No. 13-3012

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIBERTY COINS, LLC; and
JOHN MICHAEL TOMASO,

Plaintiffs - Appellees,

v.

DAVID GOODMAN, in his official capacity as
Director, Ohio Department of Commerce; and
AMANDA McCARTNEY, in her official capacity as Consumer Finance
Attorney of Division of Financial Institutions, Ohio Department of Commerce,

Defendants - Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio
Honorable Michael H. Watson, District Judge

BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION AND LESLIE YOUNG
IN SUPPORT OF PLAINTIFFS - APPELLEES AND
IN SUPPORT OF AFFIRMANCE

TIMOTHY SANDEFUR
LANA HARFOUSH, *Of Counsel*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae
Pacific Legal Foundation and Leslie Young

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit Case Number: 13-3012

Case Name: *Liberty Coins, LLC, et al. v. Goodman, et al.*

Name of Counsel: Timothy Sandefur

Pursuant to 6th Cir. R. 26.1, Pacific Legal Foundation and Leslie Young make the following disclosure:

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:

No.

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:

No.

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/s/ Timothy Sandefur

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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IDENTITY AND INTEREST OF AMICI

Pacific Legal Foundation (PLF) was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts, and represents the views of thousands of supporters nationwide. In furtherance of PLF's mission to defend individual and economic liberties, the Foundation operates its Free Enterprise Project that, among other things, seeks to elevate commercial speech to the full protection of the First Amendment. To that end, PLF has participated in several cases before the U.S. Supreme Court on matters affecting the public interest, including issues related to the First Amendment and commercial speech. *See*, *e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Wine & Spirits Retailers, Inc. v. Rhode Island & Providence Plantations*, 552 U.S. 889 (2007); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); and *FEC v. Beaumont*, 539 U.S. 146 (2003). PLF attorneys also represent *amica* Leslie Young in her case discussed below, and have published important scholarship regarding the commercial speech doctrine. *See*, *e.g.*, Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004); Timothy Sandefur, *The Right to Earn a Living* ch. 9 (2010).

Leslie Young is the owner and operator of Elist.me, a business that assists homeowners who wish to sell their homes "for sale by owner," without the assistance

or cost of a real estate agent. Elist.me operates a database into which Ms. Young enters information provided by home sellers; that data is then fed, in the form of advertisements, to third-party websites where the general public can view them. Nebraska officials have declared that Ms. Young thereby qualifies as a "real estate broker" and must obtain a Nebraska Real Estate Broker's license to operate her business. Ms. Young has an interest in stopping states from burdening entrepreneurs' speech by requiring professional licenses for pure expressive activity.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* declare that no party and no counsel for a party authored any part of this brief, and that no one other than amici paid or contributed any funds to anyone for preparation of this brief. In accordance with Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

INTRODUCTION

The Precious Metals Dealers Act (PMDA), Ohio Rev. Code Ann. § 4728, imposes an expensive and burdensome licencing requirement on individuals based on whether they engage in expressive activities covered by the First Amendment. Under the PMDA, "precious metals dealers" may only operate their businesses if they first obtain a license from the Ohio Department of Commerce's Division of Financial Institutions. Ohio Rev. Code Ann. § 4728.02(A). But unlike other occupational licenses that apply to a person or business based on what the professional *does*,

Section 4728 applies based on what that person *says*. In particular, the statute defines a precious metals dealer as a person who buys such metals "*if*, *in any manner, including any form of advertisement or solicitation of customers[,] [he] holds himself, herself, or itself out to the public as willing to purchase such articles*." Ohio Rev. Code Ann. § 4728.01(A) (emphasis added). Thus a precious metals dealer is *not* just a person who buys precious metals, but a person who both buys metal and *says* that he does.

Appellants argue that simply purchasing certain items constitutes "holding [oneself] out" as a dealer under the law, and thus that the PMDA regulates conduct, not speech. *Liberty Coins LLC v. Goodman*, No. 2:12-cv-998, at 12 (S.D. Ohio Dec. 5, 2012) (order granting preliminary injunction).[1] That interpretation is incorrect. The PMDA's plain language and basic sentence construction reveal that a person who purchases precious metals does not meet the statutory definition unless he also engages in speech activity. The district court rightly called Appellants' reading "nonsensical," reasoning that if mere purchase triggers the licensing requirement, "the entire clause after the word 'if' would be superfluous." *Id.* Thus, speech or publication are clearly triggering elements of the licensing requirement. *Id.* at 11-12.

[1] *Available at* http://www.ohioconstitution.org/wp-content/uploads/2012/12/Liberty-Coins-Order-Granting-Preliminary-Injunction.pdf (last visited Apr. 19, 2013).

Though the district court reached the correct result by applying a basic *Central Hudson* commercial speech analysis, it should have applied a more speech-protective test to the PMDA. That Act is both a content-based restriction and a prior restraint on lawful speech, both of which call for strict scrutiny under long-established Supreme Court jurisprudence. In *Sorrell*, 131 S. Ct. at 2664, the Supreme Court held that heightened scrutiny applies to content-based burdens on commercial speech as well as to content-based burdens on non-commercial speech. The PMDA's restriction on speech is content-based because it specifically regulates the substance of speakers' messages: gold buyers cannot without government permission tell others that they lawfully buy certain items. Thus, *Sorrell*'s expansion of commercial speech protection should control here. The PMDA licensing scheme also creates a prior restraint because it requires a person to obtain government permission before he may engage in truthful speech about a lawful activity. Prior restraints of commercial speech must also satisfy heightened scrutiny and be narrowly drawn to achieve some proper purpose. *See Riley v. Nat'l Fed'n of the Blind of NC, Inc.*, 487 U.S. 781, 802 (1988). Licensing speech as this Act does creates a prior restraint which cannot withstand heightened constitutional scrutiny. Whether viewed as a content-based restriction or a prior restraint, the PMDA burdens speech in ways that contravene the First Amendment.

I

THE PMDA VIOLATES THE FIRST AMENDMENT

A. Heightened Scrutiny Applies to the PMDA

Content-based regulations are restrictions on speech that target the substance of communication, as opposed to neutral time, place, and manner restrictions that simply regulate how speech activities may be conducted. Content-based regulations are reviewed under strict scrutiny and are "presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). Under that standard of review, regulations must be narrowly tailored to promote a compelling government interest and will fail if the government might have chosen some less restrictive alternative. *Id.* Further, courts "must ensure that a compelling interest supports *each application* of a statute restricting speech." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (emphasis in original).

Prior restraints also implicate heightened scrutiny. A prior restraint exists when the government prohibits speech before it has been communicated or published. Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The presumption against prior restraints "is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980). Prior restraints

on speech are permissible only where they serve obviously proper purposes and are narrowly drawn. *See Riley*, 487 U.S. at 802. Commercial speech is no exception. *Id.* To the extent that a licensing scheme requires a person to get the government's permission before engaging in speech, it is a prior restraint. *See Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).

For almost 40 years, the Supreme Court has considered commercial speech an important subset of free speech entitled to constitutional protection. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976). Under the test developed in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980), which effectively functions like a form of intermediate scrutiny for restrictions on commercial speech, any restriction on commercial speech must not be more extensive than necessary to serve a directly advanced and asserted governmental interest. But *Central Hudson* left open the important question of whether the heightened scrutiny applicable to content-based restrictions of non-commercial speech also applied to content-based restrictions on commercial speech as well. Richard Samp, *Another Big Year for the First Amendment: Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?*, 2010-11 Cato Sup. Ct. Rev. 129, 133 (The Court went "well beyond a typical *Central Hudson* analysis in its discussion of speech restrictions based on the content of the speech."); Samantha Rauer, *When the First Amendment and Public*

Health Collide: The Court's Increasingly Strict Constitutional Scrutiny of Health Regulations That Restrict Commercial Speech, 38 Am. J.L. & Med. 690, 705 (2012) (Prior to *Sorrell*, the Court typically applied *Central Hudson* to all commercial speech restrictions, "regardless of whether they [were] content-based.").

In *Sorrell*, the Supreme Court answered that question in the affirmative by declaring that heightened judicial scrutiny *does* apply to content-based regulations of commercial speech. 131 S. Ct. at 2664. The Vermont statute at issue in that case restricted speech in aid of drug-promoters' pharmaceutical marketing; specifically, the sale, disclosure, and use of pharmacy records that revealed the prescribing practices of individual doctors. *Id.* at 2659-60. Though the Court could have confined the language of its opinion to a pure *Central Hudson* analysis, it chose instead to rely on precedent from cases involving content-based restrictions on non-commercial speech and lay the framework for "a substantial expansion" of First Amendment commercial speech protections. Samp, *supra*, at 148; *see*, *e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000) (invalidating a federal law that prohibited cable stations from providing sexually explicit programming outside of late night hours); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (invalidating a state law that imposed financial burdens on those seeking to publish books about their criminal activities). Even in his dissent in *Sorrell*, Justice Breyer asserted that the majority applied a "far stricter, specially

'heightened' First Amendment standard[]" to the content-based restrictions at issue in that case. *Sorrell*, 131 S. Ct at 2673 (Breyer, J., dissenting).

In application, *Sorrell* suggests that strict scrutiny is the correct standard for content-based commercial speech regulations. Rauer, *supra*, at 706. In fact, the Court's analysis in that case "looks as strict as the standard the Court applied to a non-commercial speech regulation" in *Brown v. Entm't Merchants Ass'n*, 131 S. Ct 2729, 2731 (2011), a California case from the same term. Rauer, *supra* at 704. There, the Supreme Court employed strict scrutiny to strike down a law that restricted the sale or rental of violent video games to minors as a content-based regulation on speech. *Brown*, 131 S. Ct. at 2738-42.

Other courts have acknowledged that *Sorrell* warrants heightened scrutiny of content-based restrictions, even when the speech at issue is commercial. For instance, in *United States v. Caronia*, 703 F.3d 149, 165 (2d Cir. 2012), the Second Circuit applied heightened scrutiny to the government's application of the federal Food, Drug and Cosmetic Act (FDCA)'s misbranding provisions. In *Caronia*, a pharmaceutical sales representative promoted a prescription drug for "off-label use," a purpose not approved by the Food and Drug Administration. *Id.* at 152. The government construed the FDCA to prohibit and criminalize such promotion. *Id.* at 164. Because this created a content- and speaker-based restriction, the Second Circuit determined the regulation was subject to heightened scrutiny under *Sorrell*. *Id.* at 165. The court

vacated the promoter's conviction for violating the statute, concluding that the government cannot prosecute people for truthfully promoting the lawful, off-label use of an FDA approved drug. *Id.* at 169.

In *Friendly House v. Whiting*, 846 F. Supp. 2d 1053, 1062 (D. Ariz. 2012), an Arizona district court enjoined enforcement of provisions of Senate Bill 1070 for violating the First Amendment. That immigration reform bill made it unlawful for a person in a motor vehicle to attempt to hire a pedestrian for work at another location. *Id.* at 1055. Plaintiffs argued that those restrictions were unconstitutional restrictions on day laborers' speech. *Id.* The district court held that *Sorrell* "modified the commercial speech test originally set forth in *Central Hudson*," and made the narrow tailoring requirement more rigorous, by requiring that content-based restrictions on commercial speech be "'drawn to achieve' a substantial governmental interest." *Id.* at 1059. In *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013), the Ninth Circuit affirmed the *Friendly House* decision. Though the Ninth Circuit affirmed under a less exacting standard, it held that the district court did not err in applying stringent requirements to commercial speech in accordance with *Sorrell*. *Id*. at 821, 825.

Other courts agree that *Sorrell* expanded the applicable level of scrutiny available to content-based burdens of commercial speech. *See Minority Television Project, Inc. v. FCC*, 676 F.3d 869, 881 n.8, *reh'g en banc granted*, 704 F.3d 1009

(9th Cir. 2012) ("[A]fter *Sorrell*, it is clear that commercial speech is subject to a demanding form of intermediate scrutiny analysis."); *1-800-411-Pain Referral Serv., LLC v. Tollefson*, No. CIV. 12-3034 SRN/TNL, 2012 WL 6737776, at *12 (D. Minn. Dec. 28, 2012) ("The Court thus employs the two-part approach set forth in *Sorrell*, which incorporates the *Central Hudson* standard in the second half of the analysis."); *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251, 1262 (S.D. Fla. 2012) (In *Sorrell*, 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.").

Because the PMDA creates a content-based regulation of speech, this Court should apply heightened scrutiny in its First Amendment analysis.

B. The PMDA Fails Under Heightened Scrutiny

The PMDA is both a content-based regulation of commercial speech and a prior restraint. The Act is content-based because it specifically targets and burdens speech based exclusively on whether that speech relates to the purchase of precious metals and similar items. Ohio Rev. Code Ann. § 4728.01(A). The statute directly restricts the content of gold buyers' speech related to purchasing certain goods, but it does not prohibit them from speaking about other lawful topics. Further, the PMDA requires previous metals dealers to obtain a license before they can speak, imposing a prior restraint well beyond the functional aspects of buying precious metals that could

conceivably be subject to a valid licensing requirement. The license requirement bars unlicensed speakers from communicating truthful expression, blocking the speech from consumers and the general public before its even uttered. In effect, the Act criminalizes truthfully speaking about an otherwise legal activity.

Such occupational licensing schemes violate the First Amendment. In *Parker v. Commonwealth of Kentucky, Bd. of Dentistry*, 818 F.2d 504, 509 (6th Cir. 1987), this Court struck down a state law which prevented general dentists from holding themselves out as specialists even when they were allowed to perform special services in orthodontics, oral surgery, periodontics, and other specialities. Under Ky. Rev. Stat. § 313.445(1), in order to lawfully announce a speciality to the public, dentists were required to "acquire a speciality license" from the Kentucky Board of Dentistry. *Parker*, 818 F.2d at 505-06. Even without such licenses, general practitioners *could legally provide services* in specialization areas; but dentists risked revocation of their licenses for "unprofessional conduct" if they simply said that they were "especially qualified" in any specialization area. *Id.* at 506.

Though the plaintiff in *Parker* had performed over 200 hours in continuing education in orthodontic procedures, and orthodontia comprised about 50 percent of his practice, he was charged with violating that law for using the words "orthodontics," "braces," "brackets," and similar terms in a Yellow Pages advertisement. *Id.* This Court held that the state must meet narrow tailoring

requirements to regulate such speech. *Id.* at 509. The panel ruled that terms like "orthodontics" and "braces" were not inherently misleading because they help "describe procedures" that the plaintiff dentist was legally allowed to perform.[2] *Id.* Ultimately, this Court held that if a state permits a dentist to perform orthodontic procedures, it may not ban dentists' truthful speech about those lawful services. *Id.* In this case, this Court must resolve a question similar to that addressed in *Parker*: gold dealers may buy precious metals under the PMDA, but they can be punished for advertising or speaking about that fact.

In *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 370 (2002), the Supreme Court struck down, on First Amendment grounds, provisions of federal law that required FDA approval of compounded drugs. In that case, pharmacists' advertising "triggered" Section 127(a) of the Food and Drug Administration Modernization Act of 1997, which required the pharmaceutical providers to go through drug approval requirements that did not apply absent the speech. *Id.* The Supreme Court analyzed the restriction under *Central Hudson* and found that the FDA failed to prove that the restrictions on the pharmacies' commercial speech were no more extensive than necessary to serve the state's interest of protecting public health and safety. *Id.* at 374. The Court found that "if the Government could achieve its

[2] Even in situations where speech is "potentially misleading," this Court proclaimed that more disclosure—such as requiring businesspeople to disclose that they are unlicensed—is preferable to an outright ban on advertising. *Id.* at 509.

interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so," and that the government had not explained why it "believed forbidding advertising was a necessary as opposed to merely convenient means of achieving its interests." *Id.* at 371, 373.

In *Abramson v. Gonzalez*, 949 F.2d 1567, 1577-78 (11th Cir. 1992), the Eleventh Circuit held that a Florida statute which prohibited unlicensed psychologists from using certain terms to advertise their services, but did not otherwise regulate the practice of psychology, was an unconstitutional infringement on the right to disseminate truthful commercial speech. In that case, plaintiffs were unlicensed psychologists prevented by state law from using the term "psychologist" in communication with the public. *Id.* at 1571. The Eleventh Circuit found that the laws "clearly" placed restrictions on speech because anyone could practice psychology in the state without a license, whereas only those who met certain "examination/academic requirements" could "say that they [were] doing so or hold themselves out as psychologists or allied professionals in advertising, telephone directories, office signs or stationery." *Id.* at 1574 (emphasis omitted). In *Nat'l Ass'n for the Advancement of Psychoanalysis (NAAP) v. California Bd. of Psychology*, 228 F.3d 1043, 1054-56 (9th Cir. 2000), by contrast, the Ninth Circuit upheld a California law that regulated psychologists because it was content neutral, did not trigger strict

scrutiny, and was not a prior restraint. Instead, it required a license to *practice* psychology, not merely to advertise one's services.

This case is more like *Abramson* than *NAAP*. In *Abramson*, the statute at issue allowed anyone to practice the profession of psychology, but only some were permitted by law to speak about their practice. Similarly, under the PMDA, anyone can buy gold but only licensed individuals can buy gold *and advertise that fact*. The California regulation in *NAAP*, on the other hand, did not allow just anyone to practice the underlying profession: only those who had met certain professional requirements could offer psychology services. *NAAP*, 228 F.3d at 1047. Thus that statute was directed, not at speech, but at conduct.

The PMDA fails under the heightened scrutiny that *Sorrell* applies to content-based regulations or to prior restraints of commercial speech. Whether viewed as a prior restraint or as some other form of content-based restriction, the statute is not narrowly tailored to achieve the state's asserted interests, such as preventing theft, because its numerous exceptions entirely undercut any realistic connection to those goals. Specifically, the regulations that purport to advance the state's interest in public safety are not applied consistently among gold-buying groups. As the district court observed, the PMDA brims with exceptions. *Liberty Coins LLC*, No. 2:12-cv-998, at 21 (S.D. Ohio Dec. 5, 2012) (order granting preliminary injunction). It does not apply to transactions where both the "buyer and seller deal in

precious metals" or "hold themselves out as particularly knowledgeable or skillful." Ohio Rev. Code Ann. § 4728.11(A). The requirements do not apply to people who are "licensed to make loans," Ohio Rev. Code Ann. § 4728.11(C), or to particular purchases by licensed salvage motor vehicle dealers or various purchases of silverware and jewelry. Ohio Rev. Code Ann. § 4728.11(D)-(E). Additionally, the statute exempts the purchase of gold coins for pure numismatic value (as opposed to their precious metal content). Ohio Rev. Code Ann. § 4728.11(F). Purchases made by licensed pawnbrokers are also exempt. Ohio Rev. Code Ann. § 4728.11(G)-(H). These express omissions—as well as the fact that one who buys gold but does not advertise that he does so is also exempt—likely make it *easier* for thieves to find gold buyers who are not subject to the PMDA's police reporting requirements or other regulatory safeguards.

The state could serve its goals in a less restrictive way that does not burden and criminalize speech. Currently, if a speaker violates the Act, by expressing a willingness to purchase precious metals without a license, he will be "guilty of a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense." Ohio Rev. Code Ann. § 4728.99. This contrasts with other Ohio statutes that help the state achieve its goal of preventing theft without criminal penalties, by instead requiring some PMDA-exempted groups to simply keep records of gold transfers: thus it is possible for the state to advance its stated goals without

burdening and criminalizing commercial speech. *Liberty Coins LLC*, No. 2:12-cv-998, at 28 (S.D. Ohio Dec. 5, 2012) (order granting preliminary injunction). Ohio also could advance its goals in a constitutional way by regulating all gold buyers similarly and not burdening some gold buyers' First Amendment rights while simultaneously exempting others. Instead, the PMDA restricts certain gold buyers' expression unnecessarily and avoidably. The statute is not narrowly tailored to promote a compelling government interest or proper purpose and there are less restrictive alternatives for the state to achieve its goals. Thus, the law's restraints on truthful communication about otherwise lawful activity fail under heightened scrutiny.

II

LAWS THAT LICENSE SPEECH, BURDEN SPEECH

Occupational licensing abuse, particularly in cases where the "profession" involves only expressive activities, is on the rise. Bob Ewing, *When Free Speech Collides with Occupational Licensing*, The Freeman, July 18, 2012.[3] ("[O]ccupational licensing laws are not only widespread, but often overly burdensome and arbitrary . . . [such] laws could soon censor the speech of millions of Americans."). Statutes that, like the PDMA, impose burdens on businesses and entrepreneurs in consequence of

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[3] *Available at* http://www.fee.org/the_freeman/detail/when-free-speech-collides-with-occupational-licensing#axzz2PvQgYXK8 (last visited Apr. 19, 2013).

their expressive activities imperil both their speech rights and their right to earn a living.

An excellent example of how licensing speech harms individuals is presented by a case that *amica* Leslie Young is currently litigating in the federal district court for Nebraska.[4] Through her web-based business, Elist.me, Young uploads information about homes that are "for sale by owner" into a database that feeds those descriptions to other websites for public view. In other words, her business consists entirely of expressive activities. She does not represent herself as a real estate agent, communicate with potential buyers, offer advice, or receive commissions. *Id.*

Nevertheless, state officials sent her "cease and desist" orders warning her that those simple expressive acts qualify her as a "broker" under Nebraska's Real Estate License Act. Nebraska law provides that only licensed real estate brokers may "negotiate[] or attempt[] to negotiate the listing . . . [of] real estate" or "assist[] in procuring prospects" for listings. Neb. Rev. Stat. Ann. § 81-885.01(2). The state's Real Estate Commission interprets this to mean that only licensed real estate brokers may be compensated for any sort of communication relating to the sale of real estate located in Nebraska. Like the PMDA, this rule burdens expressive activity and infringes on the right of entrepreneurs like Ms. Young—who communicates about, but

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[4] Facts about Young's case are drawn from the First Amended Complaint, *Young v. Heineman*, No. 4:10-cv-03147-JFB-TDT (D. Neb. filed Aug. 30, 2012).

does not engage in, real estate transactions—to earn a living without unreasonable government interference; a right protected by the Fifth and Fourteenth Amendments. *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring). Violating that Act is a Class II Misdemeanor under Neb. Rev. Stat. Ann. § 81-885.45, which subjects violators to criminal penalties of up to six months in prison and a $1,000 fine. Neb. Rev. Stat. Ann. § 28-106.

The process of acquiring a real estate broker's license is time-consuming and expensive. Each applicant must have a high school diploma or equivalent, and must: (a) complete 18 credit hours in subjects related to real estate at an accredited college; or (b) complete 180 class hours in a Commission-approved real estate course; or (c) must have served as a licensed real estate sale person for two years and complete 120 hours of Commission-approved class study. Neb. Rev. Stat. Ann. § 81-885.13(3)-(5). All applicants must pass a Commission-approved written exam "covering generally the matters confronting real estate brokers," and undergo fingerprinting and a criminal background check. *Id.* Failure to comply carries civil penalties of up to $2,500 per complaint. Neb. Rev. Stat. Ann. § 81-885.10. Young is currently challenging that regulation for violating her speech rights—as well as her right to earn a living.

Courts have invalidated efforts by other states to apply their real estate licensing laws on the basis of speech activities. For example, California sought to impose its

licensing law on businesses that advertised properties for sale by owner. A website called ForSaleByOwner.com charged a fee to property owners who wanted to advertise and sell their homes without incurring the cost of employing a real estate agent, much like the real estate section of a newspaper (something that the statute exempted). *Forsalebyowner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 871 (E.D. Cal. 2004). The webpage did not provide advice to individuals about buying and selling homes, did not negotiate or make contacts on behalf of customers, or receive commissions on sales. *Id.* The site contained a disclaimer, stating that it was "legally prohibited from taking part in the actual sales transaction of any of the properties advertised on [its] site." *Id.* at 870. The federal district court agreed that California's effort to impose its licensing laws on the company solely on the basis of its speech acts was unconstitutional because the regulation differentiated between newspapers of general circulation and other outlets of media expression like the plaintiff's website, without any valid justification. *Id.* at 878-80.

Some states have also tried to impose licensing laws on interior designers, a business that consists almost entirely of protected speech. In 2007, Alabama's interior design board sued a woman for violating the state's Interior Design Consumer Protection Act for "practicing 'interior design'"—*i.e.*, selecting paint colors, accessories, fabrics, and furniture for homes and businesses—without the state's permission. *Alabama v. Lupo*, 984 So. 2d 395, 397-98 (Ala. 2007). The Act imposed

serious criminal penalties on persons who provided interior decorating advice without government authorization. *Id.* at 403. Yet the regulation exempted non-registered individuals from making design recommendations if pursuant to a retail sale. *Id.* at 398. Alabama's Supreme Court ruled that the interior design law imposed restrictions that were "unnecessary and unreasonable upon the pursuit of useful activities" and that the restrictions were unrelated to state goals. *Id.* at 405.

Similarly, a Connecticut federal judge struck down a state "titling" law that allowed anyone to perform interior design services, but only permitted licensed individuals to actually use the words "interior design" and "interior designer" in their businesses. *Roberts v. Farrell*, 630 F. Supp. 2d 242 (D. Conn. 2009). That court held that the state's complete ban on plaintiffs' use of a broad, generic professional title was more extensive than necessary to further any interest properly advanced by the government. *Id.* at 249. In *Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009), the Fifth Circuit also struck down an interior design titling law for violating the First Amendment's commercial speech protections. That court held that the state did not demonstrate a reasonable "fit" between prohibiting professionals from using the truthful and lawful terms "interior design" and "interior designers" and the state's asserted goals. *Id.* at 448-49.

In some areas, tour guides need special licenses simply to talk about their cities and show tourists historical landmarks. New Orleans tour guides are currently

challenging a city law that forces every tour guide to pass a history exam, take a drug test, and pass an FBI criminal background check every two years simply for speaking.[5] Philadelphia enacted a similar restriction on tour guides through Section 9-214 of the City Code. That restriction requires tour guides in the historical section of the city to acquire certificates before leading tours there. Philadelphia City Code § 9-214(3)(a). To secure a certificate a person must submit an application, pass a written examination, pay an application fee, and provide proof of general liability insurance. Section 9-214(3)(b). Failure to comply can result in a fine of $300 for each offense and revocation of one's business license for up to a year. Section 9-214(13). Washington, D.C., also requires tour guides to pass an examination covering the applicant's knowledge of buildings and points of historical interest in the District before operating. D.C. Mun. Regs. tit. 19, § 1203.1(a)-(c), § 1203.3. Violators face fines of up to $300 or *imprisonment for up to 90 days*. D.C. Mun. Regs. tit. 19, § 1209.2. These examples from the tour guide industry show how license requirements for speech are used and abused to hinder expression and to deprive people of the right to earn a living—a right protected by the Constitution. *See Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental

[5] The description of these requirements is drawn, in part, from a case challenging the Washington D.C. law. *See* The Complaint, *Kagan v. City of New Orleans*, No. 2:11-cv-03052 (E.D. La. filed Dec. 13, 2012).

interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment.").

The PMDA, like the numerous restrictions listed above, burdens expression to the detriment of honest entrepreneurs. It regulates what gold buyers can say, not what they can do, and punishes those who advertise.

CONCLUSION

This Court should affirm the district court's holding and strike down Ohio Rev. Code Ann. § 4728.01 under heightened scrutiny.

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Respectfully submitted,

TIMOTHY SANDEFUR
LANA HARFOUSH, *Of Counsel*

By /s/ Timothy Sandefur
TIMOTHY SANDEFUR

Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-Mail: tsandefur@pacificlegal.org

Counsel for Amici Curiae
Pacific Legal Foundation
and Leslie Young

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/s/ Timothy Sandefur
TIMOTHY SANDEFUR

Counsel for Amicus Curiae
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