

**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.)	

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

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I. 2019 Tenn. Pub. Acts Ch. 471 (“PC 471”) Does Not Violate the First Amendment.

Defendants do not concede that PC 471 cannot satisfy strict scrutiny (DE #105 at 1); rather, Defendants chose not to make arguments based on strict scrutiny because it is clearly not the appropriate standard. PC 471 regulates sales of goods or real estate by auction, which is business conduct and economic activity, not speech. The appropriate level of scrutiny is therefore the rational basis test. *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). Under the rational basis test, this Court should uphold PC 471 because it is “rationally related to a legitimate government purpose.” *Liberty Coins*, 748 F.3d at 694. Plaintiffs’ argument that *Liberty Coins* did not address speech fails to recognize that any sale of precious metals inherently involved communication, particularly because the statute at issue only applied to businesses that held themselves out as precious metals dealers. PC 471 is part of Tennessee’s comprehensive law regulating the peculiar format of sales by auction; it is not a regulation of speech.

Alternatively, if this Court continues to believe that “some speech is implicated,” (DE #83 at 37), then the Court should uphold PC 471 as a regulation of conduct that only incidentally burdens speech. Plaintiffs rely heavily on *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) (“*NIFLA*”), which cites *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-456 (1978), for two circumstances in which professional speech is “afforded less protection” under the First Amendment, including: “under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech.” *NIFLA*, 138 S.Ct. at 2371. The *NIFLA* Court did not limit *Ohralik* to its facts or place any other limitations on its precedential value. The *Ohralik* Court held that a rule banning in-person solicitation by lawyers was a conduct regulation that only incidentally burdened speech. *Ohralik*, 436 U.S. at 456-57. The Court upheld the rule because the

state's interests were "strong" and the measures taken to advance those interests were "reasonable." *Id.* at 464-67. Here, as in *Ohralik*, the State's interests are strong and the measures taken to advance those interests—requiring education, training, and licensure—are reasonable.¹

PC 471 is content and speaker neutral; it does not disfavor any speaker or message. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011). The conduct that triggers coverage under PC 471 is the *sale* of goods or real estate by auction, not the communication of a message. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). If an auctioneer is not selling something, he or she does not need a license. The exemptions to PC 471 do not make distinctions based on speaker or content. (DE #107 at 9-11 & n.3).

The State's evidence is not illusory or hypothesized. (DE #105 at 8-10). Multiple witnesses—including Plaintiff Will McLemore—explained why online auctions are like in-person auctions, while timed listings are not. (DE #88-1 at 15-16; DE #107 at 9-10). The State did not invent the distinction between online auctions and timed listings for purposes of PC 471 or this litigation. As early as 2006, the Tennessee Attorney General opined that timed listings are not auctions. Op. Tenn. Att'y Gen. 06-053 at 4 (Mar. 27, 2006). Since online auctions resemble in-person auctions, they pose the same risks and require the same level of protection. Plaintiffs would have sellers and consumers who participate in online auctions be worthy of less protection than sellers and consumers who participate in the same transactions in person. The State's decision to

¹ In *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 934 (5th Cir. 2020), the Fifth Circuit overruled its decision in *Hines v. Alldredge*, 783 F.3d 197 (5th Cir. 2015), to the extent that the *Hines* decision relied on the professional speech doctrine, which was abrogated by *NIFLA*. At no point have Defendants relied on the professional speech doctrine. The *Vizaline* Court also reversed a district court ruling that occupational-licensing provisions "do not trigger First Amendment scrutiny" because it was contrary to *NIFLA*. 949 F.3d at 931. Instead, "the relevant question" that the district court was required to ask was "whether, as applied to Vizaline's [mapping] practice, Mississippi's licensing requirements regulate only speech, restrict speech only incidentally to their regulation of non-expressive professional conduct, or regulate only non-expressive conduct." *Id.* This is the precise question that this Court is required to answer. The *Vizaline* Court did not decide whether Vizaline's mapping practice constituted conduct or speech, nor did it decide what the appropriate level of scrutiny should be. *Id.* at 934.

provide the same protections to sellers and consumers who participate in online auctions is sufficient to justify PC 471 under any level of scrutiny.

The relative lack of complaints regarding online auctions is not probative. The Commission had no jurisdiction to regulate online auctions after Will McLemore's administrative case in 2016 (DE #102-1) and while this Court's preliminary injunction has been in place (DE #30). Complaints that were submitted to the Commission, despite its lack of jurisdiction, were not adjudicated (DE #94 at 82-104); therefore, there is no way to determine the veracity of the complaints or whether the number or severity of the complaints is reflective of consumer harm from online auctions.

Plaintiffs would dismantle the protections afforded to Tennessee consumers who participate in auctions conducted in Tennessee, whether in person or online, by arguing that the Commerce Clause's prohibition on regulation of extraterritorial conduct renders those protections powerless. (DE #105 at 13). Just as Tennessee cannot regulate online auctioneers located outside of the State, it cannot protect its consumers who drive to Kentucky to participate in in-person auctions there, but the State's lack of authority over conduct in other states does not render its laws powerless, much less violative of the First Amendment. *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004), involved a statute prohibiting the dissemination over the internet of materials harmful to minors. To remedy an overbroad Virginia statute that clearly restricted speech based on content, the state proposed multiple narrowing constructions, which the Court held would render the statute powerless. *Id.* at 238-39. In contrast, PC 471 regulates auctions in Tennessee, whether in person or online, and is in no way analogous to the overbroad speech restriction at issue in *PSINet*; nor is the statutory limitation to auctions in Tennessee analogous to the narrowing constructions proposed by the state in *PSINet*. The Commerce Clause does not prohibit the State from regulating otherwise regulable in-state transactions simply because they are connected to the

internet, *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 505 (5th Cir. 2001), nor does it render those regulations powerless.

II. PC 471 Does Not Violate the Dormant Commerce Clause.

PC 471 does not apply extraterritorially. By its express terms, the regulatory scheme applies only to auctions in Tennessee. Tenn. Code Ann. § 62-19-115; Tenn. Comp. R. & Regs. 0160-01-.18 (“Rule 18”). Moreover, the statute is presumed to have no extraterritorial effect. *BMW Stores, Inc. v. Peugeot Motors of America, Inc.*, 860 F.2d 212, 215 n.1 (6th Cir. 1988).

Plaintiffs mischaracterize the regulatory and legislative history to support their Commerce Clause claims. The State began regulating online auctions no later than 2001, when the Commission promulgated Rule 18, which limits the application of the State’s auction laws to “electronic media or computer-generated auction[s] originating from within Tennessee.” If the State did not regulate online auctions before 2006, there would have been no need to clarify that the State’s auction laws do not apply to “fixed price or timed listings that allow bidding on an Internet web site but which do not constitute a simulcast of a live auction.” 2006 Tenn. Pub. Acts Ch. 533. The Commission lost jurisdiction to regulate online auctions when Mr. McLemore successfully argued in 2016 that his online auctions were timed listings. (DE #102-1). Thus, a statutory change was required in 2019 to regulate online auctions and clarify the intended meaning of timed listing. Defendants’ previous statements are consistent with this history.

Plaintiffs likewise mischaracterize the State’s enforcement of the auction laws. After Mr. McLemore’s 2016 administrative case, the Commission did not enforce the auction laws against online auctions and dismissed any complaints that were submitted, for lack of jurisdiction.² After

² The lone exception was PCI Auctions, which agreed to a consent order in 2017. (DE #94-2). Earlier, in 2015, Everything But the House likewise agreed to a consent order. (DE #94-3). Since these entities executed consent orders,

this Court's preliminary injunction, the State did not send out letters of instruction or otherwise enforce the auction laws against online auctions. (DE #107 at 12 n.6). Rule 18 shows what the Commission considers to be an electronic auction in Tennessee; Plaintiffs' conjecture about what the Commission might do in the future does not. Since only auctions originating from within Tennessee are regulated, there is no Commerce Clause violation.

PC 471 does not impermissibly burden commerce. Plaintiffs fail to demonstrate any burdens on interstate commerce from a correct reading of the statute. Instead, Plaintiffs fall back on their flawed lack of complaints argument and incorrect reading of the statute to apply to online advertisements by auctioneers located outside of Tennessee. While it is true that PC 471 does not prevent auctioneers, whether in person or online, from fleeing the State to escape regulation (DE #105 at 24), it does prevent Tennessee auctioneers from moving their transactions to the internet to escape regulation, *Ford Motor Co.*, 264 F.3d at 505. Since PC 471 applies only to auctions in Tennessee, there is no burden on interstate commerce, and the law easily passes the balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

CONCLUSION

For the foregoing reasons, as well as those stated in Defendants' motion for summary judgment and supporting memorandum, 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.

they agreed that their activities in Tennessee were within the Commission's jurisdiction. These complaints of course predate PC 471 and do not show how PC 471 will be applied. If PC 471 were to be applied extraterritorially in the future, the complaint respondent would likely have an as-applied Commerce Cause claim, but the Commission has not applied or threatened to apply PC 471 to any out-of-state Plaintiff in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply has been served on the following via the court's electronic filing system on June 10, 2021:

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