Duke Law Journal

Application Packet

2024

Affinity Groups

TABLE OF CONTENTS

May 2024

Dear 1Ls,

Congratulations on finishing your first year of law school! We are incredibly excited to welcome many of you into the *DLJ* community in just a few months.

We know Casenote can be daunting, especially after exams, so we put together this packet of information to help you in these next two weeks. Here you will find tips from current *DLJ* members, examples of successful Casenotes and personal statements, and the rubrics that we will use to grade your materials.

Remember, the two weeks allotted for Casenote account for travel, rest, and even starting your summer job. In order to be successful, you do not need to spend the full two weeks working - think more like 2-4 days total spread out in the way that makes sense for your schedule.

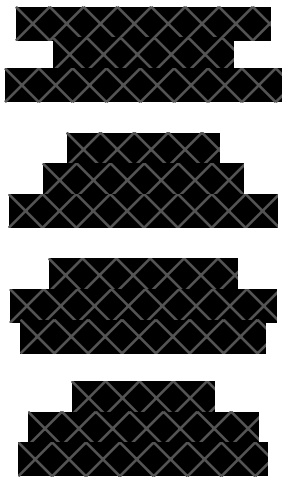
We are rooting for you!

Sincerely,

Duke Law Journal Volume 74

Duke Law Journal

Have questions? Email us!



https://dlj.law.duke.edu/
dlj@law.duke.edu

The Duke Law Journal*:* The *Duke Law Journal* (*DLJ*) is a student-run, general-interest law review that publishes scholarship by premier legal thinkers. *DLJ*'s student members select, refine, and publish these works and are thus able to steer the future of legal discourse. Membership on *DLJ* is a socially and intellectually rewarding experience, and members form close bonds working side-by-side during their 2L and 3L years.

DLJ publishes eight issues annually. Each issue includes top-tier articles submitted by professors, judges, and practitioners. DLJ has published articles by prominent authors such as Chief Justice John Roberts, Jr., Justice Ruth Bader Ginsburg, Justice Antonin Scalia, Judge Richard Posner, Cass Sunstein, Reva Siegel, Henry Monaghan, and others. *DLJ* also hosts its annual *Administrative Law Symposium*—the nation's leading administrative law event for over five decades. This year DLJ will also be publishing an issue of articles from the Lutie Lytle Black Women's Scholarship Workshop, which incoming staff editors can play a role in selecting.

Additionally, *DLJ* stands out among top law journals for its commitment to publishing student scholarship. Each 2L Staff Editor writes a Note, an original work of legal scholarship approximately thirty to forty-five pages in length. This year, 12 student Notes will be published in our print volume. Members who follow the appropriate law school procedures may also receive academic credit and simultaneously complete the upper-level writing requirement credit by writing a Note.

Membership*:* Membership on the *Duke Law Journal* is a two-year commitment. At the end of their 1L summer, new members return to the Law School to participate in a mandatory orientation. 1Ls interested in joining the *Duke Law Journal* should plan to be available for orientation, which will occur on August 24, 2024. Orientation will not interfere with on-campus interviewing or LEAD Fellow responsibilities.

During the course of their 2L and 3L years, *DLJ* members complete a total of 14-15 assignment credits, where one credit is one full-length assignment. During their 2L year, assignments primarily consist of checking and substantiating citations of accepted pieces. In addition, 2L members will complete their Notes and evaluate and select Articles submitted by law professors for publication in *DLJ*. In the Spring of their 2L year, Staff Editors are either promoted to the Editorial Board or elected to a position on *DLJ*'s Executive Board.

Selection*: DLJ* typically invites 18 to 20 percent of the rising 2L class to join as members. First, we extend 33 percent of the invitations exclusively based on first year GPA. Then, we extend 33 percent of our invitations based on casenote competition score alone. The final 33 percent of the invitations are extended based on a combination of GPA, casenote competition score, and personal statement score, with each factor weighted equally. All applicants must submit an acceptable casenote (showing a good-faith effort) and a personal statement to be considered for *DLJ* membership, even those ultimately selected based on grades alone. The personal statement is a 500-word essay asking students to describe how their backgrounds, experiences, and interests have equipped them to make unique and valuable contributions to *DLJ.* Both casenotes and personal statements are evaluated anonymously by current *DLJ* editors.

TIPS & TRICKS

DUKE LAW JOURNAL | MARCH 25, 2024

135 S.Ct. 2076
Supreme Court of the United States

Menachem Binyamin ZIVOTOFSKY, By His Parents and Guardians, Ari Z. and Naomi Siegman Zivotofsky, Petitioner
v.
John KERRY, Secretary of State.

No. 13–628
|
Argued Nov. 3, 2014.
|
Decided June 8, 2015.

nposes three key limitations on
nform to (1) the allocation of
Government, (2) the allocation
al Government and the States,
and (3) the protections for retained individual rights under the Constitution. See Lawson & Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 **Duke L.J.** 267, 291, 297 (1993). In other words, to be "proper," a law "must be consistent with principles of separation of powers, principles of federalism, and individual rights." *Id.*, at 297.

OPINION REVIEW & OUTLOOK Follow

The Problem With Police Unions

Collective bargaining protects too many bad cops from discipline.

By The Editorial Board Follow
June 10, 2020 at 7:16 pm ET

Some 40 states require or permit collective bargaining for police. A Duke Law Journal study in 2017 that analyzed 178 police union contracts concluded that a "lack of corrective action in cases of systemic officer misconduct is, in part, a consequence of public-employee labor law" that in most states permits unions "'to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment.'"

The New York Times

Supreme Court's Devotion to Gun Rights Faces a Challenging Test

In a new study in The Duke Law Journal, Professor Charles examined more than 300 decisions applying the new standard in the 12 months after last year's decision. More than two dozen rejected state or federal laws, including ones setting age limits, imposing strict licensing requirements, limiting so-called assault weapons and excluding guns from sensitive places.

WHAT IS *DLJ*?

- Student-run publication that publishes faculty and student scholarship
- Recognized as one of the nation's top law reviews since 1951

statutes Congress has adopted, but to do what they might while they can. See R. Pierce, The Combination of *Chevron* and Political Polarity Has Awful Effects, 70 **Duke L. J.** Online 91, 92 (2021).

143 S.Ct. 1487
Supreme Court of the United States.

Wes ALLEN, Alabama Secretary of State, et al., Appellants
v.
Evan MILLIGAN, et al.
Wes Allen, Alabama Secretary of State, et al., Petitioners
v.
Marcus Caster, et al.

Nos. 21-1086 and 21-1087
|
Argued October 4, 2022
|
Decided June 8, 2023*

Hispanic-preferred candidates are
–4. That is because as residential
it has "sharply" done since the
ditional districting criteria such as
the compactness requirement "becomes more difficult." T. Crum, Reconstructing Racially Polarized Voting, 70 **Duke L. J.** 261, 279, and n. 105 (2020).

143 S.Ct. 14
Supreme Court of the United States.

Thomas H. BUFFINGTON
v.
Denis R. MCDONOUGH, Secretary of Veteran Affairs

No. 21-972
|
Decided November 7, 2022

Scalia continued his campaign in an academic article. See Judicial Deference to Administrative Interpretations of Law, 1989 **Duke L. J.** 511 (1989). Eventually, these efforts began to bear fruit as a majority of the Court came to embrace Justice Scalia's view. See Merrill 2022, at 93–94.

The New York Times

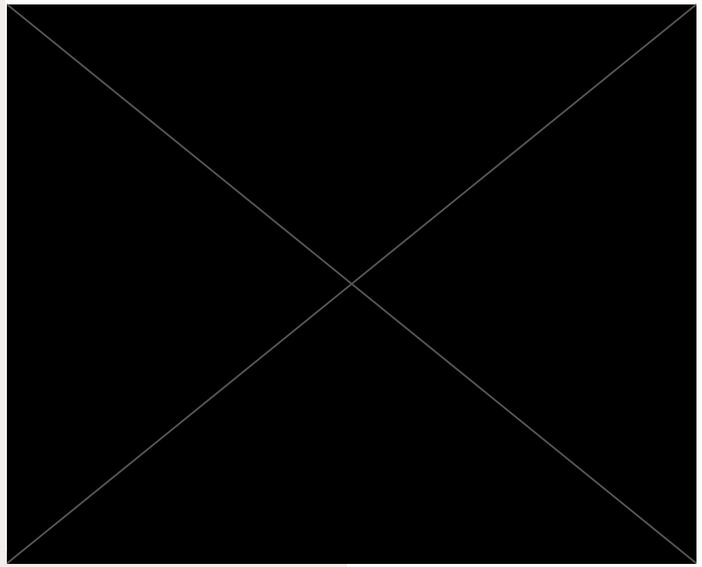
SIDEBAR

Campaign Funds for Judges Warp Criminal Justice, Study Finds

Professor Sukhatme conducted the study, which will be published in The Duke Law Journal, with Jay Jenkins, a lawyer with the Texas Criminal Justice Coalition, a research and advocacy group. It considered more than 290,000 felony cases in Harris County between 2005 and 2018, analyzing data on elections, assignments,

BENEFITS OF *DLJ* MEMBERSHIP

- Publish *your* work!
- Have a voice in selecting which social and legal issues to elevate amongst 2,000+ articles submitted to *DLJ* each year
- Learn about legal issues you won't otherwise have a chance to
- Be a part of the *DLJ* community and alumni network
- Receive job-related benefits
  - Clerkships
  - Improve writing and analytical skills
  - Train your detail-oriented eye
  - Serving on a flagship journal remains highly regarded by older members of the legal profession



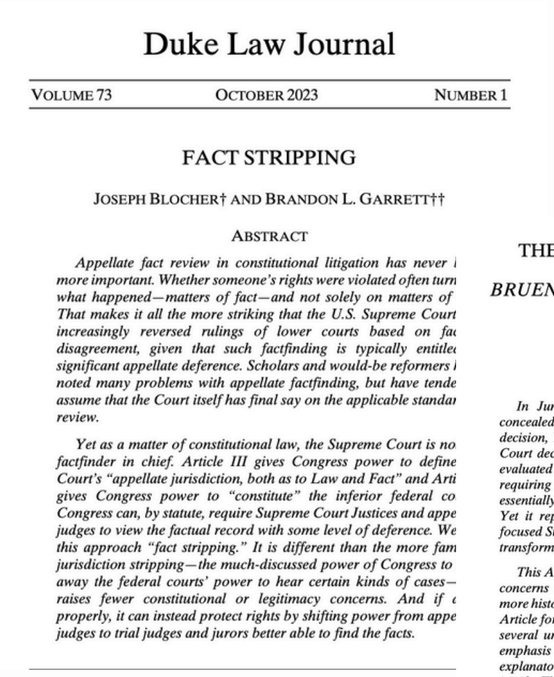
THE PROCESS OF BUILDING A VOLUME

The *Journal* Publishes One Volume per Academic Year

Each volume has 32 pieces

- Articles (written by experts, professors, and practitioners)
- Notes (written by Duke Law students)

The pieces are split between eight issues. One issue is published each month from October to May.



Duke Law Journal

VOLUME 73 OCTOBER 2023 NUMBER 1

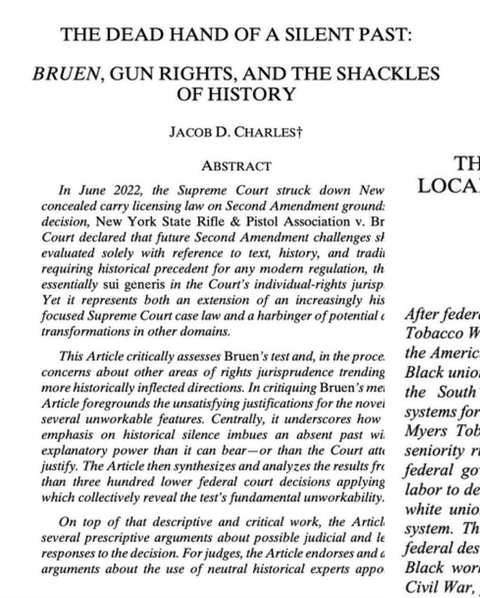
FACT STRIPPING

JOSEPH BLOCHER† AND BRANDON L. GARRETT††

ABSTRACT

Appellate fact review in constitutional litigation has never i more important. Whether someone's rights were violated often turn what happened—matters of fact—and not solely on matters of That makes it all the more striking that the U.S. Supreme Court increasingly reversed rulings of lower courts based on fa disagreement, given that such factfinding is typically entitle significant appellate deference. Scholars and would-be reformers noted many problems with appellate factfinding, but have tende assume that the Court itself has final say on the applicable standa review.

Yet as a matter of constitutional law, the Supreme Court is no factfinder in chief. Article III gives Congress power to define Court's "appellate jurisdiction, both as to Law and Fact" and Arti gives Congress power to "constitute" the inferior federal co Congress can, by statute, require Supreme Court Justices and appe judges to view the factual record with some level of deference. We this approach "fact stripping." It is different than the more fam jurisdiction stripping—the much-discussed power of Congress to away the federal courts' power to hear certain kinds of cases— raises fewer constitutional or legitimacy concerns. And if properly, it can instead protect rights by shifting power from appe judges to trial judges and jurors better able to find the facts.



THE DEAD HAND OF A SILENT PAST:

BRUEN, GUN RIGHTS, AND THE SHACKLES OF HISTORY

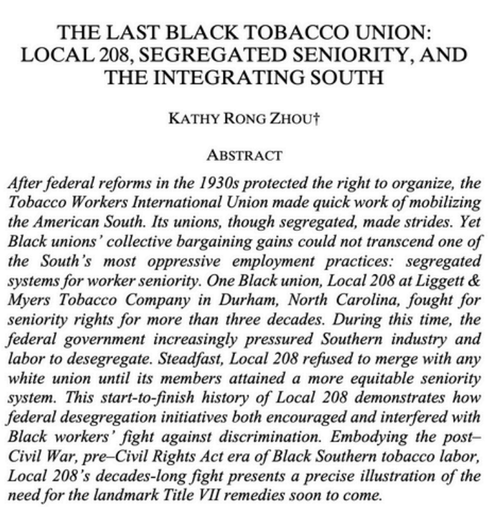
JACOB D. CHARLES†

ABSTRACT

In June 2022, the Supreme Court struck down New concealed carry licensing law on Second Amendment ground decision, New York State Rifle & Pistol Association v. Br *Court declared that future Second Amendment challenges sh evaluated solely with reference to text, history, and tradi requiring historical precedent for any modern regulation, th essentially* sui generis *in the Court's individual-rights jurisp Yet it represents both an extension of an increasingly his focused Supreme Court case law and a harbinger of potential transformations in other domains.*

This Article critically assesses Bruen*'s test and, in the proce concerns about other areas of rights jurisprudence trending more historically inflected directions. In critiquing* Bruen*'s me Article foregrounds the unsatisfying justifications for the novel several unworkable features. Centrally, it underscores how emphasis on historical silence imbues an absent past wi explanatory power than it can bear—or than the Court att justify. The Article then synthesizes and analyzes the results fr than three hundred lower federal court decisions applying which collectively reveal the test's fundamental unworkability.*

On top of that descriptive and critical work, the Articl several prescriptive arguments about possible judicial and le responses to the decision. For judges, the Article endorses and arguments about the use of neutral historical experts appo



THE LAST BLACK TOBACCO UNION: LOCAL 208, SEGREGATED SENIORITY, AND THE INTEGRATING SOUTH

KATHY RONG ZHOU†

ABSTRACT

After federal reforms in the 1930s protected the right to organize, the Tobacco Workers International Union made quick work of mobilizing the American South. Its unions, though segregated, made strides. Yet Black unions' collective bargaining gains could not transcend one of the South's most oppressive employment practices: segregated systems for worker seniority. One Black union, Local 208 at Liggett & Myers Tobacco Company in Durham, North Carolina, fought for seniority rights for more than three decades. During this time, the federal government increasingly pressured Southern industry and labor to desegregate. Steadfast, Local 208 refused to merge with any white union until its members attained a more equitable seniority system. This start-to-finish history of Local 208 demonstrates how federal desegregation initiatives both encouraged and interfered with Black workers' fight against discrimination. Embodying the post–Civil War, pre–Civil Rights Act era of Black Southern tobacco labor, Local 208's decades-long fight presents a precise illustration of the need for the landmark Title VII remedies soon to come.

Our Volume

The selection and editing cycle for Volume 74 started in the spring.

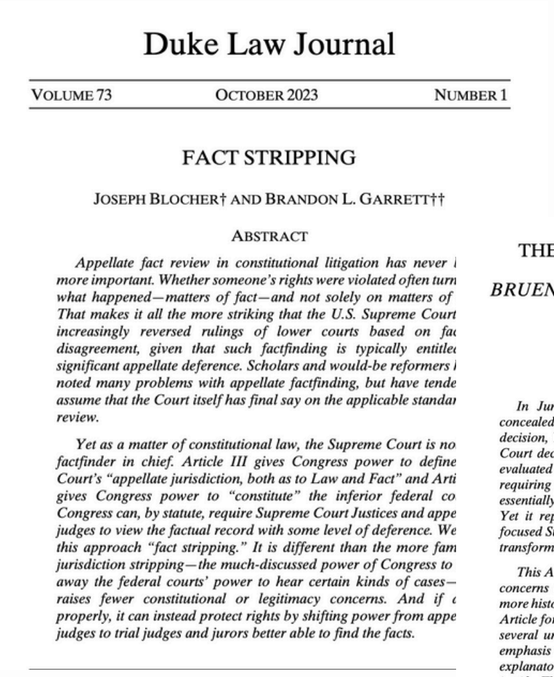
The first issue of Volume 74 will be published in October 2024. Volume 74 will be complete in May 2025, when the class of ‘25 graduates.

Your Volume

Rising 2Ls will assist in the publication of Volume 74 in the fall of 2024.

Then, in spring 2025, you will begin the selection and editing cycle for Volume 75

THE PROCESS OF BUILDING VOLUME 74



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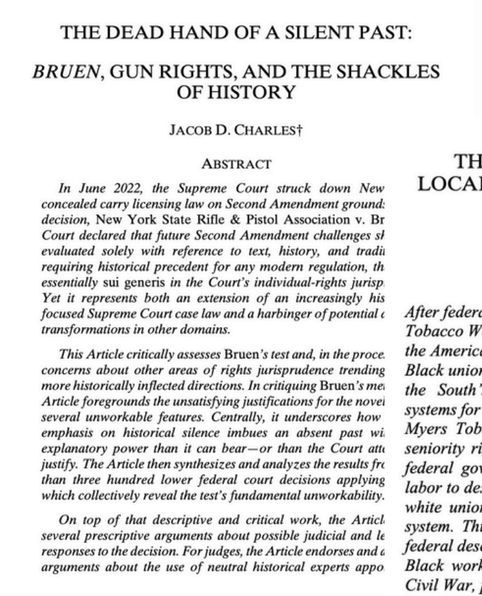

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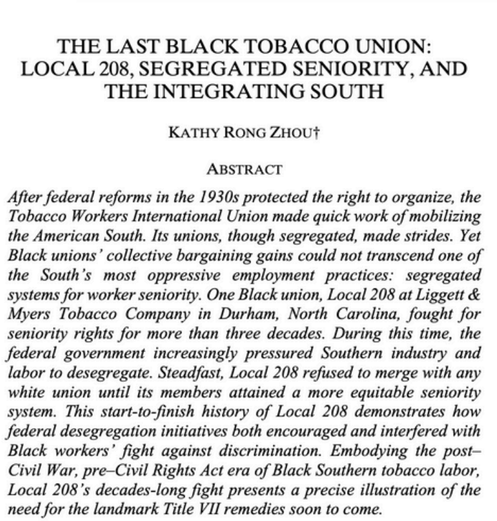

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Spring 2024

Volume 74 received 1,500+ articles.

- Every member screened (reviewed submissions)
- The Article Selection Committee made offers to 13 articles

The editing process for the October, November, and December issues began.

Summer 2024

The editing process continues.

Recruitment for Volume 75.

Fall 2024

Editors for Volume 75 join Volume 74's editing process.

- Monthly editing assignments
- Weekly office hours

Spring 2025

Volume 75 executive board is elected and begins to select articles for their volume.

WHAT DO *DLJ* MEMBERS DO?

2L Year: Staff Editor

Office Hours (weekly)

Average about 45 minutes/week
Tasks include:

- Final reads
- Check ~4 citations
- Verifying quotations and name spelling

+

Assignments (3-4 per semester)

Each assignment takes around 8-10 hours

- Finding the sources used by authors
- Checking citations
- Working with other *DLJ* members (both 2Ls and 3Ls)

3L Year: Choose Your Adventure

Executive Board (Elected)

- Select articles and notes
- Substantive edits
- Work with authors
- Manage publication cycle and journal operations

OR

Editorial Board

- Complete assignments (4-6 throughout the year)
- Miscellaneous work on an emergency basis

ARTICLES YOU MIGHT WORK ON

Abortion Disorientation
Greer Donley & Caroline Kelly

Poverty, Process & the Right to an Appropriate Education
Claire Raj

Reparations for Project One Hundred Thousand
Eleanor Morales

Relocating Justice
Ruhan Sidhu Nagra

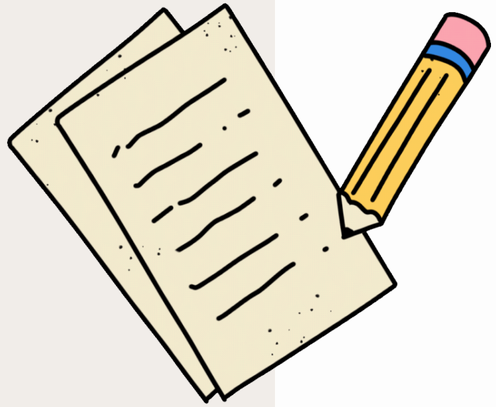
Getting to Home: Understanding the Collateral Consequences of Negative Records in the Rental Housing Market
Sara Sternberg Greene et al.

The Social Benefits of Control
Emilie Aguirre

Lutie Lytle Black Women's Scholarship Workshop

JOINING *DLJ*: THE CASENOTE COMPETITION

- Casenote is a writing, research, and bluebooking assignment based on a recent case
  - An 11-12 page double-spaced paper with the following sections: introduction, legal background, analysis, conclusion
- May 6th - May 17th
- The administration will send you a link containing the full instructions for the competition and a portal to submit your application/Casenote
- We consider your Casenote score, your personal statement, and first-year grades
  - Option 1: Casenote score alone
  - Option 2: First-year grades alone (must still participate in Casenote)
  - Option 3: Combination of Casenote, personal statement, and grades



CASENOTE GRADING

- **Bluebooking and support (50%): To what extent did the casenote comply with Bluebook rules?**
  - Does it include footnotes after all major propositions?
  - Does it comply with the abbreviation rules in T6 and T10?
  - Does it follow the order of authorities?
  - Does it use short cites and the Rule of Five correctly?
  - Does it use cross references (i.e., supra and infra) correctly?
  - Does it use signals and include quoting/explanatory parentheticals appropriately?
  - Does it utilize typefaces (e.g. small caps and italics) correctly?
  - Does it integrate case history where necessary?
  - Is the bluebooking free of sloppy (due to a lack of attention to detail) errors?
- **Argument (25%): To what extent was the argument well-reasoned?**
  - Did they clearly respond to one of the prompts?
  - Is the thesis easy to explain (could you say it in a sentence)?
  - Does it address counter-arguments?
  - If they divided up the argument, was it done in a coherent manner?
  - Is the argument logical?
  - Is the argument persuasive?
  - Did they provide a roadmap and use signposting to guide the reader?
  - Was the argument thorough (covers a topic that could be fleshed out in 12 pages)?
  - Is the argument original (distinct from the holding, concurrence, or dissents)?

CASENOTE GRADING

- **Writing style (15%): To what extent is the casenote easy to read?**
  - Is mostly written in clear, direct, and concise language
  - Paragraphs are primarily organized around particular ideas with topic sentences
  - Topic sentences are very clear
  - It is free from typos
  - Uses correct grammar, spelling, and punctuation.
  - Does not overuse passive voice
  - Is free of awkward word choice, avoids legalese, and adopts a formal tone (no contractions, first person, etc.)
  - Uses informative transitions
  - Uses effective paraphrasing (i.e., does not overuse quotations)

- **Format (5%): To what extent is the casenote formatted according to the casenote committee's directions?**
  - Has all the required sections: introduction; legal background; analysis; and conclusion
  - Has section headings
  - Includes page numbers
  - Is double-spaced ATL and single-spaced BTL.
  - Is in Times New Roman and 12-point font.
  - Includes a Student ID on header of each page
  - Has at least 10 pages
  - Is visually neat (centered headings, no orphaned headings, etc.)
  - Quotations are properly formatted (blockquotes used only when necessary, proper use of ellipses, etc.)

- **Research (5%): To what extent were a variety of sources used to develop the argument?**
  - Does the casenote rely on more than a few cases?
  - Does the casenote rely on more than one law review?
  - Does the casenote use a variety of sources (statutes, newspaper articles, legislative history, YouTube, student notes, books, web sources, etc.)?
  - Are the propositions substantiated by the sources cited?

2023 CASENOTE

Verdun v. City of San Diego

- Plaintiffs had their vehicles chalked and received a parking citation from the City of San Diego after not moving their cars within the allotted time frame
- They filed a class action suit under the Fourth Amendment
- Is tire chalking a search? If so, it is an unreasonable search?
- Circuit split

Casenote Example Walkthrough

BLUEBOOK TIPS

(

)

Overall Tips

- Use the WHITEPAGES, not the bluepages! There are notable differences (e.g., case names are not italicized in full citations in the Whitepages).
- Use footnotes, not in-text citations.
- Substantiate almost every sentence you write (basically, every sentence will have some sort of footnote & source).

BLUEBOOK TIPS

Be careful about typefaces for Rule 16 sources

Incorrect	Correct
Joseph Blocher & Brandon Garrett, Fact Stripping, 73 DUKE L.J. 1 (2023).	Joseph Blocher & Brandon Garrett, *Fact Stripping*, 73 DUKE L.J. 1 (2023).
Joseph Blocher & Brandon Garrett, *Fact Stripping*, 73 DUKE L.J. 1 (2023).	Joseph Blocher & Brandon Garrett, *Fact Stripping*, 73 DUKE L.J. 1 (2023).
Joseph Blocher & Brandon Garrett, *Fact Stripping*, 73 Duke L.J. 1 (2023).	Joseph Blocher & Brandon Garrett, *Fact Stripping*, 73 DUKE L.J. 1 (2023).
	Tip for using small caps: highlight the text you want to convert to small caps, right click, click font, enable small caps

Be careful about typefaces for Rule 15 sources

Incorrect	Correct
Harper Lee, To Kill a Mockingbird (1960).	HARPER LEE, TO KILL A MOCKINGBIRD (1960).
HARPER LEE, To Kill a Mockingbird (1960).	HARPER LEE, TO KILL A MOCKINGBIRD (1960).

BLUEBOOK TIPS

Be careful about when to use *supra* (R 4.2)

When not to use supra	When to use supra

• The first time you are citing a source
• May not be used for:
  • Cases
  • Constitutions
  • Legislative materials (other than hearings)
	• After you have already cited the source in full
	• May be used for:
	  • Legislative hearings
	  • Books
	  • Periodicals (e.g., law review articles)
	  • Directives

Be careful about *how* to use *supra*

Incorrect	Correct
1. Joseph Blocher & Brandon Garrett, *Fact Stripping*, 73 DUKE L.J. 1 (2023). 2. HARPER LEE, TO KILL A MOCKINGBIRD (1960). 3. Joseph Blocher & Brandon Garrett, *Fact Stripping*, 73 DUKE L.J. 1, 4 (2023).	1. Joseph Blocher & Brandon Garrett, *Fact Stripping*, 73 DUKE L.J. 1 (2023). 2. HARPER LEE, TO KILL A MOCKINGBIRD (1960). 3. Blocher & Garrett, *supra* note 1, at 4.

BLUEBOOK TIPS

Thing to be Careful About: The Rule of 5

The Rule of 5: Cases, legislative materials, and statutes appear in short form if the full cite appears in one of the preceding footnotes. *See* BBR 4.1 & 10.9(b).

Incorrect	Correct
1. Vega v. Tekoh, 597 U.S. 134, 136 (2022). 2. Random Cite 3. Random Cite 4. Random Cite 5. Random Cite 6. Random Cite 7. Random Cite 8. Random Cite 9. *Vega*, 597 U.S. at 137.	1. Vega v. Tekoh, 597 U.S. 134, 136 (2022). 2. Random Cite 3. Random Cite 4. Random Cite 5. Random Cite 6. Random Cite 7. Random Cite 8. Random Cite 9. Vega v. Tekoh, 597 U.S. 134, 137 (2022).

THE PERSONAL STATEMENT

- 500-word statement about how you can contribute to DLJ
- Possible topics:
  - Your upbringing or personal identity and how it has shaped your perspectives and experiences
  - Your academic background
  - Your past experience working in a specific area of the law or as an editor
  - Your love of a specific area of the law
  - Your leadership experience
  - Combination of all of the above and more!

PERSONAL STATEMENT GRADING

- **Contribution**
  - Does this person's perspective, including
    - their personal identity (e.g., their membership in an underrepresented or marginalized group, veteran status, disability status),
    - their background (e.g., as a non-traditional student, first-generation student, student from a lower socioeconomic status),
    - and/or their experience (including their professional or academic background or their experience as a public interest student) lend itself to contributing to DLJ's goals of publishing excellent academic scholarship and promoting diverse perspectives in legal academia?
  - Does this person seem ready and willing to take on staff editor work?
  - Does this person seem like they are ready to contribute to the mission of the Journal?
  - Additional considerations
    - The person has meaningfully advanced the interests of diverse communities either at school or in their community (e.g., they hold a leadership position in an affinity group or have created a program to support people from underrepresented backgrounds)
    - This person has a STEM or technical background that can help us evaluate empirical pieces during article selection
    - The personal statement includes a statement explaining why this person wants to be on a journal
    - The personal statement includes specific details about why this person wants to join DLJ (e.g., they attended a tips & tricks session, they display knowledge of our article selection process)

- **Style/Polish**
  - Give 0 points if the personal statement displays an egregious lack of attention to detail (e.g., excessive typos, run-on sentences, grammatical mistakes).
  - Give 3 points if the personal statement displays an average level of polish (e.g., minimal typos and grammatical mistakes).
  - Give 5 points if the personal statement displays an exception level of polish (e.g., no typos, exceptional writing quality).

PERSONAL STATEMENT EXAMPLES

To combat the lack of diversity in legal academia, I plan to use my voice at Duke Law Journals, through article selection, critiques, and writing my note on pertinent legal issues that affect the Asian-American community. As someone who is pursuing a [redacted], I have the critical eye and apposite writing skills to analyze and determine the strength of an empirical piece. A diverse legal industry begins with a diverse law school experience, and I am committed to fostering an environment that welcomes the voices of marginalized groups.

During 1L I began an original research project aimed for publication in a law journal, and have been learning about the publication process in the legal field via my mentors. While I still have a great deal to learn, I believe I will provide the perspective of someone who understands how much a piece in DLJ can mean to a law professor's career and how to assess the piece at hand in the context of their broader work. Furthermore, I am passionate about ensuring that the legal academic profession that I hope to join reflects the diversity of the current and future law student community, in a way that it currently does not. A large part of that involves not just looking at the typical lenses of diversity that we consider, such as gender or racial diversity, when advocating for a career-defining publication, but also institutional and issue-area diversity, since these can provide proxies for often-overlooked forms of diversity (e.g. socioeconomic).

PERSONAL STATEMENT EXAMPLES

I have missed analyzing complex graphs and studies in order to extrapolate information, as I had often done as a STEM major. Trying to understand and use the Bluebook somewhat felt akin to that, at least as close as something in law school could. While I am still not perfect in my bluebooking, I have genuinely enjoyed learning new rules and skills. [redacted] I absolutely loved having this responsibility and took pride in the work we were putting forward. . . I hope to bring this same level of dedication and eagerness for responsibility to DLJ. I am ready and excited to hopefully contribute to DLJ's mission, infusing my work with unwavering effort and a commitment to excellence that echoes my past experiences.

Truth is, I am lucky to be here today. Despite the challenges my mom and I faced growing up, I was fortunate enough to have a parent that sacrificed everything for my well-being. I have a unique—certainly among law students—upbringing. [redacted] All of which will be useful in promoting diversity within DLJ. With goals of working in the public sphere one day, having the opportunity to review and publish influential legal scholarship is exciting. Put together, Asian-Americans need to have community leaders who understand and reflect our experiences in public and political spaces. I would like to start on this path by working on DLJ.

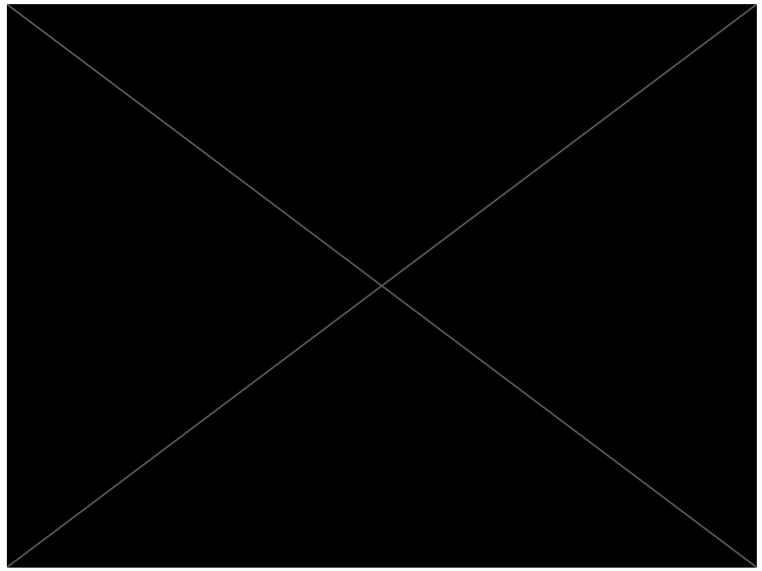
LEARN MORE ABOUT *DLJ*

Underrepresented Voices on Journal - April 2

- Hear first-hand from *DLJ* alumni
- Both litigation and transaction focused alum joining

Coffee Chats - April 11 & 15

- Informal chance to chat with current members



Note-On & Online Essay Competition - March 27

- Note-On - Publish your SWRP
- Online Essay - 5,000 word essay & $500 cash prize
- Publication in *DLJ* and leadership position on *DLJ*

Duke Law Journal

Grades should be determined by the following factors, each of which is weighted according to the percentages indicated in parentheses:

- **Argument (25%):** Includes strength of the argument, plausibility of the argument, and the degree of legal support provided for the argument. Although we ask that you focus on the author's argument and legal analysis, the author should also be citing relevant precedent in the topic area.

- **Writing style (15%):** Includes how engaging and entertaining the author's writing and voice are, how clear and well-organized the piece is, and how mechanically polished the casenote is (e.g., whether the author employs proper grammar and spelling, active voice, and whether there are typos or usage errors).

- **Bluebooking and support (50%):** Includes conformity with Bluebook conventions, proper use and formatting of the citations, and diversity of citations. Additionally, consider whether the citations seem to support the propositions above the line.

- **Research (5%):** Substantial effort by the author into learning the issues at play in the case should be rewarded if apparent. You may also take into consideration an apparent lack of research effort. Lastly, the failure to mention relevant precedents for any claim should be taken into account.

- **Format (5%):** Includes stylistic neatness (e.g., no orphaned headings), properly formatted quotations, and section headings. This category also rewards the author for following the Competition instructions. Major Competition requirements include:
    - Length
        - Casenotes must be no longer than 12 pages in length.
    - Structure
        - Casenotes must have at least five sections: (1) Introduction, (2) Facts, (3) Legal Background, (4) Holding, and (5) Analysis.
        - Casenotes may also include a sixth section, "Conclusion."
    - Additional Formatting Requirements
        - Margins must be one inch on all sides.
        - Body text must be 12-point font.
        - Footnote text must be 12-point font.
        - Body text must be double-spaced, and footnote text must be single spaced.
        - All text must be in Times New Roman font. We do not want candidates to

manipulate the length of their casenotes by altering their font styles. If your casenote would be longer than 14 pages but for a font size change, please notify us immediately.

- Citations must conform to Bluebook style for law review articles as opposed to "Bluepages" format.

Category	*Description*	*Points Range*
Formatting	**To what extent is the casenote formatted according to the casenote committee's directions?**	Please score up to 10 points. 1) Add 1 point if the casenote has all the required sections: introduction; facts; legal background; holding; analysis. (and optionally a conclusion). 2) Add 1 point if there are section headings. 3) Add 1 point if it includes page numbers. 4) Add 1 point if it is double-spaced ATL and single-spaced BTL. 5) Add 1 point if it is in Times New Roman and 12-point font. 6) Add 1 point if the author includes a Student ID on header of each page. 7) Add 1 point if there are at least 12 pages. 8) Add 1 point for visual neatness (centered headings, no orphaned headings, etc.). 9) Add 1 point if quotations are *mostly* properly formatted (blockquotes used only when necessary, proper use of ellipses, etc.). 10) Add 1 addition point if *all* quotations appear to be properly formatted.
Research	**To what extent were a variety of sources used to develop the argument?** Consider, in part: • Does the casenote rely on more than a few cases? • Does the casenote rely on more than one law review? • Does the casenote use a variety of sources (statutes, newspaper articles, legislative history, YouTube, student notes, books, web sources, etc.)? • Are the propositions substantiated by the sources cited?	2-4 points if your answers to most of these questions & similar ones are no. 5-7 points if your answers to most these questions & similar ones are mixed. 8-9 points if your answers to most of these questions & similar ones are yes. Only Casenotes that use a variety of sources should get scores of 8+ here. A "variety of sources" refers to at least 5 different *types* of sources. Scores of 1 and 10 *and above* are reserved for when the casenote is exceptionally weak or exceptionally strong, respectively, in this category.
Style	**To what extent is the casenote easy to read?**	Please score up to 10 points. 1) Add 1 point if it is mostly written in clear, direct, and concise language. 2) Add 1 point if paragraphs are primarily organized around particular ideas with topic sentences.

		3) Add an additional point if topic sentences are very clear. 4) Add 1 point if it is mostly free from typos. 5) Add an additional 1 point if it is completely free of typos. 6) Add 1 point for correct grammar, spelling, and punctuation. 7) Add 1 point if it does not overuse passive voice. 8) Add 1 point if it is free of awkward word choice, avoids legalese, and adopts a formal tone (no contractions, first person, etc.). 9) Add 1 point if it uses informative transitions. 10) Add 1 point for effective paraphrasing (i.e., does not overuse quotations).
Argument	**To what extent was the argument well-reasoned?** Consider, in part: • Is the topic sufficiently related to the case? • Is the thesis easy to explain (could you say it in a sentence)? • Does it address counter-arguments? • If they divided up the argument, was it done in a coherent manner? • Is the argument logical? • Is the argument persuasive? • Did they provide a roadmap and use signposting to guide the reader? • Was the argument thorough (covers a topic that could be fleshed out in 14 pages)? • Is the argument original (distinct from the holding, concurrence, or dissents)?	2-4 points if your answers to most of these questions & similar ones are no. 5-7 points if your answers to most these questions & similar ones are mixed. 8-9 points if your answers to most of these questions & similar ones are yes. Scores of 1 and 10 are reserved for when the casenote is exceptionally weak or exceptionally strong, respectively, in this category.
Bluebooking	**To what extent did the casenote comply with Bluebook rules?** Consider, in part: • Does it include footnotes after all major propositions? • Does it comply with the abbreviation rules in T6 and T10? • Does it follow the order of authorities? • Does it use short cites and	2-4 points if your answers to most of these questions & similar ones are no. 5-7 points if your answers to most these questions & similar ones are mixed. 8-9 points if your answers to most of these questions & similar ones are yes. *Scores of 8 and 9 should be reserved for casenotes that include a variety of types of

	the Rule of Five correctly? • Does it use cross references (i.e., *supra* and *infra*) correctly? • Does it use signals and include quoting/explanatory parentheticals appropriately? • Does it utilize typefaces (e.g. small caps and italics) correctly? • Does it integrate case history where necessary? • Is the bluebooking free of sloppy (due to a lack of attention to detail) errors?	sources. Scores of 1 and 10 *and above* are reserved for when the casenote is exceptionally weak or exceptionally strong, respectively, in this category.

These tips are from an individual on DLJ and are not a product of the *Duke Law Journal*.

DLJ-specific Casenote Tips

1. Make sure you follow the instructions. Every year, people are disqualified because they have not properly formatted their casenote (e.g., the footnotes are the wrong font size).
2. Look at the sample casenotes you have been given to get a feel for what your casenote should look like, but **remember that previous casenotes were longer and had sections that yours should not include**.
3. The single most important part of your casenote is your bluebooking. We allocate a ton of points on our rubric to bluebooking because that is what you primarily be doing as a first-year staff editor on DLJ.
4. If you are confused about how to Bluebook a specific type of source and can't figure it out in the Bluebook, search within previous DLJ articles for that kind of source.
5. Because bluebooking is so important, allot one or two days into the very end of your writing schedule so you can proof your bluebooking thoroughly, checking every cite.
6. **DO NOT FORGET THE RULE OF FIVE.** THIS IS VERY IMPORTANT and easy to spot when people forget it. **Cases, legislative materials,** and especially **statutes** should only be short-cited if they appear within one of the **five** footnotes above. An Id. counts as a prior citation. **Otherwise, a full case name or statute citation must be used** (Rules 4.1 & 10.9(b)). Note: this rule does NOT apply to law review articles.
7. You should use *supra* to cross-reference law review articles and books after you cite them the first time.
    1. For instance, if you cite Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, X (1890) in footnote 1, the short form citation you would use in every subsequent citation (besides an *id.* cite) to that article would be Warren & Brandeis, *supra* note 1, at X.
8. Pay attention to the fonts used for different sources. Make sure you are italicizing when needed and using small caps when needed.
    1. For instance, per rule 15 (books and reports), you should use small caps for the author's name and the title of the source. Ex: JOHN STEINBECK, EAST OF EDEN 23 (1952) (editor's name, edition, year of publication).
        1. To put text in small font on a mac, highlight the text and then hit command, shift, k.
9. The bluebook is available online https://www.legalbluebook.com/. You can use the free seven-day trial. Once you identify the source type, just type it into the search bar and it will take you to the appropriate rule. MAKE SURE YOU ARE USING THE WHITE PAGES. This is free for DLJ members, so you likely do not want to buy more than a one-year subscription.
10. Drop footnotes as you write. What I mean is: Substantiate as you go along, because substantiating after you write is really hard and time-consuming. But don't get obsessed with bluebooking perfectly unless that's just how you work. Either way, substantiate as you go.
11. Write clearly. Avoid showing off and using excessive adverbs. Do not use the word "very" or "extremely." Clarity is most important.
12. Consider the time constraints of your grader and ensure that the first and last sentences of every paragraph are strong examples of your writing.

These tips are from an individual on DLJ and are not a product of the *Duke Law Journal*.

13. Note that DLJ uses the Oxford comma.
14. Use "First" not "Firstly."
15. The student who wrote on to DLJ said that her casenote had just over 100 footnotes. I recommend above 80 footnotes as a good goal. Almost every sentence should have a footnote. That said, no one cares if you have 200 footnotes if they're done poorly.
16. Use a variety of sources. In the past people have cited the bible, RuPaul's Drag Race, and a Tweet from Kim Kardashian. A nice assortment of sources you know how to cite is ideal. Include statutes, law review articles, treatises, cases, books, and internet sources.
17. Pick DLJ first if you would commit if asked!
18. For the personal statement, make sure you are writing about how you can contribute to the Journal as an editor. It is not a statement of interest (like other journals' personal statements).

What are the factors important to graders?

- Formatting. (e.g. section headings, small caps in section headings). Does this person follow directions?
- Research. Did you rely on more than a few cases? Did you rely on more than one law review? Did you use a variety of sources? (e.g. statutes, newspaper articles, books, legislative history, youtube)?
- Style. Is the note easy to read? Did you have clear topic sentences? Was the Note free of typos etc...? Did you mostly use the active voice?
- Argument. Is the argument easy to explain in a sentence? Does it address counterarguments? Was it organized coherently? Is it logical and persuasive? Did you provide us with a roadmap, and did you stick to it?
- Bluebooking? Did you Footnote almost every sentence? Did you comply with Rule of 5, T6, and T10? Did you follow the order of authorities? Did you use *supra* and *infra* correctly? Did you use signals appropriately? Did you use small caps correctly? Is the bluebooking free of sloppy errors? (e.g. copied and pasted from WestLaw, and format changed in Word).

The Personal Statement:

- **Do:**
  - Discuss traditional diversity (race, gender, ethnicity etc...), your work or academic background, your experience as an editor, etc.
  - Discuss how your background/worldview might bring something UNIQUE, NEW, AND IMPORTANT to the Journal
  - How do people contribute to the Journal? Mostly in the form of writing student Notes, and selecting Articles written by professors.
  - Advice from a current 3L: "I think it should reflect how your unique perspective/background/etc. will bring something new and important to the journal. The contributions that individual editors make to the journal are basically in the form of Note writing and article selection, so you might want to consider

how your background will lend itself to unique contributions in those realms. (As an example, if I had to write a personal statement, for instance, I would probably write about how my dad's career as a public defender has instilled in me a passion for criminal law, defense, criminal justice reform, etc.; I'm now writing my Note on criminal law and fought hard for good crim justice reform pieces during article selection.) Also, remember that the personal statement should, at the end of the day, be well-written and tell a compelling story about who you are as a person. If you have any questions about the personal statement, feel free to ask."

- **Don't:**
  - Make it impersonal
  - Write it quickly
  - Treat it as a statement of interest (like the statements for the other journals)

THE FOURTH AMENDMENT AND WARRANTLESS SEARCHES: CONSIDERING AN IMPLIED CONSENT APPROACH TO PARKING ENFORCEMENT IN *VERDUN V. CITY OF SAN DIEGO*

I. INTRODUCTION

The breadth of Fourth Amendment protections has withered in recent decades, driven at least in part by the expansion of the administrative state and courts' enthusiastic implementation of the administrative search exception.[1] This exception allows government actors to dispense with the warrant and probable cause requirements of the Fourth Amendment in specific circumstances, so long as the resulting search is reasonable.[2] Courts have long struggled with just how to apply the administrative search exception,[3] and this struggle is only likely to grow as technology changes and the nature of searches themselves consequently shift.[4]

The Ninth Circuit's application of the administrative search exception in *Verdun v. City of San Diego*[5] constitutes an appropriate use of the exception. Given the vast reaches of the

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[1] *See* Ronald F. Wright, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1129 (1984) ("This extension of the Fourth Amendment results largely from the expansion of the administrative state and its capacity to regulate citizens' lives.").
[2] G.S. Hans, *Curing Administrative Search Decay*, 24 B.U. J. SCI. & TECH. L. 1, 1 (2018).
[3] *See, e.g.*, Taylor v. City of Saginaw, 11 F.4th 483, 488 (6th Cir. 2019) (holding that chalking tires does not fall within the administrative search exception because it is not designed to serve special needs, does not fall into a closely regulated industry, and does not provide an opportunity for pre-compliance review). The *Taylor* decision has been criticized for focusing "too narrowly" on alternative enforcement mechanisms rather than the applicability of the administrative exception. *See, e.g.*, Verdun v. City of San Diego, 51 F.4th 1033, 1046 (9th Cir. 2022); Bernard W. Bell, *Just Pay the Ticket!: Is Chalking Tires an Unconstitutional Search?*, YALE J. ON REGUL. NOTICE AND COMMENT (Sept. 6, 2021) https://www.yalejreg.com/nc/just-pay-the-ticket-is-chalking-tires-an-unconstitutional-search/ ("In light of the complete absence of selectivity in choosing the targets of a search, the practice of chalking tires without providing a pre-compliance hearing can be justified as an administrative search.").
[4] *See* Hans, *supra* note 2, at 4 ("This issue has become more trenchant as technology has dramatically changed the volume and detail of personal data being collected and stored in the course of everyday business. The records potentially covered under the administrative search doctrine are more robust than ever.").
[5] *Verdun*, 51 F.4th at 1035.

administrative search exception, tire chalking seems exactly the context where it should apply.[6] But hidden in the *Verdun* decision is a cogent argument about the role implied consent plays in analyzing the reasonableness of an administrative search[7]—even if the court never uses the word "consent."[8] Despite remaining a stealth presence in *Verdun*, the implied consent doctrine is an additional lens to evaluating the constitutionality of administrative searches that courts should consider employing more often—particularly in the context of rapidly developing technology.[9]

II. FACTS

The City of San Diego ("City") owns thousands of parking spaces and regulates those spaces by imposing publicly-posted time limits.[10] For over fifty years, the City has enforced those time limits by "chalking" the tires of parked vehicles,[11] a parking enforcement tool used in the U.S. for over a century.[12] Parking officers place an "impermanent chalk mark of no more than a few inches" on the tire of each parked vehicle, which disappears soon after the vehicle starts moving.[13] City officers do not have discretion in choosing which vehicles to chalk, but instead

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[6] *See* Bell, *supra* note 3 ("[C]halking is less intrusive and has less serious privacy implications than monitoring that is clearly permissible under the Fourth Amendment.").
[7] *See Verdun*, 51 F.4th at 1045 ("The context in which chalking applies only further bears out our reasonableness analysis. There is already a reduced expectation of privacy for vehicles . . . and [drivers] can also reasonably expect greater administrative scrutiny . . . .").
[8] *See id.* at 1035–59.
[9] *See, e.g.*, United States v. Jones, 565 U.S. 400, 404 (2012) (Sotomayor, J., concurring) (noting that "physical intrusion is now unnecessary to many forms of surveillance," particularly given the proliferation of smartphones, and that the court should contemplate the "attributes of GPS monitoring . . . when considering the existence of a reasonable societal expectation of privacy").
[10] *Verdun*, 51 F.4th at 1035.
[11] *Id.*
[12] *Id.* at 1037.
[13] *Id.* at 1035. *See also* CBS New York, *Chalking Tires Ruled Unconstitutional*, YOUTUBE (Apr. 26, 2019), https://www.youtube.com/watch?v=Cu0pCyF4fIE (depicting a parking enforcement officer "chalking" the tires of parked vehicles).

are required to mark each and every vehicle in a chosen area.[14] After the time limit for parking in an area expires, officers may issue citations to any remaining vehicles with chalked tires.[15]

The City maintains, and the record supports, that chalking is "intended to enhance public safety, improve traffic control, and support commerce."[16] Enforcing time limits increases vehicle turnover, which in turn reduces double parking, cruising, and other dangerous forms of illegal parking.[17] Moreover, readily available parking in busy commercial areas increases access to businesses and "encourages customers to visit, shop, and dine within a reasonable time to allow more customers to do the same."[18] The more thoroughly the City enforces municipal parking regulations and time-limits, the more widespread public compliance becomes.[19]

Although there are alternative procedures for enforcing parking limits, the City asserts that chalking is the most cost-effective method[20] and "invite[s less] intrusions into personal privacy" than those alternatives.[21] For example, some municipalities use License Plate Reader (LPR) technology.[22] While LPR technology is a possible alternative to chalking, it would cost the City millions in implementation and require maintaining a database of time-stamped photographs

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[14] *Verdun*, 51 F.4th at 1035.
[15] *Id.*
[16] *Id.*
[17] *Id*. Insufficient parking leads drivers to park in a manner that can block access to fire hydrants and bus lanes. Appellees' Answering Brief at 43, Verdun v. City of San Diego, 51 F.4th 1033 (2022) (No. 21-55046).
[18] *Verdun*, 51 F.4th at 1036.
[19] *Id.* at 1035.
[20] *Id.* at 1036.
[21] *Id.* at 1046.
[22] *Id.* at 1036.

and Global Positioning System (GPS) data for each parked vehicle.[23] As a result, the City "views tire chalking as superior to other methods of parking enforcement."[24]

Andre Verdun and Ian Anoush Golkar ("Plaintiffs") each received one or more parking citations after their vehicles were chalked by the City's parking enforcement officers.[25] Plaintiffs filed a putative class action under 42 U.S.C. § 1983 in May 2019, alleging that the City's practice of chalking violates the Fourth Amendment.[26] Plaintiffs sought injunctive relief and monetary damages in the form of "amounts the putative class . . . paid in parking tickets."[27] The district court granted the City's motion for summary judgment, concluding that although chalking constitutes a warrantless Fourth Amendment search, "it is justified under the administrative search exception."[28] Plaintiffs filed a timely appeal.[29]

III. LEGAL BACKGROUND

The Fourth Amendment, incorporated to the states through the Fourteenth Amendment,[30] safeguards "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and declares that "no [w]arrants shall [be] issue[d], but upon probable cause."[31] Jurisprudential concepts of what constitutes a Fourth Amendment search have varied throughout history, from analogizing situations to "the canonical example of a

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[23] *Id.*
[24] *Id. See also* Bell, *supra* note 3 (describing the comparative invasiveness of alternatives to chalking, including photographs and license plate scanners).
[25] *Verdun*, 51 F.4th at 1036.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Mapp v. Ohio, 367 U.S. 643, 655 (1961).
[31] U.S. CONST. amend. IV.

home invasion," to a two-pronged expectations of privacy analysis.[32] In recent years, however, the Supreme Court adopted a trespass based theory, holding that a search occurs "when the Government physically occupie[s] private property for the purpose of obtaining information."[33] Traditionally, searches and seizures are considered using a warrant and probable cause requirement.[34] Thus, the Court has long held that searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment.[35] Over time, however, some specific exceptions were carved out.[36]

Though the text of the Fourth Amendment does not distinguish between criminal and civil searches and seizures, courts have only recently begun to apply the Fourth Amendment to government activities in a civil context.[37] In *Camara v. Municipal Court*,[38] the Court held that inspection programs by municipal employees constitute "significant intrusions upon the interests protected by the Fourth Amendment."[39] The Court noted that the issues at stake in civil contexts are not merely "peripheral" to those in traditional criminal contexts.[40] The Fourth Amendment's core purpose is thus "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials," regardless of when and where those invasions occur.[41]

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[32] *See* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 67–69 (2013) (outlining the evolution of Fourth Amendment search jurisprudence).
[33] United States v. Jones, 565 U.S. 400, 404 (2012).
[34] *See, e.g.*, Agnello v. U.S., 269 U.S. 20, 33 (1925) (holding that the search of a private dwelling was not justified without both a warrant and "facts unquestionably showing probable cause").
[35] New Jersey v. T.L.O., 469 U.S. 325, 354 (1985) (Brennan, J., concurring in part).
[36] *See, e.g.*, Maryland v. Dyson, 527 U.S. 465, 466–67 (1999) (noting an established exception to the warrant requirement for vehicle searches, the "automobile exception").
[37] *See* Wright, *supra* note 1, at 1128–29 (1984) (describing the post-1967 "extension of the Fourth Amendment" to governmental actions in civil contexts).
[38] 387 U.S. 523 (1967).
[39] *Id*. at 534.
[40] *Id.* at 529.
[41] *Id.* at 528.

Perhaps due to the Court's willingness to apply Fourth Amendment limitations to civil actions and the "expansion of the administrative state," one exception to the *per se* rule of invalidity for warrantless searches that has grown in prominence is the administrative search exception.[42] The roots of the exception extend to the 1980s,[43] when the Court first began carving out "special needs" exceptions.[44] These exceptions are largely based on a theory that, in some noncriminal contexts, balancing a compelling government interest with individual liberty is necessary. Subsequent the *Camara* decision in 1967, the Court has analyzed the permissibility of numerous warrantless searches through a special needs or administrative search lens, including: state hospital officials searching offices of employees,[45] searches conducted by public school officials,[46] and inspections of commercial property by Labor Department officials.[47] Despite differing terminology, "the Supreme Court has often discussed 'administrative' and 'special needs' searches together."[48]

The Court ultimately stipulated that "search regimes where no warrant is ever required may be reasonable where 'special needs . . . make the warrant and probable-cause requirement

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[42] Wright, *supra* note 1, at 1129.
[43] Eve B. Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 260 (2011).
[44] *See, e.g.*, Skinner v. Ry. Lab. Execs. Ass'n, 489 U.S. 602, 620 (1989) (finding that regulation of railroad employees presents "special needs" that may justify "departures from the usual warrant and probable-cause requirements"); New Jersey v. T.L.O., 469 U.S. 325, 340–41 (1985) (holding that warrantless searches are not *per se* unreasonable in a public school because school administrators have a "substantial" interest in maintaining order).
[45] *See* O'Connor v. Ortega, 480 U.S. 709, 715 (1987) (holding that searches and seizures by government employers or supervisors are subject to the restraints of the Fourth Amendment).
[46] *See T.L.O.*, 469 U.S. at 336-37 ("[S]chool officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.").
[47] *See* Donovan v. Dewey, 452 U.S. 594, 599 (1981) ("[T]he Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property.").
[48] Verdun v. City of San Diego, 51 F.4th 1033, 1038 (9th Cir. 2022) (quoting Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000)).

impracticable,'"[49] and where the "'primary purpose' of the searches is '[d]istinguishable from the general interest in crime control.'"[50] To evaluate the applicability of the administrative search exception, courts consider whether the warrantless search "bear[s] a sufficient connection to the governmental interests they serve," and whether the primary purpose is one other than detecting "ordinary criminal wrongdoing."[51] Moreover, in administrative or special needs searches, the traditional warrant and probable cause requirement is replaced with a "reasonableness balancing" test.[52] If a court finds that a special needs or administrative search exception is applicable, it will balance the government's compelling interest against the degree of intrusion to determine whether the search is reasonable.[53]

Consent is another major exception to the *per se* rule of unreasonableness for warrantless searches.[54] In addition to verbal or explicit consent,[55] implied or unspoken consent has been the basis of some Supreme Court decisions concerning warrantless searches. For example, in *Wyman v. James*,[56] the Court permitted home inspections by state caseworkers because the visits were mandated by a welfare program that the plaintiff opted to participate in.[57] Although the plaintiff

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[49] City of Los Angeles v. Patel, 576 U.S. 409, 420 (2015) (quoting Skinner v. Ry. Lab. Execs. Ass'n, 489 U.S. 602, 619 (1989)).
[50] *Id.* at 420 (quoting *Edmond*, 531 U.S. at 44).
[51] *Verdun*, 51 F.4th at 1040.
[52] Dru Brenner-Beck, *Borrowing Balance: How to Keep the Special Needs Exception Truly Special*, 56 S. TEX. L. REV. 1, 8 (2014) (quoting Camara v. Municipal Court, 387 U.S. 523, 536–37 (1967)). The Court has also employed a balancing test in stop-and-frisk cases. *See* Wright, *supra* note 1, at 1131–33 (noting that the Court has never "singled out the civil nature of cases to explain its resort to balancing" but that, apart from stop-and-frisk, "balancing flourished in civil cases alone").
[53] Primus, *supra* note 47, at 267.
[54] Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).
[55] The Court's explicit consent cases have pertained primarily to the scope of consent. *See, e.g.*, Florida v. Jimeno, 500 U.S. 248, 250 (1991) (granting certiorari "to determine whether consent to search a vehicle may extend to closed containers found inside the vehicle").
[56] 400 U.S. 309 (1971).
[57] Bell, *supra* note 3.

in *Wyman* did not explicitly consent to the inspections,[58] the Court pointed to the lower expectation of privacy a beneficiary of "charity" maintains.[59] Though relied upon less in recent years,[60] implied consent is sometimes still deployed as a balancing tool in determining the reasonableness of an administrative or special-needs search.[61]

IV. HOLDING

The bulk of the Ninth Circuit's inquiry focuses on whether to uphold tire chalking as a valid administrative search.[62] Though the court implicitly acknowledges that a search through chalking is warrantless,[63] it conducts limited analysis on whether that chalking actually constitutes a search or seizure. Instead, the court "assume[s] without deciding that it is [a possible search]."[64]

The court next turns to the applicability of the administrative search exception, analogizing chalking to vehicle dragnets.[65] The court's analysis is two-fold, asking first whether

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[58] 400 U.S. at 313–14.
[59] *Id.* at 319.
[60] The Ninth Circuit decided a series of airport security cases on a theory of implied consent, suggesting travelers impliedly consented to be searched by traversing security checkpoints, *See, e.g.*, U.S. v. Pulido-Baquerizo, 800 F.2d 899, 901 (9th Cir. 1986) (upholding constitutionality of warrantless airport x-ray scan on a theory of implied consent), *overruled by* U.S. v. Aukai, 497 F.3d 955, 962 (9th Cir. 2007). Later, the Ninth Circuit overruled any need for consent, explicit or otherwise, in administrative search cases. *Aukai*, 497 F.3d at 962.
[61] *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 90–91 (2001) (Kennedy, J., concurring) ("An essential, distinguishing feature of the special needs cases is that the person searched has consented . . . The consent, and the circumstances in which it was given, bear upon the reasonableness of the whole special needs program.").
[62] *See* Verdun v. City of San Diego, 51 F.4th 1033, 1035–59 (9th Cir. 2022).
[63] *See id.* at 1044 (suggesting it would be "impracticable" to require the City's parking enforcement officers to "seek warrants for monitoring parking violations").
[64] *Id.* at 1037.
[65] *Id.* at 1040. Dragnets are a "system of coordinated [policing] measures" that are applied broadly to a targeted population rather than on an individualized basis. WIKIPEDIA, *Dragnet (policing)*, https://en.wikipedia.org/wiki/Dragnet_(policing) (last visited May 19, 2023).

the City's primary purpose is one other than general crime control,[66] and second whether there is a sufficiently close connection between chalking and the harm it seeks to prevent.[67] The court concludes that the primary purpose of chalking is to "assist the City in its overall management of vehicular traffic," by regulating the flow of traffic and deterring violations of parking rules.[68] Although chalking can lead to a citation, the court distinguishes between searches with the primary purpose of discovering criminal activity from searches which can ultimately result in criminal consequences.[69] Moreover, tire chalking is unique from other acceptable administrative searches because it cannot lead to discovery of other, unrelated criminal behavior.[70] Finally, the court concludes there is a close connection between the harm chalking seeks to prevent—vehicles overstaying parking time limits—and the search being conducted, bolstered by the fact that parking enforcement officers do not have discretion in selecting vehicles to chalk.[71]

Having determined that chalking constitutes an administrative search, the court finally focuses on the reasonableness of the search, using the administrative search reasonableness balancing test.[72] Here the court evaluates three factors: the "gravity of the public concerns served" through chalking, "the degree to which" chalking "advances the public interest," and "the severity of the interference with individual liberty."[73] While acknowledging that parking

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[66] *Verdun*, 51 F.4th at 1042.
[67] *Id.* at 1043.
[68] *Id.* at 1042.
[69] *Id.*
[70] The court highlights an example of a vehicle checkpoint intended to prevent hunting in a national park, which ultimately led to citations for driving while intoxicated—a warrantless search upheld under the administrative search exception. *Id.*
[71] *Id.* at 1042–43.
[72] *See id.* at 1043 (quoting Demarest v. City of Vallejo, 44 F.4th 1209, 1220 (9th Cir. 2022)) ("[W]e now consider 'the reasonableness' of the search 'on the basis of the individual circumstances' . . . This requires us to evaluate [three factors].").
[73] *Id.*

enforcement is not the most pressing concern,[74] the court notes that chalking nevertheless serves a compelling government interest.[75] The court further concludes that chalking is "appropriately tailored" to that interest, leading to no "spillover" outside its stated purpose.[76] Finally, the court reflects on the relatively minor intrusion that results from a "temporary dusting of chalk on the outer part of a tire on a vehicle parked in a public space."[77] These observations[78] lead the court to hold that the City's chalking is reasonable.[79] The Ninth Circuit consequently affirms the district court's order granting summary judgment for the City.[80]

V. ANALYSIS

The Ninth Circuit's administrative exception analysis of tire chalking represents an appropriate and precise application of modern Fourth Amendment jurisprudence, bolstered in part by the Court's inherent acknowledgement that implied consent plays an important role in the reasonableness of a search.[81] This nod to implied consent is only the beginning of what could have been a sound addition to the court's administrative search analysis. Implied consent offers a tool for strengthening applications of the administrative search exception. And the suitability of an implied consent approach is bolstered when, as in *Verdun*, the search occurs in a location

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[74] *Id.*
[75] *See id.* ("It does not take an advanced degree in urban planning to appreciate the significance of free- moving vehicular traffic and parking availability to the basic functioning of a municipality and the quality of life of its residents, businesses, and visitors.").
[76] *Id.* at 1044.
[77] *Id.* at 1045.
[78] Following its reasonableness analysis, the court briefly considers the context of the chalking. *See* discussion *infra* Part V.A.
[79] *Verdun*, 51 F.4th at 1043.
[80] *Id.* at 1035.
[81] *See id.* at 1045 (suggesting the "context" of chalking, which includes a "reduced expectation of privacy," bolsters the court's reasonableness analysis).

other than private property[82]—particularly when parties subject to a warrantless search are on notice.[83]

A. Traces of an Implied Consent Analysis in Verdun *Represent the First Steps of a Deeper Evaluation.*

Although the Ninth Circuit ultimately upholds the constitutionality of chalking through an application of the administrative search exception,[84] an unequivocal examination of implied consent as a contextual factor would strengthen the court's approach.[85] The court's implied consent analysis in *Verdun* is limited to a small section of the opinion, following a discussion of the three factors used to evaluate reasonableness of an administrative search.[86] The court reasons that the "context" of chalking, which occurs on a public street and in a setting where vehicle owners have lowered expectations of privacy, suggests intrusions are expected.[87] However, the court could have gone much further than its one paragraph of analysis.[88]

Vehicle owners choosing to park in municipally owned spaces, knowing that the municipality uses chalking, could be construed as implied consent.[89] The Supreme Court has historically recognized implied consent can exist "merely because of the person's conduct in

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[82] *See* Bell, *supra* note 3 ("[T]he theory of [implied] consent provides a sound basis for chalking tires to determine whether individuals have overstayed time limits for free municipal parking lots. The Government is entitled to exclude individuals from government-owned parking lots.")
[83] *See id.* (noting that the "practice of chalking tires is presumably widely known in the municipalities that use that practice," and thus "anyone who does not consent can presumably forgo" parking in government-owned spaces).
[84] *Verdun*, 51 F.4th at 1035.
[85] *See* Bell, *supra* note 3 (suggesting an implied consent approach in response to *Taylor*, the Sixth Circuit's decision ruling chalking tires unconstitutional).
[86] *Verdun*, 51 F.4th at 1045.
[87] *Id.* The court specifically references fliers placed under windshield wipers as one example of an expected intrusion.
[88] *Id.*
[89] Bell, *supra* note 3.

engaging in a certain activity."[90] Implied consent by engaging in certain activity has been assumed in various scenarios, from continually engaging in "pervasively regulated" activities[91] to bringing luggage through airport security.[92] In addition to an individual's behavior, another consistency across implied consent cases is that those subject to warrantless searches were typically on notice.[93] A similar analysis can apply to time-limited parking in *Verdun*; consider that the City has practiced "chalking" since the 1970s and parking limits for city-owned spaces are publicly posted.[94] Drivers who choose to park in those spaces, knowing the municipality practices chalking, are engaging in activity that could be construed as implied consent.[95] Moreover, concerns about the voluntariness or irrevocability of implied consent are significantly less prevalent in cases like *Verdun*; in the context of municipally owned parking, drivers can simply opt to park in a different location.[96]

This analysis is bolstered by the recognition that vehicles already have a reduced expectation of privacy.[97] Warrantless searches of vehicles "have been upheld in circumstances in which a search of a home or office would not."[98] This is at least in part because the function of vehicles is to travel in public locations.[99] As the *Verdun* court notes, vehicle owners can

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[90] 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2(l) (6th ed. 2022).
[91] U.S. v. Biswell, 406 U.S. 311, 316 (1972).
[92] U.S. v. Doran, 482 F.2d 929, 932 (9th Cir. 1973).
[93] In *Biswell*, the plaintiff was "annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority." 406 U.S. at 316. In *Doran*, there were publicly posted signs indicating bags were subject to search. 482 F.2d at 930–31.
[94] Verdun v. City of San Diego, 51 F.4th 1033, 1035 (9th Cir. 2022).
[95] Bell, *supra* note 3.
[96] *Id.*
[97] *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 367 (1976) ("Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.").
[98] *Id.*
[99] *Id.* at 368.

"reasonably expect greater administrative scrutiny for compliance with parking laws."[100] In some states, this reasonable expectation of greater scrutiny has even been statutorily enforced.[101] This reduced expectation of privacy, combined with the choice to park in a municipally owned space with knowledge that the City chalks, weigh in favor of an inference of implied consent.

B. Implied Consent is One Tool to Narrow the Scope of the Administrative Search Exception.

Though the Ninth Circuit abandoned an implied consent justification for administrative searches[102] soon after the Supreme Court declared consent was unnecessary to justify an administrative search,[103] it seems more appropriate than ever to add more tools the jurisprudential toolbox— particularly given the expansion of the administrative search exception and recent developments in technology.[104] Thus, instead of acting merely as an independent doctrine, implied consent is equally useful as a contextual factor to consider the reasonableness of an administrative search, as the *Verdun* court did.[105] In other words, rather than using implied consent as justification for the lawfulness of a warrantless search, the existence of consent should be one of many factors a court explicitly weighs. Indeed, Justice Kennedy once described the existence of consent as an "essential, distinguishing feature of the special needs cases."[106]

This use of implied consent as a contextual factor could be increasingly helpful in the coming years. For example, data privacy and regulatory oversight of the technology industry

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[100] *Verdun*, 51 F.4th at 1045.
[101] *See, e.g.*, N.C. GEN. STAT. § 20-16.2 (2023); MINN. STAT. ANN. §§ 169A.50–169.A.53 (West 2023).
[102] U.S. v. Aukai, 497 F.3d 955, 962 (9th Cir. 2007).
[103] In 1972, the Court clarified that in administrative searches, "there is lawful authority independent of the [consent] of the" party searched. U.S. v. Biswell, 406 U.S. 311, 315 (1972).
[104] *See* Hans, *supra* note 2, at 2 ("The sensitivity of our data means that the current [administrative search doctrine] cannot endure any longer.").
[105] *See* Verdun v. City of San Diego, 51 F.4th 1033, 1045 (9th Cir. 2022). ("The context in which chalking is used only further bears out our reasonableness analysis.").
[106] Ferguson v. City of Charleston, 532 U.S. 67, 91 (Kennedy, J., concurring). *See also supra* note 63.

loom large in Fourth Amendment jurisprudence.[107] Given the pervasive use of the administrative search exception in regulatory contexts,[108] and the wealth of personal information stored by highly-regulated technology companies, scholars are growing increasingly concerned about the role of the administrative search exception in data privacy.[109] While some companies like Airbnb require users to consent to sharing data shared with government,[110] the scope of that consent—implied or otherwise—could be one factor to weigh if governmental collection of this data using an administrative search is ever challenged.

VI. CONCLUSION

The Ninth Circuit's approach to the administrative exception in *Verdun v. City of San Diego* contains an underlying acknowledgment of the Plaintiffs' implied consent to chalking.[111] The court's nod to implied consent is just the first step in analyzing its relevance. Using the implied doctrine to evaluate searches, particularly those occurring in public places where parties have a lower expectation of privacy, provides just one tool courts can use in the future to limit the administrative search exception; this will be particularly important as the administrative state, and its regulation of emerging technologies, continues to expand. Ultimately, it provides another lens to consider the balance between individual liberty and government interests—which is the core goal of Fourth Amendment jurisprudence.[112]

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[107] Hans, *supra* note 2, at 38–39.
[108] *See, e.g.*, U.S. v. Biswell, 406 U.S. 311, 313 (1972) (upholding regulatory inspections of commercial property).
[109] *See, e.g.*, *supra* note 104.
[110] *See* AIRBNB, *Privacy Policy*, https://www.airbnb.com/help/article/3175 (last updated Jan. 25, 2023) (notifying users of potential data disclosure to governmental authorities).
[111] *See* Verdun v. City of San Diego, 51 F.4th 1033, 1045 (9th Cir. 2022) (discussing the "context" of chalking).
[112] *See, e.g.*, Skinner v. Ry. Lab. Execs. Ass'n, 489 U.S. 602, 619 (1989) ("[T]he permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.").

CHALK IT UP TO URBANISM: COMPARING REASONABLENESS IN SAN DIEGO AND SAGINAW CITY IN *VERDUN V. CITY OF SAN DIEGO* AND *TAYLOR II*

I. INTRODUCTION

In *Verdun v. City of San Diego*, the Ninth Circuit applied the administrative search exception to uphold San Diego's chalking method of municipal parking enforcement.[1] However, around one year prior the Sixth Circuit had declined to apply the exception to chalking in Saginaw City, Michigan.[2] Doctrinally, the courts disagreed on what factors to emphasize from Supreme Court jurisprudence that defined the administrative search exception.[3] With consideration for these opposing holdings, in the Fourth Amendment realm, where reasonableness reigns for better or for worse,[4] courts should analyze the relative urbanism of the cities at issue in cases involving the administrative search exception.

II. FACTS

Plaintiff-appellants Verdun and Golkar had finally had enough of San Diego ("City") parking enforcement.[5] In the two years before filing suit they had "each received and paid one or more parking tickets in the City."[6] On each of these occasions, they had parked in a time-limited City parking spot enforced by city Parking Enforcement Officers ("PEOs").[7] And on each of these occasions, PEOs had chalked their tires.[8]

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[1] *See* Verdun v. City of San Diego, 51 F.4th 1033, 1035 (9th Cir. 2022), *petition for cert. filed*, (U.S. Mar. 28, 2023) (No. 22-943).
[2] *See* Taylor v. City of Saginaw, Mich., 11 F.4th 483, 486 (6th Cir. 2021).
[3] *See Verdun*, 51 F.4th at 1046.
[4] *See e.g.*, Brief for The United States as Amicus Curiae Supporting Respondents at 6, Caniglia v. Robert v. Storm, 141 S.Ct. 1596 (2021) (No. 20-157), 2021 WL 679094.
[5] Brief for Plaintiffs-Appellants at 4, Verdun v. City of San Diego, 51 F.4th 1033 (9th Cir. 2022) (No. 21-55046), 2021 WL 1936164.
[6] *Id.*
[7] *Id.*
[8] *Id.*

The City owned and operated "thousands of parking spaces" situated on City property and governed by provisions in the San Diego Municipal Code ("the code").[9] Section 86.0106 of the code authorized the City to establish time limits for cars parked in City-owned parking spaces.[10] PEOs operated under the San Diego Police Department to enforce parking spot time limits.[11] The City used PEOs to enforce parking laws with a variety of parking methods including parking meters, permits, signs posting time limits, visual marking, and chalking.[12]

The chalking method involved a PEO placing an "impermanent chalk mark of no more than a few inches on the tread of one of the vehicle's tires."[13] PEOs had no discretion on which cars they marked and marked every car in the area.[14] PEOs waited until the posted time maximum of the space had expired and examined "each vehicle to determine whether the mark on the tire tread [was] undisturbed."[15] This chalk mark was temporary, and would rub off the tread within a few tire rotations after a car left the parking space.[16]A disruption of the chalk mark indicated that the car had moved in pursuance with the allotted time limit.[17] But if the chalk mark was undisturbed, the PEO could clearly and definitively determine that the car had overstayed the time limit.[18] If a vehicle overstayed a time limit, the PEO could issue a citation, colloquially a parking ticket, like those received by Verdun and Golkar.[19]

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[9] Verdun v. City of San Diego, 549 F. Supp. 3d 1192, 1193-94 (S.D. Cal. 2021), *aff'd*, 51 F.4th 1033 (9th Cir. 2022).
[10] *Id.* at 1194.
[11] *See* SAN DIEGO CALIF. MAYOR TODD-GLORIA, ADOPTED BUDGET FISCAL YEAR 2023 471 (2022), https://www.sandiego.gov/sites/default/files/fy23ab_v2police.pdf.
[12] Brief for Plaintiffs-Appellants, *supra* notes 5-8, at 1.
[13] *Verdun*, 549 F. Supp. 3d at 1194.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1201.
[17] *Id.* at 1194.
[18] *Id.*
[19] *Id.*

On May 3rd 2019 pursuant to 42 U.S.C. § 1983, Verdun and Golkar filed a putative class action suit in federal court alleging that their Fourth Amendment Constitutional rights had been deprived by an unconstitutional search of chalking.[20] The United States District Court for the Southern District of California granted summary judgment to the City.[21] In their holding, the District Court found that tire chalking was a search within the meaning of the Fourth Amendment because chalking was a trespass "conjoined with an attempt to obtain information" about how long cars had been parked in a City space.[22] However, the City successfully argued that chalking fell under the Fourth Amendment's administrative search requirement by proving that chalking did not serve a purpose of general crime control in violation of the Fourth Amendment, but rather a purpose of enforcing parking regulations.[23]

Finally, the City presented evidence toward the reasonableness of chalking under the Fourth Amendment.[24] Both parties conceded that noncompliance with parking time limits "in turn prevent[ed] cruising, double parking, and illegal parking" which caused "major negative public safety, environmental and business impacts" on the City.[25] The minimal intrusion on the vehicle, non-discriminatory nature of chalking, and proven support for the public welfare together proved chalking reasonable enough to "pass muster under the Fourth Amendment."[26]

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[20] *Id.*; *See also* Complaint at 3, Verdun v. City of San Diego, 549 F. Supp. 3d 1192 (S.D. Cal 2021) (No. 3:19-cv-00839-AJB-WVG) (discussing jurisdiction and venue for the class action).
[21] *See* Verdun v. City of San Diego, 51 F.4th 1033, 1036 (9th Cir. 2022), *petition for cert. filed*, (U.S. Mar. 28, 2023) (No. 22-943).
[22] *Verdun*, 549 F. Supp. 3d at 1196 (citing United States v. Jones, 565 U.S. 400, 405 (2012)).
[23] *Id.* at 1200.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 1201.

Verdun and Golkar appealed to the United States Court of Appeals for the Ninth Circuit which reviewed the claims de novo.[27]

III. LEGAL BACKGROUND

18 U.S.C. § 1983 "affords a 'civil remedy' for deprivations of federally protected rights [including the Bill of Rights] caused by persons acting under color of state law."[28] The protected federal right at issue here is the Fourth Amendment which protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."[29] Therefore, for a search to be lawful under the Fourth Amendment, the government usually needs to adhere to judicial processes including obtaining a warrant before a search.[30] The Fourteenth Amendment applied the Fourth Amendment to states and localities like San Diego.[31] This section will first focus on the search doctrine of the Fourth Amendment and its exceptions as delineated by the Supreme Court and then shift to a discussion of the elements of the administrative search exception which contributed to a Circuit split between the Ninth and Sixth Circuit Courts.

A. Fourth Amendment Search Doctrine and Exceptions

In *Jones*, the Supreme Court interpreted the Fourth Amendment's guidelines for what constitutes a search to include government installation of a GPS device used to monitor the target vehicle's movements.[32] By tying entry and occupation of private property to search doctrine, the

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[27] *Id.*
[28] Parratt v. Taylor, 451 U.S. 527, 535 (1981), *rev'd on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986).
[29] U.S. CONST. amend IV.
[30] *See, e.g.*, Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619 (1989); Donovan v. Dewey, 452 U.S. 594, 598 n.6 (1981).
[31] Verdun v. City of San Diego, 51 F.4th 1033, 1036 (9th Cir. 2022), *petition for cert. filed*, (U.S. Mar. 28, 2023) (No. 22-943).
[32] United States v. Jones, 565 U.S. 400, 404 (2012).

Supreme Court moved away from the "reasonable expectation of privacy" standard for identifying Fourth Amendment searches back toward a trespass-based approach.[33] *Jardines* articulated the current Fourth Amendment standard that while "property rights 'are not the sole measure of Fourth Amendment violations[,]'" a physical intrusion on persons, houses, papers, or effects indicates an undoubtable intrusion.[34] However, trespass alone is not enough to constitute a search.[35] The trespass must be conjoined with an attempt to find something or obtain information.[36]

Fourth Amendment search doctrine has exceptions carved out to the warrant requirement for which the government bears the burden of proof.[37] The pertinent exception in *Verdun* is the administrative search exception, which the Ninth Circuit equates with the "special needs" exception,[38] that allows government agencies to conduct searches in accordance with administrative goals subject to strict requirements.[39] Search regimes without a warrant can be reasonable where "special needs…make the warrant and probable-cause requirement[s] impractical."[40] Further, the primary purpose of the administrative search must be "[d]istinguishable from the general interest in crime control."[41] In general, for an administrative

[33] *See id.* at 406.
[34] Fla. v. Jardines, 569 U.S. 1, 5 (2013) (quoting Soldal v. Cook Cnty., 506 U.S. 56, 64 (1992)).
[35] *Jones*, 565 U.S. at 408 n.5.
[36] *Id.*
[37] *See* United States v. Jeffers, 342 U.S. 48, 51 (1951).
[38] *See* Verdun v. City of San Diego, 51 F.4th 1033, 1038 (9th Cir. 2022), *petition for cert. filed*, (U.S. Mar. 28, 2023) (No. 22-943).
[39] *See generally* 68 AM. JUR. 2D *Searches and Seizures* § 49 (2023) (providing a survey of administrative search doctrine).
[40] City of Los Angeles v. Patel, 576 U.S. 409, 420 (2015) (quoting Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619 (1989)).
[41] *Id.* (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000)).

search to be constitutional, there must be "an opportunity to obtain precompliance review before a neutral decisionmaker."[42]

In any consideration of the administrative search exception, Fourth Amendment reasonableness still applies.[43] There is no test for reasonableness under the Fourth Amendment "other than…balancing the need to search against the invasion which the search entails."[44] However, the Supreme Court has considered factors including a long history of judicial and public acceptance of the practice, a substantial public interest that a dangerous condition be prevented or abated, the necessity of the invasion to the legislative scheme, and that the invasion is relatively limited.[45]

B. Administrative Search Exception Subcategories and Doctrinal Confusion

The administrative search doctrine houses four different types of exceptions that are subject to different types of standards.[46] These include public safety code compliance,[47] closely regulated industries,[48] law enforcement dragnets ("dragnets"),[49] and special needs populations.[50] Most relevant here are the closely regulated industries and dragnets categories, both of which are exempt from precompliance requirements.[51]

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[42] *Id.* at 410.
[43] *See* Camara v. Mun. Ct. of San Francisco, 387 U.S. 523, 536 (1967).
[44] *Id.* at 536-37.
[45] *Id.* at 537.
[46] Verdun v. City of San Diego, 51 F.4th 1033, 1055 (9th Cir. 2022), *petition for cert. filed*, (U.S. Mar. 28, 2023) (No. 22-943) (Bumatay, J., dissenting).
[47] *See Camara*, 387 U.S. at 535 (evaluating government mandated city-wide health inspections).
[48] *See* Donovan v. Dewey, 452 U.S. 594, 604 (1981) (evaluating mining as a closely regulated industry).
[49] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976) (originating the dragnet doctrine through evaluating police checkpoint stops.)
[50] *See* Griffin v. Wis., 483 U.S. 868, 873-74 (1987) (evaluating the special needs of a probation system).
[51] *See* Taylor v. City of Saginaw, Mich., 11 F.4th 483, 488 (6th Cir. 2021).

For certain businesses operating within closely regulated industries "the Fourth Amendment [does] not limit Congress's power to prescribe warrantless searches."[52] *Patel* articulated the most modern closely regulated industries doctrine by discussing two specific elements: the necessity for intrinsic danger to the public welfare ("intrinsic danger" requirement) and the need for a pervasive regulatory scheme that creates notice to substitute for a warrant.[53] The Sixth Circuit in Taylor II adopted the intrinsic danger requirement,[54] while the Ninth Circuit excluded intrinsic danger from its overview of the doctrine.[55]

A dragnet is a search "of every person, place, or thing in a specific location or involved in a specific activity."[56] The dragnet category originated in *Martinez-Fuerte*, a case in which the Supreme Court "upheld the constitutionality of vehicle stops made without warrants or reasonable suspicion at 'permanent immigration checkpoints[s]' on major highways heading away from the border."[57] Subsequent cases distinguished constitutional routine stops without police discretion,[58] from roving patrol stops, holding that the latter allows for "standardless and unconstrained discretion" and therefore violates the constitution.[59] The line of cases also

[52] Note, *Rethinking Closely Regulated Industries*, 129 Harv. L. Rev. 797 (2016).
[53] *See id.*
[54] *See* Taylor v. City of Saginaw, Mich., 11 F.4th 483, 488 (6th Cir. 2021).
[55] *See* Verdun v. City of San Diego, 51 F.4th 1033, 1039 (9th Cir. 2022), *petition for cert. filed*, (U.S. Mar. 28, 2023) (No. 22-943).
[56] *See generally* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 CLMLR 254, 260 (2011) (discussing dragnet searches and examples at the Supreme Court).
[57] Demarest v. City of Vallejo, Cal., 44 F.4th 1209, 1216 (9th Cir. 2022) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 545 (1976)).
[58] *See, e.g.*, *Martinez-Feurte*, 428 U.S. at 559 (discussing how the lack of police discretion in routine checkpoint stops supports a routine checkpoint as constitutional).
[59] *See, e.g.*, Prouse v. Del., 440 U.S. 648, 661 (1979).

distinguished constitutional sobriety checkpoints,[60] from a highway checkpoint designed to search for illegal narcotics which was an unconstitutionally general crime control tactic.[61]

When distilled, this line of cases establishes that an evaluation of a dragnet begins with a determination of whether the checkpoint is per se invalid because of a primary purpose of advancing general crime control, and next analyzes the general reasonableness of the search.[62] Reasonableness review consists of three considerations including "the gravity of the public concerns served by the [search], the degree to which the [search] advances the public interest, and the severity of the interference with individual liberty."[63] The Sixth Circuit, however, included an additional element of the rule derived from *Edmond* under which the dragnet must be "designed to serve special needs."[64]

In *Taylor II*, the Circuit precedent, the City of Saginaw attempted to argue that its chalking program fell under either the closely regulated industries or dragnet categories of the administrative search exception.[65] However, the Sixth Circuit rejected classification under both categories holding that municipal parking regulation failed to meet both the closely regulated industries *Patel* requirement of intrinsic danger and the dragnet requirement of a "special need." The Sixth Circuit held that chalking was an unconstitutional search under the Fourth Amendment because the City of Saginaw both failed to prove an administrative search exception and meet its burden to prove the reasonableness of the search.[66]

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[60] *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990) (describing sobriety checkpoints as "indistinguishable" from *Martinez-Feurte* stops).
[61] *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).
[62] Demarest v. City of Vallejo, Cal., 44 F.4th 1209, 1220 (9th Cir. 2022).
[63] Brown v. Tex., 443 U.S. 47, 50-51 (1979).
[64] *Edmond*, 531 U.S. at 37.
[65] Taylor v. City of Saginaw, Mich., 11 F.4th 483, 488 (6th Cir. 2021).
[66] *Id.* at 489.

IV. HOLDING

The Ninth Circuit held that chalking was a constitutional search by analogizing the practice of chalking to a dragnet.[67] Like a dragnet, the City of San Diego placed a chalk mark on every vehicle parked in the municipal lot without discretion for individual suspicion.[68] Even though chalking was a search rather than a seizure, "the much less intrusive nature of the City's actions as compared to a checkpoint [did] not diminish the comparison to a dragnet" established through considering the form and function of chalking as an administrative search.[69] On account of the strength of the parallel between chalking and a dragnet, the Ninth Circuit then analyzed chalking through each piece of the dragnet analysis.[70]

First, chalking was not found to have a purpose for general crime control because the purpose of chalking is more specific: "to assist the City its overall management of vehicular traffic and the use of city parking spots."[71] In support of this conclusion, the court noted that although chalking can result in a citation, chalking had a close enough connection to overstaying noted parking times that its purpose was sufficiently specific.[72]

Second, the reasonableness analysis concluded that chalking served a substantial interest that outweighed the minimal intrusion of chalking.[73] While the gravity of the public interest was smaller than the previous cases that presented more pressing danger, San Diego's pedestrians, drivers, businesses, and visitors all benefitted from the increased safety and functioning that

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[67] Verdun v. City of San Diego, 51 F.4th 1033, 1041 (9th Cir. 2022), *petition for cert. filed*, (U.S. Mar. 28, 2023) (No. 22-943).
[68] *Id.*
[69] *Id.*
[70] Brown v. Tex., 443 U.S. 47, 50-51 (1979).
[71] *Verdun*, 51 F.4th at 1042.
[72] *Id.*
[73] *Id.* at 1045.

comes from thorough parking enforcement.[74] Chalking was also "appropriately tailored" to the substantial interest as chalking prevented "spillover" use of data outside of the scope of the search, was closely tied to parking enforcement, and was within the limits of the kind of search that the City can undertake.[75] Finally, chalking was a minimally invasive search in that it involved only the impermanent placement of chalk on the tire of a car parked in a public place, leaving no permanent damage to the car and involving no detainment of people or property.[76] On balance, the minimal invasiveness of chalking matched the relatively less urgent interests promoted by the search and therefore was found reasonable.[77]

The *Verdun* majority explicitly broke with *Taylor II* and critiqued the Sixth Circuit's focus on the wide variety of available alternatives to chalking rather than engaging in an analysis of whether chalking itself fit under the administrative search exception.[78] The majority also criticized their colleague's dissent for "[m]erely citing the general concerns that animated the Fourth Amendment and some basic legal history" in seeking to make an originalist argument against the constitutionality of chalking.[79] Although the dissent cited legitimate concerns with the scope of chalking as a suspicionless search, and the lack of absolute limiting principles for the dragnet category of the administrative search exception,[80] the majority pointed out that the dissent failed to engage with the core of the Fourth Amendment—reasonableness.[81]

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[74] *Id.* at 1043.
[75] *Id.* at 1044 (where appropriate tailoring does not require the least restrictive search practicable); *accord* City of Ontario, Cal. V. Quon, 560 U.S. 746, 763 (2010).
[76] *Verdun*, 51 F.4th at 1044-45.
[77] *See id.* at 1045.
[78] *See id.* at 1046.
[79] *Id.*
[80] *See id.* at 1051-56 (Bumatay, J., dissenting).
[81] *See id.* at 1047; *contra id.* at 1051 (Bumatay, J., dissenting).

Based on their analysis, the Ninth Circuit affirmed the District Court's judgment and ruled in favor of summary judgment for the City.[82]

V. ANALYSIS

Verdun appears to create a circuit split between the Ninth and Sixth Circuits on the constitutionality of chalking.[83] In their legal analyses and understanding of Supreme Court precedent there is in fact a split with the Ninth Circuit rejecting elements of the administrative search doctrine utilized by the Sixth Circuit.[84] However, *Verdun* could be distinguishable from *Taylor II* at the level of Fourth Amendment reasonableness due to substantial differences between the cities involved in each suit. This note will first discuss Fourth Amendment reasonableness as it concerns the gravity of the public interest, then the key demographic differences between San Diego and Saginaw City, and finally conclude that these differences justify different outcomes for each city in a reasonableness analysis of chalking.

With such a minimal intrusion as chalking,[85] the gravity of the public interest—the other key factor of the reasonableness analysis—presents a compelling place to analyze the differences between the cities at the core of each case. As Justice Oliver Wendell Holmes once said, "we must think things not words."[86] Thinking things not words involves a pragmatic understanding of the stakes that shape the need to use the state's use of the police power.[87] Pragmatism is essential

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[82] *Id.* at 1048.
[83] *See* Jeff Welty, *Circuit Split! New Opinion Upholds Warrantless Tire Chalking*, NORTH CAROLINA CRIMINAL LAW (Dec. 5, 2022, 6:00 AM), https://nccriminallaw.sog.unc.edu/circuit-split-new-opinion-upholds-warrantless-tire-chalking/.
[84] *See Verdun*, 51 F.4th at 1040.
[85] *See id.*
[86] Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 460 (1899).
[87] *See e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (applying pragmatism to strike down state law as a regulatory taking).

in the Fourth Amendment context because of the centrality of reasonableness as the "touchstone" of Fourth Amendment doctrine.[88] A one-size-fits all analysis of the government's need to serve the public interest through a search fails in the face of the diversity of American localities. The city size gap manifests in many ways such as education levels,[89] unemployment rates,[90] and interconnectedness of the community.[91] The size of the city impacts the budget,[92] and impacts the peoples' way of life.[93] As such, a reasonableness analysis is not complete without consideration of the unique attributes of the locale utilizing the administrative practice at issue.

However, Judges are not and should not be treated as "amateur scientists" in the physical or social sciences.[94] Therefore, difficulties could arise if reasonableness of a search were evaluated based on demographic data that judges feel unequipped to evaluate. Further, without guidelines, judges could contort or only consider the numbers to satisfy their desired arguments or goals.[95] However, data could also give judges a shield from the current critiques of the judiciary as overly political.[96] As with chalking, where a data-driven analysis bears on

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[88] Brigham City v. Stuart, 547 U.S. 398, 403 (2006).
[89] *See* Mark Muro & Jacob Whiton, *Big Cities, Small Cities—and the Gaps*, BROOKINGS: THE AVENUE (Oct. 17, 2017), https://www.brookings.edu/blog/the-avenue/2017/10/17/big-cities-small-cities-and-the-gaps.
[90] *See id.*
[91] *See* Pooja Bachani Di Giovanna, *Small Towns, Big Communities*, PM MAGAZINE (Nov. 01, 2021), https://icma.org/articles/pm-magazine/small-towns-big-communities.
[92] *See e.g.*, Courtney Holcomb, *San Francisco Alone Has a Larger Budget Than Dozens of Countries*, CULTURE TRIP (Dec. 21, 2016), https://theculturetrip.com/north-america/usa/california/articles/san-francisco-alone-has-a-larger-budget-than-dozens-of-countries/.
[93] *See* On Point, *Why Americans Are Leaving Big Cities Behind*, WBUR, at 26:57 (May 03, 2023), https://www.wbur.org/onpoint/2023/05/03/why-americans-are-leaving-big-cities-behind.
[94] *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 601 (1993) (Rehnquist, J., concurring in part, dissenting in part).
[95] *See e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting).
[96] *See e.g.*, Rep. Barbara Lee (@RepBarbaraLee), TWITTER (Apr. 19, 2023, 5:55 PM), https://twitter.com/RepBarbaraLee/status/1648807627319656448.

reasonableness, utilizing data bolsters the Fourth Amendment's requirement of determining the degree of the public interest served by an administrative search.

Saginaw City and San Diego have different populations, densities and economies to evaluate when determining whether their cities' municipal parking enforcement addresses a pressing public safety risk. According to the U.S. Census Bureau, the population estimate of Saginaw City, MI is 48,854.[97] Total retail sales in 2017 were $165,350,000 which per capita is roughly $3,393.[98] In contrast, San Diego has a population, within city limits alone, of 1,381,611.[99] Total retail sales in 2017 were $20,732,341,000 which per capita is roughly $14.704.[100]

While the dramatic difference in per capita retail sales could be in part a function of the differential between cost of living indexes, it is unlikely that the cost of living index alone can account for a disparity of 4.43 times between the per capita retail sales.[101] Likely, increased tourism rates in part account for the difference in per capita retail sales as San Diego hosts an estimated 28.8 million visitors each year.[102] Contrast that figure with the 4.3 million visitors in the entire region Saginaw is situated in within Michigan.[103] Density of people living in each

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[97] Comparing Census Data of San Diego City, Calif. and Saginaw City, Mich., UNITED STATES CENSUS QUICK FACTS, https://www.census.gov/quickfacts/ (Search for "San Diego city" and then search for "Saginaw city" consecutively in the main search bar) [hereinafter *Census Data*] (last visited May 17, 2023).
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *See* Cost of Living Data Series, MO. ECON. RSCH. AND INFO. CTR., https://meric.mo.gov/data/cost-living-data-series (last visited May 17, 2023).
[102] *See* SAN DIEGO INDUSTRY RESEARCH, https://www.sandiego.org/about/industry-research.aspx (last visited May 17, 2023).
[103] *See* MICHIGAN TRAVEL USA, TRAVEL USA VISITOR PROFILE: REGION 1 & REGION 3 (2019).

square mile of each city likely also contributes with San Diego at 4,255.9 people per square mile and Saginaw City at 2,587 people per square mile.[104]

The greater population density, retail activity and tourism all indicate that more people will be crowding San Diego's streets in all modes of transportation.[105] The City of San Diego itself experiences the consequences of traffic in a dense area, with twelve of the top fifteen deadliest intersections in the City located near downtown tourist attractions.[106] Ultimately, the nature of San Diego as both a large, dense, city and a global tourist hub allows for the potential dangers of parking enforcement to pose a heightened risk to San Diegans and tourists alike when compared to smaller, less dense, and less traveled Saginaw City.[107]

VI. CONCLUSION

Verdun and *Taylor II* present the same legal issue in the context of two different types of cities with opposite outcomes. While not explicitly considered by either court, the differences between Saginaw City and San Diego could account for opposite conceptualizations of the public interests served by chalking. Without considering the urbanist context of administrative practices, courts could miss the nuances of how the administrative practice uniquely impacts each locality. Reasonableness under the Fourth Amendment could better reflect what is, in fact, reasonable with the additional consideration of urban demographics.

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[104] *Census Data*, *supra* notes 97-100.
[105] *See e.g.*, Press Release from Governors Highway Safety Association (May 19, 2022), https://www.ghsa.org/resources/news-releases/GHSA/Ped-Spotlight-Full-Report22 (discussing the increase in pedestrian deaths as drivers returned to the roads after COVID-19 shutdowns).
[106] *The Fatal Fifteen Intersections- Vision Zero*, CIRCULATE SAN DIEGO (Jan. 30, 2018), https://www.circulatesd.org/fatal_15_sd_2020.
[107] *See Census Data*, *supra* note 97-100, 104.

BACKED INTO AN EXCEPTION: *VERDUN V. CITY OF SAN DIEGO* AS AN EXAMPLE OF THE IMPLICATIONS OF THE FOURTH AMENDMENT TRESPASS-FIRST APPROACH

I. INTRODUCTION

The Fourth Amendment provides an important protection against the unreasonable government intrusion.[1] In order to protect society, sometimes the government must intrude into one's private life.[2] Not all government actions constitute Fourth Amendment searches.[3] If it is a search, it is reasonable and thus permissible when there is a warrant.[4] If there is no constitutional violation, the information found can be used during a trial or for other legal purposes.[5] Yet, there are some situations where the government acts absent a warrant, which are presumably unconstitutional.[6] The Court, however, has created exceptions where warrantless searches are not per se unreasonable.[7] Within these exceptions, there is a delicate balance between the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[8]

In *Verdun v. City of San Diego*,[9] the Ninth Circuit deals with the ever-changing Fourth Amendment "search" doctrine, demonstrating a concerning implication of the Supreme Court's

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[1] U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").
[2] *See* United States v. Aukai, 497 F.3d 955, 958, 963 (2007) (holding that a search is reasonable in situations where there is a real risk to the public's safety).
[3] *See* Goldman v. United States, 316 U.S. 129, 134–35 (1942) (finding that the government act did not constitute a search under the privacy approach).
[4] *See* United States v. Jeffers, 342 U.S. 48, 51 (1951) ("Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes.").
[5] *See* Elkins v. United States, 364 U.S. 206, 212–13 (1960) (stating that evidence in violation of the Fourth Amendment could not be used, suggesting that evidence not in violation can be).
[6] *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without approval by judge or magistrate, are per se unreasonable . . . .").
[7] *See e.g.*, Carroll v. United States, 267 U.S. 132, 147 (1925) (holding that the search falls under an exception expressed by the legislature, thus making the search reasonable and constitutional).
[8] United States v. Place, 462 U.S. 696, 703 (1983).
[9] Verdun v. City of San Diego, 51 F.4th 1033 (9th Cir. 2022).

recent decisions. While the problem does not originate from *Verdun*, it is an example of how the current tests for what constitutes a search can inadvertently reduce Fourth Amendment protection. By essentially being forced to deem tire chalking a "search," the Ninth Circuit must use the "administrative search" or "special needs" exceptions,[10]despite the potentially dangerous implications of their broad applications.

II. FACTS

The City of San Diego ("the City") owns and manages thousands of parking spaces.[11] The San Diego Municipal Code governs the use of its parking spaces, and if a driver violates the regulations, he may receive a civil fine.[12] The City can restrict how long a driver may remain in a particular spot through publicly posted time limits.[13]

One parking enforcement method is tire chalking, which the City has used since at least the 1970s.[14] Tire chalking involves a City parking officer making a small chalk mark on a vehicle's tire tread that easily comes off when it is driven.[15] Officers mark all vehicles in an area, and if the chalk mark remains past the time limit, they may leave a parking ticket.[16] While there are other enforcement methods, evidence shows tire chalking is more cost-effective, efficient, and accurate, as the City has previously explored alternatives, however, these either had too many difficulties or were too inefficient.[17] The alternatives also led to the City receiving a larger number of complaints from local businesses regarding the lack of parking.[18]

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[10] *Verdun*, 51 F.4th at 1038.
[11] *Id.* at 1035.
[12] *Id.*
[13] *Id.*; *accord* SAN DIEGO, CA., MUNICIPAL CODE § 86.0106 (2019).
[14] *Verdun*, 51 F.4th at 1035.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 1036.

Andre Verdun and Ian Anoush Golkar ("the Plaintiffs") each received at least one parking ticket from the City after officers had chalked their tires.[19] The Plaintiffs filed a punitive class action under 42 U.S.C. § 1983 in May 2019, seeking an injunction and monetary damages, arguing that tire chalking violated the Fourth Amendment.[20] The district court disagreed, and held that although tire chalking was a search, it was within the "administrative search exception," and constitutional.[21] On appeal, the Plaintiffs agreed that traffic and parking enforcement is a "strong government interest," but argued other less-intrusive methods should be used instead.[22]

III. LEGAL BACKGROUND

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated . . ."[23] Its purpose "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."[24] Yet, Fourth Amendment doctrine has not been consistent.[25] This Part discusses the entangled web of what constitutes a Fourth Amendment search. It then discusses the analysis once a search has been established.

A. *Let's Get Physical: The Early Property-Based Search Analysis*

Historically, the Supreme Court grounded its search analysis in property law.[26] The "trespass" approach is largely tied to our Nation's history with England, as the cases that

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[19] *Verdun*, 51 F.4th at 1036.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 1044.
[23] U.S. CONST. amend. IV.
[24] Camara v. Mun. Ct. of S.F., 387 U.S. 523, 528 (1967).
[25] *See* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 69 (2012) (discussing the tumultuous history of Fourth Amendment analysis).
[26] *See* Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 33 (2005) (explaining the Supreme Court used property law to interpret the Fourth Amendment "[f]rom the late nineteenth century until the 1960s").

highlighted our need for the Amendment were trespass cases.[27] Under this approach, an act is not a search unless a physical invasion occurs.[28]

An example is *Olmstead v. United States*, where the Court found that the wiretapping was not a Fourth Amendment search, with most of its discussion focusing on the lack of a physical invasion of the defendant's property.[29] While it did not explicitly adopt a trespass test, the Court's considerations suggest as such.[30] The Court affirmed *Olmstead* in *Goldman v. United States*, finding that the use of a "detectaphone" was constitutional because there was no "trespass or unlawful entry."[31] Another early-era trespass case was *Silverman v. United States*, where the Court held microphone evidence was inadmissible because the microphone's spike made physical contact with the home's heating duct.[32] The Court acknowledged, however, that there does not need to be a "technical trespass" according to tort or property law, as the physical invasion itself is a violation of the Fourth Amendment.[33]

In the 1960s, however, the Court shifted away from grounding its holdings in property law,[34] partly because it began facing cases involving new surveillance technology.[35]

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[27] An old English case about trespass is Entick v. Carrington (1765) 95 ENG. REP. 807 (K.B.).
[28] *See* Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that there is no constitutional violation "unless there has been an official search and seizure of his person . . . or an actual physical invasion of his house . . . for the purpose of making a seizure.").
[29] *See id.* at 458–66 (examining and contrasting prior Fourth Amendment precedent).
[30] *See* Kevin Emas & Tamara Pallas, United States v. Jones: *Does* Katz *Still Have Nine Lives*?, 24 ST. THOMAS L. REV. 116, 118–20 (2012) (noting that the *Olmstead* Court focuses on trespass).
[31] Goldman v. United States, 316 U.S. 129, 134–35 (1942).
[32] *See* Silverman v. United States, 365 U.S. 505, 509–12 (1961) (holding the spike's physical invasion violates "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion").
[33] *See id.* at 511–12 ("It is based upon . . . an actual intrusion into a constitutionally protected area.").
[34] *See* Emas & Pallas, *supra* note 30, at 125–126 (noting how *Katz* created a new paradigm).
[35] *See* Scott Russell, Olmstead v. United States*, 277 U.S. 438 (1982)*, *in* PRIVACY RIGHTS IN THE DIGITAL AGE 427, 429 (2019) (discussing Justice Brandeis's warning of "the potential for technology to circumvent personal liberties with minimal or no physical violation").

B. *No Peeking: The Switch to the Privacy-Based Search Approach*

After a period of determining whether a search occurred based on property law, in *Katz v. United States,* the Court abandoned the trespass approach.[36] The *Katz* opinion became the seminal decision for Fourth Amendment cases.[37] The Court overruled *Olmstead* and *Goldman,* straying from the property law approach that had permeated prior decisions.[38] *Katz* thus ushered in a new era of Fourth Amendment analysis, with privacy as the focal point.[39]

Under this new approach, the protections the Fourth Amendment afforded were greatly expanded.[40] While the Court acknowledged that the Amendment should not be read as "a general constitutional 'right to privacy,'" it asserted that its scope "cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[41] The privacy interest recognized was broader than the interest it had recognized prior in *Griswold v. Connecticut*.[42] The Court stated that "the Fourth Amendment protects people, not places."[43] Thus, listening to one's telephone

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[36] Katz v. United States, 389 U.S. 347, 350 (1967).
[37] *See* Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIAMI L. REV. 589, 595 (2014) ("[F]or nearly half a century *Katz* was the starting point for all Fourth Amendment analysis.").
[38] *See Katz*, 389 U.S. at 353 ("We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.").
[39] *See* C-Span, *Supreme Court Landmark Case* Katz v. United States, APPLE PODCASTS (April 9, 2018) https://podcasts.apple.com/us/podcast/supreme-court-landmark-case-katz-v-united-states/id1039393662?i=1000466837394 (discussing shift from "property law to whether somebody had an expectation of privacy" in Fourth Amendment cases).
[40] With *Katz* no longer requiring a trespass for an act to be considered a search, more activity can be a search, thus increasing Fourth Amendment protection. *See* Sarah Murphy, Note, *Watt Now? Smart Meter Data Post-* Carpenter, 61 B.C. L. REV. 785, 792 (2020) ("[T]he Supreme Court abandoned a strict application of the Fourth Amendment in favor of a flexible one.").
[41] *Katz*, 389 U.S. at 350, 353.
[42] *Compare id.* at 350–52 (stating the right to privacy extends beyond the home), *with* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (establishing a right to privacy within the home).
[43] *Katz*, 389 U.S. at 351.

call through electronic listening devices, invading one's relied upon privacy, is considered an unconstitutional search.[44]

Following *Katz*, a two-part test formulated in Justice Harlan's concurrence governed the search analysis.[45] For a government act to be a search, a person must exhibit an "actual (subjective) expectation of privacy," and this expectation must be "one that society is prepared to recognize as 'reasonable.'"[46] Whether the expectation is reasonable is determined by the Court.[47] Thus, if a reasonable expectation of privacy has been violated, then there is a search.[48] If that search is warrantless, then it is unreasonable and unconstitutional as violating the Fourth Amendment.[49]

Justice Harlan's test was explicitly adopted in *Smith v. Maryland*, where the Court further elaborated on the principles discussed in *Katz*.[50] In *United States v. Knotts*, the Court found no Fourth Amendment search, as "a person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[51] Additionally, in *United States v. Karo*, the Court found that "monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of

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[44] *Katz*, 389 U.S. at 353.
[45] *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 739–40 (1979) (using Justice Harlan's *Katz* test for its search analysis).
[46] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
[47] *See Smith*, 442 U.S. at 742 (asserting that the expectation was one that society would not deem reasonable). It does not, however, explain why society would find it unreasonable, nor cites any evidence of society believing it was unreasonable.
[48] *See Katz*, 389 U.S. at 352 (concluding that the defendant expected privacy by closing the phonebooth, which was a reasonable expectation, thus officers listening to his calls was a search).
[49] *See id.* at 362 (Harlan, J., concurring) (discussing how having a warrant is the baseline for reasonableness, but that there may be exceptions).
[50] *See Smith*, 442 U.S. at 739–46 (applying *Katz* to find that the use of a "pen register" was not a Fourth Amendment search).
[51] United States v. Knotts, 460 U.S. 276, 281 (1983).

those who have a justifiable interest in the privacy of the residence."[52] This was because the monitoring revealed critical information about the inside of the home that would not have been ascertained absent a warrant.[53]

While the reasonable expectation of privacy governed Fourth Amendment cases for decades, the approach was not without criticism.[54] Just as it replaced the trespass approach as the dominant methodology, the expectation of privacy approach was eventually dethroned.[55]

C. *Running it Back: The Return to the Trespass Approach*

After decades of *Katz* guiding the doctrinal underpinning of Fourth Amendment caselaw,[56] its dominance ended with *United States v. Jones*.[57] There, the Court was faced with determining whether remotely monitoring a vehicle's public movement for almost a month via a device that had been placed on the vehicle was a search that violated the Fourth Amendment.[58] Rather than rely on the expectation of privacy test, the Court held that a search had occurred based on property law, calling back to the pre-*Katz* era.[59]

In this opinion, the Court clarified that the *Katz* privacy test was not exclusive, and was "*added to*, but not *substituted for,* the common-law trespassory test."[60] The Court held that a

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[52] United States v. Karo, 468 U.S. 705, 714 (1984).
[53] *Id.* at 715.
[54] *See Katz*, 389 U.S. at 350, 353 (Black, J., dissenting) (arguing that the new approach was too broad and contrary to the language of the Fourth Amendment); *see also* Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 S. CT. REV. 173, 188 (1979) (criticizing the privacy test as "circular").
[55] *See* United States v. Jones, 565 U.S. 400, 406–07 (2012) (stating that the *Katz* test is unneeded for determining whether a search occurred, returning to a property law-based analysis).
[56] *See* Kamin & Marceau, *supra* note 37, at 595 (describing *Katz* as the key Fourth Amendment case for "nearly half a century").
[57] United States v. Jones, 565 U.S. 400, 406–07 (2012).
[58] *Id.* at 403.
[59] *See id.* at 405–06 (explaining the shifts in Fourth Amendment caselaw over the years).
[60] *Id.* at 409.

search occurs when the government "physically occup[ies] private property for the purpose of obtaining information."[61] Thus, *Jones* revived the previously used property law trespass approach by finding that placing a GPS tracker on the defendant's car without his consent, which is a physical intrusion, was an unconstitutional search.[62]

The property-based approach's revival was confirmed in *Florida v. Jardines*.[63] While the concurrence argued for a privacy analysis,[64] the majority relied on the trespass approach to find that there was an unconstitutional search.[65] It stated that having a "property-rights baseline" keeps "easy cases easy," as it allows the Court to find a search solely based on whether a physical intrusion occurred, regardless of any expectation of privacy.[66] The Court once again clarified that both the property-based approach and the expectation of privacy approach coexist with one another.[67]

D. *Back it up with a Warrant: The Presumption of Unreasonability*

Once a search has been found, either through the property-based approach or privacy-based approach, courts must then determine whether the search is unconstitutional.[68] Warrantless searches are "per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions."[69] Some of these exceptions include the

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[61] *Jones*, 565 U.S. at 404.
[62] *Id.* at 403–05.
[63] Florida v. Jardines, 569 U.S. 1, 5–6 (2013).
[64] *Id.* at 13–16 (Kagan, J., concurring).
[65] *See id.* at 10 (whether a search occurred "depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered.").
[66] *Id.* at 11.
[67] *Id.* at 5; *accord Jones*, 565 U.S. at 409. An example of the Court discussing both approaches and applying the privacy test is Carpenter v. United States, 1138 S. Ct. 2206 (2018).
[68] *See* O'Connor v. Ortega, 480 U.S. 709, 719 (1987) (holding that there was search, but then engaging in an analysis as to whether an exception applies, which would make the search reasonable).
[69] Katz v. United States, 389 U.S. 347, 357 (1967).

"emergency aid" exception,[70] the "consent" exception,[71] and the "administrative search" exception.[72] When an exception applies, the warrantless search is considered reasonable, and thus constitutional.[73]

IV. Holding

The Ninth Circuit rejected the plaintiffs' argument that tire chalking violated the Fourth Amendment, affirming the district court's holding.[74] Assuming that tire chalking constituted a Fourth Amendment search, it found that tire chalking fell within one of the recognized exemptions, specifically the "administrative search" or "special needs" exemption.[75] Accordingly, the court found that the Fourth Amendment had not been violated.[76]

The court first chooses not to do a full analysis of whether tire chalking is a Fourth Amendment "search," and instead assumes that it is.[77] It questions the Plaintiffs' assertion that tire chalking is akin to the search in *Jones*.[78] The characterization that any physical occupation as a means of finding information is a search is too strict of a rule for the court, and it questions

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[70] *See* Mincey v. Arizona, 437 U.S. 385, 392–93 (1978) (noting that warrants are not needed when lives are potentially at risk).
[71] *See* Georgia v. Randolph, 547 U.S. 103, 106 (2006) (stating that warrantless searches are permissible when the police obtain "voluntary consent").
[72] *See* Donovan v. Dewey, 452 U.S. 594, 598 (1981) ("[L]egislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment."); *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (outlining several cases where the administrative search exception applied).
[73] *See* Illinois v. Lidster, 540 U.S. 419, 427–28 (2004) (holding that the search was constitutional because it fell within an exception, thus making it reasonable).
[74] Verdun v. City of San Diego, 51 F.4th 1033, 1035 (9th Cir. 2022).
[75] *Id.*
[76] *Id.* at 1037–38.
[77] *Id.* at 1037.
[78] *Id.*

whether this interpretation was what the *Jones* court intended to convey.[79] It further rejects the comparison by distinguishing the searches by noting the apparent "meaningful differences."[80]

Assuming that tire chalking is a search, the court discusses the "administrative search" or "special needs" exceptions that would make a warrantless search reasonable.[81] Considering both exceptions together, it explores examples where it and the Supreme Court has found a search to fall within the exceptions.[82] From these examples, it extracts grounding principles for Fourth Amendment analysis.[83] First, there must be a "sufficient connection" between the warrantless search and the government interest, and this interest cannot have the "primary purpose" of "uncover[ing] evidence of ordinary criminal wrongdoing."[84] Additionally, it still must be reasonable.[85]

Applying these principles, the court first concludes that tire chalking does not have an impermissible, general crime monitoring purpose.[86] It explains that tire chalking's primary purpose is "to assist the City in its overall management of vehicular traffic and the use of city parking spots."[87] It finds a close connection between tire chalking and "harm it seeks to prevent, namely, vehicles staying too long in city spots," and as such, tire chalking is not per se

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[79] *See Verdun*, 51 F.4th at 1037 (refusing to apply this interpretation of *Jones*).
[80] *See id*. (implying that the search in *Jones* was more intrusive because a GPS tracking device gathers a greater amount of information than chalking a tire does).
[81] *Id.* at 1038–40.
[82] *Id.* Some of these cases include Illinois v. Lidster, 496 U.S. 444, 455 (1990) (upholding a highway checkpoint search conducted to obtain information regarding a hit-and-run), New York v. Burger, 482 U.S. 691, 703–04 (1987) (upholding a warrantless search with the purpose of ensuring the automobile junk yard was in compliance with federal law), and Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 633 (1989) (finding warrantless drug and alcohol testing of certain employees who had a reduced expectation of privacy was reasonable).
[83] *Verdun*, 51 F.4th at 1040.
[84] *Id.* (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000)).
[85] *Id.*
[86] *Id.*
[87] *Id.*

unreasonable.[88] Turning to whether it is reasonable, the court evaluates "[1] the gravity of the public concerns served by the [search], [2] the degree to which the [search] advances the public interest, and [3] the severity of the interference with individual liberty."[89] Through this analysis, it finds that tire chalking is reasonable under the Fourth Amendment.[90] Thus, tire chalking is not a Fourth Amendment violation.[91]

V. Analysis

The Ninth Circuit interestingly avoided a core portion of Fourth Amendment analysis. Rather than engaging in the everchanging Fourth Amendment search analysis, the court quickly glosses over the issue by assuming tire chalking is a search.[92] During its short discussion, the court is skeptical of the scope of the property-based approach that was revived in *Jones*.[93] Its concerns are valid, as *Verdun* demonstrates an overlooked implication of the post-*Jones* Fourth amendment search doctrine.

A. *New Technology, Old Rules: The Common Criticisms of* Jones

The *Jones* opinion is no stranger to criticism.[94] One of the most common is that the Supreme Court failed to address many of questions regarding advancements technological

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[88] *Verdun*, 51 F.4th at 1043.
[89] *Id.* (quoting Illinois v. Lidster, 496 U.S. 444, 426 (1990)).
[90] *Id.*
[91] *Id.* at 1048.
[92] *Id.* at 1037.
[93] *See id.* ("It is not clear *Jones* should be read to suggest that every physical touch that is designed to obtain information, even one as fleeting as tire chalking, rises to the level of a "physical intrusion," as required for a Fourth Amendment search." (quoting United States v. Jones, 565 U.S. 400, 404 (2012))).
[94] *See, e.g.*, Michael L. Snyder, Katz-*ing Up and (Not) Losing Place: Tracking the Fourth Amendment Implications of* United States v. Jones *and Prolonged GPS Monitoring*, 58 S.D. L. REV. 158, 160 (2013) (noting how *Jones* failed to answer several important questions regarding the Fourth Amendment and technology).

surveillance that people hoped it would address.[95] The Court instead revived the trespass approach, likely as a means to avoid dealing with the complex issues of evolving technology, particularly technology that would allow officers to obtain private information without ever coming near an individual or his home.[96]

As a result, many believe that *Jones* will have little impact on any future caselaw, especially cases regarding "technologically advanced surveillance and tracking," including social media, which does not require any form of physical intrusion to gather information.[97] *Jones*, however, does have a different impact that is not as discussed.

B. *Swallowed up by Exceptions: The Undiscussed Implication of* Jones

In his dissent in *Verdun*, Judge Bumatay warns that the administrative search exception should be used sparingly, or else there is the "risk [of] swallowing the protections of the Fourth Amendment within its exception."[98] This is a valid concern, as a large number of acts can be considered a reasonable means of achieving a government interest, especially considering it is not required that the government adopt the least invasive means.[99] Yet, the new Fourth Amendment search framework from *Jones* virtually forced the *Verdun* court to use the exception.

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[95] *See* Jace C. Gatewood, *It's Raining* Katz *and* Jones*: The Implications of* United States v. Jones *– A Case of Sound and Fury*, 33 PACE L. REV. 683, 684 (2013) (discussing the previous expectations many had for the *Jones* opinion that were not met).
[96] *See id.* at 692–697 (discussing the Court's refusal to address "critical issues involving the use of advanced technology that do not involve a physical trespass.").
[97] *Id.*
[98] Verdun v. City of San Diego, 51 F.4th 1033, 1056 (9th Cir. 2022) (Bumatay, J., dissenting).
[99] *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 293–94 (2011) (discussing how the current administrative search exception doctrine fails to stop the proliferation of unnecessary warrantless investigative techniques).

Following *Jones*, Fourth Amendment search analysis begins with a property-based test.[100] The majority opinion in *Jones* made it clear that courts should *first* engage in a trespass test, and if there is no trespass, then engage in a privacy-based examination such as done in *Katz*.[101] Thus, the Fourth Amendment search doctrine turns into somewhat of a decision tree, with reasonable expectations of privacy being considered only if there is no trespass.[102] Under the trespass-first approach, a search requires a physical intrusion of "persons, houses, papers, and effects" that was done for the purpose of obtaining information.[103] The Court does not explain what constitutes a physical intrusion, other than that it "would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."[104]

This is where the issue arises in *Verdun*. Due to the unclear scope of the trespass-first test in *Jones*, something as minor as chalking a tire can be a search because the officer touched the vehicle.[105] Given that the *Jones* opinion establishes that a trespass test must be considered first, despite specifically defining the approach's scope,[106] the court in *Verdun* is unable to avoid deeming tire chalking as a search.[107] The court could have come to its ultimate outcome under an expectation-of-privacy approach, as it is unlikely that there is a reasonable expectation of privacy

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[100] *See* Florida v. Jardines, 569 U.S. 1, 7 (2013) (starting its analysis with whether or not there was an "unlicensed physical intrusion.").
[101] *See* Emas & Pallas, *supra* note 30, at 154–56 (analyzing the implications of *Jones*).
[102] *See* United States v. Jones, 565 U.S. 400, 409 (2012) ("The *Katz* reasonable-expectation-of-privacy test has been *added to,* not *substituted for,* the common-law trespassory test).
[103] *Id.* at 404–05 (quoting U.S. CONST. amend. IV.).
[104] *Id.*
[105] *See* Taylor v. City of Saginaw, 922 F.3d 328, 332–33 (2019) (holding that tire chalking is a search based on the trespass-first approach, as vehicles are Fourth Amendment "effects").
[106] *See* Kerr, *supra* note 25, at 69 (stressing the need to define *Jones*'s trespass test's scope).
[107] If the court argues that tire chalking is not a trespass or physical invasion, absent any clarification as to what is, it risks the Supreme Court reversing its decision.

for a vehicle in a public location.[108] It was, however, unable to find that tire chalking was not a search via the privacy approach due to *Jones*'s trespass-first requirement.[109]

The inability to use the privacy approach to find that tire chalking was not a search, and thus constitutional, forced the court to use the administrative search exception.[110] Through its new doctrine, *Jones* pressures courts to apply exceptions that perhaps are better left for special circumstances.[111] Additionally, as technology continues to evolve, it can be assumed that more forms of investigation will be found to fall under the administrative search exception.[112] As the administrative search exception expands, the protection under the Fourth Amendment is threatened.[113] Thus, *Jones* has greater implications than it may initially seem, and the court's approach *Verdun* is an example of this.

VI. Conclusion

The Ninth Circuit's opinion in *Verdun* is an example of *Jones*'s impact on Fourth Amendment caselaw. Beyond its implications on investigative techniques that do not involve a trespass, it can push courts to use exceptions, further expanding them. If Fourth Amendment protection are to remain, the Supreme Court should reconsider its trespass-first approach.

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[108] *See* Rakas v. Illinois, 439 U.S. 128, 148 (1978) (stating that "cars are not to be treated identically with houses or Apartments for Fourth Amendment purposes.").
[109] If tire chalking is considered a physical intrusion, it is a search. *Jones*, 565 U.S. at 404–05. Based on the current approach, this cannot be ignored, as the privacy test is only *in addition* to the trespass test, not a full-blown alternative. *Id.* at 409.
[110] Once it was deemed a search, the only means of finding tire chalking constitutional is through an exception due to the presumption of unreasonableness for warrantless searches. Verdun v. City of San Diego, 51 F.4th 1033, 1037–38 (9th Cir. 2022).
[111] *See id.* at 1051–55 (Bumatay, J., dissenting) (using history to explain why the administrative search and special needs exceptions should not be expanded).
[112] *See* Primus, *supra* note 99, at 259 (noting how the administrative search exception has grown in the wake of new technology and societal changes, such as September 11, 2001).
[113] *See* Maximilian Sladek de la Cal, City of Los Angeles v. Patel*: The Fourth Amendment's "Special Needs" in the Information Age*, 31 BERKELEY TECH. L.J. 1137, 1138–39 (2016) (noting the risk of Fourth Amendment exceptions undermining Fourth Amendment protection).

Duke Law Journal

A. Grading Criteria

Grades should be determined by the following factors, each of which has a maximum number of points possible, as indicated in the parentheses:

- **Contribution (10)**: An assessment of whether this person's perspective, as indicated in their statement, lends itself to contributing to *DLJ*'s goals of publishing excellent academic scholarship and elevating diverse perspectives and experiences in legal academia. Also, consider whether this person seems ready and willing (i.e., they seem sincere about their excitement for the *Journal*) to take on the work of a *DLJ* staff editor if they receive an invitation. Each candidate begins at a baseline of zero points in this category.

- **Polish (10):** An average statement will receive a 5 in this category. But if the personal statement, as evidenced by the writing, style, and substance, is exceptionally good or poor you can adjust the number of points given as indicated in the rubric below.

- **Bonus (10):** Please see the rubric below for specific questions to consider when grading personal statements. Each candidate begins at a baseline of zero points in this category.

B. Rubric

Contribution (total of 10 points possible, can give half points)	Consider, in part: - Does this person's perspective, including their personal identity (e.g., their membership in an underrepresented group, veteran status, disability status), their background (e.g., as a non-traditional student, first-generation student, student from a lower socioeconomic status), and/or their experience (including their professional or academic background or their experience as a public interest student) lend itself to contributing to DLJ's goals of publishing excellent academic scholarship and promoting diverse voices in legal academia? - Does this person seem ready and willing to take on staff editor work? - Does this person seem like they are ready to immediately contribute to the mission of the Journal?	Each candidate begins at a baseline of zero points in this category. Note to grader: Please note that some applicants may elect to not write about every facet of their diverse perspectives or experiences. Some people may go in-depth on one or two aspects of their perspective, while others may mention several. Please provide points for depth as well as breadth to account for this.

Polish (total of 10 points possible, can give half points)	- Remove point(s) if the personal statement displays an egregious lack of attention to detail (e.g., excessive typos, run-on sentences, grammatical mistakes). - Do not deviate from the baseline if the personal statement displays an average level of polish (e.g., minimal typos and grammatical mistakes). - Add point(s) if the personal statement displays an exceptional level of polish (e.g., no typos, exceptional writing quality).	Note to grader: The baseline score for a "good" or "average" response should be 5 points. Deviate from this baseline score based on good or poor statements, assessed by the considerations in the column to the left.
Bonus (total of 10 points possible)	- Add 3-5 point(s) if the person has meaningfully advanced the interests of communities with diverse perspectives and experiences either at school or in their community (e.g., they hold a leadership position in an affinity group or have created a program to support people with diverse backgrounds). - Add 1-2 point(s) if this person has a STEM or technical background that can help us evaluate empirical pieces during article selection - Add 1-2 point(s) if the personal statement includes a statement explaining why this person wants to be on a journal. - Add 1-2 additional point(s) if the personal statement includes specific details about why this person wants to join DLJ (e.g., they attended a recruitment event, they display knowledge of our article selection process)	

Raw score out of 30: _____

Duke Law Journal Personal Statement

While my interest in being a member of Duke Law Journal (DLJ) lies in the knowledge, experience, and community that I will gain, I also feel confident that I will provide valuable contributions to the team through my research experience, passion for legal academia, and perspective as a Latino/a student.

[redacted]

In case my passion for research has not already made it clear, I aim to one day pursue a career in legal academia. [redacted]. Furthermore, I am passionate about ensuring that the legal academic profession that I hope to join reflects the diversity of the current and future law student community, in a way that it currently does not. A large part of that involves not just looking at the typical lenses of diversity that we consider, such as gender or racial diversity, when advocating for a career-defining publication, but also institutional and issue-area diversity, since these can provide proxies for often-overlooked forms of diversity (e.g. socioeconomic).

The main reason that I want the legal academic profession to reflect the diversity of students is because of the impact that professors who share my identities have had on me. I am a Latino/a student, and was lucky enough in 1L to have a Latina professor who served as a role model that I could see myself in, balanced the perspectives shared in the classroom, and made it a point to highlight the discrimination present within the law. [redacted]

As an Asian-American woman and a daughter of immigrants, I am afforded with different perspectives, experiences, and privileges.

I grew up in a white-majority community, where I felt alienated, often one of the few Asian students in the classroom. At school, I was either ignored by my classmates or insulted with stereotypes, and teachers type-casted me before I even had the chance to speak. [redacted]

My time in college has been eye-opening when it came to my identity and experiences with diversity. For the first time in my life, I was in a diverse city and campus, where I made the most diverse group of friends. I found that my lectures and discussions were enhanced and enriched by different perspectives and voices. As someone who grew up in a bubble, university was where I felt comfortable and where I learned the most about social issues.

[redacted] I received formal training on diversity and inclusion, on how to be a better ally for individuals with identities different from my own. I stood up for my own community and was critical of those who perpetuated harmful stereotypes like the "model minority myth," which is used to pit Asians against other minority groups to the detriment of both communities.

One of the most important lessons I learned was the power and richness of diversity, to be inclusive and empathetic of the experiences of others, to relate with and to stand up for those who may not have the same privileges as I do and have been historically marginalized.

My first year at Duke Law sometimes harkened back to the experiences of my childhood. This time, however, I was not alone. I have a tightknit group of friends and mentors from different backgrounds, races, and sexuality. Throughout the year, we talked about the lack of diversity on campus, times where we were one of few people of color in a room and the hurtful

exchanges we had with students and professors who belittled our experiences and backgrounds. APALSA was also a big source of strength for me, especially in light of attacks on Asian people in major cities, [redacted]

To combat the lack of diversity in legal academia, I plan to use my voice at Duke Law Journals, through article selection, critiques, and writing my note on pertinent legal issues that affect the Asian-American community. [redacted]

I have the critical eye and apposite writing skills to analyze and determine the strength of an empirical piece. A diverse legal industry begins with a diverse law school experience, and I am committed to fostering an environment that welcomes the voices of marginalized groups.

[redacted]

I chose to pursue law school after seeing how legal work could be fused with organizing and advocacy to empower communities. My experiences throughout 1L reinforced this goal for my future, but also helped introduce me to both a myriad of ways to be a lawyer and newfound academic interests. Duke Law Journal (DLJ) membership will help me get where I want to go as a labor movement lawyer and advocate; in addition, I will also bring my experiences and perspective as a diverse [redacted] as a Staff Editor on DLJ.

I plan to continue pursuing my passion for labor justice and alternative-legal service provision through my research, writing, and career. Labor first came onto my radar as a potential field to pursue after [redacted]

What changed in returning to pursue higher education are the available methods to apply these skills. My skills have found a new purpose in [redacted] active participation in classroom discussion, and engagement with interdisciplinary projects and organizing. However, these same skills will bolster my performance as a Staff Editor as I engage in detail-oriented work that still requires an understanding of the bigger picture.

The perspective I will bring to DLJ is unique on the levels of substantive interest and personal background as well. [redacted]

[redacted]

Finally, I will bring my unique perspective as a Middle Eastern Jewish woman. Through exploring my intersectional identity in both academic and professional settings, I have strengthened my abilities to engage with different viewpoints and understand my limits. Living across different cultures, constant exposure to a variety of perspectives and ways of life taught me to listen first, ask questions, and interact with others in good faith. These qualities have served me well in life and will continue to prove useful in the collaborative environment of DLJ. As a woman, and a woman with Middle Eastern heritage, I also understand of the importance of presenting a solid work product and building credibility. However, when balancing many different and difficult priorities, as in law school, pushing beyond my limit will not result in my best self or work. Next year, I will come prepared to properly manage each of my responsibilities so I can be successful on DLJ and in other areas of my life.

Joining a journal makes no sense to my Cuban, non-lawyer family. They can't imagine why anyone would want to spend their time reading through hundreds of citations, check the cited sources, and compare it to some "blue colored book." Yet, after the first semester of law school, I knew I wanted to join DLJ.

During LARW, I found blue-booking to be really cathartic. There was something really satisfying about going through all the rules and catching an error in a citation. It felt like a puzzle that I had to solve, and once I came to a solution, it was really rewarding. As a public health and cellular and molecular biology student in undergrad, I missed having to analyze complex graphs and studies to extrapolate information. Trying to understand and use the Blue Book somewhat felt akin to that, at least as close as something in law school could. I was deemed the "crazy" one for admitting that I found blue booking "fun." While I am still not perfect in my blue-booking, I have genuinely enjoyed learning new rules and skills, even during the stress of writing the casenote.

[redacted]

Also, as a Latina woman who was [redacted], I am used to being a part of white, primarily male dominated fields. Growing up, my skills and abilities were always questioned, as if people had to "make sure I could handle it." I never let it

get to me, as it only pushed me to work harder and not prove to others, but to myself, that I was more than capable of doing anything I set my mind to.

My hard work ethic strongly stems from my grandparents, who fled Cuba with nothing to their name. They managed to build a life in the US that allowed me, [redacted] to be sitting here writing a personal statement on a fancy computer about why I hope to join and be an asset to one of the premier law journals in the country. It honestly is pretty crazy when I think about it. Above all else, this drive that my grandparents instilled in me has gotten me to where I am today, and I hope that I will have the honor of bringing that drive to DLJ.