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MOTEL BLUES: INSPECTING PATEL'S IMPACT ON THE LAW OF ADMINISTRATIVE SEARCHES

Casey Adams*

I. INTRODUCTION

Administrative inspections are a vital tool for agencies charged with guarding public health and safety at all levels of government. Fire, health, sanitation, building, and labor departments across the country rely on administrative inspections to ensure that regulated entities comply with laws and rules. These agencies have limited resources and may not be able to shoulder the burden of obtaining judicial process for every routine inspection of the potentially thousands of entities they regulate. In addition, the nature of the activity regulated may make random, unannounced inspections necessary for effective oversight. But administrative inspections clearly have a privacy dimension as well—after all, an inspection may involve a uniformed agent of the government making demands to see documents or access nonpublic areas, sometimes under threat of criminal penalties and always with the specter of further enforcement action lingering in the background. Finding the balance between these two competing interests—the government's need to effectively enforce its mandates and the regulated entity's constitutional right to privacy—animated a line of Supreme Court jurisprudence that resulted in the development of a specialized doctrine on administrative searches. In 2015, the Court decided *City of Los Angeles v. Patel*, a case that struck down an administrative inspection statute—a version of which had been on the books for more than a century—as facially violative of the Fourth Amendment.[1] Since then, understanding *Patel*'s effect on the law of administrative searches[2] has become urgently important for the governmental agencies that rely on these tools to carry out their responsibilities and the legislatures that write statutes authorizing their use.

The full scope of *Patel*'s impact is not yet clear. At a minimum, the decision restated and clarified the basic structure of administrative inspections: most will require precompliance review of a demand before a neutral decisionmaker, while a select few industries will merit a lower bar because they are closely regulated. So far, the lower courts have tended to read *Patel* as having a limited impact on the content of the tests for whether industries are closely regulated and whether

* Fordham University School of Law, 2019. My thanks to my former colleagues at the New York City Department of Consumer and Worker Protection and Law Department for guiding me through my first encounters with the law of administrative inspections. In particular, I thank Tamala Boyd for her thoughtful feedback on this article.

1. 135 S. Ct. 2443 (2015).

2. This Article uses the phrases "administrative search" and "administrative inspection" interchangeably unless otherwise noted.

inspection regimes for those industries are constitutionally sufficient. The most immediate consequence of *Patel* may be that administrative agencies, regulated entities, and lower courts are now on notice that *all* inspection regimes must be rigorously evaluated against the appropriate standard, and that longevity of a procedure will not insulate it against searching review. In that sense, the decision tightens the bolts on existing doctrine rather than reinventing it.

This paper sketches the realized and potential impact on administrative searches of *Patel* and its progeny in the lower courts. First, it examines the history and background of the doctrine, tracing its development in the pre-*Patel* era. Next, it reviews the *Patel* decision itself. Finally, it examines post-*Patel* cases in the circuit courts and attempts to draw from them lessons and continuing questions for legislatures and regulatory authorities.[3]

II. HISTORY AND BACKGROUND

The Fourth Amendment protects the public against "unreasonable searches and seizures."[4] In the absence of a warrant, searches "are *per se* unreasonable under the Fourth Amendment" unless they fall into one of "a few specifically established and well-delineated exceptions to that general rule."[5] However, it has not always been clear that the Fourth Amendment's protections extend to civil, as opposed to criminal, matters. In fact, some early cases explicitly denied that the Fourth Amendment can be violated in a civil proceeding.[6] This understanding of the Fourth Amendment meant that state and local civil authorities had free rein to demand access to books and records or even entry into private dwellings. In 1959, the Supreme Court decided *Frank v. State of Maryland*, a case concerning just this type of intrusion, that appeared to confirm the conclusion that civil inspections fall outside the protective scope of the Fourth Amendment.[7] Less than a decade later, the Court reversed itself in *Camara v. Municipal Court of City and County of San Francisco*[8] and *See v. City of Seattle*,[9] kicking off a long-term process of doctrinal development that laid the groundwork for *Patel*. That evolution picked up speed when the Court

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3. It is important to remember that some activities that could be called "inspections" do not implicate the full range of Fourth Amendment protections. For example, some agencies inspect businesses for things that may be observable in areas open to any member of the public, like price listings, posted proof of licensure, fire and safety signage, and various consumer-facing disclosures. This Article focuses on searches or inspections that go beyond public areas or reach items, like papers, that are specifically protected by the Fourth Amendment, and those are the activities I mean when I refer to "inspections." The full range of administrative inspections, however, is broader.

4. U.S. CONST. amend. IV.

5. City of Ontario v. Quon, 560 U.S. 746, 760 (2010) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

6. *See, e.g.*, *In re* Strouse, 23 F. Cas. 261, 261–62 (D. Nev. 1871) ("[I]t need only be remarked that the fourth amendment . . . is applicable to criminal cases only."); *In re* Meador, 16 F. Cas. 1294, 1299 (N. D. Ga. 1869) ("[T]his is a civil proceeding, and in no wise does it partake of the character of a criminal prosecution; no offense is charged against the Meadors. Therefore, in this proceeding, the fourth amendment is not violated.").

7. Frank v. Maryland, 359 U.S. 360 (1959), *overruled by* Camara v. San Francisco, 387 U.S. 523 (1967), *and* See v. City of Seattle, 387 U.S. 541 (1967).

8. 387 U.S. 523, 528.

9. 387 U.S. 541, 542.

began fashioning a special doctrine for closely regulated industries in *Colonnade Catering Corp. v. United States*[10] and *United States v. Biswell*,[11] which culminated in the comprehensive test laid out in *New York v. Burger*.[12]

A. Frank v. Maryland

The dispute in *Frank* started with a complaint about vermin. Gentry,[13] an inspector for the Baltimore City Health Department, responded to a complaint about rats infesting the basement of a local home.[14] After inspecting the area, Gentry discovered a house that was in an "extreme state of decay," with a pile of "rodent feces mixed with straw and trash and debris [of] approximately half a ton" located near the rear.[15] The owner of the house refused to allow Gentry inside, and was subsequently arrested for violating a local statute that required owners or occupiers of homes to permit entry to health inspectors, even in the absence of a warrant.[16] The owner then brought a facial challenge to the validity of the statute.

The Court concluded that Fourth Amendment protections did not apply. Tracing the Fourth Amendment's roots back to the pre-colonial era, the majority opined that it really contained two protections: the "right to be secure from intrusion into personal privacy" and "the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual."[17] The Court did not view the attempted administrative inspection as treading upon either right. Rather, the attempted inspection was "merely to determine whether conditions exist which the Baltimore Health Code proscribes . . . . No evidence for criminal prosecution is sought to be seized."[18] It viewed the appellant's objections as an unreasonable assertion of an "absolute right to refuse consent for an inspection designed and pursued solely for the protection of the community's health, even when the inspection is conducted with due regard for every convenience of time and place."[19] The Court approvingly cited the safeguards and limitations of the statute, and noted that "[i]nspection without a warrant, as an adjunct to a regulatory scheme for the general welfare . . . and not as a means of enforcing the law" had a pedigree reaching back more than 200 years in Maryland.[20]

Observing that the need for administrative inspections was only likely to grow with the size and importance of urban centers, the Court concluded that "the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have

10. 397 U.S. 72 (1970).
11. 406 U.S. 311 (1972).
12. 482 U.S. 691 (1987).
13. The decision does not disclose Gentry's first name.
14. Frank v. Maryland, 359 U.S. 360, 361 (1959), *overruled by* Camara v. San Francisco, 387 U.S. 523 (1967), *and* See v. City of Seattle, 387 U.S. 541 (1967).
15. *Id.*
16. *Id.*
17. *Id.* at 365.
18. *Id.* at 366.
19. *Id.*
20. *Id.* at 367.

sanctioned."[21] The Court's review of the particular protections in Baltimore's statute suggested that, in civil matters, a regulatory scheme authorizing warrantless inspections could survive constitutional scrutiny so long as it was "hedged about with safeguards designed to make the least possible demand on the individual . . . and to cause only the slightest restriction on his claims of privacy" as weighed against the governmental purpose to be furthered and the burden on the enforcing agency of obtaining a warrant in each case.[22]

In dissent, four justices sharply disagreed with the majority's attempt to carve out a new test for administrative inspections in civil cases. Justice Douglas accused the majority of "cast[ing] a shadow over [the Fourth Amendment] guarantee as respects searches and seizures in civil cases."[23] According to the dissenters, exempting civil inspections from the full force of Fourth Amendment protections would require "considerable editing and revision" of the amendment itself.[24] Conducting his own review of history, Justice Douglas concluded that the framers must have had in mind a long history of official intrusions aimed at stifling dissent and nonconformity, including a specific line of "oppressive practices directed at the press," accomplished by both civil and criminal means.[25] Accordingly, Justice Douglas argued, "[t]he Fourth Amendment . . . has a much wider frame of reference than mere criminal prosecutions."[26] The dissent also found the case at bar to be a poor vehicle for resolving the issue, as the vast majority of people simply consented to an inspection—indeed, the dissent claims that only one person a year, on average, was prosecuted for failure to allow an inspection.[27]

B. *Camara*, *See*, and Closely Regulated Industries

Less than a decade later, the advantage swung back toward the dissenters. In *Camara* the Court expressly overruled *Frank* and inaugurated a new era of administrative inspection jurisprudence.[28] On the same day, the Court handed down *See*, a case clarifying that this change would apply equally to private dwellings and commercial premises.[29] In *Camara*, the Court noted that *Frank* needed to be reexamined because "more intensive efforts at all levels of government to contain and eliminate urban blight have led to increasing use of [administrative] inspection techniques."[30]

As in *Frank*, the dispute arose from a municipal inspector attempting to gain access to a private dwelling without a warrant.[31] The Court first recognized that *Frank* "has generally been interpreted as carving out an additional exception to the

21. *Id.* at 372.
22. *Id.* at 367.
23. *Id.* at 374 (Douglas, J., dissenting).
24. *Id.*
25. *Id.* at 376.
26. *Id.* at 377.
27. *Id.* at 384 ("One rebel a year . . . is not too great a price to pay for maintaining our guarantee of civil rights in full vigor.").
28. Camara v. San Francisco, 387 U.S. 523, 534 (1967).
29. See v. City of Seattle, 387 U.S. 541, 545–46 (1967).
30. 387 U.S. at 525.
31. *Id.* at 526.

rule that warrantless searches are unreasonable under the Fourth Amendment."[32] It then rejected two of the pillars of the *Frank* opinion: first, that the scheme was hedged about with safeguards and made few demands on the inspected, and second, that a warrant requirement would be unworkable for the government agencies charged with enforcing health and safety provisions.[33] On the former contention the Court pointed out that even where safeguards were in place and few demands made, the person inspected must still decide whether to comply immediately or risk criminal punishment for resisting.[34] On the latter, the Court observed that "broad statutory safeguards are no substitute for individualized review" and that "[i]t has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement."[35] Ultimately, the Court held:

> [A]dministrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. State of Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections.[36]

The Court went on to clarify that while the Fourth Amendment requires that warrants only issue upon probable cause, the content of that requirement differs depending on the type of proceeding and the standard is likely to be lower in the case of administrative inspections than criminal investigations.[37] It also explicitly preserved the ability for authorities to bypass a warrant requirement when another Fourth Amendment exception applies, for example when exigent circumstances call for prompt emergency action.[38]

The companion case, *See,* extended the holding of *Camara* to inspections of commercial premises. In that case, the appellant violated an ordinance mandating access by refusing entry to a representative of the Seattle Fire Department attempting to inspect his storage warehouse business for compliance with the city's fire code.[39] The Court, recognizing that "governmental regulation of business enterprise has mushroomed in recent years," saw "no justification for . . . relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws . . . for commercial premises."[40] Accordingly, the Court held that "minimal limitations on administrative action . . . are constitutionally required in the case of

32. *Id.* at 529.
33. *Id.* at 532–33.
34. *Id.* at 533.
35. *Id.*
36. *Id.* at 534.
37. *Id.* at 538.
38. *Id.* at 539.
39. See v. City of Seattle, 387 U.S. 541, 541 (1967).
40. *Id.* at 543.

investigative entry upon commercial establishments."[41] The decision analogized limitations on the scope of subpoenas seeking books and records—that the demand be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome"[42]—to establish the new limits on warrants for entry without consent. Taken together, *Camara* and *See* made clear that the ground had shifted in the world of administrative inspections. Going forward, a warrant would be required for every inspection not covered by a well-established Fourth Amendment exception, whether administrative or not.

Shortly after *Camara* and *See*, the Court took a step back toward the *Frank* era with a pair of cases recognizing special applications of the Fourth Amendment for certain types of industries. The first case, *Colonnade*, concerned a federal statute that authorized agents of the Internal Revenue Service to demand entry to the premises of retail liquor dealers and made it a criminal offense to refuse entry.[43] The Court reviewed the long history of warrantless inspections to enforce revenue laws, both in the United States and in England, and concluded that "[t]he general rule laid down in [*See*]—that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure—is therefore not applicable here."[44] The Court stated that the holding in *See* "reflects this Nation's traditions that are strongly opposed to using force without definite authority to break down doors," and distinguished the situation at bar by observing that liquor dealers were "long subject to close supervision and inspection," and therefore in no danger of being surprised by a government agent acting under uncertain authority.[45]

The second case, *Biswell*, concerned a federal statute that authorized agents of the Treasury Department to demand entry onto the premises of federally licensed firearms dealers.[46] The Court recognized that regulation of firearms dealers was not as deeply rooted in history as the regulation of liquor dealers examined in *Colonnade*, but found that the compelling federal interest in the control of interstate commerce in weapons required a similar result.[47] The Court held that where "regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."[48] The combination of *Colonnade* and *Biswell* made clear that some form of warrantless inspection regime, undergirded by either a deeply rooted history of regulation, a compelling federal interest, or both, had survived the shift from *Frank* to *Camara* and *See*.

The borders of this exception came into sharper relief with *Marshall v. Barlow's, Inc.*, a case that examined a broad statutory authorization for warrantless

41. *Id.* at 545.
42. *Id.* at 544.
43. Colonnade Catering Corp. v. United States, 397 U.S. 72, 73–74 (1970).
44. *Id.* at 76 (quoting *See*, 387 U.S. at 545) (internal quotation marks omitted).
45. *Id.* at 77.
46. United States v. Biswell, 406 U.S. 311, 315 (1972).
47. *Id.* at 315.
48. *Id.* at 317.

inspections to enforce the federal Occupational Safety and Health Act (OSHA).[49] The statute at issue empowered agents of the Secretary of Labor to search "the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations of OSHA regulations," sweeping in a huge swath of federally regulated employers.[50] The government urged that the statute was lawful under *Colonnade* and *Biswell*, which it argued stood for an exception to the *Camara* and *See* doctrine for "pervasively regulated businesses."[51]

The Court agreed that an exception had been recognized, but refused to extend it to any business regulated by federal statute.[52] Rather, the Court said, the exception was restricted to "certain carefully defined classes of cases," like liquor and firearms dealers, where the history of pervasive regulation extinguished any reasonable expectation of privacy: "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation."[53] The Court held that the government had failed to show that there was a history of federal regulation of working conditions "of the order of specificity and pervasiveness that OSHA mandates," and therefore could not avail itself of the *Colonnade-Biswell* exception.[54] As it had in earlier cases, the Court flatly rejected the argument that a warrant requirement would be too burdensome for the government and undermine enforcement of the statute.[55] Ultimately, the Court held that the portions of OSHA that purported to authorize warrantless inspections were unconstitutional and enjoined their enforcement.[56] In the wake of *Marshall*, it became clear that the *Colonnade-Biswell* exception was just that—an exception—and that the Court would remain on guard lest it be allowed to swallow the rule.

C. Doctrinal Refinement: *New York v. Burger*

In the following decade, the Court attempted to fit the *Colonnade-Biswell* exception into a comprehensive doctrine. The opportunity came in *New York v. Burger*, a case concerning a challenge to a state statute authorizing warrantless inspections of licensed vehicle dismantling businesses, which was part of a regulatory regime designed to deter the illegal trade in stolen auto parts.[57] The Court first recognized that the concept of "closely regulated businesses" is defined by a reduced expectation of privacy on the part of the business owner and so must be measured by the "pervasiveness and regularity of the federal regulation."[58] The opinion then laid out a three part test for warrantless inspections of closely regulated businesses: (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made;" (2) "the warrantless

49. 436 U.S. 307, 307 (1978).
50. *Id.*
51. *Id.* at 313.
52. *Id.*
53. *Id.* at 312–13.
54. *Id.* at 314.
55. *Id.* at 316.
56. *Id.* at 325.
57. 482 U.S. 691, 693 (1987).
58. *Id.* at 701 (quoting Donovan v. Dewey, 452 U.S. 594, 605–06 (1981)).

inspections must be 'necessary to further [the] regulatory scheme;" and (3) "the statute's inspection program . . . [must] provid[e] a constitutionally adequate substitute for a warrant."[59] Applying these standards, the Court held that because of the comprehensive nature of the regulatory scheme and the similarity between vehicle dismantling businesses and long-regulated businesses like junkyards and secondhand dealers, vehicle dismantlers could be classed as closely regulated even though most of the regulations were less than 20 years old.[60]

The first prong of the three-part test was satisfied by the government's substantial interest in controlling automobile theft.[61] The second prong was satisfied because the government could rationally conclude that regulating vehicle dismantlers would deter automobile theft by reducing the availability of markets for stolen vehicles and parts, and helping to "trace the origin and destination of vehicle parts."[62] The inspections were also necessary to further the regulatory scheme because a warrant requirement could alert a business owner of the government's interest and give him or her time to conceal any stolen parts.[63] Finally, the third prong was satisfied because the statute alerted business owners that inspections would take place regularly, and therefore "the vehicle dismantler knows that the inspections to which he [or she] is subject do not constitute discretionary acts by a government official but are conducted pursuant to statute."[64] Additionally, the statute authorized only limited inspections subject to time, place, and manner restrictions, which the Court found to be "appropriate restraints upon the discretion of the inspecting officers."[65]

After *Burger*, any scheme operating under the *Colonnade-Biswell* exception for closely regulated businesses would need to satisfy this three-part test. Since then, Courts of Appeals have upheld regulatory schemes authorizing warrantless inspections of, among other things, mining operations,[66] coin-operated gambling machines,[67] commercial motor vehicles,[68] fishing vessels,[69] deer-breeding ranches,[70] manufacturers of veterinary drugs,[71] and businesses that sell animals to research facilities.[72] *Patel* reached the Supreme Court against this background.[73]

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59. *Id.* at 702–03.
60. *Id.* at 703.
61. *Id.* at 708.
62. *Id.* at 709.
63. *Id.* at 710.
64. *Id.* at 711.
65. *Id.*
66. LeSueur-Richmond Slate Corp. v. Fehrer, 666 F.3d 261 (4th Cir. 2012).
67. Rivera-Corraliza v. Morales, 794 F.3d 208 (1st Cir. 2015).
68. United States v. Ponce-Aldona, 579 F.3d 1218 (11th Cir. 2009).
69. Tart v. Massachusetts, 949 F.2d 490 (1st Cir. 1991).
70. Anderton v. Tex. Parks & Wildlife Dep't., 605 F. App'x 339 (5th Cir. 2015).
71. United States v. Argent Chem. Lab'ys., Inc., 93 F.3d 572 (9th Cir. 1996).
72. Hodgins v. U.S. Dep't of Agric., 238 F.3d 421 (table), 2000 WL 1785733, at *6 (6th Cir. Nov. 20, 2000).
73. For another list of industries held to be closely regulated by Circuit Courts of Appeals, *see* City of Los Angeles v. Patel, 576 U.S. 409, 435–36 (2015) (Scalia, J., dissenting) (collecting cases).

III. *PATEL*

Naranjibhai and Ramilaben Patel owned and operated the Rio Palace Motor Inn in Los Angeles, California.[74] Like all motels in the city, their establishment was subject to a local statute that required them to record certain information about guests and their vehicles and make those records available to any officer of the Los Angeles Police Department upon demand.[75] In 2003, the Patels joined with other motel owners to challenge the constitutionality of the statute under the Fourth Amendment.[76] The District Court declined to find the inspection statute facially unconstitutional.[77] Although it concluded that hotels and motels did not qualify as closely regulated industries and therefore did not reach the three-prong *Burger* test, the District Court found that this did not matter because the Patels had no "reasonable expectation of privacy in registers created pursuant to a municipal mandate."[78]

On review, a panel of the Ninth Circuit Court of Appeals affirmed the lower court's decision. The court elaborated on the rationale used below, explaining that motel owners must establish a protectable privacy interest in information by showing a subjective expectation that is objectively reasonable, just as in other Fourth Amendment cases.[79] The decision noted that, generally, hotel registers are accessible to the public at the front desk and therefore cannot give rise to a reasonable expectation of privacy.[80] However, the court also clarified that it was rejecting the city's argument that a business owner can never have a reasonable expectation of privacy in a document that is required to be kept, and made available for inspection on demand, by statutory mandate.[81] Indeed, the court observed that "[t]o hold otherwise would allow the government to conduct warrantless searches just by announcing that it can."[82] With no protectable privacy interest established, the court declined to reach the *Burger* test.[83]

On an en banc rehearing, the Ninth Circuit reversed the panel's decision.[84] The en banc decision rejected the contention, relied upon by the District Court and the Ninth Circuit panel, that the Patels were required to prove that they possessed a reasonable expectation of privacy in their guest registers before Fourth Amendment protections could come into play.[85] The court recognized that the registers were "papers" specifically protected under the Fourth Amendment, no less than papers stored in the desk of a private citizen's home.[86] So long as those papers could be

74. Joint Appendix at 75, City of Los Angeles v. Patel, 576 U.S. 409 (2015) (No. 13-1175), 2014 WL 7205656, at *75.

75. *Patel*, 576 U.S. at 412–13.

76. *Id.*

77. Patel v. City of Los Angeles, No. CV 05–1571 DSF, 2008 WL 4382755, at *4 (C.D. Cal. Sept. 5, 2008).

78. *Id.* at *3.

79. Patel v. City of Los Angeles, 686 F.3d 1085, 1087–88 (9th Cir. 2012).

80. *Id.* at 1088.

81. *Id.*

82. *Id.*

83. *Id.* at 1090.

84. Patel v. City of Los Angeles, 738 F.3d 1058 (9th Cir. 2013) (en banc).

85. *Id.* at 1062.

86. *Id.*

considered "private," and were not exposed to the public or otherwise stripped of Fourth Amendment protection by some action of the Patels, the analysis should proceed to the reasonableness of the search.[87] Finding that "no serious argument can be made that the hotel industry has been subject to the kind of pervasive regulation that would qualify it for treatment under the *Burger* line of cases,"[88] the court noted that the statute lacked the "essential procedural safeguard" of an opportunity for precompliance review of a demand for inspection.[89] The Supreme Court granted *certiorari*.[90]

Like *Frank*, *Patel* was decided by a closely divided Court in a 5 to 4 vote.[91] Justice Kennedy joined Justices Kagan, Breyer, and Ginsburg in an opinion authored by Justice Sotomayor.[92] The decision drew two dissents, one by Justice Scalia[93] and another by Justice Alito.[94] This division is notable in light of the fact that the majority opinion purports to be a straightforward, and narrow, application of the established principles of law discussed above. The majority will be discussed first, followed by Justice Scalia's dissent. Justice Alito's separate dissent, joined by Justice Thomas, will not be discussed in detail because it focuses on the standard for holding a statute facially unconstitutional.[95]

Justice Sotomayor's majority opinion held the Los Angeles statute facially unconstitutional "because it fail[ed] to provide hotel operators with an opportunity for precompliance review."[96] To reach this conclusion, the majority read *See* together with *Donovan v. Lone Steer, Inc.*, a case involving an administrative subpoena issued by the Secretary of Labor in the course of enforcing the Fair Labor Standards Act.[97] That case distinguished between the administrative subpoena issued by the Secretary of labor, which sought only the production of records, and the demands for entry into nonpublic areas that were at issue in *Camara* and *Marshall*.[98] The Court in *Lone Steer* held that, where no entry is demanded, an administrative agency may compel the production of records by an administrative subpoena rather than a judicial warrant.[99] The *Patel* majority applied this reasoning to conclude that some opportunity for precompliance review, and not necessarily just by means of administrative subpoenas, must be given where an agency seeks to conduct an administrative inspection falling outside the *Burger* line of cases. Somewhat confusingly, the majority refers to this as the "general administrative search

87. *Id.* at 1062–63.

88. *Id.* at 1064 n.2.

89. *Id.* at 1064–65 ("[the statute] is facially invalid under the Fourth Amendment insofar as it authorizes inspections of [hotel registers] without affording an opportunity to 'obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.'") (quoting See v. City of Seattle, 387 U.S. 541, 545 (1967)).

90. City of Los Angeles v. Patel, 576 U.S. 409 (2015).

91. *Id.* at 412.

92. *Id.*

93. *See id.* at 428–41 (Scalia, J., dissenting).

94. *See id.* at 441–44 (Alito, J., dissenting).

95. *See id.*

96. *Id.* at 419.

97. 464 U.S. 408 (1984).

98. *Id.* at 414.

99. *Id.* at 415.

doctrine," a phrase usually used to refer to *Burger* cases, which the majority discussed next.

The majority rejected the argument that hotels and motels are closely regulated enough to qualify for *Burger* treatment. In the eyes of the majority, classifying hotels as closely regulated "would permit what has always been a narrow exception to swallow the rule."[100] The Court viewed Los Angeles's statutory scheme as similar to the provisions of OSHA that failed to qualify employers in interstate commerce as closely regulated in *Marshall*.[101] The "hodgepodge of regulations" on hotels found in the historical record, some of which dated back to the eighteenth century, failed to convince the Court that there was a comprehensive scheme reaching the requisite level of pervasive regulation.[102]

The majority was similarly unconvinced that Los Angeles could satisfy the *Burger* three-prong test even if it assumed that hotels were closely regulated. Specifically, the Court found that the statute satisfied the first prong of *Burger*—the existence of a substantial government interest—but failed the second and third prongs: that warrantless inspections be necessary to further the interest and that the scheme provide a constitutionally adequate substitute for a warrant.[103] The Court rejected the argument that warrantless inspections were "necessary" because the use of a warrant or other instrument of process would give operators an opportunity to falsify records.[104] Pointing back to *Lone Steer*, the Court emphasized that administrative subpoenas, and possibly sequestration of requested records while a demand is being challenged, would serve the same purposes as warrantless inspections without the attendant risks of abuse.[105] Finally, the Court found that the statute in question did not provide a constitutionally adequate substitute for a warrant in terms of the "certainty and regularity" of inspections.[106] In one of the cloudier portions of the opinion, the Court seemed to suggest that a statutory scheme must include some form of regular inspection in order to put regulated entities on notice and pass constitutional muster, though the bar could be as low as inspections performed on a "regular basis."[107]

Ultimately, the majority opinion reaffirmed the requirement that administrative inspections, even those that seek access only books and records, must provide some kind of legal process with a meaningful opportunity for precompliance review before a neutral decisionmaker, though it need not always be by way of a judicial warrant. The opinion's impact on the content of the *Burger* test for reasonableness of warrantless inspections of closely regulated businesses is less clear, but it certainly called into question the general argument that warrantless inspections can be termed "necessary" simply because notice of a demand gives the recipient an opportunity to falsify or conceal requested information. There appears to be some tension between the *Patel* majority's view of this prong and the *Burger*

100. *Patel*, 576 U.S. at 424–25.
101. *Id.* at 425.
102. *Id.*
103. *Id.* at 426.
104. *Id.* at 427.
105. *Id.*
106. *Id.*
107. *Id.* at 427–28.

opinion itself, which accepted a similar argument, stating that "surprise is crucial if the regulatory scheme aimed at remedying this major social problem is to function at all."[108] In any event, the majority's discussion of *Burger* could be viewed as *dicta*, since it declined to find that hotels are closely regulated and disposed of the case on general Fourth Amendment grounds.

Justice Scalia's dissent, joined by Justice Thomas and Chief Justice Roberts, disputed the majority's conclusions both that hotels are not closely regulated and that the regulatory scheme could not survive the *Burger* test even if they were. Scalia's dissent argues that the main factors bearing on whether a business is closely regulated are the duration of the regulatory tradition, the comprehensiveness of the regulatory regime, and the imposition of similar regulations by other jurisdictions.[109] The opinion surveyed a long history of state regulation of public inns dating back to colonial times[110] and argued that the regulatory scheme at issue was "substantially *more* comprehensive than the regulations governing junkyards in *Burger*, where licensing, inventory-recording, and permit-posting requirements were found sufficient to qualify the industry as closely regulated."[111] Finally, Justice Scalia pointed to a list of more than 100 similar register-inspection regimes in cities and counties across the country to argue that such regulations are widely imposed across different jurisdictions.[112] Ultimately, the dissenters concluded that closely regulated industries may be searched without a warrant because of "the expectation of those who enter such a line of work," and that hotel operators were unquestionably on notice that this doctrine would apply to them.

Justice Scalia also argued that the statute satisfied all three prongs of the *Burger* test. The governmental purpose was to deter criminal activities that frequently take place in hotels, such as drug dealing, prostitution, and human trafficking.[113] Warrantless inspections were necessary to further the regulatory scheme because hotel operators could alter or destroy records upon receiving a demand and the operational burden on police departments of sequestering all such records would be too great.[114] Moreover, Scalia argued, the *Burger* test does not require the government to choose the "least-restrictive-means" for conducting an administrative search, only a reasonable one.[115] Justice Scalia argued that the scheme provided a constitutionally adequate substitute for a warrant because it restricted the scope of any inspection to the four corners of the guest register, a narrower limitation than those upheld earlier in the line of *Burger* cases.[116] He also accused the court of misreading *Burger* to conjure a frequency requirement that not only was not part of that case's holding, but in fact was not satisfied by the inspection regime it upheld as constitutional. Ultimately, Scalia's critique was that the Court was "mistaking [Supreme Court] precedent for the Fourth Amendment itself" and losing sight of the

108. New York v. Burger, 482 U.S. 691, 710 (1987).
109. *Patel*, 576 U.S. at 432 (Scalia, J., dissenting).
110. *See id.* at 432–33 (Scalia, J., dissenting).
111. *Id.* at 434 (Scalia, J., dissenting).
112. *Id.*
113. *Id.* at 436 (Scalia, J., dissenting).
114. *Id.* at 436–38 (Scalia, J., dissenting).
115. *Id.* at 438 (Scalia, J., dissenting).
116. *Id.* at 438–39 (Scalia, J., dissenting).

fundamental constitutional question of "whether the challenged search is reasonable."[117]

IV. POST-*PATEL* CASES

At the date of writing, six Circuit Courts of Appeal have meaningfully discussed or applied *Patel*'s Fourth Amendment analysis.[118] I discuss each in turn in an attempt to tease out the borders of *Patel*'s impact.

A. Early Cases: Rivera-Corraliza, Free Speech Coalition, and Bell

The first case, *Rivera-Corraliza v. Morales*, was handed down by the First Circuit exactly one month after the Supreme Court decided *Patel*.[119] The case involved difficult qualified immunity questions and, because the events in question took place before *Patel* was decided, the court concluded that it did not apply.[120] The court did, however, note that "the law governing administrative searches continues to develop and that the bench and bar must be on the lookout for situations where *Patel* does hold sway," and made two observations relevant to that admonishment.[121] First, the court said that it "need not decide whether *Patel* . . . changed the *Burger* test in any way."[122] This, of course, leaves open both the substantive question and the door for a later case where that question can or must be decided. Second, the court suggested that the plaintiffs' argument that an industry must be "inherently dangerous to persons" to be considered a closely regulated industry, while not persuasive in this case, might "have more traction [in future cases] given the Court's *Patel* decision,"[123] which contained a footnote suggesting that closely regulated industries are typically "intrinsically dangerous."[124]

Free Speech Coalition, Inc. v. Attorney General involved a Third Circuit challenge to various aspects of the Child Protection and Obscenity Enforcement Act of 1988 and successor provisions which, among other things, required extensive record keeping by producers of pornography in order to combat trafficking and exploitation of underage models.[125] The rules promulgated under the statute authorized warrantless inspections of records kept pursuant to statutory mandate.[126] The case had a complex procedural history—this decision was the third time it had risen to the Third Circuit and the plaintiffs had already won an earlier as applied

117. *Id.* at 440–41 (Scalia, J., dissenting).

118. Several Circuits have also cited *Patel* for its discussion of facial constitutional challenges to statutes. *See, e.g.*, United States v. Wright, 937 F.3d 8, 17 (1st Cir. 2019); Winston v. City of Syracuse, 887 F.3d 553, 559 (2d Cir. 2018); City of El Cenizo v. Texas, 890 F.3d 164, 187 (5th Cir. 2018).

119. 794 F.3d 208 (1st Cir. 2015).

120. *Id.* at 223.

121. *Id.*

122. *Id.* at 217 n.12.

123. *Id.* at 219 n.16.

124. City of Los Angeles v. Patel, 576 U.S. 409, 424 n.5. (2015).

125. 825 F.3d 149 (3d Cir. 2016) [hereinafter FS III].

126. *See id.* at 158.

constitutional challenge to the regulations.[127] In this third iteration of the case, decided after *Patel*, the court expanded its analysis and held the inspection provisions of the statutes themselves facially unconstitutional.[128] To reach this conclusion, the court first found that producers of pornography are not closely regulated because (1) regulations of the industry are broad, not directly targeted; (2) producers are not required to obtain a license or register with the government; and (3) the inspection provisions themselves could not be relied upon to establish pervasive regulation under *Patel*.[129] Since the industry is not closely regulated, *Patel* allowed for no administrative inspection without an opportunity for precompliance review before a neutral decisionmaker. However, as in *Patel*, the court went on to detail why the statute would fail the *Burger* test even if the industry were held to be closely regulated. The court did not dispute that the government has a substantial interest in combating trafficking and exploitation of underage models, but concluded that the second prong of *Burger* was not satisfied and therefore the third prong need not be reached. The court argued that warrantless inspections were not necessary because the government showed no evidence of a need for the "element of surprise" and the records concerned "could not easily be recreated on short notice nor could violations be concealed."[130]

The Seventh Circuit case *Bell v. City of Chicago* involved a local statute that authorized the impoundment of vehicles involved in drug crimes.[131] The court flatly rejected appellants' argument that *Patel* stands for "the proposition that a law that permits warrantless seizures in all instances is facially unconstitutional."[132] It distinguished the impoundment ordinance from Los Angeles's hotel register ordinance by noting that the latter "allowed the search to occur without probable cause," and concluded that "*Patel* did not . . . call into question the constitutionally of . . . forfeiture statutes, which only allow for seizure of a vehicle after the officer or state actor developed *probable cause* of a violation of the law."[133] The Supreme Court denied review.[134]

B. A Full Reckoning: *Liberty Coins*

The first appellate case to grapple in full with *Patel*'s teachings on the Fourth Amendment was the Sixth Circuit decision *Liberty Coins, LLC v. Goodman*, which resulted in the invalidation of portions of a statute regulating precious metal dealers.[135] *Liberty Coins* was also the first appellate case since *Patel* where an industry was found to be closely regulated, giving the court occasion to explore

127. Free Speech Coal., Inc. v. Att'y Gen. U.S., 787 F.3d 142, 146 (3d Cir. 2015).
128. FS III, 825 F.3d at 167.
129. *Id.* at 170–71.
130. *Id.* at 172.
131. 835 F.3d 736, 737 (7th Cir. 2016).
132. *Id.* at 741.
133. *Id.*
134. Bell v. City of Chicago, 137 S. Ct. 1231 (2017) (Mem.).
135. 880 F.3d 274, 291–92 (6th Cir. 2018).

whether *Patel* in fact altered the *Burger* test. After concluding that the legislative scheme provided no opportunity for precompliance review of inspection requests, the court turned to the test for whether precious metal dealers are closely regulated. The court recited the *Burger* test for close regulation—(1) pervasiveness and regularity; (2) duration; and (3) comparable schemes in other states—and noted that in *Patel* the Supreme Court "reiterated that closely regulated industries are the "'exception'" and suggested that businesses operating within these industries all pose a clear and significant risk to the public welfare."[136]

Ultimately, the court rejected appellees' argument that "*Patel* significantly narrowed the test for closely regulated industries" and concluded that precious metals dealers should be considered closely regulated even after *Patel*.[137] The court recognized that "[w]hile *Patel* undoubtedly clarified the application of *Burger*," it did not institute a requirement that an industry be "ultra-hazardous" in order to be considered closely regulated.[138] Rather, the court read *Patel*'s focus on the dangerousness of the industries recognized as closely regulated by the Supreme Court—"liquor, firearms, mining, and automobile junkyards"—as going to an "intrinsic danger" that presents a "clear and significant risk to the public welfare" that need not be physical in nature.[139] For example, the *Patel* Court recognized that junkyards meet the requirement because they "'provide[d] the major market for stolen vehicles and vehicle parts."'[140]

Unfortunately for the state, the analysis did not end there. Turning to the three-prong *Burger* test, the court engaged in a bifurcated analysis that reached different results: First, it sustained two provisions requiring dealers to record and make available to police records about articles sold and, upon demand, the articles themselves (the "specific provisions").[141] Second, it struck down two provisions that gave police broad discretion to inspect all of a dealer's papers related to the conduct of regulated business (the "broad provisions").[142] In both of these analyses, the court

136. *Id.* at 282 (quoting City of Los Angeles v. Patel, 576 U.S. 409, 424 (2015)) (internal quotation marks omitted).

137. *Id.* at 283.

138. *Id.* at 284.

139. *Id.*

140. *Id.* (quoting *Patel*, 576 U.S. at 424).

141. *Id.* at 286–87, 289. "Each person licensed under Chapter 4728. of the Revised Code, shall, every business day, make available to the chief or the head of the local police department, on forms furnished by the police department, a description of all articles received by the licensee on the business day immediately preceding, together with the number of the receipt issued." OHIO REV. CODE ANN. § 4728.07 (West 2019–20); "Every person licensed under this chapter shall keep and use books and forms approved by the superintendent of financial institutions, which shall disclose, at the time of each purchase, a full and accurate description including identifying letters or marks thereon of the articles purchased, with the name, age, place of residence, driver's or commercial driver's license number or other personal identification, and a short physical description of the person of the seller. The licensee also shall write in the book the name of the maker. The licensee shall keep the books in numerical order at all times at the licensed location, open to the inspection of the superintendent or chief of or head of the local police department, a police officer deputed by the chief or head of police, or the chief executive officer of the political subdivision thereof. Upon demand of any of these officials, the licensee shall produce and show an article thus listed and described which is in the licensee's possession." *Id.* § 4728.06.

142. *Liberty Coins*, 880 F.3d at 289–90. "The superintendent of financial institutions may, either personally or by a person whom the superintendent appoints for that purpose, if the superintendent

assumed that the government had a substantial interest in deterring the resale of stolen goods.[143] Throughout its analysis, the court made clear that it believed *Patel* has wrought some lasting change on the content of the *Burger* test.

Writing on the necessity prong, the court mostly repeated the established *Burger* test. Importantly, it cited *Patel* for the proposition that "simply seeking to prevent falsification of records or looking to avoid administrative burdens will not be sufficient to conduct a warrantless search."[144] The court reasoned that inspections were necessary under the specific provisions because of the "fluid and transitory nature of articles made of precious metals."[145] The court also noted the importance of frequent warrantless inspections to the overall scheme's ability to deter thieves from stealing articles made of precious metals and motivate dealers to be more careful about what articles they purchase.[146] The opinion distinguished *Patel* by observing that, in that case, Los Angeles relied solely on the need to prevent falsification of records to justify warrantless inspections, when in fact it had other methods available to achieve that goal.[147] On the other hand, the court found that the broad provisions were not necessary because the only stated justification was to "ensure compliance," a goal that, as in *Patel*, could be accomplished by administrative subpoena or other methods.[148]

Next, the court examined whether the provisions provided a constitutionally adequate substitute for a warrant. The opinion describes this inquiry as containing two parts: (1) whether a statute is comprehensive to the point that "businesses are on notice that they will be subject to periodic searches of a properly defined scope," and (2) whether the discretion of inspecting officers is "carefully limited in time, place, and scope."[149] While the court recognized that *Patel* found the lack of a "specific temporal limitation"[150] in Los Angeles's statute to be "deficient,"[151] it held that such

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considers it advisable, investigate the business of every person licensed as a precious metals dealer under this chapter, and of every person, partnership, and corporation by whom or for which any purchase is made, whether the person, partnership, or corporation acts, or claims to act, as principal, agent, or broker, or under, or without the authority of this chapter, and for that purpose shall have free access to the books and papers thereof and other sources of information with regard to the business of the licensee or person and whether the business has been or is being transacted in accordance with this chapter. The superintendent and every examiner may examine, under oath or affirmation, any person whose testimony may relate to any business coming within this chapter." OHIO REV. CODE ANN. § 4728.05(A) (West 2019–20), *invalidated by Liberty Coins*, 880 F.3d at 290; "Inspection of books and records: All books, forms, and records, and all other sources of information with regard to the business of the licensee, shall at all times be available for inspection by the division for the purpose of assuring that the business of the licensee is being transacted in accordance with law. All purchased items shall be kept at the licensed location for seventy-two hours from the time of purchase. All books, forms, records, etc., shall be kept at the licensed location." OHIO ADMIN. CODE § 1301:8-6-03(D) (2014–15) (amended 2018).

143. *Liberty Coins*, 880 F.3d at 285.

144. *Id*.

145. *Id.* at 285

146. *Id.* at 287 (citing New York v. Burger, 482 U.S. 691, 709 (1987)).

147. *Id.* at 288.

148. *Id.* at 290.

149. *Id.* at 285–85 (quoting New York v. Burger, 482 U.S. 691, 702 (1987)) (internal quotation marks omitted).

150. *Id.* at 288.

151. *Id.* at 286.

an absence was not "fatal"[152] to the specific provisions. It held that the specific provisions "establishe[d] a predictable and guided . . . regulatory presence" and refused to find them unconstitutional because of missing "magic words" about the regularity of inspections.[153] Conversely, the court felt that the broad provisions failed this test because they were "too broad in scope."[154] This was so both because the broad provisions applied to licensees and nonlicensees[155] and because the "seemingly unlimited" grant of unqualified access at all times failed to "sufficiently constrain the discretion of the inspectors."[156]

C. Related Issues: ***Stemple*** and ***Sesay***

Other recent cases in the Sixth Circuit suggest that housing and building maintenance codes authorizing warrantless inspections remain on safe ground post-*Patel*, so long as they provide meaningful precompliance review.[157] In *Benjamin v. Stemple*, the court upheld a local ordinance requiring owners of vacant properties to register them with the city and consent to a warrantless search in the event that the building is found to be dangerous.[158] A preliminary finding of dangerousness triggered a hearing process that allowed the property owner to contest the determination before an inspection took place.[159] The court noted the "many fairness guarantees" built into this process: the appointment of a neutral hearing officer not employed by the city, opportunity for testimony from both the inspector and property owner, and the right of both parties to call and examine witnesses, introduce physical evidence, conduct cross-examination, and be represented by counsel.[160] The court held that these facts satisfied the "minimal requirement" for precompliance review before a neutral decisionmaker.[161]

The Eighth Circuit has clarified who may assert a challenge after *Patel*. In *United States v. Sesay*, the court rejected an attempt by a motel guest to invoke *Patel*'s protections to shield his registration from a warrantless search.[162] The court reasoned that the guest's claim failed under the third-party doctrine[163] because he

152. *Id.* at 288.

153. *Id.* at 288–89 (quoting *Donovan v. Dewey*, 452 U.S. 594, 604 (1981)).

154. *Id.* at 291.

155. Certain businesses that bought and sold precious metals were exempt from licensure, e.g. jewelry stores whose monthly precious metals purchases represented less than 25% of their total inventory. *Id.* at 277–78. The broad provisions applied to businesses even if they did not require a license.

156. *Id.* at 291.

157. Gardner v. Evans, 920 F.3d 1038, 1055 (6th Cir. 2019) ("We recently noted that one such exception [to the Fourth Amendment warrant requirement] is an 'administrative search[ ] designed to assure compliance with building codes, including codes designed to prevent buildings from becoming dangerous to tenants and neighbors.'") (quoting Benjamin v. Stemple, 915 F.3d 1066, 1069 (6th Cir. 2019)).

158. 915 F.3d at 1067–68.

159. *Id.* at 1070.

160. *Id.*

161. *Id.* (quoting City of Los Angeles v. Patel, 576 U.S. 409, 420 (2015)).

162. 937 F.3d 1146, 1151–52 (8th Cir. 2019).

163. The third-party doctrine holds that a "'person has no legitimate expectation of privacy in information he [or she] voluntarily turns over to third parties' . . . 'even if the information is revealed on

had voluntarily turned over his information to the motel.[164] According to the court, *Patel* "did not hold that *motel guests* have a privacy interest in registration records; to the contrary, the decision acknowledged that 'hotel operators remain free to consent to searches of their registries.'"[165] Claims challenging warrantless inspections must still be asserted by the business owner who has a reasonable expectation of privacy in them.

D. Diverging Paths Ahead? *Hawley*, *Olson*, and *Zadeh*

Some circuits have reaffirmed holdings reached under pre-*Patel* reasoning. In *Calzone v. Olson*, the Eighth Circuit reaffirmed an earlier holding in the same matter that a Missouri statute authorizing warrantless inspections of commercial vehicles by police was constitutional.[166] The earlier case—*Calzone v. Hawley*—did not mention *Patel* despite being decided after that case came down.[167] Instead, *Hawley* focused on applying the *Burger* test. The court held that "commercial trucking" continues to be a closely regulated industry under past decisions.[168] This approach implicitly assumes that *Patel* had no impact on the *Burger* test for whether an industry is closely regulated, or at least no impact deep enough to leave a mark on the court's analysis. The cases cited for the proposition that commercial trucking is closely regulated mostly refer back to other cases without explaining their reasoning.[169] For example, *United States v. Dominguez-Prieto* concluded that commercial trucking is closely regulated because extensive federal regulations "cover driver's qualifications, motor vehicles' parts and accessories, reporting of accidents, drivers' hours of service, inspection, repair and maintenance of motor vehicles, recording of itineraries, transportation of hazardous materials, and other safety issues."[170]

The *Hawley* court also determined that Missouri's statute satisfied the three-prong *Burger* test. The court concluded that (1) the state has "a substantial interest in ensuring the safety of motorists on its highways and in minimizing damage to the highways from overweight vehicles," (2) "effective enforcement would be nearly impossible without impromptu, warrantless searches" because of the transitory nature of commercial trucking, and (3) the statute contained a permissible substitute for a warrant because it "provide[s] notice to commercial truck drivers of the possibility of roadside inspection by a designated law enforcement officer, and []

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the assumption that it will be used only for a limited purpose' . . . 'As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections.'" Carpenter v. United States, 138 S. Ct. 2206, 2216 (2018).

164. United States v. Sesay, 937 F.3d 1146, 1152 (8th Cir. 2019).

165. *Id.* (quoting *Patel*, 576 U.S. at 423).

166. Calzone v. Olson, 931 F.3d 722, 726–27 (8th Cir. 2019).

167. 866 F.3d 866 (8th Cir. 2017).

168. *Id.* at 871 (citing United States v. Ruiz, 569 F.3d 355, 356–57 (8th Cir. 2009); United States v. Mendoza-Gonzalez, 363 F.3d 788,794 (8th Cir. 2004)).

169. *See*, *e.g.*, *Mendoza-Gonzalez*, 363 F.3d 788 at 794 (concluding that "Commercial trucking is a closely regulated industry within the meaning of *Burger*" without further elaboration and citing cases).

170. United States v. Dominguez-Prieto, 923 F.2d 464, 468 (6th Cir. 1991).

limit[s] the scope of the officer's inspections to an examination solely for regulatory compliance."[171]

In *Olson*—which does cite *Patel*—the court quoted and reaffirmed its conclusions from *Hawley*.[172] The court also rejected the argument that the party challenging the statute should not be subject to warrantless inspection because, as a dump truck operator, he was exempt from "the lion's share" of federal regulations and therefore not closely regulated like other commercial truck companies.[173] It based this conclusion on the fact that Missouri regulations still apply to dump trucks and "[b]y choosing to operate a heavy truck in furtherance of a commercial venture, Calzone subjects himself to a pervasive regulatory scheme and has a reduced expectation of privacy."[174]

The Fifth Circuit confronted *Patel* in *Zadeh v. Robinson*.[175] The case involved a licensed doctor and owner of a medical practice who objected to a demand for immediate compliance with an administrative subpoena by inspectors of the Texas Medical Board.[176] The inspectors served an assistant at Dr. Zadeh's office with a subpoena and threatened "disciplinary action" against the doctor's license if the assistant did not grant them access to patient records, which she eventually did.[177] The state argued that the medical profession as a whole is closely regulated in Texas under *Burger* and, therefore, the Board was not required to offer an opportunity for precompliance review of its subpoenas.

The court rejected that argument.[178] It stated that "[t]here is no doubt that the medical profession is extensively regulated and has licensure requirements. Satisfying the *Burger* doctrine requires more."[179] The court specifically pointed to the requirements of pervasiveness and regularity of regulation as well as the duration of the regulatory scheme.[180] It noted that, outside of the licensure requirement, the regulations cited by Texas did not "apply to the entire medical profession."[181] Instead, they targeted specific practices like prescribing controlled substances or administering anesthesia.[182] The court also observed an absence of an "entrenched history of warrantless searches" of medical offices, which it explained was "relevant, though not dispositive," under *Burger*.[183]

The court then examined whether, assuming that pain management clinics specifically are closely regulated, the Texas scheme could satisfy the three-prong *Burger* test. It held that the first two *Burger* prongs were clearly satisfied but that the regulatory scheme failed to provide a constitutionally adequate substitute for a

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171. Calzone v. Hawley, 866 F.3d 866 at 871.
172. 931 F.3d at 725.
173. *Id.*
174. *Id.* at 726.
175. 928 F.3d 457, 465 (5th Cir. 2019).
176. *Id.* at 462.
177. *Id.*
178. *Id.* at 466.
179. *Id.* at 465.
180. *Id.*
181. *Id.*
182. *Id.* at 465–66.
183. *Id.* at 466.

warrant.[184] The court held that both the Board's subpoena authority and its random inspection authorization suffered from the same "fatal *Burger* flaw . . . [because] they did not limit how the clinics inspected are chosen." In a separate opinion concurring in part and dissenting in part, Judge Willett argued that *Patel* had changed the closely regulated industry test. He argued that a pre-*Patel* case finding that an industry was closely regulated should not control because "the Supreme Court has since clarified" the test in that decision.[185]

V. LESSONS AND CONTINUING QUESTIONS

Reading *Patel* together with its antecedents and its progeny yields some possible insights and open questions. At a high level, the state of the law appears to be that there is a "general administrative search doctrine"[186] that allows governments to conduct civil inspections under the authority of an administrative subpoena rather than a judicial warrant, provided there is an "opportunity to obtain precompliance review before a neutral decisionmaker."[187] Separately, there is a specialized doctrine allowing warrantless inspections of closely regulated industries if the authorizing statute meets the *Burger* three-prong test.[188] One likely, and probably intended, effect of *Patel* is that lower courts will more closely adhere to this general structure.

Patel may lead to courts applying a stricter version of the closely regulated industry test. Judges may appreciate and apply the Supreme Court's newly restated directive that the closely regulated industry test, like the three-prong *Burger* test to which it is the gateway, is something that courts "must jealously protect, lest this particular warrantless-search exception destroy the Fourth Amendment."[189] It is less clear whether *Patel* altered the *substance* of the closely regulated industry test. In *Liberty Coins*, the Sixth Circuit backed away from reading *Patel* to impose an "ultrahazardous conduct" requirement, as the First Circuit speculated in *Rivera-Corraliza* might be the case. In *Zadeh*, the Fifth Circuit concluded that satisfying the closely regulated industry test requires more than extensive regulation and licensing requirements, albeit without explicitly stating whether it believed that this was a pre-existing requirement or a change made by *Patel*. The *Liberty Coins* court seemed to believe that *Patel* raised the bar for what should be considered a closely regulated industry, while Judge Willett's separate opinion in *Zadeh* expressly states that pre-*Patel* decisions holding an industry to be closely regulated should no longer be considered controlling authority.[190] However, *Olson* and *Hawley* demonstrate that some courts might reach very different conclusions on this question.

A similar dynamic is at play in *Patel*'s impact on the three-prong *Burger* test. While some parts of the inquiry appear to have been substantively sharpened by *Patel*, the decision may be more important for its ability to impel the judiciary to apply more scrutiny to administrative inspections. There is not much evidence that

184. *Id.* at 467–68.
185. *Id.* at 475–76 (Willett, J., concurring in part and dissenting in part).
186. City of Los Angeles v. Patel, 576 U.S. 409, 424 (2015).
187. *Id.* at 420.
188. *Id.* at 424.
189. Rivera-Corraliza v. Morales, 794 F.3d 208, 217 (1st Cir. 2015).
190. *See Zadeh*, 928 F.3d at 475–76 (Willett, J., concurring in part and dissenting in part).

Patel impacted the substantial government interest prong. Indeed, the Court "assume[d that the] petitioner's interest in ensuring that hotels maintain accurate and complete registries" might satisfy this requirement.[191] A substantial government interest has been found in each of the Circuit cases that have reached this test: protecting children against exploitation, deterring theft and resale of precious metals articles, regulating the prescription of controlled substances, and ensuring the safety of motorists on highways and minimizing roadway damage from overweight vehicles.[192] On the necessity prong, *Patel* seems to have settled substantive law by establishing that an agency's desire to avoid administrative burden or prevent falsification of records are no longer sufficient justifications—standing alone—for the necessity or warrantless inspections, a holding the Sixth Circuit applied in *Liberty Coins*.[193]

The *Patel* decision initially appeared to modify the last *Burger* prong, but its ultimate impact is still not clear. One of the biggest questions after *Patel* was whether it had elevated the "certainty and regularity" portion of the constitutionally adequate substitute for a warrant prong to the point of requiring specific limits on timing and discretion in any statute authorizing warrantless inspections.[194] In *Liberty Coins*, the court found that the absence of a specific temporal limitation did not doom the statute, and instead relied on the older conception of predictability of inspections drawn from *Donovan v. Dewey*.[195] In *Zadeh*, by contrast, the Fifth Circuit held that the lack of a limitation on how inspectors chose targets was a "fatal flaw" under *Burger*.[196] The contours of *Patel*'s impact on the certainty and regularity prong of *Burger* are still coming into focus. Interested observers should be on the lookout for further development in this area.

Conversely, some courts may conclude that *Patel* had no effect at all on *Burger*, either as to the closely regulated industry test or the three-prong test. That seemed to be the conclusion of the Eighth Circuit in *Hawley* and *Olson*, which reaffirmed pre-*Patel* analyses under *Burger*. The *Hawley* and *Olson* decisions appear

191. *Patel*, 576 U.S. at 426. This could be read as a subtle misapplication of the *Burger* test. In *Burger*, the test was stated as: "there must be a 'substantial' government interest that *informs the regulatory scheme* pursuant to which the inspection is made." New York v. Burger, 482 U.S. 691, 702 (emphasis added). Applying the test, the Court found that "the State has a substantial interest in regulating the vehicle-dismantling and automobile-junkyard industry because motor vehicle theft has increased in the State and because the problem of theft is associated with this industry." *Id.* at 708. As Justice Scalia points out, Los Angeles attempted to justify the inspection requirement for hotels by observing that "they are . . . a particularly attractive site for criminal activity ranging from drug dealing and prostitution to human trafficking." *Patel*, 576 U.S. at 428–29 (Scalia, J., dissenting). The government interest in *Patel* is therefore not in the keeping of accurate and complete registries at hotels, but in preventing hotels from providing a venue for criminal activity.

192. FS III, 825 F.3d 149, 171 (3d Cir. 2016); Liberty Coins, LLC v. Goodman, 880 F.3d 274, 285 (6th Cir. 2018); *Zadeh*, 928 F.3d at 467; Calzone v. Hawley, 866 F.3d 866, 871 (8th Cir. 2017) (citation omitted).

193. *Liberty Coins*, 880 F.3d at 285.

194. "While the Court has upheld inspection schemes of closely regulated industries that called for at least four times a year, or on a 'regular basis,' [the Los Angeles ordinance] imposes no comparable standard." *Patel*, 576 U.S. at 427–28 (citing Donovan v. Dewey, 452 U.S. 594, 604 (1981); *Burger*, 482 U.S. at 711).

195. 880 F.3d at 288–89.

196. 928 F.3d at 468.

to be in substantial tension with *Zadeh*. The *Olson* court concluded that dump trucks are closely regulated as "commercial vehicles," despite the fact that they are specifically exempted from the extensive federal regulatory scheme for those vehicles.[197] The *Zadeh* court took arguably the opposite approach, concluding that the medical profession as a whole is not closely regulated despite an "extensive regulatory scheme," but that specific parts of it might be.[198] *Hawley* concluded that a statute providing for random stops and inspections of commercial vehicles on state highways was an adequate substitute for a warrant because it "provide[s] notice to commercial truck drivers of the possibility of roadside inspection by a designated law enforcement officer, and [] limit[s] the scope of the officer's inspections to an examination solely for regulatory compliance."[199] But *Zadeh* held that it was a "fatal flaw" under *Burger* that the authorizing statutes did not limit how the targets of inspection are chosen.[200] It is hard to square a blessing of purely random inspections under *Burger* with a holding that a constitutionally adequate substitute for a warrant must limit how officials choose targets. Whatever tension exists between these approaches has not yet warranted Supreme Court attention—parties in both cases petitioned for and were denied certiorari.[201]

Ultimately, *Patel* does not seem to have significantly altered the framework questions administrative agencies and legislatures must ask themselves when designing or reassessing an inspection regime: is there a precompliance review mechanism in place and, if not, is this industry closely regulated? If it is, what substantial government interest is being furthered, what is the justification for needing warrantless inspections, and what safeguards are in place to constrain the discretion of inspectors? The cases reviewed suggest that courts may scrutinize these questions more closely than they did in the pre-*Patel* era. Courts have confirmed that classic health and safety inspections that provide a meaningful opportunity for precompliance review before a neutral decisionmaker—like those examined in *Stemple*—continue to be permissible after *Patel*. Other inspection practices should be designed with a close eye on the Court's recent teachings on both the general administrative search doctrine and both *Burger* tests.

VI. CONCLUSION

Patel sent up alarms in many quarters because it invalidated a statute that city officials had applied and relied upon for decades. Closer analysis of the decision—and its progeny in the lower courts—suggests that the decision was more of a restatement and reinforcement of the law than a reinvention. Los Angeles's mistake was not designing an unconstitutional regime, but taking for granted that the one it had on the books was constitutional. With *Patel*, the Court handed down both

197. Calzone v. Olson, 931 F.3d 722, 726 (8th Cir. 2019).

198. 928 F.3d at 465–66.

199. Calzone v. Hawley, 866 F.3d 866, 871 (8th Cir. 2017).

200. 928 F.3d at 468.

201. Calzone v. Olson, 140 S. Ct. 955 (2020) (mem.) (denying certiorari); Zadeh v. Robinson, 141 S. Ct. 110 (mem.) (denying certiorari). The justices made no statements respecting the reasons for denial and, of course, "such a denial carries with it no implication whatever regarding the Court's views on the merits of a case." Maryland v. Balt. Radio Show, 338 U.S. 912, 919 (1950).

a toolbox for assessing administrative inspection regimes and an admonition that these programs should be carefully reviewed.

Legislatures and administrative agencies should take note of the direction of Supreme Court jurisprudence on administrative searches and act proactively. Responding effectively will require these actors to both assess proposed inspection tools more closely and reexamine the basis for older programs that may not withstand renewed scrutiny. The cases reviewed above demonstrate that a system of inspections is not insulated from constitutional scrutiny by the "long history of its exercise."[202] After all, longevity was not enough to sustain the hotel inspection regime in *Patel*.

Significant questions remain open after *Patel*. In cases like *Olson* and *Zadeh*, circuit courts have sent mixed messages about whether *Patel* impacts either the threshold or substantive tests of the *Burger* exception. Given that the Court has declined to review these cases, entities involved in policing closely regulated industries will have to pay close attention to how the law develops in their jurisdiction.

Perhaps the enduring legacy of *Patel* will be that it inched up the bar for what is "reasonable" under the Fourth Amendment when it comes to administrative inspections. After all, and as Justice Scalia pointed out in his dissent, all the doctrinal complexity emanating from the *Colonnade-Biswell* line of cases is ultimately a judicial elaboration of the Fourth Amendment's requirement that a search be "reasonable."

202. Frank v. Maryland, 359 U.S. 360, 371 (1959), *overruled in part by* Camara v. Mun. Ct. of S.F., 387 U.S. 523 (1967).