No. 13-1175

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES,

Petitioner,

v.

NARANJIBHAI PATEL ET AL.,

Respondents.

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

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

This Court granted certiorari to address these two questions:

1. To resolve a split between the Ninth and Sixth Circuits are facial challenges to ordinances and statutes permitted under the Fourth Amendment?

2. 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 where the guest supplied information is mandated by law and that ordinance authorizes the police to inspect the registry? If so, is the ordinance facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry?

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BRIEF FOR THE RESPONDENTS

Exposing *government* conduct to sunlight may be the "best of disinfectants." Petr. Br. 1 (quoting LOUIS BRANDEIS, OTHER PEOPLE'S MONEY 92 (1914)). But the Fourth Amendment was enacted precisely to prevent the "the privacies of life of all the people . . . [from being] exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts." *Olmstead v. United States*, 277 U.S. 438, 479 n.12 (1928) (Brandeis, J., dissenting).

For that reason, "review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights," *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972), and a search must be authorized by a warrant, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). Even in exceptional cases where a warrant is not required, it is only in the rarest circumstances that the Fourth Amendment permits the government to bypass the judiciary altogether by criminalizing a citizen's resistance to a search demand. *See, e.g.*, *New York v. Burger*, 482 U.S. 691, 700, 702 (1987).

Against this backdrop, the City of Los Angeles seeks to defend an ordinance that authorizes the police to carry out warrantless, suspicionless searches of hotel registries while providing no avenue for hotel owners to challenge the searches before complying. Los Angeles Municipal Code (LAMC) § 41.49. Sitting en banc, the Ninth Circuit held the ordinance unconstitutional on its face because it

subjects hotels "to the 'unbridled discretion' of officers in the field" without adequate "procedural safeguard[s] against arbitrary or abusive inspection demands." Pet. App. 12.

That decision should be affirmed. Because the City fails to show any special need for endowing individual police officers with this extraordinary authority, the Court cannot accept petitioner's interpretation of the Fourth Amendment without simultaneously encouraging governments throughout the country to adopt similar laws providing police with unfettered access to all manner of business records. That result would turn a narrow Fourth Amendment exception into the rule, doing violence to the privacy the Founders intended the Amendment to secure.

STATEMENT OF THE CASE

I. Background Of The Ordinance

Los Angeles Municipal Code Section 41.49 imposes two distinct requirements on all hotel owners. First, owners must record a variety of information about their guests, including their names, addresses, vehicle information, arrival and departure dates, room prices, and payment methods. Any guest who rents a room without a reservation or by paying in cash is required to present identification, such as a driver's license, and the hotel must record the identification number and expiration date. LAMC § 41.49(4)(a), (c). For guests checking in with a credit card at an electronic kiosk, the hotel must record the credit card information. *Id.* § 41.49(2)(b). The ordinance further criminalizes

providing a pseudonym or other false information. *Id*. §§ 41.49(6)(a), (b), 11.00(m).

Separately, Section 41.49 requires that hotels make these records "available to any officer of the Los Angeles Police Department for inspection" on demand. *Id.* § 41.49(3)(a). As petitioner concedes, this provision authorizes inspections at any time "without consent or warrant," and without probable cause or even suspicion. Petr. Br. 8. The provision also does not permit hotel owners to challenge an officer's demand before a neutral judge or magistrate before having to comply. Instead, the ordinance makes failure to produce the registry on command a crime. LAMC §§ 41.49(3)(a), 11.00(m).

Officers thus may search any hotel irrespective of its history of criminal activity or non-compliance with the recordkeeping requirement. The ordinance also provides no limitation on the registration records officers may search, instead allowing police to comb through the guests' data in any way they see fit. There is no limit on how officers may use the information they find, how long they can retain it, or with whom they may share it. In particular, nothing prevents officers from using the information as evidence of a crime. In fact, as petitioner has frankly admitted, the search authority provided in Section 41.49 is intended "expressly [to] help police investigate crimes such as prostitution and gambling, capture dangerous fugitives and even authorize federal law enforcement to examine these registers." Pet. 6.

II. Facts And Procedural History

1. Respondents are approximately forty hotel owners and the Los Angeles Lodging Association, of which the hotel owners are members. J.A. 31. The owners are Asian-Indian immigrants. *Id.* Respondents maintain guest registries, which they use both to satisfy the requirements of Section 41.49 and for unrelated tax and business purposes. *Id.* 144-45. Officers of the Los Angeles Police Department have conducted and continue to conduct warrantless searches and seizures of respondents' hotel registries under the ordinance. *Id.* 194-95.[1]

2. Respondents challenged these searches in multiple suits in the United States District Court for the Central District of California.[2] As relevant here, the complaints alleged that the ordinance violates the Fourth Amendment, and sought declaratory and injunctive relief. J.A. 37-38, 41, 53, 57, 94, 97. Each also presented as-applied challenges to past searches seeking damages against the City and individual officers. *Id.* 33-39, 48-54, 76-81.

In various pretrial agreements, the parties agreed to streamline the litigation by consolidating the challenges to Section 41.49 into a single case.

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[1] Counsel recently learned that respondents Naranjibhai and Ramilaben Patel no longer own a Los Angeles motel. This development does not raise any mootness question for the Court, however, because the other respondents have Article III standing. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (declining to adjudicate standing when some plaintiffs had it).

[2] Respondents did not challenge the recordkeeping requirements.

J.A. 110-11. To make this trial as efficient as possible, petitioner and respondents agreed to an initial phase of litigation in which "the sole issue in the consolidated action [would be] a facial constitutional challenge to LAMC section 41.49 under the Fourth Amendment." *Id.* 195.[3] They further agreed to put the as-applied damages claims on hold by dismissing them without prejudice and tolling the statute of limitations for those claims pending resolution of the facial challenge. *Id.* 110-11. This arrangement permitted the City, the individual defendants, and the court to avoid the cost and complication of litigating the as-applied challenges until the fundamental Fourth Amendment question had been resolved.

Over the next four years, the City litigated the facial constitutionality of the ordinance, asking the courts to reject respondents' facial challenge on the merits.[4] After a bench trial in 2008, the district court obliged. As an initial matter, the court rejected petitioner's argument that Los Angeles hotels fall within the "pervasively regulated industries" exception to warrant requirement under *New York v. Burger*, 482 U.S. 691 (1987). *See* Pet. App. 54-55. Petitioner had submitted "*no evidence* that hotels have been subjected to the same kind of pervasive

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[3] Shortly before an initial bench trial in 2006, the City amended the ordinance, causing the court to order a new trial in 2008. *See* J.A. 177, 201. Before each trial, petitioner agreed that the constitutionality of the ordinance was the sole issue. *Id.* 110, 195.

[4] *See, e.g.*, Def.'s Tr. Br. 8-9.

and regular regulations as other recognized 'closely regulated' businesses." *Id.* 54 (emphasis added). Consequently, the court was "not persuaded *on this record* that hotels and motels are closely regulated businesses for purposes of the administrative search exception to the Fourth Amendment." *Id.* 55 (emphasis added).

The district court nevertheless ruled for petitioner on a different ground, holding that the registry inspections authorized by the ordinance did not constitute a "search" within the meaning of the Fourth Amendment because respondents lacked a reasonable expectation of privacy in the registries. Pet. App. 55-56. Consequently, the court dismissed the facial challenge. *Id.* 57.

3. A divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, agreeing that hotels have no constitutionally protected expectation of privacy in their registries. Pet. App. 40-43.

4. The Ninth Circuit granted rehearing en banc. One week before oral argument, the court *sua sponte* ordered the parties to be prepared to discuss the relevance of *Sibron v. New York*, 392 U.S. 40 (1968), to respondents' facial challenge. J.A. 2, 260. No doubt prompted by the order, at oral argument the City argued for the first time that the district court should not have accepted the City's invitation to rule on the merits of respondents' facial challenge. *Id.* 280-81.

The en banc court reversed. Pet. App. 14. The court assumed *arguendo* that the ordinance was not a pretext for criminal investigative searches, and therefore did not require a warrant. *Id*. 10. But

despite "giv[ing] the city the benefit of the doubt at each turn," the court nonetheless held the ordinance invalid. *Id.* 11.

Unlike the district court, the court of appeals had "little difficulty" concluding that the inspections authorized by Section 41.49 constituted searches under the Fourth Amendment because they interfere both with respondents' constitutionally protected property interests and with respondents' reasonable expectations of privacy. Pet. App. 6-7. The court then considered whether the searches authorized by Section 41.49 were reasonable. The court acknowledged a narrow exception to the traditional warrant requirement for administrative searches of business records to enforce regulatory, rather than criminal, laws. *Id.* 11-13. But that exception, the court explained, nonetheless required an opportunity for the subject of the search to seek judicial review before having to comply. *Id.* 12 (citing *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984); *See v. City of Seattle*, 387 U.S. 541, 545 (1967)). Because Section 41.49 concededly provides no such opportunity for pre-compliance judicial review, the court held it facially unconstitutional. *Id.* 13.

The majority recognized that *Burger* allowed an even narrower exception to *See*'s requirement of pre-compliance judicial review when the business searched is in a "closely regulated industr[y]." Pet. App. 13 n.2. But in light of the City's failure to submit any record evidence on the question, the court of appeals held that "no serious argument can be made that the hotel industry has been subjected to the kind of pervasive regulation that would qualify it for treatment under the *Burger* line of cases." *Id.*

Neither of the two dissenting opinions disagreed with the majority's rejection of the City's *Burger* defense. Instead, one dissent, relying on *Sibron*, argued that the court's review should have been confined to specific searches and seizures that actually occurred, rather than the ordinance's facial constitutionality. Pet. App. 16-17. A second dissent would have affirmed on the ground that respondents had not established a protected privacy interest in their registries. *Id.* 32-34.

5. The City petitioned for certiorari, seeking review on two questions that, it said, divided the lower courts. First, petitioner asked this Court to decide categorically whether "facial challenges to ordinances and statutes [are] permitted under the Fourth Amendment," Pet. i, emphasizing what it perceived as "fundamentally different conclusions" between the Sixth and Ninth Circuits, *id.* 5. Petitioner stressed the need to settle the "deeply divided" constitutional question of whether "facial challenges are available under the Fourth Amendment." *Id.* 20, 24.

The second question had two parts. Petitioner first asked this Court to decide whether "a hotel [has] an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest supplied information is mandated by law and that ordinance authorizes the police to inspect the registry," Pet. App. i, citing a conflict between the Ninth Circuit's holding in this case and *Commonwealth v. Blinn*, 503 N.E.2d 25 (Mass. 1987). Pet. 25-26. Petitioner also asked whether, if hotel owners do have an expectation of privacy, Section

41.49 is facially unconstitutional, *id.* i, although it did not allege any circuit conflict on this question.

6. This Court granted certiorari.

SUMMARY OF ARGUMENT

1. Petitioner's writ should be dismissed as improvidently granted because, having induced the Court to grant certiorari to resolve two circuit conflicts, petitioner has filed a brief concluding that the Ninth Circuit was on the right side of both splits. Specifically, although it sought review to resolve whether hotels have a reasonable expectation of privacy in their registries, it does not challenge the Ninth Circuit's conclusion that they do. And although it pointed to a circuit conflict over whether Fourth Amendment facial challenges are *categorically prohibited* (as held by the Sixth Circuit and rejected by the Ninth), it now admits they sometimes are permitted. Rather than address the categorical question at the heart of the circuit split, petitioner spends most of its brief arguing that even if the Fourth Amendment applies to hotel registries and even if facial Fourth Amendment challenges are permitted, this particular facial challenge fails on the merits under *New York v. Burger*, 482 U.S. 691 (1987). But it never even hinted at this argument in its petition, the district court rejected the argument for lack of evidence, and the question is not the subject of a circuit conflict. In these circumstances, the Court should dismiss the petition as improvidently granted, for if the City had been more forthright in its petition, the Court surely would have denied review.

2. Regardless, this Court has repeatedly considered facial Fourth Amendment challenges and the City identifies no good reason to change course now. Indeed, the City admits that the facts of a particular search are irrelevant to some Fourth Amendment challenges. This case presents one such challenge – the Ninth Circuit rightly concluded that a law authorizing searches purportedly to enforce non-criminal regulations must afford an opportunity for pre-compliance judicial review of officials' search demands. The absence of this procedural protection renders Section 41.49 unconstitutional in all of its applications, just as a statute authorizing warrantless searches of homes would be invalid whenever invoked. Petitioner identifies no basis in law or reason why a court should hesitate to declare a statute facially unconstitutional when leaving the statute on the books will only mislead the police and risk infringing citizens' constitutional rights.

3. The City's defense of the ordinance is meritless. It is a "basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (citation omitted). The Court has recognized an exception for certain searches aimed at enforcing administrative regulations, but only if those searches are subject to pre-compliance judicial review, which Section 41.49 does not permit. *See v. City of Seattle*, 387 U.S. 541 (1967); Pet. App. 9-13.

The City thus is forced to invoke an even narrower exception reserved for "pervasively

regulated industries." *Burger*, 482 U.S. at 693. But hotels are not more closely regulated than the panoply of businesses subject to various federal, state, and local laws. Accepting the City's invocation of the pervasively regulated industries exception would allow the exception to swallow the rule.

Even if the *Burger* test applies, the ordinance does not satisfy it. The City has failed to show that the exception is necessary to serve its interests. And the ordinance fails to include any meaningful protections against individual police officers conducting fishing expeditions, including pretextual searches in support of criminal investigations.

In fact, the disconnect between the City's asserted interest in enforcing its recordkeeping requirement and the nearly limitless search authority bestowed by the ordinance shows that the principal purpose of the law is to facilitate ordinary criminal investigation. This Court has been clear that such pretextual search regimes are subject to the ordinary warrant requirement that governs any other criminal search.

4. Running out of options, the City claims that even if Section 41.49 fails every established Fourth Amendment test, it should still be upheld either under ad hoc "reasonableness balancing" or by historical analogue. Neither argument saves the ordinance. First, this Court has already struck the constitutional balance in its regulatory search cases, making a second round of balancing unnecessary. Nor would re-balancing lead to a different result. However strong the City's interest in preventing crimes in some hotels, the City has failed to show that eliminating any form of pre-compliance judicial

review is necessary to advance that interest. At the same time, the City unduly disparages the privacy interests of hotels and their customers.

Finally, the City fails to substantiate its claim that similar searches of private hotel registries were a clearly established, commonly accepted practice in the Founding Era.

ARGUMENT

I. The Court Should Dismiss This Case As Improvidently Granted.

Having obtained review on the promise that the Court could resolve two important circuit splits, petitioner's merits brief takes no side in either conflict. Instead, the City seeks reversal on a theory that the Ninth Circuit barely addressed because petitioner failed to substantiate its factual predicate in the record below. Rather than condone the City's bait-and-switch tactics, the Court should dismiss the writ as improvidently granted.

1. The petition's first Question Presented asks categorically whether "facial challenges to ordinances and statutes [are] permitted under the Fourth Amendment." Pet. i. Petitioner insisted that the decision here conflicted with the law of the Sixth Circuit, which holds such claims categorically unreviewable. *See id.* 7-8 (embracing the view that the "constitutional validity of a warrantless search is preeminently the sort of question which *can only be decided in the concrete factual context of the individual case*") (quoting *Sibron v. New York*, 392 U.S. 40, 59 (1968)).

In its merits brief, however, petitioner abandons that argument, recasting the Question Presented to ask not whether Fourth Amendment facial challenges are categorically prohibited, but rather whether "the Ninth Circuit err[ed] in using a facial challenge to strike [Section] 41.49" *in this case*. Petr. Br. i. Thus, the City now agrees with the Ninth Circuit that "courts are capable of making some Fourth Amendment determinations without any consideration of case-specific facts." *Id.* 28. It argues only that the Ninth Circuit erred in how it conducted the facial analysis in this particular case. *See id.* 18-28. Addressing that fact-bound assertion will not resolve the circuit conflict and would not have warranted this Court's review.

Indeed, this case is an exceptionally poor vehicle to address when courts should exercise their discretion to entertain Fourth Amendment facial challenges. *Cf.* U.S. Br. 21-24. Regardless of whether courts should ordinarily abstain from considering facial Fourth Amendment challenges as a matter of constitutional law or equitable discretion, *see id.* 21-23, the Ninth Circuit was justified in *this* case in deciding the facial challenge. The City agreed that hearing only the facial challenge would simplify the cases and allow the district court to resolve respondents' principal concern – the validity of the ordinance – without the need for individualized trials in as-applied damages actions. *See* J.A. 110. Consequently, respondents agreed to dismiss without prejudice their as-applied challenges. *Id.* 110-11. Had the City even hinted that it reserved the right to dispute the district court's authority to consider the facial claims, respondents would not have agreed to

dismiss their as-applied challenges. Under these circumstances, petitioner has waived any error in the court's deciding the question that the City presented for resolution, and is judicially estopped from contesting the district court's authority to resolve respondents' facial challenge. *See, e.g.*, *United Rys. & Elec. Co. of Balt. v. West*, 280 U.S. 234, 248-49 (1930) (challenge to valuation waived when it "was accepted without question by both parties" below); *cf. New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel prohibits a party from "gain[ing] an advantage by litigati[ng] on one theory, and then seek[ing] an inconsistent advantage by pursuing an incompatible theory" (citation omitted)).

2. The City presented a two-part second question. The first part asked whether a hotel has "an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest supplied information is mandated by law and that ordinance authorizes the police to inspect the registry." Pet. i. Petitioner argued for review in light of a split between the Ninth Circuit and the Massachusetts Supreme Judicial Court. *Id.* 26 (citing *Commonwealth v. Blinn*, 503 N.E.2d 25 (Mass. 1987)). Petitioner now abandons that question, too, conceding that the Fourth Amendment applies to registry searches. *See* Petr. Br. 51 (arguing only that "[h]otels have a *diminished* privacy interest in their guest registers" (emphasis added)).

The second question presented also asked whether Section 41.49 is "facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry." Pet. i. In its merits

brief, petitioner principally argues that Section 41.49 satisfies the test for pervasively regulated industries under *New York v. Burger*, 482 U.S. 691 (1987). Petr. Br. 29-47. But petitioner did not make that argument in its cert. petition – which did not even cite *Burger*, *see* Pet. vii-xi (Table of Authorities) – perhaps because it knew there was no circuit conflict over *Burger*'s application to the hotel industry. Or perhaps it hid its intention to rely on *Burger* because the Ninth Circuit had addressed the argument only briefly in footnotes, explaining that the district court had found that the City "submit[ted] no evidence that hotels or motels in California or Los Angeles have been subjected to the same kind of pervasive and regular regulations as other recognized 'closely regulated' businesses." Pet. App. 54; *see id*. 13 n.2 (court of appeals agreeing that "no serious argument can be made that the hotel industry has been subjected to the kind of pervasive regulation that would qualify it for treatment under the *Burger* line of cases"); *id*. 14-34 (en banc dissents) (raising no objection to majority's resolution of the *Burger* claim). Had the City forthrightly asked this Court to review that case-specific and fact-bound determination, the Court surely would have denied certiorari.[5]

The City now seeks a ruling that would leave the circuit conflicts and the petition's principal questions

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[5] The City also failed to argue in its petition or below that the ordinance is constitutional in light of Founding-era historical practice and under ad hoc reasonableness balancing. *Compare* Petr. Br. 47-54, *with* Def. C.A. Br. 6-24, *and* Pet. 25-30.

unresolved, or would require resolving them without adversarial presentation. The City would have the Court either decide whether the Fourth Amendment applies to searches of hotel registries (without briefing the question) or assume that it does for the purposes of this case (in which case a later contrary ruling would render the decision here meaningless). Both results are inappropriate.

Dismissing the petition will also signal to parties that the Court directs its limited resources toward resolving questions that *it* believes warrant review, not issues petitioners elect to brief after the Court grants certiorari.

II. The Ninth Circuit Properly Entertained Respondents' Facial Challenge.

In any event, petitioner and its amici are wrong to suggest that the Fourth Amendment is peculiarly ill-suited to facial challenges or that the Ninth Circuit erred in adjudicating the challenge in this case.

While facial challenges may be "disfavored," this Court has squarely held that they may be sustained when the strict standard for facial invalidation is met. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Accordingly, the Court has entertained such challenges under a diverse range of constitutional provisions, including those that, like the Fourth Amendment, require balancing state and private interests. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 625, 634-35 (1996) (Fourteenth Amendment challenge to a state constitutional amendment prohibiting ordinances protecting against sexual orientation discrimination); *Kraft Gen. Foods, Inc. v.*

Iowa Dep't of Revenue & Fin., 505 U.S. 71, 81-82 (1992) (Foreign Commerce Clause challenge to a state tax provision); *Mathews v. Eldridge*, 424 U.S. 319, 339-49 (1976) (Due Process Clause challenge to administrative scheme's procedural protections).

The Fourth Amendment is no exception to this rule. In fact, this Court has repeatedly declared facially invalid laws authorizing unreasonable searches and seizures. In *Chandler v. Miller*, 520 U.S. 305, 309 (1997), for instance, candidates for public office challenged a Georgia statute requiring all candidates to pass a drug test. The Court held the law unconstitutional on its face because drug tests "d[id] not fit within the closely guarded category of constitutionally permissible suspicionless searches." *Id.*; *see also, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67, 85-86 (2001) (facially invalidating a program authorizing warrantless drug testing of pregnant mothers); *Payton v. New York*, 445 U.S. 573, 576 (1980) (striking down a statute that allowed police to make warrantless arrests inside arrestee's home); *Torres v. Puerto Rico*, 442 U.S. 465, 467-68, 474 (1979) (striking down a statute that authorized warrantless luggage searches); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978) (invalidating a statutory provision allowing OSHA inspectors to conduct warrantless searches); *cf. Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989) (deciding the facial validity of regulations authorizing drug tests of railroad employees). Although the Court did not describe all of these cases as facial challenges, they are properly regarded as such because in each case the Court held the statute invalid in all its applications, not simply on the facts of the case

before it. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (explaining that the distinction between facial and as-applied challenges hinges on "the breadth of the remedy employed by the Court, not what must be pleaded in a complaint").

To the extent petitioner and its amici ask this Court to abandon these precedents and adopt a rule limiting Fourth Amendment challenges to particular searches without any possibility of broader relief, they would prevent the Court from addressing blatant constitutional violations. Under petitioner's rule, this Court could not facially invalidate a statute providing across-the-board authority for warrantless searches of homes, suspicionless strip searches of schoolchildren, or the very general warrants the Fourth Amendment was enacted to prohibit, *see Riley v. California*, 134 S. Ct. 2473, 2494 (2014). And all for no conceivable purpose: as the Chief Justice has noted, "whether [the Court] label[s] [a] claim a 'facial' or 'as-applied' challenge, the consequences of the Court's decision are the same" if the Court's holding would render every application of the statute unconstitutional. *Citizens United*, 558 U.S. at 376 (Roberts, C.J., concurring); *see also Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984) ("[T]here is no reason to limit challenges to case-by-case 'as applied' challenges when the statute on its face and therefore in all its applications falls short of constitutional demands."). When a statute is unconstitutional in all its applications, refusing to say so leaves a law on the books that can never be applied lawfully, setting a trap for unwary police officers and posing a serious risk to the constitutional

rights of ordinary citizens. At the same time, it guarantees a flood of future as-applied challenges and risks inconsistent rulings in the lower courts.

This Court's decision in *Sibron v. New York*, 392 U.S. 40 (1968), is not to the contrary. In *Sibron*, the defendants challenged the constitutionality of a statute that authorized police to "stop any person abroad in a public place whom [they] reasonably suspect[] is committing, has committed or is about to commit a felony" and provided that, when an officer "reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon." 392 U.S. at 43-44. This Court decided whether the petitioners' individual searches violated the Fourth Amendment, but declined to go further. *See id.* at 62-63, 66. In a sentence upon which the City heavily relies, the Court concluded that applying the petitioners' particular Fourth Amendment objections to other applications of the statute would require the "abstract and unproductive exercise of laying the extraordinarily elastic categories of [the statute] next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible." *Id.* at 59.

This sentence cannot bear the weight petitioner and its amici place upon it. The Court merely identified a particular circumstance in which it was impracticable to resolve a broad challenge to a "peculiar" statute, because the statute's terms were indeterminate. *See id.* at 61-62. But *Sibron* did not announce a general rule against facial challenges. If it had, then this Court never could have considered *Skinner*, *Chandler*, *Ferguson*, *Torres*, *Payton*, or *Barlow's*. If there were any doubt, the next sentence

of the *Sibron* opinion resolves it. The Court explained that a facial challenge *would* be appropriate to test "the adequacy of the procedural safeguards written into a statute." *Id.* at 59 (citing *Berger v. New York*, 388 U.S. 41 (1967)). Here, of course, the lack of procedural safeguards is precisely what respondents challenge.

Sibron itself thus explains why the en banc dissenters were wrong to suggest that all Fourth Amendment facial challenges should be barred because they turn on search-specific facts. Pet. App. 15-16. Their reasoning ignores the many *per se* rules that govern Fourth Amendment cases. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 701 (1983) ("In the ordinary case, this Court has viewed a seizure of personal property as *per se* unreasonable . . . unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized."); *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions."); *Barlow's*, 436 U.S. at 325 (holding that warrantless regulatory searches require pre-compliance judicial review). The Court established these *per se* Fourth Amendment protections to give concrete guidance to the police and avoid turning the constitutionality every disputed search into an ad-hoc reasonableness debate.

Even when the Court considers whether a statute is "reasonable" under the Fourth Amendment, it does not do so solely or even primarily

by reference to a single case's factual context.[6] Instead, it evaluates features of the statute that do not vary from case to case. In *Ferguson v. City of Charleston*, for example, the Court considered the constitutionality of a policy that subjected pregnant women to warrantless drug testing. 532 U.S. at 69-71. The Court did not analyze whether it was reasonable to conduct tests on the ten women who challenged the policy; in fact, it did not even describe the individualized circumstances under which they were tested. *Id.* at 73. Instead, it considered general features of the policy and the privacy interests at stake. *Id.* at 78.

Likewise, because the issue here is whether Section 41.49 provides adequate procedural safeguards, no further facts are necessary. The record here[7] details the City's construction of the

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[6] Of course, because every plaintiff raising a facial challenge must establish standing under Article III, every facial challenge will arise from a particular concrete factual context. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). The extent to which parties present evidence regarding how the statute has been applied in practice will depend on the nature of the constitutional claim and the litigation choices of the parties. In this case, for example, the City had every opportunity to present additional evidence at trial to substantiate the need for the extraordinary features of its ordinance, but chose not to do so. That litigation decision, however, cannot insulate the ordinance from facial review.

[7] The 2008 pre-trial order provides that LAMC Section 41.49 will be the only exhibit in the trial. J.A. 199. However, there are other documents in the record that the Court could consider if it deemed them relevant.

ordinance,[8] how it may be enforced,[9] the function and practical use of registration information for hotel owners,[10] and respondents' injuries.[11] On these facts, the Court has enough information to conclude that Section 41.49 is unconstitutional in all of its applications. *See infra* Parts III-IV.

Second, petitioner and some amici argue that facial challenges cannot be raised against statutes under the Fourth Amendment because the Fourth Amendment only constrains executive action. Petr. Br. 26-27; Br. of Amicus Curiae Manhattan Institute for Policy Research 10-14. But nothing in the text of the Fourth Amendment limits its application to executive officials. In plain terms, the Amendment creates a right – "the right of the people to be secure" against unreasonable searches and seizures – that "shall not be violated." U.S. Const. amend IV. It is like many other constitutional provisions that guarantee rights instead of restricting particular branches, such as the Second Amendment (right to bear arms), the Fifth Amendment (due process; protection from double jeopardy and self-incrimination), the Sixth Amendment (speedy and public trial;

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[8] *Id*. 194-95 (stipulation that Section 41.49 authorizes searches without consent or a warrant).

[9] *Id*. 115-16 (declaration describing an LAPD officer's experience enforcing Section 41.49).

[10] *Id.* 145 (testimony about the purpose and uses of registry cards).

[11] *Id*. 194 (stipulation that respondents have been "subject to searches and seizures . . . without consent or warrant").

trial by jury), and the Eighth Amendment (protection from cruel and unusual punishment).

This Court has considered facial challenges to statutes that interfere with such rights. *See Boyd v. United States*, 116 U.S. 616, 638 (1886) (finding forced production of a business invoice violated the Fourth and Fifth Amendments and holding "the law which authorized the order . . . unconstitutional"); *Skinner*, 489 U.S. at 632 n.10 (considering the constitutionality of a mandatory drug testing scheme under the Fourth Amendment "on its face"); *Salerno*, 481 U.S. at 741, 752 (considering the facial validity of the Bail Reform Act under the Fifth and Eighth Amendments). If the Court adopted petitioner's and amici's argument, it would be restricted from even considering the facial constitutionality of statutes under any of those constitutional provisions, and from granting relief even when there is no set of circumstances in which the challenged statute could be constitutionally applied.[12]

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[12] Such direct challenges to statutes authorizing unreasonable searches and seizures predate the Fourth Amendment. In *Paxton's Case*, 1 Quincy 51 (Mass. 1761), for example, the Massachusetts Superior Court heard arguments against writs of assistance authorizing "house-to-house searches" that had been issued in favor of British customs agents, not against the searches conducted pursuant to those writs. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602-1791, at 380-81 (2009). James Otis, representing an association of prominent merchants from Boston and Salem, argued that "where an Act of Parliament is against Common Right and Reason or repugnant or impossible to be performed, the Common Law will controul [sic] it and adjudge it to be void." *Id.* at 385, 388. Although that court

III. The Ordinance Is Unconstitutional On Its Face.

The Ninth Circuit correctly held that Section 41.49 violates the Fourth Amendment. Ordinarily, "a search . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989). This Court has recognized a narrow exception for certain searches aimed at enforcing regulations. *See v. City of Seattle*, 387 U.S. 541 (1967). Such searches are constitutional only if they are subject to "judicial review of the reasonableness of the demand prior to [the imposition of] penalties for refusing to comply," and if they are conducted for a non-criminal purpose. *Id.* at 544-45. Section 41.49 neither permits pre-compliance judicial review, nor falls within the narrow exception to that requirement applicable to certain "pervasively regulated" industries. *New York v. Burger*, 482 U.S. 691, 701-03 (1987). Instead, the ordinance is a pretext for avoiding the warrant requirement in conducting ordinary criminal searches. These systemic procedural defects render Section 41.49 unconstitutional in all its applications.

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ultimately approved the issuance of the writs, the case "intensified public antipathy to the writs of assistance and revealed the breadth and depth of that antipathy." *Id.* at 395.

A. The Fourth Amendment Requires An Opportunity For Pre-Compliance Judicial Review Before The Government Can Conduct A Regulatory Search.

1. The Fourth Amendment generally requires a warrant to address the Founders' fundamental "concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). The warrant requirement "interpose[s] a neutral magistrate between the citizen and the law enforcement officer." *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989). In addition, by requiring that the warrant "particularly describe[] the place to be searched, and the persons or things to be seized," the Fourth Amendment seeks to safeguard against "exploratory rummaging in [that] person's belongings," including her papers. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (plurality). In combination, these requirements ensure that the decision whether, and how, to invade a person's privacy is not made by officers in the field "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948); *see also United States v. U.S. Dist. Court*, 407 U.S. 297, 317 (1972).

This Court has recognized, however, that the basic purposes of the warrant requirement can be satisfied through other means in a "closely guarded" set of circumstances. *Chandler v. Miller*, 520 U.S. 305, 309 (1997). Most relevant here, the Court has developed a different set of restrictions applicable to searches designed to achieve "special needs" other

than criminal enforcement, including searches to enforce regulations. *Id.* at 313.

That exception was first recognized in *See v. City of Seattle*, 387 U.S. at 544. There, city officials attempted to enter a warehouse to conduct a building code inspection. *Id.* at 541. As in this case, the city ordinance required neither a warrant nor any basis to suspect a violation. *Id.* Likewise, as in this case, the ordinance imposed no meaningful restrictions on officials' discretion over which businesses to search. *Id.* Nor, as in this case, did Seattle provide an opportunity for any type of pre-compliance judicial review of inspection demands. *Id.* Instead, as here, refusal to consent was a crime. *Id.* at 542 n.1.

This Court recognized that "[o]fficial entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws." *See*, 387 U.S. at 543-44. Addressing the Fourth Amendment's application to this context for the first time, the Court concluded that a warrant and probable cause were not required, but that the search regime must functionally reproduce the warrant requirement's two constraints on police discretion.

First, the Court held that the law must provide substantial restrictions on officials' discretion regarding the subject and scope of the search. *See*, 387 U.S. at 544. Specifically, the Court held that "the decision to enter and inspect [may] not be the product of the unreviewed discretion of the enforcement officer in the field." *Id.* at 545. For example, in a companion case involving housing code inspections, the Court suggested that rather than allowing individual inspectors to decide which buildings to

inspect, an ordinance might apply ex ante standards "based upon the passage of time, the nature of the building (*e.g.*, a multifamily apartment house), or the condition of the entire area." *Camara v. Mun. Court*, 387 U.S. 523, 538 (1967).

Second, the Court held that, absent exigent circumstances, the subject of the search must be able to "obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *See*, 387 U.S. at 545; *Camara*, 387 U.S. at 539.

While the United States expresses befuddlement over what judicial review would accomplish in this context, *see* U.S. Br. 33, this Court has made clear the important but reasonable inquiry the magistrate would undertake to ensure that searches conducted pursuant to such special needs exceptions "are not the random or arbitrary acts of government agents." *Skinner*, 489 U.S. at 622. First, the magistrate must confirm compliance with the statutory limits on the official's authority. *Camara*, 387 U.S. at 538. Second, the magistrate ensures that the search complies with the Fourth Amendment. *Id.* at 538-39; *see also United States v. Chadwick*, 433 U.S. 1, 8-9 (1977). That means, for one thing, that the search must be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See*, 387 U.S. at 544. It also means that the search must not be a pretext for harassment or criminal investigation. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 15 (1968); *U.S. Dist. Court*, 407 U.S. at 316-17.

The modern administrative state has existed comfortably with "these rather minimal limitations

on administrative action" for nearly half a century. *See*, 487 U.S. at 545. Indeed, Congress has enacted a broad range of regulatory regimes that comply with these Fourth Amendment limitations, and neither petitioner nor the United States suggests that the government has been unable to advance its regulatory interests while complying with the law. *See, e.g.*, Veterans Employment Opportunities Act of 1998, 5 U.S.C. § 3330a(b); Consumer Product Safety Act, 15 U.S.C. §§ 2076(b)(3)-(4), 2076(c); Federal Energy Administration Act of 1974, 15 U.S.C. § 772(e); Federal Trade Commission Act, 15 U.S.C. § 49; Toxic Substances Control Act, 15 U.S.C. §§ 2610(a), 2616; Higher Education Act of 1965, 20 U.S.C. § 1097a; Occupational Safety and Health Act, 29 U.S.C. § 657; Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4326(b); 41 U.S.C. § 610 (subpoena authority of agency boards of contract appeals); Atomic Energy Act of 1954, 42 U.S.C. § 2201(c); Clean Air Act Amendments of 1990, 42 U.S.C. § 7412(r)(6)(L)(i); 10 U.S.C. § 2313(b) (subpoena authority of the Defense Contract Audit Agency).

2. Applying these principles, the en banc Ninth Circuit correctly held that Section 41.49 violates the Fourth Amendment. The court of appeals acknowledged that under the more "lenient" Fourth Amendment standards for administrative regulatory searches, Pet. App. 11, the ordinance "need not require issuance of a search warrant" in order "to be reasonable," *id*. 9. But, consistent with this Court's longstanding precedents, the Ninth Circuit held that "at a minimum," that search regime must "afford an

opportunity for pre-compliance judicial review, an element that § 41.49 lacks." *Id.* 9-10.

B. The Pervasively Regulated Industries Exception Is Inapplicable.

Because *See* and its progeny plainly prohibit Section 41.49's regime of warrantless, suspicionless searches without pre-compliance judicial review, petitioner attempts to shoehorn the ordinance into the "closely guarded category of constitutionally permissible suspicionless searches," *Chandler*, 520 U.S. at 309, reserved for "pervasively regulated industries," *Burger*, 482 U.S. at 693. To qualify for the exception, in addition to being "pervasively regulated," the search regime must satisfy three additional criteria: (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be 'necessary to further [the] regulatory scheme'"; and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." *Id*. at 701-03 (alterations in original) (citations omitted). Petitioner bears the burden of meeting each prong, including the particularly exacting standard of "necessity." *See United States v. Jeffers*, 342 U.S. 48, 51 (1951) ("the burden is on those seeking the exemption to show the need for it"); *New Jersey v. T.L.O.*, 469 U.S. 325, 356 (1985) (Brennan, J., concurring in part and dissenting in part) (defining "necessity" in the context of other "special needs" exceptions as when doing otherwise is "impossible" or "hopelessly infeasible").

Petitioner's invocation of the pervasively regulated industries exception, Petr. Br. 29-47, is misplaced. Hotels are not pervasively regulated, and in any event, Section 41.49 cannot satisfy either the necessity or the warrant-substitute requirement.

1. Hotels Are Not "Pervasively Regulated."

The pervasively regulated industry exception applies only in "relatively unique circumstances." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978); *Burger*, 482 U.S. at 701 (describing the "narrow focus" of the exception). In the past forty-five years, this Court has found the exception applicable only with respect to four industries, each of which presented unusual risk of harm to the public. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor industry); *United States v. Biswell*, 406 U.S. 311 (1972) (firearm and ammunitions sales); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining); *Burger*, 482 U.S. 691 (automobile junkyards).

At the same time, the Court has resisted interpretations of the exception that would apply to broad swaths of the business community. *See Barlow's*, 436 U.S. at 313-14. And for good reason: it is easy enough for the government to assert that a wide range of industries are "pervasively regulated," and it has every incentive to do so because those industries frequently maintain records that would be helpful to law enforcement in conducting routine criminal investigations for which it would ordinarily have to seek a warrant (or at least, under *See*, submit to pre-compliance judicial review). For example, the police often would like to track suspects' movements, *see* U.S. Br. 26-27, and it is plausible to claim that

rental car companies, gas stations, subway systems, and taxis are closely regulated industries. *Cf. United States v. Jones*, 132 S. Ct. 945 (2012); *United States v. Knotts*, 460 U.S. 276 (1983). Likewise, the police will frequently want to know where a person spends her time, and apartment rental companies, public housing, psychiatrists' offices, nursing homes, day cares, gyms, and most employers are subject to regulation from a variety of sources. Law enforcement is often critically interested in obtaining suspects' communications, *cf. Riley v. California*, 134 S. Ct. 2473 (2014); *Katz v. United States*, 389 U.S. 347 (1967), and the telecommunications industry is one of the most highly regulated in the country. *See, e.g.*, 47 C.F.R. §§ 24.1-24.839.

Accordingly, the test for what counts as a pervasively regulated industry is necessarily strict. An industry is pervasively regulated only when there exists "such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *Barlow's*, 436 U.S. at 313. Thus, the inquiry turns on "the pervasiveness and regularity of the federal regulation," *Dewey*, 452 U.S. at 606. Those entering an industry in which government inspectors are an ever-present fact of life may not retain a significant expectation of privacy in the facilities and documents subject to that regular regulatory review. *See id*.

The City argues that hotels are pervasively regulated within the meaning of this exception because they are subject to a hodge-podge of regulations ranging from general licensing, false advertising, and non-discrimination requirements that apply to any business, to conservation and

environmental measures that apply to a broad subset of the business community. *See* Petr. Br. 33-34. That view, if accepted, would take the narrow exception and "make it the rule." *Barlow's*, 436 U.S. at 313. Nearly every business in the United States is subject to a comparable patchwork of broadly applicable federal, state, and local regulations. But an industry is not closely regulated simply because it must comply with a variety of laws. The critical question is whether the industry expects to be subject to regular, ongoing searches under a comprehensive regulatory regime. *See, e.g.*, *id*. at 313-14.

The alleged pervasive regulation in this case thus stands in marked contrast with the regulatory regimes addressed in the Court's prior cases. For example, unlike the comprehensive regulatory system enforced by federal mining inspectors in *Dewey*, 452 U.S. at 596, the alleged pervasive regulation in this case is undertaken by an assortment of city agencies, none of which administers Section 41.49, which is enforced only by the police.[13]

In addition, the pervasive regulatory regime alleged by the City lacks the necessary "regularity" of

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[13] The City suggests that hotels are subject to strict licensing requirements comparable to those at issue in the Court's prior cases. *See* Petr. Br. 32. But its citations support no such comparison. *See id*. (citing the requirement that hotels – like churches, day cares, schools, and theaters – must obtain an operational permit from the fire department); *see also id*. (citing requirement of a Transient Occupancy Registration Certificate, which is simply a means for the City to collect the transient occupancy tax, *see* LAMC §§ 21.1.1-21.17.5).

inspection to support any claim that the hotel owners have the especially diminished expectation of privacy required for the exception. In *Dewey*, this Court explained that consistent and regular inspections can "establish a predictable and guided federal regulatory presence" that may diminish privacy expectations to the point that the protections for regulatory searches no longer apply. *Dewey*, 452 U.S. at 596. On the other hand, the Court explained, "warrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Id.* at 599.

Here, the City does not claim that any of the laws it cites other than Section 41.49 are regularly enforced through on-site searches that could vitiate hotel owners' otherwise established expectation of privacy in their business records. To the contrary, as far as the City has demonstrated, the only searches conducted at hotels – and certainly the only allegedly regulatory searches conducted *by the police* – are those authorized by this ordinance. And the City has not proven that even *those* searches are sufficiently regular and frequent to warrant applying the pervasively regulated industry exception. Unlike the statute in *Dewey*, for example, the ordinance itself makes no provision for a regular schedule of inspection. *See* 452 U.S. at 596. As far as the law is concerned, officers may visit respondents' hotels every day for a year without setting foot in the vast majority of hotels subject to the recordkeeping requirement. Moreover, the City has placed no

evidence in the record suggesting that the searches actually conducted are anything other than the random, infrequent, and unpredictable pattern of inspections this Court held insufficient in *Dewey*. *See id.* at 599.

The district court thus was entirely correct in concluding that the City had failed to establish that Los Angeles hotels are pervasively regulated. The Court can overturn that ruling only if it adopts a standard that will be incapable of principled limits and that renders the justification for the exception a sham. If a law authorizing the police to rummage through a business's records can, in itself, establish the basis for a "pervasively regulated" industry exception, then the justification for the exception will be founded on only "the most fictional sense of voluntary consent." *Barlow's*, 436 U.S. at 314.

2. Section 41.49 Does Not Satisfy The Test Applied To Pervasively Regulated Industries.

Even if the Court holds that Los Angeles hotels are pervasively regulated, Section 41.49 does not meet the applicable test for two reasons. First, the City has failed to demonstrate that dispensing with the ordinary opportunity for pre-compliance judicial review is "necessary to further [the] regulatory scheme." *Burger*, 482 U.S. at 702. Second, the ordinance does not sufficiently limit the discretion of the officer in the field to provide "a constitutionally adequate substitute for a warrant." *Id*. at 702-03.

a. Necessity. No one contests the City's right to impose the recordkeeping requirement of Section 41.49, or to inspect these records after complying

with appropriate safeguards. The Fourth Amendment question thus is not whether *record-keeping* is necessary to deter crime, or whether inspections generally are necessary to ensure that hotel owners keep proper records. Rather, the question is whether the kind of inspection authorized by Section 41.49 – which eliminates the traditional requirement of an opportunity for pre-compliance judicial review – is necessary to enforce the recordkeeping requirement. It is not.

One could understand an argument that allowing pre-compliance judicial review would be inconvenient if the searches were intended to assist the police in catching drug dealers, prostitutes, or their customers. But that is not the City's claim, as it would require admitting that the ordinance is an unconstitutional pretext for criminal investigation. *See infra* Part III.C. Instead, petitioner's argument is that eliminating pre-compliance judicial review is necessary to further the non-criminal purpose of ensuring that hotel owners keep proper records. Petr. Br. 37-41.[14]

That argument is implausible. Myriad federal and state recordkeeping regulations are successfully enforced even while providing an opportunity for pre-

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[14] When LAPD wishes to inspect a registry as part of a criminal investigation, it has the whole range of law enforcement tools at its disposal: it may obtain a warrant, quickly via telephone when needed, *see Missouri v. McNeely*, 133 S. Ct. 1552 (2013), dispense with the warrant in exigent circumstances, *Schmerber v. California*, 384 U.S. 757, 770-71 (1966), or invoke any of the other "well-delineated exceptions" to the warrant requirement, which apply to hotels as well as in homes. *Gant*, 556 U.S. at 338; *see, e.g.*, *Jeffers*, 342 U.S. at 51.

compliance judicial review. *See supra* p. 28. The City must explain what is special about its recordkeeping requirement, or the context in which it is enforced, that makes an extraordinary exception to traditional Fourth Amendment rules "necessary." This, the City has failed to do.

For example, petitioner argues that permitting pre-compliance judicial review would give hotel owners the opportunity to complete or falsify records, thereby evading detection of their violations of Section 41.49. But if that is true, it is true of *all* recordkeeping requirements. And, in fact, it is not true.

To start, if officers have a genuine basis to believe that evidence will be altered or destroyed, they may seize and hold the registry without searching it pending judicial review. *See Camara*, 387 U.S. at 539 (exigency exceptions apply in non-criminal searches); *Riley v. California*, 134 S. Ct. 2473, 2486 (2014) (police may seize and hold cell phone pending search warrant to prevent destruction of evidence); *Illinois v. McArthur*, 531 U.S. 326, 331-33 (2001) (officers may seize property or suspect to prevent destruction of evidence pending issuance of a warrant). Seizing the record to prevent destruction of evidence may be necessary to ensure proper records are kept, but searching the registry would not. *See United States v. Chadwick*, 433 U.S. 1, 15 (1977) (finding necessary the impounding of a locked footlocker to prevent destruction of property, but not the warrantless search of the footlocker's contents). Or, of course, the police may seek an *ex parte* warrant authorizing a surprise inspection. *See Barlow's*, 436 U.S. at 316-20; *see also* WAYNE R. LAFAVE, SEARCH &

SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.2(d) n.95 (5th ed. 2012).[15]

In any event, often the "element of surprise" will not even be necessary. For example, at oral argument before the en banc court, counsel for petitioner explained that the LAPD routinely demands access to a hotel's records after an officer witnesses a hotel owner improperly recording a guest's information, for example, by failing to make any entry at all. J.A. 282-83. But in this scenario, the officer does not need to inspect the registry (much less thumb through its entire contents), having already witnessed a citable violation.

Likewise, in other circumstances, hotel owners who fail to keep proper records will be unable to evade detection even if permitted to challenge the search before a magistrate. For example, the delay in seeking judicial review would afford a hotel owner who has not kept any registry no realistic opportunity to create ninety days' worth of false records. *Cf. Burger*, 482 U.S. at 694-95 (owner unable to produce any logbook at all).

Perhaps it might be possible to fabricate entries covering a shorter period of time. But, to the extent the police are able to determine whether records are accurate – by, for example, comparing the registry

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[15] These options are especially appropriate here given that this ordinance is enforced by the police. *Cf. Skinner*, 489 U.S. at 623 (expressing concern that requiring a warrant would be infeasible when the search is conducted by non-law enforcement personnel).

entries to officer's notes of the "license plates of the cars in the parking lot," Petr. Br. 39 – a hotel will not evade liability even if it is able to backfill the registry with made-up entries.[16] For example, even if the hotel owner attempted to go into the parking lot and write down all the numbers of the cars then in the lot (which the police could prevent her from doing, *see supra* p. 36), she would not be able to match the license number with the actual guest (although the police, through Department of Motor Vehicles records, could). And the police could make this sort of evasion even more difficult by taking note of the license plates and returning a day or two later, when the cars that should have been recorded in the registry likely would have left the lot.

For the same reason, delay will not help the hotel owner who includes false information on an ongoing basis – *e.g.*, making up names as guests check in. When the police arrive to conduct spot checks with correct information, the fabrication will be apparent. Conversely, if the police have made no effort to determine what *should* be in the registry – if they simply show up and thumb through the records – then dispensing with pre-compliance judicial review will serve no purpose, as they will have no way of knowing if the registry is accurate with or without the element of surprise.

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[16] It is unclear in any event how this procedure could actually detect violations, given that the ordinance requires hotels to document the vehicle of the person who rents the room, not the vehicles of hotel guests' visitors or others who may, for various reasons, be parked in the hotel lot.

Finally, the City has failed to substantiate any claim that there is a recordkeeping problem in need of this extraordinary solution. To be sure, the City talks at length about the problem of crime in *some* of the city's hotels (although the ordinance applies broadly to all hotels, including, for example, the Four Seasons). But the ordinance must be justified as a means to enforce the recordkeeping requirement, not as a general crime control measure. The question is whether the City has demonstrated a real problem of recordkeeping violations that would evade detection under ordinary Fourth Amendment standards. The City points to no such evidence, having elected to present no evidence at all in defense of the ordinance. *Cf. Chandler*, 520 U.S. at 319-20 (invalidating a drug test for political candidates where there was no sufficient showing of a drug problem among candidates).[17]

In fact, hotel owners like respondents have little incentive to falsify records or to allow criminals to stay in their hotels. Criminals drive away legitimate customers, cause property damage, and present a danger to hotel owners, some of whom live on the property. And hotel owners often have an independent interest in accurate records, such as for

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[17] The City cannot blame this lack of evidence on respondents' choice to bring a facial challenge. Nothing prevented the City from submitting evidence establishing the statute's necessity; its lawyers simply elected not to do so. Nor would the evidence required have varied from search to search, making as-applied litigation preferable.

tax or insurance purposes, or as proof of the value of their business if the hotel is sold. *See* J.A. 145.

b. Limits on Discretion. In furtherance of the Fourth Amendment's core purpose of preventing a "fishing expedition for evidence of unidentified criminal activity," *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1256 (2012) (Sotomayor, J., dissenting), the closely regulated industries exception retains the general Fourth Amendment requirement that a search unsupported by probable cause and a warrant must "limit the discretion of the inspecting officers" in a manner sufficient to "provide a constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 703. For example, in *Dewey*, the Court approved a warrantless inspection scheme under the federal Mine Safety and Health Act because the statute and its implementing regulations required inspection of all underground mines at least four times per year and required specific follow-up after finding certain violations, rather than leaving the choice of whom to inspect to officials in the field. 452 U.S. at 603-04; 30 C.F.R. §§ 100.1-100.5.[18]

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[18] The Court has required similar limitations in other special needs cases. *See, e.g.*, *Skinner*, 489 U.S. at 622 (upholding warrantless drug testing for *all* federal railroad employees after a crash, given "the standardized nature of the tests and the minimal discretion vested in those charged with administering the program"); *Nat'l Treasury Emps. Union*, 489 U.S. at 667 (upholding drug testing program for every applicant for certain positions under the "special needs" exception); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650 (1995) (upholding randomized drug testing of student-athletes); *Camara*, 387 U.S. at 538 (upholding a warrantless building

Section 41.49 fails to comparably limit officers' discretion. The ordinance does not limit an officer's discretion to decide which hotels to inspect or how often to inspect them. *See* LAMC § 41.49. Nor does it limit the officer's review of the information in the registry – an officer is permitted to peruse those private records at will, whether he is searching for recordkeeping violations, looking for the names of criminal suspects or fugitives, or merely curious about who is staying in the hotel. *See id.* This permits exactly the kind of "general rummaging in order to discover incriminating evidence" that the Fourth Amendment prohibits. *See Whren v. United States*, 517 U.S. 801, 811 (1996).

To be sure, as the City notes, it could be worse. The ordinance limits officers to rummaging through the hotel's registry, and suggests that officers try to do so at convenient times. Petr. Br. 45-46. But these arguments miss the point. These restrictions do nothing to address the core Fourth Amendment flaw, which is the lack of any meaningful constraint on officers' discretion regarding whom to search, how frequently to inspect, and what information to review.[19]

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inspection regime where inspectors enter *all* buildings in a designated area).

[19] In addition, the vagueness of Section 41.49's limitations on the timing of searches – requiring the police are to conduct inspections "at a time and in a manner that minimizes any interference" with the hotel's business operation, "[w]henever possible" – render its protections largely illusory. *See Mincey v. Arizona*, 437 U.S. 385, 394-95 (1978) (noting that these sorts of vaguely worded "guidelines . . . confer unbridled discretion upon

3. This Case Is Distinguishable From Burger.

Petitioner is left then to argue that despite these failures, its ordinance is no worse a fit with the pervasively regulated industry exception requirements than the junkyard inspection ordinance in *Burger*. *See* Petr. Br. 30-33, 42-46. That argument is understandable, as *Burger* surely represents the outer boundary of the exception. *See, e.g.*, John C. Yoo, *BCW Treaties and the Constitution*, *in* THE NEW TERROR 269, 283 (Sidney D. Drell et al. eds., 1999) (noting that "*Burger* establishes the farthest that government officials can go in the context of warrantless searches"). The comparison nonetheless fails for several reasons.

First, the vehicle disassembly companies in *Burger* were subject to a comprehensive, pervasive regulatory regime entirely unlike the grab-bag of unrelated laws the City points to here. In *Burger*, for example, Section 415-a of the New York Vehicle and Traffic Laws not only required the keeping of a logbook, but also established stringent licensing requirements. The law required the Commissioner of the Department of Motor Vehicles to determine whether each applicant was a "fit person[] to engage in such business," *Burger*, 482 U.S. at 704 n.15, which was determined based on an application listing all convictions and arrests "relating to the illegal sale or possession of a motor vehicle or motor vehicle

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the individual officer to interpret" the ambiguous statutory terms).

parts." *Id*. Junkyards were also subject to regulations promulgated by the Commissioner. *See* N.Y. Comp. Codes R. & Regs. tit. 15, §§ 81.2 (registration); 81.8 (procedures upon acquisition of junk and salvage vehicles); 81.10 (vehicle identification numbers); 81.12 (records) (1986). Petitioner has identified no comparable licensing scheme for hotels in Los Angeles. *See supra* p. 32 n.13.

Second, the Court concluded in *Burger* that ordinary Fourth Amendment procedures were infeasible in the automobile disassembly industry because "frequent and unannounced" inspections were necessary given that "stolen cars and parts often pass[ed] quickly through an automobile junkyard." *See Burger*, 483 U.S. at 710 (quotation marks omitted). Access to a logbook was needed to allow an immediate comparison to the parts found at the facility before the parts disappeared. *See id*. But here, as discussed above, there is no comparable danger. While it may be infeasible for the police to seize the thousands of parts stored in any given junkyard, officers concerned about alteration of a hotel registry can easily ensure that it does not "move quickly" off the premises by securing a single registry kept in the hotel lobby or nearby office. *See supra* p. 36.

Third, in any event, although the law in *Burger* also had a recordkeeping requirement, as petitioner notes, Petr. Br. 30, the Court never had occasion to decide any question regarding warrantless record searches without pre-compliance judicial review because the junkyard operator in that case failed to keep a record book at all, and was not arrested for

any recordkeeping violation. *See Burger*, 482 U.S. at 695-96.

Fourth, although the Court ultimately was able to conclude in *Burger* that "no reasonable expectation of privacy could exist for a proprietor" of a junkyard, *Burger*, 482 U.S. at 700 (citation omitted), quite different privacy concerns are at issue in the hotel industry. In contrast to the inspection of a junkyard logbook, searching a hotel registry implicates important privacy interests of hotel guests, even if those interests may not be protected directly by the Fourth Amendment.

Finally, as discussed next, Section 41.49 is a pretext for general crime control, whereas the inspection scheme in *Burger* was not. *See Burger*, 482 U.S. at 712-14, 716 n.27.

C. Section 41.49 Is Also Unconstitutional Because Its Principal Purpose Is Facilitating Warrantless Searches In Aid Of Criminal Investigations Of Hotel Guests.

Although the Ninth Circuit had no occasion to reach the question, *see* Pet. App. 10, Section 41.49 is also unconstitutional because its principal purpose is to facilitate criminal investigations.

Special needs exceptions to the warrant requirement, like the administrative searches permitted under *See* and *Burger*, are unavailable when the search regime's "primary purpose is ultimately indistinguishable from the general interest in crime control." *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000); *see Burger*, 482 U.S. at 712-15. Warrantless searches undertaken

pursuant to a putatively non-criminal inspection regime, but actually "designed as a pretext to enable law enforcement authorities to gather evidence of penal law violations," are unconstitutional. *Skinner*, 489 U.S. at 621 n.5 (citation and quotation marks omitted); *compare Edmond*, 531 U.S. at 44 (invalidating vehicle checkpoint designed to detect drug crimes), *and Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979) (invalidating arbitrary vehicle spot checks designed to detect drivers without proper license and registration), *with Illinois v. Lidster*, 540 U.S. 419, 427-28 (2004) (upholding vehicle checkpoint designed to solicit information), *and Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451, 455 (1990) (upholding vehicle checkpoint designed to promote public safety by removing intoxicated drivers from roads).

To decide whether a purportedly administrative search is a pretext for criminal investigation, the Court looks to "the programmatic purpose" of the law or policy to determine if it is appropriately "divorced from the State's general interest in law enforcement" or is instead a pretext for general crime control. *Ferguson*, 532 U.S. at 81, 79; *see also Edmond*, 531 U.S. at 42-43. The Court does not "simply accept the State's invocation of a 'special need.'" *Ferguson*, 532 U.S. at 81. Instead, the Court carries out "a 'close review' of the scheme at issue," *id.* (quoting *Edmond*, 531 U.S. at 44), "consider[ing] all the available evidence," *id.*

Here, the primary purpose of Section 41.49 is general crime control. That purpose is evident first by the breadth of the search authorization and lack of any meaningful constraints on officer discretion. The

police can search the registry of any hotel, at almost any time, for almost anything. *See* Pet. App. 63. That power is of great value for the investigation of particular crimes – where a person or a vehicle was on a particular date is critical to many investigations, as the City and the United States have emphasized. *See* Pet. 29-30; U.S. Br. 26-27. Consequently, if the City had wanted to design an inspection ordinance solely for the purpose of aiding criminal investigations, it would have drafted precisely the same ordinance.

Second, the police's "involve[ment] in the day-to-day administration" of the putatively administrative program is another reason to conclude that the ordinance is pretextual. *Ferguson*, 532 U.S. at 82. The police are the only government officials allowed to enforce Section 41.49. And of the various regulations governing hotels that petitioner cites, Petr. Br. 33-34, Section 41.49 is the *only* one enforced by the police. *See supra* pp. 32-33.

Third, the only sanction for violating the ordinance is criminal. LAMC § 11.00(m). As a consequence, even when the police search a registry solely to determine whether the owner has violated the recordkeeping requirement, they are enforcing a criminal statute.

Fourth, in announcing the purpose of the ordinance in 2006, the City emphasized that the "inspection of hotel and motel registers by the police department is a significant factor in reducing crime in hotels and motels." Petr. Br. Supp. App. 8-9. The United States thus recognizes the true function of the provision when it argues that "[m]aking guest information available for inspection assists police in

finding missing persons, including fugitives, probationers, suspects, and potential witnesses." U.S. Br. 26. The United States even admits, "[i]nspection of the records enables police to determine swiftly whether a person is staying at a particular hotel . . . [e]ven when Fourth Amendment standards of exigency are not present." *Id.* at 27.

Petitioner responds that the purpose of the statute is to deter crime, not to detect and punish it. Petr. Br. 2, 38-40; U.S. Br. 25-26. But that is a very fine line. Any search that results in the detection and punishment of a crime necessarily deters crime. Thus, the government in *Edmond* and *Ferguson* could have equally said in those cases that drug checkpoints and maternal drug testing were intended to deter crime, not punish it. So while "a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions," *Burger*, 482 U.S. at 712, here, the conclusion drawn from "all the available evidence" is that Section 41.49's "direct and primary purpose" is not "divorced from the State's general interest in law enforcement." *Ferguson*, 532 U.S. at 81, 84, 79.[20]

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[20] Even if the Court believes Section 41.49 was not drafted to allow unconstitutional warrantless criminal investigatory searches, it still runs the high risk of being used by *individual* officers as a pretext for these types of unconstitutional searches. Affording pre-compliance judicial review would allow a neutral magistrate to ensure that officers do not cross that fine line.

D. In Light Of The Foregoing, Section 41.49 Is Facially Unconstitutional Under *Salerno*.

An ordinance is facially invalid when "no set of circumstances exists under which [it] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). That standard is met here because every search authorized by Section 41.49 lacks constitutionally adequate procedural safeguards, and "*every* warrantless Section 41.49 inspection is equally unconstitutional *for the same reason*, irrespective of who is being searched." U.S. Br. 16. No "narrower remedy" could "fully protect the litigants," so facial invalidation of Section 41.49's warrantless inspection requirement is the only way to protect respondents from ongoing constitutional violations. *Nat'l Treasury Emps. Union v. Von Raab*, 513 U.S. 454, 477-78 (1995).

1. Petitioner attempts to avoid that outcome by conjuring a handful of situations in which it claims that the ordinance could be validly enforced. Petr. Br. 19-20. These five hypothetical examples do not save the warrantless inspection requirement from facial invalidation; instead, they illuminate its constitutional defect.

In three of the City's hypothetical enforcement scenarios, police derive their legal authority from a source other the ordinance itself, such as a warrant, consent, or exigent circumstances, or because the Fourth Amendment does not even apply given a hypothetical hotel's decision to permit public access to its records. Petr. Br. 19-20. These examples prove only that there are constitutional alternatives to Section 41.49 – they say nothing about searches

pursuant to Section 41.49. In effect, the City argues that the ordinance is constitutional because, in certain hypothetical scenarios, it does no work. That cannot be correct. Otherwise, the same examples would save *any* statute allowing law enforcement to conduct suspicionless, warrantless searches – and yet, the Court has facially invalidated statutes that authorize searches that violate the Fourth Amendment. *Chandler*, 520 U.S. at 314; *Payton v. New York*, 445 U.S. 573, 576 (1980); *Torres v. Puerto Rico*, 442 U.S. 465, 467-68 (1979).

The United States likewise argues that Section 41.49 performs an independent function by forcing hotel owners to cooperate with law enforcement officers when they have an alternative legal basis, such as exigency, for the search. U.S. Br. 18-20. But the ordinance is not necessary to serve that purpose either, because the law already requires business owners to comply with lawful search requests. California's obstruction of justice statute, for example, imposes steeper penalties than Section 41.49, and those penalties are available only in the absence of other sanctions. *See* Cal. Penal Code § 148(a)(1); LAMC § 11.00(m); *see also In re Lowenthal*, 15 P. 359, 359 (Cal. 1887). That, no doubt, is why the City has not enacted versions of Section 41.49 for hospitals, car dealerships, or any of the thousands of other businesses that may be searched in exigent circumstances without a warrant.

Alternatively, petitioner suggests that warrantless searches pursuant to Section 41.49 would not violate the Fourth Amendment if officers requested redacted copies of the registry or if registry entries were uploaded to a government database.

Petr. Br. 19-20. These examples may suggest that a different ordinance might be constitutional, but they say nothing about Section 41.49, which neither authorizes nor contemplates these hypothetical procedures. *See Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 77-78 (1992) (rejecting as "not persuasive" Iowa's and amicus United States' argument that a state tax scheme did not unconstitutionally discriminate against foreign corporations because they could adopt more tax-efficient corporate structures).

In fact, both hypotheticals run directly contrary to the ordinance as written. Section 41.49 does not require hotels to maintain multiple versions of the registry; instead, it requires that hotel owners prepare a single, comprehensive, and transparent record of guest transactions, which must be available for inspection. LAMC § 41.49(3)(c). Nor does Section 41.49 require – or even permit – hotels to upload guest data to the City, which has no capacity to receive that information in any event. The ordinance requires that the registry be kept "on the hotel premises in the guest reception or guest check-in area or in an office adjacent to that area," and that the hotel owners keep the records for ninety days. *Id.* § (3)(a)- (d). It is these physical records – not some uploaded electronic data – that must be "made available to any officer of the Los Angeles Police Department for inspection." *Id.* § (3)(a).[21]

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[21] The City is wrong in any event to assert that it could require hotels to report all the information in their guest registries to a government agency without violating the Fourth

2. Finally, the United States – but not petitioner – argues that the district court *could have* "exercise[d] its traditional equitable discretion to deny respondents" declaratory and injunctive relief because of respondents' "failure to introduce evidence of concrete searches." U.S. Br. 21. Apparently, the Government takes the view that denying relief on that ground would be appropriate even if, as in this case, no such evidence was needed to evaluate the constitutionality of a law, and even if it was absolutely clear on the record before the court that the statute was unconstitutional in every application. *See id*. 21-23.

This Court need not entertain that argument, for here the district court chose *not* to exercise any such discretion to deny relief on that ground – no doubt in large part because the City never made this argument below – and the City never made this argument as an alternative ground for affirmance below or in this Court. In any event, no "further factual development" is needed to decide the legal issues at hand; petitioner admits that the Court can

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Amendment. In *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 67 (1974), the Court found a record reporting requirement for certain high-value transactions constitutional because the information required in the reports was "sufficiently related to a tenable congressional determination as to improper use of transactions of that type in interstate commerce." In contrast, the City's hypothetical reporting requirement would require hotel owners to disclose information about *every* hotel guest without any attempt to tailor the scope of the reporting to a subset of transactions giving rise to a reasonable concern of illegality.

make some Fourth Amendment determinations "solely by looking to the language and legislative history of the statute and the history of regulation of the industry, not by considering the facts of any particular search," Petr. Br. 28, and this is such a case.

Finally, even if the district court had discretion to decline to rule on respondents' claims, it would surely be an abuse of discretion to do so here, given that the City invited the alleged error by agreeing to litigate the present facial challenge, and thereby induced respondents to dismiss their as-applied damages claims. *See supra* Part I.

IV. Petitioner's Remaining Arguments Are Meritless.

The City argues that even if the ordinance fails under every established Fourth Amendment test, it should still be upheld for two reasons, neither of which it preserved below and neither of which has any merit.

1. Petitioner argues first that Section 41.49 should be upheld using an ad hoc "reasonableness balancing" inquiry. Petr. Br. 47-48. Under this Court's precedents, however, the "balance has already been struck" in this context. Pet. App. 9.

Although the Fourth Amendment requires that searches be "reasonable," courts are not forced to engage in case-by-case balancing whenever a statute or search is challenged. "Fourth Amendment rules ought to be expressed in terms that are readily applicable by the police" and understandable to the public. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (quotations and citations omitted). To

that end, this Court evaluates the reasonableness of searches on a context-by-context basis. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (citing *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

In the particular context of administrative searches, this Court's precedents establish rules for assessing the reasonableness of a law authorizing searches. *See, e.g.*, *See v. City of Seattle*, 387 U.S. 541, 545 (1967) (administrative regulatory searches require pre-compliance judicial review to be constitutional); *see also New York v. Burger*, 482 U.S. 691, 699-702 (1987) (exception to *See* for closely regulated businesses). In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 324 (1978), for example, upon determining that the Occupational Health and Safety Administration's warrantless inspection scheme did not qualify for the closely regulated business exception, the Court held that the inspection scheme was unconstitutional because it failed to provide pre-compliance judicial review as required by *See*. Having decided that the statute failed the applicable Fourth Amendment test, the Court did not go on to engage in another round of reasonableness balancing to try to save the statute. *Id.* at 324-25; *see also Chandler v. Miller*, 520 U.S. 305, 318-23 (1997) (Georgia's failure to demonstrate that drug-testing statue met the special needs exception articulated in previous drug-testing cases resulted in the statute's immediate invalidation, not new balancing).

Nor would the balancing petitioner invites serve any purpose. The City does not identify any consideration not already taken into account in the Court's decisions in *See* and *Burger*. To the contrary,

it does little more than repeat the claims it made in arguing that warrantless inspections are necessary under *Burger*. Petr. Br. 50 (citing pages 37-43 of its own brief).

Even if the Court engages in reasonableness balancing anew, the City has not shown that the balance favors the warrantless inspection requirement. Petitioner cites its "interest in deterring crime in hotels," Petr. Br. 50, but it does not show that this interest is different in kind or degree from those weighed by the Court in *See*, *Camara*, and *Barlow's*, in which the Court acknowledged the government's equally important interest in preventing devastating fires, epidemics, or workplace injury and deaths. *See Barlow's*, 436 U.S. at 309, 316 (workplace safety hazards); *See*, 387 U.S. at 541 (fires); *Camara v. Mun. Court*, 387 U.S. 523, 533 (1967) ("the health and safety of entire urban populations"). Moreover, as shown above, Section 41.49's dramatic departure from ordinary Fourth Amendment protections is unnecessary to serve the City's interests. *See supra* Part III.B.2.

Likewise, the City relies heavily on hotel owners' "diminished" privacy interests. Petr. Br. 51. But the Court acknowledged in the *See* and *Burger* lines of cases that this is true of every commercial enterprise, and it developed Fourth Amendment tests calibrated to the variation in that diminishment. *See, e.g.*, *Burger*, 482 U.S. at 702 (concluding that diminished privacy interests justify foregoing pre-compliance judicial review only if an industry is "closely regulated").

Petitioner also understates respondents' privacy interest. The Fourth Amendment "embod[ies] a

particular concern for government trespass upon the areas ('persons, houses, *papers*, and effects') it enumerates." *United States v. Jones*, 132 S. Ct. 945, 950 (2012) (emphasis added). This Court has consistently held that this central Fourth Amendment concern for the privacy of papers extends to business records as well as private documents. *See, e.g.*, *See*, 387 U.S. at 544; *Hale v. Henkel*, 201 U.S. 43, 76 (1906).[22]

For hotel owners, the registries are important confidential business records. They may use them to develop customer lists and keep track of sales. *See* J.A. 145; Pet. App. 7. They may also use the registries for tax auditing purposes and for preparing valuations of their properties, which may be essential in credit applications or in the event the property is sold. *See* J.A. 144-45.

The privacy of the hotel registry also protects the privacy of the hotel's guests. As this Court has recognized, hotels are guests' homes away from home, where they engage in activities that are necessarily private. *See Hoffa v. United States*, 385 U.S. 293, 301 (1966). That interest extends to guests' comings and goings from the hotel: knowing whether

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[22] Though the lower standard of review for commercial records is a reflection of the government's traditional visitorial power to inspect business records, that power is not immune to minimal pre-compliance judicial review protection. *See, e.g.*, *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 209 (1946); *see also Rex v. Purnell*, (1748) 96 Eng. Rep. 20 (K.B.) (common law protections required that requested papers be public before the government could compel production).

a person has checked into a hotel, whether that person checked in alone, and how long that person stayed all sheds light on that person's private affairs. Section 41.49's warrantless inspection regime burdens this interest directly by authorizing suspicionless rummaging through guest records for the avowed purpose of diminishing guest privacy. In addition to information about guests' whereabouts, hotel registries also contain sensitive information, including driver license and credit card numbers. *See* LAMC § 41.49(2)(b); 41.49(4)(c). Even if customers may have lost the right to raise a Fourth Amendment objection to search of the registries by disclosing this information to a third party, the Court should not turn a blind eye to the very real third-party privacy interests at stake when weighing the overall reasonableness of this regulation.

Against these weighty interests, petitioner argues that hotel registries have in the past been publically accessible. Petr. Br. 51-52. But in modern times, that is only because the City required hotels to make them public. *See* Petr. Br. 52; *id.* S.A. 20 (1936 ordinance requiring guest registry to be public). The City cannot bootstrap its way out of a Fourth Amendment violation by requiring public access to otherwise private papers (*e.g.*, one's diary), then claiming that its searches invade no privacy interests.[23] In any event, petitioner fails to establish

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[23] For the same reason, the fact that the City requires hotels to maintain a registry – something they would have done anyway, for a wide variety of reasons, *see supra* pp. 4, 40; *infra* p. 55 – cannot strip the papers of Fourth Amendment protection. Accordingly, while the Court has treated

a pervasive modern practice that diminishes respondents' privacy interest. Los Angeles curtailed public access to registries almost a decade ago, and the sole modern ordinance petitioner cites involves a limited registry including only the guest's name and address. Petr. Br. 52; Pet. App. 68.

To satisfy its burden, petitioner relies principally on its claim that there is a history of warrantless searches of hotels in Los Angeles dating back to 1899. Petr. Br. 34. But that showing – regarding the practices of single municipality, beginning more than a century after the ratification of the Fourth Amendment – is too little, too late.[24]

When it eventually turns to the right era, petitioner's evidence does not establish a "clear practice" of warrantless, suspicionless searches of inn registries at the discretion of law enforcement

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government-mandated records differently for self-incrimination purposes, it has never done so under the Fourth Amendment. *See Shapiro v. United States*, 335 U.S. 1, 33 & n.42 (1948) (holding that the required records doctrine applies to Fifth Amendment protection, not to the reasonableness inquiry of the Fourth Amendment). Perhaps for that reason, petitioner has not argued that there is a "required records exception" to the Fourth Amendment, although the question is a matter of some dispute in the lower courts. *Compare McLaughlin v. Kings Island, Div. of Taft Broad. Co.*, 849 F.2d 990 (6th Cir. 1988), *and Brock v. Emerson Elec. Co.*, 834 F.2d 994 (11th Cir. 1987), *with McLaughlin v. A.B. Chance Co.*, 842 F.2d 724 (4th Cir. 1988). Given the lack of briefing, this Court should leave it for another day.

[24] Petitioner cites to ordinances in other jurisdictions as well, Petr. Br. 36 n.3, but does not claim that they were enacted in the Founding Era.

officials. For example, the City cites an ambiguous paragraph in a book asserting that several states allowed warrantless inspections of commercial entities like breweries and bakeries. Petr. Br. 49-50. However, the author describes these states as outliers, following a "countervailing tradition." CUDDIHY, *supra*, at 743. They likely embody a pre-Fourth Amendment view that any licensed business could be subject to warrantless inspection, an idea the Fourth Amendment did not codify, but rejected. *See See*, 387 U.S. at 545; *cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (explaining that "extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company").

Petitioner asserts that at the Founding, police had access to hotel guest lists because they were not kept private. Petr. Br. 51. That may be true, but it is ultimately irrelevant. Some hotels made registries accessible to the general public – for example, to serve as advertisements by both the hotel and the hotel's guests. *See* David Allen Fyfe, *Commerce and Sociability in Small-Town America: Explorations in Historical GIScience* 71 (2008) (the hotel registry "was often mounted on a rotating fixture with advertisements around the edges."); *id*. at 72 ("Vaudeville acts and the circuses also used the book as advertising by drawing (usually full-page) images of their shows."). But the question here is not whether the police may inspect hotel registries voluntarily exposed to public examination (which they surely can do and need no ordinance to permit). The question is whether they may search registries in

the absence of such voluntary public disclosure. The City cites no relevant history on this question.[25]

Moreover, the history the City does cite demonstrates that any analogy between the public guest book of the Founding Era and modern hotel registries is inapt. Not only are modern registries *not* voluntarily made available for public perusal, they also can contain sensitive information like driver's license and credit card numbers that have no analog in Eighteenth-Century guest books. And even though both modern and historical registries included other identifying information, like the guest's name, the City has not identified anything like Section 41.49's prohibition on the use of pseudonyms in the Founding Era.

If anything, Section 41.49 is most analogous to the reviled writs of assistance that led to the Fourth Amendment's adoption. These writs never expired and enabled the indiscriminate seizure of papers, subjecting the colonists to recurring fishing expeditions into their homes and businesses. *See, e.g.*, *Boyd v. United States*, 116 U.S. 616, 624-26 (1886). The searches authorized by Section 41.49 function the same way: the ordinance provides police with full discretion and continuous license to rummage through hotel records with no judicial involvement whatsoever. Thus, the Ninth Circuit rightly held the ordinance facially unconstitutional.

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[25] For the same reason, petitioner's attempt to show that "inns were heavily regulated at the Founding," Petr. Br. 49, is irrelevant. The question is whether they were subject to the kinds of warrantless searches at issue here.

CONCLUSION

For the foregoing reasons, this Court should dismiss the writ of certiorari as improvidently granted, or, in the alternative, affirm the judgment of the court of appeals.

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