No. 25-

IN THE

Supreme Court of the United States

WILL MCLEMORE, *et al.*,

Petitioners,

v.

ROXANNA GUMUCIO, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TENNESSEE AUCTIONEER COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 768 (2018) (*NIFLA*), this Court rejected the professional speech doctrine, which gave government "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." Yet in the seven years since, "the division between speech and conduct has not been evenly applied throughout the country, particularly when it comes to licensing schemes that determine which individuals can speak about certain topics." *Richwine v. Matuszak*, 148 F.4th 942, 953 (7th Cir. 2025) (citing conflicting decisions from federal courts of appeals). The decision below deepened that acknowledged circuit split. The questions presented are:

1. Whether a burden on speech must be incidental merely because it is imposed by an occupational licensing law.

2. Whether a law that imposes incidental burdens on speech must satisfy intermediate scrutiny.

PARTIES

Petitioners (Plaintiffs-Appellants below) are Will McLemore; McLemore Auction Company, LLC; Ron Brajkovich; Justin Smith; and Blake Kimball.

Respondents (Defendants-Appellees below) are Roxanna Gumucio, in her official capacity as Executive Director of the Tennessee Auctioneer Commission; John Lillard, in his official capacity as Assistant Director of the Tennessee Auctioneer Commission; Jeff Morris, in his official capacity as Chair of the Tennessee Auctioneer Commission; Ed Knight, in his official capacity as Vice Chair of the Tennessee Auctioneer Commission; and Larry Sims, Dwayne Rogers, and Jay White in their official capacities as members of the Tennessee Auctioneer Commission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner McLemore Auction Company, LLC, certifies that it has no parent corporation and no publicly held company owns 10% or more of its stock. Petitioners Will McLemore, Ron Brajkovich; Justin Smith; and Blake Kimball are individuals.

STATEMENT OF RELATED PROCEEDINGS

The proceedings in the federal district and appellate courts identified below are directly related to the above-captioned case in this Court.

McLemore v. Gumucio, No. 3:23-cv-01014 (M.D. Tenn. Aug. 19, 2024).

McLemore v. Gumucio, No. 24-5794 (6th Cir. Aug. 12, 2025).

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PETITION FOR A WRIT OF CERTIORARI

Seven years ago, this Court rejected the professional speech doctrine, which lower courts applied to grant government "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 768 (2018) (*NIFLA*). Yet, as the decision below shows, that doctrine is alive and well in some parts of the country today. The Sixth Circuit panel below refused to apply First Amendment scrutiny to a licensing requirement for online auctioneers by recasting their speech as professional conduct. Its decision calls for this Court's review for three reasons.

First, the decision below deepened an acknowledged circuit split on whether a burden on speech must be incidental merely because it's imposed as part of an occupational licensing law. As the Seventh Circuit put it in another case just months ago, "the division between speech and conduct has not been evenly applied throughout the country, particularly when it comes to licensing schemes that determine which individuals can speak about certain topics." *Richwine v. Matuszak*, 148 F.4th 942, 953 (7th Cir. 2025).

Second, the decision below contravenes this Court's precedents. This Court has never countenanced a diluted First Amendment standard for occupational licensing laws. Quite the opposite: it has emphasized that "Speech is not unprotected merely because it is uttered by professionals." *NIFLA*, 585 U.S. at 767. And even if the panel below were correct that the burdens on speech were "incidental," it still erred in applying only rational basis review. *See Free*

Speech Coalition, Inc. v. Paxton, 145 S. Ct. 2291, 2306 (2025) (laws that impose an incidental burden on speech must be subjected to intermediate scrutiny).

Third, this case is an excellent vehicle for this Court to address an important question. The rise in both the number of occupational licensing laws and the number of Americans who speak for a living puts both on a collision course. This Court's intervention is thus needed to provide clarity not just for online auctioneers, but also for journalists, advice columnists, tour guides, and other Americans who speak for money. This case presents an exceptional vehicle for this Court's review since speech isn't incidental to an online auction; it's the essence of an online auction. And this case's procedural procedure enables this Court to focus its limited resources on resolving the important question of whether full First Amendment scrutiny applies to this occupational licensing law.

This Court should grant the petition.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–21a) is reported at 149 F.4th 859. The opinion of the district court (App. 22a–44a) is not reported but is available at 2024 WL 3873415.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on August 12, 2025. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the U.S. Constitution, as incorporated against the states by the Fourteenth Amendment, provides: "Congress shall make no law . . . abridging the freedom of speech." Tennessee law makes it unlawful for a person to "[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by the commission." Tenn. Code Ann. § 62-19-101(a)(1). An auction is a "sales transaction conducted by oral, written, or electronic exchange between an auctioneer and members of the audience, consisting of a series of invitations by the auctioneer for offers to members of the audience to purchase goods or real estate, culminating in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience." Tenn. Code Ann. § 62-19-101(2).

STATEMENT OF THE CASE

I. Factual Background

A. Online Auctions and Online Auctioneers

Will McLemore is a pioneer in his field. In 2006, McLemore founded McLemore Auction Company, LLC, and became one of the first online auctioneers in Tennessee.[1] *See* Complaint, ECF No. 1 *McLemore v. Gumucio*, 3:23-cv-01014, ¶ 7 (M.D. Tenn. Sept. 25, 2023).

1. McLemore Auction Company lists items on its website and allows consumers to bid on them. *See* McLemore Auction Company, https://www.mclemoreauction.com/ (last visited October 31, 2025).

Popularized by companies such as eBay, online auctions allow consumers to bid on items from their homes and avoid the clamor and din associated with traditional auctions.[2] Yet because consumers in online auctions (unlike those in traditional auctions) can't physically inspect the items up for auction, they must rely on online auctioneers to furnish accurate and enticing descriptions of the items being sold. *Id.* ¶ 23. Online auctioneers craft narratives, images, and descriptions to inform bidders of the characteristics of items up for auction. *Id.* For instance, an online auctioneer may highlight an item's historical significance or tout the accomplishments of an artist who created the work that's up for auction. *See id.* ¶¶ 24–25.

McLemore's online auctions, for example, have highlighted the work of acclaimed speaker designer Jim Thiel, who used the auctioned items in his laboratory before his death. *Id.* ¶ 26. This type of information helps bidders understand the significance of items up for auction and ensures that the online auctions at McLemore Auction Company are as informative, enticing, and interesting as possible. *Id.* ¶ 28.

The success of McLemore Auction Company is largely due to those who work for it. Petitioners Ron Brajkovich, Justin Smith, and Blake Kimball contribute to the company's success by exhibiting creativity in their roles as online auctioneers.[3] *See* Declarations in Support of Mot.

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2. Online auctions do not refer to live auctions on interactive platforms like Zoom.

3. For ease of reference, "Online Auctioneers" refers to all Petitioners, "McLemore" refers to Petitioners Will McLemore and McLemore Auction Company, LLC, and "Unlicensed Online

for Prelim. Inj., ECF No. 14-1, 14-2, 14-3, *McLemore v. Gumucio*, 3:23-cv-01014 (M.D. Tenn., Oct. 31, 2023); *See also* Opp. to Mot. to Dismiss, ECF No. 22, at 3 & n.5, 5–7 (incorporating declarations). Blake Kimball, for example, has at times taken a role similar to a film director by selecting backdrops or lighting for cars that are up for auction. Declaration of Blake Kimball, ECF No. 14-1, ¶ 3. This included putting dome lights on a Dodge Charger to "capture its majestic appearance at night." *Id.* Because Tennessee did not require a license for online auctioneers until recently, Petitioners Brajkovich, Smith, and Kimball do not hold an auctioneer's license. *See* Compl. ¶¶ 44–47.

B. Tennessee's Regulation of Online Auctions

With the rise of e-commerce, the Tennessee General Assembly in 2006 exempted online auctions for "fixed price or timed listings that allow bidding on an internet website, but do not constitute a simulcast of a live auction" from its regulation of auctioneers. 2006 Tenn. Pub. Ch. 533, codified at Tenn. Code Ann. § 62-19-103(9).

Yet by 2016, the Commission sought to regulate online auctions. After the Commission determined that Mr. McLemore's extended-time online auctions fell under the statutory exemption for online auctions, Compl. ¶ 31, it proposed a rule change to regulate extended-time online auctions.[4] *See* Tenn. Comp. R. & Regs. 0160-01-.28

Auctioneers" refers to Petitioners Ron Brajkovich, Justin Smith, and Blake Kimball. The "Commission" or "the government" refers to all Respondents.

4. In a "fixed-timed" auction, the goods offered for sale have a fixed ending time. App. 25a. By contrast, an "extended-time"

(Online Auctions, expired). But the Joint Committee for Government Operations voted a negative recommendation on the portion of the rule that would have regulated online auctions. Joint Government Operations Committee, Rule Filed in October 2016, (Dec. 15, 2016) 4:09:51–4:10:47.[5]

In 2017, the General Assembly considered bills that would have regulated extended-time, but not fixed-time, online auctions. *See* Tenn. SB 0814; Tenn. HB 0747. The bills did not pass. Undeterred, similar bills were introduced in 2018. *See* Tenn. SB 2081; Tenn. HB 2036. Rather than pass the bills to regulate online auctions, the General Assembly enacted legislation to create an Auctioneer Modernization Task Force to study the need to amend the law. *See* 2018 Pub. Ch. 941. The Task Force was directed to study different auction platforms and recommend changes to auctioneer licensing laws. *Id*. Yet Task Force members publicly admitted that they did not know how members of the public were harmed by online auctions. Compl. ¶ 33. That observation matched the Task Force's own data, which showed that only 15 of 117 complaints against auctioneers in the three preceding years involved online auctions and only three of those involved extended-time online auctions. Compl. ¶ 34. The vice president of the Tennessee Auctioneer Association put forth a different reason for licensing online auctioneers. He testified that "there's a real need to look at oversight for online auctions because we can all agree that's not going to diminish in its activity." Tenn. Dep't of Comm.

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auction allows the period for sale to extend as long as bidders keep bidding. *Id*.

5. https://tnga.granicus.com/player/clip/12457?view_id=315&redirect=true (last visited November 5, 2025).

and Ins., Auctioneer Task Force Meeting (Aug. 27, 2018) at 34:25–34:32.[6]

The Task Force recommended regulating online auctions, and the General Assembly enacted a licensing requirement for online auctioneers ("Online Auction Law"). *See* 2019 Tenn. Pub. Ch. 471 (codified at Tenn. Code Ann. § 62-19-101 et seq.). The Online Auction Law amended the auctioneering law to include online auctions consisting of "electronic" exchange between an online auctioneer and members of the audience.

> Auction means a sales transaction conducted by oral, written, or *electronic* exchange between an auctioneer and members of the audience, consisting of a series of invitations by the auctioneer for offers to members of the audience to purchase goods or real estate, culminating in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience.

Tenn. Code Ann. § 62-19-101(2) (emphasis added). The Online Auction Law also changed the 2006 exemption and defined "timed listings" to exclude online auctions that are "extend[ed] based on bidding activity." *Id.* § 62-19-101(12). In practice, this meant that the type of auctions conducted by the Online Auctioneers are subject to the Online Auction Law, while sites like eBay, which conduct fixed-time online auctions, remained exempt. Compl. ¶ 40. Although members of the Task Force admitted that

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6. https://www.youtube.com/watch?v=UpDp7OBc0Wc&t=7347s (last visited, November 2, 2025).

"leaving the fixed time and leaving the extended time as being different is somewhat problematic," Tenn. Dep't of Comm. and Ins., Auctioneer Task Force Meeting (Nov. 05, 2018) at 32:36-32:43,[7] they explained that they were "carving" out fixed-time auctions from the law so that "we don't kick an eBay's nest." *Id.* at 41:16-22.

The Online Auction Law subjects Petitioners to Tennessee's regulatory framework for auctioneers. Under that framework, it is unlawful for a person to "[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by the [C]ommission." Tenn. Code. Ann. § 62-19-102(a)(1). "All auctions arranged by or through a principal auctioneer must be conducted exclusively by individuals licensed under this chapter." *Id.* § 62-19-101(b). Conducting an online auction without a license is a Class C misdemeanor, *Id.* § 62-19-121, and violators are subject to a civil fine of up to $2,500. *Id.* § 62-19-126. The Online Auctioneers must therefore obtain a license to conduct online auctions or face criminal and civil penalties.

C. Procedural History

The Online Auctioneers initiated this lawsuit in 2023, alleging that the Online Auction Law violates their rights under the Free Speech Clause under the First and Fourteenth Amendment to the United States Constitution.[8]

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7. https://www.youtube.com/watch?v=_JRUrRJgPA8 (last visited November 2, 2025).

8. McLemore and his company asserted their First Amendment rights in an earlier case that did not involve the Unlicensed Online Auctioneers. The Sixth Circuit dismissed the

See Complaint, ECF. No. 1, *McLemore v. Gumucio*, 3:23-cv-01014, at ¶¶ 51–64 (M.D. Tenn., Sept. 25, 2023); *see also id.* at ¶¶ 5 (noting that the federal court had jurisdiction under 28 U.S.C. §§ 1331 and 1343). The Commission moved to dismiss, arguing that the Petitioners lacked standing and that their First Amendment claims failed on the merits. App. 5a–6a. The district court granted the Commission's motion. The court first assured itself of its jurisdiction to hear the case. *See* App. 31a–35a. It found that standing for the Unlicensed Online Auctioneers presented a "straightforward question" since they were challenging a licensing requirement for online auctioneers. App. 31a–33a (citing Tenn. Code Ann. § 62-19-102(a)). The Court also found that McLemore and his company had standing to press their case, and noted that the debate was "academic" since their claim was identical to that of the Unlicensed Online Auctioneers. *See* App. 34a (citing *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 623 (6th Cir. 2016)). Turning to the merits, the district court acknowledged that an "auction is as clear an example of commercial speech as one is likely to find." App. 42a. But it refused to apply heightened First Amendment scrutiny because the Online Auction Law was "an economic regulation that burdens speech only insofar as that speech is made in facilitation of the economic transaction." App 43a. The court concluded that the Online Auction Law satisfied rational basis review and dismissed the case.

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case on the grounds that McLemore lacked standing to bring a dormant Commerce Clause challenge "without reopening the question of whether Tennessee's statutes comport with the First Amendment." App. 26a. So the court did not "ultimately resolve[] the First Amendment-based claim on the merits." App. 27a.

The Sixth Circuit affirmed. It saw no reason to adopt any of the Commission's jurisdictional arguments, *see* Appellees' Br. at 51–62, No. 24-5794 (6th Cir. Nov. 7, 2024), and proceeded to the merits on the Online Auctioneers' First Amendment claim. App. 6a–7a. The Court framed the threshold question as whether the Online Auction Law, as an occupational licensing statute, "regulates . . . speech or simply regulates economic activity." App. 8a. And, in analysis that mirrors that of the district court, it held that "burdens on speech are merely incidental" because the Online Auction law "regulates economic activity." App. 8a. The panel stressed that "regulation of professional auctioneering is plainly authorized by the state police power." App. 13a. In the panel's view, the Online Auction Law didn't "censor" the Online Auctioneers' speech; it "only prevents them from conducting an auction without a license." App. 12a. The panel concluded that the Online Auction Law imposed incidental burdens on speech, applied rational basis review, and affirmed the district court's dismissal. App. 12a–14a. In a concurrence, Judge Bush opined that, given past practices of regulating auctioneering as a part of the government's police powers, the panel's conclusion was also supported by "the history and tradition of the First Amendment." App. 15a; App. 19a–21a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. Federal Circuit Courts are Divided on the First Question Presented

The decision below deepened an acknowledged circuit split on the first question presented. As the Seventh Circuit recently observed, "the division between speech

and conduct has not been evenly applied throughout the country, particularly when it comes to licensing schemes that determine which individuals can speak about certain topics." *Richwine v. Matuszak*, 148 F.4th 942, 953 (7th Cir. 2025) (citing decisions from the Fourth, Fifth, Ninth, and Eleventh Circuits). With its decision below, the Sixth Circuit joined the Eleventh Circuit in declining to apply ordinary First Amendment principles to a restriction on speech—merely because that restriction comes in the form of an occupational licensing law. By contrast, the Fourth, Fifth, and Second Circuits recognize that government may not get a free pass to restrict speech merely by doing so as part of an occupational licensing law. The Ninth Circuit's jurisprudence varies panel by panel, and the Seventh Circuit, while noting that its sibling circuits are in flux, has declined to address the question. This Court's intervention is sorely needed to ensure that First Amendment protections are "evenly applied throughout the country." *Id.*

1. Like the Sixth Circuit, the **Eleventh Circuit** refuses to apply full First Amendment scrutiny for Americans who confront speech restrictions that come in the form of occupational licensing laws. In *Del Castillo v. Secretary, Florida Department of Health*, the Eleventh Circuit rejected a claim that a Florida law requiring a license to practice as a dietician or nutritionist violated an unlicensed professional's First Amendment rights to provide advice on diet and nutrition to her clients. 26 F.4th 1214, 1216 (11th Cir. 2022). In so doing, the court both purported to disavow the professional speech doctrine and adopted it in another form. *Id.* at 1218 (acknowledging that the "*NIFLA* Court expressly rejected the professional speech doctrine.") (internal quotation marks omitted). The

Eleventh Circuit refused to afford Del Castillo any level of First Amendment protection and instead recast her speech as "professional conduct." *Id.* at 1225–26. And the Eleventh Circuit declined to name a single occupational licensing law that could trigger First Amendment scrutiny—perhaps because of its broad reasoning that "nutritional counseling" was not speech because it is "what a dietician or nutritionist does as part of her professional services." *Id.* Thus, the Eleventh Circuit, like the Sixth Circuit in the decision below, dismisses the possibility that an occupational licensing law can impose a direct burden on speech.

2. By contrast, three circuit courts hold that occupational licensing laws are not exempt from robust First Amendment scrutiny. In *Billups v. City of Charleston*, the **Fourth Circuit** applied First Amendment scrutiny to invalidate a licensing requirement for tour guides. 961 F.3d 673, 690 (4th Cir. 2020). The court declined to mechanically classify the occupational licensing law as "a restriction on economic activity that incidentally burdens speech." *Id.* at 683. It could hardly be otherwise. Licensing laws don't get a free pass under the First Amendment, particularly where the government tries to license "activity which, by its very nature, depends upon speech or expressive conduct." *Id.*

The panel below noted that it was not bound by *Billups* but still sought to distinguish it in two unpersuasive ways. First, the panel below pointed to the Fourth Circuit's more recent decision in *360 Virtual Drone Servs. LLC v. Ritter*, 102 F.4th 263, 274 (4th Cir. 2024) (pet. for cert. filed, Sept. 9, 2024). *See* App. 11a–12a True, that panel applied a multi-factor "unpopular or dissenting" message and

harmful "economic and legal consequences" test that has no basis in this Court's precedents. *360 Virtual Drone*, 102 F.4th at 278. But that error has no bearing on the circuit split since even the *360 Virtual Drone* panel recognized that the "fact that a regulation falls within a generally applicable licensing regime does not automatically mean it is aimed at conduct." *Id.* at 274. Second, the panel below believed that "*Billups* turned on the fact that the city's ordinance 'aimed at speech taking place in a traditionally public sphere,' namely 'public sidewalks and streets,' where First Amendment Rights are at their apex." App. 11a (quoting *360 Virtual Drone*, 102 F.4th at 274). But the online auctioneers speak on private property, where they are afforded greater First Amendment protection than when they speak on government property. *Cf. U.S. Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114, 129–30 (1981) (observing that the government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.") (internal quotation marks omitted). There is thus no principled way to reconcile the Fourth Circuit's precedent in *Billups* with the Sixth Circuit's decision below.

Like the Fourth Circuit, the **Fifth Circuit** refuses to withhold First Amendment scrutiny merely because the challenged law governs occupational conduct. In *Hines v. Pardue*, the court ruled for a veterinarian in a challenge to a law requiring veterinarians to physically examine an animal before they can practice veterinary medicine. 117 F.4th 769, 785 (5th Cir. 2024) (pet. for cert. filed, Feb. 24, 2025). It mattered not that the burden on the plaintiff's speech came in the form of an occupational regulation. Courts don't blindly "follow whatever label

a state professes," but instead "consider a 'restriction's effect, as applied, in a very practical sense.'" *Hines*, F.4th at 777 (quoting *Thomas v. Collins*, 323 U.S. 516, 536 (1945) (footnote omitted)). The Fifth Circuit applied the same logic in a challenge to a surveyor-license law. *See Vizaline LLC v. Tracy*, 949 F.3d 927, 932 (5th Cir. 2020). The court there held that the standard for determining whether an occupational licensing law regulates speech or conduct is this Court's "traditional conduct-versus-speech dichotomy." *Id.* In reaching that holding, the court rejected the notion, pressed by the district court, that licensing requirements only incidentally affected the plaintiff's speech because they determine "*who* may engage in certain speech." *Id.* at 932 (emphasis in original). Instead, the court noted that this Court's decision in *NIFLA* "makes clear that occupational-licensing provisions are entitled to no special exception from otherwise-applicable First Amendment protections." *Id.* at 931.

The **Second Circuit** recently joined the Fourth and Fifth Circuits in applying First Amendment scrutiny to an occupational licensing law that directly burdens speech. *Upsolve, Inc. v. James*, 22-1345, 2025 WL 2598725, at *5 (2d Cir., Sept. 9, 2025). That case concerned a nonprofit's as-applied challenge to New York's application of its unauthorized practice of law statute to the group's speech. *Id.* at *1. Although the court vacated the district court's preliminary injunction, it had no difficulty concluding that the court should apply intermediate scrutiny under the First Amendment. *Id.* at *7. Citing "analogous cases" in *Billups* and *Hines*, the Second Circuit joined the Fourth and Fifth Circuits in applying First Amendment scrutiny to a professional regulation. *Id.* at *5. Those circuits, unlike the Sixth and Eleventh Circuits, do not

apply rational basis review to a restriction of speech merely because that restriction comes in the form of an occupational licensing law.

3. Precedents from two other circuit courts underscore the need for this Court's review. The standard in the **Ninth Circuit** varies from one panel to the next. In *Pacific Coast Horseshoeing School v. Kirchmeyer*, the court held that an educational licensing law "squarely implicate[d] the First Amendment" because it "regulate[d] what kind of educational programs different institutions can offer to different students." 961 F.3d 1062, 1069 (9th Cir. 2020). Another Ninth Circuit panel took a different tack in *Crownholm v. Moore*, No. 23-15138, 2024 WL 1635566 (9th Cir. Apr. 16, 2024) (pet. for cert. filed, Sept. 9, 2024). Relying in part on the Eleventh Circuit's precedent in *Del Castillo*, the Ninth Circuit declined to afford any First Amendment protections for unlicensed land surveyors who produce "drawing[s] that provide[] a visual image of property by depicting property boundaries, structures, and measurements." *Id.* at *2 (brackets in original). In reaching that conclusion, the panel cited Ninth Circuit precedent holding that "psychoanalysis and performing conversion therapy are conduct, not speech, even though both *require* the use of spoken words." *Id.* at *1 (citing *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1054 (9th Cir. 2000); *Tingley v. Ferguson*, 47 F.4th 1055, 1077–78 (9th Cir. 2022)) (emphasis added).

The **Seventh Circuit**, while acknowledging the circuit split, declined to take sides in *Richwine v. Matuszak*. *See Richwine*, 148 F.4th at 953–54. The court affirmed a preliminary injunction in favor of a death doula in her

challenge to Indiana's enforcement of its funeral services licensing law against her. *See id.* at 946, 958; *see also id.* at 946 (death doulas "discuss[] with [their] clients how they want to be remembered after death, help[] clients write letters to loved ones, and provide[] emotional support to the dying"). In concluding that Richwine was likely to succeed on her First Amendment claim, the court saw no need to discern whether the law produced a direct or incidental burden on her speech. *Id.* at 954. That's because all agreed that the law imposed some burden on Richwine's speech and triggered at least intermediate scrutiny—a standard the court concluded that the government was unlikely to meet. *Id.*; *see also infra* at II.B (intermediate scrutiny is the proper standard to evaluate regulations that impose incidental burdens on speech); *but see* App. 13a–14a (applying rational basis review after concluding that the Online Auction Law imposed incidental burdens on speech). More relevant here, the Seventh Circuit recognized a burgeoning circuit split on the first question presented here. *Richwine*, 148 F.4th at 953–54 (citing cases from the Fourth, Fifth, Ninth, and Eleventh Circuits). This Court should grant the petition to ensure that the "division between speech and conduct" is "evenly applied throughout the country, particularly when it comes to licensing schemes that determine which individuals can speak about certain topics." *Id.* at 953.

II. The Decision Below is Inconsistent with This Court's Precedents

a. Occupational Licensing Laws are Entitled to No Special Exemption from Otherwise Applicable First Amendment Protections

This Court's precedents require courts to apply ordinary First Amendment principles in cases involving occupational licensing laws. In *Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, this Court reviewed the professional speech doctrine, which lower courts used to apply reduced First Amendment protections to "a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others." 585 U.S. 755, 773 (2018) (*NIFLA*). Those courts, like the Sixth Circuit below, relied on Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985), as support for adopting a bespoke rule for professional regulations. *See* App. 10a, 13a; *Pickup v. Brown*, 740 F.3d 1208, 1227–31 (9th Cir. 2014); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988). Yet this Court, in rejecting the professional speech doctrine, dispelled the notion that "professional speech" is a "separate category of speech that is subject to different rules." *NIFLA*, 585 U.S. at 767. Rather, *NIFLA* directs courts "to adhere[] to the traditional conduct-versus-speech dichotomy" in evaluating First Amendment challenges to occupational licensing laws. *Vizaline*, 949 F.3d at 932 (citing *NIFLA*, 585 U.S. at 771–75).

It could hardly be otherwise. Governments across the nation routinely enact and enforce occupational licensing laws. *See infra* at III (discussing the proliferation of

occupational licensing laws). A special rule that requires courts to apply deferential review merely because the government is restricting speech as part of its power to license an occupation would endow it with "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 585 U.S. at 773.

There is no merit to the contention that *NIFLA* draws an unprincipled distinction between what professionals can say rather than which Americans can speak. *See* App. 36a (district court's conclusion that "*NIFLA* raises issues about what the government can require *as part of* its licensure authority, but nothing about it brings that licensure authority itself into doubt") (emphasis in original).[9] *NIFLA* itself disavowed many lower court opinions that applied the professional speech doctrine to occupational licensing laws. *See Vizaline*, 949 F.3d at 932–33 (collecting cases). And both the Second and Fifth Circuits squarely applied *NIFLA*'s logic to occupational licensing laws. *Id.* at 929; *Upsolve*, 2025 WL 2598725, at *5.

There's no reason why an occupational licensing law can't directly burden First Amendment rights. As this Court noted, "[g]enerally, speakers need not obtain a license to speak." *Riley v. Nat'l Fed'n of the Blind of N.*

9. Because the dispute between the parties will remain regardless of the outcome of this Court's forthcoming decision in *Chiles v. Salazar* (24-539), this Court should grant the petition. At a minimum, this Court should hold this petition pending its resolution of that case, which it's presumably doing with three other petitions pending before this Court. *See Pardue v. Hines* (24-920); *Crownholm v. Moore* (24-276); *360 Drone Services, LLC v. Ritter* (24-279).

Carolina, Inc., 487 U.S. 781, 802 (1988). While government may choose to require a license for journalists, radio hosts, comedians, political activists, and the like, *see* Amicus Br. of Parties in Other First Amendment Cases, *Chiles v. Salazar* (24-539), at 18–20 (collecting examples), no one could seriously contend that those activities would lose all First Amendment protections simply because the government purports to regulate occupational conduct. The panel below presented a false dichotomy between statutes that regulate speech and ones that "simply regulates economic activity." App. 8a (citation omitted). Yet "a great deal of vital expression" stems "from an economic motive." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011). "[T]he degree of First Amendment protection is not diminished merely because . . . speech is sold rather than given away." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) (citation omitted); *see also Thomas v. Collins*, 323 U.S. 516, 531 (1945) (rejecting the assertion that "the First Amendment's safeguards are wholly inapplicable to business or economic activity"). For instance, although this Court resolved *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018), on free exercise grounds, no one could seriously argue that an artistic cakeshop owner loses his First Amendment right only because the cake was created as part of a "sales transaction." App. 10a–11a.

Nor is the Online Auction Law exempt from First Amendment scrutiny merely because the government is licensing speech rather than banning it outright. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 566. This Court has thus long applied the First Amendment to regulations that license speech.

See Collins, 323 U.S. at 525–32; *Riley*, 487 U.S. at 802, n.13 ("Nor are we persuaded by the dissent's assertion that this statute merely licenses a profession, and therefore is subject only to rationality review.").

There's also little to support the contention that licensing laws do not pose First Amendment issues so long as they do not discriminate against a particular viewpoint. *See* Gov't Br., *McLemore v. Gumucio*, 24-5794, at 34 (6th Cir., filed Nov. 7, 2024) (justifying the Online Auction Law on grounds that it "does not seek to silence any particular message the Auctioneers may want to communicate through their narratives") (quotation marks and brackets omitted). Licensing laws typically restrict speech because of content, and the First Amendment looks at content-based speech restrictions with the same kind of skepticism as it views viewpoint-based ones. *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015) ("[I]t is well established that the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.") (internal brackets and quotation marks omitted). Otherwise, legislators "might [] infer[]" that they may remedy a viewpoint-based speech restriction by reenacting a law with a "broader" prohibition of speech. *NIFLA*, 585 U.S. at 779 (Kennedy, J., concurring). For instance, although a campaign finance law would surely raise First Amendment concerns if it targeted a political viewpoint, a court wouldn't reflexively bless such a law just because it applied with equal force to Republicans and Democrats alike.[10]

10. The Online Auction Law is a content-based restriction on speech. It applies only to speech that consists of a "series of

In the end, a "mere label of state law" does not shield a law from First Amendment scrutiny. *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (citing *NAACP v. Button*, 371 U.S. 415, 429 (1963)) (internal quotation marks deleted). Occupational licensing laws "can claim no talismanic immunity from constitutional limitations" and "must be measured by standards that satisfy the First Amendment." *Id.* at 269.

Had the lower courts applied ordinary First Amendment principles, they would have found that the Online Auctioneers have pleaded a plausible First Amendment claim. *First*, the Online Auction Law facially restricts speech. The statute prohibits unlicensed individuals from conducting auctions, which it defines by reference to its communicative characteristics. Under the statute, an auction is a "sales transaction conducted by oral, written, or electronic *exchange* between an auctioneer and members of the audience, consisting of a series of *invitations* by the auctioneer for *offers* to members of the audience to purchase goods or real estate." Tenn. Code Ann. § 62-19-101(2) (emphasis added). The Online Auctioneers have pleaded a First Amendment claim because the text unambiguously burdens speech.

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invitations by the auctioneer for offers to members of the audience to purchase goods or real estate, culminating in the acceptance by the auctioneer of the highest or most favorable offer." Tenn. Code Ann. § 62-19-101(2). And it's riddled with exemptions, such as auctions concerning "nonrepairable or salvage vehicles," livestock, and tobacco. *Id.* §§ 62-19-103(6)–(8), 62-19-103(10)–(11). But even if the law were content-neutral, the panel below still erred in applying rational basis review. *See* App. 13a–14a; *TikTok Inc. v. Garland*, 145 S. Ct. 57, 67 (2025) (content-neutral laws are subject to intermediate scrutiny).

See Sorrell 564 U.S. at 563–567 (discussing that the law on its face regulated speech). *Second*, even if the Online Auction Law prohibited the Online Auctioneers' speech in a covert way, the First Amendment would apply all the same. That's because statutes that don't restrict speech on their face may still be applied in a way that restricts an individual's First Amendment rights. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (First Amendment scrutiny applied to a facially neutral statute because "the conduct triggering coverage under the statute consist[ed] of communicating a message").

The Online Auction Law is just that type of statute. Online Auctioneers must advertise in the course of their work. *See* Compl. ¶¶ 22–28 (Online Auctioneers must craft accurate and enticing narratives, images, and descriptions because consumers can't see the auctioned items in person). And no matter how the government crafts the licensing statute, it can't avoid the obvious fact that the conduct of an auction just *is* speech: it's one solicitation after the other. See App. 42a (district court's observation that "an auction is as clear an example of commercial speech as one is likely to find" as it "consists of parties proposing a series of alternative transactions to each other before settling on one that actually goes into effect"); *see also* App. 10a–11a (Sixth Circuit's holding that the Online Auctioneers' speech is merely "incidental" to the sales transaction, even though "Plaintiffs must speak to an audience or even craft narratives to sell products.") (internal brackets and quotation marks omitted); Compl. at ¶ 21 (Respondent Gumucio testified that it is impossible to have an auction without an oral, written, or electronic communication). Speech is thus not incidental to online auctions; speech is the essence of an online auction. Had

the panel below applied traditional First Amendment principles, it would have had no basis to affirm the district court's dismissal.[11]

b. Laws that Impose Incidental Burdens on Speech Must Be Evaluated Under Intermediate Scrutiny

Even if the Online Auction Law imposed incidental burdens on speech, the panel below erred in applying rational basis review. *See* App. 13a–14a. As this Court recently observed, laws that impose an incidental burden on speech must be subjected to intermediate scrutiny. *Free Speech Coalition, Inc. v. Paxton*, 145 S. Ct. 2291, 2306 (2025). At a minimum, this Court should grant the petition and remand to the lower court to apply the correct standard. *See Sheetz v. County of El Dorado*, 144 S. Ct. 893, 902 (2024) (deciding the threshold question on proper standard and remanding to state court to adjudicate the merits).

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11. In a concurring opinion, Judge Bush sought to "support the court's holding based on . . . the history and tradition of the First Amendment." App. 15a. The panel below declined to adopt the views expressed in the concurrence, which produces the "implication that any speech-burdening regulation which can be characterized as an exercise of the police power is exempt from First Amendment scrutiny." *Tingley v. Ferguson*, 57 F.4th 1072, 1080 (9th Cir. 2023) (O'Scannlain, J., respecting the denial of rehearing en banc). If it were otherwise, a state could "evade First Amendment scrutiny for signage regulations simply by pointing out that building regulation is within the police power." *Id.*; *see also United States v. Stevens*, 559 U.S. 460, 472 (2010) (Courts do not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment.").

A remand is even more important here because the Online Auctioneers pleaded a viable claim under intermediate scrutiny. That standard requires government to show that a law "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997); *see also Free Speech Coal.*, 145 S. Ct. at 2316 (intermediate scrutiny is "deferential but not toothless," and "plays an important role in ensuring that legislatures do not use ostensibly legitimate purposes to disguise efforts to suppress fundamental rights"). Although preventing fraud is an important interest "in the abstract," the Online Auction Law "furthers the state's interests the way an atom bomb would further the eradication of a residential ant infestation." *Richwine*, 148 F.4th at 942. The government hasn't "been able to identify any harm" that the Online Auctioneers and their longstanding practice have caused. *Id.* at 957. And it's hard to see how a blanket ban on unlicensed online auctioneers is properly tailored, since the government could presumably satisfy those interests just as well by enforcing existing consumer protection laws or enacting a certification program for online auctioneers. *See Billups*, 961 F.3d at 688–89.

The Online Auction Law also fails intermediate scrutiny because it's "wildly underinclusive." *NIFLA*, 585 U.S. at 774 (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 802 (2011)). The statute exempts fixed-time auctions, Tenn. Code Ann. § 62-19-101(12); *id.* § 62-19-103(9), which have garnered significantly more complaints from the public. *See* Compl. ¶¶ 2, 34 (four times as many complaints about fixed-time auctions).

Although intermediate scrutiny doesn't require a perfect fit, the Online Auction Law is so underinclusive that it "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Entertainment Merchants Assn.*, 564 U.S. at 802. The Online Auctioneers pleaded a viable First Amendment claim under intermediate scrutiny, a standard that the panel below refused to apply.

III. The Questions Presented are Important

The questions presented are extraordinarily important. Occupational licensing has ballooned in recent years. Where only about five percent of workers needed an occupational license in the 1950s, nearly one in four American workers today requires a license to earn a living in their chosen profession.[12] Despite the mounting evidence that occupational licensing does not improve the quality of services or public health and safety,[13] over a

12. Jason Furman & Laura Giuliano, *New Data Show that Roughly One-Quarter of U.S. Workers Hold an Occupational License*, White House (Pres. Obama) (June 17, 2016), https://obamawhitehouse.archives.gov/blog/2016/06/17/new-data-show-roughly-one-quarter-us-workers-hold-occupational-license; *see also* Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, Vol. 31, Journal of Labor Economics, University of Chicago Press, 173 (2013) (estimating that 29% of workers were licensed in 2013).

13. The Department of the Treasury Office of Economic Policy, the Council of Economic Advisers and the Department of Labor, *Occupational Licensing: A Framework for Policymakers*, 13 (2015) (stating that "most research does not find that licensing improves quality or public health and safety.").

thousand occupations are licensed in the United States.[14] At the same time, due to the rise in technology and the information age, more people earn a living by using, creating, and disseminating information.[15]

The Online Auction Law is just one example of the collision between the rise in occupational licensing and the growth in the number of Americans who speak for a living. Since 2013, federal courts have heard cases involving licensing regimes for tour guides, fortune tellers, health bloggers, and advice columnists. *See Edwards v. D.C.*, 755 F.3d 996, 1000 (D.C. Cir. 2014) (tour guides); *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, (4th Cir. 2013) (fortune tellers), abrogated by *NIFLA*, 585 U.S. at 773; *Cooksey v. Futrell*, 721 F.3d 226, 229–32 (4th Cir. 2013) (health blogger); *Rosemond v. Markham*, 135 F. Supp. 3d 574, 578 (E.D. Ky. 2015) (Psychology board in Kentucky sending cease and desist letter to a popular syndicated advice columnist for publishing parenting advice in newspapers). As those examples show, the mere fact that the government is regulating "economic activity" doesn't mean that it's not also restricting speech. On the contrary, licensing schemes can plainly burden a professional's First Amendment rights. *But see* App. 12a (concluding that the Online Auction Law does not censor speech because Petitioners can "craft compelling descriptions and

14. National Conference of State Legislatures, *Occupational Licensing: Assessing State Policies and Practices Final Report*, 14 (2021).

15. Aaron Smith, *Gig Work, Online Selling and Home Sharing*, Pew Research Center, (November 17, 2016), https://www.pewresearch.org/internet/2016/11/17/gig-work-online-selling-and-home-sharing/ (detailing the growth of the digital economy, including selling goods online).

narratives" as part of their work as online auctioneers, as long as they are licensed).

The decision below eviscerates otherwise applicable First Amendment protections for Americans who speak for a living. The panel's reasoning invites government to stifle speech just by reconceptualizing it as a regulation of professional conduct. "Professors' lectures could become 'the practice of instruction'; musicians' songs could become 'the practice of composing' and writers' op-eds could become 'the practice of journalism.'" *Richwine v. Matuszak*, 707 F. Supp. 3d 782, 803 (N.D. Ind. 2023), aff'd, 148 F.4th 942 (7th Cir. 2025). Such a result is not far-fetched. In 2016, a lawmaker in South Carolina introduced the "Responsible Journalism Registry Law," which would have required journalists to register with the state and allowed government to revoke a journalist's registration.[16] But lawmakers "may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 566. Although the government may choose to enact a licensing scheme, the presence of a licensing requirement can't "reduce a group's First Amendment rights." *NIFLA*, 585 U.S. at 773. Given the proliferation of occupational licensing and the increasing number of Americans who speak for a living, this Court's intervention is needed to ensure that a state's statutory power to license doesn't override the individual's constitutional right to free speech.

16. Melissa Chan, *South Carolina Lawmaker Wants to Register Journalists with the Government*, Time (Jan. 19, 2016), https://time.com/4185928/journalist-registry-south-carolina-pitts/.

IV. This Case Provides This Court with an Excellent Vehicle to Decide the Questions Presented

This case is a clean vehicle to address the relationship between occupational licensing laws and free speech. This case presents a facial challenge to a licensing law that regulates professionals who speak for a living. The plain text of the Online Auction Law prohibits unlicensed individuals from engaging in certain forms of communication. An auction, after all, is defined as "sales transaction conducted by oral, written, or electronic exchange" between an auctioneer and members of the audience, "consisting of a series of invitations by the auctioneer for offers to members of the audience to purchase goods or real estate, culminating in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience." Tenn. Code Ann. § 62-19-101(2).

Beyond the plain text of the statute, both lower courts and the Commission acknowledge that speech is integral to auctions. Commissioner Gumucio testified that it's impossible to have an auction without an oral, written, or electronic communication. *See* Compl. ¶ 21. The district court noted that "an auction is as clear an example of commercial speech as one is likely to find." App. 42a. It "consists of parties proposing a series of alternative transactions to each other before settling on one that actually goes into effect." App. 42a; *see also* App. 10a (acknowledging that the Online Auctioneers "must speak to an audience or even craft narratives to sell products.") (internal brackets and quotation marks deleted). More to the point, speech is an even more integral part of online auctions. Consumers are not physically present for online

auctions, so online auctioneers must rely on images and narratives to convey the information about the goods up for auction. *See* Compl. ¶¶ 21–28.

Both the text of the Online Auction Law and the practice of online auctioneers make this case a cleaner vehicle than one in which a facially neutral law prohibits speech in some of its applications. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (noting that the First Amendment applies when "the conduct triggering coverage under the statute consists of communicating a message"). The Court would not need to parse out some aspects of the Online Auction Law from others because the statute facially prohibits unlicensed individuals from engaging in a certain type of speech. Thus, the Court may proceed directly to the question of whether courts must apply heightened First Amendment scrutiny to occupational licensing laws that restrict speech.

The Sixth Circuit's resolution of that question was central to its affirmance of the district court's dismissal. The Sixth Circuit's analysis revealed that it did not believe there could be overlap between a licensing law that regulates professional conduct and one that restricts speech. The court presented the "threshold question" as "whether the Online Auction Law, a state licensing statute, 'regulates . . . speech or simply regulates economic activity.'" App. 8a (citation omitted). The Sixth Circuit's decision to apply rational basis review was animated by its view that "the Online Auction Law is a licensing scheme that regulates professional conduct—not speech." App. 9a, 11a.

Had the Sixth Circuit recognized that the Online Auction Law triggers First Amendment scrutiny because the conduct it regulates is speech, there would have been no basis for it to apply rational basis review. In fact, *both* of the panel's errors led it to apply an incorrect standard of review. Heightened scrutiny is appropriate both where a law imposes direct First Amendment burdens *and* where a law imposes incidental burdens on speech. *See supra* at II.B. Because the panel below applied the wrong standard in affirming dismissal, this case would not require this Court to go beyond the pleadings or to adjudicate whether the government could meet its burden under heightened scrutiny. Instead, this Court can focus its efforts on the important threshold question of whether a law that requires an occupational license for Americans who wish to engage in speech implicates the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: November 2025

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 12, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5794
File Name: 25a0221p.06

WILL MCLEMORE; MCLEMORE AUCTION COMPANY, LLC; RON BRAJKOVICH; JUSTIN SMITH; BLAKE KIMBALL,

Plaintiffs-Appellants,

v.

ROXANNA GUMUCIO, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TENNESSEE AUCTIONEER COMMISSION; JOHN LILLARD, IN HIS OFFICIAL CAPACITY AS ASSISTANT DIRECTOR OF THE TENNESSEE AUCTIONEER COMMISSION; JEFF MORRIS, CHAIR OF THE TENNESSEE AUCTIONEER COMMISSION, IN HIS OFFICIAL CAPACITY; LARRY SIMS, MEMBER OF THE TENNESSEE AUCTIONEER COMMISSION, IN HIS OFFICIAL CAPACITY; ED KNIGHT, VICE CHAIR OF THE TENNESSEE AUCTIONEER COMMISSION, IN HIS OFFICIAL CAPACITY; DWAYNE ROGERS, MEMBER OF THE TENNESSEE AUCTIONEER COMMISSION, IN HIS OFFICIAL CAPACITY; JAY WHITE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE TENNESSEE AUCTIONEER COMMISSION,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 3:23-cv-01014—Aleta Arthur Trauger, District Judge.

Argued: March 20, 2025

Decided and Filed: August 12, 2025

Before: CLAY, BUSH, and BLOOMEKATZ, Circuit Judges.

OPINION

CLAY, Circuit Judge. Plaintiffs, a group of auctioneering professionals in the state of Tennessee, appeal the district court's dismissal of their First Amendment claim against the Tennessee Auctioneer Commission and its members under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below, we **AFFIRM**.

I. BACKGROUND

A. Legislative and Factual History

In 1967, the Tennessee General Assembly passed a state law to define and regulate the auctioneering profession. *See* 1967 Tenn. Pub. Acts ch. 335. Under this law, the Tennessee Auctioneer Commission ("the Commission") was charged with issuing professional licenses to auctioneers who were "reput[able], trustworthy,

honest and competent to transact the business of an auctioneer . . . to safeguard the interest of the public." Ex. A, 1967 Tenn. Pub. Acts ch. 335, R. 19-1, at Page ID #157. Broadly speaking, this regime requires auctioneers to become licensed in Tennessee, and a person may not "[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by the [C]ommission." Tenn. Code. Ann. § 62-19-102(a)(1).[1] Persons may become licensed auctioneers after successful completion of a licensure exam or course of instruction ranging from sixteen to thirty-four hours, depending on the auctioneer's desired title and role, ranging from "bid caller auctioneer" to "affiliate auctioneer" to "principal auctioneer."[2] *See* Tenn. Code. Ann. § 62-19-111.

This statutory scheme underwent various updates throughout the years to keep pace with changing technology and the rise of online auctions. Since 2019, the Tennessee statute has defined an "auction" to mean:

> [A] sales transaction conducted by oral, written, *or electronic* exchange between an auctioneer and members of the audience, consisting of a series of invitations by the auctioneer for offers

1. The Tennessee statute only applies to auctioneering professionals, as opposed to various amateur, non-profit, court-appointed, or government actors who may engage in auctioneering. *See* Tenn. Code. Ann. § 62-19-103.

2. Principal auctioneers also require a high school diploma or equivalent credential to become licensed and must serve as an affiliate auctioneer under supervision for at least six months. Tenn. Code. Ann. § 62-19-111(c).

> to members of the audience to purchase goods or real estate, culminating in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience.

Tenn. Code. Ann. § 62-19-101(2) (emphasis added). Among other exemptions, this definition excludes online listings for a "fixed price," where the seller has set a predetermined price for the item, as well as "timed listings that allow bidding on an internet website, but do not constitute a simulcast of a live auction." Tenn. Code. Ann. § 62-19-103(9). The term "timed listing" is understood to mean an online listing "offering goods for sale with a fixed ending time and date that does not extend based on bidding activity," such as with items sold through platforms such as eBay. *See* 2019 Tenn. Pub. Acts ch. 471, R.19-4, at Page ID #190; Tenn. Code. Ann. § 62-19-101(12). Unlike timed listings, auctioneers hosting *extended-time auctions* are subject to Tennessee's license requirement because of their apparent similarity to conventional auctions and increased potential for escalatory bidding. Conducting an online auction without a license, or otherwise violating the statute, is a Class C misdemeanor. Tenn. Code. Ann. § 62-19-121.

Plaintiffs Will McLemore, Ron Brajkovich, Justin Smith, and Blake Kimball are professional auctioneers employed by the Tennessee-based McLemore Auction Company, LLC, who conduct extended-time auctions online. Plaintiff McLemore, the company's president and founder, is a licensed auctioneer under Tennessee

law. Plaintiffs Brajkovich, Smith, and Kimball are all unlicensed ("the unlicensed auctioneers"). Over a series of Task Force meetings to implement the 2019 auctioneering law (the "Online Auction Law"), McLemore advocated against the law's application to extended-time online auctions, but his views did not prevail.

B. Procedural History

In his first lawsuit, Plaintiff McLemore alleged that the Online Auction Law's licensing requirement was unconstitutional under either the First Amendment or Dormant Commerce Clause. The district court granted his Motion for Summary Judgment on the latter theory but did not resolve the First Amendment issue. *See McLemore v. Gumucio*, 593 F. Supp. 3d 764, 782–83 (M.D. Tenn. 2022). On appeal, this Court vacated the district court's decision for a lack of standing and remanded to dismiss on jurisdictional grounds. *See McLemore v. Gumucio*, No. 22-5458, 2023 WL 4080102, at *3 (6th Cir. June 20, 2023). The case was then dismissed.

On September 25, 2023, Plaintiffs Brajkovich, Smith, and Kimball joined McLemore in filing another lawsuit against the Commission and its members ("the Commission" or "Defendants"), alleging that Tennessee's licensing scheme violates the First Amendment. On October 3, 2023, Plaintiffs filed a Motion for Preliminary Injunction to enjoin the Commission from enforcing the licensing scheme against extended-time auctions conducted online. On November 22, 2023, Defendants filed a Motion to Dismiss arguing that Plaintiffs lacked

standing, and that their First Amendment claim failed on the merits. On August 19, 2024, the district court granted Defendants' Motion to Dismiss and denied Plaintiffs' Motion for Preliminary Injunction. The district court reasoned that *Liberty Coins, LLC v. Goodman* negated Plaintiffs' First Amendment claim by subjecting it to rational basis review rather than heightened scrutiny. 748 F.3d 682 (6th Cir. 2014). This appeal followed.

II. DISCUSSION

A. Standard of Review

We review *de novo* the district court's dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007); *Kiser v. Kamdar*, 831 F.3d 784, 787 (6th Cir. 2016). "To 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)). These allegations, viewed in the light most favorable to Plaintiffs, "must be enough to raise a right to relief above the speculative level." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *Twombly*, 550 U.S. at 555.

B. Analysis

Plaintiffs argue that speech by unlicensed auctioneers conducting business online is "pure speech" protected

by the First Amendment, and that Tennessee's Online Auction Law unconstitutionally burdens this right. *See* Appellants' Br., ECF No. 15, 17–18. They allege that the Law constitutes a content-based speech restriction by distinguishing between the rights of licensed auctioneers, who may host extended-time auctions online, and unlicensed auctioneers, who may not. Plaintiffs also take issue with the Law's various exemptions for auctions of fixed price goods, intangible property, and nonprofit items, in an attempt to argue that the Law discriminates based on content or the speaker's identity. Plaintiffs further explain that online auctioneers must "craft[] narratives" and use "editorial discretion" to make their items "more enticing to [online] buyers," which they allege is hindered by the state's enforcement of the Online Auction Law. *See id.* at 23–24. They contend that the district court misconstrued *Liberty Coins* in holding that the Online Auction Law regulates business conduct as opposed to speech, thereby applying rational basis review and dismissing their complaint for failure to state a claim. 748 F.3d at 682. Plaintiffs urge this Court to apply heightened scrutiny to the Online Auction Law and remand to the district court.

In response, Defendants describe the Online Auction Law as a legitimate regulation of Plaintiffs' economic and professional conduct, not their speech, and endorse the district court's interpretation of *Liberty Coins*. We agree with Defendants.

As an initial matter, Plaintiffs' attempt to characterize the professional conduct of auctioneers

as "pure speech" or "commercial speech" is misplaced. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023) (associating "pure speech" with "images, words, symbols, and other modes of expression" entitled to strong First Amendment protection); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience" and entitled to some constitutional protections, albeit less than those reserved for pure speech). Their First Amendment claim does not turn on classifications of speech. Rather, the threshold question we must resolve is whether the Online Auction Law, a state licensing statute, "regulates . . . speech or simply regulates economic activity." *Liberty Coins*, 748 F.3d at 695. We hold that it regulates economic activity, and that its burdens on speech are merely incidental to that regulation. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 768 (2018) (hereinafter "NIFLA").

In the instructive case, *Liberty Coins*, we reached a similar conclusion in the context of the Precious Metals Dealers Act (the "PMDA"), an Ohio statute requiring all persons "engaged in the business of purchasing" precious metals to obtain a license before "hold[ing] [themselves] out to the public as willing to purchase" such metals. 748 F.3d at 687. Plaintiff Liberty Coins, an unlicensed business and dealer of precious metals, challenged the PMDA as facially violating the speech rights of businesses by requiring them to obtain a license before conducting

their operations in public. *See id.* at 685–86. Liberty Coins alleged that the PMDA's license requirement placed an unconstitutional burden on commercial speech and necessitated heightened scrutiny review, but we deemed that argument misplaced. *See id.* at 695. This Court reasoned that commercial speech rights do not extend to *unlicensed* dealers operating businesses "that [are] not in compliance with the reasonable requirements of Ohio law." *Id.* at 697. In other words, the PMDA's requirement that precious metals dealers become licensed before holding themselves out as such to the public was a proscription on "business conduct and economic activity, not speech." *Id.* This regulation served the undeniably sound purpose of protecting consumers from theft, fraud, money laundering, terrorism, and the dealing of stolen goods, amid other concerns. *See id.* at 693-94 (describing the PMDA as "a regulatory scheme meant to protect the safety and welfare of the public through the regulation of professional conduct"). Thus, because the PMDA served a valid government purpose and did not burden a fundamental right or create a suspect classification, we applied rational basis review to conclude that the PMDA did not violate the plaintiff's First Amendment rights. *Id.* at 693–95.

Like the PMDA, the Online Auction Law is a licensing scheme that regulates professional *conduct*—not *speech*. *See id.* at 693, 697. As noted by the Supreme Court, "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *See Sorrell v.*

IMS Health Inc., 564 U.S. 552, 567 (2011). This stands true for all types of conduct. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (stating that "it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed"). Notably, professional conduct is not protected by the First Amendment merely because it involves language. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 429 (6th Cir. 2019); *Lowe v. S.E.C.*, 472 U.S. 181 (1985) (White, J., concurring) (noting that "[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech"). We instead ask whether the state law targets "speech as speech," or merely "professional conduct" with an incidental burden on speech. *See NIFLA*, 585 U.S. at 768, 770. The latter applies here, since the Online Auction Law "incidentally burdens [Plaintiffs'] speech only as part of [Tennessee's] regulation of professional conduct [for auctioneers]."[3] *EMW Women's*, 920 F.3d at 446. While Plaintiffs must speak to an audience or even "craft[] narratives" to sell products, their speech is incidental to

3. Of course, regulations targeting the sale of speech itself do not escape the First Amendment's ambit. *See Thomas v. Collins*, 323 U.S. 516, (1945) (holding unconstitutional a law requiring pro-union advocates to obtain a license before giving paid speeches). In the present matter, however, the statute only regulates the sale of property at auction, not the sale of an auctioneer's speech.

the underlying sales transaction.[4] Appellants' Br., ECF No. 15, 23.

Plaintiffs argue that *Liberty Coins* is inapposite "because metal dealers, unlike online auctioneers, don't necessarily engage in speech." Appellants' Br., ECF No. 15, 29. They liken the instant facts to those in *Billups v. City of Charleston*, a Fourth Circuit decision where the court reviewed a licensing ordinance for Charleston tour guides under intermediate scrutiny. 961 F.3d 673 (4th Cir. 2020). *Billups* does not bind us. But even so, this argument is unavailing for two main reasons. First, it presupposes that metal dealers such as those in *Liberty Coins*, as well as other professionals, do not engage in speech like auctioneers. We cannot think of a profession that does not involve speech to some degree, and auctioneers are not in a class of their own merely because they conduct their business primarily through the use of language. *See Giboney*, 336 U.S. at 502 (noting that most "course[s] of conduct" are "brought about through speaking or writing"). Second, and more importantly, Plaintiffs' argument fails even under Fourth Circuit precedent. As the Fourth Circuit recently explained, *Billups* turned on the fact that the city's ordinance "aimed at speech taking place in a traditionally public sphere," namely "public sidewalks and streets," "where First Amendment Rights are at their apex." *360 Virtual Drone Servs. LLC v. Ritter*, 102 F.4th 263, 274 (4th Cir. 2024). The Fourth Circuit has declined to apply *Billups* to professional services, such as

4. The Online Auction Law requires licensing for the practice of auctioneering, which involves conducting or facilitating a "sales transaction." Tenn. Code. Ann. § 62-19-101(2).

Plaintiffs' auctioneering, that take place "in the private sphere," involve no "unpopular or dissenting" message, and carry harmful "economic and legal consequences" if rendered improperly. *See id.* at 278.

Importantly, the Online Auction Law does not censor Plaintiffs' freedom of expression or instruct Plaintiffs *how* to advertise their products for auction online; it simply prevents unlicensed members of the profession from transacting with consumers and the public.[5] *See Lichtenstein v. Hargett*, 83 F.4th 575, 588 (6th Cir. 2023) (emphasizing the import of asking "whether a law treats different *messages* differently, not whether it treats different *conduct* differently"). This incidental burden on Plaintiffs' speech is simply the government's regulation of auction sales. *See Sorrell*, 564 U.S. at 567. Certainly, the Online Auction Law does not prevent Plaintiffs from "craft[ing] compelling descriptions and narratives" for their products at a sanctioned auction. Appellants' Br., ECF No. 15, 23. It only prevents them from conducting an auction without a license.

5. Many courts have acknowledged the state's broad power to restrict the commercial conduct of unlicensed professionals. *See generally Young v. Ricketts*, 825 F.3d 487, 495 (8th Cir. 2016) (noting that a licensing scheme was "rationally related to the legitimate State interest in ensuring the competency and honesty of those who hold themselves out as providing professional [] services"); *Off. of Pro. Regul. v. McElroy*, 824 A.2d 567, 571 (Vt. 2003) (upholding a law restraining an unlicensed broker "from publishing misleading statements about his own status as a broker"); *Martinez v. Goddard*, 521 F. Supp. 2d 1002 (D. Ariz. 2007) (upholding a law preventing unlicensed contractors from engaging in construction work).

Moreover, the regulation of professional auctioneering is plainly authorized by the state police power, which affords Tennessee "broad power to establish standards for licensing practitioners." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975); *see also Liberty Coins*, 748 F.3d at 692 (noting that the state's "regulatory power is often exercised through the enactment of licensing statutes"). Tennessee has exercised that regulatory power by imposing a general licensing requirement for commercial auctioneers such as Plaintiffs. *See Lowe*, 472 U.S. at 232 (White, J., concurring) (noting that "generally applicable licensing provisions limiting the class of persons who may practice [a] profession" should not be construed as "a limitation on freedom of speech"). Under that regime, Plaintiffs must abide by the "relatively undemanding" requirements of Tennessee law to become licensed auctioneers. Order, R. 30, at Page ID #261. Because Tennessee's licensing scheme does not implicate a suspect classification or fundamental right, we apply rational basis review. *Liberty Coins*, 748 F.3d at 693. Under that standard, we uphold "[r]egulations on entry into a profession . . . [as] constitutional if they 'have a rational connection with the applicant's fitness or capacity to practice' the profession." *Lowe*, 472 U.S. at 228 (White, J., concurring).

This permissive standard bears "a strong presumption of constitutionality," and Defendants need only show that the statute is "rationally related to a legitimate government purpose." *Id.* at 694. In their appellate brief, Defendants assert that the Tennessee General Assembly endeavored in 1967 to hold auctioneers to certain professional and

ethical standards to safeguard the public from fraud. Ex. A, 1967 Tenn. Pub. Acts ch. 335, R. 19-1, at Page ID #161 (aiming to protect Tennesseans from "improper, fraudulent or dishonest dealings"). The law continued to evolve over the years in light of technological changes and the rise of internet platforms. Then, in 2019, the legislature sought to extend these protections to auctions conducted through "electronic" means, Tenn. Code Ann. § 62-19-101(2), while exempting fixed timed listings, which apparently do not implicate the same concerns.

In applying rational basis review, the district court properly stated that "Tennessee has a legitimate interest in addressing fraud and incompetence in the auctioneering field." Order, R. 30, at Page ID #261; *see Liberty Coins*, 748 F.3d at 694 (noting that "such a government purpose is legitimate, even compelling"). Further, the exemption for online timed listings "is rationally supported by extended-time auctions' greater similarity to conventional auctions and greater vulnerability to escalatory bidding strategies, including fraudulent ones." Order, R. 30, at Page ID #261. Accordingly, the Online Auction Law withstands rational basis review, and the district court did not err by granting Defendants' motion to dismiss under Rule 12(b)(6).

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** the judgment of the district court.

Appendix A

CONCURRENCE

JOHN K. BUSH, Circuit Judge, concurring. Auctioneers speak, so one might first think that auctioneer licensing runs afoul of the First Amendment guarantee of "freedom of speech." *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). But the Free Speech Clause must be understood like any other constitutional provision: text requires context. The majority ably relies on one type of context—case law—to explain why that initial reading of the First Amendment is incorrect. I write separately to support the court's holding based on another type of context—the history and tradition of the First Amendment.

First, the relevant case law in a nutshell. Free-speech doctrine distinguishes between conduct and speech. Only regulations of the latter receive heightened scrutiny under the First Amendment. But these categories sometimes overlap. Expressive conduct, like burning a draft card or designing a website, can receive the heightened protection we give speech. *See United States v. O'Brien*, 391 U.S. 367 (1968); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). And some written or verbal speech, like a drug prescription, is tied so closely to conduct that the state may regulate it without facing heightened scrutiny even when the necessary consequence of that regulation is a burden on speech. *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 47 (2017); *see also Thomas v. Collins*, 323

U.S. 516, 547 (1945) (Jackson, J., concurring) ("[T]he constitutional remedy would be to stop the evil, but permit the speech, if the two are separable; and only rarely and when they are inseparable to stop or punish [the] speech.").

As relevant here, when a speaker "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of [a] client," that "is properly viewed as engaging in the practice of a profession," which we categorize as conduct. *Lowe v. S.E.C.*, 472 U.S. 181, 229 (1985) (White, J., concurring). Under Tennessee law, an auctioneer is a seller's agent. *Johnson v. Haynes*, 532 S.W.2d 561, 564 (Tenn. Ct. App. 1975). Because an auctioneer's speech functions to create a binding agreement between the property owner and the highest bidder, *Green v. Crye*, 11 S.W.2d 869, 870 (Tenn. 1928), the state may burden that speech insofar as the burden is a necessary consequence of the state's regulation of auction sales.[1]

That may be true under the case law, but what about the original meaning of the constitutional text?

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1. Indeed, the statute targets auctioneering speech only in the context of an auction. It does not regulate how one may advertise a legitimate auction. And it does not require a license to use auctioneering speech in other contexts, like at a competition or in a music video. *See* Goldwater Inst. Br. at 22 (discussing the World Livestock Auctioneer Championship); Autotuned Vids, *Auctioneer Contest with Autotune*, https://youtu.be/-PO-F_P3OW0.

The freedom of speech had an understood content when Americans ratified the First Amendment. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 565 n.28 (2021) (Alito, J., concurring in the judgment). While the outer limits of this guarantee are open to debate, the history shows us some basics. Simply put, if American governments in the founding era routinely prohibited a type of communication, it probably does not fall within the freedom of speech that the Constitution protects. *Cf. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 28–30 (2022).

The Supreme Court applied this logic in *Vidal v. Elster*, 602 U.S. 286 (2024). There, the plaintiff argued that the federal government's trademark regime violated the freedom of speech because a trademark necessarily discriminates based on content—only a mark's owner may use it. True, the Court acknowledged, a trademark regime "necessarily requires content-based distinctions." *Id.* at 295. But at the same time, "despite its content-based nature, trademark law has existed alongside the First Amendment from the beginning." *Id.* at 299. The Court resolved this apparent conflict between clear history and modern doctrine in favor of the history: the "longstanding, harmonious relationship" between trademark law and the First Amendment "suggest[ed] that heightened scrutiny need not always apply in this unique context." *Id.* The Court concluded that "history and tradition establish that the particular restriction before us . . . does not violate the First Amendment." *Id.* at 310. If modern doctrine

conflicts with how the ratifiers of the Constitution would have understood their rights, then the doctrine has room to improve. If we cannot adjust the doctrine, *Vidal* directs us to carve out an exception when the government makes a sufficient historical showing that a constitutional right does not extend to the conduct that it seeks to regulate.

Justice Barrett disagreed with the *Vidal* majority. She believed the majority should not have relied on history and tradition in that case because "federal trademark law did not exist at the founding—and American trademark law did not develop in earnest until the mid-19th century." *Id.* at 312 (Barrett, J., concurring in part). Indeed, the first case to adjudicate a trademark dispute came in 1837, too late in Justice Barrett's view to support "a claim about the original meaning of the Free Speech Clause." *Id.*

Here, however, the evidence from the founding era is much stronger. At common law, British auctioneers had legal responsibilities to both the seller, and, "after knocking down the hammer," to the buyer. *Simon v. Motivos*, 97 Eng. Rep. 1170, 3 Burr. 1921 (K.B. 1766). This understanding crossed the Atlantic: James Kent, a renowned expositor of American common law and Chancellor of New York's highest court, said that the issue was "settled" and that *Simon* had been "repeatedly recognised, and considered as the established doctrine in respect to auction sales of lands and chattels, by

the English and American courts." 2 James Kent, *Commentaries on American Law* 427 (1827). Sitting as Chancellor, Kent held that "the auctioneer is a competent agent to sign for the purchaser either of lands or goods at auction; and the insertion of his name as the highest bidder in the memorandum of the sale by the auctioneer, immediately on receiving his bid, and striking down the hammer, is a signing within the statute [of frauds], so as to bind the purchaser." *McComb v. Wright*, 4 Johns. Ch. 659, 663–64 (N.Y. 1820).

Given that auctioneering commanded significant legal obligations, perhaps it comes as no surprise that auctioneer licensing was common at the founding. Auctioneers in Britain needed a license. 1 William Blackstone, Commentaries *320. Starting in 1730, auctioneers in Pennsylvania did, too.[2] By 1773, at least three other colonies had joined Pennsylvania in licensing their auctioneers.[3] And for a short period during the

2. *See* "An Act for Regulating Peddlers, Vendues, &c," Ch. 308, *in* 4 *The Statutes at Large of Pennsylvania* 141 (1897) (eff. Feb. 14, 1730). The legislature explained that "sundry persons . . . have taken upon themselves to set up lotteries and also to sell and retail goods . . . by way of vendue at unseasonable times in the public streets of the said city of Philadelphia, in deceit of the buyers and to the great annoyance of its inhabitants by reason of the many idle and disorderly persons assembling themselves together in the night-time in the open streets at the said vendues or public sales." *Id.* at 143.

3. *See* 1757 R.I. Acts & Resolves 59 ("Whereas Mr. William Coddington . . . represented unto this Assembly, That all Vendue-

American Revolution, some states restricted auction sales altogether.[4]

The ratification of the First Amendment appears to have had no impact on auctioneer licensing regimes. In 1794, Congress enacted a statute requiring all auctioneers nationwide to have a license—it found licensing necessary to implement its power to tax auction sales. 1 Stat. 397. And by the end of 1796, at least eight of the thirteen original states had enacted licensing regulations for auctioneers.[5] Indeed, Chancellor Kent referred to the

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Masters within the Colony, have, by the Laws thereof, always had, since the Appointment of such Officers, the sole Right of selling Goods, Wares, and Merchandizes, at Public Auction, except such Things as the Sheriffs have seized by Execution."); "An Act to Regulate the Sale of Goods at Public Vendue, Auction or Outcry, Within This Colony," Ch. 1516, *in Laws of the City of New York* 637 (1774) (eff. 1772); "An Act . . . to Limit the Number of Auctioneers," Ch. 44, 1773 Mass. Acts and Resolves 248.

4. *See, e.g.*, "An Act to Prevent the Selling of Goods at Public Vendue," Aug. 1777 R.I. Acts & Resolves 5 ("[I]n a Time of Scarcity, it often happens, that one Person bidding upon another has a Tendency to enhance the Price of such Goods much beyond the real Value, to the great Damage of the Public: And some People have been wicked enough to bid upon their own Goods for the Purpose of raising the Price."); "An Act to Prevent Forestalling, Regrating, Engrossing, and Public Vendues," Ch. 11, May 1777 Va. Acts 65; "An Act to Prohibit the Sale of Goods, Wares, and Merchandises by Public Vendue . . . ," Ch. 26, 1777 Pa. Laws 80.

5. *See* "An Act to Regulate Auctions in Baltimore-Town in Baltimore County," Ch. 61, 1784 Md. Laws 412; "An Act Concerning Corporations," 1796 Va. Acts 13; "An Act for the Better Regulating

licensing of auctioneers as one of the core aspects of a state's police power. *See Livingston v. Van Ingen*, 9 Johns. 507, 580 (N.Y. 1812).

In short, the evidence is strong that the Constitution's ratifiers did not consider the ability to chant at auctions part of the natural right to free speech recognized by the First Amendment. Like trademark rules, auctioneer licensing laws encompass part of the "unique context" in which "heightened scrutiny need not always apply." *Vidal*, 602 U.S. at 299. Here, what case law indicates, history and tradition confirm: auctioneer licensing laws do not infringe the freedom of speech codified in the Constitution.

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of Vendues Within This State," *in Digest of the Laws of the State of Georgia* 570 (1802) (eff. Dec. 8, 1794); "An Ordinance for Regulating the Public Vendues in This State. . . ," *in The Public Laws of the State of South Carolina* 363 (1790) (eff. Mar. 17, 1785); "An Act Empowering the Town of Providence to Choose as Many Vendue-Masters, or Auctioneers, As They Shall Think Necessary," June 1796 R.I. Acts & Resolves 7; "An Additional Supplement . . . Respecting Public Auctions and Auctioneers," Ch. 1389, *in* 2 *Laws of Commonwealth of Pennsylvania* 519 (1810) (eff. Mar. 27, 1790); "An Act for the Regulation of Sales by Public Auction," Ch. 4, 1784 N.Y. Laws 590; "An Act to Regulate the Sale of Goods at Public Vendue," Ch. 8, 1795 Mass. Acts and Resolves 323.

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF TENESSEE, NASHVILLE DIVISION, FILED AUGUST 19, 2024

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:23-cv-01014
Judge Aleta A. Trauger

WILL MCLEMORE; MCLEMORE AUCTION COMPANY, LLC; RON BRAJKOVICH; JUSTIN SMITH; AND BLAKE KIMBALL,

Plaintiffs,

v.

ROXANA GUMUCIO, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TENNESSEE AUCTIONEER COMMISSION; THE ASSISTANT DIRECTOR OF THE TENNESSEE AUCTIONEER COMMISSION, IN HIS OFFICIAL CAPACITY; AND KIMBALL STERLING, JEFF MORRIS, LARRY SIMS, ED KNIGHT, AND DWAYNE ROGERS, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE TENNESSEE AUCTIONEER COMMISSION,

Defendants.

Filed August 19, 2024

Appendix B

MEMORANDUM

The plaintiffs have filed a Motion for Preliminary Injunction (Doc. No. 8), to which the defendants (collectively, the "Commissioner") have filed a Response (Doc. No. 12), and the plaintiffs have filed a Reply (Doc. No. 14). The Commissioner has filed a Motion to Dismiss (Doc. No. 18), to which the plaintiffs have filed a Response (Doc. No. 22), and the Commissioner has filed a Reply (Doc. No. 23). For the reasons set out herein, the plaintiffs' motion will be denied, and the Commissioner's motion will be granted.

I. BACKGROUND

Since 1967, Tennessee has regulated auctions and auctioneers within its borders. *See* 1967 Tenn. Pub.Acts, ch. 335. That statutory scheme, in its current form, makes it unlawful to "[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by" the Tennessee Auctioneer Commission. Tenn. Code Ann. § 62-19-102(a)(1). An aspiring auctioneer can receive a license by completing a sufficient course of instruction and passing the Commission's licensure exam. *See* Tenn. Code Ann. § 62-19-111. If an individual wishes to be a "principal auctioneer"—that is, an auctioneer who does not work for another auctioneer—he also must have a high school diploma and serve for six months as an "affiliate auctioneer" under a principal auctioneer's supervision. Tenn. Code Ann. § 62-19-111(c). No license is required if an individual "generates less than twenty-five thousand dollars ($25,000) in revenue a calendar year from the

sale of property in online auctions." Tenn. Code Ann. § 62-19-103(12). The Tennessee statutes, in their current form, apply only to individual auctioneers; they do not require a business entity that employs or works with those auctioneers to obtain separate licensure. See Tenn. Code Ann. §§ 62-19-101(1), (3), (4), (9).

An auctioneer license grants the holder the right to "conduct auctions at any time or place in" Tennessee. Tenn. Code Ann. § 62-19-115(a). The license scheme, however, serves another purpose, aside from simply dictating who is permitted to run an auction. The fees associated with obtaining or renewing a license include a required payment into the state's "auctioneer education and recovery account," and that account is available, by court order, to provide compensatory damages to individuals injured by a licensee's violation of the state's rules. Tenn. Code Ann. § 62-19-116(a)–(d). A licensee "must obtain six (6) hours of continuing education per renewal cycle in order to renew a license." Tenn. Comp. R. & Regs. 0160-03-.03(1).

Auctioneering—like many areas of commerce—has seen the rise of new methods and practices intended to take advantage of advances in computing and information technology. Those changes have, in turn, given rise to questions regarding what qualifies as an auction for licensure purposes. Broadly speaking, Tennessee's licensure statutes define "auction" to mean "a sales transaction conducted by oral, written, or electronic exchange between an auctioneer and members of the audience, consisting of a series of invitations by

the auctioneer for offers to members of the audience to purchase goods or real estate, culminating in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience." Tenn. Code Ann. § 62-19-101(2). There are, however, a number of exemptions to that definition, including an exemption for "[a]ny fixed price or timed listings that allow bidding on an internet website, but do not constitute a simulcast of a live auction." Tenn. Code Ann. § 62-19-103(9).

There is no such exception for online listings for sale that are neither "fixed price" nor "timed." The "fixed price" distinction is self-explanatory: a sale with a fixed price is not an auction, as conventionally understood, and need not be regulated as such. The exemption of "timed" auctions, however, reflects a different set of concerns. A "timed listing" is a listing "offering goods for sale with a fixed ending time and date that does not extend based on bidding activity." Tenn. Code Ann. § 62-19-101(12). In contrast, an "extended-time" auction may begin with a minimum time period, but that period is extended as long as bidders keep bidding—much like an ordinary, in-person auction. While either type of auction can result in an escalatory bidding war, that risk is inherently more pronounced in an extended-time auction, due to the lack of a fixed cutoff time for bids.

The individual plaintiffs conduct online extended-time auctions through the business entity plaintiff, McLemore Auction Company, LLC. (Doc. No. 1 ¶¶ 2, 7–11.) Plaintiff Will McLemore is a licensed auctioneer

and that company's founder. (*Id.* ¶ 7.) The other individual plaintiffs—Ron Brajkovich, Justin Smith, and Blake Kimball—are McLemore Auction Company employees who, unlike McLemore, are not licensed auctioneers. (*Id.* ¶¶ 9–12.) According to the plaintiffs, Brajkovich, Smith, and Kimball each "conducts [extended-time] online auctions" without an auctioneer license. (*Id.* ¶¶ 44–47.)

In 2019, McLemore and a Kansas-based auctioneer, along with their companies, filed suit in this court alleging that Tennessee's licensure requirement is unconstitutional under either the First Amendment or the dormant Commerce Clause doctrine. (*See* Case No. 3:19-cv-530, Doc. No. 1.) That litigation was assigned to another judge, who granted the plaintiffs summary judgment based on the Commerce Clause issue and elected not to resolve the First Amendment claim, which the court found to be functionally redundant. *See McLemore v. Gumucio*, 593 F. Supp. 3d 764, 783 (M.D. Tenn. 2022). The Commissioner appealed, however, and the Sixth Circuit held that no plaintiff had standing to bring the dormant Commerce Clause challenge. The court, accordingly, vacated the district court's decision and remanded with instructions to dismiss for lack of jurisdiction. *See McLemore v. Gumucio*, No. 22-5458, 2023 WL 4080102, at *3 (6th Cir. June 20, 2023). Based on that instruction, the district court dismissed the case without reopening the question of whether Tennessee's statutes comport with the First Amendment. (*See* Case No. 3:19-cv-530, Doc. No. 134.) The parties agree that, although the district court did perform some preliminary analysis related to the First Amendment in that case, neither the

district court nor the Sixth Circuit ultimately resolved the First Amendment-based claim on the merits. (*See* Doc. No. 8-1 at 7.)

On September 25, 2023, these plaintiffs—three of whom were not part of the earlier litigation—filed their Verified Complaint in this case. (Doc. No. 1.) The Complaint asserts one claim, under 42 U.S.C. § 1983, alleging that Tennessee's licensure scheme violates the First Amendment. (*Id.* ¶¶ 50–65.) On October 3, 2023, the plaintiffs filed a Motion for Preliminary Injunction asking the court to enjoin the Commissioner from "applying Tennessee's auctioneering laws, licenses, and regulations to 'sales transaction[s] conducted by . . . electronic exchange between an auctioneer and members of the audience, consisting of a series of invitations by the auctioneer for offers to members of the audience to purchase goods or real estate, culminating in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience.'" (Doc. No. 8 at 1 (quoting Tenn. Code Ann. § 62-19-101(2)).) On November 22, 2023, the defendants filed a Motion to Dismiss in which they argue that (1) the plaintiffs lack standing and, in the alternative, (2) their claims fail on the merits. (Doc. No. 18.)

II. LEGAL STANDARD

A. Motion for Preliminary Injunction

"Four factors determine when a court should grant a preliminary injunction: (1) whether the party moving

for the injunction is facing immediate, irreparable harm, (2) the likelihood that the movant will succeed on the merits, (3) the balance of the equities, and (4) the public interest." *D.T. v. Sumner Cty. Sch.*, 942 F.3d 324, 326 (6th Cir. 2019) (citing *Benisek v. Lamone*, 138 S. Ct. 1942, 1943–44 (2018); Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948 (3d ed. & Supp. 2019)). The district court must "weigh the strength of the four [preliminary injunction] factors against one another," with the qualification that irreparable harm is an "indispensable" requirement, without which there is "no need to grant relief *now* as opposed to at the end of the lawsuit." *D.T.*, 942 F.3d at 327 (citing *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)). Similarly, "a finding that there is simply no likelihood of success on the merits is usually fatal" to a request for preliminary injunctive relief. *Gonzales v. Nat'l Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir. 2000) (citing *Mich. State AFL–CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997)).

B. Rule 12(b)(1)

"Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction generally come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). When a Rule 12(b)(1) motion contests jurisdiction factually, the court must weigh the evidence in order to determine whether it has the power to hear the case, without presuming the challenged allegations in the complaint to be true. *Id.*; *DLX, Inc. v. Kentucky*, 381 F.3d

511, 516 (6th Cir. 2004). However, if a Rule 12(b)(1) motion challenges subject matter jurisdiction based on the face of the complaint, as this one does, the plaintiff's burden is significantly less demanding. *Musson Theatrical Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996). A court evaluating a facial attack to the assertion of subject matter jurisdiction must consider the allegations of fact in the complaint to be true and evaluate jurisdiction accordingly. *Genetek*, 491 F.3d at 330; *Jones v. City of Lakeland*, 175 F.3d 410, 413 (6th Cir. 1999).

C. Rule 12(b)(6)

In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court will "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002). The Federal Rules of Civil Procedure require only that a plaintiff provide "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The court must determine only whether "the claimant is entitled to offer evidence to support the claims," not whether the plaintiff can ultimately prove the facts alleged. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

The complaint's allegations, however, "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To establish the "facial plausibility" required to "unlock the doors of discovery," the plaintiff cannot rely on "legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action," but, instead, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679; *Twombly*, 550 U.S. at 556.

III. ANALYSIS

A. Standing

A party seeking to invoke the court's jurisdiction must establish the necessary standing to sue, before the court may consider the merits of that party's cause of action. *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990). To establish standing under the Constitution, a plaintiff must show that: (1) he has suffered an "injury in fact" that is (a) concrete and (b) particularized, as well as (c) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested. *Gaylor v. Hamilton Crossing CMBS*, 582 F. App'x 576, 579 (6th Cir. 2014) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992));

see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000). These constitutional requirements—commonly known as (1) injury-in-fact, (2) causation, and (3) redressability—apply in every case.

The Commissioner's argument that the plaintiffs lack standing has two primary parts, each of which bears on the question of injury-in-fact. First, the Commissioner argues that McLemore lacks standing because he is already licensed and faces no ongoing or imminent future burden under the challenged laws. Second, the Commissioner argues that, while an unlicensed auctioneer who actually intended to violate the licensing scheme might have standing, the Complaint's allegations regarding Brajkovich, Smith, and Kimball are too conclusory to support such a holding. Regarding the other plaintiff, McLemore Auction Company, LLC, the Commissioner admits that, if the employee plaintiffs can establish standing based on their own injuries, the resultant economic costs to the company "might be cognizable injuries for standing purposes" under Article III. (Doc. No. 19 at 8.) The Commissioner disputes, however, whether the company would have a claim under § 1983—a distinct question from constitutional standing. *See Knife Rights, Inc. v. Vance*, 802 F.3d 377, 388 n.9 (2d Cir. 2015) (collecting cases)

The unlicensed employees' standing presents the most straightforward question. While the Commissioner

is correct that the Complaint is relatively short on details regarding those plaintiffs' actions, the court does not ultimately find that pleading to be impermissibly conclusory. The Verified Complaint clearly states that each employee "conducts online auctions in Tennessee." (Doc. No. 1 ¶¶ 9–11.) That formulation may not include much detail, but the statute at issue does not require it. The Tennessee licensure statute does not adopt any complex or exacting definition of when it applies; it simply requires a license any time a person "[a]ct[s] as, advertise[s] as, or represent[s himself] to be an auctioneer," unless an exemption applies Tenn. Code Ann. § 62-19-102(a). Brajkovich, Smith, and Kimball have explicitly asserted that they act as auctioneers, in direct violation of that provision.

Admittedly, the Complaint itself does not expressly establish whether or not Brajkovich, Smith, or Kimball might qualify for an exemption to licensure. Those three plaintiffs, however, have filed Declarations specifically addressing that issue, including by asserting that their auctions generate sufficient revenue to put them beyond the exemption for auctioneers generating under $25,000 per year. (See Doc. No. 14-1 ¶¶ 4–5; Doc. No. 14-2 ¶¶ 5–6; Doc. No. 14-3 ¶¶ 6–7.) If this case were to continue, it might be wise for the plaintiffs to amend their complaint in order to include those allegations in the pleading itself. The court, however, will not dismiss the plaintiffs' claims simply because no such amendment has yet been made.

It is, moreover, not fatal to the unlicensed plaintiffs' claims that no enforcement action has yet been initiated

against them. "[A]n actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging" the constitutionality of a law regulating an individual's ongoing or expected future behavior. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). It is sufficient to establish a "substantial probability" or "credible threat" of enforcement. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (quoting *Warth v. Seldin*, 422 U.S. 490, 504 (1975)); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). Brajkovich, Smith, and Kimball have alleged that they are in active, ongoing violation of a binding state licensure requirement. The Commissioner is aware of that assertion, and there is nothing in the record to suggest that the Commissioner would not enforce the licensure requirement against Brajkovich, Smith, or Kimball if they continue to violate it. Therefore, the employee plaintiffs have pleaded an actual or imminent injury-in-fact attributable to the defendants' conduct and potentially remediable in this litigation.

The court is similarly unpersuaded that McLemore's current license deprives him of standing. Although the Sixth Circuit held that McLemore lacked standing in the earlier litigation, that holding was based on the Sixth Circuit's understanding that McLemore was, at that point, alleging only a dormant Commerce Clause doctrine claim based on the potential extraterritorial application

of the licensure scheme. In light of that conception of the case's scope, the Sixth Circuit found no standing because "McLemore is an in-state auctioneer and thus concededly must obtain a Tennessee license in any event." *McLemore*, 2023 WL 4080102, at *2. No such issue is present here.

The bare fact that McLemore is currently in compliance with the licensure scheme does not mean that he is unharmed by it. "All licenses issued by the commission expire two (2) years from the original date the license was issued." Tenn. Code Ann. § 62-19-111(i). McLemore will, therefore, face a need to obtain renewed licensure in the foreseeable future, and, if he does not do so, his predicament will be indistinguishable from that of the other individual plaintiffs. The licensure statutes, moreover, impose some affirmative obligations on McLemore as a licensee, including—if he wants to renew his license when that expiration date arrives—a continuing education requirement. *See* Tenn. Comp. R. & Regs. 0160-03-.03(1). The presence of those ongoing obligations further support a finding of standing.

In any event, McLemore's employees have sufficiently pleaded standing, and the Sixth Circuit has suggested that, "[w]hen one party has standing to bring a claim, the identical claims brought by other parties to the same lawsuit are justiciable." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 623 (6th Cir. 2016). The Commissioner disputes that proposition, but the issue is, at most, academic. Dismissing McLemore from

the case would not meaningfully change the litigation's scope or the ultimate substantive question of whether the licensure scheme comports with the First Amendment. The court, accordingly, sees no reason to depart from the rule recognized by the Sixth Circuit and will permit all of the functionally identical claims to proceed.

B. Merits of First Amendment Challenge

If the Commissioner is correct that the plaintiffs have failed to state a claim on which relief can be granted, then the plaintiffs are, by definition, not entitled to a preliminary injunction. The court, accordingly, will first consider the merits of the plaintiffs' claims and will proceed to the remaining preliminary injunction factors only if necessary.

The Commissioner argues that the constitutionality of the Tennessee auctioneer licensure statute is wholly resolved by the Sixth Circuit's decision upholding Ohio's precious metals dealer licensure statute in *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 693 (6th Cir. 2014). That statute, like this one, regulated commercial communication, in that its applicability depended on whether one was "holding oneself out" as a precious metals dealer. *Id.* at 692. Nevertheless, the Sixth Circuit recognized that the licensure scheme was, for the purposes of the First Amendment, simply an ordinary business regulation, such that the government "need[ed] only demonstrate that the statute's classification and the licensing requirement [were] rationally related to a legitimate government interest." *Id.* at 693. That approach is consistent with the

principle—essential to the government's well-established power to regulate economic activity—that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

The plaintiffs suggest that the Sixth Circuit's approach in *Liberty Coins* cannot be squared with the Supreme Court's later decision in *National Institute of Family and Life Advocates ("NIFLA") v. Becerra*, 585 U.S. 755 (2018), in which the Court addressed the constitutionality of a particular disclosure requirement imposed on licensed clinics that provided family planning or pregnancy-related services. The Supreme Court, however, did not treat that law as an ordinary business regulation, because, among other things, the law required specific disclosures that "in no way relate[d] to the services that licensed clinics provide[d]." *NIFLA*, 585 U.S. at 769. This case poses no such problem. The plaintiffs do not challenge any particular notice they must provide or step they must take in connection with running an auction or holding a license. Rather, they simply do not want to have to obtain a license to engage in this profession at all. *NIFLA* raises issues about what the government can require *as part of* its licensure authority, but nothing about it brings that licensure authority itself into doubt. The court, accordingly, finds no basis in *NIFLA* for treating *Liberty Coins* as overruled.

The plaintiffs next argue that this case is distinguishable from *Liberty Coins* because auctioneering

is, in their view, a more speech-centered profession than dealing in metals, and Tennessee's auctioneer licensure statute is more directly targeted at speech than Ohio's corresponding statute governing precious metals dealers. The judge who considered McLemore's earlier challenge found a version of this argument potentially persuasive. *See McLemore*, 2020 WL 7129023, at *19. The issue was not, however, ever resolved definitively in connection with a dispositive motion in that case, and the plaintiffs have identified no reason why the earlier court's preliminary openness to this argument would bind this court's consideration of the issue in this case.

Based on this court's review of the Ohio statute at issue in *Liberty Coins* and the Tennessee auctioneering statute at issue here, the court cannot conclude that Tennessee's statute regulates speech any more than Ohio's does. Auctioneers do "speak" for a living, in a colloquial sense—but so do metals dealers. Every salesperson does. Auctioneering may involve more dramatic forms of communication than some other sales jobs do—in that there is an element of competition involved—but, ultimately, every person who works in sales or in the facilitation of sales is a professional communicator. A salesperson communicates that an item is for sale. He, often, communicates details about the item and reasons why one might want to purchase it. He communicates the price. If there are negotiations, he communicates another price. And, finally, he communicates his assent to the terms of sale. All of those steps involve communication, whether the underlying transaction is an auction or not. The

government, however, routinely regulates transactional activity, based on the foundational rule that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 47 (2017) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)). All commerce involves communication, but the courts have never suggested that that fact turns all commercial regulation into a First Amendment issue.

Tennessee's licensure scheme, moreover, is drafted with the recognition that its purpose is to regulate transactions, not speech. A license is not required to work as a copywriter or a graphic designer for an auction company. A license is not required to run advertisements for some else's auctions in one's publication. A license is only required to conduct an auction or to hold oneself out as a person who does so—and an auction, under the express definition of Tennessee's statutes, is a type of "sales transaction." Tenn. Code Ann. § 62-19-101(2). The plaintiffs act as if it is constitutionally suspect that, to be an auction, the transaction must, among other things, be "conducted by oral, written, or electronic exchange between an auctioneer and members of the audience," *id.*, but that describes nearly every transaction that occurs in the American economy. An auctioneer's speech is no less transactional, and no more protected, than a cashier's or a pharmaceutical wholesaler's.

The plaintiffs also echo the argument, raised in the earlier litigation, that the Tennessee licensure scheme is different from the Ohio licensure scheme because the Ohio statute applies "'regardless of whether [the seller] advertise[s] or post[s] signage' (i.e., engage[s] in speech)." *McLemore*, 2020 WL 7129023, at *19 (quoting *Liberty Coins*, 748 F.3d at 697). The specific terms of the Ohio statute, however, weigh against that reading. The Sixth Circuit did note that the Ohio statute applied to dealers even if they did not advertise or post signage, but that does not mean that the Ohio statute had no communicative component. In fact, the opposite is true: if anything, the scope of the Ohio statute is more dependent on communication than Tennessee's, not less. By the plain text of the Ohio statute, it applies only to "a person who is engaged in the business of purchasing articles made of or containing gold, silver, platinum, or other precious metals or jewels of any description *if, in any manner, including any form of advertisement or solicitation of customers, the person holds himself, herself, or itself out to the public as willing to purchase such articles*." Ohio Rev. Code Ann. § 4728.01(A) (emphasis added). The Tennessee statute, in contrast, makes it unlawful to "*[a]ct as*, advertise as, *or* represent to be an auctioneer without holding a valid license." Tenn. Code Ann. § 62-19-102(a)(1) (emphasis added). It is, therefore, Tennessee's statute, not Ohio's, that can apply based solely on the character of the transaction at issue, without any additional requirement focused on speech or communication.

Appendix B

The Tennessee statute, as applied to these plaintiffs,[1] is simply a straightforward licensing scheme for performing a specific type of commercial transaction—even more so than the statute challenged in *Liberty Coins*, which applied only if one made one's availability for that type of transaction publicly known. The plaintiffs, moreover, have not identified any way in which the Tennessee licensure scheme burdens them any more significantly than Ohio's scheme burdened precious metals dealers. The plaintiffs' argument for distinguishing *Liberty Coins* is, at most, an argument for overruling *Liberty Coins* as wrongly decided—which this court has no power to do. The precedents of this circuit, therefore, require dismissal.

It bears noting, however, that, even if one were to disregard both *Liberty Coins* and its rationale in favor of treating Tennessee's licensure scheme as subject to an elevated level of scrutiny under the First Amendment, there would be substantial grounds for doubting the viability of the plaintiffs' claims. The plaintiffs make much of the fact that the Supreme Court, in *NIFLA*, expressed skepticism of the idea, espoused by some courts, that laws governing "professional speech" are subject to a distinct, relatively forgiving First Amendment framework. *NIFLA*, 585 U.S. at 766–67. Even if one treats all of the lower courts' "professional speech" precedents as overruled, however, it would not necessarily mean much in terms of the constitutionality of licensing of auctioneers

1. While there may be distinct constitutional questions related to the Tennessee statute's application to individuals who merely advertise themselves as auctioneers but do not actually "act as" such, any such questions are not at issue in this case.

in particular. Doctrines about professional speech largely focus on the government's power to regulate advisory professions—like law, counseling, or medicine—in which a licensed individual gives a client or patient advice "based on '[his] expert knowledge and judgment.'" *Id.* at 767 (quoting *King v. Governor of the State of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014)). Auctioneering, however, is a transaction-focused profession, not an advisory one. While auctioneers undoubtedly do provide advice sometimes, their core function is to facilitate sales of products. Because transactions are involved, another line of First Amendment caselaw is relevant: that involving regulation of *commercial* speech.

The Supreme Court has long held that so-called "commercial speech . . . is entitled to reduced protections under the First Amendment." *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980)). While it is "not always clear" what qualifies as "commercial speech," *Matal v. Tam*, 582 U.S. 218 (2017), one of the key considerations is "the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Cent. Hudson*, 447 U.S. at 562 (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455–456 (1978); citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev.

1, 38–39 (1979)). From that perspective, an auction is as clear an example of commercial speech as one is likely to find. An auction consists of parties proposing a series of alternative transactions to each other before settling on one that actually goes into effect; it is little more than a competition between commercial utterances. Holding oneself out as an auctioneer simply involves adding another layer of commercial speech to that process—a solicitation to assist others in their own solicitations. All of the speech at issue is paradigmatically commercial.

Content-neutral commercial speech regulations[2] are typically subject only to intermediate scrutiny, *Int'l Outdoor, Inc. v. City of Troy, Mich.*, 974 F.3d 690, 703 (6th Cir. 2020), which requires a law to "be 'narrowly tailored to serve a significant government interest[] and leave open

2. A higher level of constitutional protection—strict scrutiny—applies to some commercial speech regulations on the ground that those regulations are not "content neutral." *See International Outdoor*, 974 F.3d at 706. The concept of "content neutrality" relevant to this context, however, can be challenging to nail down. Every restriction on commercial speech is, in a sense, a content-based regulation, because the commercial character of speech is, by necessity, a feature of the speech's content—speech cannot be commercial without being *about commerce*, which is a content-based distinction. Strict scrutiny only arises, however, when the regulation at issue "singles out specific subject matter for differential treatment"—such as when, for example, a regulation treats commercial speech about one subject matter differently from commercial speech about another. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 619 (2020).

ample alternative channels of communication.'" *Ramsek v. Beshear*, 989 F.3d 494, 498 (6th Cir. 2021) (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The State of Tennessee's significant interest in overseeing the practice of auctioneering has been established and acted upon for over fifty years and reflects the inherent vulnerability of auctions to fraud—for example, through the use of fake or covertly subsidized bids to drive up a price. The licensure requirement is, moreover, a relatively undemanding tool for addressing that genuine problem. It is, therefore, questionable whether the plaintiffs could prevail under intermediate scrutiny.

This court, however, need not answer that question, because *Liberty Coins* governs this case in its entirety. Under the law of the Sixth Circuit, Tennessee's auctioneer licensing system is an economic regulation that burdens speech only insofar as that speech is made in facilitation of the economic transactions that Tennessee has, within its ordinary authority, chosen to regulate. The law is therefore subject to rational basis review and must be treated as consistent with the Constitution as long as it is rationally related to a legitimate government purpose. The plaintiffs identify no reason why Tennessee's licensure requirement would fail that test, and the court sees none. Tennessee has a legitimate interest in addressing fraud and incompetence in the auctioneering field, and its relatively undemanding licensure scheme is rationally related to that interest. The decision to require a license for extended-time online auctions, but not timed online auctions, is rationally supported by extended-time

auctions' greater similarity to conventional auctions and greater vulnerability to escalatory bidding strategies, including fraudulent ones. The plaintiffs, therefore, have no plausible likelihood of success and no entitlement either to a preliminary injunction or to a denial of the plaintiffs' motion to dismiss.

IV. CONCLUSION

For the foregoing reasons, the Commissioner's Motion to Dismiss (Doc. No. 18) will be granted, and the plaintiffs' Motion for Preliminary Injunction (Doc. No. 8) will be denied.

An appropriate order will enter.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge