

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION**

STEVEN F. HOTZE, M.D., <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 2:24-cv-210-Z
)	
UNITED STATES DEPARTMENT OF THE)	
TREASURY, <i>et al.</i> ,)	
)	
Defendants.)	

**BRIEF *AMICUS CURIAE* OF
AMERICA’S FUTURE,
GUN OWNERS OF AMERICA, INC.,
GOA TEXAS,
GUN OWNERS FOUNDATION,
U.S. CONSTITUTIONAL RIGHTS LEGAL DEFENSE FUND, AND
CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND
IN SUPPORT OF PLAINTIFFS**

William J. Olson
Jeremiah L. Morgan
William J. Olson, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

J. Mark Brewer (Texas Bar No. 02965010)
209 N. Nugent Ave.
Johnson City, TX 78636
(830) 307-7810
brewer@bplaw.com

November 18, 2024

Counsel for Amici Curiae

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Authorities	ii
Interest of the <i>Amici Curiae</i>	1
Statement of the Case	1
Argument	3
I. THE CTA IS ENTITLED TO LITTLE OR NO PRESUMPTION OF CONSTITUTIONALITY	3
II. THE CTA DOES NOT CONSTITUTE A PROPER EXERCISE OF THE COMMERCE POWER AND IS NOT AUTHORIZED BY THE NECESSARY AND PROPER CLAUSE	9
A. The Government’s Commerce Clause Analysis Is Unavailing	10
B. CTA Fails Under the Methodology for Evaluating the Scope of the Commerce Clause Established by Chief Justice Marshall.	11
C. Marshall’s Necessary and Proper Clause Analysis	13
D. An Alternative Commerce Clause Approach	13
III. THE CTA JEOPARDIZES THE SECOND AMENDMENT RIGHTS OF AMERICANS.	16
IV. THE U.S. SUPREME COURT HAS BARRED STATES FROM OMNIBUS DATA COLLECTION THAT COULD CHILL FIRST AMENDMENT SPEECH AND ASSOCIATION, AND THAT PRINCIPLE SHOULD APPLY TO THE FEDERAL GOVERNMENT	19
A. The Supreme Court Has Ruled Against State Omnibus Data Collection from Nonprofits to Protect Speech and Associational Rights	19
B. The Federal Government Has a Track Record of the Weaponized Use of Information Against Political Opponents of the Party in Power	21
Conclusion	22
Certificate of Service.	

TABLE OF AUTHORITIES

	<u>Page</u>
CONSTITUTION	
Art. I, Sec. 8, cl. 3	9-16
Art. I, Sec. 8, cl. 18	9, 11, 13
Amendment I	2
Amendment II	16, 17, 18
Amendment IV	2
Amendment V	2
Amendment X	2
 STATUTES	
William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (Jan. 1, 2021)	1, 9
18 U.S.C. § 922.	17
26 U.S.C. § 501.	8
31 U.S.C. § 5336.	1, 2, 6, 9, 22
 CASES	
<i>Americans for Prosperity Foundation v. Bonta</i> , 594 U.S. 595 (2021)	19, 20
<i>Champion v. Ames (The Lottery Case)</i> , 188 U.S. 321 (1903)	14
<i>CTS Corp. v. Dynamics Corp. of Am.</i> , 481 U.S. 69 (1987)	6
<i>Gibbons v. Ogden</i> , 22 U.S. 1 (1824)	11, 12, 15
<i>McCulloch v. Maryland</i> , 17 U.S. 316 (1819)	13
<i>Morales v. Daley</i> , 116 F. Supp. 2d 801 (S.D. Tex. 2000)	21
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958)	19
<i>National Small Business United v. Yellen</i> , 2024 U.S. Dist. LEXIS 36205 (Mar. 1, 2024)	3, 10
<i>Southern Railway Co. v. United States</i> , 222 U.S. 20 (1911)	14
<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	13, 15, 16
<i>Wickard v. Filburn</i> , 317 U.S. 111 (1942)	15
 MISCELLANEOUS	
165 Cong. Rec. H 8316, <i>et seq.</i>	6, 7, 17
“Beneficial Ownership Information Reporting Requirements,” 87 <i>Fed. Reg.</i> 59498 (Sept. 30, 2022)	2
Constitution of State of Texas, Art. III, Sect. 35	4
D.P. Currie, <u>The Constitution in Congress: The Federalist Period, 1789-1801</u> (U. Chicago Press: 1999)	4
<u>The Constitution in Congress: The Jeffersonians, 1801-1829</u> (U. Chicago Press: 2001)	4
<u>The Constitution in Congress: Democrats and Whigs, 1829-1861</u> (U. Chicago Press: 2013)	4
<u>The Constitution in Congress: Descent into the Malestrom, 1829-1861</u> (U. Chicago Press: 2007)	4

Editorial Board, “Harris and the First Amendment: The Supreme Court rebuked her use of lawfare in California,” *Wall Street Journal* (Aug. 4, 2024) 19

The Federalist No. 42 12

M. Garofalo, “Leaders of the anti-gun movement: Six politicians who refuse to stay silent,” *Salon* (Jan. 9, 2019) 16

House Judiciary Committee, “Financial Surveillance in the United States: How Federal Law Enforcement Commandeered Financial Institutions to Spy on Americans” (Mar. 6, 2024) 18

House Financial Services Committee Report, “Corporate Transparency Act of 2019,” Rep. 116-227 (Oct. 8, 2019) 7

INTEREST OF THE *AMICI CURIAE*¹

The interest of these *amici* is set out in the accompanying motion for leave to file *amicus* brief.

STATEMENT OF THE CASE

On December 28, 2020, the U.S. House of Representatives passed the \$740 billion National Defense Authorization Act (“NDAA”), followed by passage by the U.S. Senate in a rare New Year’s Day session, making NDAA the only veto by President Trump that was overridden.² Buried in the 1,500-page NDAA bill was a 21-page subsection labeled the Corporate Transparency Act (“CTA”). *See* Complaint (“Compl.”) at ¶ 2 (Dkt. 1).

The CTA requires all “beneficial owners” of business entities with less than 20 employees and annual revenue of less than \$5 million to submit personal identifying information to the Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”). Compl. at ¶ 7. This information must include “full legal name, date of birth, current ... residential or business street address, and ‘unique identifying number from an acceptable identification document,’” such as an unexpired passport or government-issued identification card or driver’s license. 31 U.S.C. § 5336(b)(2)(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.” 31 U.S.C.

¹ No party’s counsel authored the brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

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

§ 5336(a)(3). This would necessarily include single-member LLCs and privately held corporations. Certain exemptions were granted, such as to accounting firms — but not law firms, and nonprofit organizations exempt from taxation under Internal Revenue Code § 501(c) — but not other nonprofit organizations.

The CTA treats a failure to report as a serious felony. Any “beneficial owner” who willfully fails to report the information to FinCEN is subject to a civil penalty of up to \$500 per day, a separate fine up to \$10,000, and two years’ imprisonment, or both. 31 U.S.C. § 5336(h)(1), (3)(A).

On September 30, 2022, FinCEN issued its Final Rule implementing the CTA, which took effect on January 1, 2024 for newly-formed entities and is set to take effect for existing entities on January 1, 2025.³

Plaintiffs here allege that Congress lacks authority to enact the CTA (Compl. at ¶¶ 61-81), as well as violations of: First Amendment speech and associational freedoms (*id.* at ¶¶ 82-94); Fourth Amendment protection against unreasonable searches and seizures (*id.* at ¶¶ 95-104); Fifth Amendment due process rights due to confusing and vague language (*id.* at ¶¶ 105-116); and Tenth Amendment’s protection due to the creation of an unprecedented federal database of the personal information of all business owners in the nation (*id.* at ¶ 77). Plaintiffs also allege violations of the Administrative Procedure Act (*id.* at ¶¶ 117-122).

The constitutionality of the CTA has been challenged in other federal district courts. A challenge brought in the Northern District of Alabama resulted in Judge Liles C. Burke

³ See “Beneficial Ownership Information Reporting Requirements,” 87 *Fed. Reg.* 59498 (Sept. 30, 2022); 31 C.F.R. pt. 1010.

enjoining the CTA as applied to the plaintiffs in that action. There, the court addressed and found wanting all three of the government’s asserted sources of constitutional authority: the foreign affairs powers, the Commerce Clause authority, and as a necessary and proper exercise of Congress’ taxing power. *See National Small Business United v. Yellen*, 2024 U.S. Dist. LEXIS 36205 (Mar. 1, 2024). The government has appealed that injunction to the Eleventh Circuit.

ARGUMENT

These *amici* urge this Court to grant Plaintiffs’ motion for an expedited preliminary injunction for the reasons advanced by Plaintiffs, as well as those set out in this *amicus* brief which seeks to provide the Court with additional information about the curious history of the enactment of the CTA, the unconstitutionality of the CTA under different views of the Commerce Clause, the risk that the CTA presents as a trap for Americans to have their Second Amendment rights stolen, as well as the risk to Americans posed by the CTA in the hands of an increasingly weaponized government.

I. THE CTA IS ENTITLED TO LITTLE OR NO PRESUMPTION OF CONSTITUTIONALITY.

There was a day that Congress cared deeply about the constitutionality of the laws that it passed, as floor debates over the Constitution demonstrated deep understanding rivaling the quality of today’s oral arguments before the Supreme Court. University of Chicago Law Professor David P. Currie’s four-volume history of “The Constitution in Congress” demonstrates the Congress’ felt responsibility to enact only laws it believed constitutional over

a period of over 70 years.⁴ Sadly, today Congress enacts laws and hopes either that they will not be challenged or that the federal courts will clean up any constitutional problems at a later time. This is such a time.

There are many reasons for Congressional neglect of constitutional limitations on its power and protections for its People. Congress lacks a federal “one subject” restriction of the sort that is in 43 state constitutions.⁵ The length, breath, and sheer complexity of many bills is such that Senator Rand Paul felt it necessary to introduce “The Read the Bills Act,” [S.3360](#), first in the 112th Congress and in each succeeding Congress, to require that members of Congress certify they have actually read a bill before voting for it. With most Senators content with the lack of accountability to voters permitted by the *status quo* where the legislator can hide behind the “must pass” nature of telephone-book-like bills, Senator Paul’s effort at reform has never been reported out of Committee.

As will be demonstrated *infra*, the CTA was a bill that Congress was unable to pass on a stand-alone basis, inserted into a “must-pass” bill, considered on an expedited schedule, on New Year’s Day, approved over a Presidential veto, with no meaningful Congressional scrutiny, responding to none of the questions about the need for and operation of the bill raised by the Minority, ignoring all the arguments raised against the bill by the Minority, imposing a

⁴ See D.P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801 (U. Chicago Press: 1999); The Constitution in Congress: The Jeffersonians, 1801-1829 (U. Chicago Press: 2001); The Constitution in Congress: Democrats and Whigs, 1829-1861 (U. Chicago Press: 2013); The Constitution in Congress: Descent into the Malestrom, 1829-1861 (U. Chicago Press: 2007).

⁵ See, e.g., Constitution of State of Texas, Art. III, Sect. 35.

burden on small businesses to create duplicative records for no demonstrated reason, and imposing costs on the private sector in an unknown amount. This was a perfect way for such an unpopular bill to be adopted without the accountability of Congress to the People. The government often relies on a principle governing judicial review that statutes are entitled to a presumption of constitutionality which developed when Congress was mindful of its Constitutional limitations. Particularly based on the manner in which the CTA was enacted, that statute should be entitled to, at best, the weakest possible presumption of constitutionality.

In fact, enactment of the CTA violated most of the precepts that should undergird the enactment of a law in a constitutional republic. In all likelihood, the only individuals who were aware of the provision being in the NDAA bill were committee staff, some of the leadership, and probably the sponsor of the bill. Many bad laws are enacted in this manner — 1,500 page “must pass” bills covering multiple topics enacted by an overwhelming number of members of the House and Senate, enabling individual Congressmen to escape accountability to the People for imposing such burdens on Americans.

The CTA had its origin in a bill introduced by former Representative Carolyn B. Maloney (D-NY-12),⁶ who introduced it as H.R. 2513, Corporate Transparency Act of 2019, on May 3, 2019, which passed the House on October 22, 2019,⁷ but which was not approved by the Senate.

⁶ In the same year that the CTA was enacted, Maloney lost a primary while seeking her party’s nomination for re-election.

⁷ H.R. 2513, [Corporate Transparency Act of 2019](#) (116th Congress).

Although it has long been “an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares” (*CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987)), the CTA aims to establish “a clear, Federal standard for incorporation practices.” 31 U.S.C. § 5336 note (5)(A). As a result, much opposition arose to this bill. Representative Patrick McHenry (R-NC), then-ranking member of the House Financial Services Committee, asserted:

This would be **the first consumer-facing intelligence bureau that we would have in the federal government**. This bill would require small business owners and small business investors to submit their personal information to a new federal database without adequate privacy protections. This new federal database will be accessible to law enforcement without a warrant and without a subpoena, a disturbing violation of due process.... **This has the fewest civil liberties protections of any federal intelligence bureau database. It is a lower standard of accountability than what Congress provides in the PATRIOT Act, which largely targets foreign actors.** [165 Cong. Rec. H 8316-17 (emphasis added).]

McHenry continued: “[t]he whole mindset here is absolutely wrong. We ... have an intelligence bureau that is going to go out to the public and [require] information directly from the public. We don’t do that with NSA to look at your cell phone records. In fact, we require the NSA to go before court in order to look at a cell phone database.” 165 Cong. Rec. H 8325.

Representative Andy Barr (R-KY) stated, “This bill ... presents unacceptable due process concerns for millions of small business owners whose sensitive personally identifiable information will be collected and stored in a new Federal database accessible **without a warrant** or a Federal subpoena.” He added, “H.R. 2513 would require small business owners

or officers to report personally identifiable information such as name, Social Security number, and drivers license number to a newly created Federal Government database.... Law enforcement can access the database **without due process.**” *Id.* at 8318 (emphasis added).

These and other questions about and problems with the bill were raised by Republicans in filing minority view on the bill.⁸ The National Federation of Independent Businesses (“NFIB”) explained that the Maloney bill imposed burdens on small businesses which do not have “access to teams of lawyers, accountants, and compliance experts to gather beneficial ownership information and report it to the government....” *Id.* at 8322. Additionally, NFIB asserted that “[t]he supposed justification for this bill is the burden associated with implementing the CDD [Customer Due Diligence] rule [imposed on financial institutions]. However, CDD will continue to co-exist,” and the CTA’s new burden fails to replace that rule, thus “[t]he result could be a duplicative regulatory burden on millions of small businesses....”⁹ The Congressional Budget Office estimate of the magnitude of the law’s burden on private business was lacking, providing almost no information to Congress on which to evaluate that factor. *Id.* The CTA, as passed, neither addressed the obvious problem set out in the Maloney bill, nor did it address “how H.R. 2513 will protect against sophisticated money launders that can circumvent the beneficial ownership filing requirements by forming a

⁸ The dissenting Republicans on the Committee whose concerns were disregarded were: Lance Gooden; Scott Tipton; Bryan Steil; Denver Riggleman; Tom Emmer; Warren Davidson; Alexander X. Mooney; Ann Wagner; Bill Posey; Trey Hollingsworth; Anthony Gonzalez; John W. Rose; French Hill; Patrick T. McHenry; Andy Barr; and Steve Stivers.

⁹ House Financial Services Committee Report, “Corporate Transparency Act of 2019,” Rep. 116-227 (Oct. 8, 2019) at 41.

business trust or partnership, both of which are exempted....” *Id.* Lastly, the need for “H.R. 2513 is based on anecdote rather than data. To date, and despite multiple requests from the Ranking Member of the Committee and other Financial Services Committee Republicans, the Treasury Department, FinCEN, and the Department of Justice have failed to provide adequate data to demonstrate the need for the legislation.” *Id.* All of these criticisms — and more — apply to the CTA as enacted.

Further, the statute is vague as to its application to certain types of organizations, including: (i) incorporated churches which refuse to seek or take advantage of IRC § 501(c)(3) status to avoid being bound by the Johnson Amendment restricting their advocacy (26 U.S.C. § 501(c)(3)); (ii) organizations filing an IRS Form 8976 (Notice of Intent to Operate under section 501(c)(4)) but not filing an IRS Form 1024 seeking IRS recognition of such exemption; and (iii) incorporated educational organizations which do not have IRC § 501(c)(3) status.

Moreover, there is a Catch-22 provision buried in the statute. For all nonprofits without IRC § 501(c) status, and particularly for many churches, the concept of the organization having a “beneficial owner” is completely inappropriate. Indeed, such nonprofits have no owners, but rather are administered as a trust by fiduciaries in pursuit of the organization’s nonprofit objective. Any such fiduciary seeking to protect himself from the onerous CTA sanctions would therefore be required to make an assertion of ownership which could run afoul of state law. On the other hand, failure to assert beneficial ownership through mandated reports, even if in violation of state law, would make the fiduciary subject to prosecution under the CTA.

The statute, 31 U.S.C. § 5336, was supported by “Sense of Congress” broad and unsupported assertions which assert federal authority on the supposed “failure” of states to require information about “the beneficial owners of the corporations, limited liability companies,” thereby facilitating all manner of criminal 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....” Pub. L. No. 116-283, Sec. 6402(3). The absence of state regulation does not empower the federal government to assert a new power over state corporations.

Just as the practical problems were ignored, the serious Constitutional flaws in this law were likewise ignored by Congress, now requiring this Court to carefully consider the limitations on the constitutional powers of Congress that thus far have been so obviously disregarded by both the House and Senate.

II. THE CTA DOES NOT CONSTITUTE A PROPER EXERCISE OF THE COMMERCE POWER AND IS NOT AUTHORIZED BY THE NECESSARY AND PROPER CLAUSE.

Enactment of the Corporate Transparency Act cannot be justified either as an exercise of its power under the Commerce Clause or the Necessary and Proper Clause. Insofar as this *amicus* brief is being filed without having seen the government’s opposition, the assumption is made that the arguments made by the government in the Alabama litigation likely will be raised again here.

A. The Government’s Commerce Clause Analysis Is Unavailing.

In the Alabama litigation, the government’s Commerce Clause justification relied on three points:

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. [*Nat’l Small Business United* at *29 (emphasis added).]

Analyzing each of these three assertions, the Alabama court first concluded: “The plain text of CTA does not regulate the channels and instrumentalities of commerce, let alone commercial or economic activity.... The word ‘commerce,’ or ... instrumentality of commerce, nowhere to be found in the CTA.” *Id.* at *30-31. Additionally “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.” *Id.* at *36. Further, “the *future* activities of state entities are not enough to invoke Congress’ ‘substantial effects’ commerce powers.... The Supreme Court’s commerce-clause jurisprudence has always ‘involved preexisting economic activity.’” *Id.* at *38 (citing *NFIB v. Sebelius*, 567 U.S. 519, 549 (2012)).

Rejecting the government’s assertions, the Alabama court then focused on the question it believed to be central to the case: “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,’” answering that question “No.” *Id.* at *39.

To bolster its Commerce Clause contention, the government relied on another Clause: “CTA is within Congress’ power under the Commerce Clause **and the Necessary and Proper Clause.**” *Id.* at *28 (emphasis added). Both clauses are discussed *infra*.

B. CTA Fails Under the Methodology for Evaluating the Scope of the Commerce Clause Established by Chief Justice Marshall.

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

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

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

To determine whether a challenge to a statute is (i) an enumerated powers case or (ii) a necessary and proper case, the key question to answer is “what is its object of the statute?” The object of the statute must align with the object of an enumerated power. When the language of a statute (subject matter) aligns with the language of an enumerated power (subject), the Court should analyze it as an enumerated powers case rather than as a Necessary

and Proper Clause case. Because the federal statute in *Gibbons* regulated subject matter that constituted interstate commerce, it was a pure enumerated powers case.

The object of the Commerce Clause, stated generally, is to establish a free and common market among the several states. Congress is limited to regulating the subject of interstate commerce to advance the object of ensuring free trade among the states.¹⁰ Concurring in *Gibbons*, Justice Johnson identified the object as being the elimination of trade barriers between the states: “If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.” *Gibbons* at 231 (Johnson, J., concurring).

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

¹⁰ James Madison wrote: “A very material object of this power [*i.e.*, the Commerce Clause] was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter.” *The Federalist* No. 42 (James Madison). Madison further noted that it is among a class of powers “which provide for the harmony and proper intercourse among the States.” *Id.*

C. Marshall’s Necessary and Proper Clause Analysis.

Because the CTA fails to regulate the subject of interstate commerce it should be treated as a Necessary and Proper Clause case. But even under this Clause the object test is critical. As Marshall famously wrote “Let the end [object] be legitimate, let it be within the scope of the constitution...” *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

Since the CTA does not satisfy the object test of the Commerce Clause, the government must demonstrate that it is “plainly adapted” to furthering the end or object of one of the other powers enumerated in the Constitution. Because the CTA does not further the object of any other enumerated power of the federal government, the assertion of the Necessary and Proper Clause constitutes nothing more than a pretext for exercising the police powers reserved to the states.

D. An Alternative Commerce Clause Approach.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court “identified three broad categories of activity that Congress may regulate under its commerce power.” *Id.* at 558. These categories, with corresponding tests, are channels of interstate commerce, instrumentalities of interstate commerce, and activities having substantial effects on interstate commerce.

The Alabama district court addressed the constitutionality of the CTA under the headings of three categories. That court’s analysis and its conclusion that the CTA is unconstitutional under the corresponding tests are very persuasive.

1. *Channels of Commerce Cases.*

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

The leading case applying the prohibition principle is *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1903). There, the Court ruled that Congress could criminalize the transportation of lottery tickets through interstate commerce. *See id.* at 344-45. This satisfied the subject matter test because the statute regulated commercial activity that crossed state lines. However, the object of the statute was not to foster interstate commerce but to prohibit it. The object was to criminalize immoral conduct, which falls within the police powers reserved to the states. *Id.* at 356-57. Nevertheless, the Court upheld the statute.

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

2. *Instrumentalities of Commerce Cases.*

The instrumentalities test is based on the principle that Congress can protect people, goods, vehicles, and even electronic transmissions involved in interstate commerce that may be endangered even by intrastate activity. The classic example is *Southern Railway Co. v. United States*, 222 U.S. 20 (1911), which upheld a statute requiring intrastate activities to comply

with safety standards to protect commerce moving interstate. Because the CTA on its face is not designed to protect interstate commerce from threats posed by intrastate activities this test is not implicated.

3. *Substantial Effects Cases.*

The substantial effects test grants Congress the most expansive power of any of the Commerce Clause tests. As expansive as that power is, the CTA still manages to exceed the scope of Congress's regulatory power.

The substantial effects test was most famously stated in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Having done away with the object component in *Champion*, the Court then eliminated the subject component as well. No longer was Congress limited to regulating the subject matter of interstate commerce; it was free to regulate any activity that in the aggregate had a substantial effect on interstate commerce. Congress was thus allowed to regulate Filburn's intrastate, noncommercial production and personal consumption of wheat grown on his own farm.

Implicitly, the power to regulate was no longer limited by any object other than what Congress might think contributes to the general welfare, or in other words would be good for America. The substantial effects test threatened to change the nature of the federal government from one of enumerated powers into one of general powers.

Eventually recognizing the danger to the Republic, the Supreme Court reformulated the substantial effects test in *Lopez*. The *Lopez* Court quoted portions of Marshall's opinion in *Gibbons v. Ogden*, which carefully defined the subject matter of the Commerce Clause — "commerce" and "among the states." *Lopez* at 553. Nevertheless, the Court then ignored the

importance of the subject component. As reformulated in *Lopez*, the substantial effects test allows Congress to regulate only economic activity that in the aggregate has a substantial effect on interstate commerce. *Id.* at 560-61. In effect, the Court modified the subject component of the commerce power but failed to focus on the object of the Commerce Clause.

The Court in *Lopez* ruled that the possession of a gun in a school zone was not economic in nature and therefore struck the statute as exceeding Congress's power to regulate under the Commerce Clause. Similarly, on its face, the CTA fails to regulate economic activity and therefore exceeds Congress's power to regulate under the Commerce Clause.

The *Lopez* Court suggested that Congress would be able to regulate non-economic activity pursuant to the Commerce Clause if the non-economic activity was an essential part of a comprehensive regulatory scheme that was economic in nature. *See Lopez* at 561-63. That approach does not save the statute in this case because the CTA, of which disclosure requirements are a part, is not economic in nature nor is the National Defense Authorization Act, of which the CTA is a part, an economic regulatory scheme.

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

The sponsor of the 2019 bill which became the CTA, Representative Carolyn Maloney (D-NY), was one of the most committed leaders of the anti-gun movement in Congress.¹¹ For that reason, it is not unreasonable to have concern that there could be an anti-gun agenda lurking behind her sponsorship of this bill. Plaintiffs point out in their Motion for Preliminary

¹¹ *See* M. Garofalo, "[Leaders of the anti-gun movement: Six politicians who refuse to stay silent](#)," *Salon* (Jan. 9, 2019).

Injunction that Plaintiff Ramsland “is a gun owner who would lose his right to bear arms if he were found in violation of the CTA, due to its penalty of up to two years’ imprisonment and the operation of 18 U.S.C. § 922(g)(1).” Plaintiffs’ Motion for Preliminary Injunction at 3 (Dkt. 16). Plaintiffs’ point is well-taken. Those convicted of federal felonies lose the right to possess weapons. 18 U.S.C. § 922(g)(1) and (9). Once a federal felony is incurred, the possibility of ever regaining gun rights is negligible. According to the Department of Justice:

Although 18 U.S.C. § 925(c) provides that the Attorney General may grant relief from federal firearms disabilities ... there currently is no means to obtain relief through this mechanism. Since Fiscal Year 1992, Congress has prohibited the Bureau of Alcohol, Tobacco, Firearms and Explosive ... from spending any appropriated funds to investigate or act upon applications for such relief. Accordingly, at this time a presidential pardon is the only means by which a person convicted of a federal felony may obtain this relief.¹²

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

Even more concerning was a recent report by the House Judiciary Committee that revealed FBI whistleblower evidence that, early in the Biden Administration, the FBI and the

¹² U.S. Department of Justice, Office of the Pardon Attorney, “[Frequently Asked Questions](#).”

Department of Treasury's FinCEN division targeted purchasers of firearms for scrutiny as potential "violent extremists." According to the report:

FinCEN also distributed materials to financial institutions instructing them on how to use Merchant Category Codes (MCCs) to search through transactions to detect potential criminals or "extremists." These MCCs use keywords to comb through transactions, such as "small arms" purchases or recreational stores such as "Cabela's," "Bass Pro Shop," and "Dick's Sporting Goods." Americans doing nothing other than shopping or exercising their Second Amendment rights were being tracked by financial institutions and federal law enforcement. Despite these transactions having no criminal nexus, FinCEN seems to have adopted a characterization of these Americans as potential threat actors and subject to surveillance.¹³

FinCEN suggested a number of firearms sellers whose names could be paired with MCCs for firearms purchasers, to flag possible "violent extremists," including Dick's Sporting Goods, Gander Mountain, Bass Pro Shops, Cabela's, Backcountry World, Targetsportsusa.com, AR15.com, and Midway USA. *Id.* at 27.

Plaintiffs' concern that the anti-gun FinCEN should not be entrusted with a highly sensitive list of "beneficial owners" is amply supported by FinCEN's own demonstrated hostility to the Second Amendment. The CTA is an existential threat to the Second Amendment rights of millions of small business owners about to fall victim to the CTA's "trap for the unwary" once the filing deadline passes on January 1, 2025.

¹³ House Judiciary Committee, "[Financial Surveillance in the United States: How Federal Law Enforcement Commandeered Financial Institutions to Spy on Americans](#)," at 2-3 (Mar. 6, 2024).

IV. THE U.S. SUPREME COURT HAS BARRED STATES FROM OMNIBUS DATA COLLECTION THAT COULD CHILL FIRST AMENDMENT SPEECH AND ASSOCIATION, AND THAT PRINCIPLE SHOULD APPLY TO THE FEDERAL GOVERNMENT.

A. The Supreme Court Has Ruled Against State Omnibus Data Collection from Nonprofits to Protect Speech and Associational Rights.

An earlier attempt at the wholesale collection of private, primarily corporate information was ruled recently to violate the associational rights of Americans by the U.S. Supreme Court. In what the *Wall Street Journal* termed as an early use of “lawfare against political opponents,”¹⁴ then California Attorney General Kamala Harris began enforcing a long-ignored aspect of state law requiring charities raising funds in California to file their IRS Form 990 Schedule B’s revealing “the names and addresses of donors who have contributed more than \$5,000 in a particular tax year....” *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 602 (2021) (“*AFPF*”). The *Journal* editorial summarized the case nicely: “[s]he demanded [nonprofits] hand to the state their federal IRS Form 990 Schedule B in the name of discovering ‘self dealing’ or ‘improper loans,’ [but] the real purpose was to learn the names of conservative donors and chill future political giving — that is, political speech.”

The California law applied only to a small fraction of those subject to CTA disclosure, as “over 100,000 charities are currently registered in the State, and roughly 60,000 renew their registrations each year.” *Id.* The Court reviewed its observation in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), that: “[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint

¹⁴ Editorial Board, “[Harris and the First Amendment: The Supreme Court rebuked her use of lawfare in California](#),” *Wall Street Journal* (Aug. 4. 2024).

on freedom of association as [other] forms of government action.” *AFPF* at 606. The Court did not accept the government’s purported rationale, asserting that: “California’s interest is less in investigating fraud and more in ease of administration. This interest, however, cannot justify the disclosure requirement.” *Id.* at 614. The Court found “a dramatic mismatch ... between the interest that the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end” *Id.* at 612. Additionally, the Court did not find persuasive the argument that disclosure was benign because it would be only to the government, because “disclosure requirements can chill association ‘[e]ven if there [is] no disclosure to the general public.’” *Id.* at 616. The Court concluded that: “[t]he risk of chilling effect on association is enough, ‘[b]ecause First Amendment freedoms need breathing space to survive.’” *Id.* at 618-19 (citation omitted).¹⁵

The principles articulated in *AFPF* apply to both for-profit and nonprofit corporations, as both types of corporations regularly engage in political advocacy and other protected types of speech which may be considered objectionable by government. Regardless of which political party may be in control of the federal government, the database revealing the associational activities of Americans that the Treasury Department seeks to develop should not be permitted to be created.

¹⁵ See also brief filed by some of these amici: [Brief Amicus Curiae of Free Speech Coalition](#), *Americans for Prosperity Foundation v. Becerra*, U.S. Supreme Court Nos. 19-251 & 19-255 (Mar. 1, 2021).

B. The Federal Government Has a Track Record of the Weaponized Use of Information Against Political Opponents of the Party in Power.

The threat that the government database created under CTA could be misused is real. The recent history of abuses waged by the federal government against dissenting Americans has been of such magnitude that the House of Representatives felt obliged to create a Select Subcommittee on the Weaponization of the Federal Government under the House Judiciary Committee. See [House Select Committee on Weaponization, Hearings, 2023-24](#). Numerous hearings have revealed the massive weaponization of the federal government, particularly the Department of Justice, against Americans. See, e.g., “[Weaponization Subcommittee Report: Documents Show No Legitimate Law-Enforcement Basis for Garland’s Anti-Parent Memo](#)” (Mar. 21, 2023); “[New Report Details the Extent of the FBI’s Weaponization of Law Enforcement Against Traditional Catholics](#)” (Dec. 4, 2023).

In a challenge to the collection of certain personal data by the Census Bureau, another federal district court in Texas recounted the danger of entrusting vast amount of personal data to the federal government. The Court described such data as having been:

used during the Second World War to identify Americans with Japanese ancestry [who] were then placed in internment camps for the duration of the war. This is a startling example of how census data, collected for proper purposes, has been illegally used by the government for improper purposes. [*Morales v. Daley*, 116 F. Supp. 2d 801, 811 (S.D. Tex. 2000).]

That court also discussed the risk that such data could be compromised inadvertently: “in the era of the World Wide Web, with computer ‘glitches’ and human error that can instantaneously disseminate private information literally all over the world, the citizen can have a justifiable wariness about the secrecy of the information he gives.” *Id.* at 811, n.5.

The CTA itself recognizes the highly sensitive nature of the information which is required to be provided to the government. *See* 31 U.S.C. § 5336(c)(2)(A), (c)(3), (c)(4), (c)(8), (h)(5). The law seeks to prevent disclosure to the public, but allows sharing of this information broadly inside government. Based on recent experience, there is good reason to believe that Americans have as much, or more, to fear from disclosure of this information to the government than they do with disclosure to the public at large.

CONCLUSION

For the foregoing reasons, the Plaintiffs' expedited motion for preliminary injunction should be granted.

Respectfully submitted,

William J. Olson
Jeremiah L. Morgan
William J. Olson, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

/s/ J. Mark Brewer
J. Mark Brewer (Texas Bar No. 02965010)
209 N. Nugent Ave.
Johnson City, TX 78636
(830) 307-7810
brewer@bplaw.com

November 18, 2024

Counsel for Amici Curiae