UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Liberty Coins, LLC, *et al.*,

Plaintiffs, **Case No. 2:12–cv–998**

v. **Judge Michael H. Watson**

David Goodman, *et al.*,

Defendants.

OPINION AND ORDER

This matter is before the Court upon Plaintiffs Liberty Coins, LCC ("Liberty Coins"), John Michael Tomaso ("Tomaso"), Worthington Jewelers, LTD. ("Worthington Jewelers"), and Robert Capace's (collectively, "Plaintiffs") Motion for Partial Summary Judgment ("Plaintiffs' Motion"). ECF No. 98.

Also before the Court is Defendants Andre Porter, David Goodman, and Amanda McCartney's (collectively "Defendants") Response to Plaintiffs' Motion for Partial Summary Judgment, Motion to Dismiss Plaintiffs' First Amended Verified Complaint, and Motion for Summary Judgment ("Defendants' Motion"). ECF. No. 104.

For the following reasons, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion, and **GRANTS IN PART AND DENIES IN PART** Defendants' Motion.

Plaintiffs have also filed a motion to voluntarily dismiss without prejudice certain claims in their amended verified complaint ("Plaintiffs' Motion to Dismiss"). ECF No. 105. Defendants responded in opposition. ECF No. 108.

For the following reasons, the Court **DENIES** Plaintiffs' Motion to Dismiss.

I. BACKGROUND

Plaintiffs Liberty Coins and Worthington Jewelers are jewelry, coin, and precious metal scrap stores that are subject to Ohio's Precious Metals Dealers Act, Ohio Rev. Code § 4728.01, *et seq.* (the "PMDA"). The respective owner-operators of the two stores, Tomaso and Robert Capace, are also plaintiffs. Defendants are former and current government officers tasked by the Ohio Department of Commerce with implementing and enforcing the PMDA. Defendant Amanda McCartney is sued in her official capacity as Consumer Finance Attorney with the Ohio Department of Commerce's Division of Financial Institutions. Defendants Andre Porter and David Goodman are sued in their official capacity as former Directors of the Ohio Department of Commerce.

Plaintiffs Liberty Coins and Tomaso filed their original complaint on October 29, 2012, bringing a number of 42 U.S.C. § 1983 claims against Defendants. Compl., ECF No. 1. Plaintiffs alleged that Defendants, through their enforcement of the PMDA, violated their free speech and due process rights under the First Amendment of the United States Constitution, as well as their right to be free from unlawful search and seizure under the Fourth Amendment. *Id.*

Plaintiffs argued in the original complaint that the PMDA suppresses protected commercial speech by: (1) prohibiting advertising and other commercial speech without a license; and (2) imposing burdens only upon businesses who engage in protected commercial speech. These restrictions include mandatory governmental inspections of "books and records," conducted at the discretion of the

Ohio Department of Commerce. Plaintiffs further alleged that obtaining licensure under the PMDA is, itself, an unconstitutional burden under the First Amendment due to vague eligibility criteria.

Plaintiffs admitted that, for many years, they chose not to seek a license under the PMDA. Nonetheless, they dealt in precious metals with the public and advertised their willingness to do so through store frontage and signs, newspaper advertisements, and the distribution of business cards. The advertisements indicated that Liberty Coins buys, sells, and trades gold and silver, with an emphasis on coins and "scrap."

As a result, on or about October 1, 2012, Defendant Amanda McCartney, in her role as Consumer Finance Attorney for the Ohio Department of Commerce's Division of Financial Institutions, sent a letter to Tomaso charging that "Liberty Coins has held itself out to the public as willing to purchase precious metals" without a license and that, based on this activity, it was in violation of the PMDA. *Id.* at PAGEID 10. The letter requested production of Liberty Coins' business records within twenty-one days "to demonstrate the amount of precious metal [the] business has purchased from the public over the last twelve (12) months." *Id.* The letter further advised that failure to respond may result in a cease and desist order and the imposition of up to a $10,000 fine. As a result of Defendant McCartney's enforcement conduct, Plaintiffs ceased all advertisements and totally "discontinued the purchases of gold and silver." *Id.* at PAGEID 13.

Shortly after filing the complaint, Plaintiffs moved for a preliminary injunction enjoining Defendants from enforcing the PMDA. Mot. Prelim. Inj., ECF No. 7.

Plaintiffs argued primarily that the PMDA facially violates the freedom of speech clause of the First Amendment. *Id.*

After full briefing and evidentiary hearings, Hr'g Trs., ECF Nos. 12 and 26, the Court granted the preliminary injunction, finding that Plaintiffs were likely to succeed on their facial First Amendment challenge to the PMDA. Prelim. Inj. Order, ECF No. 27. The Court held, in part, that "Defendants have not shown that forcing those who engage in commercial speech to obtain a license is a reasonable fit with the State's goals" of preventing theft, fraud, fencing stolen goods, money laundering, and other crimes. *Id.* at PAGEID 616. Specifically, the Court ruled that the PMDA limited its applicability to individuals who advertise to the public, and thus was underinclusive. *Id.* at PAGEID 615. In so doing, the Court stated, "[i]f the licensing requirement applied to all those who purchased precious metals, Defendants may have an argument that it directly and materially advances the State's interest in preventing theft." *Id.*

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the Court's order. *Liberty Coins, LLC v. Goodman,* 748 F.3d 682 (6th Cir. 2014). The Sixth Circuit explained that "[s]ince 1921, the state of Ohio has, in some form, prohibited businesses from engaging in the purchasing of precious metals without a license. As Defendants assert in this case, the Ohio legislature sought to regulate businesses potentially dealing in stolen goods." *Id.* at 686. Under the current statutory framework, "any individual or business that formally holds itself out to the public through advertisement, solicitation, or other means, must have a license before operating its business." *Id.* at 687.

The Sixth Circuit interpreted the reach of the PMDA more broadly than the Court's preliminary injunction order, ruling that the PMDA applies to any individual or business that regularly transacts with the public and holds itself out as willing to make such deals, whether or not they actively advertise to the public.

> [T]he Ohio General Assembly sought to distinguish between the typical person who casually stops at a garage sale "to engage in the business of purchasing" nonexempt articles and businesses with storefronts that have a presence in the community and formally announce to the public that they are open for business. The state of Ohio used its police power to regulate those individuals and entities by requiring that they obtain a license and comply with requirements placed on all licensed precious metals dealers. Plaintiffs missed the point of the statute when they argued before the district court that "the drafters could have easily dispensed with the promotional speech requirement altogether and written the PMDA to regulate 'any person who actually purchases metals.'" Had the drafters employed such language, the statute would have applied far too broadly, to those who make infrequent purchases in casual environments and do not hold themselves out to the public as willing to make such purchases. Instead, the State regulates those who have storefronts or otherwise indicate to the public that they are open for business, whether through signage, business cards, word of mouth, newspaper advertisements, conducting public transactions, or a large window to the street with precious metals displays.

Id. at 692. In short, "[u]nder the PMDA, any business holding itself out as willing to purchase non-exempt goods must be licensed, regardless of the way in which it holds itself out." *Id.* at 697.

The Sixth Circuit further held that the PMDA "neither burdens a fundamental right, nor creates a suspect classification. It merely constitutes a regulatory scheme meant to protect the safety and welfare of the public through the regulation of professional conduct" and was thus subject to only rational basis review. *Id.* at 693. Under this framework, the Sixth Circuit held that it was reasonable for the Ohio legislature to require licensing and to "have believed that a licensing requirement

and the close monitoring of those who are licensed would curtail the amount of stolen goods in the marketplace and aid the police in their attempt to recover stolen goods in a timely manner." *Id.* at 695. The Sixth Circuit found that, "[t]herefore, under rational basis review, Plaintiffs [were] unlikely to prevail on the merits, and they [were] not entitled to a preliminary injunction in their favor." The Sixth Circuit remanded the case to this Court. *Id.*

Shortly after remand, Plaintiffs filed the amended verified complaint, ECF No. 72, adding as plaintiffs Worthington Jewelers and its owner-operator Robert Capace. Like Liberty Coins, Worthington Jewelers is in the business of buying, selling, and trading coins, jewelry, and other non-exempt items. Worthington Jewelers, again like Liberty Coins, did so for years without a PMDA license and received a notice of violation from Defendants, as well as a $150,000 fine for unlicensed activity. In response, Worthington Jewelers applied for a PMDA license and entered into a settlement agreement with Defendants, which reduced the fine to $12,500. According to Plaintiffs, Defendants demanded that Worthington Jewelers pay the reduced fine as a precondition to licensure. After paying the fine, Worthington Jewelers received a PMDA license in November of 2012.

Plaintiffs' amended verified complaint mirrors their original complaint, adding a claim under the Eighth Amendment's prohibition against excessive fines: that Defendants "force precious metal dealers to pay a financial penalty that is determined on those dealers' individual business profits as sales before they may obtain a license." *Id.* at PAGEID 848. According to Plaintiffs, this policy results in unconstitutionally excessive fines, including the $12,500 fine issued to and paid by

Worthington Jewelers. In summary, Plaintiffs complain that "an Ohioan who deals in precious metals is forbidden from speaking on behalf of his business unless he acquires a government-issued license. And when such an Ohioan speaks on behalf of his business without a license, he is subject to criminal sanction–engaging in such speech is a misdemeanor of the first degree, punishable by imprisonment." *Id.* at PAGEID 839.

Through the amended verified complaint, Plaintiffs seek from the Court a declaratory judgment that the PMDA violates various constitutional provisions and an injunction barring its enforcement. *Id.* at PAGEID 850–51. Plaintiffs also seek an unspecified amount of monetary damages from the Defendants in the form of nominal damages and restitution. *Id.* at PAGEID 851.

II. STANDARD OF REVIEW

There are two dispositive motions before the Court, invoking three different standards of review: Plaintiffs' Motion, ECF No. 98, and Defendants' Motion, ECF No. 104.[1]

A. Motion for Summary Judgment[2]

The standard governing summary judgment is set forth in Federal Rule of Civil Procedure 56(a), which provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the

[1] Defendants filed their Motion at ECF No. 104. They filed a fragment of the Motion, as well as the exhibits to the Motion at ECF No. 103. Therefore, the Court reviews these two entries together.

[2] Defendants argue that certain declarations from Plaintiffs were not properly sworn and must be stricken from the record. ECF No. 104 at 1293–94. The Court does not rely on any of the challenged declarations and, therefore, need not rule on Defendants' argument.

movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must grant summary judgment if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265 (6th Cir. 2007).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, who must set forth specific facts showing there is a genuine issue of material fact for trial, and the Court must refrain from making credibility determinations or weighing the evidence. *Pittman v. Cuyahoga Cnty. Dept. of Children and Family Serv.*, 640 F.3d 716, 723 (6th Cir. 2011). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 511 (6th Cir. 2009). Thus, the central issue is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Pittman*, 640 F.3d at 723 (quoting *Anderson*, 477 U.S. at 251–52).

B. Motion to Dismiss under Federal Rule Civil Procedure 12(b)(6)

A Rule 12(b)(6) motion requires dismissal if the complaint fails to state a claim upon which relief can be granted. While Rule 8(a)(2) requires a pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief," in order "[t]o survive a motion to dismiss, a complaint must contain sufficient

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must also "contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 538 (6th Cir. 2012) (quotations and citations omitted). Finally, "[a]lthough for purposes of a motion to dismiss [a court] must take all the factual allegations in the complaint as true, [it] [is] not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555 (internal quotations omitted)).

C. Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1)

The issue of standing is "considered an attack on the court's subject-matter jurisdiction under Rule 12(b)(1)." *Allstate Ins. Co. v. Global Med. Billing, Inc.*, 520 F. App'x 409, 410–11 (6th Cir. 2013) (citations omitted). The Sixth Circuit has summarized the standard of review for motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1):

> A Rule 12(b)(1) motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack). *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of Rule 12(b)(1) analysis. *Id.*
>
> A factual attack challenges the factual existence of subject matter jurisdiction. In the case of a factual attack, a court has broad discretion with respect to what evidence to consider in deciding whether subject matter jurisdiction exists, including evidence outside of the pleadings, and has the power to weigh the evidence and determine the effect of

> that evidence on the court's authority to hear the case. *Id.* Plaintiff bears the burden of establishing that subject matter jurisdiction exists. *DLX, Inc. v. Commonwealth of Ky.*, 381 F.3d 511, 516 (6th Cir. 2004).

Cartwright v. Garner, 751 F.3d 752, 759–60 (6th Cir. 2014). The party asserting jurisdiction bears the burden of proving it by a preponderance of the evidence. *Yongli Xu v. Gonzales*, No. C-3-07-203, 2007 U.S. Dist. LEXIS 71038, at *2 (S.D. Ohio Sept. 25, 2007) (internal citations omitted).

III. ANALYSIS

The Court will review the parties' pending motions in the following order. First, the Court will address Plaintiff's motion to voluntarily dismiss certain claims. ECF No. 105. Second, the Court will address Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of standing. Third, the Court will address Defendants' arguments that Goodman and Cooper must be dismissed under Federal Rule of Civil Procedure 25(d).

Then, the Court will address the substance of Plaintiffs' verified amended complaint and the merits of the parties' dueling dispositive motions. ECF Nos. 98 and 104. First, the Court will address Count 1 of the amended verified complaint, Plaintiff's challenge to the PMDA under the First Amendment. Second, the Court will address Count II, Plaintiffs' challenge to the PMDA based on vagueness. Third, the Court will address Count III, Plaintiffs' challenge to the PMDA under the Fourth Amendment. Fourth, the Court will address Count IV, Plaintiffs' claims under the Eighth Amendment, due process, and equal protection. Fifth and finally, the Court will address Plaintiffs' request for monetary relief.

A. Plaintiffs' Motion to Voluntarily Dismiss Certain Claims

As a preliminary matter, Plaintiffs move to voluntarily dismiss without prejudice portions of their amended verified complaint pursuant to Federal Rule of Civil Procedure 41(a)(1)(a)(i). Pls' Mot. Dismiss, ECF No. 105. Specifically, Plaintiffs move to dismiss Count I, other than Paragraphs 103–108; Count II in its entirety; claims for restitution and nominal damages; and the second, fourth, and seventh enumerated paragraphs in Plaintiffs' Prayer for Relief. This would remove the majority of Plaintiffs' First Amendment challenges to the PMDA. According to Plaintiffs, the motion is made in response to the Court's August 26, 2015 order requesting the parties to jointly agree on a second amended complaint that would eliminate meritless or abandoned claims and allow for more streamlined briefing.

Plaintiffs' motion is not well taken. The Court, in its August 26, 2015 Order, directed the parties to jointly agree whether Plaintiffs were to file a second amended complaint and to inform the Court of that mutual decision by September 28, 2015. ECF No. 94. Plaintiffs were advised that they could not make any changes to the second amended complaint that were not agreed to by defense counsel. The parties failed to reach an agreement and no second amended complaint was filed with the Court. Accordingly, the Court issued a scheduling order for dispositive motions, ECF No. 97, and the parties proceeded with discovery and summary judgment briefing on the amended verified complaint.

Plaintiffs may not now voluntarily dismiss without prejudice, over Defendants' objections, ECF. No. 108, select portions of its amended verified complaint. Neither the Federal Rules of Civil Procedure nor the Court's August 26, 2015 order allows

for such late, piecemeal dismissal. *See Philip Carey Mfg. Co. v. Taylor*, 286 F.2d 782, 785 (6th Cir. 1961) (Fed. R. Civ. P. 41(a) allows for timely dismissal of actions, not individual claims.) Therefore, the Court will consider Plaintiffs' amended verified complaint in its entirety and will rule on Defendants' arguments for dismissal and summary judgment accordingly.

B. Plaintiff Robert Capace Lacks Standing

Defendants move to dismiss all claims by Plaintiff Robert Capace due to lack of standing. ECF No. 104 at PAGEID 1298–99. Plaintiffs do not respond to this argument.

As Defendants point out, Robert Capace's only alleged connection to the controversy at-hand is that he is "the owner and operator of Worthington Jewelers." Am. Compl., ECF No. 72 at PAGEID 826. There are no allegations that he is personally subject to the PMDA or that he has or ever will independently deal in precious metals.

Accordingly, Robert Capace lacks standing to bring any claims regarding the constitutionality of the PMDA on his own behalf. *See Adair v. Wozniak*, 492 N.E.2d 426, 429 (Ohio 1986) (holding that shareholders do not have an independent cause of action for harm done to the business). Nor may he proceed on behalf of his business Worthington Jewelers. *Gerber v. Gariepy*, No. 93-3409, 1994 U.S. App. LEXIS 17335, at *7 (6th Cir. July 12, 1994) (Under Ohio law, "a claimed injury to a corporation in Ohio must be brought by the corporation itself[.]")

This dismissal is of little practical effect to the parties, however. It will not result in the dismissal of any of the remaining Plaintiffs' claims regarding the

constitutionality and enforceability of the PMDA. *See Am. Civil Liberties Union of Kentucky v. Grayson Cty., Ky.*, 591 F.3d 837, 845 (6th Cir. 2010) (only one plaintiff with standing is required when injunctive relief is sought). Further, Plaintiff Worthington Jewelers, which Robert Capace owns and operates and which has engaged the same defense counsel, is a proper plaintiff and may proceed on all of its claims.

C. Plaintiffs' Claims against Defendants Porter and Goodman

Defendants move to dismiss all claims against Defendants Andre Porter ("Porter") and David Goodman ("Goodman"). ECF No. 104. Both Defendants were named only in their official capacity as Director of the Ohio Department of Commerce, but neither holds that position any longer. In April of 2015, Jacqueline T. Williams was appointed by the Governor of Ohio to the directorship. Plaintiffs do not contest this fact nor the dismissal of Porter and Goodman.

Under Federal Rule of Civil Procedure 25(d), when a public officer "who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending," the "officer's successor is automatically substituted as a party." Here, because Porter and Goodman have ceased to hold public office, they are no longer proper parties to this action. Formal dismissal of these Defendants is unnecessary because, by operation of law, they are no longer parties and Jacqueline T. Williams has been substituted as a party in their stead. No action by the Court is needed. Fed. R. Civ. P. 25(d) ("The court may order substitution at any time, but the absence of such an order does not affect the substitution.")

Regardless, in the interest of clarity, the Court rules that Porter and Goodman are no longer defendants in this action and that Jacqueline T. Williams is substituted as a defendant in her official capacity as current Director of the Ohio Department of Commerce.

D. Count I: Plaintiffs' Challenge Under the First Amendment

Plaintiff offers two theories in their challenge to the PMDA under the First Amendment. First, they argue that the PMDA is a prior restraint on protected speech. Second, they argue that the PMDA is overbroad. The Court addresses each.

1. The PMDA is Not a Prior Restraint on Speech.

Plaintiffs claim that the PMDA's licensing requirement is an invalid prior restraint of their protected First Amendment speech. Am. Compl., ECF No. 72. Defendants move for summary judgment on this claim, arguing that the PMDA is merely a business regulation and does not restrain speech. ECF No. 104 at PAGEID 1302–05. Plaintiffs do not respond to this argument.

Under the PMDA, "any individual or business that formally holds itself out to the public through advertisement, solicitation, or other means, must have a license before operating its business." *Liberty Coins, ,* 748 F.3d at 687. "[N]o person shall act as a precious metals dealer without first having obtained a license from the division of financial institutions in the department of commerce." Ohio Rev. Code § 4728.02(A).

Plaintiffs are correct insofar that a licensing requirements constitute a suspect "prior restraint" on speech when the "exercise of a First Amendment right depends

on the prior approval of public officials." *Bronco's Entm't, Ltd. v. Charter Twp. of Van Buren*, 421 F.3d 440, 444 (6th Cir. 2005); *Wilson v. Lexington-Fayette Urban Cnty. Gov't*, 201 F. App'x 317, 322–23 (6th Cir. 2006) ("Such restraints are presumed to be invalid because of the risk of censorship associated with the vesting of unbridled discretion in government officials and the risk of indefinitely suppressing permissible speech when a licensing law fails to provide for the prompt issuance of a license.") (quotations omitted).

The Sixth Circuit, however, has already ruled that the PMDA does not implicate the First Amendment. The Sixth Circuit ruled that its requirements "neither burdens a fundamental right, nor creates a suspect classification." *Liberty Coins*, 748 F.3d at 693. "It merely constitutes a regulatory scheme meant to protect the safety and welfare of the public through the regulation of professional conduct." *Id.* In short, "[t]he statute proscribes business conduct and economic activity, not speech." *Id.* at 697.

Therefore, the PMDA is subject only to rational basis review. *Id.* at 693. This is a forgiving standard: "To prevail under rational basis review, Defendants need only demonstrate that the statute's classification and the licensing requirement are rationally related to a legitimate government interest." *Id.* at 694.

> There is a strong presumption of constitutionality and the regulation will be upheld so long as its goal is permissible and the means by which it is designed to achieve that goal are rational. *Nat'l Ass'n for Advancement of Psychoanalysis*, 228 F.3d 1043, 1050 (9th Cir. 2000). "This standard is highly deferential; courts hold statutes unconstitutional under this standard of review only in rare or exceptional circumstances." *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 501 (6th Cir. 2007). "Under rational basis scrutiny, government action amounts to a constitutional violation only if it is so

> unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational." *Michael v. Ghee*, 498 F.3d 372, 379 (6th Cir. 2007) (quotations omitted). Finally, under rational basis review, the government "has no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.'" *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 790 (6th Cir. 2005) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)).

Id.

The PMDA meets this standard. "[T]he Ohio legislature's purpose in enacting and subsequently amending and enforcing the PMDA was to protect consumers and the public from theft, fraud, money laundering, fencing, to restrict the flow of stolen goods, and to prevent terrorism. Even Plaintiffs concede that such a government purpose legitimate, even compelling." *Id.* And, as the Sixth Circuit held, "the PMDA's licensing requirement is rationally related to that legitimate government purpose." *Id.* at 694–95. "It was reasonable for the legislature to have believed that a licensing requirement and the close monitoring of those who are licensed would curtail the amount of stolen goods in the marketplace and aid the police in their attempt to recover stolen goods in a timely manner." *Id.* at 695. Plaintiffs have not identified any reason why the Court should now hold otherwise.

2. The PMDA is Not Overbroad.

Plaintiffs further allege in their amended verified complaint that the PMDA is overbroad because it could reach "advertising to purchase exempt items that constitute the majority of their businesses, just because that advertisement could also be read to include items that are not exempt." Am. Compl., ECF No. 72 at

PAGEID 839. This is the one First Amendment claim that Plaintiffs did not move to voluntarily dismiss without prejudice. Pls' Mot. Dismiss, ECF No. 105. They do not, however, develop this argument in their summary judgment briefing.

Defendants move for summary judgment on this claim, arguing that the Sixth Circuit has already ruled on this issue and, moreover, Plaintiffs have admitted that they deal in "non-exempt" articles. ECF. No. 104 at PAGEID 1304–05. "While Plaintiffs may disagree with the Sixth Circuit, Defendants' use Plaintiffs' advertisements as evidence that Plaintiffs are engaged in the unlicensed business of precious metals dealing does not violate the First Amendment." *Id.* at PAGEID 1305.

Even assuming that Plaintiffs have properly characterized the statute's reach in their amended verified complaint, it is of no constitutional moment. The PMDA requires to be licensed any individual or business that holds itself out to the public as willing to transact in precious metals. The Sixth Circuit has already reviewed for overbreadth, and upheld, this very requirement. *Liberty Coins*, 748 F.3d at 695 (holding that the PMDA properly applies to all "businesses that hold themselves out to the public as formally, frequently, or routinely dealing in precious metals . . . "). It is irrelevant if some, or even all, of the licensee's actual transactions involve exempt materials. As long as the business holds itself out to the public as willing to deal in precious metals, it is properly subject to the PMDA's licensing requirements.

The Court grants Defendants' Motion and enters summary judgment in their favor as to Count I of the amended verified complaint.

E. Count II: Plaintiffs' Vagueness Claims Under the First Amendment

In the amended verified complaint, Plaintiffs allege that the PMDA's licensing criteria are unconstitutionally vague under the First Amendment. ECF No. 72 at PAGEID 840–42. In particular, Plaintiffs take umbrage at Ohio Revised Code § 4728.03(B)(1)'s requirement that the applicant be of "good character." *Id.* This requirement, they argue, allows for too much discretion by the licensing authority and invites abuse.

Defendants move for summary judgment on this claim, arguing that the PMDA's licensing criteria do not implicate constitutionally protected activity and, moreover, the "good character" requirement is not vague. Defs' Mot., ECF No. 104 at PAGEID 1306–09.[3] In support, Defendants cite to a number of federal and state decisions upholding similar licensing provisions. *Id.* (citing, for example, *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917)). Plaintiffs do not respond to this argument.

Plaintiffs' amended verified complaint is, in one sense, correct. If a PMDA license were a prior restraint on protected First Amendment speech, its subjective "good character" criteria would be vulnerable under constitutional scrutiny. The Northern District of Ohio has explained the standard as follows:

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[3] Here, contrary to Defendants' arguments, Plaintiffs meet both the standing and ripeness requirements of Article III. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs, as precious metal dealers, are subject to the PMDA's licensure requirement and thus must meet the eligibility criteria, and they have alleged that this requirement prevents them from conducting business. Compare to *Friedman v. Giles Cnty. Adult-Oriented Establishment Bd.*, No. 1-00-0065, 2005 U.S. Dist. LEXIS 48045, *at 41–42 (M.D. Tenn. Step. 29. 2005) (finding no injury-in-fact where state regulator had not yet enacted licensing criteria.)

> This Court has previously held that when a license is conditioned merely upon a showing of "good moral character," it grants the licensing authority an impermissible level of discretion. See *Ohio Citizen Action v. City of Seven Hills,* 35 F. Supp. 2d 575 (N.D. Ohio 1999). . . . [A] prior restraint on speech must provide narrow, objective, and definite standards to the licensing authority. Nothing in this Ordinance constrains the issuing authority from denying a license on any grounds that they see fit, and nothing set forth in the Ordinance provides any minimum standards which must be met for a license to be granted. This omission allows, and in fact requires the issuing authority to exercise the very epitome of "unbridled discretion" which is prohibited by First Amendment jurisprudence. *See, e.g., City of Lakewood v. Plain Dealer Pbl'g Co.*, 486 U.S. 750, 770 (1988). This Court cannot presume that discretion will be applied consistently, in good faith and in accordance with appropriate standards when no standards exist on the face of the regulation.

Ohio Citizen Action v. City of Mentor-On-The-Lake, 272 F. Supp. 2d 671, 682 (N.D. Ohio 2003); *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486, 495 (E.D. Tenn. 1986) (holding that "'Good character' provisions" may not be used as a basis for licensing First Amendment activity.)

But, as explained above, the PMDA does not implicate or restrain a First Amendment right. "The statute proscribes business conduct and economic activity, not speech." *Liberty Coins,* 748 F.3d at 697. Therefore, the PMDA's licensing requirement cannot be considered a "prior restraint" of constitutionally protected conduct.

In a vagueness challenge where "the enactment implicates no constitutionally protected conduct," courts "should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494–95 (1982). Even where the plaintiff has brought a facial challenge, enactments "must be examined in the light of the facts of the case at

hand." *Id.* at 495 n.7 (citing *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975)). "The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.*

To be valid, the PMDA need only articulate some comprehensible standard for licensure.

The PMDA sets forth a number of qualifications for a license, including that a license should be granted to any applicant "of good character, having experience and fitness in the capacity involved, who demonstrates a net worth of at least ten thousand dollars and the ability to maintain that net worth during the licensure period." Ohio Rev. Code § 4728.03(B)(1). The PMDA further defines "experience and fitness" as "sufficient financial responsibility, reputation, and experience in the business of precious metals dealer, or a related business, to act as a precious metals dealer in compliance with this chapter." Ohio Rev. Code § 4728.03(A).

This is not a unique or troublesome licensing framework. Courts have long sanctioned licensing statutes that afford considerable discretion to public officials in deciding whether or not to approve an application, including a review of the applicant's character. "[T]he conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the State is not violative of rights secured by the Fourteenth Amendment." *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552, 562 (1905). In exercising this discretion, the licensing

authority may properly limit its approval to "persons of good character and reputation." *Gundling v. Chicago*, 177 U.S. 183, 184 (1900) (upholding as constitutional a city ordinance requiring that applicants for license to sell cigarettes be of "good character and reputation" in the opinion of both the mayor and the superintendent of health).

While the PMDA's licensing standard set forth in Ohio Revised Code § 4728.03 would benefit from additional precision, it is not incomprehensible and thus is not impermissibly vague in all of its applications, or as applied specifically to Plaintiffs. This is particularly evident in this case of Plaintiff Worthington Jewelers, which was evidently able to successfully navigate the standard and obtain a PMDA license. The Court cannot find that the licensing criteria are incomprehensible where at least one Plaintiff has already comprehended and successfully met the criteria.

The Court therefore grants Defendants' Motion and enters summary judgment in their favor as to Count II of the amended verified complaint.

F. Count III: Plaintiffs' Claims Under the Fourth Amendment

1. The Challenged PMDA Inspection Provisions

Plaintiffs challenge four provisions of the PMDA under the Fourth Amendment: Ohio Revised Code § 4728.05; § 4728.06, § 4728.07; and Ohio Administrative Code § 1301:8-6-03(D) (collectively the "Inspection Provisions"). These provisions jointly set forth the government's right to freely inspect, without a warrant or administrative subpoena, the books and records of PMDA licensees. Specifically, the provisions provide as follows:

Ohio Revised Code § 4728.05 provides that the government may "investigate the business" of any PMDA licensee "and for that purpose shall have free access to the books and papers thereof and other sources of information with regard to the business of the licensee or person and whether the business has been or is being transacted in accordance with this chapter."

Ohio Revised Code § 4728.06 provides that PMDA licensee shall maintain compliant records "at the licensed location, open to the inspection of the superintendent or chief of or head of the local police department, a police officer deputed by the chief or head of police, or the chief executive officer of the political subdivision thereof. 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."

Ohio Revised Code § 4728.07 provides that PMDA licensees "shall, every business day, make available to the chief or the head of the local police department, on forms furnished by the police department, a description of all articles received by the licensee on the business day immediately preceding."

Finally, Ohio Administrative Code § 1301:8-6-03(D) provides that "[a]ll 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 government.

2. The Challenged PMDA Inspection Provisions Violate the Fourth Amendment.

Plaintiffs move for summary judgment on this claim, arguing that the Inspection Provisions are facially invalid under the Fourth Amendment's prohibition

against unreasonable searches and seizures. Pls' Mot., ECF No. 98. In support, they rely primarily on an opinion of the Supreme Court of the United States, *City of Los Angeles v. Patel*, __ U.S.__, 135 S. Ct. 2443 (2015). In *Patel*, the Supreme Court struck down as unconstitutional a California hotel statute with similar inspection provisions and held that a business owner must have an opportunity "to question the reasonableness" of the administrative warrantless search "before suffering any penalties for refusing to comply with it." 135 S.Ct. at 2452. Plaintiffs argue that the reasoning in *Patel* compels the Court to invalidate the PMDA because it also does not allow for any precompliance review or means to question the search at all. ECF No. 9.

Defendants respond that *Patel* does not control here because the PMDA, unlike the statute at issue in *Patel*, "does not have a penalty for failure to provide records." Defs' Reply ECF No. 112 at PAGEID 1387.[4] They argue that "[i]f a person ever refused access to records the PMDA limits Defendants actions" to seeking a subpoena or supervised enforcement. Defs' Mot., ECF No. 104 at PAGEID 1323.

[4] Defendants further respond to Plaintiffs' Fourth Amendment claim by again challenging both standing and ripeness. Defs' Mot., ECF No. 104 at PAGEID 1314–17. They argue that "[t]he facts of this case do not show any searches of Plaintiffs by Defendants." *Id.* at PAGEID 1312. They also argue, somewhat inconsistently, that the inspection of Worthington Jewelers did not "contain commercially sensitive information." *Id.* at PAGEID 1318. Upon review of the briefs, the Court holds that these arguments are not well taken. Plaintiffs are all precious metal dealers subject to the PMDA's licensing requirement, including the Inspection Provisions, and at least one Plaintiff, Worthington Jewelers, has received and responded to an inspection request from Defendants. Article III does not require that Plaintiffs first refuse to comply with an inspection demand, risking jail time and fines, before challenging the constitutionality of the provisions. *See Lujan*, 504 U.S. at 561. Further, Plaintiffs are also bringing a facial challenge to the provisions.

The Court is familiar with *Patel* and its effect on this case. It previously stayed the parties' briefing on the Fourth Amendment issue in order to allow the Supreme Court to decide *Patel* and to give the parties an opportunity to address the decision in their dispositive motions. Order, ECF No. 83. The stay was lifted on July 8, 2015. Order, ECF No. 88. Thereafter, the Court directed the parties to file their dispositive motions and to "incorporate any argument as to *Patel* that the parties wish to make." Order, ECF No. 94 at PAGEID 1080.

As set forth below, Defendants' attempt to read limitations into the PMDA and thus distinguish *Patel* is unavailing. The PMDA's Inspection Provisions authorize warrantless, on-demand searches of licensees by the government or law enforcement and, contrary to Defendants' argument, provide that a business owner's failure to comply is punishable as a criminal offense.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Patel*, 135 S. Ct. at 2451–52. "[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.'" *Id.* (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009)). "This rule 'applies to commercial premises as well as to homes.'" *Patel*, 135 S. Ct. at 2452 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)).

Under this framework, even purely "administrative searches"—such as searches designed to ensure a business's compliance with a statutory or regulatory

recordkeeping requirement—must be made pursuant to a warrant or otherwise provide adequate constitutional safeguards. "[I]n 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." *Patel*, 135 S. Ct. at 2452 (citing *Donovan v. Lone Steer*, 464 U.S. 408, 415 (1984)). "[T]he availability of precompliance review alters the dynamic between the officer and the [business] to be searched, and reduces the risk that officers will use these administrative searches as a pretext to harass business owners." *Id.* In short, the business owner must have an opportunity "to question the reasonableness" of the administrative warrantless search "before suffering any penalties for refusing to comply with it." *Patel*, 135 S. Ct. at 2452 (citing *Lone Steer*, 464 U.S. at 415).

The Supreme Court noted that it "has never attempted to prescribe the exact form an opportunity for precompliance review must take," but the Court did offer some guidance on what measures would suffice. *Patel*, 135 S. Ct. at 2452. For example, the Court noted that warrantless searches "would be constitutional if they were performed pursuant to an administrative subpoena," which would provide the nonconsenting business owner with an opportunity to "move to quash the subpoena" without punishment "before any search takes place." *Id.* at 2543.

In *Patel*, the California statute, which required hotels to make their records available for inspection by law enforcement, did not guarantee such safeguards and was thus struck down by the Supreme Court as unconstitutional under the Fourth Amendment. The Supreme Court noted that the statute did not provide any mechanism for hotel owners to refuse the search request and seek neutral review.

Instead, even a justified refusal would subject the owner to possible arrest and criminal punishment. *Id.* at 2543 n.1. "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." *Id.* at 2452. *See also Camara v. Mun. Court of S.F.*, 387 U.S. 523, 532–33 (1967) ("[B]road statutory safeguards are no substitute for individualized review [by a neutral party], particularly when those safeguards may only be invoked at the risk of a criminal penalty."); *Lone Steer*, 464 U.S. at 415 ("[A]lthough our cases make it clear that the Secretary of Labor may issue an administrative subpoena without a warrant, they nonetheless provide protection for a subpoenaed employer by allowing him 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.").

The PMDA's Inspection Provisions suffer from the same constitutional deficiencies as the California statute struck down in *Patel*. Contrary to Defendants' arguments, the Inspection Provisions give the government and law enforcement the right to inspect a licensee's records without any opportunity for the licensee to seek neutral, precompliance review. Ohio Rev. Code §§ 4728.06, 4728.07. The PMDA specifically provides that failure to comply with a search request is a crime. Under Ohio Revised Code § 4728.99, "[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." A first degree misdemeanor is punishable with a jail term up to 180 days. Ohio Rev. Code § 2929.24(A)(1). In addition, the nonconsenting licensee would risk punishment under Ohio's

obstruction of official business statute, Ohio Revised Code § 2921.31, which provides that anyone impeding a public official's lawful duties is guilty of a second-degree misdemeanor. There is also a risk of arrest "on the spot" under Ohio Revised Code § 2935.03(A)(1), which provides that a police officer "shall arrest and detain, until a warrant can be obtained, a person found violating . . . a law of this state[.]" *State v. McLemore*, No. 24211, 2011 Ohio App. LEXIS 199, ¶ 17 (Ohio Ct. App. Dist. 2, Jan. 21, 2011) ("A police officer is permitted to make an arrest without a warrant for a misdemeanor committed in his presence.").

While Defendants argue that "its employees are not law enforcement officers" who could arrest or impose criminal penalties, ECF No. 104 at PAGEID 1318, they ignore that both Ohio Revised Code § 4728.06 and § 4728.07 expressly extends inspection authority to law enforcement, specifically "the superintendent or chief of or head of the local police department" or "a police officer deputed by the chief or head of police." What is more, nothing in the PMDA prevents a non-police inspector from contacting law enforcement in the event of a licensee's noncompliance with a search request.

There is no meaningful difference between the PMDA's Inspection Provisions and the statute struck down by the Supreme Court in *Patel*. As a result, in accordance with the Supreme Court's holding in *Patel*, the Court rules that the PMDA's Inspection Provisions violate the Fourth Amendment's protection against unreasonable searches and seizures.

3. Defendants' Argument that Precious Metal Dealing is a Closely Regulated Industry in Ohio Does Not Change the Court's Decision.

Defendants argue that, in evaluating Plaintiffs' claims, the Court should apply the lesser Fourth Amendment protections applicable to searches conducted of a "closely regulated" industry. Defs' Reply, ECF No. 112 at PAGEID 1384–85. Plaintiffs counter that precious metal dealers have never been closely regulated by the state and, instead, the PMDA was historically ignored until a recent resurgence of enforcement activity. Pls' Mot., ECF No. 98 at PAGEID 1116–21.

As set forth below, this is a close question. However, the Court need not decide this issue because the PMDA's Inspection Provisions would still fail under the relaxed Fourth Amendment standards applicable to closely regulated industries.

"The element that distinguishes [closely regulated] enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Marshall*, 436 U.S. at 313. *United States v. Biswell*, 406 U.S. 311, 316 (1972) ("When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."). "Because the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search have lessened application in this context." *New York v. Burger*, 482 U.S. 691, 702 (1987); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (holding that,

because liquor dealers have been historically subject to warrantless inspections since colonial America, such inspections were reasonable and did not violate the Fourth Amendment.).

Very few industries fall within this category. "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[.]'" *Patel*, 135 S. Ct. at 2454 (quoting *Barlow's, Inc.*, 436 U. S. at 313). These industries are liquor sales, firearms dealing, automobile junkyards, and mining. *Id.* While "practically all commercial premises or services . . . can be put to use for nefarious ends," these four industries have historically been considered "intrinsically dangerous" to the public welfare. *Id.* at n.5. "[T]he closely regulated industry . . . is the exception." *Barlow's, Inc.*, 436 U.S. at 313.

Of the four recognized closely-regulated industries, precious metals dealing is most similar to the automobile junkyards discussed by the Supreme Court in *New York v. Burger*, 482 U.S. 691, 705 (1987). Both industries are subject to inspection by the state due to the risk that participants will traffic in stolen goods. *Burger*, 482 U.S. at 705 (noting that the purpose of the junkyard inspection requirement is "to determine whether a junkyard owner is storing stolen property on business premises."); *Liberty Coins*, 748 F.3d at 686 (noting that the PMDA was passed because "the Ohio legislature sought to regulate businesses potentially dealing in stolen goods."). And the regulatory schemes for both industries are similarly extensive. The junkyard statute at issue in *Burger* provided that a business "cannot

engage in this industry without first obtaining a license," "must maintain a police book recording the acquisition and disposition of motor vehicles and vehicle parts, and make such records and inventory available for inspection by the police or any agent of the Department of Motor Vehicles[,]" "must display his registration number prominently at his place of business," and "is subject to criminal penalties, as well as to loss of license or civil fines, for failure to comply with these provisions." *Burger*, 482 U.S. at 705. These requirements—obtaining and publicly displaying a license, record keeping of sales and inventory, on-demand inspection, and criminal and civil penalties for violations—are all found in the PMDA as well. *See* Ohio Rev. Code § 4728.01 *et seq.*; *see also Liberty Coins*, 748 F.3d at 686 ("Since 1921, the state of Ohio has, in some form, prohibited businesses from engaging in the purchasing of precious metals without a license."). It is possible, therefore, that precious metal dealing could fairly be considered a closely regulated industry in Ohio.

The Court, however, need not decide this question. Even if precious metals dealing were a closely regulated industry in Ohio, the PMDA's Inspection Provisions would still fail under *Patel*. Warrantless inspections in the context of a closely regulated business will be deemed reasonable only so long as three criteria are met: the inspection must be part of a regulatory scheme that serves a "substantial" government interest; the inspection must be necessary to further that regulatory scheme; and the inspection program must, in terms of the certainty and regularity of its application, provide "a constitutionally adequate substitute for a warrant." *Patel*, 135 S. Ct. at 2456 (quoting *Burger*, 482 U.S. at 703).

Here, as in *Patel*, the Inspection Provisions would fail under the second and third prongs of this test. The Inspection Provisions are not "necessary" to further the PMDA's regulatory purpose. The government would still have the ability to inspect licensees' records without advanced warning in order to ensure that they were not trafficking in stolen goods. The government would simply need to obtain an *ex parte* warrant or an administrative subpoena. *See Patel*, 135 S. Ct. at 2456 ("[N]othing 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."). Under these approaches, "business owners can be afforded at least an opportunity to contest an administrative search's propriety without unduly compromising the government's ability to achieve its regulatory aims." *Id.* at 2454. Defendants have not provided any reason why these options would be insufficient for purposes of the PMDA.

The Inspection Provisions also fall short of the "certainty and regularity" prong. The PMDA "fails sufficiently to constrain police officers' discretion as to which [businesses] to search and under what circumstances." *See Patel*, 135 S. Ct. at 2456. The PMDA does not set forth any restraints on Defendants' decision-making regarding when, why, or how often to inspect a licensee. Under the PMDA, nothing would prevent Defendants from deciding to inspect the same business every day, for any reasons or no reason at all, while never visiting another.

Accordingly, the PMDA's Inspection Provisions—Ohio Revised Code § 4728.05; § 4728.06, § 4728.07, and; Ohio Administrative Code § 1301:8-6-

03(D)—are unconstitutional under the Fourth Amendment. The Court grants Plaintiffs' Motion and enters summary judgment in their favor as to Count III of the amended verified complaint.

G. Count IV: Plaintiffs' Claims under the Eighth Amendment's Excessive Fine Provision, Due Process, and Equal Protection

Plaintiffs move for summary judgment on their claim that Defendants' calculation and imposition of fines under the PMDA, Ohio Revised Code § 4728.03(D), goes beyond what is allowed under the statutory language and thus violates their "constitutional rights to proportionate fines, due process, and equal protection." Pls' Mot., ECF No. 98 at PAGEID 1128. Plaintiffs do not challenge the constitutionality of the PMDA penalty provision itself but, rather, Defendants' alleged variations from that provision. Rather, making an as-applied challenge, they argue that "any fine in excess of $10,000" violates the Eighth Amendment, due process, and equal protection. *Id.* at PAGEID 1131.

Defendants respond that each of the Plaintiffs are barred from challenging the constitutionality of any PMDA fines. Defs' Mot., ECF No. 104. Plaintiffs Liberty Coins and Tomaso have never been assessed a fine by Defendants. *Id.* at PAGEID 1325. And Plaintiff Worthington Jewelers entered into a settlement agreement with Defendants that released any legal challenges to its PMDA penalties. *Id.* Defendants also argue that any claims by Worthington Jewelers are time-barred. *Id.* at PAGEID 1301–02. Plaintiffs do not address any of these arguments in their reply. *See generally*, Pls' Reply, ECF No. 109.

Defendants arguments are well taken. With respect to Plaintiffs Liberty Coins and Tomaso, the record is clear that Defendants have never assessed an allegedly excessive or unconstitutional PMDA fine against them. *See* Am. Compl., ECF No. 72. They have suffered no injury in fact and thus lack Article III standing to assert their claims. *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004). *Whitmore v. Ark.*, 495 U.S 149, 155–56 (1990) ("The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.") (quotations omitted).

With respect to Plaintiff Worthington Jewelers, its claims are barred by a 2012 contractual release. In Ohio, "[a] release of a cause of action for damages is ordinarily an absolute bar to a later action on any claim encompassed within the release." *Haller v. Borror Corp.*, 552 N.E.2d 207, 210 (1990). Such contracts are "favored by the law to encourage the private resolution of disputes." *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, 606 F. Supp. 2d 722, 734 (S.D. Ohio 2009).

Here, Plaintiffs allege that Defendants "demanded $150,000" from Worthington Jewelers as a penalty for conducting business for years without a PMDA license. Am. Compl., ECF No. 72 at PAGEID 834–35. Plaintiffs concede, however, that, on or about November 8, 2012, Worthington Jewelers entered into the settlement agreement with Defendants, whereby it agreed to obtain a PMDA license and to pay a reduced fine of $12,500. *Id.* at PAGEID 834. Worthington Jewelers also agreed to release Defendants "from any and all liability arising from the within matter." Settl. Agmt, ECF No. 103-3 at PAGEID 1270. Plaintiffs have not

identified any reason for the Court to set aside the settlement agreement and release. Am. Compl., ECF No. 72. As a result, this contractual release bars Worthington Jewelers from now bringing a lawsuit against Defendants based on the $12,500 PMDA fine.

In any event, Worthington Jewelers' claims are time-barred. Section 1983 actions are governed by the state statute of limitations period for personal injury actions. *Wallace v. Kato*, 549 U.S. 384, 387 (2007); *McCune v. City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988). In Ohio, that period is two years. Ohio Rev. Code § 2305.10(A); *Kuhnle Bros., Inc. v. Cty. of Geauga*, 103 F.3d 516, 519 (6th Cir. 1997). Here, at the latest, Worthington Jewelers' claims accrued when it entered into the settlement agreement setting forth the $12,500 fine, on or about November 8, 2012. Am. Compl., ECF No. 72 at PAGEID 834. It did not bring its claims against Defendants, however, until January 19, 2015, more than two year later. *Id.* As a result, its claims are time-barred.[5]

The Court grants Defendants' Motion and enters summary judgment in their favor as to Count IV of the amended verified complaint.

H. Plaintiffs' Claims for Monetary Damages

Finally, Defendants move to dismiss Plaintiffs' claims for monetary damages on the grounds that the Eleventh Amendment bars suits seeking to impose liability

[5] The parties have not touched on but not fully briefed whether the settlement agreement and release bars any of Worthington Jeweler's other claims against Defendants. However, because Plaintiffs Liberty Coins and Tomaso were not parties to this agreement and could thus pursue the claims against Defendants independently, the Court need not reach this issue in order to resolve this case.

which must be paid from public funds. Defs' Mot., ECF No. 104 at PAGEID 1296. Plaintiffs do not respond to this argument.

The Court finds Defendants' position well taken. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."); *see also Thiokol Corp. v. Dep't of Treasury, Revenue Div.*, 987 F.2d 376, 381 (6th Cir. 1993) ("The [Eleventh] amendment also bars suits for monetary relief against state officials sued in their official capacity.").

Accordingly, Plaintiffs' claims for monetary damages are dismissed.

IV. CONCLUSION

For the above reasons, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion, and **GRANTS IN PART AND DENIES IN PART** Defendants' Motion. Specifically, the Court dismisses all claims by Plaintiff Robert Capace, enters summary judgment in favor of Plaintiffs as to Count III of the amended verified complaint, and enters summary judgment in favor of Defendants as to all other claims. Accordingly, the Court **GRANTS** Plaintiffs' request to enjoin Defendants from enforcing the inspection provisions set forth at Ohio Revised Code § 4728.05; § 4728.06, § 4728.07; and Ohio Administrative Code § 1301:8-6-03(D).

In addition, the Court **DENIES** Plaintiffs' Motion to Dismiss.

The Clerk is directed to terminate this case.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT