No. 13-1175

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES, *Petitioner*,
v.
NARANJIBHAI PATEL, RAMILABEN PATEL, LOS ANGELES LODGING ASSOCIATION, *Respondents*.

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

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Respondents

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street
Suite 2
Ramona, CA 92065
Attorney for Amicus Curiae U.S. Justice Foundation

HERBERT W. TITUS*
ROBERT J. OLSON
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*

January 30, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, The Abraham Lincoln Foundation for Public Policy Research, Inc. and DownsizeDC.org, are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Downsize DC Foundation, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3).

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Each organization has filed many *amicus curiae* briefs in this and other courts.

These *amici* filed *amicus curiae* briefs in several Fourth Amendment cases in the recent past:

- Gun Owners of America, Inc. *et al.*, U.S. v. Jones, 565 U.S. ___, 181 L.Ed.2d 911 (2012)

---

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

(placing GPS on automobile as a trespass), http://lawandfreedom.com/site/constitutional/USvJones_amicus.pdf (Petition) http://lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf (Merits);

- Gun Owners Foundation, *et al.,* Heien v. North Carolina, 574 U.S. _____ (2014) (traffic stop based upon mistake of law), http://www.lawandfreedom.com/site/constitutional/Heien%20GOF%20amicus%20brief.pdf;
- Downsize D.C. Foundation, *et al.*, U.S. v. Wurie, Docket No. 13-212 (searches of cell phones incident to arrest), http://www.lawandfreedom.com/site/constitutional/Wurie%20DDCF%20Amicus%20Brief.pdf;
- U.S. Justice Foundation, *et al.*, Quinn v. Texas, Docket No. 13-765, January 27, 2014 (no-knock warrants), http://www.lawandfreedom.com/site/firearms/Quinn%20v%20Texas%20amicus%20brief.pdf;
- U.S. Border Control, *et al.*, Cotterman v. U.S., Docket No. 13-186 (suspicionless border searches), http://lawandfreedom.com/site/constitutional/Cotterman_v_US_Amicus.pdf; and
- U.S. Justice Foundation, *et al.*, Rodriguez v. U.S., Docket No. 13-9972 (dog sniff after completion of traffic stop), http://www.lawandfreedom.com/site/constitutional/Rodriguez%20USJF%20Amicus%20Brief.pdf.

SUMMARY OF ARGUMENT

Just three years ago, in United States v. Jones, this Court returned the Fourth Amendment to its original primary purpose — to protect the property rights vested by the common law in the "persons, houses, papers, and effects" of the people. To that end, in Florida v. Jardines, the Court established the people's property rights as the Fourth Amendment baseline. Although the Court has continued to recognize that the Fourth Amendment additionally protects the people's reasonable expectations of privacy, such privacy expectations can only add to, but cannot subtract from, the people's protected property rights.

In compliance with Jones, the *en banc* court of appeals below found that the hotel guest registry, required by the City of Los Angeles to be kept, is the private property of the hotel, and that the hotel's property right to the registry is a "paper" protected from an unreasonable search and seizure under the Fourth Amendment. That finding is not in dispute in this case. What is in dispute is whether a warrantless search of that property at the sole discretion of a police officer is "unreasonable," and thus an unconstitutional intrusion upon the hotel's liberty.

According to the parties to this case, the question of unreasonableness depends upon the strength of the hotel's expectation of privacy in its registry. The parties are mistaken. Any speculation about expectations of privacy should not even be reached. According to the Jones and Jardines property baseline,

the question of unreasonableness depends first and foremost upon whether the code authorizes a trespassory intrusion upon the hotelier's constitutionally protected property right. Because there is nothing in the record showing that the intrusion authorized by the city code is anything but non-consensual, the code's authorization of a warrantless search is, on its face, unreasonable and, therefore, in violation of the Fourth Amendment's property rights baseline.

Relying on New York v. Burger and United States v. Biswell, the City contends that, as a highly regulated industry, hotels and motels are not entitled to full Fourth Amendment protection. But this exception, carved out by this Court before Jones and Jardines were decided, is squarely based upon an attenuated expectation of privacy which, if continued, would undermine the Jones/Jardines property baseline. For this reason alone, the City's reliance upon Burger and Biswell is misplaced.

The City's argument that businesses should have lesser Fourth Amendment rights than private residences is absurd. Indeed, the Fourth Amendment traces its lineage to warrantless searches of businesses. In defending business owners against the infamous writs of assistance that had been used for warrantless searches of Boston merchants and ship owners, James Otis called the practice "the worst instrument of arbitrary power [and] destructive of English liberty." John Adams later recalled that speech as being the moment the American Revolution was born.

Additionally, the City's reliance on Biswell is seriously misjudged. Biswell dealt with a random, warrantless inspection scheme that Congress has since repudiated, which intruded upon the records and premises of federally licensed firearms dealers. Congress later concluded that the Biswell-approved scheme violated the Fourth Amendment, and thus federal law currently permits only one annual warrantless inspection of the firearms licensee's premises and records. Finally, Biswell wrongfully equated the manufacture and sale of firearms to the making and marketing of alcohol that could not withstand analysis then, much less today, after District of Columbia v. Heller and McDonald v. City of Chicago.

ARGUMENT

I. ON ITS FACE, THE LOS ANGELES CITY ORDINANCE UNLAWFULLY INTRUDES UPON RESPONDENTS' PROPERTY RIGHTS IN THEIR GUEST REGISTERS.

In an historic decision just three years ago, this Court returned the Fourth Amendment to its original purpose — to protect the people's property rights "in their persons, houses, papers, and effects, against unreasonable searches and seizures." *See* United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 949 (2012).

Condemning trespassory intrusions on private property, Jones put to rest the widely-held notion that, under Katz v. United States, 389 U.S. 347 (1967), the

Fourth Amendment protected foremost the people's "reasonable expectations of privacy." Katz, the Court asserted, had caused many to assume that, unless the government intruded on such a privacy interest, there could be no violation of the Fourth Amendment's command against unreasonable searches and seizures. *See* Jones at 950. Instead, the Jones Court explained, "the Katz reasonable-expectation-of-privacy test [was] *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 952.

Fourteen months later, this Court clarified the relationship between Jones and Katz, first affirming that the Fourth Amendment:

> establishes a simple **baseline**, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." [Florida v. Jardines, 569 U.S. ___, 133 S.Ct. 1409, 1414 (2013) (emphasis added).]

Second, the Court confirmed that "property rights" are not the "sole measure of Fourth Amendment violations." Jardines at 1414. However, "'when the Government [does not] engage in [a] physical intrusion of a constitutionally protected area,'" the Katz privacy formulation "may **add to the baseline,** [but] does **not subtract** anything from the Amendment's protections." *See* Jardines at 1414 (emphasis added). *See also id.* at 1417.

Following Jones, the *en banc* court of appeals found that because the "[r]ecord inspections under § 41.49 [of the City code] involve[d] a physical intrusion upon a hotel's papers"[2] in which the hotel had a property right, "[a] police officer's non-consensual inspection of hotel guest records plainly constitutes a 'search' under ... the property-based approach of *Jones*." *Id.* at 1061-62. At the same time, the *en banc* court also found that the search authorized by the city code constituted a search under "the privacy-based approach of *Katz*." *Id.* at 1062. Having made these twin findings, the court turned to the question whether the search authorized by the city code was "reasonable." *Id.* at 1063. Instead of conforming its analysis to the property rights baseline, as dictated by Jones and Jardines, the court below departed from that baseline, relying exclusively on court precedents based entirely upon the Katz expectation of privacy test. *See id.* at 1063-64. Consequently, the issues presented to this Court by both the Petitioner and the Respondents are based upon the assumption that the reasonableness of the physical intrusion upon the hotel's Fourth Amendment protected property right in its guest registry records turns on the Katz privacy expectation test,[3] not the

---

[2] Patel v. City of Los Angeles, 738 F.3d 1058, 1061 (9th Cir. 2013).

[3] The *en banc* majority presumed, on the basis of a "lack [of] an expectation of privacy," that the guests themselves had no protected Fourth Amendment interest in the "information" that they had "voluntarily" provided to the hotel. *See* Patel at 1062. However, Justice Sotomayor, concurring in Jones, recognized the problems inherent in deciding that a "voluntary" divulgement of information to a private entity for a particular purpose is

Jones trespassory test. *See* Brief for Petitioner ("Pet. Br.") at 33, 51-52; Brief for Respondents ("Resp. Br.") at 33, 55-56.

Both the *en banc* court and the parties are mistaken. This Court "need not decide whether [a police] officers' investigation of [the company's business records] violated [the company's] expectation of privacy under *Katz*." *See* Florida v. Jardines, 569 U.S. ___, 133 S. Ct. 1409, 1417 (2013). Rather, the question to be decided is whether the city ordinance authorizes an unconstitutional trespassory intrusion upon the hotel's property rights in its guest registry.

Since the officer's investigation authorized by the city ordinance would take "place in a constitutionally protected area," the question is whether the intrusion would be accomplished through an "unlicensed physical intrusion." Jardines at 1415. Any nonconsensual physical intrusion upon a company's business records kept from public view would be fully comparable to, and just as impermissible as, a nonconsensual physical intrusion upon one's home, which is "so sacred, that no man can set his foot upon his neighbour's close without his leave." *Id.* *See also* Boyd v. United States, 116 U.S. 746, 625-26 (1886).

---

tantamount to a forfeiture of Fourth Amendment rights to the government for any purpose. In her separate opinion, Justice Sotomayor stated that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." Jones, 132 S. Ct. at 957.

According to the application of the property baseline here, the only remaining question is whether there is an express or implied license permitting the Los Angeles police to examine the guest register that the hotelier is required by city ordinance to keep. If there is no such license, then the warrantless intrusion authorized by the city code would be unreasonable under the Fourth Amendment.[4] Although the City attempts to establish that warrantless searches of hotel guest registers was an established practice during the founding era, the City does not suggest that the historic record would support an implied license for the police to conduct a warrantless search of such records. Rather, the City argues that the historic record supports its argument that "[h]otels have a diminished **privacy** interest in their guest registers." Pet. Br. at 51 (emphasis added). In any event, the historic record of access to hotel guest registers falls far short of the evidence necessary to infer that by one's entry into the hotelier business, the owner and

---

[4] The *en banc* majority presumed that the only constitutionally –imposed barrier protecting the hotel's property right in its business records was the Fourth Amendment's warrant, probable cause, and particularity requirements. Under the Fourth Amendment's original property rights principle, however, unless the government can establish a property right superior to that of the hotel, it cannot search for or seize such records unless they are contraband, fruits of a crime or an instrumentality of a crime. If the government's interest is no more than informational, then the search should be unlawful under the "mere evidence" rule. *See* Gouled v. United States, 255 U.S. 298 (1921). Happily, this Court's abandonment of that rule need not be addressed in this case.

operator have impliedly consented to a police search of their guest registry. *See* Resp. Br. at 56-59.

By ignoring the Fourth Amendment property-rights baseline, the court below and the parties have unnecessarily complicated this case by inviting this Court to reach an issue that it need never decide — whether an investigation of a hotel's guest registry implicates the hotel's or guests' expectation of privacy.[5] As this Court emphasized in Jardines, and as the above analysis demonstrates, "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *See* Jardines at1417.

II. THE CITY'S ARGUMENT THAT THE SEARCH AUTHORIZED BY THE CITY CODE IS REASONABLE CONFLICTS WITH JONES AND JARDINES.

Throughout its brief, the City of Los Angeles has completely ignored this Court's teaching in Jones and Jardines. Indeed, the City has acted as if the two cases do not exist. Not once in its entire brief has the

---

[5] Indeed, the privacy expectation is, in reality, just another balancing test that empowers judges, in the name of constitutional law, to reach a pre-ordained result that has no textual support in the Constitution. *See* Patel, 738 F.3d at 1070-74 (Clifton, J., dissenting). Of course, as this Court warned in District of Columbia v. Heller, 554 U.S. 570 (2008), "[a] constitutional guarantee subject to future judges' assessment of its usefulness is no constitutional guarantee at all." *Id.* at 634.

City even alluded to the Jones property baseline.[6] And not once in its entire brief has the City even cited Jardines, much less indicated any awareness that the absence of any privacy expectation cannot "subtract" from the Fourth Amendment protection against "physical intruding on constitutionally protected areas." Jardines at 1417. To the contrary, the City's entire argument is based upon the claim that the "touchstone of any Fourth Amendment analysis is reasonableness and that inquiry turns on the circumstances surrounding the search:"

> Assessing the general reasonableness of the administrative searches contemplated by § 41.49 thus requires weighing the degree which the searches intrude upon an individual's **privacy** against the degree to which the searches are necessary to promote legitimate governmental interests. [Pet. Br. at 14. (emphasis added).]

The City has attempted to bolster its argument with claims from history. *See* Pet. Br. at 33-36, 49-50. But the City invoking the historic record does nothing to refute a hotelier's private property interest in its business records, or to establish some kind of implied license or consent to police investigations of hotelier guest registers. *See, e.g.*, Pet. Br. at 51. And the City

---

[6] To be sure, the City finally cites Jones, but not to the majority opinion that establishes the new property rights baseline. Rather, the City cites Justice Sotomayor's concurring opinion that addresses the privacy interests of persons who voluntarily disclose certain information to third parties. *See* Pet. Br. at 52.

has certainly made no effort to argue that any of the cited historic practices would support a finding that a "'license may be implied from the habits of the country,'" such as recognized in Jardines. *See id.* at 1415. Rather, the City argues the case exclusively from a privacy perspective, referring to such historic practices to support its claims that (i) "the individual **privacy** concerns pale in comparison to the City's legitimate interests in deterring prostitutes, drug dealers, and other serious criminals from committing crimes in hotels;" (ii) "[h]otels have only a **limited privacy** interest in their required registers;" (iii) "a register of guests' names, addresses, and license plate numbers is **not highly personal** information about the hotel;" and (iv) "record inspections ... are ... particularly unobtrusive as the police need never step foot into the hotel's **private places** and are authorized to look only at the register itself." *See* Pet. Br. at 16 (emphasis added).

Ignoring altogether the hotelier's property interest in its guest register, the City conveniently focuses solely upon hotelier's privacy interests, urging this Court to conclude that the search authorized by its ordinance is not "unreasonable" in light of the hotelier's attenuated privacy interest. By interjecting the hotelier's expectation of privacy into its reasonableness analysis, the City subordinates the hotelier's property rights to his privacy expectations and, thereby, subverts the Fourth Amendment property rights baseline established in Jones and Jardines. Because the City may not insist at the front end that privacy expectations determine whether a non-consensual inspection of hotel guest records is a

"search" within the meaning of the Fourth Amendment, the City should not be allowed to sneak the privacy expectation in at the back end to determine the "reasonableness" of a search under that Amendment. To rule otherwise would completely erase the Fourth Amendment's property rights baseline.

III. THE CITY'S RELIANCE ON NEW YORK v. BURGER IS MISPLACED.

Throughout its brief, the City has relied upon New York v. Burger, 482 U.S. 691 (1987). *See* Pet. Br. at 14, 17-18, 28, 30-47. Burger, as acknowledged by the City, stands for the proposition that "owners of 'commercial premises' in 'closely regulated' industries have 'reduced expectations of **privacy,**' and the 'government interests in regulating' such business are 'concomitantly heightened." Pet. Br. at 30 (emphasis added). Indeed, as this Court stated in Burger:

> [T]he Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes.... An owner or operator of a business thus has an **expectation of privacy** in commercial property, which society is prepared to consider to be reasonable.... An **expectation of privacy in commercial premises, however, is different from, and indeed less** than, a similar expectation in an individual's home.... This expectation is particularly attenuated in commercial

> property employed in "closely regulated" industries. [*Id.* at 699-700 (emphasis added).]

Based upon this "reduced expectation of privacy" predicate, the Court in Burger ruled that "the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, have **lessened** application in this context."[7] *Id.* at 702 (emphasis added). Thus, the Court in Burger "conclud[ed] that ... where the **privacy** interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a **warrantless** inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." *Id.* (emphasis added).

In short, under the Burger rule, a business owner's property rights in his commercial premises must give way to a government search that would otherwise be unreasonable — because of a lower expectation of privacy derived from Katz. This is the very analysis that this Court has since discarded. In Jones, the

---

[7] Burger appears out of step with other precedents in which other rights are not given a "lessened application" in the business or corporate context. Most recently, in Citizens United v. FEC, 558 U.S. 310 (2010), this Court "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id.* at 343. Likewise, "[t]he right of the people to be secure in their persons, houses, papers, and effects" should not be construed differently depending on whether they are at home or at the office, or whether they are balancing their personal checkbooks or the firm's.

Court ruled that the Fourth Amendment foremost protects property rights, not expectations of privacy. In Jardines the Court held that, whatever privacy interest is recognized under the Fourth Amendment, privacy cannot be employed so as to diminish a property right that is otherwise protected by the Fourth Amendment.

At no point in its brief does the City deny that hotels and motels have a property interest in the guest register that is required to be kept by the Los Angeles ordinance. Instead, the City assiduously avoids addressing that issue — for obvious reasons.[8] But the *en banc* court of appeals majority opinion did not. After devoting a good deal of attention to the property question, the court below found that a Los Angeles hotel or motel has a Fourth Amendment property interest in its guest register as a protected "paper." It also found that business owners need not prove that,

---

[8] As Respondents point out, the district court was not so reserved, "concluding that hotels and motels do not have an ownership or possessory interest that gives rise to a privacy right in their guest registries because those registries were created in order to comply with the ordinance." Opp. Br. at 3. This argument is absurd. On the one hand, the Ninth Circuit previously has held that guests have no interest in the hotel registry because they provided — under force of law (Los Angeles Municipal Code 41.49(4) and (6)) — their names to the hotel. *See* United States v. Cormier, 220 F.3d 1103, 1108 (9th Cir. 2000). On the other hand, the district court held that the hotel itself has no interest in its own registry because the registry was also created under penalty of law. The result of these two holdings is that, simply by enacting one law that forces the guest to divulge his identity, and another which forces the hotel to record that identity and divulge it to the police, no one is protected by the Fourth Amendment.

"as a factual matter, that their business records are subject to a reasonable expectation of privacy ... any more than homeowners are required to prove that papers stored in a desk drawer are subject to a reasonable expectation of privacy." *See* Patel v. City of Los Angeles, 738 F.3d 1058, 1062 (9th Cir. 2013).

In other words, business records located in a commercial establishment and personal papers located in a residence are equally protected by the Fourth Amendment, because in both situations the owner has the same property interest protected by the Fourth Amendment. Any claim by the City, as here, that the business record owner's protected property interest is reduced because of a diminished expectation of privacy is foreclosed by Jones and Jardines. The Burger rule to the contrary, therefore, is erroneous.[9]

Indeed, the very roots of the Fourth Amendment trace back to the protection of the People's businesses, rather than the protection of the People's homes. James Otis, Jr., once Advocate-General for the British Crown, was asked to argue in favor of the use of now-infamous writs of assistance. Such writs had been used extensively in the colonies to search businesses, ships, etc. for smuggled goods that had evaded taxation. In a dramatic juxtapose, Otis resigned from his position, and represented the very Boston merchants he had been opposing.

---

[9] The Court may want to reconsider Burger at this time, but Burger at a minimum should not be applied as though Jones and Jardines had never been decided, as the City apparently would prefer.

In defending its writs of assistance the Crown, like Los Angeles, no doubt believed that it had "legitimate interest in deterring [smugglers, tax evaders], and other serious criminals from committing crimes." *See* Pet. Br. at 16. No doubt the Crown believed that importers and merchants should be treated as "closely regulated industr[ies]." *Id*. at 14. No doubt, the Crown believed that "[w]arrantless inspections of [ships and cargo] are necessary to further this important interest." *Id*. at 15. No doubt the Crown believed that "[a writ of assistance] is an adequate substitute for a warrant" based upon probable cause. *Id*. No doubt the Crown believed that "the individual privacy concerns pale in comparison to the [Crown's] legitimate interest[s]," because "[a merchant's wares and a ship's cargo] is not highly personal information about the [merchant or shopkeeper]." *Id*. at 16.

In his famed address, Otis likened writs of assistance to "instruments of slavery" and described them as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law." James Otis, "Against Writs of Assistance" (Feb. 24, 1761). Years later, John Adams described Otis' oration as a "flame of fire," and explained that "American independence was then and there born. The seeds of patriots and heroes ... was then and there sown.... Then and there the child Independence was born. In fifteen years ... he grew up to manhood and declared himself free." J. Adams & J. Sewall, Novanglus, and Massachusettensis: Or, Political Essays, Published in the Years 1774 and 1775, on the Principal Points of Controversy, Between Great Britain and Her Colonies, Hews & Goss (1819).

As the Fourth Amendment traces its lineage to the rights of Boston merchants rather than Boston homeowners, the City's argument — that businesses are deserving of less Fourth Amendment protection — would have shocked and disappointed the framers of that Amendment.

IV. THE CITY'S RELIANCE ON THE OUTDATED MISTREATMENT OF FEDERALLY LICENSED FIREARMS DEALERS APPROVED IN U.S. v. BISWELL IS SORELY MISPLACED.

The City also relies on United States v. Biswell, 406 U.S. 311 (1972), although not as heavily as it relies on Burger. The Court in Biswell permitted unannounced warrantless searches of business records and premises of a federally-licensed firearms dealer without any consideration of the dealer's property rights under the Fourth Amendment. Abandoning the Amendment's property rights principle, the Biswell Court justified "unannounced, even frequent, inspections" because they allegedly "pose[d] only limited threats to the dealer's **justifiable expectations of privacy**." *Id.* at 316 (emphasis added).

Completely omitted from Biswell is any mention of the now-recognized foremost purpose of the Fourth Amendment — the protection of property rights in one's "person, house, papers and effects." Instead, the Biswell Court "ha[d] little difficulty in concluding [that] regulatory inspections further urgent federal interest, and the possibilities of abuse and the **threat**

to privacy are not of impressive dimensions, [so] the inspection may proceed without a warrant." *Id.* at 317 (emphasis added).

Later, the Court in Burger would parlay these casual privacy references in Biswell into a full-throated justification for its newly crafted "closely regulated" industry exception to the Fourth Amendment. *See* Burger at 699-702. As is true of Burger, so it is true of Biswell — both precedents have been undermined by the teaching of Jones and Jardines. There is every reason to believe that "closely regulated" industries should be treated the same as any other, for the Biswell/Burger exception is based solely and squarely on an attenuated expectation of privacy, and thereby would subvert the property rights baseline revitalized by Jones and Jardines.

Additionally, Biswell is weakened by the 1986 Firearms Owners Protection Act ("FOPA") repeal of the Gun Control Act ("GCA") provision that authorized "unannounced warrantless inspections" of the business premises and records of federally-licensed dealers. Enacted over the strong objection of the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), 18 U.S.C. Section 923(g)(1) now prohibits inspections of business premises and records without reasonable cause of violation and a warrant, except for (i) annual inspections to "ensur[e] compliance with the record keeping requirements" of the firearms chapter, and (ii) "in the course of a reasonable inquiry [related] to a criminal investigation of persons other than the licensee." FOPA overrode ATF's contention that:

> The prohibition against unannounced inspections would enable unscrupulous licensees to conceal violations of the law; (b) limiting compliance inspections to a single, annual inspection would have the same result and would be too infrequent to ensure compliance.... [Assessment by the ATF (Feb. 10, 1986), reprinted in 4 U.S.C.C.A.N. 1342 (99th Cong., 2d Sess. 1986).]

In its findings, Congress explained that it was moved to make such changes, in part, to protect "the rights of citizens ... to security against illegal and unreasonable searches and seizures under the fourth amendment...." Pub. Law No. 99-308, 100 *Stat.* 449 (1986).

Biswell is further discredited by its mistaken assumption that the manufacture and sale of firearms is analogous to the brewing or distilling and sale of alcohol. In Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), this Court observed the potential of federal statutory authority for warrantless searches and seizures of liquor, observing that Congress has been especially "solicitous in protecting the revenue against various types of fraud and to that end has repeatedly granted federal agents power to make warrantless searches and seizures of articles under the liquor laws." *Id.* at 75. Contrary to the Biswell Court's putting firearms into the same category as beer and bourbon (*id.* at 315), Congress has affirmed that in regulating the firearms trade it has always purposed not "to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of

firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity." *See* Pub. Law No. 90-618, 82 *Stat*. 1213-14.

Finally, Biswell is outmoded, decided before District of Columbia v. Heller and McDonald v. City of Chicago, 561 U.S. 742 (2010), which established that the Second Amendment secures to individuals the right to keep and bear arms.

In sum, there is no basis for the City's reliance on the Biswell Court's[10] approval of an ATF scheme of unannounced and warrantless inspection which was repudiated by Congress in 1986 with its enactment of FOPA.

CONCLUSION

For the reasons stated, the *en banc* court of appeals ruling should be affirmed on grounds consistent with this Court's rulings in Jones and Jardines.

Respectfully submitted,

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065

HERBERT W. TITUS*
ROBERT J. OLSON
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN

---

[10] *See* Pet. Br. at 40, 42, and 44.

(760) 788-6624
Attorney for Amicus Curiae U.S. Justice Foundation

WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*
January 30, 2015