government's powers were "few and defined."[9] Of particular concern to the Antifederalists was the Necessary and Proper Clause.[10] For example, George Mason warned that, under that clause, the federal government could "extend [its] power as far as [it] shall think proper; so that the state legislatures have no security for the powers now presumed to remain to them; or the people for their rights."[11]

Hamilton dismissed such concerns, accusing the Antifederalists of holding the Necessary and Proper Clause up "in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated," when, in fact, it could "be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article."[12]

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[9] The Federalist No. 45, at 241 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

[10] *See, e.g.,* The Antifederalist No. 32, at 82-86 (Brutus) (Morton Borden ed. 1965) ("If then the objects of this power cannot be comprehended, how is it possible to understand the extent of that power which can pass all laws which shall be necessary and proper for carrying into execution? It is truly incomprehensible. A case cannot be conceived of, which is not included in this power.").

[11] George Mason, *The Objections of the Honorable George Mason to the Proposed Federal Constitution*, *in Pamphlets of the Constitution of the United States, published during its Discussion by the People* 331 (Paul Leicster Ford ed., 1888) available at https://oll.libertyfund.org/titles/ramsay-pamphlets-on-the-constitution-of-the-united-states-1787-1788.

[12] Hamilton, *supra* note 4, at 158.

Unlike the Necessary and Proper Clause, the Commerce Clause apparently caused conspicuously little controversy during the pre-ratification debates. Madison noted that, in relation to the Articles of Confederation, "[t]he regulation of commerce . . . is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."[13] This demonstrates that at the time of the Founding, even those who were worried about an expansive federal government were largely unconcerned with the expansiveness of the commerce power, suggesting strongly that that power was not understood by anyone to be the general grant of power it acts as today.[14]

As the federalists' assurances demonstrate, the purpose of the federal government was national unity, not national uniformity. "The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."[15] The Founding generation understood that the powers delegated to the federal government "w[ould] be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most

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[13] Madison, *supra* note 9, at 242.

[14] Of course, the inverse is not thereby true. It is not true that just because the Antifederalists were concerned about the Necessary and Proper Clause, therefore the clause was in fact a general grant of authority. As will be discussed below, the Federalists were right to give their assurances that the Necessary and Proper Clause itself was not a source of unbridled federal authority, and those assurances formed the original meaning on which the Constitution's ratifiers relied.

[15] Madison, *supra* note 9, at 241.

part be connected."[16] The federal government does not have a general police power. It cannot "regulate marriage, littering, or cruelty to animals, throughout the 50 states . . . Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring).

On the other hand, "The powers reserved to the several states [were to] extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state."[17] Or, as Hamilton explained, "The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction."[18]

This distinction between wholly intrastate activity and activity that crossed state lines was crucial. As Noah Webster said a month after the close of the constitutional convention, Congress cannot "interfere in any affair which respects one state only. This is the general line of division, which the Convention endeavored to draw, between the powers of Congress and the rights of the states."[19]

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[16] *Id.*

[17] *Id*.

[18] The Federalist No. 17 at 80-81 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

[19] 1 *Debates on the Constitution* 145 (Bernard Bailyn ed., 1993).

In South Carolina, David Ramsey wrote a few months later that "all the powers of Congress. . . shew that they all may be referred to this single principle, 'that the general concerns of the Union ought to be managed by the general government."[20] Internal regulation, these supporters of the Constitution promised, would remain the province of state legislation.

This understanding of the federal government as concerned with national—not local—issues is also evident in the way those of the Founding generation discussed commerce as related to productive industries. There are many instances of speakers and writers around the time of drafting and ratification using "the term 'commerce' . . . in contradistinction to . . . productive activities," such as agriculture and manufacturing. *Lopez*, 514 U.S. at 586 (Thomas, J., concurring).

Arguing that the power to regulate navigation was encompassed in the power to regulate commerce, Professor Barnett quotes discussions from ratification debates distinguishing between "commerce and navigation" on the one hand and "'various branches of business thereon dependent' as well as specifically from agriculture," on the other.[21] In the context of the purpose of the Constitution, this distinction between agriculture and manufacturing, activities that take place within a state, and commerce or trade, an activity that may cross state lines, makes perfect

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[20] 2 *Id*. at 148.

[21] Barnett, *supra* note 5 at 126 (quoting Jonathan Elliot, ed, 2 *The Debates in the Several State Conventions on the Adoption of the Constitution* at 170, 83 (Taylor & Maury 2d ed. 1863).

sense. Those who voted to ratify the Constitution in the states thus did not understand the Constitution to cede general regulatory power to the federal government.

That is why, for federal district court Judge John Davis, a member of Massachusetts's ratifying convention, the suggestion that Congress had the power to regulate the growing of corn, an activity that occurs wholly within one state, was inconceivable. "It would not be admitted, I presume, that an act, *so extravagant*, would be constitutional . . . And why? Because it would be, most manifestly, without the limits of the federal jurisdiction, and relative to an object, or concern, not committed to its management." *United States v. The William*, 28 F. Cas. 614, 622 (1808) (emphasis added).

Had those considering the ratification of the Constitution believed that the Commerce Clause conferred "so extravagant" a power upon the federal government as was upheld in *Wickard* and its progeny, reaching countless purely local activities, Antifederalists like Mason would have objected more strenuously and the Constitution would almost assuredly not have been ratified.[22]

The expansive reading of the Commerce Clause not only violates the expectations of the ratifying public; it also undermines the affirmative guarantee of the

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[22] Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment* 25 Minn. L. Rev. 432, 434 (1941) ("Among the first things that strikes one on going through the mass of materials dealing with the formation and adoption of the constitution is the nearly universal agreement that the federal government should be given the power of regulating commerce.").

Tenth Amendment. The Tenth Amendment was a reaffirmation, not a novel proclamation, that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. The Court's broad interpretation of the Commerce Clause, however, turns the Tenth Amendment "on its head." *Lopez*, 514 U.S. at 589 (Thomas, J., concurring). The Court's "case law could be read to reserve to the United States all powers not expressly *prohibited* be the Constitution." *Id.*

The Court's interpretation of the Clause in *Wickard* and its progeny has ushered in an age of vast federal power at the expense of constitutionally ensured state authority. This case is a prime example. As Petitioners explain, the Framers rejected a proposal in the Constitutional Convention to give the federal government the power to charter corporations because they feared the centralization of government economic power. Pet. at 4-5. Lacking the general power of incorporation, the CTA tries to piggy-back on the reserved state power and regulate the non-economic act of incorporation.

Textual context, too, demands a textualist reading of the Commerce Clause. At the same time that an expansive interpretation of the clause gives Congress powers it does not have, it also renders redundant many of those powers the Constitution actually does vest in Congress. As Justice Thomas explains, "much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would have been surplusage if Congress had been given authority over matters

that substantially affect interstate commerce." *Lopez*, 514 U.S. at 589 (Thomas, J., concurring).

As the Court has long recognized, "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." *Marbury*, 5 U.S. (1 Cranch) at 174. The words of the Commerce Clause certainly do not require that it be read in a manner that would render meaningless large swaths of constitutional text.

Were the Commerce Clause a grant of power to regulate all things which substantially affect commerce:

> [T]here [would be] no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that

> Congress can regulate international trade and commerce with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.

Lopez, 514 U.S. at 588-89 (Thomas, J., concurring). Such an interpretation "simply cannot be correct." *Id.* at 589. Surely all of this constitutional language is not swallowed up by one clause which, again, received very little attention at the time of the founding even from the Constitution's critics.

Because a broad interpretation of the Commerce Clause would directly conflict with the understanding of the purpose of the federal government at the time of ratification, such an interpretation is not plausible. That broad interpretation—be it that the Commerce Clause grants Congress the power to regulate all of what today is considered commercial activity, or that it grants Congress the power to regulate those things that have a substantial effect on commercial activity, or that it allows federal mandates on state-created corporations triggered by the noncommercial act of incorporation because the corporation might engage in commercial activity—is inconsistent with the evidence of original meaning of the text, is contrary to the general purpose of the national government as understood by those who drafted and ratified the Constitution, and would render much of Article I Section 8 of the Constitution a redundant waste of ink and parchment. The Commerce Clause grants Congress exactly the power it says it does: the power to regulate commerce among the several states. It is not a Trojan horse that once ratified would beget an unseen and unanticipated army of federal powers.

Because the CTA does not regulate trade among the states, it is not a legitimate exercise of the power granted to Congress by the Commerce Clause. Entities incorporated under state law are creatures of state law, and the act of incorporation is a noncommercial act that takes place entirely within the state. Thus, whether the Commerce Clause is interpreted more broadly or, as is consistent with its original meaning, narrowly, Congress did not have the authority under the Clause to enact the CTA.

II. The CTA is not a Necessary and Proper Exercise of Congress's Commerce Clause Power.

The district court in this case correctly explained why, even under the Supreme Court's relatively expansive reading of the Necessary and Proper Clause,[23] the CTA still falls outside of the power it grants to Congress. *Nat'l Small Bus. United v. Yellen*, 721 F. Supp. 3d 1260, 1275-78, 1284-86, 1288-89 (N.D. Ala. 2024). The Eleventh Circuit disagreed. It treated the CTA as regulating "only what entities must do after they are registered to do business" and thus authorized by the Commerce Clause and the Necessary and Proper Clause. App.12. This interpretation is broader than the text can bear.

Article I, Section 8 enumerates Congress's powers, and the last clause of that section says that Congress can "make all Laws which shall be necessary and

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[23] The Supreme Court has "been very deferential to Congress's determination that a regulation is 'necessary.' [The Court] has thus upheld laws that are 'convenient, or useful or conducive to the authority's beneficial exercise.'" *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 559.

proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. Despite the seemingly strict language of the Clause, Antifederalists were concerned that it vested in Congress vast powers.

In response, Hamilton argued that:

> [I]t may be affirmed with *perfect confidence*, that the constitutional operation of the intended government would be *precisely the same*, if the [Necessary and Proper Clause and the Supremacy Clause] were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by the necessary and unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers.[24]

Hamilton continues, "What is a power but the faculty of doing a thing? What is the ability to do a thing but the power of employing the *means* necessary to its execution? What is a LEGISLATIVE power but a power of making LAWS?"[25]

Hamilton's assurance in the Federalist Papers helped convince New York to ratify the Constitution and the other states that followed. As Chief Justice Marshall explained in *McCulloch v. Maryland*, echoing Hamilton, the Necessary and Proper Clause does not confer upon Congress any "great substantive

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[24] Hamilton, *supra* note 4, at 158.

[25] *Id*. at 159.

and independent power." 17 U.S. 316, 411 (1819). Textually and logically, this makes sense. The Necessary and Proper Clause, by its terms, is attached to the "foregoing powers," *i.e.* the enumerated powers in Article I, Section 8. It has no independent weight without being attached to an enumerated power, which is also textually clear. To say Congress has the power to do things "necessary and proper" mandates the inevitable question, "necessary and proper to do *what*?"

Chief Justice Marshall elaborated on that connection in *McCulloch*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

As Justice Thomas has explained, *McCulloch* created a two-part test for compliance with the Necessary and Proper Clause. "First, the law must be directed toward a 'legitimate' end, which *McCulloch* defines as one 'within the scope of the [C]onstitution'—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution." *United States v. Comstock*, 560 U.S. 126, 160 (2010) (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421). After all, as Hamilton explained, the Necessary and Proper Clause simply restates what was already implicit in the powers enumerated in the Constitution; it does not create new powers.[26]

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[26] Hamilton, *supra* note 4 at 158.

> Second, there must be a necessary and proper fit between the "means" (the federal law) and the "end" (the enumerated power or powers) it is designed to serve . . . The means Congress selects will be deemed "necessary" if they are "appropriate" and "plainly adapted" to the exercise of an enumerated power, and "proper" if they are not otherwise "prohibited" by the Constitution and not "[in]consistent" with its "letter and spirit."

Id. at 160-61 (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421).

Finally, "no matter how 'necessary' or 'proper' an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than 'carrying into Execution' one or more of the Federal Government's enumerated powers." *Id*. at 161 (quoting U.S. Const. art. I, § 8, cl. 18). Since its decision in *McCulloch*, the Court's precedents "uniformly have maintained that the Necessary and Proper Clause is not an independent fount of congressional authority, but rather 'a *caveat* that Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution.'" *Id*. (emphasis in original) (quoting *Kinsella v. Singleton*, 361 U.S. 234, 247 (1960)) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 (1936)).

While the Court has characterized *McCulloch v. Maryland* as creating "a means-end rationality test," "'[A]ppropriate' and 'plainly adapted' are hardly synonymous with 'means-end rationality.'" *Sabri v. United States*, 541 U.S. 600, 611, 612 (2004) (Thomas,

J., concurring) (quoting *Sabri*, 541 U.S. at 605 (majority opinion)).

Because the CTA cannot survive under even the broader view of the Necessary and Proper Clause adopted by the Court, it certainly falls outside the much narrower original meaning as established by the Court in *McCulloch*. First, the CTA is not "'within the scope of the [C]onstitution'—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution." *Comstock*, 560 U.S. at 160 (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421). As noted in Section I above, Congress was not authorized to enact the CTA under the Commerce Clause. Thus, Congress cannot regulate noncommercial activity via the Necessary and Proper Clause.

Indeed, if Congress is to exercise power under the Necessary and Proper Clause to aid its enforcement of its Commerce Clause power, the exercise of the latter must directed at commercial activity. Because state incorporation is not commercial in nature, Congress cannot use its power under the Necessary and Proper Clause to reach it. What is more, the Framers explicitly rejected an effort to empower the federal government to regulate incorporation, choosing instead to leave that power to the states.

Second, "[t]he means Congress selects will be deemed 'necessary' if they are 'appropriate' and 'plainly adapted' to the exercise of an enumerated power, and 'proper' if they are not otherwise 'prohibited' by the Constitution and not '[in]consistent' with its 'letter and spirit.'" *Id.* 560 at 160-61 (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421). As noted above, the CTA

is not "'plainly adapted' to the exercise of an enumerated power." *Id.* And the CTA is "'prohibited' by the Constitution," *id.*, because it encroaches on a deeply rooted state power (incorporation) that was explicitly denied to the federal government at the convention. Further, the Court's interpretation of the Constitution's "letter and spirit" should be informed by other parts of the document—such as the Fourth Amendment, the CTA's broad violations of which the Petitioners describe. Pet. at 27-32.

The CTA is thus not a legitimate act of Congress under the Commerce Clause or as a necessary and proper exercise of the power under that clause.

III. The Collection of Data Invites Hacking and Abuse of Both Private and Government Information Databases.

The CTA would create a dangerous massive database on American citizens. History demonstrates that databases will be prone to attacks from malevolent actors. The government cites a general law enforcement interest, but of course such a general interest, if taken seriously, would justify eviscerating the Fourth Amendment. After all, the protection of the Fourth Amendment unquestionably hampers law enforcement. Yet that vital amendment demands that we weigh privacy against asserted law enforcement interests. The CTA fails that test.

In December 2024, "Chinese state-sponsored hackers breached the U.S. Treasury Department's computer security guardrails" stealing "documents in what Treasury called a 'major incident.'"[27] Similarly,

[27] Raphael Satter and A.J. Vicens, *US Treasury says Chinese*

in 2016, hackers broke into the Securities and Exchange Commission's Electronic Data Gathering, Analysis, and Retrieval system (EDGAR).[28] EDGAR processes over 1.7 million electronic filings annually, and "traded on at least nonpublic 157 earnings releases," enriching themselves by over $4 million.[29] In 2018, a hacker breached 60 million records of US Postal Service user account details even after the Service was warned a year prior.[30] Hackers stole the personal information of 21.5 million current and former federal government employees from Office of Personnel Management files in 2015.[31] 26,000 current and former Defense Intelligence Agency employees experienced a breach of personally identifiable information (PII) in 2023.[32] A British teenager published the contact information of 20,000 FBI

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hackers stole documents in 'major incident', Reuters (Dec. 31, 2024, 2:27 PM) https://www.reuters.com/technology/cybersecurity/us-treasurys-workstations-hacked-cyberattack-by-china-afp-reports-2024-12-30/.

[28] Amir Bibawy, *SEC reveals 2016 hack that breached its filing system*, Associated Press (Sep. 20, 2017, 11:37 PM) https://apnews.com/article/d81daf569c75472bbcba22d2f5ba0f34.

[29] Craig A. Newman, *A Closer Look: SEC's Edgar Hacking Case*, Patterson Belknap Data Security Law Blog (Feb. 12, 2019) https://www.lexology.com/library/detail.aspx?g=e76f2a97-982b-4a9a-aec1-8442a407d5b9.

[30] Paul Bischoff, *A recent history of US Government Breaches – can you trust them with your data?*, Comparitech (Nov. 28, 2023) https://www.comparitech.com/blog/vpn-privacy/us-government-breaches/.

[31] *Id*.

[32] David DiMolfetta, *The Pentagon is notifying individuals affected by 2023 email data breach*, Government Executive (Feb. 15, 2024) https://www.govexec.com/technology/2024/02/pentagon-notifying-individuals-affected-2023-email-data-breach/394184/.

agents in 2016.[33] United States Army soldier Chelsea Manning infamously handed over 750,000 classified documents to WikiLeaks.[34] The healthcare information of 4.9 million active duty servicemembers, veterans, and their family members was compromised in a 2011 Tricare breach.[35] GovPayNow.com, which is used by thousands of state and local governments, leaked 14 million records in 2018, including addresses, phone numbers and partial credit card numbers.[36] Additionally, a hacker exposed 191 million records from a database of American voters in 2015.[37]

The private sector has experienced massive breaches as well. On July 12, 2024, AT&T announced that someone illegally obtained records of phone calls and text messages from almost all its wireless customers,[38] and an April 2024 data breach exposed

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[33] Mary Kay Mallonee, *Hackers publish contact info of 20,000 FBI employees*, CNN (Feb. 8, 2016, 8:34 PM) https://edition.cnn.com/2016/02/08/politics/hackers-fbi-employee-info/index.html.

[34] Bill Hutchinson, *Chelsea Manning speaks of solitary confinement during New Year's Day poetry event*, ABC News (Jan. 2, 2024, 4:29 PM)

https://abcnews.go.com/US/chelsea-manning-speaks-solitary-confinement-new-years-day/story?id=106043233.

[35] Jim Forsyth, *Records of 4.9 mln stolen from car in Texas data breach*, Reuters (Sep. 29, 2011, 6:00 PM) https://www.reuters.com/article/us-data-breach-texas-idUSTRE78S5JG20110929/.

[36] Bischoff, *supra* note 30.

[37] Thomas Brewster, *191 Million US Voter Registration Records Leaked In Mystery Database*, Forbes (Dec. 28, 2015, 8:50 AM) https://www.forbes.com/sites/thomasbrewster/2015/12/28/us-voter-database-leak/.

[38] Jon Haworth and Luke Barr, *AT&T says hacker stole some data*

2.7 billion records, including names, addresses, dates of birth, phone numbers, and even Social Security numbers.[39]

And yet FinCEN has instructed corporations not to send beneficial ownership information to third parties for the sake of security, the very information it wants to collect with the CTA. Pet. at 30. The CTA's mass collection of data is thus incredibly dangerous. The Constitution does not always prevent Congress from adopting dangerous policies. But when it does, the Court should take the case and ensure the liberty the Constitution was enacted to protect.

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from 'nearly all' wireless customers, ABC News (Jul. 12, 2024, 12:24 PM) https://abcnews.go.com/US/att-hacker-stole-data-wireless-customers/story?id=111874118.

[39] Aimee Picchi, *Hackers may have stolen the Social Security numbers of many Americans. Here's what to know.*, CBS News (Aug. 15, 2024, 6:15 PM) https://www.cbsnews.com/news/social-security-number-leak-npd-breach-what-to-know/.

CONCLUSION

The Court should grant certiorari and rule for Petitioners.

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