

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**LIBERTY COINS, LLC,**

**: Case No. 2:12-cv-00998**

**:**

**and**

**:**

**: Judge \_\_\_\_\_**

**JOHN MICHAEL TOMASO,**

**:**

**: Magistrate \_\_\_\_\_**

**Plaintiffs,**

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**:**

**v.**

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**DAVID GOODMAN, in his official capacity as  
Director, Ohio Department of Commerce,**

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**:**

**: VERIFIED COMPLAINT**

**and**

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**AMANDA MCCARTNEY, in her official  
capacity as Consumer Finance Attorney of  
Division of Financial Institutions, Ohio  
Department of Commerce,**

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**Defendants.**

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Now come Plaintiffs, LIBERTY COINS, LLC (“Liberty Coins”) and JOHN MICHAEL TOMASO (“Mike Tomaso” or “Mr. Tomaso”) (collectively, the “Plaintiffs”), and for their Complaint against DAVID GOODMAN (“Mr. Goodman”) and AMANDA MCCARTNEY (“Ms. McCartney”) (collectively, the “Defendants”), allege as follows:

### **INTRODUCTION**

1. This is an action brought pursuant to 42 U.S.C. §1983 for declaratory judgment, temporary restraining order, and preliminary and permanent injunction, arising from the unconstitutional policies and practices of Defendants. Defendants’ policies, practices and custom, as well as certain conduct by one or more Defendants, Plaintiffs have suffered and will continue to suffer irreparable harm to their rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution. The harm may only be remedied by a ruling from this Court.

2. Defendants have impeded and threaten to unconstitutionally impede Plaintiffs in their right to engage in protected advertisement and solicitation for their precious metals business, and their right to be free from unlimited warrantless searches without probable cause by maintaining, implementing and enforcing vague policies that (i) restrict and prohibit Plaintiffs and certain other Ohioans from engaging in protected commercial speech, (ii) impose significant criminal and administrative burdens on Plaintiffs and certain other Ohioans in response to their protected commercial speech, (iii) vest unfettered discretion in administrators to restrict and burden commercial speech, and (iv) threaten Plaintiffs and certain other Ohioans with subjection to unduly broad warrantless searches of their business property without probable cause.

3. Additionally, Plaintiffs desire to engage in speech activities consistent with the purpose and goals of their business that are prohibited by the policies and practices of the Defendants even though the transactions proposed are exempt from the regulation of Defendants.

4. As a result of the policy, practice and custom of the Defendants, as well as certain conduct by one or more Defendants, Plaintiffs have suffered and will continue to suffer irreparable harm unless the Defendants are immediately enjoined from restricting Plaintiffs protected speech in this manner.

### **PARTIES**

5. Plaintiff Liberty Coins, LLC is an Ohio Limited Liability Company with its principal place of business in Delaware County, Ohio.

6. Liberty Coins is in the business of buying, selling, and trading silver and gold coins, jewelry and other items, hallmark bars, ingots, and numismatics. Plaintiff John Michael Tomaso is the owner and operator of Liberty Coins, and is a resident of Delaware County, Ohio

7. Mr. Tomaso, who has 35 years of experience in the field of gold and silver coins, wishes to continue on in this business, and further, to notify others that Liberty Coins is engaged in this business. In the alternative, Mr. Tomaso wishes to continue his purchase, trade, and sale of gold and silver coins, hallmark bars, ingots, numismatics, and currency.

8. Heretofore, Liberty Coins has advertised its business through limited means: (1) a sign in its store window; (2) a free-standing sign just outside of the retail location; (3) several newspaper advertisements; and (4) business cards distributed by Mr. Tomaso when he comes into contact with current and prospective clients.<sup>1</sup> These advertisements indicate that Liberty Coins buys, sells, and trades gold and silver, with an emphasis on coins and “scrap.” “Scrap” is

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<sup>1</sup> See October 17, 2012 Email at 2:37 p.m. from Ohio Dept. of Commerce Consumer Finance Attorney Amanda McCartney to Mike Tomaso (attached as Exhibit A).

an industry term referring to gold and silver that is valuable primarily due to its gold and silver content, to the extent that its highest value is to be melted down and reconstituted.

9. Mr. Tomaso's speech does not seek out stolen gold or silver, or in any manner encourage the theft of gold or silver items. When Mr. Tomaso encounters a potential customer who he suspects is attempting to sell stolen goods, he refuses to purchase the item(s), and reports it to the police.

10. As a result of Defendants' threats, Mr. Tomaso stopped all advertising for Liberty Coins in September 2012. Shortly thereafter, also in response to Defendants' threats, Mr. Tomaso stopped all purchases of gold and silver items. Today, Liberty Coins operates in a state of paralysis, subject to unlawful criminal sanction if it continues to speak, subject to unlawful warrantless intrusions if it obtains a license, and subject to destruction of its business if it does neither.

11. Defendant David Goodman is, and has been at all times relevant to the facts at issue in this case, the Director of the Ohio Department of Commerce ("DOC"). As Director, Mr. Goodman is the DOC's chief administrative and executive officer, and has oversight and authority over enforcement of the Ohio Precious Metals Dealers Act (the "Act") and Ohio Administrative Code regulations promulgated in putative support thereof.

12. Defendant Amanda McCartney has been at all times relevant to the facts at issue in this case, the "Consumer Finance Attorney" with the Ohio Department of Commerce's Division of Financial Institutions that has taken and threatened enforcement action against Plaintiffs, putatively pursuant to the Ohio Precious Metals Dealers Act. Based upon information and belief, Ms. McCartney, as part of her official duties and responsibilities with the DOC,

implements or enforces the unconstitutional restrictions accomplished through the DOC's policies and practices (as described herein).

13. All actions by the Defendants described herein were undertaken under color of state law which caused the deprivation of Plaintiffs' rights protected by the United States Constitution.

### **JURISDICTION AND VENUE**

14. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as this action arises under the First, Fourth, and Fourteenth Amendments to the United States Constitution; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state law, of rights, privileges, and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that it seeks to recover damages and secure equitable relief under an Act of Congress, specifically, 42 U.S.C. § 1983, which provides a cause of action for the protection of civil and constitutional rights; under 28 U.S.C. § 2201(a), to secure declaratory relief; under 28 U.S.C. § 2202, to secure preliminary and injunctive relief and damages; and under 42 U.S.C. § 1988, to award attorneys fees.

15. Venue is proper within this judicial district and division pursuant to 28 U.S.C. § 1391(b) and Local Rule 82.1, as (i) the Defendants are situated within this judicial district and division; and (ii) all of the claims asserted by Plaintiffs arose within this judicial district and division.

### **FACTUAL ALLEGATIONS**

16. Liberty Coins is in the business of buying, selling, and trading silver and gold coins, jewelry and other items, hallmark bars, ingots, and numismatics. Liberty Coins maintains

a single storefront retail location on North Sandusky Street, the main street through Delaware, Ohio.

17. Mike Tomaso, the owner of Liberty Coins, has 35 years of experience in the field of gold and silver coins, and wishes to continue on in this business, and, in so doing, to notify or apprise others that Liberty Coins engages in this business. In the alternative, Mr. Tomaso wishes to continue his purchase, trade, and sale of gold and silver coins, hallmark bars, ingots, numismatics, and currency.

18. Heretofore, Liberty Coins has advertised its business through limited means: (1) a sign in its store window; (2) a free-standing sign just outside of the retail location; (3) several newspaper advertisements; and (4) business cards distributed by Mr. Tomaso when he comes into contact with current and prospective clients.<sup>2</sup> These advertisements indicate that Liberty Coins buys, sells, and trades gold and silver, with an emphasis on coins and “scrap.” “Scrap” is an industry term referring to gold and silver that is valuable primarily due to its gold and silver content, to the extent that its highest value is to be melted down and reconstituted.

19. An advertisement or solicitation indicating “[w]e buy gold and silver” is a truthful method of advertising for the purchase of gold and silver items that are exempt under the Act, such as gold and silver hallmark bars, coins, ingots, and numismatics, because each of these items consists of gold and silver.

20. Over the first half of 2012, 62.3 percent of value of Liberty Coins’ purchases consisted of items that may have consisted of gold and silver, but were nevertheless exempt under the Act. Specifically, in January through June of 2012, Liberty Coins purchased

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<sup>2</sup> See October 17, 2012 Email at 2:37 p.m. from Ohio Dept. of Commerce Consumer Finance Attorney Amanda McCartney to Mike Tomaso (attached as Exhibit A).

over \$184,000 in coins and other numismatics, but less than \$112,000 in non-exempt precious metals.

### **The Ohio Precious Metals Dealers Act's Speech and Search Policies**

21. Although enacted in 1983, the Ohio Precious Metals Dealers Act, codified in R.C. 4728, has been largely unenforced since its inception, and consequently, has never been challenged.

22. In recent months, the Ohio Department of Commerce has ramped up enforcement efforts, resulting in submission of threatening letters and fines to numerous Ohio coin and precious metals dealers.<sup>3</sup>

23. Rather than solely regulating Ohio coin dealers on the basis of their *conduct*, the Ohio Precious Metals Dealers Act suppresses protected commercial speech by (1) prohibiting protected speech without a license; and (2) imposing formidable burdens only upon businesses and individuals who engage in protected speech.

24. R.C. 4728.02(A) dictates that “no person shall act as a precious metals dealer without first having obtained a license from the division of financial institutions in the department of commerce.” In turn, one is only held to “act as a precious metal dealer,” and therefore subject to the numerous burdens of the Act, if and only if he engages in speech protected by the First Amendment: “Precious metals dealer” means a person who is engaged in the business of purchasing articles made of or containing gold, silver, platinum, or other precious metals or jewels of any description if, in any manner, including any form of advertisement or

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<sup>3</sup> See Ohio Department of Commerce “Enforcement Actions” by month, last checked on October 29, 2012, available at <http://www.com.ohio.gov/fiin/enforcement.aspx>. The months of June, July, and August show a significant number of fines under the PMDA.

solicitation of customers, the person holds himself, herself, or itself out to the public as willing to purchase such articles.” R.C. 4728.01(A)

25. Thus, purchasers of precious metals who do not advertise, solicit or otherwise hold themselves out to the public are exempt from the Act, as are jewelers and bankers.

26. In this manner, the Act disadvantages those who engage in constitutionally-protected speech.

27. Purchasers of valuables that are not subject to the Act, such as gold and silver coins, hallmark bars, ingots, and numismatics, are, absent the acquisition of a license and submission to its significant burdens, prohibited from truthfully advertising their interest in purchasing these products.

28. The burdens imposed on those who advertise, i.e., those who engage in constitutionally protected speech, are significant.

29. First, R.C. 4728.05(A) subjects those who speak to arbitrary and plenary government investigation, for the purposes of which, the state shall have “free access to books and papers \* \* \* and other sources of information.”

30. R.C. 4728.05(B) subjects those who advertise to “at any time” and for any reason, compelled attendance for depositions and compelled production of all books, records, and documents.

31. R.C. 4728.06 subjects those who speak to the requirements of (1) keeping government-approved books and forms; (2) compelled disclosure of each and every item purchased and physical description of the seller of each such item; (3) keeping one’s books “in order” and “open to inspection” at all times; and (4) making available to the local police



department, on each and every business day, a comprehensive list of every item purchased by the business.

32. Further, despite an industry that features dramatic fluctuations in price and low margins, R.C. 4728.09(A) requires those who speak to hold all gold and silver items purchased for five days from the date of purchase.

33. R.C. 4728.04 stringently limits the locations where legitimate transactions in and of gold and silver, by those who advertise, can occur: such transactions are prohibited anywhere other than the licensee's physical store location and certain limited auctions, conventions, and exhibitions that are "for the primary purpose of trading precious metals."

34. In addition, the Department of Commerce has promulgated OAC 1301:8-6-03 "Books and records." Division (D) of that section indicates "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 books, forms, records, etc., shall be kept at the licensed location.

35. Second, the Act prohibits speech by those who buy and sell precious metals, unless they first obtain a license.

36. The path to such a license is costly and vague. To be eligible for such a license, and transitively, to advertise for one's precious metals business, the applicant must "have good character," as adjudged by the Ohio Department of Commerce.<sup>4</sup> An applicant is further judged by his "reputation" and "ability to maintain net worth during the licensure period." Finally, before he may engage in protected speech, the applicant must pay the state a fee of up to \$550.<sup>5</sup>

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<sup>4</sup> R.C. 4728.03(B).

<sup>5</sup> R.C. 4728.03(C).

37. Consequently, an Ohioan who deals in precious metals is forbidden from speaking on behalf of his business unless he acquires a government-issued license. And when such an Ohioan speaks on behalf of his business without a license, he is subject to criminal sanction - - engaging in such speech is a misdemeanor of the first degree, punishable by imprisonment.<sup>6</sup>

38. Thus, Ohioans who buy, sell, and trade gold and silver, in whatever form, and advertise, are forced to choose between the options (1) remaining silent regarding their business activity; (2) acquiring a license and adhering to its substantial burdens in order to engage in protected speech; and (3) prison.

#### **Defendants' Application and Enforcement of the Act against Plaintiffs**

39. On October 1, 2012, Ms. McCartney issued a threatening letter to Liberty Coins and Mr. Tomaso.<sup>7</sup> (A true and accurate copy of this letter is attached hereto as Exhibit B).

40. The letter indicates and/or asserts that (1) DOC's "Division of Financial Institutions visited Liberty Coins and discussed violations of [the Act];" (2) "Liberty Coins has held itself out to the public as willing to purchase precious metals via signage at the store location;" and (3) "Based upon the language of the PMDA, the Division has evidence that your business has violated the PMDA."<sup>8</sup>

41. In her letter, Ms. McCartney then orders Liberty Coins to "produce business records" so as to "enable the Division to determine a fine amount consistent with settlements made for similar violations of the law."<sup>9</sup>

42. This letter concludes that "[i]f you fail to respond to this letter, the Division may issue a cease and desist order that imposes a fine of up to \$10,000," and "continued violation of

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<sup>6</sup> R.C. 4728.99.

<sup>7</sup> See October 1, 2012 Letter to Liberty Coins from Amanda McCartney, Consumer Finance Attorney, Division of Financial Institutions to Liberty Coins (attached as Exhibit B).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

the PMDA may reflect negatively upon the good character and fitness the division must find in order to issue a PMDA license to your business.”<sup>10</sup>

43. Mr. Tomaso requested clarification, via email, on October 17, 2012. And in an October 17, 2012 email response to Mr. Tomaso, DOC indicated and/or asserted that Mr. Tomaso had engaged in prohibited speech through (1) a “We Buy Gold” sign in his store window; (2) a “freestanding sign outside [his] store’s door” indicating “Buying Gold & Silver;” (3) Mr. Tomaso’s Liberty Coins business card, which states, aside from the name, location, hours and website, “American and Foreign Coins and Currency,” above “Gold and Silver Scrap” above “Buy-Sell-Trade-Appraisals-Estates” above “35 years professional experience in numismatics;” (4) the statement in an August 22, 2012 Delaware Gazette news story by a newspaper reporter for the Delaware Gazette, on a largely unrelated topic, briefly describing “Tomaso’s shop and all others who purchase, sell, exchange or receive second-hand article containing precious metals or jewels. . . .”;<sup>11</sup> and (5) a “newspaper advertisement” in the Delaware Gazette classified section indicating that Liberty Coins is “paying top competitive prices for gold and silver. . . . Buying American and Foreign Coins and Currency . . . Buy-Sell-Trade-Singles-Collections-Estates... Professional Numismatist for 35 years.”<sup>12</sup>

44. As Ms. McCartney declared in her email, the DOC maintains that *each* of these modes of protected speech are separate “violations [that] can impose a fine and is a first degree misdemeanor for the first offense and a fifth degree felony for each subsequent offense.”<sup>13</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> See August 22, 2012 article in The Delaware Gazette (attached as Exhibit C).

<sup>12</sup> October 18 Email from Liberty Coins from Amanda McCartney, Consumer Finance Attorney, Division of Financial Institutions (attached as Exhibit A); see also photocopy of August 22, 2012 Delaware Gazette Advertisement (attached as Exhibit D).

<sup>13</sup> October 18 Email to Liberty Coins from Amanda McCartney, Consumer Finance Attorney, Division of Financial Institutions in response to Liberty Coins' question 3, referencing response to question 2 (attached as Exhibit A).

45. Thus, the conduct of buying gold and silver coins, currency, etc. is not the violation of the Act: rather, it is the speech indicating that one wishes to buy such items constitutes the alleged violations of law.

46. The next day, on October 19, DOC indicated to Mr. Tomaso that, as a result of his advertising, “you cannot buy any gold or silver without a license. You must cease all illegal activities immediately, as each violation is subject to a \$10,000 fine and criminal sanctions.”<sup>14</sup>

47. This government mandate from DOC and/or Ms. McCartney transcends even the plain language of the law, which allows for the purchase of gold and silver coins, ingots, hallmark bars, and numismatic items without a license, and also allows for the purchase of gold and silver from other dealers, so long as the purchaser does not engage in protected speech.

48. Moreover, Ms. McCartney and/or the DOC appear to use any past statements or advertisements against coin dealers: Ms. McCartney’s email states “Simply ceasing advertising does not eliminate the need for a license. Ceasing precious metal business in its entirety is the only way to forego the need for a license.”<sup>15</sup>

49. The foregoing statement appears at variance with the Act itself, which requires licensure only “if, in any manner, including any form of advertisement or solicitation of customers, the person holds himself, herself, or itself out to the public as willing to purchase such articles,”<sup>16</sup> and apparently reflects the policies of the DOC and/or Ms. McCartney.

50. In response to Defendants’ threats, in conjunction with “in person” and otherwise unwritten threats and orders issued by Ohio Department of Commerce Employee Brian Landis,

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<sup>14</sup> October 19, 2012 Email to Liberty Coins from Amanda McCartney, Consumer Finance Attorney, Division of Financial Institutions. (attached as Exhibit A).

<sup>15</sup> October 17, 2012 Email to Liberty Coins from Amanda McCartney, Consumer Finance Attorney, Division of Financial Institutions.(attached as Exhibit A).

<sup>16</sup> R.C. 4728.01(A).

Plaintiffs have discontinued all advertising, and have further discontinued the purchase of gold and silver.

51. Today, Liberty Coins exists in a state of paralysis, subject to unlawful criminal sanction and civil fine if it advertises without a license, and subject to meeting vague standards and enduring warrantless searches and seizures if it obtains a license.

**DECLARATORY JUDGMENT AND INJUNCTION**  
**(28 U.S.C. § 2201, *et seq.*)**

52. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

53. An actual controversy has arisen and now exists between Plaintiffs and Defendants concerning Plaintiffs' rights under the United States Constitution. A judicial declaration is necessary and appropriate at this time as to Counts I through II.

54. A state actor is liable under § 1983 if it took "action pursuant to official policy of some nature [that] caused a constitutional tort."<sup>17</sup>

55. "[Governmental] liability may be imposed for a single decision by [government] policy makers under appropriate circumstances."<sup>18</sup>

56. Threatened deprivation of constitutional rights that chills speech is a First Amendment harm.<sup>19</sup>

57. The Supreme Court has clearly expressed that "the threat of burdensome litigation" can "serve as a deterrent and chill protected speech."<sup>20</sup>

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<sup>17</sup> *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

<sup>18</sup> *Id.* at 480.

<sup>19</sup> *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6<sup>th</sup> Cir. 2004).

<sup>20</sup> *Wisconsin Right to Life*. at 468–70, 127 S.Ct. 2652.

58. A state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising one's constitutional rights, especially one's right to free expression and one's right to be free from unlimited warrantless searches of private property without probable cause.<sup>21</sup>

59. A state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising one's constitutional rights, including one's right to be free from warrantless searches of papers and effects without the existence probable cause of criminal conduct protected by the Fourth Amendment.

60. Plaintiffs desire a judicial determination of their rights against Defendants as they pertain to Plaintiffs' right to express through advertisement, solicitation, and other public and private communications, the content that they are willing and able to purchase various gold and silver items, without being subjected to regulations that are not content neutral, not narrowly tailored to serve a substantial government interest, and do not leave open ample alternative channels of communication, and further, as they pertain to Plaintiffs' right to be free from unlawful searches and vague speech licensing requirements.

61. In order to prevent further violation of Plaintiffs' constitutional rights by Defendants, it is appropriate and proper that a declaratory judgment be issued, pursuant to 28 U.S.C. § 2201 and FED. R. CIV. P. 57, declaring unconstitutional all relevant portions of the Ohio

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<sup>21</sup> *Id.*, citing *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697–98, 33 L.Ed.2d 570 (1972) (“For at least a quarter-century, this Court has made clear that even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”); *Keyishian v. Board of Regents*, 385 U.S. 589, 606, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963)) (“It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”).

Precious Metals Dealers Act, Ohio Administrative Code, and Defendants enforcement policies, practices, and actions.

62. Furthermore, pursuant to 28 U.S.C. § 2202 and FED. R. CIV. P. 65, it is appropriate and hereby requested that this Court issue preliminary and permanent injunctions prohibiting the Defendants from enforcing their search policies and restrictions on Plaintiffs' expressive activities to the extent they are unconstitutional, in order to prevent the ongoing violation of Plaintiffs' constitutional rights.

### **COUNT I**

#### **VIOLATION OF RIGHT TO FREE SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

63. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

64. At all times relevant to the allegations in this Complaint, each and all of the acts alleged herein were attributed to one or more of the Defendants acting under the color, authority, and pretense of state law, statutes, ordinances, regulations, customs, usages, and policies of the State of Ohio and/or the Ohio Department of Commerce.

65. Plaintiffs have engaged in and desire to engage in commercial speech which is not misleading, and which is protected by the First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment.

66. Further, "[t]he First Amendment does not permit [the state] to value certain types of noncommercial speech more highly than others."<sup>22</sup> And, content-based regulations of noncommercial speech are presumptively unconstitutional.<sup>23</sup>

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<sup>22</sup> *Ackerley Commc'ns of Mass. v. City of Cambridge*, 88 F.3d 33, 37 (1st Cir.1996).

67. “[S]igns, it is clear, represent a medium of expression that the Free Speech Clause has long protected.”<sup>24</sup>

68. Promotional speech, on signs and otherwise, triggers the regulations imposed by the Ohio Precious Metals Dealers Act, both on its face and as applied to Plaintiffs.

69. Promotional activity is to be analyzed as commercial speech.<sup>25</sup>

70. The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation.<sup>26</sup>

71. The Supreme Court has outlined a four-part test that subjects restrictions on commercial speech to a form of intermediate scrutiny.<sup>27</sup>

72. A restriction on protected commercial speech will be upheld only if the government “assert[s] a substantial interest in support of its regulation,” “demonstrate[s] that the restriction on commercial speech directly and materially advances that interest[,]” and draws the regulation narrowly.<sup>28</sup>

73. Put another way by the Sixth Circuit in *Bench Billboard v. City of Toledo*, “[f]or commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether [(2)] the asserted governmental interest is substantial. If both inquiries yield positive answers, we must [(3)] determine whether the regulation directly advances the governmental interest asserted, and [(4)] whether it is not more extensive than is necessary to serve that interest.”

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<sup>23</sup> See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

<sup>24</sup> *Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 818 (6th Cir.2005).

<sup>25</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).

<sup>26</sup> *Virginia Pharmacy Board*, 425 U.S., at 761-762, 96 S.Ct. at 1825.

<sup>27</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

<sup>28</sup> *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002).



74. Further, the Supreme Court has declined to uphold regulations that only indirectly advance the state interest involved.

75. The State cannot regulate speech that poses no danger to the asserted state interest,<sup>29</sup> nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.

76. Ohio's interests here, *at most*, consist of (1) Preventing theft and the temptation to steal; (2) apprehending thieves and recovering stolen property; and (3) restricting the flow of stolen goods.

77. Rather than directly regulating the *conduct* of the purchase of stolen goods, or requiring registration of those who buy a significant amount of gold and silver, the Ohio Precious Metals Dealers Act suppresses protected commercial speech by (1) prohibiting protected speech without a license; and (2) imposing formidable burdens only upon businesses and individuals who engage in protected speech

78. Purchasers of precious metals who do not advertise are exempt from the Act, as are jewelers and bankers. Meanwhile, purchasers of valuables that are not subject to the Act, such as gold and silver coins, hallmark bars, ingots, and numismatics, are, absent the acquisition of a license and submission to its significant burdens, prohibited from truthfully advertising their interest in purchasing these products.

79. Consequently, an Ohioan who deals in precious metals is forbidden from speaking on behalf of his business unless he acquires a license. And when such an Ohioan speaks on

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<sup>29</sup> See *First National Bank of Boston v. Bellotti*, *supra*, at 794-795, 98 S.Ct., at 1425-1426.

behalf of his business without a license, he is subject to criminal sanction - - engaging in such speech is a misdemeanor of the first degree, punishable by imprisonment.<sup>30</sup>

80. Thus, Ohioans who buy, sell, and trade gold and silver, in whatever form, are forced to choose between the options of (1) remaining silent regarding their business activity; (2) acquiring a license and adhering to its substantial burdens in order to engage in protected speech; and (3) prison.

81. That the burdening of speech is essential is also undermined by the fact that the target of the regulation is not those who *buy* gold and silver, but rather, those who *advertise* to the public that they buy gold and silver. An Ohioan may purchase significantly more gold than Mr. Tomaso, without burden, if he or she simply does not advertise to the public that he or she does so.

82. Finally, the Ohio Precious Metals Dealer Act, as written and enforced, burdens, suppresses, and prohibits speech advertising for transactions that do not require any licensure at all. Put another way, the Act burdens speech by requiring licensure in response to it, even if that speech proposes a transaction that is *exempt* from the Act.

83. The Department of Commerce and Ms. McCartney's position is that Liberty Coins and others can be sanctioned for advertising to purchase exempt items that constitute a majority of their businesses, just because that advertisement could also be read to include items that are not exempt.

84. Defendants, through their action and conduct pursuant to the Ohio Precious Metals Dealers Act, have infringed and continue to threaten the First Amendment rights of the Plaintiffs.

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<sup>30</sup> R.C. 4728.99.

85. The regulation and infringement of the Plaintiffs' First Amendment rights, through the Defendants' conduct and the Ohio Precious Metals Dealers Act, lacks a substantial government interest to support such regulation and infringement, any such putative interest is not directly or materially advanced by such regulation and infringement, and such regulation and infringement is narrowly drawn.

86. Furthermore, the regulation and infringement of the Plaintiffs' First Amendment rights is based upon the content of the Plaintiffs' speech

87. Rather than directly regulating the *conduct* of the purchase of stolen goods or requiring registration of those who buy a significant amount of gold and silver, the Ohio Precious Metals Dealers Act suppresses protected commercial speech by (1) prohibiting protected speech without a license; and (2) imposing formidable burdens only upon businesses and individuals who engage in protected speech.

88. Purchasers of precious metals who do not advertise are exempt from the Act, as are jewelers and bankers. Meanwhile, purchasers of valuables that are not subject to the Act, such as gold and silver coins, hallmark bars, ingots, and numismatics, are, absent the acquisition of a license and submission to its significant burdens, prohibited from truthfully advertising their interest in purchasing these products.

89. But in order to engage in constitutionally protected commercial speech, the Ohio Precious Metals Dealers Act requires those desiring to engage in such speech must first obtain a government-issued license.

90. However, the path to such a license is costly, vague and arbitrary.

## COUNT II

### **VIOLATION OF THE RIGHT TO DUE PROCESS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

91. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

92. Under the Act, when an Ohio silver and gold dealer speaks, he risks losing his business entirely. This is because the standards for whether the business can obtain a license, and thus continue to lawfully advertise, are entirely dependent on a burdensome, nebulous, vague, and arbitrary application procedure.

93. As an initial matter, “because unfettered governmental discretion over the licensing of free expression ‘constitutes a prior restraint and may result in censorship,’ a plaintiff may bring facial challenges to statutes granting such discretion ‘even if the discretion and power are never actually abused.’”<sup>31</sup>

94. “When a law predicates expressive activity on the prior acquisition of a permit, the law must contain narrow and precise standards to control the discretion of the permitting authority.”<sup>32</sup> To avoid violating free expression, courts have required that a permitting scheme leave relatively little discretion in the hands of public officials regarding whether to grant a permit.<sup>33</sup>

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<sup>31</sup> *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755–56, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); *Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir.2010).

<sup>32</sup> *Parks v. Finan*, 385 F.3d 694, 699 (6th Cir. 2004) (citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992)).

<sup>33</sup> *See FW/PBS, Inc.*, 493 U.S. at 225-26, 110 S.Ct. at 605 (1990).

95. Vague policies are unconstitutional in their own right. This is because, when vague, “even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression.”<sup>34</sup>

96. “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”<sup>35</sup>

97. The void-for-vagueness doctrine not only ensures that laws provide “fair warning” of proscribed conduct, but it also protects citizens against the impermissible delegation of basic policy matters “for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”<sup>36</sup>

98. Without “clear standards guiding the discretion of public officials” with enforcement authority, there is a risk that those officials will “administer the policy based on impermissible factors.”<sup>37</sup> As a result, laws or regulations that, for example, give officials “unbridled discretion over a forum’s use” are impermissible because of the “danger of censorship and of abridgement of our precious First Amendment freedoms.”<sup>38</sup> A statute that fails to constrain “an official’s decision to limit speech” with “objective criteria” is unconstitutionally vague.<sup>39</sup>

99. The standards R.C. 4728 requires Plaintiffs to adhere to before they may be eligible to engage in protected speech are vague and invite arbitrary bureaucratic discretion.

100. Pursuant to R.C. 4728.03, in response to speaking through advertising, and in order to continue to speak through advertising, one who buys and sells gold and silver must be

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<sup>34</sup> *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (referring to an official’s overly broad discretion in granting or denying a speech-related permit).

<sup>35</sup> *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963).

<sup>36</sup> *UFCW*, 163 F.3d at 358–59 (citing *Grayned*, 408 U.S. at 108–109, 92 S.Ct. 2294).

<sup>37</sup> *UFCW*, 163 F.3d at 358–59.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

“of good character, hav[e] experience and fitness in the capacity involved, [and] demonstrates a net worth of at least ten thousand dollars and the ability to maintain that net worth during the licensure period.”<sup>40</sup> An applicant is further judged by his “reputation” and “ability to maintain net worth during the licensure period.” Finally, before he may engage in protected speech, the applicant must pay the state a fee of up to \$550.<sup>41</sup>

101. Each of these standards, upon which the business owners’ speech is conditioned, is unduly vague and arbitrary.

### COUNT III

#### **VIOLATION OF RIGHT TO BE FREE FROM UNLAWFUL SEARCH AND SEIZURE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

102. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

103. In *See v. City of Seattle*,<sup>42</sup> the Supreme Court held that, like the search of a private home, the search of a business is presumptively unreasonable if conducted without a warrant, as a businessman's Fourth Amendment guarantees are “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.”<sup>43</sup> Indeed, [i]t is

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<sup>40</sup> R.C. 4728.03(B)(1). Notably, the Ohio Administrative Code does nothing to clarify these standards. Nor does R.C. 4728.03(A), which merely states as follows: “As used in this section, ‘experience and fitness in the capacity involved’ means that the applicant for a precious metals dealer's license has had sufficient financial responsibility, reputation, and experience in the business of precious metals dealer, or a related business, to act as a precious metals dealer in compliance with this chapter.

<sup>41</sup> R.C. 4728.03(C).

<sup>42</sup> 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967)

<sup>43</sup> *Id.* at 543, 87 S.Ct. at 1739.

untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.”<sup>44</sup>

104. Further, employers have a recognizable privacy interest in the records in question, even though the employer is required by law to keep them.<sup>45</sup>

105. An exception to the warrant requirement has been recognized for searches of pervasively or closely regulated industries.<sup>46</sup>

106. Plaintiffs are not doing business in a “pervasively or closely regulated industry.”

107. Even if Plaintiffs were operating in such an industry, In *Burger*, the Supreme Court enunciated three criteria that must be met before any such warrantless inspection or search is constitutionally acceptable: “First, there must be a “substantial” government interest that informs the regulatory scheme pursuant to which the inspection is made. Second, the warrantless inspections must be “necessary to further [the] regulatory scheme. \* \* \* Finally, “the statute’s inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.”

108. Under *Burger* and its progeny, for a warrantless search to comport with the Fourth Amendment, the statute authorizing the search must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made

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<sup>44</sup> *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, 98 S.Ct. 1816, 1820, 56 L.Ed.2d 305 (1978).

<sup>45</sup> *Brock v. Emerson Electric Co.*, 834 F.2d 994 (11th Cir.1987).

<sup>46</sup> *See Burger, supra* (junkyard industry); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (coal mining); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (liquor); *see also United States v. Acklen*, 690 F.2d 70 (6th Cir.1982) (pharmacies); *Marshall v. Nolichuckey Sand Co.*, 606 F.2d 693 (6th Cir.1979) (sand and gravel industry), *cert. denied*, 446 U.S. 908, 100 S.Ct. 1835, 64 L.Ed.2d 261 (1980).

pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.<sup>47</sup>

109. Under *Burger* and its progeny, the Fourth Amendment requires that the employer have some notice and opportunity to be heard to challenge the reasonableness of the agency request. While an “agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute,... *it must delimit the confines of a search by designating the needed documents in a formal subpoena.*”<sup>48</sup>

110. Further, a provision authorizing warrantless administrative inspections “devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field...”<sup>49</sup> Safeguards must be “geared to evaluating the reasonableness of the inspector's decisions prior to his acting on them” and such an “evaluation should take place prior to any search or citation issued for refusal of a search” [because] “[a]n employer may not be threatened with a penalty for asserting his Fourth Amendment rights”<sup>50</sup>

111. OAC 1301:8-6-03(D), governing precious metals dealers, disbands with all constitutionally-required safeguards by permitting inspection of all business records at any time for any reason without warrant or even subpoena: “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

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<sup>47</sup> See, 387 U.S. at 544, 87 S.Ct. at 1740 (emphasis added). See *United States v. Consolidation Coal Co.*, 560 F.2d 214, 217 (6th Cir.1977), *vacated and remanded*, 436 U.S. 942, 98 S.Ct. 2841, 56 L.Ed.2d 783 (1978), *judgment reinstated*, 579 F.2d 1011 (6th Cir.1978), *cert. denied*, 439 U.S. 1069, 99 S.Ct. 836, 59 L.Ed.2d 34 (1979) (Even if federal law requires records to be maintained and specifically authorizes on-premises inspection, the inspection must be pursuant to a warrant or its equivalent).

<sup>48</sup> See, 387 U.S. at 544, 87 S.Ct. at 1740 (emphasis added). See *United States v. Consolidation Coal Co.*, 560 F.2d 214, 217 (6th Cir.1977), *vacated and remanded*, 436 U.S. 942, 98 S.Ct. 2841, 56 L.Ed.2d 783 (1978), *judgment reinstated*, 579 F.2d 1011 (6th Cir.1978), *cert. denied*, 439 U.S. 1069, 99 S.Ct. 836, 59 L.Ed.2d 34 (1979) (Even if federal law requires records to be maintained and specifically authorizes on-premises inspection, the inspection must be pursuant to a warrant or its equivalent).

<sup>49</sup> *Barlow's*, 436 U.S. at 323, 98 S.Ct. at 1826.

<sup>50</sup> *Emerson*, 834 F.2d at 997.



that the business of the licensee is being transacted in accordance with law. \* \* \* All books, forms, records, etc., shall be kept at the licensed location.”

112. Key provisions in R.C. 4728.05-4728.07, including but not limited to R.C. 4728.05(B) and (C) (broad discretion to subpoena attendance and a broad array of records, without probable cause or a warrant; suspension of the license of business owners who do not comply with such subpoenas); R.C. 4728.06 (books at records open to inspection “at all times at the licensed location,” and “upon demand”); and R.C. 4728.07 (“each licensed person \* \* \* shall every business day, make available \* \* \* a description of all articles received \* \* \*.”) similarly fail to abide by the constitutionally-required safeguards.

113. As a proximate result of Defendants’ policies, practices, and actions, including not only the Act itself, but also Defendants’ written and oral communications and orders to Plaintiffs, Plaintiffs have been irreparably injured, are threatened with further irreparable injury, and will continue in the future to be irreparably injured, in that they have been and will be deprived of their right to free speech under the First and Fourteenth Amendments to the Constitution, and are threatened with deprivation of their Fourth Amendment rights, should they seek to redeem their First Amendment rights through licensure.

114. As a direct result of the Defendants’ policies, Plaintiffs continue to be prohibited from advertising or otherwise soliciting to purchase gold and silver, whether such a purchase is prohibited without a license or not, and continues to be prohibited from actually purchasing such gold and silver.

115. To regain the right to advertise and purchase inventory essential to their business, Plaintiffs must submit to a licensure scheme that features unconstitutional searches and seizures.

116. As a legal consequence of the Defendants' violation of Plaintiffs' First, Fourth, and Fourteenth Amendment rights, as alleged above, Plaintiffs are entitled to injunctive relief, and to recover nominal damages.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for judgment against Defendants and that the Court:

- (1) Declare that the imposition of the burdens of obtaining and maintaining a license under Chapter 4728 of the Ohio Revised Code, in response to protected commercial speech and predicated upon the identity of the speaker and content of the speech, are unconstitutional on their face because they violate the rights to freedom of speech and due process of law guaranteed under the First and Fourteenth Amendments to the Constitution;
- (2) Declare that the search and seizure provisions in OAC 1301 and R.C. 4728 authorizing warrantless searches without probable cause are unconstitutional;
- (3) Issue a temporary restraining order, and preliminary and permanent injunction against the Defendants prohibiting the enforcement of said policies against Plaintiffs and others who seek to participate in expressive activities and operate their businesses without submission to unlawful searches and seizures;
- (4) Award Plaintiffs nominal damages against Defendants;
- (5) Pursuant to 42 U.S.C. §1988 and other applicable law, award Plaintiffs their costs and expenses incurred in bringing this action, including their reasonable attorneys' fees;  
and
- (6) Grant such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted,

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