No. 24-6979

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIRESTONE, Et Al.

Plaintiff-Appellants,

v.

YELLEN, Et Al.

Defendant-Appellees.

On Appeal from the United States District Court
for the District of Oregon
No. 3:24-cv-01034-SI
Hon. Michael H. Simon

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

Appellants argued below that the Corporate Transparency Act ("CTA"), 31 U.S.C. § 5336, *et seq.*, exceeded Congress' authority under the U.S. Constitution's Commerce Clause and the Necessary and Proper Clause. They also argued the CTA violated the First, Fourth, Fifth, Eighth, and Ninth Amendments to the Constitution. Appellants thus moved for a preliminary injunction pursuant to 28 U.S.C. §§ 2201, 2202, and Rule 65(a) of the Federal Rules of Civil Procedure. ECF No. 3.

The district court had subject matter jurisdiction because Appellants challenged the constitutional validity of a federal statute. 28 U.S.C. § 1331. This Court possesses jurisdiction to review "interlocutory orders of the district courts of the United States" "refusing . . . injunctions." 28 U.S.C. § 1292(a)(1).

QUESTION PRESENTED

Whether the trial court properly denied the Appellants' request to enjoin the Corporate Transparency Act, when they are likely to succeed on the merits of their constitutional claims, and they face irreparable injury without an injunction.

STATUTORY AND REGULATORY AUTHORITY

All relevant constitutional, statutory, and regulatory authorities appear in the addendum to this brief.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

I. The Corporate Transparency Act

On January 1, 2021, Congress enacted the CTA, 31 U.S.C. § 5336. The CTA mandated that any "reporting company," file with the Financial Crimes Enforcement Network (FinCEN) reports of all its "beneficial ownership information." 31 U.S.C. § 5336(b)(1)(A).

A "reporting company" is "a corporation, limited liability company, or other similar entity that is" "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." *Id.* at § 5336(a)(11). The CTA exempts large companies (those employing more than 20 people and generating more than $5,000,000 per year in gross revenue), all publicly traded companies, and essentially all businesses involved in finance. *See id.* at § (a)(11)(B). A non-profit is exempt only if it has an active exemption under section 501(c) of the Internal Revenue Code or if it is a "political organization (as defined in section 527(e)(1) of such Code) that is exempt from tax under section 527(a) of such Code." *Id.* at § (a)(11)(B)(xix).

Both pre-existing and newly formed entities are required to identify each "beneficial owner" of the entity, by providing the "full legal name," "date of

birth," and current address of every natural person 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[.]" *Id.* at §§ (a)(3), (b)(1). Each beneficial owner must provide a non-expired photo identification to FinCEN to prove their identity. *Id.* at § (a)(1). Entities must update this information as it changes. *Id.* at § (b)(1)(D). Failures to file reports or updates can be criminally enforced. *Id.* at § (h)(3).

FinCEN must disclose this information when requested by "a Federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity" or "from a State, local, or Tribal law enforcement agency," if authorized by a court. *Id.* at § (c)(2)(B). The CTA also delegates to the Secretary of Treasury the discretion to authorize additional disclosures "to financial institutions and regulatory agencies." *Id.* at § (c)(2)(C).

Significant evidence exists that the CTA was partially intended to compel disclosures of the identities of political donors. The original version of the Act was introduced in 2017, and its co-sponsor Senator Sheldon Whitehouse shared his goals. In a speech Senator Whitehouse gave on the Senate floor in 2017, he explained that a beneficial ownership reporting regime would provide a means of stopping what he saw as the "unprecedented dark money [that] flow into our

elections from anonymous dark money organizations, groups that we allow to hide the identities of their big donors," such as "American dark money emperors, like the Koch brothers." Congressional Record, Vol. 163, No. 101 at S3469 (Senate, June 14, 2017). By tracking "the actual owners of companies" law enforcement could stop entities from "funneling money into our elections through faceless shell companies," and allow the government to determine "the identities behind big political spending." *Id.* Since the Act was passed, it has even been hailed by commentators because it "can shine light on dark money in U.S. elections." Devon Himelman, *How the Corporate Transparency Act Can Shine Light on Dark Money U.S. Elections*, Global Anticorruption Blog (April 15, 2022) *available at* https://globalanticorruptionblog.com/2022/04/15/how-the-corporate-transparency-act-can-shine-light-on-dark-money-in-u-s-elections/.

FinCEN issued regulations implementing the CTA. *See* 31 C.F.R § 1010.380. Every non-exempt corporate entity in the United States must register its beneficial ownership information with FinCEN prior to January 1, 2025. *See id.* at § (a)(1). Once filed, reports must be updated within 30 days for any change in reported information. *Id.* at § (a)(2). FinCEN rejected the argument that the exemption for tax-exempt entities should extend to "entities that had applied to the IRS for tax-exempt status but were still awaiting a determination" or other "nonprofits ... that did not qualify for tax-exempt status under section 501(c)."

Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59542 (Sept. 30, 2022) (Reporting Rule). Instead, FinCEN pointed to "concerns raised about potential exploitation of this exemption as well as the following exemption for entities assisting tax-exempt entities." *Id*. at 59542-43.

II. The Plaintiff-Appellants

Appellants are each beneficial owners of small reporting companies. ER-4, 8, 12, 16, 19, 24, 30. Each will incur costs associated with compiling and reviewing records, including costs for legal services. ER-4, 9, 13, 16, 21, 27, 32. Under Oregon's laws, Appellants need not disclose their, or anyone else's, beneficial ownership status. *See* ER-4, 8, 13, 25, 30.

Lindsay Berschauer owns Leona Consulting Co. and is an elected county commissioner in Oregon. ER-24—25. Her business is a political consultancy offering "digital branding" and "marketing" services for clients including those "that are candidates running for public office; political action committees seeking to support or oppose public policy outcomes and elections of candidates; individuals who want to affect political speech and messaging on behalf of themselves or others with whom they associate; and grass roots organizations whose efforts are wholly comprised of support or opposition for public policy outcomes and elections of candidates to public office." ER-24. The company only does business with individuals that share Berschauer's political beliefs. ER-24.

Given the company's structure, it has numerous beneficial owners who must be disclosed under the CTA because of their non-public political associations. ER-24-26.

Berschauer's clients realistically fear retaliation because of their political associations with Leona Consulting if their identities are revealed. ER-25-27. In fact, one of Leona Consulting's former political clients (who also served as counsel below), faced a complaint with the state bar filed by Bershauer's opponent in an election. ER-26. The complaint cited the political association between Leona Consulting and the former client and this litigation as a purported, but plainly meritless, basis for attorney discipline. ER-26. Bershauer fears that other clients who are not otherwise known will face similar kinds of retaliation should their association with Leona Consulting become public. ER-25-27.

Michael Firestone is married to Lindsay Berschauer. ER-30. He owns Firestone Ag Enterprises Co. ER-30. He also owns Firestone Processing Co jointly with Berschauer. ER-30. Both companies operate solely in Oregon within the agricultural sector. ER-30.

Lisa Ledson owns Nursewise Delegations, LLC. ER-12. This small business "provides nursing delegation services to patients and their care providers." ER-12. In general, this business instructs others about medical treatment regimens that may concern the use of prescribed drugs or medical

devices. ER-12. In some cases, this advice can include "proper education and use of prescribed pharmaceuticals, including the use of medical cannabis; durable medical goods," and items considered illegal drug paraphernalia federally that are legal in Oregon. Er-12. Because of Nursewise's size and structure, Ledson is concerned that she will need to disclose information about one or more of her clients pursuant to the CTA. ER-13-14.

Thomas Reilly owns Same Day Auto Service. ER-8. He is also the president of the Oregon Small Business Association, a 501(c)(4) entity with a political action committee that supports political candidates and causes that align with his beliefs. ER-8.

Katerina Eyre owns a small accounting business that operates wholly within Oregon. ER-19. Given that she is a Certified Public Accountant, she is subject to criminal background checks and "self-reporting of any violations of federal, state, or local laws[.]" ER-19. Eyre has particularly complex compliance obligations because some of her work requires filing BOI reports on behalf of her clients, often concerning unclear and complex aspects of ownership and control. *See* ER-20-21.

Tayler Hayward owns a small jewelry company. ER-16. And Gerald Earl Cummings is a beneficial owner of two, unnamed non-party companies that operate wholly within Oregon. ER-4.

III. Procedural History

Appellants filed a Complaint seeking declaratory and injunctive relief on June 27, 2024. ECF No. 1. That same day, they moved for an emergency temporary restraining order and preliminary injunction. ECF No. 3. The district court denied the TRO without prejudice. ECF No. 10. Appellees responded to the motion for preliminary injunction on August 16. ECF No. 13. Appellants replied on August 30. ECF No. 16.

The district court held oral argument on September 9, and, in a written opinion, denied the appellants' motion for preliminary injunction on September 20. ECF No.'s 17-18. On November 18, 2024, Appellants filed a notice of interlocutory appeal as well as a motion for injunction pending appeal with the district court. *See* ECF No.'s 19-20. At the time of this filing, the motion for injunction remains pending with the district court. Undersigned counsel began representing Appellants in this matter on November 18.[1]

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[1] When reviewing the denial of a preliminary injunction, courts of appeals often address factual issues that were not resolved by a district court. *See Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 712 (3d Cir. 2004) (even after finding error, appellate court will "first look to see whether the record provides a sufficient basis to ascertain the legal and factual grounds for the grant or denial of the injunction") (citation omitted). Indeed, because of the inherent need for quick review, a court of appeals "will review the findings and conclusions of the district court *and the factual assertions and contentions of the parties* in light of the controlling legal principles to see whether the facts and law compel a particular result," and if so, grant or deny relief. *Id.* (emphasis added). Appellants furnished the district court with supplemental declarations concerning their motion for appellate relief. ECF No.'s 21-27. Those declarations are now properly part of the record on appeal, even though the district court did not address them. *See Kos Pharms., Inc.*, 369 F.3d at 712.

SUMMARY OF THE ARGUMENT

Appellants, who are seven small business owners, are entitled to a preliminary injunction against enforcement of the CTA and the reporting rule, and the district court abused its discretion when it denied Appellants this relief.

Unless enjoined, Appellants, along with at least 32.6 million other businesses, will face an impermissible dilemma on **January 1, 2025**. That is the deadline for compliance with the CTA's requirement that nearly all business entities in the country file invasive reports about their associations and private financial information with the U.S. Department of Treasury. More importantly, that date also is when the failure to file any such report triggers *criminal* liability, and *daily* civil fines.

The CTA should have been enjoined by the district court:

I. *First*, the CTA, and its implementing regulations, are likely unconstitutional for three reasons. First, the federal government lacks the power to regulate entities organized under state law merely because they have registered with their home state. Congress has no enumerated power to control such local activities that have always been regulated exclusively by the states. Second, the Act restricts associational rights protected by the First Amendment, because it forces entities to disclose the identities of individuals associated with the entity's expressive activities. Finally, the Act violates the Fourth Amendment because it

mandates invasive disclosures on pain of criminal punishment without any particularized suspicion or pre-compliance review from a neutral party.

II. *Second*, compliance with this unconstitutional federal statute requires Appellees to suffer irreparable harm. The CTA comes with significant practical and constitutional costs. *Appellees* estimate that preparing and filing the required reports will cost each Appellant as much as $2,614.87. Those are all costs incurred *before* the reports can be filed. Once filed, though, the reports disclose information that often reveals associations that are kept privileged by the First Amendment. Further, the reports demand sensitive financial information that the CTA itself recognizes to be "confidential."

Appellants face competing demands to *either* comply with a law that violates their constitutional rights, and, in the process, incur thousands of dollars in unrecoverable compliance costs, and disclose highly sensitive information about their most private affairs, *or* face federal criminal liability and daily civil fines.

III. *Third,* the equities favor an injunction, as the public interest is *always* served by enjoining unconstitutional government action. Regardless of the government's interests in deterring financial crime, those interests must yield to the Constitution.

STANDARD OF REVIEW

The proponent of a preliminary injunction must show (1) a likelihood of success on the merits, (2) irreparable harm in the absence of preliminary relief, (3) a balance of equities in the proponent's favor, and (4) "that the injunction is in the public interest." *Doe v. Snyder*, 28 F.4th 103, 111 (9th Cir. 2022). This Court reviews a district court's "denial of a preliminary injunction for abuse of discretion." *Id.* at 106. But it reviews the underlying legal issues *de novo*. *Creech v. Idaho Comm'n of Pardons & Parole*, 94 F.4th 851, 854 (9th Cir. 2024).

ARGUMENT

THIS COURT SHOULD ENJOIN THE CTA

I. Appellants are Likely to Succeed on the Merits.

a. The CTA exceeds Congress' enumerated powers.

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012). The Tenth Amendment confirms that the federal Constitution reserves all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States . . . to the States respectively, or to the people." Both Congress and the court below ignored these limits. The CTA is not authorized by any enumerated power. Nor does it bear a sufficient nexus to any enumerated power to be lawful under the Necessary and Proper Clause.

1. The States have exclusively controlled corporate formation and registration prior to the CTA

"Throughout the history of American law, the definition and supervision of business entities has been the task of the states. At the Constitutional Convention, during the Progressive Era, and at the height of the New Deal, the federal government debated whether to enter the corporate area itself and every time declined." Allen D. Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 Ohio St. L.J. 1037, 1037-38 (1986).

Even as the Supreme Court expanded Congress' role over regulating interstate commerce, it emphasized that "state law governs in the corporate area. Federal law forms an overlay, significant but secondary, upon state law. It does not provide for business organization, nor does it define or create trusts, partnerships, or corporations. It deals only with the transfer of interests in those business entities." *Id.* at 1056. As observed by the Supreme Court, "No 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).

2. The CTA is not a valid exercise of the commerce power.

"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." *Nat'l Small Bus. United v. Yellen*, No. 5:22-cv-1448-LCB, 2024 U.S. Dist. LEXIS 36205, at *4 (N.D. Ala. Mar. 1, 2024), *appeal filed* at No. 24-10736 (11th Cir.)

Article I, Section 8, Clause 3 of the U.S. Constitution allows Congress "to regulate commerce . . . among states." The Supreme Court has identified "three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce.

Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i..e, those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (cleaned up).

The Commerce Clause "must be read carefully to avoid creating a general federal authority akin to the police power." *NFIB*, 567 U.S. at 536. After all, "The founding generation understood the term 'commerce' to mean only 'trade or exchange of goods.'" William H. Seidleck, *Originalism and the General Concurrence*, 3 U. Pa. J.L. & Pub. Affs. 263, 269 (2018).

The government argued below that the first two categories authorized the CTA. But it has also explicitly conceded otherwise in other challenges to the CTA. Indeed, *it has made this concession both before and after* the district court's decision in this case. First, the same defendant-appellees acknowledged that use of the wires to file reports wouldn't suffice. *See NSBU*, 2024 U.S. Dist. LEXIS 36205, at *39 ("The Government wisely ... 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.'") And then after the district court's decision here, the United States was explicit that the CTA "does not regulate the 'channels' or 'instrumentalities' of interstate commerce." *Community Associations Institute v. Yellen*, No. 1:24-cv-1597, at 13 (E.D. VA, Oct. 10, 2024) (order denying motion for preliminary injunction).

The government should have conceded the point here as well. The CTA regulates neither the channels nor the instrumentalities of interstate commerce—it applies regardless of whether an entity uses them. The CTA captures within its sweep all "reporting companies," entities defined (with several exceptions) as those "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." 31 U.S.C. § 5336(a)(11). The CTA then requires those entities to report information about their beneficial owners, like the Appellants, and applicants to FinCEN. *Id.* § 5336(b)(1)-(2)(A). The word "commerce," or references to any channel or instrumentality thereof, appear nowhere in the CTA's text. *See* 31 U.S.C. § 5336.

Merely "filing [] a document" with a state is not a sufficient use of the means or instrumentalities of interstate commerce to justify the CTA. Hence the government's earlier, and "wise[r]" concessions. *See NSBU*, 2024 U.S. Dist. LEXIS 36205, at *39. It is similarly insufficient that the CTA mandates filing with

FinCEN. Congress cannot create the relevant interstate nexus by demanding conduct that would not otherwise occur. *See NFIB*, 567 U.S. at 549.

The CTA also cannot be justified by any purported aggregate effects on interstate commerce. When a statute relies on the third *Lopez* category, the question is whether the statute regulates an economic class of activities or non-economic activity. *See Lopez,* 514 U.S. at 559, 567. When "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances under that statute" does not deprive Congress of the ability to regulate that activity. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). But this is true only if the regulated activities "are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.*

Where the *class of activities* is *non-economic*, aggregation is impermissible, and intrastate conduct is simply beyond Congress' reach. *See Taylor v. United States*, 579 U.S. 301, 306 (2016) ("While this final category is broad, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."). In *United States v. Morrison*, for example, the Supreme Court rejected aggregation because the relevant statute, which punished "[g]ender-motivated crimes of violence," did "not, in any sense of the phrase, [target] economic activity." 529 U.S. 598, 613 (2000). *Raich* reaffirmed this "pattern of analysis," observing that the statute in

Morrison was "unconstitutional because . . . it did not regulate economic activity." 545 U.S. at 25; *accord Lopez*, 514 U.S. at 567 (The "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.")

Nor is *future* economic activity subject to aggregation. "The 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. The Court has always required "preexisting economic activity." *Id.*; *see also BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021) (federal vaccine mandate "likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' policy power"), *aff'd* 142 S.Ct. 661 (2022).

The CTA does not regulate an "economic class of activity" and so the government cannot look to *Lopez*'s third category. Instead, the CTA regulates the mere act of registration under state law, irrespective of the presence or absence of any commercial activity. *See* 31 U.S.C. § 5336(a)(11). The CTA applies regardless of whether an entity sells goods or services. And it applies to non-profit entities, even if they have no assets, and even if they don't engage in any commercial activity. As FinCEN observed, "nonprofits . . . that did not qualify for tax-exempt status under section 501(c)" must file reports, regardless of their

activities. *See* 87 Fed. Reg. at 59542. The United States has conceded in a separate challenge to the CTA that registering with a state is not economic activity. *See NSBU*, 2024 U.S. Dist. LEXIS 36205, at *39. Because corporate registration is non-economic intrastate activity, it falls outside Congress' limited jurisdiction. *See Taylor,* 579 U.S. at 306.

If this Court deemed the mere act of registration *with a state* as economic activity subject to aggregation, this would allow the federalization of all corporate law for the first time in our nation' s history. Indeed, virtually every act in a person's everyday life relates in some way to filing a document with a state government. If this is good enough to justify Congress's expansive intrusion into state affairs with the CTA, then there's no reason why applying for a driver's license could not trigger federal control over how a person drives. If the government's argument is correct, parents who have enrolled their children in public schools have also engaged in *interstate commerce* sufficient to authorize total federal control over education. This reasoning cannot be squared with existing precedent holding that corporate law is the domain of the state—not Congress. *See CTS Corp.*, 481 U.S. at 89 ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations.").

The district court, however, accepted the government's argument and concluded that the "CTA is directed at commercial entities . . . that, in the aggregate, have a substantial effect on interstate and foreign commerce." *Firestone*, No. 3:24-cv-1034-SI, at 12. But the relevant question is not whether the regulated *entity*—in the aggregate—affects interstate commerce. Rather, the proper question is whether the regulated *activity*, in the aggregate, has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 559 (observing that the regulated "activity" must "substantially affect[] interstate commerce.") If the district court were correct that entities were the proper subject, then Congress could regulate all aspects of corporate law, as corporations, in the aggregate, substantially affect interstate commerce. The Supreme Court has squarely foreclosed such analysis. *See NFIB*, 567 U.S. at 557 ("The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.").

Tellingly, the district court recognized that Congress may not regulate wholly intrastate activity that "has . . . nothing to do with commerce or any sort of economic enterprise." *Firestone*, No. 3:24-cv-1034-SI, at 13 (footnote 8). Nevertheless, the district court equated an entity's filing of a registration document with a state with economic conduct, but those are hardly equivalent concepts. As described above, merely filing a paper with a state registrar has nothing to do with

commerce or economic activity, and the CTA applies regardless of whether or how much the entity *engages in economic activity*. For instance, Appellant Hayward operates a "micro" enterprise and does "not anticipate that [she] will earn enough in net sales in my small business to cover the cost of obtaining professional help to comply with the CTA." ER-16. In other words, the direct economic burdens of the federal regulation far exceed Hayward's *intrastate* commerce. Surely something has been lost from the Constitution's promise of federalism if such an upside-down notion of interstate commerce is all the justification required.

The government's defense of the CTA thus requires impermissibly "pil[ing] inference upon inference," as the only way to connect registration and commerce requires the occurrence of multiple uncertain events. *See Lopez,* 514 U.S. at 567. But "[n]o matter how inherently integrated" the regulated activity and commerce may appear in the abstract, "they are not the same thing: They involve different transactions, entered into at different times, with different" parties. *See NFIB*, 567 U.S. at 558. This Court must require some level of "proximity and degree of connection" between the face of the statute and commerce at large. *Id.* That's absent in the CTA.

Even so, the district court attempted to link registration and interstate commerce by observing that the CTA regulates "entities with the capacity to engage in commerce[.]" *Firestone*, No. 3:24-cv-1034-SI, at 14. An entity's ability

to engage in commerce is irrelevant. That *some* entities may enter interstate commerce after they register does not authorize Congress to regulate the registration of *each* entity. Congress only enjoys authority to regulate "preexisting economic activity" under the Commerce Clause. *NFIB*, 567 U.S. at 557. To accredit the court's view, one must ignore this constraint.

The CTA is also not a comprehensive regulatory scheme over commerce. "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18. The regulatory scheme should, however, "directly regulate economic, commercial activity." *See id.* at 26.

The CTA is not part of a larger regulatory scheme, and Congress identified no such scheme in passing it. The vague goal of "deter[ring] money laundering" or invoking terrorism concerns are not such schemes. And the CTA's organization disposes of Congress' pretense. The CTA requires all entities to file reports once they register with a state, regardless of their activities or non-economic purposes. 31 U.S.C. § 5336(b)(1)(A). And the CTA has exemptions that broadly, and irrationally, exclude businesses that are the most likely culprits of international money laundering. These exclude money transmitters, public companies, and—inexplicably—any company with more than twenty employees and $5,000,000 in

yearly revenue. 31 U.S.C. § 5336(a)(11)(B). Many non-profits or entities with no assets or activities must nevertheless file reports. Indeed, the CTA treats Appellant Hayward, with her nascent "micro" enterprise and compliance costs projected to exceed revenue, as a bigger threat to illicit finance than a money transmitting firm that sends funds to residents of a hostile foreign power. ER-16. The CTA's structure makes one thing perfectly clear—its vague goals would be undeterred if the Act couldn't reach entities engaged in no commercial activity and with no assets.

Invoking *Raich*, the district court nevertheless suggested that the CTA is part of a larger regulatory scheme. *Firestone,* No. 3:24-cv-1034-SI, at 12-14. Congress may occasionally regulate "intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18. But *Raich*'s lesson was that the regulation of illicit drugs may be undermined by individual exemptions for home-grown marijuana. *See* 545 U.S. at 41-42. The CTA is not cut from the same cloth. Given that the law exempts those most likely to engage in financial crimes, one cannot plausibly suggest the failure to capture beneficial ownership information undermines the longstanding frameworks criminalizing money laundering. And even if the law

may be helpful in addressing some financial crime, that too is an insufficient connection to the regulatory framework to justify the CTA.

At best then, the CTA bears a tenuous relation to existing, legitimate schemes Congress has created to address financial crimes. That relation alone does not authorize the CTA. If that were so, then Congress' regulation of the healthcare market would have authorized the Affordable Care Act under the Commerce Clause. The Supreme Court rejected such reasoning though, as this Court should do here. *See NFIB*, 567 U.S. at 560 ("No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.") No aspect of the Commerce Clause authorizes the CTA.

3. The CTA is neither necessary nor proper to effectuating the foreign affairs or taxing powers.

The Necessary and Proper Clause does not authorize the CTA. *See* U.S. Const., Art. I, § 8, cl. 18. The 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. Rather than provide Congress an independent power, the clause merely allows Congress to execute its existing powers. *Id.* At most, it forgives close questions concerning "individual *applications* of a concededly valid

statutory scheme." *See id.* (citing *Raich*, 545 U.S. at 72). The Supreme Court has labelled the clause "the last, best hope of those who defend *ultra vires* congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). When a court considers 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." *United States v. Comstock*, 560 U.S. 126, 150 (2010) (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) (the Founders believed the Clause "did not go 'a single step beyond the delegated powers.'")

The district court found that the CTA was a necessary and proper means to effectuate both Congress' taxing and foreign affairs powers. *Firestone*, No. 3:24-cv-1034-SI, at 14-17. But the CTA's connection to the taxing power is tenuous. Finding that Congress is permitted to collect useful data and allow tax officials to access that data would be a "substantial expansion of federal authority." *See NFIB*, 567 U.S. at 560. That exercise of power—with marginal relation, at best, to collecting taxes—is "in no way an authority that is 'narrow in scope,' or 'incidental' to the exercise of the [taxing] power." *See id* (citations omitted). Even if the CTA's reporting requirements were *necessary* (which they are not),

expanding the taxing power in this manner is not a *proper* exercise of Congressional authority. To withstand scrutiny, the CTA must be both. *See id.*

The district court ignored this. Instead, it found that the CTA was necessary and proper to effectuating Congress' taxing power because "Congress explicitly determined that corporate ownership reporting requirements are 'highly useful' to combatting tax fraud and other forms of tax evasion." *Firestone,* No. 3:24-cv-1034-SI, at 15. The fact that the CTA may be "highly useful" to effectuating this end is not dispositive. And more fundamentally, the CTA is not a tax. If the CTA were necessary and proper to fulfilling the taxing power, then any act that *might* conceivably lead the federal government to *someday* gather revenue would be permissible. This is far too broad a view of the authority conferred on Congress by the Necessary and Proper Clause. *See NFIB*, 567 U.S. at 560.

The CTA's connection to foreign affairs rests on even shakier ground. Foreign entities represent only a small subset of the entities that must register under the CTA. *See* 31 U.S.C. § 5336(a)(11). And *possible* international applications of a domestic statute do not save otherwise impermissible exercises of federal authority. *See Bond v. United States*, 572 U.S. 844, 883 (2014) (Scalia, J. concurring).

It is along these lines the district court went astray. The possible, ambiguous applicability of the CTA to foreign actors, as suggested by Congress' findings,

does not justify applying the CTA to every domestic entity. Further, a court cannot plausibly claim that knowing the identity of every beneficial owner of domestic corporations is necessary to national security. Suggesting so flirts with absurdity.

b. The CTA violates the First Amendment by burdening anonymous association.

"[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, education, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (collecting cases). This includes the right to associate anonymously. *Americans for Prosperity v. Bonta*, 141 S.Ct. 2373, 2382-83 (2021) (plurality op.) "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] other forms of governmental action." *NAACP v. Ala. Ex. Rel. Patterson*, 357 U.S. 449, 462 (1958).

Groups of people engaged in "expressive association" are protected "by the First Amendment's expressive associational right." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Healy v James*, 408 U.S. 169, 181 (1972) ("[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs.") The "First Amendment's protection of expressive association is not reserved for advocacy groups." *Id.* Instead, a group must merely

"engage in some form of expression, whether it be public or private" to be protected. *Id.*

Expressive association takes many forms. When any "level" of an entity takes "public positions on a number of diverse issues . . . like civic, charitable, lobbying, fundraising, and other activities," each are "worthy of constitutional protection under the First Amendment." *Jaycees*, 468 U.S. at 626-27 (citations omitted). Entity members involved in these activities are also protected in expressing the "views that brought them together." *Id.* at 623. It is for this reason that the Supreme Court recognized expressional association rights of members of organizations that advocate for political, social, and cultural issues, see, e.g., *NAACP*, 357 U.S. at 462, political parties and organizations, see, e.g., *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973), and non-profit organizations of all types, see, e.g., *SFP*, 141 S.Ct. at 2383, *Boy Scouts*, 530 U.S. at 656, and *Jaycees*, 468 U.S. at 612.

For-profit corporate entities enjoy the same right to expressive association as any other speaker. The "Government may not suppress political speech on the basis of the speaker's corporate identity," and this applies equally to "nonprofit or for-profit corporations." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010). For this reason, the Court held in *303 Creative LLC v. Elenis* that a single-member company, engaged in expressive "commercial" activity, had the

same expressive rights as any other entity. 143 S.Ct. 2298, 2316 (2023). The company could thus refuse to associate its commercial products with ideas it did not share. *Id.*

Government "intrusion into the internal structure or affairs of an association" may unconstitutionally burden expressive association rights. *Boy Scouts*, 530 U.S. at 648. "Regardless of the type of association, compelled disclosure requirements are [thus] reviewed under exacting scrutiny." *AFP*, 141 S.Ct. at 2383.[2] For a disclosure requirement to survive exacting scrutiny, "there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* "[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* And "a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring."

Under this standard, the Supreme Court recently struck down a law mandating that charitable organizations disclose the names and addresses of donors

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[2] This part of Justice Roberts' opinion was only joined by Justices Kavanaugh and Barrett. *Id*. However, a majority of the Court called for at least this level of scrutiny. Justice Thomas concurred that the statute was unlawful and argued that the correct standard was strict scrutiny. *Id*. at 2389-90 (Thomas, J., concurring). Justice Alito, joined by Justice Gorsuch, agreed that the statute violated the First Amendment under either standard, but believed it unnecessary to articulate which applied. *Id*. at 2392 (Alito, J., concurring).

who contributed more than $5,000 in a year. Despite the disclosures being non-public, the Court found that the "disclosure requirement imposes a widespread burden on donors' associational rights. And this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing, or that the State's interest in administrative convenience is sufficiently important." *Id.* at 2389. The reporting requirement was facially invalid, even though it was undoubtedly lawful in certain contexts, because the statute chilled protected expressive activity. *Id.*

Appellants are engaged in protected expressive activities. Appellant Berschauer, for example, is a beneficial owner of a small business that conducts political consulting and advocacy. ER-24-25. The CTA would force that business to disclose her association with the company's other beneficial owners, many of which associate for the explicit purpose of furthering political beliefs shared among the beneficial owners. *Id.* It would also force disclosure of the company's internal decision-making structure. *Id.* Disclosure of the beneficial owners and that structure could harm Appellant Bershauer, as she has already faced both public scrutiny and attempts to "dox" her protected associations by political opponents. *Id.* Given that she chooses to associate with others of similar political persuasions, Appellant Berschauer's association plainly constitutes expressive activity. *See Boy Scouts of Am.*, 530 U.S. at 648.

The same is true of Appellant Ledson. She is a beneficial owner of a nursing delegation company that often provides "instruction" to patients and care providers on sensitive topics such as pharmaceuticals, "the use of medical cannabis," and "drug paraphernalia" that is lawful in Oregon but illegal under federal law. ER-12. The CTA would force this company to disclose Appellant Ledson's associations with other beneficial owners, some of which may be sensitive. ER-12. Similarly, Appellants Cummins, Firestone, Eyre, Hayward, and Reilly are each beneficial owners of non-party companies subject to the CTA. ER-4, 8, 16, 19, 30. Each would be required to disclose both their protected association with other beneficial owners and sensitive details about themselves and their entities' internal structure. *Id.*

This intrusion implicates each appellants' right to anonymous speech and association, and it must pass exacting scrutiny. *See AFP*, 141 S.Ct. at 2382-83 (observing that individuals have a right to anonymous association). Every reporting company, including entities like Leona Consulting, which Appellant operates to support political speech and campaigns, must disclose some or all of its political clients' identities based on the CTA's absurdly broad notion of beneficial ownership. ER-24. Under the CTA "beneficial owners" include all individuals who "indirectly" "exercise[] substantial control over the entity," even when that control is not formalized. 31 U.S.C. § 5336(a)(3)(A). Each entity then, regardless

of its mission, must not only disclose the names of all 25% owners, but also their directors, officers, donors, or *any* influential member. Indeed, the Reporting Rule mandates disclosure of senior officers, or any person exercising "substantial influence over important decisions," major expenditures or investments, "[a]mendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures," or even the scope of operations. 31 C.F.R. § 1010.380(d)(1)(i).

This means that Appellants face significant disclosure obligations about their associational activities by their respective reporting entities. In some cases, like Appellant Berschauer's, the relevant entity must even disclose the identities of the individuals who make decisions to engage in political advocacy. In such situations the CTA forbids political candidates from exercising a core political activity—*privately* directing political speech through Leona Consulting. Less invasive laws have triggered exacting scrutiny. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366 (11th Cir. 1999) (applying exacting scrutiny to "a provision that requires corporate applicants for adult business licenses to disclose the names of 'principal stockholders'"); *Buckeye Inst. v. IRS*, No. 2:22-cv-4297, 2023 U.S. Dist. LEXIS 201628, at *12 (S.D. Ohio Nov. 9, 2023) (holding that exacting

scrutiny applied to federal law requiring disclosure of "substantial donors" for 501(c)(3) tax exemption).

The CTA fails exacting scrutiny. Like *AFP*'s impermissible reporting requirement, the CTA allegedly thwarts financial crimes, including money laundering via shell companies. *See* 31 U.S.C. § 5336 note. Per FinCEN, "These requirements are intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, while minimizing the burden on entities doing business in the United States." Reporting Rule, 87 Fed. Reg. at 59498. Noble ends, to be sure. But the CTA is poorly tailored because it is both over and under inclusive. For example, the statute applies to *every entity* registered with a state—no matter the entity's size or purpose—and even when it lacks any assets. On the other hand, the CTA arbitrarily exempts large corporations and more than a dozen other entities, almost all of which primarily or exclusively conduct financial transactions. *See* 31 U.S.C. § 5336(a)(11)(B). Exempting the companies most likely to engage in financial crimes, while capturing those least disposed toward misconduct in a nearly ubiquitous dragnet, is an obviously poor fit for a purportedly financial crimes statute. This alone proves the CTA's lack of narrow tailoring. *See AFP*, 594 U.S. at 610 ("The government may regulate in the First Amendment area only with narrow specificity") (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Inexplicably, FinCEN rejected calls to narrow the CTA's reach, as it insists there remains the slight possibility that charities may be involved in illicit financial transactions. *See* 87 Fed. Reg. at 59542-43. If that's true, it's unclear why federally exempt organizations need not comply with the CTA, while others, like Appellant Ledson's entity who may qualify for federal exemption but still lack that status, must report. The Congressional record shows a pernicious reason for the CTA's irrationalities—the Act was intended, in part, to allow the government to determine "the identities behind big political spending." *See* Congressional Record, Vol. 163, No. 101 at S3469. This is a grotesquely unconstitutional objective. *See AFP*, 141 S.Ct. at 2389. And it further evinces the CTA's lack of tailoring.

The district court improperly declined to apply exacting scrutiny. In the court's view, Appellants failed to establish that the reporting requirement burdened their associational rights. *Firestone*, No. 3:24-cv-1034-SI, at 18. But the CTA demands disclosure similar to that in *AFP*, where the Court held that the disclosure "impose[d] a widespread burden on donors' associational rights." *AFP*, 594 U.S. at 618. And the district court identified no reason that the CTA, which sweeps broader and captures more sensitive information than *AFP*'s disclosures, is any less violative of Appellants' associational rights. Given the greater burden on

associational rights presented by the CTA, the court's failure to apply exacting scrutiny is inexcusable.

In an apparent attempt to circumvent *AFP* and *NAACP*'s clear applicability to the CTA, and the requirement to employ exacting scrutiny, the district court contradicted the unmistakable holding of *AFP* and insisted that Appellants *prove* that they will suffer impermissible retaliation before they could challenge the not-yet-effective CTA. The district court contrasted the litigants in *NAACP*, with what the court considered the to be "speculative" and "conclusive" burdens on Appellants' associational rights. *Firestone*, No. 3:24-cv-1034-SI, at 18. In the court's view, *NAACP* is inapposite because those litigants "presented credible evidence" that they previously experienced injury due to their association with the NAACP. *Id.*

The court's analysis misses the mark and explicitly conflicts with the Supreme Court's *AFP* decision. The CTA is unlawful because its demands "*might* chill association." *See AFP*, 594 U.S. at 615 (emphasis added). Plaintiffs need not "show[] that [individuals connected to a] substantial number of organizations will be subjected to harassment and reprisals," because the *risk* of chilled association outweighs the Government's interest in maintaining its overbroad regime. *Id.* at 617. Thus, Appellants need not show past injury to substantiate their claim. It is sufficient to show that the CTA creates a *risk* of chilling association. *See AFP*, 594

U.S. at 616 ("Exacting scrutiny is triggered by state action which *may* have the effect of curtailing the freedom to associate, and by the *possible* deterrent effect of disclosure") (internal quotation marks omitted). How else would a pre-enforcement challenge *possibly* operate? Appellants can easily clear the necessary hurdle given that the Supreme Court has explicitly recognized that similar reporting requirements "create[] an unnecessary risk of chilling in violation of the First Amendment." *See id.*, 594 U.S. at 616 (quoting *Secretary of State of Md. V. Josephy H. Munson Co*, 467 U.S. 947, 968 (1984)).

Even if they had a burden of proof, Appellants allegations here evince a greater risk of chilling than what was present in *AFP*. Appellant Berschauer potentially faces public harassment due to her private associations with the other beneficial owners in her company. ER-24—27. In fact, one of Leona Consulting's former political clients (who also served as counsel below), faced overt retaliation from a political opponent because of her association with Bershauer and this litigation. ER-24—25. Bershauer thus quite reasonably fears that other clients who are not otherwise known will face similar kinds of retaliation should their association with Leona Consulting become public. Similarly Appellant Ledson, whose entity takes controversial positions in the medical field, might easily face similar hostility with disclosure of her association to other beneficial owners (who are not identified here). ER-12—13. These facts prove that their association could

be chilled under the CTA, and that is sufficient to trigger exacting scrutiny. *See AFP*, 594, U.S. at 616.

Finally, the district court's suggestion that beneficial ownership would only "become known to the federal government" further demonstrates its misguided approach. "Our cases have said that disclosure requirements can chill association '[e]ven if there [is] no disclosure to the general public.'" *AFP*, 594 U.S. at 616 (citation omitted). This is because of the "constant and heavy pressure" individuals might "experience simply by disclosing their associational ties[.]" *Id.* (citing *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)) (internal quotation marks omitted). Insofar as the First Amendment is concerned, no relevant difference exists between public reporting and reporting to the government. *Id.* ("While assurances of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it.") The Supreme Court's directions in *AFP* are clear: A state law requiring disclosure of certain political donors to California authorities was unconstitutional because it *threatened* to chill protected association *even before* it took effect and *even though reports were non-public*. *See id.* There is simply no way to avoid *AFP*'s holding by pretending that the risks to associational freedom or fears over disclosure are in any way less significant than in that case.

The district court ignored these issues and erred by failing to apply exacting scrutiny. This Court should therefore conclude that the CTA impermissibly burdens Appellants' associational rights under the First Amendment.

c. The CTA facially violates the Fourth Amendment

"[A]n order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment." *Hale v. Henkel*, 201 U.S. 43, 76 (1906); *see also Patel v. City of Los Angeles*, 738 F.3d 1058, 1061 (9th Cir. 2013) (*en banc*) ("the 'papers' protected by the Fourth Amendment include business records like those at issue here") *aff'd* 576 U.S. 409 (2015). "Compulsory production of private papers," by the government is both a search and seizure. *Hale*, 201 U.S. at 76. The "papers" protected by the Fourth Amendment include business records. *See id.* at 76-77 (subpoena for "all understandings, contracts or correspondence" between corporation and others and "reports made, and accounts rendered by such companies from the date of the organization" was unreasonable under the Fourth Amendment). When a law mandates that a business compile private information and disclose it upon demand by law enforcement then, this constitutes a "search." *See City of L.A. v. Patel*, 576 U.S. 409, 421 (2015).

The Fourth Amendment generally demands a warrant. "Searches conducted outside the judicial process, without a prior approval by a judge or a magistrate

judge, are *per se* unreasonable subject only to a few specifically established and well-delineated exceptions." *Id.* at 419 (cleaned up). That "rule applies to commercial premises as well as to homes." *Id.* at 419-20 (citation omitted).

Warrantless "administrative search[es]" may sometimes be permissible "where the primary purpose of the searches is distinguishable from the general interest in crime control." *Id.* at 419 (cleaned up). But "absent consent, exigent circumstances, or the like, in order an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Id.* If administrative searches carry criminal consequences for noncompliance, then "[a]bsent an opportunity for precompliance review," an "intolerable risk" exists that such searches will be abused by the government. *Id.*

The government must also demonstrate some level of individualized suspicion before it may demand a business entity's private papers. *See Patel*, 738 F.3d at 1064 ("The government may ordinarily compel the inspection of business records only through an inspection demand 'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome'") (quoting *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208-09 (1945)). While subpoenas for corporate records are thus usually permitted on a showing of need less than probable cause, judicial process is still required to

determine that "the charge [against the target] is proper and the material requested is relevant[.]" *McLane Co. v. EEOC*, 581 U.S. 72, 77 (2017). The subpoena may not be "too indefinite," issued for "an illegitimate purpose," or be "unduly burdensome." *Id.*; *see See v. City of Seattle*, 387 U.S. 541, 544 (1967) ("It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.")[3]

The CTA's requirement that every reporting company provide beneficial ownership information about Appellants without pre-compliance review or individualized suspicion facially violates the Fourth Amendment. The CTA's disclosure requirement plainly implicates their privacy interests, as they are beneficial owners subject to disclosure. FinCEN concedes the existence of

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[3] Similarly, courts have "recognized the existence of a constitutionally protected interest in the confidentiality of personal financial information," which can only "be overcome by a sufficiently weighty government purpose." *Statharos v. N.Y.C. Taxi & Limousine Comm'n*, 198 F.3d 317, 322-23 (2d Cir. 1999); *see also NASA v. Nelson*, 562 U.S. 134, 138 (2011) ("We assume, without deciding, that the Constitution protects a privacy right[.]"); *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing constitutional protections related to "individual interest in avoiding disclosure of personal matters," and "independence in making certain kinds of important decisions"); *Nat'l Treasury Emps. Union v. United States Dep't of the Treasury*, 25 F.3d 237, 242 (5th Cir. 1994) (recognizing the "individual interest in avoiding disclosure of personal matters ... which is properly called the right to confidentiality"). While the contours of this latter right are somewhat unclear, the Second Circuit has noted that mandatory financial disclosure laws for "heavily regulated" businesses must still pass "intermediate scrutiny" to be valid. *Statharos*, 198 F.3d at 323.

Appellants' privacy interest, recognizing that beneficial ownership information "shall be confidential and may not be disclosed" except in limited ways. *See* 31 U.S.C. § 5336(c)(2)(A). And courts have found "a constitutionally protected interest in the confidentiality of personal financial information." *See Statharos*, 198 F.3d at 322-23 (collecting cases). Further, the CTA's disclosure requirements implicate information protected by the First Amendment. Appellants engage in protected association that relies on the corporate form's guarantee of anonymity. For these reasons, the CTA's disclosure requirements are significantly more intrusive than a hotel's guest list, which the Court protected in *Patel*. 576 U.S. at 419.

The CTA's scope reinforces its Fourth Amendment problem. It applies to at least 32.6 million existing entities, including those without existing assets or operations. Despite the Act's express purpose being crime control, it sweeps broadly without individualized suspicion. And its disclosure requirements apply regardless of whether an entity is suspected of *any* wrongdoing. Instead, the CTA casts each entity into the panopticon, where none escape the government's gaze. Any entity that dares evade this surveillance faces *criminal* penalties. Yet the CTA provides no opportunity for pre-compliance review. The overreach is striking, and the Fourth Amendment does not permit it.

The district court disregarded these concerns. It suggested that the "CTA falls within the category of reasonable reporting requirements that courts have long understood as constitutional." *Firestone*, No. 3:24-cv-1034-SI, at 20. In the court's view, the CTA is akin to the reporting requirement upheld in *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974). *Id.*

Shultz dealt with disclosure requirements under the Bank Secrecy Act, and, in particular, requirements that banks and other financial institutions provide certain reports to the federal government about their customer's transactions. *See* 416 U.S. at 25-26. The Court upheld the statute against challenges from both financial institutions and customers, but its differing treatment of the classes of plaintiffs has profound consequences. *See id.* at 66-67. The Court held that the statute's "requirements for the reporting of domestic financial transactions abridge no Fourth Amendment right of the banks themselves," largely because any "bank is itself a party to each of these transactions, earns portions of its income from conducting such transactions, and in the past may have kept records of similar transactions on a voluntary basis for its own purposes." *Id.* at 66. The Court then rejected the more significant challenge raised by the accountholders pursuant to the third-party doctrine—the individual account holders had voluntarily disclosed this information and given up their privacy interests in it, while the financial

institutions could not vicariously assert the interests of the account holders. *Id.* at 69. The latter holding thus avoided the concerns presented here.

As more recent cases have explained, the outcome in almost all Fourth Amendment cases relies on the presence or absence of a reasonable expectation of privacy in the target of a government search. *See Carpenter v. United States*, 585 U.S. 296, 310 (2018). While *Shultz* showed that the "government may require businesses to maintain records and make them available for routine inspection when necessary to further a legitimate regulatory interest," even that holding was tempered by the requirements that the demand be "'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'" *Patel*, 738 F.3d at 1064 (citing *Shultz*, 416 U.S. 21, 45-46, and quoting *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208-09 (1945)), *aff'd* 576 U.S. 409 (2015). Indeed, the Court has since explained that *Shultz* was a case involving "requests for evidence implicating diminished privacy interests or for a corporation's own books," and flatly rejecting the view that "the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." *Carpenter*, 585 U.S. at 317-18, 318 n. 5.

Shultz does not ameliorate the CTA's Fourth Amendment problem. *Shultz* evaded the salient Fourth Amendment concerns in that case because the accountholders, who claimed a privacy interest in their transactions, had

voluntarily disclosed the information to the bank. *Id.* at 69. They thus waived any privacy interest in the transactions under the third-party doctrine. *Id.* Appellants here have done no such thing, as the CTA forces disclosure of otherwise private information, including confidential financial information and the identities of political associates.[4] Unlike *Shultz*'s litigants then, Appellants likely have a reasonable expectation of privacy in the information at issue. And that means that not even the third-party doctrine would save the constitutionality of the CTA. *See Carpenter*, 585 U.S. at 317-18, 318 n. 5.

The district court also incorrectly suggested that the "CTA does not disturb any interest the Fourth Amendment protects." *Firestone,* No. 3:24-cv-1034-SI, at 20. This simply ignores *Patel*, a decision conspicuously absent from the district court's analysis. The *Patel* decision clearly held that the government cannot force a hotel to compile information about its guests and disclose that information absent pre-compliance review and targeted suspicion. *See Patel*, 738 F.3d at 1064 (discussing *Oklahoma Press*). If the government cannot force a hotel to turn over this information without these safeguards, then it surely cannot mandate disclosure of far more sensitive information without the same protections. Because the

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[4] Oregon does not require Appellants to disclose beneficial ownership information at any point during registration. *See* ER-4, 8, 13, 25, 30.

Supreme Court already found a Fourth Amendment interest in *far* less sensitive information, the district court's conclusion about the CTA was wrong.

Finally, the district court insisted that "any asserted privacy interests are sufficiently protected by the statutory safeguards provided in the CTA." *Firestone*, No. 3:24-cv-1034-SI, at 21. While Congress and the government may desire otherwise, the Fourth Amendment limits government *collection* of information. *See Patel*, 576 U.S. at 421. The fact that the CTA includes marginal data protection *ex post* is irrelevant. *See id.* Indeed, "broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of criminal penalties." *Id.* (quoting *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 533 (1967)). So yet again, the Supreme Court has cut off the government's flimsy excuse, and the district court erred in accepting this defense of the CTA. After all, Appellants struggle to identify another context where one could reasonably conclude that no Fourth Amendment problem exists where *law enforcement* collects private information *for the purpose of investigating crime*. In sum, the CTA likely violates the Fourth Amendment.

d. The reporting rule must also be vacated

As discussed, the CTA imposes multiple unconstitutional requirements on Appellants. The Reporting Rule implements these same unconstitutional

provisions while also setting out compliance deadlines. *See* 31 C.F.R. § 1010.380(a)(1)(iii). The Administrative Procedure Act instructs courts to "hold unlawful and set aside agency action . . . found to be . . . contrary to constitutional right[s]." 5 U.S.C. § 706(2)(B). Thus, a Final Rule is invalid where it effectuates an unconstitutional statute. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (explaining that "unlawful" agency action "includes unconstitutional action"). Because the Reporting Rule implements the CTA's unconstitutional provisions, this Court should also enjoin the rule.

II. Appellants Face Imminent Irreparable Injuries

"It is well established that the deprivation of constitutional rights" irreparably injures a plaintiff. *Arevalo v. Hennessy*, 882 F.3d 763, 766-67 (9th Cir. 2018) (citation omitted); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Indeed, the Supreme Court has observed that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. Thus, when a law threatens a plaintiff's First Amendment rights, that plaintiff suffers an irreparable injury. *See id.*

Separately, but of similar import, unrecoverable compliance costs may constitute irreparable injury. *See California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) ("such harm is irreparable here because the states will not be able to recover monetary damages[.]") While purely economic costs are "not normally considered

irreparable" harm, this rule need not apply when the costs cannot be recovered in the course of litigation, such as with claims under the APA. *See id*; *see also Idaho v. Coeur D'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015).

Appellants will suffer irreparable injury from the CTA unless this Court enjoins it and its implementing regulations prior to January 1, 2025. Because the named appellants will be required to comply with the filing requirements—and must expend resources to do so—their nonrecoverable compliance costs constitute irreparable injury. *See Azar*, 911 F.3d at 581. Each appellant will incur costs, including legal fees, to comply with the CTA. ER-4, 9, 13, 16, 21, 27, 32.

There are hardly speculative costs either. Compliance with the CTA isn't always achieved easily. Compliance requires a filer to make sure that the information they have gathered is comprehensive and accurate, particularly for complex business arrangements. FinCEN itself recognized that the estimated burden hours include filing initial reports, reviewing information and complying with ongoing duties to update them when information changes, applying for FinCEN identifiers and updating these identifiers, all at a cost of $22,800,287,021.69 *in the first year*. 87 Fed. Reg. at 59581. FinCEN also recognized that small entities would face different regulatory burdens depending on their "beneficial ownership structure," with "simple," "intermediate" and "complex" structures facing differing obligations, with the burden on *each filer* to

file initial reports as $85.14, $1,350, and $2,614.87 respectively, and the burden to *update* the reports for each filer as $37.84, $299.33, and $560.81. *Id.* at 59574, 59576. *Some* of Appellants may have initial compliance costs at the lower end of this range. Others, such as Eyre, with her complex roster of accounting clients for whom she may be required to file reports, or Berschauer and Firestone, with Berschauer's ownership in her own political consulting company, her shared interest in Firestone Processing Co, and Firestone's separate control of other reporting companies, all face significant burdens. ER-19—21, 24, 27, 30.

Further, because the CTA and Reporting Rule both threaten to infringe Appellants' First and Fourth Amendment rights, irreparable injury is present. *See Oakland Tribute, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985) (a plaintiff must merely "demonstrate that there exists a significant threat of irreparable injury.") As described above, Appellants imminently face the unconstitutional threat of revealing sensitive, and constitutionally protected, information on pain of criminal penalties. That alone constitutes irreparable injury.

III. The equities favor an injunction

The third and fourth factors, "harm to the opposing party and weighing the public interest . . . merge when the Government is the opposing party." *Nken*, 556 U.S. at 420 (discussing identical factors for a stay). "'Generally, public interest concerns are implicated when a constitutional right has been violated, because all

citizens have a stake in upholding the Constitution.'" *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017). "It is always in the public interest to prevent the violation of a party's constitutional rights." *X Corp. v. Bonta*, No. 24-271, 2024 U.S. App. LEXIS 22456, at *27 (9th Cir. 2024) (quoting *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 695 (9th Cir. 2023)).

However legitimate the Government's interest in deterring financial crimes, "even undeniably admirable goals must yield when they collide with the . . . Constitution." *Id.* (internal quotation marks omitted). Because the CTA and its implementing regulations are constitutionally invalid, the equities favor an injunction. *See id.* ("When a party raises series First Amendment questions, that alone compels a finding that the balance of hardships tips sharply in its favor") (cleaned up).

The district court ignored that the public interest favored Appellants by finding that the merits favored the government. *Firestone*, No. 3:24-cv-1034-SI, at 27. As described above, these findings were erroneous. The equities favor Appellants, regardless of any interest the government may have in deterring financial crime. The court's concern about "interfer[ing] with Congress' judgment" is equally unpersuasive given the CTA's constitutional infirmities. *See*

id. at *27. The court below thus erred when it found that the equities weighed against an injunction.

CONCLUSION

This Court should enjoin Appellees from enforcing the CTA, 31 U.S.C. § 5336.

Date: November 22, 2024

Respectfully,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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