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

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

**PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FOURTH AND FOURTEENTH AMENDMENT CLAIMS, AND MOTION FOR PARTIAL SUMMARY JUDGMENT ON THOSE SAME CLAIMS**

Now come Plaintiffs, and respectfully request summary judgment on the Fourth and Fourteenth Amendment claims contained in Count III of their Complaint. For the same reasons, Defendants' February 23, 2015 Motion to Dismiss these same claims must be denied.

## I. INTRODUCTION

The Precious Metal Dealers Act ("PMDA") professes to authorize sweeping warrantless searches and seizures of the business records and private property of both licensed and unlicensed precious metals dealers alike. These searches fail to withstand Fourth Amendment scrutiny on their face, as well as in applications where no subpoena or warrant has been obtained to acquire the records or property.

Recent United States Supreme Court precedent simply reaffirms preexisting Sixth Circuit precedent on all relevant fronts: (1) Plaintiffs are entitled to challenge the facial constitutionality of the search authorizations in circumstances where those authorizations empower warrantless searches; (2) warrantless searches of private property are paradigmatically unreasonable, and the state bears the burden of proving their lawfulness; (3) while there is an exception to the warrant requirement for "closely regulated" businesses, the Plaintiffs' businesses do not fall within that very narrow scope; and (4) even if Plaintiffs' businesses did qualify as closely regulated, a warrant would still be necessary because warrantless searches

here are neither "necessary" or "regular;" and (5) the state may not force citizens to choose between a business license and their Fourth Amendment rights - - such a choice is inherently coercive, as is a statute that professes to impose criminal or civil penalties in response to one's refusal of an unlawful search.

Applying these principles here, it becomes clear that Plaintiffs have not only stated a Fourth Amendment claim upon which relief could be granted, but further, are entitled to summary judgment as a matter of law.

## II. BACKGROUND

### *A. The Plaintiff's Subjection to Warrantless Searches*

Each Plaintiff operates a retail store that holds itself out to the public as willing to purchase precious metals. And each Plaintiff opposes unlawful searches of its private business records and inventory.[1] Plaintiff Worthington Jewelers, confident that such searches will be limited in the wake of the Supreme Court's decision in *City of Los Angeles v. Patel,* is in now the process of applying for a Precious Metal Dealers Act license, and there is every reason to believe that this application will be granted.[2] Plaintiff Liberty Coins refuses to choose between a license to do business and its Fourth Amendment rights, and will not apply for a PMDA license so long as the challenged search requirements remain in place without clear limits.[3]

There can be no dispute that, once licensed, Worthington Jewelers will be subject to the full array of searches authorized by the PMDA and corresponding Ohio Administrative Code provisions. Even prior to licensure, each Plaintiff is subject to the search provisions, which authorize warrantless searches of not just "every person licensed as a precious metals dealer," but further "every person, partnership, and corporation by whom or for which any purchase is made, whether the person. . . acts . . . under or without the authority of

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1 See July 31, 2015 Declaration of Robert Capace, August 4, 2015 Declaration of Michael Tomaso, each attached hereto as Exhibit A.

2 Declaration of Mr. Capace, at Paragraphs 6-9.

3 Declaration of Mr. Tomaso, at Paragraphs 3-6.

this chapter." See R.C. 4728.05(A); See also R.C. 4728.05(E), authorizing warrantless investigations of "a person not licensed under this chapter."

***B. The Warrantless Search Provisions at Issue***

The search provisions at issue in this matter are as follows: OAC 1301:8-6-03(D), R.C. 4728.05, R.C. 4728.06, and R.C. 4728.08.

**OAC 1301:8-6-03(D)** requires neither a warrant nor a subpoena as a precondition of the searches it professes to authorize. Instead, it simply states "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." There is no dispute that this provision (1) authorizes an "administrative inspection;" and (2) is only directed at PMDA licensees.

**R.C. 4728.05(A)** requires neither a warrant nor a subpoena as a precondition of the searches it professes to authorize. Instead, it authorizes exceptionally broad searches and inspections: "The superintendant of financial institutes shall have * * * free access to the books and papers [of every person who has made a purchase or is licensed under the PMDA] and other sources of information with regard to the business of the licensee or the person." R.C. 4728.05(B)(5) provides the Department of Commerce with *the option* of using a subpoena to compel the search of the aforesaid records, providing that the Department *"may* * * * Compel by order or subpoena duces tecum the production of all relevant books, records, accounts, and other documents and examine [them]." Pursuant to R.C. 4728.05(B), this *option* applies only to "this section." This Section further provides that if a licensed precious metal dealer refuses an inspection when the State *does* utilize its subpoena power , then "the superintendant * * * may suspend or revoke the license of any precious metals dealer who fails to comply with this Division," *even if* a meritorious reason for refusing the subpoena were demonstrated.

**R.C. 4728.06** requires neither a warrant nor a subpoena as a precondition of the searches it professes to authorize. Instead, it authorizes exceptionally broad warrantless searches of books, papers, and inventory by *local police*: "The licensee shall keep the books in numerical order at all times at the licensed location, *open to the inspection of the superintendant or chief of or head of the local police department * * *. Upon Demand* of any of these officials, *the licensee shall produce* and show an article thus listed and described which is in the licensee's possession." There is no disputing that (1) this Section applies only to licensees; (2) this section is not limited to administrative inspections; (3) This Section, as opposed to R.C. 4728.05, does not authorize the police to seek a warrant or subpoena; and (4) this section authorizes the inspection of books, papers, and inventory "upon demand at all times."

**R.C. 4728.07** requires neither a warrant nor a subpoena as a precondition of the searches it professes to authorize. Instead, it compels all licenses to produce private business records to the police, beginning on their very first day as a PMDA licensee, and each and every day thereafter: "each licensed person * * * shall every business day, make available to the * * * police * * * a description of all articles received on the business day immediately preceding, together with the number to the receipt issued * * *." Defendants have testified that this provision commands that "the precious metal dealer needs to report to the police every day their purchases of precious metal."[4] There is no disputing that this Section (1) applies only to licensees; (2) is not limited to administrative inspections; (3) as opposed to R.C. 4728.05, does not authorize the police to seek a warrant or subpoena; and (4) compels the production of private business records "every business day."

The vast majority of the authorizations above are substantially identical to the warrantless search authorizations recently declared facially unconstitutional in *City of Los Angeles, Calif. v. Patel*: "Section

[4] See testimony of Brian Landis, Preliminary Injunction hearing transcript, p. 80.

41.49(3)(a)—the only provision at issue here—states, in pertinent part, that hotel guest records 'shall be made available to any officer of the Los Angeles Police Department for inspection."[5]

### *C. Penalties for Failure to Comply with the Warrantless Search Provisions at Issue*

One who refuses a search under any of the warrantless search provisions chronicled above is subject to a number of criminal and civil penalties.

**R.C. 4728.99** provides for serious criminal penalties that include jail time and substantial fines for failure to comply with any one of the search provisions above at any time: "[w]hoever violates Chapter 4728 of the Revised Code is guilty of a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense." In Ohio, a first degree misdemeanor authorizes up to 180 days in prison. This penalty could be imposed upon a new licensee who simply fails to convey his business records to the police on his first day as a license-holder. R.C. 4728.07. Likewise, it applies to one who fails to provide business records or inventory to police "at any time upon demand." R.C. 4728.06. It further applies to any licensee who refuses to provide a record that is only remotely related to his or her business to authorities, "upon demand." This Section is equivalent to the criminal penalty provision at issue in *Patel,* a "general provision applicable to the entire [code]," which resulted in the implicit reality that "a hotel operator's failure to make his or her guest records available for police inspection is a misdemeanor punishable by up to six months in jail and a $1,000 fine."[6]

**R.C. 4728.10** provides that the Department of Commerce must refer for criminal prosecution any violator of any section of the PMDA including through noncompliance with any of the warrantless search provisions above, whether licensed or not: "The superintendent of financial institutions shall enforce this chapter, make all reasonable effort to discover alleged violators, notify the proper prosecuting officer

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[5] *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2448 (2015). That Section provided greater safeguards than most of the PMDA Sections cited herein, providing "'"[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business."

[6] *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2448 (2015).

whenever the superintendent has reasonable grounds to believe that a violation has occurred, act as complainant in the prosecution thereof, and aid officers to the best of the superintendent's ability in prosecutions."

**R.C. 4728.13(B)** reinforces that it is a criminal act to refuse to comply with any of the warrantless search provisions elsewhere in the PMDA: "No person shall obstruct or *refuse to permit any investigation conducted under this chapter* by the superintendent of financial institutions, a person acting on behalf of an agency or a political subdivision of this state, or a law enforcement officer. All articles purchased by a person licensed under this chapter *shall be made promptly available for inspection* by these officials." R.C. 4728.13(A) further makes the point, stating "No person, firm, partnership, corporation, or association, and no agent, officer, or employee thereof, shall violate this chapter."

## III. STANDARD FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[7] "The moving party has the initial burden of proving that no genuine issue of material fact exists, and the court must draw all reasonable inferences in the light most favorable to the nonmoving party."[8]

"Once the moving party meets its initial burden, the nonmovant must 'designate specific facts showing that there is a genuine issue for trial.'"[9] "The nonmovant must, however, do more than simply show that there is some metaphysical doubt as to the material facts, . . . there must be evidence upon which a

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[7] Fed. R. Civ. P. 56(a).

[8] *Stansberry v. Air Wisconsin Airlines Corp*., 651 F.3d 482, 486 (6th Cir. 2011) (internal quotations omitted); *cf.* Fed. R. Civ. P. 56(e)(2) (providing that if a party "fails to properly address another party's assertion of fact" then the Court may "consider the fact undisputed for purposes of the motion").

[9] *Kimble v. Wasylyshyn*, 439 Fed. Appx. 492, (6th Cir. 2011) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324(1986)); *see also* Fed. R. Civ. P. 56(c) (requiring a party maintaining that a fact is genuinely disputed to "cit[e] to particular parts of materials in the record").

reasonable jury could return a verdict in favor of the non-moving party to create a genuine dispute."[10] "When a motion for summary judgment is properly made and supported and the nonmoving party fails to respond with a showing sufficient to establish an essential element of its case, summary judgment is appropriate."[11]

As further summary judgment evidence, in addition to the evidence adduced through discovery and witness testimony, Plaintiffs submit the affidavits of Robert Capace and Michael Tomaso.

## IV. LAW AND ANALYSIS

The PMDA's authorization of extraordinarily broad searches of business records and property, without corresponding warrant and subpoena requirements, fails to withstand constitutional scrutiny.

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." A fundamental purpose of the Amendment is "to protect against all *general* searches." *Go–Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). And "the suspicion-less search is one primary evil the Fourth Amendment was intended to stamp out." See *Boyd v. United States, infra*., at 625–630 (1886). Thus, "a search without a warrant demands exceptional circumstances." *McDonald v. U.S.*, 335 U.S. 451, at 454-455 (1948).

Defendants argue that the Plaintiffs' Fourth Amendment claims are not viable for the following reasons, each of which, in light of the established precedent and principles below, is incorrect: (1) "the precious metals industry is pervasively regulated in that licensure is required and the regulatory scheme provides a number of requirements of licenses;"[12] (2) the Plaintiffs have not yet been searched and therefore

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[10] *Lee v. Metro. Gov't of Nashville & Davidson Cnty*., 432 F. Appx. 435, 441 (6th Cir. 2011) (internal quotation marks and citations omitted).

[11] *Stansberry*, 651 F.3d at 486 (citing *Celotex*, 477 U.S. at 322-23).

[12] Defendants' February 23, 2015 Motion to Dismiss, p. 18 (Doc. 77, PAGEID 885).

have not suffered sufficient "injury in fact" to enjoin the unlawful searches, as "Plaintiffs make no allegation that they were ever [searched]," and therefore may not seek to enjoin and invalidate the challenged statutes;[13] (3) "Because Plaintiffs are not licensed, they are not subject to the requirements of OAC 1301:8-6-03(D), R.C. 4728.06, or R.C. 4728.07;" (4) the foregoing three statutes not coercive; and (5) R.C. 4728.05 is lawful because it only permits coercion with court oversight. Additionally, on July 6, 2015, the Defendants characterized the United States Supreme Court's *Patel* decision as follows: "Unlike the Los Angeles Municipal Code, Ohio's Precious Metals Dealers Act provides for precompliance review by means of court supervised subpoena enforcement. Ohio Rev. Code § 4728.05. Accordingly, Defendants reiterate the arguments for dismissal in their February 23, 2015 Motion to Dismiss."[14]

Plaintiffs proceed below under the presumption that these are the full extent of Defendants' defenses. And because each of these defenses is meritless, Plaintiffs' respectfully submit that not only does their Fourth Amendment claim serve as a claim upon which relief could be granted, but Plaintiffs are entitled to Summary Judgment as a matter of law.

### *A. The PMDA's Warrantless Searches are "Searches."*

*First*, the Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: when "the Government obtains information by physically intruding on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred." *United States v. Jones*, 132 S.Ct. 945, 950–951 (2012). This understanding reflects the reality that, as the United States Supreme Court recently emphasized, the Amendment expressly protects *property* and specifically includes *"papers"* as amongst such property. *Id.*

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; and

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13 Id., at p. 20.

14 Defendants' July 6, 2015 Notice regarding *City of Los Angeles v. Patel*, p. 1 (Doc. 88, PAGEID 1042).

the phrase “in their persons, houses, papers, and effects” would have been superfluous. Indeed, The Fourth Amendment “indicates with some precision the places and things encompassed by its protections: 'persons, houses, papers, and effects.'" *Oliver v. United States,* 466 U.S. 170, 176 (1984). Simply put, a "search" occurs for Fourth Amendment purposes when the government physically intrudes upon one of these enumerated areas, or invades a protected privacy interest, for the purpose of obtaining information. *Jones,* supra, at 949–51, (2012); *Katz v. United States,* 389 U.S. 347, 360–61 (1967)(Harlan, J., concurring).

As an important caveat, the "Fourth Amendment rights do not rise or fall with the *Katz* formulation" (the "reasonable expectation of privacy" test). To this end, the Supreme Court explains “[w]e [do not] believe that *Katz,* by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home." *Alderman v. United States,* 394 U.S. 165, 176 (1969). And The *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test." *Jones*, supra. (Syllabus)(*Katz* added to the baseline the "expectations" test where no intrusion on property takes place, *Katz* "does not subtract anything from the Amendment's protections 'when the Government does engage in [a] physical intrusion of a constitutionally protected area.”) Thus government trespasses upon private papers and property generally require warrants.

These principles are reaffirmed by *City of Los Angeles, Calif. v. Patel,* which struck down the warrantless search authorization at issue without any discussion of "the reasonable expectation of privacy."

***B. The PMDA's Warrantless Search authorizations are coercive.***

There can be no dispute that the search authorizations articulated above in OAC 1301:8-6-03(D), R.C. 4728.05, R.C. 4728.06, and R.C. 4728.08, are coercive. Each is a provision of the PMDA, and violation of any provision of the PMDA is grounds, pursuant to R.C. 4728.99, R.C. 4728.10, and R.C. 4728.13, for subjection to criminal penalty, significant fine, and loss of PMDA licensure. Some of these provisions apply to licenses, as well as those without a license who purchase precious metals.

Further, it is no defense that the PMDA's search authorizations are *indirectly* rather than *directly coercive.* The Supreme Court has confirmed in a variety of contexts that "government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983); see also, *e.g.*, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59–60 (2006); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78 (1990); *Perry v. Sindermann*, 408 U.S. 593 (1972). "Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v St. Johns River Water Management Dist.*, 133 S.Ct. 2586, at 2594 (2013). Pursuant to this Doctrine, "[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz*, supra.

Thus, here, it is no defense to the PMDA's search authorizations that precious metal dealers voluntarily submit to the searches as a condition of obtaining the license necessary to continue to advertise and purchase precious metals: choosing between one's business and one's Fourth Amendment rights is a false choice that the Fourteenth Amendment prohibits. Rather than make that submit to that unconstitutional condition, Plaintiff Liberty Coins has been forced to refrain from applying for a PMDA license in order to protect its Fourth Amendment rights.[15]

As such, the statutes authorizing broad warrantless searches have coerced Liberty Coins into abstaining from acquiring a helpful if not necessary business permit. Meanwhile, this dichotomously-coercive choice has subjected Worthington Jewelers to the mirror-opposite harm: unwilling to part with its need to engage in the precious metals business, it has now been forced to surrender its Fourth Amendment rights, for so long the PMDA's search requirements remain intact. Of course, Worthington Jewelers could

[15] See, generally, Declaration of Michael Tomaso.

refuse the PMDA searches, but it would then be subjected to criminal penalties and loss of license. And this, also, is precisely the type of false choice that the unconstitutional conditions doctrine prohibits government from imposing.

Further, several of the PMDA's search authorizations are *uniquely coercive.* Upon the very first day of acquiring a PMDA license, a licensee must submit otherwise-protected business records to authorities pursuant to what appears to be something other than an *administrative* search. And even were the Department of Commerce to use its subpoena power to compel the protection of otherwise-protected records, which the statute makes clear the Department has no obligation to do, the business will violate the Act and lose its PMDA license if it attempts to fight the subpoena, even if its position is ultimately meritorious.

Finally, searches where the Plaintiffs or others may truly consent are not the types of searches authorized by the acts in question. The Supreme Court helpfully clarified this issue in *Patel:*

> [W]hen assessing whether a statute meets this standard [of unconstitutional in all of its applications], the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct. . . Similarly, when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant. If exigency or a warrant justifies an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute. Statutes authorizing warrantless searches also do no work where the subject of a search has consented. Accordingly, the constitutional "applications" that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute

*City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2451 (2015). Accordingly, the PMDA search statutes are coercive in *all of their applications* because they are only employed when coercion becomes necessary.[16]

### *C. Coercive government searches of business property generally require a warrant.*

Courts to have addressed the issue within the proper context have repeatedly concluded that searches of commercial property, even if "administrative" in nature, generally require a warrant. First and foremost,

[16] Defendants' policy of ordering Plaintiffs and other businesses 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," is subject to Fourth Amendment scrutiny and similarly coercive, insofar as Plaintiffs are automatically penalized with larger fines if they abstain from producing such records.

such searches must abide by the Supreme Court of the United States' 1967 decision in *Camara v. Municipal Court.* There, the Court held unconstitutional a San Francisco ordinance that permitted nonconsensual warrantless inspections of buildings or premises to ensure compliance with the city's housing code. *Camara v. Municipal Ct.*, 387 U.S. 523 (1967). The Court found applicable to that situation the governing principle that "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 387 U.S. at pp. 528–529.

Further, since "the governmental purpose behind the search would not be frustrated by the burden of obtaining a warrant, and because administrative searches of the type there at issue involved significant intrusions upon the interests protected by the Fourth Amendment," the Court determined that such searches could not be made without the owner's consent unless a search warrant had first been obtained. *Id.* The Court explained its rationale, which carries considerable force here:

> We do not believe, however, that the requirement of a warrant for an administrative inspection is a hollow one. . . it is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures. . . The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. . . .In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual. . .

See *Camara, supra*, at 539 (concluding [a]ssuming the facts to be as the parties have alleged, we therefore conclude that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection."). Later, the Court reinforced this ruling, holding in *See v. City of Seattle* that the warrant procedure and the prohibition against nonconsensual warrantless entry outlined in *Camara* would be applicable to private purely commercial premises.

As recently as 2010, the Sixth Circuit has confirmed that "[s]ince *Camara v. Mun. Court of City and County of San Francisco*, and *See v. City of Seattle*, statutes such as Cleveland's Municipal Code [a

warrantless fire inspection ordinance], have been held unconstitutional unless construed to require a search warrant supported by administrative probable cause." *Engineering & Mfg. Services, LLC v. Ashton*, 387 Fed.Appx. 575 (6th Cir. 2010); see also *Allinder v. State of Ohio*, 808 F.2d 1180 (6th Cir. 1987) ("a warrant is required before conducting an administrative search of commercial property or *commercial products*").

To be clear, "[t]his prohibition exists not only with respect to traditional police searches conducted for the gathering of criminal evidence, but also with respect to administrative inspections designed to enforce regulatory statutes." *Term Auto Sales, Inc. v. City of Cleveland*, 54 F.3d 777 (6th Cir. 1995), citing *Barlow's, supra., at* 312-13 (1978); see also *See*, supra., at 546 (1967)(administrative search of commercial property generally must be supported by a warrant) ("the basic component of a reasonable search under the Fourth Amendment -- that it not be enforced without a suitable warrant procedure -- is applicable ... to business ... premises").

In conclusion, "[w]hen a warrantless search has been conducted, the state bears the burden to establish that the search falls within one of the exceptions to the warrant requirement." *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 454–455; *State v. Kessler* (1978), 53 Ohio St.2d 204. Here, none of the PMDA search statutes *requires* a warrant, or even a subpoena, prior to (1) the search or inspection; or (2) the imposition of a severe penalty for resisting the search or inspection.

***D. No exception to the Warrant Requirement applies to the PMDA searches.***

The Supreme Court and the Sixth Circuit recognizes only one finite exception to the warrant requirement for administrative searches that could even remotely be viewed as applicable, and the Department of Commerce identifies this exception as their last defense to the PMDA statutes authorizing warrantless searches: "as to searches conducted of 'closely regulated' industries, a legislative scheme may serve as a substitute for a warrant." *Id.*, citing *Donovan v. Dewey*, 452 U.S. 594, 603 (1981).

In *Donovan,* the Supreme Court held that in certain limited situations, warrantless administrative searches of commercial property do not violate the fourth amendment. This Circuit has characterized these exceptions under the rationale of "the notion of implied consent." *Dow Chemical Co.,* 749 F.2d at 311, n. 1; *see also, Barlow's, Inc.,* 436 U.S. at 313. However, since this form of search is an exception to the warrant requirement, the burden of proof rests with the party asserting the exception. *See Barlow's, Inc.,* 436 U.S. at 324.

And this exception is both narrow and finite: "*the pervasively regulated industry exception is limited,* and indeed the exception, as industries affected by OSHA regulation are not by definition pervasively regulated." *Barlow's,* 436 U.S. at 315 ("The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents.").

In 1995, the Sixth Circuit expressed that "[t]o date the Court has identified four such closely regulated industries: the liquor industry, the firearms industry, the mining industry, and the vehicle dismantling industry." *Id.* (Of note, in *McLaughlin v. Kings Island,* 849 F.2d 990 (6th Cir. 1988), the Sixth Circuit also included pharmacies). In 2003, the Circuit affirmed that even "sexually oriented businesses do not qualify as highly regulated industries." *Deja Vu of Cincinnati, L.L.C. v. Union Tp. Bd. of Trustees*, 326 F.3d 791 (6th Cir. 2003), citing 49 F.Supp.2d at 1040 (relying primarily on the fact that the Supreme Court has never reached such a conclusion, and citing *Burger,* 482 U.S. at 700–01).

Thus, as a matter of the finite and narrow exception comprising the "closely regulated" industry exception, it cannot be said that a coin dealer or jewelry store owner who also peripherally purchases precious metals is "closely regulated": such businesses are not of the liquor industry, the firearms industry, the mining industry, the vehicle dismantling industry, or the pharmaceutical industry. Since the Supreme Court reaffirmed the finite and narrow nature of the exception, in the process rebuking several district court

rulings that had strayed too far (those relied on by Defendants), this alone should end the discussion. Specifically, the Court explained the limitations of the exception as follows:

> Over the past 45 years, the Court has identified only four industries that "have such a history of government oversight that no reasonable expectation of privacy ... could exist for a proprietor over the stock of such an enterprise," *Barlow's, Inc.*, 436 U.S., at 313, 98 S.Ct. 1816. Simply listing these industries refutes petitioner's argument that hotels should be counted among them. Unlike liquor sales, *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970), firearms dealing, *United States v. Biswell*, 406 U.S. 311, 311–312, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), mining, *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981), or running an automobile junkyard, *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987), nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare. See, *e.g.*, *id.*, at 709, 107 S.Ct. 2636 ("Automobile junkyards and vehicle dismantlers provide the major market for stolen vehicles and vehicle parts"); *Dewey*, 452 U.S., at 602, 101 S.Ct. 2534 (describing the mining industry as "among the most hazardous in the country").
>
> Moreover, "[t]he clear import of our cases is that the closely regulated industry ... is the exception." *Barlow's, Inc.*, 436 U.S., at 313, 98 S.Ct. 1816. To classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule. The City wisely refrains from arguing that § 41.49 itself renders hotels closely regulated. Nor do any of the other regulations on which petitioner and Justice SCALIA rely—regulations requiring hotels to, *inter alia*, maintain a license, collect taxes, conspicuously post their rates, and meet certain sanitary standards—establish a comprehensive scheme of regulation that distinguishes hotels from numerous other businesses. See Brief for Petitioner 33–34 (citing regulations); *post*, at 2460 (same). All businesses in Los Angeles need a license to operate. LAMC §§ 21.03(a), 21.09(a). While some regulations apply to a smaller set of businesses, see *e.g.* Cal.Code Regs., tit. 25, § 40 (2015) (requiring linens to be changed between rental guests), online at http://www.oal.ca.gov/ccr.htm, these can hardly be said to have created a " 'comprehensive' " scheme that puts hotel owners on notice that their " 'property will be subject to periodic inspections undertaken for specific purposes,' " *Burger*, 482 U.S., at 705, n. 16, 107 S.Ct. 2636 (quoting *Dewey*, 452 U.S., at 600, 101 S.Ct. 2534). Instead, they are more akin to the widely applicable minimum wage and maximum hour rules that the Court rejected as a basis for deeming "the entirety of American interstate commerce" to be closely regulated in *Barlow's, Inc.* 436 U.S., at 314, 98 S.Ct. 1816. If such general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify. See Brief for Google Inc. as *Amicus Curiae* 16–17; Brief for the Chamber of Commerce of United States of America as *Amicus Curiae* 12–13.

*City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2454-55 (2015) (further reasoning "laws obligating inns to provide suitable lodging to all paying guests are not the same as laws subjecting inns to warrantless searches."). For the same reasons that *hotels* - - places of public accommodation where people sleep and bathe, and many of which have an extensive history of criminal activity that was discussed in *Patel* - - are

not "closely regulated," it cannot be said that coin shops, collectibles and antique shops, or jewelry stores that purchase precious metals as a peripheral part of their business are "closely regulated." Such retail stores are simply not "ultra-hazardous" in a manner similar to mining, guns, drugs, or alcohol. As such, no exception to the warrant requirement for administrative searches applies.

Finally, and even further, "before this court will determine whether or not a warrantless inspection is constitutionally acceptable, the government must first overcome the presumption of unreasonableness by showing that the owner has weakened or reduced privacy expectations that are significantly overshadowed by government interests in regulating the particular industry or industries." *McLaughlin v. Kings Island*, 849 F.2d 990 (6th Cir. 1988).

Applying this principle, the rationale for the pervasively regulated industry exception to the warrant requirement could not apply: it stems from the fact that those "industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *Barlow's*, 436 U.S. at 313, (citation omitted). And in 1987, the Sixth Circuit concluded that the state had failed to meet its burden of demonstrating that bee apiaries were "closely regulated," explaining that "less than 100 percent of beekeepers in Ohio are registered, and only about 85 percent of those registered are inspected every year." *Allinder v. State of Ohio*, 808 F.2d 1180 (6th Cir. 1987).

Here, no coin or collectibles shop owner or jewelry store would have reasonably expected to have been subjecting himself or herself to warrantless searches and seizures, particularly *on a daily basis*, and especially if it had began the purchase of precious metals prior to 2010. Just as in *Allinder*, there has long been a lack of registration, licensure, and inspections of such stores. Indeed, such evidence is before the Court in this case: PMDA enforcement chief Brian Landis confirmed in his Preliminary Injunction hearing testimony in 2012 that enforcement of the PMDA was essentially non-existent until within the prior two

years (then 2011 and 2012). Meanwhile, the Defendants had not given notice to or otherwise communicated that need to acquire a PMDA license to those they sought to regulate.[17]

### *E. Even if the purchasing of precious metals were closely regulated, the PMDA's search requirement would fail scrutiny.*

Even if this Court were to assume that Ohio's small shopkeepers who purchase precious metals are pervasively regulated businesses on par with mining, firearms, and alcohol, the warrantless searches authorized by the PMDA would not satisfy the criteria necessary for constitutionally adequacy.

Warrantless inspections of a pervasively regulated business violate the Fourth Amendment unless the following three requirements are met: "(1) there is a substantial government interest which informs the regulatory scheme pursuant to which the search is made; (2) the warrantless inspections are necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of certainty and regularity of its application, provides an adequate substitute for the warrant requirement." *Term Auto Sales, Inc. v. City of Cleveland,* No. 94–3088, 1995 WL 308988 (6th Cir. May 18, 1995)(citing *Donovan v. Dewey,* 452 U.S. 594 (1981).

The Program fails at least the latter two of these requirements. In *Hodgins v. U.S. Dept. of Agriculture*, the Sixth Circuit explained that to meet the second criterion-the necessity for warrantless inspections-the agency must show a need for "surprise." *Hodgins v. U.S. Dept. of Agriculture*, 238 F.3d 421 (6th Cir. 2000); *Cf. Marshall v. Barlow's, Inc.,* 436 U.S. 307, 316-17 (1978). "In *See v. City of Seattle,* the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short time. Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue." *Id.* In *Hodgins*, the Sixth Circuit explained "for warrantless searches to be justifiable under a regulatory scheme, the object of the search must be something that can be quickly hidden, moved, disguised, or altered beyond recognition, so that only a surprise

[17] See November 29, 2012 Preliminary Injunction Hearing Transcript, at pp. 85-86.

inspection could be expected to catch the violations. On the other hand, if a regulation is similar to a building code (as in *See v. Seattle*), where violations will be harder to conceal, the need for surprise will be less pressing, and warrantless searches will more likely be unconstitutional." *Hodgins v. U.S. Dept. of Agriculture*, 238 F.3d 421 (6th Cir. 2000), citing *McLaughlin v. KingsIsland*, 849 F.2d 990 (6th Cir.1988).

In *Patel*, the Supreme Court further explained that the need for "surprise" cannot justify warrantless searches of business records or inventory:

> We assume petitioner's interest in ensuring that hotels maintain accurate and complete registries might fulfill the first of these requirements, but conclude that § 41.49 fails the second and third prongs of this test. The City claims that affording hotel operators any opportunity for precompliance review would fatally undermine the scheme's efficacy by giving operators a chance to falsify their records. Brief for Petitioner 41–42. The Court has previously rejected this exact argument, which could be made regarding any recordkeeping requirement. See *Barlow's, Inc*., 436 U.S., at 320, 98 S.Ct. 1816 ("[It is not] apparent why the advantages of surprise would be lost if, after being refused entry, procedures were available for the [Labor] Secretary to seek an *ex parte* warrant to reappear at the premises without further notice to the establishment being inspected") . . .We see no reason to accept it here. As explained above, nothing in our decision today precludes an officer from conducting a surprise inspection by obtaining an *ex parte* warrant or, where an officer reasonably suspects the registry would be altered, from guarding the registry pending a hearing on a motion to quash. See *Barlow's, Inc.*, 436 U.S., at 319–321, 98 S.Ct. 1816; *Riley*, 573 U.S., at ——, 134 S.Ct., at 2486.

*City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2456 (2015). Thus, the "surprise"-"any time" inspections authorized by the PMDA are not necessary: the Department of Commerce or the police may require such searches, but there is no reason why they cannot get a warrant first.

In *Patel*, the Supreme Court further explained why statue there, and therefore the essentially-identical PMDA search statutes, fail the third prong of the *Burger* test:

> Section 41.49 is also constitutionally deficient under the "certainty and regularity" prong of the closely regulated industries test because it fails sufficiently to constrain police officers' discretion as to which hotels to search and under what circumstances. While the Court has upheld inspection schemes of closely regulated industries that called for searches at least four times a year, *Dewey*, 452 U.S., at 604, 101 S.Ct. 2534 or on a "regular basis," *Burger*, 482 U.S., at 711, 107 S.Ct. 2636 § 41.49 imposes no comparable standard.

*Id.* Likewise, the requirements that records "shall at all times be available for inspection," and "open to inspection," or that there shall be "free access to the books and papers," at any time, on demand" fail to place

any constraints on enforcement agents. Accordingly, the PMDA's search authorizations would fail the second and third prong of the *Burger* test (either of which is sufficient), even if Plaintiffs were closely regulated (which they are not).

### *F. The PMDA's Warrantless Search authorizations are facially unconstitutional.*

It is now beyond dispute that statutes authorizing warrantless government searches can be challenged on their face and declared facially unconstitutional. And both Supreme Court and Sixth Circuit principles and precedents affirm that the PMDA search and inspection requirements are not just unconstitutional as-applied to coercive search authorizations that do not require warrants or other judicial approval, but also *facially* unconstitutional.

#### *i. Facial constitutional challenges are permissible.*

As the Ninth Circuit recently explained in *Patel v. City of Los Angeles,* citing Sixth Circuit precedent, the requirement of availability of record for inspection there "is facially invalid under the Fourth Amendment insofar as it authorizes inspections of those records without affording an opportunity to "obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply," and "because this procedural deficiency affects the validity of all searches authorized by § 41.49(3)(a), there are no circumstances in which the record-inspection provision may be constitutionally applied." *Patel v. City of Los Angeles,* 738 F.3d 1058 (9th Cir. 2013), citing *United States v. Salerno,* 481 U.S. 739, 745, (1987) and *Barlow's,* 436 U.S. at 325. "Facial invalidation of the provision, as plaintiffs have requested, is therefore appropriate", the Court continued, citing Sixth Circuit precedents in *Kings Island,* 849 F.2d at 997, and *Emerson Elec.*, 834 F.2d at 997.

On Appeal, the Supreme Court confirmed the availability of facial challenged as against statutes such as these:

> We first clarify that facial challenges under the Fourth Amendment are not categorically barred or especially disfavored.

* * *

> Since *Sibron,* the Court has entertained facial challenges under the Fourth Amendment to statutes authorizing warrantless searches. See, *e.g., Vernonia School District 47J v. Acton,* 515 U.S. 646, 648, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) ("We granted certiorari to decide whether" petitioner's student athlete drug testing policy "violates the Fourth and Fourteenth Amendments to the United States Constitution"); *Skinner v. Railway Labor Executives' Assn*., 489 U.S. 602, 633, n. 10, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) ( "[R]espondents have challenged the administrative scheme on its face. We deal therefore with whether the [drug] tests contemplated by the regulation can *ever* be conducted"); cf. *Illinois v. Krull,* 480 U.S. 340, 354, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) ("[A] person subject to a statute authorizing searches without a warrant or probable cause may bring an action seeking a declaration that the statute is unconstitutional and an injunction barring its implementation"). Perhaps more importantly, the Court has on numerous occasions declared statutes facially invalid under the Fourth Amendment. For instance, in *Chandler v. Miller,* 520 U.S. 305, 308–309, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997), the Court struck down a Georgia statute requiring candidates for certain state offices to take and pass a drug test, concluding that this "requirement ... [did] not fit within the closely guarded category of constitutionally permissible suspicionless searches." Similar examples abound. See, *e.g., Ferguson v. Charleston,* 532 U.S. 67, 86, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (holding that a hospital policy authorizing "nonconsensual, warrantless, and suspicionless searches" contravened the Fourth Amendment); *Payton v. New York,* 445 U.S. 573, 574, 576, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (holding that a New York statute "authoriz[ing] police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest" was "not consistent with the Fourth Amendment"); *Torres v. Puerto Rico,* 442 U.S. 465, 466, 471, 99 S.Ct. 2425, 61 L.Ed.2d 1 (1979) (holding that a Puerto Rico statute authorizing "police to search the luggage of any person arriving in Puerto Rico from the United States" was unconstitutional because it failed to require either probable cause or a warrant).

* * *

> The Court's precedents demonstrate not only that facial challenges to statutes authorizing warrantless searches can be brought, but also that they can succeed.

*City of Los Angeles, Calif. v. Patel,* 135 S. Ct. 2443, 2449-2451 (2015). And furthermore, the Plaintiffs here are sufficiently "subject to the statute" to challenge and enjoin it: (1) unlicensed precious metals dealers are subject to many of the PMDA searches; (2) Plaintiff Worthington Jewelers will soon be licensed and subject to all PMDA searches; and (3) Plaintiff Liberty Coins is forced to refuse to obtain a PMDA license because of the presence of the search requirements.

***ii. The PMDA's warrantless searches are facially unconstitutional***

Applying these principles and precedents to the case before, it, the *Patel* Court concluded "we hold that § 41.49(3)(a) is facially unconstitutional because it fails to provide hotel operators with an opportunity for precompliance review." *Id*. Instead, the statute simply provided in pertinent part, that "hotel guest

records 'shall be made available to any officer of the Los Angeles Police Department for inspection.'"[18] This language is essentially identical to the provisions of each of the PMDA's four statutory search and inspection authorizations, but for the fact that those provisions are *even broader*. See Plaintiffs' "Background" Section, *supra*. Accordingly, these PMDA provisions are also facially unconstitutional, for as the Supreme Court points out, these provisions will not apply when there are exigent circumstances, when a warrant has been obtained, or even when a subpoena has been obtained.[19] *Patel* plainly confirms this:

> [T]he Court has repeatedly held that "'searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions.' " *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). This rule "applies to commercial premises as well as to homes." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978).
>
> Thus, we consider whether § 41.49 falls within the administrative search exception to the warrant requirement. The Court has held that absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. See *See*, 387 U.S., at 545, 87 S.Ct. 1737; *Lone Steer*, 464 U.S., at 415, 104 S.Ct. 769 (noting that an administrative search may proceed with only a subpoena where the subpoenaed party is sufficiently protected by the opportunity to "question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court"). And, we see no reason why this minimal requirement is inapplicable here. While the Court has never attempted to prescribe the exact form an opportunity for precompliance review must take, the City does not even attempt to argue that § 41.49(3)(a) affords hotel operators any opportunity whatsoever. Section 41.49(3)(a) is, therefore, facially invalid.
>
> A hotel owner who refuses to give an officer access to his or her registry can be arrested on the spot. The Court has held that business owners cannot reasonably be put to this kind of choice. *Camara*, 387 U.S., at 533, 87 S.Ct. 1727 (holding that "broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty"). Absent an opportunity for precompliance review, the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used

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[18] *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2448 (2015). That Section provided greater safeguards than most of the PMDA Sections cited herein, providing ""[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business."

[19] The Department of Commerce may attempt to use its Subpoena power in R.C. 4728.05 to effectuate searches authorized by *that section alone*, however, even then, (1) the PMDA does not mandate that such power be used as a condition of a search under that Section; and (2) the availability of court oversight is self-defeating because the PMDA on its face, imposes considerable criminal and civil penalties on those who object to the subpoena, thereby defeating the protective features of court oversight.

> as a pretext to harass hotel operators and their guests. Even if a hotel has been searched 10 times a day, every day, for three months, without any violation being found, the operator can only refuse to comply with an officer's demand to turn over the registry at his or her own peril.

*City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2451-53 (2015). OAC 1301:8-6-03(D), R.C. 4728.05, R.C. 4728.06, and R.C. 4728.08 *all* authorize the conductive of searches and inspections, *outside the judicial process, without prior approval of a judge or magistrate*. Such provisions authorizing warrantless administrative inspections "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field...."[20] Safeguards must be "geared to evaluating the reasonableness of the inspector's decisions prior to his acting on them" and such an "evaluation should take place prior to any search or citation issued for refusal of a search" [because] "[a]n employer may not be threatened with a penalty for asserting his Fourth Amendment rights."[21]

Thus, each Section of the PMDA that authorizes searches without judicial oversight is unconstitutional on its face. Further, each statute is unconstitutional in each *application* where it authorizes a search without such prior approval of a judge or magistrate, and the fact that a R.C. 4728.05 search gives the agency alone the option of seeking a subpoena (1) does not save the other search authorizations; (2) does not save any application of R.C. 4728.05 where no warrant or subpoena is sought; and (3) does not save R.C. 4728.05 even where judicial oversight is sought, since a penalty is imposed on the licensee who object to the subpoena sought.[22]

Accordingly, no genuine issue as to any material fact remains, and Plaintiffs are entitled to summary judgment as a matter of law.

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[20] *Barlow's*, 436 U.S. at 323, 98 S.Ct. at 1826.

[21] *Emerson*, 834 F.2d at 997.

[22] Plaintiffs position should not be misconstrued as standing for the proposition that no search authorization can ever be upheld. Examples of lawful administrative search authorizations, within the Sixth Circuit, abound. For instance, in *Harris v. Akron Dept. of Public Health*, the Court explicitly concluded that the inspection ordinance there was constitutionally adequate because "it expressly provides that if entry is refused . . . the Ordinance shall not be construed to require an owner to consent to a warrantless inspection." 10 Fed.Appx. 316(6th Cir. 2001).

## V. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Plaintiffs' Fourth Amendment Claims must be denied, and further, Plaintiffs are now entitled to summary judgment as a matter of law on those same claims: no exception to the warrant requirement permits the PMDA's sweeping warrantless searches; and each search statute permits searches and compulsion of records even without subpoenas or other opportunity for court oversight. Accordingly, pursuant to *City of Los Angeles v. Patel* and clear Sixth Circuit precedent, no reasonable person could conclude that the search authorizations contained in OAC 1301:8-6-03(D), R.C. 4728.05, R.C. 4728.06, and R.C. 4728.08 are anything other than unconstitutional on their face.

Respectfully submitted,

*/s/ Maurice A. Thompson*
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing will be served upon all counsel of record via the Court's electronic filing system on the date of filing.

/s/ Maurice A. Thompson

# EXHIBIT A

## Declarations of Robert Capace and Michael Tomaso

**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** |
| | : | |
| **ANDRE PORTER, *et al.*,** | : | |
| | : | |
| **Defendants.** | : | |
| | : | |

**JULY 31, 2015 DECLARATION OF ROBERT CAPACE**

1. My name is Robert Capace. I am a plaintiff in this case, and I am the owner and operator of Worthington Jewelers, an Ohio limited liability company.

2. Worthington Jewelers is in the business of buying, selling, and trading silver and gold coins, jewelry and other items, and numismatics, since 2000, with a heavy emphasis on jewelry.

3. Worthington Jewelers has operated both with and without a Precious Medal Dealers Act license ("PMDA") over the past several years.

4. Worthington Jewelers has not applied for a PMDA license because, amongst several reasons, being licensed again would again subject us to searches that we oppose.

5. My understanding is that the United States Supreme Court's recent decision in *City of Los Angeles, California v. Patel* means that we are likely to prevail in stopping some or all of the warrantless searches of a private property and business records authorized by the PMDA.

6. We began preparing a new PMDA application subsequent to the decision in *City of Los Angeles, California v. Patel*.

7. We plan on submitting the new PMDA application within ten days of making this Declaration, and would have done so already, had we not be hindered by our travel schedule.

8. We have received a PMDA license in the past, and know of no reasons why our new application for a PMDA license would be denied.

9. We expect our application for a PMDA license to be granted.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.
July 31, 2015

/s/ *Robert Capace*
Robert Capace
Owner and Operator
Worthington Jewelers, Ltd.

**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** |
| | : | |
| **ANDRE PORTER, *et al.*,** | : | |
| | : | |
| **Defendants.** | : | |
| | : | |

**August 3, 2015 DECLARATION OF MICHAEL TOMASO**

1. My name is John Michael Tomaso. I am a plaintiff in this case, and I am the owner and operator of Liberty Coins, an Ohio limited liability company.

2. Liberty Coins is in the business of buying, selling, and trading silver and gold coins, hallmark bars, ingots, and numismatics. In doing so, it holds itself out as willing to purchase precious metals.

3. Liberty Coins has not applied for a PMDA license because being licensed would subject Liberty Coins to searches that I oppose and believe to be a violation of my Fourth Amendment rights.

4. As I read the law, on day one, I would need to disclose private business records to authorities, or face penalty.

5. I do not believe a should be forced to choose between keeping my business or maintaining my Fourth Amendment rights.

6. So long as the warrantless searches remain attached to obtaining a PMDA license Liberty Coins, Liberty Coins will not apply for a PMDA license.

7. I know of no reasons why my application for a PMDA license would be denied, if the warrantless searches were prohibited or reduced, and I were to then apply for a PMDA license.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

August 3, 2015

/s/ *Michael Tomaso*
Michael Tomaso
Owner and Operator
Liberty Coins