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Administrative Law Update

Access to precious metals dealers' business records as mandated by Summit County Municipal Ordinances and Fourth Amendment searches and seizures

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ACCESSS TO PRECIOUS METALS DEALERS' BUSINESS RECORDS AS MANDATED BY SUMMIT COUNTY MUNICIPAL ORDINANCES AND FOURTH AMENDMENT SEARCHES AND SEIZURES

BY

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AMENDMENT IV
1791

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THINGS TO BE SEIZED.

Professor Leonard W. Levy, Mellon Professor Emeritus, Claremont Graduate School and American historian wrote in his 1999 Origins of the Bill of Rights:

> "The [Fourth] amendment constituted a swift liberalization of the law of search and seizure. Its language was the broadest known at the time." (Pg. 178)

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Camara v. Municipal Court of the City and County of San Francisco

In 1967 the United States Supreme Court decided companion cases that, in Court's words, "reexamined whether administrative inspection programs, as presently authorized and conducted, violate Fourth Amendment rights as those rights are enforced against the States through the Fourteenth Amendment." *Camara v. Municipal Court of the City and County of San Francisco,* 387 U.S. 523, 525 (1967).

The appellant in *Camara had been* criminally charged with "violating the San Francisco Housing Code by refusing to permit a warrantless inspection of his residence." *Camara* @ 526*.* He was contesting the constitutionality of the ordinance that authorized those inspections. The following are the facts that triggered the *Camara* litigation.

> "On November 6, 1963, an inspector of the Division of Housing of the San Francisco department of public health entered an apartment building to make a routine annual inspection for possible violations of the city's housing code. The building's manager informed the inspector that appellant, lessee of the ground floor, was using the rear of his leasehold as a personal residence. Claiming that the building's occupancy permit did not allow residential use of the ground floor, the inspector confronted appellant and demanded that he permit an inspection of the premises. Appellant refused to allow the inspection because the inspector lacked a search warrant. The inspector returned on November 8, again without a warrant, and appellant again refused to allow an inspection. A citation was then mailed ordering appellant to appear at the district attorney's office. When appellant failed to appear, two inspectors returned to his apartment on November 22. They informed appellant that he was required by law to permit an inspection under section 503 of the housing code:
>
> > "SEC. 503 RIGHT TO ENTER BUILDING. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building,

structure, or premises in the City to perform any duty imposed upon them by the Municipal Code." *Camara* @ 526.

The appellant refused to allow the city's inspectors access to his apartment without a search warrant. He was subsequently charged with refusing to permit a lawful inspection in violation of housing code. He was arrested and released on bail, and then filed a petition for a writ of prohibition to prevent his criminal prosecution by the City. He argued throughout the litigation that section 503 violated the Fourth and Fourteenth Amendments because Section 503 authorized municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code existed.

The Court observed that "]t]hough there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition of 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court. Nevertheless, one governing principle, justified by history and current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it is authorized by a valid search warrant." *Camara* @ 528 . . . "The right of officers to thrust themselves into a home is also a grave concern not only to the individual, but to a society, which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Camara* @ 528-529.

The *Camera* Court described the municipal ordinance at issue as an example of legislation that permitted "administrative health and safety inspections without a warrant, and noted, "as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence." *Camara* @ 530-531.

The *Camera* Court held "that administrative searches of the kind at issue here are significant intrusions upon the interest 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." *Camera* @ 534.

> "In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the government interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen. For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify **a sweeping search of an entire city conducted in the hope that these goods might be found.** Consequently, a search for these goods, even with a warrant, is 'reasonable' only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling." *Camera* @ 534-535. (Emphasis added.)

The *Camera* Court decided that local government building and fire codes which authorized area-wide inspections for the purposes of public health and safety

> "are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy. … Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." *Camera* @ 538.

The Court then stated that "in the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day. Moreover, most citizens allow inspections of their property without a warrant. Thus, as a practical matter, and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry. …. In this case, appellant has been charged with a crime for his refusal to permit housing inspectors to enter his household without a warrant."

The *Camara* Court then held that the appellant had a constitutional right to insist that the inspectors obtain a warrant to search and thus could not be convicted for refusing to consent to the inspection.

The *Camara* decision addressed the rights of an individual when government attempts an "administrative" search of that individual's home. That decision did not, however, decide whether the Fourth Amendment's protections extend to businesses, nor did *Camara* specify the process due for the issuance of a search warrant.

The companion decision with *Camara, See v. City of Seattle,* 387 U.S. 541 (1967) did address whether the Fourth Amendment extends those protections to commercial property.

The appellant in *See* had refused "to permit a representative of the City of Seattle fire department to enter and inspect his commercial warehouse without a warrant and without probable cause to believe that a violation of any municipal ordinance existed therein. The inspection was conducted as part of a routine, periodic city-wide canvas to obtain compliance with Seattle's fire code. . . . After he refused the inspector access, appellant was arrested and charged with violating" that code. *See* @ 541.

Seattle's fire code provided, in pertinent part, that:

> "It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and any other ordinance concerning fire hazards." *See* @ 541.

The appellant argued that this municipal ordinance authorized a warrantless inspection of his warehouse in violation of his rights under the Fourth and Fourteenth Amendments.

The Court noted that *Camara* had dealt with a municipal ordinance that authorized a warrantless inspection of a personal residence and stated that "[t]he only question which this case presents is whether *Camara* applies to similar inspections of commercial structures which are not used as private residences." *See* @ 542. The Court then stated that "[a]s we explained in *Camara*, a search of

private houses is presumptively unreasonable if conducted without a warrant." *See* @ 543.

The Court held that a "businessman, too, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant. " *See* @ 543.

The Court recognized that"[o]fficial entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws; thus, entry may permit inspection of the structure in which a business is located, as in this case, or inspection of business products, or **a perusal of financial books and records**. This Court has not had occasion to consider the Fourth Amendment relation to this broad range of investigations. However, we have dealt with the Fourth Amendment issues raised by another common investigative technique, the administrative subpoena of corporate books and records. We find strong support in the subpoena cases for our conclusion that warrants are necessary and a tolerable limitation on the right to enter upon and inspect commercial premises. It is now settled that when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific and directive so that compliance will not be unreasonably burdensome. The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents and a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *See* @ 545.

"We therefore conclude 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." *See* @ 545.

The Court added the caveat, however, that it was not questioning "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product" *See* @ 546.

The Court held that "the basic component of a reasonable search under the Fourth Amendment – – that it not be enforced without a suitable warrant procedure – – is applicable in this context, as in others, to business as well as to residential premises." *See* @ 546.

Thus, the Court in *See* answered affirmatively the question whether the Fourth Amendment's protections apply to commercial property and businesses.

City of Los Angeles v. Patel

In 2015 the United States Supreme Court decided a case involving the requirement in a City of Los Angeles ordinance that hotel operators must record and keep specific information about their guests. *City of Los Angeles v. Patel, et al,* 135 S. Ct. 2446 (2015).

The Court found that this ordinance compelled " '[e]very operator of a hotel to keep a record' containing specified information concerning guests and to make this record 'available to any officer of the Los Angeles police department for inspection on demand." The ordinance also provided that a hotel operator's failure to make records available was a criminal misdemeanor. *Patel* @ 2447.

Precompliance Review

The L.A ordinance thus required these business owners to maintain business records and authorized police officers to conduct warrantless searches of those business records. The Court held in *Patel* that the ordinance that authorized this warrantless search was facially unconstitutional because it failed to afford the business owner an opportunity for a "precompliance review" prior to performing that warrantless search.

The Respondents, a group of motel operators and a lodging association, challenged to this ordinance as facially unconstitutional.

The Court stated that "[t]he questions presented were whether facial challenges to statutes can be brought under the Fourth Amendment and, if so, whether this provision of the Los Angeles Municipal Code is facially invalid. We hold facial challenges can be brought under the Fourth Amendment. We further hold that the provision of the Los Angeles Municipal Code that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them an opportunity for precompliance review." *Patel* @ 2447.

The Los Angeles Municipal Code required hotel operator's to record detailed information about the hotel's guests, including "the guest's name and address; the number of people in each guest's party; the make, model, and license plate number of any guest's vehicle parked on hotel property, the guest's date and time of arrival and scheduled departure date, the room number assigned to the guest; the rate charged and amount collected for the room; and the method of payment." *Patel* @ 2447-2448. The City of Los Angeles stipulated during the litigation that the respondents had been subjected to mandatory record inspections under this ordinance without consent or a warrant.

This city ordinance further required hotel operators to make all this information available for inspection by any officer of the Los Angeles police department. A hotel operator who failed to make the guest records available for police inspection could be charged with a misdemeanor punishable by up to six months in jail and a $1000 fine.

The United States Supreme Court affirmed the Court of Appeals' *en banc* decision that "a police officer's nonconsensual inspection of hotel records under [this city ordinance was a] Fourth Amendment 'search' because '[t]he business records covered by [this ordinance] are the hotel's private property' and the hotel therefore 'has the right to exclude others from prying into the[ir] contents.' " *Patel* @ 2448**.** The Court also affirmed the Court of Appeals' holding "that this ordinance [was] facially unconstitutional 'as it authorizes inspections of hotel records without affording an opportunity to 'obtain judicial review of the unreasonableness of the demand prior to suffering penalties for refusing to comply.' " *Patel* @ 2448**.**

The United States Supreme Court held that this L.A. ordinance was "facially unconstitutional because it [failed] to provide hotel operators with an opportunity for **precompliance review**." *Patel* @ 2451. (Emphasis added.)

Citing *Camara,* the Court stated that "[this] court has referred to this kind of search as an 'administrative searc[h].' . . . Thus, we consider whether [this ordinance falls within the administrative search exception **to the warrant requirement**." *Patel* @ 2452**.** (Emphasis added.)

In other words, what administrative process is sufficient in order for a warrantless administrative search to be excepted from the warrant requirement of the Fourth Amendment?

The *Patel* Court noted that *"*[t]he Court has held that absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decision maker." *Patel* @ 2452**.** (Citing *See* @ 545)

The Court then referenced its decision in *Camera* @ 545 and the Court's 1984 decision *Donavan v. Lone Steer, Inc., 104* S.Ct. 769, and observed "(that an administrative search may proceed with only a subpoena where the subpoenaed party is sufficiently protected by the opportunity to 'question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court.') " *Patel* @ 2452. (Original in parens). The Court referred to this procedure as the "minimal requirement." *Patel* @ 2452.

The 1984 *Lone Steer* decision, cited in *Patel,* addressed the provision of the Federal Fair Labor Standards Act of 1938 that authorized the Secretary of Labor to gather data regarding wages, hours and other conditions of employment to determine whether an employer was violating that Act. The Act also authorized the Secretary of Labor to "subpoena witnesses and documentary evidence relating to any matter under investigation." *Lone Steer,* 104 S.Ct. 769, 770.

A Department of Labor official had entered Lone Steer's motel and restaurant to serve an administrative subpoena *duces tecum* on Lone Steer's employee. That subpoena directed the employee to appear and produce certain

payroll and sales records. Lone Steer refused to comply with the subpoena, arguing that the subpoena constituted an unlawful search and seizure in violation of the Fourth Amendment. The Supreme Court held that the subpoena *duces tecum* did not violate the Fourth Amendment because Lone Steer had the right to question the reasonableness of the subpoena in federal district court before suffering any penalties for refusing to comply with the subpoena. *Lone Steer*, 104 S.Ct. 769, 770.

After noting that "the Court has never attempted to prescribe the exact form an opportunity for precompliance review must take," the *Patel* Court held that the L.A. ordinance was facially invalid because the L.A. had "not even attempt[ed] to argue that [the ordinance] affords hotel operators any opportunity whatsoever." *Patel* @ 2452**.**

Except for this reference to precompliance review by a federal district court, the Court's decision in *Patel* did not define the process for precompliance review process that can provide an alternative to the opportunity for review by federal district court.

The Court did state that "we hold only that a hotel owner must be afforded an *opportunity* to have a neutral decision-maker review an officer's demand to search the registry before he or she faces penalties for failing to comply." *Patel* @ 2452. (Emphasis in original.)

The Court observed that this L.A. ordinance subjected a hotel owner who refused to give an officer access to these hotel records to "be[ing] arrested on the spot." The Court then stated that "business owners cannot reasonably be put in this kind of choice." *Patel* @ 2452. (Citing *Camara* @ 553.)

> "Absent an opportunity for precompliance review, the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests." *Patel* @ 2452-2453**.**

The Court did describe the typical process for issuing an "administrative subpoena."

> "These subpoenas, which are typically a simple form, can be issued by the individual seeking the record – – here, officers in the field – – without probable cause that a regulation is being infringed. . . . ('[T]he demand to inspect may be issued by the agency'). Issuing a subpoena will usually be the full extent of an officer's burden because the great majority of businessmen can be expected in normal course to consent to inspection without warrant.' " *Patel* @ 2453**.**

The Court in *Patel* held that warrantless searches are permissible under some circumstances. Citing with approval *Arizona v. Gant*, the Court stated that "searches conducted outside the judicial process, without approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." 556 U.S. 332, 338 (2009). "Search regimes where no warrant is ever required may be reasonable where 'special needs . . . make the warrant and probable-cause requirement impracticable.' " *Patel* @ 2452**.** The Court noted that it had assumed in this case that the searches authorized by the ordinance served a special need other than conducting criminal investigations. That special need was to 'ensure compliance with the record-keeping requirement, which in turn [deterred] criminals from operating on the hotels' premises." *Patel* @ 2452**.**

Closely Regulated Business Exception

The *Patel* Court's decision concluded by addressing the basis for the dissent of Justice Scalia that a "more relaxed standard that applies to searches" of "closely regulated" businesses when reviewing an ordinance for facial unconstitutionality. The *Patel* Court stated that, during the past 45 years, "the Court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise.' " *Patel* at 2454. Those four "closely regulated" industries are liquor sales, firearms dealing, mining, and running an automobile junkyard. *Patel* at 2454. The Court added that " ' [t]he clear import of our cases is that the closely regulated industry . . . Is the exception.' " *Patel* at 2454.

The Court then stated that "even were we to find that hotels are pervasively regulated, [this ordinance] would need to satisfy three additional criteria to be reasonable under the Fourth Amendment." *Patel* @ 2456. That is, a statute that

authorizes warrantless searches of a closely regulated industry, without opportunity for precompliance review, must meet three criteria in order to satisfy the requirements of the Fourth Amendment:

> 1. There must be a substantial government interest that forms the regulatory scheme pursuant to which the inspection is made;
>
> 2. The warrantless inspections must be necessary to further the regulatory scheme; and
>
> 3. The statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *Patel* at 2454. Citing *New York V. Burger*, 482 U. S. 691 (1987).

The Federal Sixth Circuit Court of Appeals has recently applied the *Patel* test to Ohio statutes that regulate precious metals dealers, the Precious Metals Dealers Act ("PMDA").

LIBERTY COINS, LLC V. GOODMAN

Whether the PMDA authorization of warrantless searches is facially unconstitutional was addressed recently by the Federal Sixth Circuit Court of Appeals in *Liberty Coins, LLC v. Goodman*, 880 F.3d 274 (6th Cir. 2018). The Court stated that the "four sections of the PMDA [Ohio's Precious Metals Dealers Act] that authorize warrantless searches form the heart of this appeal."

This litigation resulted from events that occurred in late 2012. On October 1, 2012, Ohio's Consumer Finance Attorney for the Ohio Department of Commerce's Division of Financial Institutions sent a letter to Liberty Coins, LLC, "charging that Liberty Coins had held itself out to the public as willing to purchase precious metals" without first obtaining an Ohio precious metals dealer's ("PMDA") license. Liberty Coins, LLC sought an injunction in Federal District Court, Southern District of Ohio, to enjoin the State from enforcing the PMDA, arguing that the PMDA facially violated Liberty's First Amendment right to free speech. *Liberty Coins v. Goodman*, Case No. 2:12-cv-998, Fed. Dist. Ct. S. Dist. OH, @3-4.

The District Court granted the preliminary injunction and the State appealed to the Federal Sixth Circuit Court of Appeals. The Sixth Circuit reversed the District Court's order and remanded to the District Court. *Liberty Coins, LLC v. Goodman,* 748 F.3d 382 (6th Cir. 2014). Upon remand, Liberty Coins amended its complaint and sought declaratory judgment that the PMDA violated additional provisions of the United States Constitution, including the Fourth Amendment. *Liberty Coins v. Goodman*, Case No. 2:12-cv-998, Fed. Dist. Ct. S. Dist. OH, @6-7. The District Court's ruling on that Fourth Amendment claim resulted in the Sixth Circuit's 2018 decision discussed below.

On this second appeal by Liberty Coins, the Sixth Circuit considered whether provisions of Ohio's PMDA and a related section of the Ohio Administrative Code (R. C. 4728.05(A), R.C. 4728.06, R.C. 4728. 07 and O. A. C. Sec.1301:8–6–03(D)) facially violated the Fourth Amendment. Provisions of these sections of the Revised Code and the Ohio Administrative Code authorized Ohio administrative agents and local law enforcement officials to conduct warrantless searches of certain businesses records by authorizing those individuals to inspect, without warrant, certain records, items, and information that those businesses were required to maintain as a condition of their licensure as precious metals dealers. *Liberty Coins* @ 277.

The Sixth Circuit Court of Appeals held that the warrantless searches authorized by R. C. Section 4728.05 (A) and O.A.C. Section 1301:8–6–03(D) were facially unconstitutional. The Court stated that "[T]hese search provisions are not necessary to furthering the State's interest in recovering stolen jewelry and coins nor do they serve as adequate warrant substitutes because they are overly broad in scope." *Liberty Coins* @ 277.

Section 4728.05 (A):

> "The superintendent of financial institutions may, either personally or by a person whom the superintendent appoints for that purpose, if the superintendent 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 relates to the business coming within this chapter." (Emphasis in original.)

O. A. C. Section 1301:8-6–03(D):

"**Inspection of books and records: All books, forms, 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." (Emphasis in original.)

In determining the Appellants' challenge to the constitutionality of this R.C. section and O. A.C. section, the Court first provided an overview of the PMDA and summarized provisions of that Act. The Court noted that the PMDA requires every precious metals dealer to apply for and obtain a license, imposes record-keeping requirements on those licensees, and authorizes state agents and local police to conduct warrantless searches of the records and businesses of these dealers. The Court found that R.C. 4728.05(A) also grants authority for state agents to investigate the business of both licensees and non-licensees who deal in precious metals, grants them additional authority to conduct warrantless searches when looking for such information, and power to compel, issue subpoenas, and apply to a court for an order, injunction or TRO. The Court also stated that O. A. C. Section 1301:8–6–03(D) "contemplates that the state shall have the authority to inspect 'at all times' the 'books, forms, and records, and all other sources of information with regard to the business of the licensee' in order to ensure 'that the business of the licensee is being transacted in accordance with the law.' " *Liberty Coins* @ 278. Citing R. C. Sec. 4728.05(B)(5).

The Court noted that the PMDA requires precious metal dealers to maintain records that "include a detailed description of all precious metals purchased as well as identifying information about the seller," information which "must be kept at the licensed location 'open to the inspection of the superintendent or chief of or head of the local police department…' ." *Liberty Coins* @ 278. (Citing R. C. 4728.06.)

The Court began its analysis with statement that a "search is generally unreasonable if it is not conducted pursuant to a warrant issued upon probable cause" and . . . applies to commercial premises as well as homes. (Citing *Camara* @ 387 U.S. 423, 528–529; and *New York v. Burger,* 482 U.S. 691, 699 (1987). *Liberty Coins* @ 280.

The Court next concluded that there are "exceptions to this warrant requirement. When a search is conducted for a 'special need' other than to investigate criminal wrongdoing, the probable-cause standard is modified. For example, when a search is conducted pursuant to an administrative regime, the government need only make a lesser showing that a search is in accord with 'reasonable legislative or administrative standards.' . . . For an administrative-search scheme to be constitutional, it generally must offer the subject of the search and opportunity to seek precompliance review of the request by a neutral decisionmaker prior to the imposition of criminal charges." *Liberty Coins* @ 280. (internal citations omitted).

Citing the "closely regulated" business exception as set forth by the United States Supreme Court in *Patel*, the Sixth Circuit Court of Appeals Court then stated that this "tempered reasonableness standard governing administrative searches is relaxed even further for searches of businesses in closely regulated industries. . . . No warrant or opportunity for precompliance review may be required at all for searches conducted of businesses in these industries since they are already subject to extensive government oversight and accordingly possess reduced privacy interests." *Liberty Coins* @ 280-281.

Thus, a statute that authorizes a warrantless search without opportunity for a precompliance review, is not facially unconstitutional if the target of that warrantless search is a closely regulated business, provided the statutes which

authorizes the warrantless search satisfies the "three criteria, as delineated by the Supreme Court in *New York v. Burger*." *Liberty Coins* @ 280. Citing *Burger,* 482 U.S. @ 702-703.

1. There must be substantial government interest that informs the regulatory scheme pursuant to which the inspection is made.

2. The warrantless inspections must be necessary to further the regulatory scheme.

3. The statute's inspection scheme, in terms of certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *Liberty Coins* @ 281.

The Sixth Circuit Court of Appeals stated that the "warrantless searches in question are authorized by the PMDA for the purpose of ensuring compliance with the Act, which the State believes will allow it to retrieve stolen jewelry and coins and both deter criminals from selling these items to licensed dealers and prevent their resale back into the marketplace. Given this 'special need,' the question is whether the PMDA's warrantless search provisions are constitutional under the administrative search doctrine. Answering this ultimate question involves answering two sub-questions: (1) does the PMDA give dealers the chance to seek precompliance review . . . to challenge a warrantless search request prior to being criminally sanctioned?; and (2) if not, is precious metals dealing a closely regulated industry, and, if so, is [the closely regulated industry] three-part test satisfied." *Liberty Coins* @ 281.

The Court first found that the PMDA does not give dealers the chance to seek precompliance review. The Court determined that the opportunity to seek precompliance review is required for a warrantless search because the PMDA, like the ordinance in *Patel*, "allows the possibility of criminal penalties." *Liberty Coins* @ 282.

The Court next examined the precious metals dealers' industry to determine whether this industry is a "closely regulated" industry, stating that "the searches the PMDA calls for must meet [the *Burger*] three-part test" in order to constitute a closely regulated industry. *Liberty Coins* @ 282. The Court then stated that, "[i]n

determining whether an industry is closely regulated, we must consider (1) the pervasiveness and regularity of regulations governing an industry; (2) the duration of a particular regulatory scheme; and (3) whether other states have imposed similarly extensive regulatory requirements." *Liberty Coins* @ 278. Citing *Burger*, 482 U. S. @ 701, 705.

The Court concluded that the precious metal dealers industry is a closely regulated industry, and thus satisfies the "closely regulated industry" exception to the requirement that a statute that authorizes a warrantless search must provide an opportunity for precompliance review in order to survive a facial constitutional challenge under the Fourth Amendment.

In reaching that conclusion, the Sixth Circuit Court of Appeals noted that it has identified two industries that are closely regulated: pharmacies and sand and gravel industries. It noted that the Federal Fourth Circuit Court of Appeals and the Michigan Court of Appeals have found that precious metals dealing is also a closely regulated industry. After comparing the precious metals dealers industry with the automobile junkyard industry that was the subject of the *Burger* Court's analysis, the Sixth Circuit Court of Appeals concluded that the precious metals dealers industry is a closely regulated industry because regulations governing precious metals dealers "are nearly identical to those the Supreme Court deemed extensive in *Burge*r," including the requirement to be licensed, the requirement to maintain and record information on each car and part bought and sold, to make those records available for inspection by police and other government agents, to display the registration numbers at their businesses, and are subject to civil and criminal penalties and loss of licensure for failing to comply with the state regulatory statutes. The Court also noted that precious metal dealers and automobile junkyards have a long history of government regulation by the State of Ohio.

Having determined that: (1) the PMDA authorizes warrantless searches, (2) without an opportunity for precompliance review, and (3) precious metal dealers are a closely regulated industry, the Court then turned its attention to the specific provisions of the Ohio Revised Code and Ohio Administrative Code that were at issue in Liberty Coins to determine if those provisions of Ohio law satisfied "*Burger's* 3-part test governing warrantless searches of closely regulated industries." *Liberty Coins* @ 284.

1. There must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made.

   The Sixth Circuit Court of Appeals stated that this criterion was met because both parties had conceded that Ohio has a substantial interest in regulating precious metals dealers.

2. The warrantless inspections are necessary to further the regulatory scheme.

   The Court began analysis under this criterion with the observation that "warrantless searches are necessary if a warrant requirement could significantly frustrate effective enforcement of the act." The Court found that "[t]his may be the case when the objects of a search lend themselves to easy concealment or alteration, making unannounced, even frequent, inspections essential" or "if the search objects are likely to change hands quickly or if unannounced inspections will otherwise constrain the market in elicit goods."

3. The statute's inspection program, in terms of certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant.

   The Court stated that this criterion "means a statute must do two things. It must be sufficiently comprehensive so that businesses are on notice that they will be subject to periodic searches of a properly defined scope. . . . Additionally, it must constrain the discretion of an inspecting officer by being carefully limited in time, place, and scope. . . . Searches that are so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials will not be permitted." *Liberty Coins* @ 286. (Internal citations omitted).

The Sixth Circuit Court of Appeals noted that the United States Supreme Court found in *Patel* that the City of Los Angeles' ordinance was deficient with respect to this third requirement because that ordinance required hotel guest records to be "made available whenever possible, with the only caveat that

'whenever possible, inspection shall be conducted at a time and in a manner that minimizes interference with the operation of the business.' "*Liberty Coins* @ 288.

The Sixth Circuit Court of Appeals then examined the warrantless searches authorized by R. C. 4728.06 and R. C. 4728.07, and concluded that the warrantless searches contemplated by those two sections satisfied the latter two criteria cited above and held that neither statute is facially unconstitutional under the Fourth Amendment.

The Court noted that R.C. 4728.07 "requires licensees to detail, on police-approved forms, a description of all precious metals purchased, and to make these forms available to the police each business day. That section, being challenged in its entirety, is reproduced below:

> '**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.' "** *Liberty Coins* @ 286. (Emphasis in original.)

The Court held that "the police access to this information without having to obtain a warrant furthers the state's interest in tracking down stolen items containing precious metals and returning them to their owners." *Liberty Coins* @ 288.

The Court next examined R. C. 4728.07, observing that it works in tandem with R. C. 4728.06.

> "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 shall also 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. 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.**" *Liberty Coins* @ 287. (Emphasis in original.)

The Court then stated "[l]ike in *Burger,* warrantless searches of the articles themselves, as provided for in section 4728.06, are necessary given the fluid and transitory nature of articles made of precious metals." *Liberty Coins* @ 287.

The Court went on to note that "it is rational for the state to believe that warrantless searches of a licensee's purchasing records are necessary to (1) deter thieves from stealing precious metals in the first place because their chances of cashing out without suspicion would be diminished; and (2) prompt dealers themselves to be more vigilant in the purchases that they make. And these interests are sufficiently weighty to pass Fourth Amendment scrutiny." *Liberty Coins* @ 287.

The Court concluded with the observation that "the state's professed needs in this case are distinguishable from the one the Supreme Court deemed inadequate in *Patel*. There, Los Angeles claimed that warrantless searches of hotel registries were necessary to prevent operators from falsifying their records. The Court explained that the city could prevent this risk without resorting to warrantless searches by, for example, obtaining an *ex parte* warrant or by guarding the registry while an administrative warrant is challenged. Here, in contrast, the state's underlying needs as to R.C. sections 4728.06 and 4728.07 relate not to ensuring the correctness of records, but to deterring both sellers and purchasers alike from engaging in suspect transactions involving precious metals. We conclude that these provisions are more akin to those in *Burger* and its progeny in this respect and therefore satisfy the necessity requirement." *Liberty Coins* @ 288.

The Court held that "R. C. 4728.06 and R. C. 4728.07 serve as constitutionally adequate warrant substitutes. First, they apply only to licensed precious metals dealers who have chosen to enter this closely regulated industry. Second, they carefully limit the scope of the warrantless searches to only a narrow subset of

information-purchasing records and the precious metals themselves. The statutes upheld in *Burger* and *Biswell* were analogous in this respect: *Burger*, (permitting warrantless searches of the records and car parts of automobile junkyards) [and] *Biswell* (same as to the records and inventory of gun dealers). This delineated scope notifies inspectors of the parameters of the permitted search, and ensures that '[t[he dealer is not left to wonder about the purposes of the inspector or the limits of his task.' Third, R. C. 4728.07 specifies that licensees may be required to provide a description of all precious metals purchased each business day. **Fourth, R. C. 4728.06 ensures that searches provided for in that provision will take place only 'at the licensed location.' "** *Liberty Coins* @ 288. (internal citations omitted). (Emphasis added.)

The Court added that "[f]urthermore, we do not think that the absence of a specific temporal limitation on searches in R. C. 4728.06 is fatal to that subsection's constitutionality. While expressed limits on the number of searches are 'a factor in an analysis of the adequacy of a particular statute,' their absence is not determinative 'so long as the statute, as a whole, places adequate limits upon the discretion of the inspecting officers.' In both *Dewey* and *Biswell*, the Supreme Court upheld statutes that, like here, neither expressly fixed the number of inspections within a particular time, nor were expressly cabined to business hours." *Liberty Coins* @ 289. (internal citations omitted).

The Court's final statement is particularly noteworthy because of what the Court did not state. That is, the definition of "unreasonable times." Following is that statement:

> "In the absence of evidence that the state or the police are conducting searches of licensees' records and inventory under R. C. 4728.06 in an unreasonable manner, we cannot say that this subsection is unconstitutional simply because it fails to use the magic words that searches may be conducted, for example, only at 'reasonable times, or on 'a regular basis.' To the contrary, the narrow scope of the searches, the temporal language in R. C. 4728.07, and **the limitation on the place where searches may take place**, coupled with the PMDA's other detailed requirements, on balance offset the warrantless intrusions provided for by R. C. Sections 4728.06 and 4728.07." *Liberty Coins* @ 290. (internal citations omitted). (Emphasis added.)

The Court's was apparently contemplating the following language when the Court referred to the "temporal language in R. C. 4728.07" - "shall, every business day, make available to the chief or the head of the local police department."

The Court next addressed R. C. 4728.05(A) and O. A. C. 1301:8–6–03(D) and concluded that both provisions are "unnecessary to further Ohio's stated interest and [are] too broad in scope to withstand facial Fourth Amendment scrutiny."

1. Warrantless inspections are necessary to further the regulatory scheme.

   The Court found that the following provisions of R. C. 4728.05(A) and O.A.C. 1301:8–6–03(D) each provide "the state with ability to investigate the entire businesses of both licensees and non--licensees alike."

   a. R. C. 4728.05 (A): "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."

   b. O. A. C. 1301:8–6–03(D): "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."

The court held that the warrantless searches authorized by these provisions "aren't necessary, they are therefore facially unconstitutional under the Fourth Amendment." *Liberty Coins* @ 290.

2. Constitutionally adequate substitute.

   The Court next determined that these two provisions also "fail the certainty and regulatory part of the" constitutionally adequate substitute criterion. The Court stated that both provisions were "too broad in scope" because they applied to "both licensees and non-licensees." "Additionally, both provisions effectively allow searches of dealers' entire businesses . . , [and] do not provide any standards to guide inspectors in

the exercise of their authority to search." "This is particularly concerning because some dealers . . . may only buy and sell precious metals as a subset of their overall business. The provisions' seemingly unlimited scope, along with the grant of free access to such information at all times, does not sufficiently constrain the discretion of the inspectors." *Liberty Coins* @ 290-291. (Internal citations omitted). For these additional reasons the Court held R. C. 4728.05 (A) and O.A.C. 1301:8–6–03(D) are facially unconstitutional under the Fourth Amendment.

LeadsOnLine

The long history of regulating purchase of precious metals dealers that the Sixth Circuit Court of Appeals referenced in Liberty Coins was not limited to regulation by state statute. Municipalities participated in that long history of regulating businesses that dealt in the purchase of precious metals through licensure and inspections. Those municipal ordinances sometimes referred to those businesses as "secondhand dealers."

As the Liberty Coins litigation was winding its way through the Federal Southern District Court and the Sixth Circuit Court of Appeals, an interesting development was occurring in Ohio municipalities' regulation of secondhand dealers and their purchase of precious metals. For many years Ohio cities had regulated "secondhand dealers" by requiring that those businesses be licensed, adhere to record-keeping requirements and be subject to warrantless searches by city agents and local police, but were beginning to revise the provisions of those early ordinances that authorized warrantless record searches.

Like Ohio's PMDA, these city ordinances require secondhand dealers to first obtain a license before engaging in that business within the municipality. Those licensees are then required to maintain records pertaining to their purchase of jewelry and other articles containing gold, silver, precious metals or jewels.

An example of one early local government ordinance provided as follows:

"747.01. SECONDHAND JEWELRY DEALERS; LICENSE REQUIRED.
No person, unless first licensed as provided in this chapter, shall engage in the following business.

(a) Purchasing, selling or exchanging secondhand precious stones, or any secondhand manufactured article composed wholly, or in part, of gold, silver, platinum or other precious metal, or gold or silver coins, for selling, exchanging or otherwise using them.
(b) Purchasing, selling or exchanging gold, silver or platinum for the purpose of melting or refining.

"747.07 POLICE FORMS

(a) Every person licensed under the provisions of this chapter shall, at the time of every purchase or exchange, enter, with typewritten or printed letters on and a blank to be furnished by the Police Department, the name, age, address and social security number of the seller or exchanger, and a description of the item purchased or exchanged, and on the back of the blank form, the seller or exchanger shall write, in his own handwriting, his name, age and address. No entry on the card shall be erased, obliterated, altered or defaced.

(b) Every licensed dealer shall, on every weekday, before the hour of 12:00 noon, deliver to the Chief of Police, or his authorized representative, the blanks furnished by the police department properly filled-in and signed by the seller in accordance with the provisions of subsection (a) hereof for all transactions of the preceding business day. Alternatively, the filled-in blanks shall if the Chief of Police so elects, be mailed to the address the chief of police may, in writing, so designate."

Some of these ordinances have been revised in recent years to reflect technological advances for information retrieval. A new tier of data retention has been added the record-keeping requirements imposed on precious metals dealers. Some of these ordinances now require the secondhand dealer/precious metals dealer to enter into a contract for services and maintain a contract LeadsOnLine.

A Google search for "LeadsOnLine" produces a website at https://www.leadsonlineccom/. That opening page of that website describes LeadsOnLine in the following manner.

> "Law enforcement gets access to the nation's largest online investigation system. And it's free for businesses to report their transactions."

A July 14, 2017 article in the Akron Beacon Journal stated that 260 Ohio police agencies had subscribed to LeadsOnLine and that there were 3,800 subscribers nationwide.

The following is one example the manner in which some Ohio municipalities have utilized LeadsOnLine in its secondhand dealer/precious metals dealers ordinances.

SECONDHAND DEALER ORDINANCE

> "Every secondhand dealer shall operate and maintain a computer system with Internet access for purposes described herein. Every secondhand dealer shall subscribe to LeadsOnLine or the city's current electronic reporting system and maintain said subscription throughout the term of the secondhand dealer's business license. Every secondhand dealer shall provide an electronic record utilizing the LeadsOnLine electronic reporting system or the electronic system then in use by the city. Such report shall enter and upload all information from its books and records regarding contracts for purchase, pledges and purchase transactions of any secondhand scrap iron, automobile parts, tires, household furniture or furnishings, household appliances, office equipment, coins, jewelry, jewels, weapons, bicycles, tools, toys, electronic media and/or electronic equipment to LeadsOnLine or a similar system as soon as reasonably possible after the transaction is consummated. Every secondhand dealer shall input information to every data field supported by the LeadsOnLine system. In the event the electronic reporting system malfunctions or is not otherwise operational, the secondhand dealer shall at all times during such malfunction or non-operation, be required to keep records of any and all transactions that would have otherwise been entered in the electronic reporting system and shall submit such records to the [**city name redacted]** division of police within

twenty-four (24) hours of such transaction during the non-operational period."

"A person licensed as a secondhand dealer shall furnish a list of every article taken in or bought by such secondhand dealer the previous day by uploading such list to the LeadsOnLine program via a secure Internet connection. A person licensed as a secondhand dealer shall, every day furnish a photograph of every article of jewelry precious stone or stone, regardless of value taken in pawn or bought by such secondhand dealer the previous day by uploading the photograph to the LeadsOnLine program via a secure connection.

"The [**city name redacted]** division of police shall enter into a contract for services and maintain its contract for services with LeadsOnLine or a similar entity in order to enhance its investigative services to protect both secondhand dealers and members of the general public."

"No item shall be received unless the person from whom the article is acquired exhibits a driver's license or state-issued identification card and the identifying numbers are recorded on the electronic report."

"All books or records which are required to be maintained as a result of this section shall be open to inspection by the Mayor or his designee immediately, at any time during hours of operation. Upon demand the Mayor or his designee, the secondhand dealer shall also produce and show the article or articles thus listed and described."

As indicated by this municipal ordinance, both secondhand dealers/precious metals dealers and the local police department are required to enter into contracts with LeadsOnLine.

The following are some of the provisions from one such contract entered into earlier this year by Ohio city.

"**Recitals**

"A. Leads operates and maintains an electronic reporting and criminal investigation system for receiving data for the use of law enforcement officials in

their official duties. Leads acts in the capacity of an agent for such law enforcement agencies for the purpose of collecting, maintaining and disseminating data.

"B. The city of [**redacted**] desires is Police Department to utilize Leads' system to support its investigations.

"Section 1. Scope of Services

"Leads will provide the city with its electronic reporting and criminal investigation system for receiving Data for the use of law enforcement officials in their official duties for the purpose of collecting, maintaining and disseminating data in accordance with the scope of agreement attached hereto and incorporated herein as exhibit A.

"Section 8. Independent contractor, not a public employee

"Leads is an independent contractor and not an agent or employee of the city and shall make no representations to the contrary. Nothing in this agreement is intended to create a joint venture or anything other than an independent contractor relationship between the city and leads. . . . "