Legal Opinion Letter

Vol. 24 No. 17 October 9, 2015

Washington Legal Foundation
Advocate for Freedom and Justice®
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Supreme Court Clarifies 4th Amendment Protection for Business Records in *Los Angeles v. Patel*

by Eric D. Miller

In *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), the Supreme Court invalidated a Los Angeles ordinance that allowed warrantless police inspections of hotel guest records. The decision will have important consequences for businesses in all industries seeking to protect the confidentiality of information about their customers.

The ordinance at issue in *Patel* required all hotel owners to collect and retain certain information about guests, including their names, the dates of their stay, and, in some cases, their driver's license numbers and credit card numbers. The ordinance required hotel owners to make the information available for inspection by any police officer upon request, with no requirement that the officer obtain a warrant, and with no opportunity for the owner to challenge the search before producing the records.

A group of hotel owners sought a declaratory judgment that the ordinance was invalid. Although the plaintiffs had been subjected to inspections under the ordinance in the past, they did not seek relief based on those particular searches. Instead, they argued that the ordinance violated the Fourth Amendment on its face. The district court denied relief, but the Ninth Circuit reversed. The Supreme Court then granted the city's petition for certiorari.

In a 5–4 decision authored by Justice Sotomayor, the Supreme Court held that the ordinance was unconstitutional. The Court first concluded that a plaintiff may assert a facial Fourth Amendment challenge to a statute if it can show that the statute is unconstitutional in all of its applications. The Court then held that the ordinance violated the Fourth Amendment because it did not provide a hotel owner an opportunity to have a neutral decisionmaker review an officer's demand to search the registry before being required to comply.

The Fourth Amendment generally requires that searches be authorized by warrants, and a warrantless search can be constitutional only if it falls within a specific exception to the warrant requirement. The Supreme Court has applied the warrant requirement even in the context of "administrative searches," such as searches to enforce a building code. But the Court has recognized an exception to the warrant requirement for searches of businesses operating in certain "closely-regulated" industries.

The Court in *Patel* devoted much of its opinion to considering and rejecting the city's argument that the ordinance could be justified under the closely-regulated industries doctrine. As the Court observed, only four business activities have ever been determined to satisfy that exception: liquor sales, firearms dealing, mining, and operating an automobile junkyard. Characterizing those industries as posing "a clear

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and significant risk to the public welfare," the Court reasoned that extending the doctrine to hotels would allow the exception to swallow the rule. Although the city had argued that hotels are subject to various regulations, the Court concluded that the regulations applicable to hotels are not different in kind from those to which all businesses are subject, so if they were sufficient to make hotels closely regulated, "it would be hard to imagine a type of business that would not qualify."

The city argued that inspections of guest records are valuable in preventing the use of hotel rooms for illicit purposes such as drug dealing and prostitution, and that providing an opportunity for pre-compliance judicial review would frustrate that purpose by making it easier for owners to falsify records. But the Court reasoned that a similar argument could be made about any recordkeeping requirement, and it observed that the city had other means of policing fraudulent records, including conducting a surprise inspection based on a warrant or guarding a registry pending a hearing on a motion to quash.

The most significant part of the *Patel* decision is likely to be the Court's affirmation of the narrowness of the closely-regulated industries exception. As the dissenting justices observed, one may question whether the four industries identified in the Court's prior decisions really pose unique risks to the public welfare. To take one example, junkyards are not inherently dangerous but are regulated largely because they can be used to facilitate crime by enabling the disposal of stolen cars. As Los Angeles pointed out, however, hotels can also be used to facilitate crime. Whatever the logical basis for the line drawn by the Court, the consequence is clear: closely-regulated industries are the exception, not the rule, and the exception is not likely to be expanded to many other industries beyond those already identified in the Court's cases. In most industries, therefore, administrative searches will require a warrant or some other opportunity for pre-compliance judicial review.

The Court's holding will be particularly important to the increasing number of online businesses that find themselves in possession of large stores of information about their customers—information that may well be of interest to law enforcement. In *Smith v. Maryland*, 422 U.S. 735 (1979), the Court held that the Fourth Amendment generally does not protect an individual's interest in the privacy of information that he or she has voluntarily disclosed to a third party. Under the "third-party doctrine" established by *Smith*, it is unlikely that customers would be able to challenge the government's warrantless collection of information from a business that stores that information.

Had the Court upheld the Los Angeles ordinance, similar laws in other industries might have left businesses unable to challenge orders to produce customer information. In other words, the combination of the third-party doctrine and the administrative-search doctrine would have allowed the government to compel businesses to collect and retain information from their customers and then produce it without any opportunity for pre-compliance judicial review or notice to the affected customers. By rejecting that outcome, the Court has enhanced the Fourth Amendment protection of customer information held by businesses.

Finally, the Court's holding on facial challenges (which was not disputed by any of the dissenting justices) is also significant. It is not easy for a plaintiff to challenge a statute on its face—doing so successfully requires showing that the statute is unconstitutional in all of its applications. But the Court's holding that such a challenge is possible under the Fourth Amendment, as it is under other constitutional provisions, means that a business may be able to challenge a scheme of warrantless searches when it is adopted, without waiting for that scheme to be applied to it. Businesses seeking to reassure their customers of the confidentiality of their personal information may find that opportunity particularly valuable.

 ISBN 1056 3059