No. 20-1755

In the
Supreme Court of the United States

DEAN HOTOP, ET AL.,
Petitioners,
v.

CITY OF SAN JOSE, A MUNICIPAL CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF SAN JOSE

NORA FRIMANN
ARDELL JOHNSON
MALGORZATA LASKOWSKA
Counsel of Record
OFFICE OF THE CITY ATTORNEY
200 East Santa Clara Street
16th Floor
San José, CA 95113-1905
(408) 535-1900
cao.main@sanjoseca.gov

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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1. *Hotop et al. v. City of San Jose*, 2018 WL 4850405 (N.D. Cal., Oct. 4, 2018) -- order granting rule 12(b)(6) motion to dismiss without prejudice

The district court granted without prejudice the City of San Jose's rule 12(b)(6) motion to dismiss the plaintiff landlords' first amended complaint without prejudice. (Appellant's Excerpts of Record in Ninth Circuit ("ER") 345-63). The court found that the complaint failed to allege facts sufficient to support the plaintiffs' claims. (ER 352.)

Regarding the Fourth Amendment search and seizure claim, the court found as follows. "As with Plaintiffs' other allegations, Plaintiffs do not allege which of the three Ordinance disclosure requirements—the Registry, the termination notice disclosure, or the buyout agreement disclosure—violates the Fourth Amendment, or whether all three do." (ER 352.)

"Plaintiffs fail to articulate how the Ordinance disclosure requirements implicate Plaintiffs' protected constitutional interests. Plaintiffs make only the conclusory allegation that Plaintiffs' business records are 'private' and 'not found in the public domain.'" (ER 354.)

The court rejected the Fourth Amendment search and seizure claim because the complaint did not allege facts showing that the Ordinance requires the plaintiff landlords to disclose any information they would not otherwise disclose as part of petitions to raise rents

beyond the amount permitted under the Ordinance. (ER 355.) "Without such supporting facts, Plaintiffs' allegation that the Ordinance requires Plaintiffs to share 'private business records that is not found in the public domain' is a legal conclusion." (*Id.*)

2. *Hotop v. City of San Jose*, 982 F.3d 710 (9th Cir. 2020)

The Ninth Circuit Court of Appeal affirmed the district court's dismissal for failure to state a cognizable claim. It also unanimously denied the landlords' petition for a panel rehearing and rehearing *en banc*.

The Ninth Circuit declined to rule whether the Fourth Amendment is implicated only by a physical inspection of documents. (*Hotop v. City of San Jose*, 982 F.3d 710, 714 (9th Cir. 2020).) The court stated, however, that "[e]ven if the Fourth Amendment is implicated by certain non-physical intrusions, in that context the plaintiff must have a reasonable expectation of privacy in the contents of the documents before the government's conduct can be deemed a Fourth Amendment 'search.'" (*Id.*)

The court found that the plaintiffs "failed to adequately allege that they have a reasonable expectation of privacy in the information contained in the business records at issue." (*Id.*) The complaint did not allege or explain how the information required by the Ordinance meaningfully differs from the information that landlords or their tenants would otherwise include in rent-related petitions to the City

under the Ordinance's other provisions whose validity was not challenged. (*Id.* at 715.)

The concurring opinion agreed with the outcome of the case and with the reasoning regarding all claims other than the Fourth Amendment. (*Id.* at 719.) The concurrence would have found that "there was no Fourth Amendment search here, irrespective of whether plaintiffs had an 'actual (subjective) expectation of privacy." (*Id.* at 723.)

The concurrence noted:

> [I]f other courts follow the majority's approach here, anyone who must provide information to government can lodge a Fourth Amendment challenge to the requirement based on their 'reasonable expectation of privacy' in the information sought. Allowing a Fourth Amendment claim to proceed *with* such allegations of privacy, but with no plausible allegation of an actual Fourth Amendment search, will subject government at every level to inappropriate judicial scrutiny of its actions—especially when it "conditions" benefits on reporting information.

(*Id.*) (emphasis in original)

The landlords' petition's misstatements and mischaracterizations of the appellate decision are addressed in detail in the argument section of this brief. (*See* Petition at 5-6.)

Respondent City of San Jose respectfully requests this Court to deny the petition for writ of certiorari.

STATEMENT OF THE CASE

A. San Jose's Apartment Rent Ordinance

1. History of the Ordinance

In 1979, San José enacted a rent control ordinance as San José Municipal Code Chapter 17.23. (ER 126.) In 2015, after several years of significant rent increases that resulted in the highest rents in San José's history until then, the City Council identified, as a high policy priority, potential changes to the Ordinance. (ER 236.)

In 2016, City staff recommended changes to the Ordinance based on findings of a consultant report, staff research, case studies, written public comment, and input from the Advisory Committee and the Housing and Community Development Advisory Commission. (ER 238-39.) Staff concluded that even though the Ordinance gave landlords flexibility to run their business, it did not satisfy the public purpose of meeting the needs of both landlords and tenants. (ER 240-42.)

To achieve a greater balance in meeting the Ordinance's goals (ER 241-42), City staff recommended adding a rent registry to facilitate monitoring and enforcement of the Ordinance. (ER 246-47.) At the time, seven California cities had their own active registries that provided a basis for enforcement and outreach. (ER 240.) San José's Ordinance did not then require landlords to register their rent stabilized units. (*Id.*)

A study commissioned by San Jose's Housing Department revealed that out of 44,300 rent-stabilized units in the City, 26% (or 11,500) turned over to new tenancies every year. (ER 247.) Yet, the City received only a fraction of that number in filed reports of no-cause evictions. (*Id.*) That meant that either landlords were not complying with the Ordinance's requirement to report no-cause evictions (preventing the City from ensuring that landlords did not impermissibly raise rents on new tenants), or many apartments turned over due to evictions or voluntary vacancies (allowing landlords to charge the market price every year). (*Id.*) A rent registry would provide information about prevalence of these scenarios. (*Id.*) Registry data would allow the City to assess compliance with the Ordinance, and let landlords and tenants gauge its effectiveness and observe trends and changes in the relevant housing stock. (*Id.*)

In November 2017, following staff's recommendations and many Council meetings, San Jose City Council adopted the Apartment Rent Ordinance as Title 17, Chapter 17.23, Parts 1 through 9. (ER 125.) This Ordinance amended and superseded the previous Apartment Rental Mediation and Arbitration Ordinance's Parts 1 through 8 of Chapter 17.23, Title 17 of the San José Municipal Code. (ER 125-26.)

2. Purpose of the Ordinance

Like the original Ordinance, the stated purpose of the current version is to promote stability and fairness in the residential rental market in order to serve public peace, health, safety, and welfare, to prevent excessive

and unreasonable rent increases, to alleviate undue hardship on individual tenants, and provide opportunity for landlords to earn a fair return. (ER 126.) To further protect tenants from excessive and unreasonable rent increases, the Ordinance generally limits annual rent increases, requires notices to the City, regulates what costs may be passed through to tenants, and provides for monitoring the rents and for an administrative review process for housing-related disputes. (ER 126-27.) The rights and obligations of landlords and tenants under the Ordinance are created under the City's general police powers to protect health, safety, and welfare of its residents. (ER 127.)

3. The Rent Registry

Part 9 of the Ordinance adds the Rent Registry for Rent Stabilized Units. (ER 166-67.) The procedures for registration are established in San Jose Municipal Code section 17.23.900 and in the Regulations adopted by the City Manager for the implementation and administration of the Ordinance. (ER 166.)

Municipal Code section 17.23.900 provides that "[a]ll registration requirements are subject to California Civil Code Section 1947.7, as may be amended." (*Id.*) Section 1947.7 provides in part that "an owner shall be deemed in compliance with the ordinance, charter, or regulation if he or she is in substantial compliance with the applicable local rental registration requirements and applicable local and state housing code provisions, [and] has paid all fees and penalties owed to the local agency . . . ." (Cal. Civil Code §1947.7(e).)

Section 17.23.900 also states that when a landlord is required to provide the name of a present or former tenant, then the tenant's name and any additional information given in connection with the regulation or monitoring of eviction must be treated as confidential under the Information Practices Act of 1977, and "a local agency subject to this subdivision may request, but shall not compel, an owner to provide any information regarding a tenant other than the tenant's name." (Cal. Civil Code §1947.7(g).)

Section 17.23.900 further states that "the Landlord shall complete and submit to the [Housing Department's] Director a registration for each Rent Stabilized Unit on a City approved form on an annual basis." (ER 166.) It requires landlords to provide tenants with a copy of a completed registration form relating to the tenant's unit, allowing the landlord to redact "any information that does not pertain to that Rent Stabilized Unit except the name and address of the Landlord." (*Id.*)

The rent registry allows City staff to proactively identify non-compliance, notify tenants when they are over-charged, and enforce program requirements. It increases the amount of information available to staff, tenants and the public and boosts analysis of trends in the residential rental market, thus serving the overall purpose of the Ordinance. For example, information about the number of tenants allows evaluation of trends in the housing markets related to the size of households and changes in the housing stock. (ER 247.) Information on initial housing services provided to tenants assists in tenant petitions to the City based on

reduction in services. (ER 144 (tenant may submit petition to City requesting rent reduction based on decreased housing services).)

The petitioners assert that "[t]he landlords [sic] ability to increase rents is contingent on their providing the information" required by the Rent Registry provisions of the Ordinance and Regulations. (Petition at 2 & 4.) This statement is not accurate because non-compliant landlords of rent-stabilized units may still apply for rent increases as follows.

Under Municipal Code section 17.23.310, landlords of rent-stabilized units may annually increase rents by up to five percent. (ER 138.) Under section 17.23.320, landlords may also submit Fair Return Petitions to the City if they wish to increase rents above the annual five percent. (ER 140.) Under sections 17.23.325 and 17.23.330, there are also certain fees, charges and costs not considered rent, which landlords may pass through to their tenants. (ER 141-44.) Thus, landlords who are not in substantial compliance with the Rent Registry provisions may not increase rent by the annual five percent but may still seek the other increases and pass-throughs.

The landlords also incorrectly claim that "personally identifying information about tenants and their households that is received by the City under this section [SJMC § 17.23.600] shall be used for investigation and prosecution of the municipal code and other applicable laws." (Petition at 3.) In fact, Municipal Code section 17.23.600 is irrelevant to the Rent Registry because it is placed in Part 6 of Chapter 17.23, entitled "Evictions – Rent Stabilized Units." (ER

151.) The investigation and prosecution referred to in section 17.23.600 concerns only unlawful evictions.

4. Information required for registration

Chapter 4 of the Apartment Rent Ordinance Regulations outlines the registration process for landlords of Rent Stabilized Units. (ER 181-83.) The purpose of Chapter 4 is to enable the City to monitor and control allowable rents as required by the Ordinance. (ER 181.)

Under Regulations section 4.02.2, "the Landlords shall complete and submit to the [Housing Department's] Director the registration form along with the annual fee payment prior to the payment deadline identified in the fee statement." (*Id.*)

The registration form must include: the address of the unit; the name and address of the landlord; the unit's occupancy status, and if occupied, the tenancy's start date; the unit's rent history; the amount of the security deposit; whether the unit is sub-metered, master-metered, or unmetered; the names and number of tenants occupying the unit; household services provided at the start of the tenancy; the landlord's signature that the information provided in the annual registration is true and correct under penalty of perjury; and other information reasonably requested by the City. (ER 182-83.)

5. Information that landlords and tenants of rent-stabilized units routinely submit to the City

In San José, even absent the new Rent Registry, landlords and tenants subject to rent control routinely submit information to the City's Housing Department regarding their units. For example, landlords have the right to petition the City for a fair return rent increase above the Ordinance's annual allowance. (ER 154-65.) They can petition to pass through to their tenants the cost of certain capital improvements. (ER 141.) And tenants can petition the City in cases of improper rent increases, improper pass through of charges, housing service reductions, Housing Code violations, or a violation of the Ordinance. (ER 144.) Landlords and tenants can also file joint petitions regarding addition of new housing services. (ER 145.)

In a fair return petition under Part 8 of the Ordinance and Chapter 8 of the Regulations, landlords would submit documentation such as tax returns, ledgers, receipts, invoices, checks, insurance claims, and appraisals. (ER 196-97.) And when petitioning for increases based on capital improvements, landlords would include invoices and other financial documents justifying their request. (ER 203-206.) A tenant's petition for any of the above reasons would require the landlord's and tenant's names and contact information, the apartment number, move-in date, the basis for the petition and, depending on the basis, information about either the security deposit, rent amount, improperly charged fees, or problems with the rent stabilized unit. (*See* ER 186-89.) In each of these instances the

information provided by landlords and tenants under the petition process allows them to benefit from the procedures set forth in the Ordinance and Regulations. The information requested under the Ordinance's rent registry provisions is similar. (*See* ER 182-83.)

B. Allegations in the first amended complaint

The operative first amended complaint ("complaint") sought to assert a violation of civil rights under 42 U.S.C. section 1983 based on the City's alleged official policy, custom, and practice. (ER 119 (¶22) & 122 (¶28).) It alleged that all plaintiffs are "long standing apartment owners and operators" in San José. (ER 113 (¶3).) In November 2017, the City adopted an ordinance that amended San José Municipal Code Title 17, Chapter 17.23 ("Ordinance"); the City also adopted regulations to implement the Ordinance ("Regulations"). (ER 114 (¶¶8-9) & ER 124-217.)

The complaint stated that the Ordinance and Regulations "establish a 'Rent Registry'" that requires landlords of "rent stabilized units," defined in the ordinance, to submit registration forms to the City with certain information. (ER 115-16 (¶¶11-12).) At the end of a tenancy, the Ordinance requires a notice to the City with certain information. (ER 116-17 (¶14-15).) The Ordinance also mandates that landlords provide tenants with disclosure forms when they negotiate a voluntary vacancy with their tenants. (ER 117 (¶16).)

The complaint claimed that those disclosure requirements violate the Fourth Amendment because the plaintiff landlords and their tenants do not consent to them. (ER 115-18 (¶¶13-17) & ER 119-20 (¶23).) The

Ordinance and Regulations allegedly infringe on the plaintiffs' tenants' privacy rights under the California Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. (ER 118 (¶¶18-19).)

The pleading asserted violations of the Fourth Amendment, substantive and procedural due process rights, the Takings Clause of the Fifth Amendment, equal protection, and the Contract Clause of Article I of the United States Constitution. (ER 119-22 (¶¶23-27).) The complaint alleged that the plaintiffs, because they are subject to the Ordinance and Regulations, are treated differently from those landlords who are not subject to them, "such as duplexes, multifamily rental properties constructed after September 7, 1979 and other rentals." (ER 121 (¶26).) The complaint also asserted that the Ordinance and Regulations interfere with the plaintiffs' lease and rental contracts. (ER 121-22 (¶27).) The complaint sought damages, injunctive and declaratory relief and attorney's fees. (ER 122.)

THE PETITION SHOULD BE DENIED

1. The Questions Presented were neither pressed nor passed below.

The petition's first Question Presented asks whether the City's Ordinance "constitute [sic] a 'constructive' search under the Fourth Amendment." (Petition at i.) But the petition's analysis of the Ninth Circuit's majority opinion does not mention "constructive search." It instead focuses on the "trespass" theory of the Fourth Amendment absent from the Questions Presented—that the challenged

provisions of the Ordinance allegedly effect a physical trespass on the petitioners' business records and that the courts below should have addressed that theory. (*See id.* at 7-10.)

The petition raises "constructive search" only when discussing the concurrence. (*See id.* at 9, 12 & 14.) Only the concurring opinion mentioned constructive searches. (*Hotop*, 982 F.3d at 721.) They are commonly associated with court orders and administrative subpoenas, but the present case involves neither. (*Id.*) Because concurring opinions are not binding precedent, this Court's review of this concurring opinion is not needed. (*Bronson v. Bd. of Educ.*, 510 F.Supp. 1251, 1265 (S.D. Ohio 1980).) (*See also Alexander v. Sandoval*, 532 U.S. 275, 285 n.5 (2001) (majority opinion is not coextensive with concurrence because majority does not expressly preclude concurrence's approach).)

The second question presented is whether there is "a 'required records' exception to the Fourth Amendment for business records or information required to be maintained and produced to the government by way of a regulatory process." (Petition at i.) This question is based on the false premise that "the majority and [the concurrence] appear to hold that there is some form of a required records exception" allegedly applicable here. (*See* Petition at 7 & 14-17.) As explained below, the Ninth Circuit's decision contains no such holding.

Additionally, the phrases "constructive search" and "required records" are absent from the petitioners' briefs in the district court and the court of appeal. (*See*

Petitioners' Appx. A & B.) Because those issues were not before either court, they did not decide them.

Finally, both questions mention "business records and information," but the challenged provisions of the Ordinance only seek information, not records. (ER 166 (SJMC §17.23.900).) The landlords acknowledge that the Ordinance seeks information on a City form. (*See* Petition at 2-3.)

In sum, the Questions Presented were neither raised nor decided in the courts below and do not apply to the facts the petitioners alleged or the Ordinance's provisions. Whatever inherent interest of the Questions Presented, this case is not an opportunity to address them.

2. The arguments of the petitioners and their amici rest on a mischaracterization of the decision below.

a. The argument that the court fused expectation of privacy with the property interest analysis

The landlords misstate the Ninth Circuit's decision when they argue that the court unnecessarily focused "on the *Katz* 'reasonable expectation of privacy' standard" because "under the property prong of the Fourth Amendment" expectation of privacy need not be determined. (Petition at 8-9.) The landlords neglect to acknowledge that their complaint did not plausibly allege a possessory property interest and that the court declined to address it because they only raised that theory for the first time on appeal. (*Hotop*, 982 F.3d at 714 n.3.)

Amici California Rental Housing Association and Apartment Owners Association of California, Inc. ("California Associations") similarly mischaracterize the Ninth Circuit's opinion. They assert that it contains the "holding that whether the challenged government conduct is characterized as a 'physical inspection' or a 'non-physical intrusion,' the challenger must always establish 'a reasonable expectation of privacy' in order to state a Fourth Amendment 'search.'" (Cal. Assns.' Brief at 5.) Not so.

In fact, by stating that "[w]ith respect to searches of 'papers,' we need not decide whether the Fourth Amendment is implicated only by a physical inspection of the documents themselves" (*Hotop*, 982 F.3d at 714), the Ninth Circuit indicates that no physical inspection or "trespass" was plausibly alleged. That is reasonable because the Ordinance and Regulations "requir[e] landlords to provide certain information [as opposed to documents] to the City through the Director of the Department of Housing." (*Id.* at 713.)

The Ninth Circuit continues its analysis by assuming that the Fourth Amendment is implicated by "certain non-physical intrusions," and that in the non-physical context "the plaintiff must have a reasonable expectation of privacy in the contents of the documents before the government's conduct can be deemed a Fourth Amendment 'search.'" (*Id.*)

For emphasis, the Ninth Circuit's opinion notes that the landlords raise a "property interest" Fourth Amendment claim for the first time on appeal, and that the court in its discretion declines to address it. (*Id.* at 714 n.3.) Therefore, contrary to the argument of the

petitioners and the California Associations amici, the Ninth Circuit did not hold that a reasonable expectation of privacy must be shown for both property- and privacy-type Fourth Amendment claims.

b. The alleged misapplication of the "required records" doctrine

The petitioner landlords incorrectly argue that the Ninth Circuit somehow decided that they lost their Fourth Amendment rights in their business records with the enactment of the Ordinance. (Petition at 14-17.) They raise an irrelevant exception to records production under the Fifth Amendment. (*Id.*) The required records exception was never argued by the City nor was it mentioned by the Ninth Circuit.

Neither party argued below that the required documents doctrine applies here. Nor does the Ninth Circuit's opinion make any mention of "required records." The landlords claim that "the majority and [the concurrence] appear to hold that there is some form of a required records exception to the Fourth Amendment, at least in the area of administrative searches of business records." (Petition at 7.) The landlords distort the *Hotop* opinion. There is no such holding.

Unlike the cases below on which the landlords rely, the Ordinance does not authorize a search of any item or location.

McLaughlin v. Kings Island, 849 F.2d 990 (6th Cir. 1988), involved "an unannounced inspection accompanied by an arbitrary and discretionary demand to inspect company records not only as they relate to a

specific complaint, but for hygenic and environmental problems in general." (*Id.* at 995.) Unlike in *McLaughlin*, there is no risk of "unbridled discretion" on the part of City staff, "particularly those in the field" (*id.* at 997), because the Ordinance does not authorize unannounced field inspections or any inspections at all and delimits the type of information the City may collect. (ER 166 (SJMC §17.23.900) & ER 181-82 (Regs. Ch. 4).)

Brock v. Emerson Electric Co., 834 F.2d 994 (11th Cir. 1987), also involved a records inspection. (*Id.* at 995-96.) In fact, *Brock* concerned the same provision of the Occupational Safety and Health Act later invalidated by the 6th Circuit in *McLaughlin*. (*See McLaughlin*, 849 F.2d at 991.) *Patel v. City of Los Angeles*, 738 F.3d 1058 (9th Cir. 2013) (en banc), too, concerned a law authorizing unannounced field inspection of documents. (*Id.* at 1061.)

Rakas v. Illinois, 439 U.S. 128 (1978), another case on which the landlords rely, involved evidence seized in a car in which defendants were passengers. (*Id.* at 129-30.) The *Rakas* Court held that the passengers were not entitled to challenge the search of areas where they had no property or possessory interest and no legitimate expectation of privacy. (*Id.* at 148.) The case provides no basis to conclude that a landlord has a property or possessory interest in information of the type collected by the City under the Ordinance.

Finally, *Shapiro v. United States*, 335 U.S. 1 (1948), involved a subpoena for documents required by the Emergency Price Control Act, and the Court held that documents required by statute are sufficiently public

(rather than private) to remove them from Fifth Amendment protection, giving rise to the "required records" exception from the Fifth Amendment. (*Id.* at 3, 34-35.) *Shapiro* does not help the petitioner landlords here, either, because they had waived any argument related to the "required records" doctrine by failure to press it below.

c. The alleged difference in information sought by the Rent Registry and in rent increase petitions

Both the landlords and their amici California Associations misstate the Ninth Circuit's decision when they claim that it decided that their business records and information were public. (Petition at 16-17; Cal. Assns. brief at 9-13.) The amici also erroneously claim that the court of appeal "held" that disclosure of one set of records "automatically delegitimizes any expectation of privacy in other records" if they contain similar information. (Cal. Assns. brief at 3 & 11-12.) The appellate opinion does not contain such holdings.

The court of appeal decided that the "complaint fails to allege facts plausibly suggesting that they have a reasonable expectation of privacy in the information that must be disclosed under the challenged provisions." (*Hotop*, 982 F.3d at 715.) Despite leave to amend by the district court, the landlords chose not to amend their complaint. (*Id.* at 716; Petition at 5.)

The complaint's sole substantive allegation of privacy was that "[t]he ordinance disclosure requirements" "require plaintiffs to disclose to the City" "information [that] constitute[s] plaintiffs' private

business records that is not found in the public domain." (ER 118; *Hotop*, 982 F.3d at 714-15.) The Ninth Circuit noted that "[t]he complaint does not contain any factual allegations distinguishing the information at issue in this case from similar information landlords already provide to the City in other contexts under regulations whose validity has not been challenged." (*Id.* at 715.) Such "additional factual allegations *were* necessary before the district court could plausibly infer that plaintiffs maintained a reasonable expectation of privacy in the information contained in the business records at issue." (*Id.* at 716.) (italics in original) The landlords' argument in court or in a brief does not substitute for the complaint amendment they chose to forego. (*See* Petition at 16-17.) (*See also Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004), & Fed. R. Civ. Proc. 15.)

The Ninth Circuit distinguished the present case from *Patel v. City of Los Angeles*, 738 F.3d 1058 (9th Cir. 2013) (en banc), *aff'd*, 576 U.S. 409 (2015), as follows: "Because there was no indication in *Patel* that the hotel owners provided their guest registries or similar information to the government in other situations, the plaintiffs did not need to allege additional facts concerning the private nature of the information contained in the registries." (*Hotop*, 952 F.3d at 716.)

The California Associations amici attempt to contrast the disclosures under the Ordinance's challenged Rent Registry provisions from other—not challenged—disclosure provisions of the Ordinance by

claiming that the disclosures have a "different context" and a "different purpose." (Cal. Assns.'s brief at 9.) Not so. The context of both disclosure requirements is the same: Apartment Rent Control Ordinance and monitoring of rents in rent-stabilized units. Their purpose is also the same: financial information to substantiate a rent increase. (*See id.* at 11; *Hotop*, 982 F.3d at 715.)

The California Associations amici misstate the challenged part of the Ordinance when they argue that "[d]isclosure is compelled as the condition of simply exercising the fundamental right to use private property as a rental unit." (Cal. Assns.'s brief at 2, 9 & 11.) The amici incorrectly imply that the landlords are precluded from renting the property unless they disclose the required information. (*Id.*) In reality, as explained below, non-compliant landlords may seek fair return rent increases and various pass throughs through petitions to the City. (ER 154-65 (SJMC §§17.23.800-.870).) Those petitions are also likely to result in substantial compliance with the Rent Registry provisions. (*See* ER 162-64 (SJMC § 17.23.830).)

None of the cases on which the California Associations rely come close to the circumstances here. *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), analyzed a school district's requirement for random urinalysis of students participating in interscholastic athletics. (*Id.* at 649-50.) *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), concerned a policy of the Iowa Department of Corrections subjecting its employees to strip searches, urinalysis, blood and breath testing, and vehicle searches. (*Id.* at 1304.)

The amici quote the dissent in *California Bankers Association v. Shultz*, 416 U.S. 21 (1974), but the *Shultz* Court in fact upheld the challenged foreign transaction reporting requirements of the Bank Secrecy Act under the Fourth Amendment. (*Id.* at 62-63.) The *Shultz* Court held that the form authorized by the Secretary does not constitute a general warrant. (*Id.* at 60-61.) The *Shultz* Court also held that the regulations implementing the domestic reporting requirements invaded no Fourth Amendment right of the financial institutions required by the regulations to file reports. (*Id.* at 66.) Therefore, *Shultz* does not support the amici's argument.

The California Associations amici overlook that the operative complaint contained only a single bare-bones factual sentence with privacy allegations, and that the landlords declined an opportunity to amend the complaint.

d. The administrative searches and pre-compliance review argument

Amicus Apartment Association of Los Angeles County, Inc. ("Los Angeles County Association") argues that the challenged provisions of the Ordinance effect an administrative search without a required pre-compliance review procedure. (LA Co. Assn.'s brief at 10-15.)

As addressed elsewhere in this brief, the LA County Association erroneously claims that the Ordinance authorizes "physical trespass." (LA Co. Assn.'s brief at 10.) The amicus also erroneously states that the Ordinance allows "unsupervised collection and

inspection of rental records." (*Id.* at 12.) Thus, the amicus's claim of potential harassment of landlords or tenants by City inspectors is misplaced.

Without providing a pin cite, the amicus cites *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), for the purported rule that "[u]nder the balancing test or administrative searches, the government's 'special needs' are weighed against an individual's expectation of privacy." (LA Co. Assn.'s brief at 11.) The *T.L.O.* opinion contains no such rule. The opinion states that "special needs of the school environment require assessment of the legality of such searches [by school officials] against a standard less exacting than that of probable cause." (*T.L.O.*, 469 at 322 n.2.) The other reference to "special needs" is in Justice Blackmun's concurrence in the judgment, which does not constitute part of the opinion of the Court. (*See Alexander v. Sandoval*, 532 U.S. 275, 285 n.5 (2001) (majority opinion is not coextensive with concurrence because majority does not expressly preclude concurrence's approach).)

The amicus also relies on *New York v. Burger*, 482 U.S. 691 (1987), a case concerning a state statute authorizing warrantless inspections of vehicle dismantling businesses. (*Id.* at 693.) The *Burger* Court held that the statute came within a warrant requirement exception for administrative inspections in closely regulated businesses. (*Id.* at 707-708.) But the City never argued that the landlords' businesses qualify as closely regulated, nor does the City's Ordinance authorize administrative inspections.

None of the cases on which this amicus relies involve circumstances such as here. *Skinner v. Railway*

Labor Executives' Association, 489 U.S. 602 (1989), concerned regulations governing drug and alcohol testing of railroad employees. (*Id.* at 608-609.) *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), analyzed the constitutionality of a highway checkpoint program for discovery and interdiction of illegal drugs. (*Id.* at 34.)

Camara v. Municipal Court, 387 U.S. 523 (1967), considered municipal health and safety inspections of apartment buildings for possible violations of the city's housing code. (*Id.* at 525-26.) Unlike the ordinance in *Camara*, the City's Ordinance does not authorize entry onto the landlords' business premises. (*See* LA Co. Assn.'s brief at 13-15.) *See v. City of Seattle*, 387 U.S. 541 (1967), concerned a fire inspection of a warehouse. (*Id.* at 541-42.) *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984), concerned the constitutionality of an entry into a public lobby of a motel and restaurant to serve an administrative subpoena. (*Id.* at 413.)

Contrary to the Los Angeles County Association's argument, the landlords' complaint does not allege a "*Jones/Jardines* cause of action for physical trespasses against protected papers." (LA Co. Assn.'s brief at 11.) The amicus fails to cite the location of that proposition in the operative complaint. (*Id.*) Instead, the amicus relies on a non-existent page in the district court's order granting the motion to dismiss without prejudice. (*Id.*) The district court's order never determined that the complaint alleged a claim for physical trespass. (*Hotop v. City of San Jose*, 2018 WL 4850405 (N.D. Cal., Oct. 4, 2018.)

3. There is no compelling reason to grant certiorari because there is no split among the circuits as to the framework to assess whether a Fourth Amendment search occurred.

Amici California Rental Housing Association and Apartment Owners Association of California, Inc. (collectively "California Associations") argue that there is a circuit split as to how to determine whether a Fourth Amendment search occurred. (Cal. Assns.'s brief at 4-9.) These amici speculate that the split is partly fueled by "closely decided" cases by this Court, *Carpenter v. United States*, 138 S.Ct. 2206 (2018), and *United States v. Jones*, 565 U.S. 400 (2012), because they allegedly show a lack of consensus how to identify a search. (Cal. Assns.'s brief at 8.) The amici theorize that "the evolution of the 'search' doctrine in this Court's fractured decisions may be causing confusion among the lower courts . . . ." (*Id.* at 8.)

Amici California Associations are incorrect. There is no cause for confusion. *Carpenter* has a majority opinion. (*Carpenter*, 138 S.Ct. at 2211-23.) While *Jones* may be characterized as a plurality opinion, the rules for interpretation of such opinions are well-established: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." (*Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted)

Additionally, whether *Jones* and *Carpenter* legitimately "confuse" the courts of appeal is irrelevant

here because their factual circumstances are different from the present case. Both *Jones* and *Carpenter* considered whether a person has an expectation of privacy in their physical movements on public streets: in *Jones*, the government attached a GPS device to a car (*Jones*, 565 U.S. at 402), and in *Carpenter*, the government obtained cell site location information from a cellphone company. (*Carpenter*, 138 S.Ct. at 2211-12.) In contrast, the Rent Registry provisions of the challenged Ordinance do not authorize or result in monitoring anyone's movements. Thus, the present case is not a good vehicle for revisiting *Jones* and *Carpenter* even if the Court were inclined to do so.

The cases the California Associations amici raise as examples of the alleged split of the Ninth Circuit from other circuits are inapposite because none addressed circumstances such as here. *United States v. Miller*, 982 F.3d 412 (6th Cir. 2020), concerned an inspection of child pornography files contained in emails and on a hard drive in a home, first identified by an email service provider. *Taylor v. City of Saginaw*, 922 F.3d 328 (6th Cir. 2019), dealt with chalk marks made on tires of legally parked cars to determine how long they had been parked. *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016), analyzed entry of officers into a house. And *United States v. Gutierrez*, 760 F.3d 750 (7th Cir. 2014), examined discovery of illegal drugs in a home after a warrant was obtained as a result of a drug dog's alert in the home's curtilage. All those cases are amenable to the discussion of both physical trespass and privacy because all involve a physical inspection or entry. The amici fail to explain, however, how these cases are relevant to the present case where

no physical trespass was alleged in the complaint. The allegedly conflicting decisions are distinguishable on the facts.

Additionally, the landlords and the LA County Associations amici criticize at length the single judge's concurring opinion in this case. (Petition at 10-14; & LA County Assn.'s brief at 15-19.) Concurring opinions have no legal effect and are not binding authority. (*Bronson v. Bd. of Educ.*, 510 F.Supp. 1251, 1265 (S.D. Ohio 1980).) (*See also Alexander v. Sandoval*, 532 U.S. 275, 285 n.5 (2001) (majority opinion is not coextensive with concurrence because majority does not expressly preclude concurrence's approach).) Its contents, therefore, are irrelevant to any purported split among the circuits.

Thus, there is no genuine split of authority. The cases relied on by petitioners and their amici are distinguishable on their facts. There is no basis to conclude that another court would reach a different result than the Ninth Circuit on the same or very similar facts.

4. The decision below is correct.

a. The complaint does not state facts to allege a plausible claim of physical trespass on the landlords' business papers.

The operative complaint alleges that the Ordinance and its Regulations "establish a 'Rent Registry'" that requires landlords of "rent stabilized units," defined in the Ordinance, to submit registration forms to the City with certain information. (ER 115-16.) At the end of a tenancy, the Ordinance requires a notice to the City

with certain information. (ER 116-17.) The complaint further alleges that the Ordinance also mandates that landlords provide tenants with disclosure forms when they negotiate a voluntary vacancy with their tenants. (ER 117.) The complaint alleges:

> The ordinance disclosure requirements . . . require plaintiffs to disclose to the City, without consent of the plaintiffs, or consent of plaintiffs' tenants, or a court order as required under the Fourth Amendment of the United States Constitution. Such information constitute [sic] plaintiffs' private business records that is not found in the public domain.

(ER 118.) The complaint does not allege that the Ordinance requires the landlords to submit to physical inspections of their records.

Thus, the complaint does not contain "factual content that allows the court to draw the reasonable inference" that the challenged provisions of the City's Ordinance effect a physical trespass on the landlords' business papers. (*See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009.)) "Judicial experience and common sense" indicate that a requirement for information on a City form is different from a physical inspection of documents. (*See id.* at 679.)

In sum, contrary to the argument of amicus Apartment Association of Los Angeles County ("LA County Association") (*see* LA County Assn.'s brief at 9), the complaint did not state a "separate cause of action" of a "physical trespass" under the Fourth Amendment.

b. The Ordinance's requirement for rent registration information does not violate the Fourth Amendment.

The complaint alleged that the Ordinance and its Regulations violate the landlords' rights under the Fourth Amendment "to be free from an unreasonable search and seizure of property." (ER 119-20.) Although unclear, the landlords appeared to challenge the rent registry's requirement for disclosure of the rental unit's address, rent history, amount of security deposit, number of tenants and their names, household services provided at the start of the tenancy, a copy of the rental agreement, and the reason the prior tenant vacated the unit, among other requirements. (ER 115-17.) The complaint alleged that the required information "constitute[s] plaintiffs' private business records that is not found in the public domain." (ER 118.)

San Jose's Ordinance does not allow official entry onto any premises, nor physical intrusion, surprise code-enforcement inspections, or any other administrative searches. (ER 166-67.) San Jose's Ordinance does not authorize the City to enter or inspect the landlords' properties, nor does it even allow the City to review their business records.

The landlords cite cases where the government physically intrudes on persons or their fundamental rights. (Petition at 8-10.) None of them support their proposition that completing a government form to comply with a reasonable regulatory purpose constitutes an unconstitutional search or seizure under the Fourth Amendment.

For example, in *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992), this Court held that a complaint sufficiently alleged a Fourth Amendment "seizure" even though the owners' privacy was not invaded. (*Id.* at 60.) In *Soldal*, deputy sheriffs and the owner and manager of a mobile home park dispossessed the mobile-home owners of their home by physically tearing it from its foundation and towing it to another lot. (*Id.* at 72.) The *Soldal* opinion explained:

> [T]he first Clause of the Fourth Amendment "protects two types of expectations, one involving 'searches,' and the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs where there is some meaningful interference with an individual's possessory interest in that property."

(*Id.* at 63.) (citations omitted)

Under San Jose's Ordinance, no seizure could occur because, unlike in *Soldal*, the City would not be infringing on the landlords' possessory interest in information because it would not be taking custody of it. (ER 166 (SJMC §17.23.900) & ER 181-83 (Regs. Ch. 4).) The landlords' complaint fails to allege what the "possessory interest" in the requested information would be, and it does not allege how the City's request for that information could interfere with any possessory interest in it.

In *United States v. Jones,* 132 S. Ct. 945 (2012), this Court found a "search" when the government installed

a Global Positioning System tracking device on a suspect's car, "physically occup[ying] private property for the purpose of obtaining information." (*Id.* at 404.) San Jose's Ordinance and its Regulations, however, do not require or allow the City to physically occupy any private property. (ER 166 (SJMC §17.23.900) & ER 181-83 (Regs. Ch. 4).)

The *Jones* Court noted that "[a]s Justice Brennan explained in his concurrence in *Knotts*, *Katz* did not erode the principle 'that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.'" (*Id.* at 407.) (quoting *U.S. v. Knotts*, 460 U.S. 276, 276 (1983).) (italics in the original) The *Jones* Court explained that the holding in *Knotts* addressed only the reasonable expectation of privacy because the common-law trespass was not at issue. (*Jones*, 565 U.S. at 409.) In the present case, the trespass test is not at issue, either, because the Ordinance provides for transmission of information only, rather than any physical thing, so a physical intrusion does not occur. ER 166 (SJMC §17.23.900) & ER 181-83 (Regs. Ch. 4).)

None of the cases from other circuits address circumstances such as here; they all concerned physical intrusion on material objects. In *United States v. Paige*, 136 F.3d 1012 (5th Cir. 1998), the government seized and hauled away marijuana. (*Id.* at 1021.) In *Lenz v. Winburn*, 51 F.3d 1540 (11th Cir. 1995), the government searched through a child's closet at the father's home when the child was moved out of the father's custody. (*Id.* at 1549 & n.10.) In *Bonds v. Cox*,

20 F.3d 697 (6th Cir. 1994), the government damaged the plaintiff's house during execution of a search warrant. (*Id.* at 701-702.)

Like the landlords, the amicus brief of the LA County Association also argues that the Ninth Circuit neglected to analyze the landlords' property rights under the Fourth Amendment. (LA County Assn.'s brief at 6-9.) None of its cases, however, state or indicate that transmission of information on a government form constitutes a trespass.

In *United States v. Jacobsen*, 466 U.S. 109 (1984), the government searched and seized a wrapped parcel delivered to a freight carrier. (*Id.* at 114.) In *United States v. Place*, 462 U.S. 696 (1983), the government detained luggage to expose it to a trained narcotics detection dog. (*Id.* at 698.) In *United States v. Sweeney*, 821 F.3d 893 (7th Cir. 2016), the government searched a common space in a basement of an apartment building. (*Id.* at 897.) In *United States v. Katzin*, 769 F.3d 163 (3d Cir. 2014), as in *Jones*, the government attached a GPS device to a vehicle to monitor its movements. (*Id.* at 167.)

While the LA County Association argues that a trespass on business papers "should" also include a trespass on their contents, it fails to provide any citation to support its point. (*See* LA County Assn.'s brief at 9.) The LA County Association also incorrectly asserts that the Ordinance gives the City "inspection powers" of those papers. (*Id.*) Not so. The Ordinance and its Regulations do not contain any authorization for inspections. They only provide for submission of

information on the City's form. (ER 166 (SJMC §17.23.900) & ER 181-83 (Regs. Ch. 4).)

c. Non-compliant landlords may submit petitions to the City for a rent increase to obtain a fair return.

Petitioners and their amici claim that requiring them to provide certain information about their tenancies prevents them from exercising their rights as property owners. In effect, they challenge the City's ability to regulate the rental apartment market in San Jose.

Contrary to the landlords' and their amici's arguments, the landlords retain their right to obtain a fair return on their investments. (ER 154 (SJMC §17.23.800).) The Ordinance prohibits rent increases for units that are not registered. (ER 138 (SJMC §17.23.310.A).) But it does not prohibit landlords of unregistered units to petition for rent increases under the Ordinance in order to obtain a fair return, as before. (ER 154-65 (SJMC §§17.23.800-.870.) Thus, if landlords choose not to provide information to register their units, they are still eligible to submit petitions to the City for reasonable rent increases. (*See id.*)

The City may control rents by virtue of its police power. (*Pennell v. City of San Jose*, 485 U.S. 1, 11-14 (1988). Under the California Constitution, article XI, section 7, a city "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, §7.) Generally, rent control enactments are deemed a proper exercise of municipal police power.

(*Pennell*, 485 U.S. at 12 n.6.) Reasonable regulation of private property to serve the larger public good is the essence of police power. (*See Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 82-83 (1946).) "The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights." (*Id.* at 83.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

NORA FRIMANN
ARDELL JOHNSON
MALGORZATA LASKOWSKA
Counsel of Record
OFFICE OF THE CITY ATTORNEY
200 East Santa Clara Street
16th Floor
San José, CA 95113-1905
(408) 535-1900
cao.main@sanjoseca.gov

Counsel for Respondent

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