No. 24A653

In the
**SUPREME COURT OF THE UNITED STATES**

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

*Applicants*,

v.

TEXAS TOP COP SHOP, LLC, ET AL.,

*Respondents*.

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

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# BRIEF OF *AMICI CURIAE* UNITED STATES SENATOR CYNTHIA M. LUMMIS AND WYOMING SECRETARY OF STATE CHUCK GRAY IN OPPOSITION TO THE EMERGENCY APPLICATION FOR A STAY


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## INTERESTS OF *AMICI CURIAE*

*Amici*[1] United States Senator Cynthia M. Lummis of Wyoming and Wyoming Secretary of State Chuck Gray submit this brief as *amici curiae* in opposition to the Department of Justice's emergency application for a stay of the United States District Court for the Eastern District of Texas's injunction against the enforcement of the Corporate Transparency Act (CTA), 31 U.S.C. § 5336, and subsequent action by the United States Court of Appeals for the Fifth Circuit.

Wyoming is a leading jurisdiction for corporate formation, offering businesses a stable and predictable regulatory framework. Accurate, timely information is essential for Wyoming businesses to comply with their legal obligations. Judicial whiplash makes those obligations murky at best, and magnifies the compliance burden imposed on small businesses.

Senator Lummis, as a member of the United States Senate Committee on Banking, Housing and Urban Affairs, has a distinct constitutional interest in oversight of the Department of the Treasury and the Financial Crimes Enforcement Network (FinCEN).

Secretary Gray[2] is the State of Wyoming's elected official responsible for administration and oversight of Wyoming's corporate laws, including the formation of new business entities and ongoing reporting.

*Amici* strongly support countering the financing of terrorism and prosecution of financial crimes.

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[1] No counsel for any party authored this brief, in whole or in part, nor did counsel for any party or either party make a monetary contribution intended to fund this brief in whole or part. No person or entity contributed monetarily to this brief's preparation or submission.

[2] Secretary Gray submits this brief in his official capacity, but it is not filed on behalf of the State of Wyoming.

## SUMMARY OF ARGUMENT

The precedents of this Court establish that corporate law is squarely within the province of the States. The CTA itself purports to exercise a never-before-used constitutional power to regulate State business entities at the very moment of formation. The Government's constitutional argument that the CTA is constitutionally valid under the Commerce Clause and other powers is novel, and belied by the fact that it cannot point to similar historical legislation enacted by Congress. The fact that the CTA is without historical precedent alone means that a "telling indication" of "a severe constitutional problem" is likely present, and because of the novel nature of the questions presented, the Government cannot meet its burden for a stay.

Furthermore, there is no pressing need for immediate enforcement during constitutional review, especially given the novel type of Federal power over State business entities that is asserted. This is because the Government has already exercised its authority to delay implementation. Finally, the public interest lies in upholding a stay by ensuring clarity and protecting against punitive measures for noncompliance during a period of legal flux.

## ARGUMENT

### I. The Government's Emergency Application for a Stay Should Be Denied.

### A. Standard of Review

This Court's decision to grant or deny a stay hinges on four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U. S. 770, 776 (1987)).

"A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case. The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken,* at 433–34 (internal quotations and citations omitted).

This brief addresses factors (1), (2) and (4) *infra*.

### B. The Lack of Historical Precedent and Novel Questions Presented Means the Government Cannot Make a Strong Showing of a Likelihood of Success on the Merits

*Amici* concur with the rationale of the district court finding that the CTA is constitutionally infirm on Commerce Clause grounds under *NFIB v. Sebelius* and this Court's other precedents. *See Tex. Top Cop Shop, Inc. v. Garland*, 2024 U.S. Dist. LEXIS 218294, at *48–49, 59 (E.D. Tex. Dec. 3, 2024) (discussing the nature of 'activity' under the Commerce Clause) (citations omitted); *see generally NFIB v. Sebelius*, 567 U.S. 519 (2012).

More broadly, however, the legal questions presented by this case are constitutional issues of first impression with respect to both the Commerce Clause and federalism. *See Tex. Top Cop Shop, Inc. v. Garland*, 2024 U.S. Dist. LEXIS 218294, at *4 (E.D. Tex. Dec. 3, 2024) ("the constitutionality of the CTA and its accompanying regulations is an issue of first impression…"); *Tex. Top Cop Shop, Inc. v. Garland,* 2024

U.S. App. LEXIS 32702 (5th Cir. Dec. 26, 2024) (noting the "parties' weighty substantive arguments").

The formation of business entities and the operation of corporate law has historically been the near-exclusive province of the States. *See, e.g., Voller v. Neilston Warehouse Co.*, 311 U.S. 531, 535 (1941) ("the conditions under which corporations shall organize and operate are matters within the exclusive province of the state, so long as those conditions do not clash with the national Constitution."); *Marsh v. Rosenbloom*, 499 F.3d 165, 176 (2d Cir. 2007) (citing *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98–99 (1991) ("We begin with the observation that corporate law is overwhelmingly the province of the states."); *Motion for Preliminary Injunction*, *Texas Top Cop Shop, Inc., et al. v. Merrick Garland, Attorney General of the United States*, No. 4:24-CV-478, at *10 (E.D. Tex. Jun. 3, 2024).

The CTA itself expressly acknowledges that the Act "set[s] a clear, Federal standard for incorporation practices." *See* National Defense Authorization Act, Pub. L. 116-283, § 6402, 134 Stat. 3388, 4604 (2021). This is perhaps the most notable foray by Congress into the area of State corporate law in our Nation's history. The district court acknowledged as such, positing that "[p]erhaps this is why Congress has never before sought to regulate financial crimes in this way. But that alone raises judicial eyebrows at the constitutionality of the CTA." *Tex. Top Cop Shop, Inc. v. Garland*, 2024 U.S. Dist. LEXIS 218294, at *67 (E.D. Tex. Dec. 3, 2024). The Government, in its briefing, can proffer no direct historical analog for the legislative scheme contained in the CTA.[3]

This Court has repeatedly said that a lack of historical precedent is generally a "'telling indication'" of a "'severe constitutional problem'" with an asserted constitutional power. *United States v. Texas*, 599 U. S. 670, 677 (2023) (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505 (2010)). The very fact that the CTA is

[3] The Government offered potential comparators in its application before the Court and in briefing at the district court, but examples relating to antitrust, labor, unfair competition and securities have little direct bearing on State laws governing business entity formation, unlike the CTA. *See Application for a Stay of the Injunction Issued by the United States District Court for the Eastern District of Texas, Merrick Garland, Attorney General, et al., v. Tex. Top Cop Shop, Inc.*, No. 24A653, at *23 (Dec. 31, 2024); *Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction*, *Tex. Top Cop Shop, Inc. v. Garland*, 4:24-CV-478, at *18 (E.D. Tex. Jun. 26, 2024).

asserting a novel constitutional power itself counsels this Court to reject the Government application for a stay pending a searching constitutional review. The *Lopez* Court acknowledged as such when faced with another Commerce Clause question: "[w]hen faced with legislative acts that deviate from the historical status quo, courts, at the very least, must 'pause to consider the implications of the Government's arguments.'" *United States v. Lopez*, 514 U.S. 549, 564 (1995).

For these reasons, given the lack of historical precedent, the federalism issues inherent in the CTA and the novel constitutional questions presented, the Government cannot make a strong showing that it will likely succeed on the merits.

### C. The Government Will Not Be Irreparably Injured Absent a Stay

The Government's own actions in delaying the implementation date of the CTA for three years mortally wounds any argument that immediate enforcement is required in this case.

The CTA, enacted in early 2021, required FinCEN to promulgate rules within a year that would require reporting within two years. 31 U.S.C. § 5336(b). FinCEN delayed implementation of the reporting requirements for three years, and has asserted various powers to provide extensions and compliance variances based on the immense reporting burden on small businesses. *See, e.g.,* 88 Fed. Reg. 83499, 83500 (Nov. 30, 2023). Consequently, assertions by the Government of irreparable injury are overblown.

The Government's harm in pausing enforcement while constitutional review takes place is also far outweighed by the irreparable injuries that the stay would cause to businesses and individuals facing severe penalties for failing to comply with vague and burdensome regulations. These penalties include criminal and civil penalties—creating immediate, tangible risks for Wyoming businesses and their stakeholders relating to the enforceability of the CTA. *See, e.g.*, 31 U.S.C. § 5336(h). Meanwhile, forced disclosure will result in the waiver of the very constitutional protections the Government is alleged to be violating, *even if the Government ultimately loses*, as the disclosures thus far submitted have been deemed voluntary by FinCEN. *See*

*Beneficial Ownership Information Alert*, FinCEN, https://www.fincen.gov/boi, last visited Jan. 5, 2025.

### D. The Public Interest Lies in Denying a Stay

The public interest favors clarity and fairness in the application of the law. Allowing the injunction to stand ensures that businesses and individuals are not subjected to potentially severe penalties for failing to comply with regulations whose constitutional validity is actively disputed by reasonable jurists.

Such uncertainty is detrimental to economic growth, especially in a state like Wyoming, where small businesses form the backbone of the economy. Allowing the stay to remain in place protects the rights of Wyoming's citizens and businesses while preserving the integrity of the judicial process. Premature enforcement of the Act, without clear guidance from the courts, risks undermining public confidence in the rule of law, as well.

Because the CTA imposes criminal and civil sanctions—basic principles of due process require maximum clarity before enforcement may proceed. When reasonable jurists disagree on whether and how the CTA should be enforced, it is impossible for ordinary citizens and small businesses to determine their precise obligations without risking unwarranted criminal and civil liability.

The existence of simultaneous constitutional challenges and divergent judicial decisions renders the enforcement landscape far too uncertain for the Government enforce the CTA at this juncture, especially when the only "harm" to the Government is a delay of information collection for a few months.

The novel federalism and Commerce Clause issues raised by this case, compounded by the lack of need for immediate enforcement, underscores the wisdom of *Lopez* and a "pause to consider the implications of the Government's arguments." *Lopez*, 514 U.S., at 564.

## CONCLUSION

The emergency application for a stay should be denied.

January 10, 2025

Respectfully Submitted,

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## WORD COUNT CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the accompanying Brief of *Amici Curiae* contains 1,835 words, excluding the parts of the document that are exempted by Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 10th day of January 2025.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 10, 2025, three (3) copies of the Brief of *Amici Curiae* in the above-captioned case were served, as required by Supreme Court Rule 29.5(c), on the following:

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