No. 24-40792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

PAMELA BONDI, U.S. ATTORNEY GENERAL; TREASURY DEPARTMENT; DIRECTOR FINCEN ANDREA GACKI, DIRECTOR OF THE FINANCIAL CRIMES ENFORCEMENT NETWORK; FINANCIAL CRIMES ENFORCEMENT NETWORK; SCOTT BESSENT, SECRETARY, U.S. DEPARTMENT OF TREASURY,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas, Sherman Division
(No. 4:24-cv-478, Hon. Amos L. Mazzant)

BRIEF OF AMICUS CURIAE AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Michael Pepson
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
571.329.4529
mpepson@afphq.org
Attorney for Amicus Curiae

March 3, 2025

CERTIFICATE OF INTERESTED PERSONS

No. 24-40792
Texas Top Cop Shop, Inc., et al. v. Bondi, et al.

The undersigned counsel of record certifies that *amicus curiae* Americans for Prosperity Foundation is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Counsel is not aware of any person or entity as described in the fourth sentence of Rule 28.2.1 that has an interest in the outcome of this case other than those listed in the certificates filed by Plaintiffs-Appellees and prior *amici*. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

/s/ Michael Pepson
Dated: March 3, 2025 Michael Pepson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the vertical and horizontal separation of powers, federalism, and constitutionally limited government. As part of this mission, AFPF appears as *amicus curiae* before state and federal courts.

AFPF has a particular interest in this case because the Corporate Transparency Act ("CTA") undermines our system of dual sovereignty and threatens individual liberty. AFPF believes the CTA cannot be sustained as a valid exercise of any of Congress's enumerated powers, alone or in combination, and suffers from additional constitutional infirmities. AFPF writes to address why the CTA exceeds constitutional limits on federal authority under the Interstate Commerce Clause, even as augmented by the Necessary and Proper Clause, both as an original matter and under modern precedent, and cannot be squared with basic principles of federalism and State sovereignty.

[1] All parties have consented to the filing of this brief. Pursuant to FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than AFPF authored this brief in whole or in part, and no counsel or party other than AFPF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

"The constitutional structure of the United States has two main features: (1) separation and equilibration of powers and (2) federalism. Each functions to safeguard individual liberty in isolation, but they provide even greater protection working together." Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417, 1418 (2008). "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments." *Id.* at 1418–19.

Under this system of dual sovereignty, the federal government's powers are not unlimited but rather narrow and defined. The Constitution grants Congress authority "to regulate Commerce" "among the several States," U.S. Const. art. I, § 8, cl. 3, and to "make all Laws which shall be necessary and proper for carrying into Execution" that power, U.S. Const. art. I, § 8, cl. 18. But it does not grant the federal government a general police power. The Constitution instead reserves to the States the general task of governing. U.S. Const. amend. X.

The CTA is an "unprecedented," Supp.ROA.357, affront to our system of federalism that "intrud[es] on an area of traditional state concern," *Smith v. U.S. Dep't of the Treasury*, No. 24-cv-336, 2025 WL 41924, at *2 (E.D. Tex. Jan. 7, 2025), *appeal filed*, and "work[s] a substantial expansion of federal authority," *NFIB*

v. Sebelius, 567 U.S. 519, 560 (2012); *see* Supp.ROA.408. Its federal disclosure regime is triggered by a wholly *intra*state ministerial act—entity formation under state law—without any necessary link to commerce, let alone *inter*state commerce.

"The ultimate result of this statutory scheme is that tens of millions of Americans must either disclose their personal information to FinCEN through State-registered entities, or risk years of prison time and thousands of dollars in civil and criminal fines." *NSBU v. Yellen*, 721 F. Supp. 3d 1260, 1269 (N.D. Ala. 2024), *appeal filed*, No. 24-10736 (11th Cir.); *see* 31 U.S.C. § 5336(h). This unconstitutional assertion of federal power should not be allowed to stand.

For the foregoing reasons, this Court should affirm the district court.

ARGUMENT

I. Federalism Protects Liberty.

"[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under that system, "[t]he States have broad authority to enact legislation for the public good—what we have often called a 'police power.' The Federal Government, by contrast, has no such authority[.]" *Bond v. United States (Bond II)*, 572 U.S. 844, 854 (2014) (cleaned up); *see Gonzales v. Raich*, 545 U.S. 1, 66 (2005) (Thomas, J., dissenting) (noting "States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens"). This means that the

"general power of governing" belongs to the States, not the federal government. *See NFIB*, 567 U.S. at 535–36.

"This separation of the two spheres is one of the Constitution's structural protections of liberty." *Printz v. United States*, 521 U.S. 898, 921 (1997). "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (cleaned up). It is "a check on the power of the Federal Government[.]" *NFIB*, 567 U.S. at 536; *see Gregory*, 501 U.S. at 458. "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States (Bond I)*, 564 U.S. 211, 222 (2011). Dual sovereignty provides "a double security [] to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." Federalist No. 51 (Madison). "If [the People's] rights are invaded by either, they can make use of the other as the instrument of redress." Federalist No. 28 (Hamilton).

Federalism "protect[s] the liberty of the local communities in each State to choose the policies that would govern their local conduct." *United States v. Allen*, 86 F.4th 295, 313 (6th Cir. 2023) (Murphy, J., concurring) (citing *Bond I*, 564 U.S. at 220–22). It "ensur[es] that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond I*, 564 U.S. at 222 (citation

omitted). It also "promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

II. Congress's Legislative Power Is Not Plenary But Narrow and Limited.

Under the Constitution, the federal government is "one of enumerated powers." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). This "presupposes something not enumerated[.]" *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). "[T]he Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000).

To the contrary, it "can claim no powers which are not granted to it by the [C]onstitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816); *see* U.S. Const. amend. X; *see also United States v. Butler,* 297 U.S. 1, 63 (1936) ("The question is not what power the Federal Government ought to have but what powers in fact have been given by the people."). "And those powers are 'few and defined.' This enumeration ensures 'a healthy balance of power between the States and the Federal Government [and] reduce[s] the risk of tyranny

and abuse from either front.'" *United States v. Seekins*, 52 F.4th 988, 990 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc) (quoting *United States v. Lopez*, 514 U.S. 549, 552 (1995)).

"Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S. at 607; *see NFIB*, 567 U.S. at 535. Without a constitutional grant of authority to Congress, it simply cannot act. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). Article I grants Congress authority "to regulate Commerce" "among the several States," U.S. Const. art. I, § 8, cl. 3, and "make all Laws which shall be necessary and proper for carrying into Execution" that power, U.S. Const. art. I, § 8, cl. 18. Neither provision can justify the CTA.

A. An Original Understanding of the Commerce Clause Only Grants Congress Power to Regulate Interstate Trade and Transportation.

"The [Commerce] Clause's text, structure, and history all indicate that, at the time of the founding, the term 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Sackett v. EPA*, 598 U.S. 651, 708 (2023) (Thomas, J., concurring) (cleaned up).

"Constitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for ascertaining what our founding document means." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022) (quoting

Gibbons, 22 U.S. (9 Wheat.) at 189; 1 J. Story, Commentaries on the Constitution of the United States § 399, p. 383 (1833)). And "the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons*, 22 U.S. (9 Wheat.) at 188.

"The public meaning of 'commerce' at the time of the Constitution's ratification was hardly obscure[.] . . . 'Commerce,' at that time, meant 'trade' or economic 'intercourse,' which consisted of 'exchange of one thing for another,' 'interchange,' or 'traffick.'" *United States v. Rife*, 33 F.4th 838, 842 (6th Cir. 2022) (Kethledge, J.) (citing 1 S. Johnson, A Dictionary of the English Language 422 (6th ed. 1785)); *see* N. Webster's 1828 Dictionary (defining "commerce" as "an interchange or mutual change of goods, wares, productions, or property of any kind, between nations or individuals, either by barter, or by purchase and sale; trade; traffick"); *see also* Robert G. Natelson*, The Legal Meaning of "Commerce" in the Commerce Clause,* 80 St. John's L. Rev. 789, 805 (2006) ("In legal discourse the term ['commerce'] was almost always a synonym for exchange, traffic, or intercourse.").

As Chief Justice Marshall put it: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules

for carrying on that intercourse." *Gibbons,* 22 U.S. (9 Wheat.) at 189–90; *see Carter v. Carter Coal Co.,* 298 U.S. 238, 298 (1936) ("[T]he word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade,' and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states."). "[W]hen Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably." *Lopez*, 514 U.S. at 586 (Thomas, J., concurring).

"Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture." *Raich*, 545 U.S. at 58 (Thomas, J., dissenting); *see Lopez*, 514 U.S. at 587 (Thomas, J., concurring) ("Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles."); *see also Butler*, 297 U.S. at 68 (concluding federal "statutory plan to regulate and control agricultural production" sought to reach "a matter beyond the powers delegated to the federal government" and "invade[d] the reserved rights of the states"). "[T]he founding generation would not have seen production activities, such as manufacturing, mining, and agriculture, as being part of commerce. The writings of the framers and the purpose behind . . . the Commerce Clause also confirm its intended narrow scope." William J. Seidleck, *Originalism and the General*

Concurrence: How Originalists Can Accommodate Entrenched Precedents While Reining in Commerce Clause Doctrine, 3 U. Pa. J. L. & Pub. Affs. 263, 269 (2018).

"Federalists and Antifederalists alike . . . distinguished 'commerce' from manufacturing and agriculture. Commerce itself, then, meant trade and transportation thereof, as opposed to activities preceding those things."[2] *Rife*, 33 F.4th at 842 (citations omitted). *Cf. Kidd v. Pearson*, 128 U.S. 1, 20 (1888) ("No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce."). "[D]espite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, the founding generation did not cede authority over all these activities to Congress. Hamilton, for instance, acknowledged that the Federal Government could not regulate agriculture and like concerns[.]" *Lopez*, 514 U.S. at 591 (Thomas, J., concurring) (citing Federalist No. 17). "The term 'commerce' commonly meant trade or exchange (and shipping for these purposes) not simply to those involved in the drafting and ratification processes, but also to the general public." *Raich*, 545 U.S. at 59 (Thomas, J., dissenting) (citing Randy

[2] Given its limited intended scope, the Framers did not view the Commerce Clause as a threat to liberty. James Madison, for example, characterized it as "an addition [to the Constitution] which few oppose and from which no apprehensions are entertained." Federalist No. 45 (Madison).

Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 857–62 (2003)).

In short, "[t]he founding generation understood the term 'commerce' to mean only 'trade or exchange of goods.'" Seidleck, 3 U. Pa. J. L. & Pub. Affs. at 269. As originally understood, then, the Interstate Commerce Clause "allowed Congress to regulate both 'trade' and the 'transportation' of the traded products." *Allen*, 86 F.4th at 308–09 (Murphy, J., concurring) (quoting *Rife*, 33 F.4th at 842).

Further, under the original understanding, the Clause empowered Congress to regulate *inter*state (as opposed to *intra*state) trade and transportation. *See United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 43–44 (1869) (Constitution's "express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States[.]"). That is, "Congress's power under the Interstate Commerce Clause operates only on commerce that involves 'more States than one.'" *Haaland v. Brackeen*, 599 U.S. 255, 323 (2023) (Gorsuch, J., concurring) (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194); *see License Tax Cases*, 72 U.S. (5 Wall.) 462, 470–71 (1867) ("Congress has no power of regulation nor any direct control" over "internal commerce or domestic trade of the States").

This commonsense conclusion flows from the Clause's text. *See* Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101,

132 (2001). "[T]he term 'among' found in the Interstate Commerce Clause most naturally suggests that Congress may regulate only activities that extend in their *operation* beyond the bounds of a particular State and into another." *Brackeen*, 599 U.S. at 321–22 (Gorsuch, J., concurring) (cleaned up). The Federalist Papers, ratification debates, and "a scholarly and judicial consensus" further support this reading. *See* Barnett, 68 U. Chi. L. Rev. at 132–36, 146. "In other words, commerce that takes place 'among' (or between) two or more *territorial* units, and not just any commerce that involves *some* member of *some* State." *Brackeen*, 599 U.S. at 323 (Gorsuch, J., concurring) (citation omitted).

In sum, the Commerce Clause gives Congress "power to specify rules to govern the manner by which people may exchange or trade goods from one state to another . . . and to both regulate and restrict the flow of goods to and from other nations (and the Indian tribes) for the purpose of promoting the domestic economy and foreign trade." Barnett, 68 U. Chi. L. Rev. at 146. But that is all.

B. The Necessary and Proper Clause Is Not a Free-Floating Source of Federal Power Untethered to Congress's Enumerated Powers.

Justice Scalia colorfully described the Necessary and Proper Clause as the "best hope of those who defend *ultra vires* congressional action[.]" *Printz*, 521 U.S. at 923. But it "does not give Congress *carte blanche*." *United States v. Comstock*, 560 U.S. 126, 158 (2010) (Alito, J., concurring). And it "is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the

specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution[.]'" *Kinsella v. United States*, 361 U.S. 234, 247 (1960). The "Clause empowers Congress to enact only those laws that 'carr[y] into Execution' one or more of the federal powers enumerated in the Constitution." *Comstock*, 560 U.S. at 159 (Thomas, J., dissenting) (quoting U.S. Const. art. I, § 8, cl. 18). In other words, it is not a free-floating source of federal power and thus cannot save laws that are untethered to any of Congress's enumerated powers.[3]

As Chief Justice Marshall described the Clause's sweep: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. (4 Wheat.) at 421. This means that for a law to fall within the scope of Congress's power under the Necessary and Proper Clause it "must be directed toward . . . the powers expressly delegated to the Federal Government by some provision in the Constitution," and "there must be a necessary and proper fit between the 'means' (the federal law) and the 'end' (the enumerated power or powers) it is designed to serve." *Comstock*, 560 U.S. at 160 (Thomas, J., dissenting).

[3] Federalists "insisted that the Necessary and Proper Clause was not an additional freestanding grant of power, but merely made explicit what was already implicit in the grant of each enumerated power." Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 185 (2003).

As a textual matter, the Clause requires that a law must be *both* "necessary and proper[.]" U.S. Const. art. I, § 8, cl. 18. These are "distinct requirements[.]" Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 276 (1993). "[T]he word 'necessary' . . . refers to a telic relationship, or fit, between executory laws and valid government ends."[4] *Id.* at 272. "The means Congress selects will be deemed 'necessary' if they are 'appropriate' and 'plainly adapted' to the exercise of an enumerated power[.]" *Comstock,* 560 U.S. at 160–61 (Thomas, J., dissenting) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421). "Plainly adapted" connotes "some obvious, simple, and direct relation between the statute and the enumerated power." *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring). *Cf. A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 546 (1935) ("[W]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power.").

"The word 'proper' was 'used during the founding era to describe the powers of a governmental entity as peculiarly within the province or jurisdiction of that

[4] "[B]ased on contemporary [Founding era] dictionary definitions and the word's etymology, the best synonyms of 'necessary' are 'needful and proper' or 'congruent and proportional,' not 'useful' and 'convenient.'" Steven Calabresi, Elise Kostial, and Gary Lawson, *What McCulloch v. Maryland Got Wrong: The Original Meaning of "Necessary" Is Not "Useful," "Convenient," or "Rational"*, 75 Baylor L. Rev. 1, 47 (2023).

entity.'" *Artis v. District of Columbia*, 583 U.S. 71, 106 (2018) (Gorsuch, J., dissenting) (quoting Lawson & Granger, 43 Duke L. J. at 297); *see* N. Webster's 1828 Dictionary ("Proper" means "1. Peculiar; naturally or essentially belonging to a person or thing; not common."). "To be 'proper,' a law must fall within the peculiar competence of Congress under the Constitution." *Zivotofsky v. Kerry*, 576 U.S. 1, 48 (2015) (Thomas, J., concurring in judgment and dissenting in part). "Our constitutional structure imposes three key limitations on that jurisdiction: It must conform to (1) the allocation of authority within the Federal Government, (2) the allocation of power between the Federal Government and the States, and (3) the protections for retained individual rights under the Constitution." *Id.* (Thomas, J., concurring in judgment and dissenting in part) (citation omitted). *Cf. United States v. E.C. Knight Co*., 156 U.S. 1, 12 (1895) ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State.").

"No law that flattens the principle of state sovereignty, whether or not 'necessary,' can be said to be 'proper.'" *Bond II*, 572 U.S. at 879 (Scalia, J., concurring in judgment). And "no matter how 'necessary' or 'proper' an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than 'carrying into Execution' one or more of the Federal

Government's enumerated powers." *Comstock*, 560 U.S. at 161 (Thomas, J., dissenting) (quoting U.S. Const. art. I, § 8, cl. 18). So too here.

III. The CTA Exceeds Constitutional Limits on Federal Power.

A. The CTA Infringes States' Sovereign Power.

"The plain text of the CTA does not regulate the channels and instrumentalities of commerce, let alone commercial or economic activity." *NSBU*, 721 F. Supp. 3d at 1278. Instead, the CTA regulatory regime is triggered by purely *intra*state noncommercial conduct (entity formation under state law) that may not have any nexus with commercial activity, let alone *inter*state commerce.

Regulation of entity formation is a core exercise of State police power. "Corporations are creatures of state law[.]" *Cort v. Ash*, 422 U.S. 66, 84 (1975). "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). Indeed, "[a] State can create a corporation, in virtue of its sovereignty, without any specific authority for that purpose, conferred in the State constitutions." *McCulloch*, 17 U.S. (4 Wheat.) at 400.

In many states, corporations may be formed for any lawful purpose, many of which are noncommercial. *See, e.g.*, Ala. Code § 10A-1-2.01; 8 Del. Code § 101(b); *see* George Mocsary, *Freedom of Corporate Purpose*, 2016 B.Y.U. L. Rev. 1319, 1365 (2016) ("most states' statutes allowed the formation of corporations for any

lawful purpose since the early 1900s"). People form entities for noncommercial reasons, including to exercise freedom of association or to protect privacy.

Yet the CTA's regulatory regime and reporting requirements are triggered by the bare act of entity formation under state or tribal law the moment an entity is formed, irrespective of the entity's purpose and whether it will ultimately engage in any activity at all.[5] The CTA's definition of "reporting company" sweeps in entities engaged solely in intrastate activities within the borders of the State in which they are formed and noncommercial entities. *See* 31 U.S.C. § 5336(a)(11). For example, entities formed to hold a family residence and entities formed with the intent to seek 501(c) federal tax-exempt status that have not received that status are subject to the CTA's requirements. So, too, are non-profit entities like local private social clubs that do not intend to seek 501(c) federal tax-exempt status.

The CTA thereby reaches entirely *intra*state *non*commercial conduct.

B. The CTA Is Unconstitutional Under the Original Understanding of the Commerce Clause.

The CTA plainly exceeds Congress's power under the Commerce Clause as understood by the Framers. The Clause "empowers Congress to regulate the buying

[5] For example, "a new LLC that has never used the channels or instrumentalities of commerce would still be subject to the CTA's reporting requirements—and penalties—for a year at the minimum. At $500 per day, that is $182,500 in civil penalties for the offense of merely creating an LLC and failing to provide the requested information to FinCEN." *Smith*, 2025 WL 41924, at *6 (citations omitted).

and selling of goods and services trafficked across state lines." *Taylor v. United States*, 579 U.S. 301, 313 (2016) (Thomas, J., dissenting) (cleaned up). That is, it "originally allowed Congress to regulate both 'trade' and the 'transportation' of the traded products." *Allen*, 86 F.4th at 308–09 (Murphy, J., concurring) (citation omitted). The CTA regulates neither. *See* Supp.ROA.491–95; *see also Smith*, 2025 WL 41924, at *6 ("A company is not a channel or instrumentality of commerce because it is not a pathway of commerce or an item moving in commerce.").

Because the CTA's objective has nothing to do with Congress's enumerated powers under the Commerce Clause it also falls outside the scope of Congress's power under the Necessary and Proper Clause. "When the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain." *Comstock*, 560 U.S. at 150 (Kennedy, J., concurring in the judgment). *But cf.* Barnett, 6 U. Pa. J. Const. L. at 186. Here, the chain is nonexistent. And the CTA is neither necessary nor proper.

C. The CTA Fails the Judicially Created "Substantial Effects" Test.

Even under the Supreme Court's modern Commerce Clause doctrine, the CTA fails to pass constitutional muster. The Court's modern jurisprudence authorizes Congress to regulate three categories of interstate commerce: "the use of the channels of interstate commerce"; "the instrumentalities of interstate

commerce"; and "activities that substantially affect interstate commerce."[6] *Lopez*, 514 U.S. at 558–59 (citations omitted). The CTA regulates none of those things.

"[T]he CTA does not regulate, by its text, a channel or instrumentality of commerce." Supp.ROA.393. "The word 'commerce,' or references to any channel or instrumentality of commerce, are nowhere to be found in the CTA."[7] *NSBU*, 721 F. Supp. 3d at 1278 (citing 31 U.S.C. § 5336). It "does not facially regulate commerce." Supp.ROA.407. Thus, if the CTA is to be upheld it must fall within Congress's authority to regulate "activities that substantially affect interstate commerce." *Morrison*, 529 U.S. at 608–09 (cleaned up). It does not.

The CTA has "no express jurisdictional element which might limit its reach" to entities that "have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. That alone is a fatal constitutional defect. Given that the

[6] "[A]ctivities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone." *Raich*, 545 U.S. at 34 (Scalia, J., concurring). Instead, under current precedent, "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." *Id.* (Scalia, J., concurring). But as a matter of constitutional first principles, that Clause cannot justify federal regulation of this class of activity. *See Lopez*, 514 U.S. at 588–89 (Thomas, J., concurring).

[7] Channels of interstate commerce "include highways, railroads, navigable waters, and airspace[.]" *United States v. Ballinger*, 395 F.3d 1218, 1225–26 (11th Cir. 2005) (en banc) (citations omitted). "[A]utomobiles, airplanes, boats, and shipments of goods" are examples of instrumentalities of interstate commerce. *Id.* at 1226.

CTA's regulatory regime is triggered by the mere act of entity formation under state law and sweeps in entities created for noncommercial reasons that may not engage in any activity, let alone *commercial* activity, the absence of a jurisdictional hook or even any reference to commerce renders the statute facially invalid even under current precedent. *See id*. at 561; *Morrison*, 529 U.S. at 613. Indeed, "[n]ot only does the CTA lack any jurisdictional hook, but the reach of the statute is also expansive, regulating every private entity in the country unless it falls within a few specific exemptions." *Smith*, 2025 WL 41924, at *8 (citing 31 U.S.C. § 5336).

The CTA's novelty underscores its unconstitutionality. "[S]ometimes 'the most telling indication of [a] severe constitutional problem [] is the lack of historical precedent' for Congress's action." *NFIB*, 567 U.S. at 549 (citation omitted). That resonates here. *See* Supp.ROA.401–02; *NSBU*, 721 F. Supp. 3d at 1281. The statute is "unprecedented," Supp.ROA.357, "in its breadth and expands federal power beyond constitutional limits," *Smith*, 2025 WL 41924, at *2; *see NSBU*, 721 F. Supp. 3d at 1281 ("The Court cannot find, and the parties have not identified, any other State or federal law like the CTA.").

The Government's reliance on congressional findings to rescue the CTA, *see* Gov't. Br. 21–23, fails. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Morrison*, 529 U.S. at 614. "And congressional findings lose their weight in the face

of the Government's failure to articulate limiting principles for its Commerce Clause arguments[.]" *NSBU*, 721 F. Supp. 3d at 1287. So too here. *See* ROA.577 ("the Government has still not articulated what *activity* the CTA regulates").

The Government offers "a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce." *Schechter*, 295 U.S. at 554 (Cardozo, J., concurring). "If Congress can regulate an entity simply because it exists, then it can regulate anything—or anyone—at all. It could, for example, require all homeowners to register their homes in a federal database to prevent their properties from being used as stash houses for drug trafficking organizations." *Smith*, 2025 WL 41924, at *10. Accepting this "would work a substantial expansion of federal authority." *NFIB*, 567 U.S. at 560. Indeed, "the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government." *Schechter*, 295 U.S. at 546.

This Court cannot solve the CTA's constitutional problems by judicially editing it. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 677 (2020). Nor can constitutional avoidance rescue Congress's constitutionally flawed handiwork. *See Seila Law LLC v. CFPB,* 591 U.S. 197, 230 (2020). And because the CTA's objectives are untethered to Congress's Commerce Clause powers, the Necessary and Proper Clause cannot support the CTA's

intrusions on individual liberty and State sovereignty. *See Raich*, 545 U.S. at 34 (Scalia, J., concurring); Barnett, 6 U. Pa. J. Const. L. at 185; *see also Lopez,* 514 U.S. at 588–89 (Thomas, J., concurring).

In sum, the district court correctly found that "the CTA exceeds Congress's commerce power," Supp.ROA.401, and "cannot be upheld as a necessary and proper component of Congress's commerce power," Supp.ROA.411. "By legislating beyond its limited powers Congress has taken from the People authority that they never gave." *Gamble v. United States*, 587 U.S. 678, 710 n.1 (2019) (Thomas, J., concurring) (citing U.S. Const. art. I, § 8; Federalist No. 22).

IV. The "Substantial Effects" Test Has No Basis In the Constitution.

The federal government's overreach here showcases why it is important to return to the Constitution's original public meaning.

"[T]he [Supreme] Court's Commerce Clause jurisprudence has significantly departed from the original meaning of the Constitution." *Sackett*, 598 U.S. at 708 (Thomas, J., concurring); *see United States v. Al-Maliki*, 787 F.3d 784, 792 (6th Cir. 2015) ("[A]las in the interstate context, we have long since moved away from the

original meaning of 'regulate Commerce[.]'"); *see also Allen*, 86 F.4th at 309 (Murphy, J., concurring).

"In the New Deal era, as is well known, th[e Supreme] Court adopted a greatly expanded conception of Congress' commerce authority[.]"[8] *Sackett*, 598 U.S. at 696 (Thomas, J., concurring) (citing *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942); *United States v. Darby*, 312 U.S. 100, 119 (1941)). "The [Supreme] Court developed th[e] substantial-effects test in the 1930s to uphold federal laws designed to combat the Great Depression. The test allows Congress to regulate local activities (such as growing wheat on a private farm for personal use) if the activities 'have a substantial effect on interstate commerce' when considered in the aggregate."[9] *Allen*, 86 F.4th at 309 (Murphy, J., concurring) (citations omitted). This jurisprudential development "came during a period of national exigencies peculiar to interstate commerce—namely a national Depression ever since known as such, and (in *Wickard v. Filburn*, 317 U.S. 111 (1942)) the beginnings of a nationwide war effort." *Rife*, 33 F.4th at 844.

"By departing from" the Clause's "limited meaning," this line of precedent "ha[s] licensed federal regulatory schemes that would have been unthinkable to the

[8] AFPF respectfully believes that line of precedent should be overruled.

[9] Neither the Supreme Court nor this Court has extended this judicial gloss on the Interstate Commerce Clause to the Foreign Commerce Clause. *See Smith*, 2025 WL 41924, at *10; *see also Rife*, 33 F.4th at 843–44.

Constitution's Framers and ratifiers."[10] *Sackett*, 598 U.S. at 708–09 (Thomas, J., concurring) (cleaned up); *see, e.g.*, *Raich*, 545 U.S. 1 (local cultivation and consumption of marijuana); *Wickard*, 317 U.S. 111 (local wheat farming). *Cf. NSBU*, 721 F. Supp. 3d at 1287 (noting "Government's failure to articulate limiting principles for its Commerce Clause arguments"); *id.* at 1282. "[T]he very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *see also Lopez*, 514 U.S. at 599 (Thomas, J., concurring) (noting test's "recent vintage"). And this "revisionist structure that, 80 years ago, the Supreme Court added to the Interstate Commerce Clause," *Rife*, 33 F.4th at 844, "has come to overshadow the original structure to which it was attached," *id.* at 844.

Even the Supreme Court's more modern Commerce Clause "precedents emphasize that '[t]he Constitution requires a distinction between what is truly national and what is truly local.' The substantial-effects approach is at war with that principle." *Taylor*, 579 U.S. at 319 (Thomas, J., dissenting) (quoting *Morrison*, 529 U.S. at 617–18). This holds particularly true for the test's "aggregation principle,"

[10] "The New Deal's change in attitude toward the commerce clause [] depended upon a radical reorientation of judicial views toward the role of government that in the end overwhelmed the relatively clean lines of the commerce clause." Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1452 (1987).

which "has no stopping point." *Lopez*, 514 U.S. at 600 (Thomas, J., concurring). This judicial gloss on the Interstate Commerce Clause's original public meaning should not be further expanded to take yet another step toward granting the federal government the general police power the Constitution reserves to the States. U.S. Const. amend X; *see Lopez*, 514 U.S. at 599–602 (Thomas, J., concurring).

V. This Court Should Enforce the Constitution's Original Public Meaning to the Maximum Extent Permissible Under Precedent.

Courts "enforce the 'outer limits' of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system[.]" *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting) (citations omitted). And "constitutional limits on governmental power do not enforce themselves. They require vigilant—and diligent—enforcement." *Seekins*, 52 F.4th at 989 (Ho, J., dissenting from denial of rehearing en banc).

"Admittedly, the Supreme Court has taken us a long way from the Commerce Clause's original meaning." *Allen*, 86 F.4th at 311 (Murphy, J., concurring). But "the Constitution's original meaning is law, absent binding precedent to the contrary." *Rife*, 33 F.4th at 843–44. "That should mean that [judges] decide every case faithful to the text and original understanding of the Constitution, to the maximum extent permitted by a faithful reading of binding precedent." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc).

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

/s/ Michael Pepson
Michael Pepson
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
571.329.4529
mpepson@afphq.org

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FRAP 29(a)(5) and FRAP 32(a)(7)(B) because it contains 5,961 words. This brief also complies with the typeface and type-style requirements of FRAP 32(a)(5)-(6) because it was prepared using Microsoft Word in Times New Roman 14-point font.

/s/ Michael Pepson
Michael Pepson

Dated: March 3, 2025

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2025, I electronically filed the above Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Plaintiffs-Appellees with the Clerk of the Court by using the appellate CM/ECF system. I further certify that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson
Michael Pepson

Dated: March 3, 2025