No. 24-50984

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Spirit AeroSystems, Incorporated,

Plaintiff-Appellee,

v.

W. Kenneth Paxton, in his official capacity as Attorney General of Texas; Jane Nelson, in her official capacity as Secretary of State of Texas,

Defendants-Appellants.

Appeal from United States District Court
for the Western District of Texas, Austin Division
No. 1:24-cv-00472-RP

CATO INSTITUTE'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEE AND AFFIRMANCE

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

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***Defendants-Appellants*:** W. Kenneth Paxton, in his official capacity as Attorney General of Texas; Jane Nelson, in her official capacity as Secretary of State of Texas.

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Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A), undersigned counsel certifies that amicus curiae is not a publicly held corporation, does not issue stock, and does not have a parent corporation. No publicly held corporation owns ten percent or more of the stock of amicus.

Dated: February 10, 2025

/s/ Adam W. Kwon
Adam W. Kwon

STATEMENT REGARDING ORAL ARGUMENT

This case is scheduled for oral argument on Monday, March 31, 2025, at 1:00 PM in the West Courtroom of the Wisdom Courthouse in New Orleans, Louisiana.

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INTEREST OF AMICUS CURIAE[1]

Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. To that end, Cato's Center for Constitutional Studies publishes relevant books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs in courts across the country. This case is of interest to Cato because it concerns the Fourth Amendment rights of private businesses and the scope of such protections in a modern regulatory enforcement scheme.

INTRODUCTION

The Texas "RTE Statute"[2] is facially unconstitutional under a straightforward application of the Supreme Court's decision in *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), because it mandates "immediate" compliance with government demands for the search and seizure of corporate records without any opportunity for a neutral precompliance review. The Fourth Amendment's text and history, and controlling Supreme Court precedent, prohibit and condemn such executive

[1] No party's counsel authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, contributed money to fund the preparation or submission of this brief.

[2] Tex. Bus. Orgs. Code §§ 12.151–12.156.

overreach. If permitted to stand, the RTE Statute will allow the government to encroach unlawfully on corporations' liberties and will harm Texas by weakening the State's economic competitiveness. The trial court properly found such a result unwarranted under the Constitution and granted summary judgment in favor of Plaintiff-Appellee. The Court should affirm.

ARGUMENT

I. The RTE Statute is Facially Unconstitutional.

Appellants' theory that the RTE Statute comports with the requirements of the Fourth Amendment cannot be squared with the Supreme Court's ruling in *Patel* and finds no support in any text of law or in historical precedent.

A. The RTE Statute Runs Contrary to the Text and Purpose of the Fourth Amendment.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," by ensuring that "no Warrants shall issue" except for those supported by "probable cause" and that "particularly describ[e] the place to be searched, and the persons or things to be seized."

U.S. CONST. amend. IV. It has long been understood that the Fourth Amendment's warrant requirements constrain a government officer's authority to intrude upon the "right of the people." *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978) ("A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.").

The Supreme Court has recognized that the "right of the people" to be free from unreasonable searches and seizures extends to corporate entities, including the employees and individuals associated with them. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014). The drafters of the Fourth Amendment were concerned with addressing a particular ill affecting not only individuals, but also businesses: the much-reviled "general warrants" of the colonial period that "granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *Marshall*, 436 U.S. at 311–12 (discussing history of the Fourth Amendment and holding unconstitutional a statute authorizing OSHA to conduct warrantless searches of commercial premises to inspect for safety hazards).

The "particular offensiveness" of the general warrant "was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists." *Id.* at 311. James Otis, a colonial lawyer and Revolutionary patriot, described general warrants as "instruments of slavery," calling them "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law." James Otis, *Against Writs of Assistance* (Feb. 24, 1761). The use of general warrants was so odious to the colonies that it "was a motivating factor behind the Declaration of Independence." *Berger v. New York*, 388 U.S. 41, 58 (1967).

Recognizing this history, the Supreme Court has repeatedly affirmed over the last 120 years that the Fourth Amendment protects corporations from unreasonable searches and seizures. *See Hale v. Henkel*, 201 U.S. 43, 76 (1906) (cautioning that the government may not conduct "*unreasonable* searches and seizures" against corporations); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) ("[T]he rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful

way."); *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946) (Fourth Amendment protects corporations from "unreasonable" subpoenas); *Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 65 (1974) (corporations "may and should have protection from unlawful demands made in the name of public investigation"); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) ("Nor can it be claimed that corporations are without some Fourth Amendment rights."); *Burwell*, 573 U.S. at 707 ("[E]xtending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company.").

Most recent in this long line of precedent is *Patel*, where the Supreme Court held that a law is facially unconstitutional if "it penalizes [parties] for declining to turn over their records without affording them any opportunity for precompliance review." 576 U.S. at 412. In *Patel*, the Court considered a facial challenge to a Los Angeles city ordinance that required hotel operators to make their guest records available for inspection to any officer of the Los Angeles Police Department. *Id.* at 413. The officers did not need to obtain a warrant or make any showing of probable cause or reasonable suspicion to inspect the records. The ordinance also authorized criminal penalties and allowed officers to

arrest "on the spot" hotel operators who refused to comply. *Id.* at 421. Relying on well-settled precedent, the Court reasoned that the subject of an administrative search "must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, 576 U.S. at 420 (citing *See v. City of Seattle*, 387 U.S. 541, 545 (1967); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984)) (finding "no reason why this minimal requirement" of an opportunity for precompliance review was "inapplicable" to a right-to-inspect ordinance). Because the ordinance on its face precluded an opportunity for precompliance review, the Court held it was facially invalid under the Fourth Amendment. *Id.* at 421.

This case is on all fours with *Patel*. Like the ordinance at issue in *Patel*, which stated that hotel records "shall be made available" for inspection upon demand, *id.* at 413, the RTE Statute commands that business entities "*shall immediately permit* the attorney general to inspect, examine, and make copies of" any "records of the entity." Tex. Bus. Orgs. Code § 12.152 (emphasis added). Like the ordinance in *Patel*, the RTE Statute provides criminal penalties. *See id.* § 12.156 (violation of RTE is a Class B misdemeanor). Furthermore, a corporation that fails to "immediately" comply with an RTE "forfeits the right of the entity to

do business in [Texas], and the entity's registration or certificate of formation shall be revoked or terminated." *Id.* § 12.155. Thus, like the hotel owners in *Patel*, corporations and their officers who receive an RTE must comply immediately, or risk arrest and criminal prosecution.

Crucially, the RTE Statute contains no "opportunity to obtain precompliance review before a neutral decisionmaker." *See Patel*, 576 U.S. at 420. Further, the RTE Statute's dual threat of potential criminal liability and forfeiture of a corporation's right to conduct business puts parties who receive RTEs at a completely untenable position vis-à-vis the Texas Attorney General's coercive power. "[B]usiness owners cannot reasonably be put to this kind of choice." *Id.* at 421. Even worse, whereas the ordinance in *Patel* at least required inspections to occur "at a time and in a manner that minimizes any interference with the operation of the business," *id.* at 413, the RTE Statute affords the Texas Attorney General "the full and unlimited and unrestricted right to examination of [a] corporation's books and records at any time and as often as he may deem necessary," *Humble Oil & Refining Co. v. Daniel*, 259 S.W.2d 580, 589 (Tex. Civ. App. 1953).

Thus, the RTE Statute is hardly distinguishable from the general warrants the Fourth Amendment was intended to outlaw. *See generally* Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U. L. REV. 215, 256–57 (1995) ("[G]eneral warrants have crept back into America," but "[a] general warrant by any other name is still a general warrant."). Such "[m]odern general warrants are as offensive to individual liberty now as they were before this country existed." *Id.* at 257.

B. The RTE Statute Reflects an Outdated Understanding of Fourth Amendment Law That is Superseded by Supreme Court Precedent.

Appellants emphasize that the RTE Statute has existed "for over 100 years." Opening Br. 1. But the fact that the RTE Statute has existed since 1907 does not mean it is beyond constitutional reproach. In 1907, the Court had not yet established the extent to which a corporation has Fourth Amendment rights. And in the nearly 120 years since, controlling case law has made clear that the RTE Statute is facially unconstitutional.

When Texas enacted the RTE Statute in 1907, the Supreme Court had not yet incorporated the Bill of Rights to the States through the Due Process Clause of the Fourteenth Amendment. In 1925, the Court

recognized for the first time that the First Amendment's Free Speech Clause is operative on the States. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). The Fourth Amendment was incorporated against the States in 1961. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961). And it was not until 2015, in *Patel*, that the Supreme Court held that laws permitting executive officers to inspect a business's records with unlimited discretion and no opportunity for precompliance review—like the RTE Statute—facially violate the Fourth Amendment. *See Patel*, 576 U.S. 409. Beyond the Fourth Amendment, the Supreme Court has also recognized since the RTE Statute's passage that corporations enjoy many other basic constitutional protections.[3]

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[3] *See, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (corporations have Free Association rights guaranteed by the First Amendment); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978) (corporations have Free Speech rights guaranteed by the First Amendment); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342–43 (2010) (same); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 567 (1977) (corporations have protection against Double Jeopardy guaranteed by the Fifth Amendment); *S. Union Co. v. United States*, 567 U.S. 343, 348–50 (2012) (corporations have a right to jury trial guaranteed by the Sixth Amendment); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (it is "well established" that corporations have Equal Protection Clause rights); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996) (Due Process Clause protects corporations against "grossly excessive" punitive damages).

Appellants suggest that the Supreme Court has blessed the States with "special privileges" to exercise unrestricted visitorial powers over corporations. *See* Opening Br. 6–8. That is wrong. Appellants rely on irrelevant and inapplicable cases from the early 1900s, when (as discussed above) the Supreme Court had not yet clearly defined the constitutional rights of corporations. *Id.* at 6 (citing *Wilson v. United States*, 221 U.S. 361, 383 (1911); *Essgee Co. of China v. United States*, 262 U.S. 151, 155–56 (1923)). Neither *Wilson* nor *Essgee* concerned a Fourth Amendment challenge; both cases considered only whether a corporate entity could invoke the *Fifth* Amendment's protection against self-incrimination. Those cases are thus inapposite.

Appellants also reference *Cuomo v. Clearing House Association*, 557 U.S. 519, 525 (2009), for the erroneous proposition that the Fourth Amendment does not limit a state official's visitorial power. Opening Br. 6. Like *Wilson* and *Essgee*, *Cuomo* did not concern the Fourth Amendment, nor did it involve a state official's visitorial power. In fact, *Cuomo contradicts* Appellants' position. As Justice Scalia explained (writing for the majority), the Court has "always understood 'visitation' as [a] right to oversee corporate affairs, quite separate from the power to

enforce the law." *Cuomo*, 557 U.S. at 526. Because the RTE Statute authorizes civil and criminal *enforcement* penalties, it is not merely a visitorial statute. *See id.* at 536 (holding that "the Comptroller erred by extending the definition of 'visitorial powers' to include 'prosecuting enforcement actions' in state courts").

In any event, numerous Supreme Court decisions since the RTE Statute's passage have made clear that the opportunity for precompliance judicial review is an essential check on an executive official's investigative authority. *See, e.g.*, *Okla. Press*, 327 U.S. at 217 (subpoenas must be "subject in all cases to judicial supervision," and a subpoenaed entity is "not required to submit to [a] demand, if in any respect it is unreasonable or overreaches"); *See*, 387 U.S. at 544 ("It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. . . . [A]nd the subpoenaed party may obtain judicial review of the reasonableness of the demand *prior to suffering penalties for refusing to comply*." (emphasis added)); *Patel*, 576 U.S. at 412 (a law is "facially unconstitutional [if] it

penalizes [parties] for declining to turn over their records without affording them any opportunity for precompliance review").

Appellants nevertheless contend, incorrectly, that "abundant Texas appeals court precedent" forecloses any Fourth Amendment challenge to the RTE Statute. *See* Opening Br. 12–14 (citing *Humble Oil*, 259 S.W.2d 580; *Chesterfield Fin. Co. v. Wilson*, 328 S.W.2d 479 (Tex. Civ. App. 1959); *Walker-Texas Inv. Corp. v. State*, 323 S.W.2d 603 (Tex. Civ. App. 1959)). None of these cases considered whether the RTE Statute's failure to provide for precompliance judicial review violates the Fourth Amendment. *See Humble Oil*, 259 S.W.2d at 591 (holding that the RTE Statute did not authorize the Attorney General to make copies of records to be used as evidence in a pending tax litigation); *Chesterfield*, 328 S.W.2d at 483 (holding that the Attorney General may use the RTE Statute to make copies of records to support an action against a corporation for violation of usury laws); *Walker-Texas*, 323 S.W.2d at 606 (affirming forfeiture of corporate charter for entity that simply refused to comply with an RTE).

Even if Texas state courts had expressed clear support for Appellants' position 75 years ago (they did not), those cases have been

superseded by Supreme Court precedent recognizing the essential need for precompliance review, including most recently, *Patel*. *See In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021) (precedent is implicitly overruled "where an intervening Supreme Court decision fundamentally changes the focus of the relevant analysis" (cleaned up)); *Stokes v. Sw. Airlines*, 887 F.3d 199, 204 (5th Cir. 2018) ("Such a change occurs, for example, when the Supreme Court disavows the mode of analysis on which our precedent relied."); *see also Braswell v. United States*, 487 U.S. 99, 108 (1988) (Supreme Court has "jettisoned reliance on the visitatorial powers of the State over corporations owing their existence to the State—one of the bases for earlier decisions" (citing *United States v. White*, 322 U.S. 694, 700–01 (1944))).

Simply put, applying modern and on-point precedent, it "is easy" to determine that the RTE Statute violates the Fourth Amendment. *Spirit AeroSystems, Inc. v. Paxton*, No. 1:24-cv-00472-RP, ECF No. 51 (Oct. 11, 2024 Hr'g Tr.) at 69:17 (W.D. Tex. Oct. 28, 2024).

C. The RTE Statute's Extraterritorial Provisions Contravene Additional Constitutional Principles.

Not only is the RTE Statute invalid under the Fourth Amendment, its extraterritorial reach also contradicts principles of Constitutional federalism, the Due Process Clause, and the dormant Commerce Clause.

The RTE served on Appellee here underscores the issues. The Attorney General demanded documents related to Appellee's manufacture of aircraft components and the impacts of Appellee's diversity, equity, and inclusion practices on manufacturing quality. *See* Opening Br. 8–9. But the Attorney General has no investigative authority over aerospace manufacturing, *see US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010) ("[F]ederal regulation occupies the field of aviation safety to the exclusion of state regulations"), nor does he have primary authority to police corporate hiring standards, *see* Tex. Lab. Code § 21.003(a)(2) (assigning authority to investigate employment discrimination to the Texas Workforce Commission).

Moreover, Appellee does not reside in Texas; it is incorporated in Delaware and headquartered in Kansas. *See Spirit AeroSystems*, No. 1:24-cv-00472-RP, ECF No. 17 (Pl.'s Mot. Summ. J.) at 2 (W.D. Tex. June 6, 2024). Appellee's only facility in Texas is unrelated to the main

focus of the RTE—the manufacturing of aircraft fuselages, which Appellee performs entirely outside of Texas. *See id.* at 2–3. In other words, the RTE sought the inspection of records regarding the out-of-state practices of an out-of-state corporation, in areas of the law over which the Attorney General is not the primary investigating officer.

Such extraterritorial policing violates the structural federalism embedded in the Constitution. "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *see also* Matthew Cavedon, *Constitutional Federalism's Limits on State Criminal Extraterritoriality*, SSRN 31–32 (Jan. 13, 2025).[4] To the extent the RTE Statute authorizes the Texas Attorney General to investigate and police the activities of a non-Texas corporation that occur entirely outside of Texas, it violates the core tenet of Constitutional federalism that "[a] State cannot punish a

[4] Available at: https://ssrn.com/abstract=5096267.

defendant for conduct that may have been lawful where it occurred." *State Farm*, 538 U.S. at 421 (collecting cases).

In addition, the Attorney General's use of the RTE Statute to penalize purely extraterritorial conduct violates the Fourteenth Amendment's Due Process Clause, which "limits a state['s] power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021). General jurisdiction does not typically exist over a nonresident corporation. *Id.* at 359. And specific jurisdiction does not exist if, as in Appellee's case, the investigated conduct has no nexus to the corporation's presence in the state. *See id*; *State v. Volkswagen Aktiengesellschaft*, 669 S.W.3d 399, 430 (Tex. 2023) ("[S]pecific jurisdiction exists only if the alleged liability arises out of or is related to the defendant's activity within the forum."). Because the RTE Statute's grant of authority exceeds the outer bounds of Texas's jurisdiction, it violates the Due Process Clause.

Extraterritorial application of the RTE Statute also burdens interstate commerce in a manner that violates the dormant Commerce Clause. *See* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause is Not Dead*, 100 MARQ. L. REV. 497, 502–15

(2016) (collecting cases demonstrating that the dormant Commerce Clause "serves the constitutional purpose of limiting burdens on interstate commerce even when those burdens do not arise from intended or unintended state economic protectionism"); Katherine Florey, *The New Landscape of State Extraterritoriality*, 102 TEX. L. REV. 1135, 1197 (2024) ("[T]he [dormant Commerce] Clause may serve to restrain states from encroaching on both individuals' free choice and other states' regulatory spheres of influence."). The Attorney General's use of a Texas statute to intrude into the out-of-state affairs of an out-of-state corporation is a "projection of one state regulatory regime into the jurisdiction of another State," which the Commerce Clause does not permit. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337 (1989).

II. Appellants' Interpretation of the RTE Statute Impermissibly Strips Corporations of Fundamental Constitutional Rights.

The Fourth Amendment's "right of the people" to be secure against unreasonable searches and seizures cannot be guaranteed without adequate constraints on an executive's authority and discretion. Otherwise, "[t]he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative

officers . . . as to when to search and whom to search." *Marshall*, 436 U.S. at 323. An opportunity for precompliance judicial review ensures that corporations, like individuals, will not assume the "intolerable risk that searches authorized by [the government] will exceed statutory limits, or be used as a pretext to harass." *Patel*, 576 U.S. at 421.

Apparently recognizing the Fourth Amendment's limitations, Appellants urge this Court to hold that the RTE Statute complies with existing authority. But, as explained below, accepting Appellants' contentions would inevitably erode corporate liberties.

A. If the RTE Statute Complies with the Fourth Amendment, Lawful Subpoenas and Civil Investigative Demands Serve No Function.

Appellants' attempt to characterize a Request to Examine corporate records as an "administrative subpoena" does not make it so, nor does it cure the RTE Statute's constitutional defects. *See* Part I, *supra*. An RTE is not an administrative subpoena, and the RTE Statute does not provide the same constitutional safeguards that accompany lawful subpoena schemas. *Cf.* Tex. Gov. Code § 422.003(h) (recipient of administrative subpoena issued by the Attorney General may "petition for an order to modify or quash the subpoena").

Even if an RTE is a type of administrative subpoena, the RTE Statute remains unconstitutional. The Fourth Amendment still requires that a subpoenaed party have an opportunity for precompliance review. *See Lone Steer*, 464 U.S. at 415 (holding that a subpoenaed party must be allowed "to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it" (citing *See*, 387 U.S. at 544–45; *Okla. Press*, 327 U.S. at 208–09)). As discussed, *supra*, the RTE Statute provides no such mechanism.

Beyond the RTE Statute, the Attorney General has broad authority to investigate corporations, and the RTE Statute is far from the only statute that empowers the Attorney General to demand inspection of corporate records to investigate potential violations of Texas law. For example, he is authorized to issue civil investigate demands ("CIDs") to inspect a corporation's records for myriad violations of Texas law.[5]

[5] The Attorney General may issue CIDs to investigate, for example, possible violations of the Texas Deceptive Trade Practices Act (Tex. Bus. & Com. Code § 17.61), antitrust violations (Tex. Bus. & Com. Code § 15.10), civil racketeering and fraud (Tex. Civ. Prac. & Rem. Code §§ 140A.052, 140B.052), health care fraud (Tex. Hum. Res. Code § 36.054), consumer financial services violations (Tex. Fin. Code §§ 59.006, 393.504), and drug manufacturer pricing violations (Tex. Health & S. Code §§ 431.116, 431.208).

Holding that the RTE Statute is unconstitutional will not interfere with the Attorney General's ability to enforce the law.[6]

On the other hand, if the Court were to find the RTE Statute is constitutional, it would effectively permit the Attorney General to bypass the Fourth Amendment at his discretion and would make administrative subpoenas and CIDs superfluous. There would be no reason for the Attorney General to seek an administrative subpoena or issue a CID to search or seize a corporation's private records. He could simply invoke the RTE Statute, which permits a demand for records to investigate violations of "*any law* of this state." Tex. Bus. Orgs. Code § 12.153(2) (emphasis added). This would tie the hands of all businesses within the State and preclude any business from having the opportunity to challenge the reasonableness of any search.

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[6] Appellants imply that states have long used the "visitatorial power" to investigate corporations in the same way that the RTE Statute permits. Opening Br. 6. Appellants cite no other statute that grants such unfettered government access to corporate records. But even if other states had similar laws, they would have no bearing on the RTE Statute's unconstitutionality. *See* U.S. CONST. art. IV, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land."); *see also, e.g.*, *Lawrence v. Texas,* 539 U.S. 558, 573 (2003) (holding Texas statute unconstitutional while acknowledging the existence of similar laws in 12 other states).

B. The Mere Possibility of Prosecutorial Grace Is An Inadequate Substitute for Fourth Amendment Protections.

Appellants claim that "the Attorney General admits (indeed, embraces) the proposition that RTE [] recipients may enjoy review before suffering penalties." Opening Br. 27. But this hollow assertion directly contradicts the plain text of the RTE Statute, which commands that a recipient "*shall immediately permit* the attorney general to inspect, examine, and make copies of the records of the entity." Tex. Bus. Orgs. Code § 12.152. A business that must "immediately" comply with an RTE has no opportunity for neutral review *before* it complies.

Appellants impliedly concede that there may be instances in which the Attorney General demands immediate compliance with an RTE. Appellants state that "the Attorney General *almost* always provides [RTE] recipients weeks to comply" rather than demanding immediate compliance. Opening Br. 30 (emphasis added); *see also id.* at 2. Under Appellants' theory, the RTE Statute cannot be held facially unconstitutional because at least *some* RTE recipients *might* have sufficient time to seek precompliance review. *Id.* at 32. The Supreme Court's decision in *Patel* forecloses this argument.

In *Patel*, the government "principally contend[ed] that facial challenges to statutes authorizing warrantless searches must fail because such searches will never be unconstitutional in *all* applications." 576 U.S. at 417 (emphasis added). At least *some* searches conducted at hotels, the government argued, involved exigent circumstances, consent by the hotel owners, or police acting with a valid warrant. *Id.* at 417–18. The Court rejected this argument and explained: "[W]hen addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant." *Id.* at 418; *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992) ("Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.").

Like the government's argument in *Patel*, Appellants' reliance on the Attorney General's occasional, discretionary grant of prosecutorial leeway is futile. The RTE Statute is unambiguous: a recipient "shall immediately" comply. Tex. Bus. Orgs. Code § 12.152. If the Attorney General determines, in his discretion, not to require a business to immediately comply, he has chosen *not* to apply the RTE Statute as it is

drafted, and that voluntary deviation is "irrelevant" to the Fourth Amendment inquiry. *See Patel*, 576 U.S. at 417–19.

The constitutionality of the RTE Statute cannot depend on the grace of the Attorney General or his decision to "almost always" exercise discretion in a constitutional manner. A court will "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *See United States v. Stevens*, 559 U.S. 460, 480 (2010). "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and [constitutional rights]." *United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 317 (1972) ("The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates."). Even where government officials state they will "voluntarily exercise [] discretion with restraint" and in accordance with the Constitution, the Supreme Court has held officials cannot act "free of judicial oversight of any kind." *United States v. Ortiz*, 422 U.S. 891, 896 (1975) ("This degree of discretion to search . . . is not consistent with the Fourth Amendment.").

Protection against prosecutorial overreach that depends solely on the restraint of the prosecutor is no protection at all. The Fourth Amendment requires more.

C. The Court Should Reject Appellants' Dangerous Invitation to Create an "Acid Test" for Corporations Subject to Government Demands for Search and Seizure.

Appellants argue that corporations *should not* have any opportunity at all for precompliance judicial review. Opening Br. 23–24. Appellants contend that a corporation should instead be "force[d] . . . to put skin in the game" by risking criminal penalties and the revocation of its corporate charter if it dares to even challenge the reasonableness of an RTE. *Id.* at 24. That is unconscionable.

The case on which Appellants rely for this harrowing proposition does not support their contention. *See id.* at 23 (citing *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254 (1st Cir. 1989)). In *Garcia*, the plaintiff served subpoenas duces tecum on two non-party witnesses who asserted executive privilege over the requested documents. 876 F.2d at 256. The district court reviewed the documents, ruled on privilege assertions, and ordered the production of some documents. *Id.* The

witnesses appealed to the First Circuit, which held there was no appellate jurisdiction because the witnesses had to first be subject to a contempt order before appealing. *Id.* at 256–58. Importantly, the witnesses who were subjected to this "acid test" *had an opportunity for precompliance review* of the subpoenas—the district court examined and considered their privilege assertions. *Id.* at 256. *Garcia* only underscores the importance of precompliance review.

Appellants' argument also flies in the face of *Patel*, which warned against the creation of such acid tests and emphasized that "broad statutory safeguards are no substitute for individualized review, *particularly when those safeguards may only be invoked at the risk of a criminal penalty*." *Patel*, 576 U.S. at 421 (emphasis added) (quoting *Camara v. Mun. Ct. of City & Cnty. of S.F.*, 387 U.S. 523, 533 (1967)). As the Supreme Court recognized in *Patel*, permitting such a Hobson's choice would effectively gut Fourth Amendment protections for law-abiding corporations.

III. The RTE Statute Threatens Negative Effects for Texas and All Corporations Doing Business in Texas.

As explained above, the RTE Statute violates the Fourth Amendment's text and history and controlling Supreme Court precedent. That is enough for this Court to affirm. But if there remains any doubt, public policy considerations further support the outcome. The RTE Statute leaves corporations vulnerable to abuses of state power, and that is likely to chill economic activity in Texas.

A. The RTE Statute Affords Corporations No Safeguard Against Potential Abuses of Executive Power.

The RTE Statute lacks the procedural safeguards promised by the Fourth Amendment and grants "the Attorney General the full and unlimited and unrestricted right of examination of [a] corporation's books and records at any time and as often as he may deem necessary." *Humble Oil*, 259 S.W.2d at 589. This presents a substantial risk that any Attorney General may weaponize this broad, unlimited power "to pursue their personal predilections," unchecked by the protections guaranteed by the Fourth Amendment. *See Marinello v. United States*, 584 U.S. 1, 11 (2018) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). Such a regime "could result in the nonuniform execution of that power across

time and geographic location," stoke public fear of arbitrary prosecution, and undermine public confidence in the enforcement of the law. *Id.*

There are no safeguards, for example, to prevent use of an RTE to harass corporations that hold or promote differing political viewpoints, under pretenses of an ostensibly legitimate "investigation." Under the plain text of the RTE Statute, there is no limit on how many RTEs may be issued or how wide-ranging an RTE may be. This leaves all corporate entities that wish to conduct any business in Texas vulnerable to arbitrary exercises of state power anathema to a free society.

It is easy to see how this power could be abused for political ends. For example, an Attorney General could use RTEs to demand membership lists and donor records from organizations that support opposing political causes, ostensibly to investigate fraud. *Cf. Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021) (facially invalidating California's donor disclosure requirements for charities). Or a pro-choice Attorney General could "investigate" the practices of pregnancy centers that promote opposing views on abortion, ostensibly for suspected data privacy violations. *Cf.* Abigail Brooks, *Watchdog Group Asks 5 Attorneys General to Investigate Crisis Pregnancy Center Privacy Practices*, NBC

NEWS (Apr. 23, 2024).[7] Or an Attorney General in favor of firearm regulation could require a gun manufacturer to provide the names of its suppliers and buyers, ostensibly for suspected deceptive marketing. *Cf.* Rep. Carolyn Maloney, *Letter to Mark P. Smith*, (May 26, 2022).[8]

The Attorney General's recent invocations of the RTE authority suggest that the threat of politically motivated searches may not be merely hypothetical, but real. Just last year, the Attorney General attempted to revoke the charter of a Catholic charity aiding migrants at the U.S.-Mexico border for failing to turn over its records within 24 hours of receiving an RTE. *See* Robert Moore, *Judge Suggests Paxton Has "Ulterior Political Motives" in Annunciation House Case*, EL PASO MATTERS (Mar. 7, 2024).[9] He has also used the RTE Statute to target a

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[7] Available at: https://www.nbcnews.com/health/health-news/watchdog-group-asks-5-attorneys-general-investigate-crisis-pregnancy-c-rcna148188.

[8] Available at: https://oversightdemocrats.house.gov/sites/evo-subsites/democrats-oversight.house.gov/files/2022-08-01.CBM%20to%20Smith-Smith%20and%20Wesson%20re%20Subpoena.pdf.

[9] Available at: https://elpasomatters.org/2024/03/07/el-paso-annunciation-house-ken-paxton-court-hearing/; *see also Spirit AeroSystems*, No. 1:24-cv-00472-RP, ECF No. 18-8 at 8–26 (W.D. Tex. June 6, 2024) (OAG's Petition and Counterclaim

non-profit group that promotes civic participation. *See* James Barragan, *Ken Paxton Agrees to Pause Its Investigation into Texas Civic Group's Voter Registration Efforts*, TEX. TRIBUNE (Sept. 13, 2024).[10]

As these examples illustrate, the RTE Statute places any corporation doing business in Texas at risk of suffering undue harassment by any activist Attorney General that disapproves of its political views. This is precisely the kind of threat to liberty that the *Patel* Court warned against and that our nation's Founders intended to prevent with the Fourth Amendment. *See Patel*, 576 U.S. at 421 ("[T]he ordinance creates an intolerable risk that searches authorized by it will . . . be used as a pretext to harass."); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393, 394–411 (1995) (Fourth Amendment was largely a reaction to the use of general warrants against political dissidents).

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in the Nature of Quo Warranto in *Annunciation House, Inc. v. Paxton*, Cause No. 2024DCV0616 (Tex. Dist. Ct. Feb. 16, 2024)).

[10] Available at: https://www.texastribune.org/2024/09/13/texas-voter-registration-investigation-paxton-lawsuit/.

B. The RTE Statute Discourages Businesses from Operating in Texas and Threatens the State's Economic Competitiveness.

The sweeping nature of the RTE Statute generates uncertainty and added costs for businesses, who value stability, predictability, and privacy in their operations. Law-abiding corporations operating in Texas must face the possibility of receiving and complying with an RTE at any time. This disproportionately affects small and mid-sized businesses vital to Texas's economy, which may not have the access or means to comply with a broad and overreaching RTE or to retain legal counsel to assist in its defense. *See 2023 Small Business Profile: Texas*, U.S. SMALL BUS. ADMIN. OFFICE ADVOC. (2023) (reporting that small businesses employ 5 million Texans, accounting for 44.3% of all Texas jobs).[11]

The RTE Statute also threatens Texas's economic competitiveness and potential for growth. Historically, Texas has created a friendly and welcoming regulatory environment for businesses and corporations. Between 2000 and 2019, Texas enjoyed substantial net in-migration of businesses each year. *See* Pia Orrenius, *Hang Your Hat in Texas: State Remains a Leader in Firm Relocations*, FED. RSRV. BANK DALL. (Feb. 2,

[11] Available at: https://advocacy.sba.gov/wp-content/uploads/2023/11/2023-Small-Business-Economic-Profile-TX.pdf.

2024).[12] In the last decade, over 7,000 net businesses have moved into the state, creating approximately 103,000 jobs for Texans. *Id.* Some of these businesses have publicly cited the overly intrusive and arbitrary regulatory environments in other states as a motivating reason for their move to Texas. *See, e.g.*, Heather Somerville, *Elon Musk Moves to Texas, Takes Jab at Silicon Valley*, WALL ST. J. (Dec. 8, 2020).[13]

Recently, however, Texas has seen an increasing level of regulation that threatens the state's competitiveness and growth. One very recent study found that Texas is the fifth-most-regulated state in the country, with nearly 275,000 existing regulatory restrictions. *See* Patrick McLaughlin, *Regulatory Reform in Texas: An Opportunity for Greater Economic Growth*, MERCATUS CENTER (Jan. 7, 2025).[14] Meanwhile, businesses face other pressures threatening Texas's economy, including decreases in investment, expiring tax incentives, high tax burdens, and skyrocketing costs of supplies, energy, and health care. *See* Holly Wade

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[12] Available at: https://www.dallasfed.org/research/swe/2024/swe2402.

[13] Available at: https://www.wsj.com/articles/elon-musk-to-discuss-teslas-banner-year-despite-pandemic-silicon-valleys-future-11607449988.

[14] Available at: https://www.mercatus.org/research/policy-briefs/regulatory-reform-texas-opportunity-greater-economic-growth.

& Madelein Oldstone, *Small Business Problems & Priorities*, NFIB RSCH. CENTER 90–95 (2024);[15] Christopher Hooks, *Texas Attracted California Techies. Now It's Losing Thousands of Them.*, TEX. MONTHLY, (Apr. 26, 2024).[16]

The onerous RTE Statute and the risk that any Attorney General may aggressively use it "to pursue their personal predilections," *Marinello*, 584 U.S. at 11, only exacerbates the threat that overregulation poses for the growth of Texas's economy and business population. Corporations already doing business in Texas may hesitate to expand; those looking to enter Texas may reassess that decision; and others may choose to leave the Texas market altogether. No doubt corporations would prefer to operate in states where Attorneys General do not have free reign to undertake broad, warrantless searches that threaten corporate existence. If this Court holds that the RTE Statute is constitutional, it is Texans who will bear the cost.

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[15] Available at: https://strgnfibcom.blob.core.windows.net/nfibcom/2024-Small-Business-Problems-Priorities.pdf.

[16] Available at: https://www.texasmonthly.com/news-politics/austin-texas-tech-bust-oracle-tesla/.

CONCLUSION

The RTE Statute is facially unconstitutional in view of the Fourth Amendment and the Supreme Court's decision in *Patel*. This Court should affirm.

Respectfully submitted,

DATED: February 10, 2025 By: */s/ Adam W. Kwon*

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I certify that on February 10, 2025, this document was transmitted to the Clerk of the Court and served on all parties or their counsel of record through the CM/ECF system.

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/s/ Adam W. Kwon
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