No. 24A653

IN THE

Supreme Court of the United States

MERRICK GARLAND, ATTORNEY GENERAL, ET AL.,
Applicants,

v.

TEXAS TOP COP SHOP, INC., ET AL.,
Respondents.

On Application for a Stay of the Injunction Issued by the United States District Court for the Eastern District of Texas

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AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN OPPOSITION TO APPLICATION FOR A STAY

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INTEREST OF THE AMICUS CURIAE[1]

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. 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 government's expansive interpretations of the Commerce Clause and the Necessary and Proper 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 interpretations would grant Congress general police powers, which the federal government does not possess and which belong instead to the States.

Additionally, as an organization that often seeks to preliminarily halt unlawful agency action, NCLA has a vested interest in ensuring that reviewing courts retain the authority to "postpone the effective date of an agency action" on a nationwide basis under § 705 of the Administrative Procedure Act ("APA"). NCLA thus objects to

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

the Government's alternative request to depart from § 705's plain text and narrow the scope of interim relief granted below.

INTRODUCTION AND SUMMARY

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 then, the Supreme Court has limited the Commerce Clause's reach to only economic activities that have substantial effects on national markets. Non-economic activities, such as violent crimes that may nonetheless impact commerce indirectly, 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). Likewise, a person's anticipated future economic activities cannot be a basis for regulation under the Commerce Clause. *NFIB*, 567 U.S. at 557.

The Government's request to stay the preliminary injunction of the Corporate Transparency Act ("CTA"), Pub. L. No. 116-283, 134 Stat. 4604 (2021) (codified at 31 U.S.C. § 5336), and its implementing regulation, ignores this important limitation. According to the Government (at 15–16), Congress may regulate the creation and continued existence of corporate persons based on the theory that such entities will one day engage in economic activities that impact interstate commerce. This Court should deny the stay request because it is based on a boundless interpretation of the federal commerce power that is utterly incompatible with limited government.

The CTA mandates that any entity "created by the filing of a document" for incorporation under state law must submit detailed reports, including 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. *Id.* § 5336(h)(3). 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 Respondent the Libertarian Party of Mississippi.

The only "activity" that triggers the CTA's reporting requirements is the entity's creation 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. Nor can the Government anticipate future economic activity that a corporate person will one day engage in to justify regulating its birth and continued existence under the Commerce Clause.

The Government is unlikely to succeed on the merits in showing that the CTA falls within Congress's Commerce Clause and power, so the Court should deny Applicants' request for a stay. The Court should also deny their alternative request to narrow the scope of the injunction to the corporate entities named in the Complaint. The APA expressly authorizes the district court to "postpone the effective

date of an agency action"—here the agency rule implementing the CTA—interim relief that extends to all parties, not just those in this litigation. *See* 5 U.S.C. § 705.

ARGUMENT

I. THE CTA EXCEEDS CONGRESS'S POWER TO REGULATE COMMERCE AMONG THE STATES

The Constitution vests Congress with the exclusive power "[t]o regulate Commerce … among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause was originally understood to have a "relatively limited reach." *Lopez*, 514 U.S. at 590 (Thomas, J., concurring). "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Id.* at 585–86 (Thomas, J., concurring) (collecting sources). The Government does not defend the CTA under these categories. Instead, it invokes the power to regulate " 'intrastate economic activity' that, 'viewed in the aggregate,' 'substantially affects interstate commerce.'" Applicants' Br. 13–14 (quoting *Lopez*, 514 U.S. at 590).

But even the substantial-effects test—which reflects an interpretation that "has drifted far from the original understanding" of the Commerce Clause, *id.* at 584 (Thomas, J., concurring)—has its limits. Recognizing that virtually every sort of intrastate activity, when aggregated, would have some substantial effect on commerce, this Court has limited the substantial-effects test to *economic* activities that directly affect commerce, as opposed to intrastate *non-economic* activities that may have downstream, indirect consequences for commerce. *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 616–17. The CTA, however, targets a *non-economic* activity—

the filing of incorporation paperwork under state law—and thus it may not be sustained under the Commerce Clause.

A. 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 regulations must target activity that is economic to begin with. *Morrison*, 529 U.S. at 613 ("[O]ur cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."). Hence, non-economic activities that affect commerce only indirectly—such as violent crime and family formation—fall outside the ambit of the Commerce Clause. *Id.* 616–17.

In its most basic form, "quintessentially economic" activity is "the production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 26 (quoting *Webster's Third New International Dictionary* 720 (1966)). Even *Wickard v. Filburn*, 317 U.S. 111 (1942), the "most far reaching example of Commerce Clause authority," involved the direct regulation of inherently economic activity—the growing of wheat for personal consumption to obviate purchases on the open market. *Lopez*, 514 U.S. at 560–61 (citing *Wickard*, 317 U.S. at 128). But the Commerce Clause does not permit Congress to regulate non-economic activity on the theory that it has an indirect effect on interstate commerce. *Id. 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 an open market in *Wickard*. *Id.* at 560. The Court warned

that the Commerce Clause does not permit regulation of activity with merely an "indirect and remote" effect on interstate commerce. *Id.* at 557. Rather the effect must be direct and substantial in the aggregate. It thus rejected the Government's "costs 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.

There is little reason to doubt that gun violence affects commerce, and that effect can be substantial in the aggregate. But that effect is still indirect. If Congress could regulate any activity that, in the aggregate, has an indirect 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.* The Court thus drew a sharp distinction 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 ("VAWA"), which created a federal civil remedy for gender-motivated violence. *Morrison*, 529 U.S. at 601–02, 617. In enacting the VAWA, Congress found that gender-motivated violent crimes negatively impact

interstate commerce. That is undoubtedly so: violent crimes of all sorts are bad for commerce, and in the aggregate, the impact can surely be significant. The Court repeated its admonition against regulating activities with "indirect and remote" effects and struck down the challenged provision because, notwithstanding their impact on commerce, "[g]ender-motivated crimes of violence [were] not, in any sense of the phrase, *economic* activity." *Id.* at 608, 613 (emphasis added). *Morrison* thus reaffirmed that "the noneconomic … nature of the conduct at issue was central to [the] decision" striking down the statute in *Lopez*, *id.* at 610, and continued to "reject 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 substantially impact interstate commerce—while other activities are non-economic in nature, such as family planning, and cannot be so regulated regardless of their aggregate indirect effect on commerce. In upholding the Controlled Substances Act's ("CSA") ban on cultivating marijuana for personal medicinal use, *Gonzales v. Raich* crystallized the line between economic activities that directly affect commerce and non-economic activities that have indirect effects. 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 [VAWA] 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 affect commerce, they are not "economic" activities because they are not directly related to the 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. "Because the CSA is a statute that *directly regulates economic, commercial activity*, [the Court's] opinion in *Morrison* casts no doubt on its constitutionality." *Id.* at 26 (emphasis added).

Economic activity that Congress may regulate under the Commerce Clause must be preexisting. *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' 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, such 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 threshold question in determining whether legislation is permitted under the Commerce Clause is what is being directly regulated. The law will be sustained if it directly regulates economic activity, such as the growing of a fungible commodity even for self-consumption. *Raich*, 545 U.S. at 26. But if it directly regulates non-economic activity, the law is invalid regardless of its downstream impact on commerce. *See Morrison*, 529 U.S. at 617; *Lopez*, 514 U.S. at 567. Finally, the economic activity that is directly regulated must currently exist, and not be merely anticipated to occur in the future. *NFIB*, 567 U.S. at 557; *id.* at 657 (Scalia, J., dissenting).

B. The CTA Does Not Directly Regulate Economic Activity

The CTA cannot be sustained under the Commerce Clause because it does not directly regulate preexisting economic activity. In considering whether a statute regulates economic activity, courts "should look only to the expressly regulated activity," not its downstream consequence, *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003), nor the regulated party's anticipated conduct, *NFIB*, 567 U.S. at 557. Hence, in *Lopez* and *Morrison*, the directly regulated activities considered were handgun possession near a school and gender-based violent crimes, not the downstream or future effects of such conduct.

Here, while the Government claims the CTA collects information that may be used to "counter money laundering … and other illicit activity," Applicants' Br. 5 (quoting § 6402(5)(E)), the Act does not directly 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 regulates neither making financial transactions nor participating 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 does not involve the production, consumption, or exchange of goods or services. Even the Agricultural Adjustment Act at issue in *Wickard*, a case representing the outer limit of the Commerce Clause's scope, directly 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. Va. Surface Mining & 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 the VAWA—directly 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 involved in the mere creation and continued existence of a corporate entity.

The Government tellingly does not claim that the filing of incorporation paperwork is itself inherently economic in nature. Nor does it claim that coming into existence is an economic activity. Rather, it argues that "entities that incur the trouble and expense of filing papers to obtain authority to conduct economic transactions in their own name will go on to exercise that authority." Applicants' Br. 15–16. That is undoubtedly often so. But it was also the case that violent crimes prevent and deter victims from engaging in commerce. *Lopez*, 529 U.S. at 615. But that reasoning was not enough to permit Congress to regulate violent crimes that are inherently non-economic. *Id.* at 617. Allowing indirect economic effects of non-

economic activities to justify Commerce Clause regulations would open the door to federal regulation of virtually every human activity, including "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615–16.

The Government's theory of commerce power here likewise improperly expands Congress's reach. It is true that most corporations that are created will engage in some commerce during their existence. Applicants' Br. 15–16. But so will *all* naturally born persons. The Government's reasoning is analogous to claiming that a natural person's propensity for commerce allows Congress to regulate his or her birth and every other aspect of life. *Cf. Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) (reserving the question of whether federal partial-birth-abortion ban exceeds Commerce Clause powers). Under that logic, all persons—corporate or natural—could be regulated for merely coming into existence. Such boundless power is foreclosed by this Court's precedent making clear that Congress's Commerce Clause power reaches only "preexisting economic activity." *NFIB*, 567 U.S. at 557. It thus cannot justify regulation based on anticipated future economic activity, such as the possible—even probable—subsequent production or consumption of goods and services after filing for incorporation—or being born. *Id.* at 557; *see also id.* at 657 (Scalia, J., dissenting).

The CTA simply cannot withstand scrutiny under the Commerce Clause. On its face, the Act's provisions clearly target and regulate the mere act of entity incorporation. The Act establishes reporting requirements to the federal government,

solely based on whether an entity was created by filing for incorporation under state law. It requires no production, consumption, or exchange of goods or services before the reporting requirements apply. Because of this omission, the CTA does not regulate economic activity and thus cannot be sustained under the Commerce Clause.

II. THE NECESSARY AND PROPER CLAUSE DOES NOT EXPAND CONGRESS'S COMMERCE POWERS TO ENCOMPASS NON-ECONOMIC ACTIVITY

As a fallback, the Government invokes (at 17) the Necessary and Proper Clause, which this Court has said is the "last, best hope of those who defend ultra vires congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). The Government insists that because the information collected under the CTA is intended to combat money laundering and fraud, the Act "effectuat[es] Congress's power to 'regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.'" Applicants' Br. 18.

But the Necessary and Proper Clause "does not give Congress *carte blanche*." *United States v. Comstock*, 560 U.S. 126, 158 (2010) (Alito, J., concurring). It is "a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution[.]'" *Kinsella v. United States*, 361 U.S. 234, 247 (1960); *see also* Randy Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 185 (2003) ("the Necessary and Proper Clause was not an additional freestanding grant of power"). The Clause merely "vests Congress with authority to enact provisions 'incidental to the [enumerated] power, and conducive to its beneficial

exercise[.]'" *NFIB*, 567 U.S. at 559 (citing *McCulloch v. Maryland*, 4 Wheat. 316, 418 (1819)).

The substantial-effects standard that the Government relies on (at 13–14) already reflects the additional reach provided by the Necessary and Proper Clause. *See Raich*, 545 U.S. at 22 (upholding challenged law as falling within Congress's "authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce … among the several States.'"); *see also id.* at 34 (Scalia, J., concurring) (explaining that "activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone"). The Government may not invoke the Clause to further expand the substantial-effects test again to reach non-economic activities.

To be "proper," Congress's regulation of intrastate conduct "may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *Id.*, 545 U.S. at 39 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421–22). A regulation is not "proper for carrying into Execution the Commerce Clause when it violates a constitutional principle of state sovereignty," *id.*, "undermine[s] the structure of government established by the Constitution," *NFIB*, 567 U.S. at 559, or "work[s] a substantial expansion of federal [commerce] authority," *id.*

In *NFIB*, the court held that the Individual Mandate violated these principles by purporting to regulate based on the theory that a person will eventually engage in commerce by consuming healthcare. 567 U.S. at 560. Permitting such regulation of non-economic activity would improperly allow Congress to "reach beyond the natural

limit of its [commerce] authority and draw within its regulatory scope those who otherwise would be outside of it." *Id.* The same holds true here. The Government seeks to regulate a corporate person for merely coming into existence on the theory that it "will one day engage in commerce." *See id.* at 657 (Scalia, J., dissenting). This is not merely an "incidental" "exercise[] of authority derivative of, and in service to" the Commerce Clause. *Id.* at 559–60. Rather, it impermissibly "work[s] a substantial expansion of federal [commerce] authority" to target non-economic activity, *id.*, and it intrudes into the power to charter corporations, which has always been an exclusive and traditional function of States.

The Government's interpretation of the Necessary and Proper Clause would empower the Commerce Clause to overcome the precise limits this Court placed on federal commerce authority. Commerce Clause regulation of intrastate non-economic activity based on its downstream or future effects would grant Congress police power that intrudes into "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." 529 U.S. at 615–16 (citing *Lopez*, at 567).

The Government's reliance (at 17) on *Comstock*, 560 U.S. at 133, is misplaced. Any reading of *Comstock* to permit Congress to make laws necessary and proper for carrying out not just the Constitution's enumerated powers but also statutory ends is grossly incorrect, dangerous, and must be rejected. *See id.* at 161 (Thomas, J., dissenting) ("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.") (quoting Art. I, § 8, cl. 18.). But more immediately, the key considerations undergirding Justice Breyer's multi-factor analysis in that case are missing here. Unlike the statute in *Comstock*, there is no "long history of federal involvement" in state incorporation; the Government has failed to provide "sound reasons for the statute's enactment"; the CTA provides no "accommodation of state interests," and, by covering over 30 million corporate entities, it lacks a "narrow scope." 560 U.S. at 149. Moreover, *Comstock* merely held that the Necessary and Proper Clause permits the continued confinement of certain individuals already in federal custody. *Id.* at 129–30. That limited and "incidental" power is a far cry from the Government's request here to expand commerce power to regulate intrastate non-economic activities. *See NFIB*, 567 U.S. at 560 (distinguishing the limited scope of necessary-and-proper powers in *Comstock* from an expansion of commerce power).

Simply put, it is not a necessary and proper exercise of Congress's commerce power to regulate intrastate non-economic activity, here the creation of a corporate entity through the filing of papers under state law. The Government thus cannot establish a likelihood of success on the merits, so the Court should deny the Government's request for a stay of the district court's injunction.

III. THE DISTRICT COURT PROPERLY EXERCISED ITS AUTHORITY UNDER § 705 OF THE APA TO POSTPONE THE AGENCY'S RULE IMPLEMENTING THE CTA

The Government's alternative request to narrow the scope of the nationwide preliminary relief against Treasury's rule implementing the CTA to just the corporate entities named in the Complaint is meritless and should be rejected. To be sure,

"nationwide injunctions would be permissible only if Congress authorized them." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 838 (2024) (Kavanaugh, J., concurring). But here, Congress has expressly "empower[ed] the judiciary to act directly against the challenged agency action," which necessarily involves nationwide relief. *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 2 n.1 (2023) (Kavanaugh, J., concurring in the denial of an application for stay) (quoting Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 1012–13 (2018)); *Corner Post*, 603 U.S. at 838 (same).

Section 706 of the APA, which authorizes reviewing courts to "set aside" unlawful agency action as ultimate relief, provides for universal vacatur of the agency action. *Corner Post*, 603 U.S. at 827 (Kavanaugh, J., concurring) ("The APA authorizes vacatur of agency rules"); *see also* Tr. of Oral Argument at 35–38, *United States v. Texas*, 599 U.S. 670 (2023) (No. 22–58) (Chief Justice Roberts objecting to Solicitor General's position that the APA does not authorize universal vacatur). And this Court has routinely affirmed universal vacatur of unlawful agency action. *See, e.g., DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 36 & n.7 (2020) (affirming lower court's vacatur of unlawful agency action); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (affirming vacatur of regulation); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 n.18 (1979) (same). Consistent with § 706's universal scope of final relief, § 705, which governs "Relief Pending Review," states that the "reviewing court[] may issue all necessary and appropriate process to postpone the

effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

"Nothing in the text of Section 705, nor of Section 706, suggests that either preliminary or ultimate relief under the APA needs to be limited to [the plaintiff] or its members." *Career Colls. & Schs. of Tex. v. United States Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024), *cert. granted on other grounds*, No. 24-413 (Jan. 10, 2025).[2] Section 705 by its plain terms authorizes preliminary relief in the disjunctive. In addition to preserving "status or rights," Congress separately authorized preliminary relief against the agency action itself—here the agency rule implementing the CTA—by postponing its effective date. The agency action is the object of interim remedies under § 705 just as agency action is the object of universal final "set aside" remedy under § 706. Thus "the scope of preliminary relief under Section 705 aligns with the scope of ultimate relief under Section 706, which is not party-restricted and allows a court to 'set aside' an unlawful agency action." *Id.* (collecting authorities). The lower court thus had authority to postpone nationwide the agency rule implementing the CTA under § 705.

The district court properly exercised that authority. The Government misconstrues (at 35) § 705's language authorizing interim relief "to the extent necessary to prevent irreparable injury." That is simply the familiar requirement that a plaintiff show irreparable injury to secure preliminary relief, and the Government

[2] The Court notably declined to grant a writ of certiorari on the Government's second question presented in *Career Colleges & Schools of Texas* concerning the appropriateness of universal interim relief under § 705.

does not contest the lower court's findings that Respondents here demonstrated irreparable compliance costs and constitutional injuries. *See* App. 41–50a. These irreparable injuries are common to all corporate entities affected by Treasury's CTA rule and could be averted only by postponing its effective date.

Under the Government's self-serving view, each of the millions of regulated entities must file a separate challenge and prove its own irreparable injury to seek temporary relief from agency action that an Article III court has found likely to be unlawful. And so must every worker or employer affected by an unlawful OSHA mandate; every company affected by an improper EPA rule; every landlord whose right to evict tenants is taken away by an unauthorized HHS regulation; every gun owner who is turned into a felon by an erroneous ATF interpretation; every immigrant encompassed by an executive order on border enforcement; every veteran harmed by an unlawful VA policy, and so forth. Unsurprisingly, no court has embraced this recipe for pandemonium that departs from § 705's plain text. To the contrary, this Court has routinely suspended agency action without limiting relief to the parties. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 120 (2022) (per curiam) (staying OSHA vaccine mandate); *West Virginia v. EPA*, 577 U.S. 1126 (2016) (staying EPA's Clean Power Plan); *West Virginia v. EPA*, 597 U.S. 697, 715 (2022) (observing that the Court had "granted a stay" of the Clean Power Plan, thereby "preventing the rule from taking effect"). It should not stay the lower court's suspension of agency action authorized by § 705 in this case.

CONCLUSION

For the foregoing reasons and those provided by Respondents, Applicants are not likely to succeed on the merits, and the Court should deny their request to stay the district court's preliminary injunction. The Court should further deny Applicants' alternative request to narrow the scope of that injunction.

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Respectfully submitted,

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