

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.)
)
 ROXANA GUMUCIO, et al.,)
)
 Defendants.)

TEMPORARY RESTRAINING ORDER

Before the Court is Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (Doc. No. 3, “the Motion”). In the Motion, Plaintiffs request the Court to issue a temporary restraining order enjoining Defendants from enforcing the State of Tennessee’s new statutory provisions that would extend the State’s auctioneer licensure regime to particular kinds of online auctions.

On May 24, 2019, Governor Bill Lee signed 2019 Tenn. Pub. Ch. 471 (hereinafter “PC 471”) into law. Effective July 1, 2019, PC 471 amends Tennessee’s statutes regulating auctions and the licensing requirements for those who conduct “auctions.” Specifically, PC 471 amends the definition of “auction” to include “electronic” exchanges. *See* PC 471 § 4. It further states that it is unlawful for any person to “[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by the commission.” *Id.* at § 5. The Act further narrowed the exemption, to otherwise applicable licensing requirements, for so-called “timed listings” that allow bidding on an internet website; the Act carved out from this exemption so-called extended-time auctions— auctions whereby the ending time can be extended based on bidding activity. *Id.* at § 6(9). Therefore, although the parties disagree as to the apparent or actual scope of certain aspects of the

law, it is fair to say that—to the extent it is applicable—the law, as amended, generally requires auctioneers participating in online auctions (or at least online extended-time auctions) to be licensed.

Also included in PC 471 are numerous exemptions to the requirement that an online auction be conducted by a licensed auctioneer. These exemptions include, among others, “[a]n auction conducted by or under the direction of a governmental entity”; “[a]n auction conducted on behalf of a political party, church, or charitable corporation or association”; “[a]n auction conducted for the sale of livestock”; “an auction for the sale of tobacco”; “[a]ny fixed price or timed listings that allow bidding on an internet website, but do not constitute a simulcast of a live auction”;¹ “[a]n in person or simulcast auction whose primary business activity is selling nonrepairable or salvage vehicles in this state” and “[a]n individual who generates less than twenty-five thousand dollars (\$25,000) in revenue a calendar year from the sale of property in online auctions.” *Id.* at § 6.

Plaintiffs allege that McLemore Auction has operated, and plans to continue to operate, online extended-time auctions of real estate and personal property in Tennessee. (Doc. No. 1 at ¶¶ 22 & 29). McLemore Auction employs one full-time employee, Will McLemore, and four independent contractors: Blake Kimball, Wilson Land, Jamie Boyd, and Dwayne Smith. (*Id.* at ¶ 23). Kimball, Land, and Boyd do not hold any license under Tennessee’s auctioneer laws. (*Id.* at ¶ 24). McLemore Auction exclusively uses the extended-time auction format, whereby the time of the auction closing extends based on bidding activity. (*Id.* at ¶ 32). McLemore Auction generates, and anticipates that it will continue to generate, more than \$25,000 in sales revenue per calendar year from the sale of goods or real estate in online auctions. (*Id.* at ¶ 53).

¹ This particular exemption is discussed briefly above.

Plaintiffs contend that the provisions of PC 471 that require licensure for extended-time online auctions violate their rights to free speech under the First Amendment and Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the Tennessee Constitution; burden interstate commerce in violation of the Commerce Clause of the United States Constitution; and violate the Privileges or Immunities Clause of the United States Constitution. (*See* Doc. No. 1). Accordingly, Plaintiffs seek a temporary restraining order and preliminary injunction to prevent PC 471 from going into effect until the constitutionality of PC 471 can be resolved via adjudication in this lawsuit.

In determining whether to grant a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure, a court must consider whether a plaintiff has established: (1) a “strong” likelihood of success on the merits; (2) that he will suffer irreparable injury absent injunctive relief; (3) that issuance of an injunction would not cause substantial harm to others; and (4) that the public interest would be served by the issuance of the injunction. *See, e.g., Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017).

Alternatively, the Sixth Circuit permits a district court, in its discretion, to grant a preliminary injunction or temporary restraining order “even where the plaintiff fails to show a strong or substantial probability of ultimate success on the merits of his claim, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued.” *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982) (“[I]n general, the likelihood of success that need be shown (for a preliminary injunction) will vary inversely with the degree of injury the plaintiff will suffer absent an injunction.” (citing *Metro. Detroit Plumbing & Mech. Contractors Assoc. v. H.E.W.*, 418 F. Supp. 585, 586 (E.D. Mich. 1976))).

Defendants contend that Plaintiffs have failed to demonstrate a substantial likelihood of success of Plaintiffs' First Amendment claim. In doing so, Defendants assert that auctioneers' speech is commercial speech and thus subject to an intermediate scrutiny analysis. *See W. Mich. Band Instruments, LLC v. Coopersville Area Pub. Sch.*, 761 F. App'x 497, 500 (6th Cir. 2019) ("Restrictions on commercial speech are subject to a form of intermediate scrutiny[.]" (citing *Pagan v. Fruchey*, 492 F.3d 766, 770-71 (6th Cir. 2007))). The Court finds debatable the proposition that the speech at issue is a form "commercial speech" subject to diminished protection (rather than some more protected form of speech). And in any event, the Court cannot conclude, based on the current record before it, the State could even pass the lower level of intermediate scrutiny associated with "commercial speech." *See Id.* (explaining that to justify a regulation on commercial speech, "[t]he government must demonstrate that the restriction on commercial speech *directly and materially advances a substantial governmental interest*, and 'even common-sense decisions require some justification.'" (citing *Pagan*, 492 F.3d at 777)).

Moreover, to the extent that the State seeks to defuse the First Amendment issue by characterizing its licensing scheme as one affecting conduct primarily and speech only incidentally, the Court cannot acquiesce. As Plaintiffs note, the definition of "auction[ing]"—the specific act sought to be licensed and thus subject to abridgement via the Act—is defined solely in terms of communicative activity, thus inclining the Court at this stage to believe it well may be entirely "speech" within the scope of the First Amendment.

Defendants contend that the State's interest in regulating the auctioneering profession is substantial because the State has a substantial interest in protecting the public from unfair or deceptive auctions, including online auctions. (Doc. No. 13 at 7). There are problems, however, with Defendants' rationale. First, if the interest in protecting the public from deceptive online

auctions is so substantial, then why does PC 471 exempt *numerous* categories of online auctioneers from the regulation, including “[a]n in person or simulcast auction whose primary business activity is selling nonrepairable or salvage vehicles in this state” and “[a]n individual who generates less than twenty-five thousand dollars (\$25,000) in revenue a calendar year from the sale of property in online auctions.” PC 471 at § 6. Plaintiffs assert that PC 471 is “so riddled with exemptions that it undermines any plausible notion that the government has any real legitimate interest in the regulation.” (Doc. No. 5 at 14). Plaintiff may well have a point, although the record is not currently sufficient to determine whether the existence of all of these exemptions in fact entirely undermine the State’s claim of a substantial interest.

Second, the data allegedly compiled by the Task Force created by the Tennessee Auctioneers Association to study the issue of online auctions revealed that in the year 2018, the State did not receive a *single* consumer complaint about extended-time online auctions. (Doc. No. 1 at ¶ 156); *see United States v. Nat’l Treasure Emps. Union*, 513 U.S. 454, 475 (1995) (“when the Government defends a regulation on speech . . . [i]t must demonstrate that the recited harms are real, not merely conjectural . . .”).

Thus, the Court finds that Plaintiffs have shown some likelihood that Defendants cannot justify its restriction on auctioneers’ speech by a substantial governmental interest. At this juncture, the Court does not want to overstate its current position regarding the degree of likelihood that Plaintiff will prevail on its First Amendment claim; any firm assessment of likelihood would be premature at this stage. And the State has set forth a series of legitimate arguments (professionally and on short notice, the Court wishes to add) against Plaintiff’s position. But Plaintiffs have shown at least there are “serious questions going to the merits” and these questions “decidedly outweigh[]

any potential harm to [D]efendant[s] if an injunction is issued.” *Friendship Materials, Inc.*, 679 F.2d at 105.

Additionally, Plaintiffs have demonstrated that they will suffer immediate and irreparable harm if injunctive relief is not granted pending a preliminary injunction hearing. The Court agrees with Plaintiffs that “the loss of First Amendment rights, even for minimal periods of time, constitutes irreparable injury sufficient to justify injunctive relief.” *Milliron v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 867 F. Supp. 559, 564 (W.D. Ky. 1994); *see also G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (“[V]iolations of [F]irst [A]mendment rights constitute *per se* irreparable injury.”).

Considering the lack of evidence on the current record that extended-time online auctions are harming Tennessee consumers, the Court finds that the balance of relative harms among the parties weighs in favor of Plaintiffs and against Defendants at this time.

Finally, the Court finds that the public interest will not be harmed by injunctive relief pending a preliminary injunction hearing, that will be set in short order.

Accordingly, Plaintiff’s Motion for Temporary Restraining Order (Doc. No. 3) is **GRANTED** in part and pursuant to Federal Rule of Civil Procedure 65, Defendants are **ENJOINED** from applying Tennessee’s auctioneering laws and licenses to “electronic” exchanges, or online auction websites, or against Plaintiffs until further order of the Court.

Because this case involved “constitutional issues affecting the public[,]” the Court finds it unnecessary to require Plaintiffs to post security as a condition of obtaining injunctive relief. *See Stand Up Am. Now v. City of Dearborn*, No. 12-11471, 2012 WL 1145075 (E.D. Mich. Apr. 5, 2012). Therefore, Plaintiffs are excused from doing so.

This Temporary Restraining Order is effective upon its issuance on June 28, 2019 at 5:00 p.m., and expires on July 11, 2019 at 12:00 p.m., absent further order of the Court. A preliminary injunction hearing will be scheduled for July 10, 2019 at 9:00 a.m.

IT IS SO ORDERED.



ELI RICHARDSON
UNITED STATES DISTRICT JUDGE