

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

WILL MCLEMORE, et al.,)	
)	
Plaintiffs,)	Case No. 3:19-cv-00530
)	
v.)	JUDGE RICHARDSON
)	
ROXANA GUMUCIO, et al.,)	MAGISTRATE JUDGE FRENSELY
)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT**

Defendants submit this Memorandum of Law in support of their Motion for Summary Judgment. For the reasons set forth below, 2019 Tenn. Pub. Acts Ch. 471 (“PC 471”) does not violate the dormant Commerce Clause or the First Amendment. There is no genuine dispute as to any material fact and Defendants are entitled to judgment as a matter of law. This Court should therefore enter a summary judgment in favor of Defendants and against Plaintiffs declaring that PC 471 is constitutional, denying the declaratory and injunctive relief requested by Plaintiffs, lifting the present injunction against enforcement of PC 471, and denying Plaintiffs’ attorneys’ fees claim under 42 U.S.C. § 1988.

BACKGROUND

In this action, Plaintiffs challenge the constitutionality of amendments to Tenn. Code Ann. §§ 62-19-101 *et seq.* that were made in 2019 through PC 471. Plaintiffs seek declaratory and

injunctive relief pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983 for purported violations of the dormant Commerce Clause and the First Amendment.¹

Since 1967, it has been the public policy of the State of Tennessee to regulate the auctioneering profession and to require auctioneers to be licensed. *See* 1967 Tenn. Pub. Acts Ch. 335. With the growth of electronic commerce, in 2001, the Tennessee Auctioneer Commission (“Commission”) promulgated a rule to regulate online auctions, which provides, “Any electronic media or computer-generated auction originating from within Tennessee shall conform to the requirements of Tennessee Code Annotated, Title 62, Chapter 19 et seq. (Auctioneer Licensing Law) and the Rules of the Tennessee Auctioneer Commission.” Tenn. Comp. R. & Regs. 0160-01-18 (“Rule 18”).

In 2006, the Tennessee legislature added a new provision to the auctioneering statutes providing that an auctioneering license is not required 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.”² 2006 Tenn. Pub. Acts Ch. 533, § 1. The 2006 Public Act did not define timed listing.

In 2019, the Tennessee legislature significantly revised the auctioneering statutes. These revisions included *inter alia* adding a statutory definition of timed listing: “‘Timed listing’ means offering goods for sale with a fixed ending time and date that does not extend based on bidding activity.” PC 471, § 4(12). These revisions also added the word “electronic” to the statutory definition of “auction,” so that “auction” now means

¹ Plaintiffs also brought claims under the Tennessee Constitution and the Privileges and Immunities Clause of the Fourteenth Amendment, which this Court properly dismissed in its order entered December 4, 2020. [DE 84.]

² At the time, the Tennessee Attorney General opined that a timed listing was not an auction because *inter alia* a timed listing “does not culminate in the acceptance of the highest or most favorable bid in the traditional sense, but rather in the highest bid that has been registered within a specified period.” Op. Tenn. Att’y Gen. 06-053 at 4 (Mar. 27, 2006).

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.

Id. § 4(2). Other than adding the word “electronic,” PC 471 did not substantially change the pre-2019 definition of “auction.” *See* Tenn. Code Ann. § 62-19-101(2) (2009 & 2018 Supp.).

PC 471 also created new classifications of auctioneers and made it easier to become a licensed auctioneer. PC 471 created the bid caller auctioneer license. An applicant for a bid caller auctioneer license must be at least eighteen years of age and have completed sixteen hours of classroom or online instruction on the basic fundamentals of auctioneering at an accredited auction school. PC 471, § 10(a). PC 471 also replaced the apprentice auctioneer license with the affiliate auctioneer license. An applicant for an affiliate auctioneer license must be at least eighteen years of age and have successfully completed an additional thirty-four hours of classroom or online instruction on the basic fundamentals of auctioneering at an accredited auction school. *Id.* § 10(b). PC 471 also eliminated the auctioneer firm license and defined the responsibilities of a principal auctioneer to include “the management and supervision of an auction company, including its wholly owned subsidiary or affiliate company.” *Id.* § 4(9). An applicant for a principal auctioneer license must be at least eighteen years of age; have served as an affiliate auctioneer under the supervision of a licensed, full-time principal auctioneer for at least six months; and have a high school diploma, general equivalency diploma, or HiSET® diploma. *Id.* § 10(c).

PC 471 further provides that it is unlawful for any person to “[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by the commission.” PC

471, § 5(a)(1). The previous law contained similar prohibitions. *See* Tenn. Code Ann. § 62-19-102(a)(1) (2009). PC 471 also provides that “[a]ll auctions arranged by or through a principal auctioneer must be conducted exclusively by individuals licensed under this chapter.” PC 471, § 5(b). The previous law likewise contained a similar requirement. *See* Tenn. Code Ann. § 62-19-102(b) (2009).

FACTS

Plaintiff McLemore Auction Company, LLC, (“McLemore Auction”) is a Tennessee limited liability company located in Nashville, Tennessee. (Am. Compl. ¶7; Ans. ¶7). Plaintiff Will McLemore (“McLemore”) is the president and sole member of McLemore Auction. (Am. Compl. ¶6; Ans. ¶6). McLemore is a Tennessee resident. (Am. Compl. ¶6; Ans. ¶6). McLemore holds a Tennessee auctioneer license first issued by the Tennessee Auctioneer Commission in 1999. (Am. Compl. ¶34; Ans. ¶34).

McLemore and McLemore Auction contract with owners of tangible personal property to sell that property at auction through the website www.mclimoreauction.com (“McLemore Auction website”). (Am. Compl. ¶¶22, 25, 26, 28, 29; McLemore & McLemore Auction Resp. to Interrog. No. 6). McLemore and McLemore Auction rely on independent contractors who do not hold Tennessee auctioneer licenses to conduct auctions through the McLemore Auction website. (Am. Compl. ¶¶23, 24, 28; McLemore & McLemore Auction Resp. to Interrog. No. 6). The auctions that McLemore and McLemore Auction conduct through the McLemore Auction website do not have a fixed ending time; rather, the ending time is extended by five minutes if any bids are received within five minutes of the designated ending time. (Am. Compl. ¶32; McLemore & McLemore Auction Resp. to Interrog. No. 6).

Plaintiff Purple Wave, Inc., (“Purple Wave”) is a Delaware corporation with its headquarters located in Manhattan, Kansas. (Am. Compl. ¶9; Ans. ¶9). Purple Wave also has an office in Kansas City, Missouri. (Purple Wave Dep. at 9:20-10:1). Purple Wave does not own or lease any real or tangible personal property in Tennessee. (McKee & Purple Wave Resp. to Req. for Admis. Nos. 5 & 7). Purple Wave does not have any employees or independent contractors in Tennessee. (McKee & Purple Wave Resp. to Req. for Admis. No. 9). No employee or independent contractor of Purple Wave holds an auctioneer license issued by the Tennessee Auctioneer Commission. (Am. Compl. ¶216).

Plaintiff Aaron McKee (“McKee”) is the President and CEO of Purple Wave. (Am. Compl. ¶8; Ans. ¶8). McKee is a resident of Kansas. (Am. Compl. ¶8; Ans. ¶8). McKee holds an auctioneer license issued by the State of Texas. (Purple Wave Dep. at 11:9-13). McKee does not hold an auctioneer license issued by the Tennessee Auctioneer Commission. (Am. Compl. ¶216; Purple Wave Dep. at 11:9-13). McKee does not own or lease any real or tangible personal property in Tennessee. (McKee & Purple Wave Resp. to Req. for Admis. Nos. 4 & 6). McKee does not have any employees or independent contractors in Tennessee. (McKee & Purple Wave Resp. to Req. for Admis. No. 8).

McKee and Purple Wave contract with owners of tangible personal property to sell that property at auction through the website www.purplewave.com (“Purple Wave website”). (Am. Compl. ¶¶209-213; McKee & Purple Wave Resp. to Interrog. No. 6). The auctions that McKee and Purple Wave conduct through the Purple Wave website do not have a fixed ending time; rather, the ending time is extended by five minutes if any bids are received within five minutes of the designated ending time. (Am. Compl. ¶¶214, 215; McKee & Purple Wave Resp. to Interrog.

No. 6). The Purple Wave website, including the auctions and advertisements posted thereto, is accessible in all states, including Tennessee. (Am. Compl. ¶218; Ans. ¶218).

McKee and Purple Wave have sold tangible personal property at auction through the Purple Wave website to Tennessee residents. (Am. Compl. ¶227; Purple Wave Dep. at 60:17-61:4 & Ex. 7). McKee and Purple Wave have sold tangible personal property at auction through the Purple Wave website on behalf of property owners who are in Tennessee. (Am. Compl. ¶228; Purple Wave Dep. at 55:4-56:15 & Ex. 5). McKee and Purple Wave have sold tangible personal property at auction through the Purple Wave website where the property being sold is in Tennessee. (Am. Compl. ¶229; Purple Wave Dep. at 56:24-60:10 & Ex. 6). Purple Wave generates more than \$25,000 in annual revenues from the sale of tangible personal property at auction to Tennessee residents. (Am. Compl. ¶230; McKee & Purple Wave Resp. to Interrog. No. 13).

When the tangible personal property to be sold at auction is in Tennessee, one of Purple Wave's auction specialists typically travels to Tennessee to negotiate a listing contract with the property owner, inspect the property, collect ownership documents, collect photographs or videos of the property, and create a detailed description of the property. (McKee & Purple Wave Resp. to Interrog. No. 6; McKee & Purple Wave Am. Resp. to Interrog. No. 12; Purple Wave Dep. at 57:23-59:23, 67:7-68:3). The auction specialist then transmits the contract, photographs or videos, property description, ownership documents, and any other pertinent information to Purple Wave employees located outside of Tennessee to review and approve the auction. (Purple Wave Dep. at 22:23-24:22). Once the auction is approved, a member of Purple Wave's web operations team, which is located outside of Tennessee, uses the photographs or videos and

property description to create an auction listing and post the listing to the Purple Wave website. (Purple Wave Dep. at 22:23-24:22, 41:2-42:25, 68:1-3).

No employee or representative of the Tennessee Auctioneer Commission has ever told McKee that he is required to hold a Tennessee auctioneer license to conduct his online auction business from the State of Kansas. (McKee & Purple Wave Resp. to Req. for Admis. No. 15). No employee or representative of the Tennessee Auctioneer Commission has ever told Purple Wave that it is required to hold a Tennessee auctioneer license to conduct its online auction business from the State of Kansas. (McKee & Purple Wave Resp. to Req. for Admis. No. 16). No employee or representative of the Tennessee Auctioneer Commission has ever told McKee or Purple Wave that any of their employees or independent contractors are required to hold a Tennessee auctioneer license. (McKee & Purple Wave Resp. to Req. for Admis. Nos. 17 & 18).

Plaintiff Interstate Auction Association (“IAA”) is an unincorporated association whose membership includes licensed and unlicensed auctioneers in Tennessee and other states, including McLemore, McKee, and employees and independent contractors of McLemore Auction and Purple Wave. (Am. Compl. ¶¶10, 204, 206; Ans. ¶¶10, 204, 206; IAA Resp. to Interrog. Nos. 3 & 4). No employee or representative of the Tennessee Auctioneer Commission has ever told any out-of-state member of IAA that the out-of-state member is required to hold a Tennessee auctioneer license to conduct the out-of-state member’s online auction business from the out-of-state member’s home state. (IAA Resp. to Req. for Admis. No. 1). Purple Wave is the only out-of-state member of IAA that generates more than \$25,000 in annual revenues from the sale of tangible personal property at auction to Tennessee residents. (IAA Dep. at 8:18-9:13).

ARGUMENT

For the reasons stated below, PC 471 does not violate the dormant Commerce Clause or the First Amendment. The State’s regulatory scheme for auctioneers, including the amendments made pursuant to PC 471, does not apply extraterritorially and does not impermissibly regulate or restrict speech. This Court should therefore enter a summary judgment in favor of Defendants and against Plaintiffs declaring that PC 471 is constitutional, denying the declaratory and injunctive relief requested by Plaintiffs, lifting the present injunction against enforcement of PC 471, and denying Plaintiffs’ attorneys’ fees claim under 42 U.S.C. § 1988.

I. PC 471 DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

The U.S. Constitution grants Congress the power “[t]o regulate Commerce . . . among the several States.” U.S. Const., Art. I, § 8, cl. 3. “Although the Commerce Clause is written as an affirmative grant of authority to Congress, [the Supreme] Court has long held that in some instances it imposes limitations on the States absent Congressional action.” *South Dakota v. Wayfair*, --- U.S. ---, 138 S.Ct. 2080, 2089 (2018). “Modern precedents rest upon two primary principles that mark the boundaries of a State’s authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce.” *Id.* at 2090-91. “[A] regulation that has the practical effect of controlling commerce that occurs entirely outside of the state in question” is “virtually per se invalid under the dormant Commerce Clause.” *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 645 (6th Cir. 2010). Courts are required to presume that a state statute is “intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state . . . enacting it. Thus, an extraterritorial effect is not to be given statutes by

implication.” *BMW Stores, Inc. v. Peugeot Motors of America, Inc.*, 860 F.2d 212, 215 n.1 (6th Cir. 1988) (quoting 73 Am. Jur. 2d *Statutes* § 359).

PC 471 does not apply extraterritorially. Plaintiffs’ dormant Commerce Clause claims are premised primarily on the flawed presumption that, by merely adding the term electronic to the statutory definition of auction, the State’s auctioneering regulations now apply extraterritorially. But the amendments included in PC 471 fit into an existing statutory scheme that, by its express terms, applies only to auctions conducted in Tennessee. At least since 2001, the State has regulated online auctions. Rule 18, adopted by the Commission that year, expressly provides, “Any electronic media or computer-generated auction *originating from within Tennessee* shall conform to the requirements of Tennessee Code Annotated, Title 62, Chapter 19 *et seq.* (Auctioneer Licensing Law) and the Rules of the Tennessee Auctioneer Commission.” (emphasis added). The addition of the word electronic by PC 471 merely confirms this longstanding rule.³ This rule explains what the Commission deems to be an auction “in this state” and makes crystal clear that Tennessee’s licensing requirement applies only to auctions “originating from within Tennessee.” The Commission’s interpretation and application of the statutes it administers are entitled to considerable deference. *See Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 761 (Tenn. 1998). This establishes that there is no threat of an attempt to regulate auctions that do not originate from within the State.⁴ The Commission would not and could not violate its own rule by attempting to reach auctions originating from locations outside of Tennessee.

³ Some online auctioneers sought to evade the regulation by relying on the 2006 statute providing that timed listings do not require a license, even though the ending time of their auctions could be extended based on bidding activity. The new statute closes this loophole by specifying that a timed listing must have a fixed ending time, which cannot be extended based on bidding activity.

⁴ The State has a longstanding legitimate interest in regulating auctions conducted in the State and a longstanding policy of confining its regulations to in-state conduct. There is no reason to

This resolves any ambiguity in the statutes themselves. Construing the prohibition against “[a]ct[ing] as, advertis[ing] as, or represent[ing] to be an auctioneer without holding a valid license issued by the commission,” PC 471, § 5(a)(1), to apply extraterritorially is a forced reading that ignores that the Commission’s authority is limited to issuing licenses that grant the privilege to conduct auctions only in this State. Tennessee Code Ann. § 62-19-115(a) provides, “Any auctioneer licensed under this chapter may conduct auctions at any time or place *in this state*.” (emphasis added). Tennessee Code Ann. § 62-19-102(a)(1) thus prohibits acting as, advertising as, or representing to be a *Tennessee* auctioneer without the required license. It does not prohibit an auction company that conducts online auctions from Kansas from stating on its website that it is a “true auction company.” (Am. Compl. ¶219).

Under Plaintiffs’ reading of the prohibition, a licensed Arizona auctioneer who places an online advertisement for an in-person auction to be conducted in Arizona would be in violation of the prohibition because the auctioneer advertises as and represents to be an auctioneer in an online advertisement that reaches Tennessee via the internet. But Tennessee has no interest in prohibiting an individual from advertising or representing to be an auctioneer in another state. Tennessee’s interest is in prohibiting an individual who is not licensed in Tennessee from advertising or representing that he is licensed in Tennessee. Moreover, construing any of PC 471’s provisions to apply extraterritorially is inconsistent with the required presumptions of constitutionality, *Mitchell v. Mitchell*, 594 S.W.2d 699, 702 (Tenn. 1990), and against extraterritoriality, *BMW Stores, Inc.*, 860 F.2d at 215 n.1. That being the case, there is no threat of a Commerce Clause violation. Auctioneers located outside of Tennessee have no need of a Tennessee license, even if Tennessee

conclude that the State’s regulations apply to out-of-state online auctions any more than they apply to out-of-state in-person auctions, since an auction is defined as “a sales transaction conducted by *oral, written, or electronic* exchange between an auctioneer and members of the audience.” PC 471, § 4(2) (emphasis added).

residents can bid on items they offer online. Tennessee can regulate auctioneers located here, whether they conduct their business in person or over the internet.

PC 471 does not impermissibly burden commerce. State laws that “regulat[e] evenhandedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Here, the State regulates auctions conducted in the State to effectuate the legitimate local public interest of promoting the integrity of competitive auctions, protecting sellers and consumers from untrained or unqualified auctioneers, and preventing fraudulent or deceptive practices in auctions conducted in the State. The State is regulating purely in-state conduct—*i.e.*, auctions conducted from within Tennessee. The State’s scheme for regulating in-state auctions did not become an undue burden on interstate commerce merely because the State added the term electronic to the statutory definition of auction. Indeed, the State had already regulated online auctions originating from within Tennessee for eighteen years before the statutory change. *See* Rule 18. The burdens on interstate commerce, if any, are negligible, and they are certainly not clearly excessive in relation to the local benefits of regulating in-state auctions.

Plaintiffs mischaracterize the nature of the regulations by asserting that they license and regulate an instrumentality of commerce. The State is regulating auctions conducted within the State; it is not regulating the internet. The dormant Commerce Clause does not render otherwise regulable transactions unregulable simply because they are connected to the internet. *See Ford Motor Co. v. Tex. Dep’t of Transp.*, 264 F.3d 493, 505 (5th Cir. 2001). To allow in-state auctioneers to escape the State’s valid regulations by connecting their auctions to the internet

would be an absurd result that is not mandated or supported by the dormant Commerce Clause.
Id.

II. PC 471 DOES NOT VIOLATE THE FIRST AMENDMENT.

A. Tennessee’s Auctioneering Statutes Are Reasonable Regulations of Business Conduct and Economic Activity, Not Speech.

This is not a free speech case. Tennessee’s auctioneering statutes, including the amendments made by PC 471, regulate business conduct and economic activity, not speech. As such, this Court is required to apply rational basis scrutiny and uphold these statutes because they are rationally related to a legitimate government purpose. *See Bevan & Assocs., LPA, Inc. v. Yost*, 929 F.3d 366, 374-75 (6th Cir. 2019); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 692-94 (6th Cir. 2014), *cert. denied*, 135 S.Ct. 950 (2015).

In *Liberty Coins*, the Sixth Circuit applied rational basis scrutiny to conclude that unlicensed precious metals dealers were unlikely to prevail on the merits of their First Amendment challenge to Ohio’s Precious Metals Dealers Act (“PMDA”) and therefore reversed the district court’s order granting a preliminary injunction. The PMDA required persons acting as precious metals dealers to be licensed by the state and prohibited unlicensed individuals from holding themselves out as precious metals dealers. *See Liberty Coins*, 748 F.3d at 686-88. Much like an auctioneer, holding oneself out as a precious metals dealer included advertisements and solicitations of customers for the purchase of precious metals. *Id.* at 687. The Court found that the PMDA was a valid business regulation. The Court explained that the PMDA was, “first and foremost, a licensing statute. It is a statute calculated to regulate individuals and entities that hold themselves out to the public as willing to purchase precious metals.” *Id.* at 691. The Court further explained that “the PMDA uses ‘holding oneself out’ to distinguish those who

Defendants wish to regulate and those who should and must remain free from regulation by nature of the infrequency and informality of their precious metals transactions.” *Id.* at 692.

The Court determined that rational basis review applied to the PMDA. “Long ago, the Supreme Court recognized that ‘[t]he power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud.’” *Id.* at 692 (quoting *Dent v. West Virginia*, 129 U.S. 114, 122 (1889)). “[W]here a regulatory scheme neither implicates a fundamental right, nor creates a suspect classification, rational basis review applies.” *Id.* at 693. The Court determined that the PMDA was a statute that neither burdened a fundamental right, nor created a suspect classification. *Id.* The PMDA “merely constitutes a regulatory scheme meant to protect the safety and welfare of the public through the regulation of professional conduct. Rational basis review therefore applies.” *Id.*

Under rational basis review, a law is upheld so long as it is rationally related to a legitimate government purpose. There is a strong presumption of constitutionality and the regulation will be upheld so long as its goal is permissible and the means by which it is designed to achieve that goal are rational.

Id. at 694. “[U]nder rational basis review, the government has no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid and may be based on rational speculation unsupported by evidence or empirical data.” *Id.* (quoting *TriHealth, Inc. v. Bd. of Comm’rs*, 430 F.3d 783, 790 (6th Cir. 2005) (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)) (internal quotation marks omitted).

Applying rational basis review, the Court found that Ohio had a legitimate government purpose “to protect consumers and the public from theft, fraud, money laundering, fencing, to restrict the flow of stolen goods, and to prevent terrorism.” *Id.* The Court further found that the

state's licensing requirement was rationally related to that legitimate government purpose. *Id.* at 694-95. The Court held that "it was reasonable for the Ohio legislature to have distinguished between businesses that hold themselves out to the public as formally, frequently, or routinely dealing in precious metals and those who merely purchase precious metals informally, infrequently, and for their own personal use." *Id.* at 695. The Court further held that "[i]t was reasonable for the legislature to have believed that a licensing requirement and the close monitoring of those who are licensed would curtail the amount of stolen goods in the marketplace and aid the police in their attempt to recover stolen goods in a timely manner." *Id.* Because the PMDA was a rational method for achieving the government's legitimate interest in protecting the public from theft or fraud, the Court held that the plaintiffs were unlikely to prevail on the merits and were thus not entitled to a preliminary injunction in their favor. *Id.*

The Court expressly declined to apply the test laid out in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980), for burdens on commercial speech. The Court concluded that the PMDA "proscribes business conduct and economic activity, not speech." *Liberty Coins*, 748 F.3d at 697. The Court held that the PMDA "does not burden the commercial speech rights of unlicensed precious metals dealers because such dealers do not have a constitutional right to advertise or operate an unlicensed business that is not in compliance with the reasonable requirements of Ohio law." *Id.*

Such dealers cannot "hold themselves out" to the public without a license, regardless of whether they advertise. This case does not turn on advertising or solicitation, it turns on whether the business in question holds itself out to the public, which can occur by posting a sign, placing goods in an open window, simply conducting business in a manner that is visible to the public, or otherwise making its wares available to the public.

Id. Accordingly, the Court held that it was appropriate to apply rational basis review to uphold the PMDA. *Id.*

For First Amendment purposes, there is no meaningful difference between the statutes at issue in *Liberty Coins* and the statutes at issue in the instant case. As in *Liberty Coins*, Tennessee’s auctioneering statutes, including the amendments contained in PC 471, are valid business regulations that should be reviewed under rational basis scrutiny and upheld because they are rationally related to a legitimate government purpose. Indeed, the business activities undertaken by the precious metals dealers in *Liberty Coins* were substantially like those of auctioneers—auctioneers merely deal with a broader range of items for sale. Rational basis review is appropriate because the auctioneering regulations neither burden a fundamental right, nor create a suspect classification, but “merely constitute[] a regulatory scheme meant to protect the safety and welfare of the public through the regulation of professional conduct.” *Liberty Coins*, 748 F.3d at 693.

The State has a legitimate government purpose in promoting the integrity of competitive auctions, protecting sellers and consumers from untrained or unqualified auctioneers, and preventing fraudulent or deceptive practices in auctions conducted in the State. Indeed, it has been the public policy of the State since 1967 to regulate the auctioneering profession and to require auctioneers to be licensed. Potential risks that auctions pose include misrepresentations made to sellers while executing a listing contract, false or misleading advertising, misrepresentations made to the audience regarding the nature or quality of the item being auctioned, commingling of funds, and shill bidding in which the auctioneer or seller employs a shill to drive up the price of the auction. (*See* Allen Dep. at 25:15-27:7, 44:21-45:7; Ochs Dep. Ex. 2 at 1-3; Gumucio Decl. [DE 20-2] ¶6); Black’s Law Dictionary (11th ed. 2019) (defining

“by-bidder” a.k.a. “shill” as “[a]t an auction, a person engaged by the seller to bid on property for the sole purpose of stimulating bidding by potential genuine buyers, thereby inflating the price while being secured from risk by a secret understanding with the seller that he or she need not make good on bids”).

It was reasonable for the Tennessee legislature to believe that a licensing requirement for auctioneers would achieve the State’s legitimate government purpose. *See Liberty Coins*, 748 F.3d at 694-95; (Allen Dep. at 24:25-25:11, 141:23-144:3; Ochs Dep. Ex. 2 at 1-3). It was likewise reasonable for the legislature to believe that requiring auctioneers to complete a reasonable number of hours of instruction on the basic fundamentals of auctioneering and to serve briefly under a licensed auctioneer would achieve the State’s legitimate government purpose. *Id.* It was also reasonable for the legislature to believe that online auctions pose the same risks and should be regulated in the same manner as oral or written auctions. *See Liberty Coins*, 748 F.3d at 694-95; (Allen Dep. at 140:8-141:22; Ochs Dep. Ex. 2 at 1). Finally, it was reasonable for the legislature to distinguish between so-called extended-time auctions, which are auctions, and timed listings, which are not. *See Liberty Coins*, 748 F.3d at 694-95; (Am. Compl. ¶140 & Ex. 10 at 30:1-3 (quoting Mr. Allen as saying “the difference is an extended time auction is absolutely and unequivocally just like a live auction and a fixed time is not”) & ¶151 & Ex. 11 at 30:9-12 (quoting Mr. Allen as saying “in an online soft close auction you are mimicking the exact behavior of an auctioneer”); Allen Dep. at 138:9-140:7 & Ex. 8 at 30:1-3, 33:17-25; McLemore Auction Dep. at 82:8-83:4); Op. Tenn. Att’y Gen. 06-053 at 4. Unlike timed listings, so-called extended-time auctions, like traditional auctions, pose the risk that auctioneers will misrepresent the nature or quality of an item or employ skills to encourage additional bidding to keep the auction going indefinitely.

As in *Liberty Coins*, Tennessee’s auctioneering regulations “proscribe[] business conduct and economic activity, not speech.” 748 F.3d at 697. An auction is first and foremost “a sales transaction,” PC 471, § 4(2), which is business conduct and economic activity that falls squarely within the State’s authority to regulate, without offending the First Amendment, *see Liberty Coins*, 748 F.3d at 697. Just as Ohio has authority to regulate sales of precious metals without offending the First Amendment, so too does Tennessee have authority to regulate auction sales without offending the First Amendment. The State’s regulation of auctioneers’ transactions with sellers likewise falls within the State’s authority to regulate business conduct and economic activity, without offending the First Amendment. For instance, auctioneers “offer[] and execute[] a listing contract, sale, purchase, or exchange of goods” in exchange “for a fee, commission, or any other valuable consideration, or with the intention or expectation of receiving a fee, commission, or any other valuable consideration.” PC 471, § 4(9). Again, this is “business conduct and economic activity, not speech.” *Liberty Coins*, 748 F.3d at 697.

Plaintiffs attempt to frame their claims as free speech claims by focusing on language in the definition of auction referring to an “exchange between the auctioneer and the audience.” PC 471, § 4(2). But the auctioneer’s exchange with the audience is for the purpose of completing a sales transaction. This is economic activity, not speech, just like the offer and acceptance in a traditional contract. Moreover, the statutory definition of auction included language about an exchange between the auctioneer and the audience before PC 471 was enacted. PC 471 merely added the term electronic. But a sales transaction completed by electronic means is not speech any more than a sales transaction completed by oral or written means. Plaintiffs’ transactions do not become speech merely because they are conducted online, rather than in person. If anything, Plaintiffs’ exchanges with the audience involve less speech than in-person auctions because the

exchanges are automated and take place without human involvement. (*See* McKee & Purple Wave Am. Resp. to Interrog. No. 11).

Plaintiffs Will McLemore and McLemore Auction Company also complain that they are prohibited from stating on their website that they will pay rebates for referrals. But the State does not simply prohibit auctioneers from stating that they will pay rebates for referrals; rather, the State prohibits auctioneers from paying rebates for referrals. *See* Tenn. Comp. R. & Regs. 0160-01-.02. Again, this is a conduct regulation, not a speech restriction.

Similarly, Plaintiffs' claims do not become free speech claims merely because unlicensed persons are prohibited from "advertis[ing] as" or "represent[ing] to be an auctioneer." PC 471, § 5(a)(1). The prohibition does not burden the commercial speech rights of unlicensed persons because they do not have a constitutional right to advertise or operate an unlicensed business that is not in compliance with the reasonable requirements of Tennessee law. *See Liberty Coins*, 748 F.3d at 697. The State may prohibit unlicensed persons from advertising as auctioneers just as it may prohibit unlicensed persons who purport to provide legal services from advertising that they are lawyers.

The exemptions from the auctioneer licensing requirements further demonstrate that the State is regulating business conduct and economic activity, rather than speech. Most of the activities that are exempted from the licensing requirements are auctions conducted by persons who are not in the business of auctioneering, such as persons acting under court order; trustees; governmental entities; political parties, churches, and charities; the Tennessee Department of Agriculture and the University of Tennessee; and individuals who earn less than \$25,000 annually from online auctions. *See* PC 471, § 6. Like the Ohio statute at issue in *Liberty Coins*, the statutory exemptions from Tennessee's auctioneer licensing requirement demonstrate that the

State is seeking to regulate only those who regularly engage in the business of auctioneering, rather than those who conduct auctions infrequently and informally. *See Liberty Coins*, 748 F.3d at 692.

For the foregoing reasons, Tennessee’s auctioneering statutes, including the amendments made pursuant to PC 471, constitute a rational method for achieving the State’s legitimate interest in promoting the integrity of competitive auctions, protecting sellers and consumers from untrained or unqualified auctioneers, and preventing fraudulent or deceptive practices in auctions conducted in the State. Accordingly, this Court should uphold the State’s reasonable regulatory scheme under the rational basis scrutiny required by *Liberty Coins*.

B. Alternatively, Tennessee’s Auctioneering Statutes Impose Only Incidental Burdens on Speech, Which Is Permissible Under the First Amendment.

The *Liberty Coins* Court rejected the plaintiffs’ attempt to couch their claims as free speech claims and applied rational basis scrutiny to uphold the state’s regulation of business conduct and economic activity. But, even if this Court accepts Plaintiffs’ characterization of their claims as free speech claims, the State’s regulations should be upheld as valid commercial regulations that impose only incidental burdens on speech, which is a level of scrutiny that mirrors the rational basis test.

“[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. . . . [T]he 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). “[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978). “Numerous examples could be cited of communications that are regulated without offending the First Amendment,

such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees." *Id.* (internal citations omitted). *See also Nat'l Inst. of Family & Life Advocates v. Becerra*, --- U.S. ---, 138 S.Ct. 2361, 2372 (2018) ("NIFLA") ("States may regulate professional conduct, even though that conduct incidentally involves speech.") (citing *Ohralik*, 436 U.S. at 456 and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992)); *Casey*, 505 U.S. at 884 (holding that state's informed consent requirement for abortions did not violate First Amendment; "[t]o be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.") (internal citations omitted).

In *Ohralik*, for example, the Supreme Court upheld an Ohio State Bar Association prohibition on lawyers' in-person solicitation of remunerative employment. The Court found that in-person solicitation was "a business transaction in which speech was an essential but subordinate component." *Ohralik*, 426 U.S. at 457. "While this does not remove the speech from the protection of the First Amendment, . . . it lowers the level of appropriate judicial scrutiny." *Id.* The Court determined that "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns," which "falls within the State's proper sphere of economic and professional regulation." *Id.* at 459. Accordingly, the lawyer's conduct was "subject to regulation in furtherance of important state interests." *Id.* The Court found that the State had a strong interest in protecting consumers, regulating commercial transactions, and maintaining standards among the licensed professions. *Id.* at 460. The Court held that it was "not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited," *id.* at 466,

and therefore it was “not unreasonable, or violative of the Constitution, for [the] State to respond with what in effect is a prophylactic rule,” *id.* at 467.

Here, as in *Ohralik*, an auction is “a business transaction in which speech [is] an essential but subordinate component.” *Id.* at 457. And auctioneering, if it implicates free speech at all, is “a subject only marginally affected with First Amendment concerns,” which “falls within the State’s proper sphere of economic and professional regulation.” *Id.* at 459. Auctioneering is therefore “subject to regulation in furtherance of important state interests.” *Id.* The State has a strong interest in promoting the integrity of competitive auctions, protecting sellers and consumers from untrained or unqualified auctioneers, and preventing fraudulent or deceptive practices in auctions conducted in the State. *Id.* at 466. And, as argued above, the measures taken by the State to advance this interest were reasonable. *Id.* Accordingly, as in *Ohralik*, the State’s regulations do not violate the First Amendment.

CONCLUSION

For the reasons set forth above, this Court should enter a summary judgment in favor of Defendants and against Plaintiffs declaring that PC 471 is constitutional, denying the declaratory and injunctive relief requested by Plaintiffs, lifting the present injunction against enforcement of PC 471, and denying Plaintiffs’ attorneys’ fees claim under 42 U.S.C. § 1988.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum has been served on the following via the court's electronic filing system on April 30, 2021:

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