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* INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Institute for Justice[1] ("IJ") is a nonprofit, public-interest law center committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is to protect private property rights, both because an individual's control over his own property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights.").

The aggressive enactment of warrantless search procedures by legislatures poses a grave threat to the protection of property rights. It is for this reason that in several jurisdictions, IJ has challenged the facial validity of ordinances authorizing mandatory inspections of private homes without either consent or a warrant issued upon a showing of probable cause. *See, e.g.*, *McCaughtry v. City of Red Wing*, 831 N.W.2d 518 (Minn. 2013); *Black v. Vill. of Park Forest*, 20 F. Supp. 2d 1218 (N.D. Ill. 1998); *Brumberg v. City of Marietta,* No. 04-1-5794-34 (Super. Ct. of Cobb Cnty., Ga., filed July 21, 2004).

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[1] This brief is filed based on the parties' written blanket consents filed with this Court. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

IJ's ability to challenge these ordinances on their face is crucial to our work. Ordinances mandating warrantless, nonconsensual inspections of private homes are plainly unconstitutional under *Camara v. Municipal Court*, 387 U.S. 523 (1967), where this Court facially invalidated such an ordinance. Despite *Camara*, however, cities still adopt and enforce materially identical ordinances. Only facial invalidation of these ordinances will prevent cities from adopting and enforcing them. As-applied challenges by those fortunate enough to receive IJ's representation – or wealthy enough to hire a private attorney – will only prevent the ordinances' application in individual cases. Cities will still be able to continue to violate the Fourth Amendment against the next tenant or property owner. Foreclosing facial challenges under the Fourth Amendment – as this Court is considering in the first Question Presented in this case – will therefore largely foreclose IJ's ability to use the Fourth Amendment to protect property rights.

SUMMARY OF THE ARGUMENT

Amicus provides two main arguments for why this Court should preserve Fourth Amendment facial challenges. First, to demonstrate the practical effect that an abandonment of such challenges would have, *amicus* discusses the importance of Fourth Amendment facial challenges in one concrete setting: laws mandating warrantless, nonconsensual home inspections – inspections similar to the inspection of hotels

at issue in this case. Second, more generally, *amicus* demonstrates that Fourth Amendment facial challenges are proper as a matter of history, law, and practice.

First, in *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court determined a San Francisco ordinance requiring such inspections to be facially unconstitutional. Despite this, cities continue to adopt and enforce materially identical ordinances. However, facial challenges have enabled many law-abiding citizens to invalidate these laws, protecting the privacy and sanctity of their homes and preventing the laws from being enforced against anyone else. To bar facial challenges under the Fourth Amendment would mean these challenges could only be brought as-applied, allowing the government to enforce an obviously unconstitutional law against the next unsuspecting citizen not fortunate enough to be able to mount a legal challenge. It would also essentially vacate this Court's facial ruling in *Camara*.

Second, facial challenges to legislation are entirely in keeping with the history and purpose of the Fourth Amendment's adoption. The Amendment was not only intended to address evils such as writs of assistance, but legislation authorizing them to be issued. Further, this Court has specifically sanctioned, in *Illinois v. Krull*, 480 U.S. 340, 352, 354 (1987), facial invalidation as the best means to deter legislatures from adopting laws authorizing unconstitutional searches and seizures. It also has facially invalidated statutes and ordinances under the Fourth Amendment

a number of times, making clear that facial adjudication is particularly appropriate in areas with overriding legal issues. Finally, concerns over advisory opinions and ripeness are not valid objections to Fourth Amendment facial challenges. These concerns arise from a misunderstanding of the difference between facial and as-applied challenges. The difference is in the remedy, not the procedural posture, evidentiary requirements, or underlying merits of a claim.

To answer the question of whether facial challenges should *ever* be available under the Fourth Amendment, the Court need only perform a simple thought experiment. Substitute the words "private homes" for "hotel guest records." Such a law, allowing warrantless searches of homes, would fly in the face of the most "basic principle of Fourth Amendment law": that "searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980). The law would, of course, be exceedingly unconstitutional.

A facial challenge would be the most sensible way to address such a statute. Fourth Amendment facial challenges enable a single law-abiding citizen to vindicate this right for *everyone* against laws that violate the Fourth Amendment. And such facial challenges ensure that this service may be performed *before* anyone must face the choice of either allowing the police to conduct an unconstitutional search or going to jail for refusing to comply. This Court should

not forbid this sensible and historically accepted tool of relief.

ARGUMENT

I. Fourth Amendment Facial Challenges Enable Law-Abiding Citizens to Protect the Privacy and Sanctity of Their Homes.

Residents (both tenants and resident homeowners) and landlords routinely raise facial Fourth Amendment challenges (and routinely succeed in those challenges) to ordinances which mandate the warrantless, nonconsensual inspection of their homes. Indeed, despite this Court's categorical ruling in *Camara v. Municipal Court*, 387 U.S. 523 (1967), that cities must obtain a warrant before making a nonconsensual inspection of a residence – and that cities cannot punish a tenant or property owner's refusal to allow a warrantless inspection – there are countless ordinances across the nation that make warrantless home inspections mandatory. These ordinances, on their face, make a refusal to allow a home inspection without a warrant result in the denial of a license or even fines and imprisonment. Landlords, tenants, and resident homeowners must be allowed to challenge these clearly unconstitutional ordinances on their face, or their ready adoption and enforcement will only multiply.

This Section describes how this Court has already determined that an ordinance allowing for warrantless, nonconsensual home inspections is on its face a violation of the Fourth Amendment. This includes a discussion of how the facial invalidation of a law authorizing warrantless searches that do not fall under an exception to the Fourth Amendment's warrant requirement is just as legitimate as the facial invalidation of a law authorizing invalid warrants. This Section then provides a sample of similar ordinances on the books in cities today, despite what this Court has said. It then highlights several lower court opinions where judges have properly adjudicated facial challenges to these ordinances, declaring them unconstitutional and even enjoining their enforcement.

Together, these examples of successful challenges to facially unconstitutional laws, and identical laws that are currently being enforced, demonstrate that, without the ability to bring Fourth Amendment facial challenges, cities will be able to enforce these laws without fear that a court will prevent them from continuing to enforce them. Thus, although a handful of people might be able to afford the expense of mounting one-off as-applied challenges (either pre-enforcement or as a defense to a prosecution), an unconstitutional inspection regime will continue to operate as applied to everyone else because a facial ruling, and its tools of relief, including a facial injunction, will be unavailable. Only a rule of law allowing for the vigorous use of Fourth Amendment facial

challenges – both pre-enforcement facial challenges and facial challenges made as a defense – can prevent cities from enforcing these categorically unconstitutional laws.

A. This Court ruled in *Camara v. Municipal Court* that laws authorizing warrantless, nonconsensual home inspections facially violate the Fourth Amendment.

If this Court concludes that facial challenges to ordinances are not permitted under the Fourth Amendment it will essentially be overruling its holding in *Camara v. Municipal Court* and that opinion's categorical protection of a resident's privacy and property rights. In *Camara*, a tenant objected to a city housing inspector's demand that the inspector be allowed to view the interior of his apartment. 387 U.S. at 526. The request was made as part of a routine inspection. *Id.* at 526-27. The ordinance required tenants to provide inspectors with access to their residences and subjected those who did not comply with criminal sanctions. *Id.* After the tenant refused he was arrested. *Id.*

While awaiting trial, the tenant filed an action in state court requesting a writ of prohibition. *Camara v. Municipal Court*, 237 Cal. App. 2d 128, 130 (Cal. Ct. App. 1965). Although early in the proceedings he also pursued an as-applied claim under the Fourth Amendment (in addition to claims under the California Constitution), *id.* at 130, 137 n.3, the only claim

that reached this Court was his facial challenge to the ordinance under the Fourth Amendment. *See* 387 U.S. at 525 ("Appellant brought this action . . . that a writ of prohibition should issue to the criminal court because the ordinance authorizing such inspections *is unconstitutional on its face*." (emphasis added)); 237 Cal. App. 2d at 137 n.3 ("Plaintiff thereafter elected to stand upon the assertion that the ordinance *was unconstitutional on its face*." (emphasis added)).

The city argued Mr. Camara's claim must fail under *Frank v. Maryland*, 359 U.S. 360 (1959), an earlier case in which the Court had concluded the Fourth Amendment did not require the government to obtain a warrant to perform a nonconsensual home inspection that is part of a "fire, health, and housing inspection program[ ]." *Camara*, 387 U.S. at 530. The Court, however, overruled *Frank*, holding that searches of homes, even in the civil inspection context, require the government to obtain warrants when residents object. *Id.* at 534.[2]

Furthermore, the Court held that since demanding a government official obtain a warrant to perform an administrative inspection is a right guaranteed by the Fourth Amendment, it is unconstitutional for the government to *punish* a resident for simply so demanding. *Id.* at 540. Thus, a clear holding of this

[2] Further, a companion case, *See v. City of Seattle*, 387 U.S. 541 (1967), extended *Camara*'s holding to owners of commercial property, in that case a locked warehouse.

Court is that an ordinance is facially unconstitutional if it punishes a resident for simply not allowing access to his home and demanding the government obtain a warrant before performing an administrative inspection.[3]

Even though *Camara* was a facial ruling, the Court analyzed the enforcement of the challenged ordinance against Mr. Camara. *Cf.* Resp't's Br. 22 (stipulation that ordinance has been enforced against Respondents). This demonstrates that "facial challenge" does not mean a challenge without any facts. It simply means that a law is unconstitutional beyond its application to the challenging party. *Cf. Citizens United v. FEC*, 558 U.S. 310, 375-76 (2010) (Roberts, C.J., concurring) (explaining that given the nature of an underlying legal claim, if that claim is successful a law can be declared unconstitutional beyond the challenging party).

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[3] Another part of the *Camara* opinion – Section II – stated that the warrant the government must obtain to force a resident to allow an administrative inspection does not have to require traditional individualized probable cause, but only a lower level of "probable cause" where evidence of a code violation in an individual dwelling is not required. *Camara,* 387 U.S. 534-39. Amicus disagrees with this section of *Camara* for several reasons – including that it is contrary to the original meaning and purpose of the Fourth Amendment – and has worked to have this Court revisit the issue. *See* Brief of *Amicus Curiae* Institute for Justice in Support of Petition for Writ of Certiorari, *Nelson v. City of Rochester* (U.S. No. 12-646). However, as Section II of *Camara* is not directly relevant to the arguments in this brief, or in the present case, *amicus* does not address the probable cause issue any further here.

At this point, it is important to observe that under this Court's Fourth Amendment jurisprudence, two types of search-authorizing laws exist: (1) laws authorizing searches *based on the issuance of a warrant*; and (2) laws authorizing searches *without a warrant*. *Camara* was of the latter type. As to the first type, this Court has recognized that facial review is entirely available to address "the adequacy of the procedural safeguards written into a statute which purports to authorize the issuance of search warrants in certain circumstances." *Sibron v. New York*, 392 U.S. 40, 59 (1968). Indeed, "[n]o search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope." *Id.* Thus, if a law were to, for example, permit search warrants to be issued without requiring any specific description of "the persons or things to be seized," the law would be "plainly invalid" under the Fourth Amendment. *Groh v. Ramirez*, 540 U.S. 551, 557 (2004).

As *Camara* demonstrates, facial review is equally possible with respect to laws that authorize warrantless searches. But because the Fourth Amendment does not delineate explicit standards for warrantless searches (unlike the limits that it places on the issuance of warrants), such review is premised on "the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth

Amendment – subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Only the Court has the power to establish these exceptions and the legislature may not contravene these "constitutional rules" in enacting laws that authorize warrantless searches. *Dickerson v. United States*, 530 U.S. 428, 437-38 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution."); *see also City of Boerne v. Flores*, 521 U.S. 507, 517-21 (1997). When the Court has given a firm "no" to a proposed exception – as it did in *Camara* to regulatory inspections of homes – a law nevertheless authorizing warrantless searches in that area is facially unconstitutional.

B. Despite this Court's ruling in *Camara*, local governments continue to enact laws that authorize warrantless, non-consensual home inspections.

The holding of *Camara*, and its companion case, *See v. City of Seattle*, is unambiguous. The government may not mandate that a tenant or property owner submit to a non-emergency administrative inspection without first obtaining a warrant, and may not punish him for not allowing access without a warrant. Just as was the case with the San Francisco ordinance under which the city prosecuted Mr. Camara, and which he successfully had this Court

facially invalidate, any similar ordinance is facially unconstitutional.

Yet, even though this Court could not have been more clear than it was in *Camara*, cities often do adopt ordinances creating regulatory programs that mandate warrantless, nonconsensual inspections and punish residents and landlords for refusing an inspection.

For example, Lowell, Massachusetts mandates rental properties be licensed, and one of the requirements for a license is "the satisfactory result of an inspection by a City code enforcement inspector. . . ." City of Lowell Code § 176-2(B).[4] The code provides for no warrant procedure. It simply mandates an inspection in order to obtain a license. And renting without a license is an offense. *Id.* § 176-3(B) (fine of up to $300 for every day found to be in violation). Thus, the choice is between waiving a Fourth Amendment right and prosecution. Similar examples abound from coast to coast. *See, e.g.*, Coatesville, Pennsylvania Code § 136-14.1(H)[5] (mandatory inspections with no warrant procedure); Joliet, Illinois Code § 8-154[6] (same); Ontario, California Municipal Code § 8-17-109[7] (same).

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[4] The code is available at http://ecode360.com/12360647.

[5] *Available at* http://ecode360.com/9633639.

[6] *Available at* https://www.municode.com/library/il/joliet/codes/code_of_ordinances.

[7] *Available at* http://www.amlegal.com/ontario_ca/.

All of these ordinances are *per se* unconstitutional. They require exactly the same kind of warrantless, nonconsensual searches found facially unconstitutional in *Camara*. Residents should therefore be able to challenge these laws on their face and obtain an injunction protecting the plaintiff and every other resident of those cities.

C. Facial challenges have enabled law-abiding citizens to protect the privacy and sanctity of their homes from laws that authorize warrantless, nonconsensual inspections.

Fortunately, through the use of facial challenges, both residents and landlords have invalidated some of these programs. A few of these cases are discussed in this section.

In *Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 900-01 (N.D. Tex. 2005), a landlord and a tenant challenged their city's rental licensing ordinance which required owners of rental housing to license their properties, and established that to obtain a license, the owners had to submit to an annual inspection. The plaintiffs filed suit shortly after the ordinance was adopted and moved for a preliminary injunction, arguing the ordinance violated the Fourth Amendment on its face.

The district court granted the motion, finding that the ordinance was facially unconstitutional. *Id.* at 904, 904 n.8. The ordinance unconstitutionally

lacked a provision requiring the city to obtain a warrant if a tenant or landlord refused entry. As the court put it:

> The court determines that in order to comply with the requirements of *Camara* and the protections of the Fourth Amendment, the Ordinance must give the landlord the opportunity to refuse to consent . . . and include a warrant procedure to be followed in the event the landlord refuses.

Id. at 904.

A similar story occurred in Freeport, New York, where a coalition of landlords filed an action, this time in state court, to have a warrantless rental inspection program declared unconstitutional under the Fourth Amendment. *Sokolov v. Freeport*, 420 N.E.2d 55, 57 (N.Y. 1981) (declaring inspection requirement unconstitutional because landlords are forced to give up constitutional right to demand a warrant in exchange for being able to rent out their property). The New York Court of Appeals held the ordinance unconstitutional on its face because it forbade any landlord from renting her property if she did not submit to a warrantless inspection.[8]

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[8] Many of these facial challenges never make it to a decision, but nevertheless are an indispensable tool of protecting Fourth Amendment liberties. Many times cities have adopted unconstitutional rental inspection ordinances, tenants and landlords have filed suit, and the cities have then amended the law before a court decision. If it were not for the lawsuits, however,

(Continued on following page)

Facial challenges to warrantless inspection programs are not just essential to protecting the Fourth Amendment rights of tenants and landlords, but of resident homeowners as well. Many jurisdictions require "point of sale" inspections, where a house must be inspected before title can transfer to a buyer. Courts, relying upon *Camara*, have found programs such as these that do not contain warrant provisions to be facially unconstitutional, and have enjoined their enforcement. *See Wilson v. Cincinnati*, 346 N.E.2d 666, 671 (Ohio 1976); *Hometown Co-operative Apartments v. City of Hometown*, 495 F. Supp. 55, 60 (N.D. Ill. 1980).

Only facial challenges to these ordinances can prevent them from being enforced. As-applied victories, as opposed to facial victories, in individual cases will allow the ordinances to continue to be enforced

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these cities very well would have continued to demand warrantless, nonconsensual home inspections. *See, e.g.*, Betsy Bloom, *Judge Delays Ruling on City, Landlords Dispute*, La Crosse (Wis.) Tribune, Aug. 19, 2014, *available at* http://lacrossetribune.com/news/local/judge-delays-ruling-on-city-landlords-dispute/article_1277cdfa-b51a-5dc7-bb81-6e89a03db629.html (reporting a judge was set to strike down an inspection ordinance until the city quickly removed the offending language); Eileen Zaffiro-Kean, *Daytona Rental Inspection Law Gets Addition*, Daytona Beach News-Journal, Oct. 15, 2014, *available at* http://www.news-journalonline.com/article/20141015/NEWS/141019570; Larry Barszewski, *Lauderdale Lakes Repeals Rental Inspection Program*, Sun-Sentinel (South Florida), June 23, 2013, *available at* http://articles.sun-sentinel.com/2013-06-23/news/fl-lakes-repeals-rental-program-20130623_1_inspection-program-annual-inspections-lauderdale-lakes.

against everyone but the successful tenant or landlord. The next victim will likely be a different tenant or landlord who knows nothing of the former case and who cannot afford their own counsel while the city either denies the landlord a license or takes the license away and evicts the tenant from his home.

If this Court abandons Fourth Amendment facial challenges it would mean every resident or landlord who wanted to challenge a warrantless inspection requirement would have to either violate the law and subsequently endure a prosecution, license revocation, or eviction proceeding, or have to file an as-applied pre-enforcement challenge that would result in nothing more than a declaratory judgment or injunction pertaining to their rights only. A judge faced with an obviously unconstitutional law before him could do no more than forbid its enforcement against the resident and landlords in that individual case. Cities could enforce these laws knowing that the worst that could happen is they would be stopped in an individual enforcement action. This Court should not allow this to happen by taking away facial invalidation under the Fourth Amendment.

II. Fourth Amendment Facial Challenges Are Proper as a Matter of History, Law, and Practice.

In arguing that facial challenges should not be available under the Fourth Amendment, the City and its *amici* emphasize certain analysis by this Court

disfavoring facial challenges in general and this Court's refusal nearly five decades ago in *Sibron v. New York*, 392 U.S. 40 (1968) to rule on the facial validity of a state stop-and-frisk statute. *See, e.g.*, Pet'r's Br. 21-24; Brief of *Amicus Curiae* Manhattan Institute 30-31. In their view, the fleeting statements in *Sibron* completely foreclose Respondents' facial claim.

But an examination of the history and purpose of the Fourth Amendment, this Court's Fourth Amendment jurisprudence, and the practice of how facial challenges actually function support facial enforcement of the provision. The Fourth Amendment was adopted to prohibit both certain nefarious searches, seizures, and warrants, *and* legislation authorizing those searches, seizures, and warrants. Further, this Court's Fourth Amendment jurisprudence, both before and after *Sibron*, not only permits facial challenges but invites them in appropriate circumstances. This Court has specifically authorized Fourth Amendment facial claims over other forms of relief. It, and lower courts, have adjudicated Fourth Amendment facial claims many times, and in doing so have demonstrated three areas particularly suitable to facial challenges involving warrantless searches. Finally, facial challenges under the Fourth Amendment can be adjudicated without risking an advisory opinion or decision of an unripe case, thus obviating the concerns raised by this Court in *Sibron*, the Sixth Circuit, and Judge Tallman in his dissent in this matter. *See Sibron*, 392 U.S. at 58-62; *Patel v. City of Los Angeles*, 738 F.3d 1058, 1065-67, 1070 (9th Cir. 2013)

(Tallman, J., dissenting); *see also Warshak v. United States*, 532 F.3d 521, 525-34 (6th Cir. 2008) (*en banc*). These concerns arise from a misunderstanding of what makes facial and as-applied challenges distinct. Facial challenges are not challenges without facts. They are challenges with a broader *remedy* than as-applied challenges.

A. The history and purpose of the Fourth Amendment support the ability to make facial challenges.

Under this Court's jurisprudence, any analysis of the Fourth Amendment must "begin with history." *Virginia v. Moore*, 553 U.S. 164, 168 (2008). And that history demonstrates that the Amendment was intended to prohibit the legislature from authorizing unreasonable searches and seizures, not just to prohibit the executive from performing them. Thus, facial challenges against offending legislation are a proper means to enforce the Fourth Amendment's purpose.

As is well recognized, one of the Amendment's primary goals was to prohibit general warrants similar to the hated writs of assistance "under which officers of the Crown . . . bedeviled the colonists." *Stanford v. Texas*, 379 U.S. 476, 481 (1965). "Opposition to such searches," in turn, was "one of the driving forces behind the Revolution itself." *Riley v. California*, 134 S. Ct. 2473, 2494 (2014).

But the writs of assistance did not spring from a vacuum. Rather, it was several Acts of Parliament[9] including "[t]he Townshend Act . . . [that] vested the power to issue writs of assistance in American judges." *State v. Ochoa*, 792 N.W.2d 260, 271 (Iowa 2010). Resistance to the writs of assistance thus naturally extended to resistance to their authorizing legislation. For example, during his famous 1761 speech in a Boston courtroom, James Otis criticized writs of assistance as "a power that place[d] the liberty of every man in the hands of every petty officer."[10] Otis then observed that "[n]o Acts of Parliament can establish such a writ. . . . 'An act against the constitution is void.'"[11] Otis finally emphasized that it was "the business of th[e] court to demolish this monster of oppression."[12]

The Fourth Amendment was targeted not so much at illegal searches but at legislation such as the Townshend Act that might authorize them. For example, James Madison urged adoption of the Bill of Rights in order to prohibit Congress from enacting

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[9] *See* 2 *Legal Papers of John Adams* 131-32 (L. Kinvin Wroth & Hiller B. Zobel, eds., Harvard Univ. Press 1965) (identifying the relevant Acts of Parliament).

[10] *See id.*, at 141-42.

[11] *Id.* at 144. By "constitution," Otis was referring to British common law tradition, such that "when an Act of Parliament is against Common Right and Reason . . . the Common Law shall control it, and adjudge it to be void." *Id.* at 128 n.21 (internal citations & annotations omitted); *see also id.* at 144 & n.46.

[12] *Id.*

similar legislation authorizing general warrants. Madison explained that "'[t]he General Government has a right to pass all laws which shall be necessary to collect its revenue'" and "'the means for enforcing the collection are within the direction of the Legislature'" – meaning that "'general warrants [could] be considered necessary for this purpose.'" *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 355 (1977) (quoting 1 Annals of Cong. 438 (1834 ed.)). This led Madison to argue that "'[i]f there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.'" *Id.* *See also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 657-60 (1999) (demonstrating that the Framers were not concerned that general warrants themselves might be upheld under prevailing common law, but that future legislation might make them legal, and therefore that they intended the Fourth Amendment to prevent legislation authorizing general warrants).

Madison and his fellow Framers would not have pushed for the Fourth Amendment's adoption so it would only apply to individual general warrants but have nothing to say about the underlying legislation authorizing them. As Madison's comments make clear, the Constitution needed to prohibit legislation authorizing general warrants just as it needed to prohibit general warrants themselves. Therefore, upon the Fourth Amendment's adoption, legislation could

violate the Constitution just as individual searches, seizures, and warrants could.

In turn, today we should understand facial challenges as a logical means of furthering the Amendment's purpose of invalidating legislation that authorizes unconstitutional searches, seizures, and warrants. Whether an individual statute or ordinance is facially unconstitutional, or whether it only could be found unconstitutional as applied to certain instances, will depend on individual cases. But in at least certain categories, including those involving warrantless, nonconsensual home inspections discussed above in Part I, facial challenges are completely consistent with the Fourth Amendment's origins.

B. This Court's precedents openly invite Fourth Amendment facial challenges, and make facial review particularly appropriate in several areas.

This Court has specifically authorized Fourth Amendment facial challenges in two different ways. First, it has explicitly stated that facial challenges are allowed because they are the primary deterrent against legislatures enacting laws that violate the Fourth Amendment. Second, it has repeatedly found individual laws to facially violate the Fourth Amendment, and in so doing has demonstrated facial adjudication to be particularly appropriate in three different areas involving warrantless searches.

1. In *Illinois v. Krull* this Court explicitly approved Fourth Amendment facial challenges to the exclusion of other remedies.

Facial challenges under the Fourth Amendment are not only proper, but this Court has embraced them to the exclusion of other remedies. In *Illinois v. Krull*, this Court reviewed a motion to suppress in a state prosecution of the operators of an automobile wrecking yard. 480 U.S. 340, 344-45 (1987). The evidence at issue had been obtained in a warrantless search of the wrecking yard pursuant to a state statute. *Id.* at 343. However, literally the day following the search, in a completely separate action involving other operators, a federal court found the statute unconstitutional on its face. *Id.* at 344 (citing *Bionic Auto Parts & Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981), *aff'd in part, vacated in part, and remanded in part*, 721 F.2d 1072 (7th Cir. 1983)).[13] The question before the Court was whether the evidence was admissible because the officer had relied upon the statute's constitutionality in good faith. *Id.* at 346.

[13] The statute's constitutionality was not before the Court in *Krull*. The federal district court's ruling was appealed, but while the appeal was pending the Illinois legislature amended portions of the statute. In its appeal decision the Seventh Circuit stated that the amendments had cured some of the statute's constitutional defects, including the one at issue in *Krull*. *Bionic Auto Parts & Sales*, 721 F.2d at 1075.

This Court concluded the evidence was admissible because the purpose of the exclusionary rule – deterrence – was not present. It reasoned that an officer cannot be expected to be deterred to follow a statute if the statute is ruled unconstitutional *after* the search in question. *Id.* at 349-50. This would be "'[p]enalizing the officer for the [legislature's] error, rather than his own.'" *Id.* at 350 (quoting *United States v. Leon*, 468 U.S. 897, 921 (1984)) (second bracket in original). And, the Court also concluded that legislatures themselves would not be deterred from enacting laws violating the Fourth Amendment through the exclusionary rule because of the various, and general, incentives legislatures have. *Id.* at 352.

Instead, the Court declared that what would deter legislators from enacting laws that violate the Fourth Amendment was allowing facial challenges:

> Thus, it is logical to assume that the greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes. Invalidating a statute informs the legislature of its constitutional error, affects the admissibility of all evidence obtained subsequent to the constitutional ruling, and often results in the legislature's enacting a modified and constitutional version of the statute, as happened in this very case.

Id. at 352. This Court then plainly stated that "a person subject to a statute authorizing searches without a warrant or probable cause may bring an action

seeking a declaration that the statute is unconstitutional and an injunction barring its implementation." *Id.* at 354.

This is *exactly* what Respondents are doing in this case. If this Court concludes Respondents cannot bring a facial claim under the Fourth Amendment it will be overturning this crucial reasoning from *Krull*.

2. Fourth Amendment facial challenges are particularly appropriate in a few areas where purely legal questions predominate.

Given that this Court has explicitly sanctioned facial enforcement of the Fourth Amendment, it is unsurprising that this Court and many lower courts have repeatedly decided, on the merits, Fourth Amendment facial claims or class actions tantamount to facial claims. *See, e.g.*, *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989) (deciding, on Fourth Amendment grounds, a facial challenge to blood/urine tests of railway employees); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (declaring federal statute providing for warrantless, nonconsensual searches of businesses violated the Fourth Amendment on its face); *Camara*, 387 U.S. at 534; *Berger v. New York*, 388 U.S. 41, 54-56 (1967) (deciding whether state wiretap statute on its face violated the Fourth Amendment for lack of constitutionally-required safeguards); *see also, e.g.*, *Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349 (8th Cir. 2004) (deciding

class action that challenged established school search policy under the Fourth Amendment); *Pentco, Inc. v. Moody*, 474 F. Supp. 1001, 1009 (S.D. Ohio. 1978) (holding ordinance authorizing warrantless inspection of massage parlors unconstitutional and enjoining its enforcement); *Haw. Psychiatric Soc. v. Ariyoshi*, 481 F. Supp. 1028, 1052 (D. Haw. 1979) (declaring medical records inspection law facially unconstitutional and enjoining its enforcement); *Sokolov v. Freeport*, 420 N.E.2d 55, 57 (N.Y. 1981) (declaring rental housing inspection ordinance facially unconstitutional).

Based on this precedent, laws authorizing warrantless searches are particularly open to facial review under the Fourth Amendment on at least one of three grounds. All of these call for legal analysis not beholden to a particular factual scenario, and all serve the interests of both individuals and the justice system through obtaining a definitive answer that legislators, individuals, and government actors can then rely upon. These interests are served both when a law is declared unconstitutional and constitutional. In either case the public is given a definitive answer.

First, laws may be facially challenged where they fail to evince a bare compliance with this Court's precedents regarding warrantless searches. For example, this past term in *Riley v. California*, this Court held that: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is . . . simple – get a warrant." 134 S. Ct. at 2495. Now if the California legislature were to enact

a law tomorrow authorizing the warrantless search of any cell phone incident to arrest, such a law would be open to facial attack on the grounds that it abridged this Court's controlling interpretation of the Fourth Amendment in *Riley*. *See Marshall*, 436 U.S. at 313 (declaring warrantless search statute facially unconstitutional as it did not comply with holdings in *Camara* and *See v. City of Seattle* and finding no additional exception to warrant requirement); *see also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Likewise, a law authorizing warrantless searches is open to facial challenge where it is not based on an exception to the warrant requirement recognized by the Court. *See Patel v. City of Los Angeles*, 686 F.3d 1085, 1091 (9th Cir. 2012) (Pregerson, J., dissenting) (finding that Los Angeles's guest-registry-search law was not supported by any established exception to the warrant rule).

Second, laws authorizing warrantless searches are open to facial review to the extent they rest on a recognized exception to the warrant requirement whose elements are capable of adjudication before any search has taken place. An example is the question of whether a business is subject to the "closely regulated business" exception to the warrant requirement. Even Petitioner concedes this point, observing that "courts are capable of making some Fourth Amendment determinations without any case-specific facts" and then citing the test established by this Court in *New*

York v. Burger, 482 U.S. 691 (1987) for warrantless administrative inspections of closely regulated businesses. Pet'r's Br. 28 ("These determinations are made solely by looking to the language and legislative history of the statute and the history of the regulation of the industry, *not by considering the facts of any particular search*." (emphasis added)). This point is also reflected by a case like *Chandler v. Miller*, 520 U.S. 305, 323 (1997) where this Court made clear that laws authorizing warrantless searches under the "special needs" exception to the warrant requirement must rest on a "substantial and real" risk to public safety. The Court accordingly invalidated a Georgia statute that required all candidates for state office to take a drug test where it was clear that "the statute was not enacted . . . in response to any fear or suspicion of drug use by state officials" – a fact that long preexisted any actual enforcement of the law. *Id.* at 319.

Third, laws authorizing warrantless searches are open to facial review to the extent they delegate too much discretion to law enforcement, thus placing "the liberty of every man in the hands of every petty officer." *Payton v. New York*, 445 U.S. 573, 584 n.21 (1980) (facially invalidating a New York statute allowing for felony arrests in a home without a warrant). For example, this Court has refused to adopt a judicial rule that would allow the search of a vehicle whenever a person commits a traffic offense. *Arizona v. Gant*, 556 U.S. 332 (2009). This is because it allows the inspecting officer unbridled discretion to rummage through property having nothing to do with the

offense. *Id.* And where the same problem is raised by a warrantless-search-authorizing law, the law "is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case." *City of Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring) (emphasis in original).

C. Fourth Amendment facial challenges can be decided without the risk of an advisory opinion or an unripe case.

In adjudicating facial challenges, courts decide whether a statute or ordinance should be enforced beyond just the individuals or businesses before them, thus "tak[ing] into account possible applications of the statute in other factual contexts besides that at bar." *NAACP v. Button*, 371 U.S. 415, 432 (1963). Again, it is entirely proper for courts to do this, just as when litigants invoke other provisions of the Bill of Rights. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 482 (2010) (statute facially violated the First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (ordinance facially violated the Second Amendment); *Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1964) (statute facially violated the Fifth Amendment); *United States v. Booker*, 543 U.S. 220, 248 (2005) (statute facially violated the Sixth Amendment).

Nevertheless, in *Sibron v. New York*, this Court refused to engage in the purportedly "abstract and

unproductive exercise" of "pronounc[ing] on the facial constitutionality" of a state stop-and-frisk statute. 392 U.S. 40, 59, 61 (1968). The Court observed that "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." *Id.* And based on this concern, the Sixth Circuit and a member of the Ninth Circuit in dissent have expressed concerns about the justiciability of Fourth Amendment facial challenges in general.

In *Warshak v. United States*, the Sixth Circuit held that the ripeness doctrine prevented it from deciding a facial Fourth Amendment challenge to a law that allowed the government to obtain *ex parte* orders forcing internet service providers to produce their subscribers' e-mails. 532 F.3d 521, 523 (6th Cir. 2008). The Sixth Circuit found that this challenge was not ripe for review – even though the plaintiff had already been searched two previous times under the law – because the court needed a more developed record to address the "complex factual issues" raised by plaintiff's claim. *Id.* at 527-28 (noting the court needed more facts about, for example, "the variety of internet-service agreements and the differing expectations of privacy that come with them").

In addition to the Sixth Circuit's concern about the ripeness of Fourth Amendment facial challenges, Judge Tallman of the Ninth Circuit has concluded that such challenges call for advisory opinions. Dissenting from the en banc decision in this case, Judge

Tallman stated that the Fourth Amendment facial challenge could not be decided because it forced the court to engage "in the gymnastics of the hypothetical" and render a decision "rife with assumptions about the police conduct that must occur for the ordinance to be applied." *Patel*, 738 F.3d 1058, 1066 (9th Cir. 2013) (Tallman, J., dissenting). This was because, explained Judge Tallman, the record was devoid of facts demonstrating how the ordinance was applied. *See id.* at 1068.

The Court should not find the Sixth Circuit's concerns in *Warshak* nor Judge Tallman's concerns in *Patel* persuasive. Fourth Amendment facial claims are wholly justiciable: they do not require the kind of hypothetical gymnastics described by Judge Tallman in *Patel*, nor do they require courts to settle for a barebones factual record on issues the court deems vital to adjudication of the broader claim.

Both the Sixth Circuit and Judge Tallman – and perhaps this Court in *Sibron* – appear to have overlooked the actual legal distinction between facial and as-applied challenges. The difference between facial and as-applied challenges is "the breadth of the remedy employed by the Court." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). The difference is *not* that facial challenges ignore facts while as-applied challenges develop them. And the difference is *not* that facial challenges can only be made in a pre-enforcement context – where standing and ripeness may be more tenuous – while as-applied claims arise in the *post hoc* context of prosecutions or actions for

damages following an actual search. *See Warshak*, 532 F.3d at 528 (observing that Fourth Amendment claims usually arise via a suppression motion in a criminal case or a suit for damages).

To the contrary, facial challenges can involve a weighty record containing numerous facts. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93 (2003) (reviewing challenge to Bipartisan Campaign Reform Act that involved a voluminous record).[14] Facial challenges can also be made in a post-enforcement context where standing and ripeness are unassailable. *See, e.g.*, *Camara v. Municipal Court*, 387 U.S. 523 (1967) (declaring ordinance facially unconstitutional in response to criminal defendant's writ of prohibition). And Plaintiffs can raise as-applied pre-enforcement challenges. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007) (rejecting facial challenge to abortion statute, but allowing pre-enforcement as-applied challenges). For example, Respondents originally brought a pre-enforcement, as-applied challenge in this case. *Patel*, 738 F.3d at 1066 (Tallman, J., dissenting).

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[14] Petitioner and its *amici* make much out of Respondents having proffered no evidence at the trial in this case. *See, e.g.*, Pet'r's Br. 51; Brief of *Amicus Curiae* United States 17-18. However, that decision was only made because Petitioner agreed with Respondents to "put the as-applied damages claims on hold by dismissing them without prejudice and tolling the statute of limitations" for reasons of judicial economy. Resp't's Br. 5. Petitioner's attempt to now use this mutual decision against Respondents should not color whether this Court disallows anyone from ever making a Fourth Amendment facial challenge again.

Had they pursued it at trial, that claim would have concerned whether the challenged ordinance was unconstitutional *as applied to Respondents*, and whether the Court should issue an injunction forbidding Petitioner from enforcing the ordinance *against Respondents*. The facial claim before this Court involves the same analysis, but instead asks whether the ordinance is unconstitutional *in general* and whether the Petitioner should thus be enjoined from enforcing the ordinance against *anyone*.

It is for this reason that "[w]hen asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). Facial challenges are thus a vital tool in our constitutional order because if courts could only provide as-applied relief, then courts would be generally unable to prevent the enforcement of unconstitutional laws. If a law authorizes otherwise unconstitutional searches and a court finds that the law as applied to a given citizen violates the Fourth Amendment, there is nothing to prevent the city from enforcing the law against the next person, and the next. Only if the case makes its way to an appellate court could the matter have a direct effect beyond that citizen, and even there it entirely depends on the scope of the appellate court's language.

There is nothing special about the Fourth Amendment that lessens these concerns in the search and seizure context. For example, if an ordinance allows

for warrantless, nonconsensual searches of home, and this Court has categorically held that such an ordinance is unconstitutional, it makes no sense to forbid lower courts from declaring similar ordinances unconstitutional on their face and forbidding their enforcement against people other than the individuals before the Court. Such an unconstitutional law demands such a remedy. As the Ninth Circuit found, the same is true in the context of warrantless inspections of hotel records.

CONCLUSION

No law-abiding citizen should be forced to wait until the police or a government inspector comes knocking at their door demanding to search without a warrant before challenging their authority. And no court should be prevented from generally invalidating a law, and preventing its future enforcement, which unquestionably violates the Constitution. This Court should therefore make clear that facial challenges are available under the Fourth Amendment.

Respectfully submitted,

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Dated: January 30, 2015