

No. 24A653

THE SUPREME COURT OF THE UNITED STATES

MERRICK GARLAND, ATTORNEY GENERAL OF
THE UNITED STATES, et al.,

Applicants,

v.

TEXAS TOP COP SHOP, INC., et al.,

Respondents.

On Application for Stay of Injunction Issued in the
United States Court of Appeals for the Fifth Circuit

**AMICUS BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE
IN SUPPORT OF RESPONDENTS**

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I. INTEREST OF AMICUS CURIAE.¹

The Community Associations Institute (“CAI”) is an international nonprofit research and education organization formed in 1973 by the Urban Land Institute, the National Association of Home Builders, and the United States Council of Mayors to provide the most effective guidance for the creation and operation of condominiums, cooperatives, and homeowner associations. CAI is dedicated to providing information, education, resources, and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI’s more than 49,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 75.5 million homeowners who live in more than 365,000 community associations in the United States. These residents constitute roughly 30% of the population of the United States.

Community associations are property developments in which a developer, or declarant, has willingly submitted an interest in real property to some form of community association regime. The regimes include, among others, condominiums, homeowner associations, and cooperatives. The community association presents a unique form of ownership where responsibility for the submitted property is shared

¹ In accordance with Supreme Court Rule 37.6 no party to this case authored or assisted in any way with the preparation of this brief. Similarly, no party to this case funded or made any monetary contribution intended to fund the preparation or submission of this brief.

between the individual owner or member, on the one hand, and an association, trust, or corporation, on the other. To that end, many commentators have suggested that community associations make up and comprise the last bastion of affordable housing in the United States.

All community associations are governed by nonprofit organizations led initially by the developer or declarant and eventually by a group of volunteer homeowners elected by their fellow homeowners. Depending on the locality, community associations are formed as a nonprofit corporation, trust, or, less frequently, unincorporated associations. The primary role of community associations is to manage the common areas of the community, i.e., fix the roofs, maintain the lawns, shovel the snow, insure the buildings, etc. The elected board of volunteer homeowners take on or oversee these tasks free of charge. Volunteer board members of community associations cycle on and off their boards frequently, at least annually through the election process, and sometimes more frequently because of relocation, resignation, death and/or removal.

CAI submits this amicus brief on behalf of its members who recognize that the sustained health of the community association form of ownership in the United States depends in large part upon the willingness of owners to continue to serve on their associations' volunteer boards to make their homes and communities better places to live.²

² CAI has also filed an amicus brief regarding the Corporate Transparency Act in *National Small Business United, et al. v. U.S. Department of the Treasury, et al.*, No. 24-10736, 11th Cir., as well as

Community associations were not given one of the twenty-three (23) exemptions under the Corporate Transparency Act (“CTA”).³ CAI believes that this was an oversight. CAI respectfully submits that community associations are not “hotbeds” of financial crimes or terrorist activity by anonymous players using shell corporations to disguise their activities, which is the stated purpose of the CTA. First, community associations are anything but anonymous. Their owners are on public record with local registries of deeds when they buy property in a community. Community associations also record the identities of their volunteer board members with the local registry or secretary of state’s office annually. Second, given that community association boards are made up of volunteer homeowners who ensure the lawns are cut, roofs are repaired, and the swimming pools are maintained in affordable housing across America, they are as far from a terrorist or financial threat as could be. They are the backbone of America, homeowners living in and volunteering to make their communities better.

Notwithstanding this, the Financial Crimes Enforcement Network (“FinCEN”) and the Department of the Treasury (collectively the “Government”) have specifically refused to grant community associations an exemption from reporting under the CTA. This could be because they recognize that residents in community associations make up 30% of the United States population and because an underlying goal of the Government may well be to create as large of a facial recognition database as possible.

been party to an action in *Community Associations Institute, et al. v U.S. Department of the Treasury, et al.*, Case No. 1:24-cv-1597, E.D. Va., as well as in the 5th Circuit Court of Appeals in this case.

³ A small number may be exempt as 501(c)(4) organizations, however, that is the exception to the norm.

However, CAI respectfully submits that requiring community associations and their volunteer homeowner leaders to comply with the beneficial ownership reporting requirements will effectively chill volunteer participation going forward and is contrary to other expressly stated legislative intents to promote volunteerism in nonprofit organizations.

The CTA contradicts Congress's prior express intent in encouraging and providing immunity for volunteers of nonprofit entities. The Federal Volunteer Immunity Act of 1997, 42 U.S.C. § 139 (1997), expressly provides immunity for negligent acts of volunteers within nonprofit entities. In enacting this legislation, Congress specifically found that "the willingness of volunteers to offer their services is deterred by the potential for individual liability...and the withdrawal of volunteers has had an adverse effect on organizations." Yet the CTA subjects volunteer homeowners to imprisonment and civil fines if they don't upload their driver's license to a government website the moment they begin their service, undermining prior legislation and prior stated legislative intent.

Volunteerism is the backbone of every community association. Board members are not paid for their service. CAI respectfully submits that volunteer homeowners will be less likely to serve in that capacity if they are required to file a beneficial ownership report with the Government, providing their sensitive personal information including their driver's license and photo identification and then to amend their filings each time the board brings on a new board member or a director obtains a new state issued driver's license. CAI further contends that existing

volunteers will resign their positions. This is especially true where failure to comply brings with it \$500.00 per day fines and the possibility of imprisonment.

The complexities of CTA could be especially punitive to community associations. Condominium and HOA boards typically range from five (5) to seven (7) individuals. Many of them are older and do not have access to technology. If a single board member fails to upload his or her driver's license to a government website on time, it subjects the remainder of the board members to imprisonment and fines.

It's horrifying to imagine that a homeowner could be subject to imprisonment in the United States of America because he or she purchased a home and volunteered to serve on the board of directors for their community association but failed to upload a photograph of their state issued driver's license to a federal database. Homeowners not only would be reluctant to volunteer in light of the potential Orwellian consequences imposed by the CTA, they will resign in droves.

CAI submits that the CTA will have a devastating and unintended consequence on community associations and their operations throughout the United States. CAI respectfully submits that the CTA exceeds the power of Congress to regulate activity that is governed entirely by the states in which the community associations are located. The CTA's application to community associations and their volunteer homeowners but not to business corporations that have more than \$5,000,000.00 in profits per year demonstrates the absurdity of its reach and the reality that it is not in furtherance of its stated purpose. Moreover, as detailed herein,

the CTA is constitutionally vague and its application to community associations is like attempting to fit a square peg into a round hole.

In keeping with CAI's long-standing interest in promoting understanding regarding the operation and governance of community associations, CAI urges this Court to deny the Government's Motion, leaving the Nationwide Preliminary Injunction in force.

The injunction itself has been a rollercoaster for community associations, many of which scrambled to comply with the filing requirement, until the Texas District Court issued the Nationwide Injunction on December 3, only to start up again on December 23rd when the 5th Circuit issued an order staying the Nationwide Injunction, only to get relief once again on December 26th when the Injunction was reinstated. As noted above, complying with the CTA for community associations is not the simple six-minute computer exercise the government contends it is for a single shareholder in a single purpose LLC. Complying with the CTA in a community association is a coordinated effort of numerous individuals, all of whom are volunteer homeowners, and requires explanation, cajoling and coordination with the volunteer homeowners and often their management company for information pertaining to the entity itself. In light of the recent legal rollercoaster and the time and effort needed for compliance by community associations, CAI respectfully submits that this Court should deny the governments Motion to once again stay or dissolve the nationwide injunction until this case can be reached on the merits.

II. SUMMARY OF ARGUMENT

Staying the nationwide injunction will irreparably harm community associations and their volunteer homeowner directors. (pp. 7-8).

The Corporate Transparency Act is unduly burdensome to community associations and their volunteers. (pp. 9-10).

Staying the nationwide injunction will cause irreparable harm to community associations and the community association industry as it will irrevocably discourage and forever undermine volunteerism on community association boards (pp. 10-12).

ARGUMENT

A. STAYING THE DISTRICT COURT'S PRELIMINARY INJUNCTION WILL CREATE IRREPARABLE HARM TO COMMUNITY ASSOCIATIONS, PARTICULARLY TO THEIR VOLUNTEER HOMEOWNER BOARD MEMBERS.

The CTA was enacted on January 1, 2021 with a stated purpose of combating money laundering and terrorism financing by cracking down on the use of anonymous “shell companies.”⁴ While there may be laudable purposes in requiring that persons behind “shell companies” report personal information, the CTA has unfortunately caught homeowners’ and condominium associations and housing cooperatives (“community associations”) in its wide and expansive net. Community associations are hardly “shell companies” with anonymous or nefarious ownership; these non-

⁴ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388.

profit associations are run by volunteers who openly own homes in their residential communities.

The CTA, as implemented, would require every U.S. homeowner who volunteers to serve on their community association board to report personal information to FinCEN,⁵ despite the dubious connection between the purposes of the CTA and requiring these volunteers to provide their information to FinCEN.

Nonetheless, community association volunteers nationwide have been ramping up to fulfill the CTA's reporting requirements, expending substantial resources to achieve compliance, only to be told to "stand down" per the effect of the District Court's Preliminary Injunction. Now the Government insists on asking the Court to re-implement the CTA reporting deadline, while such reporting hardly constitutes an emergency in the larger picture of the purposes of the CTA. Worse, to reverse course in yet another whiplash maneuver and effectively require community volunteers to scramble to report their information would be devastating and result in irreparable harm to community associations throughout the nation. Accordingly, the Government's Motion should be denied, leaving the Preliminary Injunction in force.

⁵ If a volunteer homeowner becomes a board member, they are required to file a beneficial ownership report with FinCEN or be subject to penalties. However, that same board member is further required to amend their beneficial ownership report with FinCen within thirty (30) days if they change their e-mail address or renew their driver's license.

B. THE CTA WAS ALREADY UNDULY BURDENSOME AS TO COMMUNITY ASSOCIATIONS, CREATING SUBSTANTIAL COMPLIANCE COSTS TO THESE NON-PROFIT ENTITIES AND THEIR VOLUNTEERS

As noted above, the CTA reporting requirements already operate to discourage volunteer service on community association boards. If homeowner volunteers fail to file or amend their beneficial ownership report timely, they will be subject to penalties or imprisonment.⁶ The CTA is also unclear on the consequences if one volunteer fails to file their beneficial ownership report with FinCEN. Does that subject other members to penalties? Are volunteer board members now required to police the other volunteers' CTA reporting? Even at this late date, these simple questions have not been answered by the Government, leaving only fear and trepidation for community volunteers grappling with the new requirements of the CTA.

Due to the potential penalties under the CTA, community associations and their volunteers throughout the United States have been working in "overdrive" during the last several months to find a way to comply with FinCEN's reporting requirements. Some associations hire vendors at substantial expense (particularly given that these nonprofit entities have "no-frills" budgets) to help secure information from the board volunteers. Others turned to lawyers or CPAs to shepherd them

⁶ Application of the CTA to community associations is already having a chilling effect on volunteerism within communities. Many people are uncomfortable providing personal information for inclusion in FinCEN's database. Additionally, the penalties for noncompliance are so severe as to discourage individuals from volunteering to serve their neighbors on their association's board of directors. Why would someone volunteer for a position that provides no compensation when they are subjected to potential fines of up to \$250,000.00 and two years in jail if the person fails to provide their personal information to FinCEN?

through the FinCEN reporting process, made even more challenging due to reasonable reluctance by some volunteers to provide such information.

All of these compliance efforts were originally oriented around the January 1, 2025, deadline. When the District Court entered the Preliminary Injunction staying enforcement of the CTA nationwide, most community associations stood down their efforts to collect data from their volunteers pending the outcome of this case. While this did not reverse the harm and costs already imposed on community associations by the CTA, it “stopped the bleeding” at least until the District Court can enter a final order and rule on the merits. Now, with the latest Order from the Fifth Circuit again pausing the CTA reporting deadline, community associations have been able to take a breath and wait for a determination on the merits. This status quo is wholly appropriate and mitigates the potential harm of the CTA to community associations, at least for now, and we respectfully request the status quo be preserved.

C. REIMPLEMENTING THE STAY OF THE PRELIMINARY INJUNCTION AT THIS LATE DATE WILL CAUSE IRREPARABLE HARM TO COMMUNITY ASSOCIATIONS NATIONWIDE, FURTHER DAMAGING THE COMMUNITY ASSOCIATION INDUSTRY

The Government now demands that the Nationwide Injunction again be stayed and the compliance requirements be reinstated. The effect of entering another stay will be that community association volunteers subject to the BOI reporting requirement may not have sufficient time to coordinate and file their reports with FinCEN. The task is made even more difficult by the legal rollercoaster and confusing whipsaw effect of the Nationwide Injunction, the stay previously entered

and the other actions that have occurred in the midst of the holiday season and other year-end family activities. It is difficult for community associations to find volunteers to serve under the best of circumstances, and a legally mandated mad scramble for volunteers to file reports in January will only exacerbate the situation and harm community associations nationwide.

It should be recalled that failing to meet the CTA deadline (if it is reinstated) could result in substantial civil and criminal penalties for these volunteers and the associations they serve, consequences wildly disproportionate given that these homeowners simply volunteered to help out their local community by serving on their board of directors. Exposing these volunteers to such penalties under any kind of tight deadline implicated by staying the Injunction is exactly the kind of irreparable harm the Court should consider in balancing the relative harms and determining whether a stay is merited under these unusual circumstances.

The Government argues that it will suffer irreparable harm if the Preliminary Injunction is not stayed. Nothing could be further from the truth. What is the harm to the Government arising from a slight delay in the reporting deadline while the District Court reaches a final determination on the merits as to the constitutionality of the CTA? None. Yet, the CTA's penalty provisions – particularly when levied against volunteer board members in a homeowners' association – are sufficiently substantial that they could very well devastate an industry that relies wholly on volunteerism to supply its governance structure.

In sum, for these volunteers to be advised on one day that the CTA reporting requirement deadline has been stayed, then reinstated, then stayed again and reinstated -- with a shockingly sudden deadline to comply -- will do nothing but set up community associations for failure, especially given the volunteer-driven structure and nonprofit purposes of this industry. Such a result would be both inequitable and reeking with irreparable harm. Delivering potential civil and criminal penalties upon community volunteers is hardly in keeping with the spirit of equitable jurisprudence and, accordingly, the Government's Motion to stay the Preliminary Injunction should be denied and the Fifth Circuit's reimplementations of the stay upheld.

III. CONCLUSION

For the reasons as set forth above, CAI urges this Court to deny the Government's Motion to Stay the Preliminary Injunction.

Respectfully submitted,

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