No. _____

In the
Supreme Court of the United States

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

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2021, Congress intruded into an area that the Framers reserved for the states when it enacted the Corporate Transparency Act (CTA). On pain of severe penalties, the CTA requires state-chartered corporations to disclose sensitive data about their "beneficial owners" to federal authorities. The CTA does not require companies to engage in any economic activity before they must comply; mere existence under state law triggers the federal mandate. And although the statute authorizes federal authorities to use the collected information to further a generalized interest in law enforcement, it does not require individualized suspicion or a warrant.

The district court recognized that the CTA exceeded Congress' authority, but the Eleventh Circuit reversed. Invoking *Wickard v. Filburn*, 317 U.S. 111 (1942), the court of appeals held that, under the Commerce Clause, the mere potential to engage in commerce empowered Congress to regulate companies chartered under state law. It also found the CTA's suspicionless and warrantless searches reasonable under the Fourth Amendment based on precedent approving federal efforts to require banks engaged in commerce to report transactional information.

The questions presented are:

1. Whether the CTA's regulation of corporations merely because they exist under state law exceeds Congress' Commerce Clause authority.

2. Whether the CTA's suspicionless and warrantless searches to further a generalized interest in expedient law enforcement violate the Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellees below) are National Small Business United, d/b/a National Small Business Association, and Isaac Winkles.

Respondents (defendants-appellants below) are Scott Bessent, the United States Department of the Treasury, and Andrea Gacki.

CORPORATE DISCLOSURE STATEMENT

National Small Business United, d/b/a National Small Business Association, is a nonprofit corporation organized under the laws of the State of Ohio. It is not owned in whole or in part by any parent corporation or publicly traded company, and it does not issue stock.

STATEMENT OF RELATED PROCEEDINGS

National Small Business United v. United States Dep't of the Treasury, No. 24-10736 (11th Cir.) (judgment entered Dec. 16, 2025);

National Small Business United v. Yellen, No. 5:22-cv-1448-LCB (N.D. Ala.) (judgment entered Mar. 1, 2024).

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PETITION FOR WRIT OF CERTIORARI

This case involves a double blow to the Constitution: an extraordinary effort to expand Congress' Commerce Clause power in a way not seen since *NFIB v. Sebelius*, 567 U.S. 519 (2012), all while ignoring core Fourth Amendment protections to boot. The offending and unprecedented law is known as the Corporate Transparency Act (CTA), which Congress enacted in 2021 as part of a package of legislation that President Trump vetoed at the tail end of his first term. Under the CTA, companies must collect and turn over to the federal government a vast array of sensitive and private information that most state authorities directly responsible for chartering corporations pointedly do not require—*i.e.*, the names, birthdates, addresses, and other identifying information of all "beneficial owners" who exercise "substantial control" over the state-chartered companies, whether "directly or indirectly." Of particular relevance here, that federal reporting requirement is triggered not by the state-chartered entity's actual participation in commerce, but rather by its mere existence under state law. And federal authorities justify the forced disclosure and collection of all this non-commercial information about beneficial owners—which they deemed too difficult and time-consuming to gather through the constitutionally prescribed warrant process—to further an undifferentiated interest in law enforcement.

Petitioners are a nonprofit corporation that represents small businesses nationwide and one individual who formed two small businesses in

Alabama. In 2022, petitioners filed suit alleging that the CTA is unconstitutional because, *inter alia*, it exceeds Congress' Commerce Clause authority and violates the Fourth Amendment. The district court agreed with petitioners on the former argument, obviating the need to reach the latter. As that court explained, the mere act of incorporation by state authorities is not sufficient to trigger Congress' commerce power. Incorporation is a quintessential state-law area, and the mere possibility that corporations may engage in commercial activity in the future is not sufficient either, as *NFIB* makes crystal clear that neither the mere potential for engaging in commerce nor any economic effect of inactivity justifies the exercise of the commerce power. To the contrary, one of the few options for avoiding the federal government's reach is to refrain from commercial activity.

The Eleventh Circuit reversed. The court of appeals relegated *NFIB* to a one-paragraph afterthought and invoked *Wickard v. Filburn*, 317 U.S. 111 (1942), instead, holding that Congress could rationally conclude that potential future economic activity would have a substantial effect on interstate commerce. And while the court did not disagree that the CTA effected *en masse* searches, it deemed those searches reasonable after relying on cases upholding record-keeping and disclosure obligations on companies engaged in commerce, like banks.

The Eleventh Circuit's decision is profoundly wrong and represents a profound threat to federalism and individual liberty. The Framers debated the possibility of the new federal government displacing

states in chartering corporations and expressly rejected the possibility. For over two centuries, Congress respected that judgment and left the requirements, including disclosure requirements regarding ownership, for chartering corporations to the states. The CTA broke from that long tradition and flouted this Court's teaching that Congress' ample Commerce Clause powers do not extend to regulating economic potentialities or inactivity. Equally important, the entire point of the Fourth Amendment is to prevent the government from engaging in suspicionless and warrantless searches, and precedents upholding record-keeping requirements on those engaged in commerce provide no support for requiring disclosures by those who have done no more than comply with the state requirements for chartering a corporation.

Unsurprisingly given these glaring constitutional defects, the executive branch recently issued an administrative regulation exempting all domestic entities and U.S. persons from the CTA's reporting requirement. While that is certainly a welcome development, there is substantial doubt about the President's authority to effectively repeal the CTA domestically and no guarantee that future administrations will show comparable restraint. Moreover, the citizenry should not have to rely on executive grace for rights that the Constitution guarantees. Instead, this Court should use the respite provided by that executive restraint to resolve the constitutionality of the CTA on the merits docket rather than the emergency docket. The Court should embrace that opportunity, grant the petition, and reverse.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 161 F.4th 1323 and reproduced at App.1-20. The district court's opinion is reported at 721 F.Supp.3d 1260 and reproduced at App.21-69.

JURISDICTION

The Eleventh Circuit issued its opinion on December 16, 2025. On March 4, 2026, Justice Thomas extended the deadline to file a petition for certiorari until April 15, 2026. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced at App.70-117.

STATEMENT OF THE CASE

A. Constitutional & Legal Background

1. At the Constitutional Convention in 1787, a minority of delegates proposed that the federal government should possess a broad power to oversee "charters of incorporation." 2 M. Farrand, *The Records of the Federal Convention of 1787* at 325, 615 (1911) ("*Records*"). One delegate deemed such a power "necessary to prevent a State from obstructing the general welfare." *Id.* at 615 (emphasis omitted). But the majority view at the Convention was quite different. As the prevailing voices explained, granting the federal government a general power over incorporation would "prejudice[]" and "divide[]" the states. *Id.* at 616. And a federal power over corporations, which would displace any conflicting state laws, *see* U.S. Const. art. VI, cl.2, would permit

the creation of nationwide "monopolies of every sort," *Records* 616, which the Founders reviled. The Founders understood that their decision would have costs: "[L]eaving business regulation primarily to the individual states might cause friction within the overall American economy." Allen D. Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 Ohio St. L.J. 1037, 1041 (1986) ("Boyer"). Nevertheless, they "were more reluctant … to allow concentrations of economic power, which they visualized as a government-sponsored monopoly." *Id.*

The view that prevailed at the Convention continued to carry the day until Congress broke with tradition in the CTA. In 1791, the Founders ratified the Tenth Amendment, reinforcing the understanding that corporation law is "reserved to the States" and to "the people." U.S. Const. amend. X. And although the federal government "debated whether to enter the corporate area itself" on multiple occasions in the intervening centuries, including "during the Progressive Era[] and at the height of the New Deal," it resisted the temptation "every time," even in the face of concerns that laboratories of state government were creating a race to the bottom in matters of corporate law. Boyer 1037-38. As a result, "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). Simply put, "[c]orporations are creatures of state law." *Cort v. Ash*, 422 U.S. 66, 84 (1975).

2. While the Constitutional Convention included a decisive debate over the federal-state balance of power over corporations, other important issues received scant attention. "[S]o far as can be ascertained from the reports thereof, there was no discussion regarding searches and seizures." Joseph J. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part Two*, 4 U. Rich. L. Rev. 60, 61 (1969). That is not because the topic lacked salience. To the contrary, opposition to the "general warrants" and "writs of assistance" of the colonial era, "which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity," helped "spark the Revolution itself." *Carpenter v. United States*, 585 U.S. 296, 303-04 (2018). To make abundantly clear that the new federal government did not possess a "general, suspicionless warrant" to violate personal privacy to achieve its law-enforcement goals, *Maryland v. King*, 569 U.S. 435, 467 (2013) (Scalia, J., dissenting), the Founders ratified the Fourth Amendment. That guarantee prohibited "unreasonable searches and seizures" and established judicial procedures for obtaining search warrants supported by probable cause. U.S. Const. amend. IV.

Under this Court's Fourth Amendment precedent, "it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable … subject only to a few specifically established and well-delineated exceptions.'" *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). And to ensure that the exceptions do not swallow the rule, this Court has admonished that "the normal need for law enforcement" is not a

sufficient justification for dispensing with the warrant requirement. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). In other words, "[a] generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Georgia v. Randolph*, 547 U.S. 103, 115 n.5 (2006).

3. In 2021, Congress radically departed from these bedrock constitutional principles when it enacted the CTA as Title LXIV of the 2021 National Defense Authorization Act—over President Trump's veto. *See* Pub. L. No. 116-283, §§6401-03, 134 Stat. 3388, 4604-625 (2021); *Message to the House of Representatives Returning Without Approval the National Defense Authorization Act for Fiscal Year 2021*, 2020 Daily Comp. Pres. Doc. 903 (Dec. 23, 2020). The CTA begins by providing the "sense of Congress" that "more than 2,000,000 corporations and limited liability companies are being formed under the laws of the States each year" and that "most or all States do not require information about the beneficial owners of the corporations, limited liability companies, or other similar entities formed under the laws of the State." CTA §6402(1)-(2), 134 Stat. at 4604 (codified at 31 U.S.C. §5136 note). Perceiving that state of affairs as a problem in need of a federal solution, Congress declared that "the collection of beneficial ownership information" (BOI) "is needed to … set a clear, Federal standard for incorporation practices" and that the establishment of a federal "database" aggregating BOI is necessary to "facilitate important national security, intelligence, and law enforcement activities." *Id.* §6402(5)(A), (6)(A), (7)(A), 8(C), 134 Stat. at 4604-05.

To that end, the CTA requires any "reporting company" to "submit to FinCEN"—*i.e.*, the Financial Crimes Enforcement Network of the U.S. Department of the Treasury—a "report" with information regarding any "beneficial owner" and "applicant." 31 U.S.C. §5336(b)(1)-(2). A "reporting company" is defined in the statute as a "corporation, limited liability company, or other similar entity" that is "created by the filing of a document" with relevant state authorities or that is "formed under the law of a foreign country and registered to do business in the United States by the filing of a document with" such authorities. *Id.* §5336(a)(11). A "beneficial owner" is defined as an "individual" who "exercises substantial control over the entity," whether "directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise," or who otherwise "owns or controls not less than 25 percent of the ownership interests of the entity." *Id.* §5336(a)(3)(A). And an "applicant" is an individual who files an application to form an entity under state law or who seeks to register a foreign entity with state authorities. *Id.* §5336(a)(2).

The CTA explicitly acknowledges that the required "report" includes "sensitive information." CTA §6402(6), 134 Stat. at 4605. In particular, the report must include "the full legal name[,] date of birth[,] current[] … residential or business street address" of every beneficial owner or applicant, and either a "unique identifying number from an acceptable identification document" or what the statute refers to as the "FinCEN identifier" of the entity's beneficial owners and applicants. 31 U.S.C. §5336(b)(2)(A). Reporting companies also have a

continuing obligation to update FinCEN with changes to BOI after filing the initial report. *See id.* §5336(b)(1)(D). FinCEN then retains all BOI for the lifetime of the reporting company and "not fewer than 5 years" beyond. *Id.* §5336(c)(1).

Once FinCEN obtains a reporting company's BOI and deposits it into the federal database, the CTA authorizes FinCEN to disseminate that information to a variety of third parties. For instance, any "[f]ederal agency engaged in national security, intelligence, or law enforcement activity" that requests the information through "appropriate protocols" can receive it. *Id.* §5336(c)(2)(B)(i). FinCEN can also share BOI with a "State, local, or Tribal law enforcement agency" pursuant to a court order. *Id.* §5336(c)(2)(B)(i)(II). On top of that, FinCEN may send BOI overseas to a "law enforcement agency, prosecutor, or judge of another country" subject to "an international treaty, agreement, convention, or official request made by law enforcement, judicial, or prosecutorial authorities in trusted foreign countries" for "authorized investigation or national security or intelligence activity." *Id.* §5336(c)(2)(B)(ii). And BOI is also available to "appropriate regulatory agenc[ies]" or federal tax officials. *Id.* §5336(c)(2)(B)(iv), (c)(5).

Severe penalties await those who do not comply with the CTA's reporting requirements. A person who willfully fails to report complete or updated BOI (or provides false information), faces the prospect of $10,000 in criminal fines or two years of imprisonment (or both). *See id.* §5336(h). The CTA also authorizes civil penalties of up to $500 for each day of non-compliance. *See id.*

The CTA does not require commercial activity to trigger its obligations. To the contrary, it actually exempts some of the "biggest players in the economy," *Small Bus. Ass'n of Mich. v. Yellen* (*SBAM*), 769 F.Supp.3d 722, 735 (W.D. Mich. 2025), such as financial institutions, insurance agencies, accounting firms, and telecommunications providers via its various exemptions from BOI reporting. *See* 31 U.S.C. §5336(a)(11)(B). The CTA also contains a catchall exemption provision, which authorizes the Treasury Secretary to issue regulations exempting otherwise-covered entities if he determines that obtaining "beneficial ownership information from the entity or class of entities … would not serve the public interest" and "would not be highly useful in national security, intelligence, and law enforcement agency efforts." *Id.* §5336(a)(11)(B)(xxiv). As FinCEN itself has explained, "[t]he CTA reporting requirements target generally smaller, more lightly regulated entities," not the corporations most actively engaged in interstate commerce. 86 Fed. Reg. 69,920, 69,928 (Dec. 8, 2021). Nor is the real target of this law just abstract entities. FinCEN has emphasized that the purpose of the CTA is to sniff out "the real people who ultimately own or control" the smallest state-chartered entities. FinCEN, *Beneficial Ownership Reporting Outreach and Education Toolkit*, https://perma.cc/7VFM-9YDN (last visited Apr. 14, 2026); *see* CA11.Dkt.67.at.4-5 ("Congress … requir[ed] entities with the capacity to engage in commerce to identify the human beings behind the corporate form.").

4. In 2022, FinCEN promulgated a final rule implementing the CTA. *See* 87 Fed. Reg. 59,498 (Sept. 30, 2022). Among other things, the rule emphasized

congressional testimony from a prior FinCEN director, who lamented that FinCEN historically needed to secure "search warrants" before obtaining BOI, which supposedly "take[] an enormous amount of time" and "waste[] resources." *Id.* at 59,504. To make FinCEN's law-enforcement mission more efficient, the rule explained that it would take effect in January 2024 and that reporting companies would have to begin complying with the CTA's suspicionless and warrantless regime no later than January 2025. *See id.* at 59,511. The rule also projected that the reporting requirement would apply to 32.6 million small businesses in the United States in the first year alone and to five million new entities in each succeeding year. *See id.* at 59,549. As a result of that sweeping coverage, "FinCEN estimate[d] that the rule will have total estimated [compliance] costs in the billions of dollars on an annual basis." *Id.*

B. Factual & Procedural Background

1. Petitioner National Small Business Association (NSBA) is an Ohio nonprofit corporation that represents over 65,000 small businesses and entrepreneurs nationwide. *See* App.5-6. NSBA's purpose is to advocate for its members' interests, to protect the interests of small businesses and entrepreneurs in the United States, and to provide its members with guidance regarding how to navigate government regulations. *See* App.23. Petitioner Isaac Wilkes is an NSBA member who has formed two small businesses under Alabama law. *See* App.6.

In November 2022, only weeks after FinCEN promulgated its rule implementing the CTA, petitioners filed suit in the Northern District of

Alabama to challenge the statute. *See* App.24. Among other things, petitioners alleged that Congress lacked authority under the Commerce Clause or any other constitutional provision to enact the CTA and that the statute violated the Fourth Amendment. *See* App.6. Petitioners sought a declaratory judgment that the CTA is unconstitutional and an order enjoining its enforcement against them. *See* App.6.

After reviewing hundreds of pages of dispositive motions briefing and hearing oral argument, the district court issued a 53-page decision granting summary judgment to petitioners and permanently enjoining the enforcement of the CTA against them. *See* App.21-69. As relevant here, the court held that the CTA exceeded Congress' enumerated powers, including its Commerce Clause authority. *See* App.33-68. At the outset, the court rejected the government's arguments that the CTA regulates the channels or instrumentalities of interstate commerce.[1] *See* App.44-50. Nor did the court agree with the government that the CTA regulates commercial activity that, in the aggregate, has a substantial effect on interstate commerce. *See* App.50-65. As to the latter theory, the court explained that the government had "concede[d]" that merely "'submitt[ing] documents to a Secretary of State" to create a corporate entity "does not "implicate[] the Commerce Clause," meaning that the government's Commerce Clause argument hinged on the proposition that Congress may regulate corporate entities formed under state law because they are likely to engage in future "activities" that

[1] The government abandoned these arguments on appeal. *See* App.7-8.

have a substantial effect on commerce. App.52. The court determined, however, that "the *future* activities of state entities are not enough to invoke Congress' 'substantial effects' commerce powers," as "'[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.'" App.51 (quoting *NFIB*, 567 U.S. at 557 (opinion of Roberts, C.J.)). Because the conclusion that Congress exceeded its enumerated powers proved dispositive, the court found it unnecessary to address petitioners' Fourth Amendment argument. *See* App.69.

2. In March 2025, after the district court issued its decision—and after the beginning of President Trump's second term—FinCEN issued an interim final rule that superseded its 2022 rule. *See* 90 Fed. Reg. 13,688 (Mar. 26, 2025). Although the CTA explicitly contemplates that FinCEN would collect BOI from entities formed under state law, *see* CTA §6402, (6), 134 Stat. at 4604, the interim final rule declared that FinCEN had invoked the CTA's catchall exemption provision and opted to exempt "all domestic reporting companies, and their beneficial owners," from the CTA's reporting requirement, on the ground that it "'would not serve the public interest'" and "'would not be highly useful in national security, intelligence, and law enforcement agency efforts'" to require BOI from any domestic reporting company, 90 Fed. Reg. at 13,690-91 (quoting 31 U.S.C. §5336(a)(11)(B)(xxiv)). The interim final rule also "exempt[ed] foreign reporting companies, and their U.S. person beneficial owners, from the requirement to provide the BOI of any U.S. persons who are beneficial owners of the foreign reporting company."

Id. at 13,690. The interim final rule thus preserved the CTA's reporting requirement only as to foreign reporting companies and foreign-person beneficial owners. *See id.* at 13,692-93.

3. In December 2025, the Eleventh Circuit reversed the district court's decision. *See* App.1-20. After agreeing with the parties that the interim final rule did not moot petitioners' challenge to the CTA, App.5 n.1, the court of appeals concluded that the CTA fit within Congress' power to regulate interstate commerce under the "substantial effects" test, *see* App.7-18. Echoing the government's arguments, the court first reasoned that the CTA "regulates activity that is economic in nature" simply because it regulates corporations, which are often "[f]or-profit business entities" that engage in activity to "maximize profits." App.8, 10; *see* CA11.Dkt.18.at.23 (government arguing that "the CTA regulates a class of entities—primarily active, for-profit businesses—whose defining feature is their authority and propensity to conduct commercial transactions"). According to the court, that propensity to engage in activity "is comparable to other regulated activities the Supreme Court … found commercial in nature" in *Wickard*. App.11. The court also explained that, "to the extent a corporate entity is not involved in commerce, the CTA's many carveouts will likely exempt it." App.11.

Having determined that the CTA regulated economic activity, the Eleventh Circuit next concluded that "Congress rationally conclude[d] that the regulated conduct has a substantial aggregate effect on interstate commerce." App.14. According to the court of appeals, "financial crime," "money

laundering," "drug trafficking," and "terrorist operations" have a substantial effect on interstate commerce, and some entities formed under state law proceed to "abuse[] … the corporate form" by engaging in such conduct. App.15-16. By requiring state-law entities to reveal BOI, the court summarized, the CTA is a "routine federal law" just like other federal reporting requirements—"[a]part from its scope," which the court did not consider routine. App.14.

The Eleventh Circuit also rejected petitioners' argument that the CTA violates the Fourth Amendment. *See* App.18-20. The court of appeals likened the CTA's reporting requirement to another reporting requirement found in the Bank Secrecy Act, which requires banks to report domestic currency transactions above a certain amount, together with identifying information about the persons involved in those transactions. *See* App.19. Because this Court found that reporting requirement consistent with the Fourth Amendment in *California Bankers Association v. Shultz*, 416 U.S. 21 (1974), the court saw "no Fourth Amendment issue" with the CTA's reporting requirement either, reasoning that "'[t]he inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.'" App.20 (quoting *Shultz*, 416 U.S. at 67, in turn quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision provides a blueprint to vastly expand congressional power and to severely restrict individual liberty. Indeed, the court of appeals' decision transforms the federal

government into the superintendent of state-chartered entities by demanding more disclosure than states without regard to whether those state-law entities engage in any commerce. And it empowers federal officers to engage in suspicionless and warrantless searches and to assemble a massive database of sensitive information for no reason other than to facilitate law enforcement. That decision would shock those who prevailed at the Constitutional Convention in rejecting efforts to have the new federal government take over the chartering of corporations and enshrining the protection against warrantless searches in our foundational document. This Court's review is imperative.

This Court granted certiorari in *NFIB* and confirmed that Congress does not have authority to regulate natural persons under the Commerce Clause on the theory that their inactivity affects commerce. Instead, the Court held that a valid exercise of the commerce power requires some preexisting commercial activity for Congress to regulate. Put differently, after decades of expansive interpretations of the Commerce Clause, *NFIB* made clear that the one option retained by the citizenry for avoiding federal regulation is refraining from commercial activity. This case is *NFIB* all over again—except that it also involves corporate persons. In the CTA, Congress declared that state-chartered entities and the natural persons who own or control them must disclose BOI to the federal government merely because the entities exist under state law, without regard to whether the entities or such natural persons are engaged in any activity. But inactivity is no more commerce when it comes to artificial persons than

natural persons. Indeed, if anything, the fact that a corporation exists only because of a state's act of incorporation (subject to whatever disclosure requirements that the state deems appropriate) only underscores the federalism problems with a federal effort to deem corporate inactivity a sufficient basis for federal regulation. And, if anything, the founding-era debates more clearly condemned this kind of overreach into an area of traditional state authority. Despite all that, the Eleventh Circuit all but ignored the clear direction of *NFIB* in favor of the Commerce Clause's high-water mark in *Wickard v. Filburn*. But even *Wickard* involved some economic activity—the production of wheat on a farm—and no precedent supports federal regulation of untilled but farmable land. The decision below thus out-*Wickard*s *Wickard* while ignoring the clear import of *NFIB*.

The Fourth Amendment problems posed by the CTA are equally frightening. The Eleventh Circuit did not dispute that the government's collection of BOI under the CTA constitutes a search. It could hardly be otherwise given that reporting companies and their beneficial owners plainly have a reasonable expectation of privacy in information that the state deems unnecessary and has heretofore always remained private. Nonetheless, the court of appeals deemed the search reasonable by relying on cases upholding record-keeping and disclosure requirements on highly regulated entities engaged in commerce. Those precedents distinguish themselves and underscore that the searches authorized here are unprecedented, unreasonable, and unconstitutional.

These twin errors cry out for this Court's review. The CTA is a threat not only to our Constitution, but also to the tens of millions of small businesses across the country and the "real people" behind them who face the prospect of debilitating penalties for failure to comply with novel federal regulation that will generate billions of dollars in compliance costs. Underscoring the importance of the issues here, multiple other plaintiffs across the country have filed similar challenges. But there is no better vehicle for resolving these issues than this case. The lower courts squarely addressed and definitively resolved the questions presented in the proceedings below, and this case is far ahead of all other comparable cases. Moreover, the executive's admirable restraint in suspending enforcement of this misguided statute against state-chartered entities and their beneficial owners both underscores its constitutional infirmities and creates a window for thoughtful review on the merits docket. The alternative of rushed litigation in an emergency posture after a subsequent administration unleashes the statute has nothing to recommend it. The prudent course thus is to grant certiorari here and now.

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

The Constitution gives Congress only limited and enumerated powers. Among them is the power to "regulate Commerce … among the several States." Art. I, §8, cl.3. Although broad interpretations of that power render it "expansive," *United States v. Morrison*, 529 U.S. 598, 608 (2000), it is neither a plenary nor a police power; the Clause still "has

limits," *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968). Indeed, this Court has expressly warned that the scope of the interstate commerce power must be limited to preserve the Framers' elaborate efforts to maintain a "distinction between what is national and what is local." *United States v. Lopez*, 514 U.S. 549, 557 (1995). The Eleventh Circuit erased that distinction here, positing that the inherently local formation of a company under state law is simultaneously an inherently commercial act by both the entity itself and its beneficial owners sufficient to trigger federal regulation under the Commerce Clause. That holding cannot stand.

A. The CTA Impermissibly Regulates Corporations as Such, Not Their Preexisting Commercial Activities.

"The path of [this Court's] Commerce Clause decisions has not always run smooth." *NFIB*, 567 U.S. at 549 (opinion of Roberts, C.J.). But this Court's precedent now establishes that Congress' power to regulate interstate commerce encompasses "three broad categories": (1) the "use of the channels of interstate commerce," (2) the "instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. Although the government once took a different view, it is now common ground that the CTA does not regulate the channels or instrumentalities of interstate commerce. *See* App.7-8. Thus, the CTA's validity under the Commerce Clause turns on whether the statute regulates commercial activities that, in the aggregate, have a substantial effect on interstate

commerce. Even setting aside whether the "rootless and malleable" substantial-effects test is "[]consistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases," *Morrison*, 529 U.S. at 627 (Thomas, J., concurring), the answer to that question is plainly no.

After all, under the Commerce Clause, Congress is empowered only to "*regulate* Commerce"—a phrase that "presupposes the existence of commercial activity to be regulated." *NFIB*, 567 U.S. at 550 (opinion of Roberts, C.J.); *see id.* at 649-50 (joint dissent).[2] Put another way, "it must be *activity* affecting commerce that is regulated." *Id.* at 658 (joint dissent). Hence, Congress may not target "inactivity" for regulation or persons who are "doing nothing." *Id.* at 555-56 (opinion of Roberts, C.J.). That is because the "police power to regulate individuals as such, as opposed to their activities, remains vested in the States" under the Tenth Amendment. *Id.* at 557.

NFIB reflects these foundational principles. In pertinent part, that case addressed the constitutionality of the "individual mandate" in the Affordable Care Act under the Commerce Clause's substantial-effects test. *See, e.g.*, *United States v. White*, 782 F.3d 1118, 1124 (10th Cir. 2015) ("All of the justices focused their discussion of the Commerce Clause on the third *Lopez* prong and addressed whether the individual mandate was a valid regulation of intrastate activity that substantially affects interstate commerce."). The individual

[2] Justices Scalia, Kennedy, Thomas, and Alito joined the joint dissent.

mandate required individuals who had opted not to obtain health insurance "to purchase a health insurance policy providing a minimum level of coverage." *NFIB*, 567 U.S. at 530-31. A majority of the Court concluded that Congress' commerce power did not extend that far. *See id.* at 546-61 (opinion of Roberts, C.J.); *id.* at 649-60 (joint dissent). As the Chief Justice explained, the individual mandate "targeted ... a class" of individuals "whose commercial inactivity rather than activity is its defining feature." *Id.* at 556 (opinion of Roberts, C.J.). But this Court's cases recognized only "Congress's power to regulate classes of *activities,* not classes of *individuals,* apart from any activity in which they are engaged." *Id.* (citation omitted). Or as the joint dissent put it, Congress does not have commerce power to regulate someone or something "simply because it exists." *Id.* at 658 (joint dissent).

Under *NFIB*, the CTA's unconstitutionality is self-evident. The CTA provides that "any reporting company" that is "formed or registered" under state law "shall … submit to FinCEN a report" containing "sensitive" information about their legally distinct beneficial owners. 31 U.S.C. §5336(b)(1)(A)-(D) & note. And the statute defines a "reporting company" to include an entity "created by the filing of a document" with relevant state authorities. *Id.* §5336(a)(11)(A)(i). There is thus no disputing that the CTA seeks to regulate state-chartered entities "simply because [they] exist[]" under state law, *NFIB*, 567 U.S. at 658 (joint dissent), not because they are actually engaged in any "preexisting economic activity" that implicates Congress' commerce power, *id.* at 557

(opinion of Roberts, C.J.). That is precisely what this Court precluded in *NFIB*.

The only distinction between *NFIB* and this case is that the former involved natural persons alone instead of both corporate and natural persons. But that is a distinction without a constitutional difference. If anything, the framing-era history more emphatically precludes federal regulation of an artificial entity merely because it has been brought into existence by state law. Indeed, "'[o]ur whole experience' as a Nation," *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014)—from the Constitutional Convention of 1787 to modern times, *see* pp.4-5, *supra*—reveals that the "very existence" of a corporation is entirely the "product of state law." *CTS Corp.*, 481 U.S. at 89; *see also Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1868) (explaining that a corporation is "the mere creation of local law"). Regulation of corporations as such thus is a prototypical "purely local" concern. *Bond v. United States*, 572 U.S. 844, 860 (2014). Allowing the federal government to intrude into that space absent some regulable act of commerce would "invade state sovereignty" and "improperly limit the scope of powers that remain with the States." *United States v. Comstock*, 560 U.S. 126, 144 (2010); *cf. All. for Fair Bd. Recruitment v. SEC*, 125 F.4th 159, 182 (5th Cir. 2024) (en banc).

To be sure, the federal government has historically chartered a limited number of corporations addressing uniquely federal interests. *See, e.g.*, *An Act to incorporate the subscribers to the Bank of the United States*, ch. X, 1 Stat. 191 (1791) (First Bank of the United States); *An Act to*

incorporate the Protestant Episcopal Cathedral Foundation of the District of Columbia, ch. XX, 27 Stat. 414 (1893) (National Cathedral); Pub. L. No. 91-518, 84 Stat. 1327 (1970) (Amtrak); Pub. L. No. 90-129, 81 Stat. 365 (1967) (Corporation for Public Broadcasting). But those targeted actions to advance enumerated powers are the exception that proves the rule. The act of incorporation is not commerce, as the government wisely conceded below. *See* App.52. And regulation of entities or individuals based on their mere existence is the essence of the police power that the framing generation denied the new federal Leviathan. The CTA cannot be reconciled with that settled understanding.

B. The Decision Below Is A Blueprint to Vastly Expand Congressional Power.

The Eleventh Circuit's decision blessing the CTA's overreach is egregiously wrong. The court of appeals began by acknowledging (as it must) that the CTA does not a contain any "jurisdictional element" that actually "link[s]" the statute to "interstate commerce." App.8; *cf. Lopez*, 514 U.S. at 561 ("§922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce"). But the court nevertheless found the CTA constitutionally valid under the Commerce Clause's substantial-effects test because (1) it purportedly "regulates activity that is economic in nature," and (2) "Congress rationally concluded" that this "regulated activity" has "a substantial aggregate effect on interstate commerce." App.8-9. The court stumbled at both steps.

The Eleventh Circuit started off on the wrong foot in concluding that the CTA regulates economic activity. The court of appeals reasoned that, "after they have incorporated," many corporations "exist primarily to 'use [their] resources and engage in activities designed to increase [their] profits.'" App.10, 12. But that is a near carbon copy of the theory that this Court *rejected* in *NFIB*. The government found it "sufficient" there that "almost all those who are uninsured will, at some unknown point in the future, engage in a health care transaction." *NFIB*, 567 U.S. at 557 (opinion of Roberts, C.J.). But a majority of the Court deemed such inchoate or potential commercial activity *in*sufficient. As *NFIB* admonished, just because a person may "predictably engage in particular transactions" affecting interstate commerce does not authorize Congress to regulate that person under the Commerce Clause. *Id.*; *see id.* ("The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in [this Court's] precedent."). Indeed, "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." *Id.* at 657 (joint dissent).[3]

Despite its obvious relevance, the Eleventh Circuit had virtually nothing to say about *NFIB*, which it dismissed in a paragraph, suggesting that,

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[3] Regardless, not all corporations formed under state law (*e.g.*, religious and charitable organizations, homeowners' associations, and so forth) inevitably proceed to engage in activity to "maximize profits." *Contra* App.10.

unlike the Affordable Care Act, "the CTA does not 'compel [entities] not engaged in commerce' to do so." App.14. That is immaterial and, if anything, makes the CTA less defensible. At least the Affordable Care Act recognized that the Commerce Clause requires commercial activity and thus forced people to engage in commercial transactions the better to regulate them. The CTA skips that step and imposes obligations (backed by criminal penalties) on state-chartered entities and their beneficial owners without regard to whether they ever engage in commercial activity. That plainly runs afoul of *NFIB*'s central lesson that the Commerce Clause does not empower Congress to regulate in the absence of "preexisting economic activity." 567 U.S. at 557 (opinion of Roberts, C.J.). The Eleventh Circuit highlighted *NFIB*'s language that "Congress can anticipate the *effects* on commerce of an economic activity," *id.* (opinion of Roberts, C.J.), App.14, but that language still requires economic activity. The CTA, by contrast, requires none and regulates based on mere existence—*i.e.*, the CTA does precisely what *NFIB* forbids.

In lieu of seriously grappling with *NFIB*, the Eleventh Circuit resorted to "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560. According to the court of appeals, the CTA is constitutionally permissible because it targets conduct that is "comparable to [the] regulated activities the Supreme Court … found commercial in nature" in *Wickard*. App.11. Wrong again. If *Wickard* had held that Roscoe Filburn could face Commerce Clause regulation merely because he owned farmable land,

perhaps the CTA would pass muster. But *Wickard* held no such thing. "[T]he farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce." *NFIB*, 567 U.S. at 553 (opinion of Roberts, C.J.). Out-*Wickard*ing *Wickard*—"the *ne plus ultra* of expansive Commerce Clause jurisprudence," *id.* at 648 (joint dissent)—is no mean feat. In fact, it is reversible error that should not stand uncorrected.

The Eleventh Circuit attempted to deny that the CTA regulates inactivity by suggesting that it "exempts businesses that are not actively engaged in commerce from the reporting requirement." App.13. But, unfortunately, Congress showed no such restraint. The only statutory provision cited by the court of appeals for that proposition, *see* App.5, is 31 U.S.C. §5336(a)(11)(B)(xxiii), which exempts entities "not engaged in active business" only if (among other things) they have "existe[d] for over 1 year." Of course, that exemption is meaningless for newly formed or registered entities, as they must comply with the CTA's reporting requirement long before they hit the one-year mark—*viz.*, "at the time of formation or registration." 31 U.S.C. §5336(b)(1)(C). Furthermore, the exemption is subject to numerous exceptions, including for entities with "an ownership interest in any corporation, limited liability company, or other similar entity"—even if that entity is not engaged in economic activity. *Id.* §5336(a)(11)(B)(xxiii).[4]

[4] The CTA also contains no exemption for beneficial owners not engaged in commerce. The Eleventh Circuit assumed that, if Congress has Commerce Clause authority over state-chartered

As all of this demonstrates, the CTA simply does not regulate any preexisting economic activity. As a result, it follows that the Eleventh Circuit erred at the second step of its analysis when it posited that Congress rationally concluded that the "regulated activity in the aggregate substantially affects interstate commerce." *Contra* App.8. While the court of appeals suggested that, "[a]part from its scope, the CTA is a routine federal law," App.14, there is nothing routine about congressional regulation of inactivity. Such efforts were correctly determined to be "unprecedented" in *NFIB*, and the second time is not the charm. As this Court has frequently stated, "[p]erhaps the most telling indication of [a] severe constitutional problem with" federal action is a "lack of historical precedent" for it. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010). Moreover, when it comes to the Commerce Clause, the permissible "scope" of federal law is the essential problem, not some detail to be set to one side. "Apart from [their] scope," the laws in *Lopez*, *Morrison*, and *NFIB* were defended as "routine federal law[s]." They were all unconstitutional. The same is true of the CTA.

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

The Eleventh Circuit's misguided Commerce Clause conclusion required it to address whether the CTA is consistent with the Fourth Amendment. The

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entities, it also has Commerce Clause authority over the human beings that chartered them despite their legal separateness. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

court of appeals correctly recognized that the CTA authorizes searches on a massive scale, but nonetheless deemed those *en masse* suspicionless and warrantless searches of private and sensitive information perfectly reasonable. *See* App.19-20. That holding is equally flawed and equally deserving of this Court's review.

A. The CTA Impermissibly Authorizes Suspicionless and Warrantless Searches to Further a Generalized Interest in Expedient Law Enforcement.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. As this Court has explained, the Fourth Amendment developed as a response to the founding generation's opposition to the "general warrants" and "writs of assistance" of the colonial era, which armed British officers with unfettered discretion to engage in suspicionless invasions of privacy. *See, e.g.*, *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) ("It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England."). The Fourth Amendment thus serves the dual purposes of "secur[ing] the privacies of life against arbitrary power" and "plac[ing] obstacles in the way of a too

permeating police surveillance." *Carpenter*, 585 U.S. at 305.

Whether government action violates the Fourth Amendment involves two basic questions. The threshold question is whether the government has engaged in a "search." Under this Court's cases, a search occurs either when the government "obtains information by physically intruding on a constitutionally protected area" or when it violates a person's "reasonable expectation of privacy." *United States v. Jones*, 565 U.S. 400, 406 & n.3 (2012); *see Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). If such a search occurs, it is constitutional only if it is "reasonable." *See Riley v. California*, 573 U.S. 373, 381-82 (2014). The Eleventh Circuit correctly recognized that the CTA effects searches on a massive scale, but erred in deeming those nearly unprecedented *en masse* intrusions reasonable.

The CTA effects a search because reporting companies and beneficial owners subject to the statute plainly have a reasonable expectation of privacy in their BOI. State law sets the baseline for reasonable expectations, and the *raison d'être* of the CTA is to demand information that states do not require. Indeed, the CTA's text itself pronounces that "most or all States do not require information about the beneficial owners of the corporations, limited liability companies, or other similar entities formed under the laws of the State." CTA §6402(2), 134 Stat. at 4604. "Nor is there any other local, state, or federal law mandating beneficial owner disclosure directly to the government." *SBAM*, 769 F.Supp.3d at 731. Reporting companies thus unquestionably have an

"actual (subjective) expectation of privacy." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). And that expectation is "objectively … justifiable," *id.*, as the text of the CTA again underscores by describing BOI as "sensitive information," CTA §6402(6), 134 Stat. at 4604. FinCEN has also instructed reporting companies to "not send BOI" to unauthorized third parties due to the sensitivities. *Beneficial Ownership Information*, FinCEN, https://perma.cc/VN3Z-DZ9W (last visited Apr. 13, 2026). As another court has explained, the CTA "places in the hands of government officials and special government employees large volumes of personally identifiable information and commercially sensitive data" that reveals a company's "internal power dynamics." *SBAM*, 769 F.Supp.3d at 731-32. That is a search, as the decision below did not dispute.

Nothing about the *en masse* searches launched by the CTA are reasonable. "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley*, 573 U.S. at 382. The CTA does not require a warrant; in fact, FinCEN has applauded the CTA precisely because it *eliminates* the need for a warrant, which supposedly "takes an enormous amount of time—time that could be used to further other important and necessary aspects of an investigation—and wastes resources, or prevents investigators from getting to other equally important investigations." 87 Fed. Reg. at 59,504. *But see Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) ("The warrant requirement … is not an inconvenience to be somehow 'weighed' against the claims of police efficiency."). Nor do any exceptions to the warrant requirement apply here. This Court

has stated that the government may conduct a search without a warrant when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 619 (1989). That exception is obviously inapplicable here, as the CTA itself states that BOI is necessary to "facilitate" normal "law enforcement activities." CTA §6402(6)(A), 134 Stat. at 4604. Ordinary law enforcement objectives do not come close to justifying the extraordinary *en masse* searches authorized by the CTA.

B. The Decision Below Badly Misapplies This Court's Precedent.

The Eleventh Circuit recognized that the government engages in searches for Fourth Amendment purposes when requiring the disclosure of BOI under the CTA. However, the court of appeals deemed those searches "reasonable" based on this Court's decision in *California Bankers Association v. Shultz*. App.19-20. But *Shultz* distinguishes itself. *Shultz* addressed a constitutional challenge to the Bank Secrecy Act's requirement that banks disclose to the government the "name, address, business or profession and social security number" of persons participating in "domestic financial transactions" involving at least $10,000. 416 U.S. at 39 n.15, 65, 67. In finding those searches reasonable, *Shultz* applied this Court's decision in *United States v. Morton Salt Co.*, which "held that organizations *engaged in commerce* could be required by the Government to file reports dealing with particular phases of their activities" so long as "the inquiry is within the

authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Id.* at 65, 67 (emphasis added).

Shultz is obviously distinguishable on grounds that should have been obvious to a court that just found the CTA within Congress' Commerce Clause authority despite reaching countless state-chartered entities not engaged in commerce. It is one thing to impose reporting requirements on companies actively engaged in interstate commerce, and quite another to demand disclosure from those being regulated based on their very existence and without regard to whether they engage in any commerce whatsoever. *Shultz* thus provides no shelter for the unprecedented federal searches at issue here.

Moreover, the CTA goes well beyond the disclosures at issue in *Shultz* in other significant respects. Although the CTA provides that reporting companies should direct their BOI report to FinCEN, *see* 31 U.S.C. §5336(b)(1)(A), that report is hardly restricted to that agency. To the contrary, the CTA permits FinCEN to disclose BOI to *any* federal agency for use in "national security, intelligence, or law enforcement" purposes. 31 U.S.C. §5336(c)(2)(B)(i)(I). FinCEN can also distribute BOI to state law-enforcement agencies. *See id.* §5336(c)(2)(B)(i)(II), (ii). In fact, FinCEN even has authority to distribute BOI to *foreign* law-enforcement agencies. *See id.* §5336(c)(2)(B)(ii). In other words, the CTA authorizes an agency (FinCEN) to receive information that it has no authority to receive in the first place and then empowers that agency to distribute that information around the world. The "gist" of the *Morton Salt* test is

that the "disclosure sought shall not be unreasonable." *Shultz*, 416 U.S. at 67. A statute that allows the government to send concededly sensitive information worldwide is the very opposite of reasonable.

That conclusion is only reinforced by the reality that the CTA's "demand" is "indefinite" in the extreme. *Id.* The CTA demands reporting companies to disclose any "beneficial owner," which includes anyone who "exercises substantial control over the entity," whether "directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise." 31 U.S.C. §5336(a)(3)(A). As the district court aptly observed, the term "substantial control"—which is left undefined in the statute—is "as vague as it sounds." App.25. And far from affecting a finite number of entities, the CTA instead sweeps in tens of millions of "smaller" entities (and counting), 86 Fed. Reg. at 69,928, generating tens of billions of dollars in compliance costs, 87 Fed. Reg. at 59,549.

In the end, the CTA "amounts to … a broad, grab-everything collection of suspicionless data because some day, some way, somehow, someone in law enforcement might find it useful." *SBAM*, 769 F.Supp.3d at 735. That is as unreasonable and unconstitutional as it gets.

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

The importance of this case is indisputable. Even the Eleventh Circuit conceded that the CTA is "controversial." App.5. That is an understatement. As long as the CTA remains on the books, tens of millions of state-law entities and countless more beneficial owners throughout the Nation, *see* 87 Fed.

Reg. at 59,549, will face the threat of substantial criminal and civil penalties, *see* 31 U.S.C. §5336(h), if they fail to disclose information so "sensitive" that "States do not require" disclosure themselves, CTA §6402(1)-(2), (6) 134 Stat. at 4604-05. By statutory design, moreover, the vast majority of those regulated entities are "smaller" entities. 86 Fed. Reg. at 69,928. While small businesses are the lifeblood of the Nation's economy collectively, *see, e.g.*, Bureau of Econ. Analysis, U.S. Dep't of Com., *Gross Domestic Product, Third Quarter 2024 (Second Estimate) and Corporate Profits (Preliminary)* (Nov. 27, 2024), https://perma.cc/BW5X-CPKN; U.S. Small Bus. Admin., *Frequently Asked Questions* (Jul. 23, 2024), https://perma.cc/85G4-86TQ, they are poorly positioned individually to shoulder the "billions of dollars" in compliance costs that the statute imposes, 87 Fed. Reg. at 59,549.

But CTA-regulated reporting companies and their beneficial owners are hardly the only ones with a stake in this case. Simply put, the Eleventh Circuit's reasoning is a green light for Congress to use its commerce power to nationalize American corporate law and to usurp authority that has traditionally belonged to the states. Indeed, under the court of appeals' reasoning, as soon as a company is "created by the filing of a document with a secretary of state," 31 U.S.C. §5336(a)(11)(A)(i), Congress has plenary power to regulate it. That cannot be correct unless the entire process of enumerating specific and limited federal powers was pointless as to corporations and the Framers' confidence that they had preserved the states' primary authority over state-chartered entities was entirely misplaced. The stakes for the federal-

state balance are thus sky-high. As the district court summarized, the CTA "converts an astonishing amount of traditionally local … conduct into a matter for federal enforcement, and involves a substantial extension of federal police resources." App.40 (brackets omitted) (quoting *Bond*, 572 U.S. at 863).

It thus is little wonder that an informed citizenry did not take the CTA lying down. Challenges to the CTA's constitutionality have repeatedly arisen—including on this Court's emergency docket. *See Garland v. Texas Top Cop Shop*, 145 S.Ct. 1 (2025); *see also SBAM*, 769 F.Supp.3d 722; *Smith v. U.S. Dep't of the Treasury*, 761 F.Supp.3d 952 (E.D. Tex. 2025); *Comm. Ass'ns Inst. v. Yellen*, 2024 WL 4571412 (E.D. Va. Oct. 24, 2024); *Texas Top Cop Shop, Inc. v. Garland*, 758 F.Supp.3d 607 (E.D. Tex. 2024). This case is an ideal vehicle in which to resolve the questions presented once and for all. The lower courts have already provided their final word on those constitutional questions. *Cf. Virginia Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). Nor are there are any "unresolved factual questions" or other disputes that make this Court's resolution of those questions premature. *Kennedy v. Bremerton Sch. Dist.*, 586 U.S. 1130, 1130 (2019) (Alito, J., respecting the denial of certiorari). Furthermore, unlike the *Texas Top Cop Shop* case that previously came to this Court on an emergency basis, this case does not involve extraneous questions that detract from the core constitutional ones, such as "the question whether a district court may issue

universal injunctive relief." 145 S.Ct. at 1 (Gorsuch, J., concurring in the grant of stay).

Nor does FinCEN's 2025 interim final rule exempting domestic reporting companies and U.S. persons from the CTA's reporting requirement pose an obstacle to this Court's review. *See* 90 Fed. Reg. 13,688. As the Eleventh Circuit observed, everyone agrees that the interim final rule "does not render this case moot." App.5 n.1. That position is correct: This case concerns the constitutionality of the CTA, not any administrative regulation, and "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). If anything, FinCEN's interim final rule makes this case an even *more* attractive vehicle. The CTA remains lying around like the proverbial loaded revolver waiting to be wielded by the next administration, no doubt precipitating challenges on the emergency docket. And precisely because FinCEN is not currently enforcing the CTA against domestic reporting companies or U.S. persons, this Court has the ability to address the CTA's constitutionality on the merits docket after the benefit of receiving full briefing and argument, instead of on the emergency docket on a "short fuse without benefit of full briefing and oral argument." *Does 1-3 v. Mills*, 142 S.Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief). In sum, this is both the right time and the right case in which to resolve whether this unprecedented statute is constitutional.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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April 15, 2026

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-10736

NATIONAL SMALL BUSINESS UNITED, d.b.a. National Small Business Association, ISAAC WINKLES,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF THE TREASURY, ACTING DIRECTOR OF THE FINANCIAL CRIMES ENFORCEMENT NETWORK, SECRETARY, U.S. DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

Filed: Dec. 16, 2025

Before: Jordan, Newsom, and Brasher, Circuit Judges.

OPINION

Brasher, Circuit Judge:

The question in this appeal is whether a federal law requiring corporations to report information about their owners is constitutional. Congress found that bad actors have been using the anonymity of the corporate form to commit financial crimes, such as

money laundering and financing terrorism. To prevent these anonymous business dealings, Congress passed the Corporate Transparency Act as part of the Anti-Money Laundering Act of 2020. Pub. L. No. 116-283, 134 Stat. 4604 (codified at 31 U.S.C. § 5336). The CTA requires certain corporate entities to report their "beneficial owners"—i.e., the actual people who exercise control over the entity— to the Department of the Treasury.

To be constitutional, every federal law must, first, be consistent with one of Congress's enumerated powers and, second, not violate any of the Constitution's individual rights guarantees. National Small Business United, a business association, and Isaac Winkles, a real-estate manager, argue that the CTA fails on both counts. As relevant here, they say that the CTA is not an appropriate exercise of Congress's power to regulate interstate commerce and is therefore facially unconstitutional. *See* U.S. Const. art. I, § 8, cl. 3. In the alternative, they say that the CTA violates the Fourth Amendment's prohibition on unreasonable searches and is facially unconstitutional for that reason. *See* U.S. Const. amend IV.

The district court concluded that the CTA did not regulate economic activity and, on that basis, granted the plaintiffs summary judgment. We disagree. We believe that, by effectively prohibiting anonymous business dealings, the CTA facially regulates economic activities having a substantial aggregate impact on interstate commerce. Moreover, as a uniform and limited reporting requirement, the CTA does not facially violate the Fourth Amendment. Accordingly, we reverse.

I.

Financial crime is a serious problem. According to one recent estimate, money laundering costs the government billions of dollars every year. Dep't of the Treasury, National Money Laundering Risk Assessment 3 & n.1 (2024). Financial criminals often use shell companies to conceal their fraud and their identities. *Id.* at 53. Because most states do not require businesses to report information about their owners, law enforcement has long suffered from an information gap when fighting financial crime. H.R. Rep. No. 116-227, at 2 (2019).

To combat this problem, Congress passed the CTA. In doing so, it made a series of findings. It found that more than 2,000,000 corporations and limited liability companies are formed each year, mostly in states that do not require beneficial ownership information. *Id.* These anonymous companies sometimes abuse the corporate form to commit crimes "affecting interstate and international commerce." *Id.* Congress therefore concluded that the CTA was necessary to combat securities and financial fraud. *Id.* Congress also found that uniform reporting laws would support "national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity." Pub. L. No. 116-283, § 6402(5)(D), 134 Stat. 4604.

The CTA provides for the "collection of beneficial ownership information" of designated reporting companies. *Id.* § 6402(5), 134 Stat. 4604. Under the law, those companies must disclose information about "each beneficial owner" and "each applicant" to the Department of the Treasury's Financial Crimes

Enforcement Network. 31 U.S.C. § 5336(b)(1)(A), (b)(2)(A). A "reporting company" is a corporation, LLC, or other similar entity incorporated under the laws of a state, or formed under the law of a foreign country and registered to do business in the United States. *Id.* § 5336(a)(11). "Beneficial owner" is defined as an individual who exercises substantial control over an entity or otherwise controls at least twenty-five percent of its ownership interests. *Id.* § 5336(a)(3)(A). "Applicant" refers to an individual who files an application to form an entity. *Id.* § 5336(a)(2). Reporting companies must provide FinCEN with their beneficial owners' and applicants' full legal name, date of birth, home or business address, and government ID. *Id.* § 5336(b)(2)(A).

The CTA applies differently depending on when the reporting company incorporates. Under the CTA and subsequent Treasury regulations, businesses created before March 26, 2025, were required to comply with the CTA by April 25, 2025. 31 C.F.R. § 1010.380(a)(1)(ii); U.S.C. § 5336(b)(1)(B). Companies formed after that date must file a report within thirty days of registration. 31 C.F.R. § 1010.380(a)(1)(i); 31 U.S.C. § 5336(b)(1)(C). The reporting requirement is an ongoing obligation. If there is any change with respect to required information previously submitted to FinCEN, the company must file an updated report within thirty days. 31 C.F.R. § 1010.380(a)(2)(i); 31 U.S.C. § 5336(b)(1)(D).

The CTA contains numerous exceptions. Excluded from the definition of "reporting company" are banks, credit unions, brokers, investment companies, insurance companies, accounting firms, and 501(c)

nonprofits. 31 U.S.C. § 5336(a)(11)(B). Also excluded are entities that employ more than twenty employees and make more than $5,000,000 in annual gross sales. *Id.* § 5336(a)(11)(B)(xxi). Entities in existence on or before January 1, 2020, that are not engaged in active business, are not owned by a foreign person, have not experienced a recent change in ownership, do not hold assets, and have not sent or received funds in an amount greater than $1,000 in the past year are likewise exempt. 31 C.F.R. § 1010.380(c)(2)(xxiii); 31 U.S.C. § 5336(a)(11)(B)(xxiii).

The CTA also permits the Secretary of the Treasury to pass regulations exempting other groups from the reporting requirement. 31 U.S.C. § 5336(a)(11)(B)(xxiv). After passage, FinCEN issued an interim final rule exempting domestic companies from the CTA's requirements. The interim final rule still requires foreign companies to report ownership information except as to American owners.[1] *See* Beneficial Ownership Information Reporting Requirement Revision and Deadline Extension, 90 Fed. Reg. 13688, 13690 (Mar. 26, 2025) (to be codified at 31 C.F.R. pt. 1010).

The CTA was controversial from the start. *See* Kate Kelly, *On Eve of Money Laundering Law's Activation, a Lobby Cries Foul*, N.Y. Times, Dec. 18, 2023, at B4. After it was enacted, NSBU and Winkles sued the Secretary of the Treasury, the Department of the Treasury, and FinCEN's Acting Director, seeking declaratory and injunctive relief. NSBU represents

[1] The parties agree that this rulemaking does not render this case moot. We believe they are correct. *See Naturist Soc'y v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992).

"over 65,000 businesses and entrepreneurs located in all 50 states. [Its] members come from every sector of the U.S. economy, including manufacturing, retail, food service, and professional services." McCracken Decl. at 2. Winkles owns a small business with three full-time employees and "annual turnover of under $20 million." Winkles Decl. at 1-2.

NSBU and Winkles claimed that the CTA is facially unconstitutional and that it violates the First, Fourth, Fifth, Ninth, and Tenth Amendments. The parties agreed that the case could be resolved on dispositive motions without discovery. They then cross-moved for summary judgment.

The district court granted the plaintiffs' motion for summary judgment and denied the defendants' cross-motion for summary judgment. The court held that neither the Commerce, Taxing, and Necessary and Proper Clauses, nor Congress's foreign affairs and national security powers, justified the CTA. Regarding the Commerce Clause, the court ruled that the CTA primarily regulates the non-commercial act of incorporation and that the connection between the act of incorporation and the activities Congress sought to curb was too attenuated. The court also emphasized the CTA's lack of any jurisdictional hook limiting its reach to interstate commerce. Because it held that the CTA exceeded Congress's enumerated powers, the court did not address whether it violated the First, Fourth, or Fifth Amendments.

The government timely appealed.

II.

This Court reviews *de novo* the district court's disposition of a motion for summary judgment. *See*

Lowery v. AmGuard Ins. Co., 90 F.4th 1098, 1103 (11th Cir. 2024). We also review *de novo* the constitutionality of a challenged statute. *United States v. Paige*, 604 F.3d 1268, 1270 (11th Cir. 2010).

III.

NSBU and Winkles advance two main arguments against the facial constitutionality of the CTA. First, they argue that Congress did not have the power, under the Commerce Clause or otherwise, to enact the CTA. Second, in the alternative, they argue that the CTA violates the Fourth Amendment's prohibition on unreasonable searches. We address each argument in turn.

A.

Turning to the Commerce Clause, we start with first principles. Every law enacted by Congress must be based on one or more of its constitutionally enumerated powers. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.). One of those enumerated powers is the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

To preserve a "distinction between what is truly national and what is truly local," *United States v. Lopez*, 514 U.S. 549, 567-68 (1995), the Supreme Court has identified three categories of activity that Congress may regulate under its Commerce Clause power: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *Id.* at 558-59. The district court held, and

the parties do not dispute, that the CTA does not regulate the channels or instrumentalities of commerce. Therefore, the question is whether the CTA passes muster under the third category: the "substantial effects" test.

Under the substantial effects test, the Court has distinguished between laws having "nothing to do with 'commerce' or any sort of economic enterprise," *id.* at 561, and those laws regulating "quintessentially economic" activities, *Gonzales v. Raich*, 545 U.S. 1, 25 (2005). The substantial effects test is ordinarily met only when the underlying activity is economic in nature or where the statute contains a jurisdictional element linked to interstate commerce. *See Lopez*, 514 U.S. at 560-61; *United States v. Morrison*, 529 U.S. 598, 613 (2000) ("[O]ur cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *United States v. Olin Corp.*, 107 F.3d 1506, 1511 (11th Cir. 1997) ("have an economic character"). In short, for a law to be facially constitutional under the substantial effects test in the absence of a jurisdictional element, the law ordinarily must be directed at some kind of commercial or economic activity and Congress must have rationally concluded that the regulated activity in the aggregate substantially affects interstate commerce.

Applying the substantial effects test, we hold that the CTA is a constitutional exercise of Congress's power under the Commerce Clause. First, on its face, the CTA regulates activity that is economic in nature. It effectively prohibits anonymous corporate dealings, regulates commercial entities that are active in the

stream of commerce, and requires them to report information related to their ownership. Second, Congress rationally concluded that anonymous corporate dealings have a substantial aggregate effect on interstate commerce. We address each point below.

1.

We will start with whether the CTA regulates economic activity. The Supreme Court has held that run-of-the-mill criminal laws flunk this test. For example, criminal statutes prohibiting firearms in school zones and gender-motivated violence are not directed at economic activity. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 613, 617. But a law can regulate economic activity even if the connection between the challenged law and commerce isn't airtight. It is enough that the regulated activity involves "some sort of economic endeavor" with "an apparent commercial character." *Morrison,* 529 U.S. at 611 & n.4.

We think the CTA is sufficiently connected to economic activity to meet the first part of the substantial effects test. The law applies to "corporation[s], limited liability compan[ies], or other similar entit[ies]." 31 U.S.C. § 5336(a)(11). Corporations are formed when prospective shareholders exchange money, property, or both, in return for stock. A corporation conducts business, realizes losses or gains, pays taxes, and distributes dividends to its shareholders. Holger Spamann, Scott Hirst & Gabriel Rauterberg, Corporations in 100 Pages 1-12 (2020); Richard D. Freer & Douglas K. Moll, Principles of Business Organizations 194-96 (2d ed. 2018). Like corporations, LLCs offer owners protection from personal liability, although profits are

passed through to a member's personal income without facing corporate taxes. Franklin A. Gevurtz, Corporation Law 4-6 (3d ed. 2021); Stephen M. Bainbridge, Agency, Partnership & LLCS 269 (4th ed. 2024).

These entities are commercial by their very nature. As the Supreme Court has long recognized, a corporation is never created "for its own sake," but instead exists "for the purpose of effecting something else." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819). For-profit business entities are a means to an economic end. They exist primarily to "use [their] resources and engage in activities designed to increase [their] profits." Milton Friedman, Capitalism and Freedom 133 (1962); Stephen M. Bainbridge, Corporation Law and Economics 419-29 (2002) (traditional fiduciary duties require corporations to maximize profits). Aside from being profit maximizers, business entities also exist to efficiently pool capital and allow creditors and shareholders to invest without disclosing their identities. William J. Moon, *Anonymous Companies*, 71 Duke L.J. 1425, 1429-32 (2022). For all these reasons, the corporate form is understood to be "the foundation of the modern market economy." Giuseppe Dari-Mattiacci, Oscar Gelderblom, Joost Jonker & Enrico C. Perotti, *The Emergence of the Corporate Form*, 33 J.L. Econ. & Org. 193, 225 (2017).

Considering the nature of the corporate form and modern business, we can safely say that the CTA facially regulates economic activity. The statute is specifically directed at domestic companies created under the laws of a state and foreign companies

registered to do business in the United States. 31 U.S.C. § 5336(a)(11)(A). By requiring these corporate entities to provide beneficial ownership information, the CTA regulates how they operate and the level of secrecy with which they do business. The maintenance and operation of a separate corporate entity is comparable to other regulated activities the Supreme Court has found commercial in nature. *See Wickard v. Filburn*, 317 U.S. 111 (1942) (consumption of home-grown wheat); *Perez v. United States*, 402 U.S. 146 (1971) (extortionate intrastate credit transactions).

NSBU's and Winkles's own declarations emphasize the point. NSBU represents tens of thousands of businesses in every sector of the economy. According to NSBU, eighty percent of its members fall under the CTA's definition of "reporting company." Winkles co-owns two corporations that "manage and lease real property" and generate "annual turnover of under $20 million." Winkles Decl. at 1-2. Winkles's two companies earn approximately $8 million and $5 million in annual gross sales. Neither NSBU nor Winkles has identified any reporting companies that do not engage in commercial activity. That both plaintiffs are clearly economically active and failed to provide evidence of a non-commercial entity regulated by the CTA is strong evidence that the statute regulates commerce.

Moreover, to the extent a corporate entity is not involved in commerce, the CTA's many carveouts will likely exempt it. The statute excludes trusts, banks, government agencies, public utilities, political organizations, and nonprofits. 31 U.S.C. § 5336(a)(11)(B). The CTA also exempts inactive

businesses that are created on or before January 1, 2020, hold no assets, and have not sent or received funds exceeding $1,000 in a year. 31 C.F.R. § 1010.380(c)(2)(xxiii); 31 U.S.C. § 5336(a)(11)(B)(xxiii). Congress's decision to tailor the CTA to active businesses is further evidence the statute regulates commerce on its face.

NSBU and Winkles make three arguments to resist this conclusion. None works.

First, they argue, like the district court, that the CTA regulates the noneconomic "isolated, discrete act" of incorporation. We'll assume without deciding that this "isolated, discrete act" is not itself commercial in character. Even indulging that assumption, we believe the CTA's text establishes that it does not regulate the act of incorporation. Instead, the CTA regulates entities after they have been incorporated. Even though the statute defines "reporting company" as one "created by the filing of a document," this provision serves only to identify those entities that must comply with the statute's reporting requirements. 31 U.S.C. § 5336(a)(11)(A)(i). The statute in no way affects how businesses incorporate. It does not alter any relevant state law. It addresses only what entities must do *after* they are registered to do business—provide beneficial owner information to the Treasury Secretary.

Other parts of the text confirm that the CTA is not regulating the act of incorporation. The statute requires existing businesses that have already incorporated to continue reporting changes in ownership. *Id.* § 5336(b)(1)(D). Foreign entities registered to do business in the United States, but that were incorporated abroad, are also subject to the CTA.

Id. § 5336(a)(11)(A)(ii). And, as we've already explained above, the CTA exempts businesses that are not actively engaged in commerce from the reporting requirement.

Second, NSBU and Winkles argue that the CTA is constitutionally infirm because it lacks a jurisdictional element. Again, we disagree. A jurisdictional element "ensure[s], through case-by-case inquiry, that the [activity] in question affects interstate commerce." *Lopez*, 514 U.S. at 561. We have held that a jurisdictional element—because it allows a case-by-case assessment—immunizes criminal statutes from facial challenges. *United States v. Pugh*, 90 F.4th 1318, 1326 (11th Cir.), *cert. denied*, 145 S. Ct. 236 (2024). *See also United States v. Dupree*, 258 F.3d 1258, 1259 (11th Cir. 2001) (jurisdictional hook defeated facial challenge to statute prohibiting a felon from possessing a firearm). But neither we nor the Supreme Court has ever suggested that a jurisdictional element is necessary for an *economic* regulation. *See United States v. Moghadam*, 175 F.3d 1269, 1275-76 (11th Cir. 1999) (holding that a jurisdictional element was unnecessary where the statute regulated economic activities having a substantial effect on interstate commerce). In *Lopez* and *Morrison*, for example, a case-by-case jurisdictional assessment was necessary because the statutes facially regulated non-economic activity. "The absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect interstate commerce." *Id.* (citation modified).

Finally, citing *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), NSBU and Winkles say that the CTA regulates inactivity. But the CTA does not "compel [entities] not engaged in commerce" to do so. *Id.* at 549. Because of the tailored scope of the act, it regulates entities that are active in commerce. *See* 31 U.S.C. § 5336(a)(11)(B), (b)(1)(B). The CTA does not regulate based on an entity's anticipated future conduct. Instead, the CTA anticipates the *effects* on commerce of active businesses not reporting ownership information. *See NFIB*, 567 U.S. at 557.

In sum, the CTA regulates economic activity on its face. Accordingly, the only question for its facial constitutionality under the Commerce Clause is whether the intrastate economic activity it regulates substantially affects interstate commerce.

2.

We turn now to that second question: did Congress rationally conclude that the regulated conduct has a substantial aggregate effect on interstate commerce? We believe that it did.

Apart from its scope, the CTA is a routine federal law. Federal reporting requirements are very common. *See Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 47 (1974) ("[P]rovisions requiring reporting or recordkeeping . . . are by no means unique."). The United States Code is replete with them. *See, e.g.*, 31 U.S.C. § 5313 (requiring banks to file reports with the Secretary of the Treasury whenever they are involved in cash transactions exceeding a certain amount); 52 U.S.C § 30104 (requiring political committees to file reports of receipts and disbursements); 2 U.S.C.

§ 1604 (requiring registered lobbyists to file reports with Congress that include their name, a list of lobbying activities, and a list of employees). So the CTA is hardly based on a "new conception[] of federal power." *NFIB*, 567 U.S. at 550.

This particular reporting requirement is an effort to curtail abuses of the corporate form. In its report accompanying the CTA, the House Committee on Financial Services found that anonymous ownership and the corporate form were contributing to fraud. The Committee concluded that anonymous shell companies "afford a high level of secrecy" to money launderers. H.R. REP. NO. 116-227, at 10 (2019). The report also found that the United States was not meeting international standards regarding disclosure requirements, making it a target for money laundering. *Id.* at 2, 11.

In reaching these conclusions, Congress relied on input from numerous national security and law enforcement experts about how anonymous shell companies affect interstate and international commerce. Congress held a hearing on the CTA, during which the former Director of the FBI's Terrorist Financing Operation Section testified that the CTA was "necessary and long overdue." *Promoting Corporate Transparency: Examining Legislative Proposals to Detect and Deter Financial Crimes*: *Hearing on H.R. 2513 Before the Subcomm. on Nat'l Sec., Int'l Dev., & Monetary Pol'y of the H. Comm. on Fin. Servs.*, 116th Cong. 49 (2019) (statement of Dennis M. Lormel). Lormel also stated that he believed reporting requirements would help reduce drug trafficking. *Id.* at 28. Congress heard additional

testimony in support of the CTA from law enforcement associations such as the Fraternal Order of Police. The Fraternal Order said that collecting beneficial ownership information would help combat the threat posed by "[t]ransnational criminal organizations and terrorist operations." *Id.* at 69. Finally, an array of industry representatives concluded the CTA would protect financial institutions of all stripes from financial crime. *Id.* at 75-76.

Congress could rationally conclude that the freedom of beneficial owners to operate anonymously through shell companies had a substantial aggregate impact on interstate commerce. Congress found that 2,000,000 corporations and LLCs are formed annually. Congress reasonably concluded that failing to require businesses to report beneficial ownership information would undercut its goal of regulating interstate financial crime. Indeed, it explicitly found that the CTA was necessary to prevent the use of the corporate form to commit fraud. Anti-Money Laundering Act of 2020, Pub. L. No. 116-283, § 6402(5), 134 Stat. 4547, 4604 (2021).

Although congressional findings are not necessary, *Katzenbach v. McClung*, 379 U.S. 294, 299, 304 (1964), and alone cannot sustain Commerce Clause legislation, *see Morrison*, 529 U.S. at 614, such findings may better "enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce." *Lopez*, 514 U.S. at 563. Congress's findings here are entitled to deference. *See United States v. Viscome*, 144 F.3d 1365, 1371 (11th Cir. 1998) (holding that "explicit findings that the proscribed activity in issue

substantially affected interstate commerce" are accorded "substantial deference"). Here the connection between the thing being regulated—the anonymous ownership and operation of businesses—and its effect on interstate commerce is direct and straightforward. Congress had a rational basis for believing that, in the aggregate, the anonymous operation of businesses substantially affected interstate commerce.

NSBU and Winkles resist this conclusion by citing examples of hypothetical entities that engage in purely intrastate activity but may still be regulated by the CTA. The existence of some edge cases doesn't help in this facial challenge. "[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Lopez*, 514 U.S. at 558 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968) (citation modified), *overruled on other grounds by*, *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976)). This argument about corporations that are uniquely focused on intrastate activity is the stuff of an as-applied challenge. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005). Because Congress reasonably determined that this cumulative activity would substantially affect commerce, the existence of some purely intrastate entities does not invalidate the CTA as a facial matter.

* * *

In short, the CTA is a constitutional exercise of Congress's enumerated power to regulate interstate commerce. Because it is directed at the ownership and maintenance of corporations, it is a regulation of economic activity. And Congress rationally concluded

that this activity has a substantial aggregate impact on interstate commerce.

B.

Having determined that Congress had the power to enact the CTA, we now ask whether the CTA facially violates any individual rights amendment. A facial challenge under an individual rights amendment is "hard to win." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). A plaintiff cannot succeed on such a facial challenge unless he "'establish[es] that no set of circumstances exists under which the [law] would be valid,' or he shows that the law lacks a 'plainly legitimate sweep.'" *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987) and *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-451 (2008)).

NSBU and Winkles urge us to affirm on the ground that the CTA facially violates the Fourth Amendment. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. NSBU and Winkles argue that the reporting requirement is unconstitutional because it permits suspicionless searches for general law enforcement purposes.[2] We disagree.

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[2] NSBU and Winkles vaguely reference First, Fifth, Ninth, and Tenth Amendment claims but make no argument in support of them. These arguments are abandoned for purposes of appeal. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (a party fails to adequately brief a claim when it fails to clearly present it or refers to it only in passing).

The Supreme Court has previously considered Fourth Amendment challenges to uniform reporting requirements. In *Shultz*, the Court addressed a statute requiring banks to report domestic currency transactions above a certain amount. 416 U.S. 21 (1974). The reports contained the "name, address, business or profession and social security number of the person conducting the transaction," as well as a description of the transaction itself. *Id.* at 39 n.15. The Court upheld the statute against a Fourth Amendment challenge, concluding that the regulations "do not impose unreasonable reporting requirements on the banks." *Id.* at 67. Even though the law required banks to obtain information "simply because the Government want[ed] it," the information was limited in nature and "sufficiently related to a tenable congressional determination as to improper use of transactions of that type in interstate commerce." *Id.*

Under this precedent, the CTA does not violate the Fourth Amendment. It is a uniform reporting requirement applied to all businesses that meet the CTA's definition of "reporting company." There is nothing arbitrary or discretionary about its application. *See Brock v. Emerson Elec. Co., Elec. & Space Div.*, 834 F.2d 994, 996 n.2 (11th Cir. 1987) (concluding that a "uniform statutory or regulatory reporting requirement satisfies the Fourth Amendment concern regarding the potential for arbitrary invasions of privacy"). The information it requires is "sufficiently described and limited in nature" and is no more detailed than the reports in *Shultz*. 416 U.S. at 67.

The CTA also has several privacy guarantees. It permits disclosure of beneficial ownership information only upon request by discrete categories of agencies under certain circumstances. 31 U.S.C. § 5336(c)(2). The statute requires the Secretary of the Treasury to protect ownership information and prevent breaches of confidentiality. *Id.* § 5336(c)(8). And the Comptroller General must conduct periodic audits to ensure the Department of the Treasury is using beneficial ownership information appropriately. *Id.* § 5336(c)(10).

In support of their argument, NSBU and Winkles cite a series of decisions involving substantial arbitrary privacy intrusions in which the government collected an array of detailed and sensitive information. But these decisions bear no resemblance to the facts of this case. Here, "[t]he inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Shultz*, 416 U.S. at 67 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)). Because the CTA's disclosure requirement is reasonable, there is no Fourth Amendment issue. *See id.*

IV.

We **REVERSE** and **REMAND** for further proceedings consistent with this opinion.

Appendix B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

No. 22-cv-1448

NATIONAL SMALL BUSINESS UNITED, d.b.a. National Small Business Association, et al.,

Plaintiffs,

v.

JANET YELLEN, in her official capacity as Secretary of the Treasury, et al.,

Defendants.

Filed: Mar. 1, 2024

MEMORANDUM OPINION

The late Justice Antonin Scalia once remarked that federal judges should have a rubber stamp that says Stupid But Constitutional. *See* Jennifer Senior, *In Conversation: Antonin Scalia*, New York Magazine, Oct. 4, 2013. The Constitution, in other words, does not allow judges to strike down a law merely because it is burdensome, foolish, or offensive. Yet the inverse is also true—the wisdom of a policy is no guarantee of its constitutionality. Indeed, even in the pursuit of sensible and praiseworthy ends, Congress sometimes enacts smart laws that violate the Constitution. This case, which concerns the constitutionality of the

Corporate Transparency Act, illustrates that principle.

When Congress passed the 2021 National Defense Authorization Act, it included a bill called the Corporate Transparency Act ("CTA"). Although the CTA made up just over 21 pages of the NDAA's nearly 1,500-page total, the law packs a significant regulatory punch, requiring most entities incorporated under State law to disclose personal stakeholder information to the Treasury Department's criminal enforcement arm.

By requiring these disclosures, Congress aimed to prevent financial crimes like money laundering and tax evasion, which are often committed through shell corporations. Broadly defined, a shell corporation is a legal entity with no (or minimal) employees, customers, business, or assets. Although shell corporations serve many legitimate purposes, it's also possible to disguise the identity of interested individuals and the flow of money by layering shell companies on top of each other, "such that each time an investigator obtains ownership records for a domestic or foreign entity, the newly identified entity is yet another corporate entity, necessitating a repeat of the same process[.]" Pub. L. 116-283 § 6402(4).

Yet corporate formation includes far more than for-profit enterprise. Each year, the States grant formal status to millions of entities that can and do serve "any lawful purpose," including benefit corporations, non-profits, holding companies, political organizations, and everything in between.

With that in mind, this case presents a deceptively simple question: Does the Constitution

give Congress the power to regulate those millions of entities and their stakeholders the moment they obtain a formal corporate status from a State? The Government thinks so. While it acknowledges that Congress "can exercise only the powers granted to it," the Government says that the CTA is within Congress' broad powers to regulate commerce, oversee foreign affairs and national security, and impose taxes and related regulations.

The Government's arguments are not supported by precedent. Because the CTA exceeds the Constitution's limits on the legislative branch and lacks a sufficient nexus to any enumerated power to be a necessary or proper means of achieving Congress' policy goals, the Plaintiffs are entitled to judgment as a matter of law. As a result, the Court **GRANTS** the Plaintiffs' motion for summary judgment and **DENIES** the Government's motion to dismiss and alternative cross-motion for summary judgment.

I. Background

Plaintiffs. Plaintiff National Small Business Association is "an Ohio non-profit corporation that represents and protects the rights of small businesses across the United States," including "over 65,000 businesses and entrepreneurs located in all 50 states." (Doc. 39-2 at 1-2). The NSBA's stated purpose is "to advocate for its members" and their employees, and "to provide its members guidance and data on how to navigate government regulations." *Id.* at 2.

Plaintiff Isaac Winkles is an NSBA member and owner of two small businesses, one of which "is a small family business with 3 full-time employees and annual turnover of under $20 million." (Doc. 39-3 at 1-2).

Procedural Background. The Treasury Department's criminal-enforcement bureau, the Financial Crimes Enforcement Network ("FinCEN"), issued a final rule implementing the CTA on September 29, 2022, slated to go into effect on January 1, 2024. 87 Fed. Reg. 59498 (Sept. 30, 2022) (codified at 31 C.F.R. § 1010.380). Six weeks later, Plaintiffs sued the Treasury Department, along with Treasury Secretary Janet Yellen and Acting Director of FinCEN Himamauli Das in their official capacities, alleging that the CTA's mandatory disclosure requirements exceed Congress' authority under Article I of the Constitution and violate the First, Fourth, Fifth, Ninth, and Tenth Amendments. (Doc. 1). The parties agreed that the case could be resolved on dispositive motions without discovery, so the parties cross-moved for summary judgment in early 2023, with the Government simultaneously moving to dismiss. (Docs. 23 & 24). In the following months, the parties and amici exchanged hundreds of pages of briefing, and oral argument on the parties' motions was held in November 2023.

The Operation of the Corporate Transparency Act. As always, "[o]ur analysis begins and ends with the text," *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014), and the text of the CTA is wide-ranging in scope. The CTA regulates "reporting company[ies]," defined as "corporation[s], limited liability company[ies], or other similar entit[ies]" that are either "(i) created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe, or (ii) formed under the law of a foreign country and registered to do business in the United States." 31

U.S.C. § 5336(a)(11)(A). The CTA exempts twenty-four kinds of entities from its reporting requirements, including banks, insurance companies, and entities with more than twenty employees, five million dollars in gross revenue, and a physical office in the United States. § 5336(a)(11)(B).

In total, FinCEN estimates that the CTA applies to 32.6 million currently existing entities and 5 million new entities formed each year from 2025 to 2034. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at, 59,549. The CTA requires these millions of entities to disclose the identity and information of any "beneficial owner." § 5336(b)(1)(A). A beneficial owner is defined as "an individual who . . . (i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity," with some exceptions for children, creditors, and a few others. § 5336(a)(3). The definition of "substantial control" is as vague as it sounds—although it includes some clear categories like "senior officer[s]," FinCEN's regulations "clarify" that a person with substantial control also includes someone who "[h]as any other form of substantial control over the reporting company" besides those listed. 31 C.F.R. § 1010.380(d)(1)(i)(D).

For new entities incorporated from January 1, 2024, onward, the CTA requires them to disclose the identity and information of both Beneficial Owners and "Applicants," defined as "any individual who files an application to form a corporation, LLC, or other similar entity under the laws of a State or Indian

Tribe; or registers [a foreign entity] to do business in the United States." 31 U.S.C. § 5336(a)(2).

Reporting entities must give FinCEN a Beneficial Owner or Applicant's full legal name, date of birth, current address, and identification number from a driver's license, ID card, or passport. § 5336(a)(1), (b)(2)(A). Under the final rule, reporting entities are also required to submit an image of the identifying document. 31 C.F.R. § 1010.380(b)(1)(ii)(E). If any of that information changes, the reporting company must update FinCEN, 31 U.S.C. § 5336(b)(1)(D), and FinCEN retains Applicant and Beneficial Owner information on an ongoing basis for at least five years after the reporting company terminates. § 5336(c)(1).

The CTA's disclosure requirements aren't toothless, either: knowing or willful violations carry serious civil and criminal penalties. A willful provision of false or fraudulent beneficial ownership information or failure to report "complete or updated beneficial ownership information to FinCEN" by "any person" is punishable by a $500 per day civil penalty and up to $10,000 in fines and 2 years in federal prison, § 5336(h)(1), (3)(A); a knowing and unauthorized disclosure or use of beneficial ownership information by "any person" is punishable by a $500 per day civil penalty, along with a $250,000 fine and 5 years in federal prison, § 5336(h)(2), (3)(B); and a knowing and unauthorized use or disclosure while violating another federal law "or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period" by "any person" is punishable with a $500,000 fine and 10 years in federal prison, § 5336(h)(3)(B)(ii)(II).

Crucially (at least for standing purposes), these severe penalties apply to individuals, not reporting entities. For starters, a disembodied corporate entity cannot be sentenced to federal prison. Beyond that, although the CTA does not define "person," it *does* define both "United States person" (§5336(a)(14)) and "Foreign person" (§5336(a)(7)) to include corporations, partnerships, and trusts, and uses those terms in other provisions. *See* § 5336(a)(11)(B)(xx). Yet the statute does not use those terms in its penalty provisions, so the statute can be read only to penalize individual beneficial owners and applicants, not reporting entities.

The ultimate result of this statutory scheme is that tens of millions of Americans must either disclose their personal information to FinCEN through State-registered entities, or risk years of prison time and thousands of dollars in civil and criminal fines.

II. Legal Standards

Although the Government requested summary judgment as an alternative to its motion to dismiss, summary judgment is the most appropriate means for resolving this case. The parties have waived discovery and agreed that this case can be "resolved through dispositive motions." (Doc. 16 at 3). Furthermore, when there are no genuine issues of material fact and "the only issues before the Court are pure questions of law," disposition of the case by summary judgment is particularly appropriate. *Maxim Crane Works, L.P. v. Zurich Am. Ins.*, 11 F.4th 345, 350 (5th Cir. 2021) (cleaned up); *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011) ("When the only question

a court must decide is a question of law, summary judgment may be granted.").

Under Federal Rule of Civil Procedure 56(a), summary judgment is warranted if "there is no genuine dispute as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Because there are no disputed issues of fact here, the Court need only decide which parties are entitled to judgment as a matter of law.

III. Discussion

The Court's opinion is in two parts. First, the Court considers its own jurisdiction, looking mainly to the Plaintiffs' standing. Having found that Winkles is a regulated party and a member of the NSBA, and that the NSBA has associational standing as a result, the Court concludes that both Plaintiffs have standing to bring their constitutional claims.

With standing out of the way, the Court then addresses the Government's proffered justifications for the CTA's constitutionality—that the CTA falls within the ambit of the Commerce, Taxing, and Necessary and Proper Clauses, along with Congress' foreign affairs and national security powers. After a close look at each of these putative justifications, the Court concludes that the CTA is not authorized by the Constitution.

A. Standing

The first order of business is to make sure the Court has jurisdiction to decide the merits of this case. Article III, § 2 of the U.S. Constitution confines the federal judicial power to "cases" and "controversies,"

and an "essential and unchanging part of the case-or-controversy requirement of Article III" is the requirement that a plaintiff have standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To satisfy the "irreducible constitutional minimum of standing," *id.*, "a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008).

According to the Government, neither Plaintiff has standing to bring this suit: Winkles, it suggests, has failed to show a concrete and particularized injury, while NSBA has failed to support its claim to organizational, third-party, or associational standing. Neither argument is persuasive.

1. Plaintiff Isaac Winkles

Winkles has standing to challenge the CTA's beneficial owner provisions because the compelled disclosure of Winkles' sensitive personal information to FinCEN is a concrete, imminent injury that is traceable to the government, and redressable by a favorable decision. The Government does not dispute that the CTA will require Winkles, as the beneficial owner of at least one reporting entity, to submit his beneficial owner status and information to FinCEN. As a result, because Winkles has "challeng[ed] the legality of government action" and is undisputedly the "object of the action," there is "little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62.

The Government disagrees. In its view, Winkles' injuries aren't traceable to the CTA or redressable by a favorable decision because he has already disclosed at least some of the required information while complying with other regulatory requirements, like "tax returns, passport forms, and bank account applications." (Doc. 24-1 at 19-20). The Government also argues that Winkles isn't injured by disclosing government-provided information like a passport number to the government. *Id.* at 20.

Yet federal subdivisions like FinCEN must still follow standard judicial procedures to obtain even federally provided information without an express authorization like the CTA's. And although the Government says that disclosure to FinCEN is no big deal because it's "no secret" that Winkles is the beneficial owner of at least one company, *id.*, the Government never explains why it needs to compel Winkles to disclose beneficial owner information at all if that information is so easily discovered by other means. After all, FinCEN already compels banks and other financial institutions to obtain nearly identical information from State entity customers and provide it to FinCEN. *See* 31 C.F.R. § 1010.230(a) (requiring "covered financial institutions" to "identify and verify beneficial owners of legal entity customers.").

The Government's standing arguments miss the mark for an additional reason: the injury to Winkles is not disclosure itself, but disclosure to FinCEN, the Treasury Department's criminal enforcement division. The mandatory disclosure of personal information to FinCEN for law-enforcement purposes satisfies the injury requirement for Winkles' First,

Fourth, and Fifth Amendment claims, since courts "accept as valid the merits of [the non-movant's] legal claims" for standing purposes when deciding a motion for summary judgment, *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 298 (2022), and Winkles has alleged that the CTA requires disclosure of "sensitive personal information to FinCEN for law enforcement purposes." (Doc. 1 at 4); *see also id.* at 11 ("Winkles will be subject to the Act's reporting requirements to give his sensitive personal information to FinCEN."); and *id.* at 12-14, 21 (describing the injury as disclosure to FinCEN). Thus, the Court "must assume" that the CTA violates constitutional "right[s] we must assume [Winkles] has." *Cruz*, 596 U.S. at 298.

Winkles also has standing to challenge the CTA's applicant disclosure requirement. Because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358, n.6 (1996), Winkles is obligated "to demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). In a pre-enforcement challenge like this one, the injury-in-fact requirement is met when the plaintiff "alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution" under that statute. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (internal quotation marks omitted).

Here, Winkles has submitted sworn testimony that he has "formed [other Alabama entities] in the past," and he "anticipate[s] forming other Alabama entities over the next few years." (Doc. 39-3 at 2). Because the CTA would impose serious criminal

penalties on Winkles for non-compliance with the CTA's applicant disclosure requirements, "it is not necessary that [Winkles] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). And because there is no doubt the CTA will be applied with its full force, "the plaintiffs' fear of prosecution [is] not imaginary or wholly speculative." *Susan B. Anthony List*, 573 U.S. at 160 (internal quotation marks omitted). As a result, Winkles has standing to challenge the CTA's applicant provisions because they present Winkles with a choice between compliance and felony prosecution. (Doc. 35-3 at 3) (Winkles' Affidavit: "[i]f I do not comply with these rules, I understand that I may face fines and even imprisonment.").

Finally, Winkles' standing to challenge the CTA's applicant and beneficial owner provisions on First, Fourth, and Fifth Amendment grounds gives him standing to challenge the CTA as a congressional overreach. Although "[i]ndividuals have no standing to complain simply that their Government is violating the law," Winkles "is a party to an otherwise justiciable case or controversy," and is therefore allowed "to object that [his] injury results from disregard of the federal structure of our Government." *Bond v. United States*, 564 U.S. 211, 225-26 (2011).

2. National Small Business Association

The Government attacks NSBA's standing on three fronts, asserting that the NSBA lacks organizational, third party, and associational standing. When it comes to federal jurisdiction, however, standing on one leg is as good as standing on

three. Because Winkles is a member of the NSBA and has standing as an individual, the NSBA has associational standing.

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right." *Georgia Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1203 (11th Cir. 2018). "[O]rganizations can assert the standing of their members." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). That said, organizations can't merely allege that a member has standing—instead, "an organization must make specific allegations establishing that at least one identified member has suffered or will suffer harm." *Georgia Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1203 (11th Cir. 2018) (cleaned up).

NSBA has done so here. Winkles has standing on his own and has been a dues-paying member of the NSBA since 2021. (Doc. 39-2 at 4; Doc. 39-3 at 2). Furthermore, "the interests at stake are germane to the [NSBA]'s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). As a result, the NSBA has satisfied the requirements of associational standing.

Having determined that both Winkles and the NSBA have standing to challenge the CTA, the Court next considers whether Congress had the authority to enact it.

B. Constitutionality of the CTA

The powers of the federal government are expressly enumerated in the Constitution. *McCulloch*

v. Maryland, 4 Wheat. 316, 405 (1819). To protect individual liberty, the Founders also drafted the Constitution to ensure "separation and independence of the coordinate branches of the Federal Government," which "prevent[s] the accumulation of excessive power in any one branch." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Within the green pastures of its enumerated powers, however, Congress may frolic with "great latitude." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537 (2012).

Still, because enumeration itself "presupposes something not enumerated," Congress cannot range wherever it pleases. *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824). It's as simple as *expressio unius est exclusio alterius*: "The Constitution's express conferral of some powers makes clear that it does not grant others. And the federal government 'can exercise only the powers granted to it.'" *NFIB*, 567 U.S. at 534-35 (quoting *McCulloch*, 4 Wheat. at 405).

To be sure, a "[p]roper respect for a coordinate branch of the government requires that [a court] strike down an Act of Congress only if the lack of constitutional authority to pass the act in question is clearly demonstrated." *Id.* at 538 (cleaned up). But appropriate judicial deference to Congressional action ends at the borders of the Constitution, because "there can be no question that it is the responsibility of [the courts] to enforce the limits on federal power by striking down acts of Congress that transgress those limits." *Id.* After all, a law "beyond the power of Congress" is "no law at all." *Nigro v. United States*, 276 U.S. 332, 341 (1928).

The Government offers three sources of constitutional authority for Congress' enactment of the CTA. First, the Government argues that Congress has the power to enact the CTA under its foreign affairs powers. That is so, the Government says, because the political branches have plenary power to conduct foreign affairs, and Congress' motivating interest in curbing foreign money laundering and other malign foreign influences places the CTA under the aegis of those powers. Second, the Government argues that Congress has the power to enact the CTA via its Commerce Clause authority. Because many State entities engage in activities that qualify as or affect "commerce," the argument goes, the act of corporate formation itself is enough to invoke Congress' Commerce powers. Finally, the Government asserts that the CTA is a necessary and proper exercise of Congress' taxing power, since one purpose of the FinCEN database created by the CTA is to assist in efficient tax administration.

1. Foreign Affairs & National Security

The Government first turns to Congress' extensive powers over foreign affairs and national security and the Necessary and Proper Clause. The Government's theory is this: In enacting the CTA, "Congress concluded that collecting beneficial ownership information 'is needed to . . . protect vital Unite[d] States national security interests'; 'better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity'; and 'bring the United States into compliance with international anti-money laundering and countering

the financing of terrorism standards.'" (Doc. 24-1 at 27) (quoting Pub. L. 116-283 § 6402(5)).

And because the Executive Branch agrees with Congress about the "necessity" of the CTA, says the Government, "there is a rational relationship between FinCEN's collecting limited beneficial ownership and applicant information and advancing the national security and foreign policy interests of the United States." *Id.* The Government also contends that the Court should defer to the political branches' policy determination that compliance with international financial standards is best achieved through the CTA, and that the CTA is within Congress' foreign affairs and national security powers because foreign parties use domestic shell companies to harm the United States' interests. (Doc. 40 at 8). Not only that, but "the Court *must* defer to the political branches on these matters, not to advocacy groups or private citizens." *Id.* at 28 (emphasis added).

The Government is absolutely right to say that courts should defer to the political branches on matters of policy. As a matter of first principles, "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). This is so not only because foreign policy "should be undertaken only by those directly responsible to the people whose welfare they advance or imperil," but because "the Judiciary has neither aptitude, facilities nor responsibility" for those policies. *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948). Thus, judicial

deference to the political branches is most stringently required in the arena of foreign affairs.

All the same, the Court's "deference in matters of policy cannot . . . become abdication in matters of law," and its "respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *NFIB*, 567 U.S. at 538. As already explained, "[o]ur constitution limits the government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones." *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967). Of course, Congress' foreign affairs powers are different from its domestic powers in at least one important way: the enumerated powers limitation "is categorically true only in respect of our internal affairs." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-16 (1936).

In any event, Congress is bound by the Constitution's enumerated powers limitation here, because incorporation is an internal affair. It is blackletter law that "[c]orporations are creatures of state law." *Cort v. Ash*, 422 U.S. 66, 84 (1975), *abrogated on other grounds by Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 (1979). In fact, "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (holding that federal securities law did not preempt state law regulating corporate takeovers).

At the Constitutional Convention of 1787, both James Madison and Thomas Pinkney proposed

granting powers of incorporation to the federal government. 2 M. Farrand, *Records of the Federal Convention of 1787*, at 325 (1911). The defenders of these proposals made similar arguments to those the Government makes in defense of the CTA. James Wilson, for instance, claimed that federal incorporation was "necessary to prevent a State from obstructing the general welfare." *Id.* at 615. Even so, these proposals were rejected outright. *Id.* at 616. Although the Founders "were aware that leaving business regulation primarily to the individual states might cause friction within the overall American economy[, t]hey were more reluctant . . . to allow concentrations of economic power, which they visualized as a government-sponsored monopoly, and therefore chose" to leave incorporation to the States. Allen D. Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 Ohio St. L.J. 1037, 1041 (1986).

Apart from quasi-public corporations like the Tennessee Valley Authority and Amtrak (which were formed by acts of Congress), the Founders' deliberate choice to leave general incorporation to the States has gone unchanged, even at times when calls for federal incorporation were at a fever pitch and Congress was perhaps most willing to upset the balance of state and federal power. For instance, Congress rejected twenty bills to establish federal incorporation between 1903 and 1914 alone. *Id.* at 1049.

To be sure, the CTA is not a direct regulation of corporate formation. There are no preemption or commandeering concerns here, *contra* (Doc. 23-1 at 21 n.9), because the CTA does not establish general

federal incorporation or force States to demand beneficial owner and applicant information as a filing requirement for incorporation; rather, the CTA is a federal reporting requirement imposed on entities that voluntarily incorporate. Thus, the operative question in light of "[t]he underlying assumptions of our dual form of government," *Kelly v. Robinson*, 479 U.S. 36, 49 n.11 (1986) (citation omitted), is whether Congress' Foreign Affairs powers justify the CTA's regulation of "creatures of state law," which are ordinarily within the sovereign purview of the States. *Cort*, 422 U.S. at 84. In this case, the answer is no.

The Supreme Court's unanimous decision in *Bond v. United States* is instructive. 572 U.S. 844 (2014). In *Bond*, a woman inflicted "irritating" but ultimately harmless chemical burns on her husband's mistress. *Id.* at 861. For that, Bond was prosecuted and convicted for violating the Chemical Weapons Convention Implementation Act of 1998, which "ma[d]e it a federal crime for a person to use or possess any chemical weapon, and . . . punishe[d] violators with severe penalties." *Id.* at 848. The Chemical Weapons Act implemented the international Convention on Chemical Weapons "pursuant to the Federal Government's constitutionally enumerated power to make treaties." *Id.*

On appeal, the Supreme Court overturned Bond's conviction, ruling that the Chemical Weapons Act did not "reach purely local crimes." *Id.* at 860. Instead, the Court held that because "our constitutional structure leaves local criminal activity primarily to the States," courts "have generally declined to read federal law as intruding on that responsibility, unless Congress has

clearly indicated that the law should have such reach." *Id.* at 848. Thus, absent a clear indication from Congress, the Court concluded that Congress' treaty powers did not extend to Bond's "unremarkable" and "purely local" offense. *Id.*

Although *Bond*'s central question was one of statutory (rather than Constitutional) interpretation, the logical parallels between *Bond* and this case are obvious. For starters, Congress' treaty and foreign affairs powers are closely related. And like local criminal law, corporate formation has always been the province of the States. So although the CTA does not directly interfere with or commandeer State incorporation practices, the CTA still "convert[s] an astonishing amount of traditionally local . . . conduct into a matter for federal enforcement, and involve[s] a substantial extension of federal police resources." *Id.* at 863 (internal quotation marks omitted).

The CTA also cannot be justified as necessary and proper to carry out Congress' foreign affairs powers. When Congress invokes the Necessary and Proper Clause, it must "involve[] exercises of authority derivative of, and in service to, a granted power." *NFIB*, 567 U.S. at 560. This is a showing the Government has failed to make. Instead, the Government seems to argue that regulation of purely internal affairs may be necessary and proper to effectuate Congress' foreign affairs powers if foreign actors (or enough foreign actors) participate in those internal affairs to illicit ends.

The Court can find little support in history or precedent for that position. The *only* support, in fact, seems to be the CTA's congressional findings,

including the finding that "malign actors seek to conceal their ownership of [corporate] entities in the United States to facilitate illicit activity, . . . harming the national security interests of the United States and allies of the United States." (Doc. 24-1 at 26-28) (quoting Pub. L. 116-283 § 6402(3)). The Government offers these findings as proof that the CTA is "rationally related to the implementation of a constitutionally enumerated power" and thus is a necessary and proper exercise of Congress' foreign affairs powers. *Id.* at 26 (citing *United States v. Comstock*, 560 U.S. 126, 134 (2010)). But the CTA's congressional findings are not enough to conclude that a regulation in the purely domestic arena of incorporation is an "exercise[] of authority derivative of, and in service to" Congress' foreign affairs powers, especially in light of the States' historically exclusive governance of incorporation. *NFIB*, 567 U.S. at 560.

The Government also asserts that the Necessary and Proper Clause "extends not only to Article I, § 8 powers, but to 'all other Powers vested by th[e] Constitution in the Government of the United States, or in any Department or Officer thereof,'" (Doc. 40 at 11) (citing U.S. Const. art. I, § 8, cl. 18), but never explains what "other Powers" it could invoke in the arena of foreign affairs to justify the CTA. Instead, the Government cites Congress' finding that the CTA is needed to "bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards." (Doc. 24-1 at 27) (citing Pub. L. 116-283 § 6402(5)(E)).

Compliance with international standards may be good policy, but it is not enough to make the CTA

"necessary" or "proper." As admirable as Congress' goals may be, this Court's only job is to consider whether the CTA follows the Constitution, not whether it is good policy. *See Lester v. United States*, 921 F.3d 1306, 1318 (11th Cir. 2019) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)) (courts must "'say what the law is,' not what it should be."). The law is clear on this much: the Necessary and Proper Clause, "gives Congress authority to 'legislate on that vast mass of incidental powers which must be involved in the constitution,'" but "it does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *NFIB*, 567 U.S. at 559 (quoting *McCulloch*, 4 Wheat. at 411, 421).

The Government's reading of the Necessary and Proper Clause is far afield from that principle. It would sanction almost any exercise of Congressional power given the existence of a relevant international standard. Read that way, the Necessary and Proper Clause would give Congress carte blanche to do as it pleases, allowing it to "reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it." *NFIB*, 567 U.S. at 560; *see also Bond*, 572 U.S. at 877-78 (Scalia, J., concurring) (reasoning that Congress' general foreign affairs powers cannot "come[] with no implied subject matter limitations," otherwise "the possibilities of what the Federal Government may accomplish, with the right [international standard] in hand, are endless and hardly farfetched.").

Given the limits on Congress' authority under the Necessary and Proper Clause, *Bond* yields an unavoidable conclusion: the CTA is not authorized by

Congress' foreign affairs powers, because those powers do not extend to purely internal affairs, especially in an arena traditionally left to the States. Nor can Congress look to international standards or agreements to extend those powers, no matter how praiseworthy the policy goal, because "no agreement with a foreign nation," formal or informal, "can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957). As a result, this Court must look somewhere other than Congress' foreign policy powers to justify the CTA.

2. Commerce Clause

The Government also says that the CTA is within Congress' power under the Commerce Clause and the Necessary and Proper Clause. In relevant part, the Constitution gives Congress the "Power . . . To regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. As for the power to regulate foreign commerce, "jurisprudence addressing Congress's positive Foreign Commerce Clause power is sparse," and "the Supreme Court has never clearly articulated the bounds of the positive foreign commerce power." *United States v. Davila-Mendoza*, 972 F.3d 1264, 1270 (11th Cir. 2020). That said, the Court "assume[s], without deciding, that the Foreign Commerce Clause has the same scope as the Interstate Commerce Clause," *id.* at 1271, so the analysis is identical.

Although "the path of" Commerce Clause jurisprudence "has not always run smooth . . . it is now well established that Congress has broad authority under the Clause." *NFIB*, 567 U.S. at 549. The

Supreme Court has identified "three broad categories of activity that Congress may regulate under its commerce power." *United States v. Morrison*, 529 U.S. 598, 608 (2000).

In the Government's view, the CTA's regulations fit squarely within all three categories: (1) the channels of interstate and foreign commerce, (2) the instrumentalities of, and things and persons in, interstate and foreign commerce, and (3) activities that have a substantial effect on interstate and foreign commerce. (Doc. 24-1 at 28); *see Morrison*, 529 U.S. at 609. For brevity's sake, and in line with the Government's arguments, the Court addresses the channels and instrumentalities of commerce as a single category.

a) *Channels and Instrumentalities of Commerce*

First, the Government says the CTA is a valid regulation of the channels and instrumentalities of commerce because "[b]oth the record and common sense indicate that entities constituting CTA reporting companies frequently utilize the channels of interstate commerce." (Doc. 24-1 at 33). Yet this argument can't be reconciled with the plain text of the CTA.

It is "well-settled" that Congress has the power to regulate "those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature." *United States v. Orito*, 413 U.S. 139, 144 (1973). The channels of commerce are "interstate transportation routes through which persons and goods move." *United*

States v. Ballinger, 395 F.3d 1218, 1225 (11th Cir. 2005) (quoting *Morrison*, 529 U.S. at 613 n.5). These transportation routes "include highways, railroads, navigable waters, and airspace, as well as telecommunications networks, and national securities markets." *Id.* at 1225-26 (cleaned up and collecting cases).

Congress can also "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558 (1995). Unlike channels of commerce, instrumentalities of commerce make the conduct of interstate commerce possible—typically "the people and things themselves moving in commerce, including automobiles, airplanes, boats, and shipments of goods," along with "pagers, telephones, and mobile phones." *Ballinger*, 395 F.3d at 1226 (cleaned up and collecting cases).

The plain text of the CTA does not regulate the channels and instrumentalities of commerce, let alone commercial or economic activity. The CTA applies to "reporting companies," defined (with a list of exceptions) as entities "created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe." 31 U.S.C. § 5336(a)(11). The CTA then mandates that those entities report information about their beneficial owners and applicants to FinCEN. *Id.* § 5336(b)(1)-(2)(A). The word "commerce," or references to any

channel or instrumentality of commerce, are nowhere to be found in the CTA. *See* 31 U.S.C. § 5336.

The Government points to the Supreme Court's decisions in *California Bankers Ass'n v. Shultz* and *American Power & Light Co. v. Sec. & Exch. Comm'n* to prove that reporting entities "frequently use the channels of commerce[, so] Congress can impose conditions on that use." (Doc. 40 at 13). The Government reads those cases too broadly.

In *Shultz*, banks and bank customers sought to enjoin the enforcement of reporting and record keeping requirements authorized by the Bank Secrecy Act and promulgated by the Treasury Department. *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 25-26 (1974). First, the *Shultz* plaintiffs challenged the Treasury Department's requirement that banks maintain copies of each check for more than $100, as well as "extension[s] of credit in an amount exceeding $5,000 except those secured by interest in real property," as well as any "advice, request, or instruction . . . regarding the transfer of funds, currency, or other money or credit in amounts exceeding $10,000 to a person, account, or place outside the United States." *Id.* at 34.

Second, the *Shultz* plaintiffs challenged the BSA's requirement that "anyone connected with the transportation into or out of the country of monetary instruments exceeding $5,000 on any one occasion" must report the transaction. In tandem, they also challenged the BSA's grant of authority to the Treasury Secretary "to prescribe regulations requiring residents and citizens of the United States, as well as nonresidents in the United States and doing business

therein, to maintain records and file reports with respect to their transactions and relationships with foreign financial agencies." *Id.* at 36-37.

Third, the *Shultz* plaintiffs challenged the Treasury Secretary's requirement "that financial institutions file" a report "for each deposit, withdrawal, exchange of currency, or other payment or transfer 'which involves a transaction in currency of more than $10,000.'" *Id.* at 39.

Shultz is not on point for two reasons. First, *Shultz* did not address Congress' constitutional authority to enact the Bank Secrecy Act, only "the Act's asserted violation of specific constitutional prohibitions," the First, Fourth, and Fifth Amendments. *Id.* at 30, 44. Second, *Shultz* also illustrates the CTA's over-inclusiveness problem: unlike the challenged disclosure requirements in *Shultz*, the CTA regulates most State entities, not just entities that move in commerce.

The reporting and record-keeping requirements at issue in *Shultz* were upheld largely because they governed negotiable instruments and money *actually* moving in foreign and interstate commerce. As the *Shultz* Court concluded, Congress "was not limited to any one particular approach to effectuate its concern that negotiable instruments moving in the channels of [interstate] commerce were significantly aiding criminal enterprise." *Id.* at 46. Further, the BSA's requirements were imposed on banks, not bank customers, because "Congress recognized that the use of financial institutions, both domestic and foreign, in furtherance of activities designed to evade the

regulatory mechanisms of the United States, had markedly increased." *Id.* at 38.

In sum, *Shultz* doesn't stand for the principle that Congress may regulate an entire class whenever some sub-class engages in commerce; *Shultz* affirms that Congress may regulate a class's use of the channels and instrumentalities of commerce based on the activities of a sub-class. That is why Congress "could have made the transmission of the proceeds of any criminal activity by negotiable instruments *in interstate or foreign commerce* a separate criminal offense . . . [or] required that each individual engaging in the sending of negotiable instruments *through the channels of commerce* maintain a record of such action." *Id.* at 47 (emphasis added). But that is as far as *Shultz* goes.

American Power & Light Co. v. Sec. & Exch. Comm'n further proves the point. 329 U.S. 90 (1946). There, two public utility holding companies challenged congressional authority to enact the Public Utility Holding Act, which authorized the Securities and Exchange Commission to require holding companies and their subsidiaries to ensure that their structure "d[id] not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders." *Id.* at 97. Both plaintiffs in *American Power & Light* were part of the same corporate structure, composed of an umbrella corporation, five sub-holding companies (including the plaintiffs), and 237 "direct and indirect subsidiaries." *Id.* at 95-96. This "vast system embrace[d] utility properties in no fewer than 32

states from New Jersey to Oregon and from Minnesota to Florida, as well as in 12 foreign countries." *Id.* at 98.

The Supreme Court affirmed the constitutionality of the act, noting first that the challenged statute was "directed solely to public utility holding company systems that use[d] the channels of interstate commerce." 329 U.S. at 100. The Court held that:

> Congress, of course, has undoubted power under the commerce clause to impose relevant conditions and requirements *on those who use the channels of interstate commerce* so that those channels will not be conduits for promoting or perpetuating economic evils. Thus *to the extent that corporate business is transacted through such channels*, affecting commerce in more states than one, Congress may act directly with respect to that business to protect what it conceives to be the national welfare. It may prescribe appropriate regulations and determine the conditions under which that business may be pursued.

Id. at 99-100 (emphasis added) (citations omitted).

Thus, the Government misses the mark when it argues that the Commerce Clause allows Congress to regulate an entire class just because *some* members of the class use the channels and instrumentalities of commerce. The shared principle between *Shultz* and *American Power & Light Co.* is that Congress may "regulate the channels and instrumentalities of commerce . . . to prohibit their use for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce and is purely local in

nature." *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005) (affirming Congressional power to prohibit destruction of religious property "in or affect[ing] interstate or foreign commerce."). The Commerce Clause thus allows Congress to regulate "commerce to the extent of forbidding and punishing the use of such commerce," but no further. *Brooks v. United States*, 267 U.S. 432, 436 (1925) (emphasis added).

These cases also illustrate how easily Congress could have written the CTA to pass constitutional muster. For instance, nothing in *Shultz* or *American Power & Light Co.* would bar Congress from imposing the CTA's disclosure requirements on State entities as soon as they engaged in commerce, or from prohibiting the use of interstate commerce to launder money, "evade taxes, hide . . . illicit wealth, and defraud employees and customers." Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59,501. Indeed, Congress has already done so in countless other statutes. *See, e.g.*, 18 U.S.C. § 1343 (criminalizing the communication of information "in interstate or foreign commerce" for the purpose of wire fraud).

But that is not what the CTA does. Because the CTA doesn't regulate the channels and instrumentalities of commerce or prevent their use for a specific purpose, it cannot be justified as a valid regulation of those channels and instrumentalities.

b) *Substantial effect on Interstate and Foreign Commerce*

The Government also says that the CTA is within Congress' commerce power because "Congress

rationally concluded that the ability of certain legal entities to withhold beneficial ownership and applicant information, taken in the aggregate, substantially affects interstate commerce." (Doc. 24-1 at 29) (cleaned up). Indeed, Congress has broad Commerce Clause power "extend[ing] to activities that have a substantial effect on interstate commerce," including "activities that do so only when aggregated with similar activities of others." *NFIB*, 567 U.S. at 549 (internal quotation marks omitted).

In brief, this "substantial effects" doctrine allows Congress to regulate purely intrastate, non-economic activity that (1) has a substantial effect on interstate commerce in the aggregate, when (2) the regulation is in the service of a comprehensive statute that regulates commercial activity on its face, and (3) regulation of the non-economic, non-commercial activity is necessary to make the broader regulation effective. Yet even under this expansive doctrine, the Commerce Clause does not extend far enough to sanction the CTA.

First, the *future* activities of state entities are not enough to invoke Congress' "substantial effects" commerce powers. Even a near certainty of future conduct is insufficient—"[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions." *NFIB*, 567 U.S. at 557. Congress may "anticipate the effects on commerce of an economic activity," but it has never been "permitted . . . to anticipate that activity itself in order to regulate individuals not currently engaged in commerce." *NFIB*, 567 U.S. at 549. The Supreme

Court's commerce-clause jurisprudence has always "involved preexisting economic activity." *Id.*

If future activities are off the table, a substantial effects justification for the CTA is limited to two possibilities: either (1) entity formation itself is a commercial activity that substantially affects interstate commerce, or (2) the fact that "many entities subject to the CTA *do engage* in interstate commercial activity" is enough to extend the Commerce power to a regulation of incorporated entities. (Doc. 24-1 at 30) (emphasis added). The Government wisely hangs its hat on the latter option and concedes that "[i]t is the activities of these entities, not the mere fact that they submitted documents to a Secretary of State, that implicates the Commerce Clause and permits Congress to exercise its authority." (Doc. 40 at 12).

That brings us to the central question: Does Congress have authority under the Commerce Clause to regulate non-commercial, intrastate activity when "certain entities, which have availed themselves of States' incorporation laws, use the channels of commerce, and their anonymous operations substantially affect interstate and foreign commerce?" (Doc. 40 at 11). The Supreme Court's Commerce Clause decisions all point to the same conclusion: No.

For starters, "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." *NFIB*, 567 U.S. at 549. The Court cannot find, and the parties have not identified, any other State or federal law like the CTA. The Government correctly points out that Congress routinely requires entities to submit

information to the government without a suspicion of wrongdoing, but the cases it cites in support are not on point. (Doc. 40 at 11) (citing *Helvering v. Mitchell*, 303 U.S. 393, 399 (1938) (upholding statute criminalizing tax evasion as an exercise of Congress' enumerated taxing power); and *Elec. Bond & Share Co. v. SEC*, 303 U.S. 419, 432-33, 437 (upholding public utility holding company regulation where petitioners conceded that their corporate structure and operations "involve[d] continuous and extensive use of the mails and instrumentalities of interstate commerce.")).

Furthermore, "[i]n addition to being a historical anomaly," *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020), the CTA runs into trouble because it is not a facial regulation of commercial activity, a hallmark of valid substantial effects legislation. *United States v. Morrison*, 529 U.S. 598, 613 (2000). As already noted, the Government concedes that "submitt[ing] documents to a Secretary of State" does not "implicate[] the Commerce Clause." (Doc. 40 at 12). Thus, the Government's real argument is that the connection between the act of incorporation and the activities Congress sought to curb through the CTA is strong enough to "permit[] Congress to exercise its authority." *Id.* But the connection between incorporation and criminal activity is far too attenuated to justify the CTA. Indeed, if such an attenuated connection were enough, Congress' commerce powers would be functionally limitless.

The Supreme Court's decision in *United States v. Morrison* is helpful on this point: Congress, it said, can validly regulate intrastate activity where the

regulated activity is "economic in nature." *Morrison*, 529 U.S. at 613. The *Morrison* Court considered a challenge to a provision of the Violence Against Women Act that "provide[d] a federal civil remedy for the victims of gender-motivated violence" without requiring "a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action." *Morrison*, 529 U.S. at 601-02, 606 (2000).

In defense of the law, the government asserted that it fell within Congress' substantial effects commerce power, arguing that "gender-motivated violence affect[ed] interstate commerce by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; [and] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." *Morrison*, 529 U.S. at 615 (cleaned up).

The *Morrison* Court rejected the government's substantial effects justification, in large part because "the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce" would expand Congress' power far beyond constitutional boundaries. *Id.* The chief indicator of this excessive attenuation was that "[i]f accepted, [the government's] reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." *Id.*

The *Morrison* Court also observed that although there is no "categorical rule against aggregating the

effects of any noneconomic activity in order to decide these cases," the Supreme Court has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613. And because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity," the Court concluded that aggregation of effects was not permissible. *Id.*

Finally, as the Supreme Court later explained, the cause of action created by the Violence Against Women Act at issue in *Morrison* was "unconstitutional because . . . it did not regulate economic activity." *Raich*, 545 U.S. 1, 25 (distinguishing *Morrison*). *Morrison* thus established a "clear pattern of analysis" for Commerce Clause cases: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.*

In *Gonzalez v. Raich*, the Supreme Court applied *Morrison*'s "clear pattern of analysis" in upholding the federal regulation of purely intrastate manufacturing and possession of marijuana. *Id.* In *Raich*, individuals who used medical marijuana, which was legal under California law, challenged the enforcement of the Controlled Substances Act after federal agents destroyed a plaintiff's personal cannabis plants. *Id.* at 6-7. Among other things, the *Raich* plaintiffs challenged the CSA as a violation of the Commerce Clause "to the extent it prevent[ed] them from possessing, obtaining, or manufacturing cannabis for their personal medical use." *Id.*

Unlike the Plaintiffs here, the *Raich* plaintiffs did "not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control

Act, was well within Congress' commerce power." *Id.* at 15. Instead, they asserted a "limited," as-applied claim that "the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause." *Id.*

On those narrow grounds, the *Raich* Court held that the CSA was a valid exercise of Congress' commerce power because, unlike the domestic violence at issue in *Morrison*, growing marijuana even in small amounts was a "quintessentially economic" activity, defined as "the production, distribution, and consumption of commodities." *Id.* at 25-26 (citation omitted). Thus, "[b]ecause the CSA . . . directly regulate[d] economic, commercial activity . . . *Morrison* cast[] no doubt on its constitutionality." *Id.* at 26.

Leaning on the legislative purpose of the CTA, the Government asserts that *Raich* governs here because Congress similarly sought to regulate "quintessentially economic" activities through the CTA. (Doc. 24-1 at 31). Such activities include the "use [of] shell companies to evade taxes, hide . . . illicit wealth, and defraud employees and customers," as well as money laundering. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59,501. The Court agrees that "it is difficult to imagine a more obviously commercial activity than engaging in financial transactions involving the profits of unlawful activity." *United States v. Goodwin*, 141 F.3d 394, 399 (2d Cir. 1997).

Even so, the Government has conceded that the act of incorporation is not enough to invoke the Commerce power, so it runs into the same problem here as it does elsewhere—the plain text of the CTA does not regulate the quintessentially economic activities the Government asserts or require entities to engage in those activities to be regulated. As repeatedly shown, incorporation is "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567.

Here, as in *Morrison*, "the but-for causal chain from" incorporation "to every attenuated effect upon interstate commerce" is too attenuated to be justified under the Commerce Clause. *Morrison*, 529 U.S. at 615. Courts may not "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. Thus, "[n]o matter how inherently integrated" corporate formation is with the activities of those entities, "they are not the same thing: They involve different transactions, entered into at different times, with different" parties. *NFIB*, 567 U.S. at 558 (internal quotation marks omitted). Because "[t]he proximity and degree of connection between" the formation of an entity and its activities is too attenuated, "[s]uch a law cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'" *Id.*; *see also Morrison*, 529 U.S. at 616 n.6 (noting that "the but-for causal chain must have its limits in the Commerce Clause area"). Indeed, such a permissive "view of causation . . . would obliterate the distinction between what is national and what is local

in the activities of commerce." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935).

The Government also justifies the CTA as a "general regulatory statute bearing a substantial relation to commerce." (Doc. 40 at 11-12) (citing *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1273 (11th Cir. 2007)). It is true that Congress has "substantial leeway to regulate purely intrastate activity (whether economic or not) that it deems to have the capability, in the aggregate, of frustrating the broader regulation of interstate economic activity." *United States v. Maxwell*, 446 F.3d 1210, 1215 (11th Cir. 2006). Congress' "substantial leeway" includes the "aggregation of economic effects . . . where the federal action in question is 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1272 (quoting *Lopez*, 514 U.S. at 561).

There are three problems with this argument. First, the "comprehensive regulatory scheme" framework does not apply to a "single-subject statute whose single subject is itself non-economic." *Maxwell*, 446 F.3d at 1216 n.6 (noting that appellant was "challeng[ing] a component of a broader regulatory scheme whose subject [was] decidedly economic."). The CTA is just such a statute. As already shown, it is not enough that some sub-class of entities engage in illicit, commercial, or economic activity. Nor are legislative statements that the CTA is a "comprehensive bipartisan reform of . . . anti-money laundering laws"

enough to make it so. (Doc. 24-1 at 30-31) (quoting 166 Cong. Rec. S7289, S7309 (Dec. 9, 2020) (statement of Sen. Brown)).

Rather, unlike a "constitutionally 'comprehensive'" statute that "regulate[s] an entire market for a commodity," the CTA regulates entities, owners, and applicants that incorporate an entity with their state, an "isolated, discrete act[]" like the statutes "that were the subject of regulation in *Lopez* and *Morrison*." *Maxwell*, 466 F.3d at 1217 n.7. In other words, incorporation is a single, discrete action far closer to "possession of a gun in a school zone or gender-motivated violence" than a general regulation of controlled substances. *Id.* at 1216 n.6.

Second, the Government's argument misses that the "essential part of a larger regulation" analysis typically comes into play when assessing whether an exercise of the Commerce power is necessary and proper, not whether the exercise itself is within Congress' Commerce power. *See NFIB*, 567 U.S. at 558-59 (treating the Commerce Clause and Necessary and Proper Clause analyses as distinct inquiries). The "comprehensive regulatory scheme" analysis "poses a problem for . . . as-applied challenge[s], because when a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1272 (quotation marks omitted). But the Government's argument fails to explain how this principle applies in the context of the facial challenge here, besides its repeated assertions that Congress need only use means that are "rationally related" to its

commerce power. (Doc. 24-1 at 26) (citing *Comstock*, 560 U.S. at 134).

Once again, these arguments simply do not address the fact that the CTA does not regulate economic or commercial activity on its face. More than that, the Government's core cases on this point all involve statutes that did facially regulate commerce. *See, e.g.*, *Raich*, 545 U.S. at 15 (noting that there was no "dispute that passage of the CSA . . . was well within Congress' commerce power."); *Maxwell*, 446 F.3d at 1212 (rejecting as-applied challenge to 18 U.S.C. § 2252A(a)(5)(B), which prohibits possession or access to child pornography that is "transported [or produced] using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means").

Third, the Government's argument that the CTA is necessary and proper to carry out a legitimate exercise of Congress' commerce powers fails because the CTA is far from essential. *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1272. FinCEN's 2016 Customer Due Diligence rule requires "covered financial institutions" to "identify and verify beneficial owners of legal entity customers." 31 C.F.R. § 1010.230(a). And how does the CDD rule define a "legal entity customer?" As "a corporation, limited liability company, or other entity that is created by the filing of a public document with a Secretary of State or similar office, a general partnership, and any similar entity formed under the laws of a foreign jurisdiction that opens an account," unless the entity fits into one of sixteen exemptions, eight fewer than the CTA. *Id.* § 1010.230(e)(1)-(2).

The CDD rule defines beneficial owner broadly as well: "Each individual . . . who owns, directly or indirectly, 25 percent or more" of the entity; has "significant responsibility to control, manage, or direct a legal entity," including "a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer)" and "[a]ny other individual who regularly performs similar functions." *Id.* § 1010.230(d)(1)-(2).

To be clear, FinCEN's CDD rule and the CTA provide FinCEN with nearly identical information, but the CDD rule does so in a constitutionally acceptable manner. *See Shultz*, 416 U.S. at 49 (approving similar bank record-keeping requirements). Even the CTA itself acknowledges the similarity. *See* 31 U.S.C. § 5336(b)(1)(F) (requiring the Secretary of the Treasury to promulgate regulations that "collect [beneficial owner and applicant] information . . . in a form and manner that ensures the information is highly useful in . . . confirming beneficial ownership information provided to financial institutions." (emphasis added); *see also* Pub. L. 116-283 § 6402 (6)(B) "It is the sense of Congress that . . . [collection of] beneficial ownership information . . . [will] confirm beneficial ownership information provided to financial institutions.").

Even at the outer limits of the Necessary and Proper Clause, the practical similarities between these two regulations make it hard to justify a conclusion that "failure to regulate" corporate entities upon formation would "leave a gaping hole" in Congress' fight against illicit corporate activity and

money laundering. *Raich*, 545 U.S. at 22; *cf. NFIB*, 567 U.S. at 619 (Ginsburg, J., concurring in part) (reasoning that the ACA's individual insurance mandate was necessary and proper because "[w]ithout the individual mandate . . . guaranteed-issue and community-rating requirements would trigger an adverse-selection death spiral in the health-insurance market").

Finally, as our analysis began with the text, so too does it end with it. *Octane Fitness*, 572 U.S. at 553. And the text of the CTA is missing a crucial component of valid substantial effects legislation: it "has no express jurisdictional element which might limit its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562; *see also* 31 U.S.C. § 5336. The inclusion of a jurisdictional hook is standard operating procedure for Commerce Clause legislation for good reason—it "precludes any serious challenge to the constitutionality of [a] statute as beyond the Commerce power, because it guarantees 'a legitimate nexus with interstate commerce.'" *Goodwin*, 141 F.3d at 400 (quoting *Lopez*, 514 U.S. at 561).

The absence of a jurisdictional hook from the CTA is even more mystifying because Congress knows how to include one when it wants to. So commonplace are these jurisdictional phrases that, for purposes of statutory interpretation, courts assume that "Congress uses different modifiers to the word 'commerce' in the design and enactment of its statutes." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). When Congress legislates pursuant to its

Commerce Clause authority, "[t]he phrase 'affecting commerce' indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause," while "the general words 'in commerce' and the specific phrase 'engaged in commerce' are understood to have a more limited reach." *Id.*

There are many examples of this principle, including a recent Eleventh Circuit case which upheld 18 U.S.C. § 231(a)(3), a statute "which prohibits impeding law enforcement officers during a civil disorder affecting interstate commerce." *United States v. Pugh*, 90 F.4th 1318 (11th Cir. 2024). Other examples abound—for instance, Congress has set wage and hour requirements for "[e]nterprise[s] engaged in commerce or in the production of goods for commerce," 29 U.S.C. § 203(s)(1), and imposed registration requirements on "any person engaged in the business of manufacturing gambling devices, if the activities of such business in any way affect interstate or foreign commerce." 15 U.S.C. § 1173(a); *see also Ballinger*, 395 F.3d at 1229 (collecting statutes).

Faced with the loud silence of the text, the Government argues that Congress *meant* to regulate interstate and foreign commerce in the CTA: "The CTA is authorized based on the undisputed facts that certain entities, which have availed themselves of States' incorporation laws, use the channels of commerce, and their anonymous operations substantially affect interstate and foreign commerce." (Doc. 40 at 11); *see also id.* (citing to Congressional findings and legislative history); and (Doc. 24-1 at 29) (citing Congressional findings that the "collection of

beneficial ownership information is needed to protect interstate commerce.") (cleaned up).

In any event, what Congress intended to do is not the Court's animating concern, because "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Of course, the presumption that Congressional action is constitutional gives the CTA a significant head start. *United States v. Ruggiero*, 791 F.3d 1281, 1284 (11th Cir. 2015). And yet even with that head start, "the most formidable argument[s] concerning the statute's purposes c[an] not overcome the clarity [found] in the statute's text." *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012). Congress, for good or ill, "says in a statute what it means and means in a statute what it says." *Carcieri v. Salazar*, 555 U.S. 379, 392 (2009).

As for appeals to congressional findings, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Morrison*, 529 U.S. at 614 (cleaned up). On the contrary, "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." *Lopez*, 514 U.S. at 557 n.2, (alteration in original) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S., 241, 273 (Black, J., concurring)). And

congressional findings lose their weight in the face of the Government's failure to articulate limiting principles for its Commerce Clause arguments, which makes "the concern . . . that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seem[] well founded." *Morrison*, 529 U.S. at 615. As a result, "Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that [courts] have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Id.*

All the same, maybe Congress' omission of a jurisdictional hook from the CTA was just inartful drafting. No matter, "it is beyond [the Court's] province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result." *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (cleaned up); *see also Arizona v. Mayorkas,* 143 S. Ct. 478, 479 (2022) (Gorsuch, J., dissenting) (observing that federal courts are "court[s] of law, not policymakers of last resort."). Because "[i]t is emphatically the province and duty of" this Court to interpret the law, not write it, the Court cannot amend the CTA to include a jurisdictional hook. *Marbury*, 5 U.S. at 177. Only Congress can do that.

Because the CTA does not regulate commerce on its face, contain a jurisdictional hook, or serve as an essential part of a comprehensive regulatory scheme, it falls outside Congress' power to regulate non-commercial, intrastate activity.

C. Taxing Power & Necessary and Proper Clause

The Court turns finally to the Government's argument that the CTA is justified by Congress' taxing power and the Necessary and Proper Clause.

The Government first argues that Plaintiffs have conceded the CTA may be a proper application of Congress' taxing power, and so their facial challenge must fail. (Doc. 40 at 14) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). That is a misreading of Plaintiffs' brief, which said that "[i]f Congress were to limit use and access of the FinCEN database to tax collection purposes, it might be justified under the Necessary and Proper Clause as rationally related to the Taxing Power." (Doc. 39 at 21). That statement does not amount to a concession that the CTA might actually be a valid exercise of the taxing power.

Moving on, the Plaintiffs do not dispute Congress' power to levy taxes. *See* U.S. Const. Art. I, § 8, cl. 1; amend. XVI. And although the CTA's civil penalties, like all civil penalties, "yield[] the essential feature of any tax" by "produc[ing] at least some revenue for the Government," the Government does not claim that the CTA's civil penalties are a tax. *NFIB*, 567 U.S. at 564. Nor could it, since revenue production is necessary but not sufficient to qualify a government action as a tax. Under *NFIB*'s "functional approach," the CTA's civil penalties are not a tax: they are not paid into the Treasury and have no income thresholds; the penalty amounts are fixed rather than variable; the penalties are not "found in the Internal Revenue Code and enforced by the IRS"; and the penalties are imposed

only on those who "knowingly" or "willfully" violate the law, and "[s]uch scienter requirements are typical of punitive statutes," not taxes. *Id.* at 564-66.

Instead, the Government posits that "the collection of beneficial ownership information is necessary and proper to ensure taxable income is appropriately reported," and that Congress recognized this relationship by "draft[ing] the CTA to allow '[o]fficers and employees of the Department of the Treasury [to] obtain access to beneficial ownership information for tax administration purposes[.]'" (Doc. 24-1 at 36-37) (quoting 31 U.S.C. § 5336(c)(5)(B)). In other words, the CTA's regulations are constitutional because they are sufficiently "incidental" to the taxing power. *McCulloch*, 4 Wheat. at 418.

Although the relationship between disclosure provisions and the taxing power is "well recognized," (Doc. 40 at 15), the cases relied on by the Government illustrate that providing access to the CTA's database for tax administration purposes is not enough to establish a sufficiently close relationship here. *See Helvering*, 303 U.S. at 399 (noting that tax return disclosure requirements are an exercise of the taxing power itself); *Kramer*, 2008 WL 313827, at *3 (holding that a federal occupational tax and registration requirement for gun manufacturers, dealers, and importers was a "legitimate exercise[] of Congress' taxation power").

As previously discussed, the Necessary and Proper Clause will not justify an act of Congress unless it "involve[s] exercises of authority derivative of, and in service to, a granted power." *NFIB*, 567 U.S. at 560. Thus, Congress' broad authority under the

Necessary and Proper Clause depends on the force and vigor of Congress' enumerated powers for its existence. Put plainly, "[w]hen the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain." *Comstock*, 560 U.S. at 150 (Kennedy, J., concurring); *but see* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 186 (2003) (stating that the Founders believed the Clause "did not go 'a single step beyond the delegated powers.'").

The chain here is weak indeed. It would be a "substantial expansion of federal authority" to permit Congress to bring its taxing power to bear just by collecting "useful" data and allowing tax-enforcement officials access to that data. *NFIB*, 567 U.S. at 560. Read that way, the Necessary and Proper Clause would sanction any law that provided for the collection of information useful for tax administration and provided tax officials with access. All Congress would have to do to craft a constitutional law is simply impose a disclosure requirement and give tax officials access to the information.

That kind of unfettered legislative power "is in no way an authority that is 'narrow in scope,' or 'incidental' to the exercise of the commerce power." *Id.* (citations omitted). Thus, "even if" the CTA's provisions were "necessary," "such an expansion of federal power is not a 'proper' means for making those [policy goals] effective." *Id.*

IV. CONCLUSION

The Corporate Transparency Act is unconstitutional because it cannot be justified as an exercise of Congress' enumerated powers. This conclusion makes it unnecessary to decide whether the CTA violates the First, Fourth, and Fifth Amendments.

For these reasons, the Plaintiffs are entitled to summary judgment as a matter of law. The Court **GRANTS** the Plaintiffs' Motion for Summary Judgment (Doc. 23) and **DENIES** the Defendant's Motion to Dismiss or Alternative Cross Motion for Summary Judgment (Doc. 24). The Court will separately issue a final judgment.

DONE and **ORDERED** March 1, 2024.

[handwritten: signature]
LILES C. BURKE
UNITED STATES
DISTRICT JUDGE

Appendix C

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, §8, cl.3

The Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Pub. L. No. 116-283, tit. LXIV, 134 Stat. 4604 (2021)

Sec. 6401. Short Title.

This title may be cited as the "Corporate Transparency Act".

Sec. 6402. Sense of Congress.

It is the sense of Congress that—

(1) more than 2,000,000 corporations and limited liability companies are being formed under the laws of the States each year;

(2) most or all States do not require information about the beneficial owners of the corporations, limited liability companies, or other similar entities formed under the laws of the State;

(3) malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption, harming the national security interests of the United States and allies of the United States;

(4) money launderers and others involved in commercial activity intentionally conduct transactions through corporate structures in order to evade detection, and may layer such structures, much like Russian nesting "Matryoshka" dolls, across various secretive jurisdictions such that each time an investigator obtains ownership records for a domestic or foreign entity, the newly identified entity is yet another corporate entity, necessitating a repeat of the same process;

(5) Federal legislation providing for the collection of beneficial ownership information for corporations, limited liability companies, or other similar entities formed under the laws of the States is needed to—

(A) set a clear, Federal standard for incorporation practices;

(B) protect vital Unites States national security interests;

(C) protect interstate and foreign commerce;

(D) better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity; and

(E) bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards;

(6) beneficial ownership information collected under the amendments made by this title is sensitive information and will be directly available only to authorized government authorities, subject to effective safeguards and controls, to—

(A) facilitate important national security, intelligence, and law enforcement activities; and

(B) confirm beneficial ownership information provided to financial institutions to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law;

(7) consistent with applicable law, the Secretary of the Treasury shall—

(A) maintain the information described in paragraph (1) in a secure, nonpublic database, using information security methods and techniques that are appropriate

to protect nonclassified information systems at the highest security level; and

(B) take all steps, including regular auditing, to ensure that government authorities accessing beneficial ownership information do so only for authorized purposes consistent with this title; and

(8) in prescribing regulations to provide for the reporting of beneficial ownership information, the Secretary shall, to the greatest extent practicable consistent with the purposes of this title—

(A) seek to minimize burdens on reporting companies associated with the collection of beneficial ownership information;

(B) provide clarity to reporting companies concerning the identification of their beneficial owners; and

(C) collect information in a form and manner that is reasonably designed to generate a database that is highly useful to national security, intelligence, and law enforcement agencies and Federal functional regulators.

Sec. 6403. Beneficial Ownership Information Reporting Requirements.

(a) In General.—Subchapter II of chapter 53 of title 31, United States Code, as amended by sections 6306(a)(1), 6307(a), and 6313(a) of this division, is amended by adding at the end the following:

" § 5336. Beneficial ownership information reporting requirements

"(a) Definitions.—In this section:

"(1) Acceptable Identification Document.—The term 'acceptable identification document' means, with respect to an individual—

"(A) a nonexpired passport issued by the United States;

"(B) a nonexpired identification document issued by a State, local government, or Indian Tribe to the individual acting for the purpose of identification of that individual;

"(C) a nonexpired driver's license issued by a State; or

"(D) if the individual does not have a document described in subparagraph (A), (B), or (C), a nonexpired passport issued by a foreign government.

"(2) Applicant.—The term 'applicant' means any individual who—

"(A) files an application to form a corporation, limited liability company, or other similar entity under the laws of a State or Indian Tribe; or

"(B) registers or files an application to register a corporation, limited liability company, or other similar entity formed under the laws of a foreign country to do business in the United States by filing a document with the secretary of state or similar office under the laws of a State or Indian Tribe.

"(3) Beneficial Owner.—The term 'beneficial owner'—

"(A) means, with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—

"(i) exercises substantial control over the entity; or

"(ii) owns or controls not less than 25 percent of the ownership interests of the entity; and

"(B) does not include—

"(i) a minor child, as defined in the State in which the entity is formed, if the information of the parent or guardian of the minor child is reported in accordance with this section;

"(ii) an individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;

"(iii) an individual acting solely as an employee of a corporation, limited liability company, or other similar entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person;

"(iv) an individual whose only interest in a corporation, limited liability company, or other similar entity is through a right of inheritance; or

"(v) a creditor of a corporation, limited liability company, or other similar entity,

unless the creditor meets the requirements of subparagraph (A).

"(4) Director.—The term 'Director' means the Director of FinCEN.

"(5) FinCEN.—The term 'FinCEN' means the Financial Crimes Enforcement Network of the Department of the Treasury.

"(6) FinCEN Identifier.—The term 'FinCEN identifier' means the unique identifying number assigned by FinCEN to a person under this section.

"(7) Foreign Person.—The term 'foreign person' means a person who is not a United States person, as defined in section 7701(a) of the Internal Revenue Code of 1986.

"(8) Indian Tribe.—The term 'Indian Tribe' has the meaning given the term 'Indian tribe' in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5130).

"(9) Lawfully Admitted for Permanent Residence.—The term 'lawfully admitted for permanent residence' has the meaning given the term in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)).

"(10) Pooled Investment Vehicle.—The term 'pooled investment vehicle' means—

"(A) any investment company, as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)); or

"(B) any company that—

"(i) would be an investment company under that section but for the exclusion provided from that definition by paragraph (1) or (7) of section 3(c) of that Act (15 U.S.C. 80a-3(c)); and

"(ii) is identified by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the Securities and Exchange Commission.

"(11) Reporting Company.—The term 'reporting company'—

"(A) means a corporation, limited liability company, or other similar entity that is—

"(i) created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or

"(ii) formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe; and

"(B) does not include—

"(i) an issuer—

"(I) of a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*); or

"(II) that is required to file supplementary and periodic information under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d));

"(ii) an entity—

"(I) established under the laws of the United States, an Indian Tribe, a State, or a political subdivision of a State, or under an interstate compact between 2 or more States; and

"(II) that exercises governmental authority on behalf of the United States or any such Indian Tribe, State, or political subdivision;

"(iii) a bank, as defined in—

"(I) section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

"(II) section 2(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)); or

"(III) section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a));

"(iv) a Federal credit union or a State credit union (as those terms are defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752));

"(v) a bank holding company (as defined in section 2 of the Bank Holding

Company Act of 1956 (12 U.S.C. 1841)) or a savings and loan holding company (as defined in section 10(a) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)));

"(vi) a money transmitting business registered with the Secretary of the Treasury under section 5330;

"(vii) a broker or dealer (as those terms are defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)) that is registered under section 15 of that Act (15 U.S.C. 78o);

"(viii) an exchange or clearing agency (as those terms are defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)) that is registered under section 6 or 17A of that Act (15 U.S.C. 78f, 78q-1);

"(ix) any other entity not described in clause (i), (vii), or (viii) that is registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

"(x) an entity that—

"(I) is an investment company (as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3)) or an investment adviser (as defined in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2)); and

"(II) is registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.);

"(xi) an investment adviser—

"(I) described in section 203(*l*) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(*l*)); and

"(II) that has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the Securities and Exchange Commission;

"(xii) an insurance company (as defined in section 2 of the Investment Company Act of 1940 (15 U.S.C. 80a-2));

"(xiii) an entity that—

"(I) is an insurance producer that is authorized by a State and subject to supervision by the insurance commissioner or a similar official or agency of a State; and

"(II) has an operating presence at a physical office within the United States;

"(xiv)(I) a registered entity (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)); or

"(II) an entity that is—

"(aa)(AA) a futures commission merchant, introducing broker, swap dealer, major swap participant, commodity pool operator, or commodity trading advisor (as those terms are defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)); or

"(BB) a retail foreign exchange dealer, as described in section 2(c)(2)(B) of that Act (7 U.S.C. 2(c)(2)(B)); and

"(bb) registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.);

"(xv) a public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7212);

"(xvi) a public utility that provides telecommunications services, electrical power, natural gas, or water and sewer services within the United States;

"(xvii) a financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010 (12 U.S.C. 5463);

"(xviii) any pooled investment vehicle that is operated or advised by a person described in clause (iii), (iv), (vii), (x), or (xi);

"(xix) any—

"(I) organization that is described in section 501(c) of the Internal Revenue Code of 1986 (determined without regard to section 508(a) of such Code) and exempt from tax under section 501(a) of such Code, except that in the case of any such organization that loses an exemption from tax, such organization shall be considered to be continued to be described in this subclause for the 180-day period beginning on the date of the loss of such tax-exempt status;

"(II) political organization (as defined in section 527(e)(1) of such Code) that is exempt from tax under section 527(a) of such Code; or

"(III) trust described in paragraph (1) or (2) of section 4947(a) of such Code;

"(xx) any corporation, limited liability company, or other similar entity that—

"(I) operates exclusively to provide financial assistance to, or hold governance rights over, any entity described in clause (xix);

"(II) is a United States person;

"(III) is beneficially owned or controlled exclusively by 1 or more United States persons that are United States citizens or lawfully admitted for permanent residence; and

"(IV) derives at least a majority of its funding or revenue from 1 or more United States persons that are United States citizens or lawfully admitted for permanent residence;

"(xxi) any entity that—

"(I) employs more than 20 employees on a full-time basis in the United States;

"(II) filed in the previous year Federal income tax returns in the United States demonstrating more than $5,000,000 in gross receipts or sales in the aggregate, including the receipts or sales of—

"(aa) other entities owned by the entity; and

"(bb) other entities through which the entity operates; and

"(III) has an operating presence at a physical office within the United States;

"(xxii) any corporation, limited liability company, or other similar entity of which the ownership interests are owned or controlled, directly or indirectly, by 1 or

more entities described in clause (i), (ii), (iii), (iv), (v), (vii), (viii), (ix), (x), (xi), (xii), (xiii), (xiv), (xv), (xvi), (xvii) (xix), or (xxi);

"(xxiii) any corporation, limited liability company, or other similar entity—

"(I) in existence for over 1 year;

"(II) that is not engaged in active business;

"(III) that is not owned, directly or indirectly, by a foreign person;

"(IV) that has not, in the preceding 12-month period, experienced a change in ownership or sent or received funds in an amount greater than $1,000 (including all funds sent to or received from any source through a financial account or accounts in which the entity, or an affiliate of the entity, maintains an interest); and

"(V) that does not otherwise hold any kind or type of assets, including an ownership interest in any corporation, limited liability company, or other similar entity;

"(xxiv) any entity or class of entities that the Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security, has, by regulation, determined should be exempt from the requirements of subsection (b) because requiring

beneficial ownership information from the entity or class of entities—

"(I) would not serve the public interest; and

"(II) would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes.

"(12) State.—The term 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the United States Virgin Islands, and any other commonwealth, territory, or possession of the United States.

"(13) Unique Identifying Number.—The term 'unique identifying number' means, with respect to an individual or an entity with a sole member, the unique identifying number from an acceptable identification document.

"(14) United States Person.—The term 'United States person' has the meaning given the term in section 7701(a) of the Internal Revenue Code of 1986.

"(b) Beneficial Ownership Information Reporting.—

"(1) Reporting.—

"(A) In General.— In accordance with regulations prescribed by the Secretary of the Treasury, each reporting company shall

submit to FinCEN a report that contains the information described in paragraph (2).

"(B) Reporting of Existing Entities.—In accordance with regulations prescribed by the Secretary of the Treasury, any reporting company that has been formed or registered before the effective date of the regulations prescribed under this subsection shall, in a timely manner, and not later than 2 years after the effective date of the regulations prescribed under this subsection, submit to FinCEN a report that contains the information described in paragraph (2).

"(C) Reporting at Time of Formation or Registration.—In accordance with regulations prescribed by the Secretary of the Treasury, any reporting company that has been formed or registered after the effective date of the regulations promulgated under this subsection shall, at the time of formation or registration, submit to FinCEN a report that contains the information described in paragraph (2).

"(D) Updated Reporting for Changes in Beneficial Ownership.—In accordance with regulations prescribed by the Secretary of the Treasury, a reporting company shall, in a timely manner, and not later than 1 year after the date on which there is a change with respect to any information described in paragraph (2), submit to FinCEN a report that updates the information relating to the change.

"(E) Treasury Review of Updated Reporting for Changes in Beneficial Ownership.—The Secretary of the Treasury, in consultation with the Attorney General and the Secretary of Homeland Security, shall conduct a review to evaluate—

"(i) the necessity of a requirement for corporations, limited liability companies, or other similar entities to update the report on beneficial ownership information in paragraph (2), related to a change in ownership, within a shorter period of time than required under subparagraph (D), taking into account the updating requirements under subparagraph (D) and the information contained in the reports;

"(ii) the benefit to law enforcement and national security officials that might be derived from, and the burden that a requirement to update the list of beneficial owners within a shorter period of time after a change in the list of beneficial owners would impose on corporations, limited liability companies, or other similar entities; and

"(iii) not later than 2 years after the date of enactment of this section, incorporate into the regulations, as appropriate, any changes necessary to implement the findings and determinations based on the review required under this subparagraph.

"(F) Regulation Requirements.—In promulgating the regulations required under subparagraphs (A) through (D), the Secretary of the Treasury shall, to the greatest extent practicable—

"(i) establish partnerships with State, local, and Tribal governmental agencies;

"(ii) collect information described in paragraph (2) through existing Federal, State, and local processes and procedures;

"(iii) minimize burdens on reporting companies associated with the collection of the information described in paragraph (2), in light of the private compliance costs placed on legitimate businesses, including by identifying any steps taken to mitigate the costs relating to compliance with the collection of information; and

"(iv) collect information described in paragraph (2) in a form and manner that ensures the information is highly useful in—

"(I) facilitating important national security, intelligence, and law enforcement activities; and

"(II) confirming beneficial ownership information provided to financial institutions to facilitate the compliance of the financial institutions with anti-money

laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law.

"(G) Regulatory Simplification.—To simplify compliance with this section for reporting companies and financial institutions, the Secretary of the Treasury shall ensure that the regulations prescribed by the Secretary under this subsection are added to part 1010 of title 31, Code of Federal Regulations, or any successor thereto.

"(2) Required Information.—

"(A) In General.—In accordance with regulations prescribed by the Secretary of the Treasury, a report delivered under paragraph (1) shall, except as provided in subparagraph (B), identify each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company by—

"(i) full legal name;

"(ii) date of birth;

"(iii) current, as of the date on which the report is delivered, residential or business street address; and

"(iv)(I) unique identifying number from an acceptable identification document; or

"(II) FinCEN identifier in accordance with requirements in paragraph (3).

"(B) Reporting Requirement for Exempt Entities Having an Ownership Interest.—If an exempt entity described in subsection (a)(11)(B) has or will have a direct or indirect ownership interest in a reporting company, the reporting company or the applicant—

"(i) shall, with respect to the exempt entity, only list the name of the exempt entity; and

"(ii) shall not be required to report the information with respect to the exempt entity otherwise required under subparagraph (A).

"(C) Reporting Requirement for Certain Pooled Investment Vehicles.—Any corporation, limited liability company, or other similar entity that is an exempt entity described in subsection (a)(11)(B)(xviii) and is formed under the laws of a foreign country shall file with FinCEN a written certification that provides identification information of an individual that exercises substantial control over the pooled investment vehicle in the same manner as required under this subsection.

"(D) Reporting Requirement for Exempt Subsidiaries.—In accordance with the regulations promulgated by the Secretary, any corporation, limited liability company, or other similar entity that is an exempt entity described in subsection (a)(11)(B)(xxii), shall, at the time such entity no longer meets the criteria described in subsection

(a)(11)(B)(xxii), submit to FinCEN a report containing the information required under subparagraph (A).

"(E) Reporting Requirement for Exempt Grandfathered Entities.—In accordance with the regulations promulgated by the Secretary, any corporation, limited liability company, or other similar entity that is an exempt entity described in subsection (a)(11)(B)(xxiii), shall, at the time such entity no longer meets the criteria described in subsection (a)(11)(B)(xxiii), submit to FinCEN a report containing the information required under subparagraph (A).

"(3) FinCEN Identifier.—

"(A) Issuance of FinCEN Identifier.—

"(i) In General.—Upon request by an individual who has provided FinCEN with the information described in paragraph (2)(A) pertaining to the individual, or by an entity that has reported its beneficial ownership information to FinCEN in accordance with this section, FinCEN shall issue a FinCEN identifier to such individual or entity.

"(ii) Updating of Information.—An individual or entity with a FinCEN identifier shall submit filings with FinCEN pursuant to paragraph (1) updating any information described in paragraph (2) in a timely manner consistent with paragraph (1)(D).

"(iii) EXCLUSIVE IDENTIFIER.—FinCEN shall not issue more than 1 FinCEN identifier to the same individual or to the same entity (including any successor entity).

"(B) Use of FinCEN Identifier for Individuals.—Any person required to report the information described in paragraph (2) with respect to an individual may instead report the FinCEN identifier of the individual.

"(C) Use of FinCEN Identifier for Entities.—If an individual is or may be a beneficial owner of a reporting company by an interest held by the individual in an entity that, directly or indirectly, holds an interest in the reporting company, the reporting company may report the FinCEN identifier of the entity in lieu of providing the information required by paragraph (2)(A) with respect to the individual.

"(4) Regulations.—The Secretary of the Treasury shall—

"(A) by regulation prescribe procedures and standards governing any report under paragraph (2) and any FinCEN identifier under paragraph (3); and

"(B) in promulgating the regulations under subparagraph (A) to the extent practicable, consistent with the purposes of this section—

"(i) minimize burdens on reporting companies associated with the collection

of beneficial ownership information, including by eliminating duplicative requirements; and

"(ii) ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful.

"(5) Effective Date.—The requirements of this subsection shall take effect on the effective date of the regulations prescribed by the Secretary of the Treasury under this subsection, which shall be promulgated not later than 1 year after the date of enactment of this section.

"(6) Report.—Not later than 1 year after the effective date described in paragraph (5), and annually thereafter for 2 years, the Secretary of the Treasury shall submit to Congress a report describing the procedures and standards prescribed to carry out paragraph (2), which shall include an assessment of—

"(A) the effectiveness of those procedures and standards in minimizing reporting burdens (including through the elimination of duplicative requirements) and strengthening the accuracy of reports submitted under paragraph (2); and

"(B) any alternative procedures and standards prescribed to carry out paragraph (2).

"(c) Retention and Disclosure of Beneficial Ownership Information by FinCEN.—

"(1) Retention of Information.—Beneficial ownership information required under subsection

(b) relating to each reporting company shall be maintained by FinCEN for not fewer than 5 years after the date on which the reporting company terminates.

"(2) Disclosure.—

"(A) Prohibition.—Except as authorized by this subsection and the protocols promulgated under this subsection, beneficial ownership information reported under this section shall be confidential and may not be disclosed by—

"(i) an officer or employee of the United States;

"(ii) an officer or employee of any State, local, or Tribal agency; or

"(iii) an officer or employee of any financial institution or regulatory agency receiving information under this subsection.

"(B) Scope of Disclosure by FinCEN.—FinCEN may disclose beneficial ownership information reported pursuant to this section only upon receipt of—

"(i) a request, through appropriate protocols—

"(I) from a Federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity; or

"(II) from a State, local, or Tribal law enforcement agency, if a court of

competent jurisdiction, including any officer of such a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation;

"(ii) a request from a Federal agency on behalf of a law enforcement agency, prosecutor, or judge of another country, including a foreign central authority or competent authority (or like designation), under an international treaty, agreement, convention, or official request made by law enforcement, judicial, or prosecutorial authorities in trusted foreign countries when no treaty, agreement, or convention is available—

"(I) issued in response to a request for assistance in an investigation or prosecution by such foreign country; and

"(II) that—

"(aa) requires compliance with the disclosure and use provisions of the treaty, agreement, or convention, publicly disclosing any beneficial ownership information received; or

"(bb) limits the use of the information for any purpose other than the authorized investigation or national security or intelligence activity;

"(iii) a request made by a financial institution subject to customer due diligence requirements, with the consent of the reporting company, to facilitate the compliance of the financial institution with customer due diligence requirements under applicable law; or

"(iv) a request made by a Federal functional regulator or other appropriate regulatory agency consistent with the requirements of subparagraph (C).

"(C) Form and Manner of Disclosure to Financial Institutions and Regulatory Agencies.—The Secretary of the Treasury shall, by regulation, prescribe the form and manner in which information shall be provided to a financial institution under subparagraph (B)(iii), which regulation shall include that the information shall also be available to a Federal functional regulator or other appropriate regulatory agency, as determined by the Secretary, if the agency—

"(i) is authorized by law to assess, supervise, enforce, or otherwise determine the compliance of the financial institution with the requirements described in that subparagraph;

"(ii) uses the information solely for the purpose of conducting the assessment, supervision, or authorized investigation or activity described in clause (i); and

"(iii) enters into an agreement with the Secretary providing for appropriate

protocols governing the safekeeping of the information.

"(3) Appropriate Protocols.—The Secretary of the Treasury shall establish by regulation protocols described in paragraph (2)(A) that—

"(A) protect the security and confidentiality of any beneficial ownership information provided directly by the Secretary;

"(B) require the head of any requesting agency, on a non-delegable basis, to approve the standards and procedures utilized by the requesting agency and certify to the Secretary semi-annually that such standards and procedures are in compliance with the requirements of this paragraph;

"(C) require the requesting agency to establish and maintain, to the satisfaction of the Secretary, a secure system in which such beneficial ownership information provided directly by the Secretary shall be stored;

"(D) require the requesting agency to furnish a report to the Secretary, at such time and containing such information as the Secretary may prescribe, that describes the procedures established and utilized by such agency to ensure the confidentiality of the beneficial ownership information provided directly by the Secretary;

"(E) require a written certification for each authorized investigation or other activity described in paragraph (2) from the head of

an agency described in paragraph (2)(B)(i)(I), or their designees, that—

"(i) states that applicable requirements have been met, in such form and manner as the Secretary may prescribe; and

"(ii) at a minimum, sets forth the specific reason or reasons why the beneficial ownership information is relevant to an authorized investigation or other activity described in paragraph (2);

"(F) require the requesting agency to limit, to the greatest extent practicable, the scope of information sought, consistent with the purposes for seeking beneficial ownership information;

"(G) restrict, to the satisfaction of the Secretary, access to beneficial ownership information to whom disclosure may be made under the provisions of this section to only users at the requesting agency—

"(i) who are directly engaged in the authorized investigation or activity described in paragraph (2);

"(ii) whose duties or responsibilities require such access;

"(iii) who—

"(I) have undergone appropriate training; or

"(II) use staff to access the database who have undergone appropriate training;

"(iv) who use appropriate identity verification mechanisms to obtain access to the information; and

"(v) who are authorized by agreement with the Secretary to access the information;

"(H) require the requesting agency to establish and maintain, to the satisfaction of the Secretary, a permanent system of standardized records with respect to an auditable trail of each request for beneficial ownership information submitted to the Secretary by the agency, including the reason for the request, the name of the individual who made the request, the date of the request, any disclosure of beneficial ownership information made by or to the agency, and any other information the Secretary of the Treasury determines is appropriate;

"(I) require that the requesting agency receiving beneficial ownership information from the Secretary conduct an annual audit to verify that the beneficial ownership information received from the Secretary has been accessed and used appropriately, and in a manner consistent with this paragraph and provide the results of that audit to the Secretary upon request;

"(J) require the Secretary to conduct an annual audit of the adherence of the agencies to the protocols established under this paragraph to ensure that agencies are

requesting and using beneficial ownership information appropriately; and

"(K) provide such other safeguards which the Secretary determines (and which the Secretary prescribes in regulations) to be necessary or appropriate to protect the confidentiality of the beneficial ownership information.

"(4) Violation of Protocols.—Any employee or officer of a requesting agency under paragraph (2)(B) that violates the protocols described in paragraph (3), including unauthorized disclosure or use, shall be subject to criminal and civil penalties under subsection (h)(3)(B).

"(5) Department of the Treasury Access.—

"(A) In General.—Beneficial ownership information shall be accessible for inspection or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure subject to procedures and safeguards prescribed by the Secretary of the Treasury.

"(B) Tax Administration Purposes.—Officers and employees of the Department of the Treasury may obtain access to beneficial ownership information for tax administration purposes in accordance with this subsection.

"(6) Rejection of Request.—The Secretary of the Treasury—

"(A) shall reject a request not submitted in the form and manner prescribed by the Secretary under paragraph (2)(C); and

"(B) may decline to provide information requested under this subsection upon finding that—

"(i) the requesting agency has failed to meet any other requirement of this subsection;

"(ii) the information is being requested for an unlawful purpose; or

"(iii) other good cause exists to deny the request.

"(7) Suspension.—The Secretary of the Treasury may suspend or debar a requesting agency from access for any of the grounds set forth in paragraph (6), including for repeated or serious violations of any requirement under paragraph (2).

"(8) Security Protections.—The Secretary of the Treasury shall maintain information security protections, including encryption, for information reported to FinCEN under subsection (b) and ensure that the protections—

"(A) are consistent with standards and guidelines developed under subchapter II of chapter 35 of title 44; and

"(B) incorporate Federal information system security controls for high-impact systems, excluding national security systems, consistent with applicable law to prevent the loss of confidentiality, integrity, or availability of information that may have a severe or catastrophic adverse effect.

"(9) Report by the Secretary.—Not later than 1 year after the effective date of the regulations prescribed under this subsection, and annually thereafter for 5 years, the Secretary of the Treasury shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report, which—

"(A) may include a classified annex; and

"(B) shall, with respect to each request submitted under paragraph (2)(B)(i)(II) during the period covered by the report, and consistent with protocols established by the Secretary that are necessary to protect law enforcement sensitive, tax-related, or classified information, include—

"(i) the date on which the request was submitted;

"(ii) the source of the request;

"(iii) whether the request was accepted or rejected or is pending; and

"(iv) a general description of the basis for rejecting the such request, if applicable.

"(10) Audit by the Comptroller General.—Not later than 1 year after the effective date of the regulations prescribed under this subsection, and annually thereafter for 6 years, the Comptroller General of the United States shall—

"(A) audit the procedures and safeguards established by the Secretary of the Treasury under those regulations, including duties for verification of requesting agencies systems

and adherence to the protocols established under this subsection, to determine whether such safeguards and procedures meet the requirements of this subsection and that the Department of the Treasury is using beneficial ownership information appropriately in a manner consistent with this subsection; and

"(B) submit to the Secretary of the Treasury, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives a report that contains the findings and determinations with respect to any audit conducted under this paragraph.

"(11) Department of the Treasury Testimony.—

"(A) In General.—Not later than March 31 of each year for 5 years beginning in 2022, the Director shall be made available to testify before the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives, or an appropriate subcommittee thereof, regarding FinCEN issues, including, specifically, issues relating to—

"(i) anticipated plans, goals, and resources necessary for operations of FinCEN in implementing the requirements of the Anti-Money Laundering Act of 2020 and the amendments made by that Act;

"(ii) the adequacy of appropriations for FinCEN in the current and the previous fiscal year to—

"(I) ensure that the requirements and obligations imposed upon FinCEN by the Anti-Money Laundering Act of 2020 and the amendments made by that Act are completed as efficiently, effectively, and expeditiously as possible; and

"(II) provide for robust and effective implementation and enforcement of the provisions of the Anti-Money Laundering Act of 2020 and the amendments made by that Act;

"(iii) strengthen FinCEN management efforts, as necessary and as identified by the Director, to meet the requirements of the Anti-Money Laundering Act of 2020 and the amendments made by that Act;

"(iv) provide for the necessary public outreach to ensure the broad dissemination of information regarding any new program requirements provided for in the Anti-Money Laundering Act of 2020 and the amendments made by that Act, including—

"(I) educating the business community on the goals and operations of the new beneficial ownership database; and

"(II) disseminating to the governments of countries that are allies or partners of the United States information on best practices developed by FinCEN related to beneficial ownership information retention and use;

"(v) any policy recommendations that could facilitate and improve communication and coordination between the private sector, FinCEN, and the Federal, State, and local agencies and entities involved in implementing innovative approaches to meet their obligations under the Anti-Money Laundering Act of 2020 and the amendments made by that Act, the Bank Secrecy Act (as defined in section 6003 of the Anti- Money Laundering Act of 2020), and other anti-money laundering compliance laws; and

"(vi) any other matter that the Director determines is appropriate.

"(B) TESTIMONY CLASSIFICATION.—The testimony required under subparagraph (A)—

"(i) shall be submitted in unclassified form; and

"(ii) may include a classified portion.

"(d) Agency Coordination.—

"(1) In General.—The Secretary of the Treasury shall, to the greatest extent practicable, update

the information described in subsection (b) by working collaboratively with other relevant Federal, State, and Tribal agencies.

"(2) Information from Relevant Federal, State, and Tribal Agencies.—Relevant Federal, State, and Tribal agencies, as determined by the Secretary of the Treasury, shall, to the extent practicable, and consistent with applicable legal protections, cooperate with and provide information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information.

"(3) Regulations.—The Secretary of the Treasury, in consultation with the heads of other relevant Federal agencies, may promulgate regulations as necessary to carry out this subsection.

"(e) Notification of Federal Obligations.—

"(1) Federal.—The Secretary of the Treasury shall take reasonable steps to provide notice to persons of their obligations to report beneficial ownership information under this section, including by causing appropriate informational materials describing such obligations to be included in 1 or more forms or other informational materials regularly distributed by the Internal Revenue Service and FinCEN.

"(2) States and Indian Tribes.—

"(A) In General.—As a condition of the funds made available under this section, each State and Indian Tribe shall, not later than 2 years after the effective date of the regulations

promulgated under subsection (b)(4), take the following actions:

"(i) The secretary of a State or a similar office in each State or Indian Tribe responsible for the formation or registration of entities created by the filing of a public document with the office under the law of the State or Indian Tribe shall periodically, including at the time of any initial formation or registration of an entity, assessment of an annual fee, or renewal of any license to do business in the United States and in connection with State or Indian Tribe corporate tax assessments or renewals—

"(I) notify filers of their requirements as reporting companies under this section, including the requirements to file and update reports under paragraphs (1) and (2) of subsection (b); and

"(II) provide the filers with a copy of the reporting company form created by the Secretary of the Treasury under this subsection or an internet link to that form.

"(ii) The secretary of a State or a similar office in each State or Indian Tribe responsible for the formation or registration of entities created by the filing of a public document with the office under the law of the State or Indian

Tribes shall update the websites, forms relating to incorporation, and physical premises of the office to notify filers of their requirements as reporting companies under this section, including providing an internet link to the reporting company form created by the Secretary of the Treasury under this section.

"(B) Notification from the Department of the Treasury.—A notification under clause (i) or (ii) of subparagraph (A) shall explicitly state that the notification is on behalf of the Department of the Treasury for the purpose of preventing money laundering, the financing of terrorism, proliferation financing, serious tax fraud, and other financial crime by requiring nonpublic registration of business entities formed or registered to do business in the United States.

"(f) No Bearer Share Corporations or Limited Liability Companies.—A corporation, limited liability company, or other similar entity formed under the laws of a State or Indian Tribe may not issue a certificate in bearer form evidencing either a whole or fractional interest in the entity.

"(g) Regulations.—In promulgating regulations carrying out this section, the Director shall reach out to members of the small business community and other appropriate parties to ensure efficiency and effectiveness of the process for the entities subject to the requirements of this section.

"(h) Penalties.—

"(1) Reporting Violations.—It shall be unlawful for any person to—

"(A) willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN in accordance with subsection (b); or

"(B) willfully fail to report complete or updated beneficial ownership information to FinCEN in accordance with subsection (b).

"(2) Unauthorized Disclosure or Use.—Except as authorized by this section, it shall be unlawful for any person to knowingly disclose or knowingly use the beneficial ownership information obtained by the person through—

"(A) a report submitted to FinCEN under subsection (b); or

"(B) a disclosure made by FinCEN under subsection (c).

"(3) Criminal and Civil Penalties.—

"(A) Reporting Violations.—Any person that violates subparagraph (A) or (B) of paragraph (1)—

"(i) shall be liable to the United States for a civil penalty of not more than $500 for each day that the violation continues or has not been remedied; and

"(ii) may be fined not more than $10,000, imprisoned for not more than 2 years, or both.

"(B) Unauthorized Disclosure or Use Violations.—Any person that violates paragraph (2)—

"(i) shall be liable to the United States for a civil penalty of not more than $500 for each day that the violation continues or has not been remedied; and

"(ii)(I) shall be fined not more than $250,000, or imprisoned for not more than 5 years, or both; or

"(II) while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.

"(C) Safe Harbor.—

"(i) Safe Harbor.—

"(I) In General.—Except as provided in subclause (II), a person shall not be subject to civil or criminal penalty under subparagraph (A) if the person—

"(aa) has reason to believe that any report submitted by the person in accordance with subsection (b) contains inaccurate information; and

"(bb) in accordance with regulations issued by the Secretary, voluntarily and

promptly, and in no case later than 90 days after the date on which the person submitted the report, submits a report containing corrected information.

"(II) Exceptions.—A person shall not be exempt from penalty under clause (i) if, at the time the person submits the report required by subsection (b), the person—

"(aa) acts for the purpose of evading the reporting requirements under subsection (b); and

"(bb) has actual knowledge that any information contained in the report is inaccurate.

"(ii) Assistance.—FinCEN shall provide assistance to any person seeking to submit a corrected report in accordance with clause (i)(I).

"(4) User Complaint Process.—

"(A) In General.—The Inspector General of the Department of the Treasury, in coordination with the Secretary of the Treasury, shall provide public contact information to receive external comments or complaints regarding the beneficial ownership information notification and collection process or regarding the accuracy, completeness, or timeliness of such information.

"(B) Report.—The Inspector General of the Department of the Treasury shall submit to Congress a periodic report that—

"(i) summarizes external comments or complaints and related investigations conducted by the Inspector General related to the collection of beneficial ownership information; and

"(ii) includes recommendations, in coordination with FinCEN, to improve the form and manner of the notification, collection and updating processes of the beneficial ownership information reporting requirements to ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful.

"(5) Treasury Office of Inspector General Investigation in the Event of a Cybersecurity Breach.—

"(A) In General.—In the event of a cybersecurity breach that results in substantial unauthorized access and disclosure of sensitive beneficial ownership information, the Inspector General of the Department of the Treasury shall conduct an investigation into FinCEN cybersecurity practices that, to the extent possible, determines any vulnerabilities within FinCEN information security and confidentiality protocols and provides recommendations for fixing those deficiencies.

"(B) Report.—The Inspector General of the Department of the Treasury shall submit to the Secretary of the Treasury a report on each investigation conducted under subparagraph (A).

"(C) Actions of the Secretary.—Upon receiving a report submitted under subparagraph (B), the Secretary of the Treasury shall—

"(i) determine whether the Director had any responsibility for the cybersecurity breach or whether policies, practices, or procedures implemented at the direction of the Director led to the cybersecurity breach; and

"(ii) submit to Congress a written report outlining the findings of the Secretary, including a determination by the Secretary on whether to retain or dismiss the individual serving as the Director.

"(6) Definition.—In this subsection, the term 'willfully' means the voluntary, intentional violation of a known legal duty.

"(*i*) Continuous Review of Exempt Entities.—

"(1) In General.—On and after the effective date of the regulations promulgated under subsection (b)(4), if the Secretary of the Treasury makes a determination, which may be based on information contained in the report required under section 6502(c) of the Anti-Money Laundering Act of 2020 or on any other information available to the Secretary, that an

entity or class of entities described in subsection (a)(11)(B) has been involved in significant abuse relating to money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or any other financial crime, not later than 90 days after the date on which the Secretary makes the determination, the Secretary shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report that explains the reasons for the determination and any administrative or legislative recommendations to prevent such abuse.

"(2) Classified Annex.—The report required by paragraph (1)—

"(A) shall be submitted in unclassified form; and

"(B) may include a classified annex.".

(b) Conforming Amendments.—Title 31, United States Code, is amended—

(1) in section 5321(a)—

(A) in paragraph (1), by striking "sections 5314 and 5315" each place that term appears and inserting "sections 5314, 5315, and 5336"; and

(B) in paragraph (6), by inserting "(except section 5336)" after "subchapter" each place that term appears;

(2) in section 5322, by striking "section 5315 or 5324" each place that term appears and inserting "section 5315, 5324, or 5336"; and

(3) in the table of sections for chapter 53, as amended by sections 6306(b)(1), 6307(b), and 6313(b) of this division, by adding at the end the following:

"5336. Beneficial ownership information reporting requirements.".

(c) Reporting Requirements for Federal Contractors.—

(1) In General.—Not later than 2 years after the date of enactment of this Act, the Administrator for Federal Procurement Policy shall revise the Federal Acquisition Regulation maintained under section 1303(a)(1) of title 41, United States Code, to require any contractor or subcontractor that is subject to the requirement to disclose beneficial ownership information under section 5336 of title 31, United States Code, as added by subsection (a) of this section, to provide the information required to be disclosed under such section to the Federal Government as part of any bid or proposal for a contract with a value threshold in excess of the simplified acquisition threshold under section 134 of title 41, United States Code.

(2) Applicability.—The revision required under paragraph (1) shall not apply to a covered contractor or subcontractor, as defined in section 847 of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116–92), that is subject to the beneficial ownership disclosure and review requirements under that section.

(d) Revised Due Diligence Rulemaking.—

(1) In General.—Not later than 1 year after the effective date of the regulations promulgated under section 5336(b)(4) of title 31, United States Code, as added by subsection (a) of this section, the Secretary of the Treasury shall revise the final rule entitled "Customer Due Diligence Requirements for Financial Institutions" (81 Fed. Reg. 29397 (May 11, 2016)) to—

(A) bring the rule into conformance with this division and the amendments made by this division;

(B) account for the access of financial institutions to beneficial ownership information filed by reporting companies under section 5336, and provided in the form and manner prescribed by the Secretary, in order to confirm the beneficial ownership information provided directly to the financial institutions to facilitate the compliance of those financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law; and

(C) reduce any burdens on financial institutions and legal entity customers that are, in light of the enactment of this division and the amendments made by this division, unnecessary or duplicative.

(2) Conformance.—

(A) In General.—In carrying out paragraph (1), the Secretary of the Treasury shall rescind paragraphs (b) through (j) of section 1010.230 of title 31, Code of Federal

Regulations upon the effective date of the revised rule promulgated under this subsection.

(B) Rule of Construction.—Nothing in this section may be construed to authorize the Secretary of the Treasury to repeal the requirement that financial institutions identify and verify beneficial owners of legal entity customers under section 1010.230(a) of title 31, Code of Federal Regulations.

(3) Considerations.—In fulfilling the requirements under this subsection, the Secretary of the Treasury shall consider—

(A) the use of risk-based principles for requiring reports of beneficial ownership information;

(B) the degree of reliance by financial institutions on information provided by FinCEN for purposes of obtaining and updating beneficial ownership information;

(C) strategies to improve the accuracy, completeness, and timeliness of the beneficial ownership information reported to the Secretary; and

(D) any other matter that the Secretary determines is appropriate.