

No. 15-24-00091-CV

IN THE COURT OF APPEALS
FOR THE FIFTEENTH JUDICIAL DISTRICT
AUSTIN, TEXAS

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In Re OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF TEXAS,

Relator,

CATHOLIC CHARITIES OF THE RIO GRANDE VALLEY,
Real Party in Interest.

On Petition for Writ of Mandamus to the 139th Judicial District Court, Hidalgo
County, Cause No. C-2639-24-C

**CATHOLIC CHARITIES OF THE RIO GRANDE VALLEY'S RESPONSE
TO PETITION FOR WRIT OF MANDAMUS**

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Statement Regarding Jurisdiction

Because the Attorney General originally filed his mandamus petition in the Thirteenth Court of Appeals, his statement of jurisdiction addresses the scope of that court's jurisdiction, Pet. vi, which differs from the scope of this Court's jurisdiction. Real Party in Interest Catholic Charities of the Rio Grande Valley (CCRGV) maintains its position, as expressed in its prior motion to transfer, that this Court lacks original jurisdiction over this mandamus action.

“The original jurisdiction of the Court of Appeals for the Fifteenth Court of Appeals District to issue writs is limited to writs arising out of matters over which the court has exclusive intermediate appellate jurisdiction” Tex. Gov't Code § 22.221(c-1). The Attorney General's mandamus petition arises out of a matter that is not appealable at all, much less within this Court's exclusive intermediate appellate jurisdiction. This mandamus action therefore does not fall within this Court's original jurisdiction.

Although CCRGV's motion to transfer was denied, *see* Denial of Request to Transfer Case from the Fifteenth Court of Appeals, Misc. Dkt. No. 24-9088 (Tex. Oct. 17, 2024), CCRGV renews its jurisdictional objection for the Court's consideration.

Issue Presented

1. Whether the district court committed a clear abuse of discretion by denying the Attorney General's petition to take a pre-suit deposition under Rule 202 of the Texas Rules of Civil Procedure.

Introduction

The Office of the Attorney General has been investigating Catholic Charities of the Rio Grande Valley (CCRGV) for seven months. During that time, the Attorney General has not produced a single piece of evidence substantiating his investigation or suggesting any wrongdoing by CCRGV. Rather than closing his investigation when it turned up nothing, the Attorney General filed a petition in the district court for a pre-suit deposition under Rule 202 of the Texas Rules of Civil Procedure. The district court denied the petition because the Attorney General failed to carry his evidentiary burden. That decision was correct—and certainly not a clear abuse of discretion. This Court should therefore deny the Attorney General’s mandamus petition.

CCRGV has already substantially complied with the Attorney General’s investigation. Among its many charitable works serving people throughout its community, CCRGV operates a Humanitarian Respite Center that provides shelter to asylum seekers. The noncitizens who stay at the Respite Center have been processed by federal authorities and are in the country legally. CCRGV has made this clear to the Attorney General by providing more than a hundred pages of documents, as well as a sworn statement from CCRGV’s Executive Director, Sister Norma Pimentel, demonstrating that CCRGV complies with all immigration laws.

Despite CCRGV’s extensive cooperation, the Attorney General filed a Rule 202 petition seeking to depose CCRGV’s corporate representative. A court must grant a pre-suit deposition under Rule 202 “if, but only if, it finds that . . . the likely benefit of

allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.” Tex. R. Civ. P. 202.4(a); *see In re Jorden*, 249 S.W.3d 416, 423 (Tex. 2008). The Attorney General bore the burden in the district court of presenting evidence to meet that standard. Instead, he offered only conjecture. He speculated about possible legal consequences “if CCRGV were transporting aliens who have not been processed by Border Patrol as part of an effort to conceal them from law enforcement.” M.R. 6; *see* Pet. 15. But “ifs” are not evidence. The Attorney General offered no factual proof to show that CCRGV had actually engaged in that hypothetical conduct. Nor did he submit any evidence to show that a pre-suit deposition would provide any likely benefit. He certainly did not show a benefit that outweighed the burden on CCRGV’s operations or its religious exercise. He thus provided the district court with no basis on which to make the findings that Rule 202 requires, and his petition was accordingly denied.

The Attorney General’s mandamus petition in this Court primarily argues that he is exempt from meeting the Rule 202 standard for the sole reason that he is the Attorney General. He relies on Chapter 12, Subchapter B of the Texas Business Organizations Code (“Visitorial Statute”), which delegates to the Attorney General visitorial power to inspect the books and records of corporations. But the Attorney General cites no case ever holding that his powers under the Visitorial Statute alter the requirements of Rule 202. To the contrary, the Supreme Court of Texas has held that the findings required by Rule 202 are mandatory before a court can order a pre-suit

deposition. *In re Jorden*, 249 S.W.3d at 423. And in any event, the Visitorial Statute does not permit the Attorney General to take depositions at all. The Attorney General can thus seek a Rule 202 deposition only if he shows that the likely benefit outweighs the burden, and he has failed to do so. His mandamus petition should be denied.

Statement of Facts

CCRGV is a nonprofit corporation that provides services within the Diocese of Brownsville. CCRGV expresses its Catholic faith by providing food, shelter, and other basic necessities to homeless people, veterans, asylum seekers, and others in need in the Rio Grande Valley. CCRGV complies with the law; the immigrants it serves have been processed by the federal government and are often delivered to CCRGV's Respite Center by agents of U.S. Customs and Border Protection.

On March 25, 2024, claiming that it was entitled to investigate “whether [CCRGV] ha[s] taken any action related to services provided to aliens that would cause forfeiture of [its] corporate charter,” the Texas Office of the Attorney General served a “Notice of Demand for Sworn Statement” on CCRGV. M.R. 243. The Attorney General's demand, which was served during the Holy Week of the Catholic faith, directed CCRGV to designate someone to testify in a deposition on April 11, 2024. *Id.* Invoking Section 12.153 of the Business Organizations Code as a source of investigative authority, the Attorney General sought “an examination under oath” concerning a broad range of topics: CCRGV's “governance, hiring, retention, and oversight of . . . employees, contractors, and volunteers”; its “rules, processes, and

procedures for admitting immigrants, refugees, or aliens”; “documentation and processes for submitting Emergency Food and Shelter Program applications”; and CCRGV’s “relationship” with law enforcement. M.R. 243, 245.

CCRGV replied on April 3, 2024, offering to produce documents instead of testimony. M.R. 246–47. In a letter sent on April 5, 2024, the Attorney General expressed his “appreciat[ion]” for CCRGV’s “willingness to share documents with us, potentially in lieu of an oral examination,” and he confirmed that he was “not accusing” CCRGV of “any substantive legal wrongdoing” at that time. M.R. 248.

On April 9, 2024, CCRGV sent 111 pages of documents in response to the Attorney General’s initial demand. M.R. 258–332, 338–76. These documents showed CCRGV’s compliance with the law. For instance, CCRGV’s policy on “Business Ethics and Conduct” explained that “the nature of our work is to provide services to the people of the Diocese of Brownsville,” which “requires careful observance of the spirit and letter of all applicable laws.” M.R. 277. An employee’s failure to live up to that standard “could lead to disciplinary action, up to and including possible termination of employment.” *Id.* In the document production, CCRGV also discussed its policy for admitting immigrants and refugees: “All immigrants/Asylum Seekers need to have been processed and released by [U.S. Customs and Border Protection] to be admitted” to CCRGV’s Respite Center. M.R. 310. And CCRGV noted that it “has established a working relationship with federal, state, and local law enforcement,” and that it collaborates with government actors in the intake process. M.R. 374.

The Attorney General was not satisfied with CCRGV's production and requested more documents in a phone call on April 24, 2024. In a letter sent that same day, CCRGV reiterated its position that the Attorney General lacked statutory authority to demand a sworn statement but, in the spirit of cooperation, welcomed the Attorney General to send "a letter with more detail of what areas or documents you want us to search for." M.R. 377. On April 25, 2024, the Attorney General wrote to CCRGV requesting additional documents by May 2, 2024. M.R. 380–81. Specifically, the Attorney General sought "[a]ll documents . . . regarding [CCRGV's] procedure for admitting immigrants or refugees [sic]," "[a]ll training materials given to volunteers and employees regarding these procedures," more details on CCRGV's policy and practices with respect to law enforcement, and CCRGV's intake form for its volunteers. *Id.* If CCRGV complied with these requests, the Attorney General said that he "believe[d]" CCRGV could "forego [sic] a sworn statement and/or Rule 202 deposition." M.R. 380.

On May 2, 2024, CCRGV sent 18 additional pages of documents, including CCRGV job descriptions and volunteer intake forms. M.R. 383–403. To further cooperate with the Attorney General's inquiry, CCRGV also provided written explanations responding to the Attorney General's requests. For instance, because CCRGV did not have documents setting forth written procedures for admitting immigrants or refugees, it explained that "both volunteers and employees" are given "verbal instructions" to "only take those that are brought to them by the federal government employees handling that." M.R. 383. CCRGV further explained that

“[d]uring the course of the last 5 years Federal, State and local law enforcement have visited the Humanitarian Respite Center for meetings and to drop off asylum seekers,” and that “[n]o law enforcement officer has been denied admittance to any of the CCRGV facilities.” M.R. 390.

On May 7, 2024, the Attorney General thanked CCRGV for its “continued cooperation” but requested that CCRGV identify a representative within two days to be deposed. M.R. 404. In response, on May 9, 2024, CCRGV reiterated its opposition to a deposition, explaining that “there is no legal authority for the taking of a deposition under the Texas Business Organizations Code or even for a sworn statement.” M.R. 405. Nevertheless, in the spirit of cooperation, CCRGV offered to provide a written statement from a person knowledgeable about CCRGV’s operations. *Id.* After the Attorney General asked that any such statement answer a list of specific questions by letter dated May 23, 2024, M.R. 407–08, CCRGV provided a sworn statement from Executive Director Sister Norma Pimentel on May 31, 2024, M.R. 409–12. The sworn statement responded to the Attorney General’s specific questions. For example, in response to questions about CCRGV’s properties, Sister Norma provided the address, ownership, and operating details for the two facilities that CCRGV operates. M.R. 410. With respect to CCRGV’s Humanitarian Respite Center in particular, she wrote that the “facility operates as a humanitarian response by providing humanitarian care to asylum seekers released by CBP/ICE.” *Id.* And in addressing the Attorney General’s request for details about communications with federal agencies, the statement explained

that these calls “take[] place verbally” and provided the names of federal officials with whom CCRGV works. M.R. 411.

The Attorney General never responded to Sister Norma’s sworn statement or requested additional information. Instead, without prior notice to CCRGV, he filed a Rule 202 petition on June 5, 2024, seeking a pre-suit deposition of CCRGV’s corporate representative. M.R. 1–10. CCRGV opposed the petition. M.R. 16–32. The district court held an evidentiary hearing on the Rule 202 petition on July 17. M.R. 211–37. At the hearing, the Attorney General called no witnesses, and nearly all of the documentary evidence he submitted consisted of CCRGV’s own voluntarily provided records. CCRGV objected to the introduction of a letter from a single member of Congress discussing Catholic Charities USA, a separate organization from CCRGV. M.R. 217. The court took the objection under advisement and never admitted the letter into evidence. M.R. 219–20. In response to the Attorney General’s presentation, CCRGV argued that the evidence provided no basis to conclude that a pre-suit deposition would provide any benefit to the investigation of any potential claim. On July 24, the court issued an order denying the petition. M.R. 209.

On August 23, the Attorney General filed a Petition for Writ of Mandamus in the Thirteenth Court of Appeals. One week later, the Supreme Court issued an order transferring the petition to the Fifteenth Court of Appeals. *See* Supplemental Transfer of Cases to the Fifteenth Court of Appeals, Misc. Dkt. No. 24-9063, at § VI (Tex. Aug. 30, 2024). CCRGV moved to retransfer the petition back to the Thirteenth Court of

Appeals on the grounds that this Court lacks jurisdiction over the petition and that, in any event, the petition should not have been transferred. Although the Thirteenth Court of Appeals agreed that the petition was “inadvertently transferred,” *see* Letter from Chief Justice Dori Contreras, No. 13-24-00419-CV (Sept. 30, 2024), the Supreme Court without issuing any opinion ultimately denied CCRGV’s motion, *see* Denial of Request to Transfer Case from the Fifteenth Court of Appeals, Misc. Dkt. No. 24-9088 (Tex. Oct. 17, 2024).

On October 21, 2024, this Court requested that CCRGV file a response to the Attorney General’s mandamus petition.

Standard of Review

In seeking mandamus relief, the Attorney General faces a demanding standard. “Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.” *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (internal quotation marks omitted). “The burden of establishing an abuse of discretion . . . is a heavy one.” *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (per curiam). A trial court commits a clear abuse of discretion only if “it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.” *In re Cerberus Cap. Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (internal quotation marks omitted).

Rule 202 permits a court to order a pre-suit deposition “only if” the court finds that either “(1) allowing the petitioner to take the requested deposition may prevent a

failure or delay of justice in an anticipated suit” or “(2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.” Tex. R. Civ. P. 202.4(a). In this case, the Attorney General relies on only the latter ground for taking the requested deposition. He therefore bore the burden in the district court of demonstrating, with evidence, that the likely benefit of a pre-suit deposition outweighed the burden or expense. *In re East*, 476 S.W.3d 61, 66, 68 (Tex. App. 13th 2014).¹

“Rule 202 depositions are not now and never have been intended for routine use.” *In re Jorden*, 249 S.W.3d at 423. “The intrusion into otherwise private matters authorized by Rule 202 outside a lawsuit is not to be taken lightly.” *In re Does*, 337 S.W.3d 862, 865 (Tex. 2011) (per curiam). “Rule 202 is not a license for forced interrogations,” and courts must therefore “strictly limit and carefully supervise pre-suit

¹ Appellate Rule 41.3 provides that “[i]n cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court’s decision otherwise would have been inconsistent with the precedent of the transferor court.” Tex. R. App. P. 41.3. Because the Supreme Court transferred this case to this Court from the Thirteenth Court of Appeals, *see* Supplemental Transfer of Cases to the Fifteenth Court of Appeals, Misc. Dkt. No. 24-9063, at § VI (Tex. Aug. 30, 2024), the precedent of the Thirteenth Court of Appeals is binding under Rule 41.3. In any event, the decision of the Thirteenth Court of Appeals in *In re East*, which the Attorney General cites approvingly, *see* Pet. 16, is a leading precedent on the standards that apply to Rule 202 petitions and reflects the consensus among the courts of appeals. It should therefore be followed as a persuasive precedent, even if this Court does not consider it binding.

discovery to prevent abuse of the rule.” *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (per curiam).

Argument

To obtain a pre-suit deposition under Rule 202, the Attorney General must meet the same evidentiary standard that applies to everyone else. The Supreme Court of Texas has held that it would be an abuse of discretion for a district court to order a pre-suit deposition without first making the findings that Rule 202 requires. The Visitorial Statute does not override the requirements of Rule 202—in fact, it provides no authority for the Attorney General to take depositions at all. The Attorney General’s argument that he is entitled to a pre-suit deposition as a matter of law is therefore baseless.

Under the ordinary Rule 202 standard, the Attorney General was required to present evidence showing that the likely benefit of the pre-suit deposition outweighed the burden or expense. The district court committed no clear abuse of discretion in concluding that the Attorney General failed to do so. The scant evidence presented by the Attorney General provided no basis for concluding that a pre-suit deposition would provide any benefit, much less a benefit that would outweigh the substantial burden.²

² CCRGV agrees with the Attorney General that, because the district court’s denial of a Rule 202 petition seeking to depose an anticipated defendant is unappealable, the Attorney General did not have an adequate remedy at law, and mandamus is the appropriate vehicle for seeking review. *See In re Jorden*, 249 S.W.3d at 419.

I. The Attorney General Is Not Automatically Entitled to Take Pre-Suit Depositions as a Matter of Law.

The Attorney General contends that he is “always entitled to conduct presuit depositions . . . as a matter of law.” Pet. 8–9. That is true, he says, regardless of whether the benefits of the deposition outweigh the burdens in the circumstances of the particular case. *See* Pet. 3, 13; *see also* M.R. 5. But the Attorney General fails to cite a single case holding that he gets a free pass under Rule 202, and the text of the Rule shows that he does not. The district court was thus correct to reject the Attorney General’s novel and unsupported claim that he satisfies the Rule 202 standard automatically.

The plain language of Rule 202 rebuts the Attorney General’s argument. *See Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 579 (Tex. 2012) (“When construing rules of procedure, we apply the same rules of construction that govern the interpretation of statutes.”). As relevant here, Rule 202 directs a district court to order a pre-suit deposition “if, but only if, it finds that . . . the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.” Tex. R. Civ. P. 202.4(a). In accordance with that unambiguous text, “presuit depositions are available under Rule 202 only if a trial court makes” the required “findings” to mitigate the “practical as well as due process problems with demanding discovery from someone before telling them what the issues are.” *In re Jorden*, 249 S.W.3d at 423. Indeed, the Supreme Court has held that ordering

a pre-suit deposition without first making the required findings is a clear abuse of discretion. *In re Does*, 337 S.W.3d at 864–65. The text of Rule 202 and binding precedent interpreting it thus foreclose the Attorney General’s argument. The Attorney General chose to initiate this proceeding under Rule 202, so he is subject to its requirements.

Contrary to the Attorney General’s contention, nothing about his separate authority to oversee corporations under the Visitorial Statute alters the requirements of Rule 202. *See* Pet. 9–11. The Attorney General cites no case that has ever held either that the Visitorial Statute allows him to take depositions or that his powers under the Visitorial Statute exempt him from complying with Rule 202. If the Attorney General could depose every officer of every corporation doing business in Texas at any time, for any reason, without making any showing that the depositions would serve any legitimate purpose, it would raise serious constitutional questions and create a powerful disincentive to do business in this State. The Court should reject the Attorney General’s baseless argument that he is entitled to depose CCRGV’s corporate representative as a matter of law.

A. The text of the Business Organizations Code does not provide the Attorney General with authority to take pre-suit depositions.

Even if the Visitorial Statute could somehow alter the standard set forth in Rule 202, it provides no authority for taking pre-suit depositions. The Attorney General relies primarily on Section 12.153, which refers to his authority to “investigate” corporate entities. He argues that the use of the word “investigate” grants him an unfettered

power to depose. *See* Pet. 9–11. When read in context, however, it is clear that the Visitorial Statute authorizes the Attorney General only to review records, not to take testimony. In fact, the function of Section 12.153 within the statutory scheme is to *limit* that review of records to certain purposes. The Visitorial Statute cannot justify the Attorney General’s request to depose CCRGV.

To understand why the Attorney General’s argument fails, the Visitorial Statute should be read from the beginning. As with all laws, the six provisions within the Visitorial Statute must be read “according to their plain language, but in context—not isolation.” *State v. Hollins*, 620 S.W.3d 400, 407 (Tex. 2020) (per curiam). Section 12.151 grants the Attorney General authority “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. That authority is specific to obtaining “record[s]” and does not encompass demands for testimony. Section 12.152 then provides a mechanism by which the Attorney General can obtain access to those records. The Attorney General must make a “written request,” known as a request to examine, “to a managerial official, who shall immediately permit the attorney general to inspect, examine, and make copies of the records of the entity.” *Id.* § 12.152. Again, that provision is explicitly limited to records.

This brings us to Section 12.153, which provides that “[t]he Attorney General may investigate the organization, conduct, and management of a filing entity or foreign filing entity and determine if the entity has been or is engaged in acts or conduct in

violation of: (1) its governing documents; or (2) any law of this state.” *Id.* § 12.153. Read against the backdrop of the preceding provisions, Section 12.153 serves to specify the purposes for which the Attorney General can request the records made available under Sections 12.151 and 12.152. It does not implicitly grant him new, intrusive investigatory powers unmentioned elsewhere in the statute. And that is exactly how courts have interpreted Section 12.153. *See, e.g., Humble Oil & Ref. Co. v. Daniel*, 259 S.W.2d 580, 589–90 (Tex. Civ. App. 1953) (holding that the Attorney General could exercise his authority to review records only for the two purposes listed in the predecessor statute to Section 12.153). Delineating those purposes makes sense as a meaningful limitation on the Attorney General’s authority because at common law, a visitor could seek corporate records for a number of different purposes, depending on the nature of the corporation and the identity of the visitor. *See Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 673–82 (1819) (opinion of Story, J.).

The provisions that follow Section 12.153 confirm that the Attorney General’s authority is limited to records. Section 12.154 provides for the confidentiality of information “derived in the course of an examination of an entity’s records or documents.” Tex. Bus. Orgs. Code § 12.154. Under Section 12.155, an entity that “fails or refuses to permit the attorney general to examine or make copies of a record” forfeits its right to do business in the State. *Id.* § 12.155. And finally, Section 12.156 imposes criminal penalties on corporate officials who “fail[] or refuse[] 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.” *Id.* § 12.156(a).³ The common thread among all these provisions is that they specifically refer to records. None says anything about a deposition.

The Attorney General suggests that the word “investigate” in Section 12.153 (and in Section 12.156) should be read as implicitly conferring a potentially unlimited range of investigative powers, including the blanket authority to compel officers of any Texas corporation to be examined under oath at any time, for any reason. *See* Pet. 9–10. He claims that his reading is necessary to prevent Section 12.153 from becoming duplicative of the other provisions permitting him to examine documents. *Id.* But as explained above, Section 12.153 has a unique role to play in the statutory scheme by identifying the purposes for which the Attorney General can seek records.

It is instead the Attorney General’s reading of the statute that would violate the rule against surplusage by “needlessly giv[ing] an interpretation” to Sections 12.151 and 12.152 “that causes [them] to duplicate another provision or to have no consequence.” Pet. 10 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The*

³ As the Attorney General notes, *see* Pet. 10–11, Section 12.156 mentions the power “to make an investigation of the entity,” as well as the power “to examine or to make copies of a record.” But the verbs in Section 12.156 (“make an investigation,” “examine,” and “make copies”) are best read as simply paralleling those in Section 12.151 (“inspect, examine, and make copies”). It makes perfect sense for Section 12.156 to impose criminal penalties for preventing the Attorney General from doing the things that Section 12.151 authorizes him to do. But it would be illogical for the criminal prohibition in Section 12.156 to silently expand the Attorney General’s authorities under Section 12.151.

Interpretation of Legal Texts 174 (2012)). If Section 12.153 were a grant of general investigative power to the Attorney General, then the lesser power to inspect records through requests to examine under Sections 12.151 and 12.152 would be superfluous. The power to investigate under Section 12.153 would necessarily include the power to inspect records, leaving Sections 12.151 and 12.152 with no independent work to do. The only way to give each of the three provisions meaning is to read 12.153 as a sensible limitation on the Attorney General's authority, not a vast expansion of it.

The Attorney General's reading of Section 12.153 would also create a procedural anomaly within the Visitorial Statute. Section 12.151 creates a substantive power for the Attorney General to review records, and Section 12.152 creates a specific procedural mechanism for the Attorney General to use in obtaining those records. But the Attorney General's reading of Section 12.153 would give him a substantive right to take depositions without any accompanying procedures. It is thus unclear how depositions under the Attorney General's interpretation of Section 12.153 would be conducted. Indeed, the Attorney General seems to have tacitly acknowledged the lack of a procedural mechanism for conducting depositions under the Visitorial Statute by seeking a pre-suit deposition under Rule 202 instead. It is implausible that the Legislature would have given the Attorney General the power to take depositions under Section 12.153 without specifying the applicable procedures, when it created a specific mechanism for obtaining records in Section 12.152. The only reasonable inference is that the Visitorial Statute—including Section 12.153—is limited to records.

Finally, the Attorney General's overly broad reading of the statutory term "investigate" would render other provisions nonsensical. For instance, Section 12.154 requires the Attorney General to keep records confidential but says nothing of information obtained through testimony. Likewise, Section 12.155 provides for forfeiture of the corporate charter of an entity that fails to produce documents, but not of an entity that fails to comply with a demand for testimony. These omissions are inexplicable if the Attorney General has an unlimited power to compel testimony under Section 12.153.

B. Reading the Visitorial Statute to authorize pre-suit depositions as a matter of law would raise constitutional concerns.

Multiple cases currently pending in federal courts, as well as in the Supreme Court of Texas, raise serious constitutional doubts about the Visitorial Statute. To the extent the Visitorial Statute is unconstitutional, it cannot provide a basis for finding that the Attorney General satisfies Rule 202 as a matter of law. And a decision from this Court holding that the Attorney General can obtain pre-suit depositions without making any showing that the depositions would serve a legitimate purpose would raise similar constitutional concerns.

Most notably, in the time since the Attorney General filed his mandamus petition, a federal magistrate judge has opined that the Visitorial Statute is unconstitutional on its face under the Fourth Amendment. *See Spirit AeroSystems, Inc. v. Paxton*, No. 1:24-cv-00472-DII (W.D. Tex. Oct. 11, 2024). On October 11, 2024, at a

hearing on the parties' competing motions for summary judgment in that case, Magistrate Judge Lane stated his view that the challenged provisions are facially unconstitutional under the Fourth Amendment because they fail to provide the recipient of a request to examine records with an opportunity for precompliance review. *See* Transcript of Hearing at 68–71. Judge Lane described the issue as an “easy” one in light of the Supreme Court’s decision in *City of Los Angeles v. Patel*, 576 U.S. 409 (2015). *See* Transcript of Hearing at 69; *see also id.* (“*Patel* speaks for itself”). A written decision from Judge Lane recommending that the Visitorial Statute, including Section 12.153, be struck down in its entirety is forthcoming. *See also* Complaint, *Jolt Initiative, Inc. v. Paxton*, No. 1:24-cv-01089-RP (W.D. Tex. Sept. 13, 2024), ECF No. 1 (raising a similar Fourth Amendment challenge to a request to examine issued under the Visitorial Statute).

In addition, as CCRGV noted in the district court, a Texas state court has declared portions of the Visitorial Statute facially unconstitutional under the Fourth Amendment. *See* Order Granting Plaintiff’s Motion for Final Summary Judgment at 2–3, *Annunciation House, Inc. v. Paxton*, Cause No. 2024DCV0616 (205th Judicial District July 1, 2024). That case is now pending before the Supreme Court of Texas. *See Paxton v. Annunciation House, Inc.*, No. 24-0573 (Tex. July 16, 2024).

Insofar as the Visitorial Statute is unconstitutional, it cannot provide a basis for holding that the Attorney General satisfies Rule 202 as a matter of law. And adopting the Attorney General’s position would raise even more serious constitutional questions here. By arguing that he is *always* entitled to conduct pre-suit depositions, the Attorney

General is claiming a right to take the deposition of any individual associated with any corporation at any time and for any reason, without first meeting his burden under Rule 202 of demonstrating to a court that the likely benefit of the deposition outweighs the burden. That raises serious “due process problems,” *In re Jorden*, 249 S.W.3d at 423, and may also implicate the Fourth Amendment, *cf. Guardiola v. State*, 20 S.W.3d 216, 224–25 (Tex. App. 14th 2000) (explaining that abuse of a grand jury subpoena to conduct a custodial interrogation can constitute a seizure under the Fourth Amendment). This Court should reject the Attorney General’s arguments because “Rule 202 is not a license for forced interrogations.” *In re Wolfe*, 341 S.W.3d at 933.

C. The State’s common law visitorial powers do not support the Attorney General’s petition for a deposition under Rule 202.

The Attorney General claims that the “Centuries-old Visitorial Power” confirms his authority to conduct pre-suit depositions. Pet. 11. That argument fails for several reasons.

Most important, at common law, the State’s visitorial power was held by the legislature, which had discretion on how much of that authority to delegate to executive officials like the Attorney General. *See Guthrie v. Harkness*, 199 U.S. 148, 157 (1905) (“[T]he legislature is the visitor of all corporations founded by it . . .”). The specific provisions of the Visitorial Statute, which delegate a portion of the Texas Legislature’s visitorial power to the Attorney General, thus control. And the Legislature did not grant authority to take depositions, as explained above.

In any event, the Attorney General’s own sources indicate that, like the Visitorial Statute, the common law provided authority only to inspect the books and records of a corporation, not to take pre-suit depositions. Indeed, by the Attorney General’s own definition, the visitorial power is “the right of the state to ‘demand the production of the corporate books and papers.’” Pet. 11 (quoting *Wilson v. United States*, 221 U.S. 361, 384 (1911)). Pursuant to the common law visitorial power, the Attorney General says, “a registered entity ‘must submit its books and papers to duly constituted authority when demand is suitably made.’” Pet. 12 (quoting *Essgee Co. of China v. United States*, 262 U.S. 151, 155 (1923)). CCRGV could not have cited better cases to illustrate that the visitorial power historically applied only to documents, and *Wilson* and *Essgee* do not otherwise provide any support for a visitor to take depositions.⁴

II. The Attorney General Failed to Present Evidence in the District Court That the Likely Benefit of a Deposition Would Outweigh the Burden.

Because the Attorney General is not automatically entitled to a pre-suit deposition as a matter of law, he must meet the same standard under Rule 202 as anyone else. A court can order a deposition under Rule 202 “only if” the court finds, as relevant

⁴ Other cases cited by the Attorney General merely discuss the history of States’ visitorial power over corporations generally without specifying the means by which that power could be exercised. See *Cuomo v. Clearing House Ass’n*, 557 U.S. 519, 526–29 (2009); *State Inv. & Ins. Co. v. Superior Ct. of City & Cnty. of San Francisco*, 101 Cal. 135, 145–46 (1894); *Galveston, H. & S.A. Ry. Co. v. State*, 17 S.W. 67, 71 (Tex. 1891). The only case that mentions depositions was interpreting a statute that explicitly provided for them. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 336 n.1 (1909).

here, that “the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.” Tex. R. Civ. P. 202.4(a)(2). “Courts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule.” *In re Wolfe*, 341 S.W.3d at 933. Although Rule 202 “does not require a petitioner to plead a specific cause of action,” “[t]he law is clear that a petitioner seeking a presuit deposition must present evidence to meet its burden to establish the facts necessary to obtain the deposition.” *In re East*, 476 S.W.3d at 66, 68 (collecting cases). Neither “sworn, verified pleadings” nor “the argument of counsel” are “competent evidence to prove the facts asserted in the pleading.” *Id.* at 68; *see also Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995).

In the district court, the Attorney General failed to carry his evidentiary burden. What little evidence he submitted does not show that deposing a representative of CCRGV would provide *any* likely benefit to the investigation of a potential claim, much less that the likely benefit would outweigh the burden or expense of the deposition. In light of the Attorney General’s “sketchy” evidentiary showing, *In re Does*, 337 S.W.3d at 865, the district court did not commit a clear abuse of discretion by denying the petition.

A. The Attorney General failed to show that a pre-suit deposition would provide any likely benefit.

The Attorney General’s mandamus petition devotes about two pages to arguing that “[t]he evidence showed that a presuit deposition is the most efficient means to provide clarity related to the topics OAG’s [*sic*] is investigating.” *See* Pet. 13–15. But

remarkably, that section of the petition says next to nothing about any evidence. In the district court, it was the Attorney General's burden to present evidence showing the likely benefit of the requested deposition, *In re Jorden*, 249 S.W.3d at 423, and in this court, the Attorney General bears the additional "heavy" "burden of establishing an abuse of discretion," *In re CSX Corp.*, 124 S.W.3d at 151. The Attorney General cannot show that the district court abused its discretion in determining that the evidence was insufficient to order a pre-suit deposition when his mandamus petition fails to identify any relevant evidence.

The mandamus petition first points to "illustrative potential legal violations encompassed in the investigation." Pet. 14. But rather than citing any evidence in the record indicating that those "illustrative potential legal violations" might have actually occurred, the Attorney General merely lists statutes that CCRGV hypothetically could have violated. Pet. 14–15. Such hypotheticals cannot satisfy the evidentiary standard for ordering a pre-suit deposition under Rule 202. Otherwise, a Rule 202 petitioner could always meet its burden by naming some law that the would-be defendant conceivably could have violated. Instead, the Attorney General needed to provide a factual basis for "tak[ing] the requested deposition to investigate a potential claim" against CCRGV. Tex. R. Civ. P. 202.4(a)(2).

Similarly, the mandamus petition posits hypothetical factual scenarios in which the Attorney General might have a potential claim against CCRGV. The Attorney General speculates about what would happen "if CCRGV were transporting aliens who

have not been processed by Border Patrol” or “if CCRGV engages in conduct to conceal aliens from law enforcement.” Pet. 15. But again, “ifs” are not evidence. Rule 202 authorizes pre-suit depositions only for “an *existing*—rather than future or speculative—right that may be presently asserted.” *In re DePinho*, 505 S.W.3d 621, 624 (Tex. 2016) (per curiam) (emphasis in original). To obtain a pre-suit deposition, the Attorney General must identify facts—things that happened in the real world, rather than in his imagination—that show a potential legal claim against CCRGV meriting further investigation. Those facts are not in the record because they do not exist.

To be sure, the Attorney General need not plead all the elements of a claim against CCRGV at this stage. *See In re East*, 476 S.W.3d at 66. But if Rule 202’s evidentiary standard is to mean anything, a petitioner must at least submit some specific evidence suggesting that the potential defendant has done something that might provide grounds for a legal claim. Only then can a court determine that a deposition would provide a benefit for the development of that potential claim, as Rule 202 requires. Here the Attorney General has failed entirely to submit any such evidence.

The closest the mandamus petition comes to identifying evidence supporting a pre-suit deposition is a single citation to a document that CCRGV voluntarily provided to the Attorney General as part of its extensive cooperation with his investigation. *See* Pet. 14 (citing M.R. 310). Far from suggesting that the Attorney General has grounds to investigate a potential claim against CCRGV for violating immigration laws, that document states clearly that “[a]ll immigrants/Asylum Seekers need to have been

processed and released by [U.S. Customs and Border Protection] to be admitted to” CCRGV’s Respite Center. M.R. 310. Indeed, the information that CCRGV provided to the Attorney General as part of his investigation confirms that CCRGV works closely with federal authorities and strictly complies with immigration laws. *See, e.g.*, M.R. 277 (employee handbook provision stating that CCRGV “compl[ies] with all applicable laws and regulations and expects its executive personnel, directors, and employees” to do the same); M.R. 410 (sworn statement from CCRGV Executive Director Sister Norma Pimentel explaining that the Respite Center “provid[es] humanitarian care to asylum seekers released by CBP/ICE”). If anything, those documents prove that a pre-suit deposition would provide no benefit because the Attorney General has no potential claim.

Other than CCRGV’s own records showing that the organization complies with the law, the only other evidence the Attorney General sought to introduce in the district court comprised public statements from government officials voicing general concerns about nonprofits facilitating illegal immigration, none of which mentioned CCRGV. *See* Pet. 2 (citing Letter from Rep. Lance Gooden to Catholic Charities USA (Feb. 9, 2022)); M.R. 413. The Attorney General hardly seems to rely on those statements in this Court, mentioning them only in the introduction to his petition. Regardless, Representative Gooden’s letter to Catholic Charities USA—a separate organization that has no authority or control over CCRGV—contained only allegations unsupported by any facts and was never admitted into evidence by the district court. *See* M.R. 219 (objection

to admission of the letter); M.R. 220 (district court admitting all exhibits except the letter). General statements about the practices of other nonprofits provide no basis for deposing a representative of CCRGV in particular.

In sum, the Attorney General has completely failed to carry his burden in this Court of showing that the district court abused its discretion by determining that the Attorney General failed to show a likely benefit from a pre-suit deposition.

B. The requested deposition would impose a substantial burden.

Because the Attorney General has failed to show *any* likely benefit to taking a pre-suit deposition, the Court can deny the mandamus petition without even considering the burdens. But in any event, the Attorney General has failed to show that whatever benefit a deposition might provide outweighs the burden on CCRGV. *See Flores v. Olibas*, 657 S.W.3d 31, 41 (Tex. App. 8th 2022) (holding that a Rule 202 petitioner must prove that “the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure” (internal quotation marks omitted)); *see also Arlington Indep. Sch. Dist. v. Williams*, No. 02-23-00142-CV, 2023 WL 8643040, at *13 (Tex. App. 2d Dec. 14, 2023) (holding that a Rule 202 petition failed because the petitioner “offered no evidence regarding the burden or expense”).

As explained to the district court, CCRGV has already devoted considerable time and effort to responding to the Attorney General, and the requested deposition would force a leader of the organization to step away from her obligations and would impose

a significant additional expenditure of resources. M.R. 27. CCRGV does much more than provide immigration services. *See id.* It offers services to the homeless and veterans. It coordinates charitable responses to natural disasters, including recent hurricanes and associated flooding. And during the summer months, the organization feeds needy children who might otherwise go hungry without access to school lunch. Requiring one of CCRGV's leaders to take time from these important matters to prepare and sit for a deposition would harm both CCRGV and the needy individuals who benefit from CCRGV's services.

The Attorney General emphasizes that he has “agreed to confer on an agreeable location” for the deposition and that the deposition would “cover[] only four topics.” Pet. 15–16. But the deposition will impose the burdens just discussed regardless of where it takes place. And the four topics on which the Attorney General seeks testimony cover everything having to do with CCRGV's humanitarian response program (as well as, apparently, all related and unrelated communications with law enforcement). *See* M.R. 8. This is a far cry from the Rule 202 petition in *City of Dallas v. City of Corsicana*, cited by the Attorney General, Pet. 15–16, which sought “depositions on only one element of [petitioners'] potential claim,” No. 10-14-00090-CV, 2015 WL 4985935, at *7 (Tex. App. 10th Aug. 20, 2015).

The Attorney General also tries to minimize the burdens imposed by the requested deposition by warning that his office “has significantly more invasive tools that it can resort to if necessary to investigate a matter, particularly a matter that might

implicate criminal conduct.” Pet. 16. It is unclear exactly what to make of this veiled threat, especially given that “the Attorney General has no independent criminal prosecution authority.” *State v. Stephens*, 663 S.W.3d 45, 55 (Tex. Crim. App. 2021). But regardless, the possible existence of other, more onerous procedures does not somehow reduce the burdens imposed by the requested deposition or alter the requirements of Rule 202. Nor does the case cited by the Attorney General, *In re City of Tatum*, 578 S.W.3d 203 (Tex. App. 12th 2019), support such a counterintuitive proposition. *See* Pet. 16. In *City of Tatum*, the court explained that the benefit of a pre-suit deposition could outweigh the burden if the deposition revealed information that simplified the issues in the subsequent lawsuit or eliminated baseless claims altogether. *See* 578 S.W.3d at 211. The court in no way suggested that the burden of a Rule 202 deposition could be excused if the petitioner identified alternative pre-suit investigative tools that imposed even greater burdens.

Finally, the Attorney General fails entirely to respond to the arguments CCRGV raised below regarding the religious burdens a deposition would impose. The Texas Religious Freedom Restoration Act prohibits the State from substantially burdening religious practice unless the burden is the least restrictive means of furthering a compelling government interest. *See* Tex. Civ. Prac. & Rem. Code § 110.003. Texas law also prohibits the government from taking “any adverse action against any person based wholly or partly on the person’s membership in, affiliation with, or contribution, donation, or other support provided to a religious organization.” Tex. Gov’t Code

§ 2400.002; *see Doblen v. City of San Antonio*, 643 S.W.3d 387, 389–90 (Tex. 2022). Here, the Rule 202 petition threatens to burden CCRGV’s religious practice and targets the organization for adverse action based on that practice, and the Attorney has not explained (or even tried to explain) how the petition could be granted consistent with the restrictions imposed by Tex. Civ. Prac. & Rem. Code § 110.003 and Tex. Gov’t Code § 2400.002.

Prayer

The mandamus petition should be denied.

By: /s/ William Powell

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Rule 52.3(j) Certification

I certify that I have reviewed the factual statements contained in this Response to Petition for Writ of Mandamus and have concluded that every factual statement in the Response is supported by competent evidence in the Mandamus Record.

/s/ William Powell
WILLIAM POWELL

Certificate of Compliance

I hereby certify that this brief complies with Texas Rule of Appellate Procedure 9.4(i)(2)(B) because it contains 7,410 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ William Powell
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Certificate of Service

I hereby certify that on the 31st day of October 2024, a true and correct copy of the foregoing document was served on the following counsel by the electronic filing system:

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Appendix

- A. Tex. Bus. Orgs. Code § 12.151
- B. Tex. Bus. Orgs. Code § 12.154
- C. Tex. Bus. Orgs. Code § 12.155
- D. Tex. Civ. Prac. & Rem. Code § 110.003
- E. Tex. Gov't Code § 22.221
- F. Tex. Gov't Code § 2400.002
- G. Tex. R. App. P. 41.3
- H. Letter from Chief Justice Dori Contreras, No. 13-24-00419-CV (Sept. 30, 2024)
- I. Transcript of Hearing, *Spirit AeroSystems, Inc. v. Paxton*, No. 1:24-cv-00472-DII (W.D. Tex. Oct. 11, 2024)

Exhibit A

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 1. General Provisions (Refs & Annos)
Chapter 12. Administrative Powers
Subchapter B. Attorney General (Refs & Annos)

V.T.C.A., Business Organizations Code § 12.151

§ 12.151. Authority of Attorney General to Examine Books and Records

Effective: January 1, 2006

[Currentness](#)

Each 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. A record of the entity includes minutes and a book, account, letter, memorandum, document, check, voucher, telegram, constitution, and bylaw.

Credits

Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

[Notes of Decisions \(13\)](#)

V. T. C. A., Business Organizations Code § 12.151, TX BUS ORG § 12.151

Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

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Exhibit B

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 1. General Provisions (Refs & Annos)
Chapter 12. Administrative Powers
Subchapter B. Attorney General (Refs & Annos)

V.T.C.A., Business Organizations Code § 12.154

§ 12.154. Authority to Disclose Information

Effective: January 1, 2006

[Currentness](#)

Information held by the attorney general and derived in the course of an examination of an entity's records or documents is not public information, is not subject to Chapter 552, Government Code, and may not be disclosed except:

- (1) in the course of an administrative or judicial proceeding in which the state is a party;
- (2) in a suit by the state to:
 - (A) revoke the registration of the foreign filing entity or terminate the certificate of formation of the filing entity; or
 - (B) collect penalties for a violation of the law of this state; or
- (3) to provide information to any officer of this state charged with the enforcement of its laws.

Credits

Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

V. T. C. A., Business Organizations Code § 12.154, TX BUS ORG § 12.154

Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

Exhibit C

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 1. General Provisions (Refs & Annos)
Chapter 12. Administrative Powers
Subchapter B. Attorney General (Refs & Annos)

V.T.C.A., Business Organizations Code § 12.155

§ 12.155. Forfeiture of Business Privileges

Effective: January 1, 2006

[Currentness](#)

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.

Credits

Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

[Notes of Decisions \(3\)](#)

V. T. C. A., Business Organizations Code § 12.155, TX BUS ORG § 12.155

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Exhibit D

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 5. Governmental Liability
Chapter 110. Religious Freedom (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 110.003

§ 110.003. Religious Freedom Protected

[Currentness](#)

(a) Subject to Subsection (b), a government agency may not substantially burden a person's free exercise of religion.

(b) Subsection (a) does not apply if the government agency demonstrates that the application of the burden to the person:

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that interest.

(c) A government agency that makes the demonstration required by Subsection (b) is not required to separately prove that the remedy and penalty provisions of the law, ordinance, rule, order, decision, practice, or other exercise of governmental authority that imposes the substantial burden are the least restrictive means to ensure compliance or to punish the failure to comply.

Credits

Added by [Acts 1999, 76th Leg., ch. 399, § 1, eff. Aug. 30, 1999](#).

[Notes of Decisions \(27\)](#)

V. T. C. A., Civil Practice & Remedies Code § 110.003, TX CIV PRAC & REM § 110.003

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Exhibit E

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle A. Courts
Chapter 22. Appellate Courts
Subchapter C. Courts of Appeals (Refs & Annos)

V.T.C.A., Government Code § 22.221

§ 22.221. Writ Power

Effective: September 1, 2023

[Currentness](#)

(a) Each court of appeals or a justice of a court of appeals may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court.

(b) Subject to Subsection (c-1), each court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against a judge of a district, statutory county, statutory probate county, or county court in the court of appeals district .

(c) Each court of appeals for a court of appeals district, other than the Court of Appeals for the Fifteenth Court of Appeals District, may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against:

(1) a judge of a district court who is acting as a magistrate at a court of inquiry under Chapter 52, Code of Criminal Procedure, in the court of appeals district; or

(2) an associate judge of a district or county court appointed by a judge under Chapter 201, Family Code, in the court of appeals district for the judge who appointed the associate judge.

(c-1) The original jurisdiction of the Court of Appeals for the Fifteenth Court of Appeals District to issue writs is limited to writs arising out of matters over which the court has exclusive intermediate appellate jurisdiction under [Section 22.220\(d\)](#).

(d) Concurrently with the supreme court, the court of appeals of a court of appeals district in which a person is restrained in his liberty, or a justice of the court of appeals, may issue a writ of habeas corpus when it appears that the restraint of liberty is by virtue of an order, process, or commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case. Pending the hearing of an application for a writ of habeas corpus, the court of appeals or a justice of the court of appeals may admit to bail a person to whom the writ of habeas corpus may be granted.

Credits

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 69, § 1, eff. May 6, 1987; Acts 1987, 70th Leg., ch. 148, §§ 1.35, 2.03, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 58, § 1, eff. May 2, 1991; Acts 1995, 74th Leg., ch. 839, § 1, eff. Sept. 1, 1995; Acts 2017, 85th Leg., ch. 740 (S.B. 1233), § 1, eff. Sept. 1, 2017; Acts 2017, 85th Leg., ch. 1013 (H.B. 1480), § 1, eff. Sept. 1, 2017; Acts 2023, 88th Leg., ch. 459 (S.B. 1045), § 1.06, eff. Sept. 1, 2023.

Editors' Notes

REVISOR'S NOTE

2023 Main Volume

The revised law in Subsection (b) omits “or any Justice thereof, in vacation,” from the source law in [V.A.C.S. Article 1824](#) because amendments to [V.A.C.S. Article 1816](#) have changed the original term of the courts of appeals from the first Monday in October until the first Monday in July to a term beginning and ending with each calendar year.

[Notes of Decisions \(389\)](#)

V. T. C. A., Government Code § 22.221, TX GOVT § 22.221

Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

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Exhibit F

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title. 10. General Government (Refs & Annos)
Subtitle H. Prohibited Adverse Actions by Government
Chapter 2400. Protection of Membership in and Support to Religious Organizations

V.T.C.A., Government Code § 2400.002

§ 2400.002. Adverse Action Prohibited

Effective: September 1, 2019

[Currentness](#)

Notwithstanding any other law, a governmental entity may not take any adverse action against any person based wholly or partly on the person's membership in, affiliation with, or contribution, donation, or other support provided to a religious organization.

Credits

Added by [Acts 2019, 86th Leg., ch. 666 \(S.B. 1978\), § 1, eff. Sept. 1, 2019.](#)

[Notes of Decisions \(3\)](#)

V. T. C. A., Government Code § 2400.002, TX GOVT § 2400.002

Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

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Exhibit G

Vernon's Texas Rules Annotated

Texas Rules of Appellate Procedure

Section Two. Appeals from Trial Court Judgments and Orders (Refs & Annos)

Rule 41. Panel and en Banc Decision (Refs & Annos)

TX Rules App.Proc., Rule 41.3

41.3. Precedent in Transferred Cases.

Effective: June 1, 2020

[Currentness](#)

In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. The court's opinion may state whether the outcome would have been different had the transferee court not been required to decide the case in accordance with the transferor court's precedent.

Credits

Added by Supreme Court March 10, 2008, and Aug. 20, 2008, eff. Sept. 1, 2008. Approved by Court of Criminal Appeals Sept. 30, 2008, eff. Sept. 30, 2008.

Editors' Notes

NOTES AND COMMENTS

Comment to 2008 change: Subdivisions 41.1 and 41.2 are amended to acknowledge the full authority of the Chief Justice of the Supreme Court to temporarily assign a justice or judge to hear a matter pending in an appellate court. The statutory provisions governing the assignment of judges to appellate courts are located in Chapters 74 and 75 of the Government Code. Other minor changes are made for consistency. Subdivision 41.3 is added to require, in appellate cases transferred by the Supreme Court under [Section 73.001 of the Government Code](#) for docket equalization or other purposes, that the transferee court must generally resolve any conflict between the precedent of the transferor court and the precedent of the transferee court--or that of any other intermediate appellate court the transferee court otherwise would have followed--by following the precedent of the transferor court, unless it appears that the transferor court itself would not be bound by that precedent. The rule requires the transferee court to "stand in the shoes" of the transferor court so that an appellate transfer will not produce a different outcome, based on application of substantive law, than would have resulted had the case not been transferred. The transferee court is not expected to follow the transferor court's local rules or otherwise supplant its own local procedures with those of the transferor court.

[Notes of Decisions \(6\)](#)

Rules App. Proc., Rule 41.3, TX R APP Rule 41.3

Current with amendments received through October 1, 2024. Some rules may be more current, see credits for details.

Exhibit H

CHIEF JUSTICE
DORI CONTRERAS

JUSTICES
GINA M. BENAVIDES
NORA L. LONGORIA
JAIME TIJERINA
CLARISSA SILVA
L. ARON PEÑA JR

CLERK
KATHY S. MILLS



Court of Appeals
Thirteenth District of Texas

NUECES COUNTY COURTHOUSE
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September 30, 2024

Blake A. Hawthorne
Clerk of the Court
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711
Blake.Hawthorne@txcourts.gov
* DELIVERED VIA E-MAIL *

Re: Motion to transfer appeal to the Thirteenth Court of Appeals
Cause No. 13-24-00419-CV
Style: In re Office of the Attorney General of the State of Texas

Dear Mr. Hawthorne:

On September 5, 2024, the Thirteenth Court of Appeals received real party in interest Catholic Charities of the Rio Grande Valley's motion to transfer the above numbered and entitled cause from the Fifteenth Court of Appeals to the Thirteenth Court of Appeals. A copy of the motion and relator's response in opposition to the motion are enclosed.

A panel, consisting of myself, Justice Benavides, and Justice Silva, has considered the motion and previous filings in the cause and is now of the opinion that the original proceeding does not fall under the exclusive jurisdiction of the Fifteenth Court of Appeals, and was, therefore, inadvertently transferred. A majority of the panel is of the opinion there is merit to the motion to re-transfer the cause to the Thirteenth Court of Appeals. Justice Silva, although advised about this matter, declined to participate in the panel recommendation.

Please let us know if you need any other information to fully consider the matter.

Very truly yours,

Dori Contreras
Chief Justice

Enclosure.

cc: Justice Brett Busby, Supreme Court of Texas
Chief Justice Scott Brister, Seventh Court of Appeals
Christopher Prine, Clerk of the Court, Fifteenth Court of Appeals
William Powell
Levi T. Fuller
Matthew T. Kennedy

Exhibit I

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

SPIRIT AEROSYSTEMS, INC.,	)	AU:24-CV-00472-DII
	)	
Plaintiff,	)	
	)	
v.	)	AUSTIN, TEXAS
	)	
W. KENNETH PAXTON, JANE NELSON,	)	
	)	
Defendants.	)	OCTOBER 11, 2024

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE MARK LANE

FOR THE PLAINTIFF:	DARREN L. MCCARTY MCCARTY LAW PLLC 1410B W 51ST STREET AUSTIN, TEXAS 78756
	MATTHEW T. MARTENS GERARD A. SALVATORE WILMER CUTLER PICKERING HALE AND DORR LLP 2100 PENNSYLVANIA AVE, NW WASHINGTON, D.C. 20037
FOR THE DEFENDANTS:	RYAN SPENCER BAASCH OFFICE OF THE ATTORNEY GENERAL OF TEXAS 209 WEST 14TH STREET AUSTIN, TEXAS 78711
	MATTHEW THOMAS KENNEDY OFFICE OF THE ATTORNEY GENERAL 300 WEST 15TH STREET, 9TH FLOOR AUSTIN, TEXAS 78711
TRANSCRIBER:	ARLINDA RODRIGUEZ, CSR 501 WEST 5TH STREET, SUITE 4152 AUSTIN, TEXAS 78701 (512) 391-8791

Proceedings recorded by electronic sound recording, transcript
produced by computer.

1 (Proceedings began at 9:32 a.m.)

2 THE CLERK: The Court calls the following for a
3 Motion Hearing: 1:24-CV-472, *Spirit AeroSystems,*
4 *Incorporated v. W. Kenneth Paxton and Jane Nelson.*

5 THE COURT: Good morning, gentlemen. Let's
6 start with announcements. Tell me who you are and who
7 you represent. We'll start over here on my left.

8 MR. MARTENS: Thank you, Your Honor. Good
9 morning. My name is Matthew Martens, and I represent
10 Spirit AeroSystems, Inc.

11 MR. MCCARTY: Darren McCarty. I also represent
12 Spirit AeroSystems.

13 THE COURT: All right.

14 MR. BAASCH: Ryan Baasch on behalf of the
15 Office of the Attorney General and Jane Nelson.

16 MR. KENNEDY: Matthew Kennedy for the Office of
17 the Attorney General and Jane Nelson.

18 THE COURT: Welcome, gentlemen. Messrs. Baasch
19 and Kennedy, Mr. Baasch I know you have something filed
20 authorizing you to be part of this case. I assume
21 Judge Pitman is going to grant that, so I'm not that
22 concerned about that. And then, Mr. Kennedy, as I
23 understand it from my courtroom deputy, you are licensed
24 but not yet -- we haven't formally entered you on the
25 case; is that right?

1 MR. KENNEDY: That's correct, Your Honor.

2 THE COURT: All right. We'll get that done.

3 Okay. Obviously, in preparation from the
4 hearing I've read what you-all have filed. It's quite
5 thick, obviously, and it took a while. I also want to
6 apologize to you. I mean, this issue has been lingering
7 since July. Oh, I could give you the reasons why, but
8 they're not really good other than just personnel changes
9 and other issues. So I hope you'll forgive me for that.
10 But here we are, and now we will resolve the issue that
11 you two have joined.

12 Having read all the material, I'll share with
13 you, you can't read everything and remain a blank slate.
14 When you read everything, you start drawing some
15 conclusions and having some questions. So, with your
16 indulgence, I'm definitely going to have you guys come up
17 and speak to your points, but don't be surprised if
18 during your discussion I interrupt you and ask you
19 questions.

20 One thing I kind of want to get clear before we
21 get started is -- and this questions is directed, I
22 guess, to the plaintiffs -- just to be clear, you are --
23 you are only moving forward on the facial
24 constitutionality of the statute or not -- not
25 as-applied?

1 MR. MARTENS: We state both facial and
2 as-applied in our papers. I think the analysis --

3 THE COURT: You spend 99 percent of your
4 briefing on facial.

5 MR. MARTENS: I think that the analysis ends up
6 becoming the same. I think that they're trying to
7 defend, as we'll explain, by rewriting the statute by the
8 way they've crafted the May 13th request to examine.
9 But, ultimately, I don't think that you can change what
10 the statute says based on the RTE. And so, ultimately,
11 we're challenging the statute. That's what we've
12 challenged. We've brought a challenge to the statute.
13 Obviously, they have applied it to us, or they're trying
14 to apply it to us through the RTE. But you're right.
15 The focus of our challenge is the facial challenge.

16 THE COURT: And I don't -- to be clear, it's
17 more than focus. I mean, if this was an as-applied
18 challenge, I would have expected a lot more here about
19 the fact that you only have 90 employees in Dallas that
20 are related to Spirit and 20,000 somewhere else and
21 Spirit's incorporated out of Delaware. And you make
22 those basic statements, but you don't make any arguments.

23 MR. MARTENS: I don't think that those impact
24 the analysis, either facial or as-applied. It's
25 as-applied to us in the sense that they have served an

1 RTE on us. But I don't think that there's any other
2 facts that are relevant to the as-applied challenge.
3 Ultimately, I think --

4 THE COURT: Well, I disagree. I'm just telling
5 you --

6 MR. MARTENS: Okay.

7 THE COURT: -- just to be clear, any ruling I
8 make here is going to be on facial.

9 MR. MARTENS: Okay.

10 THE COURT: I just don't think you've made the
11 as-applied argument. Now, having said that, depending on
12 what happens, I don't see what prevents you from making
13 the as-applied argument next.

14 But they are different. And one of the reasons
15 I even raise it is because of all the cases I've read
16 about this, some courts don't even recognize the
17 distinction between the two analyses, and some do. Most
18 seem to be as-applied. Couldn't find much in the way of
19 facial constitutionality, particularly in the wake of
20 *Los Angeles v. Patel*. So I'm just -- I'm cabining this
21 to facial.

22 MR. MARTENS: And I'll keep my argument
23 accordingly.

24 THE COURT: Okay. Well, with that, you're our
25 plaintiff. I think number-wise, the Attorney General's

1 Office got in first with their cross-motion for summary
2 judgment. But I'll let you go first.

3 MR. MARTENS: Thank you, Your Honor. May it
4 please the Court?

5 THE COURT: Sure.

6 MR. MARTENS: Matthew Martens for Spirit
7 AeroSystems.

8 I think I should -- I'll start with what I
9 think is undisputed here. No one disputes that the
10 Fourth Amendment as interpreted in *Patel* requires an
11 opportunity for pre-compliance judicial review of an
12 inspection, of an administrative subpoena, of a request
13 to examine. However, characterized, *Patel* requires the
14 opportunity for pre-compliance judicial review.

15 And I think no one also disputes the Texas
16 RTE statute, the request to examine statute, on its face
17 provides no mechanism for such review. There's no --
18 unlike many of the other CID statutes, where similar
19 provisions with regard to other investigative authority
20 that the Attorney General has where there is specifically
21 identified a statutory basis to conduct a review -- to
22 conduct some judicial review, either through a motion to
23 enforce by the Attorney General or a motion to quash,
24 there is no such mechanism in RTE statute itself.

25 And, in fact, Texas law precludes that type of

1 review for two reasons: First, Texas law, both the RTE
2 statute in its text and structure preclude review. And,
3 secondly, the Texas state law of sovereign immunity
4 precludes such review.

5 So I'll discuss each of those in order.

6 So first with regard to the text and structure
7 of the RTE statute, the use of the word "immediate" in
8 defining the time for compliance precludes review as a
9 simple temporal matter. The statute does not allow time
10 for review. In fact, in the *Humble Oil* decision which we
11 place great reliance on, the court there explained what
12 "immediate" meant and how the statute actually operates.

13 What the court said in *Humble Oil*, is that the
14 statute, quote, requires every corporation to permit the
15 Attorney General or any of his assistants or
16 representatives to make examination of the record of --
17 records of the corporation as often as they may deem
18 necessary immediately after presentation of a request for
19 such examination.

20 So if the recipient of the letter is, by
21 statute, as interpreted in *Humble Oil* required to
22 immediately provide for inspection upon presentation of a
23 letter of request, then the statute necessarily doesn't
24 contemplate an opportunity for review. Temporally, you
25 can't even obtain such review.

1 And the Attorney General himself argued in the
2 *Annunciation* case that "immediate" means what it says.
3 In fact, he argued to that court that that word
4 "immediate" should be interpreted, his words, quote, as
5 written. And he then cited dictionaries for the
6 proposition that "immediate" means quote, right away, and
7 further said that any delay in compliance is, quote, a
8 matter of grace.

9 So I would respectfully suggest that it would
10 be useful to hear whether the Attorney General stands by
11 the position, the interpretation of the statute that they
12 advanced in the *Annunciation House* case, where they said
13 "immediate" was clear, it means right away, it should be
14 interpreted as written.

15 And, in fact, in that case, when someone
16 attempted in a one-day grace period to bring a lawsuit,
17 the Attorney General deemed them out of compliance and,
18 as a result, sought to -- sought to file a *quo warranto*
19 proceeding.

20 So the Attorney General's position on the
21 meaning of the statute is exactly the position we've been
22 advocating, which is that the statute as written
23 precludes the idea of judicial review because of the
24 temporal requirement of immediate compliance.

25 But that's not the only reason I think that the

1 text and structure of the statute preclude judicial
2 review. The Attorney General's unlimited discretion
3 under the RTE statute further confirms that there is no
4 judicial review contemplated under the statute.

5 Again, I go to the *Humble Oil* decision where it
6 says that the RTE statute, quote, grants to the Attorney
7 General the full and unlimited and unrestricted right to
8 examination of the corporation's books and records at any
9 time and as often as he may deem necessary. The court
10 went on to say that it's a right of unlimited visitation
11 and seizure.

12 If it's unlimited and you have -- if it's an
13 unlimited right to inspect and you have to immediately
14 allow inspection, then the text and structure of the
15 statute necessarily preclude any opportunity for judicial
16 review.

17 And that's what *Patel* forbids. That is in --
18 that is in no way distinguishable from the city ordinance
19 at issue in *Patel*, where the police could show up, demand
20 immediate access to the records, and the immediate -- and
21 if you didn't provide immediate access, you could be
22 arrested and charged with a misdemeanor.

23 Here you can be arrested, charged with a
24 misdemeanor, and lose your right to do business.

25 So on its face, the text and structure of the

1 RTE statute preclude any judicial review by the temporal
2 requirement of immediate access and by the lack of any
3 limitation or, as the *Humble -- Humble Oil* court put it,
4 the full and unlimited and unrestricted right to
5 examination. You can't have an immediate access
6 requirement and an unlimited right to examination and
7 have, in that structure, judicial review. So on its
8 face, the statute does not allow what *Patel* requires.

9 But, secondly, even if I'm wrong about that,
10 even if the statute didn't have an immediacy requirement
11 and didn't have unlimited right to inspection, under
12 Texas sovereign immunity law, a lawsuit to -- against the
13 Attorney General or against the Office of the Attorney
14 General to seek injunctive relief or other review of the
15 actual request is precluded.

16 You could under -- under 1983, and we have
17 here, brought an action to have the statute declared
18 unconstitutional. And you can under Texas law,
19 notwithstanding the doctrine of sovereign immunity, bring
20 a lawsuit to have the statute declared unconstitutional.

21 What you can't do with the doctrine of
22 sovereign immunity is bring an action in state court for
23 a review of the reasonableness of the particular request
24 that you've received.

25 THE COURT: Why not?

1 MR. MARTENS: Because the doctrine of sovereign
2 immunity allows two types of lawsuit: You can bring an
3 action against the Office of the Attorney General to have
4 the statute declared unconstitutional, but that doesn't
5 get you review of the particular request. Or you can --
6 and so the -- the AG has said, well, you could bring an
7 *ultra vires* action against the Attorney General. And
8 that's not true.

9 And the reason it's not true is because what
10 the court in an unfortunately named decision, also named
11 *Patel*, also from 2015, this one from the Texas Supreme
12 Court, explained the doctrine of sovereign immunity. And
13 what they said is that, quote: To fall within the
14 *ultra vires* exception, a suit must allege that a state
15 official acted without legal authority or failed to
16 perform a purely ministerial act rather than attack an
17 official's exercise of discretion.

18 So we can't bring -- we cannot fit within the
19 *ultra vires* action because the Texas Supreme Court's
20 decision in *Patel* says you could bring a lawsuit saying
21 the statute's unconstitutional, but we can't bring the
22 action we want to bring, which is to challenge his
23 exercise of discretion with regard to this particular
24 RTE, and to raise our objections to its scope, its
25 breadth, its burdensomeness, whether or not it seeks

1 documents outside the jurisdiction, whether or not it
2 seeks documents that are actually conceivably covered by
3 state law. All the arguments you would normally make in
4 response to, for example, a civil investigative demand
5 and where you would -- when there's a civil investigative
6 demand, get an opportunity to litigate before a Texas
7 state court, we can't bring. *Patel* is perfectly clear on
8 this.

9 And so that's the problem. Under the doctrine
10 of state sovereign immunity, even if the statute didn't
11 preclude in its text and structure an action for -- for
12 the review, sovereign immunity precludes us from bringing
13 that type of case.

14 Now, the AG has identified a number of cases
15 that he thinks establish the right to bring an injunctive
16 action of that sort, where we would fight over the
17 particular exercise of discretion, to use *Patel's* words.

18 So he cites the Supreme Court's -- the State's
19 Supreme Court's decision in *Zurawski*, just this year.
20 But that case actually supports the very point I'm
21 making, where in the -- the relevant excerpt it says that
22 you don't plead a valid declaratory judgment act claim
23 when -- when you -- I'm sorry. You do -- you can bring a
24 valid claim when you challenge the validity of a statute,
25 but you can't have a valid claim where you challenge the

1 officer's actions taken in applying the statute.

2 That's the distinction the court drew. You can
3 challenge the statute. You can't challenge the exercise
4 of discretion under the statute. So *Zurawski* says
5 exactly what *Patel* says. It draws the same line.
6 *Ultra vires* is not for challenging the exercise of
7 discretion. It's for challenging the statute.

8 So the AG I suspect will also cite a case
9 called *Chesterfield Finance*, a case from 1959 in the
10 Texas Court of Civil Appeals. There's no discussion of
11 sovereign immunity in that case, and for good reason.
12 Because in that case the argument made is that, quote,
13 the AG was, quote, without authority, which is what is
14 permitted under the -- under the *ultra vires* exception.
15 Again, as *Patel* says, you can bring an *ultra vires* action
16 to say that the AG was, quote, without legal authority or
17 failed to perform a ministerial act, but you can't bring
18 one challenging his discretion.

19 In *Chesterfield*, though it doesn't discuss
20 sovereign immunity, it probably doesn't discuss it
21 because there the allegation was that the AG was, quote,
22 without authority.

23 The AG also relies on a case called *Alliborne*.
24 So there's two cases, actually, *Alliborne* and *Cotropia*
25 that the AG relies on, both unpublished decisions.

1 Neither of them establishes that our position is
2 incorrect with regard to sovereign immunity.

3 And the reason is because both *Alliborne* and
4 *Cotropia* were cases involving administrative subpoenas
5 issued by the Texas Medical Board. And the relevant
6 provision of the Texas Medical Board statute actually
7 authorizes litigation over subpoenas. Texas Occupational
8 Code, Section 153.007 authorizes there to be litigation
9 over subpoenas issued by the medical board and for that
10 litigation to be conducted by the AG.

11 And that's our point, is that if there's going
12 to be a waiver of sovereign immunity, it has to be by the
13 legislature. That's what *Patel* says and that's what the
14 consistent case law from the Texas Supreme Court says, is
15 that the AG can't waive sovereign immunity, only the
16 legislature can waive sovereign immunity, and the
17 *ultra vires* exception is one to challenge legal
18 authority, not discretion.

19 So for all those reasons, both because of the
20 text and structure of the RTE statute and because of
21 doctrine of sovereign immunity, we lack the mechanism
22 that *Patel* says you have to be -- you have to have for an
23 inspection, a request, an administrative subpoena in
24 order for those to be compliant with the Fourth
25 Amendment.

1 THE COURT: Let me elaborate briefly on where I
2 got started with whether this is a facial or an
3 as-applied challenge. Again, with all due respect, you
4 mention "as-applied" once or twice, but it's really not
5 the focus of your briefing. And I prepared for this as
6 though this was facial only.

7 The reason I say that is I would have thought I
8 would have seen much more with why -- like, for instance,
9 more about the fact that the AG's office is suddenly
10 interested in air transportation when, historically, the
11 State doesn't have any part to play in that.

12 Or the whole DEI request that the AG's Office
13 made, I would have thought that if this was an as-applied
14 challenge, I would have had a whole lot on that. And
15 there really wasn't.

16 MR. MARTENS: Well, the reason for that is
17 because those are the types of arguments we would make in
18 state court. In other words, if we were in there
19 challenging the statute -- challenging, sorry, the
20 request to examine, we'd be arguing the AG doesn't have
21 any authority to investigate this, he doesn't have any
22 jurisdiction over air -- airplane construction, he
23 doesn't have any jurisdiction --

24 THE COURT: Right.

25 MR. MARTENS: But those are the arguments I

1 want to make in state court.

2 THE COURT: I understand. And those are
3 as-applied arguments.

4 MR. MARTENS: No. I think that those are
5 arguments about --

6 THE COURT: Reasonableness.

7 MR. MARTENS: -- about his authority to
8 investigate his state law investigative authority. Those
9 are types of arguments I would be making in state court.
10 I'd be arguing that he's reaching outside the territorial
11 bounds of the State. I'd be arguing about whether or not
12 he can investigate DEI. I'd be arguing about whether --
13 but those are all arguments about the reach of his state
14 law authority. I'm making -- I'm saying the statute has
15 a more fundamental problem, which is I can't even get
16 that review.

17 THE COURT: I get that. And so earlier you --
18 when we got started, you said facial and as-applied, and
19 I told you I thought you had just made facial arguments.

20 MR. MARTENS: Right. And that's why I'm trying
21 to focus my argument here, is the statute as written, on
22 its face, does not allow for the judicial review I'm
23 entitled to.

24 THE COURT: Right. I'm not criticizing you.
25 I'm just -- I want to make sure that no matter what I'm

1 writing or what I'm dealing with, I'm on the right
2 target.

3 So, really, you haven't made an as-applied
4 argument for the reasons you just stated. You feel that
5 you can only make those in a state court action which
6 you're otherwise not authorized to ask -- or ask for,
7 given the RTE's language, right?

8 MR. MARTENS: I think that those arguments are
9 not *Patel* arguments is what I would say.

10 THE COURT: Okay.

11 MR. MARTENS: And so what I have made is a
12 *Patel* argument, and I do think I've made it -- I
13 understand Your Honor disagrees. I do think I made the
14 *Patel* argument as-applied. I have not made other
15 arguments, as we've identified, the DEI issue or the
16 aircraft manufacture issue, because those are the type of
17 arguments that I would want to raise in a state court
18 proceeding where I would say the AG can't issue this
19 request because it's beyond his state law investigative
20 power.

21 THE COURT: The reason I'm bringing all this up
22 is I'm wondering how much further I'm supposed to go past
23 just the review of the statute itself. You know, I
24 understand this litigation is centered on what's
25 happening between the Attorney General's Office and

1 Spirit. I get it.

2 MR. MARTENS: Yep.

3 THE COURT: But how much further afield do I go
4 in just reviewing the statute? How much do I get into
5 the facts of the case? For instance, I fully expect the
6 Attorney General's Office to say, oh, Your Honor we don't
7 have -- there's not a problem with the statute because we
8 provided 20 days' time, and we encouraged Spirit to seek
9 pre-compliance review. So for those reasons the statute
10 remains viable.

11 How much do I get into that when I'm making a
12 legal analysis as to whether or not the statute itself is
13 constitutional?

14 MR. MARTENS: We think that you analyze the
15 statute and only the statute. The AG cannot, through a
16 RTE and throwing some language in there, rewrite the
17 statute. As he said in *Annunciation House*, you
18 interpret the statute, quote, as written, not as the
19 Attorney General would like it to be written. The
20 Attorney General tries to add all these new provisions
21 into his May 13th RTE to say, Well, we wouldn't object to
22 jurisdiction and we'll give you these number of days.
23 That's not what the statute says.

24 THE COURT: All right. Let me ask you this:
25 You articulated somewhere in the briefing, but what edits

1 have been made to the statute by the AG's Office in this
2 case?

3 MR. MARTENS: So the AG can't edit the statute.

4 THE COURT: I understand that. But what have
5 they --

6 MR. MARTENS: The AG has tried to.

7 THE COURT: That's my question.

8 MR. MARTENS: Yeah, yeah. The AG has tried to
9 say, I think, two things: One, that we will give you I
10 think it's 20 days to comply. I don't remember if it's
11 10 or 20, but that's not the key point. And then the
12 other thing is he has included language in the May 13th
13 RTE that says that they would not object to jurisdiction.

14 THE COURT: What about the part of the RTE in
15 May that was served that said we won't object to
16 pre-compliance review?

17 MR. MARTENS: So that's not exactly what they
18 said.

19 THE COURT: Okay. Well, tell me what they
20 said.

21 MR. MARTENS: What they said is that they
22 wouldn't object to the jurisdiction of a state court if
23 we were to file an injunctive action. And here's that --
24 here's the problem with that: They can't waive sovereign
25 immunity. The AG cannot waive sovereign immunity. We

1 cite the cases in our brief that the only party that can
2 waive sovereign immunity is the legislature.

3 And so while the AG -- and sovereign immunity
4 is a jurisdictional issue under Texas state law, and
5 *Patel* explains that. And so when they say we won't
6 object to jurisdiction, meaning we won't raise sovereign
7 immunity, that doesn't solve anything. The court has an
8 independent obligation to evaluate whether it has
9 jurisdiction, and the AG can't waive that.

10 THE COURT: Any other edits? I mean, for
11 instance, the whole criminal penalty, haven't they
12 represented to you that they're not going to do that?

13 MR. MARTENS: They -- they have explained that
14 they don't believe they have the authority to enforce
15 criminally. Again, the question -- but they haven't
16 denied that there is statutory authorization for district
17 attorneys. And it makes no difference to the *Patel*
18 analysis who can enforce criminally.

19 THE COURT: I agree.

20 MR. MARTENS: I mean, that was true in *Patel*
21 itself. The police officer doing the inspection couldn't
22 do anything other than arrest. He couldn't initiate
23 prosecution. That had to be done by another office. And
24 the court didn't find just the fact that the prosecution
25 authority versus the arrest authority was divided.

1 Similarly here, the AG staff can arrest, and a local
2 district attorney will make a decision whether to
3 prosecute. Whether or not that person does prosecute,
4 again, is beside the point. There was no evidence that
5 anybody had been prosecuted in *Patel*.

6 But you -- but what's not required is to force
7 a business person to stand there on the spot and say,
8 well, I'm going to try -- I'm going to resist on the
9 theory that maybe the DA won't prosecute me.

10 The fact is there's -- again, we're bringing a
11 facial challenge. On its face the statute says that
12 we -- that the officials in my company, if they don't
13 comply, could be criminally prosecuted.

14 THE COURT: Any other edits?

15 MR. MARTENS: I don't believe that there are
16 any other provisions in the May 13th RTE that the
17 Attorney General has added to try to solve the statutory
18 problems.

19 THE COURT: Okay. Okay. Thank you.

20 MR. MARTENS: Thank you.

21 THE COURT: All right. Who is speaking for the
22 AG?

23 MR. BAASCH: I am, Your Honor. Thank you,
24 Your Honor. We're here in an unusual posture today.
25 Spirit is complaining that it cannot obtain

1 pre-compliance review of a subpoena that was issued
2 nearly five months ago.

3 Yet here we are undergoing pre-compliance
4 review, where Spirit has not suffered and is at no risk
5 of suffering, a single penalty for noncompliance over the
6 last five months.

7 Whatever flaws you might think exist in the
8 statute, and I intend to address all of them today, it
9 should be clear that Spirit is in no position to raise
10 them. The statute is not facially invalid. It can be
11 constitutionally applied in at least some applications,
12 including this one. And the court should not indulge
13 Spirit's invitation to apply the canon of constitutional
14 collision.

15 If Spirit's worst fears about the statute come
16 to light in a future setting, then that future
17 hypothetical subpoena recipient can raise an as-applied
18 challenge. Spirit's pitch for the Court to construe the
19 statute in the most unconstitutional way imaginable and
20 then to declare it facially invalid does not pass muster.
21 And I respectfully submit, Your Honor, I've never seen a
22 party stretch and strain like Spirit has here to say that
23 it has no rights under state law when we insist that it
24 does.

25 I'm happy to proceed today however the Court

1 would find most beneficial, but my plan is to proceed as
2 follows, with the assistance of a slide deck I've
3 prepared for the Court's convenience. With your
4 indulgence, I'll start that slide show now, and I can
5 hand Your Honor a paper copy of the deck as well, if you
6 would wish.

7 THE COURT: Sure. And I like making these a
8 part of the record. Do you have an extra copy that I can
9 give the clerk?

10 MR. BAASCH: I do, Your Honor.

11 THE COURT: I'll give her mine after this. Is
12 that your only copy?

13 MR. BAASCH: Well, I'm going to point at the
14 screen, so I'm happy to give her mine.

15 THE COURT: All right.

16 MR. BAASCH: If this is working, that is.

17 THE COURT: Sam, just mark that as
18 Defense Exhibit 1.

19 MR. BAASCH: Well I apologize, Your Honor.
20 While my assistant helps me with the -- well, here we go.
21 Fantastic.

22 Okay. As I was indicating before we got the
23 slide show up, I'd like to proceed as follows: First I'd
24 like to talk a bit about *City of Los Angeles v. Patel*.
25 That case is the basket where Spirit places all of its

1 proverbial eggs, so I think it's important to explain the
2 reasons why that case came out the way it did. Second,
3 I'll say a few words about the RTE statute. Third the
4 facts about why this particular RTE was issued to Spirit.
5 I don't think, because they're not making an as-applied
6 challenge, given the way they've litigated this suit, I
7 don't think the facts of the underlying investigation
8 really matter much. I don't think Your Honor needs to
9 burden yourself with understanding those facts to resolve
10 this motion.

11 THE COURT: I agree. But I'll share this with
12 you, and take this for what it's worth: It seems like a
13 very aggressive use of the RTE statute by the Attorney
14 General's office to target an aircraft manufacturing
15 company that is, again, incorporated in another state,
16 primarily operates in another state, and has, I don't
17 know, one-one-hundredth or one-one-thousandth of its
18 employees are in Dallas, the rest are somewhere else, for
19 aircraft accidents and crashes that are the primary
20 jurisdiction of other entities.

21 It just -- because it's such an aggressive use
22 of the Attorney General's perceived powers under the RTE,
23 it invites stricter scrutiny by a court. And that's one
24 of the reasons we're here, I think. So I just wanted to
25 share that thought with you.

1 MR. BAASCH: Certainly. I understand that,
2 Your Honor. And that's why I'll explain a little bit
3 about the investigation and why we do think it's within
4 the scope of our authority.

5 Fourth, I'd like to spend the bulk of my time
6 explaining the many options that Spirit has for
7 pre-compliance review and addressing some of the things
8 my friend on the other side said before me. And then,
9 fifth, I'll address where all of their other arguments
10 fail.

11 So starting with *Patel*, I think the facts of
12 *Patel* are pretty straightforward. There was a Los
13 Angeles municipal ordinance that required hotels to keep
14 certain records and to share those records with law
15 enforcement whenever law enforcement showed up and
16 demanded them. The court held that the ordinance was
17 facially unconstitutional.

18 And I think there was three features of that
19 ordinance and the city's application of it that really
20 explain why that was. The first critical feature was
21 that the ordinance allowed the City to conduct
22 on-the-spot arrests, and the court emphasized this in its
23 opinion. I think that's extremely important because,
24 under the court's case law, the availability of
25 pre-compliance review is necessary before the subpoena

1 recipient before the other party suffers some kind of
2 penalty.

3 So in *City of Los Angeles v. Patel*, the penalty
4 is arrest on the spot if you resist. You have no ability
5 to get pre-compliance review, because either you comply
6 on the spot or you're subject to arrest. That's not the
7 case here, as I'll explain later.

8 The second critical feature of that case is
9 that the City said in its briefing that the ordinance had
10 to be enforced this way; that there could not be
11 pre-compliance review. The City said it would be
12 worthless, it would be futile, to allow hotel operators
13 to have time, such as under an administrative subpoena,
14 to actually gather up the documents and submit them.

15 The City complains in its briefing to the
16 Supreme Court that, if they allowed hotel operators to do
17 that, the hotel operators might destroy the records,
18 might falsify them, et cetera, et cetera. And so they --

19 THE COURT: But isn't that the same argument
20 that one of your colleagues made out with -- in
21 *Annunciation House*.

22 MR. BAASCH: Yes. And I'm very familiar with
23 the *Annunciation House* case, Your Honor, and I'm very
24 happy to talk about it. I can talk about it now. I was
25 going to get to it on a future slide.

1 THE COURT: No. You keep going. I just -- I
2 couldn't help it.

3 MR. BAASCH: I will emphasize about
4 *Annunciation House*, and I'll say more about this later,
5 that an *Annunciation House* is an example where an
6 as-applied challenge might have more teeth. Maybe the
7 statute is unconstitutional in certain applications. I'm
8 certainly not saying that about *Annunciation House*.
9 There are special facts pertinent to the *Annunciation*
10 *House* case that made that case special. But it's really
11 an as-applied challenge that hones on those particular
12 facts. The facts here are nothing like that.

13 THE COURT: Well, we will talk about that more.
14 I'm just sharing with you the AG's Office made the very
15 same argument as it relates to we have to get them right
16 away, otherwise, the receiving party might destroy the
17 evidence. That's the same argument you made in
18 *Annunciation House* was made in *Patel* in the Los Angeles
19 case.

20 MR. BAASCH: Certainly, Your Honor. I think
21 that the core distinction that I just want to emphasize
22 here is that the City in *Los Angeles v. Patel* said they
23 needed the records on the spot every single time.

24 *Annunciation House* is just one example, the
25 only example in the last 100-plus years, where our office

1 has taken that position that any party to this litigation
2 can even identify.

3 The third point that I want to emphasize about
4 *City of Los Angeles v. Patel* is that the court took the
5 City at its word, emphasizing that the City did not even
6 attempt to argue that pre-compliance review could ever
7 occur. And it's obvious from the City's briefs why the
8 court made that -- reached that conclusion. The City
9 said it would never allow pre-compliance review. I'm
10 going to argue the very opposite today.

11 So that's *City of Los Angeles v. Patel*. The
12 second point that I want to discuss is the RTE statute
13 just very briefly. I think we're all probably familiar
14 with the RTE here.

15 One point I'd emphasize in addition to just the
16 relevant textual provisions that I have on the screen is
17 that the statute is over 100 years old. It's not
18 elegantly written. It's not how a legislature would
19 write a statute like this today. The statute was written
20 decades before some of the Supreme Court seminal case law
21 on administrative subpoenas, searches, and the like. It
22 was written at the advent of the administrative state and
23 the federal government, much less the state government.
24 It's certainly not elegantly crafted. And I think that
25 that's why there's some trickiness to understanding

1 exactly how it should apply in the 21st century.

2 None of that makes it unconstitutional. So
3 four -- very briefly, four provisions that I think are
4 relevant here. The first is that corporations shall
5 permit the Attorney General access to records. The
6 second is that we must make a written request to the
7 corporation, and then the corporation shall immediately
8 give us the records. The third is the potential
9 forfeiture of the right to do business in Texas if a
10 corporation fails to comply. And the fourth provision is
11 the potential -- is the misdemeanor penalty.

12 So next I'd like to say a word about the
13 underlying investigation, particularly because Your Honor
14 asked about it. I think it's public record at this point
15 that there have been very many highly public incidents
16 about defective parts on Boeing planes. Spirit is a
17 parts supplier for Boeing, including for certain parts
18 that have been the subject of those public controversies.

19 So the vast majority of the things that we ask
20 about in the request to examine, the vast majority of the
21 records that we're seeking, are related to allegations
22 that were made in a class action complaint against
23 Spirit. That class action complaint is very thorough. I
24 don't think it's necessary for Your Honor to read it.
25 But if you do, it would -- I think it would underscore

1 why the State has so many concerns with Spirit.

2 And the class action complaint alleges in over
3 100 places -- I think that the word "misleading" occurs
4 over 100 times in this class action complaint, that
5 Spirit repeatedly misled investors and the public as to
6 certain flaws in its manufacturing process and in the
7 parts that it was supplying to Boeing.

8 Regardless of how many employees Spirit has in
9 Texas, that's a highly relevant set of facts for Texans,
10 because Texans fly on Boeing aircraft, obviously. And so
11 Texans are indirect consumers of Spirit parts.
12 Regardless of whether Spirit had a facility in Dallas or
13 not, this is something the Attorney General's office
14 would be entitled to investigate and would have a very
15 strong interest.

16 THE COURT: What do you mean, if they didn't
17 have it -- they have no presence here. You wouldn't --
18 what did you mean by that?

19 MR. BAASCH: So it's just like any -- any
20 corporation doing business -- doing business nationally.
21 It might be headquartered in a specific place, but
22 they're sending out goods and services that affects the
23 country nationally.

24 You can imagine a pharmaceutical company that's
25 headquartered in --

1 THE COURT: They do. But they do it out of
2 Kansas. The outfit up in Dallas is just more repair and
3 rehabilitation of parts. I mean, I hear what you're
4 saying, but this strikes me as an enormous reach to
5 target these investigations, when none of the crashes
6 happened in Texas. The bolt didn't fall off in Texas. I
7 don't understand the DEI request, how they relate to this
8 investigation. This is your weakest argument. I kind of
9 want to stay focused on facial.

10 MR. BAASCH: Certainly, Your Honor. And I
11 would like to as well. I'll move past the underlying
12 facts of the investigation, although I'm happy to answer
13 more questions about them if you wish.

14 THE COURT: Well, I want to let you go forward
15 if you think the facts of the underlying investigation
16 have importance or relate to whether or not the statute
17 remains viable. If you -- if those underlying facts you
18 believe they are, then I want to hear you. But I
19 understand -- I don't have blinders on when I have a
20 facial analysis here. But I -- the underlying facts I
21 don't think are as relevant. And, if I'm wrong, somebody
22 needs to tell me.

23 MR. BAASCH: Certainly, Your Honor. I do not
24 think the facts are relevant to the facial challenge, and
25 that's because it's well established, under a facial

1 challenge, it's Spirit's burden to show the statute is
2 unconstitutional in every single application.

3 Now, an as-applied challenge might, as
4 Your Honor indicated earlier, those underlying facts
5 might be quite a bit more relevant if we were just
6 talking about this RTE. But they're saying the entire
7 statute is unconstitutional.

8 THE COURT: Right. Right.

9 MR. BAASCH: And I think, respectfully,
10 Your Honor, they have to make the facial argument. They
11 really don't have an as-applied argument because the
12 *Patel* argument doesn't work as-applied. We gave them 20
13 days. So this whole argument about immediacy, they've
14 got no options, it just doesn't work.

15 THE COURT: You gave them 20 days, but by what
16 authority did you have the right to give them 20 days?
17 By what authority do you have the right to give them 10
18 days or 30 days? In other words, it's clearly a
19 discretionary act on the part of the Attorney General
20 that's not written into the statute at all.

21 MR. BAASCH: I'm happy Your Honor asked that
22 question. That was going to be one of the places I go to
23 next. The statute authorizes the Attorney General to
24 seek immediate access. That's -- that's basically the
25 fact pattern of *Annunciation House*. We thought that that

1 authority was -- it was necessary to use that authority
2 in its strongest form in *Annunciation House* because of
3 facts specific to that case. But the statute doesn't
4 insist that we must demand records immediately. I don't
5 think it would make any sense if it did. We're the ones
6 that has to send the written notice to the corporation
7 saying we want records in the first place. Naturally, we
8 can decide when that written request is going to be
9 submitted, and I think it's natural to infer that we can
10 decide when the records must be produced.

11 THE COURT: But you've used words like
12 "natural" and "infer" not in the statute. Why aren't
13 they in the statute?

14 MR. BAASCH: I think that goes back to my point
15 about when the statute was written, Your Honor. It's
16 over 100 years old. No legislature would write the
17 statute exactly the same way today. There are many
18 administrative subpoena statutes in the Texas Code that
19 are written differently and that I think account for
20 developments that occurred in the 20th century. These
21 statutes are just written in a more elegant way today.

22 But, as we pointed out in our briefs, it's
23 common for courts to look at subpoena statutes like this
24 that don't have a time for compliance and to read in a
25 reasonable time to comply qualifier. We cited an opinion

1 from Judge Jordan to that point. I think it's the *ESI* --
2 forgive me, Your Honor. I don't have the name of the
3 case memorized -- case. And Judge Jordan in that case
4 cited to a number of other federal cases. There's a
5 Fourth Circuit case about grand jury subpoenas,
6 explaining how courts will read in a reasonable time
7 qualify if there is no set time frame for compliance.

8 And I think, Your Honor, all we ask is that the
9 same apply here. There's no reason why the same analysis
10 shouldn't apply here. If Your Honor were, by contrast,
11 to take Spirit's invitation and to read "immediate" to
12 mean it has to be on the spot, it can never be later --

13 THE COURT: I know. But that's exactly what
14 you -- maybe it was you, but one of your colleagues
15 argued in *Annunciation House*. Immediate means immediate.

16 MR. BAASCH: And the only point I think that's
17 relevant here from that posture, or I think the reason
18 why *Annunciation House* is highly distinguishable, I
19 should say, is that we took the position there that we
20 had authority to seek it on the spot. The reason why we
21 took to that position in *Annunciation House* is because
22 there were strong indications that *Annunciation House* was
23 engaged in criminal conduct and would destroy documents.
24 And so our position is, hey, this statute that we usually
25 use to allow 20 days for --

1 THE COURT: Can I ask you, did the DA -- was
2 this El Paso County?

3 MR. BAASCH: It was.

4 THE COURT: Did he invite the AG's Office in to
5 conduct this criminal investigation?

6 MR. BAASCH: I'm not sure I'm able to make --

7 THE COURT: I don't think he did. So by what
8 authority did the Attorney General's Office have to
9 investigate a crime that occurred in El Paso?

10 MR. BAASCH: Certainly, Your Honor. So the
11 Attorney Generals Office is always able to investigate
12 corporations chartered in Texas for compliance with their
13 governing documents or for compliance with all of the
14 laws of the State of Texas. That's in the Business
15 Organizations Code 12.153.

16 THE COURT: I know. But -- but you're -- so
17 you're telling me, then, that they're allowed to conduct
18 criminal investigations under that rubric, right?

19 MR. BAASCH: Allowed to investigate crimes and
20 then impose civil penalties.

21 THE COURT: Okay. But then on the flip side,
22 you're telling me the Class B misdemeanor that's
23 authorized in the RTE statute, the Attorney General's
24 Office doesn't have the independent right to pursue that
25 criminally.

1 MR. BAASCH: That's absolutely right,
2 Your Honor.

3 THE COURT: That just seems a little
4 180 degrees to me.

5 MR. BAASCH: Well, the state of the Texas high
6 courts case law on this might not be the most intuitive,
7 but the Texas High Criminal Court has concluded we cannot
8 prosecute, full stop, period, without a district
9 attorney.

10 By contrast, we can investigate crimes and then
11 impose a civil penalty, such as forfeiture of the
12 corporate charter. That's what's at issue in
13 *Annunciation House*. The crimes are the predicate for the
14 penalty of corporate charter forfeiture.

15 THE COURT: And isn't that also here with the
16 *quo warranto* proceedings that are authorized if you want
17 to, to go against Spirit?

18 MR. BAASCH: If they -- if they refused to
19 comply, that be an authorized penalty. That's right,
20 Your Honor.

21 THE COURT: As it relates to the Class B
22 misdemeanor, could not the AG's Office just marry up with
23 a DA, pick a DA. I don't know how many we have. We
24 have, what, 254 counties. We have fewer DAs. But
25 couldn't the AG's Office just marry up with the

1 cooperating DA and then pursue charges, if it wanted to.

2 MR. BAASCH: Potentially, Your Honor. We're
3 not hiding from that fact here.

4 THE COURT: Okay. So the AG's Office may not
5 have statutory authority to move forward criminally, but
6 they do have the ability to do so under certain
7 circumstances.

8 MR. BAASCH: Well, I think I would caveat that,
9 Your Honor, by saying we need -- we would need a district
10 attorney to ever initiate a criminal action under the
11 current state of --

12 THE COURT: I know. But the current world
13 we're living in, you can find a DA that will help you
14 with that.

15 MR. BAASCH: Sure, Your Honor. We're not
16 saying that it's impossible that a misdemeanor -- that
17 the misdemeanor provision could ever be enforced. But
18 they're making a facial challenge. They have to show
19 it's unconstitutional in every application, and they
20 can't point to a single application where a district
21 attorney has ever enforced that misdemeanor provision.
22 And certainly we have no ability to do it on our own.

23 THE COURT: What does that have to do with the
24 facial analysis, that it's never been challenged before?
25 I mean, clearly, we wouldn't be talking if we were in the

1 1940s, for instance. Here we are where we are. We're
2 talking in the wake of *Los Angeles v. Patel* and some of
3 the other more recent cases that kind of changed the
4 analysis and changed the -- and hardened the review of a
5 100-year-old statute. At least that's my opinion on the
6 subject.

7 I'm sorry. I told you that I'd interrupt you,
8 but I don't want to do so. I want you to -- I want you
9 to continue with your arguments.

10 MR. BAASCH: Certainly, Your Honor. Well, I
11 want this to be most useful for the Court, so I'm happy
12 to take your questions instead of going through my
13 presentation.

14 THE COURT: Well, I keep -- I keep getting you
15 off your game. I don't mean to do that. I want you
16 to -- I'm not going to interrupt you again. Go ahead.

17 MR. BAASCH: Thank you, Your Honor. I think
18 this slide is actually the most critical one in the whole
19 slide deck.

20 Spirit has many options for pre-compliance
21 review. The first one I want to go over is an
22 *ultra vires* claim seeking injunctive relief. My friend
23 on the other side made some representations about the
24 availability or not of an *ultra vires* claim that are
25 simply not true, they do not accurately convey what the

1 Supreme Court of Texas decided just last term in *State v.*
2 *Zurawski*.

3 So in *State v. Zurawski*, the Supreme Court
4 concluded that a declaratory judgment action was
5 available to challenge the constitutionality of the
6 statute at issue there. The Supreme Court of Texas also
7 said -- and I have the footnote on-screen here -- that a
8 plaintiff who alleges a state actor is improperly
9 applying the law through an enforcement action may bring
10 an *ultra vires* claim against that official.

11 That's exactly what we have said that Spirit
12 can do here. A declaratory judgment action according to
13 *State v. Zurawski* might not be available but an
14 *ultra vires* claim absolutely is.

15 THE COURT: So break that down for me. You're
16 saying that Spirit would have the right to file an action
17 against the AG's Office. And what would their claim be?

18 MR. BAASCH: It would be an *ultra vires* claim
19 seeking injunctive relief. And we -- there's an example
20 on the next slide where a party did this under the RTE
21 statute, did this exact thing. Granted, it was many
22 decades ago, but I don't think the Court should strain to
23 conclude that pre-compliance review is not available
24 when, by all indications, it is.

25 THE COURT: No. All right. I'm going to

1 apologize again. I've lied to you too many times. I'm
2 probably going to keep interrupting. So I want to break
3 down the *ultra vires*. As I understand the way that
4 works, they would file an action saying the AG doesn't
5 have the authority to do this, and then we would look at
6 the RTE statute and we'd go it appears -- and trust me on
7 this, I'm not quibbling with the fact that attorney
8 generals across to United States have the right to seek
9 information from corporations that are operating in their
10 state. That's not what we're talking about.

11 So they would file the action saying the
12 Attorney General is out of line here, Judge. They're
13 operating outside the rubric of the RTE statute. But if
14 you look at the RTE statute, that wouldn't be the case.
15 I think you'd say, No, the AG is operating under the
16 authority given to it under the RTE statute. That's
17 where it ends. There's not a reasonableness inquiry into
18 what the Attorney General's Office actually asked for.

19 MR. BAASCH: I could tell you exactly how they
20 would make their argument in state court. I'll almost
21 write the petition for them from the podium here.

22 The *ultra vires* claim is available if we are --
23 if the Attorney General is not complying with the statute
24 or with the Constitution. The way that they can make a
25 reasonableness argument is to say that the Fourth

1 Amendment requires the Attorney General to act reasonably
2 when he issues administrative subpoenas. We don't
3 believe this administrative subpoena was reasonable
4 because of reasons X, Y, and Z, and we're saying it's not
5 in compliance with the Fourth Amendment for that reason.

6 Reasonableness review is a Fourth Amendment
7 doctrine, and the *ultra vires* claim is available for
8 constitutional claims.

9 THE COURT: But the RTE statute that gives the
10 AG's Office the authority to seek this information
11 doesn't say anything about reasonableness.

12 MR. BAASCH: That's right, Your Honor. And I
13 go back to the fact that it's over a 100-year-old
14 statute, but the statute must be interpreted against the
15 backdrop of the Constitution. The Texas Supreme Court
16 has said that repeatedly, that you should not read the
17 statute to just carve out the Fourth Amendment and say it
18 doesn't exist in this world. No. The Fourth Amendment
19 should be incorporated into how you interpret the
20 statute, the Fourth Amendment commands reasonableness
21 review, and so they could go to a Texas State Court
22 tomorrow and they could say we want our reasonableness
23 review. Because if this isn't reasonable, then the Texas
24 Attorney General has violated the Fourth Amendment. They
25 can do that. It's our position that they can do that,

1 and I think the case law reflects they can do that.

2 *Zurawski* says that basically explicitly here.

3 If you'd go back -- forward one slide, Matt.

4 Thank you.

5 And then this is an example -- this
6 *Chesterfield* case is an example of an RTE recipient, so
7 it's this exact context, bringing an action for an
8 injunction pre-compliance. So here you see it. A Texas
9 Intermediate Appeals Court, I think one that this Court
10 should defer to or maybe must defer to under *Erie*,
11 entertaining an action for an injunction.

12 My friend's only response to this case was to
13 say, well, that case didn't actually address sovereign
14 immunity. And, granted, that's technically true. But I
15 don't think we should just presume that the availability
16 for review that this court found would not be available
17 in a subsequent case.

18 I mean, maybe the Texas Supreme Court would say
19 that. I don't think they would, but we shouldn't presume
20 it, especially when the State Intermediate Court of
21 Appeals has entertained the exact -- almost the exact
22 suit that Spirit wants to bring here.

23 So that's the *ultra vires* claim for injunctive
24 relief, but there's other options, too.

25 The second option would be subpoena recipients

1 as a general matter under Texas state law can achieve
2 pre-compliance review through an action for protective
3 order under the State's generally applicable rules of
4 civil procedure. The *Alliborne* case recognized this.

5 This was a subpoena recipient that filed a
6 petition for a protective order. My friend from the
7 other side indicated, well, that's only because in that
8 specific case the medical board's governing statute, the
9 occupation code, allowed for that remedy. And so I guess
10 Spirit is saying it wouldn't be available here, but it is
11 available here.

12 The recipient in that case sought a protective
13 order under generally applicable rules of civil
14 procedure, Rule 176.6 and 192.6. Spirit can take
15 advantage of the same generally applicable rules of the
16 civil procedure to get up -- to seek a protective order.
17 And this is another Texas Intermediate State Court of
18 Appeals opinion recognizing that this form of review is
19 available, and I don't understand how Spirit could come
20 here and insist that that just shouldn't be followed.

21 You see it again in another -- from another
22 court that this one -- that this Court is bound by, the
23 Fifth Circuit. I recognize it's an unpublished opinion,
24 but the Fifth Circuit here recognizing that a protective
25 order is available in Texas State Court.

1 A subpoena recipient can move for a protective
2 order in Texas State Court. The Fifth Circuit did not
3 say there that's only available for Texas Medical Board
4 subpoenas. No. It's generally available.

5 THE COURT: But is what you've given to Spirit
6 probably characterized as a subpoena?

7 MR. BAASCH: I think it is, Your Honor. And
8 the reason why it is -- and our opening brief has some
9 case law on the difference between a search and a
10 subpoena. A search implies that some entry has occurred
11 and that something has been taken. A subpoena is just a
12 document, like a grand jury subpoena, requesting
13 information. And that's exactly what the request to
14 examine --

15 THE COURT: Just curious. I don't recall.
16 What was your demand styled as?

17 MR. BAASCH: It's styled as a request to
18 examine.

19 THE COURT: Okay.

20 MR. BAASCH: The -- I recognize that the
21 language of the letter is a little wonky or the styling
22 is a little wonky. We're just borrowing that from the
23 statute. But the substance of the letter, the first page
24 of the letter, says: Produce these records within 20
25 days. And it tells Spirit who to send the records to.

1 It tells them they could send them digitally. It's
2 absolutely a subpoena, Your Honor. It doesn't
3 contemplate a search. It doesn't contemplate entry.
4 There's no example in the RTE statute's enforcement
5 history ever of physical entry occurring or a physical
6 search occurring.

7 So that's their protective order option.

8 And then they have a third option. I think
9 candidly I'll recognize this is the weakest option.
10 Maybe in light of *Zurawski* maybe it's no longer on the
11 table. But the *Humble Oil* case said that an action for a
12 declaratory judgment is available.

13 *Zurawski* didn't overrule *Humble Oil*. *Humble*
14 *Oil* is directly on point. I would submit that, until the
15 Texas Supreme Court says otherwise, *Humble Oil* provides
16 that a declaratory judgment action is available.

17 But, of course, you don't need to there,
18 because the *ultra vires* claim and the option for
19 protective order are both clearly available under
20 recent -- very recent Texas Supreme Court, Texas Court of
21 Appeals, and Fifth Circuit precedent.

22 THE COURT: And that's where I'm confused by
23 what a facial analysis of the statute is as opposed to
24 what the AG's Office and what has been adopted over
25 100 years. And that is it seems to be what's happened

1 is, clearly, the statute itself is -- is not
2 appropriately written in today's day and time. It's not.

3 But it's being "Frankenstein-ed" and held
4 together through representations by folks like you from
5 the AG's Office that we don't do that. We provide the
6 20-day grace period most of the time. We'll give
7 extensions. We're very reasonable people. And we
8 encourage -- we now put the language in our request to
9 examine than you can seek pre-compliance. But all of
10 that is not in the statute itself.

11 And whether it's this AG or the next AG, can't
12 the next AG just say, no, we're not -- we're not going to
13 provide the 20 days. We're just going to move forward.
14 And I know what your answer would be: Well, Judge, that
15 would be the perfect vehicle, then, by which to look at
16 whether or not the statute -- but it goes back to a
17 facial analysis as opposed to an as-applied analysis.

18 I thought I was supposed to just look at how
19 this statute is worded and whether it authorizes what the
20 Attorney General's Office is seeking.

21 MR. BAASCH: Certainly, Your Honor. I've got
22 two responses there. The first response is that the
23 facial challenge burden for them is to show that it's
24 unconstitutional in every application. I think what
25 Your Honor is asking is, Well, how far can I look to see

1 what the possible range of applications are?

2 I don't think you just need to stick to the
3 strict terms of the statute for a number of reasons. One
4 is that Texas courts are supposed to strain to read
5 statutes in a constitutional way, not in an
6 unconstitutional way. So I think you indulge every
7 presumption that the statute can be interpreted
8 constitutionally.

9 Two, I think you look at the backdrop of case
10 law that exists in Texas showing, both in the RTE context
11 and in other highly related contexts, that pre-compliance
12 review is available. That's not written into the
13 statute; I recognize that, Your Honor. But it is written
14 into the Texas State Code and the protective order
15 provisions. It is recognized by the Texas Supreme Court.
16 I don't think you can just ignore all that.

17 THE COURT: I don't think I can either, but
18 you-all make the argument I shouldn't even look at
19 *Annunciation House*. It's hard for me to do, because the
20 AG's Office speaks with one voice, not two mouths. And,
21 recently, colleagues of yours in El Paso have said, Well,
22 yeah, that may be good in most cases. But in this one
23 we're moving forward without pre-compliance review.
24 We're not -- we're not suggesting for a moment that
25 *Annunciation House* has the right to pre-compliance

1 review. That's what troubles me here, is the enormous
2 amount of discretion that's been given to the AG's
3 Office.

4 MR. BAASCH: Well, two points about
5 *Annunciation House*, Your Honor. The first point is that
6 I don't think Your Honor needs to ignore that case. In
7 fact, I think that case is quite fatal for Spirit. It
8 shows that an as-applied challenge can be made and
9 perhaps made successful if the facts are right.

10 So if the future Attorney General that you're
11 hypothesizing says, No, no, no. Immediate. You must
12 give it to us right now. We're going to show up at your
13 door and we're going to demand the records right now.
14 Well, you've got an as-applied challenge to the statute
15 there. That's what *Annunciation House* did. Maybe that
16 will be successful.

17 We take the position that *Annunciation House*
18 was wrongly decided -- it's on appeal to the Supreme
19 Court of Texas -- because there were exigent
20 circumstances in that case that necessitated the
21 immediate access. But that's a one-off. That's an
22 as-applied challenge. Those are very unique facts. The
23 only reason we demanded immediate access was because of
24 those unique facts. And the only reason we think it
25 could be constitutionally applied in that setting is

1 because of those unique facts.

2 By contrast, in the mine-run of cases, we don't
3 demand immediate compliance, and we don't think it can be
4 constitutionally demanded either. If there is no
5 exigency, we don't think we can just say give us the
6 documents right now for no pre-compliance review. And
7 that's why with Spirit, 20 days -- actually, it's been
8 five months, really. No compliance by them and no
9 penalties either.

10 THE COURT: But do they sleep well at night
11 knowing that the next day you could file that action? I
12 mean, that's part of the problem here, is the chilling
13 aspect of the what the Attorney General's Office could
14 do. You keep telling me, Oh, but we're benign. We don't
15 do that. We're nice. But how does the other side know
16 when the hammer may drop?

17 MR. BAASCH: So Spirit knows the hammer won't
18 drop before the time to comply lapses. And right now,
19 pursuant to a stipulation, they have until at least
20 November 4th. We can't do anything before then because
21 they're not in noncompliance before November 4th.

22 But I would also like to talk for just a
23 second, Your Honor, about what would happen if we were in
24 that noncompliance world. Nobody from Spirit is getting
25 arrested or prosecuted. What would happen -- and this

1 happened in *Annunciation House* -- is that we might, if we
2 decide it's warranted, petition for what's called a
3 *quo warranto* action to revoke their corporate charter in
4 Texas.

5 And in that context they can get all the review
6 they want. They can say as a defense to the *quo*
7 *warranto*, Well, hey, this RTE was invalid, it was
8 unreasonable, et cetera, et cetera. They're still going
9 to get pre-compliance --

10 THE COURT: That's not pre-compliance review.
11 That's pre-sanctions review and post-review. That's your
12 weakest argument. So ...

13 MR. BAASCH: Sure, Your Honor. I don't want to
14 get hung up on that point here, because that's obviously
15 not where we are. But, if I may, I would just like to
16 very briefly address a few other points by Spirit.

17 So the first point, and we talked about this a
18 bit, is that the statutory command of immediate
19 compliance implies a reasonable time frame. There's
20 ample case law supporting that proposition, including
21 Judge Jordan's opinion and the many cases that he cited
22 there.

23 The second thing I want to emphasize -- I think
24 we've talked a little bit about this -- no possibility of
25 physical entry. Never has occurred. None of the parties

1 in this litigation have ever identified it occurring.

2 The third point I want to emphasize -- this is
3 again from the *Zurawski* opinion -- is that the Supreme
4 Court has recognized that action -- this is analogous,
5 not directly these circumstances, Your Honor. But it is
6 recognized that parties don't even have standing to
7 enjoin the Attorney General from moving forward with
8 criminal sanctions because the Attorney General has no
9 authority to proceed with criminal sanctions.

10 I think this goes to your point about district
11 attorneys. Yes, it's possible. It's highly speculative
12 that we could partner up with a district attorney and
13 prosecute that misdemeanor. But the Supreme Court -- the
14 Supreme Court of Texas knows that, but it has
15 nevertheless recognized that parties generally don't even
16 have standing to complain about the Attorney General
17 initiating criminal enforcement.

18 I think that goes to the fact that this is a
19 facial challenge. They've got to show it's
20 unconstitutional in every application, not just that,
21 hypothetically, one day maybe we'd partner up with a
22 district attorney.

23 The final point is *Annunciation House*.
24 *Annunciation House* we think was wrongly decided. It's on
25 appeal. But the most critical point I want to emphasize

1 about *Annunciation House* is that the court there actually
2 allowed us to issue more administrative subpoenas under
3 the statute. And the court simply said, I, the court, am
4 going to conduct pre-compliance review of those
5 subpoenas.

6 We've got no objection to a court here
7 conducting pre-compliance review of Spirit's subpoena.
8 That's why we've extended the deadline by five months.
9 Even *Annunciation House*, by far their best case, does not
10 go as far as they need it to go.

11 And with that, Your Honor, I -- that's the end
12 of my presentation.

13 THE COURT: Can I ask you -- and this is pure
14 ignorance -- were there other means by which you could
15 have gotten information from Spirit? In other words, I
16 don't want to dive into the as-applied analysis. But the
17 AG's Office chose the RTE vehicle by which to acquire
18 this but make the argument in briefing that we're trying
19 to advance an interest to protect the people of Texas for
20 the Texas Deceptive Trade Practices Act or the business
21 code. Why didn't you lay down an administrative subpoena
22 under those provisions to get the information? Was there
23 a tactics reasons?

24 MR. BAASCH: Certainly, Your Honor. There is a
25 number of statutes that -- more modern statutes that

1 authorize administrative subpoenas. But they're all
2 different. They don't necessarily provide the scope that
3 the RTE statute provides. And Your Honor raised the
4 Deceptive Trade Practices Act statute. That -- to issue
5 a subpoena under that statute, we have to be seeking
6 evidence of misleading or deceptive practices. And our
7 experience, and I think what Spirit would likely argue
8 here, is, well, a lot of what you're seeking couldn't
9 plausibly be related to misleading or deceptive
10 practices. Therefore, we're not going to give it to you.
11 And you've got to have that whole fight of whether it
12 comes within the scope of that relatively narrow grant
13 for an administrative subpoena.

14 But the business organization code with the
15 request to examine statute, we can seek records more
16 generally.

17 THE COURT: Okay. Okay. Thank you.

18 MR. BAASCH: Thank you, Your Honor.

19 MR. MARTENS: Briefly, Your Honor?

20 THE COURT: Yeah. You guys take your time.

21 MR. MARTENS: Well, thank you for that.

22 THE COURT: I'm not in a hurry.

23 MR. MARTENS: I appreciate that.

24 Your Honor, so I'd like to cover a couple of
25 points here. And, first, my colleague made great -- made

1 a big deal about the arrest on the spot language in
2 *Patel*. The AG can arrest -- criminally arrest on the
3 spot for failure -- for the misdemeanor violation of
4 failure to comply with an RTE. We cite that in our
5 summary judgment opposition brief. Texas criminal
6 Procedure, Section 2.122 defines a peace officer as
7 investigators commissioned by the Attorney General. And
8 Section 14.01(b) says a peace officer may arrest an
9 offender without a warrant for any offense committed in
10 his presence or within his view.

11 THE COURT: Right. And I agree. They can make
12 the arrest; they can't make the prosecution.

13 MR. MARTENS: Right. And they couldn't in
14 *Patel*. The same thing. The police officers in *Patel*
15 couldn't make the prosecution. They had to go to another
16 authority to prosecute.

17 THE COURT: But Mr. Baasch would say that's not
18 what's happening here. We're not making that threat. We
19 didn't do that in *Annunciation House*. We haven't done
20 it. We've got an investigator who provided an affidavit
21 who said he's not aware of it ever been done. Does that
22 change --

23 MR. MARTENS: *Patel* was a pre-compliance
24 review, and no one was prosecuted there. And the court
25 found the statute facially unconstitutional. Why?

1 Because the -- what the court said is that you decide
2 facial constitutionality based on what the statute says,
3 not what the AG doesn't do.

4 In other words, what they're in here arguing is
5 saying: Don't worry about the statute. We're not going
6 to enforce it. And so that's an example of when it won't
7 be unconstitutionally applied. Respectfully, that's
8 nonsense. You can't say, if I don't apply the statute,
9 there's an example of it not being applied
10 unconstitutionally.

11 And that's not just my view. That's the
12 Supreme Court's view in *Patel* where they said on page --
13 on page 419, quote: But when assessing whether a statute
14 meets the standard, meaning the standard for a facial
15 challenge, the court has considered only applications of
16 the statute in what it actually authorizes or prohibits
17 conduct.

18 In other words, you don't look at what they
19 won't do if they don't apply the statute. You look at
20 what the statute authorizes them to do, and you say: Is
21 that constitutional? Because for good reason. We don't
22 leave citizens to sit there and decide on the spot, Will
23 the AG exercise his discretion not to enforce the statute
24 or won't he? Because faced with that, any sane citizen
25 would say I'm not taking that risk. I'm going to comply.

1 I'm not going to rely on the good graces, or as the AG
2 put it, "a matter of grace" from the Attorney General.

3 And so that's the problem. It's not that the
4 AG can say I won't enforce it. The facial problem is
5 that he can enforce it. And as written, or to use
6 *Patel's* words, when you look at, quote, what it actually
7 authorizes or prohibits, when you look at that, that's
8 the problem. What it actually authorizes is criminal
9 prosecution. And any -- any and every application of
10 that, that possibility being out there, that threat being
11 out there, is exactly what renders the statute
12 unconstitutional, because every single citizen who
13 receives an RTE is faced with that threat and the choice
14 of whether to comply or not comply.

15 The AG might say I won't do it. That's not
16 binding. You couldn't bring a lawsuit later and say,
17 Well, you said you weren't going to do it.

18 THE COURT: Is it cured by the fact that
19 they -- the Attorney General's Office has not done that
20 and has acknowledged the need for pre-compliance review
21 and encouraged you to do that? Does that cure the
22 problems with the statute.

23 MR. MARTENS: I just come back to *Patel*. The
24 court considers only applications of the statute in which
25 it actually authorizes or prohibits conduct. The only

1 thing that you consider, because the only thing the *Patel*
2 court considered, is what the statute authorizes.

3 And to -- but even if you want to look at that
4 conduct, it doesn't save the statute. The fact that they
5 have not prosecuted it in any situation previously in no
6 way binds them to say they can't prosecute in the future.
7 And so to take the Spirit folks or anyone else at
8 Annunciation House or otherwise who receives an RTE, are
9 they to defy the statute and defy the request and say,
10 well, you know, I'll take my chances. It's never been
11 prosecuted in the past.

12 *Patel* says no. *Patel* says, in evaluating a
13 facial challenge, you look at what the statute
14 authorizes, because the Fourth Amendment is meant to
15 protect us against the whims of the government. We're
16 not meant to be left there wondering, Will he exercise
17 his discretion or won't he?

18 In fact, the whole purpose of *Patel* is to put a
19 judge between that, to put a judge between citizens and
20 the exercise of the AG's discretion. The whole point of
21 *Patel* is to make sure people aren't left to that
22 discretion. That's what the court says in *Camara*, which
23 is quoted in *Patel* -- the court in *Camara v. City and*
24 *County of San Francisco*. The court said you cannot,
25 quote, leave the occupant subject to the discretion of

1 the official in the field, end quote. Why? Because,
2 quote, that's precisely the discretion to invade private
3 property, which we have consistently circumscribed by a
4 requirement that a disinterested party warrant the need
5 for the search.

6 THE COURT: And which case is that?

7 MR. MARTENS: That's *Camara v. Municipal Court*
8 *of City and County of San Francisco*, 387 U.S. 523 at
9 pages 532 and -33. We cite it in our case in our briefs,
10 and the court in *Patel* cites it for that very proposition
11 that they're here saying, Don't worry, our discretion.
12 And as -- as American citizens, we're not subject to
13 their discretion -- the Executive Branch's discretion.
14 We're entitled to, under the Fourth Amendment, a judge to
15 stand between us and the investigators. That's been the
16 consistent point of the Fourth Amendment throughout its
17 history. It was reaffirmed in that case I just cited,
18 *Camara*; it was reaffirmed in *Patel*.

19 And so their whole argument, which is "don't
20 worry, sometimes we don't apply it unconstitutionally,"
21 doesn't save the statute. The question is, Does the
22 statute authorize unconstitutional conduct? Yes. And
23 their exercise of discretion not to use the statute is
24 exactly what *Camara* says doesn't save the statute.

25 And so that's the biggest problem with their

1 argument, is they're here saying, in essence, trust us.
2 And that's great if you're not on the potential criminal
3 prosecution end. But that's not enough.

4 Second point: The AG has yet to cite a single
5 case in which any court has said that sovereign immunity
6 allows a challenge to an RTE. No court has ever said
7 that. They have never cited one.

8 And I want to go back and address the language
9 in the slide deck that was used. I don't know if my
10 colleague would be so kind as to put the *Zurawski* -- and
11 I know I caught you off-guard there.

12 THE COURT: That's all right. I have it here.

13 MR. MARTENS: Your Honor has it. So it's
14 page 9 on the slide deck.

15 THE COURT: I'm good.

16 MR. MARTENS: *Zurawski*.

17 THE COURT: Yes.

18 MR. MARTENS: So they -- they quote the
19 parenthetical here from the *Sefzik* case, and here's what
20 it says: An applicant challenging an agency's denial of
21 a permit did not plead a valid declaratory judgment act
22 claim. Why was it not valid? Because the applicant
23 didn't challenge the validity of the statute but instead
24 challenged the validity of the officer's action taken in
25 applying the statute.

1 That's exactly what the *Patel* 2015 Texas
2 Supreme Court said. You could have a valid declaratory
3 judgment action if you challenge the validity of the
4 statute. But they said that's not what that defendant
5 did or that party did in his declaratory judgment action.
6 So it doesn't work. They said, in fact what he did is he
7 challenged the validity of an officer's actions taken in
8 applying the statute. That you can't do.

9 And so there's nothing inconsistent between
10 *Zurawski* and *Patel*. I could challenge the statute, but
11 what I can't do is go in and raise all of these concerns
12 that Your Honor sees. Your Honor said this seems like an
13 overreach. This seems like it's being "Frankenstein-ed,"
14 you know, all of those arguments. Is DEI within the AG's
15 jurisdiction? Can he investigate out-of-state parts
16 manufacturers? Those are all state law questions that I
17 would like to raise.

18 And to your last question, had they served me
19 with a CID under the consumer fraud statute, you know
20 what that statute allows me to do: file an action to
21 challenge. It's statutorily authorized that I can file
22 an action to raise those challenges. And what happens
23 when I file that action: automatically stays the CID
24 until the court decides it.

25 So you want to know why they didn't use that

1 option when they claim they could: because they're trying
2 to deny me that right. They're trying to deny me that
3 option. They've had -- they talk about five months.
4 They've had five months to switch stream. And, instead,
5 they haven't because they don't want me making all the
6 arguments that Your Honor is making about this statute
7 being -- being an overreach and "Frankenstein-ed" is
8 exactly what'd want to be arguing in front of a Texas
9 State Court here in Travis County or in Dallas County.

10 But I'm denied that opportunity because they've
11 gamed the system with a statute that unconstitutionally
12 strips me of that ability. And they've yet to cite a
13 single statute -- a single case that says sovereign
14 immunity doesn't bar me.

15 And I'll also note they're not even actually
16 claiming that the text and structure of the RTE statute
17 allows it. In fact, what you heard Mr. Baasch argue was
18 you should rewrite the statute. He said you should read
19 into it. I wrote it down. He said you should read into
20 the statute a reasonableness requirement.

21 And I just want to point out that that's not
22 what he told the *Annunciation House* court or his
23 colleagues told the *Annunciation House* court. They
24 didn't say read into the statute a reasonableness
25 requirement. They said that it's a matter of grace to

1 extend any time, and a matter of grace by the Attorney
2 General.

3 They said that the statute has to be -- that
4 they have to get at -- that the statute authorizes access
5 right away. They said, quote, the common, ordinary
6 meaning of "immediately" is that OAG must be given access
7 to the records right away.

8 They went on to say -- they said they
9 contrasted another statute that allows for
10 interrogatories to corporations on page 11. But they
11 said, under that statute, someone has 31 days to respond.
12 Then they said, quote: That is obviously a sharp
13 contrast from the instruction to permit, quote, immediate
14 access to the Attorney General.

15 The word -- keep going on. The word
16 "immediate" meant -- excuse me. The Legislature's use of
17 disparate timing language within the code confirms that
18 when it used the word "immediate," it meant what it said.
19 They continue: The court must enforce the statute as
20 written.

21 So they as you said, they're talking out of two
22 sides of their mouths, leaving me again subject to
23 discretion and every other citizen of Texas subject to
24 discretion. One minute they say it has to be enforced as
25 written when it's to their strategic advantage to do so.

1 And then they come into this court and say it doesn't
2 actually mean that. It means "within a reasonable time."

3 And so I want to know, have they corrected
4 their misrepresentation to the Texas -- to the court in
5 El Paso? Because while they're telling you it means
6 within a reasonable time, they're telling that court it
7 means as written, with no time whatsoever. They can't
8 both be true, and yet they've represented both of those
9 things to this court -- to two courts, leaving Texas
10 citizens who receive RTE like -- or recipients like
11 Spirit left to guess will it be enforced right away or
12 won't it be enforced right away, and who is going to be
13 subject to criminal prosecution? And that's not what's
14 allowed under *Camara*. We aren't subject to those whims.
15 We aren't subject to that discretion.

16 One last point. Mr. Baasch said repeatedly
17 that this -- that this is pre-compliance review. It
18 absolutely is not. I can't come to this -- I can't file
19 an action in federal court and make state -- purely state
20 law objections to the scope of the Attorney General's
21 jurisdiction. And, again, not just my view that this
22 isn't pre-compliance review. A court considered that
23 argument.

24 We cite the case *Airbnb, Inc. v. City of*
25 *New York*, a 2019 case applying *Patel*. And on page 494,

1 there the City of New York made the argument, well, you
2 brought a 1983 action. You got your pre-compliance
3 review. And the court was, like, no. The court said:
4 The City has alternatively argued that if pre-compliance
5 review is required, the court's evaluation of the
6 ordinance in this litigation would qualify.

7 So they brought a facial challenge, and the
8 City said, well, you brought a facial challenge to the
9 statute, so you got your pre-compliance review. The
10 court said, continued, but any such review by the court
11 could assess only whether the ordinance on its face was
12 reasonable under the Fourth Amendment. The court's
13 facial assessment in this litigation would not give a
14 particular booking service a forum to challenge any
15 particular application of the ordinance.

16 And so the court rejected that argument, that
17 the -- that the 1983 action is pre-compliance review.

18 This is not pre-compliance review. This is not
19 an opportunity to raise state law objections to the scope
20 of the particular request. That's what I would have if a
21 CID was served, that's what we're constitutionally
22 entitled to under *Patel*, and that's what we have not had
23 even five months later. Thank you.

24 THE COURT: Thank you, Mr. Martens.

25 MR. BAASCH: Thank you, Your Honor. I'll keep

1 it very brief. There's only three points that I'd like
2 to address about what my friend on the other side just
3 said.

4 First the point about whether we've made a
5 misrepresentation to El Paso in the *Annunciation House*
6 case. This is very important. There is, first and
7 foremost, an irony to my friend saying that, Oh, no, you
8 have to look only at the statute. Don't look at other
9 case law. Don't look at the Attorney General's
10 enforcement history, et cetera, et cetera. But then he
11 wants you to look at *Annunciation House*. You hear it all
12 throughout his briefs; you've heard it all today. I
13 don't think you can square that circle.

14 THE COURT: Can I interrupt you there?

15 MR. BAASCH: Certainly.

16 THE COURT: If I take -- I'm taking you at your
17 word. So if I -- for purposes of analyzing the RTE
18 statute I ignore *Annunciation House*, isn't it equally
19 fair for me to ignore AG representations that they
20 provide grace and encourage parties to seek
21 pre-compliance review in state court?

22 Aren't those -- both of those issues outside
23 the analysis of the statute as written and whether or not
24 it is facially constitutional?

25 MR. BAASCH: I think that that's technically

1 true, Your Honor. And the reason I say "technically" is
2 because I think there's an important nuance to that.

3 Those examples illustrate ways that that the
4 statute could be implied, some constitutional, maybe
5 some -- I don't know what Your Honor's view is on
6 *Annunciation House* -- maybe some unconstitutional. It's
7 examples that they could be applied in those different
8 ways, and Your Honor has to ask as part of the facial
9 analysis: Is it unconstitutional in every application?

10 We've shown you many that I think are clearly
11 constitutional. They like to harp on *Annunciation House*.
12 That's not enough for a facial challenge.

13 As far as whether we made a misrepresentation
14 to El Paso, no. The point in that litigation was that
15 the statute authorized us -- it does not require, but it
16 authorized us to go as far as we did. In order to comply
17 with the Fourth Amendment, there would have to be an
18 exigency. We recognize that. The question, really, for
19 the *Annunciation House* setting is was there an exigency.
20 That's highly fact sensitive. It's susceptible to an
21 as-applied challenge. It doesn't move the ball here for
22 them.

23 I think, in recognition of that, my friend on
24 the other side pivoted to this point about, well, the
25 statute just gives them too much discretion, and that's

1 the problem. We've kind of moved on from pre-compliance
2 review, and now we're just in a world of they can't have
3 this much discretion.

4 But discretion cashes out in an as-applied
5 challenge. If we exercise the discretion in an
6 unconstitutional way, you've got an as-applied challenge.
7 You've got maybe a party like *Annunciation House* saying
8 there was no exigency. As-applied challenge. This can't
9 be done to us. That doesn't work for Spirit.

10 The last -- the thing I'd like to close with,
11 though, Your Honor, is I'd like to explain what I think
12 that they can do. They can go to state court tomorrow.
13 They could seek a protective order. They could bring an
14 *ultra vires* claim. We would not object to the court's
15 jurisdiction. We're not raising sovereign immunity.

16 If the court *sua sponte* raises jurisdiction on
17 its own, Spirit can respond, Well, Your Honor, to the
18 state court, if you conclude that you don't have an
19 ability to review this RTE, then the RTE is
20 unconstitutional under *Patel*. It's one or the other.
21 Either the state court can review it. That's our
22 position. Or if the state court says it can't, you're
23 right in the *Patel* problem. And I think that'd be a win
24 for them if -- if they're right. If they're not right,
25 they can go to state court tomorrow. The state court

1 will hear this suit. The state court will be bound by
2 the authorities that we showed you, providing that
3 pre-compliance review is available.

4 Thank you, Your Honor.

5 THE COURT: Thank you, Mr. Baasch. Give me
6 just a minute.

7 Okay. First of all, let me tell you the
8 briefing in this case was excellent. You guys probably
9 didn't write it. Probably smart people back at your
10 respective outfits did. So kudos to them. I thought
11 they did a great job.

12 You two men did an equally good job here today.
13 Best part of the job is being in the courtroom and
14 hearing good arguments by lawyers who know how to
15 advocate. So well done.

16 But as in many cases or almost all cases, I can
17 sometimes cut the baby in half. This isn't one of them.
18 This is one where I'm being called upon to make a ball or
19 a strike call, and so somebody is going to walk away here
20 today not as pleased.

21 I think one of my favorite parts of the
22 briefing is actually in a reply brief that was prepared
23 by the plaintiff. It's Document 25, page 1. In an
24 effort to avoid that conclusion, the Attorney General
25 responds that sometimes he does not apply the RTE statute

1 as written, instead affording request recipients more
2 time to comply as a matter of grace. But the Founders
3 enacted the Fourth Amendment precisely so that the People
4 did not need to rely on the grace of executive officials
5 to protect their liberties.

6 This grace is accordingly irrelevant to the
7 facial challenge to the statute. As the Supreme Court
8 explained in *Patel*, when addressing a facial challenge to
9 a statute authorizing warrantless searches, the proper
10 focus of the constitutional inquiry is searches that the
11 law actually authorizes, not those for which it is
12 irrelevant.

13 I don't know whether it's just me or my
14 background as a prosecutor, but I'm a literal guy. I am
15 black and white, sometimes to the dismay of others. But
16 when I look at this, it just strikes me this call for me
17 is easy. The cases that precede *Patel*, they're -- I'm
18 not throwing them all out by any means, but they're not
19 as important to me on the question I'm supposed to answer
20 today that are shaped by the *Patel* case that came out in
21 2015. It's kind of what's happened, *Patel* speaks for
22 itself in the few cases that we have since then. And it
23 just strikes me that, whether by hook or by crook, this
24 is simply a facial challenge. It's not an as-applied
25 challenge.

1 I tend to agree with Mr. Martens. I'm -- he
2 couldn't file a reasonableness action in federal court,
3 and I really don't want do to it, or an as-applied
4 challenge here either. So he's here on a facial
5 challenge.

6 And in doing that, unless I'm wrong, and I
7 could be wrong, it's about the statute as written. And,
8 I mean, the AG's Office has to concede the statute is
9 silent as to pre-compliance review. It's silent as to
10 the grace or discretion extended to the Attorney General.
11 It's all been made up. It's bootstrapped.

12 And, you know, I commend the effort. It's an
13 old statute, and efforts are being made to keep it alive.
14 But in the wake of *Patel*, pre-compliance review is simply
15 not there. And the only reason *Annunciation House* is
16 important is it serves as a current and recent example of
17 not just any attorney general, but this Attorney General,
18 taking a completely different position on whether or not
19 the party is entitled to pre-compliance review or not.

20 Now, whether there are exigent circumstances,
21 I'll concede that that's a fact-based issue for that
22 case. But it just strikes me that the language in
23 support of the Attorney General's actions in *Annunciation*
24 *House* is a perfect example of why this statute is flawed,
25 it's age, and its lack of addressing the current state of

1 the law is fatal.

2 I'm not sure exactly what form or shape my
3 final order is going to take. But, Mr. Martens, I'm
4 going to charge you with preparing a proposed order for
5 my signature.

6 As all the lawyers do, you-all normally file
7 proposed orders that are short and sweet. I don't need
8 that. I need something more robust. I need something
9 that clearly explains that the statute's failure to
10 provide for pre-compliance review is fatal; that the
11 bootstrapping efforts of the Attorney General's Office to
12 keep it alive are inadequate; that the proposed
13 pre-compliance review alternatives that are not written
14 into the statute are not practically effective for the
15 reasons you have articulated both here today, but also in
16 your briefing and, obviously, distinguished Mr. Baasch's
17 best arguments, which I think center on *Zurawski* and some
18 of those other cases that he cited.

19 I'll get that, I'll wire-brush it, and then
20 I'll issue that. But, again, I go back to where I just
21 started a moment ago. This to me wasn't that hard. I'm
22 looking at the statute the way it was written. In the
23 wake of *Patel*, it is no longer valid as far as I'm
24 concerned.

25 Yes, sir?

1 MR. MARTENS: Is there a time by which you'd
2 like us to submit that?

3 THE COURT: The sooner the better, but how much
4 time do you need?

5 MR. MARTENS: Ten days?

6 THE COURT: Yeah. That's fine. So what does
7 that make it?

8 MR. MARTENS: Today's the 11th. So the 21st, a
9 week from Monday.

10 THE COURT: All right. That -- by the close of
11 the 21st and the morning of the 22nd. All right.

12 MR. MARTENS: Thank you.

13 THE COURT: All right. Again, gentlemen, good
14 job. Thank you.

15 (Proceedings concluded at 10:58 a.m.)

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REPORTER'S CERTIFICATE

I, Arlinda Rodriguez, do hereby certify that the foregoing was transcribed from an electronic recording made at the time of the aforesaid proceedings and is a correct transcript, to the best of my ability, made from the proceedings in the above-entitled matter, and that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

/S/ Arlinda Rodriguez

October 16, 2024

ARLINDA RODRIGUEZ

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