Nos. 25-1201, 25-1290

IN THE
Supreme Court of the United States

NATIONAL SMALL BUSINESS UNITED, d/b/a National Small Business Association, et al., *Petitioners*,
v.

SCOTT BESSENT, in his official capacity as the Secretary of the United States Department of the Treasury, et al., *Respondents*.

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

TODD BLANCHE, Acting U.S. Attorney General, et al., *Respondents*.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Eleventh and Fifth Circuits

Brief *Amicus Curiae* of America's Future, Gun Owners of America, Gun Owners Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioners

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae America's Future, Gun Owners of America, Inc., Gun Owners Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income taxation under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code. Each organization participates actively in the public policy process, and has filed numerous *amicus curiae* briefs in federal and state courts defending U.S. citizens' rights against government overreach. These *amici* have filed three *amicus* briefs involving challenges to the Corporate Transparency Act.

- *Hotze v. U.S. Dep't of Treasury*, N.D. Tex. No. 2:24-cv-210, Brief *Amicus Curiae* of America's Future, et al., in Support of Plaintiffs (Nov. 18, 2024);
- *Garland v. Texas Top Cop Shop*, U.S. Supreme Court No. 24A653, Brief *Amicus Curiae* of America's Future, et al., in Opposition to Application for a Stay of Injunction (Jan. 10, 2025); and
- *Texas Top Cop Shop v. Bondi*, U.S. Court of Appeals for the Fifth Circuit, No. 24-40792, Brief *Amici Curiae* of America's Future, et al., in

[1] It is hereby certified that counsel of record for all parties in No. 25-1201 received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Support of Plaintiffs-Appellees and Affirmance (Mar. 3, 2025).

STATEMENT OF THE CASE

Corporate Transparency Act

The enactment of the Corporate Transparency Act ("CTA") was unusual. Congress refused to pass CTA as a separate bill, so it was buried as a 21-page subsection into the must-pass, 1,500-page, $740 billion, 2021 National Defense Authorization Act ("NDAA"). On December 23, 2020, President Trump vetoed the NDAA, On December 28, 2020, the House of Representatives voted to override his veto, and, in a rare New Year's Day session, the Senate did so as well,[2] making this the only Trump veto which was overridden.

The CTA requires all "beneficial owners" of business entities with fewer than 20 employees and annual revenue of less than $5 million to submit personal identifying information to the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"). 31 U.S.C. § 5336(b)(2)(A). This Beneficial Ownership Information ("BOI") includes "(i) full legal name; (ii) date of birth; (iii) current ... residential or business street address; and (iv) unique identifying number from an acceptable identification document," such as an unexpired passport or government-issued

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[2] *See* H.R. 6395, William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (Jan. 1, 2021).

identification card or driver's license. *Id.* A "beneficial owner" is defined as "an individual who ... (i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity." 31 U.S.C. § 5336(a)(3). This includes single-member LLCs and privately held corporations. Congress granted certain exemptions, such as to accounting firms — but not law firms — and for nonprofit organizations exempt from taxation under Internal Revenue Code § 501(c) — but not other nonprofit organizations. The CTA treats a failure to report as a serious felony. 31 U.S.C. § 5336(h)(1), (3)(A).

National Small Business United v. Bessent

The CTA was challenged in the Northern District of Alabama, which granted summary judgment for plaintiffs. *Nat'l Small Bus. United v. Yellen*, 721 F. Supp. 3d 1260, 1267 (N.D. Ala. 2024) ("*NSBU I*"). The Eleventh Circuit reversed, ruling that the act of incorporation is itself economic, because "[f]or-profit business entities are a means to an economic end." *Nat'l Small Bus. United v. United States Dep't of the Treasury*, 161 F.4th 1323, 1329 (11th Cir. 2025) ("*NSBU II*").

Texas Top Cop Shop v. Blanche

The CTA was also challenged in the Eastern District of Texas. *See Tex. Top Cop Shop, Inc. v. Garland*, 758 F. Supp. 3d 607, 623-25 (E.D. Tex. 2024) ("*TTCS I*"). The district court granted an injunction against the CTA requirement, determining that the

CTA regulates neither the channels nor the instrumentalities of commerce. A Fifth Circuit motions panel stayed the injunction. *Tex. Top Cop Shop, Inc. v. Garland*, 2024 U.S. App. LEXIS 32565 (5th Cir. 2024). Then, a Fifth Circuit merits panel vacated the stay (2024 U.S. App. LEXIS 32702), but this Court stayed the district court injunction. *McHenry v. Tex. Top Cop Shop, Inc.*, 145 S. Ct. 1 (2025).

SUMMARY OF ARGUMENT

The Corporate Transparency Act mandates that Beneficial Ownership Information of nearly every corporation and LLC be reported to the federal government to create a massive database. Congress claimed to have enacted CTA as an exercise of the Commerce Clause even though the CTA neither comports with the subject nor the object of the Commerce Clause, under the test established by Chief Justice Marshall in *Gibbons v. Ogden*. The CTA also fails under the more modern test, as it neither regulates the channels or instrumentalities of commerce nor does it regulate activities having substantial effects on commerce. If the Commerce Clause can be expanded to encompass the CTA, then the federal government will have been given the equivalent of a general police power in violation of the Tenth Amendment.

The CTA constitutes a threat to gun owners because it creates a trap for many Americans who, unaware of this obscure law, could become felons and

lose their Second Amendment rights for what amounts to a paperwork violation.

The CTA violates the Fourth Amendment as it constitutes a general warrant by mandating the disclosure of information without suspicion or warrant. It then allows the warrantless search of this database by federal law enforcement and others. The reporting requirement is fundamentally different than the Bank Secrecy Act reporting requirement sanctioned by this Court in *California Bankers Ass'n v. Shultz*. Should *Shultz* be considered applicable here, certiorari should be granted to reconsider that 1974 case in view of this Court's 2012 revitalization of the Fourth Amendment's property principle in *United States v. Jones*.

ARGUMENT

I. THE ELEVENTH CIRCUIT DECISION IMPLICITLY ASSUMED THE EXISTENCE OF A FEDERAL POLICE POWER.

The CTA being challenged is quite unlike any federal statute, perhaps other than the Bank Secrecy Act of 1970. That Act led to the requirement that "financial institutions" file "currency transaction reports" and "suspicious activity reports" to be stored in a central, federal database. Unlike the CTA, that rule was imposed on businesses, not on private citizens. Although *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), was arguably wrongly decided, even that decision does not provide a direct precedent for what is required here, as discussed in Section V, *infra*.

The CTA takes a classic, if not quintessential, state activity — the formation of corporations — and imposes a new and federal requirement unconnected to the exercise of any previously identified or exercised federal power. The CTA imposes a duty, backed by criminal sanction, on every American to provide information allowing the creation of a federal database to be searched without warrant whenever federal agencies might wish. Exercising no apparent enumerated power, it is not surprising that Congress and the Eleventh Circuit have tried to create a new federal surveillance power, derived not from the Commerce Clause, but from the following assertions of need:

- "bad actors have been using the anonymity of the corporate form to commit financial crimes, such as money laundering and financing terrorism." *NSBU II* at 1326.
- "Financial crime is a serious problem." *Id*.
- "Financial criminals often use shell companies to conceal their fraud and their identities." *Id*.
- "Because most states do not require businesses to report information about their owners, law enforcement has long suffered from an information gap when fighting financial crime." *Id*.

To make it even worse, the duty placed on Americans is continuing, requiring regular updates within 30 days of any changes. *Id*. at 1327.

The formation, modification, and dissolution of corporate entities is an area of economic activity long

relegated to the states. Chief Justice John Marshall's majority opinion in *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518, 636 (1819), described a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law...." For nearly 250 years, Congress recognized implicitly that the law governing the creation of these corporations was state, not federal, as stated a century and a half later, in *Cort v. Ash*:

> **Corporations are creatures of state law**, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, **state law will govern the internal affairs of the corporation**. [*Id.,* 422 U.S. 66, 84 (1975) (emphasis added).]

From 1791 to 2021, no Congress had ever sought to demand that individuals involved in this quintessential state activity report their activities to the federal government. Yet, the Eleventh Circuit relied on perhaps the most elastic of all federal powers. The Commerce Clause has been the go-to power to justify the radical expansion of federal regulatory authority over Americans for the past 90 years, since *NLRB v. Jones & Laughlin Steel Corp*, 301 U.S. 1 (1937). The Commerce Clause was relied on to authorize the federal government to regulate what had long been considered purely intrastate activities, based on a more flexible test which only required: "a close and substantial relation to interstate commerce that

their control is essential or appropriate to protect that commerce from burden and obstructions...." *Id*. at 37.

Here, the sole objective is the creation of a database to be searched at will, and without a warrant, by federal law enforcement. Such an exercise of the commerce power, in the absence of actual commerce, would constitute the exercise of a never-before-recognized federal police power in violation of the Tenth Amendment. This is what Chief Justice Rehnquist rejected in his opinion for the court striking down the Gun-Free School Zones Act of 1990.

> To uphold the Government's contentions here, we 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. [*United States v. Lopez*, 514 U.S. 549, 567 (1995) (emphasis added).]

II. THE UTILITY OF A CTA FEDERAL DATABASE FOR LAW ENFORCEMENT DOES NOT PROVIDE CONSTITUTIONAL JUSTIFICATION.

The Government's Brief filed in *Texas Top Cop Shop* in the Fifth Circuit began with an ominous warning about the great evils afoot in the land, which the CTA could stop:

> For decades, **criminals** have **evaded criminal** prohibitions on **money laundering**,

> **terrorist** financing, and other financial **wrongdoing** by using **anonymous** shell companies to conduct **illicit** transactions. To address these **impediments** to law enforcement and **threats** to **national security**, Congress passed the Corporate Transparency Act (CTA).... [Brief for Appellants, *Texas Top Cop Shop v. Bondi* ("Gov't Br.") at 1 (emphasis added).]

Note the number of urgent, emotive, "sky is falling" terms used. If the problem were actually that serious, Congress would have enacted the CTA long ago in a stand-alone bill, but that strategy was tried and failed. When presented as a stand-alone bill in 2019, it had substantial push-back from members of the relevant committee and the American people. *See* H.R. 2513, "Corporate Transparency Act of 2019." To ensure passage, the CTA was buried in, and went largely unnoticed in, "must-pass" legislation.

Before adding to the Executive Branch's demands for an increase in its already vast powers, it would be wise to briefly revisit the relevant principles being violated. First, there is no precedent for the federal government to track corporations established under state law. In Federalist No. 45, James Madison explained: "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."[3]

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[3] Federalist No. 45, George Carey and James McClellan, eds., The Federalist at 241 (Liberty Fund: 2001) (emphasis added).

Conspicuously absent from those "few and defined" powers vested in the federal government is the predicate for the explosion in the number of federal crimes — "a **general police power** — a power reserved by the Tenth Amendment to the States."[4]

Second, absent from the original plan was the notion that the government was to have all the powers necessary to **prevent crime**. The Government is worried it has "fallen out of compliance with international standards for **preventing** money laundering." Gov't Br. at 6 (emphasis added). According to Holy Writ, the government's power does not include crime prevention, but rather is limited to "the punishment of evildoers, and for the praise of them that do well." 1 *Peter* 2:14.

Third, the Judiciary should be highly suspicious of laws which are insisted upon by the Executive Branch to remove "impediments to law enforcement," particularly when the Framers of our Constitution established those "impediments." Demands by law enforcement for additional powers are generally demands that the constitutional rights of the American People be surrendered. According to some, the Fourth Amendment is a meddlesome "impediment to law enforcement," as are the Second Amendment, the Fifth Amendment, and the Sixth Amendment. Fortunately, this Court is obliged to view the preservation of constitutional liberties as superior to removing "impediments" to law enforcement.

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[4] *See* ABA Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law at 5-6 (1998) (emphasis added).

III. THE CTA DOES NOT CONSTITUTE A PROPER EXERCISE OF THE COMMERCE POWER.

A. The CTA Fails under the Methodology for Evaluating the Scope of the Commerce Clause Established by Chief Justice Marshall.

In *Texas Top Cop Shop*, the Government's Commerce Clause justification presented to the Fifth Circuit relied on a line of cases starting with *Wickard v. Filburn*, 317 U.S. 111 (1942), wherein the Supreme Court authorized Congress' regulation of activity which "substantially affects interstate commerce":

> Congress may ... regulate the "channels of interstate commerce," "the instrumentalities of interstate commerce, and persons or things in interstate commerce," and even "activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *accord id.* at 34 (Scalia, J., concurring in the judgment). [Gov't Br. at 16.]

The Government claimed that "Congress determined that 'the collection of beneficial ownership information' is 'needed' to 'protect **interstate** and foreign commerce' and to 'better enable ... law enforcement efforts to counter money laundering ... and other illicit activity.'" *Id.* at 6 (emphasis added). The Government primarily relied on the congressional findings to support: "the common-sense notion that anonymous transactions jeopardize law-enforcement

efforts [as] well documented in statutory findings and the legislative history." *Id*. at 39.

Two hundred years ago, in *Gibbons v. Ogden*, Chief Justice John Marshall set out the steps to be followed in analyzing enumerated powers cases:

> We know of no rule for construing the extent of such powers, other than is given [i] by the language of the instrument which confers them, [ii] taken in connexion with the purposes for which they were conferred. [*Gibbons v. Ogden*, 22 U.S. 1, 189 (1824).]

By "language of the instrument," Marshall should be understood as having meant the relevant text of the Constitution, which states simply: "Congress shall have the Power ... To regulate Commerce ... among the several States." U.S. Const., Art. I, § 8, cl. 3. The focus of attention in *Gibbons* was on defining the words "commerce," "among the states," and "regulate." There, the Court concluded that licensing steamboats engaged in coastal trade aligned with the subject matter of the Commerce Clause. *Gibbons* at 189-97.

When the language of a statute (subject matter) aligns with the language of an enumerated power (subject), the Court should analyze it as an enumerated powers case rather than as a Necessary and Proper Clause case. Because the federal statute in *Gibbons* regulated subject matter that constituted interstate commerce, it was a pure enumerated powers case. The object of the statute must align with the object of an enumerated power.

The object of the Commerce Clause, stated generally, is to establish a free and common market among the several states. Congress is limited to regulating the subject of interstate commerce to advance the object of ensuring free trade among the states.[5] Concurring in *Gibbons*, Justice Johnson identified the object as being the elimination of trade barriers between the states: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons* at 231 (Johnson, J., concurring).

Applying Chief Justice Marshall's test, it is clear that the CTA fails both the subject component and the object component. The CTA requires certain classes of people, including the Petitioners in this case, who file organizational documents with their respective secretaries of state to provide specific identifying information to FinCEN. This filing activity that the CTA regulates is neither commercial nor interstate in nature, and thus is not a proper subject matter for Congress to regulate. Furthermore, the CTA fails the object test as it does nothing to remove barriers to free trade or promote harmonious commercial relations among the several states.

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[5] James Madison wrote: "A very material object of this power [*i.e.,* the Commerce Clause] was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter." George Carey & James McClellan, The Federalist (Liberty Fund: 2001), No. 42 at 218. Madison further noted that the Commerce Clause is among a class of powers "which provide for the harmony and proper intercourse among the States." *Id.*

B. The Modern Commerce Clause Approach.

In *Lopez*, the Supreme Court "identified three broad categories of activity that Congress may regulate under its commerce power." *Id*. at 558. These categories, with corresponding tests, are (i) channels of interstate commerce, (ii) instrumentalities of interstate commerce, and (iii) activities having substantial effects on interstate commerce.

The district court in *National Small Business United* persuasively addressed the constitutionality of the CTA under three categories. *See NSBU I* at 1277-87.

1. Channels of Commerce Cases.

The test that the Supreme Court applies in channels cases focuses almost exclusively on the subject of the Commerce Clause — is the regulated activity "commerce" and is it "interstate"? This test is based on the principle that Congress may prohibit interstate commercial activity that it believes is harmful.

The leading case applying the prohibition principle is *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1903). There, the Court ruled that Congress could criminalize the transportation of lottery tickets through interstate commerce. *See id.* at 344-45. This satisfied the subject matter test because the statute regulated commercial activity that crossed state lines. However, the object of the statute was not to foster interstate commerce but to prohibit it. The object was

to criminalize immoral conduct, which falls within the police powers reserved to the states. *Id*. at 356-57. Nevertheless, the Court upheld the statute.

The activity regulated under the CTA is the filing of articles of incorporation or similar documents with a state agency. The CTA fails under the channels of commerce test because the activity that the statute regulates is neither commercial nor interstate in nature. Additionally, as explained *supra*, some of the organizations required to disclose information are not engaged in commercial activity and may never engage in interstate activity.

2. Instrumentalities of Commerce Cases.

The instrumentalities test is based on the principle that Congress can protect people, goods, vehicles, and even electronic transmissions involved in interstate commerce that may be endangered even by intrastate activity. The classic example is *Southern Railway Co. v. United States*, 222 U.S. 20 (1911), which upheld a statute requiring intrastate activities to comply with federal safety standards to protect commerce moving interstate. Because the CTA on its face is not designed to protect interstate commerce from threats posed by intrastate activities, this test is not implicated.

3. Substantial Effects Cases.

The substantial effects test grants Congress the most expansive power of any of the Commerce Clause tests. As expansive as that power is, the CTA still

manages to exceed the scope of Congress' regulatory power.

The substantial effects test was most famously stated in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Having done away with the object component in *Champion*, the Court then eliminated the subject component as well. No longer was Congress limited to regulating the subject matter of interstate commerce; it was free to regulate any activity that in the aggregate had a substantial effect on interstate commerce. Congress was thus allowed to regulate Filburn's intrastate, noncommercial production and personal consumption of wheat grown on his own farm. Implicitly, the power to regulate was no longer limited by any object other than what Congress might think contributes to the general welfare, or in other words would be good for America. The substantial effects test threatened to change the nature of the federal government from one of enumerated powers into one of general powers.

Eventually recognizing the danger to the Republic, the Supreme Court reformulated the substantial effects test in *Lopez*. The *Lopez* Court quoted portions of Marshall's opinion in *Gibbons v. Ogden*, which carefully defined the subject matter of the Commerce Clause — "commerce" and "among the states." *Lopez* at 553. Nevertheless, the Court then ignored the importance of the subject component. As reformulated in *Lopez*, the substantial effects test allows Congress to regulate only economic activity that in the aggregate has a substantial effect on interstate commerce. *Id*. at 560-61. In effect, the Court modified

the subject component of the commerce power but failed to focus on the object of the Commerce Clause.

The Court in *Lopez* ruled that the possession of a gun in a school zone was not economic in nature and therefore struck the statute as exceeding Congress' power to regulate under the Commerce Clause. Similarly, on its face, the CTA fails to regulate economic activity and therefore exceeds Congress' power to regulate under the Commerce Clause. The *Lopez* Court suggested that Congress would be able to regulate non-economic activity pursuant to the Commerce Clause if the non-economic activity was an essential part of a comprehensive regulatory scheme that was economic in nature. *See Lopez* at 561-63. That approach does not save the statute in this case because the CTA, of which disclosure requirements are a part, is not economic in nature, nor is the National Defense Authorization Act, of which the CTA is a part, an economic regulatory scheme.

IV. THE CTA JEOPARDIZES THE SECOND AMENDMENT RIGHTS OF AMERICANS.

The sponsor of the 2019 CTA bill (H.R. 2513, 116th Congress) was Representative Carolyn Maloney (D-NY), one of the most committed leaders of the anti-gun movement in Congress.[6] For that reason, it is not unreasonable to have concern that there could be an anti-gun agenda lurking behind her sponsorship of this

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[6] *See* Michael Garofalo, "Leaders of the anti-gun movement: Six politicians who refuse to stay silent," *Salon* (Jan. 9, 2019).

bill. Those convicted of federal felonies lose the right to possess weapons. *See* 18 U.S.C. § 922(g)(1) and (9).

Representative Maxine Waters (D-CA) conceded during debate on the CTA, "approximately 78 percent of all businesses in the US are non-employer firms, meaning there is only one person in the enterprise." 165 *Cong. Rec.* H8321 (2019). Accordingly, millions of Americans risk a permanent loss of their Second Amendment rights — not to mention two-year prison terms — for the simple failure to register their personal information with "an intelligence bureau people haven't [even] heard of," under a brand new filing requirement most small business owners are likely unaware of, as Representative McHenry noted during the floor debate. 165 *Cong. Rec.* H8325.

Even more concerning was a recent report by the House Judiciary Committee that revealed FBI whistleblower evidence that, early in the Biden Administration, the FBI and the Department of the Treasury's FinCEN division targeted purchasers of firearms for scrutiny as potential "violent extremists." FinCEN suggested a number of firearms sellers whose names could be paired with Merchant Category Codes for firearms purchasers, to flag possible "violent extremists," including Bass Pro Shops, Cabela's, Backcountry World, Targetsportsusa.com, AR15.com, and Midway USA.[7] Accordingly, FinCEN cannot be

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[7] House Judiciary Committee, "Financial Surveillance in the United States: How Federal Law Enforcement Commandeered Financial Institutions to Spy on Americans," at 2-3, 27 (Mar. 6, 2024).

entrusted with a highly sensitive list of "beneficial owners." Thus, CTA is an existential threat to the Second Amendment rights of millions of small business owners about to fall victim to the CTA's "trap for the unwary" if it is allowed to stand.

V. THE ELEVENTH CIRCUIT ERRED BY REJECTING THE FOURTH AMENDMENT CHALLENGE TO THE CTA.

The second question presented by both Petitions for Certiorari is "Whether the CTA's suspicionless and warrantless searches to further a generalized interest in expedient law enforcement violate the Fourth Amendment." NSBU Petition at i; *see also* TTCS Petition at i. The Eleventh Circuit dismissed Petitioners' Fourth Amendment claim based on the proposition that "uniform reporting requirements" do not trigger Fourth Amendment scrutiny: "the CTA does not violate the Fourth Amendment. It is a uniform reporting requirement applied to all businesses that meet the CTA's definition of 'reporting company.'" *NSBU II* at 1334.

According to that curious proposition, the federal government could require every American to report health status, or firearms ownership, or literally any other personal information without triggering the Fourth Amendment, so long as the requirement applied to all members of a "uniform" class. If such a rule were adopted, is it much of a stretch to suggest that Congress could require that every company using financial software, such as QuickBooks, provide its

passwords to FinCEN because it could facilitate law enforcement?

A. *California Bankers Ass'n v. Shultz.*

In support of that proposition, the Eleventh Circuit below cited one authority only — this Court's ruling in *Shultz*. In *Shultz*, this Court ruled that the Bank Secrecy Act's requirement for banks to report domestic financial transactions of $10,000 or more did not violate the Fourth Amendment. As the *NSBU* Petitioners point out, the Bank Secrecy Act reporting requirement in *Shultz* was vastly different from the requirement under the CTA, including the fact that the CTA applies to companies the Eleventh Circuit agreed were not engaged in interstate commerce. CTA reports are not restricted to FinCEN, but may be disclosed to any federal agency for "national security, intelligence, or law enforcement" purposes (31 U.S.C. § 5336(c)(2)(B)(i)(I)), and even foreign law-enforcement agencies. *See* NSBU Petition at 31-33. Additionally here, there is no third-party bank involved, allowing the Fourth Amendment rights of individuals to be devalued due to their being held by a third party. *See United States v. Miller*, 425 U.S. 435, 443 (1976).

In addition to the points made by the *NSBU* Petitioners, the *Shultz* decision is highly problematic and, at most, should be confined to its facts. It needs reconsideration because it was decided during a period in this Court's Fourth Amendment jurisprudence when the only consideration seemed to be privacy concerns — before the revitalization of the property principle in

United States v. Jones, 565 U.S. 400 (2012) and *Florida v. Jardines*, 569 U.S. 1 (2013).

From the ratification of the Fourth Amendment in 1791, there was no confusion that the people truly would be "secure in their persons, houses, papers, and effects" against "unreasonable" searches and seizures. This principle was known as the "mere evidence rule," as declared by this Court in *Boyd v. United States*, 116 U.S. 616 (1886) and *Gouled v. United States*, 255 U.S. 298 (1921). Under that longstanding rule reflective of the original public meaning of the Fourth Amendment, all searches and seizures were deemed unreasonable, even with a warrant, unless the government had a superior property interest, as it did in the fruits of a crime, the instrumentalities of a crime, and contraband (*e.g.,* drugs and counterfeit money). Yet, in May 1967, in an opinion by Justice Brennan, this Court abandoned the "mere evidence rule" in *Warden v. Hayden*, 387 U.S. 294 (1967). In December of that same year, this Court substituted an atextual[8] "reasonable expectation of privacy" test drawn from Justice Harlan's concurrence in *Katz v. United States,* 389 U.S. 347 (1967). No longer would all searches where the government did not have a superior property interest be deemed "unreasonable." Rather, under this rule, it was frequently stated that the scope of the Fourth Amendment was determined by whether

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[8] The first significant discussion of a privacy right occurred a century after ratification of the Fourth Amendment in an article co-authored by the future Justice Louis Brandeis. *See* Samuel D. Warren & Louis Brandeis, "The Right to Privacy," 4 Harvard L. Rev. 193 (Dec. 15, 1890).

modern judges would find the searches and seizures "reasonable."

- "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).
- "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stewart*, 547 U.S. 398, 403 (2006).

Note that the type of "reasonableness" built into this test has nothing to do with an examination of what the authors and ratifiers of the Fourth Amendment believed, but rather how modern judges feel. The original public meaning of the Fourth Amendment was that all searches and seizures, with or without a warrant, were "unreasonable" if the government did not have a superior property interest.[9]

In *Jones*, Justice Scalia explained that:

> The text of the Fourth Amendment reflects its **close connection to property**, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches or seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous. [*Jones* at 405 (emphasis added).]

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[9] Herbert Titus & William Olson, "*United States v. Jones*: Reviving the Property Foundation of the Fourth Amendment," 3 Case Western Reserve J. of Law, Tech. & the Internet 243 (2012).

Had *Shultz* been decided after *Jones*, this Court would have been required to consider more than just whether it seemed to the Court that the persons involved enjoyed a "reasonable expectation of privacy." Since the challenge here comes after *Jones*, the required analysis is quite different from that which applied earlier.

B. The Fourth Amendment's Warrant Requirement.

Equally astonishing is that the CTA constitutes a complete end-run around the warrant requirement in two ways. First, the CTA requires that Americans provide the specified information to FinCEN without a warrant, backed by criminal sanction for nonfiling, and then allows the personal information provided to be accessed by virtually any federal agency without a warrant.

FinCEN basically has admitted that the purpose of the law was to circumvent the Fourth Amendment's warrant requirement. In testimony to Congress by the then-Director of FinCEN in support of the CTA's BOI reporting requirement, it was explained that "identifying the ultimate beneficial owner of a shell or front company in the United States 'often requires human source information, grand jury subpoenas, surveillance operations, witness interviews, **search warrants**, and foreign legal assistance requests to get behind the outward facing structure of these shell companies.'" 87 *Fed. Reg.* at 59504 (emphasis added).

Acknowledging that the BOI reporting seeks information that would otherwise be obtained through a search warrant admits that the information is protected by the Fourth Amendment's warrant requirement. As Justice Brennan once explained in dissent, "A legislature cannot abrogate constitutional protections simply by saying that the purpose of an administrative search scheme is to prevent a certain type of crime." *New York v. Burger*, 482 U.S. 691, 728 (1987) (Brennan, J., dissenting). That principle is all the more true in a mandatory reporting scheme. Congressional purposes cannot satisfy the warrant requirement.

This Court has long made clear that "'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.'" *Coolidge v. N.H.*, 403 U.S. 443, 454-55 (1971) (quoting *Katz* at 357). The Fourth Amendment today "must provide at a *minimum* the degree of protection it afforded when it was adopted." *Jones* at 411.

Clearly, the information demanded by the CTA — "full legal name, date of birth, current ... residential or business street address, and unique identifying number from an acceptable identification document" — is sensitive personal information that would have been protected from seizure without a warrant under protections for "persons, ... papers, and effects" at the framing. This Court has held, for example, that because "[c]ell phones ... place vast quantities of

personal information literally in the hands of individuals ... officers must generally secure a warrant before conducting such a search." *Riley v. California*, 573 U.S. 373, 386 (2014).

The CTA requires individuals to submit such unique personal identifying information to the government as a condition of opening a business, and then the government is permitted to spread the submitted information across government agencies and even internationally.

C. General Warrants and Writs of Assistance.

Contrary to the Eleventh Circuit's apparent assumption, the Fourth Amendment contains no "uniform reporting requirement" exception. Indeed, vast general seizures of documents and searches of those documents, such as provided for under the CTA, were precisely what the Framers were reacting against.

> The Founding generation crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." [*Carpenter v. United States*, 585 U.S. 296, 303 (2018) (quoting *Riley* at 403).]

In *Carpenter*, the Court stated: "as John Adams recalled, the patriot James Otis's 1761 speech

condemning writs of assistance was 'the first act of opposition to the arbitrary claims of Great Britain' and helped spark the Revolution itself." *Id.* at 303-04. This is why the Fourth Amendment required "particularity" in "describing the place to be searched and the persons or things to be seized." "'[T]he problem [posed by the general warrant] is ... a general, exploratory rummaging in a person's belongings.... [The Fourth Amendment addresses the problem] by requiring a "particular description" of the things to be seized.'" *Andresen v. Md.*, 427 U.S. 463, 480 (1976). A "fishing expedition for evidence of **unidentified criminal activity committed by unspecified persons** was the very evil the Fourth Amendment was intended to prevent." *Messerschmidt v. Millender*, 565 U.S. 535, 566 (2012) (Sotomayor, J., dissenting) (emphasis added).

The Eleventh Circuit recognized that the CTA was enacted as a tool of law enforcement — "regulating interstate financial crime" and "prevent[ing] the use of the corporate form to commit fraud." *NSBU II* at 1332. This Court has noted that "general warrants for search and seizure of papers originated with the Star Chamber," the infamous English court that allowed general warrants and compelled self-incrimination. *Boyd* at 629. The CTA's assumption that all business owners are potential criminals, and therefore their information may be searched and seized as a condition of doing business, reflects the operations of a King's prerogative court.

The Fourth Amendment's "requirement of 'probable cause' instructs ... that baseless searches

shall not proceed." *United States v. United States Dist. Court*, 407 U.S. 297, 316 (1972). The CTA was designed to facilitate baseless searches and constitutes a vast affront to the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be granted.

Respectfully submitted,

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