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 *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amicus addresses only the following questions:

1. Whether the Government may compel the disclosure of business records required to be maintained by law without an opportunity for pre-compliance judicial review.

2. Whether the closely-regulated industry exception applies to business records containing third party personal information.

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides *pro bono* legal representation to individuals whose civil liberties are threatened and educates the public about constitutional and human rights issues.

At every opportunity, The Rutherford Institute resists the erosion of fundamental civil liberties that many would ignore in a desire to increase the power and authority of law enforcement. The Institute believes that where such increased power is offered at the expense of civil liberties, it achieves a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

The Rutherford Institute is interested in this case because it is committed to ensuring the continued vitality of the Fourth Amendment. The ordinance at issue devolves nearly unbridled discretion on law enforcement to conduct on-site inspection of a hotel's guest records. It allows law

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[1] All parties to this matter have granted blanket consent for *amicus curiae* briefs in support of either or neither party. Petitioner filed such consent on November 17, 2014, and Respondents filed such consent on November 18, 2014. The requirements of Rule 37.2(a) of the rules of this court are satisfied by these filings. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

enforcement to choose which hotels to target for inspection, when to target them, how frequently, and for what purpose—all without the opportunity for pre-compliance judicial review.

The ordinance thus poses a grave risk to the privacy rights of hotel owners, who are threatened with unwarranted and unpredictable visits and demands from the police under color of law. The ordinance also has far-reaching implications for the rights of hotel guests and customers who, stripped of their own privacy rights under the third party doctrine, must rely on the private business owner to safeguard their personal information. A decision reversing the Ninth Circuit would force otherwise unwilling business owners into the role of law enforcement, removing the last barrier between the Government and a customer's personal information.

SUMMARY OF THE ARGUMENT

The ordinance in question requires otherwise non-consenting hotel owners to submit to warrantless, on-site searches of their guest registries upon the demand of any Los Angeles police officer—at any time, of any frequency, for any duration, and for any reason—under threat of criminal sanction and without any opportunity for pre-compliance judicial review. This ordinance has no "plainly legitimate sweep." *Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 449 (2008). Instead, it operates to circumvent the clear procedural safeguards this Court has recognized time and again as constitutionally required under the Fourth Amendment. That this ordinance amounts to

nothing but an end-run around these constitutionally-required procedures is demonstrated by the fact that a very narrow exception to such safeguards *already* exists—one for closely-regulated industries—and this case does not fit within it.

First, this Court has repeatedly reaffirmed the need to interpose a layer of judicial review between the Government and a business's private papers, in the form of an administrative subpoena or a warrant. *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946) (subpoena); *See v. City of Seattle*, 387 U.S. 541 (1967) (warrant). Such legal process is mandatory even where the records are required to be kept by law. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 54 (1974).

Second, third party information contained in business records cannot fall under the warrantless search exception for closely-regulated industries for one simple reason: even if an industry is closely regulated in some respects, customer or user information has historically never been the subject of such regulation. Rather, this Court has applied the closely-regulated industry exception only to cases involving the business owner's *own* compliance with the law; thus, this exception has been limited to searches of business inventory or workplace operations that raise unique issues of public concern. And this Court has recognized only four such unique instances: firearms, mines, liquor, junkyard vehicles.

Here, by contrast, the City would be tracing—not the "origin and destination of" potentially stolen vehicle parts, as in *New York v. Burger*—but the origin and destination of travelers passing through a

hotel. 482 U.S. 691, 709 (1987). But not only are the identities and comings-and-goings of hotel guests *not* traditionally closely regulated, to treat them as such would burden the fundamental rights of travel and association this Court has long safeguarded from arbitrary government scrutiny.

Finally, to the extent there may be slivers of constitutional applications left in light of the foregoing (though the City offers no viable hypotheticals, *see* Resp. Br. 48-50), leaving this law on the books risks confusing police and citizens alike and poses a serious threat to the constitutional rights of ordinary citizens. For all these reasons, this Court should affirm that this ordinance is unconstitutional.

ARGUMENT

I. GOVERNMENT ACCESS TO BUSINESS RECORDS—EVEN REQUIRED RECORDS—MUST COMPLY WITH "LEGAL PROCESS"

It is one thing for a law to require that businesses maintain certain records, but quite another for it to permit the Government full-fledged access to such records upon request. No decision of this Court has ever sanctioned the latter. To the contrary, this Court has previously emphasized that the Government must comply with "legal process" before it may gain access to records required to be maintained by law. *Shultz*, 416 U.S. at 52.

The defining characteristic of legal process is an opportunity for pre-compliance judicial review. In *Oklahoma Press*, this Court set forth the

requirements for an administrative subpoena for business records. The recipient of a subpoena, the Court stated, is "not required to submit to [it], if in any respect it is unreasonable," and he may contest the subpoena in court, "surrounded by every safeguard of judicial restraint." 327 U.S. at 217. In *See*, this Court adapted the *Oklahoma Press* standard governing administrative subpoenas in the context of on-site regulatory inspections on commercial premises—the scenario here. *See*, 387 U.S. at 544-45 (noting that the main characteristics of subpoenas are that they need to "be sufficiently limited in scope, relevant in purpose, and specific in directive . . . and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply"); *see also* Resp. Br. 26-29 (discussing § 41.49's failure to comply with the warrant requirement in *See*).

Shultz affirmed the importance of legal process in the required business records context. In *Shultz*, the Court distinguished between two different records requirements found in the Bank Secrecy Act. The Court upheld the portion of the Act requiring banks to self-report to the Government particularly large bank transactions exceeding $10,000 (Title II). 416 U.S. at 66-67. As to the portion of the Act requiring that the bank maintain a comprehensive set of records as to *all* transactions in *all* customer accounts (Title I), however, the Court upheld the records maintenance requirement only after emphasizing repeatedly that "access to the records is to be controlled by existing legal process." *Id.* at 52; *see also id.* at 27, 34-35, 49, 54. In other words, the Court found the required maintenance of comprehensive bank records constitutional in part

because the Government did not also have *carte blanche* to access them.

The Court reaffirmed the legal process requirement two years later in *United States v. Miller*, also in the bank records context. 425 U.S. 435, 446 (1976) ("[I]n *California Bankers* . . . we emphasized . . . that access to the [required bank] records was to be in accordance with 'existing legal process."). The Court further made clear that by "existing legal process," it was referring specifically to the standard set forth in *Oklahoma Press*. *See Miller*, 425 U.S. at 445-46. While holding that a bank *customer* could not challenge a subpoena for their bank records (having turned those records over to the bank), the Court recognized that the *bank* could contest its validity. *Id.* at 446 n.9. So here, law enforcement must seek the hotel guest registry through legal process, and the hotel must be afforded an opportunity to contest its validity—even if, under *Miller*, the guests themselves cannot.

Shultz, together with *Miller*, thus stands not only for the proposition that the Government may require the maintenance of certain business records, but also the corollary that the Government may not then compel their disclosure without a subpoena or warrant. Accordingly, the City misses the point entirely when it counters that the requirement for pre-compliance judicial review found in "the context of administrative subpoenas" is irrelevant because "§ 41.49 does not authorize administrative subpoenas." Petr. Br. 41. Indeed, it is *precisely* the ordinance's attempt to dispense with the subpoena requirement entirely—with no substitute form of legal process—that renders it unconstitutional.

II. "LEGAL PROCESS" CURBS ARBITRARY INVASIONS OF PRIVACY AND INDISCRIMINATE RUMMAGING

The City attempts to analogize the ordinance to the regulatory self-reporting requirement in *Shultz*. *See* Petr. Br. 53; *see also id.* at 19 (second hypothetical). But this comparison misses the key distinctions between the two different types of business record requirements. And it highlights the important purposes legal process serves.

First, in the case of self-reporting, the uniformity of the reporting requirement satisfies the Fourth Amendment concern regarding the potential for arbitrary invasions of privacy. *See Brock v. Emerson Elec. Co.*, 834 F.2d 994, 996 n.2 (11th Cir. 1987). By contrast, nothing about the instant ordinance ensures uniform enforcement. Far from it—the ordinance devolves unbridled discretion on law enforcement to enforce it however they choose.

The sole "guidance" provided by Section 41.49 is that "[w]henever possible," the police shall conduct the inspection so as to "minimize[] any interference with the operation of the business." LAMC § 41.49(3)(a). Section 41.49 otherwise leaves "the frequency and purpose of inspections to the unchecked discretion of Government officers," *Donovan v. Dewey*, 452 U.S. 594, 604 (1981), and a hotel owner is "left to wonder about the purposes of the inspector or the limits of his task." *United States v. Biswell*, 406 U.S. 311, 316 (1972). Smaller mom-and-pop motels, for instance, may be targeted more frequently than larger hotel chains. Nothing in the ordinance provides criteria

for selecting hotels for inspection. And nothing in the ordinance limits the number of times law enforcement may visit a hotel in the same month, week, or even day.

Second, regulatory self-reporting limits the potential for indiscriminate rummaging through a compendium of business records, because the information required to be reported is clearly defined and must be sufficiently related to some reasonable legislative objective. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (plurality) (Fourth Amendment seeks to safeguard against "exploratory rummaging in [that] person's belongings"). In *Shultz*, for instance, the Court found that the compulsory self-reporting of bank transactions exceeding $10,000 was "sufficiently related to a tenable congressional determination as to improper use of transactions of that type in interstate commerce." 416 U.S. at 67. In other words, the scope of information to be reported was *already* tailored to a subset of transactions giving rise to a reasonable concern of illegality.

By contrast, such tailoring is entirely lacking where a business is required by law to maintain comprehensive records of *all* customers, as here—and then to simply turn them over upon request. In these circumstances, subpoenas and warrants are necessary to limit the discretion accorded to law enforcement by: (a) requiring them to articulate a legitimate purpose for the search on a particular occasion, (b) tailoring the scope of disclosure to that purpose to avoid general "rummaging" through the records, and (c) affording the subject of the search a chance to contest the reasonableness of the demand

in court before it may be subject to criminal penalties for failing to comply.

The complete absence of these procedural protections from Section 41.49 renders it unconstitutional in all of its applications.

III. THE CLOSELY-REGULATED INDUSTRY EXCEPTION DOES NOT APPLY HERE

Petitioner also argues that the ordinance is valid because it falls within the closely-regulated industry exception. This exception is one of a very small handful of "special need" scenarios this Court has recognized, intended to accommodate unique, non-law-enforcement-driven scenarios in which the warrant requirement is impracticable. *See Griffin v. Wisconsin*, 483 U.S. 868 (1987) (collecting cases). The closely-regulated industry exception reasons that "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor *over the stock of* such an enterprise." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (emphasis added). But this exception does not apply here, where business records containing third party information is sought.

A. THIS NARROW EXCEPTION APPLIES ONLY TO GOODS AND WORKPLACE OPERATIONS

The closely-regulated industry exception has only ever been upheld in the context of inspections of business goods and operations posing special risks of danger or illegality. And it should remain that way: the warrantless exception does not make sense if

extended to business records, and particularly those containing third party private information. *Cf. Burger*, 482 U.S. at 694-95 (required "police book" contained records of automobile inventory). If permitted, then this exception—originally intended as "responses to relatively unique circumstances" (*Marshall*, 436 U.S. at 313)—would completely swallow the general rule requiring legal process.

This Court has only upheld the closely-regulated industry exception on four occasions: *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor), *Biswell*, 406 U.S. 311 (firearms), *Donovan*, 452 U.S. 594 (mines), and *Burger*, 482 U.S. 691 (junkyard vehicles and parts). Significantly, these cases all relate to whether the owner of the business is *himself* operating in compliance with the regulatory scheme governing his chosen profession—and in particular, whether the goods he traffics in or high-risk workplaces he operates are in compliance with the law. It is the *goods* and the *workplace operations* that are pervasively regulated, because of the special risks they pose.

Only then does the proffered justification for the exception make sense: businessmen that engage in enterprises of this nature "accept the burdens as well as the benefits of their trade" and "in effect consents to the restrictions placed upon him." *Almeida-Sanchez v. United States,* 413 U.S. 266, 271 (1973). A businessman who chooses to deal in a more heavily-regulated type of goods or workplace can expect to receive heightened government scrutiny to ensure that his *own* actions and dealings are legitimate.

But the businessman who renders services to or opens his doors to the public cannot expect to be compelled to open his customer records to the Government under the above rationale. Records containing personal information on customers generally have *no* bearing on whether the owner is operating his business in compliance with the law. Indeed, most third party institutions who come across and hold such private information—Internet service providers, restaurants, hotels, hospitals, telecommunications companies, banks, and credit companies, to name a few—cannot be held liable for the actions of their customers absent misconduct of their own. And these same types of businesses, in being entrusted with such personal information, have an interest—and oftentimes legal duty—in maintaining the privacy of their customers.

Were the hotel industry considered to be closely-regulated for the purposes of the exception, there would be no logical stopping point. Most businesses that serve the public are, like hotels, closely-regulated in many respects to protect the public. These regulations range from laws setting health and safety standards (*e.g.*, building codes, food preparation codes) to laws ensuring the equal treatment of customers (*e.g.*, non-discrimination laws, disability accommodation laws) to general consumer protection laws ensuring customers are treated fairly (*e.g.*, regulations governing marketing, pricing or rates). *See* Petr. Br. 33 (listing hotel regulations that primarily fall into these categories). It would be perverse indeed if these same regulations, intended to protect the public, operated instead to strip them of any privacy they have left.

Thus, a restaurant may be subject to surprise inspections from health inspectors—but may it also be compelled to turn over its reservation lists for the next three months? Cab companies are subject to strict licensing requirements—but may those same regulations empower police to demand warrantless inspections of passenger records? The closely-regulated industry exception simply cannot extend to information that bears no nexus to whether the business owner is himself operating in compliance with the regulatory scheme in question. Such a result would eviscerate the Fourth Amendment.

B. THE IDENTITIES AND COMINGS-AND-GOINGS OF HOTEL GUESTS HISTORICALLY HAVE NOT BEEN CLOSELY REGULATED

For the reasons discussed above, the Court should adopt a categorical rule that business records containing third party information cannot fall into the closely-regulated industry warrantless search exception. If this Court declines to adopt such a rule, then it should find that the exception does not apply to hotel guest registries.

Not only have the identities and comings-and-goings of hotel guests *not* been subject to "a long tradition of close government supervision," *Burger*, 482 U.S. at 700, but to treat them as closely regulated for the purposes of this exception would, in fact, burden two long-recognized fundamental rights: the right to travel and freedom of association.

Right To Travel. This Court has long recognized the "right to travel freely from State to State." *United States v. Guest*, 383 U.S. 745, 760

n.17 (1966); *id.* at 757 ("The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union.") (citing *Crandall v. Nevada*, 73 U.S. 35 (1868)); *Dunn v. Blumstein*, 405 U.S. 330 (1972) ("[F]reedom to travel throughout the U.S. has long been recognized as a basic right under the Constitution.").

This right to travel must be free of unreasonable regulatory burdens, including unreasonable government scrutiny. *Shapiro v. Thompson*, 394 U.S. 618 (1969) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land *uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement*.") (emphasis added). Thus, in *Carroll v. United States*, 267 U.S. 132, 153-54 (1925), this Court distinguished between foreign and domestic travel, noting that "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search" in the absence of probable cause. Similarly, this Court has consistently invalidated vagrancy laws that require people on the streets to identify themselves absent reasonable suspicion. *See Brown v. Texas*, 443 U.S. 47 (1979); *Kolender v. Lawson*, 461 U.S. 352 (1983); *City of Chicago v. Morales*, 527 U.S. 41 (1999).

The emphasis on freedom of movement evolved hand-in-hand with American democracy. A.K. SANDOVAL-STRAUSZ, HOTEL: AN AMERICAN

HISTORY 141 (2007) (discussing the "material and ideological changes of the late eighteenth and early nineteenth century" and "gradual collapse of locally enforced restrictions on movement").[2] By 1798, one noted European traveler observed of his time in the United States that, unlike in Europe, "[t]here are no eagles, nor customs, nor sentries, nor do they stop nor ask who one is, when once came, and for what purpose." *Id.* Hotels have long played a role in facilitating this freedom of movement. *See generally* SANDOVAL-STRAUSZ; *see also Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258 (1964). In facilitating this movement, hotel owners have an interest, if not duty, in respecting the privacy of their guests, in the same way they are bound to offer hospitality, and room and board to all travelers. *See also Stoner v. California*, 376 U.S. 483 (1964) (hotel clerk may not consent to a search of guest's room).

Freedom of Association. Similarly, one's travel companions or fellow attendees at a political convention held in a hotel have also never been subject to arbitrary government scrutiny. This Court has long recognized the "vital relationship between freedom to associate and privacy in one's associations." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). In *NAACP*, this Court held that the disclosure of membership lists of a

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[2] The idea that individuals possessed a natural right to move from place to place emerged in eighteenth century Europe during the Enlightenment period. *Id.* at 140. In 1789, the Estates General asserted that "every sojourner in this life must . . . be free to move about or come, within and outside the Kingdom, without permissions, passports, or other formalities that tend to hamper the liberty of its citizens." *Id.*

constitutionally valid association was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Id.*

Hotel guest registries can reveal much about a person's associations. Hotels and motels are the sites of political conventions, base camps for protestors, and countless of other types of group bookings. *See* SANDOVAL-STRAUSZ 258-260 (tracing the role of the hotel in the growth of regional and national associations—political, religious, and social). Indeed, the guest list from a political convention held at a hotel the previous weekend could very well constitute a membership list.

This case is thus strikingly different from the other "special needs" searches that this Court has recognized as requiring a less demanding Fourth Amendment standard. These have included searches involving: government employees' desks and offices (*O'Connor v. Ortega*, 480 U.S. 709 (1987)), student lockers in schools (*New Jersey v. T.L.O.*, 469 U.S. 325 (1985)), probationer's houses (*Griffin v. Wisconsin*, 483 U.S. 868 (1987), blood and urine tests for railway workers (*Skinner v. Rwy. Labor Execs. Ass'n*, 489 U.S. 602 (1989)), urinalysis for U.S. Customs applicants who would be dealing with firearms and drugs (*National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)), and random drug tests for students (*Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

Searches of hotel guest registries, on the other hand, implicate intimate details of travel and one's travel companions—areas this Court has

traditionally protected *against* government scrutiny. Because the affairs of travelers have not historically been closely regulated, in large part owing to the above constitutional considerations, the closely-regulated industry exception does not apply here.

CONCLUSION

For the foregoing reasons, this Court should affirm that this ordinance is unconstitutional.

Respectfully submitted,

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