No. 24-40792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS TOP COP SHOP, INC., et al.,
Plaintiffs-Appellees,

v.

MERRICK GARLAND, Attorney General of the United States, et al.,
Defendants-Appellants.

On Emergency Petition for Rehearing En Banc

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Prospective *amicus curiae*, The Buckeye Institute, respectfully requests leave to file an amicus brief in this case. A copy of the amicus brief is attached to this filing. Both parties have consented to the filing of this brief. The brief focuses on points not made in the Appellees' brief, specifically the significant harm that a stay will cause to the Plaintiffs' First Amendment rights. It will thus assist the Court in determining the issues presented by the Emergency Motion for Rehearing En Banc.

The Buckeye Institute is an independent research and educational institution—a think tank—whose mission is to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for

implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits *amicus* briefs. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3). *Amicus* briefs by The Buckeye Institute have been regularly accepted by this Court, other federal courts of appeals, and the United States Supreme Court.

For these reasons, The Buckeye Institute respectfully asks this Court to grant this motion and permit the filing of the attached amicus brief.

Respectfully submitted,

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December 26, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing motion for leave to file an amicus brief was served on all counsel of record via the Court's electronic filing system this 26th day of December 2024.

Respectfully submitted,

/s/ *Robert Alt*
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No. 24-40792

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On Emergency Petition for Rehearing En Banc

BRIEF AMICUS CURIAE OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

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

The undersigned counsel of record for amicus The Buckeye Institute certifies that The Buckeye Institute is an Ohio nonprofit organization. Pursuant to Fed. R. App. 29(a)(4)(E), The Buckeye Institute has authored this brief in whole. Counsel is not aware of any person or entity as described in the fourth sentence of Rule 28.2.1 that have an interest in the outcome of this case other than those listed in the parties' certificates. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Robert Alt
Robert Alt
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DISCLOSURE STATEMENT

Pursuant to Rules 29(a)(4)(A) and 26.1 of the Federal Rules of Appellate Procedure, *amicus* states that it is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3); as such, it has no parent corporation, issues no stock, and thus no publicly held corporation owns more than ten percent of its stock. Additionally, The Buckeye Institute states that no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

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INTEREST OF AMICUS CURIAE

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs.

SUMMARY OF THE ARGUMENT

The stay of an injunction pending appeal is no small matter. This is especially true where the district court has enjoined a statute that is constitutionally suspect for multiple reasons. In this case, the district court enjoined enforcement of the Corporate Transparency Act ("CTA") because it likely exceeded Congress's authority to regulate under the Commerce Clause. The district court thus did not need to reach the plaintiffs' other constitutional arguments. The panel chose not to consider those arguments when issuing the stay and allowing enforcement to begin. But those additional arguments must be considered in weighing whether to stay an injunction that prevents potential irreparable constitutional harm. Federal courts have thus recognized that the bar for obtaining a stay of a preliminary injunction is necessarily higher than the burden to obtain that injunction in the first place. This is

entirely consistent with the notion that the deprivation of a constitutional right—even briefly—constitutes irreparable harm. Further, to obtain the stay it seeks, the government should have been required to show that the government would suffer some actual irreparable harm absent the stay. *Nken v. Holder*, 556 U.S. 418, 434-435 (2009). The panel relied solely on the presumed harm that the government would suffer if a statute goes temporarily unenforced. Yet that is exactly what the government agreed to do following the panel's decision, and for the three years since the passage of the CTA. See https://fincen.gov/boi (accessed Dec. 26, 2024). If the nation can withstand three years between enactment and proposed enforcement, and an additional two weeks of nonenforcement following the panel opinion, it can muddle through the time necessary to hear this appeal without suffering irreparable harm.

The CTA's beneficial ownership information ("BOI") disclosure requirements apply to commercial, for-profit entities and are little different from California's nonprofit donor information reporting requirements struck down by the Supreme Court of the United States in *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021) ("*AFPF*") and *NAACP v. Alabama,* 357 U.S. 449 (1958). Although those cases involved reporting by nonprofit corporations, the privacy interests in protecting donors from harassment by the public or the government itself are similar to the privacy interests of owners or investors in for-profit ventures.

To the extent that the government assures the approximately 32 million private entities that their data will remain protected from improper disclosure, the government's record on safeguarding such information is not encouraging. Moreover, the Framers designed the First Amendment's associational freedom to protect citizens' right to associate *from* the government. Assurances that the government will protect the information it gathers offer little solace when citizens seek to keep their associations confidential from the government itself.

ARGUMENT

A. The Panel's Stay of the Trial Court's Preliminary Injunction Will Result in an Irreparable Deprivation of First Amendment Rights for Tens of Millions of Americans

Federal courts have held that "the bar for obtaining a stay of a preliminary injunction is higher than the *Winter* standard for obtaining injunctive relief." *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 824 (9th Cir. 2020) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (reciting the four-factor preliminary injunction test)). This makes eminent sense considering preliminary injunctions' function in preventing irreparable constitutional injuries. Rule 65 conditions courts' weighty power to enjoin legislation on a commensurately heavy burden on plaintiffs: The party seeking to enjoin enforcement of a federal statute must show, by clear and convincing evidence, that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary

relief, that the balance of equities tips in its favor, and that an injunction is in the public interest. *See Winter*, 555 U.S. at 20. And although a Rule 65 proceeding is expedited, it carries the hallmarks of a trial, typically including comprehensive briefing, the presentation of evidence, and oral argument. The trial court's treatment of this case below—which spanned six months, included oversized motions, notices of supplemental authority, and an in-person hearing—is an example of the expedited but thorough process a district court should follow when weighing whether to enjoin enforcement of a federal statute. This process gave both of the parties and the court ample time to ensure that if the court was going to take the extraordinary step of enjoining the CTA's enforcement, it did so on a full record with the opportunity to carefully consider the arguments and evidence submitted.

When seeking to stay a preliminary injunction, however, the burden is flipped and the Court of Appeals must consider "(1) whether the [enjoined party has] made a strong showing that they are likely to succeed on the merits; (2) whether the [enjoined party] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Index Newspapers,* 977 F.3d at 824 (citing *Nken* 556 U.S. at 434-435). The first two *Nken* factors—a likelihood of success on the merits and irreparable harm to the enjoined party—are the most critical. *Nken*, 566 U.S. at 434-435.

In comparison to the trial court's months-long process, the panel's consideration and decision granting a stay on an emergency expedited basis was particularly truncated. The panel's decision did not include a complete analysis of either of these factors, much less the substantial injuries to other parties and the public interest. The most glaring omission is that the panel failed to consider the likelihood of success on the merits of, and the substantial injury to, First Amendment associational rights that would be caused by granting the stay. Rather, the panel focused exclusively on the government's likelihood of success on the Plaintiffs' Commerce Clause argument. Because the trial court held that the CTA exceeded Congress' powers under the Commerce Clause, it did not reach the First Amendment argument. But just because the trial court did not need to reach those issues does not mean that the government is excused from the burden of addressing them when seeking a stay. To meet the burden of the likelihood of success on the merits and thereby to obtain the extraordinary relief of an emergency stay of an injunction, the government must show that it is likely to succeed on *all* the dispositive arguments that will be considered in the full merits phase, not merely the ones that the trial court happened to address. In light of the U.S. Supreme Court's recent decision in *AFPF* reaffirming the First Amendment right to associate freely and anonymously recognized in *NAACP*, and the long-standing recognition that even a brief deprivation of First Amendment rights constitutes irreparable harm, the panel

needed to examine that question in considering the likelihood of the government's success on the merits and the potential substantial injury to other parties. *See Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). If the panel was unclear on those issues, then it should have remanded for additional findings. In light of the significant stakes to the First Amendment rights of tens of millions of Americans, en banc reconsideration is the appropriate vehicle to evaluate the likelihood of success on all dispositive issues.

Likewise, requiring the enjoined party to show irreparable harm to obtain a stay of a preliminary injunction protects litigants who have already shouldered the burdens necessary to obtain an injunction. The Supreme Court has emphasized that "simply showing some possibility of irreparable injury fails to satisfy the second factor." *Nken*, 556 U.S. at 434–35. The panel's reliance on *Maryland v. King*, 567 U.S. 1301 (2012) to hold that irreparable harm exists any time a court enjoins a statute's enforcement is misplaced. *King* arose out of a criminal defendant's appeal of the denial of a motion to suppress DNA evidence collected under a Maryland law that allowed collection of DNA samples from arrestees charged with, but not yet convicted of, certain crimes. *Id.* at 1301. Although Chief Justice Roberts articulated the state's interest in enforcing a statute broadly, he noted that the injunction prohibited Maryland from *continuing* to collect DNA from arrestees, "a tool used

widely throughout the country and one that has been upheld by two Courts of Appeals and another state high court," which had proven efficacious in identifying violent offenders. *Id*. at 1303-04. Rather than reversing an ongoing practice that had already been held to be constitutional, the injunction here preserves the status quo, protecting Americans against what two federal courts have already identified as irreparable constitutional harm. The government suffers no harm because, if it ultimately prevails, it can begin the new enforcement regime—one that it has already waited three years since legislative enactment to implement. *See Casa de Maryland, Inc. v. Trump*, 2019 WL 7565389 *2-*3 (D. Maryland 2019) (requiring government to continue current enforcement regime "instead of switching to one that is likely 'not in accordance with law,' does not constitute irreparable harm"). The government's voluntary extension of the CTA's reporting deadline shows that far from suffering irreparable harm, the government can endure the lack of BOI from 32 million entities for at least a few weeks. Keeping the injunction in place pending appeal will not irreparably harm the government but may prevent irreparable constitutional harm to tens of millions of Americans.

B. The First Amendment Does Not Limit the Protection of Anonymous Association to Nonprofit or Policial Entities.

Because the district court based its decision solely on Congress's lack of authority, it did not reach the First Amendment freedom of association question raised by the Plaintiffs. But staying the injunction and allowing CTA enforcement

to proceed threatens serious harm to the associational freedom of tens of millions of Americans. Although the panel did not consider the government's likelihood of success on the merits of the First Amendment arguments, granting the petition for en banc review will allow the entire Court to do so.

The Plaintiffs' First Amendment arguments are compelling. CTA's disclosure requirements substantially curtail citizens' well-established right to associate anonymously. Indeed, the right to be free from reporting one's associations to the government is a key aspect of associational freedom. Since *NAACP,* the U.S. Supreme Court has consistently applied exacting scrutiny to forced disclosures that threaten freedom of association. To meet this burden, the government must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *Gibson v. Fla. Legislative Investigation Comm'n*, 372 U.S. 539, 546 (1963), and any such compelled disclosure must be "narrowly drawn," *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961) (citation omitted).

The Supreme Court reaffirmed this commitment to anonymous association in *AFPF*, striking down California's requirement that nonprofit organizations provide certain donor information to the state's Attorney General. The state's rationale for disclosure in *AFPF*, like here, was a vaguely defined interest in fraud prevention and the misuse of corporate entities. *AFPF*, 594 U.S. at 612.

The Court held that the disclosure requirements were not sufficiently narrowly tailored to justify an intrusion on donors' and organizations' associational privacy rights, noting "that '[i]t 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.'" *Id.* at 606–07 (quoting *NAACP,* 357 U.S. at 462). The *AFPF* decision echoed the *NAACP* Court's holding that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and noting "the vital relationship between freedom to associate and privacy in one's associations ...." *Id.* (quoting *NAACP*, 357 U.S. at 460, 462). "Because NAACP members faced a risk of reprisals if their affiliation with the organization became known—and because Alabama had demonstrated no offsetting interest 'sufficient to justify the deterrent effect' of disclosure, [the Court] concluded that the State's demand violated the First Amendment." *Id.* at 607 (citation omitted). Significantly, the Court's concern in both *AFPF* and *NAACP* implicated disclosure of the association to the government itself, not merely the risk that the information might eventually be disclosed to the public.

The *AFPF* Court emphasized that "[n]arrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Id.* at 609 (citations omitted). As its text

and breadth make clear, the CTA is anything but narrowly tailored. By the government's own reckoning, it will require nearly 32 million private entities to provide significant personal information on its beneficial owners. *See* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59584 (Sept. 30, 2022). The rationale for this disclosure is that shell companies can be used in money laundering transactions. Of course, many money launderers operate without shell companies. And there is no indication in the CTA or the government's filings that a significant number of American small businesses are money laundering fronts. The CTA thus presents a "dramatic mismatch" between the interests that the government "seeks to promote and the disclosure regime that [it] has implemented in service of that end." *AFPF*, 594 U.S. at 612–13. Indeed, the CTA's scale and intrusiveness dwarf the impact of the rule struck down in AFPF, which affected 60,000 reporting entities. *See id*.

Allowing the government to enforce the CTA's reporting requirements will alter the status quo and create substantial constitutional harm—harm that should weigh in this Court's balance of the equities against the emergency motion for a stay.

The government might argue that unlawful dissemination of BOI is unlikely, pointing to the Act's prohibition of unauthorized disclosure of BOI and significant penalties for doing so. But similar prohibitions have frequently proved to be ineffective. *See Nat'l Org. for Marriage, Inc. v. United States*, 24 F. Supp. 3d 518,

520-21 (E.D. Va. 2014) (Tax exempt organization's unredacted Schedule B was published by the Huffington Post after the IRS released it to a competing policy advocacy group in violation of federal law); Isaac O'Bannon, *IRS Exposes Confidential Data on 120,000 Taxpayers on Open Website*, CPA Practice Advisor (Sep. 02, 2022), https://tinyurl.com/3pjzwxud. More recently, a federal contractor claiming to have "acted out of a sincere, if misguided, belief [that he] was serving the public interest," was convicted of illegally releasing President Trump's tax returns to a media outlet. *Ex-IRS contractor sentenced to 5 years in prison for leaking Trump's tax returns*, NPR (Jan. 30, 2024), https://www.npr.org/2024/01/30/1227826718/ex-irs-contractor-sentenced-to-5-years-in-prison-for-leaking-trumps-tax-records. Prohibitions are insufficient to address the chilling effect that these policies have on protected association, not only because of the history of ineffective- and non-enforcement, but also because the requirement to disclose information to the government itself has a chilling effect. The CTA's collection of information presents the proverbial bell that cannot be unrung.

CONCLUSION

For all the foregoing reasons, the Court should grant en banc rehearing of this matter, vacate the panel order, and deny the government stay motion.

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December 26, 2024

CERTIFICATE OF COMPLIANCE

Excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,593 words.

This document complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type-style requirements of Fed. R. App. R. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for the most current version of Office 365 in 14-point type, Times New Roman.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing amicus brief was served on all counsel of record via the Court's electronic filing system this 26th day of December 2024.

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