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

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

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

This Court already concluded that Plaintiffs are likely to succeed and face "immediate and irreparable harm." (Doc. No 29 at 28). The state presents little new. (Doc. No. 53). First, this Court correctly found that Plaintiffs were injured by PC 471, and, second, that PC 471 likely violates the Commerce Clause. The state's recent discovery of Tenn. Comp. R & Regs 0160-01-.18 governing "computer-generated auctions" (Rule 18) changes nothing. Third, auctions are speech, not conduct or speech incidental to conduct. Fourth, supplemental jurisdiction over the state constitutional claim exits, notwithstanding *Pennhurst v. State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Fifth, a Privileges or Immunities Claim should not be dismissed at this stage.

LEGAL STANDARD

The Federal Rules of Civil Procedure allow for a case to be dismissed if it fails to state a claim upon which relief can be granted. Such a motion is not a challenge to the party's factual allegations, and so the court construes the complaint in the light most favorable to the non-moving party. Fed. R. Civ. P. 12(b)(6). A court should not dismiss a complaint even when it is unlikely the plaintiff will prevail. *Nader v. Blackwell*, 545 F.3d 459, 470 (6th Cir. 2008). Although the claims

must be plausible, all reasonable inferences, including those related to a plaintiff's legal theories, are construed in favor of plaintiffs. *Directv. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *Hebron v. Shelby Cnty. Gov't*, 406 Fed. App'x 28, 30 (6th Cir. 2010). Similarly, Fed. R. Civ. P. 12(b)(1) allows for dismissal of a complaint when the court lacks subject matter jurisdiction. Article III of the U.S. Constitution limits the federal courts to consideration of actual cases and controversies, which gives rise to the concept of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992). A motion attacking a complaint based on subject matter jurisdiction relies on a similar standard as a Rule 12(b)(6) motion. *Jetform Corp. v. Unisys Corp.*, 11 F. Supp. 2d 788, 789 (E.D. Va. 1998). A court must take the pleadings as true and construe them in the light most favorable to the party opposing the motion. *Scheurer v. Rhodes*, 416 U.S. 232, 237 (1974); *Great Lakes Educ. Consultants v. Fed. Emergency Mgmt. Agency*, 582 F. Supp. 194, 194 (W.D. Mich. 1984). To have standing, Plaintiffs must show that they have suffered an injury that is fairly traceable to the defendants' allegedly unlawful conduct. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 280-84, 291 (6th Cir. 1997).

I. PLAINTIFFS INCLUDE "AT LEAST ONE" INJURED PLAINTFF.

This Court correctly found Plaintiffs face an immediate injury. Furthermore, even under the state's logic, standing exists.

First, this Court's recognition of an "irreparable injury" for Will and Aaron more than clears the Article III injury requirement. (Doc. No. 29 at 26).[1] McLemore Auction and Purple Wave would have to disrupt their operations to take substantial and costly actions to bring

[1] The state's argument for Aaron and Purple Wave rests on its promise that it will only regulate online auctions that "originate" in Tennessee. (Doc. No. 53 at 24). This Court correctly found that PC 471 does not have a geographic limitation. (Doc. No. 29 at 12-15). Rule 18 is another effort to contort a limitation into statute that does not have one. This argument is fully addressed below.

themselves into compliance with PC 471. Their "imminent injury" easily satisfy the more lenient standard for a motion to dismiss. *See Magaw*, 132 F.3d at 280-84, 291 (pre-enforcement review of Commerce Clause challenge appropriate where plaintiffs suffered harm to their business from passage of targeted regulation).

Second, the IAA includes members who meet even the state's flawed standard. By the state's reasoning, Will is not injured because he already had an auction license, and thus is not injured by including online auctions. (Doc. No. 53 at 24). That logic acknowledges that imposing the licensing requirement on unlicensed people is an injury. That should end things. Will's auction managers, Blake and Jamie, do not have licenses, but would need one. (AC at ¶ 24). PC 471 already caused another manager, Wilson, to get license. (*Id.* at ¶ 269A). All 3 are members of the IAA, a plaintiff. (*Id*. at ¶ 206). Will is not asserting their injuries. The IAA is. It has organizational standing to assert the injuries of its members. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (associations can sue on behalf of members). This, in turn, confers standing on all plaintiffs under the "one plaintiff rule," which the state overlooks. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n. 2. (2006) (One party with standing is sufficient to satisfy Article III); *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015) (same); *Liberty Legal Found. v. Nat'l Democratic Party of the USA, Inc.*, 875 F. Supp. 2d 791, 800 (W.D. Tenn. 2012). The state implicitly concedes the Complaint is sufficient.

Finally, even when it comes to the injury to Will's free speech rights, the state misunderstands. Will is not trying to vicariously assert the rights of his unlicensed managers. (Doc. No. 53 at 24). Under the new law, Will himself can no longer *say* that he will pay a referral fee to an unlicensed person for information leading to a successful auction. (AC at ¶ 206, 278, 280). The state is not only prohibiting conduct in the form of a payment for referral. (Doc. No. 53 at 17). It

takes things into speech and has already "recommend[ed]" that Will self-censor his own website. (AC at ¶ 197). While the state is entitled to prove that this was an incidental speech restriction (Doc. No. 53 at 17), that goes to the merits. On the face of the Complaint, the state has told Will he cannot say something that he could before. This alone is a sufficient basis to allow a free speech claim to proceed.

Plaintiffs have standing. This Court has jurisdiction to consider the Complaint.

II. PLAINTIFFS STATED A VALID COMMERCE CLAUSE CLAIM.

The Complaint stated a valid Commerce Clause claim. First, the online auction license is extraterritorial. PC 471 can no more be saved by a 2001 regulation that is, unsurprisingly, not a reasonable interpretation of a 2019 law that needs no interpretation because it "contains no qualifications, no geographical limitation, and no explanation of what it means to 'act as, advertise as, or represent to be an auctioneer.'" (Doc. No. 29 at 12). Second, PC 471 would still fail the *Pike* test even if Rule 18 was an effective rule.

A. The online auction license is extraterritorial.

A state commits a *per se* violation of the Commerce Clause when it enacts extraterritorial regulations. *See Healy v. Beer Inst.*, 491 U.S. 324, 332 (1989); *Am. Bev. Ass'n. v Snyder*, 735 F.3d 362, 373 (6th Cir. 2013). A law is extraterritorial when "the practical effect … is to control conduct beyond the boundaries of the state." *Healy*, 491 U.S. at 336 (citation omitted). The "practical effect" of the online auction license is to control activity outside of Tennessee. A Tennessee internet regulation that similarly lacked geographic scope in its terms was recently found unconstitutional in *Backpage.com LLC. v. Cooper*, 939 F. Supp. 2d 805, 841-2 (M.D. Tenn. 2013). Just like the law in *Backpage.com* – a case the state ignores – PC 471 applies to anyone who acts, advertises, or represents to be, an auctioneer, with no geographic limitation. (Ex. 1 at ¶ 5(a)(1)).

As this Court found, the text of the statute lacks a geographic limitation, and it would be impermissible for the Court to create one. (Doc. No. 29 at 12-13). So when the state expanded it to auctions *online*, that is, lacking a physical location, the "practical effect," *Healy*, 491 U.S. at 336, was the regulation of out-of-state conduct because auction websites "act, advertise, and represent" anywhere and everywhere, unlike an in-person auction. (Doc. No. 29 at 13). As this Court found, Purple Wave says it is a "true auction company" on a website accessible in Tennessee even when Aaron is in Kansas. (*Id*. at 18). Per the terms of PC 471, Purple Wave needs a Tennessee license. This Court correctly ruled that PC 471 regulates out-of-state.

Scrambling to find a textual basis for a geographical limitation, the state turns to a rule it enacted almost 20 years before. Remarkably (and for the first time),[2] the state now maintains that it has regulated online auctions since 2001 under Rule 18. (Doc. No. 53 at 7). According to the state, PC 471 sought not to finally regulate online auctions, but to address those who "sought to evade the regulation by relying on the exemption for timed listings," or, in other words, to narrow the eBay exemption. (*Id.* at n. 2). For four reasons, the state's newest effort to shoehorn a limitation into PC 471 out of a 20 year old rule does not resolve the latent Commerce Clause problem.

1) The statute's scope is clear and not subject to regulatory interpretation.

PC 471 is not subject to regulatory interpretation because its text is clear. (Doc. No. 29 at 12-13). Under Tennessee cases, agency interpretation only comes into play when a statute is unclear or ambiguous.[3] *Nashville Mobilphone Co. v. Atkins*, 536 S.W.2d 335, 340 (Tenn. 1976);

[2] The state long appeared not to notice Rule 18, not mentioning it or its underlying "originating in" standard until a reply brief, despite many chances. *See* Doc. No. 13, 20, 32.

[3] The state demands "considerable deference" (Doc. No. 53 at 7) but does not explain what deference it thinks it deserves. Tennessee has never embraced standard of deference in *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), where the court "give[s] effect to" an agency's interpretation of an ambiguous statute. The Tennessee Supreme

Roddy v. Mfg. Co. v. Olsen, 661 S.W.2d 868, 871 (Tenn. 1983); *see also Tenn. Dep't of Health v. Sparks*, 2019 Tenn. App. LEXIS 439 at *11-12 (Tenn. Ct. App. Sept 6, 2019) (courts review agency interpretation *de novo*). If the statute's text is clear, then "the examination need proceed no further because both the courts and agency must give effect to the unambiguously expressed legislative intent." *Crites v. Smith*, 826 S.W.2d 459, 474 (Tenn. Ct. App. 1991) (Koch, W., concurring). If interpretation becomes necessary, then the "ultimate determination" lays with the courts – not agencies – and when the agency attempts to alter the meaning of a clear statute the courts are "impelled to depart from it." *Atkins*, 536 S.W.2d at 340. Judges perform the task of legal interpretation under Tennessee law.

This Court correctly found that PC 471 unambiguously lacks a geographic limitation. (Doc. No. 29 at 12). Inserting one to save it for the state would not be interpretation, but revision. *See Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991) ("courts do not rewrite statutes to create constitutionality."). When the text is clear, statutes should not be interpreted in ways that would "limit or extend the meaning of the language." Tenn. Code Ann. § 1-3-105(b); *see Nat'l Gas Distribs., Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991) (statute should be read "without any forced or subtle construction that would extend or limit its meaning"). The state manages to do both, at once *limiting* PC 471's scope while also *expanding* its text by inserting an entirely new element. This Court should not hesitate to again reject again the state's contrived interpretation.

2) Rule 18 unreasonably interprets PC 471 even if it was unclear.

Tennessee courts accord agency interpretations "respect and … *appropriate* weight," but more when pertaining to "doubtful or ambiguous statutes." *Atkins*, 536 S.W.2d at 540 (emphasis

Court has only ever cited to *Chevron* once, in reference to federal agency law. *See Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997). Tennessee's standard of "deference" is addressed more below.

added). Ultimately, interpretation of statutes is a legal determination that the courts review *de novo*. *See id.* An agency's construction should be "considered," particularly when the legislature had not, unlike here, considered the issue. Otherwise, "the courts are ultimately responsible for interpreting statutes." *Crites*, 826 S.W.2d at 474 (Tenn. Ct. App. 1991). The "appropriate" weight should be determined by the strength of the agency's legal arguments. *See S. Rehab. Grp., P.L.L.C. v. Sec'y of HHS*, 732 F.3d 670, 685 (6th Cir. 2013) (deference depends on "thoroughness evident in its consideration, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade"). Assuming that PC 471 is ambiguous, the state's consideration of PC 471 when it in enacted Rule 18 patently warrants no deference. In 2001, the Auction Commission was obviously not "thorough" in its consideration of how to administer the 2019 law. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (lead opinion of Kagan, J.) (agency interpretation must reflect "fair and considered judgment"). On the value of the agency's "consideration," the weight that should be accorded Rule 18 is nil.[4] *Id.* at 2416 (interpretation must be "actually made by the agency," not "ad hoc statement").

For three more reasons, Rule 18 unreasonable "interprets" PC 471, hardly surprising since they have nothing to do with each other. *First*, Rule 18 would fundamentally alter how the state regulates online auctions under PC 471. Courts cannot force an interpretation that would alter the statute's application. *See Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). PC

[4] Neither the presumption against extraterritoriality or for constitutionality helps the state. The presumption against extraterritoriality does not extend to state law (Doc. No. 29 at 12) and would be overcome in any event. (*Id.*) Additionally, the presumption of constitutionality actually hurts the state's case. If it is true that it only regulates intrastate, then the corresponding benefit in consumer protection approaches zero. Such a pointless regulation makes it *less* likely that PC 471 will survive a balancing analysis under *Pike*, the First Amendment, or even rational basis. *See PSInet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (Virginia's narrowing construction of internet regulation make it less likely to survive First Amendment or *Pike* because would have "no local benefit.").

471 applies to those who are acting as, advertising as, or representing to be, an auctioneer. (Ex. 1 at § 5(a)(1)). That application does not align with Rule 18, which applies to computer-generated auctions "originating from within Tennessee." Whatever "generating" or "originating" means is entirely different from "acting, advertising and representing." The state regulates not only generation of computer auctions, but mere representation. When Aaron says he is a "true auction company" on his website, then he is acting, advertising and representing to be an auctioneer in Tennessee even if it later results in an online auction that "originates" from Kansas, or even if he never "generates" an auction at all. Any "representation" occurs in Tennessee independent of whether Aaron initiates an online auction that "originates" in Kansas, and that is what the state regulates per PC 471. PC 471 applies to acting, advertising, and representing, not "generating" and "originating." If the state does not require a license from Aaron, then it is no longer administering PC 471. "Generation" and "origination" might make for a better law, but that is not the law that he state wrote.

Second, Rule 18 contravenes PC 471's very purpose. When an ambiguity does exist, the courts must give intent to the purpose of the statutory scheme. *See Johnson*, 151 S.W.3d at 507. Narrowing constructions are only ever permissible when "the text or other source of [legislative] intent" provides a clear line of instruction for the courts. *Reno v. ACLU*, 521 U.S. 844, 884 (1997). The stated "goal" (AC at ¶ 111) of PC 471 was no mystery. After 3 failed legislative efforts and a special Task Force, it addressed "the elephant in the room" – online auctions. (*Id.*). If unlicensed persons can still "conduct" online auctions (Ex. 1 at § 5(b)), so long as the computer generating the auction originates out-of-state, then it undermines the stated purpose. Instead of "getting our arms around this internet and auctions" (AC at ¶ 168), the state would be getting its arms around the few individuals that cannot coordinate with someone in another state with a computer. The

state can point to no legislative history to support the idea that anyone would have worked so hard to enact a law so futile. (Doc. No. 29 at 12). The state's interpretation is, aside from being absurd, not the law enacted. Unsurprisingly, the 2001 regulation makes for a poor fit with the 2019 law.

The state's interpretation is unreasonable for a *third* reason. While PC 471 lacks a geographic limitation, the exemptions do not. Words in a statute are known "by the company they keep." *Wallace,* 546 S.W.3d at 52-53. Courts presume that every word has meaning, *Faust v. Metro. Gov't of Nashville*, 206 S.W.3d 475, 489-90 (Tenn. Ct. App. 2006), and do not interpret statutes in such a way as to render words superfluous or redundant. *Johnson*, 151 S.W.3d at 507. Statutory exemptions can therefore be helpful in resolving clashing interpretations. PC 471 has two exemptions specific to online auctions that are squarely are limited to "in this state." (Ex. 1 at § 6(x), (xi)). Furthermore, these exemptions are bracketed by two other exemptions specific to online auctions, both of which *lack* an in-state requirement, (*id.* at 6(ix), (xii), further indicating that the state did not intend a general geographic limitation. The state certainly knew how to draft an in-state limitation. These exemptions discredit an interpretation that would read in an overarching geographic limitation. *See United States v. Johnson,* 529 U.S. 53, 58 (2000) ("when Congress provides exceptions in a statute … [t]he proper inference … is that Congress considered the issue of exceptions and, in the end, limited that statute to the ones set forth."). It would mean that the exemptions that have an in-state limitation do not need them, and the ones that don't now do. The state's interpretation moots and makes redundant specified words in the exemptions. The general thrust of PC 471 is obvious: generally regulate online auctions, making exemptions narrowly available to only large in-state businesses with legislative influence. (AC at ¶ 173, 178). When Tennessee wished to limit the reach of the online auction statutes, it knew how. The proposed interpretation fundamentally rejects the statutory scheme.

3) The state's regulation is a convenient litigation position.

Even when agencies present reasonable interpretations of ambiguous statutes, courts do not defer to a "convenient litigating position," or "*post hoc* rationalization." *Kisor*, 139 S. Ct. at 2417 (2019). The state's reliance on Rule 18 is both. The state has not regulated online auctions since 2001, and PC 471 was not an effort to limit the eBay exemption. The Task Force recommendations *separately* recommended adding the term "electronic" so online auctions could be regulated, before it *also* proposed to narrow the eBay exemption. (AC at ¶¶ 159-60). Certainly, none of the insiders knew that the state already regulated online auctions, to include : the head of the TAA, David Allen (AC at ¶¶ 110 (regulation of online auctions "is a must"), 130 ("a real need to look at oversight for online auctions because we all agree that's not going to diminish in activity,") 141 ("are we going to be a state that regulates online auctions. I think we should be")); Defendant Morris (*id.* at ¶¶ 138 ("we have either got to include online auctions or get rid of the auction law") 168 ("everybody's trying to get their arms around this internet and auctions")), and, most notably, the sponsor of PC 471, who said that "when these bills [regulating auctions] were drafted 70 years ago … we didn't have computers." (AC at ¶ 177). Only *after* this Court issued its preliminary injunction on Commerce Clause grounds did the state suddenly decide that Rule 18 was somehow an interpretation of PC 471, and that the state had regulated online auctions since 2001. The state's reliance on Rule 18 is an obvious "*post hoc* rationalization[n]," *Kisor*, 139 S. Ct. at 2417 (citations omitted), that it adopted only after this Court's issued its preliminary injunction.

Even in it its prior pleadings, the state recognized that PC 471 licensed online auctions:

- "In 2019, the legislature extended [the auctioneer license] to auctions that are conducted by electronic exchange with potential purchasers," (Doc. No. 13 at 13);
- "It was also reasonable for the state to believe that in enacting PC 471 that auctioneers who conduct auctions by electronic means should be regulated and licensed in the same manner as auctioneers who conduct auctions by oral or written means." (Doc. No. 20 at 9);

- "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." (Doc. No. 32 at 13).

The state also forgets its prior contention that the relative lack of consumer complaints surrounding online auctions attributed to the fact that it did not yet regulate them. (Doc. No. 29 at 23).

The state has trouble keeping its story straight. "Origination" was, until now, not the standard. When this Court asked how the state proposed only regulating online auctions "in this state," assuming such a textual limitation existed, the state first said location meant where the *auctioneer* was. (Doc. No. 29 at 13-4). When pressed further, the state changed positions, arguing that it was where the *business* was, going so far as to deny that a Mississippi auctioneer who "clicked a few buttons" in Memphis -- i.e. originated a computer-generated auction in Tennessee – would need a license. (*Id.* ("that's *probably* Mississippi's jurisdiction to regulate or not regulate.")). The state's fluid standard is a *post hoc* rationalization.

The regulation the state has dusted off does not reasonably interpret PC 471. PC 471 should be interpreted based on its own text, nothing more. The state's argument is merely a convenient litigation position.

4) The regulation of computer-generated auctions originating within the state doesn't make the license any less extraterritorial.

Even with a geographic limitation, PC 471 would still have extraterritoriality problems. (Doc. No. 29 at 13). The internet is an instrument of interstate commerce, not susceptible to state licensure, an argument this Court has not addressed "(at least not yet)." (*Id*. at 19 n. 8). "Like the nation's railways and highways, the Internet is by nature an instrument of interstate commerce." *Cyberspace Commn'cns, Inc. v. Engler*, 55 F. Supp. 2d 737, 744 (E.D. Mich. 1999). Rule 18 does not fix this problem. As this Court has already recognized, this problem inheres in the regulation of the internet. (Doc. No. 29 at 16); Braden H. Boucek, 2018-2019 Cato Sup. Ct. Rev. at 127 (2019)

("[A]ny effort to regulate is doomed to "project its regulation" into other states and "directly regulate commerce therein.'").

Even if state internet regulations are not impermissible *per se*, Rule 18 would only fix the Commerce Clause problem if the state can *prove* that it can isolate those computer-generated auctions that "originate" in Tennessee. Rule 18 may be aimed at computer-generated auctions "originating" in-state, but "[t]he Internet is wholly insensitive to geographic distinctions, and Internet protocols were designed to ignore rather than document geographic location." *Engler*, 55 F. Supp. 2d at 744 (citations omitted); *see Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003) ("internet's geographic reach … makes state regulation impracticable"). Past efforts to regulate the internet based on "origination" have failed under the Commerce Clause. *See Engler*, 55 F. Supp. 2d at 751 ("Although the Act by its terms regulates speech that 'originates' or 'terminates' in Michigan, all Internet speech is, as stipulated by Defendants available everywhere including Michigan."); *Am. Booksellers Found. v. Dean*, 202 F. Supp. 2d 300, 304 (D. Vt. 2002) (striking down restriction on "electronic communications … committed at either the place where the communication originated or the place where it was received"). This is exactly why internet regulations should be left to Congress. The state makes no effort to explain Rule 18 can succeed when similar limitations failed in the past. At the very least, the state expects an inference to be drawn in its favor about its technological abilities that is unwarranted, certainly at this stage. *See Great Lakes Steel v. Deggendorf*, 716 1101, 1105 (6th Cir. 1983) (inferences must be in favor of non-moving party).

B. The online auction license creates excessive burdens on interstate commerce.

The state also contends that the online auction license satisfies the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970). (Doc. No. 53 at 9). But this Court already ruled

that the law would likely fail under *Pike*. (Doc No. 29 at 19). The state claims they meet the test because licensing online auctions protects consumers and sellers. (Doc. No. 53 at 9). This was already discounted by the Court in its prior order and, of course, goes to the merits. The motion to dismiss should be denied. Moreover, the state's faith in Rule 18 only guarantees that it cannot satisfy *Pike* because it would have no benefit, even if it did resolve its extraterritoriality problems. *See PSInet*, 362 F.3d at 240 (If Internet regulation "can be construed in a manner that does not directly violate the Commerce Clause, the statute still fails under the Dormant Commerce Clause analysis of [*Pike*].").

As a final point on this issue, the state dwells on how long it has licensed in-person auctions, as if regulations of internet auctions are not fundamentally different. (Doc. No. 53 at 15). The state does not explain why that has any bearing on the analysis. If it is unconstitutional, then it is unconstitutional despite its age. *See Tennessee Wine & Spirits Retailers Assn. v. Thomas, et al.*, 139 S. Ct. 2449, 2472 (2019) (striking 1939 Tennessee law on Commerce Clause grounds). Moreover, the fact that Tennessee (or any other state) has chosen to license auctions does not alter the First Amendment analysis. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 513 (1996).

III. PLAINTIFFS STATED A VALID FIRST AMENDMENT CLAIM.

This is a free speech case. The professional speech doctrine has been unequivocally abandoned by the Supreme Court in *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018) ("Speech is not unprotected merely because it is uttered by 'professionals.'"). First, the state implicated speech when it defined auctions based on what words a speaker says, and then exempted different speakers.[5] Second, the state's restriction is not

[5]Because the state regulates speech, it must survive strict scrutiny. Whether it does is not a question for a motion to dismiss. Still, it appears unlikely that licensing "electronic" exchanges can satisfy any level of scrutiny (Doc. No. 29 at 22), even if written or oral exchanges could.

incidental to conduct because all of the "conduct" it regulates is speech. Third, the state relies on precedents that illuminate the difference between conduct and speech. Auctioneers are more like advice columnists, videographers, tour guides, or fortune tellers, not metal dealers or surgeons.

A. Tennessee licenses speech, not conduct, the way it has defined auctions.

The state's definition of auction functions as a speech restriction because it applies to a speaker based on *what* he or she says, the *effect of the words* on the listener, and *who* is speaking.

At the outset, the state's power to license professions is not at issue, or leally relevant. The professional speech doctrine is dead. *See NIFLA*, 138 S. Ct. at 2371-72. The state no longer brushes *NIFLA* aside as a compelled speech case that did not fundamentally change the First Amendment analysis. (Doc. No. 13 at 8). Instead, the state all but ignores *NIFLA*, instead relying on cases regarding restrictions that are distinguishable, *see infra*, and mostly pre-date *NIFLA*. The state's primary defense is its general ability to license auctions. (Doc. No. 53 at 12-15). The ability to license professions does not make speech conduct when it is part of a profession. In *NIFLA*, the Court rejected the notion that "the State[] [has] unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 138 S. Ct. at 2373. It no longer matters that the regulation is "first and foremost, a licensing statute." (Doc. No. 53 at 12 (quoting *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 691 (6th Cir. 2014)). The speech restriction struck down in *NIFLA*, 138 S. Ct. at 2371, was part of "first and foremost, a licensing statute." *Liberty Coins*, 748 F.3d at 691. *NIFLA*, post-dating *Liberty Coins*, forecloses the state's primary argument.

The government can no more regulate speech as part of a licensing scheme than in any other context. The government regulates speech when the "conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1,

28 (2010); *see* Eugene Volokh, *Speech as Conduct*, 90 Cornell L. Rev. 1277, 1346 (2005) ("When the government restricts professionals from speaking to their clients, it's restricting speech, not conduct."). "An individual's right to speak is implicated when information he possesses is subject to restraints on the way in which the information might be used or disseminated."[6] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (internal quotations omitted). This includes even just the use, creation, and dissemination of data. *Id.* at 570. It also includes restraints on the sale of information. *Id.* at 567; *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("the degree of First Amendment protection is not diminished merely because the . . . speech is sold rather than given away."). A restriction on how prices are communicated, rather than on the prices themselves, is a regulation of speech. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017). Where a state imposes content and speaker-based restrictions, the First Amendment requires "heightened scrutiny." *Sorrell*, 564 U.S. at 571.

The state defined auctions based on speech, not conduct. *See Holder*, 561 U.S. at 27-28 (where regulated "conduct" consists only speaking, the First Amendment applies). An auction is defined as 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.

(Ex. 1§ 4(2)). Every italicized word implicates speech. Auctions must be conducted by *communications*: either an oral, written – and now, electronic – exchange. It is defined by content.

[6] Congressional Research Service recently raised this as a First Amendment concern involved in regulating Big Tech. *See* LSB10309 at 4 (Sept. 11, 2019) (viewed online on Dec. 18, 2019 at: https://fas.org/sgp/crs/misc/LSB10309.pdf) (laws regulating internet based on "the topic discussed … or that impose[] different burdens based on the speaker").

The "exchange" is only regulated when it consists of a "series of invitations for offers" – also speech – to members of an audience to do something specific – "invit[ing]" them to purchase goods or real estate – which is still more speech. If the speaker was not "inviting" an offer, but was instead informing about a price (as on website like Amazon), then it would not be an auction. *What* the speaker says determines whether the speech is an auction. Only invitations that mention "goods or real estate" are regulated. (*Id.*) Goods are defined to mean "chattels, merchandise, real or personal property, or commodities of any form that may lawfully be kept or offered for sale." (*Id.* at § 4(7)). Therefore, online auctions for intangible goods, or future interests, or commodities that could not be lawfully kept or sold, are not actually auctions, and that is based on *what* the speaker says. A black-market online auction on Silk Road would qualify if the subject was guns, but not drugs which cannot lawfully be kept or sold.[7] The speaker could also discuss selling domain names (like Silk Road) because it is intangible property, but she could not discuss a placard with the domain's name.[8] Moreover, to be an auction, the speech must elicit a result from a listener: generating a high bid. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (regulation "focuses on the content of the speech and the direct impact that speech has on its listeners."). In sum, the only "conduct triggering coverage under the statute consists of communicating a message" *see Holder*, 561 U.S. at 28. If online auctions were nothing but notification of the latest bid and encouragement of further bidding, then it would be exactly like the use, creation, and dissemination of data that

[7] Silk Road was described as the "eBay of illicit goods and services." The New Yorker (Oct. 3, 3013) (viewed online at: https://www.newyorker.com/tech/annals-of-technology/how-the-ebay-of-illegal-drugs-came-undone (Dec. 18, 2019)).

[8] *See* https://auctions.godaddy.com/ or https://sedo.com/us/sell-domains/ (last viewed on Dec. 18, 2019)

the Court regarded as speech in *Sorrell*. Merely notifying the audience of the latest bid would be speech the same way as *Expressions Hair Design*.

Online auctions present as an even more clear case of a speech restriction. After all, an online auction must rely on images and words because happens on the web. (AC at ¶¶ 39 – 52). That is classic speech. These communicative aspects are an essential part of the "invitation to purchase" without which there could be no "electronic exchange." Unlike an in-person auction where the bidder can examine the product without the auctioneer describing it, an online auction is inextricable reliant on speech. "The speech itself is what the 'client' is paying for." *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1998) (fortune telling is protected speech).

It does not matter that the state calls an auction "a sales transaction" in its definition. (Doc. No. 53 at 10). "Speech itself is not conduct just because the government says it is." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). *Holder* provides that the state cannot evade the First Amendment by labelling something conduct, or in this case, a "transaction." 561 U.S at 28. The courts look to what is actually regulated. In this case, the "transaction" is entirely defined as speech – an oral, written, or electronic exchange. The state also tries to define speech down by isolating particular acts an auctioneer may perform. (Doc. No. 53 at 16 (citing PC 471 § 4(9) (auctioneers execute contracts, sales, purchases and goods)). Speech cannot be turned into conduct by breaking it into parts. *C.f., Lucero*, 936 F.3d at 752 ("To be sure, producing a video requires several actions that, individually, might be mere conduct: positioning a camera, setting up microphones…."). Also, the state is quoting the definition of a "principal auctioneer," not "auctions." The principal auctioneer definition includes "auctions" as an essential element.[9] (Ex.

[9] The state unwittingly makes a useful point by showing how it could have defined "auctions." Had the state chosen to limit its definition to sales, holding items in escrow, executing contracts

1 at § 4(9)) ("the means or process of an auction or sale at auction."). It cannot overlook the fact that its entire regime pertains to someone speaking.

As Tennessee defines it, auctions are speech. That means that the online auction license will be reviewed under a form of scrutiny that will require the state to produce evidence. *See Ohio Citizens Action v. City of Englewood*, 671 F.3d 564, 571 (6th Cir. 2012); *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456, 474-75 (6th Cir. 2007). Bare assertions are an insufficient basis to dismiss a complaint. Plaintiffs have stated a claim for relief.

B. Auctioneering does not fall under either *NIFLA* exception.

Nor does the state's regulation only "incidentally" burden speech as part of professional conduct. First, auctions are all speech, and the state is not just regulating targeted speech aspects incident to regulating conduct. Second, PC 471 makes speaker and content distinctions and cannot rely on this exemption.

NIFLA recognized that the Supreme Court has "afforded less protection to professional speech in two circumstances—*neither of which turned on the fact that professionals were speaking*." 138 S. Ct. at 2372 (emphasis added). First, there is "more deferential review" for mandatory factual disclosures of "noncontroversial information" as part of a professional's commercial speech. *Id.* at 2372. Second, states can regulate "professional conduct, even though that conduct incidentally involves speech." *Id.* The state tries to rely on the incidental burden exception, but it fails under *NIFLA*.[10] (Doc. No. 53 at 18). Where a speaker is not engaged in regulated conduct, the regulation of the speech is not "incidental." *See NIFLA*, 138 S. Ct. at 2373.

or sales, then it would have some ability to incidentally burden speech. Instead, it chose to burden all speech by how it did (and did not) define auctions.

[10] Nor can the licensing of online auctions be considered a compelled disclosure of factual information. *See NIFLA*, 138 S. Ct. at 2372.

Moreover, when the "practical operation" of a law "imposes a burden based on the content of speech and the identity of the speaker," the regulation is not "incidental." *Sorrell,* 564 U.S. at 567.

Here, as in *NIFLA* and *Sorrell,* the regulation applies regardless of whether the auctioneer is engaged in properly regulated conduct. The state is unable to rely on this exemption for the same reason California could not: the auction license applies "to all interactions," *NIFLA*, 138 S. Ct. at 2373, regardless of whether the professional engages in conduct other than speech. The state argues it properly regulates conduct, but this is question begging. The conduct it points to is what is at issue – the very act of auctioneering. Acting, representing, or advertising what is itself speech (Ex. 1 at § 5(a)(1)) requires a license irrespective of whether the auctioneer engages in any actual conduct that may be properly regulated, such as taking property in escrow, contracting or exchanging goods. Like the law in *NIFLA*, PC 471 is not tied to "any procedure at all," such as an informed consent requirement prior to performing surgery. 138 S. Ct. at 2373. PC 471"turn[s] on the fact that professionals are speaking. *Id*. at 2372. The burden is not "incidental."

NIFLA outlined what it looks like when a state regulates speech incidental to conduct, and it does not look like this. The Court pointed to "torts for professional malpractice," and laws requiring doctors who perform abortion procedures – conduct – to make certain factual disclosures to their patients about the procedure. *Id*. at 2373 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)). The cases it cited were nothing like a license for auctioneers. *Id.* at 2372-73 (malpractice restrictions, anticompetitive agreements, client solicitation, and informed consent). PC 471 looks nothing like the actual examples of an incidental regulation the state cites: mandatory disclosures, offers, acceptance, or prohibitions on deceptive statements. (Doc. No. 53 at 16-7). The state regulates the entire profession– even the parts that are wholly innocuous like posting images of golf clubs (AC at ¶ 43) – not just isolated speaking aspects.

Furthermore, the "incidental regulation" exception does not apply when the law on its face or in "practical operation" burdens speech "based on the content of speech and the identity of the speaker." *See Sorrell*, 564 U.S. at 567. PC 471 does exactly that. Aaron can create, use, and disseminate information in an online auction all he wishes so long as the communication is not about "goods or real estate." (Ex. 1§ 4(2)). Making it speaker-based, he would be free to disseminate that information if Purple Wave was a political party or church (*id.* at §6(4)), eBay, CoPart, or Ritchie Bros, (*id.* at § 6(9), (10), (11)); or if Purple Wave sold livestock with the University of Tennessee. (*Id*. at § 6(6)). The state essentially admits it makes speaker-based exemptions, explaining that they are aimed towards those not in the business of auctioneering. (Doc. No. 53 at 18). It is unclear why the state thinks this helps. *See Sorrell*, 564 U.S. at 557 ("a great deal of vital expression" is protected even if it "results from an economic motive); *United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001) ("those whose business and livelihood depend in some way on the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups"); *Parks v. LaFace*, 329 F.3d 437, 449 (6th Cir. 2003). Moreover, the state is incorrect. The exemptions are anything but aimed towards casual operators. Exemptions were made for speakers who do *the most* business: eBay, Copart (the "global leader in online car auctions" (AC at ¶¶102-03), and Richie Bros (a "global asset and management and disposition company." (*Id.* at 173-74). These exemptions are specific to online auctions and were part of the enactment of PC 471." (Doc. No, 53 at 18). Rather, they were essential, (AC at ¶¶ 140 ("one reason we're carving it out is so we don't kick eBay's nest"), 173-7), demonstrating why PC 471 survives under no form of scrutiny. The state ignores these exemptions, but they deny it the ability to rely on this exemption.

C. The state's precedents are inapplicable.

Auctioneers speak for a living. That makes them more like journalists or genealogists. Truly analogous cases that are for advice columnists, photographers, tour guides or fortune tellers. Auctioneers are not like the examples cited by the state: doctors, vets, or metal dealers.

Auctioneers are, at least as defined by Tennessee, speaking professionals. Courts reject efforts to characterize similar speaking professionals as essentially conduct restrictions.

- Advice columnists. *Rosemond v. Markham*, 135 F. Supp. 3d 574, 583-85 (E.D. Ky. 2015) (Kentucky targeted messages communicated by advice columnist).
- Videographers/Photographers. *Lucero*, 936 F.3d at 751-52; *Brush & Nib Studios, LC v. City of Phoenix*, 448 P.3d 890, 910 (Ariz. 2019).
- Tour guides. *Edwards v. District of Columbia*, 755 F.3d 996, 1009 (D.C. Cir. 2014) (violates First Amendment); *Billups v. City of Charleston*, 194 F. Supp. 3d 452, 461 (D.S.C. 2016) (speech not conduct "[b]ecause tour guide services frequently involve telling stories or providing other information about the various sites on the tour.").
- Fortune tellers. *Argello*, 143 F.3d at 1152-53.

The state chiefly relies upon *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014). (Doc. No. 53 at 7, 9, 11-16). *Liberty Coins* is a pre-*NIFLA* case concerning metal dealers. The Sixth Circuit used rational basis scrutiny to uphold a prohibition on unlicensed persons advertising, which was the only "speech" at issue.[11] *Liberty Coins*, 748 F.3d at 692-97. This is an illuminating example of a restriction that actually is incidental to conduct: the state was generally licensing conduct – dealing metals – and *also* restricting unlicensed people from advertising an illegal business. *See id*. at 691. The advertising restriction truly was incidental to the regulation of conduct. But it does not follow that the state can therefore justify licensing a speaking profession just because it can prohibit persons from advertising that they would engage in activity that is itself

[11]The Sixth Circuit subsequently ruled that a portion of the licensing regime authorized warrantless searches in violation of the Fourth Amendment. 880 F.3d 274, 277 (2018). This later ruling undercuts the notion that a general licensing scheme regulating conduct inoculates any subordinate regulation from constitutional analysis as "incidental."

conduct. Such a result would collide with *NIFLA*. The state may as well argue that "so too does Tennessee have authority to regulate [crisis pregnancy centers]." (Doc. No. 53 at 10). Unlike *Liberty Coins*, the free speech problem with PC 471 is not that it prohibits advertising by unlicensed personnel, but that it requires a license to engage in auctions, which *are* speech. Limitations on advertising an unlicensed business do not legitimize a restriction on speaking as a profession. That is the resurrection of the professional speech doctrine.

Casey helps the state even less. The state cites *Casey* to argue that "professionals are no exception" to the rule that it can burden a professional's speech. (Doc. No. 53 at 11). True, but only so much as it is incidental to a general regulation of conduct. *Casey* involved informed consent laws requiring a physician obtain informed consent prior to performing abortions. 505 U.S. at 884. Again, an informed consent requirement for specific conduct does not justify an entire speech licensing regime. The idea that doctors performing abortions must obtain informed consent is unremarkable, even post-*NIFLA*, *see RMW Women's Surgical Ctr., P.S.C v. Beshear*, 920 F.3d 421, 426 (6th Cir. 2019), but no more justifies a license for an online auction than for a journalist.

The state's reliance upon *Ohralik v. Ohio State Bar Ass'n*, 436 U.S 447 (1978) (Doc. No. 53 at 11) fails for two reasons. *First*, *Ohralik* examined a targeted speech restriction, not an entire licensing regime for speech. *Ohralik* reviewed a restriction on lawyers soliciting injured persons while they were confined in a hospital. The Court has "since emphasized that *Ohralik's* 'narrow' holding is limited to conduct that is 'inherently conducive to overreaching." *Tenn. Secondary Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291, 298 (2007) (citing cases). The Sixth Circuit recognized that *Ohralik* applied to in-person solicitations, but that anything less coercive "is protected by the First Amendment." *Bevan & Assocs., LPA v. Yost*, 929 F.3d 366, 378 (6th Cir. 2019). Online auctions are not coercive since audience members elect to participate while in the

comfort of surroundings of their own choosing. They are even less coercive than the "untargeted attorney advertising that does not constitute an invasion of privacy of the recipients of the advertising and is thus protected" that does warrant constitutional protection. *Id.* at 377 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 642-43 (1985)). *Second*, in *Ohralik*, the court did not dismiss the case. Rather, the Court ruled that it must "undertake an independent review of the record to determine whether that conduct was constitutionally protected." 436 U.S. at 463. The state asks blanket protection, the very opposite, just because the restriction is a license. Again, the state is serving professional speech leftovers.

The state also relies upon *Hines v. Quillan*, a district court case from the Southern District of Texas that reaffirmed an earlier Fifth Circuit holding that a person who gave veterinary advice online could be disciplined for unlicensed practice of veterinary medicine. (Doc. No. 53 at 20). The original *Hines* decision "beg[a]n—and end[ed]—[its] First Amendment analysis" grounded in the professional speech doctrine, and even prior to *NIFLA* the Fifth Circuit began to recognize that was problematic. *See Serafine v. Branaman*, 810 F.3d 354, 359-60, n. 3 (5th Cir. 2016). The district court later found that its prior ruling withstands *NIFLA*, but it is distinguishable, wrongly decided and the plaintiff has already announced he will appeal to the Fifth Circuit. Veterinary medicine is itself conduct, and so some targeted speech restrictions could be "incidental." Nevertheless, the district court opinion is under appeal, Case No. 1:18-cv-00155, Doc. No. 41 (S.D. Tex. July 02, 2019), and this Court should not attach any weight to it until the Fifth Circuit rules.[12]

[12]*See* Press Release (June 11, 2019), available here: https://ij.org/press-release/free-speech-fight-texas-veterinarian-heads-to-appeals-court-for-right-to-give-advice-online/ (last viewed Dec. 17, 2019). Plaintiffs otherwise agree that *Hines* is a significant case to follow post-*NIFLA*.

Finally, the state forgets that even a neutral regulation unrelated to the content of expression that incidentally burdens speech is still subject to an intermediate form of scrutiny. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *Richland Bookmart, Inc. v. Knox Cty.*, 555 F.3d 512, 520-21 (6th Cir. 2009) (citations omitted). The state will need to make a showing, which will obligate it to produce evidence. *Id*. at 521-23. For that reason alone, dismissal is inappropriate.[13]

IV. THE STATE CONSTITUTIONAL CLAIM IS PROPER.

This Court may entertain state law claims when they arise out of the same set of facts because it has supplemental jurisdiction by statute. 28 U.S.C. § 1367(a); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966). The state argues that this Court "must" dismiss the free speech claim arising out of Tennessee's Constitution even though it clearly arises out of the same set of facts as the federal one. (Doc. No. 53 at 23, citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 124-25 (1984)). *Pennhurst* limits claims for retroactive relief, not a prospective injunction. 465 U.S. at 101, n. 11, and otherwise recognizes the ability of states to limit their own sovereign immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985). Tennessee adheres to *Ex Parte Young*, 209 U.S. 123 (1909) as a matter of state law. *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 850 n. 16 (Tenn. 2008) (calling it "one of the three most important decisions"). Faithful to the holding of *Ex Parte Young*, by 2018 statutory

[13] Even under rational basis, it should not be dismissed prior to discovery because the facts are ultimately determinative. *See American Exp. Travel Related Services Co., Inc. v. Kentucky*, 641 F.3d 685, 689 (6th Cir. 2011) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) ("regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional *unless in light of the facts made known or generally assumed* it is of such a character as to preclude the assumption that it rests upon some rational basis ….") (emphasis added)); *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000) ("the evidence clearly shows that state licensure requirements do not benefit the consumer.").

enactment, Tennessee authorized suits "brought regarding the legality or constitutionality of a governmental action," so long as they do not seek damages. Tenn. Code. Ann. § 1-3-121. Moreover, *Pennhurst* was decided prior to the enactment of § 1367, which codified the case law surrounding "supplemental jurisdiction" and gave express Congressional approval to the bringing of state court claims. *See Raygor v. University of Minn.*, 604 N.W.2d 128, 133 (Minn. Ct. App. 2000). The Court can hear the state constitutional claim for the same reason it can hear the federal one. Plaintiffs seek only prospective relief for a constitutional infraction, not damages. (AC at ¶¶ 361(A) – (H)).

V. PLAINTIFFS STATED A VALID PRIVILEGES OR IMMUNITIES CLAIM.

The Fourteenth Amendment includes the Privileges or Immunities Clause. The Privileges or Immunities Clause protects privileges and immunities of national citizenship from interference by other states. Plaintiffs contend that the internet is the modern equivalent of a seaport or navigable waterway, analogous to the right to use seaports and navigable waterways protected under the Clause. *Slaughter-House Cases*, 83 U.S 36, 79-80 (1872). *Slaughter-House*, 83 U.S. at 79. Furthermore, the courts reserve ruling on Privileges or Immunities claims until the ultimate merits stage to see if the challenged license is unconstitutional on other grounds, even under rational basis. *See Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 701 (E.D. Ky. 2014). The Court should do the same here.

CONCLUSION

This Court should deny the motion to dismiss.