Austin J. Hepworth (UT 13238)
BELIEVE FIRST, LLC
549 W. 6300 S.
Murray, Utah 84123
(801) 550-7620
ahepworth@believe.legal

Jared Haynie
CAMBRIDGE LAW LLC
4610 S. Ulster Street, Suite 150
Denver, Colorado 80237
(303) 488-3338
jared@cambridgelaw.com
Pro Hac Vice Admission Pending

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

PHILLIP TAYLOR, an individual; THE PEOPLE RESTORED, LLC, a Utah limited liability company; THE PEOPLE RESTORED FOUNDATION, a Utah non-profit corporation; THE PEOPLE RESTORED, a private member community; RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA, a Montana non-profit corporation; CROFTER MARKET, LLC, a Utah limited liability company; and UTAH OSR LAND COOPERATIVE, a Utah non-profit corporation, Plaintiffs, v. JANET YELLEN, in her official capacity as the Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF THE TREASURY; ANDREA GACKI, in her official capacity as Director of the Financial Crimes Enforcement Network; FINANCIAL CRIMES ENFORCEMENT NETWORK; and	**MOTION FOR PRELIMINARY INJUNCTION** Civil No.: 2:24-cv-00527 Judge: **Hearing Requested**

MERRICK GARLAND, Attorney General of the United States, Defendants.	

Plaintiffs, by and through their counsel, hereby motion this Court for a preliminary injunction. The motion and memorandum in support both follow.

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to the Federal Rules of Civil Procedure 65(a), Plaintiffs respectfully request that this Court issue a preliminary injunction enjoining Defendants from enforcing the Corporate Transparency Act (CTA) against Plaintiffs and all similarly situated individuals and businesses within the Court's jurisdiction. The CTA is unconstitutional and Plaintiffs and all who are similarly situated will have their constitutional rights violated and lost if they are required to comply with the CTA. Accordingly, there is good cause for a preliminary injunction to issue.

MEMORANDUM IN SUPPORT

RELEVANT FACTS

1. The CTA was passed by Congress on January 1, 2021. 15 U.S.C. § 5336.
2. One of Congress's stated main purposes in passing the CTA is to combat money laundering and terrorism. Pub. L. 116–283, div. F, title LXIV, § 6402, Jan. 1, 2021, 134 Stat. 4604(5)(D).
3. The CTA mandates, under penalty of heavy fines and jail time, the reporting of "beneficial owners" and "applicants" to the federal Financial Crimes Enforcement Network ("FinCEN"). 15 U.S.C. § 5336(b)(2); 15 U.S.C. § 5336(h).
4. The CTA's reporting obligations mainly apply to small business owners and do not apply to large corporations. 31 U.S.C. § 5336(a)(11)(B)(xxi).
5. The federal government has not previously regulated business ownership, as it has been left to

the states for centuries. *See, e.g.,* Pub. L. 116–283, div. F, title LXIV, § 6402, Jan. 1, 2021, 134 Stat. 4604(2), (5)(A) (imposing a federal standard because states do not collect all information desired by the federal government when incorporating an entity); *CTS Corp. v. Dynamics Corp. of America Indiana*, 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations....").

6. "Beneficial owners" and "applicants" must provide a driver's license or passport, along with a date of birth and address, to FinCEN. 15 U.S.C. § 5336(b)(2).
7. Other countries and federal agencies can request this information from the federal government, and the federal government can provide it without a warrant or court order and without any probable cause, or even without a treaty between the countries. 15 U.S.C. § 5336(c)(2)(B).
8. Plaintiffs are a combination of individuals and entities that are subject to the CTA.
9. Some of the Plaintiffs, such as The People Restored, Crofter Market, LLC, R-CALF, and Utah OSR Land Cooperative, are associations or communities that represent dozens to thousands of other businesses that are subject to the CTA. (Compl. ¶¶ 12-17.)
10. Some of entities represented by the Plaintiffs, such as Utah OSR Land Cooperative, only hold property in their entity and do not have any activities currently that are interstate in nature. (*Id.* ¶ 17.)
11. Some of the Plaintiffs and their members only conduct business in one state, while other Plaintiffs are involved in business in multiple states. (*Id.* ¶¶ 9-17.)
12. However, in all cases, Plaintiffs' respective business ownership exists only in one state—and business ownership does not cross state lines as the ownership itself remains in the state of formation. *See, e.g.*, *CTS Corp.*, 481 U.S. at 89.

13. Plaintiffs will be irreparably injured by a loss of their constitutional rights. Among other things, their information may be irretrievably dispersed to other countries (15 U.S.C. § 5336(c)(2)(B)), including countries that may take legal action against one or more Plaintiffs for actions taken in the United States in reliance on their constitutional freedoms.

SUPPORTING AUTHORITY AND ARGUMENT

A court should issue a preliminary injunction when the Plaintiffs can show "(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *General Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007). Further, a preliminary injunction will preserve the current status quo, rather than alter it. *Id*. Thus, as the Plaintiffs meet these criteria in this case, the Court should issue a preliminary injunction enjoining enforcement of the CTA.

1. Substantial Likelihood of Success on the Merits

Plaintiffs have a substantial likelihood of success on the merits. At least one other court has ruled that the CTA is unconstitutional. *See National Small Business United, et al. v. Yellen, et al.*, 5:22-cv-01448 (U.S. District Court, N.D. of Alabama, Summary Judgment Ruling Docket 51, March 1, 2024). Indeed, the CTA violates a significant number of constitutional rights. The government is attempting to fundamentally change the rights of citizens, the relationship between the citizenry and the government, and the constitutional limitations on government. The attempt should not be allowed to continue.

The purpose of the CTA is fundamentally about law enforcement. The government has stated

as much, including in the following statements:

> [M]align actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption, harming the national security interests of the United States and allies of the United States;
>
> [M]oney launderers and others involved in commercial activity intentionally conduct transactions through corporate structures in order to evade detection, and may layer such structures, much like Russian nesting 'Matryoshka' dolls, across various secretive jurisdictions such that each time an investigator obtains ownership records for a domestic or foreign entity, the newly identified entity is yet another corporate entity, necessitating a repeat of the same process;
>
> Federal legislation providing for the collection of beneficial ownership information for corporations, limited liability companies, or other similar entities formed under the laws of the States is needed to—… (D) better enable critical national security, intelligence, **and law enforcement efforts to counter money laundering, the financing of terrorism**, and other illicit activity. Pub. L. 116–283, div. F, title LXIV, § 6402, Jan. 1, 2021, 134 Stat. 4604(3), (4), and (5)(D) (emphasis added).

Courts have long enforced constitutional rights and safeguards granted to the citizens against the government, even if it meant releasing a criminal who might otherwise be guilty. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961). But shockingly, in the case of the CTA, the federal government has determined that virtually all small business owners in America must, under threat of fines and criminal prosecution, be subject to searches and seizures, with no probable cause by providing the federal government information it deems necessary to tackle financial crime. It is a violation of the Fourth Amendment's protections on a scale never seen before.

Rather than searching and seizing the information on a "door-to-door, house-to-house, business-to-business" basis, the government has simply enacted an all-encompassing law requiring its citizens to "mail it in" as it were. In effect, the government is saying—"We, the government,

will not physically conduct a 'search and seizure' for this information—rather, you have to send it to us, and we can arrest and fine you if you don't comply." In this light, the CTA is an anti-Fourth Amendment law. It dismantles the Fourth Amendment's protections in wholesale fashion and conscripts the citizens to provide information in violation of express prohibitions on this form of government power. The information that is collected by the government can be used against these small business owners for law enforcement purposes, both in the United States and abroad. 15 U.S.C. § 5336(c)(2)(B).

If the Fourth Amendment means anything, it is that the government does not have the right or power to intrude into the "houses, papers, and effects" of its citizens without probable cause, or to require citizens to send this information in to the government—without even the pretense of probable cause or a properly obtained warrant. U.S. CONST. AMEND. IV. The government does not have the power to require hotels to produce information without probable cause of those who are staying at the hotel. *City of Los Angeles v. Patel*, 576 U.S. 409, 419, 421 (2015) ("[S]earches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are per se unreasonable…."). The government does not have the power to enter and search every home in a city when a known criminal is at large. *See Payton v. New York*, 445 U.S. 573, 603 (1980) (denying the right to enter even one home to apprehend a criminal without a warrant). Nor can the government search every home in an area where a smell of illegal drugs exists. *Chapman v. United States*, 365 U.S. 610, 618 (1961) (denying the right to search, without a warrant, even one home where a strong smell of illegal substances was present). Yet, the government claims the right, without any probable cause or inference of wrongdoing against any particular individual, to intrude into the private affairs of millions of law-abiding citizens, just so

the government *might* be able to catch a bad guy—one who likely will choose to *not* comply with the CTA anyway.

The government argues this information is necessary for national security purposes. While this claim is tenuous (as law abiding citizens do not create national security concerns), there is still no immediate connection or exigent circumstances that exist sufficient to dispense with the requirement of a warrant to obtain the information being sought. As the Supreme Court stated when discussing the importance of obtaining a warrant before conducting a search:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals, nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. **The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.** Power is a heady thing, and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. United States, 335 U.S. 451, 455-56 (1948) (emphasis added).

In other words, the Supreme Court has recognized the fundamental need to keep various powers separate, and it has consistently enforced this line when the government has crossed it. The connection between so-called "beneficial owner" information and the commission of crimes is so remote that there is not an 'exigent' circumstance that justifies collecting the information before the government even knows if the information will be useful or not. All business owners have a privacy interest, granted by their various state laws and by the Fourth Amendment, into protecting information that they are not required to disclose in order to operate a business. This information is personal, especially as it relates to those who "indirectly" but "substantially control" a business,

as those relationships often involve family, close friends and confidants, or other forms of intimate relationships.

Further compounding these issues is the fact that the federal government can share this information with other federal agencies *and* with other countries, all without a warrant or a check and balance from the judiciary. 15 U.S.C. § 5336(c)(2)(B); *see Patel*, 576 U.S. at 419 (noting that searches without judicial approval are unconstitutional except in narrow circumstances). The U.S. Treasury has full access to this information, including for tax administration purposes. 15 U.S.C. § 5336(c)(5) The United States does not even have to have a treaty with another country before sharing the information; there just has to be an agreement as to certain non-disclosure provisions that do *not* protect against prosecution by the foreign country. 15 U.S.C. § 5336(c)(2)(B)(ii). This means that any party labeled as a "beneficial owner" (which includes far more people than just "owners" in the ordinary sense of the term) could travel to another country and find himself or herself being arrested if, for example, the business that is connected to the person happened to break the laws of the foreign country.

It is not uncommon for small groups to say things or be politically active in ways that are consistent with their free speech rights in America. Unfortunately, these rights are not respected the same in other countries. If a business discusses "communist China" or voices opposition to the war in Israel, one of its reported "beneficial owners" may find himself or herself detained or arrested upon entering China or Israel or another foreign country, even if he or she did not even know about the post or speech that took place.

Additionally, a small business may not have in-house counsel and may ship products to a country where the products are not allowed or where the import or export laws were not fully

followed, without realizing that any laws were being broken. If the country can simply obtain all beneficial owners' information from the United States, all beneficial owners would take a serious risk of traveling, simply due to not having a full and complete grasp of all laws in other countries.

A prime example is the European Union's GDPR laws that regulate data privacy. These are strict laws with significant penalties,[1] yet many small businesses in America lack the knowledge, means, or opportunity to comply with these laws. If a citizen from the EU orders a product or service or contacts the company from the small business's website (including without limitation if a EU company hires a local law firm to draft a contract for a business deal it is involved in in that law firm's state), then the GDPR, by its written terms (and prior to a judicial determination on enforceability in other jurisdictions) would apply. (Ex. 2 (GDPR, Art. 3 GDPR, https://gdpr-info.eu/art-3-gdpr/ (last visited July 29, 2024).) If the EU could identify every "beneficial owner" of such a company, such persons could be arrested or punished when traveling abroad.

These potential situations are not simply theoretical. For example, Representative John Curtis has an arrest warrant in China for his speech that is protected in America.[2] The CTA would allow for others that work with Representative John Curtis in a small business setting to be punished by another country as well. From a constitutional perspective, the federal government should not be the entity that takes away and chills such important free speech rights of U.S. law-abiding citizens, especially because discussion of international issues and U.S. involvement in international issues is core political speech. *See, e.g., Hudson v. Craven*, 403 F.3d 691, 696 (9th Cir. 2005) (speaking

[1] The GDPR authorizes, among other things, administrative fines of 10,000,000 or 20,000,000 euros (or 2% or 4% of worldwide "turnover") for violating consent, privacy, or other rights of the user. (Ex. 1 (GDPR, Art. 83 GDPR, https://gdpr-info.eu/art-83-gdpr/ (last visited July 29, 2024).)

[2] (Ex. 3 (Deseret News, Rep. John Curtis responds to calls for his arrest in Hong Kong, www.deseret.com/2023/11/13/23959139/rep-john-curtis-arrest-in-hong-kong/, Nov. 13, 2023).)

out against the World Trade Organization is "an exercise that implicates core speech rights").

In effect, the CTA mandates and authorizes the broad seizure of otherwise private information. Although the stated objectives of the Act may seem reasonable, even laudable, to the government, that is not a justification to violate the Fourth Amendment and the express line it has drawn related to the government's use of citizens and their information for law-enforcement purposes. *Cf. Patel*, 576 U.S. at 421 ("broad statutory safeguards are no substitute" against violations of the Fourth Amendment). Indeed, the Supreme Court in *Patel* and *McDonald* both noted the real risk businesses face in being harassed by law enforcement when such information is readily available. *Id.* ("the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests"); *McDonald v. United States*, 335 U.S. at 456 ("Power is a heady thing, and history shows that the police acting on their own cannot be trusted.").

The CTA uses broad terms that could apply in many situations; indeed, its language is too vague for a person to be able to comply with certainty. The government is attempting to gather as much information as possible, but at the expense of providing citizens with definitive guidance. For example, the CTA states that a "beneficial owner" includes any person who exercises "indirect" but "substantial" control over the entity. Is this a spouse? A client who requires that a business offer a new service to land the contract? A lawyer who will not approve the sale of stock until certain steps are taken?

Ultimately, the CTA compounds all of these issues by diving into the heart of state jurisdiction. States have, since the founding of America, regulated the ownership of businesses. The "ownership" of a business is not portable; it remains in a particular state where the business was

formed. Business ownership and business operations are two separate legal concepts. Court precedent, through the internal affairs doctrine, has long recognized that ownership and operations are two different matters. *See, e.g.*, *Frederick Williams v. George Gaylord*, 186 U.S. 157, 165 (1902) (discussing internal affairs versus business of a corporation). Even the federal Securities Act, adopted nearly a century ago, recognizes that ownership interests, in and of themselves, are not a basis for federal regulation. *See, e.g.*, 15 U.S.C. § 77e(a)(1) (restricting regulation to sales of stock that utilize interstate commerce). Ownership alone is insufficient to invoke federal jurisdiction to regulate sales of ownership, even when the business does business in other states. This is reinforced by the internal affairs doctrine that applies a state's law to entities formed in the state. These precedents provide substantial indicia that ownership alone in an entity does not trigger federal jurisdiction under the Constitution. *Id.*; *Creswell-Keith, Inc. v. Willingham*, 264 F.2d 76, 82 (8th Cir. 1959) (expressly holding the "interstate commerce provision was inserted only for jurisdictional purposes").

The CTA is a significant violation of constitutional rights. This Court should enter a preliminary injunction enjoining its enforcement. A more detailed review of each constitutional principle follows.

a. Privacy, Freedom from Searches – First, Fourth and Ninth Amendments – The Founders lived in a world where their houses, belongings, and other items could be searched or seized at will. They knew firsthand of the abuses occasioned by such practices, and they created a system that protected citizens from the government simply taking any information it desired. Accordingly, the U.S. Constitution requires probable cause and a warrant *before* initiating searches of private information where no exigent circumstances exist (such as chasing a fleeing felon), and

even with exigent circumstances, probable cause must still exist to proceed without a warrant. *See, e.g.*, *United States v. Carter*, 360 F.3d 1235, 1241 (10th Cir. 2004). Even the CTA itself recognizes that it is obtaining "sensitive" information. Pub. L. 116–283, div. F, title LXIV, § 6402, Jan. 1, 2021, 134 Stat. 4604(6) ("beneficial ownership information collected under the amendments made by this title is sensitive information").

The government wants to (and should) find and prosecute individuals who launder money or fund terrorism, but, since the government cannot always find who the responsible individuals are, the government is requiring that virtually all small business owners register and report information. Most of this information will not aid the government in finding those who break the law, as those who break the law will not report the required information, and the CTA does *not* provide information on the movement of money. Rather, the government will be amassing information about law-abiding citizens (including Plaintiffs) who have broken no such laws.

This is not a situation where the police are in hot pursuit of an individual who enters a home, (*See, e.g., Lange v. California*, 594 U.S. ___ (2021) (discussing the hot pursuit doctrine)), or where the police suspect a gun in a vehicle or on the passenger of a vehicle, (*Arizona v. Johnson*, 555 U.S. 323 (2009) (allowing "Terry" frisks of a passenger or vehicle), or even where the police have reasonable suspicion that a person committed a crime or is armed and dangerous (*Terry v. Ohio*, 392 U.S. 1, 30 (1968)). There is nothing in the Constitution or in case precedent that justifies the indiscriminate mandate of registration and reporting of a law-abiding citizen's information in order to broadly assist the government in its efforts to find and apprehend criminals. The Supreme Court recently struck down a data-gathering means that was much smaller in scope and application. *Patel*, 576 U.S. at 421.

If the CTA is allowed to stand, what would stop the government from requiring the following?

- To help combat illegal drugs, the federal government requires each individual to provide his or her driver's license and a regular report on each city visited and each individual visited.
- To help combat the spread of AIDS or other STDs, the federal government requires that every citizen report on a regular basis the identities of each individual with whom the person has had had sexual contact.
- To help combat the spread of other communicable diseases, the federal government requires all restaurants, retail establishments, and other places of public accommodation to keep a record of all persons visiting their respective establishments and to regularly report the same with certain personally identifying information pertaining to each individual.
- To help find those who are committing fraud online, the federal government requires every person and business in America to install an app that tracks and monitors all online activity.

The right to form a corporation has long been a fundamental American right, recognized even in state constitutions. *See, e.g.,* UTAH CONST. ART. XII. This right has long been granted by the states to the people, and the states have granted certain privacy rights to business owners, including privacy rights associated with their associations with others (these rights are granted by the state authorizing the creation of an entity without requiring the disclosures mandated by the CTA). The Ninth Amendment recognizes that rights were left to the people, and governments of various states have recognized that these rights include the right to privacy in personal information. *See, e.g.,* Cal. Civ. Code §1798.1 ("The Legislature declares that the right to privacy is a personal and fundamental right protected by Section 1 of Article I of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining

to them."). The Constitution does not allow the government to require law-abiding citizens to report and provide personal and private information to the federal government in exchange for the right to own or run a business. The Fourth Amendment means that law-abiding citizens are *not* government data gatherers, they are *not* to be the subject of government fishing expeditions, and they are *not* to have these rights violated—even in the name of finding and apprehending real criminals. *See, e.g.*, *Patel*, 576 U.S. at 421.

The CTA openly states that the information obtained can be used for *law enforcement purposes*. There is no requirement that a treaty be in place, but rather just that the other nation is "trusted." 15 U.S.C. § 5336(c)(2)(B)(ii). The U.S. Treasury can access this information for any purpose, and other federal agencies can get it as well, without a warrant. *Id.*; 15 U.S.C. § 5336(c)(5). Ironically, states, who are the ones that legitimately regulate business ownership, can only get the information with court authorization. 15 U.S.C. § 5336(c)(2)(B)(i)(II). In summary, if the CTA is allowed to stand, it will eviscerate the protections of the Fourth Amendment and centuries of precedent.

b. Due Process – Fifth Amendment – Compounding the constitutional concerns that already exist from the risk of fines and criminal penalties for non-compliance is the fact that the CTA is vague; as such, it violates due process. A basic premise of due process is that there must be adequate notice of what is required and minimum standards to ensure the ability to comply, *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983), yet the CTA's language is not definitive enough to provide sufficient notice or minimum standards.

The CTA states that a "beneficial owner" is a person who "indirectly" exercises "substantial control" over the entity. By its own terms, "indirectly" would *not* include those who 'directly' vote on or manage a company. So, the question arises as to who might "indirectly" control (or

substantially control) an entity. Does that include an attorney? (Parenthetically, if it does, does that violate the attorney-client privilege?) A labor union? Employees who threaten to strike? A spouse of an owner or manager? Anybody sleeping with the CEO? A lender who requires that the company change some of its policies in order to get a loan?

The federal government is casting a wide net attempting to find enough information to see who the 'bad guys' really are, but in doing so, the net encompasses so much potential activity and lacks so much clarity that it is virtually impossible for all businesses to fully comply. Do managers and owners now have to disclose all sexual relationships so that the company's legal counsel can determine if any of those relationships have exercised "indirect" but "substantial control" of a business? Does a company have to go through and question all of its owners and managers how they came to a certain decision and who they talked to about that decision?

Without reviewing all contracts, all relationships, and all conversations, there is no way for a company to know whether it has complied or not. Trying to find and report this information involves treading into the realm of fully privileged and protected conversations, including the attorney-client privilege and the marital privilege. If these relationships and privileges are protected even in court proceedings where probable cause exists to pursue criminal charges against an individual, why are they not also protected against government intrusion when the government is simply fishing for information? The vagaries of the CTA will allow "policemen, prosecutors, and juries to pursue their personal predilections" in choosing whom to enforce the law against and how it is enforced. *Kolender*, 461 U.S. at 357-58.

Additionally, the Fourth and Fifth Amendments are violated inasmuch as the entire statutory scheme is, in effect, based on citizens being required to take part in a law-enforcement undertaking,

both in the United States and in other countries. U.S. citizens are fully protected from the federal government acting in a manner that requires citizens to produce information for law enforcement or to incriminate themselves, whether in the United States or abroad. U.S. CONST. AMEND. IV AND V. The Fourth and Fifth Amendments collectively protect against a wholesale information grab from all citizens that produces information that can be used for law enforcement purposes.

c. Freedom of Speech and Association – First and Ninth Amendments – Government exists for the people, not people for the government. *See, e.g.*, DECLARATION OF INDEPENDENCE ("Governments are instituted among Men, deriving their just powers from the consent of the governed"). Individuals should be able to unite together to speak, including about other countries and governments. It is well known that countries like China will jail Americans for speech or conduct in America. The story of Representative John Curtis is a sobering example. A warrant has been issued for his arrest based on his speech and conduct in America—and he has been advised not to travel to Hong Kong or China.[3] What if China could obtain information about "beneficial owners" of companies that John Curtis is also associated with? China could choose to retaliate against those he associates with by arresting them if they flew through the Hong Kong airport.

Or, consider the current tensions in America regarding the current war in Israel. Israel and the United States have long been allies—but people are free in this country to speak against Israel and its actions. If a group spoke out against Israel's handling of the war, what is to stop Israel or another country from retaliating against such group and its beneficial owners? Due to the sheer number of laws in a country, it would likely not be difficult for a country to identify a plausible reason to arrest a "beneficial owner." The recent detaining and jailing of U.S. journalists in Russia is another

[3] *See supra*, note 2.

example of the lack of respect other nations have for freedoms of speech, press, and association (and for due process).[4] Indeed, even the United States authorizes retaliatory actions to be taken against businesses that may not fully support U.S. war interests. *See, e.g.*, 15 U.S.C. § 77 (authorizing discrimination and retaliatory measures against businesses that give preferential or retaliatory measures to U.S. citizens or foreigners).

Congress shall make no law infringing the freedom of speech. U.S. CONST. AMEND I. When Congress passes a law authorizing the sharing and disclosure of private information of its citizens, including their relationships and identifying information for "law enforcement purposes," Congress is infringing the freedom of speech and association—as Congress is openly allowing individuals to go to jail in other countries based on things they said or things others said who were associated with them. Every American should be free to speak through a group or entity name, *see, e.g.*, *Mote v. Walthall*, 902 F.3d 500, 506-09 (5th Cir. 2018) ("the [F]irst [A]mendment protects the right of all persons to associate together in groups to further their lawful interests"), and not live in fear of retaliation from other countries for constitutional rights they exercised in America.

There are many appropriate reasons to engage in speech through a group or entity name that provides some protection to the individual. *See id.* Even the Founders spoke anonymously at times. *See* THE FEDERALIST PAPERS. When this right is engaged in, it should be fully protected by the Constitution, especially if the speech is political in nature—even and perhaps especially if the

[4] (Ex. 4 (CNN, US-Russian journalist Alsu Kurmasheva given 6.5 years in Russian jail in swift and secret trial, www.cnn.com/2024/07/22/media/us-russian-journalist-sentenced-to-6-5-years-in-jail-after-swift-secret-trial-in-russia/index.html, July 22, 2024); (Ex. 5 (CNN, 'This isn't a trial': Wall Street Journal rips Russia's secretive Evan Gershkovich prosecution, www.cnn.com/2024/06/26/media/wall-street-journal-evan-gershkovich/index.html, June 26, 2024).)

federal government or another country does not like the message. Individuals and groups are free to agree or disagree with politics in their own country; with foreign wars; with the actions, systems, or laws of foreign governments; or with trade policies or other international conditions—and to voice those opinions without fear of reprisal. *See, e.g.*, *Hudson v. Craven*, 403 F.3d at 696.

The Supreme Court has protected groups from compelled disclosure, especially those involved in advocacy. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action"). Significantly, in 2021, the Supreme Court struck down, on First Amendment grounds, an information-collection program similar in purpose and scope to that of the CTA. At issue in *Americans for Prosperity Foundation*, was a California law that required all non-profit organizations to disclose the identities of their major donors—the objective being to combat financial fraud. The California Attorney General was tasked with obtaining and keeping this information, and the law was updated to address privacy concerns with a mandate that the information stay private. Despite this, the Court found a chilling effect on the right of association and ruled that California's information-gathering scheme was unconstitutional—even though it may have made things easier or more convenient for the Attorney General. *Americans for Prosperity Foundation v. Bonta,* 594 U.S. ____ (2021).

The Court held that mandated disclosure "can chill association 'even if there is no disclosure to the general public.'" *Id.* Further, the fact that the information was also provided to the IRS for tax purposes did not reduce the chilling effect of California's required disclosures. *Id.* ("each government demand for disclosure brings with it an additional risk of chill"). The fact that disclosure can make the government's job more efficient or easy does not justify the constitutional

violations that follow forced disclosure of relationships, as "the prime objective of the First Amendment is not efficiency." *Id.*

The constitutional wrongs associated with the CTA are compounded by the fact that other countries can then engage in fishing expeditions as well. No other country needs to know the private and personal relationships of a small business owner in the United States. The CTA fundamentally violates the freedom of speech and the freedom of association vouchsafed by the Constitution. The Fourth Amendment has made clear that law enforcement is not a compelling interest that justifies a government fishing expedition, and therefore there is no compelling justification that justifies such an infringement of the freedom of speech and association that follow when this information that is "searched" and "seized" by the government is given to other countries and used in law enforcement purposes.

d. Commerce Clause – Ninth and Tenth Amendments – The creation of business entities has been regulated by the states for centuries. *See, e.g.*, *CTS Corp.*, 481 U.S. at 89 ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations."). While the federal government can charter certain federal entities, the federal government does not regulate or control the creation or formation of business entities. Despite this long-standing precedent, the federal government wants not only to mandate that law-abiding citizens provide information in violation of various constitutional rights, but wants to do so through means that are outside its grant of authority in the Constitution.

While the Constitution gives Congress the power to regulate "interstate commerce," and some case precedents apply this term liberally (*see, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942)), the Supreme Court has firmly stated: "No principle of corporation law and practice is more firmly

established than a State's authority to regulate domestic corporations." *CTS Corp.*, 481 U.S. at 89. In other words, the commerce clause power must be circumscribed by the Tenth Amendment, and, because states have consistently had the power to regulate corporate ownership, the commerce clause simply does not extend to this area.

In addition, there are two large bodies of law that have consistently recognized that company ownership is *not* interstate commerce and does not trigger federal jurisdiction—(1) the federal Securities Act and associated state "Blue Sky" laws; and (2) the large body of caselaw associated with the "internal affairs doctrine" that firmly holds that corporate ownership is to be solely regulated by the state of incorporation. *See, e.g.*, *CTS Corp.*, 481 U.S. at 89-94 ("the corporation—is one that owes its existence and attributes to state law"); *Mariasch, v. Gillette Co.*, 521 F.3d 68, 71-72 (1st Cir. 2008) ("only one State should have the authority to regulate a corporation's internal affairs").

The federal Securities Act was passed with the knowledge that corporate ownership, in and of itself, is *not* interstate commerce. This is why the Securities Act applies to the sale of an existing security only through means of interstate commerce 15 U.S.C. § 77e(a)(1). The Securities Act further confirms that it does not apply to securities that are just within a state when it states that exempt securities include "[a]ny security which is a part of an issue offered and sold only to persons resident within a single State...." 15 U.S.C. § 77c(a)(11). In other words, the Securities Act was adopted in full recognition that business ownership itself is not interstate commerce and that a sale of securities is necessary to trigger jurisdiction. This is why states have their own securities registration, as the federal government was limited in its jurisdiction and not allowed to regulate *all* securities transactions due to the commerce clause. *See, e.g.*, *Creswell-Keith,* 264 F.2d at 82

(holding "that the mails and interstate commerce provision [in the Securities Act] was inserted only for jurisdictional purposes").

In addition, when companies have owners from multiple states, courts have had to decide which state law to apply to disputes related to ownership. The "internal affairs doctrine" became the strongly accepted doctrine; it recognized the simple truth that ownership resides solely in the state of formation, even if an owner lives elsewhere. *Mariasch*, 521 F.3d at 71-72. Just as a person can own a home in Utah but live in Florida, so too can a stockholder own a business in Florida but live in Utah. Just as Florida law does not apply to real property located in Utah, so too does Florida law not apply to the ownership of a business formed in Utah. The fact that a business may produce and sell widgets from a particular piece of real estate does not make the real estate itself part of interstate commerce, and the fact that a business may sell products in interstate commerce does not make ownership of the business part of interstate commerce. Internal affairs of that business (including ownership) are under the sole jurisdiction of Utah. *Id.*

Countless cases recognize this principle. Countless cases also recognize that when interstate commerce is involved, each state impacted by the commerce can regulate the business *activities*, but they still cannot all regulate business *ownership*. These cases dealing with the internal affairs doctrine fully recognize the limits of interstate commerce, and they provided a viable, and constitutionally acceptable, resolution to choice-of-law disputes based on the same central principles that business ownership is *not* interstate commerce. A ruling that business ownership can be regulated by the federal government under the interstate commerce clause would open the door to undermining the internal affairs doctrine, as all states where a stockholder or owner lives would then have a claim to regulating the ownership. This would lead to a difficult and incredibly

complex regulatory environment for all businesses. *See, e.g.*, *Nagy v. Riblet Products Corp.*, 79 F.3d 572, 576 (7th Cir. 1996) (noting the need for businesses to have certainty with decisions).

However, business ownership is not interstate commerce. Business ownership and formation are within the full jurisdiction of the states and are not a realm for federal government regulation or intervention.[5] *CTS Corp.*, 481 U.S. at 89-94. Business *ownership* does not "substantially affect" interstate commerce, as ownership does not change interstate commerce. *See, e.g.*, *U.S. v. Lopez*, 514 U.S. 549, 559 (1995) (holding that gun possession (possession is, in some situations, similar to ownership) was not sufficient to invoke the commerce clause jurisdiction).

Finally, the Class Action Fairness Act (CAFA) also recognizes the sole jurisdiction of states to regulate the internal affairs of corporations. CAFA includes an "internal affairs" exception over federal jurisdiction of class actions that solely involve claims relating to the internal affairs of corporations. The Seventh Circuit, in reviewing CAFA, stated:

> The exception aims to exclude from CAFA's jurisdiction class actions whose claims concern the governance of a corporate enterprise, including through the exercise of fiduciary duties by directors and officers—matters on which state courts have the final word under state law. In this way, then, the inclusion of an internal-affairs exception tells us that Congress wanted to leave in state court (and withhold federal jurisdiction over) class actions concentrated on matters of corporate governance, where uniform and definitive interpretations of the legal duties governing management of the enterprise facilitate commercial activity.

Sudholt v. Country Mut. Ins. Co., 83 F.4th 621, 626 (7th Cir. 2023).

In other words, Congress again recognized, and the courts again confirmed, the long-standing principle that states have the sole authority regarding the formation of corporations formed within their respective jurisdictions. As the CTA seeks to undo this significant body of law and precedent

[5] The CTA goes so far as to ban states from creating or allowing certain types of business organization or ownership. 31 U.S.C. § 5336(f).

and delve into an area never before allowed by the Constitution, an injunction should issue against the enforcement of the CTA.

The Tenth Amendment provides that certain areas of regulation are solely those of the states, particularly when such rights were not granted to Congress. U.S. CONST. AMEND X. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." *New York v. United States*, 505 U.S. 144, 157 (1992). Quite simply, the Constitution does not grant the power to regulate corporate formation or ownership, and, as a long line of cases, statutes, and traditions have recognized, "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations..." *CTS Corp.*, 481 U.S. at 89. Accordingly, the Tenth Amendment relegates to the states the province of regulating business ownership.

e. Separation of Powers – The CTA's core premise is that law-abiding citizens are now responsible to provide the government with information to identify the illegal or bad actions of others. Indeed, the government's justification for the law is that others are breaking already-existing laws, and the government cannot easily catch them. Pub. L. 116–283, div. F, title LXIV, § 6402, Jan. 1, 2021, 134 Stat. 4604(3), (4). Thus, law-abiding citizens are now being saddled with searches and seizures of their sensitive information because of the illegal actions of others.

Laws are compulsory in nature. In this case, the CTA mandates the production of "sensitive" information that is widely considered private and personal information.[6] As such, the CTA is a fundamental violation of the rights and separation of powers established by the Constitution. The

[6] Nearly all data privacy laws treat date of birth, address, and photo identification as private, protected information. *See, e.g.*, Cal. Civ. Code § 1798.3(a) (recognizing, since 1977, this type of information is "personal information").

Fourth and Fifth Amendments protect citizens against being compelled to participate in law enforcement efforts unless there is probable cause and a warrant related to a crime.

Due process and the Fourth Amendment demand that individuals be punished for their own actions, not for someone else's transgressions. Thus, no one in America (except in very narrowly tailored situations) is criminally responsible for the actions of others.

Despite this, the CTA imposes upon law-abiding business owners compliance obligations that require them to review their personal, intimate, family, attorney, and other close, protected relationships. In a survey conducted by the National Small Business Association, the average anticipated cost of compliance for each business is $8,000, as it takes a legal opinion and review to comply with the vague terms.[7]

Criminal responsibility rests with persons who commit crimes. The burden to investigate criminal activity is on the government. The shifting of these burdens to law-abiding citizens violates the fundamental balance struck by the First, Fourth, Fifth, Ninth, and Tenth Amendments– namely, that all individuals are responsible for their own actions, not the actions of others, and that no citizen may be compelled to be subject to searches and seizures without probable cause of their own guilt, not the guilt of another.

2. Irreparable Harm

The loss of constitutional rights is irreparable harm, especially when First Amendment rights are involved. *Elrod* v. *Burns*, 427 U. S. 347, 373 (1976). In this situation, the harm is compounded by the fact that if disclosure is required, the Plaintiffs will have to disclose their private

[7] (Ex. 6 (National Small Business Association, New Survey: CTA Reporting will Cost Small Businesses Nearly $8K in Year One, www.nsba.biz/post/news-cta-survey-will-cost-small-business-8k-in-year-one, Nov. 14, 2023).)

relationships and associations, and other countries and federal agencies can obtain access to this private and sensitive information as well. Once the information is produced, the damage is done, and a later injunction against continued collection of information will not undo the damage that can come from the loss of privacy with private associations (and rights exercised through private associations). Accordingly, the harm is irreparable.

3. Balance of Equities, No Harm to Preserving the Status Quo

An injunction enjoining enforcement of the CTA will not upset the status quo. The federal government has operated for all of America's history without this information, and it will continue to do so. It also has access to increasingly sophisticated technologies and will continue to work to identify bad actors.[8] On the other hand, however, under the CTA, citizens will be required to expend large amounts of funds to comply and will lose their privacy, speech, due process, and association rights, among others. Even the best attempts at compliance may still produce fines or criminal penalties if any portion of the non-compliance was deemed to be 'willful,' and so the equities favor an injunction as there is no constitutional basis to conscript millions of Americans and force them to provide information to the government in order to gather data to pursue the illegal activities of a few.

4. Will Not Adversely Affect the Public Interest

There is no public interest in the enforcement of an unconstitutional law. The public interest favors protecting the rights of millions of small businesses over the constitutional violations associated with the government fishing for information from law-abiding citizens. As it is highly

[8] (*See, e.g.*, Ex. 7 (KSL.com, US charges 193 people in $2.75B health care fraud bust, www.ksl.com/article/51055022/us-charges-193-people-in-275b-health-care-fraud-bust, June 27, 2024 ("Officials said they have increasingly relied on data analytics to spot fraud schemes . . . .").)

unlikely that criminals will self-report themselves to the government, the public interest in this case is low, as the likely net effect is that enforcement of the CTA will only result in the gathering of information on law-abiding entities. Even if the CTA were useful to gathering certain information to combat crime, the means chosen are unconstitutional and violate the Constitution. The public interest in enforcing the Constitution and issuing a preliminary injunction against new laws that gather large amounts of information should always outweigh the minimal gains that accrue in combatting illegal activities. The government has many tools at its disposal, and other laws that provide information. Accordingly, it is in the public interest for an injunction to issue.

5. Preliminary Injunction Maintains the Status Quo

Prior to the CTA, the status quo was that the federal government did not collect and share "beneficial owner" information. Because Plaintiffs have not disclosed the information as mandated by the CTA, a preliminary injunction would preserve the status quo by keeping such information private. Accordingly, no additional factors need be met. *General Motors Corp.*, 500 F.3d at 1226.

CONCLUSION

For the foregoing reasons, this Court should issue a preliminary injunction enjoining enforcement of the CTA against the named Plaintiffs, their members, and all within the Court's jurisdiction. The CTA seriously violates a number of fundamental constitutional rights, both facially and as applied, and it should be held to be unconstitutional.

DATED this 29th day of July, 2024.

/s/ *Austin J. Hepworth*

Plaintiffs' Address
549 W 6300 S
Murray, UT 84123

Austin J. Hepworth, Esq.
Jared Haynie, Esq.*
Attorneys for Plaintiffs
**Pro Hac Vice Admission Pending*