

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

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

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

Braden H. Boucek
TN BPR No. 021399
SOUTHEASTERN LEGAL FOUNDATION
560 West Crossville Road
Suite 104
Roswell, GA 30075
Tel: 770/977.2131
bboucek@southeasternlegal.org

Meggan Dewitt
DC Bar No. 1047631
David Harbin
TN BPR No. 009477
BEACON CENTER
P.O. Box 198646
Nashville, TN 37219
Tel: 615/383.6431
meggan@beacontn.org
legal@beacontn.org

Plaintiffs respectfully reply to the state’s response. The state fails to acknowledge the significance of *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (“*NIFLA*”), reducing it to a “compelled speech” case. (Doc. No. 107 at 5.) Yes, the case involved compelled speech provisions, but the primary holding was that speech protections are not diminished simply because a regulation is part of a professional licensing scheme. *Id.* at 2375. When the state repeatedly defends PC 471, “first and foremost,” as a licensing statute, (Doc. 107 at 1, 3), it clings to the remnants of a fallen banner. Post-*NIFLA*, the only pertinent question is whether the state regulates speech.

This Court already ruled that auctions involve speech. (Doc. 83 at 36.) The state never explains why this Court was wrong. Its own 30(b)(6) witness acknowledged that it is not “possible” to have an auction without communicating. (Pls.’ SUMF ¶ 332.) Instead, the state directs us to the aspects of auctions that are conduct—sales transactions—or what principal auctioneers can do once licensed. (Doc. 107 at 3.) The state’s misdirection manages only to highlight the difference between speech (exchanges) and conduct (transactions). The reason why PC 471 regulates speech is because sales transactions are auctions *only if* they involve communications. Speech is what separates an online *auction* from an online *sale*. The state chose to define auctions as an “exchange” between a speaker and an audience of specified content—a point that the state does not address (Doc. 91 at 5, 9)—and now it must survive strict scrutiny.

The state acknowledges, but dismisses, that it makes exemptions for those “not in the business of auctioneering.” (Doc. 107 at 10.) These are still speaker-based exemptions. The Court recognized before that shady operators can slide under these exemptions. (Doc. 29 at 23.) The state doesn’t so much deny that its exemptions are speaker-based as it tries to rationalize them.

Extended-time auctions may “mimic the behavior” of an in-person auction by adding bidding time (Doc. 107 at 9), but that tells us nothing about why the state’s interest in licensing only extended-time auctions is compelling or narrowly tailored. Distinguishing auctions based on closing format was an admitted “hair you can split” designed to appease eBay, not protect Tennesseans. (Pls.’ SUMF ¶ 195.) It is undisputed that the way in which an auction closes has no bearing on whether the public faces greater risk. (*Id.* ¶¶ 145-46, 191, 287.) And an exemption for churches, even if inclusive of all “places of worship” (Doc 107 at 11 n.3), still disfavors an atheist gathering, making it speaker-based. An exemption for political parties allows them to hold unregulated auctions when the Sierra Club cannot. These speaker-based distinctions demand strict scrutiny.

On top of that, when the state turns to its exemptions for those “who are otherwise regulated” (Doc. 107 at 10), it manages to prove that PC 471 is not narrowly tailored. Those other forms of regulation are substantially less onerous than the auction license. For instance, a livestock auction needs only be “in cooperation” with the University of Tennessee extension. PC 471 § 6(6). To fall under the tobacco auction exemption, *id.* § 6(7), one need only produce a bond and proof of sufficiency of a warehouse based on the testimony of two witnesses. Tenn. Code Ann. §§ 43-19-102, 103. To obtain the wrecked vehicle exemption, one need only obtain a license from the motor vehicle commission. PC 471 § 6(10). That [license](#) requires things like bonding and proof of insurance,¹ but nothing like the state’s burdensome regime for auctions. (Doc. 29 at 21.) This is proof *per se* that PC 471 is not narrowly tailored, making this case simple.

¹Minimum Requirements for Motor Vehicle Auction: <https://www.tn.gov/content/dam/tn/commerce/documents/regboards/mvc/forms/MotorVehicleAuctionRequirements.pdf>.

The state argues PC 471 imposes at most an incidental speech burden. (Doc 107 at 4.) The Court indicated that it “afford[s] less protection for professional speech,” in circumstances that do not “turn[] on the fact that professionals were speaking.” *NIFLA*, 138 S. Ct. at 2372. Until the state can show that it is possible to have an auction without speaking—a possibility its 30(b)(6) witness discounted (Pls.’ SUMF ¶ 332)—it cannot expect lesser protection for PC 471.

Whether PC 471 is speech or an incidental burden on speech is now beside the point; the state doesn’t try to satisfy intermediate scrutiny, even though that is its “best-case scenario[.]” (Doc. 83 at 39.) The state argues that an incidental speech burden warrants a test “mirror[ing] the rational basis test.” (Doc. 107 at 4.) Plaintiffs demonstrated otherwise. (Doc. 91 at 11, n.11; Doc 105 at 6.) Accordingly, *the state* must show a compelling interest based on evidence, not speculation, *and* that PC 471 is narrowly tailored. *McCullen v. Coakley*, 573 U.S. 464, 477, 486 (2014); *Thomas v. Bright*, 937 F.3d 721, 734 (6th Cir. 2019).

The state brushes legislative history aside as “irrelevant.” (Doc. 107 at 8 n. 2.) The Supreme Court looks to legislative history as part of its First Amendment analysis. *See United States v. Playboy Entm’t Grp.*, 529 U.S. 813, 822 (2000); *McCullen*, 573 U.S. at 470-71, 495. The state cannot rely on pretextual justifications. *See Thomas*, 937 F.3d at 734. The history of PC 471 undermines the state’s claimed interest in consumer protection. (Doc. 91 at 16-19.) And the state points to no counter-legislative history suggesting a compelling interest was the state’s goal.

Instead of presenting countervailing evidence, the state nitpicks Plaintiffs’. (Doc. 107 at 11-13.) But Plaintiffs carry no burden. (Doc. 107 at 11-12.) Even if the complaint evidence was meaningless (one wonders why the Task Force bothered compiling it) and COVID holds no lessons, Plaintiffs still prevail because the state fails to meet *its* burden. The complaint evidence,

however, is probative. *See Playboy*, 529 U.S. at 821-22. The state claims it turned away complainants because it lacked jurisdiction over online auctions.² (Doc. 107 at 12 n.4.) Plaintiffs previously entered proof “upend[ing]” this falsehood (Doc. 29 at 23) so it is troubling to see its reemergence. The Task Force table shows that it did, in fact, intake (very few) online auction complaints. (Pls.’ SUMF ¶ 207.) The non-existence of complaints is itself probative, irrespective of whether they were adjudicated, (Doc. 107 at 12) which could only reduce the number the Court already found insignificant. (Doc. 29 at 22.) The state *did*, however, regard itself as having jurisdiction over complaints during the period studied by the Task Force, as PCI and Defendants must agree.³ (Doc. 105 at 21.) Similarly, even if the state was not receiving complaints during the COVID period (Doc. 107 at 12-13), (and we know that it was (Doc. 105 at 22))⁴, more important is the absence of any adverse *effects*. Complaints would be one way to gauge effects. Regardless, the state’s 30(b)(6) witness swore that she saw no public harms. (Pls.’ SUMF ¶¶ 266, 267.)

Next, the state entirely fails to address Plaintiffs’ argument that PC 471 is not narrowly tailored. (Doc. 91 at 19-22.) The words “narrow” or “tailored” do not appear *once* in the state’s response. (Doc. 107.) PC 471 is a “truly exceptional” approach to the regulation of online auctions.

²In another puzzling contradiction, the state argues it lacked jurisdiction over complaints regarding online auctions from 2016-2018 (Doc. 107 at 11) even while it claims (*id.* at 13) that it has regulated online auctions since 2001.

³The state claims PCI was a “lone exception” (Doc. 107 at 12 n.5), but how could there be *any* exceptions? Before the injunction was a concern, the TAC *and its attorney* were certain in 2017 they regulated online auctions that extended-time. (Doc. 104-2 at PageID #: 4444-47.)

⁴The state says it did not send out letters of instruction or take any other enforcement action. (Doc. 107 at 12 n.6.) The TAC at least *voted* to send out letters of instruction. (Doc. 94 at PageID #: 3279:5-8.) It lends no credit to the TAC if it halted (and put up a disclaimer about the website (Doc. 107 at 12 n.6)) once *Plaintiffs* warned them about violating the injunction. (Doc. 94 at PageID #: 3280:19-3281:4.) Nor does it appear the state ever corrected the misimpression (*id.* at PageID#: 12-21) it promulgated publicly after the injunction that auctions shouldn’t extend time if they “wanted to stay outside the law.” (Doc. 104-4 at PageID #: 4457:18-20.)

See *McCullen*, 573 U.S. at 490 (noting that “no other State” regulated abortion clinics similarly). Many states don’t regulate auctions at all. (Doc. 29 at 27) (citing License to Work).⁵ Then the state dramatically expanded Tennessee’s [particularly onerous](#) approach to the online realm,⁶ even though it admits few other states do. (Pls.’ SUMF ¶ 281.) Existing means protect consumers. (Doc. 91 at 20.) Many [additional](#) ways could have been tried.⁷ The state’s expert admits he considered none of them (Doc. 89-2 at PageID#: 2962-65) while conceding that *all* online sales (which actually are conduct) pose similar risks to online auctions. (Pls.’ SUMF ¶¶ 278, 288.)

The state’s Commerce Clause arguments all failed previously. (Doc. 29 at 10-19; Doc. 83 at 18-30.) That was before record evidence. The state says it won’t regulate an out-of-state company advertising online. (Doc. 107 at 14.) It did so to Everything But The House. (Pls.’ SUMF ¶¶ 224-25, 227-29.) The state asserts that PC 471 won’t restrict postings of companies “from Kansas.” (Doc. 107 at 14.) David Allen said companies must be “answerable ... [e]ven though the company maybe operating out of Kansas.” (Doc. 95 at PageID #: 3492:18-20.) He expressed the Task Force’s goal before it began backpedaling in the face of the Court’s injunction: “to make sure we had some type of mechanism available to where they were held accountable in the state of Tennessee [and] that meant you had to have an auctioneer’s license in order to conduct auctions in the state of Tennessee, even though you’re in Iowa or wherever.” (*Id.* at PageID #: 3494:1-3.) The record affirms this Court’s interpretation of PC 471’s scope.

⁵ The state dismisses License to Work as not updated since 2012. (Doc. 107 at 2 n.1.) Both this Court (Doc. 29 at 27) and Plaintiffs (Doc. 91 at 20) cited the 2nd edition released in [2017](#) (found at 3 of the .pdf). Plaintiffs linked the first edition in their intro (*id.* at 1) because that was the version cited by the White House in 2015. If [Tennessee](#) no longer “has the most burdensome requirements” then the state should have made that showing. See *McCullen*, 573 U.S. at 486 (burden on state).

⁶ <<https://ij.org/report/license-work-2/ltw-occupation-profiles/ltw2-auctioneer/>>

⁷ <<https://ij.org/report/the-inverted-pyramid/>>.

Dated: June 11, 2021.

Respectfully submitted,

s/ B. H. Boucek
BRADEN H. BOUCEK
TN BPR No. 021399
SOUTHEASTERN LEGAL FOUNDATION
560 West Crossville Road
Suite 104
Roswell, GA 30075
bboucek@southeasternlegal.org
Tel: 770/977.2131

Counsel for Plaintiffs

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:

| Counsel | Counsel for | Via |
|---|-------------|--|
| R. Mitchell Porcello Office of the Attorney General Tax Division P.O. Box 20207 Nashville, TN 37202 Mitch.porcello@ag.tn.gov | Defendants | <input type="checkbox"/> United States mail, postage prepaid <input type="checkbox"/> Hand delivery <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> FedEx <input checked="" type="checkbox"/> Efile |
| Meggan DeWitt David Harbin 201 4th Ave. N. Suite 1820 P.O. Box 198646 Nashville, TN 37219 (o) (615) 383-6431 meggan@beacontn.org legal@beacontn.org da.harbin@comcast.net | Plaintiffs | <input type="checkbox"/> United States mail, postage prepaid <input type="checkbox"/> Hand delivery <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Fed Ex <input checked="" type="checkbox"/> Efile |

On this date: June 11, 2021.

s/ B. H. Boucek
BRADEN H. BOUCEK