No. 13-1175

IN THE
Supreme Court of the United States

CITY OF LOS ANGELES,

Petitioner,

v.

NARANJIBHAI PATEL, ET AL.,

Respondents.

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

BRIEF OF THE UNITED STATES CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The United States Chamber of Commerce (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Chamber advocates its members' interests before Congress, the Executive Branch, and the courts, and regularly files *amicus* briefs in cases raising issues of concern to the Nation's business community.

The issues presented in this case, which concern the protection afforded under the Fourth Amendment to business records, could have profound implications for the Chamber's members. Virtually all of the Chamber's members—including numerous participants in the hospitality industry—create and maintain records that include data regarding their customers. The Chamber's members have a strong interest in a resolution of this case that recognizes that such records are "papers" that receive the full protection of the Fourth Amendment, and that rejects the City's

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Both parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's office.

expansive approach to the "pervasively regulated" business exception.

SUMMARY OF ARGUMENT

Like Respondents here, virtually every business, small or large, invests in creating and maintaining records that track the identities and contact information of, and the services and rates provided to, its customers. Furthermore, virtually every business, small or large, is subject to various statutes, regulations, and ordinances, some of which are specific to the business's particular industry and others of which are generally applicable to all businesses. Under Petitioner's understanding of the Fourth Amendment, the government could impose an unfettered inspection regime, free of any judicial check, on any of those businesses and their records.

The Court's resolution of this case should be informed by its longstanding recognition that business records, including the hotel guest records at issue in this case, are "papers" protected by the Fourth Amendment. Under *United States v. Jones*, 132 S. Ct. 945 (2012), the compelled inspection of a business's records *always* constitutes a search of property under the Fourth Amendment, which must either be justified by a warrant or subject to one of the limited exceptions to the warrant requirement. Because business records are undeniably property protected by the Fourth Amendment, the Court need not even inquire as to whether a business has a reasonable expectation of privacy in its customer records. However, should the Court reach that question, it is clear that businesses

have such an expectation given the investment they make in customer records. That is particularly the case with respect to the hospitality industry.

The City essentially concedes that its ordinance constitutes a search under the Fourth Amendment, but defends it by invoking an exception to the warrant requirement for "pervasively regulated" businesses. That exception has no applicability here. It can be justified only where the pertinent industry has "such a history of government oversight" and there exists a regulatory scheme that is "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.'" *New York v. Burger*, 482 U.S. 691, 700, 703 (1987). That is not the case here. The City and its *amici* have cobbled together a hodgepodge of unrelated, generally applicable statutes and ordinances that apply to hotels in an effort to show that the industry is comprehensively regulated. Their effort actually demonstrates the opposite. Indeed, if the regulations at issue here are enough to make the hotel industry "pervasively regulated," then there is essentially no business that would *not* be deemed "pervasively regulated."

Even if the hotel industry were pervasively regulated, the City's inspection program still would be unconstitutional. The City's asserted purpose for intruding on these businesses is one of general information gathering about third parties to deter crime. It does not serve the purpose of ensuring that the businesses themselves are complying with the

purported regulatory scheme. The Fourth Amendment does not tolerate the compelled inspection of a business's records, devoid of any judicial check, for the sole purpose of gathering information and deterring the conduct of others over whom the business lacks any control.

ARGUMENT

I. The Compelled Inspection Of Business Records Is Always A Search.

This case goes to the heart of what the Fourth Amendment protects: the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Where, as here, the government compels the inspection of "papers" that are the property of a business, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *Jones*, 132 S. Ct. at 950-51 n.3. To be sure, this Court has held that property rights "are not the sole measure of Fourth Amendment violations," *Soldal v. Cook County*, 506 U.S. 56, 64 (1992), and the Fourth Amendment likewise protects a reasonable expectation of privacy, *Katz v. United States*, 389 U.S. 347, 353-54 (1967). But where the government compels a business to turn over its "papers," that should be the end of the inquiry as to whether there has been a search under the Fourth Amendment, without even reaching the question of whether a business has a "reasonable expectation of privacy" in those papers.

Certainly, businesses, which invest heavily in customer data, do have a reasonable expectation of privacy in their records—particularly businesses in the hospitality industry at issue here. But while this reasonable expectation of privacy "may add to the baseline, it does not subtract anything from the Amendment's protections," *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013), which on their face prohibit the compelled inspection of the "papers" belonging to a business.

A. Business Records Have Always Been Considered Property Subject To The Fourth Amendment's Warrant Requirement.

This Court has long recognized that the "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See v. City of Seattle*, 387 U.S. 541, 543 (1967). There can be no doubt that among a business's most fundamental property interests is the right the business has over the papers it creates in the course of its operation. As was observed two-and-a-half centuries ago in *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765)—a case "'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' with regard to search and seizure," *Jones*, 132 S. Ct. at 949 (citation omitted):

> Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and

> though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and erried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.

Entick, 19 How. St. Tr. at 1066, *quoted in Boyd v. United States*, 116 U.S. 616, 627-28 (1886).

Business records undeniably are embraced by the protection that the Fourth Amendment affords to "papers." *See Boyd*, 116 U.S. at 622 (subpoenaed invoices were tantamount to "compulsory production of a man's private papers" and "property [that] is within the scope of the fourth amendment"); *Hale v. Henkel*, 201 U.S. 43, 76-77 (1906) (recognizing that the "books and papers" of a corporation are its "property," to which the Fourth Amendment applies); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391 (1920) (treating business records seized as "papers"); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 349-50 (1931) (referring to business's "papers, journals, account books, letter files, insurance policies, cancelled checks, index cards, and other things belonging" to it as "papers"); *Fisher v. United States*, 425 U.S. 391, 406 (1976); *Andresen v. Maryland*, 427 U.S. 463, 471, 478 (1976).

A business's right over its own records would have "little practical value" if those records could be forced from its hands at the government's calling. *Jardines*, 133 S. Ct. at 1414. It thus should be of little surprise that all twelve of the Ninth Circuit judges who reached the merits of Respondents' Fourth Amendment claim found it uncontroversial that such records must be

afforded protection as "papers." *See* Pet. App. at 6 ("The 'papers' protected by the Fourth Amendment include business records like those at issue here."); Pet. App. at 26 (Clifton, J., dissenting) ("The Fourth Amendment applies to the intrusion here, based on what the majority opinion has termed the property-based rationale. That is true whether or not hotels have a reasonable expectation of privacy in guest registers."); Pet. App. at 43 ("The guest register covered by the city ordinance is a protected paper."); Pet. App. at 47 (Pregerson, J., dissenting).

The district court was wrong to suggest otherwise. It reasoned, prior to this Court's decision in *Jones*, that hotels do not have "an ownership or possessory interest" in their guest registry because they "must create and maintain these registers in order to comply with the ordinance at issue" and are not "prevented from maintaining a separate set of documents containing the same or similar information in another location not subject to inspection." Pet. App. at 56. The district court got the analysis exactly backwards. The question is not whether businesses are free to make copies of records prepared for the government, but whether the government can compel the inspection of records that those businesses have themselves created and maintained.

The compelled inspection of business records thus will always be a search, without any need to inquire as to whether the business has a reasonable expectation of privacy in such records. And that search is per se unreasonable absent a warrant or an applicable exception to the warrant requirement. *G.M. Leasing*

Corp. v. United States, 429 U.S. 338, 352-53 (1977) ("'[O]ne governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.'" (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967)) (bracket in original)); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978) (where "the government intrudes on a person's property," a warrant is required "unless some recognized exception to the warrant requirement applies").

B. Businesses Have A Reasonable Expectation Of Privacy In Their Records.

Though it is not necessary to reach the inquiry given that the compelled inspection of "papers" belonging to a business is encompassed by the plain text of the Fourth Amendment, a business also has a significant proprietary interest in its customer records which gives rise to a reasonable expectation of privacy. *See Jardines*, 133 S. Ct. at 1419 (Kagan, J., concurring) (observing that it is not surprising that there would be both a property interest and a reasonable expectation of privacy because "the law of property 'naturally enough influence[s]' our 'shared social expectations' of what places should be free from governmental incursions" (bracket in original)).

Most businesses, large or small, invest in the creation and maintenance of the sort of records at issue in this case, which document the identity and contact information of, and the services and rates provided to,

their customers. *See* L.A. Mun. Code § 41.49.2(a)(1). Such records are at the core of a business's livelihood. Not only do they detail the specific persons and sources from which the business earns its revenue, but they can reflect the health of the business, previous strategies undertaken by the business, as well as the business's opportunities for future growth. These records are thus typically some of a business's most valuable, closely guarded, and private property.

This is particularly true with respect to the hospitality industry, in which the value of a particular hotel chain is premised in large part on customer loyalty. Hotels invest millions of dollars each year curating and cultivating records of actual and potential customers to cater to their expectations and direct marketing to their attention. *See* Iselin Skogland & Judy A. Siguaw, *Are Your Satisfied Customers Loyal?*, *in The Cornell School of Hotel Administration Handbook of Applied Hospitality* 331 (Cathy A. Enz ed. 2010). Furthermore, hotels, including independent hotels and motels, routinely compete with one another by providing consideration to customers, through rewards and other loyalty programs, to obtain customer information and win customer loyalty. *Id.*; *see also* Clay M. Voorhees, et al., *Assessing the Benefits of Rewards Programs*, 14-1 Cornell Hospitality Report no. 1, Jan. 2014, at 4, 11 (finding that independent hotels experienced approximately 50% growth in revenue through loyalty programs).

Businesses also have a proprietary interest in customer records in their aggregate. Businesses invest substantial resources in analyzing customer data to

understand opportunities for growth, to make business-planning decisions, and to ensure the optimal allocation of their resources. And, more so than ever in the age of BigData, individual and aggregate information regarding customer demographics and spending patterns has independent value to third party firms who pay large sums for such data to conduct their own market analyses.

Understandably, businesses reasonably expect to keep the proprietary information in which they have significantly invested private. Thus, although this case can be easily disposed of under a "property rubric," the Court "could just as happily . . . decide[] it by looking to . . . privacy interests." *See Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring). The sentiment that the right of a business to be free of search and seizure of its papers "while originating in property law, now also denotes a common understanding . . . about an especially private sphere." *Id.* at 1419. Businesses invest so heavily in their customer records because it is widely and reasonably understood that these records are not just their property, but their private property.

II. The City's Expansive Approach To The Exception For "Pervasively Regulated" Businesses Is Untenable.

The City's petition for certiorari asked this Court to address a purported split between the Ninth Circuit's decision below and the Massachusetts Supreme Court's decision in *Commonwealth v. Blinn*, 503 N.E.2d 25 (Mass. 1987), with respect to whether a hotel has any Fourth Amendment interest in its guest register and thus whether the compelled inspection of hotel guest

records constitutes a search. Pet. at 25-26. In its merits briefing, however, it appears that the City has abandoned that argument. Instead, the City contends that, while the inspection of hotel guest records is a search, such a search is permitted under the "pervasively regulated" exception to the warrant requirement. Pet. Br. at 29-36. But that limited exception applies only where a business is subject to a regulatory scheme that is "'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.'" *Burger*, 482 U.S. at 702-03 (citations omitted). Though the City and its *amici* have collected a series of generally applicable statutes to create the guise of a comprehensive scheme regulating the hotel industry, their effort actually demonstrates that no such scheme exists. Indeed, the City's understanding of the "pervasively regulated" exception is the very definition of the exception swallowing the rule. If the City is correct that the regulations it cites suffice to make the hotel industry "pervasively regulated," then it is difficult to imagine any business that would not be "pervasively regulated."

Moreover, even if the hotel industry *were* subject to pervasive regulation, the City's warrantless inspections would be permitted only if, in addition to providing constitutionally adequate protections, the City had "a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made" and its warrantless inspection is "'necessary to further [the] regulatory scheme.'" *Burger*, 482 U.S. at

702-03 (citations omitted) (bracket in original). No such interest is present here.

A. Under The City's Approach, Virtually Every Business Would Be "Pervasively Regulated."

The exception allowing inspection of "pervasively regulated" businesses without judicial review is premised on the idea that some businesses "have such a history of government oversight that no reasonable expectation of privacy could exist" and that such businesses have "in effect consent[ed] to" government inspection of their commercial property without any judicial check. *Barlow's*, 426 U.S. at 313 (internal quotation marks omitted) (citation omitted). But if the Fourth Amendment's protections are to have meaning in anything "but the most fictional sense," this exception must be strictly limited in scope. *Id.* at 314. This simply reflects the fact that businesses are not swift to forfeit their constitutional rights to their property and privacy. *See id.* at 313 (recognizing that the exception applies in "relatively unique circumstances" and with respect to "certain carefully defined" industries (internal quotation marks omitted)); *Burger*, 482 F.3d at 700-01 (recognizing the "narrow focus" of the doctrine to address a "unique" problem). This Court has accordingly applied this limited exception on only four occasions. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor industry); *United States v. Biswell*, 406 U.S. 311 (1972) (firearm sales); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining); *Burger*, 482 U.S. 691 (automobile junkyard).

The district court and Ninth Circuit were correct to observe that the hotel industry is not even close to being pervasively regulated. *See* Pet. App. at 13 n.2 ("no serious argument can be made that the hotel industry has been subjected to the kind of pervasive regulation" required to part with the warrant requirement); Pet. App. at 54 (there is "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"). In arguing otherwise, the City and its *amici* cobble together a number of discrete state and municipal statutes and ordinances into a comprehensive regulatory scheme. *See* Pet. Br. at 33-34; Br. of California, et al. as *Amici Curiae* in Support of Petitioner at 9-11 (hereinafter "States' Br."). In fact, however, their effort proves exactly the opposite.

According to the City and its *amici*, the following regulations demonstrate that hotels are so pervasively regulated that they have, in effect, consented in advance and without any pre-compliance review to the government's search of their property:

- California's general discrimination law, which applies to "all business establishments of every kind whatsoever." Cal Civ. Code § 51(b). *See* States' Br. at 10.
- A California criminal statute that prohibits all common carriers from refusing service without just cause. Cal. Penal Code § 365. *See* Pet. Br. at 33; States' Br. at 10.

- The Department of Health Services' sanitization requirements, which govern all "public places." Cal. Code Regs. tit. 17, §§ 30852-30858. *See* Pet. Br. at 34 (Cal. Code Regs. tit. 17, § 30852 et seq.); States' Br. at 10 (citing Cal. Code Regs. tit. 17, §§ 30852-30858).[2]
- A municipal ordinance requiring that hotels, like churches, day care facilities, hospitals, and theaters, obtain an operational permit from the Fire Marshall. L.A. Mun. Code §§ 57.105.6.1-.31. *See* Pet. Br. at 32.
- A municipal ordinance imposing various water conservation obligations on "any customer of the Department [of Water and Power]," L.A. Mun. Code § 121.09(B), and various specific businesses, *id.* § 121.08(A)(3), which contains a single sub-sub-section requiring hotels and motels to "provide guests with the option of choosing not to have towels and linens laundered daily." *Id.* § 121.08(A)(12). *See* Pet. Br. at 33.
- California's consumer protection law, which prohibits false advertising by "any person, firm, corporation or association" and, in addition to regulating the advertisement of hotel and motel rates, *see* States' Br. at 9 (citing Cal. Bus. & Prof. Code §§ 17560-17568.5), regulates

[2] Though the regulations themselves do not define "public place," the California legislature has elsewhere defined the term to include any "area open to the public" or "building open to the general public." Cal. Penal Code § 653.20.

everything from individual travel agents, Cal. Bus. & Prof. Code §§ 17550, *et seq.*, to vending machine operators, *id.* §§ 17570, *et seq.*[3]

- Fire safety laws that also govern all "privately owned highrise structures" and "apartment houses two stories or more in height that contain three or more dwelling units." Cal. Health & Safety Code § 13220; *see also id.* § 13006.5 (applicable to "any apartment house" or "roominghouse"); *id.* § 13113.7 (applicable to "all dwelling units intended for human occupancy," including any condominium); *id.* § 17920.8 (applicable to all "apartment houses"). *See* States' Br. at 10 (relying on each of these provisions).

These discrete, generally applicable laws do not resemble a "comprehensive and defined" statutory scheme from which a hotel owner or manager "cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Burger*, 482 U.S. at 705 n.16 (quoting *Dewey*, 452 U.S. at 600); *cf. Barlow's*, 436 U.S. at 314 ("It is quite unconvincing to argue that the imposition of minimum wages and maximum hours on employers . . . prepared

[3] The other false advertising provision cited by the City's *amici*, Cal. Bus. & Prof. Code § 17538.8, does not appear to be particularly relevant to hotels at all, but requires travel agents or others advertising packages of transportation and discounted accommodations, or accommodations and discounted travel, to disclose the total price to be paid by the customer. *See* States' Br. at 9.

the entirety of American interstate commerce for regulation of working conditions to the minutest detail.").

Nor is this case remotely comparable to the circumstances in which this Court has previously found businesses to be "pervasively regulated." The City does not (nor could it) make any attempt to compare the regulation of hotels to the liquor, firearm, or mining industries at issue in *Colonnade*, *Biswell*, and *Dewey*. Instead, the City focuses its energy on *Burger*, in which this Court applied the "pervasively regulated" exception to the vehicle dismantling industry in New York. Pet. Br. at 31-36. The statutory scheme in *Burger*, however, was not premised on a patchwork of discrete, generally applicable laws. Rather, *Burger* involved a unique circumstance in which New York had passed an "extensive" and unified framework of regulations specifically directed to the "activity of vehicle dismantling." 482 U.S. at 704. Those regulations included a strict licensing scheme, *id.* at 704-05 & n.15, and addressed virtually every participant in the dismantling and salvaging industry, *id.* at 705 & n.16.[4] The showing here, on the other hand, reveals that California has not sought to regulate hotels any differently from other businesses and has essentially no scheme specific to hotels, aside from the requirement of compelled inspection itself.

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[4] Furthermore, in *Burger*, the vehicle dismantler himself conceded that the vehicle dismantling industry was closely regulated. 482 U.S. at 704 n.14.

For the same reason, it does the City little good to point out that other jurisdictions also have ordinances and statutes that require the inspection of hotel guest records. Pet. Br. at 49-50 & n.3. That many jurisdictions have adopted the same, limited regulation of hotels does not show that the hotel industry is pervasively regulated. It, again, proves the opposite point: That jurisdictions are consistent in their minimal regulation of hotels. This is in stark contrast to *Burger*, where the existence of similar, "extensive" administrative schemes in other states reinforced the Court's conclusion. 482 U.S. at 698 & n.11, 705.

Under the City's and its *amici*'s understanding of what constitutes "pervasive regulation," virtually *any* business would meet the test. All industries, like hotels, are subject to a patchwork of broadly applicable laws. And, with very few exceptions, businesses operate under those laws without implicitly consenting to government trespass on their property, and without forfeiting the reasonable expectation of privacy they have in their business records. If this Court were to read the "pervasively regulated" exception as broadly as the City invites, there would effectively be no check on the government's power to search and seize any business's records.

B. Warrantless Inspection Of A "Pervasively Regulated" Business Cannot Be Based On The Government's General Desire To Gather Information Unconnected To The Broader Regulatory Scheme.

Even if the hotel industry were "pervasively regulated," the City's warrantless inspection scheme

would still fail. This Court has never permitted the government to conduct a warrantless inspection program whose chief purpose is *not* to determine whether the business subject to the intrusion is complying with the government's regulatory scheme, but instead to gather information about, and deter crime committed by, third parties.

Rather, this Court has consistently reaffirmed that, even with respect to pervasively regulated businesses, the government must have a substantial interest that "informs the regulatory scheme" and the warrantless inspection must be "necessary to further [the] regulatory scheme." *Burger*, 482 U.S. at 702-03. In each of the four limited instances in which this Court has permitted warrantless inspections of pervasively regulated businesses, the inspection programs at issue served the purpose of ensuring that the business intruded upon was acting in accordance with, and not violating, the regulatory scheme.

In *Colonnade*, the warrantless inspections were informed by and necessary to ensuring that businesses in the liquor industry were complying with, and not committing fraud with respect to, the excise laws that were part of the regulatory scheme. 397 U.S. at 75. Similarly, in *Biswell*, the warrantless inspections were informed by and necessary to ensuring industry compliance with "a crucial part of the regulatory scheme"—namely, the requirement that weapons be "distributed through regular channels and in a traceable manner." 406 U.S. at 315-16. In *Dewey*, the inspection program was informed by and necessary to ensuring that businesses in the mining industry were

complying with the regulatory scheme's mandatory health and safety requirements. 452 U.S. at 596. And in *Burger*, the inspection program was informed by and necessary to ensuring that vehicle dismantlers were not themselves dealing in stolen parts. 482 U.S. at 714.[5]

Here, on the other hand, the requirement that hotels keep guest records subject to warrantless inspection does not exist to ensure *hotels'* compliance with the purported administrative scheme. The City has made that much clear. The purpose, it says, is to allow "the police [to] scan a hotel's register at any time" to make "[p]rostitutes, johns, dealers, and other criminals . . . think twice about conducting their illicit activities." Pet. Br. at 2; *see also* Pet. Br. at 16 (describing "the City's legitimate interest in deterring prostitutes, drug dealers, and other serious criminals from committing crimes in hotels"). *See also* Br. of the United States as *Amicus Curiae* in Support of Petitioner at 26 ("Making guest information available for inspection assists police in finding missing persons, including fugitives, probationers, suspects, and potential witnesses.").

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[5] Indeed, in each of those cases, the specific inspections being challenged were conducted to ensure compliance with the regulatory scheme. *See Colonnade*, 397 U.S. at 73 (inspection to ensure business complied with scheme's excise tax); *Biswell*, 406 U.S. at 312 (inspection to ensure business complied with scheme's licensing requirements); *Dewey*, 452 U.S. at 597 (inspection to ensure business complied with scheme's health and safety requirements); *Burger*, 482 U.S. at 695-96 (inspection to ensure business was not dealing in stolen parts).

The purpose announced by the City in its 2006 amendments to the ordinance at issue is in accord: The "inspection of hotel and motel registers by the police department is a significant factor in reducing crime in hotels and motels." Supp. App. at 8-9. Only when cornered into explaining why its warrantless inspections are "necessary to further" the regulatory scheme does the City suggest that inspections are necessary to ensure that hotels are accurately recording the information. Pet. Br. at 39. That bootstrapping by the City proves too much. If accepted, any time the government seeks information, it could impose a recordkeeping requirement regarding the information, and then assert that spot checks are "necessary to further" that recordkeeping.

Particularly given the fragmented and non-comprehensive nature of the City's purported regulatory scheme, it is clear that the City's inspection program is neither informed by nor furthers that scheme. There is no suggestion that hotels themselves fail to comply with the statutory scheme by providing accommodations to guests who turn out to be prostitutes, johns, dealers, or other criminals. This is thus a case in which businesspersons face unannounced intrusions into private records *not* because of anything that they have done, ought to have done, or might not have done in violation of the regulations imposed upon them, but because the City wishes to gather information about, and deter the criminal conduct of, other people over whom the businesspersons have no control. *Cf. G.M. Leasing Corp.*, 429 U.S. at 352, 354 (warrantless search of business's "books and records"

was unreasonable because "the intrusion . . . not based on the nature of its business, its license, or any regulation of its activities"). Just as this Court would never permit the warrantless frisk of a shopkeeper because of a generalized suspicion about his customers, it should not condone the warrantless compelled inspection of a business's records for a generalized interest in gathering information about possible criminal activities by the business's patrons.

That the warrantless inspection program is not based on any suspicion of wrongdoing by the hotel owners or managers also greatly undercuts the City's argument that "unannounced" and "surprise spot checks" are necessary. Pet. Br. at 39. In such circumstances, "the great majority of businessmen can be expected in normal course to consent to inspection without warrant." *Barlow's*, 436 U.S. at 316. "Nor is it immediately apparent why the advantages of surprise would be lost if, after being refused [access], procedures were available for the [City] to seek an ex parte warrant and to reappear at the premises without further notice to the establishment being inspected." *Id.* at 319-20. To be sure, the occasional need for police to obtain a warrant in a criminal investigation before searching private business records may pose an administrative inconvenience. But since the very purpose of the Fourth Amendment is to inconvenience the government with a judicial check when it seeks to invade private property, "mere administrative inconvenience" obviously "cannot justify invasion of Fourth Amendment rights." *United States v. Robinson*, 414 U.S. 218, 258 & n.7 (1973).

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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