No. 13-1175

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF LOS ANGELES, CALIFORNIA,

Petitioner,

v.

NARANJIBHAI PATEL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the right of Los Angeles hoteliers "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is infringed by a statute that requires them to make their business records available for search on their premises by "any officer of the Los Angeles Police Department," for any reason or no reason, and without a warrant.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case centrally concerns Cato because it represents an opportunity to improve Fourth Amendment doctrine and maintain that provision's protections in the modern era.

SUMMARY OF THE ARGUMENT

Contrary to popular belief, the Fourth Amendment protects not privacy but the right to be free from unreasonable searches and seizures. The "reasonable expectation of privacy" test has proven unworkable and is not up to the task of administering the Fourth Amendment. This Court should eschew it again in this case.

The warrantless search scheme established by Los Angeles's municipal code is comprised of many seizures, which culminate in the seizure and search of hotel papers. It is not a public welfare regulation causing hoteliers to abate harms, nuisances, and

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[1] Pursuant to Rule 37.3(a), *amicus* states that all parties filed blanket consents with the Court. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored any part of this brief and that only *amicus* made a monetary contribution to its preparation or submission.

risks. Instead, it conscripts them into surveillance related to crimes to which they are mere bystanders.

The statute authorizes unreasonable—and thus unconstitutional—searches. It does not require a warrant or restrict itself to constitutional circumstances like exigency, and it places no procedural limits on government agents' searches of hotel records.

The "administrative search" doctrine, which permits searches of parties at whom the relevant regulatory scheme is directed, has no application to this context. Some hotels may have proximity to crimes—much like some people live in neighborhoods with higher crime rates—but it is nothing like the proclivity to crime in industries such as auto dismantling.

In sum, the city simply has no justification for granting itself a general license to seize and search certain hotel records.

ARGUMENT

I. THIS COURT SHOULD NOT FOCUS ON "PRIVACY" BUT SHOULD APPLY THE FOURTH AMENDMENT ON ITS OWN TERMS

The "reasonable expectation of privacy" test is a poor tool for administering that Fourth Amendment. Since at least the ruling in *Kyllo v. United States*, 533 U.S. 27 (2001), this Court has reduced its reliance on that test for determining when searches have occurred. This Court should again eschew the use of select phraseology from one concurrence in *Katz v. United States,* 389 U.S. 347 (1967), focusing instead on applying the Fourth Amendment on its

own terms. When a search or seizure occurs, its effect on privacy is one consideration in determining whether or not it was reasonable. Privacy invasion is not, however, the *sine qua non* of unreasonable searches and seizures.

Instead of asking whether Los Angeles hoteliers have an "expectation of privacy" in their business records, this Court should examine whether their right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is infringed by a statute that requires them to create business records and make them available for search on their premises by "any officer of the Los Angeles Police Department," for any reason or no reason, and without a warrant.

A. The "Reasonable Expectation of Privacy" Test Is a Poor Tool for Administering the Fourth Amendment

Katz is often treated as the lodestar of modern Fourth Amendment jurisprudence. Unfortunately, select phraseology has overtaken the rationale of that case, dominating both case law and the academic literature. By eschewing the "reasonable expectation" language that Justice Harlan used in his *Katz* concurrence, this Court can clear up the doctrinal mess created by subsequent courts' use of this test to the exclusion of more textually based analysis.

Indeed, the *Katz* majority did not rely on Justice Harlan's "reasonable expectation of privacy" language. Instead, the Court rested its decision on the physical and legal protections Charles Katz had used to secure the privacy of his telephone conversation. "What a person knowingly exposes to

the public, even in his own home or office, is not a subject of Fourth Amendment protection," the Court wrote. *Katz*, 389 U.S. at 351. "But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id*. In the paragraphs that followed, the Court discussed the facts establishing that Katz's phone conversations were indeed private: Katz was in a phone booth made of glass that concealed the sound of his voice. *Id.* at 352. Against the argument that Katz's body was in public for all to see, which would strip information he produced there of Fourth Amendment protection, the Court wrote: "what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." *Id.* The government's use of a bug to overcome the protections Katz had placed around his communication was unreasonable in the absence of a valid warrant. It was thus unconstitutional.

The "reasonable expectation of privacy" language in Justice Harlan's concurrence was an attractive addendum, but standing alone it is weak as a rule for deciding cases. As applied, that test reverses the inquiry required by the Fourth Amendment and biases Fourth Amendment doctrine against privacy.

Having a "reasonable expectation of privacy" arises from giving physical and legal protection to information, but this Court should no longer reason backward from privacy "expectations" to Fourth Amendment protection. It should not fixate on privacy, but follow the reasoning required by the Fourth Amendment itself, inquiring into the existence of searches and seizures affecting constitutionally protected interests and whether those searches and seizures are reasonable.

In other words, this Court should not ask whether individuals' expectations of privacy are reasonable. It should investigate whether government agents' seizures and searches are reasonable.

B. This Court Has Reduced Its Reliance on the "Reasonable Expectation of Privacy" Test

Kyllo may mark the beginning of a line of cases in which this Court is finding a better route to Fourth Amendment adjudication. The Court could have found in *Kyllo* that the government violated a "reasonable expectation of privacy" when its agents used a thermal imager to gather external temperatures from a home and draw inferences about what goes on within. Instead, it followed the inquiry dictated by the Fourth Amendment, asking (1) whether there was a search and, if so, (2) whether that search was reasonable. The Court analyzed the two issues distinctly, finding (1) a search that (2) was unreasonable: "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." 533 U.S. at 40.

In *United States v. Jones*, 132 S. Ct. 945 (2012), this Court could have found that monitoring a vehicle's movements for four weeks is a search because it offends "reasonable expectations of privacy." Indeed, on that ground, the concurrence agreed with the majority opinion's ruling. *Id.* at 964 (Alito, J., concurring in the judgment). But the majority opinion was stronger for rooting its finding of a "search" in the small property seizure involved

when government agents converted a privately owned vehicle to the government's information-gathering purposes: "We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Id.* at 945 (majority op.) (footnote omitted).[2] Beyond recognized exceptions to the rule, a search is presumptively invalid without a warrant.

In *Florida v. Jardines*, 133 S. Ct. 1409 (2013), this Court could have found that bringing a drug-sniffing dog to the door of a home violates "reasonable expectations of privacy." Instead, it held that the customary license to enter private property does not extend to government agents "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence." *Id.* at 1416. Entering onto private property adjacent to the home without license from the property owner is a use of the land—a seizure—that is unreasonable without a warrant.

Privacy is a relevant consideration when a seizure or search has been identified and the Court examines its reasonableness. So the Court last term in *Riley v. California*, 134 S. Ct. 2473 (2014), assessed searching of cell phones incident to arrest. One of the factors in whether the searches of the cell phones were reasonable was their effect on the privacy of arrestees. *Id* at 2488. As they enjoy the presumption of innocence, and because their phones contain a vast

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[2] The Court's footnote here goes into the ownership status of the car, signaling the importance of the property invasion—the seizure—that facilitated the four-week search for Jones's car's location.

trove of personal information about them and others, the Court pithily summarized its rule about searches of suspects' phones: "get a warrant." *Id.* at 2495.

These cases are salutary because they adhere more closely to the line of inquiry suggested by the Fourth Amendment: Was there a seizure or search? Was it of persons, houses, papers, or effects? Was it reasonable?

In this case, all parties agree—and lower court rulings rely—on the premise that the statute produces a Fourth Amendment search of hoteliers' papers. There is no call for use of the test from Justice Harlan's concurrence in *Katz*, and this Court need not evaluate the "expectation of privacy" to look for a search. The privacy of hoteliers and their guests is a consideration in determining whether the warrantless search scheme is reasonable. That assessment should be made with a view to the entirety of the investigatory scheme.

II. THE WARRANTLESS SEARCH SCHEME IS A COLLECTION OF SEIZURES AND SEARCHES THAT IS BEYOND THE AMBIT OF PUBLIC WELFARE REGULATION

As in many Fourth Amendment cases, the warrantless search scheme at issue here is not a single search, but a series of seizures and searches. Articulating and distinctly examining them can improve this Court's consideration of the issues, while modeling for lower courts how to apply the Fourth Amendment in difficult cases.

The warrantless search scheme falls outside the traditional ambit of public welfare regulation, which requires the creators of public nuisances, harms, and

risks to abate them. Instead, it seizes the assets and efforts of innocent private parties, dragooning them into the government's law enforcement apparatus.

A. "Seizure" and "Search" Are Distinct Activities, Even if They Often Occur Together

This Court's cases have rarely defined "seizure" distinctly from "search." *United States v. Jacobsen*, 466 U.S. 109, 114 n.5 (1984) ("[T]he concept of a 'seizure' of property is not much discussed in our cases"). This is in part because incursions on property rights—seizures—are often the means government agents use to discover information: Seizure is the way they search.

Often, seizures and the searches they facilitate have the same legal justification—or they both lack one. *See, e.g.*, *Jones*, 132 S. Ct. at 949 ("The Government physically occupied private property for the purpose of obtaining information."). It is convenient to refer to small seizures and the searches they facilitate collectively as though they are a unitary "search." *See, e.g.*, *Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (moving of stereo equipment to gather serial numbers "constitute[d] a 'search'"). Unfortunately, the convenience of lumping together seizures and searches has occasionally permitted this Court to ignore small seizures. *See, e.g.*, *New York v. Class*, 475 U.S. 106, 114 (1986) (police officer lifting papers not considered a seizure).

Seizures and searches are not the same, and they do not always occur together. *See, e.g., Kyllo,* 533 U.S. at 32 ("a 'search' despite the absence of trespass"); *Soldal v. Cook County*, 506 U.S. 56 (1992) (seizure of mobile home, not part of search).

Collapsing important distinctions between seizure and search can obscure the legal import of government agents' actions—particularly when information is involved. This is because the Fourth Amendment consequences of information seizures spring not so much from possession of information as from its *use*.

The warrantless search scheme in this case puts hoteliers to work for the government, gathering information for prospective investigations. The government's use of hoteliers' time and property culminates in the seizure of that information by government agents with no warrant or probable cause, so they can search it.

B. The Warrantless Search Scheme is a Series of Seizures that Facilitates Warrantless Search

To comply with L.A. Municipal Code §41.49, every hotelier must maintain a record of the name and address of every guest, as well as the make, type, and license number of each guest's vehicle. §41.49(2)(1)(i),(ii). Every hotelier receiving a guest that pays cash (and certain other guests) must collect identity information, §41.49(2)(1)(iii), gathering such information from government-issued documents and presumably turning away guests without government-issued ID. *See* §41.49(1) (definition of "identification document"). Hoteliers must also collect the precise time of guests' arrival, §41.49(2)(2), and scheduled departure, §41.49(2)(5).

Every hotelier must dedicate an area on specific parts of their premises for maintenance of this record, and they must keep this record in this area for at least 90 days from the date of the last entry.

§41.49(3)(a). Every hotelier must make the record resistant to tampering, and every hotelier must have employee training and security measures in place to protect the record and to facilitate government agents' access to the record. *See* §41.49(3)(b).

The municipal code details the construction and layout of such records kept in book form or card form. §41.49(3)(c). Any hotelier keeping the record in electronic form must have software that allows for printing of the record, §41.49(3)(c), and assumedly each must have a printer or digital device that allows the record to be copied for government agents. The Code bars hoteliers from assigning staff to guest reception if they have not been trained in maintenance of this record. §41.49(5).

The definition of "hotel" is broad, *see* §41.49(1), and it probably encompasses accommodations offered in private homes and apartments through "sharing economy" services such as AirBnB. These hoteliers must allow government agents into their homes to permit the statute's administration.

The records hoteliers have been required to create and keep in the specified form must be "made available to any officer of the Los Angeles Police Department for inspection." §41.49(3)(a).

While many of these mandates track what hoteliers are likely to do of their own accord, they differ in many respects from what hoteliers would do if left to their own devices. If Los Angeles hoteliers keep their records for only 60 days, utilize lesser-trained staff on the graveyard shift, accept patrons that lack government-issued ID, or maintain their records in a spiral-bound notebook rather than a

permanently bound book, they are liable to a penalty of six months in jail or a $1,000 fine.

The upshot of this regime is that Los Angeles hoteliers, including AirBnBers, must dedicate their time, money, and property to the government's ends as a condition of providing their services. The warrantless search scheme turns them and their property to the use of the government, depriving them of each unit of time, money, and property that they would otherwise use differently. All these mandates are seizures of hoteliers' property, culminating in searches of their mandated records.

These seizures, and the culminating searches, must all pass constitutional muster. They are not excused from constitutional standards as public welfare regulation.

C. The Warrantless Search Scheme Does Not Regulate Against Harms, Nuisances, and Risks, but Seizes and Searches Uninvolved Parties and Their Property in Furtherance of General Law Enforcement

There are plausible arguments that the giving over of records under Los Angeles's warrantless search scheme is not always a seizure because there are factual scenarios in which a hotelier may leave records open to the public or volunteer them to officers of the LAPD. These are weak arguments.

It is implausible in this day and age that hoteliers would leave customer information open for all to see. The defeat of the second argument is slightly more subtle: There is no volunteering of information when the statute's terms have taken away the hotelier's right to deny government agents access. One does

not "volunteer" an item to another by handing over what a statute already deems his to take.

A more serious argument is that the L.A. municipal code is an ordinary regulation of business activity not subject to analysis under the Fourth Amendment. It appears outwardly similar to regulation that requires hoteliers to change bed linens before a new guest occupies the bed, for example. *See* Cal. Civ. Code §1865. But there is an important difference between public welfare regulation and conscription of private entities into government service.

Whether they use it advisably or not, government entities have broad latitude to regulate in favor of the prosperity, well-being, or convenience of the public at large. Social interests within the ambit of regulatory authority include safety, order, economic interest, and aesthetics.

The entities regulated in pursuit of these public interests are almost universally those who threaten public welfare as defined by legislators and regulators. Safety regulation, for example, properly requires construction companies to erect barricades that physically protect the public, and to post signs that warn employees of dangers. In economic terms, these regulations cause construction firms to internalize the costs they might impose on others.

Consider an alternative regulatory regime that would require restaurants near construction sites to erect barricades and signs protecting passersby from assorted dangers. These restaurants may serve meals to construction workers and they may benefit indirectly from the increased customer base that a new building will sustain. But they are bystanders to

the construction project. Requiring them to look after safety on work sites does not cause them to internalize costs they impose on the public. Instead, this hypothetical regulation takes their property—in the form of time and money—for public use.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), usefully illustrates a regulation on the wrong side of the "public welfare" line. Providers of housing are subject to many regulations that guard public welfare against ills and wrongs that might be done in the provision of housing. States have full power to require landlords "to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building." *Loretto*, 458 U.S. at 440. Each of these things abates some nuisance or risk common in dwellings, or fleshes out the obligations society deems to inhere in the provision of housing.

However, a regulation obligating a landlord to turn over even a small portion of her real property to a third party falls afoul of the Fifth Amendment's restriction on takings. Such regulation may foster a more vibrant market for media and entertainment, but "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 442.

Conscripting hoteliers into law enforcement is like giving landlords' property to cable companies. The public interest in abating crime may be strong, but that does not change the status of hoteliers from bystanders into responsible parties.

Amicus does not make the argument here that the municipal code section in dispute is a taking

under the Fifth Amendment.[3] Instead, *amicus* focuses on the statute's imposition of a "public welfare"-style obligation on a party that does not owe it. That makes the seizure of that party's property (time and labor) and the search of its papers unreasonable.

The Los Angeles ordinance conscripts hoteliers into surveillance related to crimes to which they are bystanders. Ultimately, in the step that respondents here contest, it provides for seizure of their papers—a specifically protected item under the Fourth Amendment—so that those papers can be searched by government agents, all without a warrant.

III. THE STATUTE ALLOWS UNREASONABLE AND THUS UNCONSTITUTIONAL SEARCHES

The L.A. municipal code does not require a warrant, does not restrict searches to constitutional circumstances, and places no limits on government agents' searches of the records it requires hoteliers to create and maintain. Nor does the warrantless search scheme give hoteliers any opportunity to challenge searches before they occur.

The "administrative search" doctrine is not properly applied to Los Angeles hoteliers.

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[3] That amendment's historical focus on real property is only beginning to mature into recognition that property in any form may be constitutionally taken. See *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (citing *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 172 (1998)) (forced "transfer of the interest" in lawyers' trust accounts—*personal* property—under the "*per se* approach" is "akin to the occupation" of property "in *Loretto*"); *see also Horne v. U.S. Dep't of Agric.*, 2015 U.S. LEXIS 623 (U.S., Jan. 16, 2015) (No. 14-275) (cert. granted).

"Administrative search" is used in furtherance of regulation that abates nuisances, harms, and risks that the parties searched have a substantial role in creating. Provision of lodging does not have the predisposing relationship to crime that pursuits such as auto dismantling have, so hotels are inapt candidates for "administrative search."

The *California Bankers* case does not provide a precedent approving the warrantless search scheme. *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 71 (1974). To the extent it suggests that private parties can be made to perform surveillance for the government of activities to which they are bystanders, it deserves reconsideration.

A. The Statute Does Not Require a Warrant, Does Not Restrict Itself to Constitutional Circumstances, and Places No Procedural Limits on Government Agents' Searching of Hotel Records

Absent a warrant, the search and seizure of a suspect's property is *"per se* unreasonable" unless justified by one of "a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). The Los Angeles warrantless search scheme, which permits searches of non-suspects, makes no nod at all to this or other constitutional limits on authority to search suspects.

The requirement that hoteliers' papers must be "made available to any officer of the Los Angeles Police Department for inspection," §41.49(3)(a), contains no warrant requirement, of course. As treated in the briefs of the petitioners and the U.S. government, it envisions government agents appearing and making immediate demand to search.

That, according to this Court in *Gant*, is per se unreasonable absent an exception to the warrant requirement.

The statute does not restrict its applicability to any such exception. It does not limit searches to cases of exigency, for example. (And in cases of exigency, no statute is required.) Indeed, the warrantless search scheme does not even require government agents to have a suspicion that their search will reveal evidence of crime.

The statute at issue in *Sibron v. New York*, 392 U.S. 40 (1967), provides an instructive comparison. It permitted a police officer to stop a person "whom he reasonably suspects is committing . . . a felony" or other offenses. *Id.* at 43. The statute in that case at least tracked the constitutional requirement that seizures be not unreasonable.

The statute here has no such limitation. Indeed, the warrantless search scheme goes the other way. The briefs of petitioners and the United States extol "frequent, unannounced inspections" of Los Angeles hotels, Pet. Brief at 39, and "surprise inspections" of them, U.S. Brief at 33. These invasions of innocent business owners' premises would not be to discover substantive crimes, but to ensure compliance with the record-keeping regime. It is a virtue of the system, in the government parties' view, that private business owners suspected of no crime should see government agents on their premises routinely, inspecting their business records to enforce paperwork requirements.

In one sense, the statute does cabin the search regime. It only provides for warrantless searching of the papers that it required hoteliers to maintain. But

constraining searches along this subject-matter dimension must be small consolation to a business owner, no suspect of crime, whose clientele may bring government agents behind them to make "frequent, unannounced inspections."

All this can occur because of an acute failing of the statute: its lack of procedural safeguards. As the *en banc* Ninth Circuit found: "[Section] 41.49 provides no opportunity for pre-compliance judicial review of an officer's demand to inspect a hotel's guest records. . . . Hotel operators are thus subject to the 'unbridled' discretion of officers in the field, who are free to choose whom to inspect, when to inspect, and the frequency with which those inspections occur." *Patel v. City of Los Angeles*, 738 F.3d 1058, 1064 (9th Cir. 2013) (en banc).

Given its defects, this Court should find the warrantless search scheme a violation of the Fourth Amendment. Perfection should not be required of every statute affecting Fourth Amendment interests, but the warrantless search scheme seizes innocent parties, coercing them into law enforcement's information-gathering role, and authorizes searching of their papers that violates the Fourth Amendment in just about every way.

There is an argument that the statute may fit within the "administrative search doctrine," a gloss on the Fourth Amendment's reasonableness requirement that dispenses with warrants in a narrow band of cases. But "administrative search" ultimately does not save this scheme.

B. The "Administrative Search Doctrine" Is Not Properly Applied to Hoteliers in This Circumstance

The "administrative search doctrine" is a fascinating area of law. As articulated in *New York v. Burger*, 482 U.S. 691 (1987), this three-part test for escaping the Fourth Amendment's warrant requirement is a four-part test first requiring a "closely regulated" industry. If that exists, there must be a regulatory scheme that advances a "substantial" government interest, warrantless inspections that further the regulatory scheme, and "a constitutionally adequate substitute for a warrant." *Id*. at 702-03.

The cases always seem to turn on whether there is a "closely regulated" industry. As the doctrine would have it do, the petitioner's brief seeks to satisfy this most important prong of the test by listing examples that suggest hotels are pervasively regulated. Pet. Brief at 33.

The test, the application of it, or both are slightly comical, because the argument goes like this: Given the requirement that hotels must thoroughly wash multi-use ice buckets and put them in a sanitized bag, Pet. Brief at 34, hotels can be required to turn over business records on demand of any Los Angeles police officer. That is some syllogism.

The reason why this logic actually fails is that there is a premise to the "administrative search doctrine" that is rarely observed but essential to recognize: in administrative search cases, there is a close connection between the source of the problem that the regulation addresses and the entity subject to search. When that unity does not exist, as here,

applying the doctrine would not lead to a reasonable, constitutional result.

The *Burger* case dealt with administrative searches of automobile junkyards. Fittingly, the *Burger* Court noted the finding of New York regulators at the time of the inspection law's adoption that "[a]utomobile junkyards and vehicle dismantlers provide the major market for stolen vehicles and vehicle parts." 482 U.S. at 709. This is the essential reason why it may be reasonable to subject junkyards and dismantlers to warrantless administrative inspection. Possession of stolen cars and car parts is a risk that inheres in their very line of business.

Operation of hotels may have proximity to prostitution, drug dealing, and other crimes, but being in the hotel business does not produce a proclivity toward those illegal acts among hoteliers themselves. (This is true despite rare examples of hotel owners getting involved in crime.) The warrantless search scheme is not aimed at thwarting crimes on the part of hoteliers. It requires them to gather information that may be evidence to the crimes of others. This is no part of the "administrative search doctrine." It is unreasonable and unconstitutional.

C. The *California Bankers* Case Did Not Approve a Scheme Like the Warrantless Search Scheme Against Fourth Amendment Challenge

This Court's ruling in *California Bankers* does not dispose of the warrantless search scheme under the Fourth Amendment. That case dealt with many things: arguments proffered by various parties with

respect to various parts of the Bank Secrecy Act. Primarily, the case addressed the Due Process claims of banks against the record-keeping provisions of the Bank Secrecy Act's Title I. *Cal. Bankers Ass'n*, 416 U.S. at 45-51.

In its brief assessment of recordkeeping banks' Fourth Amendment claims, the Court found no issue because "[n]either the provisions of Title I nor the implementing regulations require that any information contained in the records be disclosed to the Government; both the legislative history and the regulations make specific reference to the fact that access to the records is to be controlled by existing legal process." *Id.* at 52. This is the exact opposite of what pertains in Los Angeles's warrantless search scheme, which allows government agents to search hoteliers' records on demand, without legal process, and subject to no judicial oversight or review.

In its Due Process analysis, the bulk of the precedents the majority cited were recordkeeping requirements with the primary purpose of regulating the record-keepers themselves. *Id.* at 46 (citing *Shapiro v. United States*, 335 U.S. 1 (1948), and *United States v. Darby*, 312 U.S. 100 (1941)). In one area, the Court found a consistent practice of record-keeping and reporting with the purpose of supporting law enforcement against others. That was in the area of taxation, where the (still growing) practice is for payers to file information returns that assist the government in monitoring payees. *Id.* at 47. The Court did not cite any case upholding the constitutionality of this practice against a Fourth Amendment challenge.

California Bankers was a 6-3 decision, with Justice Powell, joined by Justice Blackmun, sounding cautionary notes in a concurring opinion. *Id.* at 78-80. In his dissent, Justice Douglas decried the innovation in requiring private parties to gather information about each other for the government:

> Heretofore this nation has confined compulsory recordkeeping to that required to monitor either (1) the recordkeeper, or (2) his business. *Marchetti v. United States*, 390 U.S. 39, and *United States v. Darby*, 312 U.S. 100, are illustrative. Even then, as Mr. Justice Harlan writing for the Court said, they must be records that would "customarily" be kept, have a "public" rather than a private purpose, and arise out of an "'essentially noncriminal and regulatory area of inquiry.'" *Marchetti v. United States*, supra, at 57.

Id. at 86 (Douglas, J., dissenting)

Justice Marshall's dissent presciently objected to the Court's bifurcated treatment of mandatory recordkeeping and reporting to the government. There was no allegation that bank-collected records has been turned over to the government, so the Court declared individuals' claims against the scheme unripe. To Justice Marshall, this was "a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late." *Id.* at 97 (Marshall, J., dissenting).

Sure enough, in *United States v. Miller* two years later, 425 U.S. 435 (1976), the Court used the ever-misapplied "reasonable expectation of privacy" test to find that customers of financial services do not have a Fourth Amendment interest in details of their

financial lives because they have revealed them to financial services providers. *Id.* at 443-444.[4]

This confused and controversial pair of cases gave unsteady birth to a doctrine holding that individuals have no Fourth Amendment interest in information they relinquish to third-parties, even under fiduciary confidentiality and contractual privacy obligations. It prompted one member of this Court, concurring recently in *Jones*, to suggest more careful work in this area:

> [I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *E.g.*, *Smith*, 442 U. S., at 742; *United States v. Miller*, 425 U. S. 435, 443 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers.

Jones, 132 S. Ct. at 957 (Sotomayor, J., concurring).

California Bankers did not approve a scheme like the warrantless search scheme at issue in this case against a Fourth Amendment challenge. It did set in motion a line of decisions that have had uneven and

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[4] Customers of Los Angeles hotels are not present in this case, so *Miller* has no bearing here.

regrettable results given consensus in this Court that it should "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34; *Jones*, 132 S. Ct. at 950 (majority opinion); *id*. at 958 (Alito, J., concurring in the judgment).

The Los Angeles warrantless search scheme provides this Court an opportunity to continue improving Fourth Amendment doctrine. Recognize that the statute authorizes seizures and searches. Affirm that it is indeed "papers" being searched. And find, consistent with strong and long-lasting precedent, that such searches require probable cause and a warrant.

CONCLUSION

In 1946, Justice Murphy dissented in *Okla. Press Publishing Co. v. Walling*, 327 U.S. 186, which approved non-judicial subpoenas issued by administrative agents. "Excessive use or abuse of authority," he argued, "can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who 'sent hither swarms of officers to harass our people.'" *Id.* at 218 (Murphy, J., dissenting).

There is no second American revolution brewing among innkeepers in Los Angeles, but the conditions they suffer—some of them new Americans—are too akin in this respect to the plight of colonists under King George: the warrantless search scheme denies them dominion over themselves, their property, and their papers. These are things the American revolutionaries fought to make their right.

"A people's desire to cooperate with the enforcement of a statute is in direct proportion to the respect for individual rights shown in the enforcement process," Justice Murphy said. "Liberty is too priceless to be forfeited through the zeal of an administrative agent." *Id.* at 219.

The vast majority of hoteliers want nothing more than peaceable operation of their small businesses. They would undoubtedly cooperate with law enforcement fully if they were accorded their full rights. The warrantless search scheme must fall in order to reset the rule of law in Los Angeles. Doing so will restore constitutional order and once again make hoteliers partners in defense of the social order.

The Ninth Circuit's judgment should be affirmed.

Respectfully submitted,

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