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

WILL MCLEMORE, MCLEMORE AUCTION COMPANY, AARON MCKEE, PURPLE WAVE, INC., AND THE INTERSTATE AUCTION ASSOCIATION,	)	
PLAINTIFFS,	)	
V.	)	**Case No. 3:19-cv-00530**
ROXANA GUMUCIO, GLENN KOPCHAK, JOHN THORPE, RONALD COYLER, JEFF MORRIS, ADAM LEWIS, RANDY LOWE, IN THEIR OFFICIAL CAPACITY,	)	
DEFENDANTS.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Under Fed. R. Civ. P. 57 and 65(a), Plaintiffs respectfully request this Honorable Court issue a temporary restraining order and preliminary injunction enjoining Defendants from enforcing its licensure regime on online websites until such time as the case can be resolved.

Introduction

In a move that was squarely aimed at licensing online auctions, Tennessee recently amended its definition of "auctions" to include "electronic" exchanges. *See* 2019 Tenn. Pub. Ch. 471 (Ex. 1 at § 4(2)); the online auction license).[1] Effective July 1, 2019, this law applies to anyone who acts as, represents to be, or even advertises as, an auctioneer. (*Id*. at § 5(a)(1)). Moreover, online auctions arranged by a licensed, principal auctioneer must be conducted by licensed

[1] Ex. 1 is publicly available on the Tennessee Secretary of State's website here: https://publications.tnsosfiles.com/acts/111/pub/pc0471.pdf (last viewed June 26, 2019).

personnel. (*Id*. at § 5(b)). The law threatens immediate and irreparable injury to Plaintiffs who all persons who conduct online auctions. (*Id*. at § 21).

Plaintiffs will be irreparably harmed on two levels. First, the online auction license is an unconstitutional burden on the right of free speech. Tennessee's effort to license online auctions regulates on the basis of *content*, *speaker*, and *medium* without any compelling or even legitimate justification. Second, by requiring an auctioneer's license for activity that occurs online, the online auction license impermissibly burdens interstate commerce. Plaintiffs are likely to prevail on the merits. This outcome is evident from the text and legislative history of the statute and the contents of the verified complaint. This Court should preserve the status quo until this case can be fully evaluated on the merits.

Background[2]

Tennessee created the Tennessee Auction Commission (Commission) in 1967. (VC at ¶ 54). In 2006, as e-Commerce began to emerge, Tennessee set online auctions outside its regulatory purview when it enacted 2006 Tenn. Pub. Ch. 533, (*id*. at ¶ 65) an exemption for "fixed price or timed listings that allow bidding on an Internet web site but that does not constitute a simulcast of a live auction." *See* Tenn. Code Ann. § 62-19-103(9) (2019). This exemption is often referred to as the "eBay law." (Ex. 4 at 23, 25; Ex. 10 at 25).

Since at least 2016, licensed auctioneers set out to limit the eBay exemption. In 2016, the Commission proposed a rule that would have excluded extended-time auctions, that is, auctions where the close time resets based on bidding activity, from the eBay exemption. (VC at ¶ 86; Ex. 3). After Tennessee's Joint Government Operations Committee nixed that rule, a 2017 bill that

[2] Facts recounted here are derived from the Verified Complaint (VC), exhibits to the Complaint, and publicly available materials gathered from websites.

came "from the Tennessee Auctioneers Association" (VC at ¶ 98), proposed the same. The Tennessee Auctioneers Association (TAA) describes itself on its publicly available website as a professional organization supporting the auction industry at http://www.tnauctioneers.com/ (VC at ¶ 91). According to the bill's sponsor (himself a licensed auctioneer and past president of the TAA), the TAA wanted online auctions licensed so "everyone can compete on the same level playing field." (VC at ¶¶ 98-101). After that bill failed, the effort was renewed in 2018. (VC at ¶ 105). The president of the TAA, David Allen stressed to the Commission that regulation of online auctions was a "must;" and that the "elephant in the room is online auctions and the regulation of it by the auction industry." (VC at ¶¶ 108-112). The 2018 bill was amended to create a Task Force to study the question and passed. (VC at ¶ 114).

As part of its study, the Task Force considered whether online auctions presented an actual problem that required licensure. It analyzed three years' worth of complaint data. (VC at ¶ 154). The complaint data showed very few complaints for online auctions overall, at least that came from consumers, (11 in three years) and even fewer for extended-time format, the type that Defendants will soon be licensing (three overall and none in 2018). (VC at ¶¶ 155-157). When asked why the Task Force would contemplate singling out extended-time online auctions, Defendant Morris explained that "we would love to go as far as you've suggested… There's only so far we can get with this… We'll never get the legislature to allow us to agree to oversee all auctions whether fixed or not." (VC at ¶ 147).

The Task Force produced three recommendations: 1) add "electronic" exchanges to the definition of an auction so as to include online auctions; 2) define the "timed listing exemption" so as to exclude extended-time format; 3) add an exemption for online auction platforms who sell nonrepairable or salvage vehicles. (VC at ¶¶ 159-161). All three components made it into the bill

that became law. (Ex. 1). Plaintiffs are all persons who conduct online auctions. Plaintiffs include the IAA, an unincorporated association, formed of members with a common interest in a free and open marketplace for online auctions.

Legal Standard and Analysis

Fed Civ. P. 65 provides trial courts with authorization to grant injunctive relief. The standard for issuing a preliminary injunction is guided by a familiar, four (4) part test:

1) the likelihood that plaintiff will succeed on the merits;
2) the threat of irreparable harm to the plaintiff if the injunction is not granted;
3) the possibility that an injunction would cause substantial harm to others; and,
4) the public interest.

Jones v. Caruso, 569 F.3d 238, 254 (6th Cir. 2009)(citations omitted). The four (4) factors are "to be balanced, not prerequisites that must be met." *Id.* at 265 (citations omitted). This Court need not consider each if fewer factors are "dispositive." *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003) (citations omitted).

A. Plaintiffs are likely to succeed on the merits

The first factor asks whether Plaintiffs are likely to succeed on the merits of its claim. *Contents of Accounts*, 629 F.3d at 606. A plaintiff is likely to succeed when there is a "substantial likelihood" of prevailing. *See Miller v. City of Cleveland*, 622 F.3d 524, 528 (6th Cir. 2010).

1) *Plaintiffs are likely to succeed in the free speech claim.*

Auctioneering is entirely speech as Tennessee has defined it. Auctioneering retains its full constitutionally protected status even though it is an occupation in light of the recent decision of *Nat'l Inst. Of Family & Life Advocates ("NIFLA") v. Becerra*, 138 S Ct. 2361, 2373 (2018) (rejecting the professional speech doctrine). The online auction license is content-based, and speaker-based because it applies only to some types of speech and speakers. It is also medium-based because it arbitrarily requires a license based on whether bidding activity resets the auction's

close. The license was intended to benefit and burden particular speech and speakers, who were named by name as the law was enacted. It should be reviewed under strict scrutiny. The online auction license cannot survive under any level of constitutional scrutiny because it is a solution in search of a problem.

i. The online auction license suppresses fully protected expression.

This is a free-speech case. Auctions are speech as Tennessee has defined it. Auctioneering is entitled to full constitutional protection even though it is also an occupation. *See NIFLA*, 138 S. Ct. at 2371-72 ("Speech is not unprotected merely because it is uttered by 'professionals.'").

Online auctioneering is constitutionally protected speech. As the Supreme Court recently found in *NIFLA*, speech does not lose its constitutional protection when it is engaged in as an occupation. *NIFLA* involved a California law requiring licensed pro-life clinics to "disseminate a government-drafted notice on site" regarding abortion services provided by the state. 138 S. Ct. at 2369. This requirement regulated the content of speech, which the Ninth Circuit recognized. *See id.* at 2371. But the Ninth Circuit did not apply ordinary First Amendment scrutiny to the regulation because it concluded that the regulation was one of "professional speech." *Id.* Overruling the Ninth Circuit, the Supreme Court held that it "has not recognized 'professional speech' as a separate category of speech." *Id* at 2371-72 ("So defined, these courts [who recognize professional speech as a separate category subject to different rules] except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny."). The Court refused to "mark off new categories of speech for diminished constitutional protection." *Id.* (citations omitted). In rejecting the professional speech doctrine, the Court noted the danger in giving "the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement," *id.* at 2373, and further distinguished the power to

restrict professional conduct from the power to restrict speech uttered by professionals. *Id.* at 2372.

Online auctioneering consists of constitutionally protected speech. 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 at § 4(2)) (emphasis added). Every component of the sales transaction italicized in this definition is speech. The transaction must be conducted by *communications*: either an oral, written – and now, electronic – exchange. An "electronic exchange," or an online auction, is particularly reliant on speech because the audience member is not physically present. An online auction must post images of the goods or real estate, descriptions, and, when relevant, narratives. (VC at ¶¶ 39 – 52). These communicative aspects are essential part of the "invitation to purchase" without which there could be no "electronic exchange." Still more, the "exchange" must consist 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. This speech also must have a particular effect on the listener – inducing a high offer. The definition of auction is made up of various speech elements. So defined, the "exchange" is entirely speech.

The simple fact that the exchange is "electronic" does not make the speech any less constitutionally protected. *See e.g., Cahaly v. Larosa,* 796 F.3d 399 (4th Cir. 2015) (South Carolina anti-robocall statute unconstitutional content-based speech restriction); *Woods v. Santander Consumer USA Inc.*, 2017 U.S. Dist. LEXIS 47356 at *6 (N.D. Ala. Mar. 30, 2017) (automated calls to cellphones is a type of expression, if not pure speech, protected by the First Amendment").

Many core communications ranging from news and personal emails to political lobbying are "electronic." They do not lose their constitutional character just because they have adapted to the newest means of communication. As speaking occupations (journalist, tour guide, dietician) likewise become "electronic," they too are entitled to constitutional protection.

The online auction license falls under neither of the exceptions to requiring strict scrutiny for content-based restrictions identified in *NIFLA*.[3] 138 S. Ct. at 2372. Informed consent requirements are the first "narrow exception" the Court identified. *Id*. The online auction license is obviously not an informed consent measure. Nor do auctions, as defined, meet the other exception pertaining to restrictions on conduct that incidentally burden speech. *Id*. While drawing a line between speech and conduct can "be difficult," *id.* at 2373, it is not difficult to figure out on which side of that divide online auctioneering falls.

The Supreme Court distinguished between conduct and speech in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011). Vermont prohibited the sale, disclosure, or use by pharmacies of doctor prescriber information – federally required data about the drugs a given doctor prescribes –for "marketing purposes," even though the same information could be "sold or given away for purposes other than marketing." 564 U.S. at 557-59, 562, 580. Vermont defended its law by arguing that banning the sale of information for marketing purposes was really just a restriction on conduct. *Id*. at 567. The Court found that even just the use, creation, and dissemination of data is speech. *Id.* at 570. 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

[3] Online auctioneering also does not plausibly implicate any of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," including the traditional categories of "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations and quotations omitted).

speaker." *Id*. at 567. If all the definition of auctions included was the auctioneer notifying the audience members of the latest bid and encouraging further bidding, then it would be exactly like the use, creation, and dissemination of data that the Court regarded as speech in *Sorrell*. But Tennessee includes far more in its definition of auctions. Again, for an electronic exchange, the "invitation" to offer will include pictures, or a detailed narrative of an item's condition, or historical context. (VC at ¶¶ 39 – 52). An online auction for unique items is interesting to listeners who have an interest beyond that of a bidder. (*Id*. at ¶ 49) (local media covered his 2014 auction of the art of Paul Penczner). The definition of auctions exceeds the standard set forth in *Sorrell.*

The online auction license is nothing like the example of an "incidental regulation," the Supreme Court used in *NIFLA.* The Court pointed to 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)). In *NIFLA*, the speech restriction was "not tied to any procedure at all," because it applied to all interactions between clinics and customers regardless of whether a procedure was sought. Just as in *NIFLA*, the definition of auction includes no "conduct" to speak of. (Ex. 1 at § 4(2)). The "transaction" at issue is entirely tied to an electronic, oral or written exchange. (*Id*.). That means the Board is regulating "speech as speech," *NIFLA*, 138 S. CT. 2374, not incidentally burdening speech. *NIFLA* reminds us that "professional speech" like auctioneering is just "speech," not disfavored speech cordoned off in its own constitutionally cognizable category. *Id.* at 2371-72. (citations omitted).

Nor is the online auction license anything like a price, sales, or contract regulation because auctions are defined to include much more than just the latest bid price. In an analogous context, the Supreme Court recently held: "In regulating the communications of prices rather than the prices

themselves, [the law] regulates speech." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (finding a New York law prohibiting vendors from communicating the price of a credit card surcharge was a regulation of speech). Tennessee's auction definition does at least this much by regulating "the communications of [bids] rather than the [bids] themselves." *Id.* It actually goes considerably further because an online auctioneer must rely on images and descriptions, even a component of storytelling. (VC at ¶¶ 39 – 52). Far more than was the case in *Schneiderman*, Tennessee burdens speech.

Tennessee's new online auction license is an effort to license constitutionally protected speech and it must be reviewed accordingly.

ii. The online auction license warrants strict scrutiny because it is content-based, speaker-based and medium-based.

The online auction license is content-based, speaker-based and medium-based distinctions, applying based on *what* an auctioneer says, *who* is speaking and *how* she speaks. It therefore deserves strict scrutiny.

A speech restriction is content-based when a speaker wishes to communicate with other people and a prohibition on their speech is "not justified without reference to the content of the regulated speech." *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984). A regulation is content-based whenever a speaker wishes to communicate with other people, and "whether they may do so … depends on what they say." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010). A content-based restriction "focuses on the content of the speech and the direct impact that speech has on its listeners." *Boos v. Barry*, 485 U.S. 312, 321 (1988). Speaker-based distinctions, even of commercial speech, trigger "heightened judicial scrutiny." *Sorrell*, 564 U.S. at 565-67; *see also Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others").

The Supreme Court's decisions in *Sorrell* and *NIFLA* provide examples of content and speaker-based laws that trigger strict scrutiny. In *Sorrell,* the Court ruled that the Vermont law in question was content-based because it allowed for the purchase of the physician prescriber information for those who wished to engage in certain "educational communications." It also prohibited marketing, which is "speech with a particular content." *Id*. Likewise, it was speaker-based because it "disfavor[ed] specific speakers, namely pharmaceutical manufacturers." *Id*. Similarly, the Court found the restriction in *NIFLA* speaker-based because "a facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility across the street that advertises and provides nonprescription contraceptives is excluded." *NIFLA*, 138 S. Ct. at 2378.

A recent decision out of this district is analogous. In *Backpage.com, LLC. v. Cooper*, 939 F. Supp. 2d 805, 836-37 (M.D. Tenn. 2013), the District Court issued a preliminary injunction, finding a restriction on advertisements to be a "content-based restriction on speech." *See also Backpage.com, LLC. v. McKenna*, 881 F. Supp. 2d 1262, 1286 (W.D. Wash. 2012). The Court ruled that the law did not apply to ads promoting non-sexual acts, making it content-based. Similarly, it "single[d] out particular speakers for regulation, as it punishes publishers who sell these notices or advertisements, but not those who host the same advertisements for free." *Cooper*. 939 F. Supp. 2d at 837 (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000)).

Likewise, the online auction license applies based on *what* the auctioneer says. To meet the definition, the exchange must include an invitation for members of the audience to purchase goods or real estate culminating in acceptance of the highest or best offer made by a member of the participating audience. (Ex. 1 at § 4(2)). 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. Only invitations of a particular content qualify. The invitation must be for "goods." (Ex. 1 at § 4(2)). Goods are "chattels, merchandise, real or personal property, or commodities of any form that may lawfully be kept or offered for sale." (*Id.* at 4(7)). If the offer was for something other than a "good," like intangible property (such as naming rights for new species[4]) or future interests (as on a bond trading website[5]) or even for a good that could not "lawfully" be kept or offered for sale (such as an unlicensed short-term rental,[6] or drugs on websites like now-defunct Silk Road), then it would not be an auction. The content of the speech determines if the speech is an auction.

Also making the auction definition content-based, it only applies based on the communicative *impact* of the auctioneers' speech upon listeners. This definition is dependent on the "direct impact on the listeners." *See Boos*, 486 U.S. at 321. An auction must "culminat[e] in the acceptance … of the highest or best offer made by a member of the participating audience." (Ex. 1 at § 4(2)). If the auctioneer's invitation does not generate that effect on the audience, then it is not an auction. The definition "focuses *only* on the content of the speech and the direct impact that speech has on its listeners." *Playboy*, 529 U.S. at 811 (quotations omitted). Because the definition requires an effect on listeners, it is content-based.

The definition and exemptions are speaker-based and medium-based as well, because they limit *who* can speak and *how*. Tennessee drew a line between extended-time online auction websites, which will require a license, and fixed-time format websites, which do not. (Ex. 1 at § 6(9)). "Timed listing" means offering goods for sale with a fixed ending time and date that does not extend based on bidding activity. (*Id*. at § 4(12)). There is no real mystery about this arbitrary

[4] *See* https://undark.org/article/nomenclature-auctions-bidder/ (last viewed on June 26, 2019).
[5] *See* https://www.daytrading.com/bond-auction (last viewed on June 26, 2019).
[6] *See* http://www.skyauction.com/vacation/vacation-rentals (last viewed on June 26, 2019).

classification. The legislative record reveals that this distinction was drawn to leave one private company unregulated for reasons that are unrelated to any public concern. (VC at ¶ 137 ("I think there is a nice compromise, leave the eBay law in place and define what a timed listing is"), ¶ 140, ("one reason we're carving it out is so we don't kick an eBay's nest."). Over and again, the Commission, Task Force, and lawmakers make clear that there is no real basis for the exemption other than political expediency and an inchoate sense that the extended-bid format is more like a traditional auction. (VC at ¶¶ 92, 121, 137, 140, 145-150). The insistence on an exemption designed purposefully for one speaker – eBay – and crafted so as to dictate how to speak – through fixed time format – render the online auction license a classic speaker-based *and* medium-based restriction. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent -- by eliminating a common means of speaking, such measures can suppress too much speech.").

This Act further delineates who may speak without a license. The Act exempts online auctions when the speaker sells salvage vehicles in this state and holds the appropriate license issued by the Tennessee motor vehicle commission. (Ex. 1 at § 6(10)). The legislative record shows that this is an additional exception directed to named parties. (VC at ¶¶ 173 -177). But a company that auctions off a different type of salvage, like architectural salvage,[7] must have an auctioneer license before it can conduct an extended-time auction. This is another speaker-based distinction.

Speaker-based distinctions also exist for political parties, churches, and charitable corporations, so long as the individual receives no compensation and does not hold themselves out

[7] *See* Fathertime Auctions at https://www.fathertimeauctions.com/building-demolition-salvage-recycling-auctions.html (last viewed June 26, 2019).

as available to engage in the sale of goods at an auction. (Ex. 1 at § 6(4)). They may hold any kind of an auction, including an extended-time auction. But other non-Christian religious assemblies like mosques or synagogues cannot call themselves churches. Nor could a company not registered as a charitable corporation use an unlicensed person, even if they wanted to hold an auction to benefit a charity. The law further exempts auctions for governmental entities (*id*. at § 6(3)), the University of Tennessee extension when selling livestock (*id*. at § 6(6)), and tobacco sales operated pursuant to title 43, chapter 19 (*id*. at § 6(7)). Finally, the law also exempts persons who do not make $25,000 in annual revenue from online auction sales. (*Id*. at § 6(12)). This too is a speaker-based distinction. *See Cooper*, 939 F. Supp. 2d at 837 (law makes speaker-based exemptions by punishing publishers of for-sale ads, but not those who host the advertisements for free).

The online auction license deserves strict scrutiny.

iii. The extended-time online license cannot survive strict scrutiny.

Content and speaker-based restrictions are reviewed under strict scrutiny. *Playboy*, 529 U.S. at 813. Content and speaker-based restrictions are presumptively invalid. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). The burden is on the government to prove the license is narrowly tailored to advance a compelling government interest. *Id*. at 813; *Sable v. Comnc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). This is a burden that Defendants cannot meet.

1. *Tennessee has no compelling interest in suppressing extended-time online auctions.*

It is not enough for the government to hypothesize an interest for restricting speech. Defendants must produce real evidence, not conjecture or speculation, to support its alleged interest. *Playboy*, 529 U.S. at 816-17; *United States v. Nat'l Treasure Emps. Union*, 513 U.S. 454, 475 (1995) ("when the Government defends a regulation on speech … it must do more than simply posit the existence of the disease sought to be cured. … It must demonstrate that the recited harms

are real, not merely conjectural ….”). The arguments made for licensure relied on assumptions about harms (*id*. at ¶ 136 (“sort of like saying rape doesn’t occur on a campus because no one reports it.”)), unproven anecdotes (*id.* at ¶ 128 (“Rhessa’s letting us know she’s hearing complaints every week)), and the unsupported belief that more complaints will materialize once the State regulations provide a basis for the license. (Ex. 9 at 26) (“until you say that online auctions are regulated … I don’t think you can necessarily point to statistics in the state of Tennessee and say, we haven’t had any problem with this.”).

Defendants cannot meet their burden because the data created by the Task Force showed virtually no history of consumer complaints. (VC at ¶¶ 154-157). That means there is no substantial evidence of even a legitimate interest, let alone a compelling one. Still more, of those few complaints, the majority pertained to fixed-time online auctions, the format that the state leaves unregulated. (VC at ¶ 154). In 2018, the year the Task Force was convened, the state did not receive a *single* consumer complaint about extended-time online auctions. (*Id*. at ¶ 156). The restriction on extended-time online auctions is, as pointed out above, so riddled with exemptions that it undermines any plausible notion that the government has any real legitimate interest in the regulation. The reason for the license is because TAA wanted to see a “level playing field,” (*id*. at ¶ 100) and the Commission operated in tandem. (*Id.* at ¶ 113) (“this bill does exactly what we’re trying to get done. …). Protectionism is not a legitimate interest, let alone a compelling one. Whatever may be said about the “handwringing” (*id.* at ¶ 109) that licensed auctioneers who made up the TAA had over their unlicensed, online counterparts, it was decidedly a private problem, not a public one. The bare desire to debilitate innovative upstarts with the same regulatory playing field is anything but a compelling governmental interest sufficient to justify a content-based restriction of speech.

2. *The license is not narrowly tailored.*

The means used to advance those interests are not narrowly tailored and are far from the least restrictive available. *See Playboy*, 529 U.S. at 813 ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.") (citations omitted). Any justification the Defendants might offer collapses under the tailoring prong because the online auction license "discriminates against some speakers but not others without a legitimate 'neutral justification' for doing so." *Nat'l Fed. Of the Blind v. FTC*, 420 F.2d 331, 345 (4th Cir. 2005) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-430 (1993)). Whatever goal the government hoped to achieve is far from compelling *and* could have been achieved by other means. That Tennessee leaves so many other auctions entirely unlicensed, and that many states do not license auctioneers at all underscores the point. *see* Dick M. Carpenter, LICENSE TO WORK, TABLE 1 (2nd ed. Nov. 2017).[8] If the government had compelling reasons to act, it might first have resorted to consumer enforcement mechanisms. It could insist on bonding requirements. The list of less restrictive ways to address auction-related consumer problems is long. *Id*. at 32 (market competition, third party certification, bonding, private causes of action, inspections, registration, etc.). It is demonstrably unnecessary to license online auctions to combat any problems the government may attribute to online auctioneering.

2) *Plaintiffs are also likely to succeed in the Dormant Commerce Clause challenge.*

The online auction license unconstitutionally burdens interstate commerce. First, it is impermissibly extraterritorial because it projects Tennessee's online auctioning law into cyberspace and throughout the country onto anyone who acts as, or even advertises as, an

[8] Available here: https://ij.org/report/license-work-2/ (last viewed June 26, 2019).

auctioneer. Second, the internet is much like a common carrier and can only be burdened by the most carefully drawn state regulations. The online auction license is not such a carefully crafted provision. Third, the online auction license creates burdens that are excessive in relation to the non-existent benefits for the State, thus failing the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970).

The Commerce Clause affords power to Congress to regulate commerce among the several states. U.S. Const. Art. I, § 8. Related to Congress's exclusive purview over interstate commerce, dormant commerce clause doctrine arises out of a concern over states burdening interstate commerce. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) ("the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."). The Commerce Clause thus limits the power of states to "erect barriers against interstate trade." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). When a state law is extraterritorial, or protectionist against out-of-state business, then it is virtually *per se* invalid. *See Healy v. Beer Inst.*, 491 U.S. 324, 332 (1989). Also, some industries like railroads, trucks, and highways are instruments of commerce so thoroughly imbued with an interstate element that if states regulate at all, they must be cautious to avoid burdening interstate commerce. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 763 (1945); *Am. Libraries Assoc. v. Pataki*, 969 F. Supp. 160, 173 (S.D.N.Y. 1997). If the law is not *per se* invalid, or an impermissible regulation of an instrumentality of commerce, then the inquiry moves on to the *Pike* balancing test, which inquires whether the burdens exceed the benefits. 397 U.S. at 142. While "no clear line separate[es]" *per se* violations, the "overall effect" on interstate commerce is what is "critical." *Brown-Forman Distillers Corp. v. N.Y. State Liquor*

Auth., 476 U.S. 572, 579 (1986). The online auction license impermissibly burdens interstate commerce in three ways.

First, the online auction license is unconstitutionally extraterritorial. When states enact laws that are extraterritorial, it is a *per se* violation. *Healy*, 491 U.S. at 332. A law is extraterritorial when in "practical effect," it controls commerce occurring wholly outside the State's boundaries. *Id*. at 336. The Commerce Clause prohibits the "projection of one state regulatory regime into the jurisdiction of another," and stops states from forcing out-of-state parties to "seek regulatory approval in one state before undertaking a transaction in another." *Id*. at 336-37. An extraterritorial law faces a presumption of unconstitutionality that can only be rebutted when the state demonstrates that the burden serves a legitimate local purpose that could not be served adequately by available, non-discriminatory alternatives. *Granholm*, 544 U.S. at 489.

The recent *Backpage* cases demonstrate the interstate commerce problems states create when they try to regulate the internet. In *Backpage.com, LLC. v. McKenna*, 881 F. Supp. 2d 1262, 1286 (W.D. Wash. 2012) and *Backpage.com, LLC. v. Cooper*, 939 F. Supp. 2d 805, 841-45 (M.D. Tenn. 2013), two different district courts issued injunctions barring enforcement of state laws criminalizing the advertising or publishing of a commercial sex act with a minor. As an online classified newspaper of sorts, the laws would have implicated Backpage.com. Both courts granted injunctions on both First Amendment and Commerce Clause grounds. The Middle District of Tennessee first found that the law was extraterritorial because it projected a Tennessee law out-of-state by prohibiting online advertisements with no geographic limit. *Id.* at 841. The Court rejected the state's invitation to narrowly construe the law by limiting its application to within Tennessee when no such limit appeared in the text itself, or was evident from any legislative proceedings. *Id*. at 842. The "inherent challenge in crafting a local regulation of Internet advertising" made it

"difficult, if not impossible" to regulate the internet without running afoul of the Commerce Clause. *Id*. at 843-44 (quoting *Dean*, 342 F.3d at 103). But for that reason, "the message … is that a legislature must *make the narrow geographic scope of its laws explicit* to stay within the confines of the Dormant Commerce Clause when regulating Internet activity." *Id*. at 844 (emphasis added). In resonant holdings, both districts ruled that the laws were likely unconstitutional and warranted injunctive relief. The unmistakable warning was this: States must carefully narrow the scope of the application of any regulation of the internet so as not to burden interstate commerce.

In enacting the online auction license, Tennessee failed to heed this warning. Given that it applies to all websites that "act as, advertise as, or represent to be an auctioneer," (Ex. 1 at § 5(a)(1)), or any website "arranged by or through a principal auctioneer" (*id*. at § 5(b)) – essentially anyone who offers or executes an auction, or manages an auction company (*id*. at § 4(9)) – the online auction license patently applies to commerce occurring outside the state's borders. As in *Backpage.com*, 939 F. Supp. 2d at 842, Tennessee included no geographic limitation in the text of the law. (*Id*.). It should have been exceptionally careful to narrow the scope if that is what it intended. Any online auction website is "acting as or advertising as or representing to be" an auctioneer (*id*. at § 5(a)(1)), just by virtue of having a website promoting the business. These websites are available to anyone with internet access, including in Tennessee; there is no option to have the websites shut off at the state borders. The projection of its licensure regime onto online auction websites that have no presence in Tennessee impermissibly controls extraterritorial conduct.

Even had the law included a geographic limitation, it is simply impossible for Tennessee to regulate online auctions themselves without having the "practical effect," *Healy*, 491 U.S. at 336, of impacting online auction companies throughout out the country. Online auctions like

Purple Wave, Rasmus, or where Philip works, engage in commerce through websites that are available to everyone. And anyone with internet access can participate. While some websites have a greater degree of control over who can sell, they all are at least open for bidding throughout the country. (VC at ¶¶ 218, 245, 263). Out-of-state companies have only two choices: implement Tennessee's regulatory scheme by becoming licensed for all of its transactions or shut down. Purple Wave, Rasmus, and Philip cannot know as they set up an online auction if, for example, the property in Kentucky that a potential client in Kansas wants to sell will be bid upon by persons in Virginia and Washington, but won by an individual in Wisconsin, or whether Tennessee figures somewhere in the equation. That leaves them with no choice but to be licensed. Like the law in *Backpage*, the online auction license leaves it unclear "at what point the offense of offering to sell or selling an advertisement" for an online auction, has been consummated, "a determination that becomes complicated when dealing with interstate actors and a nationwide platform." 939 F. Supp. 2d at 842. As this is the exact sort of projection of a regulatory scheme onto wholly out-of-state commerce that states may not attempt, Plaintiffs are likely to succeed in demonstrating that the extended-time online license impermissibly burdens interstate commerce.

Second, the online auction license is an impermissible burden on an instrumentality of interstate commerce. The internet is an instrument of commerce that must be regulated exceedingly carefully if states may regulate it at all. *Backpage.com, LLC. v. Cooper*, 939 F. Supp. 2d 805, 843-4 (M.D. Tenn. 2013) (quoting *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) ("Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without project[ing] its legislation into other states.") (citing *Healy*, at 491 U.S. at 334)); *See, e.g., Pataki*, 969 F. Supp. at 173 ("The Internet is more than a means of communication; it also serves as a conduit for transporting digitized goods ….[t]he

inescapable conclusion is that the Internet represents an instrument of interstate commerce"); *Dean*, 342 F.3d at 104 ("[w]e think it likely that the internet will soon be falling within the class of subjects that are protected from State regulation because they 'imperatively demand[] a single uniform rule.'") (quotation omitted); *Johnson*, 194 F.3d at 1162 (agreeing that the internet is like rail and highway traffic requiring a national scheme so that users are able to determine their obligations); *Cyberspace Communs., Inc. v. Engler*, 55 F. Supp. 2d 737, 748 (E.D. Mich. 1999) ("The Internet has no geographic boundaries. The Act is, as a direct regulation of interstate commerce, a *per se* violation of the Commerce Clause").

Online auctions, if they are to be regulated at all, should be regulated through a nationwide scheme because the internet is the ultimate nationwide marketplace. For that reason, courts have been quick to strike down laws that broadly impose regulations on the internet, especially those without a geographic limitation in the text of the law. *See, e.g., Pataki*, 969 F. Supp. at 173; *Dean*, 342 F.2d at 104; *Johnson*, 194 F.3d 1149, 1158 (10th Cir. 1999); *Engler*, 55 F. Supp. 2d 737, 748 (E.D. Mich. 1999); *but see Am. Booksellers Found. v Strickland*, 601 F.3d 622, 628 (6th Cir. 2010) (law criminalizing sending juveniles harmful material did not violate Commerce Clause since it did not apply to generally accessible communications and benefits of protecting youth from sexual predators outweighed effects on interstate commerce); *Ford Motor Co. v. Texas Dept. of Transportation*, 264 F.3d 493, 505 (5th Cir. 2001) (state prohibition on all retail automobile sales by automobile manufacturers did not run afoul of the commerce clause; internet sales were regulated purely incidentally to the general prohibition which furthered substantial and legitimate concerns of preventing vertical economic concentration, monopolization and fraud); *Washington v. Heckel*, 24 P.3d 404 (Wash. 2001) (upholding state anti-spam legislation that was limited to messages directed to a Washington resident or from a Washington computer). Much like its

inability to regulate traditional common carriers, Tennessee cannot impose licensing requirements on e-Commerce, and certainly not without careful regard for impact on interstate commerce. The auctioneering law in question shows no concern at all, broadly licensing all internet activity falling under its statutory ambit.

Third, even assuming a license for online auctions is not a *per se* violation, it creates burdens that vastly outweigh any putative benefits. Even when not extraterritorial, states may not incidentally create burdens that are "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142 (citation omitted). Nowhere in the legislative record is there the slightest mention of any actual public problem resulting from extended-time online auctions. Instead, the concern was private: the auction business increasingly exists online (VC ¶ 130-31), traditional auctioneers sought to regulate away their competitive disadvantage, (VC at ¶¶ 99-100, 109-111, 121, 132 and politically powerful forces did not permit the licensure of all online auctions. (VC at ¶ 147 ("we'll never get the legislature to allow us to agree to oversee all auctions whether fixed or not), ¶¶ 93-94, 102, 136-37, 140, 147-150). Containment of an upstart business model is anything but a compelling *public* interest. Crafting laws to aid private companies even less so. If there was a real problem, the auctioneers would have been willing to "kick an eBay's nest." (VC at ¶ 140).

In *Backpage.com,* 939 F. Supp. 2d at 843-44, the District Court also concluded that the law violated the *Pike* test. The District Court found that the interest – eliminating sex trafficking – was "important," *id*. at 844, but the potential benefits were "undermine[d]" by the exemptions, including those for free advertisements. In contrast, the burdens would "pose[] a serious burden on interstate commerce." *Id.* The far-reaching nature of regulating print and online ads all across

the internet created such a serious burden that it could not be outweighed by any benefit the state would receive. *Id*. The online auction license fails under this analysis.

The burdens imposed by the online auction license are tremendous. Any operator must obtain an individual auctioneer license. (Ex. 1 at § 5). A person who manages an auction company is required to complete a six-month period under the supervision of another licensed auctioneer. (*Id*. at § 4(9) (principal auctioneers manage auction companies), § 10(c) (requirement for principal auctioneer). For an out-of-state website operator who is already in business, it would be incredibly burdensome to move to Tennessee and work under a sponsoring auctioneer for six months. On top of this, Tennessee requires fees and an examination. (*Id*. at § 10(e), (f)). Since all auctions arranged "by or through" a principal auctioneer must be conducted "exclusively" by licensed persons (*id*. at § 5(b)), *every person* involved with the operation of the auction website must receive a Tennessee auctioneer license of some kind. Even a "bid caller auctioneer" – the least onerous license – must obtain 16 hours of instruction at an auction school accredited by the Commission, (*id*. at § 10(a)), which is obviously difficult for out-of-state individuals. On top of the individual licenses, an out-of-state company must also set up and maintain an escrow account for all funds belonging to others for an auction in Tennessee. Tenn. Code Ann. § 62-19-117(c) (2019). They must also file an "irrevocable" consent to suits and actions and agree to be audited. *Id*. at 117(d). The burdens must be weighed against the benefits, and these burdens outweigh any benefit far more so than in *Backpage.com* where, after all, Tennessee could at least assert important interests. 939 F. Supp. 2d at 844.

Tennessee will derive little to no benefit from licensing online auctions. Any cognizable interest in the online license does not begin to compare with the importance of the interests that proved insufficient to overcome a constitutional challenge in *Backpage*, 939 F. Supp. 2d at 843-

44. It is not hard to imagine what unlicensed online auctions would look like, since they have, after all, flourished unregulated for over a decade, with little consumer concern over the last three years. (VC at ¶¶ 154-157). And within that small number of complaints, the majority concern *timed* auctions, the type of auctions that Tennessee will leave unburdened. (*Id*.). The benefits are negligible if they exist at all.

Exemptions other than that for timed auctions further undermine any notion that the law produces any benefit at all. *See Backpage.com*, 939 F. Supp. 2d at 844 (exceptions for free advertisers undermine the benefits to the state). Obviously, nothing uniquely harmful will result if extended-time online auctions continue unlicensed. When considered alongside the fact that 20 states require no license whatsoever for auctioneers, *see* Dick M. Carpenter, LICENSE TO WORK, TABLE 1 (2nd ed. Nov. 2017), and that Tennessee did not require a license for online auctions until now, there is no harm requiring redress and no benefit to be gained through regulation.

The online license is an impermissible burden on interstate commerce, no matter how it is assessed.

B. Plaintiffs satisfy the remaining requirements for a temporary restraining order or preliminary injunction.

Having demonstrated a likelihood of success on the merits, the other factors become straightforward. In constitutional cases, and especially when the First Amendment is at stake, all of the factors "are essentially encompassed by the analysis of the movant's likelihood of success on the merits." *Am. Freedom Def. Initiative v. Suburban Mobility Auth. For Reg'l Transp.*, 698 F.3d 885, 890 (6th Cir. 2012); *see Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). The likelihood of success necessarily means that Plaintiffs face irreparable harm as even momentary losses of First Amendment freedoms suffice to show that requisite harm. *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014). Prevention of

constitutional violations is always in the public interest. *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)*; Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("it is always in the public interest to prevent the violation of a party's constitutional rights."). As for countervailing interests, "if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to adhere to its enjoinment." *Déjà vu of Nashville*, 274 F.3d at 400 (citation omitted). Extended time online auctions have been around for a long time with no demonstrable harm to the public. (VC at ¶). A restraining order or an injunction simply preserves the status quo until "such time as a federal court may rule, after a full hearing, on the merits of the plaintiff['s] constitutional challenges." *United States v. U.S. Coin & Currency*, 401 U.S. 715, 728 (1971) (Brennan, J., concurring). The interests all favor granting the instant motion.

This Court should not order a bond

Under Tenn. R. Civ. P. 65.05, the applicant for an injunction must provide a bond for the payment of costs and damages as may be incurred or suffered by any person who would have been wrongfully enjoined. Requiring a bond is left to the discretion of the district court. *See Moltan Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (courts "possess discretion over whether to require the posting of security."). Courts in this circuit have found it appropriate to waive bond in cases "involving a constitutional issue affecting the public." *Stand Up Am. Now v. City of Dearborn*, 2012 U.S. Dist. LEXIS 48478 at *10 (E.D. Mich. Apr. 5, 2012). In this case a bond is unnecessary and, in fact, does not make sense. The Defendants face no financial risk if Plaintiffs continue online auctioneering. An injunction merely maintains the status quo. Accordingly, Plaintiffs respectfully request that this Court waive the bond requirement, or, alternatively, set the bond in the nominal amount of one dollar.

Conclusion

Plaintiffs respectfully request this Court issue an immediate temporary restraining order enjoining Defendants and their agents from enforcing the online auction license until such time as this Court can consider Plaintiffs' motion for preliminary injunction. This Court should not hesitate to issue a temporary restraining order and a preliminary injunction to ensure that Plaintiffs may continue speaking and participating in interstate commerce during the pendency of this litigation.

Dated: June 27, 2019.

Respectfully submitted,

s/ B. H. Boucek
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[redacted]

Counsel for plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following, by the following means:

1. I filed the document on the court's efile system.

2. I hand delivered copies to: Herbert H. Slatery III, Tennessee Attorney General's Office, War Memorial Building, 201 6th Ave. N., Nashville, TN.

On this date, June 27, 2019.

s/ B. H. Boucek
BRADEN H. BOUCEK