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Court of Appeals

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CITY OF CLEVELAND CA 25 114852

vs.

Judge:

SHAKER HEIGHTS APARTMENTS OWNER LLC

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IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY

CITY OF CLEVELAND Plaintiff-Appellee, v. **SHAKER HEIGHTS APARTMENTS OWNER LLC** Defendant-Appellant.	**CA-25-114852** Consolidated with: **CA-25-114853** **CA-25- 114854** Trial court number: 2023- CRB- 7888 (consolidated with 2023 CRB 7891 and 2023 CRB 7893)

REPLY BRIEF OF APPELLANT

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I. Introduction

The City's administrative elevator inspection scheme is analogous to the administrative inspection schemes explicitly rejected as unreasonable in *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 526, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) and in *Wilson v. City of Cincinnati*, 46 Ohio St. 2d 138, 346 N.E.2d 666 (Ohio 1976). The City advances no legitimate reason to depart from thoroughly well-reasoned Ohio Supreme Court and United States Supreme Court case law.

II. Law and Argument

A. THE TRIAL COURT ERRED BY FAILING TO GRANT DEFENDANT'S MOTION TO SUPPRESS (ASSIGNMENT OF ERROR NO. 1)

The City cannot demonstrate that its statutory scheme warrants deviation from long held traditional safeguards. "[W]arrantless searches of residential property by municipal inspectors violate[] the Fourth Amendment protection against unreasonable searches and seizures [***], **administrative searches for housing code violations significantly intrude upon the interests protected by the Fourth Amendment** and, therefore, administrative searches which are not authorized by a warrant violate the traditional safeguards provided by the Fourth Amendment and are unconstitutional." *Tobin v. City of Peoria*, 939 F.Supp. 628, 632 (C.D.Ill.1996), citing *Camara*, 87 S. Ct. at 1729-30.

i. Elevators are Not a Recognized Highly Regulated Industry

The question is not whether an *activity* is pervasively regulated – it's whether the *industry* subject to the search is pervasively regulated. The City offers no case law to support deviation from this long-held standard and allowing a shift from *industry* to *activities* allows the exception to swallow the rule. For the last 50 years, the Supreme

Court has recognized only 4 industries as belonging to this group: 1) liquor sales ; 2) firearms; 3) dealing (gambling); 4) mining; 5) automobile junkyards. *Baker v. City of Portsmouth*, 2015 U.S. Dist. LEXIS 132759, (S.) at *16. In support of this argument, the City argues that the operation of elevators within the city of Cleveland is a closely regulated activity because "[t]he City has developed a chapter of its building code to deal with elevators[.]" (Appellee's Brief, P. 16). The City's argument therefore goes, elevators are closely regulated because the City has made it closely regulated. Such an argument is circular and would allow any City to evade the warrant requirement by implementing stringent rules around it.

For these reasons, it is clear that self-regulation cannot form the basis for an argument that an industry is pervasively regulated. E.g., *Free Speech Coalition, Inc. v. AG United States*, 787 F.3d 142, 146 (3d Cir.2015) citing *Burger*, 482 U.S. at 720, "We are doubtful that the Government can create the reduced expectation of privacy of a closely regulated industry to justify warrantless inspections by simply mandating those inspections, particularly where that industry existed long before the regulation's enactment." *Id.* In other words, the determination cannot stem from the City's self-imposed rules designed to justify the exception.

In *Free Speech Coalition*, 787 F.3d 142, (Inc.). When tasked with analyzing whether the adult film industry or those engaged in "producing adult images" were closely regulated industries, in *Free Speech Coalition*, 787 F.3d 142, (Inc.), the appellate court held:

> [T]he prohibition of child pornography is a broad proscription of a class of images and does not directly target the industry in with Plaintiff's are engaged. Nor could it. ** Indeed, enforcement of the ban is not limited to only those engaged in the business of producing sexually explicit images. The ban on child pornography is therefore more appropriately considered a generally applicable

> criminal law, not the targeted regulation of any legitimate industry. Although the nature of Plaintiff's business enhances the chance that they may run afoul of these laws, that alone does not justify deeming the entire industry closely regulated.

In similar vein, the City's ordinance does not directly target the industry in which Plaintiff is engaged in (the residential rental industry). It is applicable to every industry (or every home), that maintains an elevator. Enforcement is not limited to only those engaged in the residential rental business, and it is a generally applicable building code not targeted at one particular industry. The fact that the nature of a business may enhance the chance that a business may run afoul of the ordinance cannot justify deeming the entire industry closely regulated." *Id.*

ii. The City has Failed to Demonstrate that the Warrant Requirement would Undermine its Statutory Scheme.

The fact that elevators are not part of a closely regulated industry is enough to end the analysis finding that the City engaged in an unreasonable warrantless search. However, even if this Court were to find the City has met its burden demonstrating as much, the City fails to prove the remaining necessary elements: 1) the warrantless scheme is necessary to further the regulatory scheme; 2) the inspection scheme is a constitutionally adequate substitute for a warrant [i.e. limited in its scope and time and clearly defined]; and 3) the regulatory scheme furthers a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. *New York v. Burger*, 482 U.S. 691, 702, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987).

As to criterion No. 1, "warrantless inspections are necessary where a warrant would undercut the regulatory scheme." *Free Speech Coalition*, 787 F.3d 142,

(Inc.). A regulatory scheme is undercut where "the administrative inspection scheme [] depend[s] on the element of surprise to both detect and deter violations." *Free Speech Coalition*, 787 F.3d 142, (Inc.), quoting *Heffner*, 745 F.3d at 68. (E.g., "inspections of firearms dealers and junkyards require unannounced, warrantless inspections to prevent the disposal of illicitly held items[,] or the case of the mining industry where the use of required safety procedures could suddenly be utilized.) *Id.*, citing *Biswell*, 406 U.S. at 316, *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967). See also, *New York v. Burger*, 482 U.S. 691, 710, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) ("stolen cars and parts often pass quickly through an automobile junkyard").

The City does not disagree with the fact that there is no surprise element necessary to search elevators or advance the City's objective – elevators are either working or they are not working, incapable of being hidden or moved, and can only be manipulated/ repaired by off-site third-party professional elevator maintenance companies. In other words, a non-working elevator cannot be concealed, destroyed, moved, or suddenly made operational. If the City's concern is that an elevator is not working, the fact that the City has to secure a warrant doesn't undercut its goal of ensuring elevators are properly working. The City's argument is effectively that if they had to obtain warrants, the City would be less effective because they are required to do more work. But this extra work does not undercut the goal of ensuring elevators are working. In fact, inherent in all cases where the government is required to obtain a warrant, the government is engaging

in extra work/less efficiency. What is extra work in the eyes of the City, is a constitutionally sound layer of protection to its citizens.

Further, in analyzing administrative searches, the efficiency/ feasibility argument has been explicitly rejected as an appropriate argument to support warrantless searches. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 525, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). **"Warrantless administrative searches cannot be justified on the grounds that they make minimal demands on occupants; that warrants in such cases are unfeasible; or that area inspection programs could not function under reasonable search-warrant requirement."** *Id.*

When "warrantless searches are unnecessary, there is no need to sacrifice even administrative warrants and their accompanying 'assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.'" *Id.*

iii. The City's Warrantless Search Scheme is Not an Adequate Substitution to the Warrant Requirement and is Not Reasonable

Should this Court find that the element of sudden surprise is necessary to detect and deter against non-operational elevators in the city from suddenly working or being destroyed, the statutory scheme is still unreasonable and does not provide an adequate substitution to the warrant requirement. "[A] statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. **In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial**

premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. *New York v. Burger*, 482 U.S. 691, 703, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (internal brackets and quotation marks omitted, emphasis added). "

As to properly advising the premises owner, the statute must be "**sufficiently comprehensive and defined**". *Id.* Where [the legislature] has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970). "[I]n defining how a statute limits the discretion of the inspectors, we have observed that it must be "**carefully limited in time, place, and scope**." *Burger,* (emphasis added). Here, the ordinances statutory is not limited in time, place, or scope. Additionally, the inspector admitted he was not familiar with the City's elevator ordinances and had no idea what limits are placed upon him as an inspector (i.e., there are no rules governing the procedure). (Suppression TR. 21).

iv. <u>The City has not Advanced a Compelling Governmental Interest</u>

Generalized (or speculative) concerns for safety and well-being are not enough to dispose of the Fourth Amendments protections, if so, there would never be a need for an inspector to obtain a warrant to inspect a home, since all housing and building codes are created to enforce general safety standards. The City does not advance that the concern with elevators is an actual major problem in the City or that it has historically been a major problem. Moreover, the question is not whether the ordinance advances some sort of societal interest (as all criminal law arguably do this), but was it enacted to advance a *specific* governmental concern. As examples of the government's proving a compelling

interest in support of overriding the warrant requirement, see *New York v. Burger*, 693, (482 U.) (the "State has a substantial interest in regulating the vehicle-dismantling and automobile-junkyard industry because motor vehicle theft has increased in the State and because the problem of theft is associated with this industry. In this day, automobile theft has become a significant social problem, placing enormous economic and personal burdens upon the citizens of different States."); *United States v. Biswell*, 406 U.S. 311, 314, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (regulation of firearms "of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders"); *Donovan v. Dewey,* 452 U.S. 594, 602, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1980) (substantial federal interest in improving the historically abysmal health and safety conditions workers have been subjected to).

v. Neither Consent or Satisfying the Elements of *Burger* Save an Invalid Statutory Scheme.

Even assuming this Court finds the City has met its burden demonstrating the statutory scheme satisfies *Burger* and a closely regulated business exists, administrative schemes which require a search and/or punish for failure to consent to the search are inherently unreasonable under the Fourth Amendment. *City of Los Angelos v. Patel*, 135 S. Ct. 2443 (2015); *Wilson v. City of Cincinnati*, 46 Ohio St. 2d 138, 346 N.E.2d 666 (Ohio 1976); *Baker v. City of Portsmouth,* S.D.Ohio No. 1:14cv512, 2015 U.S. Dist. LEXIS 132759, at *12 (Sep. 30, 2015), citing *Sokolov v. Village of Freeport*, 52 N.Y.2d 341, 420 N.E.2d 55, 438 N.Y.S.2d 257 (N.Y. 1981). This is even the case when it is clear that the industry is pervasively regulated. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970).

Appellee admits that there is a forced nature to its search scheme:

> [B]ut, in a way, since the government requires the inspections before permits can be closed, there could be a forced nature to the consent. **The government requires the elevator owners to allow the search or face potential fines and criminal prosecution**. See C.C.O. 3103.99 and C.C.O. 3104.

(Appellee's Brief, P. 11). Thus, both parties are in agreement that the City requires its citizens to either consent to the search or face potential fines and criminal prosecution; this alone demonstrates the inherent unreasonableness of the search. In every case brought before a Court where the statutory scheme mandates compliance or subjects the owner to fines or punishment, the scheme has been declared an unreasonable search in violation of the Fourth Amendment. Appellee has not provided any case law to the contrary. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 525, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), is valid law and has been reviewed and upheld since its inception. See, *Colonnade Catering Corp,* supra.

It is clear that the City has not met its burden establishing the validity of the search pursuant to its relevant statutory scheme. As such, Plaintiff's Motion to Suppress should be granted.

III. The Court Order requiring Defendant to put all of its Tenant's Rental Payments into a Court Governed "escrow account" for "repairs" is a Gross Abuse of Authority Amounting to an Unlawful Taking (Assignment of Error 3).

The Defendant argues that the Court's Receivership provision is allowed because a court can order a receivership in a civil action. This argument is deficient for several *basic* reasons: 1) this is a criminal action, 2) **the Cleveland Municipal Housing Court is a court of limited jurisdiction**; even if the City had brough a civil action against Defendant seeking injunctive relief and then sought to have a receiver put in place, it could not do so because **municipal judges cannot appoint receivers.** The Judge of

the Cleveland Municipal Court – like all other municipal judges - cannot appoint the extreme remedy of subjecting someone to receivership, this is reserved for courts of common pleas under very specific circumstances, and the Judge could still not appoint itself as receiver. There is no legitimate basis for the City to argue that the Receivership provision is warranted.

IV. The City's Argument that Appellant Cannot Argue that the Court's Probation Violation Sanctions are Unwarranted under the Law, Fails.

The City argues that Defendant cannot argue that the probation violation sanctions contained in its written Sentence are unwarranted under law because the transcript of the sentencing hearing was not provided.[1] The necessity of a transcript is only needed when the ultimate question posed to the Court of Appeals *depends* on the transcript. See, App. R. 9(B)(1): "it is the obligation of the appellant to ensure that the proceedings the appellant **considers necessary** for inclusion in the record *** are transcribed[.]" *Id.* (Emphasis added). See also, App. R. 9(B)(4):

> If the appellant intends to present an assignment of error on appeal that a finding or conclusion **is unsupported by the evidence or is contrary to the weight of the evidence**, the appellant shall include in the record a transcript of proceedings that includes all evidence relevant to the findings or conclusion.

Appellant is not arguing errors unsupported by evidence – it is arguing errors unsupported by law. Appellant is not arguing that the Trial Court imposed different oral sanctions in open court different from those in her written decision, that Appellant wasn't properly advised of its rights, or any argument requiring a review of what the trial Court

[1] The transcript was destroyed during the municipal Court's cyber-attack. See email from Judge Scott to the Court of Appeals in this matter referencing the relevancy of the cyber attack in this matter.

judge *said* in open Court. Anything could have been said or not said at the hearing and that would not change the fact that her written, journalized Sentence is the ultimate decision being appealed from which the errors are derived. It is a court's written orders that court's speak through, not their oral announcements.

For purposes of the issues before this Court, even if we presume "the regularity of proceedings" of the sentencing hearing, it does not change the fact that the trial court judge thereafter entered an irregular written decision which forms the basis of Appellant's Error No. 3. Appellant is not claiming errors that occurred at the sentencing hearing; it is claiming errors that occurred in the Judges Sentencing Entry, none of which require reference to the sentencing hearing.

V. The City Has Not Filed a Cross-Appeal in Accordance with App. R. 3(C) seeking to change the Judge's Sentence (AOE 4).

Should the City have wished the Judge's Sentence be "corrected", it needed to file a cross-appeal in accordance with App. R. 3(C). "[A]n appellee who seeks to change the order [being appealed] *** shall file a notice of cross appeal with the clerk of the trial court[.]" Further, allowing the appellate court to modify the Sentence post its appeal time is unfairly prejudicial to Defendant. The Sentence only sentenced on Count I and not on Counts II-IV. As such, no merger issue existed at the time Defendant filed its appeal, and would now only exist past its time for filing an appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant was sent by email to the City of Cleveland c/o David Robers, Esq. via this court's electronic filing system on 8/29/2025 to **droberts3@clevelandohio.gov**

/s/ Rachel Cohen
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