No. 24-40792

In the United States Court of Appeals for the Fifth Circuit

TEXAS TOP COP SHOP, INC. ET AL.,

Plaintiffs-Appellees,

v.

PAMELA BONDI, in her official capacity as Attorney General of the United States of America, et al.,

Defendants-Appellants.

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

BRIEF OF HAMILTON LINCOLN LAW INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELEES

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Rule 28.2.1 Statement

Case No. 24-40792

Texas Top Cop Store, Inc., et al. v. Pamela Bondi, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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February 26, 2025

/s/ Neville S. Hedley
Neville S. Hedley

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Interest of *Amicus Curiae*

Amicus curiae Hamilton Lincoln Law Institute ("HLLI") files this brief with the consent of the parties. HLLI is a 501(c)(3) public-interest firm committed to defending the constitutional separation of powers and the principles of limited government. *E.g.*, *Competitive Enter. Inst. v. FCC*, 970 F.3d 372 (D.C. Cir. 2020). This case presents critical issues regarding the limits of Congress's authority under the Commerce Clause and serious Fourth Amendment concerns.

Under FRAP 29(a)(4)(E), *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief.

Statement of the Issue

Should this Court affirm the district court's judgment and injunction barring enforcement of the Corporate Transparency Act ("CTA") because the act exceeds Congress's authority under the Commerce Clause, and on the alternative ground that the CTA violates the Fourth Amendment's prohibition against unreasonable search and seizures?

Summary of the Argument

This brief seeks to aid the Court through adding important context of why the district court was correct in concluding that Congress

exceeded its authority under the Commerce Clause when it passed the CTA. The brief also emphasizes why it is critical to affirm the district court's order because of the serious Fourth Amendment implications if reporting companies are compelled to submit sensitive Personal Identifying Information ("PII") and Beneficial Ownership Information ("BOI") that will populate the FinCEN database.

Argument

I. The district court was correct in holding that the CTA exceeds Congress's authority.

This Court should affirm the district court's injunction because it correctly determined that the CTA exceeds Congress's authority under the Commerce Clause.

Congress's authority under the Commerce Clause is broad, but it is not limitless. *See NFIB v. Sebelius*, 567 U.S. 519, 549-50 (2012). The Supreme Court has held that the Commerce Clause permits three categories of activity: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities 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). It is under the third prong that the Commerce Clause may reach

purely intrastate or even non-economic activity, but only when the statute is part of a comprehensive regulatory scheme and the regulation of intrastate or non-economic activity is necessary to preserve the scheme. *Id.* at 561; *see also Gonzales v. Raich*, 545 U.S. 1, 36 (2005). The district court correctly concluded that the CTA fails to meet all three of the criteria. ECF 33 at 36, 40.[1]

The reach of the Commerce Clause has typically turned on whether the challenged legislation regulates activity involving economic transactions. In *Wickard v. Filburn*, 317 U.S. 111, 128 (1942), it was the commercial market impact of the quantity of wheat produced and sold, while *Raich* involved the buying and selling of medicinal marijuana. 545 U.S. at 30-31. In both instances, the Court emphasized the impact of economic transactions on the commercial market. By contrast, the cases in which the Court held that Congress exceeded the limits of the Commerce Clause either did not involve economic transactions—*see Lopez*, 514 U.S. at 561 (possession of gun in school zone); *United States v. Morrison*, 529 U.S. 598, 608 (2000) (civil remedy for gender-motivated violence)—or compelled transactions that would otherwise not occur. *NFIB v. Sebelius*, 567 U.S. at 556-57 (mandated purchase of health insurance). And this Court in *Groome Resources, Ltd. v. Parish of*

[1] References to ECF are to the docket entry for case 4:24-cv-478-ALM, and references to AOB are to the Appellants Opening Brief.

Jefferson emphasized that the scope of the Commerce Clause depends on whether the regulation reaches a commercial transaction. 234 F.3d 192, 205-06 (5th Cir. 2000). There the Court upheld an antidiscrimination provision in a fair housing statute as a valid exercise Congress's authority under the Commerce Clause because the provision was intended to counter "discrimination that directly interferes with a commercial transaction." *Id.* Consequently, the key inquiry should be whether the CTA relates to commercial transactions, and the district court correctly concluded that it does not.

To illustrate this point, consider the following hypothetical: Law Firm A and Law Firm B both exclusively do real estate closing work in North Carolina and their attorneys are licensed only to practice in the state, so their commercial activity is exclusively intrastate. They both use the same instrumentalities of commerce (phones, internet, bank wires). Neither would be considered a channel of commerce. In every respect, Firm A and B are identical with identical commercial or economic footprints. The only difference between the two is that Firm A is formed as a Limited Liability Company registered with the Secretary of State while Firm B is a traditional partnership. But only Firm A is within the scope of the CTA, subject to its reporting requirements and enforcement

penalties.[2] This would be true even if Firm B employed attorneys licensed in both North and South Carolina, did business in both states, and specifically targeted out-of-state clients interested in purchasing vacation or rental property, thereby affirmatively engaging in commercial or economic *transactions* that are *interstate* in nature. *See, e.g.,* 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, 296 (2018) (emphasizing that Congressional regulation of *business transactions* aligns with entrenched Commerce Clause precedent). It is not commercial activity that triggers the CTA, but rather filing paperwork with a Secretary of State. Such non-transactional activity has never been part of a comprehensive federal regulatory scheme, but instead has been an area traditionally reserved for states to administer. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 68, 89 (1987); *NFIB v. Sebelius*, 567 U.S. at 560 (Roberts, C.J., concurring) (rejecting expansion of federal

[2] This may also be true if Firm B is a Limited Liability Partnership ("LLP"). It is an open question whether LLPs are within the scope of the CTA. FinCEN regulations seem to indicate that LLPs are in scope. But some jurisdictions do not require a filing with a Secretary of State's office to create a LLP, thereby removing LLPs from the statutory definition of a reporting company. *See generally* Thomas E. Rutledge & Robert R. Keatinge*, LLPs Are Not CTA Reporting Companies,* BUSINESS LAW TODAY (Oct. 2024).

commercial regulatory reach into matters traditionally reserved for states). Thus, the district court was correct when it held that the CTA exceeded Congress's power under the Commerce Clause.

II. The CTA violates the Fourth Amendment because it is an unreasonable intrusion by the government. Appellees have a reasonable expectation of privacy in the data and the government's unrestricted ability to search the data exceeds the limits of the Fourth Amendment.

The district court's order only touched on Fourth Amendment issues in passing and did not rule on the substantive argument that the CTA violates the Fourth Amendment. ECF No. 33 at 31, 79. Nonetheless, the CTA has serious Fourth Amendment implications that warrant the injunction. And those Fourth Amendment implications are closely related to the Commerce Clause reasoning upon which the district court's injunction rests. The Framers of the Constitution could not possibly have envisioned a Commerce Clause with such a broad sweep as to permit Congress to pass a statute that has all the indicia of the despised general warrants or writs of assistance.

A. The CTA infringes upon Plaintiffs-Appellees' security interests.

The Fourth Amendment states that the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue,

but upon probable cause." U.S. Const. amend. IV. This protection extends "to the orderly taking under compulsion of process" including disclosures compelled by statute or regulation. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). "The Fourth Amendment does not guarantee a right of privacy. It guarantees—if its actual words man anything—a rightof security." Jed Rubenfield, *The End of Privacy*, 61 Stan. L. Rev. 101, 104, (Oct. 2008); *see generally*, Thomas K Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security*, 33 Wake Forest L. Rev. 307 (1998) (arguing that the essential language of the Amendment is right of individuals to be secure from unreasonable government intrusion.). "What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure." *United States v. Hoffa*, 385 U.S. 293, 301 (1966).

The drafters of the Constitution included the Fourth Amendment to address the pernicious practice of the Crown that the Founders found so objectionable—the use of general warrants or writs of assistance. "One thing about which every Fourth Amendment scholar agrees … is that the

Fourth Amendment was meant to prohibit 'general warrants.'" Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L. REV. 1721 (2014); *see also* Rubenfield, *supra* at 122 ("The Fourth Amendment was enacted above all to forbid 'general warrants.'"). "[T]he original purpose of the Fourth Amendment was not so much privacy as it was to place substantive limitations on the scope of government power" and the guarantee of this right against such power "was central to the ultimate ratification of the Constitution." Neil Richards, *The Third-Party Doctrine and the Future of the Cloud*, 94 WASH. U. L. REV. 1441, 1450 (2017); *see also Carpenter v. United States*, 585 U.S. 296, 303 (2018) ("The 'basic purpose of this Amendment … is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.'" (quoting *Camara v. Municipal Court of City and Cnty of San Francisco*, 387 U.S. 523, 528 (1967))).

General warrants and the similar writs of assistance were excessively broad that "allowed officers to search wherever they wanted and to seize whatever they wanted, with few exceptions." Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 153 (1999). Consequently, "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance of the colonial era" and "was in fact one of the driving forces behind the Revolution itself." *Riley*

v. California, 573 U.S. 373, 403 (2010). The CTA incorporates features of general warrants that the Founders found so objectionable. The CTA requires a "reporting company" to disclose the personal information of its "beneficial owners" and "applicants" including legal names, birthdates, current addresses, and identification numbers to FinCEN without any individualized suspicion of wrongdoing. 31 U.S.C. § 5336(b)(1)-(2). The purpose is to allow FinCEN to build a financial-intelligence database that domestic and foreign law enforcement agencies may access to investigate suspected financial crimes. Treasury employees have carte blanche to access the database. 31 U.S.C. § 5336(c)(5).

While the Supreme Court has not had cause to address a statute of such dramatic sweep, its decision in *City of Los Angeles v. Patel,* 576 U.S. 409 (2015) provides the best guidance. That case addressed a city ordinance the required hotels to collect and make available to police on demand a "guest's name and address" and other sensitive information. *Id.* at 412. It further held that facial challenges to statutes authorizing warrantless searches were permissible. *Id.* at 415.

The Court assumed that the ordinance authorized searches for purposes other than for conducting criminal investigations, but still held that the Fourth Amendment warrant requirement applied. 576 U.S. at 420 (subject of even an administrative search "must be afforded an opportunity to obtain pre-compliance review before a neutral

decisionmaker"). The CTA transgresses the Fourth Amendment more blatantly than the *Patel* ordinance. The purpose of the CTA is to conduct criminal investigations. It compels reporting companies to collect and disclose PII and BOI to FinCEN, and any person who fails to turn over the required information—not just the reporting companies—is subject to penalties. If a non-criminal local ordinance requiring involuntary disclosure of sensitive information fell short of Fourth Amendment requirements, it stands to reason that the CTA also falls short and should not be enforced.

Appellants emphasize that the CTA will make complex investigations less "laborious" and more efficient. AOB 4. But ease and efficiency are not paramount concerns of the Fourth Amendment or our criminal justice system. The state's power to deprive an individual of his liberty is limited not only by the presumption of innocence and the reasonable doubt standard for conviction, but also the right to be free from police monitoring unless there is probable cause that the individual committed a crime. The warrant requirement forces police to persuade a judge that criminality has occurred or is afoot. That might be inconvenient or "laborious," but that is the point. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948). More recently, the Court has emphasized "that a central aim of the Framers was 'to place obstacles in

the way of a too permeating police surveillance.'" *Carpenter*, 585 U.S. at 305 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

The Court's rare approval of mass *ex ante* searches is limited to circumstances not applicable to the broad sweep of the CTA. In *Illinois v. Lidster* the Court upheld as reasonable a specific instance of mass search and seizure without individualized suspicion or probable cause. 540 U.S. 419, 425-26 (2004). One week after a fatal hit-and-run, police implemented a checkpoint to solicit public assistance from motorists who regularly traveled that road at the time of the accident. The checkpoint was not "primarily for general crime control purposes, *i.e.*, 'to detect evidence of ordinary criminal wrongdoing.'" *Id.* at 423. (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000)). Rather, the checkpoint was aimed at investigating a specific crime and "interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect." *Id.* at 427. Those factors weighed in favor of the Court holding the search reasonable. The mandatory disclosure of sensitive data required by the CTA, by contrast, is not targeted at a specific crime—or any crime—and constitutes an unavoidable *ex ante* dragnet sweeping up the sensitive data of all individuals who are associated with the ownership of a state-chartered business entity. That data then becomes searchable at will by government agents without so much as a showing of reasonable suspicion, never mind probable cause.

The CTA is also distinguishable from government intrusions that are more passive and not intended as a criminal enforcement tool. For instance, in *Naperville Smart Meter Awareness v. City of Naperville,* the Seventh Circuit concluded that a city's mass data collection from smart electricity meters was a search under the Fourth Amendment but deemed it reasonable because there was "no prosecutorial intent." 900 F.3d 521, 528 (7th Cir. 2018). The same cannot be said for the CTA, which Appellants readily concede—and the district court acknowledged—is intended to be a law enforcement investigative and prosecutorial tool. *See* CTA § 6402(6)(A) (the purpose of CTA is to "facilitate important national security, intelligence, and law enforcement activities"), 116 Pub. L. No. 283, § 6402(6)(A) 134 Stat. 3388, 4604-05 (2021); AOB at 6-7, 19; ECF 33 at 4 ("Congress compels these disclosures to control crime. Indeed, the CTA says as much."); at 44 ("the CTA is a law enforcement tool—not an instrument calibrated to protect commerce").[3]

[3] The explicit law enforcement feature of the CTA also distinguishes it from the cases cited by the government in support of its argument that the Necessary and Proper Clause empowers Congress to adopt the CTA's BOI and PII collection. *See* AOB at 31-33. The statutes at issue in those cases were not enacted for the express purpose of law enforcement activity, but rather were aimed at raising revenue (*Sonizinsky v. United States*, 300 U.S. 506 (1937), *United States v. Kahriger*, 345 U.S. 22 (1953), and *United States v. Matthews*, 438 F.2d 715 (5th Cir. 1971)); tax compliance (*Helvering v. Mitchell*, 303 U.S. 391 (1938) and *Farby v. Comm'r*, 100 F.4th 223 (D.C. Cir. 2024)); and

B. Plaintiff-Appellees have a reasonable expectation of privacy in the data the CTA requires to be disclosed, even in instances when there has been disclosure to third parties.

1. Appellees have a reasonable expectation of privacy.

The CTA also oversteps the limits imposed by the Fourth Amendment because it represents an intrusion on the plaintiffs' "reasonable expectation of privacy." *See Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). In the landmark decision of *Boyd v. United States*, the Court acknowledged the importance of privacy interests when it held that "compulsory production of a man's private papers to establish a criminal charge against him … is within the scope of the Fourth Amendment." 116 U.S. 616, 622 (1886). Like the CTA, the statute at issue in *Boyd* compelled individuals to disclose personal business records to the government for purposes of investigating evasion of customs duties. The Court summarized the history of colonial-era general warrants and writs of assistance and concluded that the statute in question was at odds with a practice the Founders "so deeply abhorred." *Id.* at 630. "It is not the breaking of his doors, and the rummaging of his drawers, that constitute the offense; but it is the invasion of his indefensible right of personal security, personal liberty,

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immigration and naturalization (*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)).

and private property, where that right has never been forfeited by his conviction of some public offence." *Id.*

The parallels between the statue in *Boyd* and the CTA are plain. But at least in *Boyd* an individual knew the government had targeted him for investigation. By contrast, the CTA allows government agents unfettered discretion to probe sensitive information with no reasonable suspicion or notice. The CTA includes statutory protocols and requires FinCEN to draft regulations related to the who, what, when and how a government agency may access the BOI database. But notably absent is any requirement that there be any showing of reasonable suspicion, much less probable cause, nor is there any opportunity for independent judicial review or notice to an individual targeted by the government. Such broad and imprecise guidelines fall short of the right of individuals to be secure in their persons, property, or papers. "[T]he Founders did not fight a revolution to gain the right to government agency protocols." *Riley v. California*, 573 U.S. 373, 398 (2014). Rather, they were concerned about excessive government power to intrude on individual liberty and imposed strict limitations to preserve that hard-fought liberty.

Further, even if some of the BOI has been previously disclosed to a third party, Appellees still retain a reasonable expectation of privacy in the data. In *Carpenter*, the Court held that there were limits to the doctrine of third-party disclosures, particularly considering the advent of

newer technology. 585 U.S. at 310. "A person does not surrender all Fourth Amendment protection by venturing into the public sphere." *Id.* Indiscriminate and "all-encompassing" collection of personal information "poses the danger of government fishing expeditions through database, just as the British had threatened the security of the Founders with the abusive general warrants and writs of assistance that originally inspired the Fourth Amendment." Susan Freiwald & Stephen Wm. Smith*, The* Carpenter *Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205, 220 (2018) (citing *Carpenter*, 585 U.S. at 311).

Appellants concede that the CTA compels production of BOI and PII that, in many instances, is not required to be produced to a state at the time of incorporation or formation. AOB at 7. In such instances, there has been no voluntary disclosure and the third-party doctrine would not apply. *Cf. United States v. Miller*, 425 U.S. 435, 445 (1976) (holding that bank customer has no privacy interest in account transaction bank records).

But even in instances where there has been some, perhaps limited disclosure, the Appellees still have a reasonable expectation of privacy in the sensitive data. Prior to the passage of the CTA, the Bank Secrecy Act ("BSA") mandated anti-money laundering programs. *See* 31 U.S.C. § 5318(h). In 2016, FinCEN published the Customer Due Diligence ("CDD") Rule, the main thrust of which was to require banks to obtain

BOI from customers. 81 Fed. Reg. 29398 (May 11, 2016); 31 C.F.R. § 1010.230. The CDD Rule requires bank account holders to disclose to the institution essentially the same BOI data the CTA now requires individuals to produce *to the government*. But a critical difference is that BOI produced to financial institutions comes with certain Congressionally mandated privacy protections.

Following *Miller*, Congress recognized that bank customers should have a privacy interest in their financial and bank data, and passed The Right to Financial Privacy Act ("RFPA") of 1978. RFPA provides some measure of privacy protection for financial records held by third parties. 12 U.S.C. §§ 3401-3423. Notably, the statute requires law enforcement to follow legal procedures to gain access to the information and requires customer notification when there is a request for financial records, with some exceptions. *See* 12 U.S.C. §§ 3402-3408, & 3413. The DOJ's own Criminal Resource Manual notes that there are only two situations in which a bank is prohibited from notifying a customer of a grand jury subpoena for their records. Crim. Resource Manual § 426. The exceptions to notification typically involve a specific request from law enforcement where it has established at least reasonable suspicion or some individualized nexus to a specific crime in relation to the bank records requested. Consequently, if Congress sought to put limits on the government's ability to obtain sensitive financial information from third

parties—and that now includes BOI that banks obtain pursuant to the CDD Rule—then it stands to reason that a reasonable expectation of privacy attaches to such information.

At the district court, and in other CTA cases, Appellants have pointed to *California Bankers Ass'n v. Schultz* to argue that plaintiffs had no expectation of privacy. ECF 18 at 26-27 (citing 416 U.S. 21 (1973)). Appellants' reliance on *Schultz* is misplaced and its applicability to the CTA is questionable. *Schultz* foreshadowed the Court's holding in *Miller*, upholding as reasonable the Bank Secrecy Act's requirement that certain transaction data be reported to the government. *Id.* at 66 (holding that "reporting of domestic financial transactions abridge no Fourth Amendment right of the banks themselves"). It is critical to note, however, that the Court never reached the question of whether the individual bank customers had a privacy interest in the transaction reports, concluding that because they could "not show that their transactions are required to be reported" they lacked standing. *Id.* at 68. Simply stated, *Schultz*, like *Miller*, stands for the uncontroversial proposition that a bank is required to produce to the government transaction data for which the bank was a party, subject to appropriate legal process. The bank customer's alleged privacy interest was diminished because the bank was a party to the transaction, and it was the bank's records being sought. The critical distinction between the BSA

provisions in *Schultz* and the CTA is that the CTA eliminates the bank middleman and disposes of legal process requirements. The CTA demands not bank records, but BOI data directly from the Appellees, which then becomes searchable at will.

It is important to emphasize that the privacy interest at stake is not the compelled disclosure of BOI, but rather the compelled disclosure to FinCEN's database to which state, federal, and foreign law enforcement agencies have unfettered access, with no notice to the plaintiffs. The district court in a similar CTA case agreed, finding that the injury "is not disclosure itself, but disclosure to FinCEN, the Treasury Department's criminal enforcement division." *Nat'l Small Bus. United v. Yellen*, 721 F.Supp.3d 1260, 1270 (N.D. Ala. 2024). It is the subsequent unrestricted and unlimited ability to search the data, with no reasonable suspicion or probable cause that transcends reasonableness. "The Fourth Amendment requires that 'those searches deemed necessary should be as limited as possible.' The 'specific evil' that limitation targets 'is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.'" *United States v. Blake*, 868 F.3d 960, 973 (11th Cir. 2017) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)).

The Supreme Court has acknowledged the privacy interests associated with the aggregation of sensitive personal information. In *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, the

Court rejected a Freedom of Information Act ("FOIA") request for an individual's criminal record, or rap sheet, even though the underlying criminal records were publicly available. The Court reasoned that the consolidated rap sheet was an unwarranted invasion of privacy noting that "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout a country and a computerized summary located in a single clearinghouse." 489 U.S. 749, 764 (1989)

2. The third-party doctrine is not applicable.

Further, even if some of the BOI has been previously disclosed to a third party, Appellees still retain a reasonable expectation of privacy in the data. In *United States v. Carpenter*, the Court held that there were limits to the third-party doctrine, particularly considering the advent of newer technology. 585 U.S. at 310. "A person does not surrender all Fourth Amendment protection by venturing into the public sphere." *Id.*; *see also United States v. Jones*, 565 U.S. 400, 418 (2012) (Sotomayer, J., concurring) (noting that one should "not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection").

Carpenter addressed whether the government was required to obtain a warrant to access a cell phone customer's Cell Site Location Information ("CSLI") maintained by cellular phone networks. The Stored

Communications Act, at issue in *Carpenter*, allowed the government to compel disclosure of certain telecommunications records if it offered "specific and articulable facts showing that there are reasonable grounds to believe" the records were "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Federal Magistrates issued two such orders and the networks produced stored CSLI for the defendant for the relevant period. The defendant challenged the admissibility of the evidence as a violation of the Fourth Amendment. The Court concluded that the defendant had an expectation of privacy in the CSLI even though he did not possess or control the data. Thus, obtaining the CSLI amounted to a search requiring a warrant issued pursuant to probable cause, far below the standard in § 2703(d) of the SCA. *Carpenter*, 585 U.S. at 316. Returning to the core principles of the Fourth Amendment, the Court concluded that "progress of science has afforded law enforcement a powerful new tool to carry out its responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, 'after consulting the lessons of history,' drafted the Fourth Amendment to prevent." *Carpenter*, 585 U.S. at 320 (quoting *Di Re*, 332 U.S. at 595).

The expectation of privacy that Appellees have in the BOI is even more compelling than the facts of *Carpenter*. It is the *Appellees* that possess the BOI which the CTA requires production, and not some

random third-party. In some instances, Appellees may have produced some of the BOI or PII to a third party for a limited purpose, but that doesn't lessen the Appellees' privacy interest in that data.[4] *See Riley,* 573 U.S. at 392 ("[D]iminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely."). Moreover, the BOI and PII required to be produced under the CTA is far more sensitive than location data. Unlike an individual's movements in public that are observable by random members of the public, individuals typically don't publicly disclose sensitive BOI and PII to the general public.

[4] True, the CDD Rule requires a bank or financial institution to obtain the business entity BOI when opening an account. 31 C.F.R § 1010.230. Typically, that information would be disclosed to FinCEN or law enforcement only when the bank's internal compliance function detected something concerning and prepared a Suspicious Activity Report (SAR), or if a law enforcement agency was independently investigating some alleged criminal conduct associated with the account. The investigating agency might then issue a subpoena for the relevant BOI information associated with the account subject only to a relevance standard. Even then, the Fourth Amendment warrant requirement may be implicated, requiring the government to demonstrate probable cause. *See Carpenter*, 585 U.S. at 317 ("[T]his Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy."); *see also id.* at 319 (noting that "official curiosity" cannot justify government collection of documents (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950)).

A primary concern driving the Court's decision in *Carpenter* was "the seismic shifts" in technology that dramatically altered the government's surveillance capabilities. *Carpenter*, 585 U.S. at 313. FinCEN's comprehensive government database populated with sensitive personal data that individuals are compelled to produce without any suspicion of wrongdoing similarly represents a powerful new law enforcement tool, particularly with the advent of artificial intelligence. *See, e.g., Jones*, 565 U.S. at 428 (2012) (Alito, J., concurring in the judgement) (noting that unlike the pre-computer era, mass-scale monitoring is now "relatively easy and cheap"). This Court should follow *Carpenter* and "decline to grant the state unrestricted access" to such sensitive data. 585 U.S. at 320.

C. The CTA is ripe for the type of abuse that the Fourth Amendment is designed to prevent.

In *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press* the Supreme Court recognized the privacy interests associated with aggregated sensitive personal information and recognized that there were legitimate privacy concerns with such centralized clearinghouses. 489 U.S. at 764. Those concerns are even more applicable when it is the

government that demands production of the data and then has unfettered access to that aggregated information.[5]

"Fourth Amendment rights are not just a civil liberty, but a substantive check on the power of the state to intrude into and interfere with the privacies of life." Richards, *supra* at 1449. Justice Sotomayer, joined by Justice Alito, echoed these concerns, stating that the "government's unrestrained power to assemble data that reveal aspects of identity is susceptible to abuse[,]" and is liable to "'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Jones*, 565 U.S. at 416 (Sotomayer, J., concurring) (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 295 (7th Cir. 2011) (Flaum, J., concurring)).

The need to maintain the injunction is unfortunately highlighted by the recent history of government abuse of aggregated sensitive personal data at its disposal. In May 2023, the Foreign Intelligence Surveillance Court unsealed an opinion that detailed abuse by the FBI using Section 702 of the Foreign Intelligence Surveillance Act ("FISA").

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[5] Even if the collection and aggregation of the data required by the CTA isn't itself a search, the query of the database would be a search and the Fourth Amendment's restrictions are "no less violated because it was accomplished through a [database] query rather than a more traditional search." *See* Emily Berman, *When Database Queries are Fourth Amendment Searches*, 102 MINN. L. REV. 577, 612 (Dec. 2017).

50 U.S.C. § 1881a. *[REDACTED] Memorandum Opinion and Order*, Slip Op. at 49 (FISA Ct. Apr. 21, 2022) (released to public May 18, 2023). The level of abuse was extreme: "the FBI illegally accessed a database containing communications … more than 278,000 times, including searching for communications of people arrested at protests of police violence and people who donated to a congressional candidate." Electronic Frontier Foundation, *Newly Public FISC Opinion is The Best Evidence For Why Congress Must End Section 702*, (May 23, 2023); *see also* Jared Gans, *FBI repeatedly misused surveillance tool, unsealed FISA order reveals*, THE HILL (May 19, 2023). And an earlier FISC opinion from October 2018 found that the FBI's querying and minimization procedures under Section 702 fell short of Fourth Amendment requirements. *See [REDACTED] Memorandum Opinion and Order*, Slip Op. at 2-3, 92 (FISA Ct. Oct. 18, 2018).

In *United States v. Hasbajrami*, the Second Circuit expressed reservations that querying of databases containing Section 702 communications that had been inadvertently, yet lawfully collected was permissible under the Fourth Amendment. 945 F.3d 641, 646 (2d Cir. 2019). The Court cautioned that vast databases of sensitive or private information susceptible to speculative searches by law enforcement "begins to look more like a dragnet, and a query more like a general warrant." *Id.* at 671. The Court remanded the case to the district court to

determine what information the government gleaned from querying the databases and if such querying violated the Fourth Amendment. *Id.* at 646, 673. On remand, the district court concluded that even though the government acquired the communications lawfully and inadvertently, it could not query that information without a warrant. "To hold otherwise would effectively allow law enforcement to amass a repository … that can later be searched on demand without limitation." *United States v. Hasbajrami*, 2024 U.S. Dist. LEXIS 238018 at *22-*23 (E.D.N.Y. Dec. 2, 2024).

The CTA is even more problematic. There is nothing inadvertent about the collection of the BOI that will populate the FinCEN database—it is compelled. And like the databases at issue in *Hasbajrami*, FinCEN's vast repository will be searchable on demand without limitation.

Databases containing financial data also have been the subject of alleged abuses, allowing the government unfettered access to sensitive financial data. For instance, the Wall Street Journal reported on the Transaction Record Analysis Center ("TRAC"), a database containing data on more than 150 million money transfers between people in the United States and in more than 20 countries. Dustin Volz & Byron Tau, *Little-Known Surveillance Program Captures Money Transfers Between U.S. and More Than 20 Countries*, WALL. ST. J. (Jan. 18, 2023). According to the report "any authorized law-enforcement agency can query the data

without a warrant to examine the transactions of people inside the U.S. for evidence of money laundering and other crimes." *Id.*

More recently, Congress has explored allegations that FinCEN prompted various banks to pursue specific searches regarding customer financial transactions that "keyed on terms and specific transactions that concerned core political and religious expression protected by the Constitution." *Financial Surveillance in the United States: How Federal Law Enforcement Commandeered Financial Institutions to Spy on Americans*, Interim Staff Report, Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government, U.S. House of Rep. (Mar. 6, 2024). Similarly, Congress has explored whether the IRS has used artificial intelligence to conduct warrantless financial surveillance of taxpayers by accessing troves of personal financial data. *See* Press Release, U.S. House of Representatives Judiciary Committee, Chairman Jordan and Rep. Hageman Open Inquiry into IRS's Use of AI to Surveil Americans' Financial Information, (Mar. 21, 2024), available at https://judiciary,house.gov/media/press-releases/chairman-jordan-and-rep-hageman-open-inquiry-irss-use-ai-surveil-americans.

In *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961), the Court observed that "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be

an instrument for stifling liberty of expression." *See also Jones,* 565 U.S. at 416 (Sotomayer, J., concurring) ("Awareness that the government may be watching chills associational and expressive freedoms."). As Justice Stewart observed more than 40 years ago, "the mandates of the Fourth Amendment demand heightened, not lowered, respect, as the intrusive regulatory authority of government expands." *Donovan v. Dewey*, 452 U.S. 594, 612 (1980) (Stewart, J., dissenting). The CTA is exactly the type of excessive government intrusion susceptible to abuse that offended the Founders, and it should be rejected as a violation of the Fourth Amendment. The CTA is tailor-made for similar abuses and infringements upon civil liberties. Thus, the order of the district court should be affirmed to prevent such egregious violations of the Fourth Amendment.

Conclusion

For these reasons, this Court should affirm the district court's ruling and injunction.

Dated: February 26, 2025

Respectfully submitted,

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February 26, 2025 *<u>/s/ Neville S. Hedley</u>*
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