

**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’ RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT**

For the following reasons, Plaintiffs’ motion for summary judgment (DE #90) should be denied:

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

A. PC 471 Should Be Upheld Because It Regulates Business Conduct and Economic Activity, Not Speech, and It Is Rationally Related to a Legitimate Government Purpose.

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).

Like the statute at issue in *Liberty Coins*, PC 471 is “first and foremost, a licensing statute.” 748 F.3d at 691. PC 471 “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.* at 693. Under rational basis review, PC 471 should be upheld

because it is “rationally related to a legitimate government purpose.” *Id.* at 694. “There is a strong presumption of constitutionality and the regulation will be upheld so long as its goal is permissible and the means by which it is designed to achieve that goal are rational.” *Id.* “[T]he 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).

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. 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.¹ *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, which have been regulated since 1967. *See Liberty Coins*, 748 F.3d at 694-95; (Allen Dep. at 140:8-141:22; Ochs Dep. Ex.

¹ Plaintiffs’ assertion that Tennessee “has the most burdensome requirements to become an auctioneer” (DE #91 at 1 n.1) is based on a study that has not been updated since May 2012 and does not reflect current license requirements under Tennessee law. *See* Institute for Justice, *License to Work: A National Study of Burdens from Occupational Licensing, Auctioneer*, available at <https://ij.org/report/license-to-work/ltw-occupation/?id=5>.

2 at 1). Finally, it was reasonable for the legislature to distinguish between online auctions and timed listings, which are not auctions. *See Liberty Coins*, 748 F.3d at 694-95; (Am. Compl. Ex. 10 at 30:1-3 (“[T]he difference is an extended time auction is absolutely and unequivocally just like a live auction and a fixed time is not.”) & Ex. 11 at 30:9-12 (“[I]n 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 (Mar. 27, 2006).

As in *Liberty Coins*, PC 471 “proscribes 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. 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 business conduct and economic activity, not speech, just like the offer and acceptance in a traditional contract. 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. PC 471 “does not burden the commercial speech rights of unlicensed” auctioneers because such auctioneers “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. *Id.*

Alternatively, PC 471 should be upheld as a regulation of economic activity that only incidentally burdens speech, which requires 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). *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)).

Like the in-person solicitation at issue in *Ohralik*, an auction is “a business transaction in which speech [i]s an essential but subordinate component.” 426 U.S. at 457. Like a lawyer’s procurement of remunerative services, an auction “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. An auction is thus “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 the measures taken by the State to advance this interest—requiring education, training, and licensure—are reasonable. *Id.* Accordingly, as in *Ohralik*, the State’s regulations do not violate the First Amendment.

B. The Cases Upon Which Plaintiffs Rely Are Inapposite.

PC 471 is nothing like the law at issue in *NIFLA* or any other case upon which Plaintiffs rely. In *NIFLA*, the Supreme Court struck down a statute that required pro-life clinics to deliver government-drafted notices about the availability of free or low-cost abortions because the statute was an impermissible content-based speech restriction. 138 S.Ct. at 2371. In other words, the law required medical professionals to speak, whether they wanted to or not, and told them exactly what to say, whether they agreed with the message or not. This was obviously a content-based speech restriction, and it is not surprising that the Court struck it down. But PC 471 has nothing in common with the obvious content-based speech restriction at issue in *NIFLA*. PC 471 does not compel anyone to speak or tell them what to say; rather, PC 471 requires persons who wish to sell goods or real estate at auction in Tennessee to complete a reasonable number of hours in the basic fundamentals of auctioneering, serve briefly under a licensed auctioneer, and obtain a license. Notably, the *NIFLA* Court did not hold that a state cannot require a person who wishes to provide medical treatment to patients drawn from the public to graduate from medical school, complete a medical residency, and obtain a medical license, even though doctors necessarily talk to their patients. PC 471 is no different from laws requiring doctors, lawyers, psychologists, teachers, and other professionals to be educated and licensed to practice their profession. It is a regulation of economic activity that only incidentally burdens speech, if at all.

Moreover, the *NIFLA* Court directly cites *Ohralik* for the proposition that “States may regulate professional conduct, even though that conduct incidentally involves speech.” *NIFLA*, 138 S.Ct. at 2372. Although *NIFLA* does not specify the required level of scrutiny for conduct regulations that incidentally burden speech, the *Ohralik* Court upheld the state’s attorney disciplinary rule banning in-person solicitation because the state’s interests were “strong” and the rule it promulgated to advance those interests was “reasonable.” 426 U.S. at 460, 466-67. The same rationale applies here: The State’s interests are “strong,” and PC 471 is a “reasonable” means of advancing those interests.

The *NIFLA* Court also cites *Casey* for the proposition that “professional speech” is “afforded less protection” in circumstances where the State regulates professional conduct that “incidentally involves speech.” *NIFLA*, 138 S.Ct. at 2372. In *Casey*, the Supreme Court upheld the state’s informed-consent requirement for abortions against a First Amendment challenge: “To 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.” 505 U.S. at 884 (internal citations removed). Here, the State regulates persons who sell goods or real estate at auction in Tennessee, and the incidental burdens on speech, if any, are no greater than the burdens imposed on doctors by regulations requiring them to make certain disclosures to patients to obtain the patients’ informed consent to an abortion or other medical procedure. *NIFLA* and the cases upon which it relies thus compel this Court to deny the plaintiffs’ motion for summary judgment.

In *Sorrell*, the Supreme Court struck down a statute that prohibited pharmaceutical manufacturers from using prescriber-identifying information for marketing purposes because the statute was an impermissible speaker- and content-based speech restriction. 564 U.S. at 563-65.

The *Sorrell* Court recognized once again that “restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct” and that “the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.” *Id.* at 567. The statute at issue in *Sorrell* prohibited certain speakers (pharmaceutical manufacturers) from speaking based on the content of their message (marketing), which was an obvious speaker- and content-based speech restriction. But the *Sorrell* holding has no bearing on the validity of PC 471 because PC 471 does not restrict speech, nor does it disfavor any speaker or message. Rather, PC 471 requires persons who wish to sell goods or real estate at auction in Tennessee to be educated, trained, and licensed.

In *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010), the Supreme Court found that a statute prohibiting material support for terrorism was a content-based speech restriction because whether the plaintiffs were permitted to speak depended on what the plaintiffs said. The statute prohibited the plaintiffs from speaking to two entities designated as foreign terrorist organizations if the plaintiffs’ speech to those groups imparted a “specific skill” or communicated advice derived from “specialized knowledge.” *Id.* The Court found that “the conduct triggering coverage under the statute consists of communicating a message.” *Id.* at 28. Here, the conduct that triggers coverage under PC 471 is the sale of goods or real estate at auction in Tennessee, not the communication of a message. If an individual is not selling something at auction, the auction laws do not apply.

The Sixth Circuit’s decision in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), supports Defendants’ rational basis arguments. In that case, the Court’s description of the rational basis test mirrors the description provided in *Liberty Coins*. Rational basis review

“require[es] only that the regulation bear some rational relation to a legitimate state interest.”

Craigsmiles, 312 F.3d at 223.

Even foolish and misdirected provisions are generally valid if subject only to rational basis review. As we have said, a statute is subject to a strong presumption of validity under rational basis review, and we will uphold it if there is any reasonably conceivable state of facts that could provide a rational basis. Those seeking to invalidate a statute using rational basis review must negate every conceivable basis that might support it. . . . A proffered explanation for the statute need not be supported by an exquisite evidentiary record; rather we will be satisfied with the government’s rational speculation linking the regulation to a legitimate purpose, even unsupported by evidence or empirical data. Under rational basis review, it is constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.

Id. at 223-24 (internal citations and quotation marks removed).

In *Craigsmiles*, the Sixth Circuit struck down a statute providing that only licensed funeral directors could sell caskets because protection of funeral directors from economic competition was the only possible justification for the law. *Id.* at 228-29. The Court explained that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose.” *Id.* at 224. Here, by contrast, PC 471 bears a “rational relation to a legitimate state interest.” *Id.* at 223. Even if the legislature intended PC 471 to protect licensed auctioneers from economic competition, that reasoning is “constitutionally irrelevant” as long as there is some rational basis for the law.² *Id.* at 224. While PC 471 may protect licensed auctioneers from competition, it also provides sellers and consumers who utilize online auctioneers the same

² Plaintiffs’ case relies heavily on a recitation of regulatory and legislative history regarding efforts to regulate online auctions in Tennessee. That history is irrelevant to the constitutionality of PC 471. It is common and unsurprising for interest groups to speak out in favor of legislation they support. That PC 471 was supported by certain licensed auctioneers has no bearing on its constitutionality, just as Mr. McLemore’s opposition to PC 471, because he benefits from online auctions not being regulated, has no bearing on its constitutionality.

protections afforded to sellers and consumers who utilize in-person auctioneers. Providing the same protections to sellers and consumers, regardless of auction format, is undoubtedly a legitimate state interest, and it is rational to link PC 471 to that legitimate interest. The rationale of *Craigmiles* thus supports the constitutionality of PC 471 and requires the Court to deny Plaintiffs' motion for summary judgment.

C. The Exemptions to PC 471 Do Not Make Impermissible Speaker-Based or Content-Based Distinctions.

Plaintiffs' chief argument that PC 471 makes impermissible speaker- or content-based distinctions is that the law regulates online auctions, but not timed listings. It is not arbitrary, irrational, or surprising that Tennessee's auction laws apply to auctions, but not to transactions that are not auctions. Like a fixed price listing, a timed listing, such as an eBay listing, is not an auction because it does not "culminat[e] in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience." Tenn. Code Ann. § 67-19-101(2); Op. Tenn. Att'y Gen. 06-053 at 4. Indeed, Plaintiffs choose to use the online auction format, rather than the timed listing format, precisely because the online auction format culminates in the acceptance of the highest or most favorable offer, while the timed listing format does not. (Am. Compl. ¶ 33; McLemore Auction Dep. at 82:8-83:4). So, Plaintiffs agree that there is a reasonable distinction between online auctions and timed listings, yet fault the State for making that reasonable distinction in the State's auction laws. Moreover, the Task Force recommended adding a definition of timed listing and requiring a license for online auctions, but not for timed listings, because online auctions mimic the behavior of an auctioneer at an in-person auction, while timed listings do not. (Am. Compl. Ex. 10 at 30:1-3 ("[T]he difference is an extended time auction is absolutely and unequivocally just like a live auction and a fixed time is not.") & Ex. 11 at 30:9-12 ("[I]n 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). It is not a speaker- or content-based speech restriction for the auction laws to define the conduct that constitutes an auction and to require a license for that conduct, but not for conduct that does not constitute an auction.

PC 471’s exemptions for auctions conducted by persons who are otherwise regulated likewise do not make impermissible speaker- or content-based distinctions. PC 471, section 6, exempts auction sales of tobacco that are regulated by Tenn. Code Ann. §§ 43-19-101 *et seq.*; livestock auction sales that are regulated by the United States Department of Agriculture Packers and Stockyards Administration; and auction sales of nonrepairable or salvage vehicles that are regulated by Tenn. Code Ann. § 55-17-120. Because these transactions were already regulated, it was reasonable for the legislature to conclude that the public was sufficiently protected by the existing regulations and additional regulation was unnecessary. (Am. Compl. Ex. 13 at 3:6-5:19). The policy decision to not add unnecessary, duplicative regulation to already-regulated transactions is in no way a speaker- or content-based speech restriction.

PC 471, section 6, also contains numerous exemptions for auctions conducted by or on behalf of persons who are not in the business of auctioneering, such as “[a] person acting as a receiver, trustee in bankruptcy, guardian, administrator, executor, or other person acting under order of a court”; “[a] trustee acting under a trust agreement, deed of trust or will, or a secured party selling collateral after default by a debtor in accordance with title 47, chapter 9”; “[a]n auction conducted by or under the direction of a governmental entity or pursuant to a judicial order or decree”; “[a]n auction conducted by or on behalf of a political party, church, or charitable corporation or association”; and “[a]n individual who generates less than twenty-five thousand dollars (\$25,000) in revenue a calendar year from the sale of property in online

auctions.” These exemptions serve the same function as the “hold themselves out” requirement at issue in *Liberty Coins*, as to which the Sixth Circuit 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.” 748 F.3d at 695. It was likewise reasonable for the Tennessee legislature to use exemptions to distinguish between persons who are in the business of selling goods or real estate at auction and persons who conduct auctions only infrequently and for a limited purpose. For instance, it was reasonable for the legislature to conclude that infrequent auctions to benefit a political party, church, or charitable corporation or association do not pose a significant enough risk to the public to warrant a license.³ The policy decision to distinguish between persons who are in the business of auctioneering from individuals who conduct only infrequent, limited-purpose auctions is in no way a speaker- or content-based speech restriction.

D. The Relative Lack of Complaints Regarding Online Auctions Has No Probative Value.

Plaintiffs seem convinced that the number of complaints itemized in a Task Force table is dispositive that online auctions do not pose enough of a consumer risk to warrant regulation. But the Commission had no jurisdiction to regulate online auctions during the period that the Task Force considered (2016 to 2018). Since the Commission had no jurisdiction to regulate online

³ The statute’s use of the word church necessarily includes all places of worship and does not discriminate against mosques or synagogues. *Capps v. Metro. Gov’t of Nashville & Davidson County*, 2008 WL 5427972, *2, *7-*8 (Tenn. Ct. App., Dec. 31, 2008); Internal Revenue Service, Publication 1828, *Tax Guide for Churches and Religious Organizations* 1 (Aug. 2018) (“The term church is found, but not specifically defined, in the Internal Revenue Code (IRC). The term is not used by all faiths; however, in an attempt to make this publication easy to read, we use it in its generic sense as a place of worship including, for example, mosques and synagogues.”), available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

auctions, it is not surprising, much less probative, that it received far more complaints regarding in-person auctions within its jurisdiction during that time.⁴ It is safe to presume that during that time, the Commission also received far more complaints about in-person auctions than it received about the practice of cosmetology, which is likewise not within its jurisdiction. Moreover, the online auction complaints submitted to the Commission, despite its lack of jurisdiction, were not adjudicated because the Commission dismissed them for lack of jurisdiction.⁵ For these reasons, there is no way to evaluate the veracity or severity of the complaints or determine whether the volume or severity of complaints accurately reflects consumer harm from online auctions.

Plaintiffs make the same assertion with respect to the lack of complaints regarding online auctions during the COVID-19 pandemic. But during the pandemic, the Commission was “enjoined and restrained from applying Tennessee’s auctioneering laws and licenses to ‘electronic’ exchanges, or online auction websites.” (DE #30 at 2). Because the Commission was enjoined from applying the auction laws to online auctions during the pandemic, the lack of complaints regarding online auctions is not at all probative.⁶ Perhaps the Commission did not receive many complaints because of the injunction. Or perhaps licensed auctioneers who were

⁴ Persons who called the Commission to complain about online auctions were told that the Commission did not investigate complaints regarding online auctions, because the Commission lacked jurisdiction over these types of auctions. (DE #20-2 ¶¶ 10 & 11).

⁵ The lone exception was PCI Auctions, which agreed to a consent order in 2017. (TAC 30(b)(6) Dep. Ex.6).

⁶ As Plaintiffs know, and contrary to their assertions (DE #104 at 4-5), the Commission did not send out letters of instruction to persons who conducted online auctions, nor did it take any other enforcement action against online auctions, because of the preliminary injunction ordered by this Court. (Porcello Decl. Exs. 1 & 2; Public Meeting, Tenn. Auctioneers Comm’n, Aug. 17, 2020, at 25:50, *available at* https://www.youtube.com/watch?v=wg1daQ9Ckgk&list=PLWgyob0pqnhyRcW7GVqMhyHxXgiULRB_Bh&index=4; Pls’ SUMF Nos. 268-70). And the Commission posted a public notice on its website explaining the preliminary injunction and the Commission’s lack of jurisdiction over online auctions. (Announcements, Tenn. Auctioneers Comm’n, *available at* <https://www.tn.gov/commerce/regboards/auctioneers.html>).

required because of the pandemic to conduct their auctions online, rather than in person, did not generate many complaints because auctioneers who are properly educated, trained, and regulated know what they are doing and do it professionally.

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

PC 471 does not apply extraterritorially. This Court is required to presume that PC 471 is “intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of” Tennessee. *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). “[A]n extraterritorial effect is not to be given statutes by implication.” *Id.* 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.⁷

Moreover, 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). Read in this context, the prohibition in Tenn. Code Ann. § 62-19-

⁷ 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.

102(a)(1) against acting as, advertising as, or representing to be an auctioneer is a prohibition against 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). Taken to its logical conclusion, Plaintiffs’ argument would extend the reach of the prohibition globally, regardless of whether an auction is conducted online or in person, so long as the auctioneer’s website states that he or she is an auctioneer. This could not possibly be the legislature’s intent. Just as Tennessee has no interest in prohibiting a California attorney from stating on his or her website that he or she is an attorney, Tennessee has no interest in prohibiting an Arizona auctioneer from stating on his or her website that he or she is an auctioneer.

PC 471 does not impermissibly burden commerce. PC 471 regulates auctions conducted in Tennessee 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 Tennessee. Because the State is regulating purely in-state conduct—*i.e.*, auctions conducted from within Tennessee—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. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

PC 471 does not license and regulate an instrumentality of commerce. PC 471 regulates auctions conducted within Tennessee; it does not regulate the internet or require a license to use 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.*

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be denied.

Respectfully Submitted,
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I hereby certify that a copy of the foregoing Response has been served on the following via the court's electronic filing system on May 28, 2021:

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