No. 22-5458
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILL McLEMORE, et al.,
Plaintiffs-Appellees,

v.

ROXANA GUMUCIO, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY BRIEF OF THE DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

Sections **Page**

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ARGUMENT

I. Tennessee's Auctioneer-Licensing Statutes, as Amended in 2019, Do Not Apply Extraterritorially in Violation of the Dormant Commerce Clause.

Tennessee's auctioneer-licensing statutes, as amended by 2019 Tenn. Pub. Acts, ch. 471 ("PC 471"), do not violate the Dormant Commerce Clause, because they do not "directly and inevitably control[ ] out of state transactions" and do not have "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Online Merchants Guild v. Cameron*, 995 F.3d 540, 556-57 (6th Cir. 2021) (internal quotations omitted). As Defendants have explained, the District Court erred in ruling to the contrary by not affording the statutes a presumption of constitutionality or a presumption against extraterritorial application. (Br. Defendants-Appellants, 13-16, 19-20.) The court also erred in declining to supply additional language to preserve a constitutional reading, and in failing to give weight to state administrators' expressions of intent not to apply the statutes extraterritorially. (Br. Defendants-Appellants, 17, 20-24.)

In short, while the District Court had a clear path to upholding the statutes, it strayed from that path and invalidated them. Plaintiffs' arguments in support of the District Court's ruling are unavailing.

A. The statutory scheme is entitled to the presumption against extraterritorial application and to the presumption of constitutionality.

Contrary to Plaintiff's arguments, the presumptions against extraterritorial application and unconstitutionality do apply to the auctioneer-licensing statutes at issue here. Plaintiffs suggest that Tennessee has "rejected a presumption against extraterritoriality," citing a law review article that in turn relies solely on the decision of the Tennessee Supreme Court in *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512 (Tenn. 2005). (Br. Appellees, 38.) But as Plaintiffs admit, *Freeman Indus.* considered the scope of an *antitrust* statute—the Tennessee Trade Practices Act (TTPA)—not the scope of a *licensing* statute. And as Defendants have noted, the licensing scheme in the auctioneering statutes is not comparable in this context to a consumer-protection *enforcement action*. (Br. Defendants-Appellants, 24.)

Furthermore, in *Freeman Indus*. the court observed that by its plain language, the TTPA has extraterritorial reach, 172 S.W.3d at 522, and the court held only that a case falls within the scope of the TTPA when "the alleged anticompetitive conduct affects Tennessee trade or commerce to a substantial degree," 172 S.W.3d at 523. It did not "reject" a presumption against extraterritorial application for all legislative enactments. Notably, the court also stated that "in construing the reach of the TTPA, we must develop a standard that is consistent with the legislature's intent and purpose without offending constitutional provisions." 172 S.W.3d at 522. That is

precisely the approach this Court should take in construing the reach of Tennessee's auctioneer-licensing statutes and PC 471.

Plaintiffs also suggests that this Court has *not* recognized a general presumption against extraterritoriality for state statutes, despite the statement made in *BMW Stores, Inc. v. Peugeot Motors of Am., Inc.*, 860 F.2d 212 (6th Cir. 1988). (Br. Appellees, 39 n.17.) Plaintiffs cite *Link-Belt Constr. Equip. Co., L.P., LLLP v. Road Mach. & Supplies Co.*, No. 10-103-KSF, 2011 WL 13122221 (E.D. Ky. Apr. 15, 2011), in which the district court noted that in *BMW Stores* this Court had relied on a state official's declaration of intent to regulate only in-state and the "declared policy" of the statutes at issue there. 2011 WL 13122221, at *7. But this Court recited a general principle in *BMW Stores*; indeed, it was quoting *American Jurisprudence 2d*. 860 F.2d at 215 n.1; *see Brown v. DEG Music Products, Inc.*, No. 2:07-cv-106, 2008 WL 11453680, at *3 (S.D. Ohio Feb. 13, 2008) ("Statutes of one state are generally not to be given extraterritorial effect. . . . The Sixth Circuit recognized this principle in [*BMW Stores*].") Also, and as discussed in Section E, below, evidence of an official intent to regulate only in-state exists here—namely, the Auctioneer Commission's Rule 18 (Tenn. Comp. R. & Regs. § 0160-01-.18).

B. The plain language of the statutory scheme indicates that it does not apply extraterritorially.

Plaintiffs say that the District Court "properly determined that PC 471 was not ambiguous and regulated extraterritorially based on its plain language." (Br.

Appellees, 12.) But the flaw in this assertion is that Plaintiffs' "plain language" focus is too narrow. Tennessee's auctioneer-licensing statutes, of which the amendments in PC 471 are but a part, must be considered as an integrated whole. *See In re Kaliyah S.*, 455 S.W.3d 533, 552 (Tenn. 2015) (quoting *Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010) ("Statutes that relate to the same subject matter or have a common purpose must be read *in pari materia* so as to give the intended effect to both.")

Plaintiffs stress that there is "no geographic limitation" in Tenn. Code Ann. § 62-19-102(a)(1) (Br. Appellees, 12, 14), which makes it unlawful for a person to "[a]ct as, advertise as, or represent to be an *auctioneer* without holding a valid license issued by the commission" (emphasis added).[1] But Plaintiffs fail to recognize that the licensing requirement in § 62-19-102(a)(1) works in tandem with Tenn. Code Ann. § 62-19-115(a), which *does* include a geographic limitation—it provides that "[a]ny *auctioneer* licensed under this chapter may conduct auctions at any time or place *in this state*" (emphasis added). Furthermore, as Defendants have explained, while PC 471 amended the definition of "auction" to include electronic (or online) auctions, Commission Rule 18 makes clear that it regulates only online

[1] The definition of "auction" makes clear that it is limited to "exchange[s] between an *auctioneer* and members of the audience." Tenn. Code Ann. § 62-19-101(2) (emphasis added).

auctions "originating from within Tennessee." Tenn. Comp. R. & Regs. § 0160-01-.18. (Br. Defendants-Appellants, 17.)

Consequently, Plaintiffs' assertion that an out-of-state auction company like Purple Wave "faces a real problem" is specious. (Br. Appellees, 15.) Plaintiffs are simply wrong to claim that by merely "proclaim[ing] on its website that it is a 'true auction' website, . . . Purple Wave is clearly 'acting as or advertising as or representing to be' an auctioneer." (*Id.*) It is not. While the Commission does regulate online auctions, by virtue of PC 471, it regulates only online auctions that originate in Tennessee, by virtue of § 62-19-115(a) and Rule 18. In other words, acting as, advertising as, or representing to be an *online* auctioneer does not implicate the licensing requirement; acting as, advertising as, or representing online to be an *auctioneer* implicates the licensing requirement. And an "auctioneer" under the Tennessee licensing scheme is only a person who conducts auctions *in Tennessee*—whether by oral, written, or electronic exchange. Plaintiffs cannot sustain their constitutional challenge by insisting that they need to obtain a license when the licensing authority itself has properly concluded that they need not.

C. Language in two statutory exemptions does not mean that the statutory scheme regulates extraterritorially.

The discussion above makes plain that Defendants are not contending that because "in this state" occurs elsewhere in the licensing statutes, it works its way into PC 471 "by osmosis." (Br. Appellees, 22.) Nor does the fact that the phrase

"in this state" appears in two exemptions to the licensing requirement mean that the statutory scheme otherwise applies extraterritorially. (Br. Appellees, 17.)

Tennessee Code Annotated § 62-19-103 provides a list of auctions and persons to whom the licensing requirement does not apply. Because the phrase "in this state" appears in Subsections (10) and (11), Plaintiffs would read the list of exemptions to mean that all online auctions are regulated regardless of location, but that online auctions of "non-repairable or salvage vehicles" are regulated *except* those conducted in Tennessee (Subsection 10, and in-person auctions of "non-repairable or salvage vehicles" are not regulated if they occur in Tennessee (Subsection 11). (Br. Appellees, 17-19). But this reading makes no sense; it assumes that the State enacted the exemptions to regulate out-of-state auctioneers of non-repairable or salvage vehicles while leaving their in-state counterparts alone. (Br. Appellees, 19.)

Defendants' position, on the other hand, makes perfect sense—a license is required *only* for auctions originating in Tennessee, and under § 62-19-103(10) and (11), the auctioning of "non-repairable or salvage vehicles" in Tennessee is excluded from *all regulation* by the Auctioneer Commission. The Legislature included "in this state" in the two exemptions because that is where it understood the location of all regulated auctions to be located; inclusion of this phrase may be redundant, but it did not signal that the State otherwise intends to license out-of-state auctioneers.

Likewise, the omission of "in this state" from Tenn. Code Ann. § 62-19-102(a)(1) may be inartful, but it is not proof of an intent to reach wholly extraterritorial activity.[2] The words "auction" and "auctioneer" simply have no import in the statutory scheme independent of the authorization for licensees in Tenn. Code Ann. § 62-19-115(a), which contains the limiting language "in this state."

D. Regulation of Internet communications does not inevitably amount to extraterritorial regulation.

Plaintiffs argue that regulation of an online auction company or person "necessarily embraces wholly out of state conduct," because the Internet "is both everywhere and nowhere." (Br. Appellees, 13.) Relying on the district-court decision in *Backpage.com, LLC v. Cooper*, 939 F.Supp.2d 805 (M.D. Tenn. 2013), which relied in turn on *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003), Plaintiffs contend that "states must be exceptionally careful when regulating the

[2] In response to Defendants' argument that the District Court should have read the phrase "in this state" into § 62-19-102(a)(1) so as to give effect to legislative intent (Br. Defendants-Appellants, 21), Plaintiffs quote *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 526 (Tenn. 1993), for the proposition that "courts may not 'rewrite a law to conform it to constitutional requirements.'" (Br. Appellees, 21.) But Defendants are hardly suggesting that § 62-19-102(a)(1) needs to be *rewritten*—Defendants argue only that, in construing the statute, three words be inserted "as may reasonably appear to be called for." *Connecticut Bank and Trust Co., N.A. v. Tenn. Dep't of Revenue*, 769 S.W.2d 205, 208 (Tenn. 1989) (citing *Scales v. State*, 181 S.W.2d 621 (Tenn. 1944)).

internet." (Br. Appellees, 13-14.) But a state's regulation of Internet communications does not inevitably amount to extraterritorial regulation.

In *Rousso v. State*, 204 P.3d 243 (Wash. Ct. App. 2009), the Washington Court of Appeals observed that the overly broad approach taken in *Am. Booksellers* "has been persuasively and widely criticized as resting on an impoverished understanding of the architecture of the Internet, misreading dormant Commerce Clause jurisprudence, and misunderstanding the economics of state regulation of transborder transactions." 204 P.3d at 252 (internal quotations cleaned up); *see, e.g.*, *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 505 (5th Cir. 2001) (holding that state statute's "incidental regulation of internet activities does not violate the Commerce Clause" and observing that holding otherwise "would allow corporations or individuals to circumvent otherwise constitutional state laws and regulations simply by connecting the transaction to the internet").

Plaintiffs cite the District Court's reliance on the Second Circuit's statement in *Am. Booksellers* that "because the Internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate Internet activities without projecting its legislation into other States." (Br. Appellees, 12 (citing Mem. Op., RE 116, PageID# 4680).) But again, the Second Circuit itself has retreated from this sweeping statement. (Br. Defendants-Appellants, 25 (citing *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 195 (2d Cir. 2007).) And this Court has held that activity

that traverses the Internet can be regulated without raising constitutional concerns. *See Online Merchants*, 995 F.3d at 553-57.

In *Online Merchants*, this Court stated that "to conduct [its] extraterritoriality inquiry, [the Court asks] whether *the practical effect* of the regulation is to control conduct beyond the boundaries of the State." 995 F.3d at 553 (internal citations omitted) (emphasis added). And part of the consideration of practical effect is an examination of steps that those potentially affected might take to avoid inadvertent regulation. In *SPGGC*, for example, the Second Circuit reasoned that out-of-state sellers of prepaid gift cards could ensure that they were not subject to state regulation by filtering their solicitations to exclude in-state billing addresses. 505 F.3d at 195 (distinguishing *Am. Booksellers*). In *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network*, 742 F.3d 414 (9th Cir. 2014), the Ninth Circuit similarly observed that "CNN could enable a captioning option for California visitors to its site, leave the remainder unchanged, and thereby avoid the potential for extraterritorial application of [the state's Disabled Persons Act]"); *see also Vizio, Inc. v. Klee*, No. 3:15-cv-00929, 2016 WL 1305116, *15 (D. Conn. March 31, 2016) (plaintiff could avoid Connecticut's E-waste law by not selling televisions in Connecticut).

Here, Plaintiffs, including the out-of-state company Purple Wave, can likewise avoid any claimed potential for extraterritorial application of Tennessee's

auctioneer-licensing statutes simply by not conducting auctions in Tennessee, and by not representing that it conducts auctions in Tennessee.[3] Plaintiffs complain that "[t]here is no option to shut their websites off at the state border." (Br. Appellees, 15.) But no such option need be available just because Tennessee's statutory scheme indirectly regulates *some* Internet communications.

E. Rule 18 expresses the State's intent not to regulate extraterritorially.

Plaintiffs dismiss the significance of Commission Rule 18, viewing it as something Defendants have somehow "disinterred . . . out of 'convenience'" (Br. Appellees, 35 (quoting Mem. op. R. 116, PageID# 4684).) But Rule 18 is an important part of the legislative history of PC 471. Of course, the legislature is presumed to have known the state of the law when it amended the statutory scheme in 2019. (Br. Defendants-Appellants, 18 (citing *Brundage v. Cumberland Cty.*, 357 S.W.3d 361 (Tenn. 2011)).)[4] Regardless of how actively the State has applied it, the rule expresses the interpretation of a statutory scheme by the agency charged with enforcing it—an important factor in determining the constitutionality of a statute. [5]

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[3] Notably, Purple Wave has succeeded in steering clear of Tennessee's regulators regardless of the content of its website. [McKee & Purple Wav. Disc. Resp., RE 88-16, PageID# 2776.]

[4] Plaintiffs attempt to distinguish *Brundage*, but in doing so focus only on "prior enactments" and omit the phrase "the state of the law." (Br. Appellees, 23.)

[5] The federal courts have often stated that the interpretation given a statute by state regulators is to be accorded deference in determining whether a statute passes constitutional muster. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates,*

As a statement of regulatory intent, and contrary to Plaintiff's assertions (Br. Appellees, 37 n.16), it is every bit as effective as the attorney general's stipulation on which the court relied in *SPGGC*. See 505 F.3d at 194.

Rule 18 provides clarity as to the application of the licensing requirements to Internet commerce, a question that was pressing by the time the rule was promulgated in 2001. It relates to the whole licensing regime, and thus to the emphasis on advertising and representing in Tenn. Code Ann. § 62-19-102(a)(1), and it limits this requirement to electronic auctions originating in Tennessee. Plaintiffs' speculative concerns about "how the state will act 'in the throes of enforcement zeal'" (Br. Appellees, 37 (quoting Mem. Op. R. 116, PageID# 4687)) have no bearing on their facial constitutional challenge to the auctioneer-licensing statutes.[6]

Inc., 455 U.S. 489, 494 n. 5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered."); *Quik Payday, Inc. v. Stork*, 549 F.3d 1301, 1308 (10th Cir. 2008) ("We adopt this reasonable interpretation of the statute by those charged with its enforcement."); *see also Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 761 (Tenn. 1998) ("[A] state agency's interpretation of a statute that the agency is charged to enforce is entitled to great weight in determining legislative intent.").

[6] Likewise irrelevant to Plaintiffs' facial challenge is their stated concern about "the additional complication of trying to identify where an online auction 'originates'" for purposes of Rule 18. (Br. Appellees, 41.)

II. Plaintiffs' Alternative Argument Lacks Merit.

Plaintiffs argue, as an alternative basis for affirmance, that "PC 471 fails the *Pike* test under the undisputed record," referring to the balancing test set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). (Br. Appellees, 42.) But as Plaintiffs acknowledge (*id.* at 43 n.19), the District Court did not address the *Pike* test because it found that the auctioneer-licensing statutes regulated extraterritorially. (Mem. Op, R. 116, PageID# 4692.) Accordingly, Defendants submit that if the Court agrees that the District Court erred in finding a per se violation of the Dormant Commerce Clause, the case should be remanded for the District Court to address Plaintiffs' "*Pike* test" argument in the first instance.

In any event, since Plaintiffs' alternative argument under *Pike* lacks merit, if the Court does address the argument, it should be decided in Defendants' favor. Indeed, Plaintiffs invoke *Pike* largely to bolster their argument about extraterritorial intent, suggesting that the State could not possibly have intended to regulate only in-state electronic auctions. But as discussed above, the Commerce Clause does not prohibit States from regulating otherwise regulable in-state transactions simply because they are connected to the Internet. *See Ford Motor Co.*, 264 F.3d 493 at 505.

Plaintiffs also suggest that an in-state-only regulation may prompt auctioneers to leave Tennessee altogether to avoid it. (Br. Appellees, 45-46.) But the *Pike*

analysis does not turn on a litigant's subjective opinion that an enactment is self-defeating. It asks only whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142 (1970).

The State regulates auctions conducted in the State to effectuate the legitimate local public interest of promoting the integrity of competitive auctions, protecting sellers and consumers from untrained or unqualified auctioneers, and preventing fraudulent or deceptive practices in auctions conducted in the State. These protections are contained in the licensing requirements in Tenn. Code Ann. § 62-19-111, for example, and in the Auctioneer Commission's rules. *See, e.g.*, Tenn. Comp. R. & Regs. § 01600-01-.20 (prohibiting false advertising); § 01600-01-.26 (requiring maintenance of an escrow account). And as discussed, the State is regulating purely in-state conduct—i.e., auctions conducted from within Tennessee, whether written, oral, or electronic—so any burden imposed on interstate commerce is negligible. Auctioneers may move *out of state* for all sorts of reasons; meanwhile, though, Tennessee needed to make sure that auctioneers located in Tennessee did not evade regulation by moving *online*. Tennessee therefore had a good reason to regulate auctions originating in this state and conducted electronically. *See Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 649 (6th Cir. 2010) (concluding that the

state "had a reasonable basis to believe that [its enactment's] intended benefit—consumer protection—is significant").

CONCLUSION

For the reasons stated above and in Defendants' principal brief, the judgment of the District Court should be reversed and the case remanded with instructions to award summary judgment to the Defendants on the Dormant Commerce Clause issue and to render a decision on all remaining claims.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains not more than 3,215 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Reply Brief has been served on all persons listed below by U.S. mail and by means of the Court's electronic notification system.

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