No. 24-50984

IN THE 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.

On Appeal from the United States District Court
for the Western District of Texas
Case No. 1:24-cv-472

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF TEXAS AND TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PLAINTIFF–APPELLEE AND AFFIRMANCE

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Pursuant to Federal Rules of Appellate Procedure 27 and 29(a)(3), *amici curiae* the American Civil Liberties Union Foundation of Texas ("ACLU of Texas") and Texas Civil Rights Project ("TCRP") (collectively, "*amici*") respectfully move for leave to file an *Amici Curiae* Brief in Support of Plaintiff-Appellee and Affirmance.

MOVANTS' INTERESTS

The ACLU of Texas is a leading civil rights organization in the Lone Star State. From Amarillo to Brownsville and Beaumont to El Paso, we believe in a Texas that works for all of us — a Texas where each person has an equal say in the decisions that shape our future and everyone can build a good life. The ACLU of Texas works with communities, at the State Capitol, and in the courts to protect and advance civil rights and civil liberties for every Texan, no exceptions. As a statewide civil rights organization, the ACLU of Texas has a particular interest in this case to guard against government overreach and to ensure that constitutionally adequate guardrails are applied to Texas laws.

TCRP is a 501(c)(3) legal advocacy organization with offices across Texas. TCRP boldly serves the movement for equality and justice in and out of the courts. TCRP uses the tools of litigation and legal advocacy to protect and advance the civil rights of everyone in Texas, and it partners with communities and non-profit organizations across the state to serve the rising movement for social justice. TCRP

undertakes its work with a vision of a Texas in which all communities can thrive with dignity and justice and without fear. TCRP regularly partners with and supports non-governmental organizations across the state and currently defends a non-governmental organization under investigation by the Texas Attorney General under the same statutory scheme at issue in this case.

REASONS FOR AND RELEVANCE OF THIS *AMICI* BRIEF

This case raises important questions regarding Fourth Amendment protections for nonprofits, businesses, and entities under the Texas Right to Examine Statute ("RTE Statute"). As the district court correctly held, "it is clear that the RTE Statute contains a constitutional defect in its plain language" because it "provides no opportunity to seek precompliance review on the reasonableness of a particular Request, and it explicitly prevents such opportunity through its temporal requirements and grant of unlimited power to the Attorney General." *Spirit AeroSystems, Inc. v. Paxton*, No. A-24-CV-472-DII, 2024 WL 4947290, at *12 (W.D. Tex. Nov. 1, 2024), *report and recommendation adopted*, No. 1:24-CV-472-DII, 2024 WL 5046345 (W.D. Tex. Dec. 9, 2024). Such sweeping authority afforded to the Attorney General threatens the privacy, autonomy, and freedom of every person in Texas and undermines the right to "be secure" from unreasonable searches that the Fourth Amendment promises.

Amici submit this brief to aid this Court in determining why the RTE Statute is facially unconstitutional, to explain how it conflicts with the text and history of the Fourth Amendment, and to discuss the damaging consequences of allowing Texas businesses and nonprofits to be subject to the unfettered discretion the Attorney General claims under the statute. *Amici* are well-situated to submit this brief because the ACLU of Texas and TCRP have significant experience defending civil liberties across Texas and our organizations and the communities we serve rely on Fourth Amendment protections while engaging in our robust and vibrant democracy.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant leave to file an *amici curiae* brief in support of Plaintiff-Appellee and Affirmance.

Dated: February 10, 2025

Respectfully submitted,

/s/ Brian Klosterboer

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CERTIFICATE OF CONFERENCE

Pursuant to 5th Cir. R. 27.4, *Amici* conferred with counsel for the parties regarding the relief requested in this motion. On February 7, 2025, counsel for Plaintiff-Appellee consented to the filing of this brief and counsel for Defendants-Appellants stated that they take no position.

/s/ Brian Klosterboer
Brian Klosterboer

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 2025, a true and correct copy of the foregoing was filed electronically using the CM/ECF system, which served counsel for the parties.

/s/ Brian Klosterboer
Brian Klosterboer

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BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF TEXAS AND TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PLAINTIFF–APPELLEE AND AFFIRMANCE

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CERTIFICATION OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* the American Civil Liberties Union of Texas and Texas Civil Rights Project state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

Pursuant to Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities 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.

Person or Entity	Connection to Case
ACLU Foundation of Texas, Inc.	Amicus curiae
Texas Civil Rights Project	Amicus curiae
Chloe Kempf	Counsel to amici
Brian Klosterboer	Counsel to amici
Adriana Piñon	Counsel to amici
Daniel Hatoum	Counsel to amici
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Erin D. Thorn	Counsel to amici

Dated: February 10, 2025

By: */s/ Brian Klosterboer*
Brian Klosterboer

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STATEMENT OF INTEREST[1]

The ACLU Foundation of Texas, Inc. ("ACLU of Texas") is a leading civil rights organization in the Lone Star State. From Amarillo to Brownsville and Beaumont to El Paso, we believe in a Texas that works for all of us — a Texas where each person has an equal say in the decisions that shape our future and everyone can build a good life. The ACLU of Texas works with communities, at the State Capitol, and in the courts to protect and advance civil rights and civil liberties for every Texan, no exceptions. As a statewide civil rights organization, the ACLU of Texas has a particular interest in this case to guard against government overreach and to ensure that constitutionally adequate guardrails are applied to Texas laws.

The Texas Civil Rights Project ("TCRP") is a 501(c)(3) legal advocacy organization with offices across Texas. TCRP boldly serves the movement for equality and justice in and out of the courts. TCRP uses the tools of litigation and legal advocacy to protect and advance the civil rights of everyone in Texas, and it partners with communities and non-profit organizations across the state to serve the rising movement for social justice. TCRP undertakes its work with a vision of a Texas in which all communities can thrive with dignity and justice and without fear.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that no person or entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

TCRP regularly partners with and supports non-governmental organizations across the state and currently defends a non-governmental organization under investigation by the Texas Attorney General under the same statutory scheme at issue in this case.

INTRODUCTION

Since our nation's founding, the Fourth Amendment has protected "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Supreme Court has repeatedly recognized that the "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 585 U.S. 296, 303 (2018) (quoting *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967)). The Framers who ratified the Fourth Amendment "reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California*, 573 U.S. 373, 403 (2014). Thus, courts have consistently affirmed that "absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015).

Texas's Right to Examine Statute ("RTE Statute") violates this clear constitutional requirement and imposes a general warrant on countless businesses, nonprofits, and other entities across the state. On its face, the RTE Statute permits the Attorney General "to inspect, examine, and make copies, as the attorney general

considers necessary . . . of any record," Tex. Bus. Orgs. Code § 12.151, and it requires entities to comply "immediately," *id.* § 12.152. Any entity that refuses to comply risks "forefeit[ing] the right . . . to do business in this state," *id.* § 12.155, and any managerial officer faces criminal penalties of up to six months in jail and/or a $2,000 fine, *id.* § 12.156; Tex. Penal Code § 12.22.

The district court correctly held "it is clear that the RTE Statute contains a constitutional defect in its plain language" because it "provides no opportunity to seek precompliance review on the reasonableness of a particular Request, and it explicitly prevents such opportunity through its temporal requirements and grant of unlimited power to the Attorney General." *Spirit AeroSystems, Inc. v. Paxton*, No. A-24-CV-472-DII, 2024 WL 4947290, at *12 (W.D. Tex. Nov. 1, 2024), *report and recommendation adopted*, No. 1:24-CV-472-DII, 2024 WL 5046345 (W.D. Tex. Dec. 9, 2024). Despite the Attorney General's attempt to salvage the law's constitutionality by reading in extrinsic options for precompliance review, he cannot overcome the statute's plain language that purports to give him unbridled discretion over the records of nonprofits, businesses, and other entities. Such sweeping authority to inspect records "immediately" with no provisions for precompliance review or limitations on the reasonableness of the search is unconstitutional and the same kind of general warrant that the architects of the Fourth Amendment condemned.

As the district court noted, the Attorney General has already invoked the RTE Statute's arbitrary provisions against Annunciation House, a religious nonprofit affiliated with the Catholic diocese. *Id.* at *9; *see also* Brief for Appellee at 19-25, *Paxton v. Annunciation House*, No. 24-0573 (Tex. Nov. 27, 2024). The Attorney General demanded "immediate access" to Annunciation House's files, including personal identifying information and medical records, *id.* at 22, and now seeks to shut down this nonprofit entirely for allegedly failing to comply, *id.* at 24.

Such capricious use of the RTE Statute and the lack of facial constitutional safeguards deeply concern *amici curiae*, who are nonprofit organizations defending the civil rights of all Texans. The ACLU was founded in response to thousands of warrantless searches during the Palmer Raids of 1919 and 1920. *See* David D. Cole, *Reflections on Immigration One Hundred Years After the Red Scare*, 65 N.Y.L. SCH. L. REV. 171, 194 n.2 (2021). Similarly, TCRP was founded to address the structural inequities faced by farm workers in the Rio Grande Valley, and in its history has represented varied persons and groups that have been historically targeted in Texas, including immigrants, people of color, the poor, persons with disabilities, and persons accused of crimes. Granting the Attorney General nearly unchecked authority to investigate nonprofits, businesses, and other entities—and shut them down entirely if they do not immediately comply—threatens to silence free speech and weaken our vibrant democracy.

Amici submit this brief to explain why the RTE Statute is unconstitutional, how its text and structure violate the history and requirements of the Fourth Amendment, and why the Attorney General's sweeping interpretation of his authority under the law threatens nonprofits, businesses, and other entities in Texas. Because the RTE Statute is unconstitutional on its face, it cannot stand and the district court's decision should be affirmed.

ARGUMENT

I. The RTE Statute Is Facially Unconstitutional

The district court correctly held that the RTE Statute contains the same unconstitutional infirmities as the ordinance struck down by the U.S. Supreme Court in *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015). There, the Los Angeles Municipal Code stated that hotel guest records "*shall be made available* to any officer of the Los Angeles Police Department for inspection" and provided that a "hotel operator's failure to make his or her guest records available for police inspection is a misdemeanor punishable by up to six months in jail and a $1,000 fine." *Id.* at 413 (quoting Los Angeles Municipal Code § 41.49(3)(a)). Like Texas's RTE Statute, the municipal code did not provide affirmative defenses, a mechanism for precompliance review, a reasonableness requirement for the search, or specific guardrails before criminal penalties could be imposed. *Id.* On its face, the code

authorized government officials to immediately access records and punished hotel owners who refused to comply.

The Supreme Court found this ordinance to present a straightforward Fourth Amendment violation because "absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Id.* at 420. Like the RTE Statute, the municipal code in *Patel* failed the "minimal requirement" of creating some opportunity for precompliance review, and the threatened criminal penalty forced hotel owners to abandon their Fourth Amendment rights or "refuse to comply with an officer's demand to turn over the registry at his or her own peril." *Id.* at 421. The Court reiterated a blackletter rule that an "administrative search may proceed [] *only* [] where the subpoenaed party is sufficiently protected by the opportunity to 'question the reasonableness of the subpoena'" before being exposed to possible penalties. *Id.* at 420 (quoting *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (emphases added)).

The RTE Statute has not been facially challenged since *Patel* was decided in 2015, but the Fifth Circuit has consistently applied *Patel* in other contexts to require precompliance review for administrative searches. In *Zadeh v. Robinson*, this Court held that Texas state investigators violated the Fourth Amendment when they entered a doctor's office and demanded to see patient records without an opportunity

for precompliance review. 928 F.3d 457, 464 (5th Cir. 2019). As Judge Willett explained, "[t]he Fourth Amendment forbids such roughshod rummaging" and restricts "unchecked searches." *Id.* at 474 (Willett, J., concurring in part and dissenting in part). The Fifth Circuit reiterated this holding in *Cotropia v. Chapman*, where the Court held that government officials violated the Fourth Amendment when they copied documents in a doctor's office "without any precompliance review of the administrative subpoena." 978 F.3d 282, 287 (5th Cir. 2020); *see also Mexican Gulf Fishing Co. v. United States Dep't of Com.*, 60 F.4th 956, 970 (5th Cir. 2023) (citing *Patel* for the proposition that "'the closely regulated industry [doctrine] . . . is the exception,' not the rule" for warrantless administrative searches). Similarly, the RTE Statute here fails to comply with *Patel* and the basic constitutional requirement that precompliance review be made available for any administrative search absent consent or exigent circumstances.

II. The RTE Statute's Plain Language Provides No Protection for Texas Nonprofits and Businesses

Although the Attorney General claims that there are extrinsic mechanisms through which RTE recipients might seek precompliance review, he does not dispute that the RTE Statute itself contains no guardrails for entities targeted by the government. The law's plain language mandates that "[e]ach filing entity and foreign filing entity *shall permit* the attorney general to inspect, examine, and make copies, as the attorney general considers necessary." Tex. Bus. Orgs. Code § 12.151

(emphasis added). The law requires managerial officials to "*immediately* permit the attorney general to inspect, examine, and make copies of the records of the entity." Tex. Bus. Orgs. Code § 12.152 (emphasis added). Any entity that "fails or refuses to permit the attorney general to examine or make copies of a record . . . forfeits the right of the entity to do business in this state, and the entity's registration or certificate of formation *shall be* revoked or terminated." Tex. Bus. Orgs. Code § 12.155 (emphasis added). And any individual recordholder is criminally liable for a Class B misdemeanor if that person "fails or refuses to permit the attorney general to make an investigation of the entity or to examine or to make copies of a record of the entity." Tex. Bus. Orgs. Code § 12.156. This criminal violation appears to be a strict liability offense, with no statutorily prescribed *mens rea* or affirmative defenses.

In this entire statutory scheme, there is no mention of precompliance review or any opportunity that an entity or recordholder would have to question the reasonableness of a search before harsh penalties can be triggered. The law requires entities and recordholders to submit to the Attorney General's commands and comply *immediately*, or else risk criminal sanctions and the dissolution of their business or nonprofit. As the district court recognized, the RTE Statue's explicit granting to the Attorney General of "*the full and unlimited and unrestricted right to examination* of [entities'] books and records at *any time* and *as often as he may deem*

necessary . . . creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass" businesses and nonprofits. *Spirit AeroSystems, Inc.*, 2024 WL 4947290, at *6 (quoting *Patel*, 576 U.S. at 421).

Businesses and nonprofits that receive an RTE face a Hobson's choice: they can immediately comply with the Attorney General's demands, thereby sacrificing their right to challenge an unreasonable search under the Fourth Amendment, or face the harsh criminal and civil sanctions that the RTE Statute prescribes. The Attorney General tries to downplay this dilemma by claiming that the RTE Statute simply creates "administrative subpoenas" that require consent from entities whose records are targeted. Appellants' Br. 7-8. But the text of the statute says nothing about "administrative subpoenas," nor does it require (or even allow for) the consent of the entity targeted. Instead, it states that entities "*shall permit*" the Attorney General to inspect their records and must comply "*immediately*." Tex. Bus. Orgs. Code § 12.151-52 (emphases added). In essence, the Attorney General seeks to rewrite the RTE Statute to make it seem less harsh and unreasonable, but his reliance on federal case law regarding inapposite administrative subpoenas simply highlights the RTE Statute's facial infirmities.

Confronted by the plain lack of precompliance review or reasonableness requirement in the RTE Statute itself, the Attorney General contends that RTE recipients have "at least three options for precompliance review" outside the text of

the RTE Statute: "(1) a petition for protective order under the Texas Rules of Civil Procedure; (2) an *ultra vires* action for injunctive relief against the Attorney General; or (3) review in a defensive posture, before the Attorney General can impose a penalty for non-compliance." Appellants' Br. 2. Each of these extrinsic mechanisms provides no comfort for entities in Texas subject to searches under the RTE Statute.

First, the RTE does not inform recipients about extrinsic ways to challenge the reasonableness of a search. The original RTE sent to the Appellee in this case did not mention nor offer any opportunity for precompliance review; it merely invoked the harsh penalties that the recipient would incur for failing to comply. *See Spirit AeroSystems, Inc.*, 2024 WL 4947290, at *3 ("The March 28 Request included a prominent notice of the two penalties in the RTE Statute—the loss of Plaintiff's right to do business in the state and the criminal penalty."). When confronted by such an RTE, most entities would not know to look beyond the RTE or the RTE Statute to search for the possibility of precompliance review. Even consulting with an attorney after receiving an RTE could cost hundreds or thousands of dollars; and the time it takes to consult with legal counsel would still trigger criminal or civil penalties by making the entity fail to comply "immediately."

Second, the extrinsic mechanisms the Attorney General proposes impose significant costs and burdens on targeted entities and the Texas judiciary. Filing a separate legal action requires businesses and nonprofits to obtain legal counsel and

pay a court filing fee—an insurmountable hurdle for some small businesses and nonprofits. Moreover, there is no guarantee that state courts will be able to expedite petitions for protective orders or *ultra vires* actions. Even if a targeted entity is able to successfully rush to court and obtain a timely hearing (while also somehow overcoming a separate daunting obstacle of sovereign immunity, *see* Appellee's Br. 30-33), the entity still risks being punished for failing to comply with the Attorney General's demands because the RTE Statute itself makes no allowance for extrinsic lawsuits or judicial delays. The remedy of filing a separate lawsuit imposes a burdensome barrier to nonprofits and businesses while ultimately providing no remedy at all if entities can still be punished for failing to comply under the text of the statute itself.

Third, there are no defensive procedures in the RTE Statute for entities to rely on to defend against arbitrary and discriminatory government action. Although the Attorney General posits that entities can somehow wait to contest an RTE "in a defensive posture, before the Attorney General can impose a penalty for non-compliance," Appellants' Br. 2, he does not explain how, or under what authority, this process would work. Because the RTE Statute does not mention nor provide any defenses, the Attorney General cites only federal case law regarding entirely distinct "administrative subpoenas" to claim that courts "*can* determine whether the subpoena is valid prior to compliance." Appellants' Br. 21 (emphasis added)

(quoting *Cotropia v. Chapman*, 721 F. App'x 354, 358 (5th Cir. 2018)). But this federal case law regarding incomparable subpoena mechanisms provides no comfort for RTE recipients, who are subject to the plain language of the RTE Statute and its harsh penalties with no statutorily enumerated defenses or protections. And while the Attorney General invokes a hypothetical possibility that a state or federal court *might* review the reasonableness of an RTE before enforcing the statute's harsh sanctions, there is no statutory requirement that they *must* do so, even under the Attorney General's proposed extra-statutory regime.

Texas nonprofits and businesses are therefore left defenseless under the law, subject only to any "grace" that the Attorney General might extend them. *See* ROA.472-74. But this type of "arbitrary invasion[]" by government officials into an entity's records is precisely the type of incursion on privacy prohibited by the text and history of the Fourth Amendment. *See Marshall v. Barlow's, Inc*., 436 U.S. 307, 312 (1978) (holding a law's allowance of warrantless searches into private businesses constitutionally "untenable").

III. The RTE Statute Cannot Be Squared with the Text and History of the Fourth Amendment

Granting the Attorney General nearly unbridled discretion to access the records of any entity in Texas with no opportunity for precompliance review cannot be reconciled with the text or history of the Fourth Amendment. The Founders sought to guarantee people's right "to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley*, 573 U.S. at 381 (quoting *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006)). As Appellee points out, the RTE Statute is facially unconstitutional since it does not provide any reasonableness requirement, Appellee Br. 23-26, which the Attorney General does not appear to challenge or rebut.

Moreover, the Attorney General's proposed extrinsic mechanisms to challenge an RTE before an entity is actually punished do not cure the statute's facial deficiencies. First, the RTE Statute itself does not provide any defenses or process through which an entity can assert its rights or challenge the reasonableness of a search. Second, the text of the Fourth Amendment promises people the right "to be secure" in their papers and property—not merely the ability to challenge the government's intrusion *after* it occurs. As Professor Luke Milligan notes, "'secure' is defined as 'free from fear or anxiety' and, alternatively, 'sure, not doubting.'" Luke M. Milligan, *The Right "To Be Secure": Los Angeles v. Patel*, CATO SUP. CT. REV., 251, 272 (2014-2015). The Fourth Amendment right *to be secure* from an unreasonable search therefore does not require a targeted entity to be dissolved or its recordkeeper to go to jail. Instead, "the issuance of a general warrant necessarily offends the right to be secure," *id.* at 274, because it undermines the right to be free from unreasonable searches even without further consequences being imposed.

By providing no reasonableness requirement and making no allowance for precompliance review before a neutral decisionmaker, the RTE Statute operates as the type of general warrant abhorred by the Founders. The Supreme Court has repeatedly emphasized the importance of the Fourth Amendment in safeguarding privacy against the government:

> Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself.

Riley, 573 U.S. at 403. Before the Revolutionary War, "customs officials in the colonies were free to search the homes of the colonists whenever they pleased . . . [w]ith no requirement of suspicion or particularity." Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U. L. REV. 215, 223 (1995). On the eve of independence, July 3, 1776, John Adams explained that challenges to these general writs led to the "commencement of the controversy between Great Britain and America," and ultimately the Revolution itself. *Id.* at 224.

When drafting the Bill of Rights, the Framers detested general warrants as "tool[s] that could be used arbitrarily by unscrupulous or vengeful executives and legislators to bypass common law procedural and judicial safeguards." *Id.* at 225.

"[T]he Framers' fear of governmental intrusion was obvious" and "warrants that did not abide by procedural safeguards were not to be issued." *Id.* at 225-26.

The Framers also viewed procedural guardrails as critical for safeguarding other freedoms guaranteed by the Bill of Rights. For example, "Going back to at least the 16th century, general warrants had been used in England to suppress religious and political dissent." Milligan, *The Right "To Be Secure": Los Angeles v. Patel*, at 278. As the Supreme Court has explained, "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrants of Prop. at 104 E. Tenth St., Kansas City*, 367 U.S. 717, 729 (1961).

Because entities and individuals make decisions to engage in political and religious speech based on perceived threats from the government, even the potential for the Attorney General's unchecked power to engage in searches and require entities to comply "immediately" offends the Fourth Amendment. The fear of general warrants is inherent in the history and "text of the Fourth Amendment, which protects not simply the right to be spared unreasonable searches and seizures, but also the right 'to be secure' against such government illegalities." Milligan, *The Right "To Be Secure": Los Angeles v. Patel*, at 279. Absent the safeguards required by the Fourth Amendment, the RTE Statute exposes every business and nonprofit in

Texas to arbitrary and unreasonable government intrusions, subject only to the "grace" of the Attorney General.

IV. The RTE Statute Threatens the Privacy of Millions of Entities and People in Texas

The constitutional violations inherent in the RTE Statute have profound effects across Texas. On its face, the law applies to every "filing entity and foreign filing entity" in the state. Tex. Bus. Orgs. Code § 12.151. This seemingly includes for-profit corporations, nonprofit corporations, limited liability companies, limited partnerships, professional associations, professional corporations, general partnerships, nonprofit associations, foreign filing entities, cooperative associations, and real estate investment trusts. *See* Tex. Bus. Orgs. Code §§ 4.151-161; *see also* Tex. Bus. Orgs. Code § 1.002. The RTE Statute therefore gives the Attorney General nearly unbridled discretion over countless entities in Texas, including businesses, nonprofits, and churches and religious organizations that register as nonprofits.

There are more than 2.9 million business entities currently registered with the Texas Secretary of State. *Texas Starts 2025 with 2.9 Million Business Entities*, TEXAS SECRETARY OF STATE (Jan. 1, 2025), *available at* https://content.govdelivery.com/accounts/TXSOS/bulletins/3ca3a08. There are also an estimated 130,000 nonprofit organizations in Texas, with that number growing each year. *Built for Texas: Creating a More Connected & Resourced Future for our Nonprofit Sector*, TEXAS A&M CENTER FOR NONPROFITS & PHILANTHROPY (2023),

available at https://txnonprofits-prod.oneeach.dev/sites/txnonprofits/files/bft_report/Built%20for%20Texas_2023%20Edition_updated%20March%202024.pdf. There are also more than 31 million people who live in Texas, the vast majority of whom share personal data with businesses and nonprofits. *See* Joshua Fechter, *Texas is now home to 31 million people even as population growth slows*, TEXAS TRIBUNE (Dec. 19, 2024), *available at* https://www.texastribune.org/2024/12/19/texas-population-31-million/.

Records that are regularly maintained by businesses and nonprofits include sensitive information like financial receipts, addresses, phone numbers, social security numbers, nonprofit membership lists, and medical records. Authorizing the Attorney General to attempt to "immediately" access the entire universe of filing entities' records without any explicit mechanism for precompliance review threatens the privacy, freedom, and autonomy of every person in Texas, as well as our state's visitors. The Fourth Amendment clearly prohibits granting the Attorney General free-roaming power to examine the entire universe of records from any entity in the state, and the RTE Statute is facially unconstitutional without a reasonableness requirement and clear opportunity for precompliance review. *Patel*, 576 U.S. at 420.

V. The Attorney General Has Already Used the RTE Statute in Ways that Threaten to Silence and Suppress Civic Participation

The Fourth Amendment's promise that people and entities be "secure" in their papers and records is undermined by the Attorney General's sweeping authority in

the RTE Statute itself, as well as by the Attorney General's recent use of this law to target Texas businesses and nonprofits. As exemplified by the targeting of Annunciation House, *see* Appellee's Br. 7-9, the Attorney General's power to inspect records "immediately" and trigger steep consequences for noncompliance threatens the privacy, autonomy, and free expression of millions of businesses and nonprofits in our state.

Annunciation House is a 50-year-old nonprofit religious organization affiliated with the Catholic Diocese of El Paso, which provides shelter, food, and clothing to refugees. Brief for Appellee at 19-20, *Paxton v. Annunciation House*, No. 24-0573 (Tex. Nov. 27, 2024). In February 2024, investigators from the Office of the Attorney General appeared at Annunciation House and demanded "immediate access" to the shelter's records, including "personal identifying information and medical information." *Id.* at 22. When the managing official at Annunciation House requested time to consult with legal counsel, the Attorney General offered 24 hours "but threatened that if Annunciation House refused access within 24 hours, the AG would deem the shelter non-compliant and proceed with closure." *Id.* at 23.

Although many nonprofits and businesses would not be able to obtain legal counsel and file a lawsuit in less than 24 hours, Annunciation House achieved the nearly impossible task of filing a state court lawsuit to seek protection from the RTE within a single day. *Id.* at 24. Instead of respecting Annunciation House's

constitutional right to seek precompliance review—as the State implies in this lawsuit is readily available, *see* Appellants' Br. 2—the Attorney General instead filed a counterclaim against Annunciation House asserting that the nonprofit forfeited its right to operate in Texas by failing to give its records to the Attorney General within 24 hours. *Id.* The state trial court ruled in Annunciation House's favor because, among other reasons, it found the RTE Statute to be facially unconstitutional in light of *Patel*, 576 U.S. at 413. *See* Order Granting Plaintiff Annunciation House, Inc.'s Traditional and No-Evidence Motion for Final Summary Judgment, *Annunciation House v. Paxton*, No. 2024DCV0616 (205th Judicial Dist., El Paso Cty., July 1, 2024). The Attorney General then filed a direct appeal to the Texas Supreme Court, where he is "seek[ing] to revoke the non-profit's permission to operate in the State on a permanent basis" for allegedly failing to comply with the RTE. Brief of Appellants at 23, *Paxton v. Annunciation House*, No. 24-0573 (Tex. Oct. 17, 2024).

The Attorney General's actions against Annunciation House pose a profound threat to nonprofits and businesses in Texas. Without establishing a reasonable basis for the search or offering any opportunity for precompliance review, the Attorney General issued an RTE to a faith-based organization and quickly sought to permanently ban it for failing to comply. Even when Annunciation House tried to avail itself of an extrinsic process for precompliance review—which the Attorney

General claims in this case to be available—the nonprofit is at risk of losing its very existence by filing in court instead of immediately obeying the Attorney General's commands.

The Attorney General has also targeted other nonprofits under the RTE Statute, including Catholic Charities of the Rio Grande Valley and Team Brownsville, Inc. Both nonprofits initially attempted to comply with RTEs they received until the Attorney General further expanded his atextual view of his authority, asserting that the RTE Statute empowers him not just to engage in document review but also to (1) compel sworn statements from representatives of the organizations, and (2) obtain presuit discovery as a matter of law. *See* Resp. of Interested Party at 14-15, *In re Office of the Att'y Gen. of Tex.*, No. C-2639-24-C (139th Judicial Dist., Hidalgo Cty., July 3, 2024); Resp. of Interested Party at 6-7, *In re Office of the Att'y Gen. of the State of Tex.,* No. D-1-GN-24-004200 (200th Judicial Dist., Travis Cty., Aug. 23, 2024).

These recent examples demonstrate that the RTE Statute's grant of unbounded search authority has been used in the exact manner that the U.S Supreme Court admonished should not be the case; namely, that such unfettered power by government officials "creates an intolerable risk that searches . . . will exceed statutory limits, or be used as a pretext to harass" nonprofits and businesses. *Patel*, 576 U.S. at 421. The RTE Statute's facial grant of this authority to the Attorney

General to drive nonprofits and businesses out of existence for failing to comply "immediately" with government demands—no matter how unreasonable—intolerably operates as the type of general warrant condemned by the Founders and straightforwardly violates the Fourth Amendment, as the district court here correctly held.

VI. Excising the Word "Immediately" Does Not Salvage the RTE Statute's Constitutionality

Unable to evade binding precedent that renders the RTE Statute facially unconstitutional, the Attorney General contends that the word "immediately" can be excised from the statute to somehow salvage the law's constitutionality. Appellants' Br. 35. But this proposed rewriting of the statute fails to ameliorate the statute's critical flaws since it still does not provide any reasonableness requirement or opportunity for precompliance review.

Even if an RTE recipient is forced to comply with the Attorney General's demands within hours or days instead of "immediately," the RTE Statute still imposes harsh penalties with no pathway for precompliance review. As exemplified by the Attorney General's actions towards Annunciation House, even granting an RTE recipient 24 hours to comply can still lead to an arbitrary governmental attempt to permanently and indefinitely ban the recipient from operating in Texas. Even though Annunciation House was able to obtain legal counsel and file suit within 24 hours—a monumental barrier that many small businesses and nonprofits would not

be able to overcome—RTE recipients are still deeply prejudiced if they are forced to comply with the Attorney General's arbitrarily enacted timeframe. They must expend limited resources to consult with attorneys and seek creative mechanisms for extrinsic review (if such review is even in fact available) or sacrifice their Fourth Amendment rights and submit to the Attorney General's demands to access their records. The Attorney General's actions towards Catholic Charities of the Rio Grande Valley and Team Brownsville, Inc further demonstrate the RTE Statute's defects, since these nonprofits attempted to comply "immediately" with the Attorney General's demands only to be met with further harassing and more invasive requests. *See supra* Section V. Thus, a brief extension of time beyond the "immediately" provision specifically enumerated in the statute does not cure the law's central constitutional defects since the RTE recipient has already lost the "secur[ity] in their . . . papers" guaranteed by the Fourth Amendment. U.S. Const. amend. IV.

The Attorney General also fails to show that his preferred rewriting of the statute reflects the Legislature's intent in enacting this statutory regime. Instead of judicially rewriting this statute, the Court should leave it to the Legislature to enact a reasonableness requirement and precompliance regime that fully comply with the Fourth Amendment. *See In re Miller*, 570 F.3d 633, 639 (5th Cir. 2009) ("It is beyond our providence to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.") (citation omitted).

CONCLUSION

The facially unconstitutional deficiencies of Texas's RTE Statute subject millions of Texas entities and people to the arbitrary whims of government officials who seek to access their documents and private information with no precompliance review or reasonableness requirement. This statutory scheme echoes the general warrants that the architects of the Fourth Amendment were loath to permit and cannot be reconciled with case law from this Court and the Supreme Court. The fact that the RTE Statute provides for criminal penalties and the complete shuttering of a business or nonprofit amplifies its unconstitutionality. The statute also invites arbitrary applications that chill free speech and threaten our vibrant democracy. For these reasons and others, the district court's decision should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this Brief of *Amici Curiae* in Support of Plaintiff–Appellee and Reversal complies with the type-volume limitation, typeface requirements, and type style requirements of Federal Rule of Appellate Procedure 32 because it contains 5,417 words and has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using the word-processing system Microsoft Word 2016.

Dated: February 10, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2025, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

Dated: February 10, 2025

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