

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

**WILL MCLEMORE, MCLEMORE AUCTION)
COMPANY, AARON MCKEE, PURPLE WAVE,)
INC., AND THE INTERSTATE AUCTION)
ASSOCIATION,)**

Plaintiffs,)

v.)

Case No. 3:19-cv-00530

**ROXANA GUMUCIO, GLENN KOPCHAK, JOHN)
THORPE, RONALD COYLER, JEFF MORRIS,)
ADAM LEWIS, RANDY LOWE, *in their official)
capacity,*)**

Defendants.)

**DEFENDANTS’ RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTION FOR A
TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. P. 65 and this Court’s Order entered June 27, 2019, Defendants oppose Plaintiffs’ motion for a temporary restraining order and a preliminary injunction because (1) Plaintiffs are not likely to succeed on the merits; (2) Plaintiffs will not suffer irreparable injury absent a stay; (3) granting the stay would cause substantial harm to others—namely, the public; and (4) the public interest would be harmed—not served—by granting the stay. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008); *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009); *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008).

BACKGROUND

Plaintiffs filed this action on June 26, 2019, to challenge the constitutionality of certain auctioneer licensing requirements enacted by the Tennessee General Assembly pursuant to 2019

Tenn. Pub. Acts Ch. 471. On June 27, 2019, Plaintiffs filed the instant motion for a temporary restraining order.

Plaintiff Will McLemore (“McLemore”) is a Tennessee resident and a licensed Tennessee auctioneer. (Compl. ¶¶ 6 & 34). Plaintiff, McLemore Auction Company, LLC (“McLemore Auction”), is a Tennessee limited liability company that has a physical location in Nashville, Tennessee, and holds a Tennessee auctioneer firm license. (*Id.* ¶¶ 7 & 36). McLemore is the president and sole member of McLemore Auction. (*Id.* ¶ 6). Plaintiff, Aaron McKee (“McKee”), is a Kansas resident. (*Id.* ¶ 8). Plaintiff, Purple Wave, Inc. (“Purple Wave”), is a Delaware corporation that is headquartered in Manhattan, Kansas. (*Id.* ¶ 9). McKee is the president and CEO of Purple Wave. (*Id.* ¶ 9). Plaintiff Interstate Auction Association (“IAA”) is an unincorporated association that was organized by McLemore in June 2019 and is made up primarily of online auctioneers, licensed and unlicensed, including McLemore and McKee. (*Id.* ¶¶ 6, 10, 204, & 206).

Plaintiffs allege that McLemore Auction has operated and plans to continue to operate online auctions of real estate and personal property mostly, but not entirely, in Tennessee, via its website <https://www.mclemoreauction.com>. (*Id.* ¶ 22 & 29). McLemore Auction employs one full-time employee and four independent contractors, Blake Kimball, Wilson Land, Jamie Boyd, and Dwayne Smith.¹ (*Id.* ¶ 23). Kimball, Land, and Boyd do not hold any license under Tennessee’s auctioneer laws. (*Id.* ¶ 24). For personal property auctions, McLemore Auction has four auction managers who evaluate the opportunity, negotiate a deal with the property owner,

¹ Although Plaintiffs allege that McLemore Auction has only one full-time employee, elsewhere in the Complaint, Plaintiffs refer to actions taken by “employees.” (*See, e.g.*, Compl. ¶ 29 (“as operated by employees of McLemore Auction”; *id.* ¶ 42 (“he or one of his employees may include a description”)). It is not clear, although Defendants presume it is likely, that “employees” refers to or includes the individuals previously identified as “independent contractors.”

catalog the assets, manage the inspection, and oversee the removal of the assets from the owner's premises. (*Id.* ¶ 28). These auction managers include the independent contractors who do not hold any license under Tennessee's auctioneer laws. (*Id.*). McLemore Auction exclusively uses an extended-time auction format whereby the time of the auction closing extends based on bidding activity. (*Id.* ¶ 32). For online auctions, McLemore, Kimball, Land, Boyd, and Smith post pictures and descriptions of the property that is being auctioned to the auction listing on McLemore Auction's website. (*Id.* ¶¶ 39-52). McLemore Auctions alleges that it has generated and anticipates that it will continue to generate more than \$25,000 in sales revenue per calendar year from the sale of goods or real estate in online auctions. (*Id.* ¶ 53).

Plaintiffs allege that Purple Wave likewise has operated and will continue to operate auctions online where the auction closing time extends based on bidding activity. (Compl. ¶¶ 214 & 215). None of Purple Wave's employees hold any license issued by the Tennessee Auctioneer Commission. (*Id.* ¶ 216). Purple Wave's website is accessible in all states, including Tennessee, and Purple Wave has had ninety-five bidders, twelve purchasers, and five sellers located in Tennessee in 2019. (*Id.* ¶ 218, 226-228). Purple Wave anticipates that it will continue to have bidders, buyers, and sellers located in Tennessee in the future. (*Id.* ¶¶ 226-228). Purple Wave Alleges that it has generated and anticipates that it will continue to generate more than \$25,000 in sales in a calendar year from the sale of goods in online auctions. (*Id.* ¶¶ 230).

Plaintiffs make similar allegations to those of Purple Wave for other individual auctioneers and auction companies who are located outside of Tennessee. (*Id.* ¶¶ 231-266). These individuals and companies are not named Plaintiffs, but the individuals are alleged to be members of IAA. (*Id.* ¶ 206). Plaintiffs do not allege anything about the annual revenues from online auctions for these individuals and companies.

In 2019, pursuant to 2019 Tenn. Pub. Acts Ch. 471, the Tennessee General Assembly made changes to the licensing requirements for auctioneers. These provisions go into effect on July 1, 2019. Under these provisions, an “auctioneer” is defined as “a principal auctioneer, bid caller auctioneer, or public automobile auctioneer.” 2019 Tenn. Pub. Acts § 4. A “principal auctioneer” is defined as

an individual who, for a fee, commission, or any other valuable consideration, or with the intention or expectation of receiving a fee, commission, or any other valuable consideration by the means or process of auction or sale at auction, offers and executes a listing contract, sale, purchase, or exchange of goods, and is responsible for the management and supervision of an auction company, including its wholly owned subsidiary or affiliate company.

Id. A “bid caller auctioneer” is defined as “an individual who, for compensation or valuable consideration, or otherwise, is hired by a principal auctioneer, public automobile auction, or public automobile auctioneer to solicit bids for the purchase of goods at an auction.”² *Id.* An “affiliate auctioneer” is “an individual who, for compensation or valuable consideration, or otherwise, is employed, directly or indirectly, by a principal auctioneer to deal or engage in any activity described in subdivision (9) [which defines principal auctioneer].” *Id.* An “auction” is defined as

a sales transaction conducted by oral, written, or electronic exchange between an auctioneer and members of the audience, consisting of a series of invitations by the auctioneer for offers to members of the audience to purchase goods or real estate, culminating in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience.”

Id.

Chapter 471 further provides that it is unlawful for any person to “[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by the commission.” *Id.* § 5.

² “Public automobile auction” and “public automobile auctioneer” are also defined terms, but do not appear to be relevant to Plaintiffs’ allegations.

“All auctions arranged by or through a principal auctioneer must be conducted exclusively by individuals licensed under this chapter.” *Id.*

Section 6 of Chapter 471 describes certain individuals and activities to which the licensing requirements do not apply. These include “[a]ny fixed price or timed listings that allow bidding on an internet website, but do not constitute a simulcast of a live auction” and “[a]n individual who generates less than twenty-five thousand dollars (\$25,000) in revenue a calendar year from the sale of property in online auctions.” *Id.* § 6.

In this action, Plaintiffs claim that the provisions of 2019 Tenn. Pub. Acts Ch. 471 that require licensure for extended-time online auctions violate their rights to free speech under the First and Fourteenth Amendments of the U.S. Constitution and Article I, Section 19 of the Tennessee Constitution; burden interstate commerce in violation of the Commerce Clause of the U.S. Constitution; and violate the Privileges or Immunities Clause of the U.S. Constitution. (Compl. Claims 1-3). Plaintiffs claim that McLemore and McLemore Auction will be injured because they will be required to employ licensed auctioneers to conduct extended-time online auctions and will no longer be allowed to pay commissions to unlicensed persons who help arrange auctions. Plaintiffs claim that McLemore Auction’s unlicensed independent contractors, who are not named Plaintiffs but are alleged to be members of IAA, will be injured because they will be required to obtain licenses to conduct extended-time online auctions. Plaintiffs allege that Purple Wave and other out-of-state members of IAA that conduct extended-time online auctions will be injured because they will be required to obtain licenses.

ARGUMENT

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter*, 555 U.S. at 24. To determine whether to grant a motion for a temporary restraining order or a

preliminary injunction, the court must balance the following factors: (1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest will be advanced by issuing the injunction. *Id.* at 22; *Jones v. Caruso*, 569 F.3d at 265; *Ohio Republican Party*, 543 F.3d at 361. All these factors mitigate against granting Plaintiffs’ motion for a temporary restraining order and a preliminary injunction.

1. Plaintiffs Are Unlikely to Succeed on the Merits.

a. Plaintiffs Are Unlikely to Succeed on Their Free Speech Claims.

Tennessee’s licensing requirements for auctioneers are consistent with the State’s “broad power to establish standards for licensing practitioners and regulating the practice of professionals,” *Gade v. Nat’l Solid Waste Management Ass’n*, 505 U.S. 88, 108 (1992), and are permissible under the First Amendment. “[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). This standard applies to regulation of professionals, such as auctioneers. *See Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978). The State’s regulation of auctions conducted by electronic exchange is “a subject only marginally affected with First Amendment concerns” and is “within the State’s proper sphere of economic and professional regulation.” *Id.* at 459.

In commercial speech cases, the Supreme Court has developed a four-part analysis:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 (1980).

Here, there is no specific speech at issue, so it is impossible to determine whether any specific speech concerns a lawful activity and is not misleading. Generally, the speech at issue is electronic exchanges between auctioneers and potential purchasers. Provided that the auctioneer's electronic exchanges with potential purchasers concern a lawful activity (presumably the sale of items of tangible personal property) and are not misleading, they will be protected.

The next question is whether the asserted governmental interest is substantial. The State's interest in regulating the auctioneering profession is substantial. The government has a substantial interest in protecting the public from unfair or deceptive auctions, including online auctions. *See Ohralik*, 436 U.S. at 459. The licensing requirements for auctioneers directly advance that substantial governmental interest by *inter alia* requiring auctioneers to be properly educated and trained and to abide by appropriate standards of conduct for the profession. The licensing requirements are no more extensive than necessary to serve that interest. Persons wishing to become auctioneers merely have to complete the requisite education and training, obtain a license, and abide by professional standards of conduct. The Act does not include a categorical prohibition of speech, only a neutral license requirement.

Plaintiffs' arguments would make all auctioneering unregulatable, because by definition all auctions include an exchange between the auctioneer and members of the audience, which is commercial speech. Plaintiffs complain that extending the licensing requirements to individuals who conduct auctions online is an impermissible restriction on speech because electronic exchanges with potential buyers are protected speech and the restriction is content-based. But the State already requires in-person auctions to be conducted by licensed auctioneers. It is difficult to comprehend how exchanges between the auctioneer and the audience are entitled to greater First

Amendment protections when they are conducted online. Auctioneers must communicate with potential buyers in order to engage in their profession, just as doctors and lawyers must communicate with patients and clients to engage in their professions. The fact that speech is necessary to engage in a profession does not render a licensing requirement for that profession an impermissible content-based restriction on speech. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62. These burdens on speech are merely incidental to the State's inherent authority to regulate the professions. *See Sorrell*, 564 U.S. at 567.

Plaintiffs' reliance on *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), is misplaced. That case involved compelled speech. Licensees were required by statute to make certain statements as a condition of licensure. The instant case is not a compelled speech case. The statute at issue is a professional licensing statute that only incidentally burdens speech. The applicable standard is thus the *Central Hudson* standard articulated above.

Moreover, Plaintiffs McLemore and McLemore Auction already hold auctioneer licenses. The licensing requirements thus do not impose even incidental burdens on their speech. McLemore and McLemore Auction are not prohibited from conducting auctions by electronic exchange with potential buyers because they already hold licenses. For the reasons explained in more detail in section (1)(b) below, the licensing requirements likewise do not burden the speech of Plaintiffs McKee and Purple Wave or any other out-of-state members of IAA, because the licensing requirements do not apply extraterritorially.

For these reasons, Plaintiffs are unlikely to succeed on the merits of their free speech claims.

b. Plaintiffs Are Unlikely to Succeed on Their Commerce Clause Claims.

Plaintiffs' Commerce Clause claims are based on their incorrect presumption that the provisions of 2019 Tenn. Pub. Acts Ch. 471 apply extraterritorially. They do not. "[I]t is a well settled rule in this State, and in all others as far as we know, that all statutes are presumed to be constitutional." *Smithson v. State*, 438 S.W.2d 61, 67 (1969). There is nothing in 2019 Tenn. Pub. Acts Ch. 471 that indicates it is meant to require auctioneers who are not located in Tennessee to obtain a Tennessee auctioneer license. The State's authority to regulate the auctioneering profession is confined by the geographical boundaries of the State. By its terms, the statutory scheme applies only to persons who engage in the auction business or act as an auctioneer "in this state." Tenn. Code Ann. § 62-19-117(a). And it expressly applies only to auctions conducted "in this state." Tenn. Code Ann. §§ 62-19-117(c) & 62-19-118(c)(2). To presume that the legislature intended to regulate auctioneers in other states would violate the well-settled rule that Tennessee statutes are presumed to be constitutional.

Moreover, it is unlikely that any of the out-of-state Plaintiffs would be required to obtain a license, even if the statute were intended to apply to non-Tennessee auctioneers. Plaintiff Purple Wave alleges that it has had twelve buyers from Tennessee in 2019, five sellers who sold goods from Tennessee in 2019, and six items sold from Tennessee in 2019. The statute includes an exception for individuals who "generate[] less than twenty-five thousand dollars (\$25,000) in revenue a calendar year from the sale of property in online auctions." 2019 Tenn. Pub. Acts Ch. 471 § 6. Again, the legislature is regulating the auctioneering profession in Tennessee. The \$25,000 is a threshold of Tennessee auction revenues, not nationwide auction revenues. Purple Wave alleges only that it has total sales from online auctions of more than \$25,000; it does not allege that it has Tennessee online auction sales of more than \$25,000, and with only twelve buyers

from Tennessee and six items sold from Tennessee in 2019, it is unlikely that Purple Wave exceeds the \$25,000 threshold for licensure. The other out-of-state members of IAA do not allege anything about their revenues from online auction sales, much less their revenues from Tennessee auction sales. For these reasons, McKee, Purple Wave, and other out-of-state members of IAA are not affected by the licensing requirements of 2019 Tenn. Pub. Acts Ch. 471 (even if those requirements are intended to apply extraterritorially, which they are not), and thus they do not have any justiciable Commerce Clause claims.

For these reasons, Plaintiffs are unlikely to succeed on the merits of their Commerce Clause claims.

c. Plaintiffs Are Unlikely to Succeed on the Merits of Their Privileges or Immunities Clause Claims.

Plaintiffs do not even argue in their memorandum that they are likely to succeed on the merits of their Privileges or Immunities Clause, which is telling. The Fourteenth Amendment Provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. Const., Amend IV, § 1. “The Clause prohibits States from denying out-of-state residents ‘fundamental’ rights provided to their own residents.” *Garber v. Martinez*, 888 F.3d 839, 845 (6th Cir. 2018). Plaintiffs do not allege that the State denies any rights to out-of-state residents that it provides to its own residents. Indeed, based on a misunderstanding of 2019 Tenn. Pub. Acts Ch. 471, Plaintiffs allege that in-state residents and out-of-state residents are treated the same—they are both required to obtain a license to conduct online auctions. In fact, only in-state residents are required to obtain a Tennessee auctioneer license. Moreover, out-of-state residents can apply for a Tennessee auctioneer license by reciprocity if they wish to be licensed in Tennessee. *See* Tenn. Code Ann. § 62-19-117. Because the auctioneer licensing statute does not deny fundamental rights to out-of-state residents that it

provides to its own residents, Plaintiffs are unlikely to be successful on the merits of their Privileges or Immunities Clause claims.

2. Plaintiffs Will Not Suffer Irreparable Harm Without the Temporary Restraining Order or Preliminary Injunction.

Notably, after spending roughly twenty pages analyzing their likelihood of success on the merits, Plaintiffs spend less than one page on the other factors that the Court is required to consider. Since Plaintiffs believe they are likely to succeed on the merits, *ipso facto* they will suffer irreparable harm. Of course, Plaintiffs are not likely to succeed on the merits, for the reasons described above. A constitutional claim does not warrant a presumption of irreparable harm if it is unlikely to succeed on the merits. *See Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 578-79 (6th Cir. 2002).

Plaintiffs McLemore and McLemore Auction hold Tennessee auctioneer licenses. They are thus able to continue to engage in their auctioneering business, despite the change in the licensure laws. They allege that they will have to find licensed employees or contractors to replace their current employees and contractors. They further claim that they will be required to compensate referrals differently. None of these purported injuries rises to the level of irreparable harm.

Moreover, it is not clear that any of these injuries are likely to occur. *See Winter*, 555 U.S. at 20 (“We agree with the Navy that the Ninth Circuit’s ‘possibility’ standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.”) (emphasis in original). Plaintiffs’ unlicensed employees and contractors need to be licensed as an “affiliate auctioneer” only if they perform activities described in Tenn. Code Ann. § 62-19-101(9), as amended by the Act. Some of the activities described in the Complaint do not appear to fall under that section. To the extent

that their activities do require licensure, such as negotiating a listing contract, the statutory scheme requires them to be at least 18 years of age and complete 34 hours of classroom or online instruction at an accredited auction school. This requirement is a reasonable regulation that does not constitute irreparable harm.

There is no possibility that Plaintiffs McKee and Purple Wave and out-of-state members of IAA will suffer any harm, much less irreparable harm, since the statute does not apply to them, for the reasons described above.

Plaintiffs' allegations of irreparable harm are belied by their actions in bringing this suit. Governor Lee signed 2019 Tenn. Pub. Acts Ch. 471 into law on May 24, 2019. Plaintiffs did not act as if they were in danger of suffering immediate, irreparable harm. Instead, they took the time to draft a detailed 361-paragraph Complaint, which they filed, together with hundreds of pages of exhibits, more than a month after the act was signed into law and a mere three business days before the law is scheduled to go into effect. They likewise took the time to draft a motion for a temporary restraining order and a preliminary injunction and a twenty-five page memorandum, which they filed more than a month after the act was signed into law and a mere two business days before the law is scheduled to go into effect. Now, Plaintiffs expect this Court and Defendants to respond as if there is a sense of urgency, even though Plaintiffs have not acted as if there is a sense of urgency.

For these reasons, Plaintiffs will not suffer irreparable harm if this Court denies the motion for a temporary restraining order and a preliminary injunction.

3. An Injunction Is Likely to Cause Substantial Harm to the Public and Is Thus Contrary to the Public Interest.

Again, because Plaintiffs presume that they are likely to prevail on the merits, they presume that is enough to satisfy the third and fourth factors of the analysis. Of course, for the reasons explained above, Plaintiffs are not likely to prevail on the merits. Their flawed constitutional

analysis is thus insufficient to address the third and fourth factors. Here, members of the public are likely to be harmed if this Court grants the temporary restraining order and preliminary injunction, and the public interest is thus likely to be harmed, rather than advanced, if this Court grants the relief requested.

The legislature has determined that it is in the public interest to require Tennessee auctioneers to be licensed. In 2019, the legislature extended this requirement to auctions that are conducted by electronic exchange with potential purchasers. The licensing requirement ensures that auctioneers will have adequate education and training and that they will adhere to appropriate professional standards of conduct. These protections serve the public interest by protecting members of the public from unfair or deceptive practices by auctioneers who are not licensed, do not have the requisite education and training, and/or do not adhere to appropriate professional standards of conduct. Granting the requested injunction would eliminate these protections and risk significant harm to Tennessee consumers who participate in auctions and rely on these protections for fair and forthright auctions. For these reasons, granting the requested injunction is likely to cause substantial harm to members of the public and to be contrary to the public interest.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for a temporary restraining order and a preliminary injunction.

Respectfully Submitted,

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