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*CITY OF LOS ANGELES V. PATEL:*  
THE FOURTH AMENDMENT’S “SPECIAL NEEDS”  
IN THE INFORMATION AGE

*Maximilian Sladek de la Cal*<sup>†</sup>

“[T]he Founders did not fight a revolution to gain the right to government agency protocols.”<sup>1</sup>

Chief Justice Roberts

The Supreme Court’s recent decisions in *United States v. Jones*<sup>2</sup> and *Riley v. California*<sup>3</sup> show that at least some Justices recognize the heightened potential for governmental overreach in an age when digital records are kept on nearly every aspect of our lives. But searches and seizures by police officers during investigations and arrests—like those at issue in *Jones* and *Riley*—make up a relatively small portion of government actions that implicate the Fourth Amendment.<sup>4</sup> Consider the countless security checks

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1. *Riley v. California*, 134 S. Ct. 2473, 2491 (2014).

2. 132 S. Ct. 945 (2012) (Sotomayor, J., concurring). In *Jones*, five Justices concluded that prolonged electronic location monitoring by the government, even when limited to public places, violated the Fourth Amendment. *Id.* at 955–58. The majority opinion determined it did not need to address the “reasonable expectation of privacy” question—it held that placing a GPS tracker on the defendant’s car amounted to a physical trespass in violation of the Fourth Amendment—but explicitly stated that “[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.” *Id.* at 949–53.

3. 134 S. Ct. 2473 (2014). In a unanimous opinion by Chief Justice Roberts, *Riley* held that police must obtain a warrant to search the contents of an arrestee’s cell phone, carving out an exception to the longstanding rule exempting searches-incident-to-arrest from the warrant requirement. *Id.* at 2493–95. The Court approvingly cited Justice Sotomayor’s concurrence in *Jones*, reasoning that “[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person,” and therefore deserve special Fourth Amendment protections. *Id.* at 2489–90.

4. The number of airport screenings alone far eclipses the number of arrests: Over 650 million passengers boarded airplanes in the U.S. in 2015, and in 2012 (the most recent year with complete statistics), just over twelve million arrests were made. *See TransStats*, U.S. DEP’T OF TRANSP., <http://www.transtats.bts.gov> [<https://perma.cc/8D28-6MLR>]; FBI, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2012 (2013), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/arrestmain.pdf> [<https://perma.cc/YL8W-QW86>].

that happen every day at airports, the drug tests that occur in government-run schools and workplaces, and the regulatory inspections to enforce health, safety, and business codes. These kinds of searches, which have been labeled “administrative” or “special needs” searches,<sup>5</sup> all implicate Fourth Amendment rights. Yet these searches have been exempted from the Fourth Amendment’s strongest check on government behavior—that government searches require a warrant supported by probable cause. As a result, the administrative and special needs doctrines function as a broad license for the government to conduct searches free from meaningful constitutional limitation.

Now more than ever, because of their heightened vulnerability to government abuse in the Information Age, administrative and special needs searches deserve careful scrutiny.<sup>6</sup> Public and private records about nearly every aspect of our lives are stored digitally and owned by a range of actors. In a world connected by the “Internet of Things,”<sup>7</sup> government records inspections can reveal more about individuals than physical searches of houses, papers, and effects ever could. Furthermore, such inspections are particularly prone to government abuse. Unlike traditional physical searches and real-time communications surveillance, records searches are not space- or time-limited—searches can encompass years’ worth of records and can occur until the records are deleted.<sup>8</sup> In addition, inspections in which the government aims to discover would-be perpetrators rather than identified subjects are likely to lead to harassment of disfavored groups.<sup>9</sup> Therefore, if

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5. Professor Wayne LaFave categorizes this broad umbrella of searches under the single heading of “inspections and regulatory Searches.” See WAYNE LAFAVE, 5 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 3–5 (4th ed. 2004). A portion of this Note is devoted to explaining the doctrinal confusion that surrounds the “administrative” and “special needs” labels. See *infra* Section I.B.

6. Cf. Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 16 (2008) (“The more powerful and effective our technologies of surveillance and analysis become, the more pressure the government will feel to route around warrant requirements and other procedural hurdles so that it can catch potential troublemakers more effectively and efficiently before they have a chance to cause any harm.”).

7. The term “Internet of Things” refers generally to the increasingly large network of objects equipped with sensors, software, and Internet connectivity that collect and exchange data. See generally Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 TEX. L. REV. 85 (2014) (Part I describes the types of Internet of Things devices currently available to consumers); see also Swaroop Poudel, Note, *Internet of Things: Underlying Technologies, Interoperability, and Threats to Privacy and Security*, 31 BERKELEY TECH. L.J. 997 (2016).

8. See Mark Andrejevic & Kelly Gates, *Big Data Surveillance: Introduction*, 12 SURVEILLANCE & SOC’Y 185, 187 (2014).

9. See CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT*, 191–95 (2007) (discussing the

the administrative and special needs doctrines are left unchecked and unclarified, warrantless, suspicionless searches of digital records have the potential to undermine any meaningful protection afforded by the Fourth Amendment.

In *City of Los Angeles v. Patel*,<sup>10</sup> the Supreme Court confronted the administrative and special needs doctrines for the first time in over a decade. *Patel* received some attention from scholars<sup>11</sup> and privacy advocates,<sup>12</sup> but it was by no means a “classic” Fourth Amendment case.<sup>13</sup> A group of hotel owners brought a suit against the City of Los Angeles, claiming that an ordinance requiring them to hand over their guest records for inspection by police violated the Fourth Amendment. The hotel guests’ privacy rights were not at issue in the case,<sup>14</sup> and the questions presented were ostensibly unrelated to information technology.

In a 5–4 opinion in favor of the hotel owners, Justice Sotomayor made four notable rulings: (1) facial challenges under the Fourth Amendment are allowed and not disfavored; (2) businesses have Fourth Amendment interests in records they are required to keep; (3) the special Fourth Amendment exception for “closely regulated” industries is much more

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problem of “mission creep” associated with “event-driven” (as opposed to “target-driven”) surveillance).

10. 135 S. Ct. 2443 (2015).

11. The little attention that *Patel* was afforded by scholars focused on the fact that the hotel owners challenged the ordinance “on its face,” as opposed to challenging it “as-applied” in a particular search. See *infra* Section II.B.1 for a discussion of the facial challenge issue in *Patel* and reactions from scholars.

12. See, e.g., Conor Friedersdorf, *A Motel-Sized Victory for Privacy at the Supreme Court*, ATLANTIC (June 23, 2015), <http://www.theatlantic.com/politics/archive/2015/06/an-motel-sized-victory-for-privacy-at-the-supreme-court/396542> [https://perma.cc/3NTC-PRRL] (lauding Justice Sotomayor’s commitment to protecting privacy, but remaining skeptical of the overall impact of *Patel*).

13. Fourth Amendment scholar Scott E. Sundby has contrasted searches by police officers during the course of arrests and investigations—the kind of “classic” government-citizen encounters that “raise our Fourth Amendment ire”—with the more mundane, routine inspections often involved in special needs cases, which are unlikely to “rally the citizenry to the Fourth Amendment barricades.” See Scott E. Sundby, *Protecting the Citizen “Whilst He is Quiet”: Suspicionless Searches, Special Needs and General Warrants*, 74 MISS. L. J. 505, 505–06 (2005). Sundby’s observation helps explain why the *Jones* and *Riley* decisions garnered so much attention, while the *Patel* case went largely unnoticed.

14. In fact, in its discussion of the merits of the case, nowhere does the *Patel* majority opinion even address the privacy expectations of the hotel and motel operators. Indeed, at oral argument, the owners themselves focused on how the ordinance disturbed their “tranquility,” not privacy. Oral Argument at 30:45, *Patel*, 135 S. Ct. 2443 (No. 13-1175), [http://www.oyez.org/cases/2010-2019/2014/2014\\_13\\_1175](http://www.oyez.org/cases/2010-2019/2014/2014_13_1175) [https://perma.cc/2RVR-KRRY]. But see *infra* Section II.B.2 for a discussion of how the Ninth Circuit addressed the privacy interests at stake in the case.

limited than lower courts had interpreted; and (4) precompliance review procedures are necessary for records inspection schemes.<sup>15</sup> Despite the apparent clarity of these rules, however, the Court did not take advantage of the much-needed opportunity to address key threshold questions regarding the administrative and special needs doctrines. As a result, it is unclear how *Patel* will apply to a vast array of future cases.<sup>16</sup>

Part I of this Note provides background on the Fourth Amendment, including an overview of search and seizure law related to the rights of businesses and a brief history of the administrative and special needs doctrines. Part II summarizes the Court's holdings and reasoning in *Patel*. Part III examines the crucial questions the Court left unanswered in its opinion. Part IV calls for renewed emphasis on the administrative and special needs doctrines in the Information Age to address the questions *Patel* left unanswered.

## I. FOURTH AMENDMENT BACKGROUND: COMMERCIAL PREMISES, BUSINESS RECORDS, “ADMINISTRATIVE SEARCHES,” AND THE “SPECIAL NEEDS” DOCTRINE

This Part will first provide an overview of Fourth Amendment protections for commercial premises and business records, both of which were at issue in *Patel*. Thereafter, it will summarize the evolution of the administrative and special needs doctrines.

### A. FOURTH AMENDMENT PROTECTIONS FOR COMMERCIAL PREMISES AND BUSINESS RECORDS

In two separate clauses, the Fourth Amendment establishes “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,” and provides that “no Warrants shall issue, but upon probable cause.”<sup>17</sup> A “search” occurs, and therefore the Fourth Amendment applies, when the government violates a “reasonable

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15. See *infra* Section II.B for a summary of the key holdings.

16. The Court also did not address the implications of its holding for the “third-party doctrine,” which makes sense considering that hotel owners, not guests, challenged the ordinance. See *infra* Section I.A for a discussion of the third-party doctrine. Nor did the Court engage in novel substantive interpretation of Fourth Amendment rights. *But cf.* Luke M. Milligan, *The Right “To Be Secure”*: Los Angeles v. Patel, 2015 CATO SUP. CT. REV. 251, 251 (2015) (arguing that “the *Patel* majority was quietly influenced by the ‘to be secure’ text of the Fourth Amendment”).

17. U.S. CONST. amend. IV.

expectation of privacy,”<sup>18</sup> but the Court has noted that there is “a particular concern for government trespass” upon the areas enumerated by the Amendment (persons, houses, papers, and effects).<sup>19</sup> Especially noteworthy for administrative and special needs cases, the Fourth Amendment protection “against certain arbitrary and invasive acts by officers of the Government,”<sup>20</sup> applies to *all* agents of the government—civil as well as criminal.<sup>21</sup> Therefore, the Fourth Amendment’s protection against unreasonable searches and seizures applies to a broad range of actors beyond law enforcement officers,<sup>22</sup> and “without regard to whether the government actor is investigating crime or performing another function.”<sup>23</sup>

Interpreted literally, the Amendment requires neither a warrant for each search, nor probable cause for a search to be “reasonable.”<sup>24</sup> However, the Supreme Court has deemed “searches conducted outside the judicial process . . . *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions,”<sup>25</sup> and has generally required probable cause for warrantless searches.<sup>26</sup> But the Court has also called probable cause “a fluid concept” that must be determined by an analysis of the totality of

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18. *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring). Expectations of privacy are considered “reasonable” if they satisfy a two-pronged test: the expectation of privacy must (1) be subjectively held by the individual, and (2) considered objectively reasonable in the eyes of society. *See id.*

19. *United States v. Jones*, 132 S. Ct. 945, 950 (2012).

20. *City of Ontario v. Quon*, 560 U.S. 746, 755–56 (2010) (citing *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 613–14 (1989)) (internal quotations omitted).

21. *See Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (per curiam) (“It is well settled . . . that the Fourth Amendment’s protection extends beyond the sphere of criminal investigations, and the government’s purpose in collecting information does not control whether the method of collection constitutes a search.” (quoting *Ontario v. Quon*, 560 U.S. 746, 755 (2010))).

22. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001) (holding that state hospital employees are government actors subject to Fourth Amendment restrictions); *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (finding that public school officials are government actors for Fourth Amendment purposes because “they act in furtherance of publicly mandated . . . policies”); *Andrews v. Hickman Cnty.*, 700 F.3d 845, 859 (6th Cir. 2012) (holding that state social workers are government actors under the Fourth Amendment), *U.S. v. Doe*, 61 F.3d 107, 109 (1st Cir. 1995) (finding that the Fourth Amendment applies to nongovernmental personnel manning airport security checkpoints).

23. *Quon*, 560 U.S. at 755–56.

24. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (“[A] warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required . . . probable cause is not invariably required either.”)

25. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

26. *See Carroll v. U.S.*, 267 U.S. 132, 155–56 (1925) (noting that probable cause is a “reasonableness” standard for warrantless searches and seizures).

circumstances surrounding the intrusion.<sup>27</sup> In a number of cases, it has held “reasonable suspicion”<sup>28</sup> of unlawful activity enough to justify a search when the privacy intrusion is outweighed by an important governmental interest.<sup>29</sup>

Moreover, some categories of searches have been held to be reasonable without any individualized suspicion whatsoever. This may be because they are routine and minimally intrusive to privacy interests,<sup>30</sup> or because they involve “special needs” beyond the normal need for law enforcement, such as public safety.<sup>31</sup> Finally, while the Supreme Court has long interpreted Fourth Amendment rights to extend to commercial premises and business records, over time, constitutional protections for businesses have been eroded.<sup>32</sup> The Court has recognized some Fourth Amendment interests in commercial premises not open to the public, but not if the business is deemed “closely regulated.”

In *See v. City of Seattle*, the Court required a warrantless inspection of a commercial warehouse to comply with reasonable legislative or administrative standards.<sup>33</sup> But the Court also cautioned that its decision in no way implied that “business premises may not reasonably be inspected in

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27. *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

28. Reasonable suspicion exists when there are “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

29. *See, e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 376–77 (2009) (reasonable suspicion that student possessed contraband justified search of outer clothing, but more intrusive strip search ruled unlawful); *Terry*, 392 U.S. at 22–24 (reasonable suspicion that individual was engaged in criminal activity justified brief investigatory detention and reasonable suspicion that individual was armed justified pat-down search).

30. *See, e.g.*, *United States v. Ramsey*, 431 U.S. 606, 616 (1972) (involving searches of international mail, and claiming that “searches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border”); *Colorado v. Bertine*, 479 U.S. 367, 375–76 (1987) (holding an inventory search of an impounded vehicle without a warrant or probable cause reasonable because it was exercised “according to standard criteria”).

31. *See infra* Section I.B.2 for an explanation of the “special needs” doctrine.

32. For a recent discussion of corporations’ Fourth Amendment rights (including a brief mention of *Patel*), see Kayla Robinson, Note, *Corporate Rights and Individual Interests: The Corporate Right to Privacy as a Bulwark Against Warrantless Government Surveillance*, 36 CARDOZO L. REV. 2283, 2300–09 (2015) (arguing that Supreme Court jurisprudence establishes that “corporations have baseline Fourth Amendment privacy rights,” and that coupled with lower court cases, corporations “have a constitutional right to privacy in some commercially sensitive information”).

33. 387 U.S. 541, 543–45 (1967) (observing that “[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property”).

many more situations than private homes.”<sup>34</sup> And as privacy expectations came to replace property principles at the center of Fourth Amendment analysis,<sup>35</sup> the Court began to further differentiate between residential and commercial premises. In *Donovan v. Dewey*, for example, the Court found that there is “greater latitude to conduct warrantless inspections of commercial property” because “the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual’s home.”<sup>36</sup> Consequently, virtually all businesses are subject to certain governmental inspections to ensure regulatory compliance.

Inspections of businesses require neither the traditional quantum of probable cause nor individualized suspicion.<sup>37</sup> Furthermore, in the case of commercial spaces open to the public, such as the dining area of a restaurant or the lobby of a motel, there is no Fourth Amendment protection<sup>38</sup> because there is no “reasonable expectation of privacy in the areas of the store where the public [are] invited to enter and to transact business.”<sup>39</sup>

Similar logic regarding diminished privacy interests applies in cases involving searches of “closely regulated” industries, which the Court has held to a relaxed Fourth Amendment standard.<sup>40</sup> The Court has determined

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34. *Id.* at 546.

35. This shift is traditionally attributed to the “reasonable expectation of privacy” test established in *Katz*. See *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring). Some scholars have argued though that recent Fourth Amendment decisions reflect a “re-emergence of property.” See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 106–15 (2d ed. 2014).

36. 452 U.S. 594, 598–99 (1981).

37. See *infra* Section I.B.1 (discussing the administrative search doctrine, which guides Fourth Amendment analysis of regulatory inspection schemes); see also Jack M. Kress & Carole D. Iannelli, *Administrative Search and Seizure Whither the Warrant?*, 31 VILL. L. REV. 705 (1986) (exploring Fourth Amendment precedent related to administrative inspections).

38. See *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 413–14 (1984) (entering the public lobby of a motel and restaurant to serve a subpoena did not implicate the Fourth Amendment because they were areas open to the public).

39. *Maryland v. Macon*, 472 U.S. 463, 469 (1987). Note, however, that areas where only employees are allowed *do* invoke Fourth Amendment analysis. See *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979) (“[T]here is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees.”).

40. See *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978).



that liquor sales,<sup>41</sup> firearms dealing,<sup>42</sup> mining,<sup>43</sup> and automobile junkyards<sup>44</sup> have such a history of government oversight and regulation that “no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise.”<sup>45</sup> Therefore, statutorily authorized government inspections of “closely regulated” businesses require no warrants, even the kind contemplated in *See*.

When it comes to business records, the Fourth Amendment provides some—but not much—constitutional protection for information a business keeps private.<sup>46</sup> The government conducts a Fourth Amendment “search” whenever it compels a business to hand over records in which the business holds a legitimate privacy interest, but searches of business records rarely require a warrant supported by probable cause to be reasonable. They are typically authorized by subpoena,<sup>47</sup> which has a curious status exempt from the Amendment’s central requirements.<sup>48</sup> Before handing over any documents, businesses may move to quash the subpoena on grounds that it

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41. *See* *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970).

42. *See* *United States v. Biswell*, 406 U.S. 311, 311–12 (1972).

43. *See* *Donovan v. Dewey*, 452 U.S. 594, 606 (1981).

44. *See* *New York v. Burger*, 482 U.S. 691, 703–06 (1987).

45. *Marshall*, 436 U.S. at 313.

46. Just as an individual’s “papers” are protected by the Fourth Amendment if the individual holds a reasonable expectation of privacy in them, business records that are kept private trigger some constitutional protection. *See* *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352–53 (1977) (finding that the seizure of corporate records implicated the company’s Fourth Amendment privacy interests); *See v. City of Seattle*, 387 U.S. 541, 544–45 (holding that the Fourth Amendment applies to the government’s “perusal of financial books and records”); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (“While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still . . . the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, be he individual or corporation, is entitled to protection.”).

47. *See* Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 805 (2005) (“[A]s an investigative tool, subpoenas are probably more important than physical searches of homes, businesses, and effects.”). Document subpoenas can be issued by courts or administrative agencies (both at the federal and state level), and are generally deemed valid if the records requested are “relevant” to an investigation conducted for a “legitimate purpose,” namely authorized by statute. *United States v. Powell*, 379 U.S. 48, 57–58 (1964).

48. *See* *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946) (finding that “if applicable” to subpoenas for the production of corporate records, the Fourth Amendment “at the most guards against abuse only by way of too much indefiniteness or breadth”); *see generally* CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT*, 154–64 (2007) (summarizing arguments for why the Fourth Amendment offers little protection against document subpoenas, namely because subpoenas are seen to be less intrusive than other types of searches).

lacks sufficient particularity, or is otherwise overbroad or burdensome,<sup>49</sup> but the chances of a successful challenge are slight.<sup>50</sup> There are also certain categories of businesses that are subject to inspections of records that they are required by law to keep.<sup>51</sup>

Crucially, when it comes to protections for business records, the Fourth Amendment interests of a business must be analyzed separately from the interests of its customers. Under the “third-party doctrine,” if customers voluntarily convey personal information to businesses, the customers are considered to have largely forfeited their Fourth Amendment protections in the information.<sup>52</sup> The Court has reasoned that a customer “takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.” Therefore, the customer possesses no cognizable expectation of privacy in the information.<sup>53</sup> This holds true “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”<sup>54</sup>

In sum, in a large number of business records search cases, the reasonableness of a search is determined by simply balancing the nature of the government’s intrusion against the interests served by the intrusion. As a result, the Fourth Amendment allows levels of government intrusion in the context of searches of commercial premises and business records beyond

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49. See *Fisher v. United States*, 425 U.S. 391, 401 (1976) (holding that the Fourth Amendment protects against overbroad subpoenas); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (ruling that a subpoena is valid, if *inter alia*, “the demand is not too indefinite”); *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 208–09 (1946) (limiting the Fourth Amendment’s safeguards against subpoenas, but maintaining that the Amendment still protected against “too much indefiniteness or breadth” in what the document subpoena described).

50. In *Morton Salt Co.*, the Court went as far as to say that a subpoena may pass constitutional scrutiny even when it seeks to satisfy “nothing more than official curiosity.” 338 U.S. 632, 652 (1950). See also Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 806 (2005) (describing how the low standards set by the Court have made subpoenas “extremely easy to enforce”).

51. See, e.g., *Cal. Bankers Ass’n v. Schultz*, 416 U.S. 21, 37, 76 (1974) (upholding the record-keeping and reporting provisions of the Bank Secrecy Act of 1974, which were designed to obtain financial information with a “high degree of usefulness in criminal, tax, or regulatory investigations”).

52. See *United States v. Miller*, 425 U.S. 435, 443 (1976). Noteworthy in the context of the *Patel* case, in *United States v. Cormier* the Ninth Circuit relied on *Miller* to establish that hotel guests do not have a reasonable expectation of privacy in guest registry information. 220 F.3d 1103, 1108 (9th Cir. 2000).

53. *Miller*, 425 U.S. at 443.

54. *Id.*

those allowed in the context of ordinary criminal investigations.<sup>55</sup> And when it comes to customers' privacy interests in business records, the third-party doctrine obviates Fourth Amendment analysis.

B. THE EVOLUTION OF THE "ADMINISTRATIVE SEARCH" AND "SPECIAL NEEDS" DOCTRINES

"Administrative" and "special needs" searches fall into the long list of exceptions to the rule that searches conducted outside the judicial process are *per se* unreasonable.<sup>56</sup> Despite the Court's insistence that warrantless inspection schemes are disfavored,<sup>57</sup> the types of searches that fall into the "administrative search" or "special needs" exceptions themselves are vast and growing.<sup>58</sup> Beyond the sorts of business inspection schemes at issue in *Patel*, in the past three decades, courts have held that "special needs" justify warrantless, suspicionless searches in a variety of contexts. Some target

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55. William J. Stuntz has noted the irony of this outcome—the Court "giving the government much more leeway when enforcing fairly trivial regulations than it has when enforcing laws against rape or murder"—and argues that it can be fixed by reorienting Fourth Amendment analysis in criminal procedure away from privacy concerns. William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1018–19 (1995).

56. It is commonplace for commentators to note that Fourth Amendment law is "riddled with exceptions." See, e.g., Sean M. Kneafsey, Comment, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right to be Free from Unreasonable Searches and Seizures?*, 35 SANTA CLARA L. REV. 1237, 1243 (1995) ("The requirement that a search or seizure be conducted pursuant to a warrant supported by probable cause is riddled with exceptions.").

57. See *Michigan v. Clifford*, 464 U.S. 287, 291–92 (1984) (reaffirming the Court's position "that administrative searches generally require warrants. . . . [e]xcept in certain carefully defined classes of cases").

58. See STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY, 95 (2012) ("The once obscure administrative search doctrine now matters enormously in our daily lives."); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 255 (2011) ("For some time . . . Fourth Amendment experts have understood that warrantless searches are in practice common, even if they are officially exceptional. But the magnitude and potential scope of this trend has been greatly underestimated, in large part because of inattention to an increasingly important exception to the probable cause and warrant requirements: the administrative search."); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 553 (1992) (explaining special needs cases make up a "growing category of cases"); Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 530–31 (1997) (arguing that the "special needs" exception to the warrant requirement "covers a broad range of situations" and is "so broad and far-reaching that it is poised to turn the warrant preference rule on its head").

categories of persons, such as searches of public school students,<sup>59</sup> government employees,<sup>60</sup> probationers<sup>61</sup> and parolees.<sup>62</sup> Others involve protective sweeps and deterrent efforts, such as sobriety checkpoints,<sup>63</sup> airport screenings,<sup>64</sup> and border searches.<sup>65</sup> The special needs rationale has even been used to defend the constitutionality of searches in the context of national security.<sup>66</sup> The evolution of the administrative and special needs doctrines shows how a relatively narrow Fourth Amendment carve-out for regulatory inspection schemes eventually expanded to cover almost any suspicionless search, so long as it serves a “sufficiently vital”<sup>67</sup> governmental interest “beyond the normal need for law enforcement,”<sup>68</sup> and a warrant or probable cause is “impracticable.”<sup>69</sup>

1. *The Fourth Amendment Makes Way for the Regulatory State and the Administrative Search Doctrine Is Born*

In the early twentieth century, strict interpretations of the Fourth and Fifth Amendments gave way to allow for the enforcement of new regulatory regimes such as the Sherman Act and the New Deal.<sup>70</sup> By the mid-

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59. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Bd. of Ed. v. Earls*, 536 U.S. 822 (2002).

60. See *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602 (1989); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

61. See *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987).

62. See *Samson v. California*, 547 U.S. 843, 846–47 (2006).

63. See *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1980).

64. See *U.S. v. Aukai*, 497 F.3d 955, 959–60 (2007).

65. See *George v. Rehiel*, 738 F.3d 562 (3d Cir. 2013); *United States v. McCarty*, 648 F.3d 820 (9th Cir. 2011).

66. “National Security Letters” are a form of administrative subpoena. See Ursula Gorham-Oscilowski & Paul T. Jaeger, *National Security Letters, the USA PATRIOT Act, and the Constitution: The Tensions Between National Security and Civil Rights*, 25 GOVT. INFO. QRT. 625, 632 (2008); see also U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 37–38 (2006), [https://www.justice.gov/archive/opa/docs/whitepaper\\_onnsalegalauthorities.pdf](https://www.justice.gov/archive/opa/docs/whitepaper_onnsalegalauthorities.pdf) [<https://perma.cc/UZM5-3PBV>] (“[T]he warrant requirement [is] inapplicable . . . in circumstances in which the Government faces an increased need to be able to react swiftly and flexibly, or when there are at stake interests in public safety beyond the interests in ordinary law enforcement.”).

67. See *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

68. See *id.* at 313.

69. See *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 619 (1989).

70. In the 1886 landmark case *Boyd v. United States*, the Supreme Court held that complying with a government order to provide investigators with commercial invoices pursuant to a civil forfeiture law was a “search” that violated the Fourth and Fifth Amendments. 116 U.S. 616, 622–35 (1886). And twenty years later, in *Hale v. Henkel*, the Court found that a businessman’s compelled compliance with a subpoena during the investigation of a Sherman Act violation constituted a “search.” 201 U.S. 43, 71 (1906).

twentieth century, the Supreme Court had recognized that law enforcement agencies had a “legitimate right to satisfy themselves that corporate behavior is consistent with the law and public interest.”<sup>71</sup>

In 1967, *Camara v. Municipal Court* established what eventually became known as the “administrative search” doctrine.<sup>72</sup> *Camara* held that warrantless administrative searches of private residences to enforce municipal health and safety codes violated the Fourth Amendment.<sup>73</sup> However, just as significantly, the Court validated the issuance of search warrants to inspect residences absent individualized suspicion.<sup>74</sup> Redefining probable cause as flowing from the “reasonableness” of routine inspections, the *Camara* Court concluded that “it is obvious that ‘probable cause’ to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied.”<sup>75</sup>

Three salient factors figured into the Court’s decision that the search regime at issue was “reasonable” under the Fourth Amendment. First, the Court distinguished the governmental interest in housing inspections from the governmental interest involved in criminal investigations:

Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety.<sup>76</sup>

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However, crucially, in *Hale* the Court determined the search unreasonable only because the subpoena was overbroad, and went on to warn that the holding should not be construed to undermine the government’s subpoena power in such cases. *Id.* at 75–77 (“[W]e do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment.”); see also William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 395, 428–33 (1995) (demonstrating how toward the end of Theodore Roosevelt’s presidency, “the Supreme Court began to erect unprincipled boundaries around Fourth and Fifth Amendment protections in order to limit their restrictive effect on regulatory statutes”).

71. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (noting that this principle held true even if the government request for information had been “caused by nothing more than official curiosity”).

72. 387 U.S. 523 (1967).

73. *Id.* (overturning *Frank v. Maryland*, 359 U.S. 360 (1959)).

74. *Id.* at 534–39.

75. *Id.* at 538.

76. *Id.* at 535. The Court also noted that area code-enforcement inspections had “a long history of judicial and public acceptance.” *Id.* at 537.

Second, because the inspections were “neither personal in nature nor aimed at the discovery of evidence of crime,” they involved a “relatively limited invasion of the urban citizen’s privacy.”<sup>77</sup> And third, the Court found that “the only effective way to seek universal compliance with the . . . municipal codes” was through such periodic inspections.<sup>78</sup> Having concluded that area inspections did not at their inception violate the Fourth Amendment,<sup>79</sup> the Court held that area warrants could issue so long as “reasonable legislative or administrative standards” were in place and satisfied in each case.<sup>80</sup>

In the wake of *Camara*, determining the reasonableness of an administrative inspection scheme entailed balancing four factors: the nature of the government’s interest, the level of the privacy intrusion, the necessity of the intrusion to further the government’s interest, and the procedural standards employed by authorities issuing the administrative warrants and executing the searches.<sup>81</sup> But over the years, these four factors have been repackaged into a “special needs” doctrine that has permitted a wide array of suspicionless searches in a variety of contexts.<sup>82</sup>

2. “Special Needs” Searches Grow Out of the Administrative Search Doctrine (and then Subsume It)

The term “special needs” first appeared in Justice Blackmun’s concurring opinion in *New Jersey v. T.L.O.*<sup>83</sup> Justice Blackmun agreed with the majority’s interpretation of *Camara*—that in some cases absent individualized suspicion, a search’s reasonableness could be determined by

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77. *Id.* at 537.

78. *Id.* (noting that faulty wiring, for instance, is “not observable from outside the building and indeed may not be apparent to the inexpert occupant himself”).

79. “Unfortunately,” Justice White explained, “there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails . . . . If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.” *Id.* at 536–37.

80. *Id.* at 538.

81. See CLANCY, *supra* note 35, at 596.

82. Note that while the “repackaging” has entailed reformulating some of the factors discussed in *Camara*, the opinion undoubtedly laid the foundation for the special needs doctrine. See Sundby, *supra* note 13, at 550–56 (2005) (stating *Camara*’s reasonableness-based balancing test spawned later special needs cases and “opened the door to unintended mischief”); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2501 (1996) (calling *Camara* the “forebear of all the later ‘special needs’ cases”).

83. 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

“a careful balancing [of] governmental and private interests”<sup>84</sup>—but filed a separate opinion noting that the test should only apply “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”<sup>85</sup> The purpose of Justice Blackmun’s “special needs” formulation was to articulate a distinction between the ultimate balancing of interests *if* an exception to the traditional warrant and probable cause requirements applies, and the “crucial step” of identifying whether the balancing test should apply in the first place.<sup>86</sup>

In the ten years following *T.L.O.*, the Court invoked Justice Blackmun’s “special needs” locution five times to hold that warrants supported by probable cause were not necessary to satisfy the Fourth Amendment: when an employer searches the office of a government employee;<sup>87</sup> when a probation officer searches the home of a probationer;<sup>88</sup> when the government requires certain categories of employees to take drug tests;<sup>89</sup> and when school officials require random drug testing of portions of a student population.<sup>90</sup> During this period, the language of “special needs” was embedded into the administrative search doctrine.<sup>91</sup> Indeed, any significant distinction between the administrative and special needs doctrines became difficult to discern in the language of courts<sup>92</sup> and commentators alike.<sup>93</sup>

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84. *Id.* at 337 (“Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’” (quoting *Camara*, 387 U.S. at 536–37)).

85. *Id.* at 351 (Blackmun, J., concurring) (emphasis added).

86. *Id.*

87. *See O’Connor v. Ortega*, 480 U.S. 709, 719–23 (1987) (plurality opinion).

88. *See Griffin v. Wisconsin*, 483 U.S. 868, 872–75 (1987).

89. *See Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 633–34 (1989); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989).

90. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–45 (1995).

91. *See New York v. Burger*, 482 U.S. 691, 702 (1987) (permitting an exception to the warrant requirement for situations of “special need” in “closely regulated” industries, where “the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened” (quoting *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring))).

92. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (listing the situations where the Court has invoked the special needs exception to the warrant requirement, and explaining that “for similar reasons . . . in certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements” (citing to administrative search cases)).

93. Some commentators have classified special needs searches as a type of administrative search. *See, e.g., Wayne LaFave, Controlling Discretion by Administrative*

Most significant from a doctrinal perspective, over time Justice Blackmun's two-step framework gave way to another form of analysis. Impracticability was moved from its position as a threshold question and collapsed into the Court's ultimate balancing calculus to determine reasonableness.<sup>94</sup> Instead of initially deciding whether exceptional circumstances made the warrant or probable cause requirements impracticable, the Court "balance[d] the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context."<sup>95</sup> Even in *Chandler v. Miller*—where, for the first time, the Court found a search regime invalid when applying the special needs doctrine<sup>96</sup>—the Court appeared to merge the two inquiries.<sup>97</sup>

### 3. Putting "Special Needs" to the Test

In its more recent decisions applying the special needs doctrine, the Supreme Court has attempted to clarify the first prong of the special needs analysis. In identifying whether a search indeed serves a special need, the Court has considered the nature and extent of the problem that a government search purports to remedy and distinguished between the various purposes a government search regime might serve.

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*Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 442–47 (1990). While others have characterized administrative searches as a subset of special needs searches. *See, e.g.*, Russell W. Galloway, Jr., *Basic Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 737, 755–59 (1992).

94. Dissenting in *O'Connor v. Ortega*, Justice Blackmun criticized the Court for precisely this reason: "Although the plurality mentions the 'special need' step, it turns immediately to a balancing test to formulate its standard of reasonableness. This error is significant because . . . no 'special need' exists here to justify dispensing with the warrant and probable-cause requirements." 480 U.S. 709, 742 (1987) (Blackmun, J., dissenting) (citations omitted).

95. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989) (emphasis added); *see also Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989) ("[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.").

96. *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (striking down a Georgia statute requiring candidates for public office to undergo drug testing).

97. *See The Supreme Court, 1996 Term — Leading Cases: Suspicionless Drug Testing*, 111 HARV. L. REV. 197, 290 (1997) (arguing that although the Court reached the correct result in *Chandler*, "it misapplied the special needs inquiry by conflating the initial identification of a special need with the ultimate balancing test").



First, in *Chandler*, the Court discussed the types of government interests that can justify applying the special needs exception.<sup>98</sup> A Georgia law requiring candidates for state office to pass drug tests was held to be invalid because the government had failed to show a need that was “substantial”—a need “important enough to override the individual’s acknowledged privacy interest” and “sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”<sup>99</sup> The Court pointed to the lack of any evidence of a “concrete danger” or history of drug use by Georgia public officials,<sup>100</sup> and noted that their positions did not involve high-risk or safety-sensitive work.<sup>101</sup>

Later, in *City of Indianapolis v. Edmond*<sup>102</sup> and *Ferguson v. City of Charleston*,<sup>103</sup> the Court addressed the issue of what constituted a non-law enforcement purpose.<sup>104</sup> In both cases, the Court found no special need to justify exempting the programmatic searches at issue. In *Edmond*, the Court held that the Fourth Amendment could not condone suspicionless vehicle checkpoints set up for the purpose of detecting illegal narcotics. Unlike previous cases involving checkpoints for unlicensed<sup>105</sup> and alcohol-impaired drivers,<sup>106</sup> searches for drugs were deemed “ultimately indistinguishable from the general interest in crime control.”<sup>107</sup> A year later, in *Ferguson*, the Court found that tests administered by hospital staff to expectant mothers suspected of drug abuse were not covered by the special needs exception because law enforcement officers were substantially involved in administering the drug testing scheme.<sup>108</sup> In both cases, the Court distinguished between a search’s “ultimate” purpose and its “primary” or “immediate” purpose,<sup>109</sup> but it was relatively unclear how it came to its

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98. 520 U.S. 305, 326 (1997).

99. *Id.* at 318.

100. *Id.* at 318–19.

101. The Court contrasted this fact with the two previous cases in which it had upheld suspicionless drug tests, *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602 (1989) (railway employees) and *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (customs officials). *Id.* at 320–21.

102. 531 U.S. 32 (2000).

103. 532 U.S. 67 (2001).

104. In *Chandler*, the Court had simply stated that special needs were “concerns other than crime detection.” 520 U.S. at 314.

105. *See Delaware v. Prouse*, 440 U.S. 648, 656–57 (1979).

106. *See Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 459 (1990).

107. *Edmond*, 531 U.S. at 44.

108. 532 U.S. 67, 79–84 (2001).

109. *Edmond*, 531 U.S. at 46 (distinguishing between “primary” and “secondary” purpose); *Ferguson*, 532 U.S. at 83–84 (distinguishing between “ultimate,” “direct,” and “primary” purpose).

distinction, prompting opinions in both cases questioning the validity of the approach.<sup>110</sup>

## II. CITY OF LOS ANGELES V. PATEL

In *City of Los Angeles v. Patel*, the Court addressed the Fourth Amendment rights of hotel and motel operators, and found that an ordinance requiring operators to make guest registries available to police on demand was facially unconstitutional because it denied them the opportunity for precompliance review.

The facts of *Patel* presented an interesting amalgam of Fourth Amendment issues. The case involved an administrative search regime, but one enforced by police officers to deter crime; both commercial premises and business records were potentially subject to search; inspections were carried out in person, not by subpoena; and the business records in question primarily represented the private information of hotel patrons.<sup>111</sup> Further complicating the issues, the hotel operators challenged the ordinance on its face, not as applied to a particular factual circumstance.

In a 5–4 majority opinion authored by Justice Sotomayor, the Court first assumed that inspections authorized by the ordinance constituted a Fourth Amendment “search,” implying that the hotel operators had protected privacy interests in their guest records. It then held the search regime constitutionally unreasonable, because without an opportunity for precompliance review, the ordinance failed to sufficiently constrain police officers’ discretion.

### A. FACTS AND PROCEDURAL HISTORY

In 2004, the City of Los Angeles (“City”) adopted Los Angeles Municipal Code Section 41.49,<sup>112</sup> which required motel and hotel operators to record various types of information about their guests and specified how these records were to be maintained. The operators were required to record the guest’s name and address; the number of people in the guest’s party; the

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110. See *Edmond*, 531 U.S. at 49–65 (Rehnquist, J., dissenting); *Ferguson*, 532 U.S. at 86–91 (Kennedy, J., concurring).

111. In some respects, therefore, the case actually did evoke the kind of “classic” government-citizen encounter that raises the ire of privacy advocates—the ordinance essentially authorized police officers to indiscriminately single out businesses and ask for their papers. Cf. *Marshall v. Barlow’s, Inc.* 436 U.S. 307, 311 (1978) (observing that the “particular offensiveness” of the general warrant and writ of assistance abhorred by the Framers “was acutely felt by the merchants and businessmen whose premises and products were inspected”).

112. L.A., CAL., Mun. Code (LAMC) § 41.49 (2004).

make, model, and license plate of any guest's vehicle parked on hotel property; the guest's date and time of arrival and departure; the guest's assigned room number; the rate charged for the guest's room; and the guest's method of payment.<sup>113</sup> Guests who did not have reservations, who paid in cash, or who rented a room for less than twelve hours were required to provide photo identification at check-in, and the statute mandated hotel operators record the number and expiration date of the identifying documentation.<sup>114</sup> For guests who checked in using an electronic kiosk, hotels were required to record their credit card information.<sup>115</sup> The ordinance required records be maintained in either electronic or paper form in the guest check-in area (or an adjacent office) for at least ninety days.<sup>116</sup>

The provision at issue in the case, Section 41.49(3)(a), required the hotel records "be made available to any officer of the Los Angeles Police Department for inspection." But it also provided that "[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business." Failure to make the records available was classified as a misdemeanor and punishable by up to six months in jail and a \$1000 fine.<sup>117</sup>

A group of hotel operators and a lodging association sued the City in three consolidated cases challenging the constitutionality of Section 41.49(3)(a). In the original complaint, the respondents asserted a Fourteenth Amendment challenge against the ordinance, on the grounds that its provisions were vague and unfair to a subset of motel owners. The original ordinance did not specify how or where records were to be kept and it singled out "motels," as opposed to applying to all commercial lodging establishments.<sup>118</sup> An amended version took effect in late 2006, expanding the scope of the ordinance to include other lodging establishments and also including detailed provisions regarding how and where the records were to

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113. § 41.49(2).

114. § 41.49(4).

115. § 41.49(2)(b).

116. § 41.49(3)(a).

117. § 11.00(m) (general provision applicable to entire LAMC). Hotel record-keeping statutes like these are commonplace across the country. *See* Reply Brief for Petitioner at 1, *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (No. 13-1175).

118. The owners' complaint also specified examples of officers entering premises where the owners resided in order to inspect the guest registries, which would have created a significantly different Fourth Amendment analysis. Complaint at 4, *Patel v. City of Los Angeles*, 2005 WL 5071070 (No. CV05-01571-DSF) (C.D. Cal. 2005).

be kept. The hotel owners subsequently launched a facial challenge to the ordinance on Fourth Amendment grounds.<sup>119</sup>

At the district court, hotel operators claimed that Section 41.49 failed to provide meaningful protection against police harassment<sup>120</sup> and allowed pretextual searches in support of criminal investigations.<sup>121</sup> The City, on the other hand, argued that registry inspection schemes were necessary to deter the criminal activity that frequently occurs in hotels, and that the provisions of the statute provided sufficient safeguards against abuse of discretion.<sup>122</sup> The court, following a bench trial, entered a judgment in favor of the City, holding that the challenge failed because respondents lacked a reasonable expectation of privacy in the guest records.<sup>123</sup> The Ninth Circuit affirmed on the same grounds.<sup>124</sup> But after a rehearing en banc, the court of appeals reversed.<sup>125</sup> The en banc court first determined that the hotel owners had both property and privacy interests in the guest records, which were “more than sufficient to trigger Fourth Amendment protection.”<sup>126</sup> Turning to the

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119. Thus explaining what commentators saw as the owners’ “odd[.]” choice to bring a facial challenge instead of an as applied one. *See* Nicholas Quinn Rosenkranz, *Los Angeles v. Patel and the Constitutional Structure of Judicial Review*, WASH. POST: VOLOKH CONSPIRACY (July 9, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/09/los-angeles-v-patel-and-the-constitutional-structure-of-judicial-review-2> [https://perma.cc/DT7J-3ZSK].

120. Oral Argument at 30:45, *Patel*, 135 S. Ct. 2443 (No. 13-1175), [http://www.oyez.org/cases/2010-2019/2014/2014\\_13\\_1175](http://www.oyez.org/cases/2010-2019/2014/2014_13_1175) [https://perma.cc/2RVR-KRRY].

121. Reply Brief for Petitioner at 11, *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (No. 13-1175).

122. *See id.* (“In the proverbial ‘No Tell Motel,’ a criminal can pay in cash, rent rooms by the hour and without reservations, provide no identifying information, and come and go undetected. Stripped of anonymity, criminals are less likely to use hotels as their transient lairs.”).

123. *Patel v. City of Los Angeles*, No. CV 05-1571 DSF (AJWx), 2008 WL 4382755, at \*3 (C.D. Cal. Sept. 5, 2008) (“The Court is not convinced that hotel or motel owners have an ownership or possessory interest—or at least not one that gives rise to a privacy right—in the guest registers.”).

124. 686 F.3d 1085, 1088 (9th Cir. 2012) (“The Patels presented no evidence to support their contention that hotel owners and operators, including themselves, have their own expectation of privacy in the information contained in guest registers . . . Just because information can be used by a business does not mean that the business owner desires to keep the information private, or that society would accept such a desire as objectively reasonable.”).

125. 738 F.3d 1058, 1065 (2013).

126. *Id.* at 1061–62. Note that, relying on the third-party doctrine, the Ninth Circuit quickly dismissed the idea that guests had privacy interests in the records: “To be sure, the *guests* lack any privacy interest of their own in the hotel’s records. But that is because the records belong to the hotel, not the guest, and the records contain information that the guests have voluntarily disclosed to the hotel.” *Id.* at 1062 (citing *United States v. Cormier*, 220 F.3d 1103, 1108 (9th Cir. 2000); *United States v. Miller*, 425 U.S. 435, 440 (1976)).

ordinance, the court held that because the amended provision provided “no opportunity for pre-compliance judicial review of an officer’s demand to inspect a hotel’s guest records,” the searches authorized by the City’s ordinance were unreasonable.<sup>127</sup> Finally, because “this procedural deficiency affect[ed] the validity of all searches authorized by Section 41.49(3)(a),” the court found facial invalidation of the provision appropriate.<sup>128</sup> The Supreme Court subsequently granted certiorari.<sup>129</sup>

#### B. SUPREME COURT OPINION

In a 5–4 opinion, the Supreme Court affirmed the Ninth Circuit’s decision, determining that Section 41.49(3)(a) violated the Fourth Amendment. In the majority opinion, Justice Sotomayor made four notable rulings: (1) facial challenges under the Fourth Amendment are allowed and not disfavored;<sup>130</sup> (2) businesses have Fourth Amendment interests in records they are required to keep;<sup>131</sup> (3) the special exception for “closely regulated” industries is extremely limited;<sup>132</sup> and (4) precompliance review procedures are necessary for records inspection schemes.<sup>133</sup>

Justice Scalia and Justice Alito wrote dissenting opinions. Justice Scalia argued that the statute should have been judged under the “closely regulated” industries standard because of the long history of government regulation of hotels; and consequently, under this less demanding standard of review, the inspection scheme should have been found reasonable.<sup>134</sup> Joined by Justice Thomas, Justice Alito argued that Section 41.49(3)(a) could not be considered facially invalid because there were situations in which it could be applied without violating the Fourth Amendment.<sup>135</sup>

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127. *Id.* at 1063–64.

128. *Id.* at 1065.

129. 135 S. Ct. 400 (Mem).

130. 135 S. Ct. 2443, 2449 (2015).

131. *See infra* Section II.B.2 (explaining how this follows from the Court’s assumption that the records inspection constituted a “search” in the first place).

132. *Id.* at 2455.

133. *Id.* at 2452–53.

134. *Id.* at 2459–60 (Scalia, J., dissenting).

135. *Id.* at 2464–66 (Alito, J., dissenting).

1. *Facial Challenges Under the Fourth Amendment Are Not Disfavored*

In perhaps its most controversial holding,<sup>136</sup> the *Patel* majority held that facial challenges under the Fourth Amendment are “not categorically barred or especially disfavored.”<sup>137</sup> While it noted that facial challenges are “difficult . . . to mount successfully,”<sup>138</sup> the Court pointed to a number of occasions on which it had declared statutes facially invalid under the Fourth Amendment.<sup>139</sup> The Court then described the proper framework for analyzing such challenges: “[W]hen addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant.”<sup>140</sup> When exceptions to the warrant requirement apply (like in the exigent circumstances Justice Alito described in his dissent),<sup>141</sup> the provision at issue does “no work” according to the majority.<sup>142</sup> Therefore, the Court reasoned “the constitutional ‘applications’ that . . . [the City] claim[ed] prevent facial relief . . . are irrelevant . . . because they do not involve actual applications of the statute.”<sup>143</sup>

2. *Businesses Have Fourth Amendment Rights in Records They Are Required to Keep*

At the Supreme Court, the City did not contest that the records inspections were “searches” under the Fourth Amendment, and the *Patel* opinion did not explicitly discuss the privacy interests of the hotel owners. But in affirming the Ninth Circuit’s determination that the inspections pursuant to Section 41.49 infringed the owners’ privacy interests, the Court confirmed that businesses have at least some Fourth Amendment interests in their records even when required by law to keep them. The en banc Ninth Circuit found that the records inspections “involve[d] both a physical intrusion upon a hotel’s papers and an invasion of the hotel’s protected

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136. When the Court took the case, there was a circuit split as to whether facial challenges under the Fourth Amendment were proper. *See* Petition for Writ of Certiorari at 6–9, *City of L.A. v. Patel*, 135 S. Ct. 2443 (2015) (No. 13-1175).

137. 135 S. Ct. at 2449.

138. *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (internal quotation marks omitted).

139. *Id.* at 2450 (citing *Chandler v. Miller*, 520 U.S. 305 (1997); *Ferguson v. Charleston*, 532 U.S. 67 (2001); *Payton v. New York*, 445 U.S. 573 (1980); *Torres v. Puerto Rico*, 442 U.S. 465 (1979)).

140. *Id.* at 2451.

141. *See id.* at 2464–65 (Alito, J., dissenting).

142. *Id.* at 2451.

143. *Id.*

privacy interest in those papers,” and therefore constituted a “search’ under either the property-based approach of *Jones* or the privacy-based approach of *Katz*.”<sup>144</sup> Because the guest registries were the hotels’ “private property” and contained information “businesses do not ordinarily disclose,” the court found a reasonable expectation of privacy in the records.<sup>145</sup> Furthermore, the hotel retained that expectation of privacy “notwithstanding the fact that the records are required to be kept by law,”<sup>146</sup> and despite the fact that the records at issue contained mainly information about the hotels’ guests.<sup>147</sup>

### 3. *The “Closely Regulated” Industries Exception Is Cabined*

The Court rejected the City’s claim that the hotel industry should be considered “closely regulated” for Fourth Amendment purposes. But even if it were a “closely regulated” industry, the Court held that Section 41.49 would still have been facially invalid.<sup>148</sup> Beyond the fact that the hotel industry was simply not one of the four industries traditionally held to be “closely regulated,” the Court gave two reasons why it should not be added to the category.<sup>149</sup> First, unlike liquor sales, firearms dealing, mining, and automobile junkyards (the four industries the Court has deemed “closely regulated”), the hotel industry posed no “inherent . . . clear and significant risk to the public welfare.”<sup>150</sup> Second, classifying hotels as closely regulated would “permit what has always been a narrow exception to swallow the rule.”<sup>151</sup> If a history of regulation “were sufficient to invoke the closely regulated industry exception,” the Court remarked, “it would be hard to imagine a type of business that would not qualify.”<sup>152</sup>

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144. 738 F.3d 1058, 1061–62 (2013).

145. *Id.* The en banc majority also took issue with the idea, expressed in the Ninth Circuit’s previous panel decision in favor of the City, 686 F.3d 1085, 1088 (9th Cir. 2012), that the owners should be required to prove, as a factual matter, their privacy interests in the records. Writing for the en banc majority, Judge Watford definitively stated: “We do not believe business owners are required to prove that proposition, any more than homeowners are required to prove that papers stored in a desk drawer are subject to a reasonable expectation of privacy.” 738 F.3d at 1061–62.

146. *Id.* at 1062 (citing *McLaughlin v. Kings Island, Div. of Taft Broad. Co.*, 849 F.2d 990, 995–96 (6th Cir. 1988); *Brock v. Emerson Elec. Co.*, 834 F.2d 994, 996 (11th Cir. 1987)).

147. *Id.* at 1063.

148. *Patel*, 135 S. Ct. at 2456.

149. *Id.* at 2454–55.

150. *Id.* at 2454.

151. *Id.* at 2455.

152. *Id.* Note that in lower courts, this reasoning had in fact produced such an outcome; in his dissent, Justice Scalia points out the numerous cases where industries as innocuous as barber shops and rabbit dealers had been deemed “closely regulated.” *Id.* at 2461 (Scalia, J., dissenting).

Even assuming hotels were considered closely regulated, the Court noted that the statute would have needed to satisfy four criteria to be reasonable under the Fourth Amendment: “(1) [T]here must be a ‘substantial’ government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspections must be ‘necessary’ to further [the] regulatory scheme; and (3) the statute’s inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.”<sup>153</sup> The Court explained how the City’s inspection scheme failed the second and third prongs of the test: Because an officer could still effectively conduct a “surprise inspection” by obtaining an *ex parte* warrant, or could guard the registry pending a motion to quash, Section 41.49(3)(a) was not necessary to further the goals of the regulatory scheme.<sup>154</sup> And because it “fail[ed] sufficiently to constrain police officers’ discretion as to which hotels to search and under what circumstances,” the ordinance provided no constitutionally adequate substitute for a warrant.<sup>155</sup>

4. *Precompliance Review Procedures Are Necessary for Records Inspection Schemes*

Turning to the merits of the case, the Court affirmed the Ninth Circuit’s en banc ruling and held that Section 41.49(3)(a) was facially invalid because it failed to provide hotel operators with an opportunity for precompliance review.<sup>156</sup>

The Court first assumed that the purpose of the record-keeping requirement was to deter criminal activity, not to aid in criminal investigations.<sup>157</sup> And because guest registry inspections involved situations where probable cause warrants would be impractical, they qualified as “administrative searches.”<sup>158</sup> Still, the Court found that the provisions of the ordinance unfairly limited the hotel operators’ choice in handing over the records. Relying on its decisions in *Camara*, *See*, and *Donovan*, the Court established that “absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.”<sup>159</sup> Without such an opportunity, “the ordinance

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153. *Id.* at 2456 (quoting *New York v. Burger*, 482 U.S. 691, 702–03 (1987)).

154. *Id.*

155. *Id.*

156. *Id.* at 2452.

157. *Id.*

158. *Id.*

159. *Id.*



creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests.”<sup>160</sup> Because the *Patel* statute lacked precompliance review, the Court held it facially invalid.<sup>161</sup>

Finally, the Court spent significant time discussing how the holding would produce only a minimal burden for law enforcement. The Court did not require that a particular form of precompliance review be established, but said an administrative subpoena would suffice and noted the ease with which one could be obtained.<sup>162</sup> It also underscored the narrow nature of the holding by explaining that “a hotel owner must be afforded an *opportunity* to have a neutral decisionmaker review an officer’s demand to search the registry before . . . fac[ing] penalties for failing to comply.”<sup>163</sup> Furthermore, the Court explained, if an owner did choose to challenge the inspection, law enforcement would be authorized to seize the records while the motion to quash was pending.<sup>164</sup>

### III. WHAT *PATEL* MEANS FOR THE ADMINISTRATIVE & SPECIAL NEEDS DOCTRINES

The key takeaways of *Patel* are relatively straightforward, but the holding’s immediate impacts and broader implications for Fourth Amendment doctrine are far from clear. Most importantly, because the Court’s opinion glossed over threshold questions regarding when the administrative and special needs exceptions apply in the first place, it is uncertain how other regulatory inspection schemes will be affected by the decision, and unclear what *Patel*’s impact will be on other categories of special needs searches.

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160. *Id.* The Court points to a similar situation created by the inspection ordinance in *Camara v. Mun. Court*, 387 U.S. 523, 532 (1967) (noting that “only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector’s decision to search,” leaving the “occupant subject to the discretion of the official in the field”).

161. *Id.* at 2451.

162. *Id.* at 2453–54.

163. *Id.* at 2453.

164. *Id.* (also stipulating that to justify the seizure, the officer would need reasonable suspicion).

## A. WHAT MAKES A NEED “SPECIAL”?

According to most commentators, the administrative search doctrine is a mess<sup>165</sup> and the special needs exception lacks any objective methodology.<sup>166</sup> Some have attempted to defend the ultimate outcome of the cases,<sup>167</sup> but there is near unanimity that the logic of the doctrine is severely lacking.<sup>168</sup>

Professor Wayne LaFave and others take issue with the basic premise that the government’s non-law enforcement purposes should be used to justify a diluted probable cause test or to remove the individualized suspicion requirement. They argue that the Court’s emphasis in *Camara* on the need for “universal compliance” with health and safety codes runs counter to basic Fourth Amendment jurisprudence in the context of

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165. See, e.g., Primus, *supra* note 58, at 259 (compiling the lengthy list of critical commentators and claiming that the doctrine is a “mess that has become too consequential to leave alone”).

166. See Marc M. Harrold, *Computer Searches of Probationers—Diminished Privacies, “Special Needs” & “Whilst’ Quiet Pedophiles”—Plugging the Fourth Amendment Into the “Virtual Home Visit,”* 75 MISS. L.J. 273, 339 (2005) (arguing that the special needs exception has grown “increasingly unsound, incoherent, and over-expansive”); Tracy Maclin, *Is Obtaining an Arrestee’s DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?* 34 J. L. MED. & ETHICS 165, 170, 178 (2005) (arguing that the special needs cases do not form a “coherent doctrine”); Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 261, 288 (2000) (arguing that the Court has “not adequately defined what a ‘special need’ or ‘special governmental interest’ is,” and that the handful of cases which have addressed the issue “have done little more than apply the special needs doctrine by waving a magic wand and asserting that a special need exists”); Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 90 (1992) (“The special needs rationale lacks any objective methodology, devalues fundamental Fourth Amendment individual privacy rights, and undermines legal stability by requiring ad hoc analysis of the reasonableness of a governmental search.”).

167. See, e.g., William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 555 (1992) (“In my view, the Court’s ‘special needs’ decisions have it about right; broad deference to government searches is proper in the contexts in which the Court has granted it.”). Note, however, that Stuntz’s assessment comes from a time before a number of other special needs searches were found constitutional.

168. One prominent scholar went so far as to pronounce the Court’s jurisprudence in the area a “conceptual and doctrinal embarrassment of the first order.” Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 418 (1974). *But cf.* James Jolley, Comment, *Reemphasizing Impracticability in the Special Needs Analysis in Response to Suspicionless Drug Testing of Welfare Recipients*, 92 N.C. L. REV. 948, 962–63 (2014) (“The framework that the Supreme Court currently uses in special needs cases is relatively clear . . . but the implementation of that balancing test continues to be a problem . . .”).

criminal law.<sup>169</sup> Stated differently, critics wonder why there is a greater public interest in enforcing compliance with housing codes or other regulatory schemes than enforcing criminal law.<sup>170</sup> Why couldn't Justice White's statement in *Camara*, that "the public interest demands that *all* dangerous conditions be prevented or abated,"<sup>171</sup> be used to justify suspicionless searches in criminal investigations as well? Without further explanation, the Court's decisions in administrative and special needs cases seem to support the conclusion that someone suspected of a crime has more Fourth Amendment rights than someone not suspected of one.<sup>172</sup>

Beyond the problematic doctrinal justifications for administrative and special needs searches, commentators have also bemoaned the lack of clear rules as to when the exceptions should apply.<sup>173</sup> Namely, how does one determine whether there is a non-law enforcement purpose in the first place?<sup>174</sup> For example, in *T.L.O.*, the Court phrased the governmental interest at stake as the "need for effective methods to deal with breaches of public order." This hardly seems distinct from "the normal need for law enforcement."<sup>175</sup>

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169. See LAFAVE, *supra* note 5, at 11 (noting that Justice White's statement that "the public interest demands that *all* dangerous conditions be prevented or abated" flies in the face of the generally accepted philosophy that "a certain level of undetected crime . . . [is] preferable to an oppressive police state").

170. In *Frank*, four Justices who eventually joined in the *Camara* majority opinion had seemed to reach the opposite conclusion: "Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements." 359 U.S. 360, 382 (1959) (Douglas, J., dissenting).

171. *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967) (emphasis added).

172. For this reason, before *Camara*, the D.C. Circuit had explicitly refused to relax Fourth Amendment standards for administrative inspections, stating emphatically: "[T]o say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." *District of Columbia v. Little*, 178 F.2d 13, 16-17 (D.C. Cir. 1949).

173. See, e.g., Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419, 430-32 (2007) (critiquing the Court's failure to specify the type of government purposes that satisfy the administrative search exception); Ric Simmons, *Searching for Terrorists: Why Public Safety is Not a Special Need*, 59 DUKE L.J. 843, 888-89 (2010) (pointing out the "semantic game[s]" played by the Court in special needs case law, resulting in inconsistent jurisprudence).

174. See Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 408 (1988) ("Even if the penal versus regulatory distinction could constrain the *Camara* Court's analysis, the government retains inordinate power to dictate which [F]ourth [A]mendment standard applies.").

175. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

In cases involving administrative searches, the Court has pointed to “public safety” as integral to justifying an exception to the warrant requirement. But in examining the trend of cases in that area, Stephen J. Schulhofer observes that “[i]nsistence on a substantial need to protect public safety has . . . often given way to acceptance of government objectives remote from any concrete safety concern and barely distinguishable from conventional law enforcement.”<sup>176</sup> Consider *New York v. Burger*, an administrative search case, in which the Court held a warrantless search of an automobile junkyard valid even though police officers executed the search, and its principal objective was to catch those implicated in receiving stolen goods.<sup>177</sup> Similarly, special needs cases have upheld suspicionless checkpoints of automobile drivers where drivers may be subject to arrest for violating roadway regulations.<sup>178</sup> It is difficult to make sense of the Court’s stated distinction between “the imperative of highway safety” and “the general interest in crime control.”<sup>179</sup>

In sum, critics of the administrative and special needs doctrines have noted significant flaws in the doctrines’ premises that make it difficult to discern when the government’s purposes in fact justify a departure from the warrant and probable cause requirements.

#### B. *PATEL’S LIMITED CONTRIBUTION*

In the span of three sentences, Patel manages to contribute some clarity to the administrative and special needs frameworks. However, because the Court neglected to engage in substantive analysis concerning key threshold questions, it is unclear how courts will apply the framework moving forward.

##### 1. *Patel Adds Some Clarity to the “Special Needs” Framework*

After a brief discussion of basic Fourth Amendment principles, Justice Sotomayor lays out the test for deciding whether to apply the special needs exception to the searches authorized by Section 41.49:

Search regimes where no warrant is ever required may be reasonable where “special needs . . . make the warrant and probable-cause requirement impracticable,” and where the “primary purpose” of the searches is “[d]istinguishable from the

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176. STEPHEN J. SCHULHOFER, *MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY* 101 (2012).

177. 482 U.S. 691, 716 (1987).

178. *See City of Indianapolis v. Edmond*, 531 U.S. 31 (2000).

179. *Id.* at 39–40 (distinguishing *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990)).

general interest in crime control.” Here, we assume that the searches authorized by §41.49 serve a “special need” other than conducting criminal investigations: They ensure compliance with the recordkeeping requirement, which in turn deters criminals from operating on the hotels’ premises. The Court has referred to this kind of search as an “administrative searc[h].”<sup>180</sup>

This formulation adds clarity in two ways. First, it definitively separates the impracticability and purpose inquiries. In previous decisions, the Court had sometimes combined the two, asking whether the government’s purpose *made* the warrant and probable cause requirements impracticable.<sup>181</sup> In contrast, *Patel*’s framework makes clear that for the exception to apply, the government must first establish that “special needs . . . make the warrant and probable-cause requirement impracticable.”<sup>182</sup> Moreover, by placing the impracticability requirement up front, the Court emphasized its centrality as a threshold question, thereby bringing the special needs doctrine closer in line with Justice Blackmun’s rationale in *T.L.O.*<sup>183</sup>

Second, in formulating the “purpose” prong of the test, Justice Sotomayor appeared to deliberately avoid the ambiguous phrase, “beyond the normal need for law enforcement.”<sup>184</sup> Instead, relying on language from *Edmond*, the Court asked whether the purpose of the hotel records inspections was distinguishable from “the general interest in crime control.”<sup>185</sup> And in the next sentence, the Court equated this to asking whether the searches served a need “other than conducting criminal investigations.”<sup>186</sup> Therefore, after *Patel*, the purpose of a programmatic search regime must be distinguishable from the goals of criminal investigation for the special needs exception to apply. While certainly not a

180. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000); *Camara v. Mun. Court*, 387 U.S. 523 (1967)) (some internal quotation marks omitted).

181. *See, e.g., Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989) (“[O]ur cases establish that where a Fourth Amendment intrusion serves special needs . . . it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.” (citing *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619–20 (1989))).

182. 135 S. Ct. at 2452 (internal quotation marks omitted).

183. *See supra* text accompanying note 86.

184. *See New Jersey v. T.L.O.*, 469 U.S. 325, 351 (Justice Blackmun’s oft-cited formulation is an “exceptional circumstance[e] in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”).

185. 135 S. Ct. at 2452 (quoting *Edmond*, 531 U.S. at 44).

186. *Id.*

high bar for the government, it is a clearer requirement than the oft-used “beyond the normal need for law enforcement” inquiry.

2. *Patel Neglected to Engage in Meaningful Analysis of Key Threshold Questions, Therefore It Is Still Unclear When a Need Qualifies as “Special”*

Although the language and formulation of the test in *Patel* contributed some clarity to the basic framework, the Court did not explain its reasoning for why the special needs exception in fact applied. Therefore, the decision is unlikely to reign in further expansion of the doctrine.

The Court rightly established that for the special needs exception to apply, the warrant and probable cause requirements must first be “impracticable.”<sup>187</sup> But the Court never explains why those requirements would be impracticable in the context of the hotel records inspection scheme. In *Camara*, the Court gave reasons for why traditional warrants were impractical when enforcing building codes; for example, inspectors could not detect violations such as faulty wiring without entering residences in the first place.<sup>188</sup> And in special needs cases involving drug testing, the Court has described the need to “discover . . . latent or hidden conditions.”<sup>189</sup>

However, this line of reasoning does not necessarily apply to the inspection scheme in *Patel*. It would be difficult, but far from impossible, for officers to rely on individualized suspicion to enforce the record-keeping requirement—the necessary facts to establish probable cause are not “hidden” in the same way that faulty wires are. Because guest check-in areas are open to the public, officers are not barred from observing receptionists and ascertaining whether they are collecting the appropriate information. Officers could also simply ask guests upon leaving whether or not the hotel required them to provide information.<sup>190</sup>

If the Court based its reasoning on the impracticability standard set out in other special needs cases, it is still unclear whether these hypotheticals

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187. *See id.*

188. And also note that *Camara* nevertheless maintained administrative “area” warrants were necessary for such inspection schemes to satisfy the Fourth Amendment. 387 U.S. 523, 537–38 (1967).

189. Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989).

190. This, of course, would not necessarily allow officers to know whether the hotels in fact properly kept the records. But the stated purpose of the record-keeping scheme is to deter hotel guests who want to use hotels anonymously, not punish hoteliers for keeping lax records. Furthermore, in this hypothetical scenario, learning from guests that the hotel did not ask them to provide information would be enough for officers to obtain an administrative warrant and check the records themselves.

would have been enough to show that a warrant or probable cause would be “practicable” in *Patel*.<sup>191</sup> And that’s precisely the problem. As in *Patel*, the Court’s recent decisions in special needs cases<sup>192</sup> only pay lip service to the impracticability requirement.<sup>193</sup>

The Court also unfortunately declined to engage in meaningful analysis of the ordinance’s “purpose.” In a footnote, the Court noted that because it could find the searches unconstitutional regardless of their purpose, it assumed that the ordinance’s “primary purpose”—“deter[ing] criminals from operating on the hotels’ premises”—was distinguishable from the general interest in crime control.<sup>194</sup>

The Court has found deterring criminal activity distinguishable from the interest in crime control in previous special needs cases.<sup>195</sup> But in those cases, the Court had always at least attempted to tie the deterrent effects to another government interest at work. For example, in *Earls*, Justice Thomas analogized the “health and safety” interests furthered by suspicionless drug testing to those furthered by “physical examinations and vaccinations against disease.”<sup>196</sup> Granted, in *Patel*, the Court may have found it difficult to make even a tenuous connection to a non-law enforcement purpose.<sup>197</sup> But the fact that the Court ruled deterrence alone was enough to justify the special needs exception will likely lead to further confusion about what constitutes a government purpose “[d]istinguishable from the general interest in crime control.”<sup>198</sup>

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191. It is worth noting that in *City of Ontario v. Quon*, a special needs case involving the search of a government employee’s pager, the Court explicitly rejected the Ninth Circuit’s reasoning that a search was unreasonable because the government could have accomplished its objectives through a “host of simple ways” that would not have intruded on the employee’s Fourth Amendment rights. 560 U.S. 746, 763 (2010). The Court said such an approach would be inconsistent with controlling precedent, which had “repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.” *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995)). But, unlike *Patel*, *Quon* did not involve a facial challenge to an administrative search scheme; the Court’s concern was “*post hoc* evaluations” of individual searches. *Id.*

192. See Jolley, *supra* note 168, at 952–57 (documenting the lack of meaningful analysis of the impracticability requirement).

193. Note, however, that a discussion at least related to the issue of impracticability happens in dicta, when the Court is assessing the reasonableness of the scheme had it fallen under the closely regulated industries exception. See *Patel*, 135 S. Ct. at 2456.

194. *Id.* at 2452.

195. See, e.g., *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1980).

196. 536 U.S. 822, 824, 830–31 (2002).

197. One could argue that the ultimate purpose of the record inspections was to maintain “public order,” which would be similar to the government’s purpose in special needs cases in the schooling context.

198. *Patel*, 135 S. Ct. at 2452.

In sum, the Court paid scant attention to both prongs of the test it established for deciding when the special needs exception should apply. It neglected to explain why the warrant and probable cause requirements were impracticable, and it assumed away meaningful discussion of how the government's purpose was different from the general interest in crime control. Because it could still determine that the statute failed the ultimate reasonableness test, the Court effectively passed over the threshold inquiry and moved directly to the balancing analysis, leaving unclear how courts should identify a "special need" in the first place.<sup>199</sup> Despite the lack of clarity for the special needs doctrine as a whole, *Patel's* central bright-line ruling—that precompliance review procedures are necessary for administrative searches to satisfy the Fourth Amendment—will impact numerous inspection schemes across the country. Privacy advocates (and many Fourth Amendment scholars) will likely see this as a step in the right direction, but far from a meaningful leap. To paraphrase Chief Justice Roberts, the Founders did not fight a revolution to gain the right to administrative subpoenas.<sup>200</sup>

#### IV. CONCLUSION

In debates concerning privacy vis-à-vis the government, we are frequently told there are trade-offs—we allow the National Security Agency to engage in some level of surveillance, and in return the public is kept safe from wrongdoers.<sup>201</sup> But moving into the era of Big Data, security will be just one of many benefits the government can provide in exchange for privacy.<sup>202</sup> The ubiquity of Internet-enabled computing devices and increases in digital storage capacity have allowed companies to collect and aggregate individuals' personal information on an unprecedented scale. If, in addition to the third-party doctrine nullifying individuals' privacy interests in their information, the government can point to "special needs"

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199. Note the similarity with the Court's reasoning in *Chandler*, in which Justice Ginsburg declined to discuss the impracticability requirement, but ultimately determined that the searches were unreasonable because the governmental interest did not outweigh the privacy interests. 520 U.S. 305, 322 (1997).

200. See *Riley v. California*, 134 S. Ct. 2473, 2491 (2014) ("[T]he founders did not fight a revolution to gain the right to government agency protocols.").

201. See Scott Shane, *Assessing the Trade-Offs Between Security and Civil Liberties*, N.Y. TIMES (July 24, 2012), <http://thecaucus.blogs.nytimes.com/2012/07/24/assessing-the-trade-offs-between-security-and-civil-liberties> [<https://perma.cc/V3RB-E93C>].

202. See EXECUTIVE OFFICE OF THE PRESIDENT, *Big Data: Seizing Opportunities, Preserving Values* (May 1, 2014), [https://www.whitehouse.gov/sites/default/files/docs/big\\_data\\_privacy\\_report\\_may\\_1\\_2014.pdf](https://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf) [<https://perma.cc/9WEF-JLS7>].



beyond criminal law enforcement—such as benefits to public health and safety, economic productivity, and education—to justify the flow of information onto government servers,<sup>203</sup> then the Fourth Amendment will be rendered largely meaningless.

The ostensibly clear and narrow holding in *Patel* belies the importance of the questions it declined to consider. Left unchecked, a special needs doctrine that allows for warrantless, suspicionless searches of business records has the potential to undermine any meaningful protection afforded by the Fourth Amendment. In his famous dissent in *Olmstead v. United States*, Justice Brandeis warned: “Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”<sup>204</sup> The Supreme Court should heed this warning, and take a serious look at the Fourth Amendment’s “special needs” in the Information Age.

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203. In some respects, this is a trade-off we’ve been making for centuries. After all, the modern regulatory state is only possible through the collection and management of citizens’ information. See generally Edward Higgs, *The Rise of the Information State: The Development of Central State Surveillance of the Citizen in England 1500–2000*, 14 J. HIST. SOC’Y 175 (2001). However, the unprecedented amount of information that can be collected and stored nowadays changes the calculus of the trade-off.

204. 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).