No. 16-3735

In the United States Court of Appeals for the Sixth Circuit

LIBERTY COINS, et al.,

***Plaintiffs-Appellees*,**

v.

JACQUELINE T. WILLIAMS, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Ohio at Columbus

APPELLEES' BRIEF

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
7394 Ridgepoint Drive, Suite 8
Cincinnati, Ohio 45230
(513) 379-2923
hartmanlawfirm@fuse.net

MAURICE A. THOMPSON
1851 CENTER FOR CONSTITUTIONAL LAW
122 E. Main Street
Columbus, Ohio 43215
(614) 340-9817
MThompson@ohioconstitution.org

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellees respectfully request oral argument to defend the well-reasoned decision of the District Court.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

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

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: **N/A**

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: **N/A**

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

November 30, 2016
Date

I. STATEMENT OF JURISDICTION

The District Court possessed subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as the Plaintiffs-Appellees asserted a federal civil rights claim pursuant to 42 U.S.C. § 1983. On May 31, 2016, the District Court granted Plaintiffs' motion for summary judgment, enjoining four search authorizations that penalize the failure to provide government officials with private business records and inventory despite the absence of an opportunity for pre-compliance review. Doc. 113, PageID 1419-1430. Plaintiff-Appellees do not dispute that Defendants timely appealed this Order and this Court now maintains jurisdiction over the Plaintiff-Appellees' facial claims. However, no as-applied claims are properly before this Court, as there has been no adjudication on any such claims.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal is limited to consideration of the District Court's ruling in favor of the Plaintiffs on claims brought pursuant to the Fourth, Fifth, and Fourteenth Amendments challenging unlawful warrantless search authorizations applying to those purchasing precious metals. *See* R.113, Opinion & Order, PageID#1419-1430, at 21-32. Accordingly, the issues are limited to whether four separate Precious Metal Dealers Act ("PMDA") warrantless search mandates, through requiring consent to a governmental search of private records and inventory while failing to require a

warrant, subpoena, or the opportunity for pre-compliance review, violate the Fourth, Fifth, and Fourteenth Amendment on their face.

III. SUMMARY OF THE ARGUMENT

Recognizing the extensive and intrusive nature of the warrantless searches authorized by the Precious Metal Dealers Act ("PMDA"), as well as the threat of criminal prosecution for refusal to comply with such warrantless searches, Plaintiffs brought this civil rights action pursuant to 42 U.S.C § 1983 challenging, *inter alia*, the constitutionality of the foregoing statutory provisions and administrative code section that impermissibility treads upon Fourth Amendment, Fifth, and Fourteenth Amendment rights.

Recent binding Supreme Court precedent, which reaffirms binding Sixth Circuit precedent on all relevant fronts, requires the rejection of the State's appeal. The PMDA plainly authorizes warrantless searches of Plaintiffs' private business records, including searches each and every day, and unless a clear exemption is demonstrated by the State, the Fourth Amendment forbids such warrantless searches.

Here, the State raises the "closely regulated business" exemption to the warrant requirement. However, the exemption is strictly limited, including by very recent Supreme Court precedent, and does not and could not include either Plaintiffs or those regulated by the PMDA without the exception becoming the norm.

Even if Plaintiffs or those licensed by the PMDA were to be deemed members of a "closely regulated industry," the PMDA search mandates would remain

"unreasonable," and therefore still in violation of Plaintiffs' Fourth Amendment rights because (1) warrantless searches are not necessary to advance the interests underlying the PMDA; and (2) the search authorizations entirely fail to constrain the discretion of agents performing inspections in the field.

Finally, because the search authorizations are inherently procedurally defective - - each fails to afford those searched an opportunity for judicial review prior to the imposition of a search and further imposition of a penalty upon refusal to submit to the search - - each is unconstitutional *on its face.* For these reasons, more fully articulated below, the District Court's permanent injunction should be affirmed.

IV. STATEMENT OF THE FACTS

The Precious Metal Dealers Act ("PMDA") mandates sweeping warrantless searches and seizures of the business records and private property of both licensed and unlicensed precious metal dealers alike.

The first statutory provision at issue, **Ohio Revised Code § 4728.05(A)**, grants *carte blanche* authority for searches of the business records, effects, and all other source of information of any business involved in the purchase of articles made of or containing gold, silver, platinum, or other precious metals or jewels - - without any warrant or subpoena:

> The superintendent of financial institutions may…investigate the business of every person licensed as a precious metals dealer under this chapter, and of every person, partnership, and corporation by whom or for which any purchase is made…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.

The next statutory provision at issue, **Ohio Revised Code § 4728.06**, while only applying to those licensed as precious metals dealers, authorizes exceptionally broad warrantless searches of books, papers, and inventory by enforcement agents, including *local police* - - again without required a warrant or subpoena:

> Every person licensed under this chapter shall keep and use books and forms approved by the superintendent of financial institutions…. The licensee shall keep the books in numerical order **at all times** 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.

The final statutory provision at issue, **Ohio Revised Code § 4728.07**, subjects those licensed as precious metals dealers to the prospect of a daily warrantless search of their records:

> Each person licensed … **shall, every business day, make available** to the chief or the head of the local police department…a description of all articles received by the licensee on the business day immediately preceding, together with the number of the receipt issued.

The chief examiner for the Division of Financial Institutions in the Department of Commerce, Brian Landis, characterized this provision as requiring that "the precious metal dealer needs to report to the police every day their purchases of precious metal." R.12, Preliminary Injunction Transcript (Brian Landis testimony), at 80:19-21.

Finally, **Ohio Admin. Code 1301:8-6-03(D)**, an administrative regulation not enacted by the Ohio General Assembly but adopted by the Department of Commerce in implementing the PMDA, professes to mandate even broader searches than those provided by the Ohio Revised Code - - again without any warrant or subpoena requirement:

> **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.

The broad authorization to search "all sources of information with regard to the business" raises heightened concerns because, as the undisputed evidence establishes, each business owner maintains the types of information subject to governmental search on their personal cell phones and computers. See Doc. 98-1, PageID 1141 (November 28, 2015 Declaration of Robert Capace).

Meanwhile, failure to submit to any of the warrantless searches authorized by the statues chronicled results in a number of criminal and civil penalties, including criminal conviction carrying up to 180 days in jail - - "[t]he PMDA specially provides that failure to comply with a search request is a crime." See District Court Order, Doc. 113, PageID 1424, citing R.C. 2929.24(A)(1). Specifically, **Ohio Revised Code § 4728.99** provides that **"**[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." Additionally, **Ohio Revised Code § 4728.13(B)**

reinforces the potential criminal liability for refusing to comply with any of the warrantless search provisions in the PMDA and such potential criminal liability extends, not only against the business, but against owners, operators, employees, *et al.*:

> **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."[1]

And while the Appellants feign that they "are not authorized to bring criminal actions" (Appellants' Brief, at 41), **Ohio Revised Code § 4728.10** expressly mandates the referral to "the proper prosecuting officer" for any violation of the PMDA:

> The superintendent of financial institutions **shall enforce this chapter**, make all reasonable effort to discover alleged violators, **notify the proper prosecuting officer** 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.

Each Plaintiff is subject to these searches, and therefore risks severe criminal and civil penalty each day. Plaintiff Worthington Jewelers is a highly-regarded

[1] This Section indicates that liability applies not just to the business - - Liberty Coins and Worthington Jewelers - - but also to the "persons" - - in this case, Mr. Tomaso and Mr. Capace. Both Mr. Tomaso and Mr. Capace are subject to prosecution at the time of the filing of this brief.

upscale jewelry store and bridal boutique in the heart of "Old Worthington" just north of Columbus, Ohio.[2] At all times relevant to this appeal, Worthington Jewelers has maintained a PMDA license. See Doc. 98-1, PageID 1141 (November 28, 2015 Declaration of Robert Capace). Maintaining a PMDA license subjects Worthington Jewelers to each of the challenged search mandates articulated below.

Even without a PMDA license, Plaintiff Liberty Coins 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 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." In the District Court, the State did not produce evidence that of a history of receipt of stolen property or other like-kind harmful activity at either Worthington Jewelers, Liberty Coins, or businesses similar to them.

Each of the search mandates above are materially identical to the warrantless search authorizations recently declared facially unconstitutional by the Supreme Court in *City of Los Angeles, Calif. v. Patel*: "Section 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." *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2448 (2015). Likewise, each of the penalty

[2] See, generally, *http://www.worthingtonjewelers.com/.*

provisions above are materially identical to the penalty provision before the Court in *Patel,* characterized by the Court as "a general provision applicable to the entire [code]" requiring that "a hotel operator's failure to make his or her records available for police inspection is a misdemeanor punishable by up to six months in jail and a $1,000 fine." *Id.,* at 2448.

V. ARGUMENT

The flawed foundation of the State's appeal is that it is *the plaintiff* who bears a "heavy burden" of proving the invalidity of a warrantless search authorization, and therefore, "this Court should reverse because Plaintiffs did not meet that burden." Doc. 13, PageID 32, 33. Upon this faulty foundation, the State contends that "[t]he record-keeping, inspection, and reporting requirements that Ohio imposes on dealers of precious metals do not violate the Fourth Amendment." Doc. 13, PageID 33.

However, recent binding Supreme Court precedent, which reaffirms binding Sixth Circuit precedent on all relevant fronts, requires the rejection of these contentions for the following reasons: (1) The State has failed to demonstrate that any exception is exempts the PMDA search mandates from the requirement that the State obtain a warrant or subpoena; (2) Even Plaintiffs' "industry" were "closely regulated," the search mandates at issue here fail to meet the *Burger* requirements applicable to warrantless searches of such industries; (3) Each PMDA search mandate is unconstitutionally coercive on its face because each is inherently procedurally defective; and (4) The Plaintiffs are not required to endure an unconstitutional search,

much less a prosecution, prior to challenging search mandates that are clearly and uniquely applicable to their businesses. For these reasons, more fully articulated below, the District Court's permanent injunction should be affirmed.

A. Absent a clear exception, a warrant or subpoena is a prerequisite to a coercive governmental search of private records and effects.

The Fourth Amendment prohibits "unreasonable" searches. In applying this limitation, federal courts have repeatedly emphasized that searches of commercial property, even if "administrative" in nature, generally require a warrant or subpoena. First, in 1967 the Supreme Court has interpreted the Fourth Amendment to stand for the principle that "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Ct.*, 387 U.S. 523, at pp. 528-529 (1967). The Court explained its rationale, which carries considerable force here:

> [I]t 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. Simultaneously in *See v. City of Seattle* that Court confirmed that the warrant requirement is equally applicable to private commercial

property: "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"). *See v. City of Seattle*, 387 U.S. 542 (1967). This Circuit has recognized that, since these two decisions, administrative inspections of business property and records "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, infra., at* 312-13 (1978).

Finally, and most significantly, the Supreme Court revised this issue in 2015, providing long-overdue clarification. In *Patel,* the Court summarized the binding legal principles limiting warrantless administrative searches: "[t]he 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." *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2445–66 (2015), citing *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"). While *Patel* acknowledged that an exception existed for closely regulated industries, it reminded lower courts that this exception is strictly limited. See *infra*. Thus, to perform an administrative search of private business records and inventory, the State must first obtain a warrant or subpoena in all but the most exceptional circumstances.

B. The State fails to satisfy its burden of establishing the existence of an exception to the Fourth Amendment's warrant and subpoena requirements.

"When 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. Put another way by this Circuit, "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). Because all of the PMDA searches are sanctioned to take place without the approval of a judge or magistrate, and none of the PMDA search mandates *requires* a warrant or a subpoena as a precondition to any of the PMDA's compulsory searches, the State was required to demonstrate that an

exception to the warrant requirement clearly permits the type of searches that each of these sections purport authorize. It failed to do so before the District Court, and its Brief similarly fails to do so.

i. The PMDA does not authorize searches of a "closely regulated industry."

In a futile attempt to establish and exception, the State offers the conclusory assertion that "precious metals dealers in Ohio are the quintessential example of a closely regulated industry." Appellants' Brief, at 21. But despite the length of its brief, the State fails to articulate any coherent objective test by which this Court could expand a "narrow exception" to Ohio coin dealers, jewelry stores, and antique shops. This is because no such test could exist. So instead, the State claims that "precious metals dealing" is an "industry" of which Plaintiffs are members, and that this "industry" is "closely regulated" because (1) "a precious metal dealer" "cannot but help but be aware that his property will be subject to periodic inspections," due to the PMDA's regulations; (2) "Ohio has a long history of regulating businesses that buy secondhand goods generally;" and (3) "states throughout the country regulate precious metals dealers." App. Brief, at pp. 26-29. However, the State failed to provide any *evidence* to the District Court to support this contention, and these *new* arguments on appeal propose an impermissible test that fails to withstand serious scrutiny.

In *Donovan*, the Supreme Court held that in certain limited situations, warrantless administrative searches of commercial property do not violate the Fourth Amendment, explaining "as to searches conducted of 'closely regulated' industries, a

legislative scheme may serve as a substitute for a warrant." *Donovan v. Dewey*, 452 U.S. 594, 603 (1981). Courts have justified this exception pursuant to "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. The Doctrine reflects the understanding that *the few enumerated ultra-hazardous 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). 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.

a. Only ultra-hazardous industries enumerated by the Supreme Court may be considered "closely regulated."

First, the State is forced to rely upon an erroneously standard for determining "close regulation," relying solely upon the age and breadth of the statues regulating the purchase of precious metal, alongside the possible existence of statutes in other states as to "secondhand goods dealers" or "pawnshops" (who are very different than the businesses regulated by the PMDA). In *Patel*, the Supreme Court clarified the test for determining whether an industry is "closely regulated," articulating only two outcome-determinative criteria: first, whether the Supreme Court has specifically held the industry to be closely regulated; and secondly, whether the industry is "intrinsically dangerous."

this exception is both narrow and finite: "*the pervasively regulated industry exception is limited,* and indeed the exception." *Barlow's,* 436 U.S. at 315. To this end, in *Patel,* the Supreme Court clarified that the test determining whether an industry should be deemed "closely regulated" is whether businesses within that industry are "intrinsically dangerous" and "pose a clear and significant risk to the public welfare" that is "inherent in their operation." *Patel,* supra., at 2454, see also Footnote 5. The court then explained that it identifies only four industries that have met this test:

> 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 (1970), firearms dealing, *United States v. Biswell,* 406 U.S. 311, 311–312 (1972), mining, *Donovan v. Dewey,* 452 U.S. 594 (1981), or running an automobile junkyard, *New York v. Burger,* 482 U.S. 691 (1987), nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare.
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> * * *
>
> 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. . . . 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. 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.

City of Los Angeles, Calif. v. Patel, 135 S. Ct. 2443, 2454-55 (2015) (Emphasis added).

District Courts to have thus far applied *Patel* have acknowledged this clarified standard. *See Baker v. City of Portsmouth*, Case No. 14-CV-512, 2015 WL 5822659, (S.D. Ohio Oct. 1, 2015)(rejecting effort to classify rental of residential properties as closely regulated notwithstanding several sections of Ohio Revised Code regulated terms and conditions of landlord-tenant properties, leases, rights, obligations, etc.; "the Supreme Court has only identified four industries as being closely regulated: liquor sales, firearms dealing, mining, and running an automobile junkyard. The 'clear import of [these cases] is that the closely regulated industry...is the exception…. As the Supreme Court has warned, to classify the rental business as closely regulated 'would permit what has always been a narrow exception to swallow the rule"); *United States v. Kolokouris*, Case No. 12-CR-6015G, 2015 WL 4910636, (W.D.N.Y. Aug. 14, 2015)("[c]losely or pervasively regulated businesses are the exception rather than the rule, and businesses that fall within the category generally pose an inherent risk of danger to the public welfare").

Moreover, this Circuit has confirmed that deference is owed to the Supreme Court's enumeration, subsequent to a determination of intrinsic danger: in 2003, this Circuit concluded that "sexually oriented businesses do not qualify as highly regulated industries" because "the Supreme Court has never reached such a conclusion." *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trustees*, 326 F.3d 791, 805 (6th Cir. 2003, later vacated on other grounds)("sexually oriented businesses do not qualify as

highly regulated industries"). See also *McLaughlin v. Kings Island,* 849 F.2d 990 (6th Cir. 1988).

Here, the Supreme Court has never concluded that coin dealers, jewelry stores, or antique shops are ultra-hazardous business that must be deemed members of "closely regulated industries." And because the Supreme Court's enumeration of an industry as "closely regulated" is the primary factor courts must rely upon, the foregoing analysis alone is sufficient to reject Appellants' appeal.[3]

Likewise, the State has provided *no evidence whatsoever* that a boutique jewelry store selling engagement rings in an upper-class neighborhood, such as Worthington Jewelers, "poses an inherent risk of danger to the public welfare." Nor does the state supply evidence that a small-town coin dealer such as Liberty Coins poses such a risk. The State has failed to supply applicable statistical evidence, testimony, much less a history of inherent risk of danger to the public at either Plaintiffs' establishments or like-kind establishments. Contrast this with the evidence before the Supreme Court when it determined mining to be "closely regulated": "the Mine Safety and Health Act applies to industrial activity with a notorious history of serious accidents and unhealthful working conditions." *Donovan v. Dewey,* 452 U.S. 594 (1981).

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[3] Furthermore, Appellants have failed to offer any summary-judgment evidence that might *arguendo* establish the "inherent risk of danger to the public welfare" resulting from a boutique jewelry store selling engagement rings in an upper-class neighborhood (Worthington Jewelers) or from a small-town coin dealer (Liberty Coins) risk.

Meanwhile, there can be no argument that the businesses of the Plaintiffs pose a greater threat to the public welfare than the risk of a mismanaged or neglected hotel operation: hotels are places of public accommodation where people *sleep, bathe, eat, and drink*, and the hotel industry has an extensive history of criminal activity that was discussed in *Patel*. Nevertheless, the hotel industry does not qualify as "closely regulated." Accordingly, 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. Accordingly, the judgment of the District Court should be affirmed.

b. A determination that Plaintiffs are "closely regulated" would results in impermissibly absurd consequences.

The absurdity of the State's overly-broad construction of the "close regulation" exempt to the warrant requirement is that it leaves no coherent and discernible limit to that which is an emphatically "narrow exception."

First, the State's preferred criteria is so overly-broad that it, would require *hotels* in Ohio to be deemed "closely regulated," even though the United States Supreme Court *just rejected such an argument*: R.C. 3731.01 through R.C. 3731.99 *extensively* regulates hotels in Ohio, and has for quite some time. That chapter regulates everything from licensure, building standards, sanitation, rates, and even

warrantless inspections (though significantly more limited than the PMDA inspections). See Sections R.C. 3731.02, R.C. 3731.03, R.C. 3731.05, R.C. 3731.10-.15, R.C. 3731.16.

Second, the State's focus on state regulation alone would result in impermissibly different constitutional rights for otherwise-identically-situated United States citizens living operating in different states. Hotels owners, patrons, and employees in Ohio would enjoy less Fourth Amendment protection than those in California, even though the United States Constitution provides a *federal baseline that states may not undermine:* "states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution." *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 100 S.Ct. 2035 (1980); *State v. Brown*, 63 Ohio St.3d 349 (1992). Yet, if the State's theory were to prevail, states would be empowered to limit rights of American citizens protected by the *federal* Constitution, resulting in a patchwork Bill of Rights.

Third, pursuant to the State's putative criteria, it is difficult to imagine any industry that could avoid the "closely regulated" label. For instance, *Baker v. Portsmouth* determined that the business of residential real estate rental is not Ohio, even though R.C. 5321.01 – R.C. 5321.19 provides for extensive regulation of landlord-tenant contracts, arrangements, and relations. Indeed, R.C. 5321.01 *et seq.* imposes *more* extensive regulation than the Precious Metal Dealers Act. Were the State's broad theory of "closely regulated" correct, half of all American homes would

suddenly become subject to warrantless coerced governmental intrusions. Indeed, in *Baker,* the City there contended that all fifty (50) states have some form of landlord/tenant statutory regulation," and Ohio has maintained some form of regulation since 1974.

Further, ever-increasing state regulation would erode Fourth Amendment rights. One authoritative study recently determined that today, one in three U.S. workers must obtain a government license to work in their profession (up from just one in twenty in 1950), and 102 occupations nationwide maintain licensing requirements.[4] But are all 102 industries therefore "closely regulated"? And will this "narrow exception" to the warrant requirement come to apply to over half of our nation's businesses once greater than one in two workers is required to obtain an occupational license? Without primary focus on an industry's intrinsic danger to the public, the Supreme Court's fear would be realized, as "the exception would swallow the rule." *Patel,* supra.

To this end, this Court must diligently counterbalance the State's overreach because its historic tendency is, in defiance of the notion of a limited exception, to urge that every industry that it seeks to search is "closely regulated." The Sixth Circuit has previously considered and rejected such a broad view. In *Deja Vu of Cincinnati,* the Ohio Attorney General's office *intervened* to raise the argument that

[4] See *License to Work*, *a National Study of Burdens from Occupational Licensing,* by Dick Carpenter (Institute for Justice, 2012), available online at *https://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf*

"the Township may validly perform warrantless inspections of adult cabarets because cabarets are pervasively regulated." *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trustees*, 326 F.3d 791, 805 (6th Cir. 2003, later vacated on other grounds). The Court responded by observing that "sexually oriented businesses do not qualify as highly regulated industries" because "the Supreme Court has never reached such a conclusion." *Id.,* at 806. Likewise, in *Allinder,* the State vociferously insisted that *bee apiaries* were "closely regulated," and this Court rejected such overreach. *Allinder,* supra. Meanwhile, there is no case where the State has judiciously abstained from urging for application of the "closely regulated" exception. If deference were given to the State in each case, nothing would remain exempt from the exemption.

Thus, effective judicial oversight is the only check on this slippery slope that *Patel* forbids. And oversight is considerably more effective when a court weights the intrinsic danger of the business or industry and/or Supreme Court enumeration, rather than tallying *prima facie* evidence that regulations exist. Such oversight necessary leads to the conclusion that the closely regulated industries exception does not apply so as to save the constitutional infirmities of the four PMDA search mandates.

c. The rationale for the "closely regulated" exemption to the warrant requirement does apply here.

The rationale for the pervasively regulated industry exception is the notion that those entering a particular industry impliedly consent to warrantless searches due to

unmistakable notice of intrinsic danger and pervasive federal regulation. That rationale fails to apply here for several reasons.

First, even where statutes may be "on the books," there is no notice of pervasive regulation when notice and enforcement are lacking. In *Allinder,* this Circuit held that the state had failed to demonstrate that bee apiaries were "closely regulated," in part because "less than 100 percent of beekeepers in Ohio are registered, and only about 85 percent of those registered are inspected every year":

> Defendants argue that the state regulatory scheme involved here amounts to close and pervasive regulation. But as the district court noted: The state apiarist testified that less than 100% of the beekeepers in Ohio are registered and that only about 85% of those registered are inspected every year. (Inj.Tr. at 33). He testified further that **the typical reason for failure to register colonies is beekeepers who are unaware of the registration and inspection requirements.**

Allinder v. State of Ohio, 808 F.2d 1180, 1182–92 (6th Cir. 1987).

Here, it is well-documented that enforcement of the PMDA has been sporadic at best, resulting in an utter *lack of notice* to potentially regulated businesses. The District Court Judge himself, who indicated the following at parties' first hearing on this matter: "I want to start by saying that I was the general counsel, or the chief counsel, in the Department of Commerce from '91 to '92, about a two-year period, I guess, and I was completely unaware of the existence of this law, and I don't recall that there were ever any cases or enforcement actions under this law." Motion Hearing Transcript, Doc. 12, PageID 109. Department of Commerce enforcement agent Brian Landis also confirmed that the State's interest in enforcing the PMDA did

not arise until gold and silver prices spiked sometime around 2010. See October 29, 2012 Preliminary Injunction Hearing Transcript, at pp. 85-86. Doc. 26, PageID 535-536. Mr. Landis explained that "the previous deputy that we had, it was one of the focuses or the, I guess, direction we were told to look," so "a year and nine months ago, the department became more aggressive with the Precious Metal Dealers Act." *Id.* When asked how a member of the regulated community who had been a coin dealer for 35 years was to know that the PMDA was potentially applicable to his or her business, Mr. Landis explained the inadequacies of the State's longstanding methods of enforcing the PMDA and notifying such businesses: "it's kind of word of mouth more so. I don't know of any way really to identify everybody, and especially when precious metal people are popping up in Goodyear tire stores and barber shops. They're everywhere right now. It's hard to identify them all to even give them notice." Id., at PageID 558 (Emphasis added). This evidence - - an unawareness of the registration and inspection requirement - - is materially identical to the evidence this Court relied upon in *Allinder* to determine that "the record fails to show either that the beekeeping industry has a long history of close regulation or that it is currently subject to pervasive and comprehensive regulation in Ohio." *Allinder*, supra.

Second, there is no notice that one is entering an "industry" simply by purchasing precious metals. The PMDA's many exemptions render it mysterious as to who is subject to it, particularly at the outset. Department of Commerce PMDA

enforcement attorney Amanda McCartney testified that those that purchase and sells coins may be exempt from PMDA licensure pursuant to R.C. 4728.11 if the "coins are not being purchased for their content of precious metals," but as to the meaning of the exemption, she testified "I mean – I can't necessarily state the meaning. It is not defined within the statute . . . I don't really know much about coins." Doc. 26, PageID 519. Meanwhile, Ms. McCartney also testified that the PMDA contains a "retail jeweler exemption" in R.C. 4728.11(E). Id., at PageID 521.

The determination of who is in "the industry," is made not through obvious superficial characteristics of a business that are readily apparent with regard to liquor, firearms, and mining. Rather, Mr. Landis indicated that, to make this determination, the State reviews "lots of other information" besides the location of a business:

> "Typically, it's their purchase receipts. In the case of a coin store, what I typically ask for is a copy of their state sale tax receipts . . . So that kind of gives me a percentage of their retail sales to calculate against retail purchases…we ask them to identify how much they've bought the last two years. Sometimes it's longer, but two years it the number I want to look at mainly; take a look at what they bought and how much precious metals did they sell as jewelry…we're looking at the amount of purchases they made, the amount of retail sales they've made, then calculate a percentage to see where they fit . . . if their percentage is 27 percent and 25's the limit, I might ask them for some more documentation to find out of they've been buying coins that they included in their number that maybe I can eliminate them out to get them under that 25 percent number . . . "

Doc 26, PageID 542, 560-561. With determinations of PMDA applicability depending on such biannual ratios, many businesses like Worthington Jewelers drift in and out of PMDA regulation depending on market prices and their purchases and

sales in a particular year. Such uncertainties fail to give rise to the type of unmistakable notice of pervasive regulation required to imply consent to warrantless searches.

Third, there is no "closely regulated *industry*" that one could presume to be entering through purchasing precious metals. "[T]he statute at issue must regulate a particular *industry* rather than apply generally to *all businesses*." *United States v. Kolokouris*, No. 12-CR-6015G, 2015 WL 4910636, at 20-22 (W.D.N.Y. Aug. 14, 2015).

Here, the State is forced to create the *faux* industry of "second-hand goods dealers." But businesses that sell antiques, used cars, houses, appliances, furniture, books, and electronics would be found within such a broad "industry," leaving it as no industry at all. The confusion is further demonstrated by the fact that the State's claimed in the District Court that "the business of precious metals dealing is considered a part of the *financial services industry*. As such, precious metals dealing is regulated at the state level by the Ohio Department of Commerce Division of Financial Institutions." Doc. 103, PageID 1154. Meanwhile, all agree that the PMDA regulates an *activity* that could be engaged in by *any* business, rather than a clear "industry": the State's attorneys urged the District Court to understand that the PMDA regulates activity rather than an industry, explaining "the conduct is more broad than just coins. It also regulates the purchase of jewelry potentially. So I kind of wanted to refocus and just make sure that we're all aware that the regulation is not

on coin dealers; it's a regulation on *the conduct* of the purchase of precious metals." Doc. 12, PageID 136. Indeed, the two Plaintiffs here, Worthington Jewelers and Liberty Coins, would never have cause to respect that they would be considered within the same industry, much less the "secondhand goods" or "financial" industries: while the former is an upscale jewelry store focusing on the sale of engagement rings to relatively wealthy individuals, the other specializes in historic coins, currencies, and similar collectibles. Nor would either suspect to be located within the same industry as "Goodyear tire stores and barber shops."

Without a history of enforcement, much less a clear *industry,* one cannot be "on notice" that he or she is impliedly consenting to warrantless searches by joining such an industry.

For all of these reasons, no exemption to the warrant requirement applies to the four PMDA warrantless search mandates, meaning that each mandate violates the Fourth Amendment on its face.

C. Even if exempt from the warrant and subpoena requirements due to "closely regulation," the PMDA search mandates remain "unreasonable."

Even within closely regulate industries, warrantless inspections violate the Fourth Amendment unless all of 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).

Thus assuming *arguendo*, the PMDA authorizes warrantless administrative searches of a "closely regulated" industry, if the provisions of the PMDA authorizing warrantless searches still do not satisfy these three criteria, a Fourth Amendment violation still exists. As the District Court correctly concluded, Appellants have not established that the PMDA actually satisfies the second and third criteria. (*See* R.113, Opinion & Order, at 30-31, PageID#1428-29 ("Even if precious metals dealings were a clearly regulated industry in Ohio, the PMDA's Inspection Provisions would still fail under *Patel*.…Here, as in *Patel*, the Inspection Provisions would fail under the second and third prongs of this test").[5]

i. Suspension of the Warrant and Subpoena requirements, in the manner accomplished by each of the four challenged search authorizations, are not "necessary to further the PMDA's regulatory scheme."

Without any substantive analysis of the text of the four provisions of the PMDA at issue (much less summary judgment evidence), Appellants contend that, with respect to all four provisions, the warrantless searches are necessary to advance the PMDA's regulatory scheme. (*See* Appellants' Brief, at 33-34.) In support of such a conclusory proposition, Appellants summarily contend that: (1) all of the PMDA's

[5] This Court could devise a more minimalist and tailored resolution to this case by circumventing the issue of "close regulation" and deciding the issues before on these grounds alone.

warrantless search authorizations are similar to those allowed in *Burger;* (2) they ensure that precious metals "can be identified and are traceable"; and (3) the "element of surprise" is "crucial" because unannounced and frequent[6] inspections are critical less a warrant requirement could frustrate inspection. (Appellants' Brief, at 34.)

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." 238 F.3d 421 (6th Cir. 2000); *Cf. Marshall v. Barlow's, Inc.,* 436 U.S. 307, 316-17 (1978). Later, in *Patel,* the Supreme Court clarified that the need for "surprise" cannot justify warrantless searches of business records or inventory:

> 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. The Court has previously rejected this exact argument, *which could be made regarding any recordkeeping requirement*. . .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,; *Riley,* 134 S.Ct., at 2486.

City of Los Angeles, Calif. v. Patel, 135 S. Ct. 2443, 2456 (2015)(Emphasis added), citing *Barlow's, Inc*., at 320 ("[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

[6] As noted elsewhere, the State's expert witness emphasized that inspections are *not* "frequent": the State alleges that it aspires to perform a PMDA search every 18 months.

notice to the establishment being inspected"). See also *Midwest Retailer Associated, Ltd. v. City of Toledo,* 563 F. Supp. 2d 796, 805–07 (N.D. Ohio 2008)("surprise" not necessary where the statutory scheme already imposes record retention requirements). Thus, warrantless inspections of records authorized by the PMDA, without a subpoena, are not "necessary," as a matter of law.

Nor are such searches without judicial oversight necessary as a matter of *fact*, as there are numerous *constitutionally-adequate* means by which necessary records may be acquired.

First, the State is free to acquire the Plaintiffs records through obtaining Plaintiffs' voluntary consent to the search. The Supreme Court has acknowledged that "the great majority of businessmen can be expected in normal course to consent to inspection without a warrant." *Patel,* at 2453, citing *Barlows,* 436 U.S., at 316. The Court considered it relevant that "the City has cited no evidence suggesting that without an ordinance authorizing on-demand searches, hotel operators would regularly refuse to cooperate." *Id.,* at 2453. Likewise here, the State has entirely failed to supply any such evidence to the District Court or this Court. Meanwhile, the State's own witness acknowledged that the vast majority of investigated businesses voluntarily comply. Doc. 103-2, PageID 1192 (Affidavit of Brian Landis, Paragraph 14, acknowledging that "most violations discovered are resolved by the parties exchanging correspondence").

Second, the State is free to obtain a warrant upon probable cause or even *administrative* probable cause without the business owner's knowledge. See *Allinder v. State of Ohio*, 808 F.2d 1180, 1182–92 (6th Cir. 1987)(warrantless searches not necessary because element of surprise could be retained through use of ex parte warrants). See also *Eng'g & Mfg. Servs., LLC v. Ashton*, 387 F. App'x 575, 576–86 (6th Cir. 2010)("probable cause justifying the issuance of a warrant for administrative purposes may be based either on 'specific evidence of an existing violation' or 'on a showing that 'reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment]'…a "warrant showing that a specific business has been *chosen* for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources ... would protect an employer's Fourth Amendment rights."), citing *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 98 S.Ct. 1816 (1978).

Third, Patel acknowledged that searches of private business records conducted without a warrant remain a viable option in cases of exigent circumstances. *Patel,* supra., at 2452, Footnote 4.

Fourth, Patel also acknowledged that state agents may guard records upon refusal until a proper warrant is obtained: "in the even rarer event that an officer reasonably suspects that a hotel operator may tamper with the records while the motion to quash is pending, he or she can guard the registry until the required hearing can occur, which ought not to take long." *Id*., at 2453.

Fifth, *Patel* explained that obtaining and serving a subpoena is not overly-burdensome ("this opportunity [to have a neutral decisionmaker review an officer's demand to search records] can be provided without imposing onerous burdens on those charged with an administrative scheme's enforcement.") *Id.,* at 2452, 2453.

Finally, if the State is concerned about a particular case of stolen property (the only concern it cites), the PMDA statutes do no work: Ohio's criminal statues forbidding receipt of stolen property more than suffice as a basis for obtaining a warrant or even pursuing exigent circumstances.

The State has entirely failed to provide analysis, much less evidence, demonstrating why each of these mechanisms -- which supply a measure of protection for Ohio business owners -- are inadequate. Meanwhile, the State has entirely failed to supply any *evidence* demonstrating a meritorious reason why *surprise* is necessary. To the contrary, according to the State's witness, on the first visit to a business "the examiner does not ask to see any records or other items at that time of visiting the business location." Doc. 103-2, PageID 1192 (Landis Affidavit, Paragraph 6). Additionally, "when an Examiner conducts a 'compliance examination', the Examiner asks to look at business records," and "if a licensee refuses," this refusal is noted and another request is made." *Id.,* at Paragraphs 11, 12. This is precisely the type of deliberate investigation process that the Supreme Court found negated the need for "surprise" inspection.

Moreover, the State only attempts to explain why PMDA searches of *precious metals* - - the Plaintiffs' inventory - - are necessary without the opportunity for pre-compliance review by a neutral decision-maker. This ignores the fact that several of the challenged statutes command that Worthington Jewelers and Liberty Coins divulge a broad array of records and "sources of information" separate and apart from their inventory. See OAC 1301:8-6-03(D); R.C. 4728.05(A), and R.C. 4728.06. Concerns over *inventory* and *precious metals or gems themselves* simply fail to prove that warrantless access to such *books*, *forms*, and *all sources of business information* (which permits the search of cell phones and computers) are "necessary" for the sake of "surprise." And *Patel* expressly forecloses any such notion.

As such, the State fails to posit a single circumstance whereby dispending with the warrant and subpoena requirements are actually necessary to advance any state interest. Accordingly, even if the Plaintiffs were each members of a "closely regulated industry," the challenged warrantless search authorizations would remain unconstitutional on their face because they fail the "necessity" requirement of the *Burger* requirement. Consequently, the District Court's Order should be upheld.

ii. None of the challenged search authorizations provide a "constitutionally adequate substitute for a warrant."

Even if the Plaintiffs were members of a closely regulated industry *and* the PMDA's warrantless search authorizations were "necessary," the search authorizations would still fails the third *Burger* requirement that "the statute's

inspection program, in terms of the certainty and regularity of its application, [must] provide a constitutionally adequate substitute for a warrant." Pursuant thereto, "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Hodgins v. U.S. Dep't of Agric.* 238 F.3d 421 (6th Cir. 2000), quoting *Donovan,* 452 U.S. at 600. And "in defining how a statute limits the discretion of the inspectors, ... it must be '*carefully* limited in time, place, and scope." ' *Id.* quoting *United States v. Biswell,* 406 U.S. at 315, *Burger,* 482 U.S. at 702.

The State contends that each of the four PMDA search authorizations provide a constitutionally adequate substitute for a warrant through nothing more than conclusory assertions that each search authorization (1) "informs the operator that inspections will be made on a regular basis;" (2) "sets forth the scope of the inspection;" (3) "places the owner on notice as to how to comply with the statute;" (4) "notifies the operator as to who is authorized to conduct an inspection;" (5) results in inspections that are only conducted "at the business location;" and "during regular

business hours;" and (6) "addresses the frequency of the inspections."[7] Appellant's Brief, pp. 34-36.[8]

However, in *Patel,* the Supreme Court confronted a warrantless search authorization strikingly similar to each of the four PMDA authorizations: ""Section 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." *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2448 (2015). The Court forthrightly explained why the statute there failed 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, or on a "regular basis," § 41.49 imposes no comparable standard.**

Patel, supra., at 2456, citing *Burger,* 482 U.S., at 711.

Likewise, in *Allinder,* the Court analyzed a warrantless search authorization that was also strikingly similar to the PMDA's authorizations: "To enforce sections 909.01 to 909.18, inclusive, of the Revised Code, the director of agriculture or his

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[7] It is worth this Court's observance that the State's arguments that PMDA searches are certain to occur on a regular basis undermines the State's conflicting argument elsewhere that the issue of whether Worthington Jewelers will be searched is "speculative," "hypothetical," and "imaginary." Which is it?

[8] Perhaps recognizing the impossibly of proving these assertions, in light of the PMDA's text, the State appears to give up on this analysis in the middle of its argument, simply claiming "that the Act does not contain specific limitations is largely irrelevant for purposes of the Fourth Amendment." See p. 36.

authorized representatives shall have access to and egress from any apiary or to any premises, buildings, or any other place, public or private, in which he has reason to believe that bees, honey, wax, used hives, or used appliances are kept." *Allinder,* supra., at Footnote 1. The Court found that this search authorization failed to provide sufficient certainty and regularity as to its application or limit the discretion of inspectors in the field, reasoning that "there is no requirement that inspections are to on any predetermined regular basis; there is only a 'goal' to provide yearly inspections." *Allinder,* supra., at 1188. This vests "too much discretion in the individual inspector." *Id.* See also *Deja Vu*, 326 F.3d at 804–06 (authorization to inspect premises "at all reasonable times" to insure continued compliance with the laws of Ohio and regulations, as well as requiring law enforcement officers be provided access to any and all parts of the premises for the purpose of making any health or safety inspection did not limit the scope of the inspections nor the discretion of the inspecting officers); *Donovan v. Dewey,* 452 U.S. 594, 603–04 (1981)("Similarly, warrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials."); *Colonnade Corp. v. United States,* supra, 397 U.S., at 77 ("Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply"); *V-1 Oil Co. v.*

State of Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1486 (10th Cir. 1990) ("The Wyoming Environmental Quality Act leaves inspectors free to inspect any business as often or seldom as he or she pleases. A warrant is required if searches are "so *random, infrequent, or unpredictable* that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials"); *Serpas v. Schmidt*, 827 F.2d 23, 29 (7th Cir.1987) ("To satisfy the 'certainty and regularity' requirement, *an 'inspection program must define clearly* what is to be searched, who can be searched, and *the frequency of such searches'"*); *Bionic Auto Parts & Sales, Inc. v. Fahner,* 721 F.2d 1072, 1078 (7th Cir.1983)), cert. denied, 485 U.S. 904, 108 S.Ct. 1075 (1988).

Thus, binding precedent requires the invalidation of search authorizations which, without any reference to the regularity or frequency of the administrative search, simply provide that public officials "shall have access," that records "shall be made available," or that inspection or access "shall be allowed at reasonable times."

Yet, the PMDA searches authorize warrantless searches without any reference to frequency or limits on discretion. **OAC 1301:8-6-03(D)** makes no reference whatsoever to the frequency or regularity of the broad searches it authorizes: it merely requires "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. * * *." This regulation also fails to scrutiny

because it vaguely empowers inspectors to scrutinize "all other sources of information with regard to the business of the licensee," which may include highly confidential, proprietary, and private records, property, and effects have little if anything to do with legitimate PMDA enforcement. Similarly, **R.C. 4728.05(A)**, without any reference to frequency or regularity, simply demands "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." Likewise, **R.C. 4728.06** authorizes exceptionally broad warrantless searches of books, papers, and inventory by enforcement agents including *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."

This lack of statutory guidance, particularly as to frequency, was confirmed by the testimony of the person most responsible for enforcing the PMDA:

> Q: About how often do your examiners conduct an examination at any given licensed precious metals dealer?
>
> A: **There's nothing in the code that says what the requirement is**, so it's not like there's anything required. Internally, when they first get licensed, we try to visit them within the first six months. And thereafter, it's usually every 18 months.

Doc. 26, PageID 552 (testimony of Brian Landis). This "just trust us to sort it out" approach has been expressly rejected by the Supreme Court as "unbridled discretion,"

and a bureaucratic "*goal* to provide yearly inspections" fails to substitute for a statutory requirement.

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' industries were closely regulated (which they are not). As such, even if Plaintiffs' "industry" were "closely regulated," Worthington Jewelers and Liberty Coins were entitled to summary judgment on their Fourth Amendment claim, and the District Court's Order should be upheld.

D. Each PMDA warrantless search mandate is unconstitutional *on its face*.

The State claims that Worthington Jewelers' facial claims cannot prevail because there are constitutional applications of each of the four search authorizations. App. Doc. 13, p. 54. However, the State fails to provide a single example of any such constitutional application. And it *could not*, in light of the clear prohibition on warrantless search authorizations that do not provide an opportunity to obtain precompliance review before a neutral decision-maker.

Binding precedent leaves no doubt that PMDA warrantless search authorizations are each unconstitutional on their face. The Ninth Circuit decision that the Supreme Court upheld in *Patel* concisely explained that the rule of law applicable here:

> The requirement that records always be available for inspection 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 . . . 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.[9]

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 precedent in *Kings Island,* 849 F.2d at 997, *infra.*

On appeal, the Supreme Court reiterated this rule of law: "we hold that § 41.49(3)(a) is **facially unconstitutional** because it fails to provide hotel operators with an opportunity for precompliance review." *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2451-53 (2015)(Emphasis added). In addition, the Court was clear to emphasize that a search authorization is unconstitutional on its face when its text forces citizens to make a choice between consenting to the search or risking a penalty:

> 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 (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.

[9] Analogous to here, 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."

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> 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 (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 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.

Id. (Emphasis added).

Likewise, this Circuit's seminal administrative search case regarding business records found sufficiently coercive a warrantless search authorization that did not result in immediate arrest or criminal prosecution. *McLaughlin v. Kings Island, Div. of Taft Broad. Co.,* 849 F.2d 990 (6th Cir. 1988). There, the Court invalidated the following search authorizations on their face:

> Each employer is required to "make, keep and preserve, and make available to the Secretary ... such records regarding his activities relating to [the Act]" as the Secretary "may prescribe by regulation as necessary or appropriate for the enforcement of [the Act] or for developing information regarding the causes and prevention of occupational accidents and illnesses." 29 U.S.C. § 657(c)(1). The Act also imposes a mandatory duty on the Secretary to prescribe regulations "requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job." 29 U.S.C. § 657(c)(2). The Act further requires the Secretary to "compile accurate statistics on work injuries and illnesses," and specifically authorizes the Secretary to require employers to file reports "[o]n the basis

> of the records made and kept pursuant to section 657(c)....” 29 U.S.C. §§ 673(a) and (e).
>
> ***
>
> 29 C.F.R. § 1904.2. Each employer is required to “have available for inspection” a more detailed “supplementary record for each occupational injury or illness,” recorded on either Form 101 or an acceptable alternative record. 29 C.F.R. § 1904.4.
>
> Finally, the regulations provide, in relevant part: Each employer shall provide, upon request, records provided for in §§ 1904.2, 1904.4, and 1904.5, for inspection and copying by any representative of the Secretary of Labor for the purpose of carrying out the provisions of the act....

Kings Island, supra., at 992, 993 (Emphasis added). The Court then framed the issue as precisely that which is now before this Court, holding the *allowance* of the nonconsensual searches unconstitutional: “The question before this court is whether a search warrant or its equivalent is required before the nonconsensual search of an employer's occupational health and safety records. We hold that the regulations in question, insofar as they allow such a nonconsensual search, are in violation of the Fourth Amendment of the United States Constitution.” *Id.* The Court concluded that “[t]he Fourth Amendment requires that the employer have some notice and opportunity to be heard to challenge the reasonableness of the agency request. While an agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute ... *it must delimit the confines of a search by designating the needed documents in a formal subpoena.*” *Id.*

Put otherwise, 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. *Emerson,* 834 F.2d at 997.

Here, OAC 1301:8-6-03(D), R.C. 4728.05, R.C. 4728.06, and R.C. 4728.07 *each* authorize the State to initiate searches and inspections, *outside the judicial process, without prior approval of a judge or magistrate.*

Meanwhile, there can be no dispute that each search authorizations are *coercive* because a penalty applies in the event of non-compliance with each: violation of *any* provision of the PMDA, including the search requirements above, 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. These provisions apply to licensees, and some apply to as those without a license who simply purchase precious metals.

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."[10] Thus failure to permit an inspection authorized by any of the PMDA's four warrantless search authorization is a violation of the PMDA itself.

In turn, 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 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." Of note, 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." *Patel,* supra., at 2448.

Meanwhile, 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 whenever the superintendent has reasonable grounds to believe that a violation has occurred, act as complainant in the prosecution thereof, and aid

[10] This Section indicates that liability applies not just to the business - - Liberty Coins and Worthington Jewelers - - but also to the "persons" - - in this case, Mr. Tomaso and Mr. Capace. Both Mr. Tomaso and Mr. Capace are subject to prosecution at the time of the filing of this brief.

officers to the best of the superintendent's ability in prosecutions." Thus, the plain language of the PMDA makes clear that when Worthington Jewelers fails to make available for inspection *any source of information related to its business, at any time,* it violates the PMDA, which subject it to (1) loss of license; (2) referral for criminal prosecution; and (3) a misdemeanor or felony.

In response to this reality, the State contends that (1) "Defendants are not authorized to bring criminal actions;" and (2) there is no evidence that anyone has been arrested for refusal to comply.[11] App. Doc. 13, PageID 54-55. For several reasons, these objections are not serious.

First, the forebearance of the State in pressing criminal charges or effectuating arrests that, as a matter of the plain language of the statute, could be made is irrelevant. In the often-cited case of *Brock v. Emerson Elec. Co., Elec. & Space Div.,* the Eleventh Circuit addresses this exact issue:

> The Secretary attempts to underscore the significance of the fact that no penalty was proposed when Emerson was cited for violating the law by refusing to turn over the documents. We fail to appreciate the significance of this fact. The forbearance of a field officer in graciously declining to propose

[11] True enough, when brought up on criminal charges or for revocation of one's license after refusing a search, one may get to see a judge or (Department of Commerce) hearing officers prior to the imposition of a penalty. But this misses the point: the Fourth Amendment forbids one from being brought up on criminal or administrative charges *in the first place.* And the State has conceded that one can be subjected to "administrative action" or "court action" in response to refusing a search, even where no warrant or subpoena has been issued. *Precompliance* review is distinguishable from the opportunity to defend oneself before a judge at a criminal trial, or to appeal a loss of license or imposition of a criminal or civil penalty. It is also no defense that "a number of steps are required before a penalty is imposed," as the State argued below.

> a penalty does not suffice to protect an employer's constitutional rights. The Fourth Amendment operates to protect citizens from the exercise of just such discretion.

Brock v. Emerson Elec. Co., Elec. & Space Div., 834 F.2d 994, 995–97 (11th Cir. 1987).

Second, it is no defense that precious metal dealers are not immediately arrested in the spot because the Unconstitutional Conditions Doctrine prohibits a statutory scheme that wields the power to impose *any penalty* in response to the exercise of one's Fourth Amendment right to refuse a warrantless search. 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" through a coercively false choice. *Koontz,* supra.

This coercion need not be a *criminal* penalty or a threat of *immediate arrest.* In *Baker v. Portsmouth* the Court noted there that it is not just risk of immediate criminal penalty that causes a warrantless search to be unconstitutionally coercive: "[a] property owner cannot be regarded as having voluntarily given his consent to a search where the price he must pay to enjoy his rights under the Constitution is the effective deprivation of any economic benefit from his rental property." *Baker v. City of Portsmouth*, No. 1: 14CV5L2, 2015 WL 5822659, at *4 (S.D. Ohio Oct. 1, 2015), citing *Sokolov v. Village of Freeport*, 420 N.E.2d 55 (N.Y. 1981) Further, *Baker* confirms that the threat need not be immediate, i.e. "arrest on the spot." There, the Court explained that the fact that refusal to permit a warrantless search "*may* result in an order to suspend the permit to operate" was sufficient evidence. *Id.* See also *Wilson v. City of Cincinnati,* 46 Ohio St.2d 138, at 141 (1976); *Dearmore v. City of Garland,* 400 Supp.2d 894 (N.D. Tex., 2005).

Likewise, this Circuit's decision in *Kings Island* demonstrates that *Patel* is *not* distinguishable simply because precious metals dealers are not "arrested on the spot." It was deemed sufficiently coercive there that refusal to allow a warrantless search led to further legal process that *could ostensibly* result in civil or criminal penalty. Similarly to what the State contends here, "the [government] contends that the OSHA enforcement scheme grants employers a procedural safeguard and that no monetary penalty may be imposed for failure to provide the required records until the reasonableness of the citation is affirmed by the Commission" *Id.*, at 996.

However, the Court explained that these types of defenses do not save the constitutionality of warrantless search authorizations, as "the administrative proceedings which the Secretary characterizes as procedural safeguards are simply proceedings in which an employer must defend itself against a citation alleging violation of the Act and regulations thereunder. The procedures are not geared to evaluating the reasonableness of the inspector's decisions prior to his acting on them. At a minimum, we hold that an evaluation should take place prior to any search or citation issued for refusal of a search. An employer may not be *threatened* with a penalty for asserting his Fourth Amendment rights." *Id.* Consequently, contrary to the State's contentions, it is no defense that the PMDA's search authorizations are threatening and *indirectly* or *eventually* coercive rather than *directly and immediately coercive.* Consequently, the search authorizations remain unconstitutional on their face, and the District Court's Order should be upheld.

E. The Plaintiffs were not required to endure a search or penalties prior to bringing this action.

The State's final contention is that the Fourth Amendment claims of Worthington Jewelers and Liberty Coins are not ripe for review merely because the State has never searched their records. Doc. 13, p. 56-61. For a number of reasons, this contention is absurd.

First, the entire purpose of declaratory judgment is to permit citizens to challenge unconstitutional laws before enduring either the violation of their rights or a

penalty. As parties subject to the PMDA, Plaintiffs are entitled to seek declaratory relief. The entire purpose of the Declaratory Judgment Act is to permit a plaintiff to seek a declaration of rights *before* he is forced to defy a government command and face a potential penalty as a result. The Supreme Court recently reaffirmed this, directly speaking to Defendants' concerns here:

> Our analysis must begin with the recognition that, where threatened action by *government* is concerned, we **do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.** The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128-29 (2007). Put otherwise, Plaintiffs are not required to wait and see what happens. Nor would doing so make practical sense - - at the moment an agent appears at their premises, without a warrant or subpoena, to inspect their business records (and even cell phones and laptops), Plaintiffs will be put to a choice: stand on their rights and refuse the search, risking the loss of their PMDA license and potentially the criminal penalties articulated in R.C. 4728.99; or permit the search against their will so as to avoid the penalties. Plaintiff need not wait for this moment to come to assert their rights on the spot, only to then wait and see whether agents in the field will prove faithful to the expedient litigation positions of the Department of Commerce's legal counsel. Were Plaintiffs seeking damages for past harm, they would be forced to concur with Defendants'

position. However, they only seek declaratory and injunctive relief here, and the Declaratory Judgment Act entitled them to do just that.

Second, precedent is clear that a business subject to a search authorization is not required to endure a search, prosecution, or penalty prior to brining a declaratory judgment action seeking to enjoin the search mandate. No specific past search was at issue in *Patel,* nor did the Court focus on or even consider factual nuances regarding how the search authorizations were executed. Further, the Supreme Court holds that a plaintiff is not required to endure a search prior to brining a Fourth Amendment challenge: "[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." *Patel*, at 2449-2451, quoting *Illinois v. Krull,* 480 U.S. 340, 354 (1987).

Likewise, this Circuit has already expressly addressed and rejected the State's exact contention here in *Allinder*:

> In response to the dissent's position that what we decide today is "potential and [hypothetical]", we are satisfied that the dispute between the Allinders, the Steiners and the Ohio Department of Agriculture is not an "imaginary" one . . . **Plaintiffs are clearly threatened with warrantless searches of their apiaries under the authority of O.R.C. § 909.05, and O.R.C. §§ 909.18 and 909.99 subject them to a penalty should they resist.** They have shown they are injured by the operation of O.R.C. § 909.05, and we have not confronted "a hypothetical case thus imagined." Also, it should be noted that our decision is consistent with the decision of the Supreme Court of Pennsylvania in *Commonwealth v. Lutz,* 516 A.2d 339 (Pa.Sup.Ct.1986), holding a Pennsylvania statute that authorizes warrantless searches of premises holding nonhazardous wastes unconstitutional on the grounds that

> there was a lack of reasonable legislative or administrative standards governing such searches.

Allinder v. State of Ohio, 808 F.2d 1180, 1182–92 (6th Cir. 1987). Thus, binding Sixth Circuit precedent is clear that a case is neither "hypothetical" or "imaginary" when one *subject to* a warrantless search statute brings a facial claim challenging the constitutionality of that statute.

Third, Worthington Jewelers in particular, as a PMDA licensee, is subject to PMDA searches at any time. In fact, by not faxing business records to police every day *right now,* Plaintiff Worthington Jewelers is *currently* subject to penalty. Without doubt, there is sufficient controversy and adversity to adjudicate the merits of the PMDA's warrantless search authorizations.[12] Consequently, Worthington Jewelers is clearly *subject to* the warrantless PMDA search authorizations, and as a matter of precedent, maintains the capacity to the challenge the constitutionality of this authority over it. As such, the District Court's Order was entirely proper, and should be upheld.

VI. CONCLUSION

For the foregoing reasons, OAC 1301:8-6-03(D), R.C. 4728.05(A), R.C. 4728.06, and R.C. 4728.07 violate the Fourth, Fifth, and Fourteenth Amendment on their face, and the District Court's Order must be upheld.

[12] It is worth this Court's observance that the State's arguments that the issue of whether a PMDA license holder will be searched is a "speculative," "hypothetical," and "imaginary" circumstances directly undermines the State's argument that the PMDA statues satisfy the third prong of the *Burger* test because searches of licensees are "certain, regular, and frequent."

Respectfully submitted,

/s/ Maurice A. Thompson
Maurice A. Thompson
1851 CENTER FOR CONSTITUTIONAL LAW
122 E. Main Street
Columbus, Ohio 43215
Tel: (614) 340-9817
MThompson@OhioConstitution.org

Curt C. Hartman
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Court
Amelia, Ohio 45102
(513) 752-8800
hartmanlawfirm@fuse.net

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE – FED. R. APP. 32(A)(7)

I hereby certify that, pursuant to Fed. R. App. 32(A)(7), that the foregoing Appellees' Brief contains less than 13,147 words and is otherwise in compliance with Fed. R. App. 32(A)(7).

/s/ Maurice A. Thompson

DESIGNATION OF DISTRICT COURT RECORD

Appellees incorporate Appellants' Designation of Record.

CERTIFICATE OF SERVICE

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

/s/ Maurice A. Thompson