No. 13-1175

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES, CALIFORNIA,

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* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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QUESTION PRESENTED

Amicus curiae will address the following question:

Are facial challenges to ordinances and statutes permitted under the Fourth Amendment to the United States Constitution?

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INTEREST OF *AMICUS CURIAE*[1]

The Electronic Frontier Foundation ("EFF") is a member-supported, nonprofit public interest organization based in San Francisco, California, that works to protect free speech and privacy rights in an age of increasingly sophisticated technology. Founded in 1990, EFF currently has approximately 26,000 dues-paying members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law in the digital age. As part of that mission, EFF has served as counsel or *amicus curiae* in many cases addressing Fourth Amendment issues raised by emerging technologies, including many cases heard by this Court. *See, e.g., Riley v. California*, 134 S. Ct. 2473 (2014)*; United States v. Jones*, 132 S. Ct. 945 (2012); *City of Ontario, Cal. v. Quon*, 560 U.S. 746 (2010).

INTRODUCTION AND SUMMARY OF ARGUMENT

EFF submits this brief to answer the Court's first question in its grant of *certiorari*: Are facial challenges to ordinances and statutes permitted under the Fourth Amendment? The clear answer is yes.

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1. Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of *amicus* briefs. Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in any manner, and no party, party's counsel, or any person other than *amicus*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

1. Los Angeles Municipal Code § 41.49[2] requires hotel operators to maintain certain guest registry information and to make that information available to police officers on request without consent, a warrant, or other legal process. Failing to comply with a demand is a misdemeanor, punished by up to six months in jail and a $1,000 fine. *See* Los Angeles Municipal Code § 11.00(m); *see also Patel v. City of Los Angeles*, 738 F.3d 1058, 1061 (9th Cir. 2013) (en banc). Thus, contrary to this Court's decision in *See v. City of Seattle*, 387 U.S. 541, 544-45 (1967), the ordinance does not provide for pre-enforcement judicial review before penalties are imposed for noncompliance. Since no enforcement facts are needed to make this assessment, a facial challenge to the ordinance is an appropriate course of action.

2. As a practical matter, the Court already permits facial challenges on Fourth Amendment grounds in cases challenging statutes that authorize both search warrants and warrantless searches. Petitioner relies on *Sibron v. New York*, 392 U.S. 40, 59 (1968)—a case that addressed facial challenges to statutes authorizing warrantless searches—to argue that the Court should retreat from this practice. This Court should reject that argument. *Sibron* was concerned with the factual ripeness of facial challenges—*i.e.*, the lack of concrete facts about a statute's enforcement that ultimately renders a facial challenge premature. However, its stated rule turns not on ripeness, but instead on whether the statute authorized a warrantless, as compared to a warranted, search—a very different concern. The incongruity inherent in *Sibron*

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2. Unless otherwise indicated, all section references herein refer to the Los Angeles Municipal Code.

renders its rule overbroad, sweeping up facial challenges to statutes for which there are no ripeness concerns—such as the facial challenge to the ordinance at issue here. The Court has rejected *Sibron*'s rule in practice and should take this opportunity to formally overrule it. Indeed, *Sibron*'s purported prohibition on facial challenges to statutes authorizing warrantless searches is in direct conflict with this Court's long-standing admonition that, subject to a few closely guarded exceptions, warrantless searches are *per se* unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967).

3. Facial challenges are necessary to protect key Fourth Amendment rights. A review of the Court's jurisprudence concerning a variety of constitutional rights, including free speech, privacy and equal protection, illustrates that limiting statutes to as-applied attacks can lead to under-enforcement of constitutional norms. For example, many of the concerns expressed in the First Amendment context—including chilling effects, excess discretion, and lack of visibility—apply equally in Fourth Amendment cases. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988); *see also Stanford v. State of Tex.*, 379 U.S. 476, 484-85 (1965) (noting that the First, Fourth, and Fifth Amendments are "closely related, safeguarding not only privacy and protection against self-incrimination but conscience and human dignity and freedom of expression as well") (internal quotations and citation omitted). This is especially true in the modern age, when much electronic surveillance is insulated from as-applied challenges because it does not result in a criminal prosecution.

This Court should affirm.

ARGUMENT

I. This Court Has Permitted and Should Continue to Permit Fourth Amendment Facial Challenges to Statutes That Authorize Warrantless Searches.

A. The Court Has Consistently Allowed Fourth Amendment Facial Challenges.

The Los Angeles Ordinance at issue here violates the Fourth Amendment on its face because it does not provide for pre-enforcement judicial review before penalties for noncompliance are levied. *See* Los Angeles Municipal Code § 11.00(m); *Patel*, 738 F.3d at 1063; *See*, 387 U.S. at 544-45. The Court does not need additional, specific enforcement facts to address this issue—it can determine the constitutionality of the ordinance by looking at its language alone.

This Court routinely decides facial challenges to statutes—most commonly in the First Amendment context. *See, e.g., United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (facial challenge to Stolen Valor Act, 18 U.S.C. § 704, based on Act's "plain terms"); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct 876, 888 (2010) (facial challenge to election campaign contribution limits in 2 U.S.C. § 441b); *United States v. Stevens*, 130 S. Ct. 1577, 1581-82 (2010) (facial challenge to criminal prohibition on commercial creation of depictions of animal cruelty in 18 U.S.C. § 48). But this Court has permitted facial challenges in non-First Amendment contexts, as well. *See Sabri v. United States,* 541 U.S. 600, 609-10 (2004) (stating, in dicta, that overbreadth challenges are not restricted to First Amendment cases) (citing *Aptheker v. Secretary*

of State, 378 U.S. 500 (1964) (finding statute on its face unconstitutionally restricted right to travel); *Stenberg v. Carhart*, 530 U.S. 914, 938-946 (2000) (invalidating partial-birth abortion statute on its face); *City of Boerne v. Flores*, 521 U.S. 507, 532-535 (1997) (finding portion of Religious Freedom Restoration Act violated Fourteenth Amendment on its face).

As one scholar has documented, in several Supreme Court terms, including as recently as the 2009 term, "the Court adjudicated more facial challenges on the merits than it did as-applied challenges." Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 918 (2011) (highlighting 1984, 1989, 1994, 1999, 2004, 2009 terms); *see also* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1322 (2000).

This Court has permitted facial challenges under the Fourth Amendment, too, and has explicitly permitted facial challenges to statutes that authorize the issuance of search warrants. *See Berger v. New York*, 388 U.S. 41, 55-60 (1967) (finding state statute authorizing *ex parte* order for eavesdropping to be "deficient on its face" for its failure to incorporate the Fourth Amendment's particularity requirements). Such challenges are permitted because a warrant is obviously invalid "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, which lies at the heart of the Fourth Amendment." *Sibron*, 392 U.S. at 59 (citations omitted). In these circumstances, there is no need to wait for a warrant to be issued before a constitutional challenge can be considered by a court.

The only question here, then, is whether the Fourth Amendment also permits facial challenges to statutes that authorize *warrantless* searches. A cursory search reveals that this Court has in fact entertained such challenges. For example, in *Skinner v. Railway Labor Executives Association*, the Court considered a facial challenge to regulations promulgated by the Federal Railroad Administration requiring breath and urine testing by private railroads—*i.e.*, a regulatory scheme that permitted programmatic or broad searches without individualized suspicion. 489 U.S. 602, 614 (1989). The lawsuit was filed the day before the regulations went into effect. *See Railway Labor Executives' Ass'n v. Burnley,* 839 F.2d 575, 577 (9th Cir. 1988). This Court was able to consider (and ultimately uphold) the constitutionality of the regulations in the absence of a specific person who had been injured by the regulations because, due to "the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there [we]re virtually no facts for a neutral magistrate to evaluate." *Skinner*, 489 U.S. at 622.

Skinner is just one example. In *Nixon v. Administrator of General Services*, the Court reviewed and rejected a Fourth Amendment challenge to the "facial validity" of the Presidential Recordings and Material Preservation Act. 433 U.S. 425, 430, 439, 458-74 (1977). In *California Bankers Ass'n v. Shultz*, the Court considered pre-enforcement facial challenges to recordkeeping and reporting requirements under the Bank Secrecy Act of 1970. 416 U.S. 21, 42 (1974). Finally, in *Torres v. Puerto Rico,* the Court invalidated a search of luggage under the authority of a Puerto Rican statute. 442 U.S. 465, 471 (1979). While the Court did not state unequivocally that it

found the statute invalid on its face, the opinion's language strongly suggests that it did. *See* 442 U.S. at 471 ("The search . . . pursuant to Public Law 22 did not satisfy the requirements of the Fourth Amendment as we heretofore have construed it . . . . Public Law 22 does not require, and the officers who made the search challenged here did not have, probable cause . . . . Public Law 22 requires no warrant, and none was obtained before appellant's bags were searched.") (footnote omitted).

Further, *United States v. Salerno* permits facial challenges where the challenged statute or ordinance authorizes searches that violate a Fourth Amendment rule in every instance. 481 U.S. 739, 745 (1987). The ordinance at issue here presents that very situation. As the parties stipulate, § 41.49 authorizes police officers to inspect hotel guest records at any time, without either consent or a search warrant.[3] *Patel*, 738 F.3d at 1061. This Court has already established that a statute authorizing warrantless inspections in connection with an administrative inspection scheme directed at ensuring compliance

3. Although not at issue in this case, *amicus* believes hotel guests themselves have a reasonable expectation of privacy in the information the law requires hotels to collect and retain on them. The so-called third-party doctrine for business records should not deprive hotel guests of an independent Fourth Amendment interest in this information. *See United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) ("I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."). *Amicus* similarly believes that the government's mandating the keeping of such records for the purpose of government access raises serious constitutional questions.

with a non-criminal regulatory regime must afford the party subject to the inspection an opportunity to "obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply."[4] *See*, 387 U.S. at 544-45. Any statute authorizing an administrative search that fails to provide such an opportunity violates this Court's own Fourth Amendment rule each time the government relies on it to authorize a search. As the *en banc* Ninth Circuit found, § 41.49 is such a statute and is thus unconstitutional in every instance.

While some searches of hotel guest records would be valid under the Fourth Amendment due either to the hotel's consent or exigent circumstances, Pet'r's Br. At 19-20, in such cases, a Fourth Amendment exception—and not the ordinance—would authorize the search. As Justice Breyer stated in *City of Chicago v. Morales*:

> The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because

4. *Amicus* questions whether the Court of Appeals correctly characterized the Los Angeles inspection scheme as administrative. Petitioners' defense of the ordinance relies heavily on the city's interest in crime control. *See, e.g.,* Pet'r's Br. at 2 (describing § 41.49 as a "simple strategy to use sunlight to deter crime" in "'parking-meter motels' that are a blight in many high-crime areas"). If the Court views § 41.49 as instead authorizing criminal searches, a search pursuant to the statute would not qualify as administrative under *See* and would require a warrant. *See Michigan v. Tyler*, 436 U.S. 499, 511-12 (1978). In that case, the lack of a warrant requirement in § 41.49 alone would support its unconstitutionality and its potential for facial challenge. *See Berger*, 388 U.S. at 55-60.

> the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.

527 U.S. 41, 71 (1999) (Breyer, J., concurring) (emphasis in original). However, every individual search conducted *pursuant to the ordinance*—not pursuant to a pre-existing Fourth Amendment exception—would be *per se* unconstitutional given the statute's failure to provide an opportunity for pre-enforcement review by a judicial officer. The Court of Appeal's decision in this case is consistent with *Salerno* in precisely this way; the statute's failure to include such an opportunity for review renders its every application unconstitutional. *See Patel*, 738 F. 3d at 1065. No further facts regarding the statute's enforcement are needed to assess its constitutionality, and the statute's constitutionality can be challenged on its face.

B. The Court Should Reject the Categorical Rule Espoused by *Sibron*.

1. *Sibron*'s binary distinction between permissible and impermissible Fourth Amendment facial challenges does not hold up to scrutiny.

In arguing that the Court of Appeals erred in permitting a Fourth Amendment facial challenge to § 41.49, Petitioners point to the statement in *Sibron* 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." 392 U.S. at 59. But as outlined above, the Court has not adhered to this rule and has in fact, post *Sibron*, considered the facial validity of statutes purporting to authorize warrantless searches. *See supra* at pp. 3-6.

Furthermore, the binary distinction suggested by *Sibron*—between challenges to warrantless searches, which must be as-applied, and challenges to "the adequacy of [statutory] procedural safeguards" authorizing search warrants, which can be made on the face of the statute—does not makes sense. *See Sibron,* 392 U.S. at 59 (citing *Berger*, 388 U.S. at 41).

According to *Sibron*, the statute challenged in *Berger* was susceptible to facial challenge because its "operative categories"—its standards for issuing a warrant—clearly implicated the Fourth Amendment. *Sibron*, 392 U.S. at 60; *see also Berger*, 388 U.S. at 60 (finding that the statute's "blanket grant of permission to eavesdrop" was without the "judicial supervision or protective procedures" required by the Fourth Amendment). By contrast, *Sibron* held that the terms of its challenged statute were "elastic" from a Fourth Amendment perspective and "susceptible of a wide variety of interpretations." 392 U.S. at 59-60 & n. 20. But even under this reasoning, any statute that on its face violates a settled, categorical Fourth Amendment rule—thereby rendering unconstitutional all searches authorized under it—should be subject to facial challenge. Indeed, as in *Berger*, the only "operative categories" of any such statute would be categories of the Fourth Amendment. *See id.* at 60.[5]

5. Part of the concern about interpreting the "elastic" statute in *Sibron* likely came from the fact that *Sibron* was decided the

The ordinance at issue in this case is one example of such a statute. By failing to require pre-enforcement judicial review of the search, and by making it a crime to refuse an officer's demand to inspect the records, the ordinance fails to meet basic minimum requirements under the Fourth Amendment. It is easy to envision other examples. In *City of Indianapolis v. Edmond*, this Court found that although suspicionless stops at a highway checkpoint may be constitutional when "designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety," stops that lack "some measure of individualized suspicion" and "whose primary purpose [is] to detect evidence of ordinary criminal wrongdoing" violate the Fourth Amendment. 531 U.S. 32, 41-42 (2000). A city ordinance establishing checkpoints that allow police to stop and search cars without any individualized suspicion of wrongdoing solely for the purpose of crime control clearly violates *Edmond* and the Fourth Amendment. There is no need to wait for a driver to be stopped and

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same day as *Terry v. Ohio*, 392 U.S. 1 (1968), which authorized for the first time a brief investigatory detention and pat down for weapons if law enforcement had reasonable suspicion of criminal activity. The statute at issue in *Sibron* permitted New York police to stop and question a person reasonably suspected of committing a crime. *Sibron*, 392 U.S. at 43. Thus, at the time the statute was under review, the Court had only just announced a new Fourth Amendment rule whose future applications were uncertain. *See Terry*, 392 U.S. at 29 ("These limitations will have to be developed in the concrete factual circumstances of individual cases. *See Sibron v. New York, post,* p. 40, decided today."). Here, the Fourth Amendment rule that the Los Angeles ordinance fails is almost fifty years old; thus, unlike *Terry*, future applications of the statute to clearly established Fourth Amendment requirements are certain.

searched to allow a court to examine the factual context of the individual case before a court can assess whether the ordinance violates the Fourth Amendment; it is simply unconstitutional on its face.

Similarly, a state law that allows police to search the data on an arrestee's cell phone after his arrest, without any probable cause or individualized suspicion that the data contains evidence of criminal activity, clearly violates the Fourth Amendment. *Riley v. California*, 134 S. Ct. 2473, 2493 (2014). There is no need to wait for arrestees to have the data on their phones searched and their privacy violated before the Court can determine whether the law violates the Fourth Amendment; it clearly does.

Like legislation that might violate *Edmond* and *Riley*, there is similarly no need to review the facts surrounding the enforcement of § 41.49 because its unconstitutionality is clear on its face. To follow *Sibron*, however, and to prohibit facial challenges against these sorts of laws, would allow legislative bodies to enact unconstitutional statutes secure in the knowledge that such statutes could only be challenged "as applied."

2. *Sibron*'s concern with ripeness does not mean facial challenges should be impossible under the Fourth Amendment.

In some cases, a pre-enforcement facial challenge to a statute is not ripe for adjudication because there may be instances where enforcement of the statute would not violate the Fourth Amendment and thus the statute's constitutionality turns on facts regarding its enforcement. This was the Court's concern in *Sibron*.

But *Sibron*'s attempt to address ripeness concerns by categorically prohibiting facial challenges to statutes authorizing warrantless searches is unnecessarily overbroad. As explained above, every application of § 41.49 is unconstitutional, given its failure to adhere to *See*'s Fourth Amendment rule that a party subject to an administrative inspection request be granted an opportunity to "obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *See*, 387 U.S. at 544-45. The Court does not need enforcement facts to make this assessment, and the ripeness concerns present in *Sibron* are not present here. It is therefore illogical to apply *Sibron* categorically, as Petitioner advocates.

To the extent a statute is susceptible to "elastic" interpretations that render some searches reasonable and others unreasonable, courts can address those concerns by noting that a facial challenge is inappropriate for the specific statute at issue or find that the issue is not yet ripe for adjudication. In practice, this Court has already done precisely that. For example, in *California Bankers*, the Court rejected a facial challenge on ripeness grounds without upholding the statute on the merits and without prejudice to future facial challenges. 416 U.S. at 51. Meanwhile, the Court also decided a host of pre-enforcement challenges to the recordkeeping requirements of the 1970 Bank Secrecy Act and regulations promulgated under it without any concern for its pre-enforcement nature. *Id.* at 41-42 (explaining that the case came to the Court after a district court issued a temporary restraining order against enforcement of various provisions of the Act and a three-judge district court enjoined enforcement of

certain provisions).[6] While the Court expressly upheld the Act's recordkeeping and reporting requirements against a Fourth Amendment challenge, *id.* at 52-54, 63, it refrained from addressing the depositor-plaintiffs' challenge to another part of the Act's domestic reporting requirements, explaining that the plaintiffs lacked standing and that their Fourth Amendment claims therefore could "not be considered on the record before [the Court]." *Id.* at 69. The Court did not, however, foreclose the opportunity for a plaintiff with standing to bring a facial challenge to the domestic reporting requirements.

Conversely, in *Skinner*, the Court allowed a facial challenge to a regulatory scheme that authorized warrantless searches even though that challenge was brought before the statute went into effect. *See Skinner*, 489 U.S. at 622 ("[I]n light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate."). Because enforcement facts would not have affected the Court's analysis of the statute in *Skinner*, ripeness was not an issue.

When a litigant clearly has standing to challenge a statute, as Respondents do here, the only question a court should consider in assessing whether the statute can be subject to a facial challenge is whether the statute itself supplies all the necessary "facts" to determine if

6. Indeed, while the Government objected to the lower court's facial invalidation of the statute, this Court ruled "it is the actual regulations . . . and not the broad authorizing language of the statute, which are to be tested against the standards of the Fourth Amendment." *Cal. Bankers*, 416 U.S. at 44.

the relevant Fourth Amendment rule has been violated. Because § 41.49 supplies all the necessary facts to determine its constitutionality, the Court of Appeals correctly allowed a facial challenge to proceed.

This Court's own precedent thus illustrates that ripeness can be addressed on a case-by-case basis, regardless of whether the statute purports to regulate warrants. Statutes that require additional facts would simply not be facially invalid or ripe for adjudication. Petitioner's position would sweep up facial challenges to statutes that are unconstitutional in every application and where ripeness is not even a concern.

C. Allowing Facial Challenges Is Consistent with the Court's Fourth Amendment Jurisprudence and the Purposes of the Amendment.

Sibron's categorical rule is also inconsistent with the purpose of Fourth Amendment law, because it prevents meaningful challenges to statutes that clearly violate that constitutional right. Warrantless searches such as those authorized by § 41.49 not only contravene the core requirement of the Fourth Amendment—neutral and prospective judicial review of probable cause and particularity—they also conflict with the Fourth Amendment's underlying purpose: "to prohibit the general warrants and writs of assistance that English judges . . . employed against the colonists." *Virginia v. Moore*, 553 U.S. 164, 168-69 (2008)*; see also Riley*, 134 S. Ct. at 2494; *Payton v. New York*, 445 U.S. 573, 583 (1980) ("indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption

of the Fourth Amendment."). For this reason, the Court has consistently held that warrantless searches are *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions." *California v. Acevedo*, 500 U.S. 565, 580 (1991) (internal quotations and citations omitted); *see also Mincey v. Arizona,* 437 U.S. 385, 390 (1978); *Katz*, 389 U.S. at 357.

Within the category of warrantless searches, suspicionless searches are especially disfavored. The Fourth Amendment "generally bars officials from undertaking a search or seizure absent individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 308 (1997); *see also Terry*, 392 U.S. at 21, n. 18 (the "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence"). To enforce this basic Fourth Amendment norm, the "category of constitutionally permissible suspicionless searches" is "closely guarded." *Chandler*, 520 U.S. at 309.

Prohibiting ripe facial challenges also runs counter to the Court's desire to craft workable, bright-line rules for law enforcement. *See, e.g.*, *Thornton v. United States*, 124 S. Ct. 2127, 2132 (2004) (noting the "need for a clear rule, readily understood by police officers"). Cases like *Edmond*, which held that highway stops that lack "some measure of individualized suspicion" and "whose primary purpose [is] to detect evidence of ordinary criminal wrongdoing" contravene the Fourth Amendment, articulate such clear Fourth Amendment rules—both for what is permitted and what is prohibited. *See Edmond*, 531 U.S. at 41-42.

However, enunciating clear rules is only the first step; enforcement of such rules is equally necessary. Facial adjudication promotes enforcement of clear rules by permitting invalidation of unconstitutional rules sooner rather than later. As the Court stated in *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001), "we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." Yet that is precisely what would result from a regime permitting only as-applied challenges to statutes that authorize warrantless searches.

Sibron's rule—which purportedly insulates from facial challenges statutes that on their face violate core Fourth Amendment principles—is thus inconsistent not only with how this Court actually treats Fourth Amendment facial challenges, but also the broad themes of this Court's Fourth Amendment jurisprudence. The Court has already rejected the rule in practice, and it should take this opportunity to formally overrule it.

II. Facial Challenges Are Necessary to Protect Key Fourth Amendment Rights, Particularly in an Age of Electronic Surveillance.

This Court's jurisprudence on facial challenges in other contexts creates a set of principles that apply equally to the Fourth Amendment and further weigh against *Sibron*'s categorical rule.

For example, in the context of the First Amendment, the Court has recognized an exception to the rule set out in *Salerno*—that "the challenger must establish that no set of circumstances exists under which the [statute] would be valid"—for overbroad restrictions on speech.[7] *See Salerno*, 481 U.S. at 745. And this Court has permitted

7. *Amicus* notes that there is some dispute as to whether the rule set out in *Salerno*—that "the challenger must establish that no set of circumstances exists under which the [statute] would be valid," 481 U.S. at 745—provides the correct standard for facial challenges. *See Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 449 (2008) (noting criticism of *Salerno* by some members of the Court). But the *Salerno* rule is not relevant here, as it is concerned primarily with the propriety of the remedy of facial invalidation, rather than the permissibility of a facial challenge in the first place. *Salerno*, 481 U.S. at 746 (noting that the challengers presented two grounds for invalidation of the statute at issue on its face). In any particular case, a court may either give a challenged statute a narrowing construction to avoid the constitutional problem or simply decide that the facial challenge is unripe. *See Ayotte v. Planned Parenthood of New England,* 546 U.S. 320, 329 (2006) (noting that the court can "enjoin only the unconstitutional applications" of a statute or "sever its problematic portions while leaving the remainder intact") (citations omitted). *Salerno* has bite only when the facial challenge is heard and the court must decide whether *in toto* invalidation of the statute is required. The legal question of the propriety of facial challenges thus embraces several distinct inquiries. For example, facial challenges can also raise third-party standing issues. *Amicus* does not address issues relating to third-party standing because as framed by this Court's questions presented and the lower courts' decisions, Respondents' standing is not at issue. *See Morales*, 527 U.S. at 80 n.3 (Scalia, J., dissenting) (explaining that the third-party standing rule is orthogonal to the *Salerno* rule); *see also Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (distinguishing standing component from merits question of whether overbreadth is "substantial").

facial challenges in non-First Amendment contexts as well. *See Sabri*, 541 U.S. at 609-10 (stating, in dicta, that overbreadth challenges are not restricted to First Amendment cases and citing, *inter alia*, *Aptheker*, 378 U.S. at 514 (right to travel facial challenge); *Stenberg*, 530 U.S. at 938-946 (invalidating partial-birth abortion statute on its face); *Flores*, 521 U.S. at 532-535 (facial challenge under § 5 of the Fourteenth Amendment)).

As Petitioner itself acknowledges, in some settings, "the dangers of facial challenges are outweighed by the practical consideration that a facial challenge is necessary to vindicate a constitutional right." Pet'r's Br. at 24 (citing *City of Lakewood*, 486 U.S. at 759). Quite simply, a facial challenge is often a better way to protect constitutional rights than requiring parties to wait until their rights have been violated and mount a series of costly as-applied challenges.[8] Facial challenges are thus often crucial to vindicate constitutional rights, and Fourth Amendment rights are no exception. Indeed, the concerns expressed by this Court in the context of First Amendment facial challenges apply equally to challenges brought pursuant to the Fourth Amendment.

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8. At the same time, facial invalidation does not usurp the legislature's role if properly cabined by familiar judicial techniques such as severance or narrowing construction. When these techniques cannot be used, courts respect the separation of powers by remanding the statute to the legislature rather than rewriting it. *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997); *see also Massachusetts v. Oakes*, 491 U.S. 576, 586 (1989) (Scalia, J., concurring in part and dissenting in part). As discussed above, whether a facial challenge should be entertained is different from whether a statute should be facially invalidated.

A. Facial Challenges Guard Against Laws That Chill the Exercise of Constitutional Rights.

In the First Amendment context, the Court has recognized that as-applied challenges may not fully protect rights. For example, when a statute, even if not enforced, deters those subject to its restrictions from engaging in protected expression, it chills speech. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("[T]he statute's very existence may cause others not before the court to refrain from constitutionally protected . . . expression.").

As-applied challenges cannot address that chilling effect, which occurs without an official act of enforcement. Indeed, the fundamental concern is the effect of the statute on parties who are not—and who never will be—before any court. As this Court has stated, "[s]elf-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power." *Lakewood*, 486 U.S. at 757; *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("With . . . severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law.").

But the concern for chilling effects is not limited to First Amendment cases. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 893 (1992), the Court invalidated a "husband notification" requirement of a state abortion statute because, given the realities of domestic violence, forced notification was "likely to prevent a significant number of women from

obtaining an abortion." *See also id.* at 897 ("Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband . . . prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto [previously] found unconstitutional[.]"). The Court found the statute invalid on its face because "in a large fraction of the cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895.[9]

Similarly, in *Aptheker v. United States*, the Court found § 6 of the Subversive Activities Control Act unconstitutional because it prohibited the travel of all Communist Party members, even though it had only been applied to high-ranking party leaders. *Id.* at 517. The Court stated, "[t]he threat of sanctions may deter [travel by any Party member, regardless of rank] almost as potently as the actual application of sanctions." *Id.* at 516 (internal quotations and citation omitted). The dissent claimed the statute should have been upheld "[a]s applied to the prosecution of the Communist Party's

9. *Casey* was not the first case to invalidate an abortion-related law because *most* of its applications were unconstitutional. *See Hodgson v. Minnesota*, 497 U.S. 417, 460 (1990) (O'Connor, J., concurring) (invalidating two-parent notification statute on its face because of its "broad sweep and its failure to serve the purposes asserted by the State *in too many cases*") (emphasis added); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 437-39 (1983) (invalidating on its face an ordinance requiring that second and third trimester abortions be performed in a hospital, despite the fact that such a requirement might be a valid health regulation as applied to abortions in the late second trimester or third trimester).

top dignitaries." *Id.* at 523 (Clark, J. dissenting). But the majority held that the statute's prohibition against travel "swe[pt] too widely and too indiscriminately" and was "supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe." *Id.* at 514.

Statutes that violate Fourth Amendment rights result in similar chilling effects. Most obviously, searches involving protected expression raise concerns much like those in First Amendment cases. *See Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961) ("The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."); *Stanford*, 379 U.S. at 485 (noting the "closely related" nature of First and Fourth Amendment protections). For this reason, the Court has required "scrupulous exactitude" in applying Fourth Amendment requirements to such searches. *Id.*

The growth of electronic surveillance of communications and communications records has led to concern that ostensibly private communications—along with records about whom we communicate with, when, and for how long—are being surveilled. Such surveillance generates its own form of chill: reticence in private communications and adoption of (sometimes costly) precautions against surveillance. *See United States v. United States District Court (Keith),* 407 U.S. 297, 314 (1972) ("The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation."). In the Internet era, chill or deterrence

will also affect individuals' choice of what to read about or search for online. One may reasonably fear that searches about certain political or religious topics may attract attention, just as use of public libraries did in the past. Unsurprisingly, as the details about the surveillance conducted by the National Security Agency has become public, a 2014 Harris poll showed that 47 percent of respondents "were thinking more carefully about what they do, what they say or where they go on the Internet in light of the spying revelations." Julian Hattem, "Many Say NSA News Changed their Behavior," *The Hill*, April 2, 2014.[10] And a Pew Research study from November 2014 found that 80 percent of adults "agree" or "strongly agree" that Americans should be concerned about government surveillance, while 61 percent of Americans felt like they "would like to do more" to protect the privacy of their personal information online. Pew Research Internet Project, "Public Perceptions of Privacy and Security in the Post-Snowden Era," November 12, 2014.[11] And indeed, the revelation of the National Security Agency's telephony metadata program has generated litigation over the First Amendment right to freedom of association. *See First Unitarian Church of Los Angeles v. NSA*, No. 13-cv-03287 (N.D. Cal., filed July 16, 2013); *ACLU v. NSA*, 959 F. Supp. 2d 724, 752 (S.D.N.Y. 2013), *appeal pending*, No. 14-42 (2d Cir., filed Jan. 2, 2014); *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013), *appeal pending* (D.C. Cir., filed Jan. 3, 2014).

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10. *Available at* http://thehill.com/policy/technology/202434-poll-nearly-half-say-nsa-news-affected-behaior (last visited January 23, 2015).

11. *Available at* http://www.pewinternet.org/2014/11/12/public-privacy-perceptions (last visited January 23, 2015).

Just as facial challenges are needed to address chilling effects in the context of the First Amendment, they are needed to address the chilling effects of statutes that violate the Fourth Amendment. Statutes that authorize unconstitutional searches and seizures, prompting people to think twice about how they conduct themselves online and ultimately chilling free expression, can and should be facially challenged if the law violates the requirements of the Fourth Amendment on its face.

B. Prohibiting Facial Challenges Results in Under-Enforcement of Constitutional Rights.

As-applied challenges will often be inadequate—not only because of their failure to address self-censorship and chilling effects—but because they are costly, both to affected parties and to the Constitution. In the First Amendment context, this Court has acknowledged that "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will simply choose to abstain from protected speech[.]" *Virginia v. Hicks*, 539 U.S. at 119; *see also Lakewood*, 486 U.S. at 758 (observing that while plaintiffs litigate as-applied challenges, "opportunities for speech are irretrievably lost"). As-applied challenges are also costly as a matter of judicial resources, leading to multiple, piecemeal lawsuits involving statutes that could have been struck in a single ruling.

Just as in *Hicks* and *Lakewood*, case-by-case litigation in the warrantless search context can be expected to underproduce Fourth Amendment challenges. Courts generally review such challenges in two discrete, post-

enforcement settings: (1) motions to suppress evidence obtained as a result of the warrantless search; or (2) damages claims against the officers who conducted the search under 42 U.S.C. § 1983 or its federal counterpart. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). But motions to suppress will only test the statute if someone is actually prosecuted, and many defendants have strong incentives to plea-bargain and avoid actual legal challenges. And when motions to suppress are brought, they often do not result in the exclusion of evidence—even when a constitutional violation is found to have occurred—due to the narrow application of the exclusionary rule. *See Herring v. United States*, 129 S. Ct. 695, 700 (2009) ("exclusion 'has always been our last resort, not our first impulse'") (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). Meanwhile, doctrines like qualified immunity can shield police conduct from merits review, and constitutional torts require victims of the unconstitutional search to bear substantial upfront costs simply to bring a complaint. As a result, few individuals are likely to challenge unconstitutional stop-and-frisks for lack of reasonable suspicion.

Facial Fourth Amendment challenges permit courts to assess the constitutionality of a government search or seizure without the high costs attached with these remedies. In the criminal context, facial challenges to search and seizure statutes allow courts to rule before police conduct an illegal search, which would require the application of the exclusionary rule and perhaps allows a criminal defendant to go free. In the civil context, facial challenges can similarly be brought before an unconstitutional search or seizure results in public harm, reducing costs to government entities who would otherwise be forced to defend a suit or pay damages if liable.

Moreover, this Court has already recognized two inadequacies of as-applied challenges in some Fourth Amendment contexts. First, in *Camara v. Municipal Court*, the Court found an administrative search unconstitutional, noting concern that "only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search." 387 U.S. 523, 532 (1967). Similarly, limiting Fourth Amendment challenges to as-applied situations may require in some instances a person to violate the law and suffer the consequences in order to challenge a search or seizure statute.

Second, *Camara* was also concerned that a person subject to an administrative search "may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry." *Id.* In the Fourth Amendment context, many forms of problematic electronic surveillance can easily be concealed from the surveillance targets, making it far less likely that a person being watched by the government will be on notice and thus able to challenge the surveillance. This secrecy allows the government to easily "evade[] the ordinary checks that constrain abusive law enforcement practices," specifically "community hostility" when surveillance becomes public. *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (citations omitted).

Further, the intense secrecy surrounding surveillance programs in both the national security and domestic law enforcement contexts makes any meaningful review impossible. The paucity of criminal prosecutions resulting from such surveillance and the fact that the government may not reveal the use of surveillance techniques even

when it does prosecute exacerbate this concern. *Compare Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1154 (2013) (arguing that barring facial standing to FISA Amendments Act (FAA) would not insulate the Act from judicial review due to availability of as-applied review in criminal proceedings), *with* Charlie Savage, *Federal Prosecutors, in a Policy Shift, Cite Warrantless Wiretaps as Evidence*, N.Y. Times (Oct. 26, 2013) (reporting that criminal defendants prosecuted using evidence derived from FAA surveillance had not previously been notified of this use).

Put another way, it is harder to conceal a physical search of a home or business than an act of electronic surveillance. After a search of her home, an innocent homeowner will know her rights have been violated and will, if she so chooses, be able to litigate the search under *Bivens* or a 42 U.S.C. § 1983 action. But an innocent person who has been subjected to electronic surveillance is unlikely to know that the surveillance occurred, making it equally unlikely that the specific instance of surveillance will be challenged. Barring all facial challenges to warrantless searches would make it even harder for those potentially subject to such surveillance to protect their rights.

C. Facial Challenges Ensure Against Abuse of Discretion.

Abuse of excessive official discretion—a concern in the First Amendment context—is also a concern for Fourth Amendment searches. For instance, the First Amendment condemns licensing statutes that "vest[] unbridled discretion in a government official," *Lakewood*, 486 U.S. at 755, because such laws "create[]

an impermissible risk of suppression of ideas[.]" *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992). The concern over excess discretion is not merely a concern for chilling speech in general, but a concern for discrimination against disfavored speech or speakers in particular. As this Court has explained, excess discretion "has the potential for becoming a means of suppressing a particular point of view." *Id.* at 130 (*quoting Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 649 (1981)); *see also Thomas v. Chi. Park Dist.*, 534 U.S. 316, 323 (2002) ("Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content."). Because of the risk inherent in statutes that grant officials too much discretion, this Court requires facial invalidation in such cases, "even [when the law's] application in the case under consideration may be constitutionally unobjectionable." *Nationalist Movement*, 505 U.S. at 129.

In the Fourth Amendment search context, the concern for discretion has at least two dimensions. Absent any advance judicial review, the government would enjoy great discretion regarding (i) whom or what entities to search and (ii) the scope of the search. As this Court had observed, "bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the [government].'" *Katz*, 389 U.S. at 358-59 (citation omitted). Indeed, the requirement of *See* upon which the court below decided the facial challenge at issue in this case—an opportunity for pre-enforcement judicial review of the inspection—was based on precisely this concern about official discretion. *See,* 387 U.S. at 545 (recognizing

the importance of a subsequent opportunity for review because "the [initial] decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field");[12] s*ee also Camara*, 387 U.S. at 532 (striking a conviction for refusing to comply with an ordinance authorizing warrantless housing "area" inspections for municipal code violations and observing that "[t]he practical effect of this system is to leave the occupant subject to the discretion of the official in the field").

As this Court has stated, "[t]he Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[.]'" *Morales*, 527 U.S. at 60 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)). Legislatures may also not entrust such authority to the "moment-to-moment judgment of the policeman on his beat." *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (citation omitted). Courts should not be limited to hearing as-applied challenges to statutes

12. The same concern arises in vagueness cases. In *Morales*, a plurality of the Court called for facial invalidation of criminal laws "[w]hen vagueness permeates [their] text[.]" *Morales*, 527 U.S. at 55; *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) ("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement."). In *Gentile*, the Court emphasized that "[t]he question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." *Id.*; *see also City of Houston, Tex. v. Hill*, 482 U.S. 451, 459 (1987) (explaining that vague criminal statutes "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application").

that violate these maxims by casting a surveillance net large enough to catch all possible offenders.

D. Facial Challenges Prevent, Not Merely Redress, Constitutional Violations.

The Constitution's framers originally intended the Fourth Amendment to serve as a shield against freestanding authority to conduct general searches. Facial challenges, which can ensure that a statute is struck before the government relies on it to effect an unconstitutional search, support this intent; they ensure the Fourth Amendment does not merely remedy constitutional violations but also prevents them in the first place.

The Establishment Clause similarly shields against certain government conduct. As such, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 317 (2000), the Court found that a public school procedure that would give the student body power to authorize a religious message at a football game violated the First Amendment. As the Court explained, waiting to see whether student speakers in fact prayed at football games would have "threaten[ed] the imposition of coercion upon those students not desiring to participate in a religious exercise." *Id.*; *see also id.* ("Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred. No further injury is required for the policy to fail a facial challenge.").

The Fourth Amendment, like the Establishment Clause, operates as a shield against certain government conduct—*i.e.*, unconstitutional searches. Indeed, the

Fourth Amendment is not merely a "right" against unreasonable searches, it is also a "right . . . *to be secure*" against unreasonable searches. *See* U.S. Const., amend. IV (emphasis added). The inclusion of this phrase—"to be secure"—demonstrates the Founders' intent for the Amendment to prevent, not merely redress, violations. Indeed, "[h]ad the framers sought only to safeguard a right to be 'spared,' they could have omitted the phrase 'to be secure' and drafted the Amendment to provide for a 'right against unreasonable searches and seizures.'" Luke Milligan, *The Forgotten Right To Be Secure*, 65 Hastings L.J. 713, 745–46 (2014) (noting that "[i]nterpreting 'secure' to mean [merely] 'spared'" raises the structural issue of "linguistic excess"). Indeed, the warrant clause expressly regulates the issuance of warrants, not their execution. The founding-era discourse concerning searches and seizures—"which regularly emphasized the harms attributable to the *potentiality* of unreasonable searches and seizures"—further supports that the Founders intended the Fourth Amendment to have prophylactic effect. *Id.* at 718 (emphasis in original). The very text and history of the Amendment thus calls for a protective buffer against unreasonable governmental intrusion to ensure that constitutional violations are prevented—not merely dealt with after the fact.

Permitting facial challenges to statutes that authorize unconstitutional warrantless searches is necessary to ensure that Fourth Amendment violations are prevented. As-applied challenges are simply not sufficient to prevent violations, for regardless of whether evidence obtained from unconstitutional searches conducted pursuant to the statutes is used in a criminal trial, a Fourth Amendment violation is "fully accomplished" at the time of the

search. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (citations omitted). Limiting challenges to case-by-case adjudication would thus fail to prevent unconstitutional searches. Because prohibiting facial challenges to statutes that authorize warrantless searches weakens the Fourth Amendment's power to act as shield, such a prohibition is in conflict with the Founders' intent.

As such, not only is a prohibition on Fourth Amendment facial challenges to statutes that authorized warrantless (as opposed to warranted) searches illogical, but it also violates fundamental constitutional principles. Facial challenges to unconstitutional statutes are necessary to protect key Fourth Amendment rights, and they should be allowed—regardless of whether a statute authorizes warranted or warrantless searches.

CONCLUSION

For the above reasons, the Court should hold that Fourth Amendment facial challenges are allowed.

Respectfully submitted,

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