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.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This lawsuit challenges the constitutionality of 2019 Tenn. Pub. Ch. 471 (PC 471), a measure that was squarely aimed at bringing online auctions under Tennessee's licensing regime for auctioneers.[1] (*See* Doc. 4-2, PageID # 62-68, Ex. 1.) In passing PC 471, the state amended the definition of "auctions" to include "electronic" exchanges, thereby bringing online auctions under the fold. *Id*. at § 4(2). But the state was careful to exempt some online auctions from the definition. For example, fixed-time online auctions such as those relied upon by eBay remain fully unregulated, among others. *See id.* § 6(9) (exempting "timed listings"); *id*. at § 4(12) (redefining timed listings to exclude websites that "extend based on bidding activity"). A full description of PC 471 and the history behind it was fully and adequately related by this Court in its prior orders. (*See* Doc. 29, 83.)

As Plaintiffs will show, none of the facts cited by the Court or material to Plaintiffs' motion are subject to dispute. The questions before the Court are: (1) does the state violate the First Amendment by requiring a license for internet auctions that use an extended-time format; and (2) does PC 471 violate the Commerce Clause by regulating internet auctions. This case can and should be decided in Plaintiffs' favor on their motion for summary judgment.

First, PC 471 violates the First Amendment. Auctions are pure speech because they consist of communications. Because PC 471 regulates those communications based on their content and on the identity of the speaker, the challenged law is subject to strict scrutiny. The state must

[1] According to one leading study, Tennessee has the most burdensome requirements to become an auctioneer. License to Work: A National Study of Burdens from Occupational Licensing <https://ij.org/report/license-to-work/ltw-occupation/?id=5>. License to Work was prominently cited by the White House Council of Economic of Economic Advisers. <https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf>.

establish that it has a compelling government interest, and that PC 471 is narrowly tailored to achieve that interest. Even if the state could show that PC 471 was not content- and speaker-based, the "best-case scenario" for the state is that PC 471 is subject to intermediate scrutiny. (Doc. 83 at 39.) The state will still be required to establish a significant interest, and that PC 471 is narrowly tailored to advance that interest. The state cannot carry its burden under any standard. The undisputed facts show that the state cannot make the requisite evidenced-based showing of an interest in consumer protection, its claimed justification for PC 471. Instead, the facts plainly show that the state's asserted interest in consumer protection was pretext for its actual goal of hampering innovators on behalf of licensees, an impermissible *private* interest that would fail even the rational basis test. Because the state discounted other forms of governmental consumer protection measures, the adequacy of non-licensing alternatives such as those employed by many other states, or even a less onerous license, the state cannot show that its burdensome licensing regime is tailored to fit the goal of consumer protection.

Second, by regulating online auctions, PC 471 necessarily attempts to control conduct in other states, a *per se* violation of the Commerce Clause. The Court has already twice made this finding (Doc. 29 at 19; Doc. 83 at 18-30), and it "hinges on . . . statutory interpretation," (Doc. 83 at 21) making it suitable for conversion to a final judgment. The state should leave regulation of the ultimate form of interstate commerce to Congress as many courts have otherwise found.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). Motions for summary judgment may (but need not) be supported by affidavits, declarations, and other materials in the record. Fed.

R. Civ. P. 56(c)(1)(A)–(B). The Court can also take judicial notice of public records and government documents available from reliable internet sources. *See ARJN #3 v. Cooper*, No. 3:20-cv-00808, 2021 U.S. Dist. LEXIS 22286, at *25-26 (M.D. Tenn. Feb. 5, 2021).

In summary judgment cases involving government suppression of speech, the ultimate burden rests on the government to demonstrate the constitutionality of its restriction. *See McCullen v. Coakley*, 573 U.S. 464, 495 (2014). Once Plaintiffs establish through undisputed facts that the state is regulating speech, the state must justify its restriction under either intermediate or strict scrutiny.

Strict scrutiny is a "demanding" standard. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). To survive strict scrutiny, the state must show that PC 471 "is justified by a compelling government interest and is narrowly drawn to serve that interest" *Id.* at 799. The state must carry its burden based on evidence. *Id.* ("The State must specifically identify an 'actual problem' in need of solving and the curtailment of free speech must be actually necessary to the solution.") (citations omitted). Speculation and conjecture are not sufficient. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816-17 (2000); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . ."); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) (state must "demonstrate that the recited harms are real, not merely conjectural . . . .") (citation omitted).

However, even under intermediate scrutiny, the state still must shoulder a burden based on evidence, not speculation. *Richland Bookmart, Inc. v. Knox Cty.*, 555 F.3d 512, 523 (6th Cir. 2009). The state must show that the law is narrowly tailored to serve a significant governmental interest. *Id.* at 521-22; *McCullen*, 573 U.S. at 477; *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 571 (6th Cir. 2012). The state must also show that it "seriously undertook to address the problem

with less intrusive tools readily available to it." *See McCullen*, 573 U.S. at 494. Pretextual justifications will never satisfy the First Amendment. *Thomas v. Bright*, 937 F.3d 721, 734 (6th Cir. 2019) ("[T]he Court has held elsewhere (under intermediate scrutiny) that the State must show that its justifications for a restrictive law are genuine [and] not hypothesized or invented *post-hoc* in response to litigation.") (citation and quotations omitted).

The burden of the respective parties is similar for the Commerce Clause claim. As this Court has recognized (Doc. 83 at 17), if the state directly controls out-of-state conduct, it commits a *per se* violation of the Commerce Clause. *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 644 (6th Cir. 2010). The court has "no need to consider" any balancing interests; Plaintiffs therefore only need to show that the state regulates extraterritorially. *Am. Bev. Ass'n v. Snyder*, 735 F.3d 362, 376 (6th Cir. 2013). If PC 471 is not extraterritorial, then Plaintiffs must show that PC 471 creates burdens on interstate commerce that significantly outweigh any benefits. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); *Garber v. Menendez*, 888 F.3d 839, 845 (6th Cir. 2018).

ARGUMENT

I. PC 471 Violates the First Amendment.

PC 471 is an unconstitutional speech restriction. It directly burdens speech in a manner that is content- and speaker-based, subjecting it to strict scrutiny.

A. PC 471 is subject to strict scrutiny because it restricts pure speech based on its content and the identity of the speaker.

When it denied the state's motion to dismiss, this Court correctly found that an auction, as defined by the state, "necessarily involves speech." (Doc. 83 at 36.) Because PC 471 prohibits an auctioneer from speaking without a license, "at the very least some speech is implicated." *Id.* at 37. This Court left for another day—today—"whether PC 471 is a regulation of conduct that

incidentally burdens speech, or a content-based restriction on speech." *Id.* The answer to that question determines whether PC 471 is subject to intermediate scrutiny or strict scrutiny. *See id.* at 38 (noting Court in *Nat'l Inst. of Family & Life Advocates v. Becerra,* 138 S. Ct. 2361 (2018) (*NIFLA*), appeared to apply intermediate scrutiny); *Richland Bookmart*, 555 F.3d at 521 (intermediate scrutiny of restrictions unrelated to content of speech).

1. PC 471 regulates pure speech.

"[C]onducting an auction necessarily involves speech." (Doc. 83 at 36.) In evaluating whether a law restricts speech, what matters is what triggers the law, not labels. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010) (finding the challenged law restricted speech because the "conduct triggering coverage under the statute consists of communicating a message"); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) ("Speech itself is not conduct just because the government says it is."). This Court correctly found that PC 471 "clearly regulates more than mere conduct." (Doc. 83 at 36.) Here, the triggering event is an auction, which the state has defined as speech. According to PC 471, auctions are written, oral, or (in light of PC 471's addition) electronic "exchanges." (Doc. 4, Ex. 1, PC 471 § 4(2)). An "exchange" is nothing less than a communication between the auctioneer and audience members. *See id*. And courts consistently treat communication as "pure speech." *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 775 (M.D. Tenn. 2020) ("[O]ur Court and the Supreme Court have each distinguished between laws that, on the one hand, regulate pure speech, and those that, by contrast, are a step removed from direct acts of communication[.]") (citation and quotation omitted).

In an online auction, these communications come in many forms, including images, messages about items available for purchase, condition of the items, and prior ownership. SUMF ¶¶ 327-30. Online auctions are particularly reliant on these and other communications because

audiences are not physically present and must rely on images and narratives to convey a sense of a product's value. SUMF ¶¶ 35, 43, 326-28. And for many items, such as golf clubs and historical items, the item's condition and prior ownership are key pieces of information that an online auctioneer communicates to potential buyers. SUMF ¶¶ 35-38. Even the status of the bids, a necessary component to any auction, is itself speech; restrictions on providing the bidding status would necessarily implicate Plaintiffs' right to determine how that information is used or disseminated. *See Sorrell v. IMS Health,* 564 U.S. 552, 568 (2011) ("An individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated.") (citation and quotation omitted).

PC 471 does not "incidentally" burden speech. The Court correctly recognized (Doc. 83 at 38) that regulation of speech incidental to conduct is one situation in which the Supreme Court has "afforded less protection for professional speech[.]" *NIFLA*, 138 S. Ct. at 2372. While the Supreme Court recognized that "drawing the line between speech and conduct can be difficult," *id.* at 2373, it is not difficult in this case. The Supreme Court recognized that its exceptions do not "*turn*[] *on the fact that professionals were speaking*." *Id.* at 2372 (emphasis added). In this case, the state's 30(b)(6) witness agreed that it is not "possible" to have an auction without communicating. SUMF ¶ 332 ("Q: Is it possible to have an auction without an oral, written or electronic communication? A: *No*.") (emphasis added). Because PC 471 "turn[s]" on speaking, *NIFLA*, 138 S. Ct. at 2372, it directly, not incidentally, burdens speech. PC 471, by the state's acknowledgment, restricts unlicensed auctioneers from "*communicating* a message." *Holder*, 561 U.S. at 28 (emphasis added). PC 471 is a pure speech restriction.

Auctions are unlike any of the recognized examples of incidental burdens on speech. *See NIFLA*, 138 S. Ct. at 2373 (listing examples like "torts for professional malpractice" and medical

disclosure laws) (citation omitted); *Sorrell*, 564 U.S. at 567 (explaining that "a ban on race-based hiring may require employers to remove 'White Applicants Only' signs . . . an ordinance against outdoor fires might forbid burning a flag . . . [and] antitrust laws can prohibit agreements in restraint of trade") (quotations omitted); *Capital Associated Indus. v. Stein*, 922 F.3d 198, 208 (4th Cir. 2019) (listing examples: "[b]ans on discrimination, price regulations, and laws against anticompetitive activities"). For example, a ban on outdoor burning will "incidentally" burden speech only if the item is protected by the First Amendment, like a flag or a book. That is nothing like auctions, which *always* involve communications. The state will be unable to explain how auctions are not speech without eviscerating *NIFLA's* core holding.

It is impossible to have an auction without communicating. PC 471 is a straightforward restriction on pure speech.

2. PC 471 makes speaker-based distinctions.

This Court previously observed that many of PC 471's exemptions "were based on the identity of the party conducting the auction." (Doc. 83 at 3.)

PC 471 is indeed riddled with exemptions for various speakers. *First*, and most glaringly, PC 471 was crafted from the ground up with an eye towards not "kick[ing] eBay's nest." SUMF ¶ 195. That is why PC 471 narrowed the exemption for online auctions to eBay-style "timed listings" (Ex. 1 § 6(9)), by redefining the term to exclude websites that "extend based on bidding activity." *Id*. at § 4(12)). This change came at the recommendation of the Task Force, SUMF ¶ 231, which showed an unusual commitment to what the state itself calls the "eBay" exemption. SUMF ¶ 130.

Second, the state took pains to exempt some online auction companies—even those that use extended-time format—who sell wrecked vehicles in-state. (Ex. 1 § 6(10)). PC 471's preferences for certain speakers in auctions of wrecked vehicles were nakedly expressed. Senators

literally named "some existing online type auction entities that have been exempted from the bill such as Richie Brothers[2] and others—Copart and so forth."[3] SUMF ¶ 242 (Ex. 13 at 3:8-12); *see* SUMF ¶ 160 (Rep. Gravitt in 2017 "Copart, they would be exempt."). PC 471 has a similar exemption for simulcast auctions of salvage vehicles. (Ex. 1 § 6(11).) A lobbyist for a company called Insurance Automobile Auctions encouraged this exemption at the June 19, 2018 Task Force meeting. SUMF ¶¶ 177, 179. He explained the business was "in the primary business of selling salvaged automobiles" using "online and live auctions simultaneously."[4] SUMF ¶ 178. Speaker preferences, not consumer welfare, determined who can and cannot conduct online auctions.

Third, PC 471 has other assorted speaker exemptions. *See Sorrell*, 564 U.S. at 564 ("More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers."). They include political parties, churches, and charitable corporations. (Ex. 1 at § 6(4).) Yet other religious and nonreligious gatherings, such as those taking place at a mosque, synagogue, or among an atheist group, are excluded. The same can be said for an issue advocacy group that is not a political party, like the Sierra Club or the NAACP. The law also exempts the government (*id.* at § 6(3)), the University of Tennessee extension when selling livestock (*id.* at § 6(6)), tobacco sellers (*id.* at § 6(7)), and persons who do not make $25,000 in revenue. *Id.* at § 6(12); *see also Backpage.com,*

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[2] Ritchie Bros. Auctions publicly describes its business operations on its website <https://www.rbauction.com/aboutus> as "onsite and online selling platforms and commitment to first-class customer service" for trucks and other heavy equipment. SUMF ¶ 243.

[3] Copart Auto Auctions describes itself on its website <https://www.copart.com/> as a "100% Online Auto Auctions, Featuring Used, Wholesale and Salvage Cars, Trucks & SUVs for Sale." *See* SUMF ¶ 161. PC 471 exempts non-repairable or salvage vehicles auctions conducted exclusively online. (Ex. 1 § 6(10)).

[4] Insurance Automobile Auctions' lobbyist also related that "the reason we're here" was a concern that "the original regulation sought to exempt our primary competitor" (CoPart) and "we want to be treated the same as our competitor." SUMF ¶ 179. Consumer protection was not at the fore of anyone's concerns.

LLC v. Cooper, 939 F. Supp. 2d 805, 837 (exemptions for publishers of for-sale ads, but not for-free ads, were speaker-based). *See* Doc. 29 at 24 (recognizing that small time sellers may be less accountable "inasmuch as they are more likely to be 'fly by night' operators or individuals making one-off sales.").

Online auctions are an option for some favored speakers, but not others. PC 471 is speaker-based, thereby demanding strict scrutiny.

3. PC 471 is also a content-based restriction.

PC 471 is also content-based. "Content-based regulations 'target speech based on its communicative content.'" *NIFLA*, 138 S. Ct. at 2371 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)); *see Holder*, 561 U.S. at 19 (finding a regulation is content-based when its application "depends on what they say"). PC 471 restricts the content of speech in the following three ways because it "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).

First, PC 471 restricts what sellers can say about a product's purchase price and how they can say it without a license. Auctions are "invitations" between the auctioneer and audience for offers to purchase. (Ex. 1 § 4(2)). The invitation element is the critical difference between online *auction* websites like Will's and Aaron's and an online *purchasing* website like Amazon. Under PC 471, Amazon would not need a license that Purple Wave would need because Amazon is not *inviting* bids but rather *stating* a purchase price.[5] Under PC 471, a person must obtain an auctioneer

[5]By regulating based on ending format, PC 471 is also a medium restriction. "The Court long has recognized" that the First Amendment protects against restrictions on the medium of expression. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55 n.13 (1994).

license only if he wants to invite others to bid on an item, not if he wants to state a firm purchase price. Thus, PC 471 places restrictions on *what* is said online.

Second, PC 471 restricts what auctioneers can invite others to bid on without a license. Under PC 471, an "invitation" to bid on an item only qualifies as an auction when the invitation is to bid on specified content: "goods or real estate." (Ex. 1 § 4(2)). PC 471 defines "goods" to mean "chattels, merchandise, real or personal property, or commodities of any form that may lawfully be kept or offered for sale." (Ex. 1 § 4(7)). So, PC 471 requires persons inviting others to bid on such goods or real estate to obtain a license. But if the invitation for an offer is for intangible property (as on a screenplay auction website[6] or naming rights for a new species[7]), future interests (as on a bond trading website[8]), or goods that could not be legally sold (such as an unlicensed short-term rental,[9] or criminal contraband on websites like now-defunct Silk Road[10]), then it would not qualify as an auction and no license would be required. Again, whether or not PC 471's license requirement applies is contingent solely on *what* is included in the invitation.

Third, PC 471 restricts speech because of the communicative *impact* the auctioneers' speech has on listeners. The law only applies when the speaker's speech "culminat[es] in the acceptance … of the highest or best offer made by a member of the participating audience." (Ex. 1 § 4(2) (defining "auction")). If the invitation does not generate an effect—the culmination of an acceptance—then it is not an auction, and a license is not required. Thus, application of PC 471 is

[6] < https://www.screenplaybid.com/sbp/>.
[7] <https://undark.org/article/nomenclature-auctions-bidder/>.
[8] <https://www.daytrading.com/bond-auction>.
[9]<http://www.skyauction.com/vacation/vacation-rentals>.
[10]<https://www.nytimes.com/2015/02/05/nyregion/man-behind-silk-road-website-is-convicted-on-all-counts.html>.

dependent on the "direct impact of speech on its audience." *See Boos v. Barry*, 485 U.S. 312, 321 (1988).

For these reasons, PC 471 is content-based, thereby providing another independent basis to apply strict scrutiny.

B. The State cannot carry its burden of showing that PC 471 survives any level of scrutiny.

A speech restriction—even an incidental speech restriction—that is content- or speaker-based must survive strict scrutiny. *See Sorrell*, 564 U.S. at 567; *Midwest Media Prop., L.L.C. v. Symmes Twp.*, 503 F.3d 456, 476 (6th Cir. 2007) (finding "laws which engage in 'discrimination among different users of the same medium for expression' are generally held to be content-based" and thus must survive strict scrutiny) (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972)). PC 471 is subject to strict scrutiny because it regulates based on content, *see Sorrell*, 564 U.S. at 567, and makes speaker-based distinctions. *Id*. at 565-66; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). However, even if PC 471 is only subject to intermediate scrutiny—what the Court called a "best-case scenario" (Doc. 83 at 39)—it still must undergo a searching form of review that demands "a close fit between ends and means." [11] *McCullen*, 573 U.S. at 486; *see Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 818 (6th Cir. 2005). Under either standard, the analysis is largely the same: the state must (1)

[11]While citing *Otto v. City of Boca Raton, Fla.*, 353 F. Supp. 3d 1237, 1248 (S.D. Fla. 2019), the Court left open the possibility that "perhaps" the state could succeed in arguing that rational basis is the appropriate standard. (Doc. 83 at 39 n.20.) However, the 11th Circuit reversed and remanded the case, ordering the district court to enter a preliminary injunction for Plaintiffs. *See Otto v. City of Boca Raton*, 981 F.3d 854, 861, 866, 870-72 (11th Cir. 2020) (finding that strict scrutiny applied because speech restrictions were content-based).

identify a public interest for the law, and (2) show that the interest is advanced without burdening too much speech. The state can do neither.

1. The state has no compelling or significant interest.

It is within this Court's purview to consider legislative evidence, or the lack thereof, when evaluating whether PC 471 survives strict or intermediate scrutiny. *See Playboy*, 529 U.S. at 813, 822 (strict scrutiny); *McCullen*, 573 U.S. at 470-71, 495 (intermediate). To show (1) the existence of a compelling or significant governmental interest, and (2) that it "seriously undertook to address the problem with less intrusive tools readily available to it," *id*. at 494, the Court should scrutinize: the Task Force Findings; the four Task Force Meetings; and the legislative proceedings from 2017 - 2019. None offer any meaningful evidence that PC 471 provides consumer protection.

Prior to enacting PC 471, the state formed an Auctioneer Task Force[12] to, in part, "address[] online auction activities."[13] SUMF ¶ 229. The Task Force devoted substantial attention to consumer harms based on complaint data. The following table reflects the Task Force's findings:

Online Auction Complaint Data	FY 2016	FY 2017	FY 2018	Total
Total number of auctioneer complaints	37	34	46	**117**
Total number of consumer-generated complaints	24	29	33	**86**
Total number of complaints regarding online auctions	7	4	4	**15**
Total number of consumer-generated complaints regarding online auctions	5	3	3	**11**
Total Number of complaints regarding online auctions with extended time endings	2	1	0	**3**

SUMF ¶¶ 205-7. The state's data shows that online auctions are hardly a problem for consumers.

[12] <https://www.tn.gov/commerce/regboards/auction-law-tf/additional-resources-.html>.
[13]<https://www.tn.gov/content/dam/tn/commerce/documents/regboards/auction-tf/posts/Auctioneer-Law-Modernization-Task-Force-Finalized-Recommendations.pdf>.

Moreover, as the Court has observed, fixed-time auctions—the type of online auctions exempted under PC 471 (Doc. 29 at 23)—triggered the most consumer complaints.

Based on consumer complaints, the state's interest can hardly be called significant, let alone compelling. *See Playboy*, 529 U.S. at 821-22 (lack of complaints undermined validity of government's claim that minors were viewing adult programming). As depicted in the table, SUMF ¶ 207, online auctions trigger fewer consumer complaints than in-person auctions, and extended-time online auctions trigger fewer complaints than fixed-time online auctions. Out of the 117 auction-related complaints filed in Tennessee from 2016 to 2018, only 15 of them arose from online auctions. Of those 15 complaints, only 11 were filed by consumers. 12 of the 15 arose from fixed-time online auctions, and only three arose from extended-time auctions like those regulated under PC 471. Even more telling is that the state received *no* complaints for extended-time online auctions in 2018, the last year studied. This flimsy evidence is not evidence of a significant, let alone a compelling, threat consumer harm.

Digging even deeper into the data behind the complaint table makes the state's claimed interest in consumer protection even weaker. Of the five complaints from 2016,[14] "two or three" were live auctions that "also had live simulcast" bidding online, SUMF ¶ 211, meaning these complaints pertained to simulcast auctions which already required a license under the fixed-time exemption that preexisted PC 471. *See* Tenn. Code Ann. § 62-19-103(9) (exempting internet auctions "that do[] not constitute a simulcast of a live auction"). And none of the 2016 complaints resulted in an actual finding of a violation against the respondent.[15] SUMF ¶ 212. Of the three

[14] Only two of the 2016 complaints were categorized as an extended-time auction.

[15] The state might respond that it was precluded from taking enforcement actions against unlicensed activity because of the timed listing/eBay exemption. However, many were not exempt because they were simulcast. *See, e.g.*, SUMF ¶ 211. Elsewhere, the state took enforcement actions

2017 complaints,[16] one was also a simulcast auction, SUMF ¶ 213, and only one resulted in an actual finding of a violation (PCI Auctions). [17] SUMF ¶¶ 214-16. Of the three complaints in 2018 (none of which involved extended-time), one was "performing a live auction on Facebook." SUMF ¶ 217, and another was a simulcast of a live auction. SUMF ¶ 218. None resulted in an actual finding of a violation against the respondent. SUMF ¶ 219. In sum, of the 11 consumer complaints regarding online auctions, as many as six were live auctions with a simulcast component online. Over the studied period, exactly one complaint involving an extended-time online auction was validated by an adverse finding.

There seems to be little need to protect consumers based on this evidence. The evidence bolsters this Court's original finding "that the State's purported concerns in fact are illusory, thus severely undercutting the State's position." (Doc. 29 at 24; *see Playboy*, 529 U.S. at 822 ("No support for the restriction can be found in the near barren legislative record[.]").)

Looking back further in time than 2016, this pattern continues. The state responded to an interrogatory answering that, since 2006, it has only *twice* taken enforcement action against an unlicensed person for performing an online auction of any format, suggesting that online auctions are even more harmless than the complaint data suggests. SUMF ¶ 220. The only two verified

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against unlicensed persons for online auctions. SUMF ¶ 216. The state took at least one other enforcement action related to an unlicensed online auction: Everything But The House, an unlicensed company from Ohio who entered into a consent order with the state on April 7, 2015, for advertising an online auction with extended time bidding. SUMF ¶¶ 224-25, 227-28.

[16] Only one of the 2017 complaints was categorized as an extended-time auction. SUMF ¶ 207.

[17] PCI entered a consent order with the state for performing an unlicensed, extended-time online auction on October 18, 2017. SUMF ¶¶ 216, 223. The TAC took this action even though its proposed rule to regulate extended-time online auctions had been rejected by the General Assembly. SUMF ¶¶ 147-48. The TAC was certainly outside its authority. More importantly, this indicates that the lack of enforcement actions is not attributable to the TAC's perceptions about its jurisdictional limits.

complaints were taken against Jaspar Trading House and Auction and PCI. SUMF ¶¶ 221 (Jaspar), 223 (PCI). Since Jaspar was not an online-only auction, SUMF ¶ 222, the state is left with only one verified finding to support its purported justification.[18] That is not enough.

This pattern has continued since PC 471's enactment. COVID-19, in fact, afforded an unplanned opportunity to test whether unregulated online auctions harm consumers. In the spring of 2020, the state notified licensees that in-person auctions "are prohibited" but reminded them of "the option to conduct auctions online." SUMF ¶¶ 263-64. During this time, this Court's preliminary injunction prohibited the state from regulating online auctions. (Doc. 29 at 29.) Thus, most Tennessee auctions for a year did not require a license. The effects on the public were indiscernible. The state's 30(b)(6) witness was "not aware of" any adverse impacts on the public from the prohibition of in-person auctions. SUMF ¶ 266. She had no evidence that Tennessee consumers who participated in auctions since the prohibition have been victimized more by fraud or deceptive practices. SUMF ¶ 267. The need to protect consumers from online auctions is clearly "hypothesized." *Thomas*, 937 F.3d at 734.

Even the state's proposed expert, Justin Ochs, does not create a material dispute in fact as to an actualized state interest in consumer protection. Ochs merely concluded that online auctions pose similar threats to consumers as live auctions. SUMF ¶¶ 274, 277. But he never examined whether live auctions present a threat of fraud that rises to a significant governmental interest. He never reviewed any complaint data. SUMF ¶ 279. He did not compare consumer harms during the unregulated COVID-19 period. SUMF ¶ 283. Ochs otherwise acknowledged that the harms he

[18] The state also took an enforcement action against EBTH as related above. SUMF ¶ 224. Two complaints as opposed to one doesn't change the point.

identified are equally present in any consumer transaction, such as online sales (eBay, Craigslist) or in consignment sales. SUMF ¶ 288.

The state extols its need to protect consumers, but its consumer protection rationales are pretext for an illegitimate one. *See Thomas*, 937 F.3d at 734 (finding pretextual justifications do not satisfy the First Amendment). Protection of auctioneers, not the public, is the justification. The legislative record shows (1) who wanted online auctions licensed (other auctioneers), (2) why they wanted it (to protect their own license), and (3) why they drew such patently irrational exemptions for online auctions (eBay and other companies did not care to be regulated). Licensed auctioneers, not the public, called for the regulation of online auctions. As this Court previously recognized (Doc. 29 at 23), when Representative Gravitt, the bill's sponsor (himself a licensed auctioneer and past president of the auctioneer's trade group, *see* SUMF ¶ 157) presented the first iteration of the bill, he described it as "com[ing] to us from the Tennessee Auctioneers Association." SUMF ¶ 157. Likewise, the Senate sponsor said the bill was brought at the request of the TAA and the TAC. SUMF ¶ 172. Licensees, not the public, wanted this law, further indicating that the consumer protection justification is pretextual.

Worse, licensees wanted it to protect themselves, not the public. As this Court noted, Rep. Gravitt "described the Committee's position as extended-time online auctions needed to be regulated 'so everyone can compete on the same level playing field as someone that goes out here and participated in live auctions' rather than out of a concern for the protection of Tennessee consumers." (Doc. 29 at 23 (citation omitted).) TAC member Phillips expressed the anxieties of licensees when he said that unless the state started hampering online auctions, it would "bite everybody here in the butt," and "you might as well take your license, put them in a hat and throw them down the river because without something done, [...] it is over." SUMF ¶¶ 154-55; *see also*,

Ex. 9 at 75:9-11 ("a substantial portion of the auction community has had a problem with [] the disparity"). David Allen, past-president of the Tennessee Auctioneers Association, SUMF ¶ 165, verbalized on behalf of his membership the "handwringing about the direction of the auction industry, as it particularly relates to online auctions." SUMF ¶ 166. The TAA, itself a trade group made up of licensed auctioneers, agreed that regulation of online auctions was a "must."[19] SUMF ¶ 167. Notably absent from this sentiment is any concern for the protection of consumers. PC 471 bears testament that it has:

> [L]ess to do with fencing out incompetents than with fencing in incumbents. As Nobel economist Milton Friedman observed, 'the *justification*' for licensing is always to protect the public, but 'the *reason*' for licensing is shown by observing who pushes for it—usually those representing not consumers but vested, already-licensed practitioners.

*Patel v. Tex. Dep't of Licensing & Regul., 46*9 S.W.3d 69, 104 (Tex. 2015) (Willett, D. concur) (citing Milton Friedman & Rose Friedman, Freedom *to Choose 240 (198*0) (emphasis in original)).

The legislative record and depositions further establish that everyone knew that the reason for exempting eBay-style auctions had nothing to do with consumer protection. *See Playboy*, 529 U.S. at 822 ("No support for the restriction can be found in the near barren legislative record relevant to this provision."). David Allen knew it. SUMF ¶ 146 (Allen to Sen. Bell: "both situations are equally fraught with the possibility of malfeasance."), 191 (treating them differently is "problematic"). Defendant Morris knew it. *Id.* ¶ 193 ("[A]n online auction is an auction just like any auction there is, whether you say it's timed or not."). Allen admitted to legislators in 2016,

[19] The TAA, a private trade association, and the TAC, a public regulatory board, openly colluded to enact PC 471. At the TAC meeting on February 12, 2018, Allen presented a lobbyist for the TAA bills to the TAC. SUMF ¶ 169. Defendant Morris, sitting on the Commission, said "the bill does exactly what we're trying to get done and I applaud the TAA for doing it and hiring you to get it done." SUMF ¶ 170.

SUMF ¶ 145, and again at his deposition, SUMF ¶ 146, that fixed-time online auctions do not pose any less risk to the public than extended-time. *See id.* ¶¶ 144-45 (Senator Bell: "I'm having a tough time seeing a difference in how one [auction format] exposes the public to fraudulent behavior and the other one doesn't." Allen: "speaking on behalf of the TAA, I would—I would suggest that both situations could potentially create malfeasance and that's why we expressed concerns back in 2006.").

To be sure, Allen and others offer another pretextual justification for exempting fixed-time auctions: semantics. SUMF ¶ 193. In arguing that extended-time online auctions are more akin to an "auction" because bidding extends the auction's close thereby more resembling a traditional auction format, *id.*, Allen himself acknowledged this to be a "hair you can split" distinction drawn so as not to attract eBay's ire. SUMF ¶ 195. Enforcing definitions that the state itself wrote (Ex. 1 § 4(2) (defining "auction"), § 4(12) (defining "timed listing"), does not relate to any public interest in the first place. *See Miyoko's Kitchen v. Ross*, No. 20-cv-00893-RS, 2020 U.S. Dist. LEXIS 249119, at *14 (N.D. Cal. Aug. 21, 2020) ("[J]ustifying governmental speech regulation using the government-issued dictionary is troublingly self-fulfilling."). The state is supposed to be protecting consumers, not splitting hairs. It was openly acknowledged that this distinction existed as a "compromise," SUMF at ¶¶ 191-93, or a bow to the political realities about what was achievable without attracting eBays's opposition. *Id*. ¶¶ 198-204. And even if it was misleading to call a fixed-time online auction "an auction," then it is not Will and Aaron who are misleading the public when they say they have an "auction" website. The state should have addressed fixed-time online auction

companies who say they perform "auction services,"[20] perhaps through tailored disclosure laws. Instead, the state exempted them from licensure.

Protecting the value of an auctioneering license is a *private* interest. This justification would fail even rational basis scrutiny. *See Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("protecting a discrete interest group from economic competition is not a legitimate governmental purpose."). If auctioneers feel that their license has become devalued, that is a private rather than public concern.

2. Licensing only some types of online auctions is not narrowly tailored.

Even if the state had a valid interest, it must also show a "close fit between ends and means," *McCullen*, 573 U.S. at 486, or that it "seriously undertook to address the problem with less intrusive tools readily available to it." *Id.* at 494; *accord Playboy*, 529 U.S. at 821 ("market-based solutions" not considered by government may address need for regulation). While consumer protection is, in the abstract, a valid state interest, the state cannot show how *licensing* only *some* types of online auctions is narrowly tailored to withstand constitutional scrutiny. *Id.* at 486. Consumers conduct major financial transactions constantly—increasingly online—and the state protects those consumers by less intrusive means. Tennesseans bank online, they buy TVs online, they buy cars online. The state safeguards consumers without requiring a license from bank tellers, Amazon, or car salesmen. Purchases of any kind carry some risks. Yet Tennessee has not imposed an across-the-board license on all online vendors. The state cannot explain why Tennessee consumers are at greater risk when they buy golf clubs from Will than from eBay or Amazon.

[20] < https://www.ebay.com/b/eBay-Auction-Services/50349/bn_1854063>.

There are "less intrusive tools" to protect consumers from harm that the state was obligated to consider before regulating speech. *McCullen*, 573 U.S. at 494. Fraud is a crime, after all. *See* Tenn. Code Ann. § 39-14-101. Local District Attorneys are uniquely incentivized to pursue fraudsters because the DAs can keep the funds they collect and spend them on such things as salary increases and office equipment. *See Id.* §§ 40-3-202(5), (6). Fraud involving an online auction also would be a federal crime. *See* 18 U.S.C. §1343 (wire fraud). Civil enforcement is also available; the Tennessee Attorney General's Office enforces "the Tennessee Consumer Protection Act and other consumer laws in order to protect[] consumers and businesses from those who engage in unfair or deceptive business practices."[21] The FTC makes fraud easy to report.[22] The state offers no evidence that these existing mechanisms would have failed had they opted to utilize them for one or two complaints it was able to validate.

It is not as if the state has no option but to license auctions. As the Court noted, "twenty states do not regulate the auctioneering profession, which leads the Court to find that unregulated auctioneering does not pose an obvious and serious threat of harm to consumers." (Doc. 29 at 27 (citing License to Work).)[23] How many of those twenty states also license online auctions? The state believes twelve states "regulate or license at the state or local level." SUMF ¶ 281. Even if all twelve *license* (as opposed to regulate) at the *state* level, *and* do so by defining auctions as speech, it still means that most states find other ways to protect consumers short of licensing. And how many of those state's licenses also contain PC 471's inexplicable carve-outs? To further put into perspective how excessive Tennessee's burden on speech is, Georgia—one of the states that

[21] <https://www.tn.gov/attorneygeneral/working-for-tennessee/protecting-consumers.html>.
[22] <https://www.ftc.gov/faq/consumer-protection/submit-consumer-complaint-ftc>. Tennessee is ranked #1 as the most burdensome license.
[23]< https://ij.org/report/license-work-2/ltw-occupation-profiles/ltw2-auctioneer/>.

the state claims also regulates online auctions, SUMF ¶ 285—is ranked seventh for most burdensome license in the License to work Study. Yet Georgia requires only 19 lost calendar days. *See* License to Work, *ibid.* The state's approach to regulating the field of auctioneering "raise[s] concern" that it "has too readily forgone options that could serve its interests just as well[.]" *McCullen*, 573 U.S. at 490.

Licensing only some types of online auctions is both overinclusive and underinclusive. An overinclusive law "implicates more speech than necessary to advance the government's interests." *Thomas*, 937 F.3d at 735. PC 471 is fatally overinclusive. The state could have just regulated fraud itself in online auctions, instead of licensing all auctions. For all the "handwringing" about online auctions, SUMF ¶ 166, the TAC never appeared to even consider asking for more authority to regulate misconduct or resources to directly combat misconduct itself.

PC 471 is also fatally underinclusive. *Gilleo*, 512 U.S. at 52 ("Exemptions . . . may diminish the credibility of the government's rationale for restricting speech in the first place."); *Republican Party v. White*, 536 U.S. 765, 780 (2002) (noting that statute at issue was "so woefully underinclusive" that the state's asserted interest in the statute was "a challenge to the credulous"). If consumers are at risk in ecommerce, the state should have regulated all ecommerce equally. With no basis to believe that online auctions, specifically of the extended-time format, are different from any other sort of purchase online, the state's targeting of online auctions is underinclusive from the jump. However, the exemptions in PC 471 make it so underinclusive that it is simply not credible to believe that the state is concerned with protecting consumers rather than licensed auctioneers.

Ochs also fails to create a material dispute in fact on why licensing only some types of online auctions is narrowly tailored to the goal of protecting consumers. Ochs did not, for instance,

conduct a comparison of outcomes in non-licensing states with Tennessee. SUMF ¶ 280. Neither did he conduct a comparison of outcomes within licensing states between those that do and do not extend a license to online auctions. SUMF ¶ 282. Ochs also did not conduct any analysis over whether Tennessee's 756 days lost to obtain a license produces better outcomes than, say, Georgia does with only 19 days. SUMF ¶ 286. Worse than simply failing to do any sort of compare and contrast, Ochs started with the assumption that licensing was ideal and never considered other forms of governmental intervention short of full-blown licensure. SUMF ¶ 284. Ochs also has nothing to add affecting the over/underinclusive analysis either. His proposed testimony brings us no further in understanding why auctions needed to be defined as speech when the state could have opted just to regulate transactions or fraud outright.

Ochs likewise did not provide any opinion about how extending an auction's close is somehow more dangerous to consumers. On the contrary, he acknowledged it is not. SUMF ¶ 287. Still more, he acknowledged that online auctions do not present a different threat to consumers than any sort of routine online transactions which occur free from licensure. SUMF ¶¶ 278, 288. Ochs provides no basis to denying Plaintiffs' motion.

This Court should grant summary judgment on the First Amendment Claim.

II. PC 471 Violates the Commerce Clause

This Court should also grant summary judgment on the Commerce Clause claim (Claim Two) per the logic of the preliminary injunction (Doc. 29; *see* Fed. R. Civ. P. 56, 65.02.) The Court's prior rulings have now twice rejected the state's argument that PC 471 does not regulate extraterritorially. (Doc. 29 at 19; Doc. 83 at 18-30.) This question "hinges on . . . statutory interpretation" (Doc. 83 at 21) that does not change at the summary judgment stage. Because an

extraterritorial law is *per se* unconstitutional (Doc. 29 at 19 n.9; Doc. 83 at 17 n.7), there are no facts to consider in a balancing analysis.

PC 471 violates the Commerce Clause for two additional reasons. *First*, the internet is an article of interstate commerce not subject to state regulation.[24] *See Reno v. ACLU*, 521 U.S. 844, 850-51 (1997) ("The Internet is a unique and wholly new medium of worldwide human communication… located in no particular geographical location but available to anyone, anywhere in the world[.]") (quotation omitted). *Second*, this Court indicated that PC 471 would likely fail to satisfy *Pike*, 397 U.S. 137. (Doc. 29 at 19.) Considering the factual showing made in the First Amendment analysis, this Court can now conclude for summary judgment purposes that the burdens PC 471 places on interstate commerce outweigh the benefits that accrue to intrastate commerce. *See Garber*, 888 F.3d at 843 (laws that are not per se invalid, and which appear neutral without an impermissible protectionist purpose or effect, may still impermissibly burden interstate commerce if they "impose burdens on interstate commerce that clearly exceed their local benefits").

This Court should grant summary judgment on the Commerce Clause claim.

[24] Other courts have held that the internet was an instrumentality of commerce not subject to direct regulation by the states. *See Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1158 (10th Cir. 1999); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004); *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 958 (N.D. Cal. 2006); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1022 (E.D. Cal. 2017); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 183–84 (S.D.N.Y. 1997); *Backpage.com, L.L.C. v. McKenna*, 881 F. Supp. 2d 1262, 1286 (W.D. Wash. 2012). *Cyberspace Commc'ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 744 (E.D. Mich. 1999) ("Like the nation's railways and highways, the Internet is by nature an instrument of interstate commerce."). Direct regulation of the internet should be left to the national body of legislators: Congress. *See McKenna*, 881 F. Supp. 2d at 1286 ("The internet is likely a unique aspect of commerce that demands *national* treatment.").

CONCLUSION

This Court should grant Plaintiffs' motion for summary judgment.

Dated: April 30, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the following persons by the following mean(s) on the following date:

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