Fourth Amendment — Standing — Facial Versus As-Applied Challenges — City of Los Angeles v. Patel

The distinction between "facial" and "as-applied" challenges is a notoriously confusing area of law. Judicial review of Fourth Amendment reasonableness claims, however, has generally been insulated from that confusion. Last Term, in *City of Los Angeles v. Patel*,[1] the Supreme Court held that facial challenges under the Fourth Amendment are neither categorically barred nor especially disfavored. It then facially invalidated a Los Angeles municipal code compelling hotel operators to gather certain information about guests and provide it to police on demand. While this ruling marks a surprising departure from the Court's recent rhetoric discouraging facial challenges, the Court left unaddressed many aspects of its standard for facial adjudication of Fourth Amendment claims. By doing so, the *Patel* Court added to the confusion around the facial versus as-applied forms of judicial review and potentially opened the door to a new generation of facial Fourth Amendment challenges with insufficient guidance to legislatures, courts, and litigants on the proper standard for such challenges.

Los Angeles Municipal Code section 41.49 requires hotel and motel operators to collect and retain certain information about their guests.[2] Section 41.49(3)(a), the sole provision at issue in *Patel*, required that this record be kept in a hotel's reception or check-in area for ninety days.[3] Moreover, the provision required that the record "be made available to any officer of the Los Angeles Police Department for inspection."[4] Failure to comply was a misdemeanor punishable by up to six months in jail and a $1000 fine.[5] Respondents, operators of motels and a lodging association, sued the City under 42 U.S.C. § 1983, arguing that section 41.49(3)(a)'s warrantless inspection provision violated the Fourth Amendment.[6] Although respondents originally brought both facial and as-applied challenges, they stipulated to drop the as-applied challenge.[7] The parties also stipulated that the respondents "have been . . . and continue to be subject to searches and seizures of motel registration records . . . without consent or warrant pursuant to [section] 41.49."[8] The stipulated record contained no other facts.

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[1] 135 S. Ct. 2443 (2015).

[2] *See* L.A., CAL., MUN. CODE § 41.49(2) (2008).

[3] *See id.* § 41.49(3)(a).

[4] *Id.*

[5] L.A., CAL., MUN. CODE § 11.00(m) (2004).

[6] Brief for the United States as Amicus Curiae Supporting Petitioner at 3, City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015) (No. 13-1175).

[7] *Id.*

[8] Patel v. City of Los Angeles, No. CV 05-1571, 2008 WL 4382755, at *1 n.1, *2 (C.D. Cal. Sept. 5, 2008).

The district court entered judgment for the City.[9] In a short, unpublished opinion, the court found that hotels could maintain multiple sets of registers and make registers available in publicly accessible areas,[10] thereby ensuring that nonpublic records and locations are not invaded. Ultimately, because section 41.49(3)(a) could "be reasonably interpreted as a measured ordinance meant to discourage and fight crime in hotels and motels," the ordinance was "not unconstitutional on its face."[11]

The Ninth Circuit initially affirmed.[12] Writing for the panel, Judge Clifton found that hotel operators had no reasonable expectation of privacy in the guest-registry information, as guest registers are generally kept on publicly accessible counters, an "unlikely" location to generate a reasonable expectation of privacy.[13] Nor could the common law trespassory test, recently resurrected in *United States v. Jones*,[14] save the Patels' challenge, as section 41.49(3)(a) did not "physically dispossess[] [hoteliers] of any property."[15]

Upon rehearing en banc, the Ninth Circuit reversed.[16] Writing for the seven-member majority, Judge Watford found that, even making two key assumptions that triggered "more lenient Fourth Amendment principles governing administrative record inspections,"[17] section 41.49 was still facially invalid.[18] While warrantless inspections under section 41.49 were "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance [would] not be unreasonably burdensome,"[19] the statute nonetheless failed to provide hotels with an opportunity to "obtain judicial review of the reasonableness of the de-

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[9] *Id.* at *3.

[10] *See id.*

[11] *Id.* The court did not decide whether the ordinance fell within the administrative search exception. *Id.* at *2–3.

[12] Patel v. City of Los Angeles (*Patel I*), 686 F.3d 1085, 1086 (9th Cir. 2012).

[13] *Id.* at 1088.

[14] 132 S. Ct. 945 (2012). The *Jones* Court announced that the "*Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 952. Under the *Jones* test, "a 'search' within the original meaning of the Fourth Amendment" occurs where the "[g]overnment obtains information by physically intruding on a constitutionally protected area." *Id.* at 950 n.3.

[15] *Patel I*, 686 F.3d at 1089. Judge Pregerson dissented. Noting that warrantless searches are per se unreasonable under the Fourth Amendment, he criticized the majority for upholding the ordinance without first articulating a "specifically established and well-delineated exception[]" to the warrant rule. *Id.* at 1091 (Pregerson, J., dissenting) (quoting Arizona v. Gant, 556 U.S. 332, 338 (2009)).

[16] Patel v. City of Los Angeles (*Patel II*), 738 F.3d 1058, 1065 (9th Cir. 2013) (en banc).

[17] *Id.* at 1064. First, he assumed that section 41.49 "intended to authorize administrative record inspections," which did not require search warrants. *Id.* at 1063. Second, he assumed that section 41.49 did not authorize police access to a hotel's nonpublic areas because the government would need an administrative search warrant to access such areas even to enforce health and safety regulations. *Id.*

[18] *Id.* at 1063–64.

[19] *Id.* at 1064 (quoting See v. City of Seattle, 387 U.S. 541, 544 (1967)).

mand prior to suffering penalties for refusing to comply."[20] This failure constituted a "procedural deficiency [that] affects the validity of all searches authorized by [section] 41.49(3)(a)."[21]

Judge Tallman and Judge Clifton each authored a dissent. Pointing out the impropriety of entertaining facial challenges under the Fourth Amendment, Judge Tallman admonished the majority for "engraft[ing] into [the ordinance] language that is not there" by assuming that it authorizes only warrantless inspections.[22] In fact, "the record . . . is totally bereft of facts to support the majority's assumption that the statute is actually being applied in that manner."[23] Without such facts, the majority opinion constituted a mere "advisory opinion" from Judge Tallman's perspective.[24] Likewise, Judge Clifton first argued that the Patels failed to meet the "very high bar" for a successful facial attack.[25] Next, Judge Clifton criticized the majority for failing to analyze whether the searches at issue were, in fact, unreasonable.[26] To prevail in a facial challenge, the Patels had to establish not only that they had a subjective expectation of privacy in their guest registry, but also that all hoteliers expect such privacy and that this expectation is objectively reasonable.[27] The record contained no such evidence, without which the Patels could not demonstrate that a search under section 41.49(3)(a) was "unreasonable in all circumstances."[28]

The Supreme Court affirmed. Writing for the Court, Justice Sotomayor[29] reached two discrete holdings: that "facial challenges under the Fourth Amendment are not categorically barred or especially disfavored"[30] and that section 41.49(3)(a) was facially unconstitutional.[31] In reaching the first holding, the Court began by clarifying that the Fourth Amendment is no different from the Foreign Commerce Clause or the First, Second, and Fourteenth Amendments in its capacity to facially invalidate statutes.[32] The majority also explained how

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[20] *Id.* (quoting *See*, 387 U.S. at 545).

[21] *Id.* at 1065.

[22] *Id.* at 1066–68 (Tallman, J., dissenting).

[23] *Id.* at 1069.

[24] *Id.*

[25] *Id.* at 1070 (Clifton, J., dissenting) (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).

[26] *Id.* at 1072. Judge Clifton also disagreed with the majority's conclusion that the absence of precompliance judicial review constituted a "fatal flaw" in the ordinance. *Id.* at 1071. Because that absence establishes only that the ordinance does not qualify for the administrative subpoena exception, which in turn is only one of many exceptions to the warrant requirement, Judge Clifton asserted that the majority had to adjudicate the reasonableness of section 41.49(3)(a). *Id.* at 1072.

[27] *Id.* at 1072.

[28] *Id.* at 1074.

[29] Justices Kennedy, Ginsburg, Breyer, and Kagan joined the majority opinion.

[30] *Patel*, 135 S. Ct. at 2449.

[31] *Id.* at 2451.

[32] *See id.* at 2449.

courts analyze facial challenges. While a plaintiff must indeed "establish that a 'law is unconstitutional in all of its applications,'"[33] a reviewing court considers "only applications of the statute in which it actually authorizes or prohibits conduct."[34] Thus, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[35] the facial challenge to the spousal-notification law did not include "the group for whom the law [wa]s irrelevant" — the women who would have voluntarily notified their husbands.[36] Likewise, the inquiry into section 41.49(3)(a)'s constitutional validity should exclude hoteliers who would have consented to the inspections, as well as warrantless searches justified by exigency.[37]

Next adjudicating section 41.49(3)(a)'s facial validity, Justice Sotomayor first assumed that the guest-registry search was exempt from the Fourth Amendment's warrant requirement, on the ground that it served a "special need"[38] distinct from the "general interest in crime control."[39] Even so, section 41.49(3)(a) could not fall within the administrative search exception to the warrant requirement because it deprived respondents of an opportunity for precompliance judicial review. Without this "minimal requirement," the ordinance created an "intolerable risk" of authorizing searches that exceed their statutory limits or providing a "pretext to harass hotel operators and their guests."[40]

The majority concluded by rejecting the principal dissent's categorization of hotels as a "closely regulated" industry, which provides an exception to the warrant and probable-cause requirements.[41] Justice Sotomayor pointed out the rarity of such industries, noting that the Supreme Court has recognized only four over the past forty-five years.[42] Even if hotels were closely regulated, however, section 41.49(3)(a) would still fail two of three prongs of the *New York v. Burger*[43] test for Fourth Amendment reasonableness.[44] Although a "substantial" government interest may inform the ordinance's regulatory scheme, thus satisfying the first criterion, warrantless inspections are not "'necessary' to fur-

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[33] *Id.* at 2451 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008)).

[34] *Id.*

[35] 505 U.S. 833 (1992).

[36] *Patel*, 135 S. Ct. at 2451 (quoting *Casey*, 505 U.S. at 894 (plurality opinion)).

[37] *Id.*

[38] *Id.* at 2454 (quoting Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619 (1989)). The special need consisted of "compliance with the recordkeeping requirement, which in turn deters criminals from operating on the hotels' premises." *Id.*

[39] *Id.* at 2452 (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000)).

[40] *Id.* at 2452–53.

[41] *Id.* at 2454–55.

[42] *Id.* at 2454. The four recognized industries are selling liquor, dealing firearms, mining, and operating an automobile junkyard. *Id.*

[43] 482 U.S. 691 (1987).

[44] *Patel*, 135 S. Ct. at 2456.

ther [the] regulatory scheme," and the inspection program does not provide "a constitutionally adequate substitute for a warrant."[45] The majority lastly emphasized the narrow nature of its holding, noting that despite section 41.49(3)(a)'s invalidity, officers remain free to conduct a "surprise inspection by obtaining an *ex parte* warrant" or to "guard[] the registry pending a hearing on a motion to quash" if they reasonably suspect that unscrupulous hoteliers could alter the record.[46]

Justice Scalia penned the principal dissent.[47] First, he observed the great governmental interest at stake in regulating hotel recordkeeping, as motels are a "particularly attractive site for criminal activity ranging from drug dealing and prostitution to human trafficking."[48] Next, he assumed, without deciding, that the Patels may seek facial relief under the Fourth Amendment.[49] A plaintiff's self-labeling of his challenge as facial or as-applied could not provide an "independent reason to reject it" because the "narrowness or breadth of the ground the Court relies upon in disposing of [a challenge]" — and not the plaintiff's characterization of it — determines the effect of any given case.[50]

Guided by these assumptions, Justice Scalia argued that section 41.49 was reasonable, especially in light of the "longstanding" and "comprehensive" tradition of regulating hotels, which in his opinion constituted a closely regulated industry.[51] In the context of a closely regulated industry, section 41.49 "easily satisfie[d]" the three *Burger* requirements for warrantless searches.[52] First, it furthered Los Angeles's substantial interest in deterring "drug dealing, prostitution, and human trafficking."[53] Second, its warrantless-inspection requirement was necessary to advance the government interest, as the ordinance's very effectiveness came from its unpredictable nature.[54] Third, section 41.49(3)(a) sufficiently advised hotel operators of the "scope and objects

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[45] *Id.* (alteration in original) (quoting *Burger*, 482 U.S. at 702–03).

[46] *Id.* (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 319–21 (1978)).

[47] Chief Justice Roberts and Justice Thomas joined this dissent.

[48] *Id.* at 2457 (Scalia, J., dissenting).

[49] *Id.*

[50] *Id.* at 2458. Even so, Justice Scalia warned that facial challenges may be a "poor strategic move, especially in a Fourth Amendment case, where the reasonableness of a search is a highly factbound question and general, abstract rules are hard to come by." *Id.*

[51] *Id.* at 2460. Indeed, hotel regulations were "substantially *more* comprehensive than the regulations governing junkyards," *id.*, and the frequency with which courts identified new closely regulated industries increased dramatically when taking into account cases from lower courts, which have recognized massage parlors and jewelers, barbershops and "even rabbit dealers" as closely regulated businesses, *id.* at 2461.

[52] *Id.* at 2461.

[53] *Id.*

[54] *See id.* at 2461–62.

of the search" by limiting police searches to public parts of hotels, thereby providing an adequate substitute for a warrant.[55]

In a separate dissenting opinion, Justice Alito, joined by Justice Thomas, articulated five examples of constitutionally permissible searches authorized by section 41.49(3)(a). The examples ranged from an exigent circumstance to a motel that keeps its guest register open on the front desk for anyone to walk up and flip through.[56] Justice Alito further questioned whether "the Fourth Amendment's application to warrantless searches and seizures is inherently inconsistent with facial challenges."[57] Even assuming, however, that Fourth Amendment facial challenges "ever make sense conceptually, this particular one fail[ed] under basic principles of facial invalidation."[58]

The *Patel* Court's declaration that Fourth Amendment facial challenges are not disfavored marks a surprising break from the Court's recent rhetoric disavowing facial invalidation of statutes. That the substantive backdrop of this announcement was the Fourth Amendment — an area of law often characterized by fact-intensive, incremental adjudication — is doubly surprising. Given *Patel*'s departure from the purported aversion to facial adjudication as well as its potential to jump-start a line of facial challenges under the Fourth Amendment, the Court had an important opportunity to elaborate on the proper standard for facial challenges, both in general and in the specific context of Fourth Amendment reasonableness. By failing to provide sufficiently analogous precedent and inconsistently analogizing to the abortion context, however, the Court instead added to the confusion around facial versus as-applied challenges.

Facial and as-applied challenges do not enjoy a neat demarcation,[59] but conventional wisdom defines facial challenges as "ones seeking to have a statute declared unconstitutional in all possible applications," while as-applied challenges are "treated as the residual, although ostensibly preferred and larger, category."[60] Foundational cases like *United States v. Salerno*[61] have perpetuated the common understanding that facial challenges should be rare and difficult to mount success-

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[55] *Id.* at 2463 (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978)).

[56] *See id.* at 2464–66 (Alito, J., dissenting).

[57] *Id.* at 2466.

[58] *Id.*

[59] *See, e.g.*, Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1232 (2010) (deeming both terms "malapropisms, and the doctrine distinguishing between them . . . uncommonly confused"). At times, even the Justices themselves have disagreed on how to properly categorize a challenge. *See* Doe v. Reed, 130 S. Ct. 2811, 2817 (2010) (evading categorization of challenge as facial or as-applied, observing instead that it "has characteristics of both" but ultimately that "[t]he label is not what matters").

[60] Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923 (2011).

[61] 481 U.S. 739 (1987).

fully.[62] Of course, the Court has inconsistently abided by *Salerno*'s dictates, as evinced by easier standards for facial invalidation found in abortion[63] and First Amendment[64] litigation, among others. Professor Richard Fallon's seminal survey of six Supreme Court Terms spanning three decades has also shown that "[i]n all of those Terms, the Court adjudicated more facial challenges on the merits than it did as-applied challenges."[65] Despite the Court's tacit practice of entertaining facial challenges, its rhetorical reluctance for this form of judicial review has continued, particularly with the ascent of the Roberts Court.[66]

Within Fourth Amendment reasonableness adjudication, however, the facial versus as-applied distinction has been less pronounced, perhaps because of the type of state action governed by the Fourth Amendment. Many cases in this area concern the actions of individual government officials who carry out searches or seizures, and litigants who attack the constitutionality of such actions seldom frame their suits as challenges to statutes.[67] This mode of litigation often also renders Fourth Amendment adjudication fact-intensive and context-sensitive in nature.[68] In light of the divergence between the Court's rhetoric and practice on the propriety of facial invalidation, as well as the fact-intensive nature of Fourth Amendment adjudication, the *Patel*

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[62] *Id.* at 745 ("A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

[63] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (plurality opinion) (noting propriety of facial invalidation if a statute operates as a substantial obstacle "in a large fraction of the cases" where the statute is relevant); *see also infra* note 82.

[64] The overbreadth doctrine has resulted in an easier standard for facial challenges under the First Amendment. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[65] Fallon, *supra* note 60, at 918. Others have argued that the extent to which the Roberts Court embraces or eschews a facial challenge is intertwined with a case's substantive merits. *See, e.g.*, Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 774 (2009) ("The Roberts Court also appears to use as-applied challenges strategically, in particular as a device to evade recent precedent with which it disagrees . . . ."); Rosenkranz, *supra* note 59, at 1229 ("[T]he distinction ostensibly determines the outcome in an increasing number of controversial cases.").

[66] *See, e.g.*, Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563, 564 (2009) (observing that the Roberts Court has "view[ed] facial challenges with increased skepticism and hostility").

[67] *See* Fallon, *supra* note 60, at 941, 967.

[68] *See* Rosenkranz, *supra* note 59, at 1241 ("[I]n the Fourth Amendment context . . . the statute matters little if at all, while the enforcement facts are crucial. . . . [T]he litigation will very much turn on the defendant's specific facts — what exactly was searched, and when, and where."); *see also* Navarette v. California, 134 S. Ct. 1683, 1688–92 (2014) (admitting close nature of case but parsing factual circumstances around an anonymous tip to analogize to *Alabama v. White*, 496 U.S. 325 (1990), and distinguish from *Florida v. J.L.*, 529 U.S. 266 (2000)); Warshak v. United States, 532 F.3d 521, 528 (6th Cir. 2008) (en banc) ("In [Fourth Amendment disputes], courts typically look at the 'totality of the circumstances,' reaching case-by-case determinations that turn on the concrete, not the general, and offering incremental, not sweeping, pronouncements of law." (citation omitted)).

majority's candid recognition that Fourth Amendment facial challenges are not "especially disfavored" is striking.

But the brevity with which the Court announced this holding missed an opportunity to provide much-needed clarity on the distinction between facial and as-applied challenges. In particular, the majority opinion remains unconvincing without elaboration on two key points. First, Justice Sotomayor's list of cases that purportedly support facial challenges fails to provide a coherent standard to determine which cases are appropriate for such adjudication under the Fourth Amendment.[69] *Torres v. Puerto Rico*[70] arguably does not involve a facial challenge, as evinced by the Court's characterization of the appellant's claims and the limited remedy issued.[71] *Illinois v. Krull*[72] did not discuss a statute's constitutionality; rather, it discussed the application of the exclusionary rule where an officer acted in good-faith reliance on a statute that the Illinois Supreme Court had already declared unconstitutional.[73] Meanwhile, the narrow inquiry in *Ferguson v. City of Charleston*[74] focused only on the applicability of the "special needs" exception to a policy authorizing random drug testing for pregnant women.[75]

While the remaining four cases are indeed facial challenges brought under the Fourth Amendment,[76] each of them lacked the factual ambiguity of *Patel* — by featuring either a concrete factual record or a statute with limited possible applications — and thus required little speculation by the reviewing Court.[77] By contrast, the *Patel* respondents challenged an ordinance with a broad range of applications without a factual record to demonstrate that breadth. Critically, the record was devoid of any indication that a hotelier had ever demanded

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[69] *See Patel*, 135 S. Ct. at 2450.

[70] 442 U.S. 465 (1979).

[71] The *Torres* Court characterized its holding in terms of the particular search that the appellant faced pursuant to a statute. *See id.* at 471. Furthermore, the remedy issued was suppression of the evidence obtained through the unconstitutional search, rather than declaratory or injunctive relief barring enforcement of the statute. *Id.* at 474.

[72] 480 U.S. 340 (1987).

[73] *Id.* at 346.

[74] 532 U.S. 67 (2001).

[75] *See id.* at 76.

[76] These four cases are *Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); and *Payton v. New York*, 445 U.S. 573 (1980).

[77] *Payton*, for instance, featured a rich record detailing the arrests of two defendants, *see* 445 U.S. at 576–78, and limited the remedy to defendant-specific suppression of the evidence, *see id.* at 591–92. Meanwhile, the drug test–authorizing statutes at issue in *Chandler*, *Vernonia*, and *Skinner* had straightforward, uniform applications that did not require extensive factfinding about the variety of ways in which the statutes may apply. *See Chandler*, 520 U.S. at 309–10; *Vernonia*, 515 U.S. at 650–51; *Skinner*, 489 U.S. at 608–12.

precompliance review, let alone done so and been denied.[78] Speculation may be an inevitable aspect of some facial adjudication of statutes,[79] but the variety of ways in which section 41.49 may apply requires extensive factfinding, so that the Court can understand the multiple contexts in which the law might operate. The *Patel* respondents' failure to provide concrete facts of enforcement, despite the fact that section 41.49 had been in operation for years, thus invites undue speculation and what Justice Stevens described as an "uneasy feeling" that the respondents pursued a facial challenge even when the ordinance may be applied in a constitutional manner.[80] The factual ambiguity created by *Patel*'s sparse record thus distinguishes it from the cases cited in the majority opinion. The cursory inclusion of the seven cases does not explain when facial challenges are appropriate, whether they are appropriate even for cases like *Patel* that are plagued by factual ambiguity, and if not, how to distinguish those cases appropriate for facial adjudication from others that are not.

Second, the Court's importation of the facial-adjudication standard from *Casey* is problematic without an explanation of why that standard is appropriate outside of the abortion context.[81] Given the controversy that *Casey* generated by developing an easier alternative to replace the *Salerno* standard in abortion litigation,[82] the Court should have articulated how abortion and Fourth Amendment litigation are

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[78] *Patel II*, 738 F.3d 1058, 1069 (9th Cir. 2013) (Tallman, J., dissenting). The case thus forced the Court to speculate that such an event had taken place or to assume that the ordinance's silence about precompliance review was akin to the lack of such opportunity. *But see* Burns v. United States, 501 U.S. 129, 136 (1991), *abrogated on other grounds by* Dillon v. United States, 560 U.S. 817 (2010) (noting various possible interpretations of statutory silence); Ill. Dep't of Pub. Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983) ("Not every silence is pregnant; *expressio unius est exclusio alterius* is therefore an uncertain guide to interpreting statutes . . . .").

[79] *See, e.g.*, Catherine Gage O'Grady, *The Role of Speculation in Facial Challenges*, 53 ARIZ. L. REV. 867, 879–80 (2011) (recognizing that "pure facial challenges [raised] before the statute's implementation" necessarily require judicial speculation because "no applicable context exists for a challenger to even attempt to demonstrate a personal constitutional violation").

[80] *See id.* at 880 (quoting United States v. Salerno, 481 U.S. 739, 769 (1987) (Stevens, J., dissenting)).

[81] *See Patel*, 135 S. Ct. at 2451 (analogizing to *Casey* without enumerating rationale for importing that standard to Fourth Amendment context).

[82] The *Casey* plurality announced that a statute is facially invalid if "in a large fraction of the cases in which [that statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 505 U.S. 833, 895 (1992) (plurality opinion). This constitutional inquiry, moreover, should focus on "the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 894. Since *Casey*, commentators have documented the emergence of an abortion-specific standard for facial challenges. *See, e.g.*, Rosenkranz, *supra* note 59, at 1233 n.75; Rachel D. King, Comment, *A Back Door Solution:* Stenberg v. Carhart *and the Answer to the* Casey/Salerno *Dilemma for Facial Challenges to Abortion Statutes*, 50 EMORY L.J. 873, 874–75 (2001); *see also* A Woman's Choice–E. Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002) (critiquing how competing *Salerno-Casey* standards for facial challenges to abortion statutes have "put courts of appeals in a pickle").

analogous.[83] Yet nothing in *Patel* explains why *Casey*'s method of defining the relevant population to which a statute applies should be transplanted to adjudicate Fourth Amendment unreasonableness claims, especially when *Casey* was confined to the abortion context before *Patel*.[84] And even if the Fourth Amendment proved a suitable context for the method, the Court inconsistently invoked its analogy to the abortion context for facial judicial review. For instance, it remains unclear why the Court was willing to import *Casey*'s method, yet not the remedy of partial statutory invalidation from *Ayotte v. Planned Parenthood of Northern New England*.[85] Nor is it clear why *Casey*, a 1992 opinion, provides the relevant standard when subsequent decisions seem to have made facial challenges more difficult even in the abortion context.[86]

Admittedly, an overarching explanation for section 41.49's facial defect may be rooted in the implication that the ordinance's failure to provide for precompliance judicial review necessitated its wholesale invalidation.[87] But the Court never fully developed, let alone explicitly stated, this procedure-based standard. For instance, the opinion leaves unanswered whether the procedural defect renders the ordinance per se unreasonable or whether the procedure-driven standard is altogether separate from reasonableness adjudication. It thus fails to identify a coherent set of circumstances under which Fourth Amendment facial invalidation would be appropriate.

The *Patel* Court adopted a holding that unsettles accumulated conventional wisdom about the nature of Fourth Amendment adjudication. But the brevity with which it announced the rule leaves litigants and lower courts with little guidance on precisely how to bring and adjudicate such facial challenges.

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[83] Indeed, Justice Alito's dissent showcases fundamental disagreement about using *Casey* to adjudicate *Patel*. Unlike the majority, which eliminated scenarios involving exigency or consent as "irrelevant" to adjudicating section 41.49's constitutionality, *see Patel*, 135 S. Ct. at 2451, Justice Alito's dissent included such scenarios as examples of the ordinance's constitutional application, *see id.* at 2465–66 (Alito, J., dissenting).

[84] A review of Supreme Court and lower court opinions yielded no majority opinions that explicitly invoked the *Casey* facial-challenge standard outside the abortion context.

[85] 546 U.S. 320, 329, 332 (2006) (vacating lower court's facial invalidation of parental-notification law, preferring "to enjoin only the unconstitutional applications of a statute while leaving other applications in force," *id.* at 329).

[86] *See, e.g.*, Gonzalez v. Carhart, 550 U.S. 124, 167 (2007) ("[T]hese facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge.").

[87] Justice Sotomayor's opinion hinted that section 41.49(3)(a)'s fatal flaw lay in its procedural deficiency. *See Patel*, 135 S. Ct. at 2452 ("[T]he City does not even attempt to argue that [section] 41.49(3)(a) affords hotel operators any opportunity whatsoever. Section 41.49(3)(a) is, therefore, facially invalid."); Transcript of Oral Argument at 45, *Patel*, 135 S. Ct. 2443 (2015) (No. 13-1175) ("[A]nytime [there is a] challenge as to the lack of process . . . it doesn't need to be as applied.").