

**United States Court of Appeals  
for the Sixth Circuit**

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**Case No. 13-3012**

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**LIBERTY COINS, LLC, *et al.*,**

***Plaintiffs-Appellees,***

**v.**

**DAVID GOODMAN, *et al.*,**

***Defendants-Appellants.***

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**On Appeal from the United States District Court  
for the Southern District of Ohio, Western Division**

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**BRIEF OF PLAINTIFFS-APPELLEES**

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**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTERESTS**

Pursuant to 6th Cir. R. 26.1, Plaintiffs-Appellees Liberty Coins, LLC, and Michael Tomaso make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: **N/A**
  
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: **N/A**

/s/ Maruice A. Thompson  
*Maurice A. Thompson*  
*Counsel for Plaintiffs-Appellees*

April 9, 2013  
*Date*

**TABLE OF CONTENTS**

<b>Table of Contents</b> .....			1	
<b>Table of Authorities</b> .....				
<b>I.</b>		<b>The Concepts of Standing and Failure to State a Claim . .</b>	1	
		<b>The City Application of Judicial Notice . . . . .</b> .....	3	
		<b>About An Intended Recipient . .</b> ..... .....	6	
		<b>The the Cottons' Property was Destroyed . .</b> ..... ..	9	
		<b>Circumstances . . . . .</b> ..... ..... .....	10	
		<b>The immunity . . .</b>	15	

		..... ..... ..... .....		
--	--	----------------------------------	--	--

<b>II.</b>	<b>CONCLUSION</b> .....	16	
	.....		

## TABLE OF AUTHORITIES

<b><i>Cases</i></b>			
	<i>Byrd v. Clark</i> , 783 F.2d 1002 (11th Cir. 1986) . . . . . . . . . .	6	
<b><i>Statutes and Rules</i></b>			
	Fed. R. Civ. P. 12(b) (1) . . . . . . . . . . . . . . . ..	<i>passim</i>	
	Fed. R. Civ. P. 12(b) (6) . . . . . . . . . . . . . . . ..	<i>passim</i>	

## **I. STATEMENT OF JURISIDCTION**

The District Court possessed subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as the Plaintiffs-Appellees asserted a federal civil rights claim pursuant to 42 U.S.C. § 1983.<sup>1</sup>

On December 5, 2012, the District Court granted Plaintiffs' motion for a preliminary injunction.<sup>2</sup> Subsequently, on December 28, 2012, the District Court modified, in part, the preliminary injunction.<sup>3</sup>

On January 4, 2013, the Defendants timely appealed the preliminary injunction.<sup>4</sup> Thus, this Court possess jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1).

## **II. REQUEST FOR ORAL ARGUMENT**

Plaintiffs-Appellees Liberty Coins, LLC, and Michael Tomaso believe the oral argument would assist the Court in addressing both the record, including the evidence, developed before the District Court, as well as the legal implication arising therefrom.

## **III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

Whether the District Court abused its discretion in granting a preliminary injunction so as to enjoin the Department of Commerce from imposing the Precious Metal Dealers Act, and all of its attendant regulatory burdens, on Ohio businesses in response to their protected commercial speech ("holding oneself out to the public as willing to purchase precious metals").

## **IV. STATEMENT OF THE CASE**

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<sup>1</sup> Complaint, R.1, PageID#1-38.

<sup>2</sup> Opinion & Order, R.27, PageID#597-624.

<sup>3</sup> Opinion & Order, R.35, PageID#667-680.

<sup>4</sup> Notice of Appeal, R.36, PageID# 681.

Plaintiffs-Appellees commenced this action on October 29, 2012, through the filing of a complaint which alleged that Ohio's Precious Metal Dealers' Act (PMDA) violated the First and Fourteenth Amendments to the United States Constitution.<sup>5</sup> Three days later, Plaintiffs moved for a temporary restraining order/preliminary injunction to enjoin the operation and enforcement of the PMDA.<sup>6</sup>

On November 29, 2012, the District Court conducted an evidentiary hearing on Plaintiffs' motion. In addition to the other briefing filed prior to that hearing,<sup>7</sup> the District Court accepted and consider post-hearing memoranda.<sup>8</sup> Ultimately, on December 5, 2012, the District Court granted Plaintiffs' motion for a preliminary injunction<sup>9</sup> which was subsequent modified, on December 28, 2012.<sup>10</sup> On January 4, 2013, the Defendants timely appealed the preliminary injunction.<sup>11</sup> Thus, this Court possess jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1).

Coincidentally *vel non*, Liberty Coins came to the attention of the DOC through an anonymous mailing of a newspaper article and advertisement which was sent to DOC immediately after Mr. Tomaso had opposed efforts by the City of Delaware Police Department to have the Delaware City Council imposed onerous tracking and reporting regulations upon all businesses engaged in the sale of second-hand items, *e.g.*, antique stores, consignment shops, and coin dealers. (11/29 Hearing Transcript, at 53-54; Joint Exhibits, Exh. DXP, R.23-4, PageID#394-396.)

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<sup>5</sup> Complaint, R.1, PageID#1-38.

<sup>6</sup> Motion for TRO/PI, R.7, PageID#59-97.

<sup>7</sup> Memorandum in Opposition to Motion, R.14, PageID#162-272; Reply Memorandum in Support, R.19, PageID#299-329

<sup>8</sup> Plaintiffs' Closing Argument Memorandum, R. 24, PageID#446-456; Plaintiffs' Closing Argument Memorandum, R. 25, PageID#457-473.

<sup>9</sup> Opinion & Order, R.27, PageID#597-624.

<sup>10</sup> Opinion & Order, R.35, PageID#667-680.

<sup>11</sup> Notice of Appeal, R.36, PageID# 681.

For “[this Court’s] function is to review the case presented to the district court, rather than a better case fashioned after a district court’s unfavorable order.” *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 922 (6th Cir. 2006). Thus, “the failure to present an issue to the district court forfeits the right to have the argument addressed on appeal.” *Armstrong v. City of Melvindale*, 432 F.3d 695, 699-700 (6th Cir. 2006).

But even beyond the DOC’s waiver of that argument, in seeking to identify brokers and middlemen as being those who “hold themselves out,” the DOC ignores the first part of the definition of “precious metal dealer” limited the phrase to those “engaged in the business of *purchasing* articles”. But, by definition, brokers or middlemen do not “purchase” the product; they simply “bring buyer and seller together.” (Appellants’ Brief at 17 (defining “broker”).) Thus, brokers or middlemen do not fall within the definition of “precious metal dealer”.

In *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996), this Court described the review of a preliminary injunction in the First Amendment context to be “different”, indicating that First Amendment questions are reviewed *de novo*. But a review of that case indicates that this *de novo* review was determined to be appropriate in the situation when the district court imposed or upheld a prior restraint on speech. *See also Bays v. City of Fairborn*, 668 F.3d 814 (6th Cir. 2012)(subjecting *denial* of preliminary injunction to *de novo* review in First Amendment context). Thus, this Court has applied a different standard of review in First Amendment appeals depending upon whether the preliminary injunction request was denied such that the challenged statute continued in force versus whether the preliminary injunction request was granted and the challenged statute enjoined. In this latter situation, as noted above, this Court has repeatedly subjected the issuance of a preliminary injunction to an abuse of discretion review even in the First Amendment context.