No. 24-40792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

MERRICK GARLAND, ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,

Defendants-Appellants.

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE SUPPORTING PLAINTIFFS-APPELLEES' EMERGENCY PETITION FOR REVIEW EN BANC AND EMERGENCY MOTION TO EXPEDITE RULING

December 26, 2024

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MERRICK GARLAND, ATTORNEY GENERAL
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Defendants-Appellants.

The undersigned counsel for *amicus curiae* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT OF INTEREST

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization dedicated to defending constitutional freedoms from the depredations of the administrative state.[1] The "civil liberties" referenced in the organization's name include rights at least as old as the U.S. Constitution itself, such as the right to a jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government).

NCLA is concerned by the panel's expansive interpretation of the Commerce Clause to authorize an administrative agency the power to regulate and obtain sensitive information from over 30 million for-profit and nonprofit corporate entities, irrespective of any connection to economic activity that affects interstate commerce. Such an interpretation would transform the Commerce Clause into a grant of general police power—a power the federal government does not possess and that belongs to the States.

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[1] No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to finance the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Justice Antonin Scalia warned that "if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 657 (2012) ("NFIB") (Scalia, J., dissenting). Fortunately, the Supreme Court has drawn a bright line limiting the Commerce Clause's reach to only economic activities that have a substantial effect on national markets. Non-economic activities, such as violent crimes that may nonetheless impact commerce, fall outside of Commerce Clause powers. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Nor can a person's anticipated future economic activities be a basis for regulation. *NFIB*, 567 U.S. at 557.

The panel's opinion staying the injunction against the Corporate Transparency Act (CTA), Pub. L. No. 116-283, 134 Stat. 4604 (2021) (codified at 31 U.S.C. § 5336), ignores this important limitation. According to the panel, Congress may regulate the creation and continued existence of nearly all corporate persons based on their "ability and propensity to engage in commercial activity." Panel Opinion at 4. But all natural persons also have the ability and propensity to engage in commerce. The panel's reasoning would transform the Commerce Clause into a sweeping grant of power to regulate any person—whether corporate or natural—based on the theory

that the person "will one day engage in commerce." *NFIB*, 567 U.S. at 657 (Scalia, J., dissenting). En banc review is sorely needed because this boundless interpretation of the Commerce Clause is utterly incompatible with limited government. *Id.*

The CTA mandates that any entity "created by the filing of a document" for incorporation under state law must submit detailed reports that include sensitive information to the U.S. Department of the Treasury (Treasury). *See* 31 U.S.C. § 5336(a)(11) (defining "reporting company" under the Act). Failure to comply, whether by omission or by submission of false information, results in civil and criminal penalties. These requirements are not tethered to commercial transactions nor to any other sort of economic activity. Nor are they limited to for-profit corporations but also apply to certain nonprofits, such as Plaintiff-Appellee the Libertarian Party of Mississippi.

The only "activity" that triggers CTA's reporting requirements is the entity being created by the filing of incorporation paperwork with the appropriate state official. Such mere filing is not an economic activity regulable under the Commerce Clause because it does not involve the production, consumption, or exchange of any good or service for which there is a national market. While incorporation gives a corporate person the ability to engage in commerce, that does not justify regulation under the Commerce Clause. The Supreme Court made clear that a person's

anticipated future economic activity—even if certain—cannot be the basis for Commerce Clause regulation.

The panel opinion expands Commerce Clause powers to regulate the non-economic activity of incorporation based on a person's mere "ability and propensity" for future commercial activity. En banc review is needed to prevent the Commerce Clause from becoming a grant of general police powers, which the Supreme Court has repeatedly warned is incompatible with limited government.

ARGUMENT

I. COMMERCE CLAUSE REGULATIONS MUST TARGET ECONOMIC ACTIVITY

Congress's power under the Commerce Clause is broad but not boundless. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560. But the regulated activity must be economic in nature to begin with. *Id.* at 567. Hence, non-economic activities that affect commerce—such as violent crime—fall outside the ambit of the Commerce Clause. *Id.; see also Morrison*, 529 U.S. at 617.

Even *Wickard v. Filburn*, 317 U.S. 111 (1942), the "most far reaching example of Commerce Clause authority," involved the regulation of inherently economic activity. *Lopez*, 514 U.S. at 560. There, the Court upheld the Agricultural Adjustment Act's limits on wheat production. Filburn grew wheat for his own use beyond those limits, obviating the need to purchase wheat from the market. The

existence of such a national market for wheat was central to the Court's holding that he violated the Act: "[T]he power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market." *Wickard*, 317 U.S. at 128 (internal footnote omitted). But for excess cultivation of wheat for personal use, Filburn would have purchased from the national market, thus (marginally) increasing demand and the price of wheat nationwide. *Id.* at 125–27. Because Filburn engaged in economic activity that affected the nationwide market, his conduct was a permissible subject of Commerce Clause regulation under current law.

While the existence of a national market for the regulated activity will sustain a Commerce Clause regulation, the lack of such a market is fatal because the regulated activity would be inherently non-economic. *Lopez* held that the Commerce Clause could not sustain a federal statute criminalizing firearm possession in school zones because gun possession does not "involve[] economic activity" like the cultivation of a product for which there is a national market in *Wickard*. 514 U.S. at 560. The Court rejected the Government's "cost of crime" argument, which was based on gun violence negatively impacting commerce, as a boundless interpretation of the Commerce Clause incompatible with limited government. *Id.* at 564. If

Congress could regulate any activity that has an impact on commerce, the Court reasoned, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id*. Indeed, virtually all human activity "related to the economic productivity of individual citizens" and even "family law (including marriage, divorce, and child custody), for example" would become a permissible subject of federal regulation. *Id.* To prevent that, the Court drew a bright line between economic and non-economic activities, holding that firearm possession was in "no sense an *economic* activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567 (emphasis added).

The absence of economic activity likewise doomed a provision of the Violence Against Women Act of 1994, which created a federal civil remedy for gender-motivated violence. *Morrison*, 529 U.S. at 601, 617. In enacting that provision, Congress found that gender-motivated violent crimes negatively impact interstate commerce. That is undoubtedly so: violent crimes of all sorts are bad for commerce. But the Court nonetheless struck down the challenged provision because, notwithstanding their economic impact, "[g]ender-motivated crimes of violence [were] not, in any sense of the phrase, *economic* activity." *Id.* at 613 (emphasis added). *Morrison* thus "reject[ed] the argument that Congress may regulate noneconomic … conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617.

Lopez and *Morrison* recognized that certain activities by their nature are economic—and thus could be regulated under the Commerce Clause if they impact interstate commerce—while other activities are non-economic in nature and cannot be so regulated. In upholding the Controlled Substances Act's ban on cultivating marijuana for personal medicinal use, *Gonzales v. Raich* crystallized the line between economic and non-economic activities. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Distinguishing *Lopez* and *Morrison*, *Raich* explained that "[t]he Act [at issue in *Lopez*] did not regulate any economic activity" and "[d]espite congressional findings that [gender-motivated violence] had an adverse impact on interstate commerce, [*Morrison*] held the [Violence Against Women Act of 1994] unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity." *Id.* at 23, 25. By contrast, Raich was "cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market." *Id.* at 18. Even though gun- and gender-based violent crimes undoubtedly impact commerce, they are not "economic" activities because they are not connected to any interstate market for goods or services. Conversely, the "production, distribution, and consumption of commodities" for which an interstate market exists—even for personal use—is "quintessentially economic" activity. *Id.* at 25–26.

Economic activity that Congress may regulate under the Commerce Clause must be preexisting as opposed to anticipated. *See NFIB*, 567 U.S. 519. *NFIB* held

that the Affordable Care Act's individual mandate to purchase qualified health insurance could not be sustained under the Commerce Clause because the "power to regulate commerce presupposes the existence of commercial activity to be regulated" and the individual mandate did not "regulate existing commercial activity." *Id.* at 550, 552 (cleaned up). The majority rejected the Government's argument that Congress's Commerce Clause power could rest on regulated entities' potentially engaging in future economic activity. *Id.* at 556. While "Congress can anticipate the *effects* on commerce of [preexisting] economic activity," it may not "anticipate that activity itself in order to regulate individuals not currently engaged in commerce." *Id.* at 557 (emphasis in original). That is so even where, as the dissent pointed out, the regulated economic activity in question "is virtually certain to occur" in the near future. *Id.* at 606 (Ginsburg, J., dissenting in relevant part).

At bottom, a law that does not regulate economic activity cannot be upheld under the Commerce Clause. *See NFIB*, 567 U.S. at 557; *Morrison*, 529 U.S. at 617; *Lopez*, 514 U.S. at 567. Economic activity must currently exist, not be anticipated to occur in the future. *NFIB*, 567 U.S. at 557; *id.* at 657 (Scalia, J., dissenting).

II. THE PANEL OPINION IMPROPERLY ALLOWS COMMERCE CLAUSE REGULATION OF NON-ECONOMIC ACTIVITY BASED SOLELY ON A PERSON'S ABILITY TO ENGAGE IN FUTURE COMMERCE

The CTA cannot be sustained under the Commerce Clause because it does not regulate preexisting economic activity. While the Act seeks to collect information

needed to "target illicit financial activity," it does not actually regulate any financial activity. Nowhere does the Act impose financial reporting requirements on monetary transactions of any kind. Rather, the only "activity" of any sort that the CTA regulates is the "filing of a document" to incorporate under state law. 31 U.S.C. § 5336(a)(11). The Act notably does not limit the reporting requirements to corporations engaging in commercial transactions or economic activity. For example, a newly formed entity that has not yet engaged in economic activity must still comply with the Act's reporting requirements. *See id.* (defining a "reporting company" as one "created by the filing of a document with a secretary of state").

The Act thus does not regulate financial transactions nor participation in any other market activity. Rather, reporting requirements are triggered solely by the filing of incorporation paperwork, and they persist throughout the corporate entity's continued existence. But a corporate entity's mere existence is no activity at all, let alone economic activity that Congress may regulate. Nor is the filing of incorporation papers inherently economic because it bears no connection to the production, consumption, or exchange of goods or services for which there is a national market. Even the Agricultural Adjustment Act at issue in *Wickard*, a case representing the outer limit of the Commerce Clause's scope, regulated the production and introduction of a commodity into the market where increased supply ostensibly could affect the national market for that commodity. 317 U.S. at 125–28.

The same is true for the Court's other Commerce Clause decisions upholding statutes. *See, e.g.*, *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 116, 120 (1942) (upholding price regulations on "milk and certain other commodities"); *Hodel v. Virginia Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 268, 281 (1981) (upholding Congress's regulations on coal because coal was a "commodity" and producing coal locally affects interstate commerce).

But the CTA—like the Gun-Free School Zones Act and Violence Against Women Act—regulates a non-economic activity. The filing of incorporation papers is in "no sense an economic activity that might, through repetition elsewhere, substantially affect … interstate commerce." *Lopez*, 514 U.S. at 567. For example, an entity filing for incorporation in Texas will not impact the availability or desirability of a Louisiana entity doing the same in its state. Hence, akin to imposing liability for gender-motivated crimes of violence, imposing reporting requirements based on such filings is "not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613. Similar to gun possession or gender-motivated violence, there is no production, consumption, or exchange of goods and services for which there is a national market involved in the mere creation and continued existence of a corporate entity.

Notably, the Panel did not conclude that filing incorporation paperwork is itself inherently economic in nature. Rather, it held that the Commerce Clause

permits the regulations of corporate entities that come into existence because such entities have the "ability and propensity to engage in commercial activity." Panel Opinion at 4. But so do all naturally born persons. The panel's reasoning is analogous to claiming that a natural person's propensity for commerce allows Congress to regulate his or her birth and ongoing life. *Cf. Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (reserving the question of whether federal partial-birth-abortion ban exceeds Commerce Clause powers) (Thomas, J., concurring). Under that logic, all persons—corporate or natural—could be compelled to report whatever Congress deems useful. Such boundless power is foreclosed by the Supreme Court's requirement that Commerce Clause regulations target specific economic activity.

While the defendant in *Lopez* undoubtedly engaged in commerce, Congress could not regulate his gun possession in a school zone under the Commerce Clause because *that* activity was non-economic. 514 U.S. at 567. All persons who commit violent crimes likewise engage in commerce. But their crimes fall outside the scope of the Commerce Clause if those crimes are not part of the perpetrators' commercial activities. *Morrison*, 529 U.S. at 617. At bottom, the fact that a person engages in some commerce does not allow Congress to regulate that person's other non-economic activities. The panel violated this important limitation because it concluded a corporate person's ability and propensity to engage in some commerce justified regulation of its coming into existence and continuing to exist as a

corporation, both of which are inherently non-economic activities. *En banc* review is needed to correct this grave error which, if allowed to stand, would transform the Commerce Clause into a grant of boundless power incompatible with limited government.

CONCLUSION

For the foregoing reasons and those offered by the Appellees, this Court should grant *en banc* rehearing of this matter, vacate the panel order, and deny the Government's emergency stay motion.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it has 2,585 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Times New Roman, a proportionally spaced typeface.

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