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

LIBERTY COINS, LLC, *et al.*,	:	**Case No. 2:12-cv-00998**
	:	
Plaintiffs,	:	**Judge Michael H. Watson**
	:	
-vs-	:	**Magistrate Elizabeth Preston Deavers**
	:	
DAVID GOODMAN, *et al.*,	:	
	:	
Defendants.	:	
	:	

MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION, AND MEMORANDUM IN SUPPORT THEREOF

As the Supreme Court has made clear, commercial speech is protected by the First and Fourteenth Amendments. Pursuant to this principle, Plaintiffs Liberty Coins, LLC and John Michael Tomaso hereby move, pursuant to Federal Rule of Civil Procedure 65(b), for issuance of a temporary restraining order and preliminary injunction enjoining enforcement of the unconstitutional policy, practice and custom of the Defendants David Goodman and Amanda McCartney, together with the actions of the Defendants which serve to enforce said policy, practice and custom. Defendants have threatened Plaintiffs with criminal prosecution and fines as a result of their truthful, non-misleading advertising. As a result of Defendants' threats, Liberty Coins was forced to cease all advertising in September and October of 2012. 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.

If Defendants' policy, practice and custom prohibiting or restricting Plaintiffs' ability to fully engage in the exercise of their First Amendment rights are not immediately enjoined, Plaintiffs (as well as others)

will suffer and will continue to suffer irreparable harm for which there is no adequate remedy at law. Pursuant to Local Rule 7.2(a)(1), this Motion is accompanied by a Memorandum in Support.

Plaintiffs request that the requirement to give security pursuant to Rule 65(c) be waived.

Respectfully submitted,

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SUMMARY OF THE ARGUMENT

The Ohio Precious Metals Dealers Act (the "Act" or "PMDA") was enacted in 1983. Rather than solely regulating Ohio coin dealers on the basis of their *conduct*, the PMDA 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. 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 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).

On October 1, 2012, Ms. McCartney issued a threatening letter to Liberty Coins and Mr. Tomaso alleging that his advertising made him in violation of the Act.[1] As a result of these threats, 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.

The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation.[2] As the Court of Appeals for the Sixth Circuit articulated in *Pagan v. Fruchey*, "while other forms of expression are entitled to more protection under the First Amendment than is commercial speech, the protection provided to commercial speech is nevertheless considerable."[3]

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1 See Verified Complaint at Exhibit B.

2 *Virginia Pharmacy Board*, 425 U.S., at 761-762, 96 S.Ct. at 1825.

3 492 F.3d 766 (6th Cir. 2007).

Because government regulation of content is one of the primary evils contemplated by the First Amendment, content-based restrictions are strongly disfavored and are often subject to strict scrutiny. Indeed, in the typical case, "[c]ontent-based regulations are presumptively invalid."[4]

The Supreme Court's recent decision in *Sorrell v. IMS Health, Inc*.,[5] reaffirms that the Ohio Precious Metals Dealers Act would be subjected to rigorous analysis *even if viewed through the lens of commercial speech*. In that case, the Court struck down a Vermont law which restricted the sale, disclosure, and use of records created by pharmacies that reveal the prescribing habits of doctors. Such records are useful to drug companies who market their drugs to doctors. That case therefore involved paradigmatic *commercial* speech, but the Court nonetheless noted that "the First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'"[6] The Court continued by noting that "[c]ommercial speech is no exception" to this principle in part because a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."[7]

Here, the PMDA's prohibitions and punishments of protected commercial speech cannot withstand the demanding scrutiny this Court must apply. *First*, there is no means by which the state could demonstrate that "the speech banned by the statute poses a greater threat to the [state's] interest than the speech permitted by the statute." This is for two reasons. First, there are many exemptions to the Act. Secondly, that the burdening of speech is essential is also undermined by the fact that the target of the regulation is not all who *buy* gold and silver, but rather, those who *advertise* to the public that they buy gold and silver.

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) restrict the flow of stolen goods. However, the

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4 *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

5 *Sorrell v. IMS Health Inc.*, —— U.S. ——, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011).

6 *Id.* at 2664 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

7 *Id.* (quotation marks omitted).

burdens the Act places on speech are clearly not narrowly tailored to advance these interests: suppressing advertising and solicitation by gold and silver dealers is not a tailored means of effectuating these interests.

First, 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. Defendants' 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. *Second*, the prohibition and punishment of speech does not *directly* advance the state's interests. Even putting aside the Act's punishment of particular content and speaker identity, "the Court has declined to uphold regulations that only indirectly advance the state interest involved."[8]

The state must not only to identify specifically "a substantial interest to be achieved by [the] restrictio[n] on commercial speech,"[9] but also to prove that the regulation "directly advances" that interest and is "not more extensive than is necessary to serve that interest."[10] The state cannot meet these requirements because this regulation does not directly advance any state interest.

The Act prohibits speech by those who buy and sell precious metals, unless they first obtain a license. However, the path to such a license is costly and vague. 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. 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 "of good character, hav[e] experience and fitness in the capacity involved, [and]

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[8] *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980).

[9] 447 U.S., at 564, 100 S.Ct. 2343.

[10] *Id.*, at 566, 100 S.Ct. 2343.

demonstrates a net worth of at least ten thousand dollars and the ability to maintain that net worth during the licensure period."[11] Each of these standards – upon which the business owners' speech is conditioned -- is unduly vague and arbitrary.

When vague, "even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression."[12] With respect to political speech, the Supreme Court has spoken of the test to be applied to regulations that implicate vagueness concerns: The test is whether the language * * * affords the "(p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms."[13] "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[14]

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.[15] An applicant is further judged by his "reputation" and "ability to maintain net worth during the licensure period." Thus, the PDMA does not promulgate standards sufficient to supply objective criteria or limit official discretion over licensing speech: a dealer without "good character" or sufficient "reputation" or "net worth" is criminally prohibited from promoting his business. And this is necessarily vague and unconstitutional.

Ultimately, the PMDA and Defendants' application of it violates Plaintiffs' First Amendment rights because it is a content-based prohibition of commercial speech, imposes burdensome licensing requirements in exchange for permitting the disfavored commercial speech, and is void for vagueness.

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[11] 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.

[12] *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).

[13] *NAACP v. Button*, 371 U.S., at 438, 83 S.Ct., at 340.

[14] *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963).

[15] R.C. 4728.03(B).

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs initiated this civil rights action by filing a Verified Complaint challenging the implementation of the policy, practice and custom of the State of Ohio and the Ohio Department of Commerce, whereby Defendants have unconstitutionally prevented and restrained Liberty Coins from engaging in the protected commercial speech of truthful advertising, and further restrained Liberty Coins from purchasing gold and silver numismatics in retaliation against Liberty Coins' truthful advertising.

The Ohio Precious Metals Dealers Act violates the First, Fourth, and Fourteenth Amendment rights of Plaintiffs because it (1) prohibits constitutionally-protected commercial speech without license; (2) does so through reliance upon its content and upon the identity of the speaker; (3) subjects those who speak to warrantless searches of their premises without probable cause; and (4) leaves to the vague discretion of public officials whether a business may obtain a license, so as to speak at all. Plaintiffs do not assert that there may be *no* regulation of precious metals dealers; however the PMDA is simply not a permissible means of imposing regulations.

In determining whether to grant the present motion for issuance of a temporary restraining order and preliminary injunction, the Court is to consider four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether the issuance of a temporary restraining order or preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of a temporary restraining order or preliminary injunction.[16] These factors are to be balanced against one another and should not be considered

[16] *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc)(quoting *Sandison v. Michigan High Sch. Athletic Ass'n,* 64 F.3d 1026, 1030 (6th Cir. 1995)); *see also Southwest Williamson County Cmty. Assoc. Inc. v. Slater*, 243 F.3d 270, 277 (6th Cir. 2001).

prerequisites to the granting of a temporary restraining order or preliminary injunction.[17] As developed below, the balance of interests weigh strongly in favor of the Plaintiffs and the granting of the present motion.

Firstly, Plaintiffs are highly likely to succeed on the merits because Defendants' conduct violates well-established First, Fourth, and Fourteenth Amendment rights. Promotional commercial speech is constitutionally protected. Content and identity-based regulations of speech are presumptively invalid. Moreover, the regulations in question are not tailored to achieve any legitimate government interest. Furthermore, Defendants' policies and practices for determining who may speak, and about what, are unconstitutionally vague. Finally, in order to gain the right to engage in protected speech, a precious metals dealer must submit to a regulatory regimen consistent of effectively unlimited warrantless searches of their private property and business records.

Secondly, Plaintiffs have suffered and will continue to suffer irreparable injury every day in which they are not permitted to engage in core commercial speech, and further are not permitted to purchase essential business inventory as a response to their prior engagement in protected commercial speech. Pursuant to Ohio Department of Commerce order, Mr. Tomaso may not even pass out his business cards at the time of the filing of this case, because those cards indicate that he purchases gold and silver. This infringement upon Plaintiffs' speech continues to occur due to the implementation and enforcement of Defendants' policies and practices which deliberately and consciously place Plaintiffs in a position whereby they are severely and significantly restricted in their ability to engage in the exercise of their free speech rights.

Thirdly, the requested injunctive relief would not result in any injury to Defendants or to third parties. Plaintiffs request only the ability to engage in truthful and non-misleading core protected speech. Finally, the public interest is clearly in favor of injunctive relief. As the Supreme Court has made clear in

[17] *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 347 (6th Cir. 1998).

decisions dating back decades, preserving freedom of expression is of particular importance.[18] Not only do Plaintiffs believe that permitting their specific expressive activity would benefit the public by making them aware of opportunities to buy, sell, and trade inflation-protected investments and collectibles in this time of volatile commodity prices and expansion of the monetary supply, but enjoining unconstitutional speech-restrictive policies would serve an intrinsic good as well - - it is always in the public interest to prevent the violation of a party's constitutional rights.

II. BACKGROUND

A. *Plaintiffs' Expressive Activity*

Plaintiff Liberty Coins is in the business of buying, selling, and trading silver and gold coins, jewelry, hallmark bars, ingots, and numismatics.[19] Liberty Coins maintains a storefront retail location on North Sandusky Street, the main street through Delaware, Ohio, and wishes to continue its business, and promote its business. In the alternative, Mr. Tomaso wishes to continue his purchase, trade, and sale of gold and silver coins. 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.[20] These advertisements indicate that Liberty Coins buys, sells, and trades gold and silver.[21] As a result of Defendant's threats articulated below and otherwise, Mr. Tomaso discontinued all promotional speech on behalf of Liberty Coins during September and October of 2012. Also in response to Defendant's threats, Mr. Tomaso has been forced to discontinue certain purchases of gold and silver items.

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[18] *See Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("[t]he essentiality of freedom in the community of American universities is almost self-evident.… Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die"); *see also Healy v. James*, 408 U.S. 169, 180 (1972) (noting that "[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas") (internal quotation marks omitted).

[19] Verified Complaint at ¶ 6.

[20] Verified Complaint at ¶8 and Exhibit A.

[21] Liberty Coins promotions occasionally reference the word "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. Verified Complaint at ¶8.

B. ***The Ohio Precious Metals Dealers Act***

Although enacted in 1983, the Ohio Precious Metals Dealers Act has been largely unenforced since its inception. Over that time, coin dealers have operated without a license, informally working with local police to apprehend occasional stolen property issues. In recent months, the Ohio Department of Commerce has ramped up enforcement efforts, resulting in submission of threat letters and fines to numerous Ohio coin and precious metals dealers, and the imposition of considerable fines on many.[22]

But rather than regulating *conduct*, i.e trafficking of stolen property, the Ohio Precious Metals Dealers Act suppresses and punishes constitutionally-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. 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: pursuant to R.C. 4728.01(A) "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 solicitation of customers, the person holds himself, herself, or itself out to the public as willing to purchase such articles." Purchasers of precious metals who do not advertise or otherwise promote the fact that they purchase such items are exempt from the Act, as are, pursuant to R.C. 4728.11, jewelers, antique dealers, and bankers.

The burdens imposed on those who advertise are significant. *First*, promotional speech is *prohibited* unless one first obtains a PMDA license. But the path to such a license is costly, vague, and arbitrary. To be eligible for such a license, and transitively, to advertise for one's precious metals business, the applicant must first disclose considerable personal, professional, and financial information to the state, including, for

[22] See, generally, Ohio Department of Commerce Division of Financial Institutions Enforcement Actions by month, listed on Defendants website at http://www.com.ohio.gov/fiin/enforcement.aspx, last checked October 30, 2012.

instance a list of all assets and liabilities owned by the proprietor.[23] Further, the applicant must "have good character," as adjudged by the unguided discretion of the Ohio Department of Commerce.[24] An applicant is further judged by his "reputation" and "ability to maintain net worth during the licensure period." Finally, in response to his speech and before he may engage in further business or protected speech, the applicant must pay the state a fee of up to $550.[25]

Next, if one gains the right to promote his or her business through speech-triggered licensure, he or she is subjected so constitutionally questionable warrantless searches without probable cause. R.C. 4728.05(A) subjects those who speak to plenary government investigation, for the purposes of which, the state shall have "free access to books and papers * * * and other sources of information." 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. 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. 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. Finally, 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." Meanwhile, 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

[23] See Ohio Precious Metals Dealers Act application package, available at http://com.ohio.gov/fiin/docs/fiin_PMApplicationPackage.pdf, last checked October 30, 2012.

[24] R.C. 4728.03(B).

[25] R.C. 4728.03(C).

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 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."

In sum, 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 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.[26] Thus, Ohioans who buy, sell, and trade gold and silver, in whatever form, 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.

C. ***Ohio Department of Commerce's Application of the Act to Liberty Coins.***

On October 1, 2012, The Ohio Department of Commerce issued a threat letter to Liberty Coins and Mr. Tomaso.[27] The letter indicates 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."[28] The DOC 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."[29] The 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

[26] R.C. 4728.99.
[27] Verified Complaint at ¶¶ 39-42 and Exhibit B.
[28] Id.
[29] Id.

"continued violation of 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."[30]

In an October 18, 2012 email to Mr. Tomaso, DOC, through Defendant McCartney, indicated that Liberty Coins had engaged in prohibited speech through (1) a "We Buy Gold" sign in its 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;"[31] (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. . ."; 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."[32]

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."[33] Thus, as the state enforces the Act, the conduct of buying gold and silver coins, currency, etc. is not the violation - - it is the speech that one wishes to do so that constitutes a violation of the law.

Further, in an October 19 email, DOC, again through Defendant McCartney, indicated to Mr. Tomaso that, as a result of his past promotional speech, "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

30 Id.
31 Id. at ¶ 43 and Exhibit A.
32 Id. at ¶ 43 and Exhibit A.; see also id. at Exhibit D.
33 Id. at ¶ 44 and Exhibit A.

sanctions."[34] The understanding that past promotional speech penalizes one's capacity to do business is further bolstered by DOC's statement to Mr. Tomaso that due to his past statements, "[s]imply 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."[35] This would appear at variance with the law itself, which states 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."[36]

III. LAW AND ARGUMENT

Plaintiffs satisfy the elements necessary for issuance of a temporary restraining order and/or preliminary injunction enjoining the enforcement of the Ohio Precious Metals Dealers Act's unconstitutional prohibition on speech, suppression and punishment in response to speech, vague and burdensome licensing regime, and sweeping warrantless search of precious metals dealers' properties. In the context of First Amendment violations and efforts to obtain preliminary injunctive relief, the "likelihood of success" factor is often determinative."[37]

A. Liberty Coins is likely to succeed on the merits.

Plaintiffs are highly likely to succeed on the merits because Defendants' policies and conduct – prohibiting protected speech without a license and imposing a licensing requirements and its attendant burdens in response to protected speech -- clearly violates well-established constitutional principles: A governmental unit's restrictions and burdens on speech must be (1) reasonable; (2) content-neutral; (3) narrowly tailored to serve the government interest; and (4) sufficient to leave open ample alternative channels of communication.[38] Further, "when a law or regulation predicates expressive activity on the prior

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34 Id. at Exhibit A.
35 Id. at ¶ 48 and Exhibit A.
36 R.C. 4728.01(A).
37 *Connection Dist. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).
38 *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

acquisition of a permit, *the rule must contain narrow and precise standards* to control the discretion of the permitting authority."[39]

i. Plaintiffs' speech has been restricted by Defendants' official conduct.

As an initial matter, there can be no doubt that Defendants have restricted Plaintiffs' speech: the Ohio Department of Commerce's insistence that Liberty Coins cease engaging in protected commercial speech, at peril of enduring serious criminal sanction and thousands of dollars in fines, and Plaintiffs' curtailment of their own speech in response, is more than sufficient to suffice as an injury to Plaintiffs' rights. The Supreme Court holds that "[g]enerally speaking, government action which chills constitutionally protected speech or expression contravenes the First Amendment,"[40] and "[t]he threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions."[41] And the Sixth Circuit's understanding of this matter is that "the harassment necessary to rise to a level sufficient to deter an individual is 'not extreme.'"[42]

Meanwhile, a state actor is liable under § 1983 if it took "action pursuant to official * * * policy of some nature [that] caused a constitutional tort."[43] Even a single act is sufficient to constitute official policy: "liability may be imposed for a single decision by municipal policy makers under appropriate circumstances."[44] Put another way, "if the decision to adopt that particular course of action is properly made

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[39] *Parks v. Finan*, 385 F.3d 694, 699 (6th Cir. 2004) (citing *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992).

[40] *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 794, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988); *Gehl Group v. Koby*, 63 F.3d 1528, 1534 (10th Cir. 1995); *See also Gehl*, 63 F.3d at 1534-35 ("[i]n the context of a government prosecution, a decision to prosecute which is motivated by a desire to discourage protected speech or expression violates the First Amendment and is actionable under § 1983.")

[41] *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963).

[42] *See Siggers-El v. Barlow*, 412 F.3d 693, 701 (6th Cir. 2005) (remarking that because "there is no justification for harassing people for exercising their constitutional rights, [the deterrent effect] need not be great in order to be actionable").

[43] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986), the Supreme Court further developed the rule expressed in *Monell*, stating "the 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.* at 479.

[44] *Pembaur*, supra, at 480.

by that government's authorized decision-makers, it surely represents an act of official government 'policy' as that term is commonly understood."[45]

Federal courts hold that threats of litigation and demands to cease and desist are official policies that can deprive a citizen of his constitutional rights. The Supreme Court has clearly expressed that even "the threat of burdensome litigation" can "serve as a deterrent and chill protected political speech."[46] And In *G&V Lounge, v. Michigan Liquor Control Commission,* the Sixth Circuit specifically analyzed the Plaintiff's First Amendment action in response to a city attorney's threat of litigation:

> The city's attorney wrote a letter to Plaintiff stating in pertinent part that: "* * * "in conclusion, if you proceed with your stated intentions of offering any adult-type entertainment at the aforestated location, the City of Inkster will take any and all necessary legal measures to prevent this from occuring [sic]."[47]

In response, the Sixth Circuit observed "the threat to take away Plaintiff's license or permit has already chilled Plaintiff from presenting a First Amendment protected activity to the public. This is also a distinct and palpable injury in fact, and is actual rather than merely imminent. It is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact."[48] Moreover, as the *G&V Lounge* court observed, the lower court's holding of the threat as non-actionable under the First Amendment **"**flatly contradict[ed] well established Supreme Court precedent to the effect that 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."[49]

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45 *Id*.

46 *Wisconsin Right to Life.* at 468–70, 127 S.Ct. 2652.

47 *G&V Lounge, v. Michigan Liquor Control Commission,* 23 F.3d 1071 (6th Cir. 1994). See also *All Children Matter, Inc. v. Brunner* Not Reported in F.Supp.2d, 2011 WL 665356 (S.D. Ohio 2011).

48 Id., at 1038, citing *See, e.g., Levin v. Harleston,* 966 F.2d 85, 89–90 (2d Cir.1992) (holding that a merely implicit threat to fire a professor for his controversial views chilled professor's First Amendment rights sufficiently to confer standing); *Doe v. University of Michigan,* 721 F.Supp. 852 (E.D.Mich.1989) ("It is not necessary ... that an individual first be exposed to prosecution in order to have standing to challenge a statute which is claimed to deter the exercise of constitutional rights."). *Accord NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963) ("The threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions.").

49 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

Thus, under applicable Supreme Court and Sixth Circuit precedent, the Department of Commerce's threats of costly fines and criminal sanction, and order to Mr. Tomaso to submit his financial information so that it could determine the amount by which to fine him for Liberty Coins' "violations." is sufficient official conduct to trigger standing and liability.[50]

ii. The First Amendment provides considerable protection for Commercial Speech.

The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation.[51] As the Court of Appeals for the Sixth Circuit articulated in *Pagan v. Fruchey,* "while other forms of expression are entitled to more protection under the First Amendment than is commercial speech, the protection provided to commercial speech is nevertheless considerable."[52]

Any lingering doubt as to whether the government may impose such restrictions upon speech without offending the First Amendment merely because it has the authority to regulate the underlying activity was resolved in *44 Liquormart, Inc. v. Rhode Island*, where the Supreme Court expressly rejected the concept "that because the government had the power to extensively regulate in a certain area (casino gambling) it also had the authority to regulate speech without raising First Amendment concerns."[53] The Court held that "[t]he text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society."[54]

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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.").

50 Pursuant to *Sorrell* and *United Reporting, infra,* Such activity further serves as a sufficient basis to bring a facial challenge: ("There is no question that the 'threat of prosecution ... hangs over their heads.' *United Reporting,* 528 U.S., at 41, 120 S.Ct. 483. For that reason *United Reporting* does not bar respondents' facial challenge.")

51 *Virginia Pharmacy Board*, 425 U.S., at 761-762, 96 S.Ct. at 1825.

52 492 F.3d 766 (6th Cir. 2007).

53 *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996).

54 Id.

As a result, the First Amendment directs that the government may not suppress speech as easily as it may suppress conduct,"[55] and in *Posadas* the Court expressly stated, "speech restrictions cannot be treated as simply another means that the government may use to achieve its ends."[56] Here, "while the burdened speech results from an economic *motive*, so too does a great deal of vital expression." [57]

Consequently, the Supreme Court has outlined a four-part test that subjects restrictions on commercial speech to scrutiny that the Court in 2011 indicated may rise to "heightened scrutiny" when based upon the content of the speech or the identity of the speaker: (1) The commercial speech must concern lawful activities and must not be misleading; (2) The government must establish a substantial interest in support of the regulation; (3) The regulation must directly and materially advance the substantial government interest; and (4) The regulation must be narrowly tailored to achieve the government's desired result.[58] On each point, the government bears the burden of establishing the constitutionality of its regulatory scheme.[59] And where the regulation on commercial speech is not content-neutral, the law is presumptively invalid.

iii. Liberty Coins' promotional speech is protected commercial speech.

Promotional activity is to be analyzed as commercial speech.[60] Moreover, "signs, it is clear, represent a medium of expression that the Free Speech Clause has long protected." [61] Here, Liberty Coins has engaged in speech promoting its business through signage, business cards, and newspaper advertisements.

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55 *44 Liquormart,* 517 U.S. at 512, 116 S.Ct. 1495.

56 *Id.*

57 See *Bigelow v. Virginia,* 421 U.S. 809, 818, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975); *New York Times Co. v. Sullivan,* 376 U.S. 254, 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); see also *United States v. United Foods, Inc.*, 533 U.S. 405, 410–411, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001) (applying "First Amendment scrutiny" where speech effects were not incidental and noting that "those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups").

58 *See Cent. Hudson v. Public Service Comm'n of New York,* 447 U.S. at 566 (1980).

59 *Bd. of Trustees of the State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (noting that "the State bears the burden of justifying its restrictions").

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

61 *Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 818 (6th Cir.2005).

iv. Protected promotional speech is prohibited, burdened, and suppressed by the PMDA.

Burdens imposed by the Act are a function of what is said and who is saying it, rather than a function of economic activity. The PMDA suppresses speech in several ways. First, it criminalizes the promotion of one's business without a license: R.C. 4728.02 provides, at risk of receiving a misdemeanor of the first degree, "no person shall act as a precious metal dealer without first having obtained a license." And one "acts as a precious metal dealer," pursuant to R.C. 4728.01(A), only if engaged in "advertisement or solicitation of customers" indicating willingness to purchase precious metals. However, obtaining such a license is no sure-thing, as it is conditioned upon vague standards that may disqualify proprietors who, as just one important example, object to the constitutionality of the law and its enforcement.

Secondly, the Act imposes the burdens chronicled above, including, upon licensure, subjection to broad and instantaneous warrantless searches of one's business premises without probable cause, in response to whether or not an Ohio business purchasing precious metals promotes its business to the public. These inspections almost certainly violates Plaintiffs' Fourth Amendment rights. In *See v. City of Seattle,* [62] 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." [63] Indeed, [i]t is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence."[64]

The searches promoted here are essentially limitless and standardless. As just one example, 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: <u>All</u> books, forms, and records, and all other sources of information with

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62 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967)

63 *Id.* at 543, 87 S.Ct. at 1739.

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

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." Authorization of such "anything-anytime" searches have been invalidated by the Sixth Circuit, and such searchs of precious metals dealers have been invalidated as violative of the Fourth Amendment in Kansas and Florida.[65] And Ohio's search authorizations push even further. Thus a proprietor must forego his First Amendment rights to protect his Fourth Amendment rights, or sacrifice his Fourth Amendment rights to retain his First Amendment rights.

Further, as Defendants enforce the law, once a business promotes that it purchases precious metals, it may not *ever* purchase those metals again without first obtaining a license.[66] Thus, the conduct of buying gold and silver coins, currency, etc. is not the violation - - it is the speech that one wishes to do so that constitutes a violation of the law. In fact, if one refrains from promotion, he escapes the licensing scheme entirely.

Here, promotional speech on signs and business cards and through newspaper advertisements and otherwise, (1) is prohibited by the Ohio Precious Metals Dealers Act, and also (2) triggers the Act's burdens. This understanding is bolstered by the Ohio Department of Commerce's characterization of Liberty Coins' signs, business cards, and newspapers as "violations" of the PMDA.[67] 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; or (3) fines and prison. However, this is also an impermissible burden: a state actor cannot constitutionally condition the receipt of a benefit, such as freedom from having to acquire a liquor license or an entertainment permit, on an agreement to refrain from exercising one's constitutional

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65 See *McLaughlin v. Kinds Island*, 849 F.2d 990 (6th Cir. 1988); *Joe Flynn Rare Coins Inc. v. Stephan*, 526 F.Supp. 1275 (D. Kan., 1981); *Mid-Fla Coin Exchange, Inc. v. Griffin*, 529 F.Supp. 1006 (D.C.Fla., 1981).

66 Verified Complaint at ¶¶ 43-49 and Exhibit A.

67 Id. at ¶¶ 43-44 and Exhibit A.

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.[68]

v. The PDMA impermissibly prohibits, burdens, and suppresses protected speech in response to its content and the speaker's identity.

Heightened scrutiny of the Act's suppression of speech is required, and the PMDA licensing scheme that depends upon them is presumptively invalid. "At the threshold of the inquiry, we must determine whether this restriction is content based or content neutral."[69] "[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content, then it is content based."[70]

One year ago in *Sorrell v. IMS Health, Inc.*, the United States Supreme Court emphasized the necessity of applying heightened scrutiny when reviewing speaker and content-based burdens on commercial speech.[71] Specifically, it observed as follows:

> [o]n its face, Vermont's law enacts content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. The provision first forbids sale subject to exceptions based in large part on the content of a purchaser's speech. * * * The measure then bars any disclosure when recipient speakers will use the information for marketing. Finally, the provision's second sentence prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers. As a result of these content- and speaker-based rules, detailers cannot obtain prescriber-identifying information, even though the information may be purchased or acquired by other speakers with diverse purposes and viewpoints. Detailers are likewise barred from using the information for marketing, even though the information may be used by a wide range of other speakers.[72]

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68 *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.").

69 *Minority Television Project, Inc. v. F.C.C.*, 676 F.3d 869 (9th Cir. 2012).

70 *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1071 (9th Cir.2006).

71 In *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 180 L.Ed.2d 544, 79 USLW 459 (2011).

72 Id.

Due to these factors, the Court concluded that "[t]he law on its face burdens disfavored speech by disfavored speakers,"[73] and because "Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted."[74]

In *Sorrell*, the Court observed "[s]o long as they do not engage in marketing, many speakers can obtain and use the information. But detailers cannot. [Thus, the law] imposes a speaker- and content-based burden on protected expression, and that circumstance is sufficient to justify application of heightened scrutiny. As a consequence, this case can be resolved even assuming, as the State argues, that [the] information is a mere commodity."[75]

Here, the PMDA prohibits, burdens, and suppresses its speech on the basis of who is speaking and what is being stated. First and foremost, the act prohibits and punishes marketing related to the proposed purchase of precious metals. It does not prohibit or punish *educational* speech related to precious metals. Nor does it even prohibit or punish promotional speech offering to *sell or trade* precious metals: it only prohibits promotional speech offering to *buy* precious metals. Meanwhile, there is no prohibition on signs indicating "we buy diamonds," or "we buy precious gems." Finally, the Act suppresses promotional speech on the basis of who is speaking: as just one example, pursuant to R.C. 4728.11(B)(1)(b), jewelers and others remain free to promote their businesses by indicating to the public "we buy gold and silver." Thus, heightened scrutiny is required.

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[73] Id.

[74] Id., citing *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 418, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (applying heightened scrutiny to "a categorical prohibition on the use of newsracks to disseminate commercial messages"); *id*., at 429, 113 S.Ct. 1505 ("[T]he very basis for the regulation is the difference in content between ordinary newspapers and commercial speech" in the form of "commercial handbills .... Thus, by any commonsense understanding of the term, the ban in this case is 'content based' " (some internal quotation marks omitted)); see also *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 658, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (explaining that strict scrutiny applies to regulations reflecting "aversion" to what "disfavored speakers" have to say). The Court has recognized that the "distinction between laws burdening and laws banning speech is but a matter of degree" and that the "Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 812, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (content-based financial burden); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) (speaker-based financial burden).

[75] Id.

vi. The PDMA's content and speaker-based burdens are presumptively unconstitutional.

Because government regulation of content is one of the primary evils contemplated by the First Amendment, content-based restrictions are strongly disfavored and are often subject to strict scrutiny. Indeed, in the typical case, "[c]ontent-based regulations are presumptively invalid."[76]

In *Cincinnati v. Discovery Network*,[77] the Court was faced with a content-based restriction on speech: a city ordinance banned sidewalk newsracks which distributed "commercial handbills," but not newsracks which distributed "newspapers."[78] A group of publishers of commercial hand-bills challenged the statute as an impermissible content-based restriction on speech prohibited by the First Amendment.[79] The city defended the ordinance by contending it furthered its "legitimate interest in ensuring safe streets and regulating visual blight." [80] Cincinnati contended newsracks *in general* undermined safety and esthetics in the public right of way; thus, the ban on newsracks which contained a certain type of *content* was justified because it necessarily reduced the *total* number of newsracks on sidewalks.[81]

The Supreme Court held the statute unconstitutional, because the "selective and categorical" content-based ban on newsracks containing handbills was not narrowly tailored to the city's purported interest.[82] Although the city's "desire to limit the *total* number of newsracks is justified by its interests in safety and esthetics," the statute was "unrelated to any distinction between 'commercial handbills' and 'newspapers,' " and thus was not narrowly tailored.[83] The Court stated: "The city has asserted an interest in esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks. Each newsrack, whether containing 'newspapers' or 'commercial handbills,' is equally unattractive.... [T]he city's primary concern, as argued to us, is with the aggregate number of

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76 *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).
77 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)
78 *Id.* at 429, 113 S.Ct. 1505.
79 *Id.* at 412, 113 S.Ct. 1505.
80 *Id.* at 415, 113 S.Ct. 1505.
81 *Id.* at 415, 113 S.Ct. 1505.
82 *Id.* at 417, 113 S.Ct. 1505.
83 *Id.* at 429–30, 113 S.Ct. 1505 (emphasis added, some internal quotation marks omitted).

newsracks on the streets. On that score, however, all newsracks, regardless whether they contain commercial or noncommercial publications, are equally at fault."[84] Thus, the Court held the newsrack ordinance was not narrowly tailored, because there was no proof that newsracks containing *handbills* (banned) threatened the governmental interests in esthetics and safety to a greater degree than news-racks containing *newspapers* (permitted).

The Supreme Court's recent decision in *Sorrell v. IMS Health, Inc.*, [85] reaffirms that the Ohio Precious Metals Dealers Act would be subjected to such rigorous analysis *even if viewed through the lens of commercial speech*. There, the Court struck a Vermont law restricting the sale, disclosure, and use of records created by pharmacies that reveal the prescribing habits of doctors. *Sorrell* therefore involved paradigmatic *commercial* speech, but the Court nonetheless noted that "the First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'"[86] The Court continued by noting that "[c]ommercial speech is no exception" to this principle in part because a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."[87]

The only Circuit Court of Appeals to have applied *Sorrell* had concluded "after *Sorrell,* it is clear that commercial speech is subject to a demanding form of intermediate scrutiny analysis."[88] And the only district court to address *Sorrell* has characterized it as requiring strict scrutiny when analyzing acts such as the PMDA: In *Wollschlaeger v. Farmer,* a Southern District of Florida court observed "[i]n *Sorrell v. IMS Health Inc.,* the Supreme Court applied strict scrutiny to a law involving commercial speech—which is

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84 *Id.* at 425–26, 113 S.Ct. 1505.

85 *Sorrell v. IMS Health Inc.*, —— U.S. ——, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011).

86 *Id.* at 2664 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

87 *Id.* (quotation marks omitted).

88 *Minority Television Project, Inc. v. F.C.C.*, 676 F.3d 869 (9th Cir. 2012).

normally analyzed under a less demanding standard-because it created a content—based burden on speech."[89]

Helpful to this Court, the *Minority Television* Court, "synthesizing three decades of First Amendment cases," identified "two key principles"[90] with respect to content and speaker-based regulations of commercial speech: (1) to sustain any content-based restriction, the government must prove both the reality of the recited harms and that the statute does not burden more speech than necessary "by substantial evidence;"[91] and (2) "when Congress enacts a 'selective and categorical' ban on speech, as here, the government must prove that the speech *banned* by a statute poses a greater threat to the government's purported interest than the speech *permitted* by the statute."[92]

vii. The speech banned by the PMDA poses no greater a threat to the government's purported interest than the speech permitted by the PMDA.

Here, the PMDA's prohibitions and punishments of protected commercial speech cannot withstand the demanding scrutiny this Court must apply. *First*, there is no means by which the state could demonstrate that "the speech banned by the statute poses a greater threat to the [state's] interest than the speech permitted by the statute." This is for two reasons. First, there are many exemptions to the Act. Pursuant to R.C. 4728.11(B)(4)(b), jewelry stores are exempt from the Act. That the suppression of speech is essential, or even important, to advance the state's interests is undermined by the fact that all Ohio jewelers remain free to state "we buy gold," and then actually buy gold or silver, without the state responding through punitive regulation. In fact, a jeweler prominently advertise "we buy gold," and may buy two or three times as much gold and silver as Mr. Tomaso without being subjected to punishment. Meanwhile, jewelry, gold or otherwise, is every bit as likely to be the target of theft as pure gold and silver. Similarly, there is no prohibition on a coin dealer posting a sign indicating "we buy diamonds," or "we buy precious gems."

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89 *Wollschlaeger v. Farmer* --- F.Supp.2d ----, 2012 WL 3064336 (S.D.Fla.,2012).

90 Id.

91 Id., citing *Turner II*, 520 U.S. at 211, 117 S.Ct. 1174. ("Substantial evidence" must include "substantial evidence in the record before Congress" at the time of the statute's enactmen).

92 Id., citing *Discovery Network*, 507 U.S. at 425, 113 S.Ct. 1505.

Secondly, 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 Plaintiffs, without burden, if he or she simply does not advertise to the public that he or she does so. To this end, the statute would seem to encourage the underground trafficking of stolen gold and silver (sale to criminals who do not advertise to the public), while punishing traditional law-abiding retail store owners.

viii. The PMDA's speech-triggered licensing requirement is not narrowly tailored, and burdens more speech than necessary.

Under the fourth *Central Hudson* prong, "the relevant question is whether the speech restriction is narrowly tailored; that is, we must determine whether the speech restriction at issue is more extensive than is necessary to serve the asserted interests."[93] A regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation," *and* it does not "burden substantially more speech than is necessary to further the government's legitimate interests."[94] As further relevant here, the guiding principle of narrow tailoring is that the government must "demonstrate that the recited harms" to the substantial governmental interest "are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way."[95] Importantly, the government must prove both the reality of the recited harms and that the statute does not burden more speech than necessary "by substantial evidence."[96] "Substantial evidence" has been characterized as requiring "substantial evidence in the record before Congress" at the time of the statute's enactment.[97] In addition, "[e]ven a legitimate government interest cannot justify a restriction if the restriction accomplishes that goal

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93 *Pagan*, 492 F.3d at 771 (citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (internal quotation marks omitted)).

94 Id.

95 *Turner I*, 512 U.S. at 664–65, 114 S.Ct. 2445.

96 *Turner II*, 520 U.S. at 211, 117 S.Ct. 1174.

97 Id.

at an inordinate cost to speech."[98] The regulatory technique may extend only as far as the interest it serves: the State cannot regulate speech that poses no danger to the asserted state interest,[99] nor can it suppress information when narrower restrictions on expression would serve its interest as well.

Here, the Act does not state its desired result, and when asked to articulate the state interest underlying the Act's burdens, the Department of Commerce has declined to comment.[100] However, the putative state interest in imposing these burdens can be surmised through review of other state's regulations of precious metals dealers. West Virginia's interests were described through the following statement: "[t]he temptation to steal still rears its ugly head. State governments understandably from time to time have to seek to introduce enhanced methods for detecting and preventing theft. The West Virginia legislature in enacting in 1981 Section 61-3-51 of its Code has followed one recently developed course. The statute is designed to impede the flow in commerce of stolen goods and thereby to diminish the likelihood that they will become more difficult to trace and to recover."[101] The Kansas law was enacted because "the Kansas Legislature sought to restrict the flow of stolen goods through legitimate businesses to untraceable buyers."[102]

Thus, Ohio's interests here, *at most,* consist of preventing theft and the temptation to steal, and restricting the flow of stolen goods. However, the burdens the Act places on speech are clearly not narrowly tailored to advance these interests: suppressing and punishing advertising and solicitation by gold and silver dealers is not a direct or tailored means of effectuating these interests.

As a threshold matter, 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.

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98 *Hays County*, 969 F.2d at 118.

99 See *First National Bank of Boston v. Bellotti*, *supra*, at 794-795, 98 S.Ct., at 1425-1426.

100 Verified Complaint at Exhibit A.

101 *Gallaher v. City of Huntington*, 759 F.2d 1155 (4th Cir. 1985).

102 *Joe Flynn Rare Coins Inc. v. Stephan*, 526 F.Supp. 1275 (D. Kan., 1981).

To the extent that moving beyond this is necessary, there are a number of deficiencies in the Act's regulation of speech.

First, the Ohio Precious Metals Dealer Act, as written and enforced, burdens, suppresses, and prohibits protected promotion of 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. In an October 18, 2012 email to Mr. Tomaso, DOC indicated that Mr. Tomaso had engaged in prohibited speech through (1) a "We Buy Gold" sign in his store window; and (2) a "freestanding sign outside [his] store's door" indicating "Buying Gold & Silver."[103] 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."[104]

However, R.C. 4728.11(F) actually exempts from regulation most of the gold and silver that Liberty Coins and other dealers purchase. Specifically, under that division, purchases that do not require licensure include "any purchase of coins, hallmark bars, registered ingots, and other items as numismatic objects." Plaintiffs must therefore be free to advertise that they purchase these gold and silver items without triggering the licensing requirements and burdens, and without committing the crime of advertising without a license. A sign or other advertisement or solicitation indicating "[w]e buy gold and silver" is a truthful method of advertising for the purchase of these items, because each of these items consists of gold and silver. In fact, over the first half of 2012, 62.3 percent of the dollar value of Liberty Coins' purchases consisted of such entirely exempt gold and silver items.[105]

Likewise, R.C. 4728 permits Plaintiffs and other, without a license, to purchase gold and silver from other precious metals dealers. However, Plaintiffs are clearly prohibited from advertising to those would-be dealers through indicating, by general promotional materials, anything akin to "we buy gold and silver."

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103 Verified Complaint at ¶ 43 and Exhibit A.
104 Id. at ¶ 44 and Exhibit A.
105 Id. at ¶ 20.

Defendants' position is that Plaintiffs can be (1) prohibited from engaging in such transactions without a license, even though they are exempt, merely because they have promoted the purchase of gold and silver; and (2) sanctioned for advertising to engage in such exempt transactions that constitute a majority of their businesses, just because that advertisement could also be read to include items that are not exempt.

Consequently, "the amount of beneficial speech prohibited by the act"[106] is staggering. Prohibiting small business owners from posting self-made signs in their storefront windows, and even handing business cards to colleagues, merely because those signs and cards contain the slogan "I buy gold and silver" puts such business owners in an impermissible strait-jacket. Further, it prohibits advertising communicating the willingness to purchase gold and silver items that are entirely exempt from the act, and thus ultimately burdens speech that is clearly beneficial to the public, by making it aware of the existence of a legitimate business that may wish to purchase items that the public may wish to sell. Thus the Act, and Defendants' enforcement thereof, is not narrowly tailored to prevent theft of gold and silver jewelry, etc. because it prohibits speech (and ostensibly conduct) pertaining to gold and silver items not targeted by (and exempt from) the Act.

Second, the prohibition and punishment of speech does not *directly* advance the state's interests. Even putting aside the Act's punishment of particular content and speaker identity, "the Court has declined to uphold regulations that only indirectly advance the state interest involved."[107] In both *Bates* and *Virginia Pharmacy Board*, the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted in *Virginia Pharmacy Board* that "[t]he advertising ban does not directly affect professional standards one way or the other."[108] In *Bates*, the Court overturned

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106 *Id.*

107 *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980).

108 425 U.S., at 769, 96 S.Ct., at 1829.

an advertising prohibition that was designed to protect the "quality" of a lawyer's work, observing "[r]estraints on advertising . . . are an ineffective way of deterring shoddy work." [109]

Here, the suppression of speech does not directly advance any state's interest in preventing theft and sale of stolen goods. As the Supreme Court explained in *Thompson v. Western States Medical Center* "in previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."[110] In *Rubin v. Coors Brewing Co.,* [111] for example, the Court found a law prohibiting beer labels from displaying alcohol content to be unconstitutional in part because of the availability of alternatives "such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength ..., or limiting the labeling ban only to malt liquors."[112] The fact that "all of [these alternatives] could advance the Government's asserted interest in a manner less intrusive to ... First Amendment rights" indicated that the law was "more extensive than necessary."[113]

Nowhere in the legislative history of the PMDA or the Department of Commerce's enforcement-related statements is there any explanation of why the state believed forbidding advertising was a necessary as opposed to merely convenient means of achieving its interests. Yet "[i]t is well established that 'the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'"[114] "If the First Amendment means anything, it means that regulating speech must be a last-not first-resort. Yet here it seems to have been the first strategy the Government thought to try."[115]

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109 433 U.S., at 378, 97 S.Ct., at 2706.

110 Thompson, *supra.*

111 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995).

112 *Id.*, at 490-491, 115 S.Ct. 1585.

113 *Id.*, at 491, 115 S.Ct. 1585. See also *44 Liquormart, Inc. v. Rhode Island,* 517 U.S., at 507, 116 S.Ct. 1495 (plurality opinion) (striking down a prohibition on advertising the price of alcoholic beverages in part because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance").

114 *Edenfield v. Fane,* 507 U.S., at 770, 113 S.Ct. 1792 (quoting *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 71, n. 20, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983)).

115 *Thompson,* supra.

Moreover, there are direct ways to guard against and track theft than by punishing advertising -- the state is of course free to *directly* prohibit the target of its interests: the purchase of stolen gold or silver by anyone. In fact, there is already a criminal law addressed to this subject in Ohio: R.C. 2913.51 ("Receiving Stolen Property") states "No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." The state's enforcement of this law against gold and silver dealers would be a tailored means of effectuating the state interests of curbing theft and the sale of stolen gold and silver. Likewise, a similar criminal or civil prohibition that dispensed with the *mens rea* requirement would still be more narrowly-tailored than burdening a certain class of businesses on the basis of their protected speech alone.

Third, the state cannot plausibly carry its burden of maintaining any formidable defenses to the Act's burdens. *First*, it is no defense that the Act, rather than imposing an absolute prohibition on advertisement, "merely" (1) imposes a prohibition on advertisement without a license; and (2) imposes considerable punishment and burdens upon those who advertise. In *Sorrell v. IMS Health Inc.*, the Supreme Court applied strict scrutiny to a law involving commercial speech—which is normally analyzed under a less demanding standard-because it created a content—based burden on speech. [116]

Second, it is no defense that the Act's prohibition and punishment of speech is merely a "trigger" that determines whether licensure laws are then imposed. Recently, in *Thompson v. Western States Medical Center*, the Supreme Court rejected an identical defense in protecting commercial speech.[117] There, the "provisions use[d] advertising as the trigger for requiring FDA approval-essentially, as long as pharmacists do not advertise particular compounded drugs, they may sell compounded drugs without first undergoing safety and efficacy testing and obtaining FDA approval. If they advertise their compounded drugs, however,

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[116] —— U.S. ——, ——, 131 S.Ct. 2653, 2664, 180 L.Ed.2d 544 (2011) ("[T]he distinction between laws burdening and laws banning speech is but a matter of degree and ... the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

[117] 535 U.S. 357, 122 S.Ct. 1497 (U.S.,2002).

FDA approval is required."[118] The Court stridently rejected this defense, which included the arguments that "advertising is a fair proxy for actual or intended large-scale manufacturing," and dismantled the speech-dependent regulatory scheme, rejecting the government position "conditioning an exemption from the FDA approval process on refraining from advertising."[119] Here, the regulatory scheme works identically: the precious metals purchasers who refrain from advertising the public are exempt from the regulatory scheme, but punished wish subjection to it, if they advertise. It is clearly not permissible to use protected speech as the criteria for determining whether to impose regulations.

Third, it is no defense that Liberty Coins is "a member of a regulated profession." "Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights."[120] To the contrary, "professional speech," and "even commercial speech by professionals," may be entitled to "the strongest protection our Constitution has to offer."[121] The policies invalidated in *Conant "*[sought] to punish physicians on the basis of the content of doctor-patient communications. Only doctor-patient conversations that include discussions of the medical use of marijuana trigger[ed] the policy."[122] Similarly here, if a business posts a sign indicating "we buy gold," even if it desires to buy exempt hallmark bars, silverware, and coins, it is punished for the content of this speech: it is subjected to the requirements of (1) applying for a license (and his speech is entirely prohibited if he does not receive it); (2) paying a licensing fee; and (3) subjecting his business to sweeping warrantless searches and onerous reporting requirements. If the business owner remains silent, his business remains unsaddled by any of these burdens.

Finally, it can be no justification at all for the law that Plaintiffs' advertisements might somehow induce or incite a thief to steal gold or silver, with his knowledge of a new potential outlet for sale. The "fear

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118 Id.

119 Id.

120 *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). *Thomas v. Collins*, 323 U.S. 516, 531, 65 S.Ct. 315, 89 L.Ed. 430 (1945) ("the rights of free speech and a free press are not confined to any field of human interest").

121 Id., citing *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 634, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *Bates v. Arizona*, 433 U.S. 350, 382–83, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

122 Id.

that people would make bad decisions if given truthful information" cannot justify burdens on speech.[123] That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers. The choice "between the dangers of suppressing information, and the dangers of its misuse if it is freely available" is one that "the First Amendment makes for us."[124]

Consequently, the state cannot demonstrate that the speech-based criteria for imposing the considerable burdens attendant to obtaining and maintaining a Precious Metals Dealer Act license are sufficiently direct or narrowly-tailored to advance the state's interest in curtailing the theft and unlawful resale of certain types of gold and silver. Accordingly, imposition of the licensing scheme must be enjoined.

ix. The PDMA conditions speech on impermissibly vague and arbitrary standards.

The Act prohibits speech by those who buy and sell precious metals, unless they first obtain a license; however, whether one is eligible for and able to obtain such a license to speak is governed by impermissibly vague and arbitrary standards. 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.'"[125]

Further, 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."[126] The test is whether the language * * * affords the "(p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms."[127] Otherwise, vague laws may not only "trap the innocent by not providing fair warning" or foster "arbitrary and discriminatory

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123 *Thompson*, 535 U.S., at 374, 122 S.Ct. 1497; see also *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769–770, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

124 *Ibid*.

125 *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).

126 *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).

127 *NAACP v. Button*, 371 U.S., at 438, 83 S.Ct., at 340.

application" but also operate to inhibit protected expression by inducing "citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'"[128] "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[129]

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." [130] To this end, 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,"[131] and a statute that fails to constrain "an official's decision to limit speech" with "objective criteria" is unconstitutionally vague. [132] Put another way, "when a law or regulation predicates expressive activity on the prior acquisition of a permit, *the rule must contain narrow and precise standards* to control the discretion of the permitting authority."[133]

Here, 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. 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 obtain a government license. To obtain that license, he must prove that he is "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

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128 *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 1322, 12 L.Ed.2d 377 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)).

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

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

131 *UFCW*, 163 F.3d at 358–59.

132 *Id*.

133 *Parks v. Finan*, 385 F.3d 694, 699 (6th Cir. 2004) (citing *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992).

during the licensure period."[134] Each of these standards – upon which the business owners' speech is conditioned -- is unduly vague and arbitrary. None of these terms are defined. And what does it mean to be of "good character," to have a good "reputation," or to have the "an ability to maintain [a certain] net worth?" By whose standards are these normative criteria judged? The PDMA simply does not promulgate standards sufficient to supply objective criteria or limit official discretion over licensing speech: a dealer without "good character" or sufficient "reputation" or "net worth" (in the eyes of the state) is criminally prohibited from promoting his business. And this is unduly vague, and ultimately unconstitutional.

B. Plaintiffs are confronted with irreparable injury.

Even a temporary deprivation of First Amendment freedom of expression rights is generally sufficient to prove irreparable harm.[135] Thus, satisfaction of the first prong of the preliminary injunction standard – demonstrating a strong likelihood of success on the merits – also satisfies the irreparable injury standard.[136] Plaintiffs have demonstrated a substantial likelihood of success on the merits. Thus, Plaintiffs will suffer irreparable injury if Defendants are not immediately enjoined from enforcing its unconstitutional policy.

Moreover, Defendants have prohibited Plaintiffs, simply in response to their speech, from (1) engaging in any promotion of their Liberty Coins gold and silver business; and (2) purchasing any gold and silver items. Consequently, Plaintiffs' business is imperiled by the Act and the Defendants' orders, which they purport to be pursuant thereto.

C. No public interest is served by continued enforcement of the policies against Mr. Morbitzer and YAL, nor would be private harm accrue.

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134 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.

135 *National People's Action v. Village of Wilmette*, 914 F.2d 1008, 1012 (7th Cir. 1990).

136 *See Elrod v. Burns*, 427 U.S. 347, 373 (1973) (holding that if a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (finding that "when a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor").

Neither Defendants nor others will suffer any harm if they are enjoined from enforcing this unconstitutional licensing scheme against Mr. Tomaso and Liberty Coins. There is no reason to believe that Plaintiffs' threaten criminal conduct - - in 35 years of business, Mr. Tomaso has no criminal record regarding receipt of stolen property. Moreover, those laws still apply to Liberty Coins. On the other hand, the public interest is served by protecting free expression, maximizing Ohio consumers' access to information, striking down policies that chill speech, and by vindicating Plaintiffs' constitutional rights.[137]

IV. CONCLUSION

Defendants, through enforcement of the Ohio Precious Metals Dealers Act and their own policies, which (1) prohibit protected commercial speech without a government-issued license; (2) punish protected speech by subjecting the speaker to licensure requirements and sweeping warrantless searches without probably cause that appear to violate his or her Fourth Amendment rights; and (3) maintain impermissible vague and arbitrary licensing standards. For the foregoing reasons, this Court must at once enjoin all enforcement of the aforesaid policies, including further imposition of the speech-contingent licensing regimen established by R.C. 4728, and the imposition of any attempts to fine or prosecute Plaintiffs for failing to adhere thereto.

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[137] *See G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights").

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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