No. 25-1201

In the
# Supreme Court of the United States

NATIONAL SMALL BUSINESS UNITED, d/b/a National Small Business Association; ISAAC WINKLES,
*Petitioners*,

v.

SCOTT BESSENT, in his official capacity as the Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; ANDREA GACKI, in her official capacity as the Director of the Financial Crimes Enforcement Network,
*Respondents*.

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

## REPLY BRIEF FOR PETITIONERS

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**REPLY BRIEF**

The government's submission ignores the constitutional elephant in the room, presumably because its own extraordinary actions in reducing Congress' egregious overreach to a shell of what Congress intended is explicable only by a belief that the law as enacted is blatantly unconstitutional. The Eleventh Circuit took a very different view and held that, under the Commerce Clause, Congress is free to regulate corporate entities formed under state law merely because they exist and without regard to whether they are engaged in any economic activity. It then held that, notwithstanding the Fourth Amendment, the government is free to search individuals associated with those same state-law entities and collect sensitive and private information that chartering states do not require merely to further ordinary law-enforcement needs. That extraordinary decision vastly expanding federal power and severely eroding individual liberty is as wrong as it is consequential. That is why 25 states and numerous private amici are urging the Court to grant the petition. The Court should do so and reverse the decision below affirming the constitutionality of the doubly unconstitutional Corporate Transparency Act (CTA).

The government conspicuously refuses to defend the Eleventh Circuit's reasoning. Instead, it insists that the decision is now "beside the point" and "irrelevant," because the Executive has purported to limit the sweeping CTA to *foreign* entities, and the government contends that the CTA is constitutional as applied to foreign entities, so petitioners' facial challenge must fail. It is far from clear that the CTA is constitutional as to foreign entities that validly charter themselves under domestic state law, but *those questions* truly are "beside the point" and "irrelevant." The CTA has *separate* provisions applying the statute to domestic and foreign entities, and there is no obstacle to facially invalidating the CTA's domestic provisions. Nor is there any denying that Congress intended the CTA to apply to all manner of domestic corporations and did not enact an "FCTA" demanding transparency only from foreign corporations. The Executive's effort to reduce an unconstitutional Sequoia to a foreign-only stump is not a reason to deny certiorari but an implicit admission that the statute that Congress actually passed is unconstitutional and indeed indefensible. This Court should grant review and hold as much now. The alternative of leaving the CTA and its unconstitutional provisions lying in wait to be wielded by the next administration and adjudicated on the emergency docket has nothing to recommend it.

## I. The Eleventh Circuit's Commerce Clause Holding Is Profoundly Flawed.

The CTA provides that any entity "created by the filing of a document" with state authorities—known as a "reporting company"—is presumptively subject to federal regulation at the very moment of inception. 31 U.S.C. §5336(a)(11)(A)(i), (b)(1)(A)-(D). Specifically, the CTA states that reporting companies "shall … submit to FinCEN a report" containing "sensitive" information about their "beneficial owners" even when that information is not "require[d]" by the states themselves. *Id.* §5336(b)(1)(A)-(D); Pub. L.

No. 116-283, §6402(2), (6), 134 Stat. 3388, 4604 (2021) (codified at 31 U.S.C. §5336 note). The Eleventh Circuit held that this extraordinary federal imposition "is a constitutional exercise of Congress's enumerated power to regulate interstate commerce" only by ignoring the on-point Commerce Clause holding of *NFIB v. Sebelius*, 567 U.S. 519 (2012), in favor of *Wickard v. Filburn*, 317 U.S. 111 (1942)—"the most expansive assertion of the commerce power in our history," *NFIB*, 567 U.S. at 657 (joint dissent). *See* App.11, 17. In reality, however, subjecting corporate persons to federal regulation under the Commerce Clause "simply because [they] exist[]" under state law, *NFIB*, 567 U.S. at 658 (joint dissent), and not because they are engaged in any "preexisting economic activity," *id.* at 557 (op. of Roberts, C.J.), out-*Wickard*s *Wickard* and is just a variation on the theory that *NFIB* squarely rejected.

To be fair, the Eleventh Circuit did not conjure its misguided Commerce Clause theory out of thin air—it merely parroted the government's argument below. As the government contended, the CTA falls within Congress' commerce power because it regulates persons who "are likely to go on to engage in commercial activity" in the future, even if they are not engaging in that commercial activity just yet. CA11.Dkt.18.at.29. But presumably recognizing (belatedly) that "likely" is insufficient and that a Commerce Clause argument premised on "prophesied future activity" will not cut it in this Court, *NFIB*, 567 U.S. at 557 (opinion of Roberts, C.J.), the government now says "never mind," dismisses its own theory below as "irrelevant," and invokes instead the Foreign Commerce and Necessary and Proper Clauses—

neither of which the court below even considered. BIO.7. The government then insists that, because the CTA is constitutional as to foreign companies, that is enough to defeat a facial Commerce Clause challenge.

The notion that the government can regulate foreign entities under the Foreign Commerce Clause in the absence of commercial activity is highly doubtful and would presumably provoke a swift protest if the shoe were on the other foot. *See, e.g.*, *Baston v. United States*, 137 S.Ct. 850, 852 (2017) (Thomas, J., dissenting from the denial of certiorari). And the government's "resort[] to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause," speaks volumes. *Printz v. United States*, 521 U.S. 898, 923 (1997). But the Court need not address those issues.[1]

The CTA contains a *distinct* provision that explicitly applies the statute to domestic entities "created" under state law and a *separate* provision that applies the statute to foreign entities "formed under the law of a foreign country." *Compare* 31 U.S.C. §5336(a)(11)(A)(i), *with id.* §5336(a)(11)(A)(ii). As domestic persons, petitioners' challenge has focused on the former—*i.e.*, they sought "declaratory and injunctive relief against the CTA's implementation to avoid an unconstitutional intrusion

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[1] Regardless, the government's arguments are wrong. Corporate registration of foreign-formed entities is reserved to the states, *see* U.S. Const. amend. X, and the government cannot displace that authority by invoking Congress' separate powers over immigration, taxation, bankruptcy, or the armed services, *see* U.S. Const. art. I, §8, cls.1, 4, 14; *Kleindienst v. Mandel*, 408 U.S. 753, 766-67 (1972). *Contra* BIO.9, 12-13.

by the federal government into the rights of U.S. persons seeking to form corporate entities under State law and to protect the sovereignty of the States." D.Ct.Dkt.1.at.8. And it is well-established that, to succeed on a facial challenge, a plaintiff must demonstrate only that a particular challenged "provision" of a statute has no valid applications—not that every provision in the statute is also invalid. *City of Los Angeles v. Patel*, 576 U.S. 409, 412, 418 (2015); *see, e.g.*, *Matal v. Tam*, 582 U.S. 218, 223 (2017) (plurality op.); *United States v. Morrison*, 529 U.S. 598, 605-06, 627 (2000). That approach makes sense, as the contrary rule would mean that "any moderately clever drafter could insulate an unconstitutional statute from a facial challenge simply by adding a provision to the statute that was clearly constitutional." *AFSCME Council 79 v. Scott*, 717 F.3d 851, 865 n.2 (11th Cir. 2013). But that is not the law, and provision-specific facial challenges are commonplace. Here, there is "no set of circumstances" under which the provision applying the CTA domestically "would be valid." *United States v. Rahimi*, 602 U.S. 680, 693 (2024). The government does not even attempt to argue otherwise. Indeed, the government has implicitly conceded as much by purporting to obliterate all the statute's domestic application by executive fiat.

The government attempts to convert that implicit concession of unconstitutionality into a vehicle problem, arguing that any consideration of the CTA's domestic application is "beside the point" at this juncture in light of a final FinCEN regulation—conveniently promulgated one week before the government filed its brief in opposition—that restricted the CTA "only to foreign beneficial owners and foreign applicants of foreign reporting companies." BIO.8, 14. That argument is a non-starter. As the government acknowledges, this case concerns a constitutional challenge to the *statute*, not to any administrative regulation. *See* BIO.4. And it is black-letter law that "there is no power to amend" a statute "by regulation." *Koshland v. Helvering*, 298 U.S. 441, 447 (1936). Try as it might, FinCEN cannot regulate away the constitutional deficiencies of the CTA itself.

The government disagrees, pointing to the CTA's list of exemptions. That list exempts 23 specific entities or classes of entities from the CTA's requirements—such as "public accounting" and "public utility" companies, 31 U.S.C. §5336(a)(11)(B)(i)-(xxiii)—and then includes a 24th catchall provision authorizing FinCEN to exempt "'any entity or class of entities' if requiring reporting by those entities 'would not serve the public interest' and 'would not be highly useful in national security, intelligence, and law enforcement agency efforts." BIO.20 (quoting 31 U.S.C. §5336(a)(11)(B)(xxiv)). It is far from obvious that this catchall provision authorizes FinCEN to exempt every single domestic reporting entity (including all those covered by the 23 preceding exemptions). *See* CTA §6402(1)-(2), (5), 134 Stat. at 4604; *cf. Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 217 (2024). But the validity of FinCEN's regulation is immaterial, as petitioners have challenged the statute itself as unconstitutional. Petitioners' constitutional rights do not depend on executive grace, and the fact that petitioners continue to labor under the ever-present possibility that the exemption will be repealed or invalidated is more than sufficient to prevent this dispute—which was unassailably live the day that they filed suit—from becoming moot. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189-94 (2000).[2]

The government's reliance on *Thorpe v. Housing Authority*, 393 U.S. 268 (1969), and *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), does not change the calculus. *See* BIO.8. Those cases just discuss the "general rule" that "an appellate court must apply the law in effect at the time it renders its decision." *Thorpe*, 393 U.S. at 281. Of course, the "law in effect" right now is the CTA, and that law includes language that wildly exceeds Congress' authority under the Commerce Clause and deeply intrudes into an area of traditional state authority. If Congress itself recognized the errors of its ways and repealed the CTA, then *Schooner Peggy* would be applicable. But an executive effort to repeal the statute is *ultra vires* and amounts to an admission that the Executive cannot defend the statute that Congress actually passed. That is hardly a reason to leave a decision upholding an unconstitutional statute in place.

[2] Of course, even if the dispute were otherwise moot, this case would fall within the voluntary-cessation exception, *see West Virginia v. EPA*, 597 U.S. 697, 719-20 (2022), and at a bare minimum, petitioners would plainly be entitled to vacatur under *Munsingwear*. Contrary to the government's suggestion, *see* BIO.22.n.*, a government capitulation via a regulation effectively reducing the challenged statute to a shadow would fall within the heartland of *Munsingwear*, *see Azar v. Garza*, 584 U.S. 726, 729-30 (2018) (per curiam).

## II. The Eleventh Circuit's Fourth Amendment Holding Is Equally Flawed.

The government cannot evade the Fourth Amendment problems with the CTA either. When the government engages in a "search," that search is permissible under the Fourth Amendment only if it is "reasonable." *See Chatrie v. United States*, 146 S.Ct. 2193, 2204-06, 2215 (2026). Here, by compelling reporting companies to disclose to the federal government information so "sensitive" that the chartering states themselves do not collect it, CTA §6402(2), (6), 134 Stat. at 4604, the CTA plainly intrudes into a constitutionally protected privacy sphere and thus effects searches, *see Carpenter v. United States*, 585 U.S. 296, 304 (2018). Neither the court below nor the government suggests otherwise. Nor are those searches reasonable. The Fourth Amendment requires the government to obtain a warrant for a search unless a specific exception to the warrant requirement applies. *See Riley v. California*, 573 U.S. 373, 382 (2014). But the CTA demands all this information without a warrant and does so to facilitate normal "law enforcement" needs—the stated purpose of the CTA. *See* CTA §6402(6)(A), 134 Stat. at 4605. That is not a valid exception to the warrant requirement. *See Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 619 (1989). That is a Fourth Amendment violation.

The government does not dispute that the CTA involves searches on a massive scale. Instead, the government once again points to the FinCEN rule and the possibility that the only searches that the rule leaves standing—*i.e.*, those involving foreign reporting companies—do not violate the Fourth Amendment. *See* BIO.16. That dodge fares no better as to the Fourth Amendment.

The government's premise is again dubious. The CTA applies to entities formed overseas that have established a U.S. presence by "register[ing] 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." 31 U.S.C. §5336(a)(11)(A)(ii). Those companies have Fourth Amendment rights under well-established law that the government ignores. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). But this Court can save that question for another day and hold that the CTA's *separate* provision applying the reporting requirement to *domestic* entities, *see* 31 U.S.C. §5336(a)(11)(A)(i), is facially invalid under the Fourth Amendment.

The government tries to dodge that conclusion by invoking *California Bankers Association v. Shultz*, 416 U.S. 21 (1974), claiming that (as in that case) the Court here should "decline[] to assess" the CTA's "broad authorizing language" and should "instead focus[]" only on the "actual implementation of the statute" by FinCEN. BIO.17. But the statute at issue in *Shultz* (the Bank Secrecy Act) contained material differences. On its face, the BSA did not impose a reporting requirement on any particular domestic person, but rather delegated that decision to the Treasury Department. *See Shultz*, 416 U.S. at 58 (explaining that the Treasury Department could impose the reporting requirement on the "domestic financial institution involved," the "parties to the transactions," or "both"). In stark contrast, on its face, the CTA provides an unmistakable default statutory rule that entities "created by the filing of a document with a secretary of state or a similar office under the law of a State" *are* subject to a reporting requirement. 31 U.S.C. §5336(a)(11)(A)(i).

The government next suggests that the CTA's reporting requirement is "reasonable" under *Shultz* because the information that reporting companies must disclose "is 'sufficiently described and limited in nature' and is no more detailed than the reports in *Shultz*." BIO.16-17. That argument fares no better. As petitioners have explained, *see* Pet.31-32, *Shultz* upheld a reporting requirement that was triggered by engaging in particular commercial transactions that required the disclosure of information that the banks needed to process the transactions. *See* 416 U.S. at 65, 67. Here, the disclosure obligations—*i.e.*, the searches—are triggered by the mere act of incorporation, without regard to whether the reporting company ever engages in any commercial activity, and the information at issue is information that the states do not need or collect. That clearly renders the searches here substantially less reasonable.

Nor is the CTA's reporting requirement "limited in nature"—quite the opposite. Far from "hom[ing] in on a subset of entities"—like the "subset" of "banks" involved in "the subset of transactions above $10,000"—the CTA applies "indiscriminately" to "millions of small corporations and limited liability companies formed under the laws of the fifty states each year." *Small Bus. Ass'n of Mich. v. Yellen*, 769

F.Supp.3d 722, 725-26, 735-36 (W.D. Mich. 2025). In every dimension, the CTA's reporting requirement is more burdensome and less reasonable than the requirement upheld in *Shultz*. In short, the CTA provision applying the statute domestically is doubly unconstitutional.

### III. The Issues Here Are Important, Recurring, And Ideally Presented In This Case.

As the amicus briefs filed by half the States in the Nation and multiple private groups underscore, this case is exceptionally important. The Eleventh Circuit's view that "corporate formation *is* commerce has no limit," and would give "Congress plenary authority over every entity States create." States.Amicus.Br.2, 10. Indeed, the Framers were more emphatic and explicit about states retaining their traditional authority over chartering corporations than most reserved powers, and by extending *Wickard* to entities that, unlike farmer Filburn, engage in no commercial activity whatsoever, the decision below establishes a new high water mark of federal power that disregards our federalism and "tramples Americans' civil liberties." SBAM.Amicus.Br.24.

The government nonetheless urges the Court not to intervene here because FinCEN's recent final rule "may" have mooted petitioners' challenge. BIO.7. It did not. To be sure, the "repeal" of or an "amendment" to a "challenged *statute*" may "moot[] attack[s]" against the "*statute*." 13C Wright & Miller, *Fed. Prac. & Proc. Juris.* §3533.6 (3d ed. 2026 update) (emphasis added); *see, e.g.*, *NYSRPA v. City of New York*, 590 U.S. 336, 337-39 (2020); *Keohane v. Fla. Dep't of Corr.*

*Sec'y*, 952 F.3d 1257, 1268 n.4 (11th Cir. 2020). But only Congress (not FinCEN) can amend or repeal the challenged statute here, and it has not done so. *See Clinton v. City of New York*, 524 U.S. 417, 438 (1998). From the beginning, petitioners have asserted that the CTA is inconsistent with their constitutional rights. Constitutional rights do not depend on—and cannot be mooted by—acts of executive grace.

The government alternatively suggests that, because the "practical significance" of this case is supposedly "reduced" now, the Court should stay its hand until "a future Administration rescinds the exemptions for domestic companies and individuals." BIO.19-20. But there is nothing insignificant about an appellate ruling that gives a green light to any future administration and blesses the greatest expansion of federal power in recent memory. It makes little sense to delay review of a fully litigated and definitively resolved merits dispute just to pave the way for a future emergency-docket dispute. *Cf. McHenry v. Tex. Top Cop Shop*, 145 S.Ct. 1 (2025). The far more sensible course is to grant certiorari now, resolve this case on the merits docket, and hold that this unprecedented statute cannot stand.

**CONCLUSION**

The Court should grant the petition.

Respectfully submitted,

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