CONSTITUTIONAL LAW — FOURTH AMENDMENT — NINTH CIRCUIT UPHOLDS CONDITIONING RECEIPT OF WELFARE BENEFITS ON CONSENT TO SUSPICIONLESS HOME VISITS. — *Sanchez v. County of San Diego*, 464 F.3d 916 (9th Cir. 2006).

Americans have an uneasy relationship with welfare. Still haunted by President Reagan's image of the "welfare queen,"[1] the public has bemoaned the existence of "undeserving" recipients — in particular those who commit welfare fraud. Counties, seeking to minimize the incidence of fraud, have established verification procedures that inherently infringe on recipients' privacy.[2] Courts in turn must ensure that the government does not stray too far into the protected realm of privacy.[3] Recently, in *Sanchez v. County of San Diego*,[4] the Ninth Circuit considered a verification program that conditions receipt of welfare benefits on consent to a suspicionless home visit by investigators from the District Attorney's office. In finding that the visits did not offend the Fourth Amendment, the majority effectively informed those on welfare that their homes are not as sacred as those belonging to the rest of the citizenry. Widely held and destructive assumptions about the poor drove the legal analysis behind this conclusion.

In 1997, the San Diego County District Attorney's Office kicked off "Project 100%," a program that subjects each county welfare applicant not suspected of ineligibility[5] to a mandatory "walk-through" of his or her home by fraud investigators.[6] Applicants must consent to the walk-through in order to receive benefits.[7] During the walk-through,

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[1] *See* Evelyn Z. Brodkin, *The Making of an Enemy: How Welfare Policies Construct the Poor*, 18 LAW & SOC. INQUIRY 647, 647 & n.1 (1993) (book review) (describing how President Reagan presented the media with fictitious "parables" of recipients abusing the welfare system); *see also* Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV 871, 873 (1994) ("The image of the lazy Black welfare queen . . . shapes public attitudes about welfare policy.").

[2] *See* Allison I. Brown, *Privacy Issues Affecting Welfare Applicants*, 35 CLEARINGHOUSE REV. 421 (2001) (noting that welfare applicants have always had to relinquish some privacy in exchange for welfare benefits).

[3] *Compare* Reyes v. Edmunds, 472 F. Supp. 1218, 1225–26 (D. Minn. 1979) (holding that warrantless surprise visits of welfare recipients' homes for the purpose of fraud investigation were unconstitutional), *and* Parrish v. Civil Serv. Comm'n, 425 P.2d 223, 225 (Cal. 1967) (holding that early-morning mass warrantless raids of welfare recipients' homes were unconstitutional), *with* S.L. v. Whitburn, 67 F.3d 1299, 1310 (7th Cir. 1995) (upholding warrantless home visits of welfare applicants whose documentary evidence alone was insufficient to determine eligibility).

[4] 464 F.3d 916 (9th Cir. 2006).

[5] All, that is, except those applicants suspected of fraud or ineligibility at the outset; such applicants are not enrolled in Project 100%. Appellees' Brief at 5 & n.2, *Sanchez*, 464 F.3d 916 (No. 04-55122), 2004 WL 2085319.

[6] *Sanchez*, 464 F.3d at 918. The investigators are sworn peace officers with badges and photo identifications, but they do not wear uniforms or carry weapons. *Id.* at 919.

[7] *Id.* at 919. Although the majority wrote that a refusal to consent to a walk-through "generally" results in a denial of benefits, *id.*, the County conceded in its own brief that the "conse-

which the applicant leads, the investigator may, with the applicant's consent, open any drawers, medicine cabinets, or other concealed areas.[8]

Shortly after the program was initiated, Rocio Sanchez and several other applicants filed a class action lawsuit alleging that Project 100% violated the U.S. and California Constitutions as well as California welfare regulations that prohibit "mass and indiscriminate" home visits.[9] On cross-motions for summary judgment, the U.S. District Court for the Southern District of California concluded that the Supreme Court's opinion in *Wyman v. James*[10] controlled its Fourth Amendment analysis.[11] In *Wyman*, the Court held constitutional a home visitation program in which visits to welfare recipients' homes were conducted by caseworkers whose primary purpose was "rehabilitative" — namely, to provide advice and assistance.[12] Finding no relevant distinction between the home visits in *Wyman* and *Sanchez*, the district court granted summary judgment to the County on these claims.[13]

A divided panel of the Ninth Circuit affirmed.[14] Writing for the majority, Judge Tashima[15] first considered Sanchez's Fourth Amendment claim. Agreeing that *Wyman* "directly control[led]," the majority found that the home visits were not searches because, like the visits at issue in *Wyman*, they were "not . . . part of a criminal investigation," and the recipient could choose to withhold consent without suffering criminal repercussions.[16] Even if the visits were characterized as searches, the majority found two independent reasons why they were nonetheless reasonable. First, it held that all of the factors central to *Wyman*'s finding of reasonableness — including uncoerced consent — were also present in Project 100%.[17] Next, the majority balanced the intrusion on the recipients' privacy interests against the government's interest in preventing fraud and found that the "special needs" doctrine

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quence of refusing to allow a home visit is that the application for . . . benefits will be denied," Appellees' Brief, *supra* note 5, at 9.

[8] *Sanchez*, 464 F.3d at 919.

[9] Sanchez v. County of San Diego, No. 00 CV 1467 JM (JFS), slip op. at 1 n.8 (S.D. Cal. Mar. 7, 2003) (citing CAL. DEP'T OF SOC. SERVS. MANUAL OF POLICIES & PROCEDURES §§ 20-007.33, 40-161 (2006)).

[10] 400 U.S. 309 (1971).

[11] *Sanchez*, No. 00 CV 1467 JM (JFS), slip op. at 5–6. The district court further concluded the home visits did not violate California law. *Id.* at 19–20, 27.

[12] *Wyman*, 400 U.S. at 317, 319.

[13] *Sanchez*, No. 00 CV 1467 JM (JFS), slip op. at 27.

[14] *Sanchez*, 464 F.3d at 918.

[15] Judge Tashima was joined by Judge Kleinfeld.

[16] *Sanchez*, 464 F.3d at 921.

[17] *See id.* at 923–25. The majority dismissed as inconsequential the one difference it found worth noting — that the Project 100% walk-throughs were conducted by a peace officer rather than a case worker. *See id.* at 923–24.

— developed in large part subsequent to *Wyman* — justified an exception to the warrant requirement.[18] Under this analysis, the majority first noted that while the home is a "traditionally protected area of personal privacy," welfare applicants' expectation of privacy is smaller than the general citizenry's as a result of their relationship to the state.[19] Second, the majority determined that Project 100% had a variety of procedures designed to minimize the walk-throughs' intrusiveness.[20] Finally, the majority found that the County had produced satisfactory statistical evidence that Project 100% served the purpose of reducing welfare fraud.[21] Under its analysis of the state claims,[22] the majority dismissed as inapplicable California's unconstitutional conditions doctrine because, the walk-throughs themselves not being unconstitutional, no waiver of a constitutional right was involved.[23]

Judge Fisher dissented. He disagreed with the conclusion that *Wyman* controlled, finding "significant" and "fundamental" differences between the two factual scenarios.[24] Unlike in *Wyman*, in which the Court found that the home visitation program was "primarily rehabilitative"[25] and forbade "snooping in the home,"[26] the Project 100% walk-throughs — conducted not by caseworkers but by investigators — had a "minimal, if any, rehabilitative function"[27] and did not forbid snooping.[28] He also argued that the special needs doctrine did not relax the warrant requirement. Although he agreed that the government

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[18] *Id.* at 925. The special needs doctrine permits the government to conduct suspicionless searches when it has a special need, unrelated to the normal need for law enforcement, that outweighs the individual's privacy interests. *See, e.g.*, Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619, 649 (1989).

[19] *Sanchez*, 464 F.3d at 927. The majority analogized to *Griffin v. Wisconsin*, 483 U.S. 868 (1987), in which the Supreme Court held that probationers enjoy a lesser form of privacy, even within the home, as a result of their relationship to the state. *Sanchez*, 464 F.3d at 927. The *Sanchez* majority reasoned that insofar as eligibility for benefits turns on physical residence, citizens desiring benefits should expect the state to conduct home visits to verify residency status. *See id.*

[20] *Sanchez*, 464 F.3d at 927.

[21] *Id.* at 928.

[22] The majority found that the home visits violated neither the California Constitution nor state welfare regulations. *See id.* at 928–31.

[23] *Id.* at 930–31. "The California unconstitutional conditions doctrine holds that where the 'receipt of a public benefit is conditioned upon the waiver of a constitutional right, the government bears a heavy burden of demonstrating the practical necessity for the limitation.'" *Id.* at 930 (quoting Robbins v. Superior Court, 695 P.2d 695, 704 (Cal. 1985)).

[24] *Id.* at 931–33 (Fisher, J., dissenting). Judge Fisher quoted *Wyman* to highlight the limited scope of that case's holding: "Our holding today does not mean, of course, that a termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances." *Id.* at 933 (quoting Wyman v. James, 400 U.S. 309, 326 (1971)) (internal quotation marks omitted).

[25] *Id.* at 933 (emphasis omitted).

[26] *Id.* (quoting *Wyman*, 400 U.S. at 321) (internal quotation mark omitted).

[27] *Id.* at 934.

[28] *See id.* at 936.

had articulated a valid special need,[29] he found that this need did not justify overriding the substantial privacy interests at stake.[30] The recipients' privacy interests were at their "zenith" because a home invasion was involved,[31] and were neither diminished because of the recipients' "relationship with the state"[32] nor "reduced" as a result of the procedures used or the recipients' consent.[33]

Although the majority's decision may make it easier for counties to lower the incidence of welfare fraud, this consideration should not have overridden the substantial home privacy protection that the federal and state constitutions provide.[34] The majority's analysis was driven less by legal doctrine and more by widely shared assumptions about the poor as lazy, immoral, and undeserving of aid — assumptions Professor Thomas Ross argues stem from a socially constructed "rhetoric of poverty."[35] It is troubling that these biases played a role in the decision, especially given that the result is to treat welfare recipients as second-class citizens less deserving of fundamental rights.

According to Professor Ross, one of the first steps in the creation of the rhetoric of poverty is the abstraction of the poor into a separate category from the rest of society, thereby creating an "us versus them" dichotomy.[36] The majority fell into this trap in finding that welfare recipients are distinct enough that their expectations of privacy in the home are less than those of the general public. To be sure (and as the majority recognized), certain relationships between an individual and the state can diminish her expectation of privacy; the Supreme Court said as much in *Griffin v. Wisconsin*[37] when it held that, because "[p]robation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments,"[38] warrantless searches of probationers' homes were permissible if there were "reasonable

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[29] *Id.* at 939.

[30] *Id.* at 943.

[31] *Id.* at 940 (quoting United States v. Scott, 450 F.3d 863, 871 (9th Cir. 2006)) (internal quotation marks omitted).

[32] *Id.* Judge Fisher found the majority's analogy to *Griffin* inapposite, arguing that welfare applicants, unlike convicted criminals, do not enjoy a lesser expectation of privacy in their homes than the "rest of us." *Id.*

[33] *Id.* at 942–43 (internal quotation marks omitted). Judge Fisher also reasoned that the home visits violated the California Constitution, *id.* at 943–44, but noted that he concurred with the majority's analysis of California's welfare regulations, *id.* at 944.

[34] *Cf.* Mincey v. Arizona, 437 U.S. 385, 393 (1978) ("[T]he privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.").

[35] Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1499 (1991). Professor Ross writes that this rhetoric is "most pronounced" in *Wyman*. *Id.* at 1522.

[36] *Id.* at 1499.

[37] 483 U.S. 868 (1987).

[38] *Id.* at 874.

grounds" to believe that contraband was present.[39] However, the *Sanchez* majority erred in construing *Griffin* broadly and applying it to welfare recipients. Although it is true that recipients have a different relationship with the state than do nonrecipients, it hardly follows that their rights can be analogized to those of convicted criminals.[40] Criminals, because they transgressed the law, stand in a vastly different relationship to the state than does the general public; welfare recipients, on the other hand, differ only insofar as the benefits they receive are distinguishable in degree — not in kind — from the largesse the government bestows upon the general public.

The majority also portrayed welfare recipients as different from "the rest of us" by characterizing welfare as charity. More than thirty years ago, inspired by Professor Charles Reich's theory of "new property,"[41] the Supreme Court in *Goldberg v. Kelly*[42] declared that welfare benefits are not "mere charity"[43] but rather a matter of "statutory entitlement for persons qualified to receive them."[44] This holding followed directly from the Court's recognition that "forces not within the control of the poor contribute to their poverty."[45] The *Sanchez* majority, by dismissing the unconstitutional conditions doctrine[46] — according to which "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right"[47] — reverted to a pre-

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[39] *Id.* at 876 (internal quotation marks omitted).

[40] Indeed, the *Sanchez* majority appeared to *elevate* convicted criminals over welfare recipients. *Griffin* required that the state have at least "reasonable grounds" to suspect the probationers of wrongdoing before a search could be conducted, *id.* at 876; no such protection was extended to welfare recipients in *Sanchez*.

[41] The Supreme Court quoted Professor Reich for the proposition that "[s]uch sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials." Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (quoting Charles A. Reich, *Individual Rights and Social Welfare*, 74 YALE L.J. 1245, 1255 (1965)); *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[42] 397 U.S. 254.

[43] *Id.* at 265.

[44] *Id.* at 262. While *Goldberg* has not been overruled, its precedential force is debatable after *Mathews v. Eldridge*, 424 U.S. 319 (1976), and the 1996 Welfare Reform Act, which mandates that state block grants for the Temporary Assistance for Needy Families program not be construed "to entitle any individual or family to assistance," 42 U.S.C. § 601(b) (2000). *But see* Randal S. Jeffrey, *The Importance of Due Process Protections After Welfare Reform*, 66 ALB. L. REV. 123, 133–34 (2002) (arguing that the Act does not change the "established status of public assistance as a protected property interest"); Randy Lee, *Twenty-Five Years After* Goldberg v. Kelly, 23 CAP. U. L. REV. 863, 921–22 (1994) (noting that while the era following *Mathews* resulted in *Goldberg*'s due process test becoming "a shadow of its former self," statutory entitlements remained property).

[45] *Goldberg*, 397 U.S. at 265.

[46] *See Sanchez*, 464 F.3d at 931. Beyond the majority's explicit consideration of the doctrine, the concepts at its heart — such as the germaneness of the condition to the benefit and the presence of coercion — are discussed throughout the opinion. *See, e.g.*, *id.* at 927 n.15.

[47] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

Goldberg vision of welfare.[48] Driven by negative stereotypes, the majority brushed aside situational forces and blamed the poor for their pecuniary straits. Despite the apparent limitations established by this doctrine, courts have sometimes permitted conditioning government benefits.[49] Scholars, searching for a theory to explain these applications, have postulated that a judge's evaluation of an unconstitutional conditions claim depends on whether she views the public benefit to be a deviation from the normal "baseline" of government activity; an above-baseline benefit translates to a permissible condition.[50] Viewed through this lens, the *Sanchez* majority's endorsement of mandatory walk-throughs for recipients signals its belief that welfare benefits are beyond the baseline of government activity — in other words, that they are charity.[51]

Inseparable from its rejection of the unconstitutional conditions doctrine is the majority's conclusion that the recipients have a free, uncoerced choice to refuse the home visits[52] — a conclusion plainly driven by stereotypes. A finding of coercion would have invalidated the visits.[53] In the context of searches, the Supreme Court has stated:

> [T]he Fourth . . . Amendment[] require[s] that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.[54]

The *Sanchez* majority determined that a recipient's "choice"[55] to refuse a home visit is uncoerced because "there is no penalty for refusing to

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[48] This categorization of welfare benefits is not unique to the *Sanchez* majority: academics have pointed out that it pervades both public and judicial discourse. *See, e.g.*, Robert M. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443, 448 (1966) (noting that "the 'privilege' dogma has clung most assiduously to welfare benefits").

[49] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 201–02 (1991) (upholding regulations that prohibited the use of federal funds in programs that advocated abortion as a method of family planning).

[50] *See, e.g.*, Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1351–78 (1984).

[51] This attitude toward welfare also devalues recipients' dignity interests. Professor Reich argues for recognizing welfare benefits as rights based on this concern. *See* Reich, *The New Property*, *supra* note 41, at 786 ("Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.").

[52] *Sanchez*, 464 F.3d at 921. Situating conditioned benefits at or above a baseline may determine whether a court finds that requiring consent to the condition is coercive. *See* Sullivan, *supra* note 47, at 1436, 1450, 1489.

[53] The majority found the existence of a noncoercive choice relevant to each of its findings under the Fourth Amendment: that the home visits were not searches, *see Sanchez*, 464 F.3d at 921–23; that even if searches they were reasonable, *see id.* at 923, 924 & n.13; and that they fell under the special needs exception, *see id.* at 925–27.

[54] Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

[55] *Sanchez*, 464 F.3d at 927 n.15.

consent to the home visit, other than denial of benefits."[56] However, this reasoning evinces a stark refusal to acknowledge the dire situation of welfare recipients — that welfare aid is, in the words of the Supreme Court, the "very means by which to live"[57] — and thereby reveals one of the tacit assumptions underlying the majority's opinion: that many welfare recipients are not truly in need of aid. After all, recipients have the "choice" to refuse welfare in exchange for home privacy only insofar as they also have the "choice" to survive without it.[58]

In granting deference to the stated purposes behind Project 100%, the majority allowed itself to be blinded by perceptions of the poor as immoral and by the corresponding belief in the need for expansive welfare fraud prevention programs.[59] The majority did examine the government's purposes; indeed, central to all three of its Fourth Amendment holdings was that the "underlying purpose of the home visits is to verify eligibility for welfare benefits."[60] To support this claim, the majority cited two statistics: that during the program's five-year existence, the denial rate of applicants increased by seven percent and the number of applications withdrawn increased by four to five percent.[61] However, these figures may in fact point to ulterior motives for the home visits. Welfare agencies are increasingly making use of "informal rationing" techniques that "restrict[] access to public benefits programs through the manipulation of procedural rules rather than substantive ones."[62] Through harsh verification procedures, counties

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[56] *Id.* at 921.

[57] Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

[58] The majority, by characterizing this coercive choice as unconstrained, legitimized the home visits as simply the product of the welfare recipients' subjective preferences. Professor David Super argues against the increasing trend in public benefits law toward embracing a "personal choice" model, whereby formal and informal rules are explicitly structured "so that a claimant's failure to receive benefits can be attributed to the claimant's own choices rather than to those of the state." David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 818 (2004). For a critique of the widespread tendency to legitimize unjust outcomes as products of rational and freely made choices ("choicism"), see Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006).

[59] Supporting this causal connection between perceptions of moral worth and expansive fraud prevention tactics is the observation that the more "worthy" the public deems a claimant for a federal benefit program, the less intrusive are the verification procedures. *See* Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 683–84 (2005); *see also* Ross, *supra* note 35, at 1499 (noting that one facet of the rhetoric of poverty is the belief that the poor are "especially likely to commit fraud").

[60] *Sanchez*, 464 F.3d at 926.

[61] *Id.* at 928.

[62] Mulzer, *supra* note 59, at 679; *see also* Super, *supra* note 58, at 822. Some commentators argue that one of the functions of harsh verification procedures is precisely to stigmatize and humiliate claimants. *See, e.g.*, Mulzer, *supra* note 59, at 675. As a harassment mechanism, verification procedures also serve an expressive function, both communicating to the claimants the pub-

reduce caseloads by increasing the risk of erroneous denials and discouraging people from applying for benefits[63] — precisely the effects of Project 100% that the majority observed.[64]

The fact that there exist other, less constitutionally suspect means of preventing welfare fraud supports the notion that the motives for enacting Project 100% were questionable. Computer-matching, in which welfare workers check information in public and private databases, may be an effective — and objective — verification technique.[65] This method, combined with other review of documentation, could be the primary means of verification, with home visits and other more invasive techniques serving as an occasional "back-up" when the less intrusive techniques prove insufficient.[66] Finally, while it may be true that normal warrant procedures in this context would pose "serious administrative difficulties,"[67] the court could have sanctioned the use of administrative warrants, which tolerate a lesser standard than probable cause but still provide a degree of procedural protection.[68]

Driven by stereotypes of the poor, the *Sanchez* decision threatens to further erode the already fragile privacy interests of welfare recipients. But it does more than that. Every citizen is in a "relationship" with the government, and fraud abounds in all governmental programs. What will distinguish this case from the case in which investigators want to rummage through drawers in citizens' homes to "prevent" tax fraud?[69] *Sanchez* implies that the only difference is that the instant case involves welfare recipients. But this distinction is improperly fueled by, and itself fuels, the corrosive rhetoric of poverty.

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lic's moral disapproval and confirming to the public that their fears and assumptions about the poor are being acted upon and hence are legitimate. *See id.* at 683–85.

63 Mulzer, *supra* note 59, at 674–75; *see also* Super, *supra* note 58, at 818.

64 Welfare fraud statistics also suggest ulterior motives for Project 100%. In the summer of 2006, the California Department of Social Services found sufficient evidence to support allegations of fraud for 2.3% of the state's welfare recipients. *See* CAL. DEP'T OF SOC. SERVS., FRAUD INVESTIGATION REPORT, JULY–SEPTEMBER 2006, at 2 (2006), *available at* http://www.dss.cahwnet.gov/research/res/pdf/fraud/2006/Jul-Sep06.pdf. Furthermore, at the time *Sanchez* was decided, no applicant had ever been prosecuted for fraud based on observations made during the home visits, although investigators had made referrals for further criminal investigation if, for example, they found evidence of contraband in the applicant's home. *See Sanchez*, 464 F.3d at 919 n.3. These facts undermine the position that the county was simply after fraud.

65 *See* Mulzer, *supra* note 59, at 672, 708.

66 *See id.* at 709.

67 *Sanchez*, 464 F.3d at 924–25.

68 The Supreme Court has sanctioned the use of administrative warrants in multiple contexts. *See, e.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) (holding that administrative warrants can be used in investigations for violations of the Occupational Safety and Health Act). The doctrine of administrative warrants had not been developed when *Wyman* was decided, nor was computer-matching a viable option then.

69 *See Sanchez*, 464 F.3d at 936 (Fisher, J., dissenting).