1   IN THE SUPREME COURT OF THE UNITED STATES

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3 CITY OF LOS ANGELES   :

4 CALIFORNIA,   :

5   Petitioner   : No. 13-1175

6   v.   :

7 NARANJIBHAI PATEL, ET AL.   :

8 - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Tuesday, March 3, 2015

11

12   The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:07 a.m.

15 APPEARANCES:

16 E. JOSHUA ROSENKRANZ, ESQ., New York, N.Y.; on behalf of

17   Petitioner.

18 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

19   Department of Justice, Washington, D.C.; for United

20   States, as amicus curiae, supporting Petitioner.

21 THOMAS C. GOLDSTEIN, ESQ., Bethesda, Md.; on

22   behalf of Respondents.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:07 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first this morning in Case 13-1175, the City of Los

5   Angeles v. Patel.

6   Mr. Rosenkranz.

7   ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

8   ON BEHALF OF PETITIONER

9   MR. ROSENKRANZ: Thank you, Mr. Chief

10   Justice, and may it please the Court:

11   This case is about whether to deprive scores

12   of cities of one of the most effective tools that they

13   have developed to deter human trafficking, prostitution,

14   and drug crimes that have seized the -- the ground in

15   America's hotels and motels.

16   The ordinance in question is the least

17   intrusive of -- inspection scheme that this Court has

18   ever encountered. It is limited to showing the police a

19   single book containing only information that the hotels

20   transcribe specifically for the city and that they've

21   been turning over to the police by operation of law for

22   150 years.

23   JUSTICE SOTOMAYOR: Could you -- first, two

24   questions: Is the information that they've been keeping

25   for 150 years the same? Because looking at the

1   requirements, the early information was basically

2   somebody's name and -- I'm not even sure -- their

3   address. But today's information has -- or today's

4   registry and requirements have information that Federal

5   law doesn't permit to be disclosed, like driver's

6   license, credit card information. I mean, Federal law

7   says you can't disclose that information.

8   So isn't there a difference?   It's not the

9   same tradition over 150 years.

10   MR. ROSENKRANZ: You are right, Your Honor,

11   that the amount of information has increased. The

12   privacy interests, however, have been pretty much the

13   same. It was name and address and the rate that they

14   were charged and so forth, and that is the -- the -- the

15   information that the -- that the hotels have argued is

16   the most private.

17   JUSTICE SOTOMAYOR: Right. All of the

18   things that you say, the most effective tool for

19   trafficking, prostitution, child molestation, none of

20   that sounds like it's -- the purpose of the search is

21   administrative.

22   MR. ROSENKRANZ: Well, it is administrative,

23   Your Honor, and to understand why it's administrative,

24   you have to focus first on the target. The target here

25   is not people who are accused of crimes. The target is

1   the motels and the hotels who are required to keep

2   records, to record information. And why are they

3   required to record the information? For the deterrent

4   purpose, and the deterrent purpose more specifically is

5   that criminals do not like to register. They do not

6   like to record their information.

7   JUSTICE GINSBURG: Mr. Rosenkranz, are you

8   saying then that the police can do this -- can request

9   these records on demand, and they don't have to have any

10   reason at all -- no reasonable suspicion, no probable

11   cause, nothing -- because the purpose is to deter people

12   from staying in hotels who might do bad things. So

13   no -- nothing like a reasonable suspicion requirement.

14   MR. ROSENKRANZ: That's correct, Your Honor.

15   It's the same rationale that this Court adopted in

16   Burger, that frequent, unannounced spot inspections are

17   necessary in order to achieve that deterrent purpose;

18   that if the hotels do not record all the names, and more

19   specifically, they record most names but not the names

20   of the -- of the guests that they know are criminals,

21   there's no way to know, unless you have this frequent,

22   unannounced inspection, that someone is missing. So

23   there's a real necessity here as there was in Burger and

24   in Biswell.

25   JUSTICE SOTOMAYOR: Can you tell me how many

1   prosecutions there have been -- and I use the word both

2   criminally or civil -- for the failure to register

3   people?

4   MR. ROSENKRANZ: Well, there have been

5   numerous prosecutions. I can't tell you how many. The

6   complaints in this case, which are in the beginning of

7   the joint appendix, refer to the plaintiffs having been

8   prosecuted multiple times, or fined, for failure -- for

9   failing to keep the records.

10   And I guess I do want to underscore this

11   point about necessity. The problem is not that the

12   registers are empty. The problem is that the hotels

13   decline to record the names of those who they know are

14   criminals, or the motels do --

15   JUSTICE SOTOMAYOR: But that has nothing to

16   do with the free right to search. Those people who are

17   refusing to do it are going to refuse to do it. A

18   recordkeeping requirement has no -- has no

19   constitutional challenge. What does is the unfettered

20   access to that record.

21   MR. ROSENKRANZ: Agreed, Your Honor, and so

22   let me just break it down.

23   JUSTICE SOTOMAYOR: Those people who don't

24   want to do it are not going to do it anyway.

25   MR. ROSENKRANZ: Exactly. Those people who

1   don't want to do it go somewhere else or don't commit

2   their crimes, but if they -- if they are forced to do

3   it, which is to say the motel won't let them stay there

4   unless they register, then they will not commit those

5   crimes in the motels. And the only way to make sure

6   that the motels are enforcing that obligation is to

7   descend on them without notice as -- as Justice Ginsburg

8   was saying, and frequently, so that they never know when

9   the police are going to come. Why? To make sure that

10   they are indeed recording the information.

11   And why is the real time observation key?

12   It's because they've been busy, the police show up and

13   they have a register, and they notice that room

14   number -- room No. 2 is unoccupied according to the

15   register, but they see someone in room No. 2. They know

16   only from real time observation that there is a violation

17   here. If they get the register a month later, they have

18   nothing to compare it to.

19   JUSTICE KENNEDY: You -- you mean they can

20   walk up and down the halls and see that nobody's in the

21   certain room? I don't know quite how you do that.

22   MR. ROSENKRANZ: Well, Your Honor, the way

23   it works in particular --

24   JUSTICE KENNEDY: You have room No. 2 as if

25   it's right there, but room No. 1204 --

1   MR. ROSENKRANZ: So motels, for example, are

2   out in the open. You can sit there and see --

3   JUSTICE KENNEDY: What about my question

4   about room 1204? You seem to say the police can wander

5   all over the hotel.

6   MR. ROSENKRANZ: Well, if -- the police may

7   be allowed to wander around the hotel. They probably

8   will not see much if what they're doing is wandering

9   back and forth looking at particular rooms.

10   JUSTICE SCALIA: I suppose in motels they

11 can see what rooms have cars in front of them. And I

12 suppose as to room 1204 they can see, usually behind the

13 desk what -- what keys are missing, what -- what rooms

14 appear not to be occupied.

15   MR. ROSENKRANZ: That's correct, Your Honor,

16 and that's why the real time observation is so key,

17 because you can't do that a month later. And that's why

18 we have the same necessity --

19   JUSTICE SOTOMAYOR: Sure. Why? I mean,

20 what you're saying is it's easier to prosecute, but it

21 doesn't mean that you can't devote some resources and

22 find this out. You do a surveillance which is what

23 police do for a lot of crimes. And you watch people

24 going in for two hours and leaving, and you keep a

25 record of it. You can even stop those people who are

 1 leaving to ask them.

 2   So there's a whole lot of law enforcement

 3 techniques that could be used to combat the situations

 4 you're talking about.

 5   MR. ROSENKRANZ: But not nearly as

 6 effectively, Your Honor, because --

 7   JUSTICE SOTOMAYOR: Well, since when has the

 8 Fourth Amendment completely been abandoned to how

 9 effective the proof that the police can get at a moment

10 should be?

11   MR. ROSENKRANZ: Well, Your Honor, that's

12 not the test. But Dewey refers to the fact that it's

13 not as effective, and it simply doesn't work, Your

14 Honor. Let me give you an example.

15   If all the police are doing is looking for

16 who's in what room and what keys are missing, they don't

17 actually know what to look for until long after the

18 fact. They may be looking for the wrong thing. And

19 there are many motels where they can't -- where they

20 can't do it, for example, look at the keys because

21 they're not available and easy to see. And so it's

22 having the information right in front of them, and then

23 comparing it to things that they might be able to

24 observe.

25   JUSTICE KAGAN: But, Mr. Rosenkranz, why

1 isn't this just like Barlow's really? That it's not

2 necessary on the following rationale: Number one, most

3 people will consent so that you go -- the police go into

4 a hotel and say we'd like to see your registry, most

5 people are going to consent. If somebody says no, and

6 there's a real basis for believing that the evidence is

7 going to be altered or destroyed, you can seize it

8 pending judicial review, or you can get an

9 administrative warrant ex parte and conduct a surprise

10 examination if you want to.

11   So we talked about all of those things in

12 Barlow's, about how -- why that suggested that these

13 warrantless searches were not necessary. What makes

14 this different?

15   MR. ROSENKRANZ: Your Honor, what makes this

16 different is the distinction between Barlow's on the one

17 hand and Burger, Dewey, Biswell, Colonnade, on the other

18 hand, and that is the movability of information. That

19 is the transience and -- of the information that you use

20 to verify.

21   In Barlow's, if there is an unsafe

22 condition, there is an unsafe condition, and it's hard

23 to see. The -- this Court said it also in See and

24 distinguished -- and Biswell distinguished See on that

25 ground. If you -- if you -- if it's the sort of

1   condition that doesn't change over time, you can get a

2   warrant, and it doesn't affect your --

3   JUSTICE KAGAN: What's --

4   JUSTICE ALITO: Go ahead.

5   JUSTICE KAGAN: What's going to -- what's

6   going to change here? The registry is the registry, and

7   as I said, if in an unusual case you have the feeling

8   that the hotel is complicit, you can make sure to freeze

9   the registry. But that's going to be an unusual case,

10   and mostly, the registry is going to be there.

11   And, you know, as I said mostly people are

12   going to consent. To the extent not you can go get a

13   warrant.

14   MR. ROSENKRANZ: Well, Your Honor, what

15   will -- what would change is, is the information on the

16   basis of which you draw that comparison. If you only

17   compare the register -- if you get the register a month

18   later, you can't compare it to facts on the ground to --

19   to the cause --

20   JUSTICE KAGAN: A month later doesn't -- you

21   know, it -- it's an hour later.

22   MR. ROSENKRANZ: Well, you mean get a

23   warrant within hour? Warrants within an hour are -- are

24   not that easy to get, particularly --

25   JUSTICE SCALIA: What's the probable cause

1 for the warrant?

2   MR. ROSENKRANZ: Well, there is -- that's --

3   JUSTICE SCALIA: If you haven't seen the

4 register, what's the probable cause?

5   MR. ROSENKRANZ: Right, there is no probable

6 cause.

7   JUSTICE SCALIA: What, do you have to have a

8 policeman sit outside the hotel for -- for days to -- I

9 mean, you don't have probable cause unless you know that

10 there -- there are people who are, you know, in -- in

11 the room for a short time who haven't registered.

12   MR. ROSENKRANZ: Right. That -- that's

13 exactly right. But -- and warrants are for probable

14 cause. That's why Burger and Biswell said no, you don't

15 need to get a warrant when you're doing an

16 administrative inspection.

17   JUSTICE KENNEDY: If you prevail in this

18 case and a member of the Court sits down to write the

19 opinion, does he or she have to use the phrase

20 "reasonable expectation of privacy" and say there is no

21 reasonable expectation of privacy in our society, in our

22 culture, in our day, or do we just forget that phrase?

23 In -- in a way, as we all know it's circular, that if we

24 say there is a reasonable expectation, then there is.

25   MR. ROSENKRANZ: Well, Your Honor, the

1 answer depends upon which Fourth Amendment rubric one

2 uses. Under the Burger line of cases, the Court looks

3 at the statute, asks is this a closely regulated

4 business? Was it necessary? Is it a legitimate non-law

5 enforcement purpose, and so forth.

6   JUSTICE KENNEDY: Is closely regulated

7 another way to talk about reasonable expectation of

8 privacy?

9   MR. ROSENKRANZ: Yes, indeed it is.

10   JUSTICE KENNEDY: We talk about that in the

11 Katz case, the telephone booth case --

12   JUSTICE SOTOMAYOR: I don't know that --

13   JUSTICE KENNEDY: But I'm not sure that --

14 is that still a phrase that's -- that's necessary and

15 required for us to address in an opinion like this?

16   MR. ROSENKRANZ: If the Court adopts the

17 Burger rubric, what the Court was doing in Burger was

18 saying because this is so heavily regulated in the

19 context of this case, because everyone knows that these

20 registers have been reviewed by the police for 15 years,

21 no one goes into the hole -- into the hotel business

22 unaware that their registers will be inspected.

23   JUSTICE SCALIA: Whose expectation of

24 privacy are we talking about?

25   MR. ROSENKRANZ: We are talking only about

1 the hotel.

2   JUSTICE SCALIA: Not the hotel guests;

3 right?

4   MR. ROSENKRANZ: No, Your Honor. The motel

5 -- the plaintiffs have taken the position that this is

6 not about the expectation of privacy of the guests.

7   JUSTICE SCALIA: Yes. That's what I

8 thought. It's --

9   MR. ROSENKRANZ: But only --

10   JUSTICE SCALIA: -- of the hotel.

11   MR. ROSENKRANZ: Yes.

12   JUSTICE SCALIA: You can't see my register.

13 It's -- it's dear to me.

14   MR. ROSENKRANZ: Even though I have entered

15 a business that for 115 years has revealed these

16 registers and for 100 of those years, actually revealed

17 the registers to the guests.

18   JUSTICE KAGAN: But --

19   JUSTICE SOTOMAYOR: Who --

20   JUSTICE KAGAN: Suppose that there's a --

21 Mr. Rosenkranz, suppose that there's a statute that says

22 that the taxing authority, the IRS or the equivalent on

23 the State level, that the taxing authority can go into

24 businesses at any time and check payroll records; and

25 the reason is that they need to conduct these surprise,

1 warrantless searches because there's a serious problem

2 with businesses ginning up false payroll records. Is

3 that constitutional?

4   MR. ROSENKRANZ: I would think not, Your

5 Honor, at least not without more information. And the

6 difference is, there -- there isn't this long history of

7 the government reviewing payroll records. And

8 secondly -- or at least it's a closer question. And

9 secondly, payroll records are not the sorts of things

10 for which you need spot inspections. If someone --

11   JUSTICE SOTOMAYOR: How about the hiring --

12   JUSTICE KAGAN: No. If the government says

13 that they do -- the government says that if you wait

14 till they submit everything at the end of the year,

15 they'll falsify a lot of records, and we really need to

16 see what's happening right now on the ground in

17 real time.

18   MR. ROSENKRANZ: Well, Your Honor, either a

19 payroll record is false or it's not. You don't need

20 real time verification to figure out if it's false or

21 not.

22   JUSTICE KAGAN: No, you do, because you

23 don't want to give them the time to falsify things till

24 the end of the year. I mean, we -- we could have a

25 thousand examples like this.

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 1        MR. ROSENKRANZ:        And -- and my answer is

 2   still the same.  It doesn't have the same real time need

 3   to verify against facts that are --

 4        JUSTICE SOTOMAYOR:        I don't know why not.

 5   Checking to see if people are actually registered, you

 6   don't know that until you see a person working.  So

 7   you've got a construction site.  You count the number of

 8   people; and you say, let me see your recordkeeping for

 9   your employees today.

10        MR. ROSENKRANZ:        Well, Your Honor, that

11   was --

12        JUSTICE SOTOMAYOR:        That's a real time need.

13        MR. ROSENKRANZ:        It's a -- it's -- but

14   either the record -- either the ultimate record that is

15   submitted is false or it's not.  You -- you don't have

16   the real time ability to verify whether those records

17   are --

18        JUSTICE SOTOMAYOR:        You just --

19        MR.        ROSENKRANZ:  -- correct.

20        JUSTICE SOTOMAYOR:        You just keep a

21   register -- you falsify the register the way that you're

22   saying these people would.

23        I -- my problem with the closely held --

24   closely regulated is I don't see one regulation that's

25   not applicable to virtually every public accommodation
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1   entity, whether it's a telephone company or a day school

2   or a hospital.

3   I mean, virtually all of these requirements

4   that you list are part of the normal State regulation of

5   entities that serve people.

6   Is it your position now that once we say

7   this is closely regulated, that everything is --

8   MR. ROSENKRANZ: No, your Honor.

9   JUSTICE SOTOMAYOR: -- that serves the

10   public in some way?

11   MR. ROSENKRANZ: No. And I see I'm eating

12   into my rebuttal time, so if I may answer quickly.

13   No.   There -- first of all, the closely

14   regulated exception is not -- is -- is way more than

15   just closely regulated. There are three other elements

16   to it, and you need to demonstrate the necessity, you

17   need to demonstrate that it's not a criminal justice

18   purpose, and you need to demonstrate that there's an

19   adequate substitute for a warrant.

20   So if there are no further questions, I'd

21   like to reserve the remainder of my time for rebuttal.

22   CHIEF JUSTICE ROBERTS: Thank you, counsel.

23   Mr. Dreeben.

24   ORAL ARGUMENT OF MICHAEL R. DREEBEN

25   FOR UNITED STATES, AS AMICUS CURIAE

1   SUPPORTING PETITIONER

2   MR. DREEBEN: Thank you, Mr. Chief Justice,

3   and may it please the Court:

4   This Court can resolve this case on a much

5   narrower basis than it has used in looking at other

6   administrative inspection schemes, such as the one in

7   Barlow's.

8   The Ninth Circuit itself recognized that

9   this case did not involve an entry into the nonpublic

10   working places of a business. It did not involve an

11   entry into a residential property. It involved an entry

12   only into the public lobby area of a motel and a brief

13   inspection of the registry of the motel.

14   CHIEF JUSTICE ROBERTS: Well, that doesn't

15   seem very significant. I mean, it -- it could well

16   involve entry into a drawer. We wouldn't normally say,

17   well, because you can -- our rule is not simply because

18   you can get into a house, for example, that you're free

19   to rummage through desks.

20   MR. DREEBEN: That's certainly right, but

21   what the -- this statute requires is that the registry

22   be produced for inspection. And the way in which the

23   officer gets to the registry is to walk into the lobby.

24   And so the Ninth Circuit --

25   JUSTICE SOTOMAYOR: I'm sorry. You're

1   saying that if a police officer stands outside a house

2   and says, bring me whatever it is I want from inside,

3   and he brings it out, that's not a violation of the

4   Fourth Amendment because he, under compulsion, tells the

5   person you have to bring me what's inside, because I

6   can't enter under the Fourth Amendment.

7   MR. DREEBEN: Well, Justice Sotomayor, it

8   would be a search. The reasonableness of it would

9   depend on the facts, but what -- what my --

10   JUSTICE SOTOMAYOR: So that's the point.

11   MR. DREEBEN: -- my point here is that this

12   is -- we're dealing here with businesses which have

13   reduced expectations of privacy, and we are not dealing

14   with entry into the nonpublic areas of the businesses,

15   which is what Marshall's was concerned with, Colonnade,

16   Biswell, Burger, all of those cases.

17   So the Ninth Circuit itself did not apply

18   the rules that govern those kinds of situations where

19   the Court has sometimes said an administrative warrant

20   is required and other times said it is not.

21   JUSTICE ALITO: This is a facial challenge.

22   Now, are there any or a substantial number of instances

23   in which the application of this statute would be

24   constitutional?

25   MR. DREEBEN: Well, I -- I think there

1   would, Justice Alito, in -- if there were exigent

2   circumstances that justified the access to the registry.

3   And most importantly --

4   JUSTICE KENNEDY: But -- but then you don't

5   need the statute.

6   MR. DREEBEN: Well, the statute helps

7   because it informs the --

8   JUSTICE KENNEDY: No.

9   MR. DREEBEN: -- hotels.

10   JUSTICE KENNEDY: There are exigent

11   circumstances. You can get -- get a warrant.

12   MR. DREEBEN: Yeah. Well, you don't have to

13   get a warrant.

14   JUSTICE KENNEDY: So that doesn't work.

15   MR. DREEBEN: No, I think it works, Justice

16   Kennedy, in the sense that the -- the statute provides

17   encouragement for a potentially recalcitrant hotel owner

18   to produce it, because it's an offense for him not to.

19   But more importantly, I think for the

20   Court's evaluation of the facial challenge issue is that

21   there's no record in this case about what kind of

22   privacy expectations actually exist with respect to

23   hotel registries. It's largely a matter of conjecture,

24   speculation, and everybody's intuition of --

25   JUSTICE SOTOMAYOR: I don't think -- I don't

1   see why we've ever required more. All we've required is

2   a person to say, this is my business record.

3   And why do they have to prove more?

4   MR. DREEBEN: Because --

5   JUSTICE SOTOMAYOR: What -- what are they

6   suppose to prove, that they don't use -- that they don't

7   show it to anyone else? We've never required that.

8   MR. DREEBEN: Well, I think that they should

9   show that there's a certain degree of confidentiality

10   associated with it that they in fact --

11   JUSTICE SOTOMAYOR: Well, there is today

12   when the Federal law requires that you not disclose

13   credit card information and driver's license information

14   and these registries contain that information. So you

15   can't have it both ways.

16   MR. DREEBEN: Well --

17   JUSTICE SOTOMAYOR: The registries --

18   MR. DREEBEN: -- some --

19   JUSTICE SOTOMAYOR: -- by law are required

20   to have the driver's license information taken for

21   people who are paying cash --

22   MR. DREEBEN: That's right.

23   JUSTICE SOTOMAYOR: -- and requires the

24   credit card information of people who are otherwise

25   registering.

1   MR. DREEBEN: Well, the registry doesn't

2   have to have the credit card information unless they

3   check in at a kiosk. And this, I think, brings up a

4   very important point. What the Ninth Circuit did was

5   facially invalidate the statute that said that

6   regardless of any facts, it can't be enforced against

7   anyone.

8   JUSTICE SCALIA: Yeah. I -- I assume that,

9   you know, if the problem is license plates and credit

10   card information and all of that, it's not up to the

11   hotel to complain about that invasion of privacy. It's

12   up to the guests, right?

13   MR. DREEBEN: I would agree with that,

14   Justice Scalia.

15   JUSTICE SCALIA: And this case does not

16   involve the guests. It's just the hotel who's

17   objecting.

18   MR. DREEBEN: It's just the hotel, and there

19   is a range of situations in which different information

20   is maintained in different ways.

21   So I think that treating it as a facial

22   challenge is problematic; but if you reach the merits,

23   what the Ninth Circuit itself did is conclude that this

24   case doesn't trigger the very strong safeguards that are

25   triggered when there is an invasion of a nonpublic space

1   of a business. They treat it as if it's an

2   administrative subpoena case, which does have Fourth

3   Amendment requirements associated with it; but those

4   requirements are that the subpoena be relevant, that it

5   be reasonable in scope, and that it be specific.

6   And the Ninth Circuit conceded that all

7   three of those requirements are satisfied, Section

8   41.49, by itself establishes the relevance of the

9   information for the administrative purpose that the

10 statute serves. It is specific and it is narrow in

11 scope. And anybody who goes into the hotel industry

12 knows that that is a -- an inspection that they are

13 subjected to.

14   The Ninth Circuit --

15   JUSTICE KENNEDY: How -- how do you

16 distinguish -- is it Marshall and Barlow?

17   Do I -- do I have the right name?

18   MR. DREEBEN: You do, Justice Kennedy.

19   And the distinction which the Ninth Circuit,

20 itself drew is that involved entry into the nonpublic

21 areas of a business which exposes a much wider range of

22 information to the inspection of the authorities.

23   Marshall covered every industry in

24 interstate commerce, and it allowed OSHA inspections

25 without any limitation. And in that circumstance --

1   JUSTICE KAGAN: I guess I don't understand

2 that, Mr. Dreeben. You're saying that it makes a

3 difference constitutionally whether you keep the

4 registry at the front desk or in the back office?

5   MR. DREEBEN: What I'm saying, Justice

6 Kagan, is that the Ninth Circuit analyzed it precisely

7 that way, that you can walk into the lobby of a hotel.

8 This Court so said in the Lone Steer case, you're not

9 invading any expectation of privacy. All you do is you

10 ask the hotel keeper, the front desk clerk, to show you

11 the register, which can be done as -- simply by just

12 moving the computer screen so that the officer can see

13 it. And that is the most minimal intrusion on privacy

14 interests, if they exist.

15   JUSTICE KENNEDY: Well, if I were running a

16 hotel, I think I might have -- prefer to have two

17 uniformed detectives in the backroom so the guests don't

18 see it. I think it's quite intrusive.

19   MR. DREEBEN: The Ninth Circuit treated it

20 as a lesser degree of intrusion than an inspection of

21 all of the private areas of the business; and that's why

22 it applied the subpoena line of cases. But once you

23 apply the subpoena line of cases, you realize that the

24 statute itself serves the purposes that that line of

25 cases is designed to serve.

1   And the only remaining claim that's

2   really -- well, the judicial review will be very

3   difficult to accomplish in this case, because the whole

4   purpose of this administrative scheme is, we're not --

5   you know, we regulate prostitutes, we regulate narcotics

6   activity through the criminal law. The place where they

7   are frequently conducting it are low-budget motels that

8   have a strong incentive to take cash and not fill out a

9   registry and allow this kind of criminal activity to

10 flourish.

11   So the regulatory purpose of 41.49 is to

12 target not the criminals, but the place where they

13 conduct their activity. And doing it in a classic

14 administrative way. This is lawful activity; you can

15 rent a room. You just have to not rent it to people for

16 cash, for short terms, for no reservations, when they

17 don't have an identification to show who they are, and

18 you need to keep a record of what you're doing.

19   JUSTICE KAGAN: Mr. Dreeben, I'm trying to

20 figure out what do you think is relevant here; so let me

21 give you a hypo, which is say that it's not a hotel, but

22 it's a hunting lodge. And there are recordkeeping

23 requirements about how much people shoot and when they

24 shoot them and what they shoot, and so forth and so on.

25 And the fish and wildlife service or some state

1   equivalent of that says, we do not -- we do not want to

2   rely on people reporting this to us at periodic points,

3   we just want to make spot inspections, surprise

4   inspections, all the time. Would that be all right?

5   MR. DREEBEN: It seems like a much more

6   difficult case to me, Justice Kagan, in part because --

7   JUSTICE SCALIA: Is this a public hunting

8   lodge?

9   JUSTICE KAGAN: It's a private hunting

10   lodge, this was a private hotel.

11   JUSTICE SCALIA: Well, that's a big

12   difference, isn't it?

13   MR. DREEBEN: I will have to defer to

14   members of the Court on hunting lodges.

15   (Laughter.)

16   MR. DREEBEN: But I think that interest that

17   is being served there is far weaker than the interest

18   that is being served here, which is a genuine problem

19   reflected in the fact that there are a hundred statutes

20   like this across the country in different sounds --

21   JUSTICE KAGAN: Wait, that's how you're

22   going to distinguish it, Just because it's more

23   important? Because the fish and wildlife people think

24   that it's really, awfully very important to make sure

25   that all these rules are -- are complied with.

1   MR. DREEBEN: I agree with that, Justice

2 Kagan, but I do think that this Court in it's classic

3 Fourth Amendment analysis balances the government

4 interest to be served against the nature of the

5 intrusion.

6   I don't know enough about the hunting lodges

7 that you have in mind to really gage the nature of the

8 intrusion. I will say this, that a mere requirement

9 that you expose books and records that you're required

10 to keep as a regulatory matter, and that no one disputes

11 you're required to keep, to a law enforcement officer in

12 a public area of your facility, that's this case.

13   JUSTICE SCALIA: There -- there -- there is

14 no dispute here that you can require the hotel to keep

15 the records.

16   MR. DREEBEN: That is correct.

17   JUSTICE SCALIA: Is that right?

18   MR. DREEBEN: The hotels are not challenging

19 that.

20   JUSTICE SCALIA: I think there would be a

21 big dispute with regard to private hunting lodges,

22 whether you could require them to keep the records.

23   MR. DREEBEN: And there may be Second

24 Amendment concerns that the Court would weigh in the

25 balance.

1   I think that the Court can resolve this

2   case, in an extremely narrow fashion.

3   JUSTICE SOTOMAYOR: I -- I think it's even

4   more dangerous. Look at almost how many businesses,

5   retail businesses transact their recordkeeping in public

6   areas. Talk about any shop in the country. They don't

7   go to the back, virtually any of them, and transact

8   their business, keep their credit card information.

9   They put it right on the computer in front of them. So,

10   I mean --

11   MR. DREEBEN: I -- I think --

12   JUSTICE SOTOMAYOR: So it can't be that

13   merely ask -- intruding on someone's private

14   information, in a public place eliminates the Fourth

15   Amendment.

16   MR. DREEBEN: May I answer?

17   CHIEF JUSTICE ROBERTS: Yes.

18   MR. DREEBEN: I think you ask -- asked three

19   questions, Justice Sotomayor; first, the substantiality

20   of the government interests; second, the nature of the

21   intrusion on privacy; and third, necessity. And there

22   is a strong need in the case of these hotels, where

23   prostitution and narcotics activity flourish because

24   criminals do not want to identify themselves when they

25   check in, to have regular, unannounced inspections to

1 give the hotels the incentive to comply with the

2 registration law.

3   CHIEF JUSTICE ROBERTS: Thank you, counsel.

4   MR. DREEBEN: Thank you.

5   CHIEF JUSTICE ROBERTS: Mr. Goldstein.

6   ORAL ARGUMENT BY THOMAS C. GOLDSTEIN

7   ON BEHALF OF RESPONDENTS

8   MR. GOLDSTEIN: Mr. Chief Justice, may it

9 please the Court:

10   We ask the Court to hold that the city does

11 not need to go to the judge in advance and get a

12 warrant, but instead, that it merely needs to issue us a

13 one-page subpoena. Now, we can object to that subpoena,

14 but it's going to be enforced unless the city isn't

15 actually implementing a legitimate administrative scheme

16 because it's searching us to harass us or to investigate

17 crimes.

18   JUSTICE SCALIA: Is it -- is it your

19 position that there is no instance in which this statute

20 and the -- the implementation of it would be

21 constitutional?

22   MR. GOLDSTEIN: It is because the hypothesis

23 that you would use it for, exigent circumstances or when

24 would you have waived the right to privacy by putting it

25 out on the desk, don't actually involve the enforcement

1 of the statute.

2   What's necessary here, the value that's in

3 the Fourth Amendment, is the requirement that there be a

4 regularized scheme. Now, it's going to be a regularized

5 scheme that either appears in the administrative rule

6 itself. That doesn't exist here. There's no limit on

7 when they can search, how often they can search, or the

8 reason they can search. And if there isn't that, then

9 we put a court into the process. We make

10 pre-enforcement judicial reviewable available, and the

11 reason is the Fourth Amendment protects our sense of

12 tranquility. The hotel owners, individuals in other

13 contexts, businesses in other contexts, need to know

14 that beat officers aren't going to, at their whim,

15 conduct these searches.

16   JUSTICE ALITO: Suppose that a city or a

17 State wanted to establish an administrative inspection

18 regime along the lines of Barlow's? What would it --

19 what would it have to include in your judgment? Could

20 they -- could the warrant be issued by an administrative

21 law judge --

22   MR. ROSENKRANZ: Yes.

23   JUSTICE ALITO: -- as opposed to a superior

24 court judge in California?

25   MR. ROSENKRANZ: Yes.

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 1        JUSTICE ALITO:        Would it have -- would it

 2    require probable cause?

 3        MR. ROSENKRANZ:        No.

 4        JUSTICE ALITO:        Could they -- could it be

 5    done without prior notice?

 6        MR. GOLDSTEIN:        Yes.

 7        JUSTICE ALITO:        Could you have different

 8    standards for different types of hotels?

 9        MR. ROSENKRANZ:        If there is --

10        JUSTICE ALITO:        Periodic inspections for all

11    hotels, but much more frequent inspections for hotels

12    that rent by the hour, hotels that have a large number

13    of guests who pay in cash, and so forth?

14        MR. GOLDSTEIN:        Yes.

15        JUSTICE ALITO:        All those things could be

16    done.

17        MR. GOLDSTEIN:        Sure.

18        JUSTICE ALITO:        Now if that's okay, it's

19    really not clear to me what that would add to the

20    ordinance that we have before us.

21        MR. GOLDSTEIN:        Great.  And that was,

22    Justice Kennedy asked how we -- how Barlow's plays out

23    in this context.  So Mr. Dreeben is half right in his

24    answer.  He is absolutely right that the Court has said,

25    look, if you're not physically inspecting the premises,
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1   then you don't have to, ahead of time, get a warrant.

2   And, Justice Scalia, it's not a probable

3   cause criminal warrant. All the Court has required in

4   this line of cases is that the government show that it's

5   part of an ordinarily administrative scheme.

6   But the second part is what's missing, and

7   the key case that's mentioned in passing by Mr. Dreeben,

8   it hasn't gotten enough attention in the case, it's

9   called Donovan v. Lone Steer. And it was decided by --

10   an opinion by then Justice Rehnquist, it's an unanimous

11   opinion, and it considers a circumstance very similar to

12   this, and that is, under the Fair Labors Standards Act,

13   the government can do just what it does here, and that

14   is it just demands employment records.

15   And the reason this Court said that that

16   comports with the Fourth Amendment is there is a

17   balance, and that is that the government has to issue a

18   subpoena to which the employer can object. And that

19   accomplishes two things. The first is, without

20   burdening the government, it interjects the possibility

21   of judicial review and that way you know that the

22   enforcement officer --

23   JUSTICE GINSBURG: Well, what would be the

24   nature of the objection? I'm going back to

25   Mr. Rosenkranz's answer to my question. He said, the --

1   there is no notion of probable cause, reasonable cause.

2   The hotel owner is required to keep these records and

3   the -- that's not disputed. They're each required to

4   keep them. And so -- and the police don't have to have

5   any reason.

6   What would be -- what would be shown by some

7   kind of a hearing?

8   MR. GOLDSTEIN: Sure, Your Honor. This

9   line -- this Court's consistent line of precedents,

10 there are six cases that have dealt with this subpoena

11 rule, have said the following: And that is, the

12 concern, when you have a scheme like this one that

13 doesn't tell the officer how often or when to search,

14 and -- is that the officer will do two things that are

15 forbidden by the Fourth Amendment. One is they'll do it

16 in a harassing way, and the second is they'll use it for

17 crime control.

18   And the latter is a real concern here.   The

19 city is avowedly saying it wants to look at the record

20 to, for example, find prostitutes or the Johns who are

21 involved in renting the rooms. And so that's why what

22 you do is you let the police issue the subpoena. They

23 don't go to the judge ahead of time. But the prospect

24 that there can be an objection and that you can go to a

25 judge is what protects the -- the sense of tranquility

1   of the business owner.

2   JUSTICE KENNEDY: Well, what's the

3   purpose -- you agree that it's constitutional to require

4   the registry?

5   MR. GOLDSTEIN: Absolutely.

6   JUSTICE KENNEDY: Okay. Why is the State

7   interested in requiring the register if it can't go look

8   at it with little notice?

9   MR. GOLDSTEIN: Ah --

10   JUSTICE KENNEDY: What's the point?

11   MR. GOLDSTEIN: Well, Justice Kennedy, the

12 fact that its only interest is in law enforcement I

13 think is a point in our favor. But just recognize that

14 what Mr. Rosenkranz is describing as the scenario that

15 gave rise to your question about room 1202 we think is

16 entirely inaccurate. So if I could just play out the

17 hypothetical.

18   His point is as follows: An officer shows

19 up at a motel, and sees someone in a room -- sees a

20 light on in room 2. We'll give him his best case. And

21 what he wants to do then is to go and look and, right

22 then, determine, look, there is a registration card for

23 room 2. Now, I don't know what that proves, because he

24 doesn't know that anything inappropriate is going on in

25 room 2, but it doesn't matter. What the officer does is

1 he makes a record: There was someone in room 2 on

2 June 1st 12:00 a.m. And then he comes back two days

3 later and serves the subpoena.

4   There is no reason in the world -- that

5 doesn't give any advance notice to the motel owner. If

6 he has a particular concern, then he can sequester the

7 records so that they can have them held separately, if

8 there is going to be an objection, which is extremely

9 rare. There is no reason -- his concern is about

10 contemporaneous observation. That's not the issue in

11 the case. He can sit outside and look outside the room.

12 The issue in the case is do you have to go in and have

13 no opportunity for a judge to be involved before you

14 search the records.

15   JUSTICE SCALIA: Seeing the light on doesn't

16 prove anything unless you know that the hotel has not

17 registered the person who is in the room.

18   MR. GOLDSTEIN: Justice Scalia --

19   JUSTICE SCALIA: And --

20   MR. GOLDSTEIN: -- remember, our objection

21 is not to them being able to either require the register

22 or inspect the register. Neither one of those is at

23 issue. The question is, can they do that without giving

24 us any opportunity to say to a judge what's actually

25 going on in here is law enforcement or harassment;

1   they've come in five times during the day. And that

2   system, which is they issued the subpoena, right? They

3   don't go to the judge ahead of time, they come up, they

4   show -- they give me a subpoena, right, and they say, we

5   want the records, and if there is an objection, the

6   officer has made the observation about room 2.

7   And they can go ahead -- telephonic warrants

8   are easy, but there's no reason that the subpoena

9   objection can't be heard by a judge later on. He's

10 already observed and made a note about what's going on

11 in the hotel.

12   Now, I will say --

13   JUSTICE SCALIA: They -- they -- they could

14 fill in. While he's running off getting his subpoena,

15 they fill in who was in that room.

16   MR. GOLDSTEIN: The subpoena is -- Justice

17 Scalia, the subpoena -- he's not running off anywhere.

18 The subpoena is simply handed at the desk. This is an

19 administrative one-page piece of paper. But let me just

20 say --

21   CHIEF JUSTICE ROBERTS: No, no -- sorry.

22   JUSTICE SCALIA: I don't understand.

23   MR. GOLDSTEIN: Okay. Sorry.

24   JUSTICE SCALIA: He has it in his pocket?

25   MR. GOLDSTEIN: Yes. That's how --

1   JUSTICE SCALIA: All you're asking for, all

2   this litigation, is just that the one who wants to

3   inspect it just pulls out a piece of paper and hands it

4   to him and that makes it all okay.

5   MR. GOLDSTEIN: No. There's two parts to

6   this, Justice Scalia. That's how a subpoena works. The

7   reason this Court has asserted -- has required that is

8   the bare minimum, except in the very limited Burger

9   context, is that when you hand the subpoena, the person

10   who receives the subpoena says, this is an unusual case,

11   I'm going to go to the trouble of objecting. I think I

12   can tell a judge and prove to a judge that this is law

13   enforcement in -- in disguise.

14   JUSTICE SCALIA: He could say the same thing

15   without the subpoena.

16   MR. GOLDSTEIN: Yes, but that's -- our

17   critical point is that this guarantees him the right to

18   say that to a judge.

19   JUSTICE KAGAN: And I thought --

20   CHIEF JUSTICE ROBERTS: It allows him the

21   opportunity, while the policeman is getting a subpoena,

22   to fill in the name of the person in what is otherwise a

23   blank space.

24   MR. GOLDSTEIN: Mr. Chief Justice, he's not

25   going to get a subpoena. Subpoenas don't work that way.

1   Subpoenas are issued --

2   CHIEF JUSTICE ROBERTS: Oh, I thought you

3   said that if he serves a subpoena, the other person can

4   demand judicial -- pre-enforcement judicial review.

5   MR. GOLDSTEIN: Yes, that's correct.

6   CHIEF JUSTICE ROBERTS: So the police

7   officer has to go somewhere to get the judicial review

8   with whoever the hotel owner sends.

9   MR. GOLDSTEIN: Well, it might not work that

10   way, and that is, the hotel office -- the hotel owner

11   may have to file a motion to quash. It's not

12   particularly important to your hypothetical.

13   Mr. Chief Justice, here's the problem with

14   that argument.

15   JUSTICE KENNEDY: Well, it is important to

16   the hypothetical because we're trying to figure out how

17   this works.

18   MR. GOLDSTEIN: Yes.

19   JUSTICE KENNEDY: The policeman goes with a

20   subpoena and the hotel owner says, I object.

21   MR. GOLDSTEIN: Yes.

22   JUSTICE KENNEDY: Now what happens?

23   MR. GOLDSTEIN: He files --

24   JUSTICE KENNEDY: And how long does it take?

25   MR. GOLDSTEIN: It doesn't take any amount

1 of time, which is why the Court has consistently

2 required it. And that is, he says, I'm not going to

3 give you the records. I'm going to file a motion to

4 quash. If the police want to enforce it right away,

5 they can go to an administrative judge and ask that it

6 be --

7   CHIEF JUSTICE ROBERTS: Okay. They go

8 somewhere.

9   MR. GOLDSTEIN: Yes.

10   CHIEF JUSTICE ROBERTS: Okay. During that

11 time, doesn't the hotel clerk take his pen and say, I

12 didn't register this guy in room 2, I'm going to get in

13 trouble, and he fills in whatever is left to be filled

14 in.

15   MR. GOLDSTEIN: No. For the reason given by

16 Justice Kagan, and that is, you can sequester the

17 records. And that is, the question is searching the

18 records. That is, we're talking about a set of cards.

19 And if this is a real concern -- now, I will say it is a

20 concern made up by the city's lawyers in this Court when

21 at trial they did not introduce any evidence of this and

22 it would be equally applicable in every kind of required

23 record. The same is true in a construction site or Fair

24 Labor Standards Act.

25   JUSTICE KENNEDY: So in a standard

1   construction subpoena, if you object and say, well, I'm

2   going to take these records and keep them in the police

3   car trunk until we resolve this?

4   MR. GOLDSTEIN: Yes, you can do that. There

5   are two ways --

6   JUSTICE KENNEDY: There's authority for

7   that?

8   MR. GOLDSTEIN: I'm sorry?

9   JUSTICE KENNEDY: There's authority from

10   this Court?

11   MR. GOLDSTEIN: Oh, sure. It's very similar

12   to what this Court has said in the Fourth Amendment

13   context. Remember, when the police show up at someone's

14   house and they're concerned about the destruction of

15   evidence inside, what they do is simply sequester --

16   JUSTICE KENNEDY: It seems to me that's much

17   more intrusive than the scheme you're objecting to.

18   MR. GOLDSTEIN: Justice Kennedy, I don't

19   think the government can have it both ways. These are

20   our private records, okay? And they want to do

21   something incredibly unusual that the Fourth Amendment

22   forbids, and that is, they want to have a scheme that

23   doesn't say when they'll search, how often they'll

24   search, or the purpose of the search.

25   JUSTICE SCALIA: They're not entirely

 1 private records --

 2   JUSTICE KENNEDY: Right.

 3   JUSTICE SCALIA: -- they're records required

 4 by law to be kept and you are not objecting to that at

 5 all.

 6   MR. GOLDSTEIN: Well, Justice Scalia, that's

 7 absolutely right. The other side makes a good point,

 8 and that is, these are business records that will

 9 receive reduced Fourth Amendment protection. We

10 understand that. So did the unanimous court in Lone

11 Steer. What it said is, that's the reason we don't have

12 a probable cause requirement here. That's why we

13 require the minimum amount of judicial process, which is

14 the prospect that if the owner has a good objection,

15 they can go to a judge. That's why we don't have the

16 Fourth Amendment's full protections. But remember --

17   JUSTICE KAGAN: Mr. Goldstein, I thought --

18   JUSTICE GINSBURG: But you said they could

19 be -- they can be -- they can be sequestered by the

20 police officer, they even answered before, that

21 suggested you have to have some outside approval. But

22 now you're saying if the hotel owner says, you can't

23 have these records, the police can say, give me the

24 books and take them away.

25   MR. GOLDSTEIN: Yes. They cannot inspect

1   them, just hold them aside. If this is a real problem,

2   which there's no evidence of, but if -- if they want to

3   just hold them aside, then that -- they can be just

4   sequestered. Nobody looks at them until a judge

5   decides.

6   JUSTICE ALITO: That's a seizure. That is a

7   seizure.

8   MR. GOLDSTEIN: Right. Absolutely.

9   Justice --

10   JUSTICE ALITO: So why is that justified and

11   looking at the information not?

12   MR. GOLDSTEIN: This Court has held that in

13   the identical circumstance, this arises in the Fourth

14   Amendment context. When the government is concerned

15   about the destruction of evidence, before it can acquire

16   a warrant, it can sequester the property, that is, it

17   can seize control of the property without searching it.

18   JUSTICE ALITO: Yeah, that's if it has

19   probable cause.

20   MR. GOLDSTEIN: Well, Your Honor, it has the

21   relevant level of cause that's required in the

22   particular context. We can't --

23   JUSTICE ALITO: I'm confused by your answer.

24   I thought you said in response to my earlier questions

25   that the city could have a regime under which an

1 administrative law judge issues a warrant, not a

2 subpoena --

3   MR. GOLDSTEIN: Yes.

4   JUSTICE ALITO: -- for a periodic

5 inspection.

6   MR. GOLDSTEIN: Sure.

7   JUSTICE ALITO: So the -- the officer would

8 have the warrant, would go to the hotel, here's the

9 warrant, this is your periodic inspection. There would

10 be no pre-judicial review.

11   MR. GOLDSTEIN: That is -- that's not right.

12   JUSTICE ALITO: There could be a challenge

13 to it later.

14   MR. GOLDSTEIN: No, Your Honor. When --

15 what this Court has said in cases like Camara and See,

16 and it's the distinction drawn in Lone Steer and

17 Barlow's, is that when you get the pre-enforcement

18 judicial review, that is the judicial evolvement that's

19 required.

20   JUSTICE ALITO: Right.

21   MR. GOLDSTEIN: Right? So we'd be perfectly

22 happy with that. The difference between your

23 hypothetical and this one is that a judge is involved

24 and ensures that this isn't for law enforcement. It's

25 the orderly operation of administrative scheme; whereas,

1   what the city wants is for a beat cop to be able to go

2   in at anytime, as often as he wants, for any purpose.

3   JUSTICE KENNEDY: The complexity of the

4   answers and, frankly, the surprise I have at some of

5   your answers may indicate that this is not a basis for a

6   facial -- this is not a case for facial attack.

7   MR. GOLDSTEIN: Okay. Let me --

8   JUSTICE KENNEDY: Seems to me we have to go

9   back and -- and decide these issues on a case-by-case

10   basis.

11   MR. GOLDSTEIN: Well, Justice Kennedy, I'll

12   give you my responses to that obviously, and that is, the

13   Court in all of the Colonnade line of cases and Camara

14   cases has dealt with things on a categorical basis. It

15   has never done it on a case-by-case basis, because it is

16   look at the structure of the scheme, that is, this is a

17   scheme where they're not going to have any reason --

18   they don't need any justification to come in. We know

19   what they can seize. It's still limited, right? It's a

20   particular record, but they can do it anytime. And in

21   that kind of scheme, what the Court has consistently

22   insisted on, and I hope that the Court will take a look

23   at Lone Steer, is that there be this minimum of a

24   subpoena process. I'm just describing, Your Honor --

25   JUSTICE SOTOMAYOR: I'm sorry. I thought

1   the stronger answer would be we've always looked at a

2   lack of procedural protection under a facial

3   challenge --

4   MR. GOLDSTEIN: Certainly. That's Sibron --

5   JUSTICE SOTOMAYOR: We did.

6   MR. GOLDSTEIN: Sibron says exactly --

7   JUSTICE SOTOMAYOR: Exactly. So anytime

8   that the challenge as to the lack of process --

9   MR. GOLDSTEIN: Yes.

10   JUSTICE SOTOMAYOR: -- we've looked at it,

11   facially or as applied or whatever, but it doesn't need

12   to be as applied.

13   MR. GOLDSTEIN: Yes. And let me just add

14   one other point that's sort of under-appreciated in the

15   case, and that is, not only does our complaint assert an

16   as-applied challenge, there was a trial on the

17   as-applied challenge. And the record on the as-applied

18   challenge is the record in this case. We pursued our

19   facial challenge only after before the second trial they

20   stipulated that they had only facial defenses of the

21   statute. That's the -- that's the reason we have this

22   oddity that we're here on a facial challenge. The

23   evidence has already been collected. There's nothing to

24   be gained by having a second trial.

25   JUSTICE SCALIA: Would you -- would you --

1   you've constantly said that one of the objections that

2   the hotel owner can make is that you want these records

3   for enforcement of the criminal law, right? You say

4   that's bad.

5   MR. GOLDSTEIN: Yes.

6   JUSTICE SCALIA: But the whole purpose of

7   this thing is to enable the criminal law to be enforced,

8   isn't it?

9   MR. GOLDSTEIN: Ah, Justice Scalia, there

10   are two different points that are being made here. One

11   is, you're quite right. They have an administrative

12   scheme. The point of the administrative scheme is to

13   deter criminal violations. But my point is different,

14   and that is, imagine on Tuesday a police officer comes

15   in and says, look, I think there's a prostitute in the

16   room 3, okay? So what I'm going to do is I'm going to

17   invoke this 41.49 and see if that person's name matches

18   up as a prostitute, okay? That's criminal law

19   enforcement. It requires probable cause.

20   The fact that they have an underlying

21   administrative scheme doesn't mean that they can

22   investigate crimes through using this evidence. This

23   Court has said time and time again in its administrative

24   decisions that it's really important that we involve the

25   courts because there is this concern, and this case

1   presents it more starkly than any other, that you will

2   misuse the administrative process.

3   JUSTICE SCALIA: Well, I think there may be

4   an exception to that principle where the whole purpose

5   of the scheme is to enable the detection of criminal

6   activity.

7   MR. GOLDSTEIN: But --

8   JUSTICE SCALIA: And then the objection

9   would be the whole scheme is bad. You cannot require

10   them to keep books because its whole purpose is to

11   detect criminal activity.

12   But that's not what you're arguing.   You're

13   saying, they can keep the books in order to detect

14   criminal activity, but if they request the book in order

15   to detect criminal activity, it's bad.

16   MR. GOLDSTEIN: No, its --

17   JUSTICE SCALIA: That doesn't make any sense

18   at all.

19   MR. GOLDSTEIN: Because it's not the

20   argument. And that is --

21   JUSTICE SCALIA: Well, what is -- what is

22   the argument?

23   MR. GOLDSTEIN: The argument is -- their

24   defense of the statute is not that the -- the records

25   are used to detect crime; it's they're used to deter

1   crime. They don't look at the records to find

2   criminals. All they do is look at the records to make

3   sure we're keeping records.

4   My point is that one day a police officer

5   under this -- and it can happen regularly, is that an

6   officer, a beat officer will come in and say, I'm not

7   concerned about whether you filled out the form; I

8   think there might be a prostitute in room 3, and use

9   it for criminal law --

10   JUSTICE KAGAN: And, Mr. Goldstein, I had

11   thought that an equally important purpose behind these

12   laws is to -- as you said earlier, prevent harassment.

13   MR. GOLDSTEIN: Yes.

14   JUSTICE KAGAN: Prevent, I don't like this

15   hotel owner, I want to drive this hotel out of business,

16   I'm going to be showing up in his lobby every day.

17   But that's part of what's going on here,

18   isn't that right?

19   MR. GOLDSTEIN: That's -- in fact, the

20   principal thing that this Court's precedents have

21   pointed to -- and just look at what's missing in this --

22   in this ordinance. Every time the other side will say

23   to you, look, we identified specifically the records.

24   But the question isn't what the records are, it's the

25   loss of the sense of tranquility provided by the Fourth

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 1    Amendment, that we don't know how frequently and for

 2    what harassing purpose and how -- and for what reasons

 3    at all that a police officer is just going to come in

 4    over and over again.

 5         CHIEF JUSTICE ROBERTS:        Have we used that

 6    phrase before?

 7         MR. GOLDSTEIN:        Which one, Your Honor?

 8         CHIEF JUSTICE ROBERTS:        Tranquility.

 9         MR. GOLDSTEIN:        I don't think that that word

10    is --

11         CHIEF JUSTICE ROBERTS:        We talk about

12    privacy and all that, but I'm not sure that the Fourth

13    Amendment should be expanded to protect the sense of

14    tranquility.

15         MR. GOLDSTEIN:        I'm trying to --

16         JUSTICE SCALIA:        I have a problem imagining

17    tranquil hotel owners.  It's not what I associate with

18    owning a hotel.

19         MR. GOLDSTEIN:        It is the sense of certainty

20    that the Fourth Amendment provides that what you do know

21    is that there are going to be limits on when the police

22    come in and say, show us your papers.  Okay?  And that's

23    what we're talking about.

24         CHIEF JUSTICE ROBERTS:        Do -- I think

25    there's some rule -- at least they do it, I mean, in
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1   hotels, they have these notices posted all over about

2   where the first emergency exit is and all that.

3   MR. GOLDSTEIN: Yes.

4   CHIEF JUSTICE ROBERTS: Could police come in

5   and check to make sure the hotel has those posted --

6   MR. GOLDSTEIN: Yes.

7   CHIEF JUSTICE ROBERTS: -- without any type

8   of a warrant?

9   MR. GOLDSTEIN: Because they're in public

10   spaces. That is to say --

11   CHIEF JUSTICE ROBERTS: Well, I don't know

12   -- is the back of a hotel room door -- I mean, is that a

13   private place?

14   MR. GOLDSTEIN: So you're saying, say, for

15   example, in the back of the restaurant, in the back of

16   the kitchen, for example?

17   CHIEF JUSTICE ROBERTS: No, no, I'm talking

18   about every hotel room --

19   MR. GOLDSTEIN: Yes.

20   CHIEF JUSTICE ROBERTS: -- has one of those

21   --

22   MR. GOLDSTEIN: Oh, inside the room.

23   CHIEF JUSTICE ROBERTS: Can they go and say,

24   look, you know, this is a very important thing to make

25   sure people don't die in a big fire, we're going to make

1   sure you've got them. Check -- let me go look in room

2   12 where nobody is.

3   MR. GOLDSTEIN: It's a great example for us.

4   That's actually Camara and See; that's a fire inspection

5   regime. And what has to happen is that there has to be

6   a subpoena ahead of time.

7   At the very least, this Court -- the lowest

8   level -- the lowest standard the Court has ever applied

9   is in a case called Dewey. And what Dewey said is, at

10   the very least, if you're not going to involve a court,

11   you have to have a set of rules about when these

12   searches are going to apply, or are going to be

13   conducted, and how often.

14   JUSTICE ALITO: This is -- I didn't quite

15   understand your answer about harassment. Maybe it's

16   because -- maybe this is in the record or maybe it's

17   because this wasn't as applied. But the police -- even

18   if this ordinance were invalidated, the police could

19   show up whenever they wanted, couldn't they, and ask for

20   the -- the owner or the person at the desk voluntarily

21   to disclose the register so there could be -- they could

22   be in the lobby as much as they want.

23   MR. GOLDSTEIN: Right.

24   JUSTICE ALITO: So exactly what does -- how

25   does this aid in harassment of hotels?

         1   MR. GOLDSTEIN: Because of the fact that

         2   they're requiring us to produce private records. The

         3   Court -- it was always the case, in cases like Barlow's,

         4   Camara, See, where the police couldn't show up and

         5   inspect the premises, they could still show up and

         6   harass. But what the Court said is if you're going to

         7   invade privacy -- we agree this is -- everyone agrees

         8   now this is a Fourth Amendment search.

         9   JUSTICE ALITO: No, but it's a private --

        10   it's a public space. I don't know whether it's

        11   dispositive, but it's of some relevance.

        12   So they walk in -- there are two scenarios;

        13   one, with the ordinance, one, without. Without the

        14   ordinance, they walk in and they said, would you, in the

        15   kindness of your heart, let us look at the register.

        16   And the owner says, no, I don't want to. And then they

        17   come back the next day and they do the same thing.

        18   Okay? That's the first scenario.

        19   The second one is, they come in and they

        20   say, let us see the register. You show them the

        21   register, and what? It's a harassment because they sit

        22   there for a while and the guests coming in see the

        23   police in the lobby? I just don't understand factually.

        24   MR. GOLDSTEIN: It's the fact -- it's the

        25   fact that day after day after day we have to give them

1 our private information. And it -- it really will

2 involve the problem that it can harass and be intended

3 to put us out of business. If our customers are in the

4 -- let's imagine the following scenario -- and I, you

5 know, we are put in this position because they've come

6 up with this hypothetical -- these hypotheticals about

7 when it could be valid.

8   The officers see someone come into the

9 motel, and each time they see someone come into the

10 motel, they come in and say, hey, we're the police, let

11 us see the records. The -- it really can interfere if

12 you just imagine --

13   JUSTICE GINSBURG: I think that's -- if you

14 had such a case-specific example, that might be one

15 thing. But maybe it would help if you can tell me what

16 goes on in this pre-compliance judicial review.

17   MR. GOLDSTEIN: Yes.

18   JUSTICE GINSBURG: So the hotel owner says,

19 sorry, you can't look at the registry, I want

20 pre-compliance judicial review.

21   MR. GOLDSTEIN: Yes.

22   JUSTICE GINSBURG: What is the nature of

23 that review?

24   MR. GOLDSTEIN: The -- this Court has

25 considered that question in the Fair Labor Standards

 1   Act, the context of the tax, the context -- and the

 2   banking context, so California Bankers, Donovan, and Lone

 3   Steer. And what it has said is that the administrative

 4   agent with the -- you know, the police officer, whoever

 5   enforces the law -- don't have to go to a judge -- gives

 6   a one-page subpoena. Then there is an objection by the

 7   business owner in any of these contexts, and remember,

 8   in banking, these are records that the government

 9   requires you to produce.

10   And then what happens is that the -- the --

11   what generally will be the rule, it's up to the city, is

12   that the city will put the onus on us to go to a judge.

13   And the fact that the onus is on us to go to a judge and

14   the fact that our objections are very limited, which is

15   to say, we only get to object that this is harassing or

16   for law enforcement, means that we almost always give

17   over the records because it's going to be a completely

18   futile objection. But it is the prospect that we can go

19   to a judge that tells the beat cop that he needs to

20   behave and --

21   JUSTICE GINSBURG: And those are the only

22   objections that would be --

23   MR. GOLDSTEIN: Yes.

24   JUSTICE GINSBURG: -- successful, harassment

25   and using this for law enforcement?

1   MR. GOLDSTEIN: Yes.   That's detailed in

2   this Court's precedents including Barlow's, it is what

3   -- that's the rule of Camara and See.

4   JUSTICE SCALIA: How many of these Courts'

5   precedents involves a business that has been treated

6   like a public utility? I mean, there are requirements

7   for hotels, how big the room has to be, how many people

8   you can put in the room, even in -- in many locations,

9   how much you can charge for the room.

10   The hotel owner is not like the -- like a

11   private business. He is a regulated provider of -- of

12   public services that has traditionally been regulated

13   closely over the years.

14   MR. GOLDSTEIN: The short answer -- the

15   first question you asked is, how many times have you

16   been asked that question. The answer is none. The

17   second answer to your question is that, but in the

18   relevant sense, which is to say how much of this

19   property is protected and private, is that

20   overwhelmingly hotels have constitutional protections.

21   Remember, 95 percent of this hotel is going

22   to be the guests' rooms, and unlike in cases like Berger

23   -- remember they go out and search the open junkyard,

24   unlike cases like Colonnade and Biswell where you

25   inspect the open stores or even go behind the scenes.

1   Here the police can't do it. The Fourth Amendment,

2   everybody agrees, protects privacy at the hotel. And so

3   there is a much greater expectation of privacy on our

4   part.

5   JUSTICE KAGAN: But I think the question

6   that Justice Scalia is asking is, is there a reason to

7   think that hotels are a more heavily regulated industry

8   than all the other industries that we can think of?

9   MR. GOLDSTEIN: No. I mean, just think

10   about it. California Bankers and Miller are cases

11   involving banking. Banking is incredibly heavily

12   regulated, you have to have a charter, the government

13   requires you to keep all kinds of records. And in both

14   of those cases -- and remember, Justice Scalia, those

15   are the bank customers' records, they're about the bank

16   customers' transactions.

17   And what this Court said in both of those

18   cases is that with rare exceptions, like the $10,000

19   requirement, Title I of the Bank Secrecy Act is

20   constitutional because it requires a subpoena. That is,

21   there is the prospect of getting a judge involved if the

22   Bank Secrecy requirement that the investigation is too

23   onerous.

24   I'll give you one other data point --

25   JUSTICE KENNEDY: But innkeepers have been

1 regulated, not for decades, but they've been regulated

2 for centuries and they have -- they have duties to the

3 public that are enforceable.

4   MR. GOLDSTEIN: So --

5   JUSTICE KENNEDY: And I'm just puzzled by

6 this case. You concede that the records have to be

7 kept. There are very few reasons for keeping those

8 records other than law enforcement.

9   MR. GOLDSTEIN: Ah, that we disagree with,

10 Justice Kennedy. Remember we've kept these records and

11 innkeepers have kept these records for time immemorial.

12 We use these records for very different purposes. They

13 are every record of our business transactions. We use

14 this information to keep in touch with our customers.

15 Every business does. It's quite proprietary

16 information. And while it's the case that we --

17   JUSTICE SCALIA: Motel 6 does this? Jeez,

18 I've never -- I've never received anything from them.

19   (Laughter.)

20   JUSTICE SCALIA: My goodness.

21   MR. GOLDSTEIN: You may not be in their

22 frequent guest program --

23   (Laughter.)

24   MR. GOLDSTEIN: But, nobody doubts --

25 remember, this is an ordinance that applies to the Four

1   Seasons and the Ritz-Carlton and everything else.

2   They've just carved out a very specific subset.

3   And, Justice Kennedy, while we are attentive

4   to the point that you can't -- we are not asserting and

5   the guests are not asserting Fourth Amendment rights

6   here, let's not lose sight of the fact that these

7   records can show very, very personal information. Not

8   just the driver's license information, but whether you

9   stayed at a hotel during a religious or a political

10   convention --

11   JUSTICE SCALIA: Once again, you're not

12   complaining about the privacy interests of the guests.

13   That's not your complaint here.

14   MR. GOLDSTEIN: Justice Scalia, here's the

15   point. We -- they agree this is a Fourth Amendment

16   search, point one. Then what you are doing is if you

17   have to make an honest assessment of whether this

18   information really does further the Fourth Amendment

19   value of privacy. And it does because this has private

20   stuff in it. There's just no real dispute about that.

21   And I am sympathetic, Justice Kennedy, to

22   the fact that innkeepers have been regulated for a long

23   time. I will simply say that in 99.4 percent of the

24   jurisdictions in this country, this is not the rule.

25   There are 100, but there are 18,000 other jurisdictions

1 in which this is not the rule and apparently has never

2 been the rule.

3   And the nature of that regulation isn't one

4 that, in the Burger sense, impinges on our sense of

5 privacy. We have to take guests, but what does that

6 tell us about whether our records are private? And

7 certainly, we can identify a huge array of other

8 businesses that are regulated.

9   The one data point that I wanted to make is

10 that in 2002, the Department of Justice did a study, and

11 it found that 335 different provisions of Federal law

12 use the system that I just described for you; and that

13 is, the subpoena first in order to get the records. And

14 there's a bare handful of them, none of them involving

15 just bare records with the possible exception of the OCC

16 that use this exception that says, you never have to get

17 a judge involved. It is the subpoenas --

18   CHIEF JUSTICE ROBERTS: 99.4 percent

19 jurisdictions, does that include -- are you comparing

20 the little hamlet in Indiana with Los Angeles or

21 New York? Does New York City have something like this?

22   MR. GOLDSTEIN: I don't know the answer to

23 the question of that particular city, but, Your Honor,

24 they're including big and small and so am I. So there

25 are a lot of big cities that don't have this rule.

1   My point is this, Justice Kennedy --

2   JUSTICE KENNEDY: But -- you're -- you're

3 saying, oh, the hotel has a private interest because it

4 wants to know who its customers. But they can do that

5 by keeping their own record consensually. You have

6 conceded that they can require the information as a

7 matter of law.

8   MR. GOLDSTEIN: Well, that's because your

9 precedents say they can, Your Honor. And my point is

10 this, because your precedents say --

11   JUSTICE SCALIA: Well, that means it's true.

12   (Laughter.)

13   MR. GOLDSTEIN: Well -- and hence, my answer

14 yes.

15   But my point is this: Because they can do

16 it here, Justice Kennedy, they can do it everywhere.

17 The government can require any business to keep track of

18 all of its transactions and all of its customers. And

19 if the government can then just say, all right, now,

20 give us all that information, then they've reduced the

21 Fourth Amendment to a nullity.

22   The final point I'll make is that don't be

23 confused with the idea that there's something special

24 about hotels. The amount of government regulation here

25 is massive. The reason that the deputy solicitor

1   general is here on behalf of the United States is that

2   there are hundreds and hundreds and hundreds of

3   regulatory schemes the Federal government administers

4   where it is now required to use a subpoena. But what

5   self-respecting regulator wouldn't love --

6   JUSTICE ALITO: A subpoena -- a subpoena is

7   worthless when what is sought is something that can be

8   easily destroyed, hidden or falsified. It's -- it's

9   very useful if you're trying to get complicated records

10   that can't be easily altered between the time when the

11   subpoena is issued and the time when the subpoena is

12   enforced. But nobody -- nobody issues a subpoena for

13   the murder weapon that one is -- you know, that you

14   suspect is in somebody's house.

15   So these records are more like the murder

16   weapon where there's something that can be easily

17   falsified. You -- you seem to concede when you say that

18   the police can seize them, then -- then the subpoena is

19   worthless.

20   MR. GOLDSTEIN: Lone Steer says the opposite

21   with all respect, and that is, the records there are how

22   many hours did someone work at what amount of pay. And

23   if you can't falsify that just as quickly as you can

24   falsify who's in room 2, then I just don't understand

25   the nature of recordkeeping.

1   The Court has insisted on this as a bare

2 constitutional minimum, both to keep the enforcement

3 officer in line and to let us know the enforcement

4 officer is kept in line. It has not -- it has been

5 attentive to the fact that we don't want to put undue

6 burdens on the government and that is, it's just a

7 subpoena and that we have less than Fourth Amendment

8 rights.

9   JUSTICE ALITO: You think -- you think

10 payroll records in general are no more complicated than

11 the ledger at a motel that runs by the hour?

12   MR. GOLDSTEIN: In the relevant respect,

13 Justice Alito, if the question is, did the person work

14 50 hours or 35 and the record says 50 -- the actual

15 record would be 30 -- 50 and I just want to fill in 35,

16 yes. The -- the court didn't even think that that was a

17 remotely plausible argument in that -- the line of cases

18 that I'm describing.

19   CHIEF JUSTICE ROBERTS: Thank you, counsel.

20   Four minutes, Mr. Rosenkranz.

21   REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ

22   ON BEHALF OF PETITIONER

23   MR. ROSENKRANZ: Thank you, Your Honor.

24   Let me start with the facial point and then

25 circle back to the -- to the merits. So as I hear

1   Mr. Goldstein describing the rule, the only objections

2   that are going to be raised are harassment and whether

3   this is for a legitimate purpose, but if that's the

4   concern, that's a classic as-applied challenge.

5   If a hotel has a cop coming up to them five

6   times a day, they come in and say, this is really

7   harassment. These searches are inappropriate. And if

8   the -- if it's the purpose of the officer, he's doing

9   criminal investigation rather than actually caring about

10   whether my records are complete, that is an as-applied

11   challenge.

12   Now, the plaintiffs have not even tried to

13   demonstrate that this ordinance is unconstitutional in

14   every circumstance. On pages 19 to 20 of our brief, we

15   develop numerous scenarios, and Mr. Goldstein mentioned

16   only one of them.

17   So, for example, where the hotel is required

18   to upload the records to the police department every

19   day, it may not even be a search, but it's certainly

20   less intrusive.

21   JUSTICE KENNEDY: But that's -- that's not

22   the statute. I didn't understand those examples because

23   some of those examples, the police could act without

24   this -- without this.

25   MR. ROSENKRANZ: Well --

 1   JUSTICE KENNEDY: Without this --

 2   MR. ROSENKRANZ: So not that one, Your

 3   Honor. Justice Kennedy, not that one. So some of

 4   them -- in some of them, the ordinance has the purpose

 5   of requiring someone to do something that they would not

 6   otherwise have to submit to. But the one that I just

 7   gave as an example, the scenario of uploading the

 8   documents rather than the police conducting a search on

 9   the spot, is less intrusive.

10   And -- and the problem here is that the

11   plaintiffs have tried to invalidate every possible

12   application of this ordinance but they haven't done

13   the -- the intrusiveness, privacy, government interest

14   balance that one needs to do for each of them.

15   But let me then circle to the merits

16   because --

17   JUSTICE SOTOMAYOR: I'm still very confused

18   about this. There is always a potential exception to a

19   warrant, even a Fourth Amendment warrant of going into

20   the home, exigent circumstances, there's someone sick on

21   the other side, if there's a fleeing felon into the

22   place, but that doesn't eliminate the need for a

23   warrant. It's not a tell-us-later issue. Police can't

24   just keep going in and then fish around for an excuse.

25   That's a process issue.

1   MR. ROSENKRANZ: Understood, Your Honor.

2   JUSTICE SOTOMAYOR: You're entitled to a

3   warrant, you're entitled to a subpoena, you're

4   entitled -- that's what they're challenging, which is

5   they're not challenging all of the other reasons why the

6   police could go in legitimately --

7   MR. ROSENKRANZ: Well, Your Honor --

8   JUSTICE SOTOMAYOR: -- with an exception to

9   the Fourth Amendment. They're asking whether this kind

10   of search, generally, without all of those other exigent

11   circumstances or other Fourth Amendment exceptions is

12   constitutional.

13   MR. ROSENKRANZ: Right, Your Honor.

14   JUSTICE SOTOMAYOR: Is the process here

15   right?

16   MR. ROSENKRANZ: Understood.

17   And so let's not talk about the exceptions.

18   Let's talk about another example where the motel

19   continues to keep the register in the open, like they

20   did for 100 years, and then snatches it away when the

21   police come. That --

22   JUSTICE SOTOMAYOR: You know something, but

23   that's a different issue. It's in the public.

24   MR. ROSENKRANZ: Well, right. And they

25   would --

65

     1   JUSTICE SOTOMAYOR: And how often do you

     2   think that's going to happen?

     3   MR. ROSENKRANZ: And for that reason, they

     4   would have no expectation of privacy and the Fourth

     5   Amendment calculus would be totally different. But let

     6   me -- let me --

     7   JUSTICE KAGAN: Well, but then it's not a

     8   search at all. And, once again, it's not this statute

     9   that's doing the work.

    10   MR. ROSENKRANZ: Well, no, your Honor. If

    11   they snatch it away, it certainly is this ordinance that

    12   is doing the work.

    13   JUSTICE KAGAN: You're saying that they have

    14   no expectation of privacy. We wouldn't -- we wouldn't

    15   say it's a search at all, and the police can take it

    16   away. It doesn't depend on this statute.

    17   MR. ROSENKRANZ: Well, no, exactly. We

    18   would -- we would win the Fourth Amendment case, but

    19   they would -- but that has been invalidated by -- by

    20   deciding this on a facial basis.

    21   CHIEF JUSTICE ROBERTS: Counsel, our

    22   questions intruded on your rebuttal time. Why don't you

    23   take an extra minute or so.

    24   MR. ROSENKRANZ: Thank you, Your Honor.

    25   So let me just emphasize that this is a very

1   narrow rule that we're talking about. We're talking

2   about a rule that is unlikely to be repeated in so many

3   of the other circumstances that have been discussed

4   today.

5   It's about an inspection of only a single

6   book of information that the government requires hotels

7   to maintain and that the -- that Mr. Goldstein has

8   admitted the government should -- can require hotels to

9   maintain.

10   It's in a context that is especially prone

11   to criminality. People are using these hotels precisely

12   to commit crimes where the gaps are quite detectable in

13   real time but not detectable otherwise.

14   In an industry where there has been hundreds

15   of years of regulation including a history of

16   warrantless searches that are even broader at the time

17   of the founding, hotels were being searched with --

18   without warrants at the time of the founding and a

19   history of a hundred years of police inspections in Los

20   Angeles itself and even a hundred years of these things

21   being open to the public.

22   If the Court has no further questions, we

23   respectfully request that the Court reverse.

24   CHIEF JUSTICE ROBERTS: Thank you, counsel.

25   The case is submitted.

1   (Whereupon, at 11:09 a.m., the case in the

2 above-entitled matter was submitted.)

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