No. 24-40792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS TOP COP SHOP, ET AL.,
Plaintiffs-Appellants,

v.

MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
Defendants.

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

BRIEF AMICI CURIAE OF LIBERTY JUSTICE CENTER IN SUPPORT OF PLAINTIFFS

Reilly Stephens
Counsel of Record
Duncan Crim
LIBERTY JUSTICE CENTER
7500 Rialto Blvd.
Suite 1-250
Austin, TX 78735
(512) 481-4400
rstephens@ljc.org
Attorneys for Amicus Curiae Liberty Justice Center

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for amicus curiae certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those listed in the Petitioner's Certificate of Interested Persons, 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.

Amicus Curiae: The Liberty Justice Center is a not-for-profit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It does not have a parent corporation and no publicly held company has a 10% or greater ownership interest.

Date: December 18, 2024

/s/Reilly Stephens
Reilly Stephens
Counsel of Record
Duncan Crim
Liberty Justice Center
7500 Rialto Blvd.
Suite 1-250
Austin, TX 78735
(512)481-4400
rstephens@ljc.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTEREST OF THE AMICUS CURIAE

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation center that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g. Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

This case interests amicus because constant vigilance is necessary to protect individual liberties from the abuses of government overreach.

The Liberty Justice Center files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, and all parties to the appeal have consented to the filing of this brief. No counsel for any party authored any part of this brief, and no person or entity other than amicus funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Corporate Transparency Act ("CTA") regulates noneconomic activity: companies simply existing and having beneficial owners. As the district court below explained, "[t]he fact that a company is a company does not knight Congress with some supreme power to regulate them in all aspects—especially through the CTA, which does not facially regulate commerce." Opinion below at *52, 4:24-CV-478 (ECF No. 33). Defendants' essential claim is that the very existence of a commercial entity inherently brings it under the purview of the Commerce Clause's substantial effects doctrine. But that argument falls short because the Commerce Clause is a power to regulate *commerce*, and as the Supreme Court has made clear, existence is not commerce. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 556-7 (2012).

Nothing in the challenged portion of the CTA regulates production, consumption, or distribution of commodities—nor the substantial effects thereof. Although reporting companies might be commercial enterprises, their very existence is not itself a commercial activity subject to regulation under the Commerce Clause.

Defendants cannot demonstrate a strong likelihood of success on the merits of their claim that the CTA is a valid exercise of Congress's Commerce Clause power, so their motion to stay the preliminary injunction pending appeal must fail.

Argument

Defendants have failed to demonstrate a strong likelihood of success on the merits of their claim that the Commerce Clause authorizes the CTA.

Defendants' argument that the CTA is authorized under the Commercial Clause's relies heavily on the substantial effects doctrine. ECF No. 18 at 15. But the CTA is not a regulation of an economic activity, and, as such, cannot be authorized under the substantial effects doctrine of the Commerce Clause.

A. The CTA does not regulate economic activity.

The substantial effects doctrine applies to economic activities with a substantial aggregate effect on interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *United States v. Morrison*, 529 U.S. 598. 615-616 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995). "Economics," as the Supreme Court explains, refers generally to "the production,

distribution, and consumption of commodities." *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (quoting Webster's Third New International Dictionary 720 (1966)). The Commerce Clause authorizes Congress to regulate "where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Morrison*, at 610. Whether an activity is economic hinges on whether it "arise[s] out of or [is] connected with a commercial transaction, which, viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561.

The CTA requires a "reporting company" to submit to FinCEN a report that "indentif[ies] each beneficial owner of . . . the reporting company . . . by full legal name, date of birth, current . . . residential or business street address, and [a] unique identifying number from an acceptable identification document or FinCEN identifier." 31 U.S.C. § 5336(b)(2).

Defendants argue in their motion opposing a preliminary injunction that Supreme Court precedent provides that the Commerce Clause authorizes regulation of "the activity [of] any sort of economic enterprise, however broadly one might define those terms." ECF No. 18

at 11. Because the CTA regulates "commercial enterprises," the theory goes, the CTA's compulsion of information is justified under the Commerce Clause.

But although the CTA does regulate "reporting companies," corporate entities are not necessarily, inherently engaged in a commercial enterprise. Compelling companies to divulge information on their beneficial ownership to the government is not a regulation that involves a commercial transaction, as *Lopez* requires. *Lopez*, 514 U.S. at 561. Further, the compelled disclosure of such information is not related to the "production, distribution, [or] consumption of commodities," *Raich*, 545 U.S. at 25 (2005), because no commodity exchanges hands, and no commercial transaction is formed.

Second, Defendants' arguments that commercial enterprises can inherently be regulated under the Commerce Clause simply because they are commercial enterprises reflects a linguistic misunderstanding. The Commerce Clause's substantial effects doctrine regulates *engagement in* commercial enterprises—not simply entities labeled as enterprises. For example, the Supreme Court stated in *Morrison* that "*Lopez*'s review of Commerce Clause case law demonstrates that in

those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic *endeavor*." *United States v. Morrison*, 529 U.S. 598, 611 (2000) (emphasis added).

Therefore, the CTA cannot be justified under the substantial effects doctrine as regulating an economic activity with a substantial effect on interstate commerce.

B. The Commerce Clause does not allow regulation of non-economic activities.

The Supreme Court has defined noneconomic activity to include all activities besides those that fall under the definition of "economic" articulated above. For example, noneconomic activities include the possession of firearms on school grounds (*United States v. Lopez*, 514 U.S. 549 (1995)) and crimes of not directed at the instrumentalities, channels, or goods involved in interstate commerce. (*United States v. Morrison*, 529 U.S. 598, 618 (2000)).

The Supreme Court in *Lopez* made clear that a noneconomic activity is one which does not "arise out of or are connected with a commercial

transaction." *Lopez*, at 561. Although the Court left the door open to a potential aggregate effects test for noneconomic activity, "thus far in our Nation's history [the Court's] cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, at 613.

Defendants contest this point, arguing that "Supreme Court precedent thus "provides two recognized and historically rooted means of congressional regulation under the commerce power: (1) whether the activity is any sort of economic enterprise, however broadly one might define those terms; or (2) whether the activity exists as an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." ECF 18 at 11 (quoting *Groome Res. Ltd., L.L.C. v. Par. of Jefferson*, 234 F.3d 192, 205 (5th Cir. 2000)).

But *Groome* does not support Defendants' argument. In that case, the Court was not providing a definition for noneconomic activity, but rather reiterating that the definition of economic activities includes: (1) activities that are economic enterprises; and (2) activities where are essential as a part of a larger regulation of economic activity, in which

the regulatory scheme could be undercut unless the intrastate activity were regulated. *Id*. In *Groome*, the Court found that the enactment of the Fair Housing Amendments Act of 1988, which defined housing discrimination to include a refusal to make reasonable accommodations for handicapped individuals, was within Congress's Commerce Clause power under the substantial effects doctrine. *Id.*, at 195. The Court determined that the Fair Housing Amendments Act "affected the commercial transaction of purchasing a home and the commercial rental of housing and, therefore, fits well within the broad definition of economic activity established by the Supreme Court and other circuits." *Id.* at 205. Thus *Groome*, which affected *commercial transactions*, does not support Defendants' theory that the Commerce Clause's substantial effects doctrine allows Congress to regulate noneconomic activity.

The CTA is not a regulation of an economic activity, and therefore is necessarily a regulation of a noneconomic activity (if it is to be considered a regulation of an activity at all). Because the CTA is not a regulation of economic activity, it cannot be justified under the substantial effects doctrine.

CONCLUSION

For the foregoing reasons, the motion to stay pending appeal should be denied.

Reilly Stephens
Counsel of Record
Duncan Crim
LIBERTY JUSTICE CENTER
7500 Rialto Blvd.
Suite 1-250
Austin, TX 78735
(512) 481-4400
rstephens@ljc.org
Attorneys for Amicus Curiae Liberty Justice Center

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because the brief contains 1,381 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Version 16.62 in 14-point Century Schoolbook font.

/s/Reilly Stephens
Attorney for amicus curiae Liberty Justice Center

Date: December 18, 2024

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 18, 2024.

/s/Reilly Stephens
Attorney for amicus curiae Liberty Justice Center

Date: December 18, 2024