No. 13-1175

IN THE
Supreme Court of the United States

CITY OF LOS ANGELES,
Petitioner,

v.

NARANJIBHAI PATEL, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

E. Joshua Rosenkranz
Robert M. Loeb
Rachel Wainer Apter
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Orin S. Kerr
2000 H Street, NW
Washington, DC 20052

*Counsel of Record

Michael N. Feuer
City Attorney
James P. Clark
Chief Deputy City Attorney
Thomas H. Peters
Chief Assistant City Attorney
Gregory P. Orland*
Senior Counsel
700 City Hall East
200 North Main Street
Los Angeles, CA 90012
(213) 978-8160
gregory.orland@lacity.org

Counsel for Petitioner

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES AND REGULATIONS

STATE AND LOCAL STATUTES AND ORDINANCES

INTRODUCTION[1]

Plaintiffs' brief revolves around false premises. Los Angeles hotel registers have never been "priva[te]" from the police. RB2. For 115 years, hotel owners have been required to create and maintain them for police inspection. And there is nothing "extraordinary" about § 41.49. *Id.* More than 100 cities and states have passed similar laws. For good reason. Without laws like § 41.49, hotels' amenities (a locked door, pulled blinds—and anonymity) can invite crime. In the proverbial "No Tell Motel," a criminal can pay in cash, rent rooms by the hour and without reservations, provide no identifying information, and come and go undetected. Stripped of anonymity, criminals are less likely to use hotels as their transient lairs. But laws like § 41.49 are worthless if hotels let criminals rent rooms without registering—and frequent and unannounced spot checks are the only way to catch hotels that do that.

Searches conducted under § 41.49 are, therefore, facially reasonable and the ordinance falls within the core of the *Burger* exception. But this Court need not reach the reasonableness of § 41.49. A bare facial challenge like this—shorn of any as-applied facts—is an inappropriate vehicle for deciding important questions of constitutional law.

---

[1] We cite the City's opening brief as "OB"; Respondents' brief as "RB"; and amicus briefs as "__Br.," according to the lead amicus's name. All emphasis is added unless otherwise noted.

ARGUMENT

I. A FACIAL CHALLENGE CANNOT BE USED TO STRIKE § 41.49 AS A VIOLATION OF THE FOURTH AMENDMENT.

A. Facial Challenges Are Especially Disfavored In The Fourth Amendment Context And Should Be Exceedingly Rare When Devoid Of Facts.

Facial challenges are always disfavored, as Plaintiffs concede. RB16, 48. To clarify how this rule applies in the Fourth Amendment context, this Court should hold that facial challenges claiming that a law authorizes unreasonable searches are especially disfavored—and almost never permitted when unaccompanied by an as-applied challenge and devoid of any concrete facts.

Plaintiffs acknowledge that this Court has *said* that "[t]he constitutional validity of a warrantless search is *pre-eminently* the sort of question which can only be decided in the concrete factual context of the individual case." *Sibron v. New York*, 392 U.S. 40, 59 (1968). *Sibron*'s admonition is even more apt in this context, which is missing both an as-applied challenge and concrete facts about any actual search. Plaintiffs argue that this Court did not mean what it said in *Sibron*: "If it had, then this Court never could have considered *Skinner*, *Chandler*, *Ferguson*, *Torres*, *Payton*, or *Barlow's*." RB19.

Two pages earlier, however, Plaintiffs admit otherwise: "[T]he Court did not describe all of these

cases as facial challenges." *Id.* And not a single one of them struck a statute on a bare facial challenge shorn of any facts about an actual search.

Both *Payton v. New York*, 445 U.S. 573 (1980), and *Torres v. Puerto Rico*, 442 U.S. 465 (1979), were brought as motions to suppress evidence, and the relief granted was as-applied. *See* U.S. Br. 14-15; 442 U.S. at 474. *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978), too, was as-applied. And far from categorically striking the statute, this Court declared that its ruling in no way prohibited the Secretary of Labor from applying the statute to conduct constitutional inspections. *Id.* at 325 n.23.

Ferguson v. City of Charleston, 532 U.S. 67 (2001), was not even a challenge to a statute but a hospital policy. *Id.* at 71-73. And it also had an as-applied claim, for which the ten pregnant women who were involuntarily tested for drugs pursued damages. Order of Dismissal, *Ferguson v. City of Charleston*, S.C., No. 93-cv-02624 (D.S.C. Nov. 20, 2006), ECF No. 468 (noting "Plaintiffs' claims for damages … have been amicably settled").

Chandler v. Miller is the only case Plaintiffs invoke in which this Court granted broader relief and struck the statute as unconstitutional. 520 U.S. 305, 323 (1997). But *Chandler* was not a bare facial challenge to the words of a statute without any facts. The candidates for public office in *Chandler* eventually submitted to the statutorily required drug testing and appeared on the ballot. *Id.* at 310-11. In any event, the defendants in *Chandler* did not challenge the propriety of pursuing facial relief. Just as

deciding a case without addressing jurisdiction is not a tacit jurisdictional holding, *see Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011), deciding a facial challenge without addressing the vehicle is not a tacit approval of the vehicle.[2]

These cases all disprove Plaintiffs' assertion that our proposed rule would "prevent the Court from addressing blatant constitutional violations." RB18. All involved as-applied challenges with concrete facts. Nor does our proposed rule risk a "flood of future as-applied challenges" or "inconsistent rulings in the lower courts." RB19. As-applied challenges are the norm for adjudicating constitutional questions. Yet, no flood has materialized.

B. A Bare Facial Challenge To § 41.49 Is Inappropriate.

To illustrate the impropriety of adjudicating the reasonableness of all possible searches that could be conducted pursuant to § 41.49 in a factual vacuum, our opening brief (at 19-20) set out just a few of the many scenarios possible under § 41.49. Plaintiffs argue that each scenario is either an unconstitutional inspection or not conducted "pursuant to Section 41.49." RB49.

Plaintiffs are mistaken. Scenario 1 posits that the hotel owner leaves the register open to guest in-

---

[2] This principle applies with even greater force to *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 632 n.10 (1989), where the Court *rejected* a facial challenge without considering whether the vehicle was proper.

spection (as all Los Angeles hotels were legally required to do until 2006). OB19. But what if the hotel owner snatches the register away every time the police walk in? Contrary to Plaintiffs' assertion (at 48-49), § 41.49 does all the "work" in that context: It requires the hotel to hand over the register for inspection on pain of imprisonment. The point of the scenario is that the hotel cannot claim an expectation of privacy there.

Similarly, Plaintiffs assert that § 41.49 does "no work" in scenarios 4 and 5, where § 41.49 "forc[es] hotel owners to cooperate with law enforcement officers when they have an alternative legal basis" to conduct the search. RB49. Plaintiffs argue "the law already requires business owners to comply with lawful search requests." *Id.* That is wrong. Obstruction statutes prohibit a hotel owner from *obstructing* a search, but they do not require affirmative assistance, as § 41.49 would in these scenarios.

Plaintiffs likewise assert that scenarios 2 and 3, OB19-20, would not be "pursuant to § 41.49." RB49-50. But nothing in the plain language of § 41.49 prohibits the City from establishing a system whereby a hotel makes the required information "available" for police inspection over the internet (scenario 2). And nothing precludes an officer from requesting to inspect a redacted version of the records (scenario 3). If the City takes those steps, the only basis for the demand would be § 41.49.

C. Plaintiffs Cannot Save Their Facial Challenge By Arguing Waiver Or That This Court's Grant Of Review Was Unwise.

1. The petition framed the question as: "[A]re facial challenges to ordinances and statutes permitted under the Fourth Amendment?" Pet. i. Plaintiffs incorrectly argue that the City has "abandon[ed]" the first question presented, claiming our opening brief proposes no responsive rule at all, and makes only "fact-bound" arguments limited to "this case." RB13.

That is nonsense. The proof is in Plaintiffs' description of our argument in the next section of their brief (Point II). They say we do advocate "a rule." RB18. They describe it as a rule that "facial challenges cannot be raised against statutes under the Fourth Amendment." RB22. And they explain what would supposedly happen to *other cases* under our "rule." RB18-19, 23. Whoever wrote Point I needs to be introduced to the author of Point II.

The City asked this Court to "either prohibit Fourth Amendment facial challenges *or delineate a clear rule for when they are allowed*, *especially in the troublesome warrantless search context*." Cert. Reply 2, 6. That is exactly what we have done. When "are facial challenges to ordinances and statutes permitted under the Fourth Amendment?" Almost never—particularly not in a bare facial challenge devoid of facts about any particular search. This latter feature was the main focus of our cert. petition as well. *See* Pet. 1, 13-14, 16, 21-22, 24.

2. Plaintiffs are also wrong in contending that the City "has waived any error in the court's deciding the [merits] question." RB14. Plaintiffs made the same argument in opposing cert. Brief in Opposition 13-14. They "offer[] no clear justification for" why this Court should "now embrac[e] an argument '[it] necessarily considered and rejected' in granting certiorari." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) (quoting *United States v. Williams*, 504 U.S. 36, 40 (1992)).

Moreover, this Court was right to reject the argument. Contrary to Plaintiffs' assertion, the City did not "agree[] that hearing only the facial challenge would … allow the district court to resolve … the validity of the ordinance … without the need for" concrete facts relating to specific searches. RB13. The stipulation said simply: "The parties agree that the sole issue in the consolidated action is a facial constitutional challenge to LAMC section 41.49 under the Fourth Amendment." J.A. 195; *see* J.A. 110-11.

Regardless, the issue is in this case and appropriate for decision simply because the Ninth Circuit raised whether this was a proper facial challenge and the parties addressed the issue to that court. J.A. 260-62, 280-84, 296-98.

II. SECTION 41.49 IS NOT FACIALLY UNCONSTITUTIONAL.

Before we refute Plaintiffs' arguments on the merits, we address two threshold issues: First, Plaintiffs assert that the City bears the burden of

establishing the constitutionality of § 41.49. RB2, 11, 29, 34, 39. That is backwards. Plaintiffs must establish that all searches conducted pursuant to § 41.49 would be unconstitutional. "[O]ne of the first principles of constitutional adjudication [is] the basic presumption of the constitutional validity of a duly enacted state or federal law." *Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973) (plurality opinion) (internal quotation marks omitted). That "strong presumption" applies equally to a Fourth Amendment challenge to a statute. *United States v. Watson*, 423 U.S. 411, 416 (1976) (internal quotation marks omitted). Moreover, where, as here, a plaintiff challenges a duly enacted law on its face, the challenger bears the "heavy burden" of establishing "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Second, contrary to Plaintiffs' suggestion, *See v. City of Seattle*, 387 U.S. 541 (1967), does not decide this case. In defending § 41.49, the City invoked only one established exception to the warrant requirement: *New York v. Burger*'s exception for a reasonable administrative inspection regime in a closely regulated business. 482 U.S. 691 (1987). Yet, Plaintiffs build their argument around the assertion that the City has not satisfied the completely separate exception for administrative subpoenas discussed in *See*, which requires that "the subpoenaed party … obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." 387 U.S. at 544-45; RB10, 24, 26-27, 29, 53. Since we are not invoking that exception, it is irrelevant.

Moreover, since deciding *See*, this Court has made clear that there is no categorical rule that "the Fourth Amendment requires an opportunity for precompliance judicial review before the government can conduct a regulatory search." RB25 (capitalization omitted). The established exception to the warrant requirement for administrative search regimes in closely regulated industries does not require precompliance judicial review. § II.A. And even apart from that exception, this Court has repeatedly upheld warrantless administrative searches without precompliance judicial review. *See, e.g., Skinner*, 489 U.S. at 619 (upholding drug and alcohol testing of railroad employees without a warrant or precompliance judicial review). § II.B.

Under either legal rubric, the cases belie Plaintiffs' breathless description of § 41.49 as granting "nearly limitless search authority." RB11. This Court's other commercial administrative search cases considered statutes that authorized wide-ranging searches of every nook and cranny across a company's entire premises. Not § 41.49, which authorizes a very limited inspection of a single register that contains very limited information and that hotels maintain for the City in only one of two mandated locations.

A. Section 41.49 Is A Reasonable Administrative Inspection Scheme In A Closely Regulated Industry.

The *Burger* framework, set almost 30 years ago, refines the principles of an exception this Court adopted 45 years ago and has consistently applied

since. Nevertheless, Plaintiffs avoid *Burger* at every turn (at 29-41), then argue, "Petitioner is left then to argue that … its ordinance is no worse a fit with the pervasively regulated … exception … than the junkyard inspection ordinance in *Burger*," RB42. On all fours with *the* key Supreme Court case on a subject is not a bad place to be "left." But this case compares favorably not only to *Burger*, but also to *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972); and *Donovan v. Dewey*, 452 U.S. 594 (1981), all of which entailed much more sweeping searches.

1. Hotels are closely regulated.

Our opening brief demonstrated (at 31-36) that hotels are closely regulated in Los Angeles and have been closely regulated since the Founding. Plaintiffs and their amici ignore the compelling historical materials altogether. They also do not explain away their concession that "[t]here does seem to be a pervasive scheme throughout the state statutes regulating the various aspects of the motel industry." J.A. 133. Instead, they offer three arguments why their concession was wrong.

First, they characterize the current regulations as a "hodge-podge" of regulations that "apply to any business." RB31-32. Yet most of the regulations cited apply *only* to the hospitality industry. Illustrative are regulations that:

- require collection of specified information upon renting a room, LAMC § 41.49;

- strictly limit when it is permissible to evict a lingering guest, Cal. Civ. Code § 1865(c);

- require conspicuous posting of rates, Cal. Civ. Code § 1863(a);

- prohibit charging more than the posted rate, *id.* § 1863(b);

- require a change in bed linens between guests, Cal. Code Regs. tit. 25, § 40; and

- require the hotel to offer guests the option of not having towels and linens laundered daily, LAMC § 121.08(A)(12).

The only provisions we cited that extend beyond the hospitality industry are the prohibition against turning away guests, which applies to innkeepers and common carriers, Cal. Penal Code § 365, and the provision requiring sanitary handling of cups and ice buckets, which applies to hotels, motels, and other "public places," Cal. Code Regs. tit 17, § 30852. Notably, City officials inspect hotels for compliance with that regulation. *Id.* § 30858.

Plaintiffs reject this array of hotel-specific regulations as insufficiently "comprehensive." RB32. But this regime is far more "comprehensive" than *Burger*'s junkyard regulations, which required only licensing/registration, recordkeeping, and warrantless inspections of records and inventory. *See* 482 U.S. at 704-05.

Second, Plaintiffs assert that hotel "licensing requirements" are not "stringent." RB42-43. That is

irrelevant. In *Dewey*, mine owners needed no license at all. 452 U.S. at 604. In *Colonnade*, the federal "license" was a retail liquor dealer's occupational tax stamp. 397 U.S. at 72. And *Burger* did not turn on the specifics of licensing. *See* 482 U.S. at 704 n.15.

Third, Plaintiffs contend that the four industries to which this Court has applied the exception—the only four industries it has ever considered—all "presented unusual risk of harm to the public." RB30. Plaintiffs do not explain how automobile junkyards seriously threaten public safety. If the key is, as one amicus contends, that automobile junkyards are "permeated with criminal activity," Google Br. 19, the same is true of parking-meter motels, *see* OB2, 5-6.

Regulation of hotels has been longstanding and comprehensive in the precise ways that are relevant here. Hotels are one of the few industries where, for centuries, proprietors have been legally required to open their doors to all members of the public. OB34-36. And because allowing anybody to stay at any hotel anonymously creates unusual risks of harm to the public, for more than 115 years hotel owners in Los Angeles have been legally obligated to keep guest registry information and make it available for police inspection. Accordingly, any person who chooses to operate a hotel in Los Angeles does so "with the knowledge" that he is required to maintain certain records "subject to effective [police] inspection," *Biswell*, 406 U.S. at 316, and can be fairly deemed to have "voluntar[ily] consent[ed]" to the inspections here, *Barlow's*, 436 U.S. at 314. Plaintiffs' slippery-slope warnings that, if § 41.49 falls within

Burger, the government could force any industry to keep and disclose customer records are thus unfounded. Indeed, the background here much more strongly indicates consent than *Dewey* or *Burger*, where mines and vehicle dismantlers were subject to inspection for only 15 and 8 years respectively. *See* 452 U.S. at 605 n.10; 482 U.S. at 705.

2. Section 41.49 meets *Burger*'s other criteria.

a. Section 41.49's stated purpose is to "discourag[e] the use of hotel and motel rooms for illegal activities, particularly prostitution and narcotics offenses." L.A., Cal., Ordinance 177966 (Oct. 6, 2006). Approximately 100,000 children are trafficked for sex in the U.S. each year. Love146 Br. 6. Traffickers initially recruit most girls between the ages of 12 and 14. *Id.* at 7. Hotels and motels, which offer traffickers a private and anonymous place from which to conduct business, are vital to the operation, both as sites where children engage in commercial sex acts and as prisons for the child victims. *Id.* at 3, 13.

Nevertheless, Plaintiffs speculate that § 41.49 must be a "pretext" for "criminal investigations of hotel guests." RB44 (capitalization altered). But they concede away the point. They concede that "ensuring … hotel owners keep proper records" is a valid, "non-criminal purpose." RB35. And they do not contest that doing so "discourag[es] the use of hotel and motel rooms for illegal activities," because, as the City Council explained, criminals prefer to re-

main anonymous. L.A., Cal., Ordinance 177966 (Oct. 6, 2006).

While § 41.49 is directed at deterring crime, it is just not directed at general criminal investigations against guests. Nothing in the register tells police whether a hotel guest has committed a crime—and merely scanning a register for completeness is unlikely to detect guests' crimes. Section 41.49's purpose is to ensure that commercial actors—hotel owners—comply with the regulatory requirement that they record customer identities, in order to prevent the harmful secondary effects that arise from allowing guests to remain anonymous.

Plaintiffs' two arguments that the ordinance is pretextual despite all this are both meritless. First, Plaintiffs note that the police enforce § 41.49. RB46. This Court has already held that there is no "constitutional significance in the fact that police officers, rather than 'administrative' agents, are permitted to conduct [an] inspection." *Burger*, 482 U.S. at 717. Indeed, the relevant statutes were enforced by the police in *Burger*, *id.* at 693; by a city police officer with a Federal Treasury agent in *Biswell*, 406 U.S. at 312; and by federal law enforcement agents in *Colonnade*, 397 U.S. at 72-73.

Plaintiffs' second point is that "the only sanction for violating the ordinance is criminal." RB46. But the statutes in *Colonnade, Biswell*, and *Burger* likewise criminalized the failure to maintain the required records, refusal to admit inspectors, or both. 397 U.S. at 77; 406 U.S. at 313 n.2, 315 n.4; 482 U.S. at 694 n.1.

b. Plaintiffs argue that spot inspections are not "necessary to further the non-criminal purpose of ensuring that hotel owners keep proper records." RB35. Plaintiffs ignore this Court's holdings—in multiple situations—that "the prerequisite of a warrant could easily frustrate inspection." *Biswell*, 406 U.S. at 316. That is especially true where "unannounced, even frequent, inspections are essential," i.e., where inspections seek to discover "conditions" that are easy to "conceal." *Id.* This Court applied that principle to gun dealerships, because, if a gun dealer knows an inspector is on the way, he can move off premises any illegal weapons he conveniently left off the purchase records. It applied the principle to automobile junkyards in *Burger*—even though cars are presumably harder to conceal—"[b]ecause stolen cars and parts often pass quickly through … junkyard[s]." 482 U.S. at 710. And it applied the principle to mines in *Dewey*, deferring to Congress's determination that "in [light] of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives." 452 U.S. at 603 (internal quotation marks omitted).

Plaintiffs ignore all these holdings about the need for frequent, unannounced inspections when the evidence of violations is moveable or unavailable in retrospect. They also overlook how advance notice or delayed review would defeat § 41.49's objectives in the same way. Our opening brief (at 39) gave one illustration of how spot checks detect record-keeping violations. There are many more. If the parking lot is packed with cars, but the register reflects just one

room rental, the officer knows the records are incomplete. So, too, if the officer sees a guest walk into Room 2, but the register shows Room 2 vacant.

Just as in this Court's past precedents, detection fails if inspections have to be scheduled, delayed for court review, or infrequent. Scheduled inspections mean the hotel manager simply registers everyone on premises on inspection day and advises the known criminals (or those who refuse to provide information) to find another temporary lair. Similarly, when inspection is delayed, or the officer cannot return unannounced at random intervals, the officer cannot check the registrations against observable facts in real time. An administrative subpoena system would similarly frustrate the scheme, with or without precompliance judicial review. Motel owners can obviously ensure that any records they submit are accurate for submission day, while otherwise allowing criminals to rent rooms without providing the required information.

Plaintiffs suggest that officers "may seize and hold the registry without searching it pending judicial review." RB36. But the whole point of the precedents is that warrantless inspections are essential where verifying compliance depends on observing items or conditions on premises that are easy to disguise or move. Seizing the register is useless unless the police also seize the evidence necessary to verify its accuracy, including all the guests and vehicles on premises. *See* RB43 (acknowledging that seizure of a junkyard's inventory pending judicial review is not feasible).

Next, Plaintiffs argue that the City could verify the accuracy of some information after the fact by seizing the records and then consulting the Department of Motor Vehicles. RB38. But even if the police did so, that would only discourage motel owners from creating fake cards with phony license plate numbers. It would not stop them from renting rooms without any register entry, or fraudulently filling in empty entries with real names and license plates of past customers who were not, in fact, staying in the hotel at the time.

Plaintiffs also protest that "the City has failed to substantiate" the City Council's legislative judgment "that there is a recordkeeping problem in need of this extraordinary solution." RB39. Again, Plaintiffs have the standard backwards. Plaintiffs are challenging § 41.49 on its face. They thus bear the burden of proving that even without frequent, unannounced inspections, hotel and motel owners *would* accurately record and maintain the required information. *See Salerno*, 481 U.S. at 745.

On the other side of the equation, our opening brief explains (at 42) how adding a warrant—or precompliance review—would provide no additional protection because § 41.49 inspections are not premised on probable cause to believe that a crime has been committed. Because the inspections' purpose is to incentivize motel owners to keep accurate records (which thereby deters crime), it is unclear what showing a magistrate could require before approving a request for a warrant to conduct a random spot check, or on what basis he could refuse such a request. U.S. Br. 33.

Plaintiffs respond that a magistrate would (1) "confirm compliance with the statutory limits on the official's authority"; (2) ensure that the search is "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome"; and (3) ensure that the search is not "a pretext for harassment or criminal investigation." RB27 (internal quotation marks omitted). But the first two are guaranteed by § 41.49 itself. Section 41.49 specifies exactly what information must be included in the register, how long the information must be maintained, and what police are permitted to search—only the register. Even the Ninth Circuit held that § 41.49 "adequately specif[ies] (and limit[s] the scope of) the records subject to inspection." P.A. 11-12.

As to the third point, § 41.49 itself protects against harassing searches by providing that, "[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business." § 41.49(3)(a). Plaintiffs have not documented any abuse. If they ever do, they can challenge the harassment as unconstitutional. *See LeSueur-Richmond Slate Corp. v. Fehrer*, 666 F.3d 261, 268 (4th Cir. 2012).

Finally, amicus Google argues (at 19) that "[t]he statute is far broader than necessary to accomplish the government's purpose" because not all hotels suffer from the "problems attendant to hourly motels." Plaintiffs, themselves, make no overbreadth claim, presumably because their motels are plagued by the problems to which § 41.49 is directed. And so far as

appears from the amicus activity, hotels like Four Seasons, Sheraton, and Hilton remain untroubled by the ordinance. Either way, this Court cannot strike a law on Fourth Amendment grounds neither applicable to, nor asserted by, Plaintiffs. "Fourth Amendment rights are personal rights which may not be vicariously asserted," *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) (internal quotation marks and ellipses omitted).

c. Plaintiffs do not deny all the ways in which § 41.49 limits inspections just as a warrant does. Section 41.49 provides that only the register may be inspected. Inspections can take place in only two places—in the "guest check-in area or in an office adjacent to that area," § 41.49(3)(a)—and the hotel owner chooses which. And "[w]henever possible" the inspection must be conducted "at a time … that minimizes any interference with the operation of the business." *Id.*

Plaintiffs object that § 41.49 "fails to … limit officers' discretion" because it does not prescribe "which hotels to inspect," "how often to inspect them," or "what information to review." RB41. The last objection is false. Only the register may be inspected, and § 41.49(2)(a) and (4) prescribe exactly what information the register includes. The first two objections were equally true of the statutes at issue in *Burger*, *Biswell*, and *Colonnade*. None specified how owners were to be chosen for inspection or how often inspections could occur. *See* 482 U.S. at 694 n.1 & n.2, 711 n.21; 406 U.S. at 313 n.1; 397 U.S. at 73 n.1 & n.2. And in *Burger* this Court rejected the very same argument Plaintiffs advance

here, holding it sufficient that the statute "as a whole, place[d] adequate limits upon the discretion of the inspecting officers." 482 U.S. at 711 n.21; *see Biswell*, 406 U.S. at 316.

d. One of Plaintiffs' amici (though not Plaintiffs) urges this Court to add a fourth element: "that business records containing third party information cannot fall into the closely-regulated industry" exception. Rutherford Br. 12. But the business records in *Biswell* contained even more—and more personal—third party information. *See* 18 U.S.C. § 923(g) (1970); 26 C.F.R. § 178.124 (1972) (requiring firearm dealer to record each purchaser's "name, address, date and place of birth, height, weight, and race").

Moreover, Plaintiffs disclaimed any argument based on the privacy rights of the hotel guests, conceding, both before the district court and the Ninth Circuit, that "clearly the motel guest … can't claim that he has an expectation of privacy." J.A. 235; *see* J.A. 273. Under the third-party doctrine, they had no choice. *United States v. Miller*, 425 U.S. 435, 443 (1976).

B. Searches Conducted Pursuant To § 41.49 Are Reasonable.

Even if *Burger* did not defeat Plaintiffs' facial claim, they still cannot prevail unless they demonstrate that all searches conducted pursuant to § 41.49 would be unreasonable. As explained above (at 2-5) that is not possible on a facial challenge. In any event, the ordinance strikes a reasonable bal-

ance on the core hypothetical the Ninth Circuit indulged, and even more so in the other applications.

Plaintiffs' main response is that this Court cannot balance the reasonableness of searches that could be conducted pursuant to § 41.49 if it finds that *Burger* does not apply. They claim this Court has already "establish[ed] rules for assessing" the constitutionality of all searches conducted pursuant to § 41.49 and that all relevant considerations are subsumed within *Burger*. RB53-54. But this Court has never assessed the constitutionality of any hotel register inspection scheme, let alone every possible inspection that could be conducted pursuant to § 41.49. And this Court regularly engages in the required balancing. *See, e.g.*, *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013).

Marshall v. Barlow's is not to the contrary. Plaintiffs report that "upon determining that the [OSHA] warrantless inspection scheme did not qualify for the closely regulated business exception," this Court did not "go on to engage in another round of reasonableness balancing." RB53. Wrong. After concluding that the "closely regulated industry" exception did not apply *to all businesses involved in interstate commerce*, the Court proceeded to balance the reasonableness of OSHA searches, "[b]ecause reasonableness is still the ultimate standard." 436 U.S. at 315-16 (internal quotation marks omitted). As if to anticipate Plaintiffs' point here, the Court added: "The reasonableness of a warrantless search … will depend upon the specific enforcement needs and privacy guarantees of *each statute*." *Id.* at 321.

The reasonableness balancing, which Plaintiffs barely address, begins with "guidance from the founding era." *Riley v. California*, 134 S. Ct. 2473, 2484 (2014). Our opening brief explains (at 49) that warrantless inspections of inns—not mere registers—were common at the Founding, citing laws from Massachusetts and New Hampshire. Connecticut had a similar law authorizing constables, grand jurors, and selectmen to inspect licensed houses, including inns. An Act For Licencing And Regulating Houses Of Public Entertainment, Or Taverns; And For Suppressing Unlicenced Houses, 411 (1796), *reprinted in* William Edmond, *Acts and Laws of the State of Connecticut, in America* 408-12 (1797). Plaintiffs dismiss these laws as "likely embody[ing] a pre-Fourth Amendment view that any licensed business could be subject to warrantless inspection, an idea the Fourth Amendment … rejected." RB58. But Plaintiffs must have overlooked the dates: The statutes were enacted in 1786, 1791 and 1796, respectively.

History aside, § 41.49 strikes a reasonable balance between the City's interest in ensuring that its hotels do not become hotbeds of crime and the individual hotel owner's interest in preventing police from viewing records that he has been required to maintain for police inspection since 1899. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-54 (1995). For the reasons discussed above (at 13-20), the City's interest is compelling and the search is about as limited as a search can be. As to the hotel owner's expectation of privacy, there is none—or at least none to speak of. Hotels cannot seriously claim that they have a strong privacy interest in information they have been collecting *for City inspec-*

tion for 115 years. (They certainly cannot so claim if they leave the register open for guest review, but snatch it away when the police show up.) That is not "bootstrap[ping]." RB56. It is a century-long, time-honored, legally required reality.

Plaintiffs also contend that the "registries are important confidential business records," because hotel owners may use them "for tax auditing purposes" and to "prepare[] valuations of their properties." RB55. But turning over the required information to the IRS or a commercial bank should give Plaintiffs less of an expectation of privacy in it, not more.

C. The City Has Addressed The Question Presented.

The second question in the cert. petition asks: "To resolve a split between the Ninth Circuit and the Massachusetts Supreme Court, does a hotel have an expectation of privacy under the Fourth Amendment in a hotel guest registry …? If so, is the ordinance facially unconstitutional under the Fourth Amendment … ?" Pet. i. Plaintiffs contend that the City "abandon[ed]" the question presented by "seek[ing] a ruling that would leave the circuit conflicts … unresolved." RB14-16. That is wrong. The petition correctly described the split as follows: "[*Commonwealth v. Blinn*, 399 Mass. 126 (1987)] conflict[s] with *Patel* …. *Patel* concluded the City's ordinance … was facially unconstitutional because pre-enforcement judicial review was required, but in *Blinn* the court upheld the warrantless search under the Fourth Amendment." Pet. 27. We have not con-

ceded that "the Ninth Circuit was on the right side of [that] split[]," RB9, or any other.

Plaintiffs also criticize the City for arguing that "Section 41.49 satisfies the test for pervasively regulated industries under *New York v. Burger*," without "mak[ing] that argument in its cert. petition." RB15. But the cert. petition did not make any arguments on the merits at all. It just laid out the splits that merited this Court's review. That was not a waiver of the core argument the City advanced throughout this litigation.

As to the preliminary question about expectations of privacy, Plaintiffs assert that the City "abandons that question, too, [by] conceding that *the Fourth Amendment applies* to registry searches." RB14. That conflates two separate questions. Under *United States v. Jones*, 132 S. Ct. 945, 949-51 (2012), a search occurs if the government physically intrudes upon a constitutionally protected area—person, house, paper or effect—for the purpose of gathering information, even if there is no "reasonable expectation of privacy" in that area. To concede that inspecting a guest register maintained behind the counter would be a search under *Jones* does not concede there is a reasonable expectation of privacy.

Of course, privacy interests remain relevant to whether a search is reasonable. *See, e.g.*, *King*, 133 S. Ct. at 1969. The City addressed hotel owners' privacy interests extensively, both in the context of *Burger* (at 10-13) and in the context of the reasonableness of searches that could be conducted pursuant

to § 41.49 (at 22-23).[3] Nevertheless, Plaintiffs claim that the petition should be dismissed because a sentence in the opening brief "argu[ed] only that 'hotels have a *diminished* privacy interest in their guest registers,'" RB14 (quoting OB51), rather than none whatsoever. Lest there be any doubt, our position is that a hotel has no expectation of privacy from the police with respect to the register. In any event, the difference is inconsequential as the key precedents use both interchangeably. *Compare Barlow's*, 436 U.S. at 313 (describing the closely regulated industries exception as hinging on "such a history of government oversight that *no reasonable expectation of privacy* could exist" (internal citation omitted)), *with Burger*, 482 U.S. at 701 (describing the same exception as resting on "the *reduced expectation of privacy* by an owner of commercial premises in a closely regulated industry"). The reasonableness of a search depends on the *degree* of privacy interests, not on whether they are completely nonexistent.

CONCLUSION

This Court should reverse the court of appeals' judgment.

---

[3] Plaintiffs are wrong in asserting (at 15 n.5, 52) that the reasonableness argument was waived. Both the Ninth Circuit panel and Judge Clifton's dissent concluded that a § 41.49 inspection would constitute a search under *Jones* but Plaintiffs "fail[ed] to establish that [the] search … would be unreasonable." P.A. 25-34, 43-44.

Respectfully submitted,

E. Joshua Rosenkranz
Robert M. Loeb
Rachel Wainer Apter
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Orin S. Kerr
2000 H Street, NW
Washington, DC 20052

Michael N. Feuer
City Attorney
James P. Clark
Chief Deputy City Attorney
Thomas H. Peters
Chief Assistant City Attorney
Gregory P. Orland*
Senior Counsel
700 City Hall East
200 North Main Street
Los Angeles, CA 90012
(213) 978-8160
gregory.orland@lacity.org

**Counsel of Record*

Counsel for Petitioner

Date: February 17, 2015