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## Curbing “Unbridled Discretion”: The Direct and Indirect Effects of *Patel v. Los Angeles* on Hotel Owners and Their Patrons

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# CURBING “UNBRIDLED DISCRETION”: THE DIRECT AND INDIRECT EFFECTS OF *PATEL v. LOS ANGELES* ON HOTEL OWNERS AND THEIR PATRONS

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**Abstract:** In *Patel v. City of Los Angeles*, the U.S. Court of Appeals for the Ninth Circuit struck down Los Angeles Municipal Code section 41.49, which authorized warrantless, on-site search and seizure of hotel and motel guest registries. In doing so, the majority recognized that in the absence of a warrant, an administrative record inspection scheme must provide the opportunity for pre-compliance judicial review of the search’s reasonableness. By recognizing section 41.49’s lack of pre-compliance review, the majority took a step to curb police officers’ arbitrary, unmonitored application of the statute. In turn, this will provide a disincentive for targeting guests without probable cause, as officers no longer have direct, uncontested access to hotel registries. In granting certiorari and hearing the case, the Supreme Court should recognize the extent to which this revision serves to prevent arbitrary police searches.

## INTRODUCTION

Los Angeles Municipal Code (“L.A.M.C.”) section 41.49 requires that hotel and motel owners create and maintain registries containing specified information about their guests.<sup>1</sup> Additionally, L.A.M.C. section 41.49(3)(a) authorizes warrantless, on-site inspections of these records at the demand of any police officer as part of an administrative record inspection scheme.<sup>2</sup> Motel owners Naranjibhai Patel and Ramilaben Patel challenged the constitutional

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<sup>1</sup> L.A., CAL., MUN. CODE § 41.49 (2008); *Patel v. City of Los Angeles (Patel II)*, 738 F.3d 1058, 1060 (9th Cir. 2013) (en banc), cert. granted, 135 S. Ct. 400 (2014). The Supreme Court heard oral argument on this case on March 3, 2015. See generally Oral Argument, *Patel v. City of Los Angeles*, (No. 13-1175), available at [http://www.oyez.org/cases/2010-2019/2014/2014\\_13\\_1175](http://www.oyez.org/cases/2010-2019/2014/2014_13_1175).

<sup>2</sup> L.A., CAL., MUN. CODE § 41.49(3)(a); *Patel II*, 738 F.3d at 1060. Generally, the concept of an administrative record inspection involves the inspection of statutorily mandated records for highly regulated businesses. See *Patel II*, 738 F.3d at 1063. According to the *Patel* court, “[t]he government may ordinarily compel the inspection of business records only through an inspection demand ‘sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.’” *Patel II*, 738 F.3d at 1064 (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)); see also *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (quoting *Camara v. Mun. Court*, 387 U.S. 523, 539 (1967)) (“[I]n the regulatory field, our cases have recognized the importance of ‘prompt inspections, even without a warrant, . . . in emergency situations.’”).

validity of section 41.49's warrantless inspection provision after three incidents involving unpermitted entrances into their motel, inspection and seizure of their records, and Naranjibhai and Ramilaben's arrest for violating the ordinance.<sup>3</sup> Specifically, the Patels argued that the ordinance permitted unreasonable search and seizure of their private business records in violation of the Fourth Amendment.<sup>4</sup>

The U.S. District Court for the Central District of California rejected the Patels' claim, reasoning that the Patels did not maintain a reasonable expectation of privacy in these records.<sup>5</sup> The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the warrantless inspection provision was facially invalid and unconstitutional.<sup>6</sup> In doing so, the Ninth Circuit differentiated its analysis from the lower court by acknowledging that the records covered by section 41.49 were the Patel's private property.<sup>7</sup> Accordingly, the Ninth Circuit held that the motel retained an expectation of privacy in these records, notwithstanding their legally mandated creation.<sup>8</sup>

Central to the Ninth Circuit's holding, however, was the conclusion that section 41.49 did not allow the opportunity for pre-compliance judicial review, which the court noted as a requirement in an administrative record inspection

<sup>3</sup> L.A., CAL., MUN. CODE § 41.49(3)(a); *Patel II*, 738 F.3d at 1060; *Patel v. City of Los Angeles (Patel I)*, CV 05-1571 DSF (AJWx), 2008 WL 4382755, at \*3 (C.D. Cal. Sept. 5, 2008), *aff'd*, 686 F.3d 1085 (9th Cir. 2012), *rev'd and remanded en banc*, 738 F.3d 1058 (9th Cir. 2013), *cert. granted*, 135 S. Ct. 400 (U.S. Oct. 20, 2014) (No. 13-1175); First Amended Complaint for Damages and Declaratory and Injunctive Relief at 4–5, *Patel I*, No. CV 05-1571 DSF (AJWx) [hereinafter Plaintiff's Complaint]. Los Angeles Municipal Code § 41.49(3)(a) provides, in full, the following:

The record shall be kept on the hotel premises in the guest reception or guest check-in area or in an office adjacent to that area. The record shall be maintained at that location on the hotel premises for a period of 90 days from and after the date of the last entry in the record and shall be made available to any officer of the Los Angeles Police Department for inspection. Whenever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business.

L.A., CAL., MUN. CODE § 41.49(3)(a). The Patels were arrested and charged with a misdemeanor for failure to comply with the statute. *See* Plaintiff's Complaint, *supra*, at 4–5; *see also* L.A., CAL., MUN. CODE § 11.00(m) (stating that code violations are punishable as a misdemeanor, carrying up to six months in prison and up to a one thousand dollar fine); *Patel II*, 738 F.3d at 1061.

<sup>4</sup> *Patel II*, 738 F.3d at 1060, 1061; *see* U.S. CONST. amend. IV. The Fourth Amendment provides in relevant part that persons maintain the right to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” unless there is the issuance of a warrant upon probable cause. U.S. CONST. amend. IV. In their initial complaint, the Patels contended that when relying on section 41.49 for warrantless searches, the police must provide a set of minimum guidelines specifying where the police may conduct the inspection, whether they are allowed to enter into the owner's private residence, and for what period the motel owners are obligated to keep the records open for inspection. Plaintiff's Complaint, *supra* note 3, at 7–8; *see* L.A., CAL., MUN. CODE § 41.49.

<sup>5</sup> *Patel I*, 2008 WL 4382755, at \*3.

<sup>6</sup> *See Patel II*, 738 F.3d at 1063–64, 1065.

<sup>7</sup> *See id.* at 1061.

<sup>8</sup> *Id.*

scheme.<sup>9</sup> As a result, the majority opinion held that without this procedural element “there are no circumstances in which the record-inspection provision [of section 41.49] may be constitutionally applied.”<sup>10</sup> In addition, the majority addressed the two dissenting opinions, stating that exigent circumstances would have justified a non-consensual search regardless of whether or not section 41.49 existed as a statute.<sup>11</sup>

This Comment argues that the U.S. Supreme Court should uphold the decision of the Ninth Circuit. The Ninth Circuit’s decision has two favorable consequences: (1) it curbs unmonitored police discretion in the field, thereby preventing discriminatory application of section 41.49 against minority and immigrant motel owners, and (2) the majority’s decision indirectly protects hotel patrons’ privacy by providing a disincentive for police to target individuals without evidence of criminal conduct. Accordingly, the decision advances the protection of Fourth Amendment rights of individuals, and should be recognized by the Supreme Court upon review.

### I. THE PATELS, THE REGISTRY REQUIREMENT, AND UNCHECKED POLICE SEIZURE

Naranjibhai and Ramilaben Patel owned and operated the Rio Palace Motor Inn in Los Angeles, California.<sup>12</sup> They resided at the motel and served as the facility’s on-site managers.<sup>13</sup> As motel operators, Los Angeles Municipal Code (“L.A.M.C.”) section 41.49 required that the Patels keep detailed information about their guests in either electronic or paper form.<sup>14</sup> For guests who

<sup>9</sup> See *id.* at 1063–64; see, e.g., *Sibron v. New York*, 392 U.S. 40 (1968).

<sup>10</sup> *Patel II*, 738 F.3d at 1065.

<sup>11</sup> *Id.*

<sup>12</sup> Plaintiff’s Complaint, *supra* note 3, at 2.

<sup>13</sup> *Id.*

<sup>14</sup> L.A., CAL., MUN. CODE § 41.49 (2008); *Patel v. City of Los Angeles (Patel II)*, 738 F.3d 1058, 1060–61 (9th Cir. 2013) (en banc), *cert. granted*, 135 S. Ct. 400 (U.S. Oct. 20, 2014) (No. 13-1175). According to legislative history, the statute was designed as a nuisance abatement measure intended to counteract the use of hotels and motels for “shelter[ing] parole violators and fugitives and provid[ing] bases of operation for criminal enterprises, such as prostitution, manufacturing of forged identity documents and trafficking in illegal narcotics . . . .” See L.A., CAL., ORDINANCE 177966 (Dec. 2, 2006). The logic behind the statute was that obtaining specific personal information at check-in would deter individuals from using hotels for criminal activities because the persons involved could be readily identified through the registration records. *Patel II*, 738 F.3d at 1060–63. Accordingly, the law requires that the records contain:

the guest’s name and address; the number of people in the guest’s party; the make, model, and license plate number of the guest’s vehicle if the vehicle will be parked on hotel property; the guest’s date and time of arrival and scheduled date of departure; the room number assigned to the guest; the rate charged and the amount collected for the room; and the method of payment . . . . For cash-paying and walk-in guests, as well as any guest who rents a room for less than twelve hours, the records must also contain the number and expiration date of the identification document the guest presented when

paid in cash, booked a room as a walk-in, or rented a room for less than twelve hours, the statute required that the records contain more personal information, such as the number and expiration date of the identification document presented at check-in.<sup>15</sup> The ordinance further specified that hotel operators must keep these records “on the hotel premises in the guest reception or guest check-in area or in an office adjacent to that area” for ninety days and that owners must turn over these registries upon the demand of any police officer for a warrantless, on-site inspection.<sup>16</sup> The statute treated non-compliance with an officer’s inspection demand as a misdemeanor, punishable by up to six months in jail and a one thousand dollar fine.<sup>17</sup>

On three occasions, Los Angeles Police Department officers conducted warrantless motel registration checks on the Patels’ facility pursuant to section 41.49(3)(a).<sup>18</sup> These searches were conducted at random hours of the night without notice or warning, and involved entrance into the Patels’ private family quarters.<sup>19</sup> In addition, the officers threatened the Patels with further unannounced searches.<sup>20</sup> During each incident, the officers entered the motel and the Patel residence without their consent and without judicial authorization, an administrative warrant, or a court order.<sup>21</sup> The officers inspected and seized the motel’s registrations cards and arrested Ramilaben Patel on the first occasion and Naranjibhai Patel on the second for violating section 41.49(b)—specifically for failure to maintain a register.<sup>22</sup> The citations from each incident, however, were eventually dismissed and no charges were ever filed.<sup>23</sup>

Following these incidents, the Patels sought declaratory and injunctive relief in the U.S. District Court for the Central District of California to invalidate

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checking in . . . . For guests who check in using an electronic kiosk, hotel operators must record the guest’s name, reservation and credit card information, and the room number assigned to the guest . . . . These records must be “kept on the hotel premises in the guest reception or guest check-in area or in an office adjacent to that area” for a period of 90 days . . . .”

*Patel II*, 738 F.3d at 1060, (citing L.A., CAL., MUN. CODE § 41.49(2)(a)–(b), (4)). In regards to the actual storing of this information, the *Patel II* opinion used the terms “records,” “registry information,” and “registration cards” synonymously. *See id.* at 1060, 1062, 1073.

<sup>15</sup> *Patel II*, 738 F.3d at 1060.

<sup>16</sup> *Id.* at 1062; *see* L.A., CAL., MUN. CODE § 41.49(3)(a).

<sup>17</sup> L.A., CAL., MUN. CODE §§ 11.00(m), 41.49; *Patel II*, 738 F.3d at 1061.

<sup>18</sup> Plaintiff’s Complaint, *supra* note 3, at 4–5; *see* L.A., CAL., MUN. CODE § 41.49.

<sup>19</sup> Plaintiff’s Complaint, *supra* note 3, at 4–6; *see* L.A., CAL., MUN. CODE § 41.49 (2008).

<sup>20</sup> Plaintiff’s Complaint, *supra* note 3, at 12–13; *see* L.A., CAL., MUN. CODE § 41.49.

<sup>21</sup> Plaintiff’s Complaint, *supra* note 3, at 12–13; *see* L.A., CAL., MUN. CODE § 41.49.

<sup>22</sup> Plaintiff’s Complaint, *supra* note 3, at 4–5.

<sup>23</sup> *Id.* No information was provided in either the Plaintiff’s Complaint or the *Patel* court opinions explaining why these charges were ultimately dropped. *See Patel v. City of Los Angeles (Patel I)*, CV 05-1571 DSF (AJWx), 2008 WL 4382755, at \*1 (C.D. Cal. Sept. 5, 2008) *aff’d*, 686 F.3d 1085 (9th Cir. 2012) *rev’d and remanded en banc*, 738 F.3d 1058 (9th Cir. 2013), *cert. granted*, 135 S. Ct. 400 (U.S. Oct. 20, 2014) (No. 13-1175). *See generally* Plaintiff’s Complaint, *supra* note 3.

section 41.49’s warrantless inspection provision.<sup>24</sup> The Patels did not contest the mandated creation of these records.<sup>25</sup> Rather, they asserted that the statute was facially invalid as it violated, in every circumstance, a person’s right to be free from unreasonable search and seizure.<sup>26</sup>

After a bench trial, the district court rejected the Patels’ Fourth Amendment challenge.<sup>27</sup> In particular, the court did not believe that hotel or motel owners have a sufficient ownership or possessory interest in guest registers, which is necessary to give rise to Fourth Amendment protections.<sup>28</sup> Furthermore, the district court rejected the Patels’ argument that these registries constituted business records that may be used for other private purposes.<sup>29</sup> In conclusion, the court noted that nothing prevented the Patels from creating their own set of records containing the same information in another location, which would not be subject to inspection.<sup>30</sup>

The Patels appealed the district court’s ruling to the Ninth Circuit.<sup>31</sup> Sitting en banc, the Ninth Circuit reviewed the lower court’s finding, and held that that the warrantless, on-site inspection provision of section 41.49 was facially insufficient and, therefore, unconstitutional.<sup>32</sup>

## II. PROTECTION OF HOTEL AND MOTEL OWNERS THROUGH MANDATORY PRE-COMPLIANCE JUDICIAL REVIEW OF A PROPOSED SEARCH

The Ninth Circuit, sitting en banc, reversed the district court’s decision and held that the warrantless, on-site inspection provision of section 41.49 was unconstitutional.<sup>33</sup> Judge Paul J. Watford, writing for the court, first established that the police officer’s nonconsensual inspection of hotel guest records under section 41.49 constituted a Fourth Amendment search.<sup>34</sup> In reaching this conclusion, the majority evaluated whether the Patels either possessed a property-based interest or maintained a reasonable expectation of privacy in their rec-

<sup>24</sup> *Patel II*, 738 F.3d at 1061; Plaintiff’s Complaint, *supra* note 3, at 12–13; *see* U.S. CONST. amend. IV.

<sup>25</sup> *Patel II*, 738 F.3d at 1061; *see* Plaintiff’s Complaint, *supra* note 3, at 12–13.

<sup>26</sup> *Patel II*, 738 F.3d at 1061; Plaintiff’s Complaint, *supra* note 3, at 12–13; *see also* U.S. CONST. amend. IV (protecting against unreasonable search and seizure of an individual’s property).

<sup>27</sup> *Patel II*, 738 F.3d at 1061.

<sup>28</sup> *Id.* at 1058.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1065.

<sup>32</sup> *Id.*

<sup>33</sup> *Patel v. City of Los Angeles (Patel II)*, 738 F.3d 1058, 1061, 1065 (9th Cir. 2013) (en banc), *cert. granted*, 135 S. Ct. 400 (U.S. Oct. 20, 2014) (No. 13-1175).

<sup>34</sup> *Id.* at 1061. As Judge Watford explained, “[a] search occurs for Fourth Amendment purposes when the government physically intrudes upon one of [the Amendment’s] enumerated areas, or invades a protected privacy interest, for the purpose of obtaining information.” *Id.*

ords.<sup>35</sup> He then inquired into whether the search was reasonable and determined that, absent a statutory provision for pre-compliance judicial review of a warrantless search, all such searches conducted under the statute were unconstitutional.<sup>36</sup>

*A. Traditional Fourth Amendment Analysis: Property-Based Interests, the Reasonable Expectation of Privacy, and Exceptions to the Warrant Requirement*

The majority opinion held that the Patels' claim would have been a sufficient Fourth Amendment challenge under either the *Jones* property-based standard or the *Katz* reasonable expectation of privacy test.<sup>37</sup> Specifically, the court noted that business records are considered papers under the Fourth Amendment, meaning the Patels maintained certain property-based interests in those records.<sup>38</sup> The court further explained that "[o]ne of the main rights attaching to property is the right to exclude others, and [that] one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."<sup>39</sup> In the majority's view, the Patels' right to exclude others from their records served as the foundation of their expectation of privacy under a *Katz* analysis.<sup>40</sup> The court viewed this expectation of privacy as reasonable because "businesses do not

<sup>35</sup> *Id.* The property-based approach and the reasonable expectation of privacy test are, respectively, the historical and contemporary analytical frameworks for Fourth Amendment challenges. *United States v. Jones*, 132 S. Ct. 945, 952 (2012). The reasonable expectation of privacy standard was first articulated in *Katz v. United States*, where the Supreme Court modernized Fourth Amendment jurisprudence by acknowledging that "the Fourth Amendment protects people, not places." 389 U.S. 347, 351 (1967) (expanding the scope of the Fourth Amendment protections); *id.* at 361 (Harlan, J., concurring) (providing the analytical framework for understanding the Fourth Amendment). In recognizing this personal protection, later courts applied the analysis from Justice Harlan's concurrence in what became known as the "reasonable expectation of privacy" analysis. *See Jones*, 132 S. Ct. at 950; *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring). According to Justice Harlan, "[t]he rule that has emerged from prior decisions [contains a] twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). More than fifty years later, the Court in *Jones* revived the property-based analysis for Fourth Amendment challenges. *See* 132 S. Ct. at 952; *Katz*, 389 U.S. at 351. Writing for the Court in *Jones*, Justice Scalia explained that "[f]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates. *Katz* did not repudiate that understanding." 132 S. Ct. at 950. As a result, "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 952.

<sup>36</sup> *Patel II*, 738 F.3d at 1063, 1065.

<sup>37</sup> *Id.* at 1061. *See generally Jones*, 132 S. Ct. 945 (discussing property-based analysis of Fourth Amendment violations); *Katz*, 389 U.S. 347 (establishing Fourth Amendment violation where no physical intrusion on property).

<sup>38</sup> *Patel II*, 738 F.3d at 1061.

<sup>39</sup> *Id.* (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978)).

<sup>40</sup> *Id.*

ordinarily disclose, and are not expected to disclose, the kind of commercially sensitive information contained in the records . . . .”<sup>41</sup>

Additionally, Judge Watford carefully noted that this expectation of privacy did not extend to the hotel’s guests, because “the records belong to the hotel, not the guest, and the records contain information that the guests have voluntarily disclosed to the hotel.”<sup>42</sup> As support for this conclusion, the court cited *United States v. Cormier*, an earlier Ninth Circuit case where the court rejected a motel guest’s similar Fourth Amendment challenge to a police officer’s seizure of the motel’s guest registration records.<sup>43</sup>

### *B. Applying the Reasonability Standard and the Necessity of Pre-Compliance Judicial Review*

After establishing both the Patels’ property and privacy interest in the records, the court next considered whether the searches authorized by section 41.49 were reasonable.<sup>44</sup> Traditionally, this analysis requires balancing “the need to search against the invasion which the search entails.”<sup>45</sup> Judge Watford distinguished section 41.49, however, as a statute authorizing administrative record inspections and not searches for evidence of a crime.<sup>46</sup> This characterization is significant, because administrative record inspections do not generally require the issuance of a warrant.<sup>47</sup> In the absence of a warrant, however,

<sup>41</sup> *Id.* at 1062. The majority also noted that “[t]he hotel retains that expectation of privacy notwithstanding the fact that the records are required to be kept by law.” *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; *United States v. Cormier*, 220 F.3d 1106, 1108 (9th Cir. 2000). In *United States v. Cormier*, a police officer acquired motel records through a similar Washington State statute mandating that guest registries be turned over upon police request. 220 F.3d at 1106, 1108. The hotel owner voluntarily surrendered the registry to the officer, who then ran a background check on the list of occupants. *See id.* at 1106. Through this background check, the officer learned that one of the residents had an extensive criminal history and was a registered sex offender. *Id.* at 1107. The officer conducted a “knock and talk” on this individual, and afterwards searched his room with his consent. *See id.* In the process, the officer discovered a gun, and the individual was charged with being a felon in possession of a firearm. *Id.* The Ninth Circuit rejected the defendant’s Fourth Amendment challenge to the seizure of the records on the grounds that the defendant, as a guest, did not have any privacy interest in information he voluntarily turned over to a third party. *Id.* at 1108.

<sup>44</sup> *Patel II*, 738 F.3d at 1063.

<sup>45</sup> *Id.* (quoting *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967)).

<sup>46</sup> *Id.* The City of Los Angeles characterized section 41.49 as a “nuisance abatement measure designed to deter drug dealing and prostitution,” by creating records that identify patrons. *Id.* Specifically, the City asserted—and the plaintiffs accepted—that “those who would be inclined to use hotels to facilitate their illicit activities will be less inclined to do so if they know that hotel operators must collect—and make available to the police—information identifying each of their guests.” *Id.* Consequently, section 41.49 permitted only inspection of the records to ensure compliance with the statute. *Id.* This distinction is important, as searches for evidence of a crime ordinarily require the issuance of a warrant. *Id.*

<sup>47</sup> *Id.* The Court has noted the limits of the warrant requirement when dealing with highly regulated industries. *See Donovan v. Dewey*, 452 U.S. 594, 600 (1981). For example, the Court has stated:



Fourth Amendment jurisprudence requires that the statute provide an opportunity for pre-compliance judicial review, at the very least.<sup>48</sup>

Los Angeles Municipal Code section 41.49 lacked a specific provision that granted this pre-compliance judicial review in situations where police sought to conduct a warrantless search.<sup>49</sup> Consequently, Judge Watford concluded that all searches authorized by section 41.49 are unreasonable, allowing for “no circumstances in which the record-inspection provision may be constitutionally applied.”<sup>50</sup> Judge Watford stressed that the pre-compliance mechanism provides the targeted party an opportunity to obtain judicial review of the demand’s reasonableness prior to suffering the penalties for refusing to comply.<sup>51</sup> Without such a safeguard, hotel operators are subjected to the “‘unbridled discretion’ of officers in the field, who are free to choose whom to inspect, when to inspect, and the frequency with which those inspections occur.”<sup>52</sup> The Ninth Circuit therefore held the municipal code to be facially unconstitutional.<sup>53</sup>

### *C. Judge Tallman’s Dissent: Meeting the Requisite Burden of Proof for a Facial-Invalidity Challenge*

In his dissent, Judge Richard C. Tallman argued that the court record was not sufficiently complete to examine the Patels’ facial-invalidity challenge.<sup>54</sup> According to Judge Tallman, it would have been more appropriate for the Patels to raise an as-applied constitutional challenge—especially because precedent required a case-by-case analysis on the validity of each warrantless search.<sup>55</sup> Instead, Judge Tallman contended that the majority engaged in an

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[A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence 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.

*Id.*

<sup>48</sup> U.S. CONST. amend. IV; *Patel II*, 738 F.3d at 1063. In an administrative record inspection scheme, pre-compliance judicial review refers to the opportunity to challenge the reasonableness of a warrantless search before the targeted party complies with the demand. *Id.* at 1064. The policy behind such review is to afford judicial discretion to cut down on arbitrary searches. *Id.*

<sup>49</sup> *Patel II*, 738 F.3d at 1063–64.

<sup>50</sup> *Id.* at 1065.

<sup>51</sup> *Id.* at 1064.

<sup>52</sup> *Id.* (quoting *Marshall v. Barlow’s*, 436 U.S. 307, 323 (1978)).

<sup>53</sup> *Id.* at 1060.

<sup>54</sup> *Id.* at 1065 (Tallman, J., dissenting).

<sup>55</sup> *Id.* at 1065–66. Specifically, Judge Tallman quoted *Sibron v. New York*, which held that “[t]he 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.” *Id.* (quoting 392 U.S. 40, 59 (1968)).

“abstract and unproductive exercise,” and the court should have confined its inquiry to the facts and circumstances that actually occurred.<sup>56</sup>

Additionally, Judge Tallman criticized the majority for failing to acknowledge the established rule that a statute survives a facial challenge “if a court can find any circumstance in which [the ordinance] could constitutionally be applied.”<sup>57</sup> He suggested that several exceptions to the warrant requirement could have been relied on to uphold the ordinance.<sup>58</sup> For example, the exigent-circumstances exception and the community-caretaking exception would both have permitted seizure of the hotel records without a warrant.<sup>59</sup> Tallman concluded his dissent by noting that nothing prevented the police from obtaining a warrant to carry out a search.<sup>60</sup> As a result, Tallman argued the statute was valid when analyzed under this standard procedure.<sup>61</sup>

### III. THE DIRECT AND INDIRECT EFFECTS OF CURBING “UNBRIDLED DISCRETION”

The Supreme Court should uphold Judge Watford’s holding because it would have a beneficial effect for both hotel owners and their clientele—

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<sup>56</sup> *Patel II*, 738 F.3d at 1065–66 (Tallman, J., dissenting) (quoting *Sibron*, 392 U.S. at 59).

<sup>57</sup> *Id.* at 1067.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*; see *United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993). The Supreme Court has held that “[o]ne well-recognized exception applies when the ‘exigencies of the situation’ make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)). In regards to the community caretaking exception, “[t]he Supreme Court recognized that, by necessity, local police officers often must ‘engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.’” *Erickson*, 991 F.2d at 531 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). If police officers are acting within their capacity as a community caretaker, a warrant may not be required for a search or seizure. *Id.*; see, e.g., *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005) (stating that under the community caretaking exception, police officers may impound vehicles that jeopardize public safety and efficient movement of vehicular traffic).

<sup>60</sup> *Patel II*, 738 F.3d at 1068 (Tallman, J., dissenting).

<sup>61</sup> *Id.* at 1066. Judge Clifton, also dissenting, criticized the majority for ignoring the strict burden of proof in facial invalidity challenges. *Id.* at 1070 (Clifton, J., dissenting). Judge Clifton’s argument rested on the premise that the absence of pre-compliance judicial review was not a fatal flaw for section 41.49. *Id.* at 1070–71. The majority’s analysis, according to Judge Clifton, led only to the conclusion that section 41.49 would not qualify for the administrative search exception to the warrant requirement. *Id.* at 1072. Additionally, Judge Clifton criticized the majority for concluding that the lack of pre-compliance review was unreasonable per se without performing the requisite Fourth Amendment reasonableness analysis. *Id.* As such, he noted that the court record lacked any evidence indicating that the Patels, in fact, possessed an expectation of privacy in these business records. *Id.* The majority’s logic was simply based on the notion that businesses are expected to keep such information as private; therefore, the Patels treated their records as private information. *Id.* at 1072–73 (stating “[w]e cannot simply assume that hotels in general expect information contained in their guest registers to be private . . . . The majority opinion’s construction is missing a foundation”).

particularly for minority populations of limited English-speaking ability who must deal directly with police officers' inspection demands.<sup>62</sup> The Ninth Circuit en banc's holding protects motel patrons, albeit indirectly, from police officers' unchecked discretion in implementing searches with the goal or consequence of targeting individual guests.<sup>63</sup> As the majority opinion noted, standard Fourth Amendment jurisprudence does not allow individuals to assert their own privacy interests in information they voluntarily turn over to a third party.<sup>64</sup> Guests' lack of standing, however, does not diminish expectations regarding enforcement of standard procedural safeguards, which are designed to curb arbitrary targeting.<sup>65</sup> This decision furthers these expectations by actually enforcing the application of standard procedural safeguards with regard to motel guest records.<sup>66</sup>

Under the original section 41.49 ordinance, for example, the police were free to use the warrantless seizure provision to obtain information on current guests, run background checks without their knowledge, and proceed to harass them in search of a crime.<sup>67</sup> This occurred in *Cormier*, where police in the State of Washington used motel records to run background checks on occu-

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<sup>62</sup> See *Patel v. City of Los Angeles (Patel II)*, 738 F.3d 1058, 1064–65 (9th Cir. 2013) (en banc), 135 S. Ct. 400 (U.S. Oct. 20, 2014) (No. 13-1175).

<sup>63</sup> See *Patel II*, 738 F.3d at 1062, 1065.

<sup>64</sup> See *id.* at 1062.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* at 1062, 1065. One commentator contended that:

The effect of [section 41.49's] logic is that Americans cannot travel without waiving privacy rights to personal details as intimate as where we go, the times we arrive and leave, who stays with us in our room, and how many beds are inside that room. If the state is permitted to seize all that information without probable cause or a warrant, the Fourth Amendment is worthless, at least if the same logic is extended to other businesses. After all, most people can't function in modern American society without revealing virtually every aspect of their lives to some "third party" or other.

Conor Friedersdorf, *A Hotel's Right to Protect the Privacy of Its Guests*, ATLANTIC (Oct. 30, 2014, 12:00 PM), <http://www.theatlantic.com/politics/archive/2014/10/a-hotels-right-to-protect-the-privacy-of-its-guests/382122/>.

<sup>67</sup> See *Patel II*, at 1062; *United States v. Cormier*, 220 F.3d 1103, 1108 (9th Cir. 2000). In an analysis concerning a pending California bill addressing guest privacy interests in hotel registries, the Assembly Judiciary Committee cited an incident involving a married couple in San Luis Obispo, California, where the police spotted a car resembling a stolen vehicle in a hotel parking lot and demanded the owner's information from the guest registries. ASSEMB. COMM. ON JUDICIARY, 2007 LEGIS. BILL HIST. CA A.B. 429, at 3. After obtaining the information, the police broke into a married couple's room, tazered the husband, placed them in handcuffs, interrogated the couple, and held them for over an hour before concluding that they were not the robbers. *Id.* The Assembly Judiciary Committee noted that "[t]he presumption is that if the police had been required to get a search warrant, they would have been a little more careful to ensure they had sufficient evidence to believe the hotel guests were the robbers." *Id.*

pants and then proceeded to target an individual with a criminal record.<sup>68</sup> This interaction led to a search of the defendant’s hotel room, the discovery of a weapon, and his arrest.<sup>69</sup> The *Patel* holding inserts necessary pre-compliance judicial review, and therefore a level of reasonability, which decreases police incentive to target individuals without probable cause.<sup>70</sup> Generally, this is in line with the Fourth Amendment policy articulated in *Katz* regarding protection of individuals from unreasonable government intrusion.<sup>71</sup>

The control on police discretion also protects hotel and motel owners from indiscriminate harassment by the police.<sup>72</sup> The Patels asserted that they were subjected to three searches and were under threat of further police intrusions.<sup>73</sup> Other hotel and motel operators similarly commented that their main objection was not towards the validity of section 41.49, but rather its abusive application that intruded upon their private residences, and took advantage of their limited English-speaking capabilities.<sup>74</sup> Without the opportunity to challenge the searches’ reasonableness, the Patels—and other hotel operators—could conceivably be subjected to unending section 41.49 warrantless searches or, as a result of non-compliance, face penalty after penalty.<sup>75</sup> By requiring a warrant, however, police officers must first demonstrate to a judge that their demands are reasonable.<sup>76</sup> Consequently, motel owners are provided with a level of predictability and consistency concerning police inspection of their records.<sup>77</sup>

Finally, the dissenting opinions disregarded general Fourth Amendment policy by concluding that the mere option of obtaining a warrant prior to a section 41.49 search validates the ordinance as a whole.<sup>78</sup> As the Supreme Court noted in *Katz*, the Fourth Amendment’s main objective is protecting people,

<sup>68</sup> *Cormier*, 220 F.3d at 1106–07, 1108; see *Patel II*, 738 F.3d at 1061 (explaining that those who possess or control property have the right to exclude others from that property, and therefore, also have a right to privacy).

<sup>69</sup> *Cormier*, 220 F.3d at 1106–07.

<sup>70</sup> See *Patel II*, 738 F.3d at 1061, 1063 (explaining that those who possess or control property have the right to exclude others from that property, and therefore, also have a right to privacy).

<sup>71</sup> See *Katz v. United States*, 389 U.S. 347, 351 (1967); *Patel II*, 738 F.3d at 1063; *Cormier*, 220 F.3d at 1108 (holding guests do not have expectation of privacy in hotel records).

<sup>72</sup> See *Patel II*, 738 F.3d at 1063–64.

<sup>73</sup> See Plaintiff’s Complaint, *supra* note 3, at 12–13.

<sup>74</sup> David G. Savage, *L.A. Wants Court to Revive Law Allowing Motel Guest Registry Searches*, L.A. TIMES, Sept. 27, 2014, <http://www.latimes.com/local/la-me-court-la-motels-20140928-story.html>. In an interview, Frank A. Weiser, attorney for the motel and hotel owners challenging section 41.49, noted that “most proprietors were willing to cooperate, but there were complaints about abuses. Sometimes police conducted inspections late at night and went into the family quarters . . . [M]any owners are Asians and some had a limited command of English. ‘They felt intimidated by the police.’” *Id.*

<sup>75</sup> See *Patel II*, 738 F.3d at 1064–65; Plaintiff’s Complaint, *supra* note 3, at 12–13.

<sup>76</sup> See *Patel II*, 738 F.3d at 1063–64.

<sup>77</sup> See *id.*

<sup>78</sup> See *Katz*, 389 U.S. at 351; *Patel II*, 738 F.3d at 1065 (Tallman, J., dissenting).

which can reasonably be understood as barring inappropriate use of government discretion.<sup>79</sup> There is no safeguard against an abuse of discretion, however, if a statute simply maintains the option of obtaining a warrant prior to a search.<sup>80</sup> Unlike the result under the majority approach, police would not face meaningful judicial oversight, leaving them free to proceed without challenge against vulnerable minority populations.<sup>81</sup> Thus, the majority properly recognized the harm in the unbridled discretion given to the Los Angeles police, and correctly struck down the ordinance.<sup>82</sup>

### CONCLUSION

The Ninth Circuit's en banc decision not only grants hotel owners a safeguard against discriminatory application of section 41.49, but also gives indirect privacy protections to hotel guests. By recognizing section 41.49's need to provide for optional pre-compliance judicial review, the majority took a step towards curbing police officers' arbitrary, unmonitored application of the statute. In turn, this provides a disincentive for targeting individuals, as officers no longer have direct, uncontested access to hotel registries. Finally, hotel owners have the opportunity to avoid multiple automatic misdemeanor penalties by opposing a record search. All of this, of course, is in line with the Fourth Amendment's goal of protecting people from arbitrary search and seizure.

The Supreme Court granted certiorari on October 20, 2014, and heard oral arguments on March 3, 2015. In deciding the case, the Court should follow the Ninth Circuit's approach, which recognizes the Patel's inherent privacy interest in their property, regardless of its statutorily mandated creation. In doing so, the Court would continue to protect hotel and motel owners from the arbitrary use of police discretion and interference with their industry in a manner that opportunistically circumvents Fourth Amendment protections and jurisprudence.

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<sup>79</sup> See *Katz*, 389 U.S. at 351; *Patel II*, 738 F.3d at 1064 (majority opinion).

<sup>80</sup> See *Patel II*, 738 F.3d at 1064–65; *id.* at 1065 (Tallman, J., dissenting).

<sup>81</sup> See *Patel II*, 738 F.3d at 1065 (Tallman, J., dissenting).

<sup>82</sup> *Patel II*, 738 F.3d at 1065 (majority opinion).