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, Austin Division

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

Undersigned counsel for *amicus curiae* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those listed in the Petitioners' Certificate of Interested Persons, have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

***Amicus*:** The New Civil Liberties Alliance is a nonpartisan, nonprofit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It does not have a parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

***Counsel for Amicus*:** Russell Ryan and Daniel Kelly are Senior Litigation Counsel at the New Civil Liberties Alliance. Andreia Trifoi is a Constitutional Litigation Fellow at NCLA. Mark Chenoweth is President and Chief Legal Officer of NCLA. They represent NCLA in this matter.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel states that *amicus curiae* the New Civil Liberties Alliance is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

/s/ Russell G. Ryan
Russell G. Ryan

STATEMENT REGARDING CONSENT TO FILE AND FINANCIAL CONTRIBUTIONS

The New Civil Liberties Alliance certifies that it sought consent from all parties to the filing of this brief. Appellee Spirit Aerosystems, Inc., granted its consent, but Appellants the Texas Attorney General and Secretary of State took no position on this request.

The New Civil Liberties Alliance states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

/s/ Russell G. Ryan
Russell G. Ryan

INTEREST OF AMICUS CURIAE

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself: jury trials, due process of law, and the right to be free from unreasonable searches and seizures. These selfsame civil rights are also very contemporary—and in dire need of vindication—precisely because Congress and state legislatures, federal and state executive branch officials, administrative agencies, and even some federal and state courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type that the Constitution was designed to prevent. Here, NCLA is concerned that Texas Business

Organizations Code §§ 12.151–12.156, both as written and as interpreted by Texas Courts, confer on the Texas Attorney General the power of a general warrant. Our purpose as *amicus* is to reveal this "Right to Examine" statute as a general warrant—one of the most despised abuses of governmental authority that led to the American Revolution—and to stress the fundamental importance of interposing a neutral magistrate between the executive and the target of his search.

STATEMENT OF THE CASE

This case addresses whether the "Right to Examine" statute (Tex. Bus. Orgs. Code §§ 12.151–12.156) is unconstitutional as a violation of the Fourth Amendment to the U.S. Constitution. The statute authorizes the Attorney General to obtain, on demand, the business records of any company that has received permission to do business in Texas. Failure to comply is a criminal offense and forfeits the company's right to do business in the state.

The Texas Attorney General recently deployed the authority granted by this statute to demand that Spirit Aerosystems, Inc. ("Spirit") produce its records for his review. Spirit responded with a complaint in which it sought declaratory and injunctive relief. The parties filed cross motions for summary judgment, which were assigned to a magistrate. The magistrate issued his Report and Recommendation on November 1, 2024, to which Mr. Paxton objected. The District Court rejected Mr. Paxton's objections and accepted the magistrate's recommendation to declare the Right to Examine statute unconstitutional. Mr. Paxton appealed.

ARGUMENT

Mr. Paxton says that, "[i]n 1907, the Texas Legislature recognized 'there was an emergency' because no statute expressly authorized the Attorney General to seek corporate records."[1] The Legislature rose to that "emergency" (if emergency it was), but went far, far beyond what any legislature may do. Instead of just conferring on the Attorney General the authority to "seek" corporate records, it gave him a standing general warrant for all the records of all companies who have ever received—or ever will receive—permission to do business in Texas. General warrants are among the most reviled of governmental instruments, and their deployment in colonial times was, by many accounts, largely responsible for sparking the American Revolution. In the aftermath of that conflict, the Framers wrote the Fourth Amendment for the express purpose of banishing their use.

By adopting the Right to Examine statute, however, the Texas Legislature revived this obnoxious instrument and effectively exempted the state from complying with the Fourth Amendment when the Attorney

[1] Paxton Objections to Report & Recommendation, *Spirit Aerosystems, Inc. v. Paxton* at 3, No. 1:24-cv-00472-DII (W.D. Tex. Nov. 4, 2024), ECF No. 53 (quoting *Chesterfield Fin. Co. v. Wilson*, 328 S.W.2d 479, 481 (Tex. App. – Eastland 1959)).

General wishes to indulge his curiosity about the content of a business's records. Putting the Texas Right to Examine statute side by side with the historical accounts of general warrants reveals that, with respect to business records, there is no difference. Indeed, the statute exhibits all the distinctive elements of a general warrant: It allows the Attorney General to conduct searches on his own authority with no prior review by a neutral magistrate; it does not require any legitimate reason for conducting a search; it does not require a particularized description of who will be searched and the information to be sought; and finally, because the statute does not require the Attorney General to make any factual assertions at all with respect to his intended search, it does not require an oath or affirmation.

In this brief, we provide an extremely abridged recounting of the operation of general warrants, as well as an explanation of why these instruments excited such revulsion in both the citizenry and the Supreme Court. We then demonstrate that there is a one-for-one correlation between the power of a general warrant and the power granted to the Attorney General by the Right to Examine statute. Finally, we explain why the arguments the Attorney General offers in support of resurrecting

general warrant powers in the State of Texas should be insufficient to defeat the Fourth Amendment's protections.

I. A BRIEF RECOUNTING OF GENERAL WARRANTS

The general warrant is a particularized abuse of governmental power. Here, we describe the nature of the abuse and the solution the Framers crafted to prevent its revival.

A. Why General Warrants Are Problematic

The general warrant is pernicious because of the offense it gives to some of our most cherished rights: the right to be secure in one's person and property and the right not to be compelled to give evidence against oneself. The passage of two centuries and the sensibilities of an irenic age have muted our ability to understand, truly and in our bones, why the disturbance of these rights could, once upon a time, cause an otherwise peaceable people to start a deadly shooting war against the most powerful country in the world. But for the founding generation, these impositions were their reality. And they were intolerable. So much so, in fact, that they drove the colonists to pledge to each other their "Lives, … Fortunes, and … sacred Honor" in an uncertain bid to rid themselves of their tormentors. DECLARATION OF INDEPENDENCE para. 32

(U.S. 1776). In their calculation, it was better to chance their lives on long odds than suffer the damage to human dignity that inexorably follows subservience to arbitrary and capricious governmental power.

These are not, of course, original observations—they have long been known to the Supreme Court, and their gravity has weighed heavily on its understanding and application of the Fourth Amendment. "Vivid in the memory of the newly independent Americans were those general warrants … under which officers of the Crown had so bedeviled the colonists." *U.S. v. Parcel of Land, Bldgs., Appurtenances & Improvements, Known as 92 Buena Vista Ave., Rumson, N.J.*, 507 U.S. 111, 119 (1993). "In the colonial period," Justice John Paul Stevens observed, "the oppressive British practice of allowing courts to issue 'general warrants' or 'writs of assistance' was one of the major catalysts of the struggle for independence." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 180 (1977) (Stevens, J., dissenting in part).

The Court provided its most trenchant and careful exposition of the reasons these instruments were considered intolerable—and should be

considered so today—in the celebrated case of *Boyd v. United States*.[2] Its opinion "recall[ed] the contemporary or then recent history of the controversies on the subject, both in this country and in England." *Id*. at 625. There, the Court encountered government officials using general warrants to indiscriminately cast about for evidence of criminal activity, whether commercial or private. Specifically, the Court noted "[t]he practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods … ." *Id*. So, too, did the colonies issue general warrants that authorized "searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel." *Id*. at 626.

These searches were often executed by forcible entry into the target's property and breaking open containers that might contain incriminating evidence. But the means of execution was not the primary offense. The primary offense, instead, was reducing persons and private effects to a trifle for the government's leisurely perusal. "It is not the

[2] 116 U.S. 616 (1886), *rejected by Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty[,] and private property … ." *Id.* at 630. All else just makes the central offense worse:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment [of Lord Camden].

Id.; *see also Andresen v. Maryland*, 427 U.S. 463, 480 (1976) ("The problem (posed by the general warrant) is not that of intrusion [p]er se, but of a general, exploratory rummaging in a person's belongings[.]" (cleaned up; citations omitted)).

So, what really aroused the ire of early Americans and the Court itself was that general warrants allowed the executive to lawlessly pursue the citizenry in search of potential lawlessness. The *Boyd* Court could hardly have used stronger language in condemning this practice. "[A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property," the Court said, "is contrary to the principles of

a free government." *Id.* at 631–32. It was, in the Court's estimation, beyond objectionable—"[i]t is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American." *Id.* at 632. This practice "may suit the purposes of despotic power," the Court growled, "but it cannot abide the pure atmosphere of political liberty and personal freedom." *Id.*

James Otis, one of the most vociferous critics of general warrants in his time, "pronounced [them] the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book … ." *Id.* at 625 (cleaned up). A young John Adams was so moved by Otis's condemnation that he would later credit the denunciation with the beginning of the monarchy's end in the Americas: "'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" *Id.*

To the executive, the general warrant's lack of particularity, coupled with the shift of authority away from the judiciary, are features to be greatly desired. Osmond Fraenkel, the oft-cited author on the subject of searches and seizures, says the generality of these instruments

"crept into the law by imperceptible practice." Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 Harvard L. Rev. 361, 362 (1921) (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029, 1067 (1765)) (Lord Camden's opinion)). They may have been relatively innocuous in the beginning, but they would eventually become one of the Star Chamber's most useful instruments in "find[ing] evidence among the papers of political suspects" for subsequent use against them. *Id.* The lack of particularity was the point of these warrants: "It was obviously not convenient to be as specific in such cases as practice had required in searching for stolen goods. So, there grew up the easy method of issuing general warrants which permitted the widest discretion to petty officials." *Id.* This is how the executive became clothed with the power to engage in "the indiscriminate search and seizure of undescribed persons or property based on mere suspicion." *N.Y. Tel Co.*, 434 U.S. at 180 n.3. Or idle curiosity.

General warrants facilitate the practice anathematized by Otis (and the Court) in specifically identifiable ways. First, and most significantly, they eliminate the buffering role served by neutral magistrates. The Court has recognized the surpassing importance of

proper search warrants specifically because they insert the judiciary into the determination of whether the executive may execute a search, and on what terms. A proper warrant serves a "high function," the Court has said, because it embodies, as a practical reality, a crucial constitutional command: "Absent some grave emergency," it observed, "the Fourth Amendment has interposed a magistrate between the citizen and the police." *Chimel v. California*, 395 U.S. 752, 761 (1969) (cleaned up; citation omitted). The Framers made the magistrate's role central to searches and seizures because of the importance of the rights they implicate: "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *Id.* (cleaned up; citation omitted).

Not only do general warrants eliminate the protective function of the neutral magistrate, they also effectively move the source of authority to conduct searches and seizures away from its constitutionally prescribed home. The generality means that such warrants are, in practice, "issued on executive rather than judicial authority … ." *United States v. Chadwick*, 433 U.S. 1, 8 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991).

Professor Philip Hamburger explains that "[g]eneral warrants shifted power to administrative officers and therefore were recognized as evasions of the principle that warrants had to be judicial." Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 186 (2014). And, by eschewing the need for judicial authority, the executive branch gained immense discretion in deciding when and how to conduct searches and seizures: Empowering "constables and others who enforce[] the warrants" to make these decisions gave "merely administrative officers a freedom to search and seize according to their discretion."[3] In effect, it made them their own judges. "[S]uch warrants shifted the exercise of judgment, making the [the executive employee] to be in effect the judge." *Id*. at 183 (cleaned up). With that, the consolidation of power is complete—the executive branch employee is not just the central figure, but the *sole* figure, in the decision to execute a search or seizure. That ill-considered evolution puts "the liberty of every man in the hands of every petty officer." *Boyd*, 116 U.S. at 625 (cleaned up).

[3] Hamburger at 183 (citing Matthew Hale, Historia Placitorum Coronae, 2:150 (London: 1736)); *see also United States v. Chadwick*, 433 U.S. 1, 8 (1977) (noting that writs of assistance, a type of general warrant, "were issued on executive rather than judicial authority, [and] granted sweeping power to customs officials and other agents of the King … .").

B. The Solution to the General Warrant

The antidote to general warrants—the *only* effective hedge against the manifold abuses they represent—lies in the specific requirements of the Fourth Amendment: (1) review and approval by a neutral magistrate prior to service on the target, (2) a particularized description of the object of the search and the place to be searched, (3) a justifiable reason for conducting it, and (4) a supporting oath or affirmation. These elements seamlessly work together toward a single goal: squeezing out every last drop of an executive employee's unfettered discretion to search the private papers and effects of his fellow citizens.

The second of these requirements—that a warrant contain a particularized description of the object of the search—prevents the executive from going on a fishing expedition. "The Fourth Amendment addresses [this] problem[] by requiring a 'particular description' of the things to be seized." *Andresen v. Maryland*, 427 U.S. 463, 480 (1976) (cleaned up; citation omitted). As a direct and intended consequence, this prescription "makes general searches … impossible and prevents the seizure of one thing under a warrant describing another." *Stanford v. State of Tex.*, 379 U.S. 476, 485 (1965) (cleaned up; citation omitted). It

also means that, with respect to what is taken, "nothing is left to the discretion of the officer executing the warrant." *Id*. (cleaned up; citation omitted).

The third requirement—that probable cause support every warrant—ensures that executive officers won't disturb their fellow citizens without justifiable reason. "The premise here," the Court has explained, "is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). The warrant, even a proper warrant, confers on a fallible human being a great and terrible power—permission to eliminate (at least temporarily), by force if necessary, a person's property rights, his liberty, his privacy.

The first and fourth requirements—review by a neutral magistrate and an oath or affirmation—function as the enforcement mechanism for the second and third. The oath impresses on the affiant the solemnity and seriousness of the liberty interests he is asking permission to invade, and it gives the reviewing magistrate confidence that his judgment rests on a defensible factual record. The magistrate's involvement ensures

that the sufficiency of the presented evidence and proffered justification satisfy the considered judgment of someone without a vested interest in conducting the search. *Id.* ("[T]he magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause.").

The temporal order between the neutral magistrate's review of the warrant and the officer's service on the target is crucial—judicial review and authorization first, service and execution afterward. At least, that is, according to the history of general warrants and the Fourth Amendment. This process is necessary "to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963). That rule applies even if subsequent review reveals a justifiable cause for the search. *Katz v. United States*, 389 U.S. 347, 357 (1967) (quoting *Agnello v. United States*, 269 U.S. 20, 33 (1925) ("Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause … ." (cleaned up))).

Unless the review takes place prior to *service* on the target (not just prior to compliance), a warrant is literally all form and no substance. "[T]he Constitution," according to Professor Hamburger, "guaranteed the due process of law and thereby allowed the government to bind members of the public in particular instances only through the courts and their processes." Hamburger at 189–90. Because this is true, a warrant that has not been judicially authorized before service, even should it contain all the formality and appearance of a real warrant, is, in reality, nothing but executive *ipse dixit*. An executive employee could just as well show up on the target's doorstep and demand that he turn out his household or business for inspection. If review prior to service were not necessary, then upon the target's request to see a warrant, the executive employee could, on the spot, scratch out a written demand on a scrap of paper and proceed with the search. And if, during execution of such a "warrant," he should decide that he described the scope of his search too narrowly, he could cross out the limiting language and confer on himself greater latitude. An executive employee's power to write and execute an unreviewed "warrant," therefore, is functionally indistinguishable from the power of a general warrant. William Hawkins, *A Treatise of the Pleas*

of the Crown, 2: 81-82 (II.xiii.10) (London: 1726) ("[I]f a justice cannot legally grant a blank warrant for the arrest of a single person, leaving it to the party to fill it up, surely he cannot grant such a general warrant, which might have the effect of an hundred blank warrants.").

Judicial review prior to service gives a warrant its legitimacy and protects the target against executive arbitrariness. It freezes in time the reason for the search as well as its parameters and, as noted above, it minimizes the risk of unjustified searches. The Fourth Amendment's terms reflect a judgment that, because "any intrusion in the way of search or seizure is an evil," *Coolidge*, 403 U.S. at 467, it is the government's burden to demonstrate a search's necessity to the satisfaction of a neutral magistrate *before* it visits this indignity on the targeted citizen. It is not for the citizen to undertake the time, expense, and initiative of hiring a lawyer—nor to assume the burden of persuasion—as the price for brushing back an instrument that is nothing but the product of an executive officer's uncabined will. If a warrant is required, so is judicial review and approval prior to service. Nothing in the Fourth Amendment provides the government with a shortcut to an enforceable warrant.

II. THE RIGHT TO EXAMINE STATUTE IS A GENERAL WARRANT

The Right to Examine statute, the Attorney General soothes, just gives him permission to "seek" a company's records. It certainly does that, but that's not all it does. Alongside the permission to "seek," the statute adds the "method by which to obtain." Together, the two add up to a general warrant.

The "seeking" part of the statute says "[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 in the performance of a power or duty of the attorney general, of any record of the entity." Tex. Bus. Orgs. Code § 12.151. The "method by which to obtain" portion says: "To examine the business of a filing entity or foreign filing entity, the attorney general shall make a written request to a managerial official, who shall immediately permit the attorney general to inspect, examine, and make copies of the records of the entity." Tex. Bus. Orgs. Code § 12.152. The written "request" contemplated by § 12.152 is, in any fair estimation, euphemistic. It's a demand—a polite one, perhaps, but still a demand. Failure to "immediately" comply

subjects a company's manager to criminal prosecution,[4] and sounds the death knell for the company itself.[5]

The Right to Examine statute functions in a manner indistinguishable from a general warrant because it lacks all four Fourth Amendment requirements described above. First, it allows the Attorney General to demand production of a company's records on his own authority, without prior judicial *imprimatur*. Second, it gives him immediate access to any business records he deems "necessary," without providing any justifiable reason for demanding them. Third, it excuses him from providing any description of the records he seeks, much less a particularized description. Fourth, reinforcing the reality of the Attorney

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[4] The statute provides:

> "[a] managerial official or other individual having the authority to manage the affairs of a filing entity or foreign filing entity commits an offense if the official or individual 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(a). Further, "[a]n offense under this section is a Class B misdemeanor." Tex. Bus. Orgs. Code § 12.156(b).

[5] "A foreign filing entity or a filing entity that fails or refuses to permit the attorney general to examine or make copies of a record, without regard to whether the record is located in this or another state, 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.

General's unfettered discretion, it requires no oath or affirmation because it does not contemplate a Fourth Amendment review by a neutral magistrate (or anyone else, for that matter) before service.

A Texas appellate court has confirmed the broad sweep of power the Request to Examine statute confers on the Attorney General. Addressing the then-existing version of this statute, the court said its provisions "properly grant to the Attorney General the full and unlimited and unrestricted right to examination of the corporation's books and records at any time and as often as he may deem necessary." *Humble Oil & Ref. Co. v. Daniel*, 259 S.W.2d 580, 589 (Tex. Civ. App. 1953), *cert. denied* 347 U.S. 936 (1954). The court opined that the purpose of this power was to ensure the Attorney General, to the extent of whatever interest he might happen to have, should know about everything any business in the State of Texas might be doing at any time:

> The State, by its authorized officers, has the undoubted right to require full information as to all of the business of a private corporation created by it or which it has permitted to come into the State, for the State has the right to know what its creature or one of another sovereignty which it permits to come into the State is doing.

Id.

There is nothing in the Right to Examine statute that prevents the Attorney General from perusing company records out of simple investigative curiosity. Indeed, the *Humble* Court confirmed that it is the State's prerogative to do so because it might chance upon some lawlessness. *Id*. at 589 ("[T]he Attorney General … has the right and authority to take such copies of the corporation's records as in his judgment may show or tend to show that said corporation has been or is engaged in acts or conduct in violation of … any law of this State."). Further, this information is meant to be available to the Attorney General in real time, should he wish it. The court said companies must "permit the Attorney General … to make examination of the records of the corporation … immediately after presentation of a letter of request for such examination." *Id*. All of this together means the Right to Examine statute gives the Attorney General the power to surveil the records of all businesses operating in Texas without limitation, justification, or judicial oversight. In none of his extensive district court briefing did the Attorney General disclaim any of the power described by the *Humble* Court.

The Attorney General, to the contrary, said this statute "is constitutional, in every application." Paxton Cross Mot. for Summ. J. at 1, *Spirit Aerosystems, Inc. v. Paxton*, 1:24-cv-00472-DII (W.D. Tex. June 6, 2024), ECF No. 15. But his defense of the statute's constitutionality relies largely on his assertion that he rarely exercises the full spectrum of discretion it grants him. This, he says, immunizes the statute from a charge of facial unconstitutionality. *See, e.g.*, Appellants' Br. at 25–26. Under his theory, Spirit may challenge the statute only as he has deployed it in *this* case. *Id.* That's a shockingly aggressive defense of a statute that, on its face, grants government agents unconstitutional power. It would also protect a hypothetical statute that grants the Attorney General "the power to do as he pleases" so long as he promises to use that power only in constitutionally compliant ways. This, the Supreme Court has succinctly said, won't cut it: "We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010); *see also Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001) (Congressional delegation of too much authority to an agency cannot be

cured by the agency disclaiming the quantum of power offending the non-delegation doctrine).

Similarly, the Attorney General's suggestion that the Court construe away whatever unconstitutionality the statute may contain asks too much of a court's "construing" authority. There are two circumstances in which a court may adopt a narrower application of a statute than would otherwise be apparent on its face. The first arises when a statute's text is ambiguous, in which event the court can (and should) resolve the ambiguity in a manner that comports with relevant constitutional provisions. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.").

The second circumstance allows a court to "impose a limiting construction on a statute" in response to a facial challenge, but only "if it is 'readily susceptible' to such a construction." *Reno v. ACLU*, 521 U.S. 844, 884 (1997). A statute is "readily susceptible" to such a reading when "the text or other source of congressional intent identifie[s] a clear line that this Court [can] draw." *Id.* (citation omitted). If a court were to

lean on its power to construe more heavily than justified by these two circumstances, it would invade the legislative domain.

The Attorney General does not suggest the Right to Examine statute is ambiguous, nor does he identify a "clear line" the court could use to give it a narrower reading. Indeed, it would be exceedingly difficult to do so in light of *Humble*'s enthusiastic affirmation of the statute's reach and uses. Consequently, the statute must stand or fall on its text—text that confers on the Attorney General the power of a general warrant to peruse the records of businesses throughout the State of Texas. As we explain next, this Court ought not accept the Attorney General's justification for exercising that kind of power in Texas.

III. TEXAS SHOULD NOT HAVE THE POWER OF A GENERAL WARRANT

The Attorney General bears the burden of establishing that the warrantless searches he conducts under the authority of the Right to Examine statute are excused from the Fourth Amendment's requirements. Justice Potter Stewart's well-known analytical rubric provides that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established

and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). The *Humble* Court acknowledged that the Attorney General's use of this statute comprises a search,[6] and the Supreme Court, too, recognizes that the government's compelled production of a company's records is a search within the meaning of the Fourth Amendment. *See v. City of Seattle*, 387 U.S. 541, 544–45 (1967). So, because the Attorney General's demand to search Spirit's records was not accompanied by a warrant, he must explain why it is not unreasonable.

The Attorney General says his examination demands are properly issued administrative subpoenas. For the reasons described by Spirit, they are not. But the Attorney General's proposition is more than just a classification error: The constitutionality of judicially unreviewed administrative subpoenas is no longer readily apparent. The Supreme Court used to denigrate such devices in the harsh terms traditionally reserved for general warrants. The balance of this brief first contrasts the Supreme Court's earlier liberty-centric analysis of the limits on

[6] *Humble Oil*, 259 S.W.2d at 589.

administrative subpoenas with its later regulatory-centric and permissive approach. It then describes how the Supreme Court has relatively recently rejected the cornerstone upon which it had built the regulatory-centric and sprawling power of judicially unreviewed administrative subpoenas. We do this to suggest that, because the Supreme Court's errant jurisprudence on the use of such devices no longer rests on an analytically secure foundation, this Court should not rely on it to give cover for the Right to Examine statute's grant of general warrant powers.

Administrative subpoenas operate in derogation of interests protected by the Fourth Amendment—at least that was the Supreme Court's opinion before administrative agencies became the primary locus of federal power. Which is why, in *Harriman v. Interstate Commerce Commission*, 211 U.S. 407, 419–20 (1908), the Court concluded that administrative subpoena power must be limited, "as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary[—]those where the investigations concern a specific breach of the law." That's a mild remonstrance when compared to the Court's condemnation of the power of such instruments in *Jones v.*

Securities and Exchange Commission, 298 U.S. 1 (1936). There, the Court said that an administrative subpoena allowing the government to rummage about in the records of a private corporation was unknown to our Constitution: "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws … ." *Id.* at 27 (cleaned up). That was just the Court's introduction; it continued its denunciation in terms that James Otis would likely have approved. "[S]uch an inquisition," the Court said, "would be destructive of the rights of the citizen, and intolerable tyranny." *Id.* The Court added that this is a practice wholly foreign to the rule of law: "The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government." *Id.* Nor may zeal in ferreting out some unknown wrongdoer enlarge the government's authority, for "[t]he fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious." *Id.* Calling on

Boyd and *Entrick* as authority, the Court concluded that "the shortest step in the direction of curtailing one of these rights [*i.e.* freedom from unlawful searches and seizures] must be halted in limine, lest it serve as a precedent for further advances in the same direction, or for wrongful invasions of the others." *Id.* at 28.

But as the federal government grew more powerful, the *Jones* Court's concerns came to pass as the Court started taking a more jaundiced view of the Fourth Amendment's protections in commercial settings. Today, the Court's lax approach allows the use of administrative subpoenas so long as they comply with five requirements. An acceptable subpoena need only (1) issue pursuant to "the authority of the agency," *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), (2) "not [be] too indefinite", *id.*, (3) seek information that is reasonably relevant, *id.*, (4) "not be made and enforced by the inspector in the field," *See*, 387 U.S. at 544–45, and (5) be susceptible to "judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *Id.* at 545.

This regulatory-centric bias for governmental power at the expense of Fourth Amendment interests, however, grew out of and was based

upon a now-discredited view of the relationship between constitutional rights and those who do business in a corporate form. The *Morton Salt* Court posited that when individuals opt for the latter, they forfeit a significant amount of the former. "[C]orporations," the Court said, "can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities." 338 U.S. at 652 (citations omitted). From this the Court deduced (inaccurately) that administrative subpoenas issued to a corporation don't implicate individuals' rights in the same way as if those individuals were themselves the subjects.

The existence of corporations independent of their owners is, of course, simply a convenient fiction upon which the law relies for certain purposes. "Fictitious that [corporate] personality may be, in the sense that the fact that the corporation is composed of a plurality of individuals, themselves legal persons, is disregarded, but it is a fiction created by law with intent that it should be acted on as if true." *People of Puerto Rico v. Russell & Co., Sucesores S. En. C.*, 288 U.S. 476,

479–80 (1933) (cleaned up)). But it is essential not to lose sight of the fact that this is, after all, a *fiction*.

There is no sense in which a corporation is, *in reality*, an entity separate and apart from the individuals who collectively comprise its ownership. That is to say, the corporate form exists to serve and protect the interests of individuals, not the other way around: "[I]t is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014). To say that a group of individuals work together as a corporation is simply to identify the legal relationships amongst them. *Id.* ("An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another.").

Based on that *reality*, *Hobby Lobby* rejected *Morton Salt*'s almost reflexive eliding of constitutional protections for those who do business in a corporate form. "When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these

people." *Id.* at 706–07.[7] And, as especially relevant here, the Court opined that "extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company." *Id.* at 707. Administrative subpoenas addressed to a corporation, *in reality*, operate directly and only on individuals and the things (such as business records) that they collectively create and maintain with the other individuals engaged in the enterprise. Those individuals suffer the same intrusion on privacy rights as if the subpoena were directed to each of them severally.

Without the *Morton Salt* premise that individuals who do business in a corporate form lose their Fourth Amendment protections, the proper view of judicially unreviewed administrative subpoenas would be the disdainful one expressed by the *Jones* Court. The Right to Examine statute allows the use of such devices; this Court should reject them for the same reasons the Founders did. The District Court correctly concluded that the statute is unconstitutional because it doesn't provide an opportunity for pre-compliance judicial review. But the problem runs

[7] *See also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010) (First Amendment protects the freedom of speech of those collectively speaking in corporate form).

deeper. A warrant (or, as the Attorney General would have it, an administrative subpoena) is nothing but an expression of naked executive power unless a neutral magistrate reviews and approves it prior to *service*, not compliance. To lose this interposition of judicial authority from the start is to lose the Fourth Amendment's promised protection against the overwhelming power of the executive branch.

CONCLUSION

For the foregoing reasons, the District Court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6,457 words. This brief also complies with the typeface and type-style requirements of the Federal Rules of Appellate Procedure because it was prepared using Microsoft Word in Century Schoolbook 14-point font, a proportionally spaced typeface.

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

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