No. 24-40792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS TOP COP SHOP, INCORPORATED; RUSSELL STRAAYER; MUSTARDSEED LIVESTOCK, L.L.C.; LIBERTARIAN PARTY OF MISSISSIPPI; NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INC.; DATA COMM FOR BUSINESS, INCORPORATED,

Plaintiffs-Appellees,

v.

PAMELA BONDI, U.S. Attorney General; TREASURY DEPARTMENT; ANDREA GACKI, Director of the Financial Crimes Enforcement Network; FINANCIAL CRIMES ENFORCEMENT NETWORK; SCOTT BESSENT, Secretary, U.S. Department of the Treasury,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF AMICUS CURIAE OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PLAINTIFFS-APPELLEES

March 3, 2025

Sheng Li
Mark Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Dr., Suite 300
Arlington, VA 22203
(202) 869-5210
sheng.li@ncla.legal

Counsel for Amicus Curiae

CORPORATE DISCLOSURE AND CERTIFICATE OF INTERESTED PERSONS

No. 24-40792

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

Plaintiffs-Appellees,

v.

PAMELA BONDI, U.S. Attorney General, *et al*.,

Defendants-Appellants.

The undersigned counsel of record certifies that amicus New Civil Liberties Alliance (NCLA) is a nonprofit organization as defined under § 501(c)(3) of the Internal Revenue Code. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

NCLA has authored this brief in whole. Counsel is not aware of any person or entity as described in the fourth sentence of Rule 28.2.1 that has an interest in the outcome of this case other than those listed in the Plaintiffs-Appellees' certificate. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

/s/ Sheng Li
Sheng Li

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF THE AMICUS CURIAE[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm dedicated to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

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). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American people still enjoy the shell of their Republic, there has developed within it a very different sort of

[1] All parties have consented to the filing of this *amicus* brief. 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.

government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is troubled by the government's expansive interpretations of the Commerce Clause and the Necessary and Proper Clause, which purportedly authorize an administrative agency to regulate and obtain sensitive information from over 30 million for-profit and nonprofit corporate entities, irrespective of any direct 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 frequently seeks preliminary relief against 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" nationwide under § 705 of the Administrative Procedure Act ("APA"). NCLA thus objects to the Government's alternative request to depart from § 705's plain text and narrow the scope of interim relief granted below.

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). Fittingly, the Supreme Court has recognized that the Commerce Clause only reaches 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 justify regulation under the Commerce Clause. *NFIB*, 567 U.S. at 557. The Government's request to vacate the district court's preliminary injunction disregards this important limitation.

According to the Government (at 23), "a corporation's status as a commercial entity" allows Congress to regulate it under the Commerce Clause. This Court has already rejected such a boundless interpretation of the Clause to "allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors" as being incompatible with limited government. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003). It should do so again here as to implementation and enforcement of the Corporate Transparency Act ("CTA"), Pub. L. No. 116-283, 134 Stat. 4604 (2021) (codified at 31 U.S.C. § 5336).

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; they also apply to certain nonprofits, such as Plaintiff-Appellee 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. Yet incorporation 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 justify regulation of an entity's formation and continued existence based on its anticipated future economic activity. The Government is unlikely to succeed on the merits in demonstrating that the CTA falls within Congress's permissible Commerce Clause power, so the Court should deny Appellants' request to vacate the district court's preliminary injunction.

The Court should also deny the Government's alternative request to narrow the scope of the injunction to Appellees and their members. The APA expressly authorizes the district court to "postpone the effective date of an agency action"—here the agency's implementation and enforcement of the CTA—interim relief that

extends to all parties, not just those in this litigation. *See* 5 U.S.C. § 705. This Court has not hesitated to grant preliminary relief on a nationwide basis against unlawful agency action that irreparably injures tens of millions. *See BST Holdings, LLC v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021). It should grant nationwide relief here too.

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 traditional categories of commerce. Instead, it invokes the power to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." Appellants' Br. at 16 (quoting *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

But even the substantial-effects test—which reflects an interpretation that "has drifted far from the original understanding" of the Commerce Clause, *Lopez*, 514 U.S. at 584 (Thomas, J., concurring)—has its limits. Recognizing that virtually any intrastate activity, when aggregated, could have a substantial effect on

commerce, the Supreme 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, explicitly targets a *non-economic* activity—the filing of incorporation paperwork under state law—and thus 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 unlimited. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560. While an activity's cumulative impact on commerce may be considered to meet the 'substantially affects' threshold, the regulated activity must be economic in nature from the outset. *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."). "In the light of *Lopez* and *Morrison*, the key question for purposes of [the substantial-effects test] is whether the nature of the regulated activity is economic." *GDF Realty*, 326 F.3d at 630.

At its core, "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)). This Court has

recognized that "commerce is '[t]he exchange of goods and services' or '[t]rade and other business activities'." *GDF Realty*, 326 F.3d at 629 (quoting *Black's Law Dictionary* 263 (7th ed. 1999)). Thus, "regulated intrastate activities 'arise out of or are connected with a commercial transaction[.]'" *Groome Res. Ltd., L.L.C. v. Par. of Jefferson*, 234 F.3d 192, 205 (5th Cir. 2000).

Even *Wickard v. Filburn*, 317 U.S. 111 (1942)—the "most far reaching example of Commerce Clause authority"—concerned the direct regulation of activity that had an immediate connection to economic transactions—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). However, the Commerce Clause does not permit Congress to regulate non-economic activity merely because it has an indirect or downstream effect on interstate commerce. *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" comparable to 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 true: violent crimes of all sorts harm 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 the aggregate 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 "reject[ed] the argument that Congress may regulate noneconomic … conduct based solely on that conduct's aggregate effect on interstate commerce," *id.* at 617.

In upholding the Controlled Substances Act's ("CSA") ban on cultivating marijuana for personal medicinal use, *Gonzales v. Raich* clarified the line between economic activities that directly affect commerce and non-economic activities that have indirect effects. 545 U.S. 1, 17 (2005). Distinguishing its holding from *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 already exist. *See NFIB*, 567 U.S. 519. *NFIB* held that the Affordable Care Act's individual mandate to purchase 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." *Id.* at 550. The individual mandate, however, did not "regulate existing commercial activity" *Id*. at 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).

The threshold question "is not whether the regulated activity affects commerce, it is whether the regulated activity *is* commerce." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 429 (5th Cir. 2004) (Garza, J., concurring in part and dissenting in part) (emphasis in original) (citing *Lopez*, 514 U.S. at 560-61 and *GDF Realty*, 326 F.3d at 630). The activity's effect on commerce in the aggregate "is only relevant once it is determined that economic activity is being regulated" in the first place. *Id.* The distinction between economic and non-economic activity must be strictly enforced, lest the Commerce Clause cease to limit federal power. As this Court warned in *United States v. Ho*:

> any imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic productivity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, thereby turning that clause into what it most certainly is not, a general police power.

311 F.3d 589, 599 (5th Cir. 2002). Accordingly, a law is constitutional if it regulates intrastate 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 being regulated must already exist, and not be merely anticipated. *NFIB*, 567 U.S. at 557; *id.* at 657 (Scalia, J., dissenting).

B. The CTA Does Not Expressly 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 is a permissible exercise of Commerce Clause powers, this Court "look[s] only to the expressly regulated activity," not downstream consequences, the regulated entity's motivations, *GDF Realty*, 326 F.3d at 633, nor its anticipated future 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. The Government claims (at 23) that CTA "regulat[es] ongoing corporate conduct" but refuses to identify what that conduct is. Nor can it. Nowhere does the Act expressly regulate any activities that "arise out of or are connected with a commercial transaction[.]'" *Groome*, 234 F.3d at 205. Rather, the only "activity" of any sort that the CTA expressly regulates is the "filing of a document" to incorporate under state law, 31 U.S.C. § 5336(a)(11)—an intrastate, non-economic activity that falls beyond the Commerce Clause's reach.

Incorporation is a legal act that 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.

Like 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, the mere creation of a corporate entity does not involve the production, consumption, or exchange of goods or services.

The Government notably does not claim that the act of incorporation is itself an economic activity. Rather it argues that "[i]ncorporation … is the affirmative act that brings an entity into the class of economic activities that Congress can regulate." Appellants' Br. at 23. However, what matters is the economic nature of the activity that the CTA expressly and directly regulates—incorporation—not whether incorporation may enable future economic activity nor whether it is commercially motivated. *See GDF Realty*, 326 F.3d at 633.

In *GDF Realty*, a commercial real estate company challenged the Endangered Species Act's ("ESA") prohibition against "taking" certain cave-dwelling invertebrates found only in Texas, which restricted the company's commercial development plans. *Id.* at 627. The district court upheld the ESA under the Commerce Clause, reasoning that the company's proposed takes were for developments that substantially affected interstate commerce. *Id.* This Court rejected that reasoning on appeal, explaining that courts must "look only to the expressly regulated activity" to answer the "key question … whether the nature of the regulated

activity is economic." *Id.* at 634. While "the *effect* of regulation of ESA takes may be to prohibit [commercial] development in some circumstances," that law was "not directly regulating commercial development." *Id.* This Court also admonished the district court for "expanding its scope-inquiry to plaintiffs' commercial motivations" for the expressly regulated activity. *Id.* at 634. In other words, courts should not base regulation of a non-economic activity on an entity's commercial motivation or the commercial activity that such a non-economic activity enables. Thus, it is irrelevant that entities may have a commercial motivation to incorporate, or that incorporation allows them to engage in future commercial activity. The expressly regulated intrastate activity of incorporation under state law remains non-economic and thus is not the proper target of commerce regulations.

GDF Realty ultimately upheld the challenged ESA provisions on alternative grounds, holding that the ESA's protection of endangered species nationwide is economic in nature, and that the regulation of intrastate takes of the Texas Cave Species is an "essential part" of that broader regulatory scheme. 326 F.3d at 640. As such, intrastate takes of the Texas Cave Species "may be aggregated with all other ESA takes" to satisfy the substantial-effects test. *Id.* By contrast, there is no broader regulatory scheme for which federal regulation of incorporation under state law is an essential part. To be sure, information that CTA requires may be used to enforce, *inter alia*, federal money laundering, terrorism finance, and tax evasion laws. *See*

Appellants' Br. at 18 (citing 18 U.S.C. §§ 1956, 1957, *id.* § 2339C and 26 U.S.C. § 7201). But the federal government has regulated these laws for decades[2] without requiring all entities incorporated under state law to disclose ownership information that States do not require. Such disclosure is hardly essential to these longstanding regulatory schemes, particularly in light of the Government's voluntary multi-year delay of CTA's implementation. There is no broader statutory scheme for which the regulation of state-law incorporation is an essential part.

Nor can incorporation under state law be aggregated with money laundering, terrorism financing, or tax evasion to satisfy the substantial-effects test. In *GDF Realty*, the court aggregated the takes of one endangered species with takes of all species protected under the ESA, reasoning that they were part of the same statutory framework. *GDF Realty*, 326 F.3d at 640. Similarly, in *Raich*, self-grown medicinal marijuana was aggregated with the national market for all marijuana, because all such marijuana was regulated under the same statute. *Raich*, 545 U.S. at 32. Here, however, incorporation under state law is fundamentally different in kind from money laundering, terrorism financing, and tax evasion—each of which is regulated

[2] The federal money laundering statute was added in 1986, the terrorism finance statute was added in 2002, and the tax evasion statute was enacted in 1954.

under distinct statutes. Therefore, incorporation cannot be aggregated with them to satisfy the substantial-effects test.

In any event, the Government claims (at 23) that "[t]he CTA does not regulate incorporation itself but rather is triggered by a corporation's *status* as a commercial entity." (Emphasis added). But the scope of the Commerce Clause would be unlimited if status as a commercial actor can be the basis for regulation. After all, all persons—corporate and natural—can and do engage in *some* commerce. This Court has explicitly warned against the "application of otherwise unconstitutional statutes to commercial actors" based solely on their status as such. *GDF* Realty, 326 F.3d at 634. Otherwise, there "would be no limit to Congress' authority to regulate intrastate activities … [of] entities which had an otherwise substantial connection to interstate commerce." *Id.* A valid Commerce Clause regulation must expressly target economic activity, meaning an affirmative act—and legal status as an entity with the capacity to engage in commerce does not qualify. *Id.*

The Government asserts (at 23) that "[i]ncorporation … is the affirmative act that brings an entity into the class of economic activities that Congress can regulate." If that were sufficient, then so would be the birth of every natural person. Just as incorporation grants corporate persons the capacity to engage in commerce, being born (and reaching adulthood) grants natural persons the same capacity. Yet, the Commerce Clause does not grant Congress power to regulate a natural person's birth

and every other aspect of his or her 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). On the contrary, the Supreme Court has made clear that a person's mere capacity or propensity for commerce is insufficient for regulation under the Commerce Clause. *NFIB*, 567 U.S. 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 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 transaction, production, consumption, or exchange of goods or services before the reporting requirements apply. Incorporation itself is not an economic activity and thus cannot be regulated under the Commerce Clause. Nor is status as a commercial actor an economic activity that can be the subject of such regulation.

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

In an effort to expand its Commerce Clause powers, the Government invokes (at 17) the Necessary and Proper Clause, which the Supreme Court has described as the "last, best hope of those who defend ultra vires congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). The Government asserts that the CTA "is

necessary and proper to carry out the commerce power" because it collects information intended to combat money laundering and fraud. Appellants' Br. at 14.

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 incorporates 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 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 merely for 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 the Supreme Court recognized 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*, 514 U.S. at 567).

The Government's reliance (at 19 and 22) on *Comstock*, 560 U.S. at 133, is misplaced. Any reading of *Comstock* that permits 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" because it intrudes into state incorporation law by adding new disclosures; 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 of the argument that the CTA falls within Congress's permissible Commerce Clause power. So, the Court should deny Appellants' request to vacate the district court's preliminary injunction.

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

The Government cites Article III and principles of equity (at 43-44) to request narrowing the nationwide stay under 5 U.S.C. § 705 to just the named parties and

their members. This request contradicts the Government's statement to the district court that it "cannot provide [NFIB's 300,000 members] with meaningful relief without, in effect, enjoining the CTA and Reporting Rule nationwide." *Texas Top Cop Shop, Inc. v. Garland*, No. 4:24-CV-478, 2024 WL 5049220, at *36 (E.D. Tex. Dec. 5, 2024). In any event, this Court should reject the Government's request because "arguments that general equitable and constitutional principles require the [court] to limit any relief [under § 705] to the named parties do not hold water." *Career Colls. & Schs. of Texas v. United States Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024), *cert. granted on other grounds*, No. 24-413, 2025 WL 65914 (U.S. Jan. 10, 2025). The Court should reaffirm that § 705 specifically authorizes nationwide preliminary injunction of agency action.

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 in the APA 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).

"Binding Fifth Circuit precedent" recognizes that "universal vacatur" under § 706 is "required." *Tex. Med. Ass'n v. HHS*, 110 F.4th 762, 780 (5th Cir. 2024); *see also Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374–75 (5th Cir. 2022) ("Vacatur is the only statutorily prescribed remedy for a successful APA challenge to a regulation."); *Data Mktg. P'ship, LP v. Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022) (the "default rule is that vacatur is the appropriate remedy"); *see also Corner Post*, 603 U.S. at 827 (Kavanaugh, J., concurring) ("The APA authorizes vacatur of agency rules"); 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). 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.*, 98 F.4th at 255. 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. Just as agency action is the object of final nationwide relief under § 706 (setting aside an unlawful rule), so too agency action is the object of interim nationwide relief under § 705. That is "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 district court properly exercised that authority when it comes to Treasury's implementation and enforcement of the CTA. The Government misconstrues (at 44) § 705's language authorizing non-party relief only "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 does not contest the lower court's findings that Appellees here demonstrated irreparable compliance costs and constitutional injuries. *Texas Top Cop Shop, Inc*, 2024 WL 5049220, at *11-15. Nor does the Government contest the district court's finding that irreparable injuries—being compelled to make mandatory reports—are common to all 32 million corporate entities affected by Treasury's CTA rule. *See id.* This Court has not hesitated to enjoin unlawful agency action affecting millions nationwide, even if the parties before it represent only a tiny fraction of injured persons. *See BST Holdings*, 17 F.4th at 617 (staying on a nationwide basis agency

action that "commandeers U.S. employers to compel millions of employees to receive a COVID-19 vaccine or bear the burden of weekly testing").

Under the Government's contrary 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 illegal 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 also departs from § 705's plain text.

To the contrary, this Court and the Supreme Court have routinely preliminarily suspended unlawful agency action without limiting relief to the parties. *See, e.g.*, *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 [preliminary] stay" of the Clean Power Plan, thereby "preventing the rule from taking effect" for over six years); *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 595 U.S. 109, 120 (2022) (per curiam) (staying OSHA vaccine mandate); *BST Holdings*, 17 F.4th at 617 (same). The Court should not narrow the lower court's

postponement of agency action authorized by § 705 to just the parties in this case. To the contrary, the nationwide postponement is especially appropriate and would not prejudice the Government given Treasury's announcement on March 2, 2025, that it is voluntarily suspending enforcement of the CTA against U.S. citizens and corporations. Press Release, *Treasury Department Announces Suspension of Enforcement of Corporate Transparency Act Against U.S. Citizens and Domestic Reporting Companies*, March 2, 2025.[3]

CONCLUSION

For the foregoing reasons and those provided by Appellees, the Government is not likely to succeed on the merits, and the Court should deny its request to vacate the preliminary injunction. The Court should also deny the Government's alternative request to narrow the preliminary injunction because § 705 authorizes postponement of the unlawful agency action itself.

March 3, 2025

Respectfully submitted,

*/s/ Sheng Li*_____

Sheng Li
Mark Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Dr., Suite 300
Arlington, VA 22203
(202) 869-5210
sheng.li@ncla.legal

Counsel for Amicus Curiae

[3] Available at: https://home.treasury.gov/news/press-releases/sb0038.

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 29(a)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,042 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point type, Times New Roman.

/s/ Sheng Li
Sheng Li

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above amicus brief was served on all counsel of record via the Court's electronic filing system on March 3, 2025.

/s/ Sheng Li
Sheng Li