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.,	)	MAGISTRATE JUDGE
	)	FRENSLEY
Defendants.	)	

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

Plaintiffs respectfully oppose the state's motion for summary judgment. This Court should deny the state's motion.

I. PC 471 Violates the First Amendment.

A. The state fails to show that PC 471 demands anything less than strict scrutiny.

Contrary to the state's assertions otherwise, this is a free speech case. This Court has already correctly found that PC 471 "regulates more than mere conduct" and "at the very least some speech is implicated." (Doc. 83 at 36, 37.) What this Court has not yet decided is what level of scrutiny applies: strict scrutiny if it finds PC 471 regulates pure speech or intermediate scrutiny if it finds PC 471 regulates conduct that incidentally burdens speech. Explaining that it would be better served to decide that question by a more developed factual record, this Court left the decision for today. (Doc. 83 at 37 n.18.)

The state makes no attempt to argue that PC 471 could satisfy strict scrutiny, effectively conceding that it cannot meet it. The standard is thus a dispositive issue, making it ideal for

summary judgment. Plaintiffs related in their Motion for Summary Judgment how PC 471 is speaker and content-based, requiring strict scrutiny. (Doc. 91 at 7-11.) They respectfully submit that the Court should take up the question of scrutiny first.

In any case, Plaintiffs prevail under intermediate scrutiny. The state relies on no evidence other than the opinions of two licensed auctioneers (Doc. 88-1 at 15-17) with a long history of political advocacy on the regulation of online auctions. It cannot satisfy its burden of showing either a significant interest in consumer protection, or that its license requirement is narrowly tailored absent any evidence the state ever considered other ways to protect consumers before imposing an oppressive license riddled with exemptions that are "truly exceptional." *McCullen v. Coakley*, 573 U.S. 464, 486, 490 (2014).

The state ignores this Court's prior finding and its call for the parties to augment their positions with facts. Instead, it makes the very same legal argument that this Court already rejected and claims that PC 471 is subject to rational basis because it regulates only conduct, not speech. (Doc. 88-1 at 12.) The state relies entirely on *Liberty Coins* to support its position (*id.* at 12-15), but as this Court already found, this reliance fails because the statute in *Liberty Coins* is distinguishable from PC 471. (Doc. 83 at 36.)

Unlike the statute in *Liberty Coins* which regulated all precious metals businesses even if they did not engage in speech,[1] PC 471 regulates auctioneers who, by definition, always engage in speech when they engage in an auction (*i.e.*, an auction is "conducted by oral, written, or

[1] As this Court already explained, "the statute at issue [in *Liberty Coins*] 'regulated all precious metals businesses operating in a manner that is open and accessible to the public . . . regardless of whether they advertise or post signage' (*i.e.*, engaged in speech); and thus, was not a regulation of conduct incidental to speech." (Doc. 83 at 36 (quoting *Liberty Coins LLC v. Goodman*, 748 F.3d 682, 697 (6th Cir. 2014)).)

electronic *exchange* between an auctioneer and members of an audience"). (Doc. 4-2 at PageID #: 63 (PC 471 § 5(a)(1) (emphasis added)).) Even the state's 30(b)(6) witness agreed that it is not "possible" to have an auction without communicating. Pls.' SUMF ¶ 332 (Doc. 94 at PageID #: 3154:25-3155:2) ("Q: Is it possible to have an auction without an oral, written or electronic communication? A: *No*.") (emphasis added). In other words, PC 471's license requirement only applies when an auctioneer speaks. Contrast that with the license requirement in *Liberty Coins,* which applied to all precious metal dealers who merely placed goods in a window visible to the public – no signs, no advertising, no solicitation needed. 748 F.3d at 697. Because even those who did not engage in any speech fell under the licensing regime (dealing precious metals is not *itself* a communication, unlike auctions), one can understand how the Sixth Circuit concluded that the statute regulated only conduct and economic activity and not speech. The opposite is true here.

More instructive than *Liberty Coins* is the case the state no longer cites (Doc. 53 at 20-21): *Hines v. Quillivan*, 395 F. Supp. 3d 857 (S.D. Tex 2019). As the state's lone example of a speech restriction as part of a professional licensing regime being upheld post-*NIFLA*, Plaintiffs conceded this was "a significant case to follow post-*NIFLA*." (Doc. 54 at 23 n.12.) As Plaintiffs anticipated, the Fifth Circuit reversed the state's sole bit of persuasive authority *See Hines v. Quillivan*, 982 F.3d 266, 271-72 (5th Cir. 2020) (citing *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 932-34 (5th Cir. 2020)). The state was correct originally—the same result should follow "[h]ere, as in the *Hines* cases . . .." (Doc. 53 at 21.)

Just because PC 471 only regulates electronic communications as part of a "sales transactions" (Doc. 88-1 at 17), does not make it any less of a speech restriction. As the Supreme Court related in *Holder v. Humanitarian Law Project*, a law restricts speech when the "conduct triggering coverage under the statute consists of communicating a message." 561 U.S. 1, 28 (2010).

Under PC 471, the triggering event is an oral, written, or electronic exchange.[2] Remove an "exchange" from the "sales transaction" and it is no longer an "auction." The communicative element is what sets a regulated "auction" apart from an unregulated "sales transaction." Perhaps the state could have defined auctions to simply regulate "sales transactions" without touching speech, but it did not. The situation is no different from *Expressions Hair Design v. Schneiderman*, where the Supreme Court found that a restriction on how prices are communicated, rather than on the prices themselves, is a regulation of speech. 137 S. Ct. 1144, 1151 (2017). New York could have regulated prices and stopped there. Likewise, Tennessee could have just regulated transactions, but it opted to regulate communications.

In the alternative, the state argues that if this Court were to find (as it has already done) that PC 471 regulates speech, then the regulated speech is incidental to conduct, and rational basis applies. (Doc. 88-1 at 19-21.) The state's argument is wrong on multiple levels and for multiple reasons. *First*, as Plaintiffs explained in their Motion for Summary Judgment, PC 471 is a pure speech restriction. (Doc. 91 at 4-7.) It is impossible to hold an auction without communicating. Pls.' SUMF ¶ 332. PC 471 does not just regulate all sales transactions. It only regulates those that involve communications. Nothing is "incidental" about the restriction on speech. The communication between an audience and auctioneer is the very characteristic that separates an

[2] The state points out that "exchanges" have long been a part of the definition of an auction (Doc. 88-1 at 17), but it cites to no decisions that have ever upheld the constitutionality of the definition. *NIFLA* changed the analysis. The state implicitly acknowledges as much. Now that the case has unfolded and the state knows better, it has abandoned its prior reliance (Doc. 32 at 15-17) on Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, B., concurring). This concurrence formed the basis for the now-discredited professional speech doctrine. *See NIFLA,* 138 S. Ct. at 2371-72. Besides, laws do not become constitutional with age. *See Tennessee Wine & Spirits Retailers Assn. v. Thomas*, *et al*., 139 S. Ct. 2449, 2476 (2019) (striking down a Tennessee license enacted in 1939 on dormant Commerce Clause grounds).

online auction from a regular online sale. Because PC 471 restricts unlicensed auctioneers from "*communicating* a message," *Holder*, 561 U.S. at 28 (emphasis added), it is a pure speech restriction.

Second, the reduced scrutiny afforded to incidental burdens does not apply to laws that "imposes a burden based on the content of the speech and identity of the speaker." *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *see also Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456, 476 (6th Cir. 2007). The state makes only a token effort to defend its speaker-based exemptions, which on their own, give rise to strict scrutiny: "Most of the activities that are exempted from the licensing requirements are auctions conducted by persons who are not in the business of auctioneering." (Doc. 88-1 at 18.) This is a baffling defense. The courts have affirmed time and again that profit motive is not a basis for treating speakers differently, as newspapers would undoubtedly agree. *See Sorrell*, 564 U.S. at 567 ("a great deal of vital expression" is protected even if it "results from an economic motive); *United States v. United Foods, Inc.,* 533 U.S. 405, 410-11 (2001) ("those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups"); *Parks v. LaFace*, 329 F.3d 437, 449 (6th Cir. 2003). Moreover, the state simply elides the fact that it enacted exemptions simply to avoid a fight with eBay (Pls.' SUMF ¶¶ 195-202), as well as providing others for named companies, but only when they act in-state. *Id.* at ¶¶ 242-44.

The state was, contrary to its assertion, very concerned with exempting those "who are [] in the business of auctioneering." (Doc. 88-1 at 18.) Its exemptions obviously do not protect consumers. They exist because auctioneers wanted to regulate at least some online auctions and so they made exemptions as needed. *See* Doc. 91 at 8 n.4 (Insurance Automobile Auctions lobbyist

complaining that its client deserved an exemption because its competitors had them). And the charity exemption that is the state's best example is restricted to political parties, churches, and charities. (Doc. 88-1 at 18.) Synagogues or the Sierra Club are regulated if they perform an extended time auction where a church or local Republican Party chapter will not be. Even the "charity" exemption reflects glaring speaker-based preferences.

Third, even if it finds that PC 471's regulation of speech is only incidental to conduct, at worst for Plaintiffs, intermediate scrutiny applies—*not* rational basis. *NIFLA*, 138 S. Ct. at 2375; *Richland Bookmart, Inc. v. Knox Cty., Tenn.*, 555 F.3d 512, 521 (6th Cir. 2009) ("[R]egulations unrelated to the content of speech are subject to an intermediate level of scrutiny.") (quotations omitted); *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 932 (5th Cir. 2020).

Fourth, when arguing that PC 471 is only an incidental speech burden, the state leans hard—if not entirely—on *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). (Doc. 88-1 at 19-21.) But *Ohralik* is not applicable here. The challenged law in *Ohralik* restricted lawyers from soliciting injured persons as clients while they were confined in a hospital. The Supreme Court has "since emphasized that *Ohralik*'s narrow holding is limited to conduct that is inherently conducive to overreaching." *Tenn. Secondary Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291, 298 (2007) (quotation omitted) (citing cases). PC 471 is easily distinguishable. Online auctions are not coercive. Audience members opt to participate, often in the comfort of their homes. As the Sixth Circuit recently clarified, *Ohralik* is limited to in-person solicitations. *Bevan & Assocs., LPA v. Yost*, 929 F.3d 366, 378-79 (6th Cir. 2019). *Ohralik* cannot be stretched to cover non-coercive online auctions open to the public.

Finally, the state makes no effort to argue PC 471 is not content based, a standalone basis for strict scrutiny. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). As Plaintiffs

demonstrated, PC 471 only regulates "exchanges" when they pertain to specific content. (Doc. 91 at 9-11.)

B. The State Fails to Satisfy Strict or Intermediate Scrutiny.

Strict scrutiny is a "demanding" standard that the state cannot hope to meet. *See Entm't Merchs. Ass'n*, 564 U.S. at 799. To survive this demanding standard, a law must be "justified by a compelling government interest" and "narrowly drawn to serve that interest." *Id.* The state's failure to address strict scrutiny means that it has, for all intents and purposes, ceded the case. As Plaintiffs argued in their opening brief, it is also true that PC 471 is unconstitutional *regardless* of the applicable standard. (*See* Doc. 91 at 11-22.) Even if these burdens on Plaintiffs' protected speech were truly incidental to conduct, they would be subject to at least intermediate scrutiny.[3]

Even if PC 471 is an incidental speech restriction, the state does not meaningfully address the applicable standard: intermediate scrutiny.[4] Intermediate scrutiny remains a demanding standard. The state must prove that its law is "narrowly tailored to serve a significant governmental interest." *McCullen*, 573 U.S. at 477, 486 (citation omitted). In *McCullen*, the U.S. Supreme Court made clear that courts applying intermediate scrutiny under the First Amendment must consider things like the evidence supporting the government's assertions, the unusualness of a challenged

[3] This Court has already ruled that intermediate scrutiny is likely the "best-case scenario" for the state. (Doc. 83 at 39.)

[4] The only standard the state mentions at all is rational basis. (Doc. 88-1 at 12, 15, 19.) Yet even under this test, the state's failure to respond to the facts is fatal. While the state is correct that the rational basis test allows the state to rely on rational speculation as an initial justification (*id.*), that is not the end of the analysis. Plaintiffs may rebut the state's rational speculation with facts. *See American Exp. Travel Related Services Co., Inc. v. Kentucky*, 641 F.3d 685, 689 (6th Cir. 2011) ("regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional *unless in light of the facts made known* ….) (quotation omitted). And it is blackletter law that protectionist licensing laws such as PC 471 flunk rational basis. *See Craigmiles v. Giles*, 312 F.3d 220, 228-29 (6th Cir. 2002). Plaintiffs argued at length that PC 471 is protectionist. *See* Doc. 91 at 16-19.

law, and the availability of less-restrictive alternatives. 573 U.S. at 486-493. "[I]t is not enough for [the government] simply to say that other approaches have not worked. *McCullen*, 573 U.S. at 496. Moreover, under intermediate scrutiny, the state must show that its justifications for a restrictive law are genuine [and] not hypothesized or invented *post-hoc* in response to litigation." *Thomas v. Bright*, 937 F.3d 721, 734 (6th Cir. 2019) (citation and quotation omitted).

Under intermediate scrutiny, the state cannot prevail. The only evidence the state offers is hypothesized and not genuine. The state only briefly cites to the record at four points, none of which satisfy the state's burden. *See* Doc. 88-1 at 15 (risks involved in auctions, and definition of "shill bidding," citing David Allen, Justin Ochs and Roxana Gumucio); *id.* at 16 (reasonable to believe licensing would address those risks, citing Allen and Ochs); *id*. (reasonable to believe that online auctions pose same risks, citing Allen and Ochs); *id*. (reasonable to treat extended-time auctions differently from timed online auctions, citing Allen).[5] These few, conclusory opinions (which, other than the one citation to Gumucio, come from licensed auctioneers with an established interest in seeing online auctions regulated) do not meet the standard for intermediate scrutiny, even if they are within the scope of lay witness testimony. *See* Fed. R. Evid. 702. The witnesses

[5] The state makes a fifth citation to the factual record when it contends electronic exchanges "involve less speech" than oral or written exchanges because they are automated. (Doc. 88-1 at 17-18 (citing McKee & Purple Wave Resp. to Interrog. No. 11 (explaining how Purple Wave's auctions work)).) This is not a fact or material or admitted. Video games are speech even though they are automated with no active human oversight. *See Brown*, 564 U.S. at 790. The simple fact that the exchange is "electronic" does not make the speech any less constitutionally protected. *See Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000) (computer code is First Amendment protected.); *Univ. City Studios, Inc. v. Corley*, 273 F.3d 429, 449-50 (2nd Cir. 2001) (same); *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 47256 (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 (news, emails, political lobbying, texts) are "electronic" and automated.

present no hard evidence, engaging in raw conjecture themselves. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816-17 (2000). They do not relate actual evidence of harm or offer evidence that the state's license is necessary to address those harms. Simply relating in conclusory fashion that online auctions involve potential risks does not rise to the level of a *significant* interest, *see McCullen*, 573 U.S. at 477, or show that the state *seriously* tried to address the problem through less intrusive means (*id*. at 494), a result the state appears to accept by couching everything in terms of what it deems "reasonable." (Doc. 88-1 at 16.)

No matter the level of scrutiny, the state's illusory interests fail to satisfy its burden and PC 471, with its bevy of head scratching exemptions, is "truly exceptional." *McCullen*, 573 U.S. at 490 (nothing that "no other State" regulated abortion clinics similarly). In fact, Defendant Morris suggested that the state was a considered a trailblazer by other auctioneer boards. Pls.' SUMF ¶¶ 235-36, 238 ("everybody is really interested in what we are doing with the change in our law . . .). In *McCullen*, the Supreme Court cautioned that unusual laws require extra scrutiny because their rarity suggests that the government "has too readily forgone options that could serve its interests just as well, without substantially burdening" protected speech. 573 U.S. at 490; *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). If the state's chosen course is as "reasonable" as it insists, then the state needs to explain why every other state is waiting anxiously to see how Tennessee's approach shakes out.

The state continues to ignore complaint data compiled by its own Task Force. The results suggest "that the State's purported concerns in fact are illusory, thus severely undercutting the State's position." (Doc. 29 at 24.) The state's expert admitted that the risks involved in an online

auction are the same as those involved in any consumer transaction. Pls.' SUMF ¶ 288. The state does not acknowledge that during COVID, when live auctions were largely prohibited and unregulated online auctions were encouraged, its own 30(b)(6) witness could not identify adverse harms to consumers. *Id.* at ¶¶ 263-64, 266-67. This is actual evidence. It shows that the need to protect consumers from online auctions is "hypothesized." *Thomas*, 937 F.3d at 734.

The juxtaposition between hypothesized evidence and actual evidence is most notable when the state tries to justify the exemption for fixed-timed auctions: "Unlike timed listings, so-called extended-time auctions, like traditional auctions, pose the risk that auctioneers will misrepresent the nature or quality of an item or employ shills to encourage additional bidding to keep the auction going indefinitely." (Doc. 88-1 at 16.) At the outset, the state ignores that its exemptions *also* include extended-time online auctions. *See* Doc. 4-2 at PageID #: 64 (PC 471 § 6(10) (exempting wrecked vehicle auctions in state), (12) (exempting persons making under $25,000 in revenues)). The complaint evidence showing fewer consumer complaints for extended-time than fixed-time auctions disproves the state's hypothesis. Pls.' SUMF ¶¶ 205, 207-209. The state has validated only one instance of consumer harm from an extended-time online auction (*id.* at ¶ 223 (PCI)), and it did not involve the use of a shill. The First Amendment requires more than speculation.

The state relies on Allen and Ochs (Doc. 88-1 at 15-17), yet both openly admitted that how an auction closes has nothing to do with consumer harms. Pls.' SUMF ¶¶ 144-146, 191 (Allen); *id.* at ¶¶ 278, 287, 288 (Ochs). The state quotes Allen when he explained that "the difference is an extended time auction is absolutely and unequivocally just like a live auction and a fixed time is not" (Doc. 88-1 at 16), but Allen went on to openly acknowledge that he was making up a justification (splitting hairs) to placate eBay. Pls.' SUMF ¶ 195. Splitting hairs to satisfy eBay

does not protect consumers or serve a public interest. On the record, Allen admitted that the fixed-time distinction is, like others, not "genuine" and is pretextual. *Thomas*, 937 F.3d at 734. The state's own proof shows why it cannot justify singling out extended-time online auctions.

Even if it were true that extended-time auctions pose a greater risk of fraud, the state still must show that PC 471 is narrowly tailored. Less restrictive means to protect consumers exist, but the state does not address them. *See McCullen*, 573 U.S. at 494. "Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637-38 (1980). Plaintiffs related other public mechanisms to protect consumers in their memorandum (Doc. 91 at 20-21), and the state's expert admitted he considered none of them. (Doc. 89-2 at PageID #: 2967:13-2968:20.) The state can simply punish fraud. The state can refer findings to prosecutors, or the attorney general, or appropriate more resources to agencies. Other states manage to protect consumers in auctions without a license at all. (Doc. 29 at 27.) Requiring a license for online auctions when the state does not have a similar requirement for other forms of ecommerce that also pose consumer risks is not a "close fit between ends and means." *See McCullen*, 573 U.S at 486; Pls.' SUMF ¶ 278 (Ochs: All online sales pose similar risks to consumers). There is no reason why the state should exempt auctions based on ending time when its own expert admits this has nothing to do with consumer harm. Pls.' SUMF ¶ 287. There is even less reason to exempt *some* extended-time online auctions.

The state barely defends the eBay exemption, and when it does, its defense is not rooted in consumer protection. Rather, it flatly declares that extended-time auctions are auctions and fixed timed auctions are not as if that lets it avoid defending the classification which is itself being challenged. (Doc. 88-1 at 16.) Semantics are not a legitimate interest. Auctions are whatever the state defines them to be and so the state cannot justify a speaker-based restriction because it

corresponds to a "government-issued dictionary." *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). The state needs to likewise offer evidence that there is some normative reason why its definition of "auction" is worthy of protection; otherwise, the state's view of what auction means "is not, by itself, especially compelling." *Id*. at *15. Typically, that reason might be the protection of consumers from misleading product labels, but that makes no sense here. If anyone is misleading the public by referring to a fixed-time auction as an "auction," it is a fixed-time auction company like eBay.[6] Yet the state targeted the very companies that, under its formulation, accurately call themselves "auction" companies. No one should pretend that the eBay exemption is about the integrity of the state's notions of how "traditional auctions" should operate.[7] (Doc. 88-1 at 16.)

Furthermore, the state is wrong that "traditional" auctions never end at a fixed time or fall under the state's definition. If they did not, then the state would not have needed to *exempt* fixed-time endings from regulation. *See* Doc. 4-2 at PageID #: 63-64 (PC 471 §§ 4(12) (defining timed listings to mean fixed-time), 6(9) (exempting fixed-time)). And Task Force members indicated a willingness to revisit these definitions in the future. Pls.' SUMF ¶¶ 200, 202 (Allen: "that's next year's task force"). The Task Force itself distinguished extended-time online auctions from "online auctions" in its table. Pls.' SUMF ¶ 207. And one of the best-known type of auctions are silent auctions, which the state regulates. (Doc. 104-2 at PageID #: 4442-43 (penalizing Silent Auction Bid Sheet).) Silent auctions have "no live bidding activity" (*id.* at PageID #: 4442), so they

[6]<https://www.ebay.com/b/eBay-Auction-Services/50349/bn_1854063>. In fact, eBay was originally called "AuctionWeb." < https://www.ebayinc.com/company/our-history/>.

[7] Not that the state has an interest in ensuring that auctions remain "traditional," but the most widely held popular association with traditional auctions is talking really fast. (Doc. 95 at PageID #: 3375:23-3376:2 (Allen: talking fast is "all [the public] think[s] you're learning when you go to auction school.").)

typically end at a "fixed time." *See* Doc. 89-2 at PageID #: 2850:14-2851:5 (Ochs: acknowledging silent auctions often end at a "fixed time"). A concern over the purity of the state's definition was patently "invented *post-hoc* in response to litigation." *Thomas*, 937 F.3d at 734. Allen and Task Force members were perfectly up front that the accommodations it devised for fixed-time auctions were based on political reality, not consumer protection. Pls.' SUMF ¶¶ 191-93, 198-204.

Finally, the state's insistence that it only regulates online auctions when they "originate" from within Tennessee guarantees that PC 471 fails to satisfy any constitutional standard. (Doc. 88-1 at 9.) In *PSInet v. Chapman*, the Fourth Circuit found that Virginia's internet regulation would fail if it only regulated when the prohibited material "originates within the Commonwealth or comes from individuals who would be subject to the Commonwealth's jurisdiction." 362 F.3d 227, 238-39 (4th Cir. 2004). The *PSInet* Court also found the narrowing in-state limit would leave the challenged statute "powerless and therefore constitutes an impermissible regulation of speech under the First Amendment." *Id*. at 239. Here, the state's expert acknowledged all the state's feared harms would still exist if one placed one's computers outside the state, while still selling to or from Tennessee. (Doc. 89-2 at PageID #: 2927:5-19.) If the state could regulate only in-state, then it would only protect Tennesseans from fraudsters too foolish to set up shop outside the state. That would not "alleviate" the threats to Tennesseans "to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

II. PC 471 Violates the Commerce Clause.

PC 471 is extraterritorial, both textually and under canons of statutory interpretation. Second, even if an in-state limit could be written into PC 471, it would still violate the Commerce Clause. Third, by ignoring harmful facts and failing to present any of its own, the state fails to show PC 471 satisfies the *Pike v. Bruce Church, Inc.* analysis. 397 U.S. 137, 142 (1970).

At the outset, once the Court finds that PC 471 is extraterritorial, it is *per se* unconstitutional. *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 644-45 (6th Cir. 2010). The state opts to rest its entire defense on a matter of statutory interpretation, which this Court has now twice rejected. (Doc. 29 at 10-19; Doc. 83 at 18-30.) The state makes no new arguments. The state implicitly concedes that PC 471 lacks a textual limit. Rooting around for a territorial limit, the state propounds Tenn. Comp. R. & Regs. 0160-01-.18 (Rule 18), which regulates "computer generated auctions" based on where the computer "originates" the auction (Doc. 88-1 at 9, 11), even though Rule 18 was enacted nearly two decades before PC 471. This Court previously rejected that argument. (Doc. 83 at 22-30.) Likewise, the state continues to argue that Tenn. Code Ann. § 62-19-115 imposes an in-state limitation. (Doc. 88-1 at 10.) This Court has rejected this flawed approach as well. (Doc. 29 at 11-12; 83 at 19-21 (quoting prior ruling).)

A. PC 471 is textually extraterritorial.

Basic rules of statutory interpretation preclude reading a general "in-state" limitation into PC 471. The state never acknowledges that PC 471 contains two exceptions specific to online auctions of salvage vehicles. Both are expressly limited to when the primary business activity is selling "*in this state*." (Doc. 4-2 at PageID #: 64 (PC 471 § 6(10), (11)).) Reading a general in-state limit into PC 471 turns this text into surplusage and would not be a valid interpretation. *Eastman Chemical Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Statutes should not be interpreted in ways that would "limit or extend the meaning of the language." Tenn. Code Ann. § 1-3-105(b). Still more, PC 471 contains two other exemptions specific to online auctions which both *lack* an in-state requirement: one for the eBay exemption (Doc. 4-2 at PageID #: 64 (PC 471 § 6(9))), and the other for operators who make less than $25,000. *Id.* (PC 471 § 6(10). For some online auctions, the state wanted an in-state limitation but not others. It certainly knew how to

write "in this state" when the intent was to regulate (or not regulate). It would make no sense to interpret an across-the-board in-state standard that would obviate the in-state language where it does exist and add it where it does not. *See State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013) ("[W]here the legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the legislature acted purposefully in the subject included or excluded." (quotation omitted)); *Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 35 (Tenn. 1997) ("Omissions are significant when statutes are express in certain categories but not others.") (citation omitted).

B. An "In State" Limit Would Not Satisfy the Commerce Clause.

The Court was correct that its rulings "hinge[] on … statutory interpretation," (Doc. 83 at 21), and so the facts do not come to bear. Yet this Court has also ruled that even if an "in-state" limitation could be read into PC 471, it would "not necessarily entail" the "limited meaning" suggested by the state. (Doc. 29 at 13; *see also* Doc. 83 at 19, 27-29.) Even if such text existed, the state would need to offer a cogent explanation on exactly *what* needs to be in state, and how PC 471—a law that, according to Defendant Morris, aimed to "get their arms around this internet and auctions" (Pls.' SUMF ¶ 238)—could stay within the geographic confines of a state.

After all, the state is not only asking this Court to add a whole, new element to PC 471. It *also* asks this Court to arbitrarily choose a standard about *who or what* needs to be in-state to qualify. Any auction has many components: auctioneer, auction firm, principal auctioneer, client, bidder, and property. In an online auction, the server hosting the auction may be in one place or several. (Doc. 96-2 at PageID #: 3964:23-3966:2.) It may change locations during an auction without any human interaction. (Doc. 88-16 at PageID #: 2779-80, Purple Wave Resp. to Interrogatory No. 14.) None of the persons or computers may be in the same state. So what does

it mean to be "in state?" That is a subjective call that only the General Assembly could have made. The Court's prior ruling understood that "'a legislature must make the narrow geographic scope of its law explicit to stay within the confines of the Dormant Commerce Clause when regulating Internet activity.'" (Doc. 29 at 15 (quoting *Backpage.com LLC. v. Cooper*, 939 F. Supp. 2d 805, 844 (M.D. Tenn. 2013)); *accord* Doc. 83 at 30 n.16.) The state cannot expect this Court to "draw a line that is not really there." (Doc. 29 at 15.) There are three more reasons why.

First, the state itself cannot draw a consistent line. In the initial stage of the case, this Court pressed the state to explain what it meant to be "in this state" regarding an online auction. The state "was not clear, and in fact equivocated[.]" (Doc. 29 at 13.) This Court directly asked the state whether it proposed to regulate based on (1) where the *auctioneer* was physically present, (2) where the *business* was located, or (3) whether the auction reached Tennessee *consumers*. The state said "[i]nternet makes it trickier," but that "probably" the answer was "the auctioneer, the business" was in Tennessee. (Doc. 29 at 14.) When the Court pushed the state past its guesswork by asking if a Mississippi auctioneer who "clicked a few buttons" in Memphis would need a license, the state then said it was "probably" where the *business* was. *Id.* ("that's probably Mississippi's jurisdiction to regulate or not regulate."). If "origination" was the standard, then the state would have answered differently when asked about "click[ing] a few buttons."

In its motion, the state tangles itself up further. The state now contends that it will regulate internet auctions, not based on business location, but based on (1) where the *computer* "originates" the auction[8] (Doc. 88-1 at 9); (2) where the *auctioneer* is located, (*id.* at 11 ("Tennessee can

[8] The state first appeared to notice Rule 18 on August 16, 2019, *see* Doc. 38 at 1 (raising Rule 18 for the first time in a reply), after this Court issued the preliminary injunction on July 23, 2019 (Doc. 29 at 1), despite having ample opportunity to present the rule previously. *C.f.,* Docs. 13, 20,

regulate auctioneers located here")); and (3) "*auctions* conducted in the State." *Id.* All of these standards are different from a business location standard and contradict the state's prior representation to this Court. (Doc. 29 at 14.) And these new standards are not even internally consistent. The auctioneer may not be in the same place as the computer "originating" the auction. The property for auction may be in a different location from the computer or the auctioneer.

The state's standards are tough to keep track of. Among the first documents filed by the state was a sworn declaration by its executive director, Roxana Gumucio. *See* Doc. 20-2, PageID #: 715-17. She swore under penalty of perjury (*id.* at PageID #: 717 ¶ 14), that prior to 2019, the Tennessee Auctioneer Commission (TAC) did not generally receive or investigate complaints about extended-time online auctions[9] because they fell under the eBay exemption and "were outside of the Commission's regulatory authority."[10] *Id.* at PageID #: 716-17 ¶¶ 10-11. She affirmed this again as the state's 30(b)(6) designee. (Doc. 94. at PageID #: 3173:15-20.) The state itself acknowledged in earlier pleadings that online auctions were previously unregulated. *See* Doc. 13 at 13 ("In 2019, the legislature extended [the auctioneer license] to auctions that are conducted by electronic exchange with potential purchasers."); *see also* Doc. 20 at 9; Doc. 32 at 13. These statements are binding judicial admissions, *see Ferguson v. Neighborhood Housing Services, Inc.*,

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and 32 (not raising Rule 18). The state's belated reliance on the defunct Rule 18 is an obvious "convenient litigating position' or *post hoc* rationalizatio[n]" the state adopted once it was forced to take the Commerce Clause seriously. *See Kisor v. Wilkie,* 139 S. Ct. 2400, 2417 (2019) (lead opinion of Kagan, J.) (quotations omitted). This Court was correct; the state disinterred Rule 18 out of "convenience," to save PC 471. (Doc. 83 at 25.)

[9] The other type of online auctions—fixed time—also fell under the exemption and still do. Thus, all online auctions were unregulated before PC 471 unless they were simulcasts of a live auction. The statement, "[i]ndeed the State had already regulated online auctions from within Tennessee for eighteen years" (Doc. 88-1 at 11), is simply not accurate.

[10] As will be shown shortly, on multiple occasions, the TAC acted outside its authority.

780 F.2d 549, 550-51 (6th Cir. 1986), and from no less than the state's subsequent 30(b)(6) witness. The state may not contradict itself now.

Second, even if Rule 18 could be made to fit PC 471, its "origination" standard would need further defining, as this Court has found. (Doc. 83 at 29 n.14.) "Origination" as a standard has failed to satisfy the Commerce Clause before. *See PSInet*, 362 F.3d at 240 (if regulation could be confined intrastate then it would "have no local benefit"); *Cyberspace Commn'ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 751 (E.D. Mich. 1999) ("Although the Act by its terms regulates speech that 'originates' or 'terminates' in Michigan, all Internet speech is, as stipulated by Defendants available everywhere including Michigan."); *Am. Booksellers Found. v. Dean*, 202 F. Supp. 2d 300, 304 (D. Vt. 2002) (striking down restriction on "electronic communications … committed at either the place where the communication originated or the place where it was received"). Internet speech does not "originate" any place.

The record validates this Court's fear that the state may "chang[e] its tune in the future." (Doc. 83 at 25.) Internal emails revealed that in September 2019, an out-of-state auctioneer sent an inquiry into the Department. He wanted to know if he needed a license for an online auction. (Doc. 104-5 at PageID #: 4462-63.) State personnel related "*you are required to be licensed* however there is litigation pending." *Id.* at PageID #: 4462. The state will regulate out of state once the litigation ends. The same email string refers to "one similar a while back," and "the on-line auction issue" *id.*, so this is a recurring question. Out-of-state auctioneers have every reason to fear Tennessee once the litigation is over.

The record shows that even prior to PC 471, the state had already regulated out-of-state auctioneers. In 2015, the state entered a consent order with Everything But The House (EBTH), fining it $2,000. Pls.' SUMF ¶¶ 224, 228. The order found (1) that EBTH was an "unlicensed

company *from Ohio*, conducting online auctions and doing business in Tennessee without the proper licensure to do so" and (2) that EBTH "*advertised online*" a sale of property. Pls.' SUMF ¶¶ 225-27 (Doc. 94-3 at PageID #: 3337 (emphasis added)). The state concluded that EBTH unlawfully "[a]ct[ed] as or advertise[d] or represent[ed] to be an auctioneer . . . without holding a valid license. …" (Doc. 94-3 at PageID #: 3338 (Stipulated Conclusions of Law).) Contrary to the state's assurances, "[t]he Commission would … violate its own rule [Rule 18][11] by attempting to reach auctions originating from locations outside of Tennessee." (Doc. 88-1 at 9.)

EBTH illustrates the problems with Rule 18. What if, as with EBTH, the company, auctioneer, and its computers are all in Ohio, but they auction property located in Tennessee? Pls.' SUMF ¶¶ 224-228. Conversely, if an auctioneer is in Tennessee but uses Kentucky-based computers to originate an online auction—hardly difficult in 2021—would that person need a license? Who even is the auctioneer under these facts? The person managing the auction or the person running the server? PC 471 doesn't say even though in 2006 an attorney general opinion anticipated the problem: "Computers, not individuals, conduct Internet 'auctions.'" Tenn. Att'y Gen. 06-053 (2006). Only the legislature could draw these sorts of lines if they were supposed to exist. It did not.

Third, the state cannot point to any legislative history that would provide this Court with any guidance with which to develop a standard. (Doc. 29 at 12.) At the August 27, 2018 Task Force meeting, one member (Hanson) alluded to Rule 18 when she brought up "a rule . . . that

[11] Notably, the order contains *no* findings that EBTH "originated" the auction in Tennessee, whatever that could possibly mean. The state did exactly what it says it will not do to Purple Wave: regulate it for advertising an online auction in Tennessee. The state can say that "there is no threat of an attempt to regulate auctions that do not originate from within the state" (Doc. 88-1 at 9), but EBTH proves otherwise.

addresses the location of the server." (Doc. 4-10 at PageID #: 278:21-23.) Will pointed out to no disagreement that Rule 18 "predates the 2006 exemption of timed auctions" so that the rule essentially became "irrelevant." *Id.* at PageID #: 278:24-279:3. Hanson added, "and servers are all over the place anymore too …." and may be in "multiple places." *Id.* at PageID #: 279:11-12, 16-17. The internet of 2001 with dialup access from one computer no longer exists. The state's claim that it has broadly regulated online auctions since the enactment of Rule 18 in 2001 is wholesale revisionism. (Doc. 88-1 at 9, 11.) The TAC made sporadic attempts under existing law, but they all failed because the 2006 eBay exemption covered all online auctions that were not simulcast. An entire Task Force was mustered because of a perceived need to address the regulation of online auctions. During the Task Force, everyone viewed online auctions as unregulated.[12] Obviously, if online auctions were regulated prior to PC 471, there was no need to add "electronic" exchanges to the definition of an auction. And PC 471 could have just closed the supposed "loophole" for extended-time ending if PC 471 was trying to address those who use it to "evade" regulation. (Doc. 88-1 at 9 n.3.)

The TAC has long exhibited a pattern of inconsistent and unjustified enforcement of online auctions. After extracting $2,000 from EBTH in 2015, Pls.' SUMF ¶ 228, on August 1, 2016, the TAC dismissed a complaint against Will *because* his extended time online auctions fell outside

[12] Pls.' SUMF ¶ 167 (regulation of online auctions is a "must"); *id.* at ¶ 168 ("the elephant in the room is online auction and the regulation of it by the auction industry . …"); *id.* at ¶ 187 (Allen: "real need to look at oversight for online auctions . …"); *id.* at ¶ 188 ("Or do we just say we aren't going to require [a license] of people who conduct online auctions because in that case you really have just said that we don't need any auction law."); *id.* at ¶ 189 (concern for "disparity" between regulations for online and live auctions); *id.* at ¶ 193 ("either include online auctions or just get rid of the auction law"); *id.* at ¶ 196 (Allen: "the elephant in the room has always been online auctions, are we going to be a state that regulates online auctions. I think we should be."); *id.* at ¶ 238 ("everybody's trying to get their arms around this internet and auctions.").

their jurisdiction. Pls.' SUMF ¶¶ 132-35. The state then pursued Rule 28 under which the TAC would have been able to regulate extended-time auctions. *Id.* at ¶¶ 138-140.

The state did not stop regulating online auctions at that time as it contends. (Doc. 102 at 4; *see also* Pls.' SUMF ¶¶ 215-23; Doc. 95-3 at PageID #: 3593-3597 (Transcript of June 19, 2017 TAC meeting)[13]; Doc. 94-2 at Page ID #: 3327-3334 (PCI administrative file).) In 2017, when PCI was brought up on a complaint for an online auction, it invoked the eBay exemption. (Doc. 95-3 at PageID #: 3595:1-6.) Defendant Morris "highly doubt[ed,], that PCI fell under the eBay exemption," and directed "legal" to "watch them" to see if they "extend the time – the bidding on any item at all." *Id.* at PageID #: 3596:7-15; s*ee also id.* at PageID #: 3596:22-24 ("if they extend the bidding. We can issue fines if – under that case.").[14] The TAC showed that in 2017 it continued to view extended-time auctions as fair game. Per Morris, "I don't know what needs to be changed. The law is the law. I mean if you extend the bidding, you're – you've got to be licensed." (Doc. 95-3 at PageID #: 3600:16-19.)

More revealing still was TAC's overall view on its unbounded authority. By 2017, Rule 28 was killed by legislative act. Pls.' SUMF ¶¶ 148-49. Yet on June 19, 2017, TAC member Phillips said: "I don't believe that I or you or anyone else has the authority [. . .] *including the legislatures*[sic], to overrule the attorney general unless there is proof that he was wrong.[15] And

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[13] <https://www.youtube.com/watch?v=PNNzK_kVjsA>. The portion relating to PCI begins at appx. 44 minutes.

[14] The TAC made good on its promise. On September 18, 2017, <https://www.youtube.com/watch?v=F7R_kNwycwM> (appx.19:40-23:40) the TAC revisited the complaint after its lawyer established that PCI extended the closing time. (Doc. 104-2 at Page ID #: 4444-47.) On advice of counsel (*id.* at PageID #: 4445:19-24), the TAC concluded that PCI could not rely on the eBay exemption. (Doc. 94-2 at PageID #: 3331.)

[15] Phillips alludes to the attorney general opinion that internet drop off stores which rely on online auctions like eBay do not fit the statutory definition of an "auction" or "auctioneer." Op. Tenn.

so far I've not seen that proof. And I believe that if you extend an auction online, you should have a Tennessee auctioneer license, period." (Doc. 95-3 at PageID #: 3600:5-10.) The TAC is not above oversight, even if it thought otherwise in 2017.

The TAC couldn't stop itself from regulating auctions that extended time, even after this Court enjoined the state. (Doc. 29 at 29.) While reviewing complaints of an online auction on February 24, 2020,[16] (Doc. 104-3) Defendant Morris stated (appx. 30 min) that if bidding extended the auction's close, then the auction was regulated. (Doc. 104-3 at PageID #: 4450:24-4451:11 ("That's a big deal ... if there is any extension of time, *then we do regulate those internet auctions*.").) The department attorney even reminded the TAC of this Court's injunction (*id.* at PageID #: 4450:19-23), yet Morris tabled the matter, demanding "more information." *Id.* at PageID # 4453:9-13. Again on May 18, 2020,[17] the TAC considered complaints against two online auctions. (Doc. 104-4 at PageID #: 4457.) Morris again seized on whether the company extended time: "They started out . . . extended time for bidding and then someone told them that they shouldn't do that if they wanted to stay outside the law." *Id.* at PageID #: 4457:14-17. The TAC even sent letters of instructions to the parties. (Doc. 94 at PageID #: 3279:5-8.) The Court was

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Att'y Gen. 06-053 (2006). The opinion merely stated that internet auctions "comes close enough" to the statute as to make it a "*credible argument*" that they were regulated under current law. *Id*. at 5 (emphasis added). The AG also concluded that the regulation of online auctions "may not coincide with the intent of the legislators who enacted it," and "the more appropriate course" is to "leave the decision of whether or not to regulate Internet auction-type sites to the considered judgment of the General Assembly." *Id*. at 6. The General Assembly opted to leave online auctionsalone in 2006 when it enacted the eBay exemption.

[16] <https://www.youtube.com/watch?v=tNl2BresM-4&feature=youtu.be>. The relevant portion runs from appx. 29-35.

[17]<https://www.youtube.com/watch?v=ROdv53qFmPc>. The relevant portion runs from appx. 34:40 to 39.

rightly worried about how the state will act when "in the throes of enforcement zeal." (Doc. 83 at 25.)

A record further validates this Court's observation (*id.* at 29) that the state's intent was to tackle online auctions generally, not just those "originating" in Tennessee. When renewing the complaint against PCI on September 18, 2017, Morris remarked: "We're going to continue to come under fire from auction houses all over the country that are doing this exact thing and [fining them] is the only thing that we can do to stop them from not being licensed." (Doc. 104-2 at PageID#: at 4446:7-11.) The Task Force that ultimately recommended the broad regulation of "electronic" auctions knew online servers may be in "multiple places." (Doc. 4-10 at PageID #: 279:15-16.) As recently as May of 2020, Morris continued to express anxiety over online auction companies "that come in and out of Tennessee." (Doc. 104-4 at PageID#: at 4458:21.) With good reason. It is pointless to try and regulate online auctions if the regulation could be skirted by placing computers out of state, as the state's expert conceded. (Doc. 89-2 at PageID #: 2927:5-19.)

C. The State Cannot Satisfy the *Pike* Analysis.

The state only conducts the most cursory of a *Pike* analysis. (Doc. 88-1 at 11.) And even though this Court expressly ruled that it "must assess whether the purported benefits are legitimate or illusory," (Doc. 29 at 20), the state's *Pike* analysis is fact-free, and bolstered only by conclusory statements about benefits. (Doc. 88-1 at 11.) The state cannot prevail under *Pike* based on illusory interests. (Doc. 29 at 20.)

Plaintiffs have the ultimate burden under *Pike* but have propounded ample evidence to carry that burden, from a review of the available complaint data and the COVID test-case scenario. (Doc. 91 at 12-15.) Regarding benefits, the Court previously disregarded the state's claims about consumer protection because the findings of the Task Force show there really is no threat to

consumers. (Doc. 29 at 22.) That was before a deeper dive into the complaints revealed that few related to extended-time online auctions. Pls.' SUMF ¶¶ 211, 213, 217, 222. And fewer still made a finding of consumer harm. *Id.* at ¶¶ 219-223.[18] The Court's ruling was also before the TAC directed auctions to shift online for nearly a year during COVID, which went unregulated to no detriment. *Id.* at. ¶¶ 263-267. The state does not explain how the senseless fixed/extended-time distinction promotes its purported benefits. Allen and the state's expert acknowledged that consumers face no different harms based on how an online auction closes. *Id.* at ¶¶ 145-46, 191, 287.

Moreover, the state's faith in Rule 18 guarantees that it cannot satisfy *Pike*. If the state only regulated online auctions originating in-state, then PC 471 delivers little to no benefit to consumers. Shady operators would have an easy way to evade regulation by setting up computers in another state. *See PSInet*, 362 F.3d at 240 (If Internet regulation "can be construed in a manner that does not directly violate the Commerce Clause, the statute still fails under the Dormant Commerce Clause analysis of [*Pike*]."). It is not difficult to arrange for a computer service to administer an online auction in a different state. As recognized in *Backpage.com*, 939 F. Supp. 2d at 844, Tennessee is highly sensitive to burdens on commerce given that it "is one of only two states in the nation that border eight other states." Pushing the unscrupulous to run for the borders does not protect Tennesseans.

[18]The TAC made findings against Jaspar, but that was a simulcast, not online only, auction. Pls.' SUMF ¶¶ 221-222. The other company subject to an enforcement action that the state dwas PCI. *Id*. at ¶¶ 220, 223. The PCI order only contained a finding relating to unlicensed conduct. (Doc. 94-2 at PageID #: 3331.) The TAC also made a finding against EBTH (SUMF ¶ 224), but it too was only for unlicensed conduct. (Doc. 94-3 at PageID #: 3337-38). In fact, the complainant, Patti Baldini, was herself an auctioneer (*id*. at PageID #: 3345-46), who was herself a recipient of a 2016 complaint for administering an unlicensed, extended-time online auction. (Doc. 94 at PageID #: 3218:5, 3225:3-3226:9.)

This Court correctly ruled that PC 471 "likely seriously burden[s] interstate commerce." (Doc. 29 at 25.) This Court made the ruling just by looking at the statutory requirements; the state presents no facts to alter this finding at the summary judgment stage. PC 471 regulates and prohibits all forms of advertisement that commonly appear on webpages. (Doc. 4-2 at PageID #: 63 (PC 471 § 5(a)(1)).) It squarely bans Purple Wave from displaying that it is "the largest no-reserve Internet auction firm in the country," Pls.' SUMF ¶ 59, on its website if even a single computer in Tennessee can access it. Purple Wave relies on Google "banner ads" that may pop up on a Tennessean's computer based on algorithms unrelated to geography. *Id.* at ¶¶ 61-62. That makes Purple Wave liable unless each employee who "conduct[s]" auctions, (Doc. 4-2 at PageID #: 64 (PC 471 § 5(b)))—meaning setting up images and software online—becomes licensed in Tennessee because Purple Wave "cannot simply turn off its website at the Tennessee border." (Doc. 29 at 18.)

As related in the preceding section, many obvious ways exist to protect consumers that would advance the state's purported interests "in a non-extraterritorial fashion" other than requiring a license for some types of online auctions. *See Snyder*, 735 F.3d at 376. The state does not address possible alternatives at all in its curt *Pike* assessment. (Doc. 88-1 at 11.)

CONCLUSION

This Court should deny the state's motion.

Dated: May 27, 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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On this date: May 27, 2021.

s/ B. H. Boucek
BRADEN H. BOUCEK