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

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

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Plaintiffs respectfully respond in opposition to the State's motion to dismiss and memorandum in support made under Fed. R. Civ. P. 12(b)(1) and (6). (Doc. No. 32). This brief will first establish that Plaintiffs include persons who have suffered cognizable injury as this Court necessarily found in its order granting a preliminary injunction. (Doc. No. 29). Second, the brief will show that Plaintiffs have stated a Commerce Clause claim upon which relief can be granted, as this Court has already found. (Doc. No. 29). Third, the brief will demonstrate that Plaintiffs have suffered injury giving rise to a valid free speech claim under both the federal and state Constitutions. Fourth, it will explain why the Court is able to evaluate a state constitutional claim under the *Pennhurst* doctrine because Plaintiffs seek prospective relief for constitutional infractions. (Doc. No. 32 at 27, citing *Pennhurst v. State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124-25 (1984)). Fifth, it will highlight why this Court should allow the Privileges or Immunities claim to proceed. Sixth, it will explain why, even if rational basis was the appropriate standard, a dismissal at this stage would still be inappropriate because Plaintiffs are entitled to make their case.

LEGAL STANDARD

The Federal Rules of Civil Procedure allow for a case to be dismissed if it fails to state a claim upon which relief can be granted. Such a motion is not a challenge to the party's factual allegations, and so the court construes the complaint in the light most favorable to the non-moving party. Fed. R. Civ. P. 12(b)(6). A court should not dismiss a complaint even when it is unlikely the plaintiff will prevail. *Nader v. Blackwell*, 545 F.3d 459, 470 (6th Cir. 2008). Although the claims must be plausible, all reasonable inferences, including those related to a plaintiff's legal theories, are construed in favor of plaintiffs. *Directv. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *Hebron v. Shelby Cnty. Gov't*, 406 Fed. App'x 28, 30 (6th Cir. 2010). Similarly, Fed. R. Civ. P. 12(b)(1) allows for dismissal of a complaint when the court lacks subject matter jurisdiction. Article II of the U.S. Constitution limits the federal courts to consideration of actual cases and controversies, which gives rise to the concept of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992). A motion attacking a complaint based on subject matter jurisdiction relies on a similar standard as a Rule 12(b)(6) motion. *Jetform Corp. v. Unisys Corp.*, 11 F. Supp. 2d 788, 789 (E.D. Va. 1998). A court must take the pleadings as true and construe them in the light most favorable to the party opposing the motion. *Scheurer v. Rhodes*, 416 U.S. 232, 237 (1974); *Great Lakes Educ. Consultants v. Fed. Emergency Mgmt. Agency*, 582 F. Supp. 194, 194 (W.D. Mich. 1984). To have standing, Plaintiffs must show that they have suffered an injury-in-fact that is fairly traceable to the defendants' allegedly unlawful conduct and is likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 280-84, 291 (6th Cir. 1997).

I. PLAINTIFFS HAVE SUFFERED CONSTITUTIONAL INJURY.

The state contends that Will McLemore is licensed and therefore he lacks standing. It is his unlicensed auction managers who are affected by the new law, and Will cannot vicariously assert a violation of their rights. (Doc. No. 32 at 21). However: a) this Court's preliminary injunction order already found irreparable injury; b) the one plaintiff rule provides that so long as any one plaintiff has standing then they all do; and c) the state misunderstands the precise First Amendment injury asserted by Will.

Because the "irreparable injury" standard governing the issuance of an injunction is more exacting than the constitutional minimum needed to satisfy Article III, this Court has foreclosed this argument. This Court has already found that Plaintiffs including Will face not just a possible injury, but will likely face "immediate and irreparable injury" arising from the disruption to their businesses caused by the new law. (Doc. No. 29 at 26). If Will and McLemore Auction cannot continue to rely upon unlicensed auction managers, they will not be able to fulfill their contractual obligations. Likewise, Purple Wave finds itself in a position requiring it to choose between threatened enforcement or complying with an unconstitutional law. (*Id.*) McLemore Auction and Purple Wave would have to take substantial and costly actions to bring themselves into compliance. The Sixth Circuit has recognized that this constitutes an injury. *See Magaw*, 132 F.3d at 280-84, 291 (pre-enforcement review of Commerce Clause challenge appropriate where plaintiffs suffered harm to their business from passage of targeted regulation). Will has standing.

Even if that were not the case, the state does not dispute that some plaintiffs have standing, and that ends the inquiry. (Doc. No. 32 at 21-22). One party with standing is sufficient to satisfy Article III. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n. 2. (2006); *Liberty Legal Found. v. Nat'l Democratic Party of the USA, Inc.*, 875 F. Supp. 2d 791,

800 (W.D. Tenn. 2012). The state implicitly concedes that Will's unlicensed auction managers have a cognizable injury, albeit one that Will cannot assert. (Doc. No. 32 at 22). But these same individuals -- Blake Kimball, Wilson Land, and Jamie Boyd -- are members of the IAA (VC at ¶ 206), a plaintiff in this case. The IAA has organizational standing to assert the injuries of its members. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (associations can sue on behalf of members).

Finally, even when it comes to Will and his free speech rights, the State misunderstands the actual injury asserted by Will and McLemore Auction. Will has not asserted that his free speech rights are injured if his auction managers are required to be licensed. (Doc. No. 32 at 22). He alleged the online auction license impinges on his free speech rights by preventing him from continuing to say on his website that he will pay a referral fee to an unlicensed person for information leading to a successful auction. (VC at ¶ 206, 278, 280). Prior to the new enactment, this was a permissible practice because online auctions were outside the Commission's purview. Referrals have been remunerative for him in the past and he has also been subjected to administrative discipline for utilizing them as a part of his business. (VC at ¶¶ 68-85). In short, Will's injury is that, should the license take effect, he can no longer say something that he previously could. It does not matter that he is licensed. He still cannot say that he will pay for referrals. The threat is anything but hypothetical or speculative. The State has already "recommend[ed]" that Will self-censor his own website. (VC at ¶ 197).

Plaintiffs have standing and this Court has jurisdiction to hear their claims. The Court should not dismiss the matter under Fed. R. Civ. P. 12(b)(1).

II. PLAINTIFFS HAVE STATED A VALID DORMANT COMMERCE CLAUSE CLAIM.

Taking the pleadings and accepting them as true, Plaintiffs have stated a valid dormant Commerce Clause claim upon which relief can be granted. The state's arguments have all been discounted by this Court under the more elevated standard for issuing a preliminary injunction. This Court rejected the effort to read an atextual, "in this state" limitation into the law. (Doc. No. 29 at 9-13). This Court further found that an "in this state" limitation would still pose dormant Commerce Clause problems. If the state is going to prohibit not just *conducting* online auctions but "act[ing] as, advertis[ing] as, or represent[ing] to be an [online] auctioneer," it is going to have profound dormant Commerce Clause ramifications for an online platform. (*Id.* at 13). Purple Wave advertises on its website that it is a "true auction company." (*Id.* at 18). In what sense is Purple Wave not acting as, advertising, or representing to be an online auctioneer in this state? It is significant that the state was unable to articulate a consistent standard on what an "in this state" limitation would actually mean when asked by this Court. (*Id.* at 13-14).[1]

The State also contends that the online auction license does not create an undue burden on interstate commerce, satisfying the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970). This Court has already ruled that Plaintiffs are likely to prevail in showing that the law is extraterritorial. (Doc. No. 29 at 15, 19). This Court also found that the law would fail under *Pike*.

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[1] The state asserts that out-of-state Plaintiffs do not allege that any Tennessee official told them they must comply with Tennessee's auctioneer rubric. (Doc. No. 32 at 23). Will specifically asked before filing this suit whether out of state companies could continue to advertise, accept bids or clients, or sell assets in Tennessee without a license. (VC at ¶ 190). Defendant Kopchak declined to do what would have been obvious had the law only applied in state and just say so. Instead, he refused to respond "to hypotheticals" and told Will that they would soon be sending out an email to address this question. (VC at ¶¶ 193-94). When the email with a "brief overview" of the new law came, it nowhere mentioned an in-state limitation. (VC at ¶¶ 199-202; Ex. 15). The strongest legitimate interpretation of these facts is that Tennessee officials do intend on enforcing the law against out-of-state auction companies.

(*Id.* at 19). And yet, the law is an impermissible burden in a third way: because the internet is an instrumentality of interstate commerce, any effort to foist a licensing regime upon internet activity runs into the dormant Commerce Clause. (*Id.* at 18-19 n. 8). Plaintiffs are not unmindful that the federal courts have issued scattered opinions in this regard, and that the Court has not yet decided whether "*any* Internet regulation *necessarily* is an impermissible *per se* violation of the Dormant Commerce Clause." (*Id.*) But if there is one lesson from *Backpage.com, LLC. v. Cooper*, 939 F. Supp. 2d 805, 842-43 (M.D. Tenn. 2013), it is that the state should have been exceedingly careful to narrow the scope of the license when imposing regulations on internet activity. It certainly did not exhibit the requisite caution, leaving enforcement subject to a free-floating standard. (Doc. No. 29 at 13-15). Nevertheless, for purposes of whether this is a claim upon which relief may be granted, Plaintiffs have certainly met that standard.

As a final point on this issue, the state points out how long it has licensed auctions, and that other states do as well, suggesting that this casts legitimacy on its decision to extend the license to online auctions.[2] (Doc. No. 32 at 2 ("Since 1967, it has been the public policy of the State ….), 3 ("PC 471 did not substantially change the pre-2019 definition of 'auction.'"), 4 ("The previous law contained similar prohibitions."), 15 ("PC 471 merely added the term 'electronic.' …auctioneers are licensed and regulated in most states. … this is not a new prohibition"), 16 ("And most of the exemptions predate the enactment of PC 471.")). But the state does not explain how

[2] The state also asserts that "Plaintiffs have made clear that their intention is to have the Court strike down the State's entire regulatory scheme for auctioneers, including provisions that predate PC 471 ….") (Doc. No. 32 at 5). The state does not indicate where it derives this idea. In point of fact, it is difficult to envision dormant Commerce Clause implications arising out of licensing outcry auctions since that always takes place in one easily ascertainable place. And with respect to free speech, Plaintiffs directly addressed this, previously stating that they can draw no conclusions absent more facts about the state's interest in licensing live auctions. (Doc. No. 18 at 5).

the age of the its auctioneering license factors into a constitutional analysis. Just one month ago, the Supreme Court invalidated a Tennessee licensing law that had existed since 1939 on dormant Commerce Clause grounds. *Tennessee Wine & Spirits Retailers Assn. v. Thomas*, *et al.*, 588 U.S. --, 139 S. Ct. 2449, 2476-77, 204 L. Ed. 2d 801, 832 (2019) (Gorsuch, N., dissenting). This is not uncommon. "[I]n a case that took almost 80 years to bring, the U.S. Supreme Court struck down as unconstitutional a New Deal-era, raisin-confiscation regime that had spanned thirteen Presidents." *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 98 (Tenn. 2015) (Willett, D., concurring). And the mere fact that Tennessee has chosen to license auctions does not alter the First Amendment analysis. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 513 (1996). If a license is unconstitutional, it does not no matter how old it is.

III.PLAINTIFFS HAVE STATED A VALID FIRST AMENDMENT CLAIM.

This is a free speech case, and a particularly strong one now that the professional speech doctrine has been unequivocally abandoned by the Supreme Court in *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018) ("Speech is not unprotected merely because it is uttered by 'professionals.'"). The precedents relied on by the state are readily distinguishable and represent the same reasoning the Supreme Court explicitly disavowed in *NIFLA*. Auctioneering is a profession that consists entirely of speech, unlike the practice of medicine (*NIFLA*), or dealing precious metals (*Liberty Coins*), or practicing veterinary medicine (*Hines*). A license for online auctions is not a regulation of conduct that incidentally burdens speech. It is a direct burden on speech because in order to meet the statutory definition of auctions, the speaker must be engaged in speech of a specified content.

Even while it disavows reliance upon the professional speech doctrine, the state quotes extensively (Doc. No. 32 at 15-16) from Justice White's concurrence in *Lowe v. SEC*, 472 U.S.

181, 232 (White, B., concurring) that formed the very basis for the now-discredited professional speech doctrine. *See NIFLA,* 138 S. Ct. at 2371 (citing *King v. Governor of New Jersey*, 767 F.3d 216, 230 (3d Cir. 2014) ("Justice White defined the contours of First Amendment protection in the realm of professional speech.")). The state relies upon Justice White's statement that a professional's speech is always "communication[] incidental to the regulable transaction" so long as they are part of "generally applicable licensing provisions." (Doc. No. 32 at 9). This is the professional speech doctrine. The standard created by Justice White's concurrence was *never* controlling law. The state is even less able to rely upon it now that the illegitimate professional speech doctrine that grew from it absolutely cannot be maintained after *NIFLA*, which definitively renounced the very idea. 138 S. Ct. at 2371-72 ("Speech is not unprotected merely because it is uttered by 'professionals.'"). The state is trying to trojan horse the professional speech doctrine back into First Amendment law under the guise of the *NIFLA* exceptions.

This section will first show how auctions are pure speech as Tennessee has defined them. Second, it will show how auctioneering does not fall under the *NIFLA* exemptions. Third, it will distinguish between cases by showing how auctioneering is a speaking profession, unlike the other professions at issue in cases relied on by the state. Fourth, it will highlight that the state cannot impose so many exemptions and rely on the speech-incidental-to-conduct exception.

A. Tennessee licenses speech, not conduct, the way it has defined auctions.

In light of *NIFLA*, the operative question is whether auctioneering is speech, not whether the state has licensed it. *NIFLA* categorically rejected the very idea of "professional speech." The state distinguishes the case on the basis that California had required factual disclaimers to which the unwilling speakers objected. (Doc. No. 32 at 21). *NIFLA* cannot be so easily brushed aside. 138 S. Ct. at 2371. The Ninth Circuit defended the regulation compelling speech *because* it

concluded that the provision regulated "professional speech." *Id.* at 2371. The Supreme Court refused to treat "professional speech as a unique category that is exempt from ordinary First Amendment principles," *id.* at 2375, which is exactly what Defendants incorrectly urge this Court to do when they defend the state's general ability to license auctions, not its specific decision to define auctions as speech. (Doc. No. 32 at 7 (auctions "fall[] squarely within the State's authority to regulate business conduct and economic activity."), 13 ("It was reasonable for the legislature of Tennessee to believe that a licensing requirement for auctioneers would achieve the State's legitimate government purpose.")). The endpoint of this argument leads to the conclusion that "the State[] [has] unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement," which is the rationale that the *NIFLA* court rejected. 138 S. Ct. at 2373. The very notion that speech becomes conduct when it is part of a general licensing regime (Doc. No. 32 at 8-9), fails to appreciate the core ruling in *NIFLA*. All that matters is whether "auctions" are, as defined by Tennessee, speech or conduct, not whether Tennessee has chosen to license them.

The way Tennessee has defined it, auctions consist entirely of speech. "When the government restricts professionals from speaking to their clients, it's restricting speech, not conduct." *See* Eugene Volokh, *Speech as Conduct*, 90 Cornell L. Rev. 1277, 1346 (2005). Auctions must be conducted by *communications*: either an oral, written – and now, electronic – exchange. (Ex. 1). What that actually consists of in the online context is a website that is made up of pictures and words -- speech. (VC at ¶¶ 39 – 52). These communicative aspects are an essential part of the "invitation to purchase" without which there could be no "electronic exchange." Still more, the communication must be of a specified content. It must consist of a "series of invitations for offers" – also speech – to members of an audience to do something specific – "invit[ing]" them to purchase

goods or real estate – which is still more speech, this time of a specific content. As previously discussed, if a website simply posts the price of a product instead of inviting an offer, then it is not an auction. (Doc. No. 5 at 11). Or if it invited offers, but instead of for goods or real estate, for intangible goods, or future interests, or goods that could not be lawfully kept or sold, then based on what the speaker said, it would not be an auction. (*Id.*). And all this is before accounting for the numerous exemptions for online auctions based on who the speaker is and what bidding format they employ. In sum, auctions are defined based on *what* a speaker says, *who* is speaking, and *how* they are speaking. This speech also must have a particular effect on the listener – inducing a high offer. Thus, the only "conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010).

For this reason, auctioneers are more analogous to tour guides, not doctors, vets, or precious metal dealers. In *Billups v. City of Charleston*, 194 F. Supp. 3d 452, 461 (D.S.C. 2016), the District Court ruled that Charleston was licensing speech, not conduct "[b]ecause tour guide services frequently involve telling stories or providing other information about the various sites on the tour." That made tour guides "like the sale of marketing information or message-bearing shirts, both of which have been subjected to First Amendment scrutiny." *Id.* (citing *Sorrell*, 131 S. Ct. at 2667); *cf. Rosemond v. Markham*, 135 F. Supp. 3d 574, 583-85 (E.D. Ky. 2015) (Kentucky Board of Psychology Examiners was restricting speech rather than regulating conduct when it targeted messages communicated by advice columnist). Auctioneers are, like tour guides, engaged in a profession that is itself speech, and that is quite different from the examples used by the state.

It matters not that an auction is "a sales transaction," because the "sales transaction" is exclusively defined as an oral, written, or electronic "exchange." (Doc. No. 32 at 7). In other words, it is a transaction conducted by speech. *Holder* itself provides that the state cannot evade

the First Amendment simply by labelling something as conduct. 561 U.S at 28. And so, it does not matter that Tennessee calls an auction a "sales transaction," when it must be conducted exclusively through speech. Tennessee could have avoided implicating speech if it had not made the transaction dependent on speech and its effect on listeners, but it did not. So defined, auctions are entirely speech.

B. Auctioneering does not fall under either *NIFLA* exception.

The speech-incidental-to-conduct exception is not an escape hatch for licensing auctions because the statutory definition turns on the fact that the auctioneer is speaking. Auctioneering is itself a speaking profession. And this "incidental" exception is unavailable when a law makes speaker and content distinctions.

NIFLA recognizes that the Supreme Court has "afforded less protection to professional speech in two circumstances—*neither of which turned on the fact that professionals were speaking*." 138 S. Ct. at 2372 (emphasis added). This statement makes short work of the state's efforts to come under the *NIFLA* exemptions for conduct incidental to speech because the license "turn[s] on the fact that professionals are speaking." *Id.* The state cannot and has not argued that it is possible to conduct an auction without speaking. Instead, it characterizes the auction license as an incidental burden on speech. (Doc. No. 32 at 8, 16). The state can regulate professional conduct, even if it incidentally involves speech, and the courts afford "more deferential review" to laws requiring professionals to make factual, noncontroversial disclosures in the commercial speech context. But because auctioneering turns on speaking, these exceptions are unavailable. Regardless, they do not fit.

The speech/conduct distinction can occur in one of two ways. The first would be for attempts to license speaking professions: journalist, tour guide, tee shirt printer, blogger.

Auctioneering falls into this camp; this situation is analogous to *Billups*. 194 F. Supp. 3d at 461. The second concerns an application of a license regulating conduct to speech. In *Holder*, the Court held that a statute that "*generally* function[ed] as a regulation of conduct," was nevertheless subject the First Amendment when the statute was applied to speech. 561 U.S. at 27. The second category includes scenarios in which it can be more difficult to ascertain whether that speech restriction was incidental to conduct or not. That is the class of cases put forth by the state, but auctioneering does not fall into this more difficult class.

Stated differently, this is not a situation like *Holder* in which a restriction on conduct also swept speech under its regulation, thus requiring the court to deduce if the restriction is incidental or not. The fundamental problem with the state's argument is that it has defined all auctions as requiring speech. A doctor writing a prescription is engaging in communication. But the government's regulation of that act has nothing to do with the communication itself, and everything to do with what that communication does: giving, for example, a person the legal right to purchase marijuana. *See United States v. Oakland Cannabis Buyers' Coop*, 532 U.S. 483 (2001). It does not follow, however, that the power to regulate the legal effects of speech carries with it the power to regulate speech without those effects. *See Conant v. Walters*, 309 F.3d 629, 634-39 (9th Cir. 2002) (physician has right to recommend medical marijuana even if physician may not legally prescribe it). Whatever difficulty is involved in sorting that out is not present here. Tennessee has licensed speech as speech. It has not required a license to engage in a "sales transaction." (Doc. No. 32 at 7). It has required a license to engage in a sales transaction only when it consists of speech of a specific content. That makes it a speech restriction. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150-51 (2017) (a restriction on how prices are communicated, rather than on the prices themselves, is a regulation of speech as speech.).

So in light of *NIFLA*, it is simple to figure out what it looks like when a state regulates speech incidental to conduct. The Court pointed to "torts for professional malpractice," and laws requiring doctors who perform abortion procedures – conduct – to make certain factual disclosures to their patients about the procedure. 138 S. Ct. at 2373 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)). In *NIFLA*, the speech restriction was "not tied to any procedure at all," because it applied to all interactions between clinics and customers regardless of whether a procedure was sought. Online auctions are nothing like either example. They are not tied to "any procedure at all" because it necessarily involves an "exchange" of a specific content, that is really nothing more than displaying photographs and writing words. The "transaction" itself is nothing more than speaking. (Ex. 1 at § 4(2)). And Tennessee's online auction license is nothing like a tort for professional malpractice, or compelled disclosures attached to providing specific medical procedures, so it is truly a far cry from a restriction on speech incidental to conduct.

The Court can also look to *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) in order to ascertain whether auctioneering is speech. Vermont prohibited the sale, disclosure, or use by pharmacies of doctor prescriber information – federally required data about the drugs a given doctor prescribes –for "marketing purposes," even though the same information could be "sold or given away for purposes other than marketing." 564 U.S. at 557-59, 562, 580. Vermont defended its law by arguing that banning the sale of information for marketing purposes was really just a restriction on conduct. *Id*. at 566-67, 570. But the Court found that even just the use, creation, and dissemination of data is speech. *Id.* at 570. If all the definition of auctions included was the auctioneer notifying the audience members of the latest bid and encouraging further bidding, then it would be exactly like the use, creation, and dissemination of data that the Court regarded as speech in *Sorrell*. But Tennessee includes far more in its definition of auctions because by

including online auctions, what it now regulates is putting up pictures and writing words for a website.

Moreover, the speech incident-to-conduct exemption – providing for a lower level of First Amendment scrutiny – is not available because the online auctioneering license applies based on content and speaker. In *Sorrell v. IMS Health Inc.*, the Court ruled that the "incidental regulation" exception does not apply when the law on its face or in "practical operation" burdens speech "based on the content of speech and the identity of the speaker." 564 U.S. 567. As explained previously, the online auction license only applies based on content, and then draws a number of exemptions based on speaker and medium. (Doc. No. 5 at 10-13; Doc. No. 18 at 8). The state makes only the most cursory of acknowledgments of the many exemptions and then only offers justifications that are conclusory and unsupported. (Doc. No. 32 at 12-13). Yet it will bear the ultimate burden of justifying its restrictions. *See Ohio Citizens Action v. City of Englewood*, 671 F.3d 564, 571 (6th Cir. 2012); *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456, 474-75 (6th Cir. 2007). It certainly cannot hope to dismiss the claim based on bare assertions at the 12(b)(6) stage when it has submitted no meaningful evidence.

Nor can this plausibly be thought of as a permissible compelled disclosure. *See NIFLA*, 138 S. Ct. at 2372. This category of speech is when the state requires professionals "to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* (citing cases). The auctioneering law plainly does not only require factual disclosures of noncontroversial information. And the state admits that the auctioneering law does not "compel auctioneers to deliver any particular message." (Doc. No. 32 at 21).

C. The state provides no precedent to support dismissal of the First Amendment claim.

The cases presented by the state – *Liberty Coins* and *Hines*– are helpful for illustrating the key difference with this case. Those cases did not concern speaking professions, but applications to speech as part of the profession. Like *NIFLA*, these cases equally demonstrate how auctions are speech and are not conduct. And *Ohralik's* narrow holding simply does not apply to non-lawyers in a non-coercive environment.

The state chiefly relies upon *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014), an example of the second category. (Doc. No. 32 at 7, 9, 11-16). *Liberty Coins* is a pre-*NIFLA* case upholding a licensing regime for precious metal dealers. The Sixth Circuit used rational basis scrutiny to uphold a prohibition on unlicensed persons advertising, *Liberty Coins*, 748 F.3d at 692-95, although the Court found in a subsequent case that the law authorized warrantless searches in violation of the Fourth Amendment. 880 F.3d 274, 277 (2018). *Liberty Coins* is an example of a license generally regulating conduct and only further demonstrates why auctioneering is different. *See Holder*, 561 U.S. at 27-28 (the material support of terrorism statute "generally function[ed] as a regulation of conduct" but "as applied to plaintiffs" who were merely communicating a message, it functioned as a speech restriction). But again, auctioneering is different because it is a profession that consists entirely of speaking making it fundamentally different from dealing precious metals, or a restriction on providing material support to terrorism, both of which are primarily conduct.

In *Liberty Coins*, the First Amendment challenge was not based on the actual statutory definition of the profession itself. Rather, it was aimed at a restriction that prohibited unlicensed persons from advertising. 748 F.3d at 695-97. So while that aspect of the licensing regime was applied to speech, it was "incidental" to the regulation of a profession that was not itself speech. No one argued that the profession of precious metal dealing was itself First Amendment protected unlike the case here. The Court was able to rule that it was permissible to prohibit unlicensed

people from representing that they were dealers. 748 F.3d at 691 (precious metal dealers hold themselves out as willing "to purchase precious metals."). Unlike *Liberty Coins*, the free speech problem with Tennessee's law is not that it prohibits holding oneself out as an auctioneer, but that auctioneering is itself speech. The Sixth Circuit recognized that it was only using rational basis because the regulation did not "implicate[] a fundamental right." *Id*. at 693. Speech rights protected by the First Amendment are the very definition of fundamental rights requiring much more than rational basis review to pass constitutional muster. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (describing as "fundamental" a person's "right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly"). ___.

The state also relies upon *Hines v. Quillan*, a district court case from the Southern District of Texas that reaffirmed an earlier Fifth Circuit holding that a person who gave veterinary advice online could be disciplined for unlicensed practice of veterinary medicine. (Doc. No. 32 at 18-20). This non-binding case does post-date *NIFLA*, but it is distinguishable, wrongly decided and the plaintiff has already announced he will appeal to the Fifth Circuit.[3] It is distinguishable because the practice of veterinary medicine is itself conduct, much like the practice of medicine discussed in *NIFLA*. And as such, Texas would be within its rights to generally impose some incidental restrictions on speech because its veterinary license generally functioned as a regulation of conduct, which is not to say that is what Texas correctly did in the *Hines* case. Regardless, as explained above, auctioneering is different because the profession is itself speech and thus, the

[3]*See* Press Release (June 11, 2019): available here: https://ij.org/press-release/free-speech-fight-texas-veterinarian-heads-to-appeals-court-for-right-to-give-advice-online/ (last viewed August 1, 2019). Plaintiffs otherwise agree that *Hines* is a significant case to follow post-*NIFLA*, and the Fifth Circuit's ultimate decision bears monitoring. The plaintiff in *Hines* is represented by the Institute for Justice who posts updates on the case filings here: https://ij.org/case/texas-veterinary-speech-ii/ (last viewed August 1, 2019).

license would generally function as a regulation of speech. Nevertheless, the *Hines* decision was still incorrect to rely on this exemption. The plaintiff had done nothing more than offer generalized advice in an online forum. For that reason, Texas was not burdening speech incidental to conduct. It was burdening speech. So even though the veterinary license was generally a conduct regulation (unlike the online auction license), as applied to Hines it was a speech restriction. This case is currently under appeal, Case No. 1:18-cv-00155, Doc. No. 41 (S.D. Tex. July 02, 2019), and this Court should not attach any weight to it until the Fifth Circuit addresses whether its prior ruling survives in light of *NIFLA*.

Finally, the state relies upon *Ohralik v. Ohio State Bar Ass'n*, 436 U.S 447 (1978). (Doc. No. 32 at 17-18). As pointed out previously in Plaintiffs' supplemental brief (Doc. No. 18 at 11), *Ohralik* is of no use here because it pertained to a restriction on lawyers soliciting injured persons while they were confined in a hospital. The 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) (citing cases). Online auctions are not coercive since audience members elect to participate while in the comfort of surroundings of their own choosing. And since the last round of briefing, the Sixth Circuit's opinion in *Bevan & Assocs., LPA v. Yost*, 2019 U.S. App. LEXIS 20201 (6th Cir. July 8, 2019), has curbed *Ohralik* still further. The Court distinguished *Ohralik*, limiting its holding to one-on-one solicitations. *Id.* at *23-26. The Sixth Circuit fully applied First Amendment scrutiny, affirmed that "even targeted, written solicitation by an attorney is protected by the First Amendment," then struck down the challenged measure. *Id.* at *23. In so doing, the Court also recognized that the Supreme Court refused to even prohibit in-person solicitation by accountants because "'a CPA is not a professional

trained in the art of persuasion.'" *Id.* at *25 n. 2. (quoting *Edenfeld v. Fane*, 507 U.S. 761, 775 (1993)). *Ohralik* cannot be stretched to cover a general license for online auctions.

Finally, while not the case here, even a neutral regulation unrelated to the content of expression but which incidentally burdens speech is still subject to an intermediate form of scrutiny. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *Richland Bookmart, Inc. v. Knox County, Tenn.,* 555 F.3d 512, 520-21 (6th Cir. 2009) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968) and *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989)). The state will need to show that the government's interest is unrelated to the suppression of speech and the intrusion on speech is no greater than is essential to further that interest. That includes a showing that the law is narrowly tailored to serve a significant governmental interest. *Id.* at 521-22. Here, the state will still carry a burden that it must meet based on evidence. *Id.* at 523. For that reason alone, it would be inappropriate to dismiss at this stage before the state has made any kind of a showing. The Court, in granting the preliminary injunction, has already made findings that suffice to clear this hurdle even though it did not address the First Amendment claims. In conducting the *Pike* analysis, this Court has already found that the "burden is clearly excessive to the benefits." (Doc. No. 29 at 24). Simply put, the state's data shows that online auctions are not a problem and that they are actually exempting the very type of auctions that triggered more consumer complaints. (*Id.* at 22-23). The many exemptions from regulatory cover in the law do not help the state's claim. Plaintiffs have clearly articulated a free speech claim upon which relief can be granted.

IV. This Court should not dismiss the free speech claim based on the Tennessee Constitution.

This Court is fully able to entertain state law claims when they arise out of the same set of facts and are sufficiently related such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966). The state does not dispute that the Tennessee constitutional claim meets this criteria, merely repeating that it should be dismissed along with everything else. (Doc. No. 32 at 26-27). This assertion is derivative, and the above response is incorporated here by reference. The state next turns to invoking the *Pennhurst* doctrine to argue that the Eleventh Amendment precludes consideration of the state law claim. (*Id*. at 27, citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 124-25 (1984)).

Neither *Pennhurst* nor the Eleventh Amendment constitute a procedural bar. Neither doctrine applies to suits for prospective relief seeking to remedy constitutional infractions. Since *Ex Parte Young*, 209 U.S. 123, 159-60 (1909), it has been blackletter law that the Eleventh Amendment does not preclude suits for prospective relief against government officials who, acting in their official capacity, enforce unconstitutional laws. *Pennhurst* limits claims for retroactive relief, or damages. The doctrine otherwise recognizes that the courts can hear suits against Tennessee when a state official acts so far outside her authority as to be without authority whatever. 465 U.S. at 101, n. 11; *see Grogg v. Tennessee*, Case No. 18-5794, 2019 U.S. App. LEXIS 475 at * 5 (6th Cir. Jan. 7, 2019) (recognizing *Pennhurst* does not limit official capacity suits that seek prospective relief). The Court can hear the state constitutional claim for the same reason it can hear the federal one: Plaintiffs seek prospective, not retroactive relief. They do not ask for damages for a constitutional infraction. The online auction law, after all, has not yet come into effect so it has never had retroactive application.

Plaintiffs have certainly stated a valid claim on both state and federal grounds. This Court has constitutional authority to hear claims based on the Tennessee Constitution.

V. PLAINTIFFS HAVE STATED A VALID PRIVILEGES OR IMMUNITIES CLAIM.

The Fourteenth Amendment includes the Privileges or Immunities Clause which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Privileges or Immunities Clause protects privileges and immunities of national citizenship from interference by other states. Since the *Slaughter-House Cases*, 83 U.S 36, 79-80 (1872), not long after the enactment of the Fourteenth Amendment, the Privileges or Immunities Clause has largely been dormant. The Court held that the Clause "speaks only" to those privileges or immunities that "owe their existence to the Federal Government, its National character, its constitution, or its laws," not an individual's right to pursue economic livelihood against his own state. *Id.* at 74, 79. The ruling has been applied far too broadly and is inconsistent with the original public meaning of the Privileges or Immunities Clause. Its primary concern was the "protection of economic rights for new black citizens," yet the Court largely disavowed economic liberty as a privilege or immunity protected by the Fourteenth Amendment. Timothy Sandefur, *The Right to Earn a Living*, 6 Chapman L. Rev. 207, 228 (2003). Yet one of the rights the Court did recognize is the right to use seaports and navigable waterways. *Slaughter-House*, 83 U.S. at 79. Plaintiffs contend that the internet is the modern equivalent of a seaport or navigable waterway. Plaintiffs concede that their right to earn a living is foreclosed under existing precedent but wish to preserve this issue for further review. Furthermore, Plaintiffs point out that courts reserve ruling on Privileges or Immunities claims until the ultimate merits stage to see if the challenged license is unconstitutional on other grounds, even under rational basis. *See Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (declining to reach Privileges or Immunities; "we need

not break new ground to hold" that the Tennessee license is unconstitutional under rational basis); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 701 (E.D. Ky. 2014) (same and citing *Powers v. Harris*, No. CIV-01-445-F, 2002 U.S. Dist. LEXIS 26939, 2002 WL 32026155, at *24 (W.D. Ok. Dec. 12, 2002)). The Court should do the same here.

VI. EVEN UNDER RATIONAL BASIS, THIS COURT SHOULD NOT DISMISS THE CASE.

Even under rational basis, which is an inappropriate standard for any of Plaintiffs' claims, it would be premature to dismiss the case prior to discovery taking place. The rational basis test is not a discovery avoidance device. Rather, it creates a rebuttable presumption of constitutionality that Plaintiffs would be required to rebut. To do that, they should be able to obtain discovery.

Even a rational basis inquiry entails meaningful judicial review. Well-pled rational basis cases proceed to discovery and can prevail on the merits.[4] The Sixth Circuit has noted the impropriety of dismissing claims simply because they invoke rational-basis review. *See Bower v. Vill. of Mt. Sterling*, 44 Fed App'x 670, 678 (6th Cir. 2002) (reversing dismissal in part because plaintiff "sufficiently alleged a lack of a rational basis for Plaintiff's non-selection when he alleged disparate treatment in securing the full-time police officer position"). The seminal rational basis

[4] At the U.S. Supreme Court, plaintiffs have prevailed against the government under rational-basis review at least twenty times since 1970. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 614–15 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996); *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Quinn v. Millsap*, 491 U.S. 95, 108 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty., W. Va.*, 488 U.S. 336, 345 (1989); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985); *Williams v. Vermont*, 472 U.S. 14, 24–25 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 64 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159, 159 (1977) (per curiam); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *James v. Strange*, 407 U.S. 128, 141–42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 77–78 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971); *Turner v. Fouche*, 396 U.S. 346, 363–64 (1970).

case in this circuit is *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), wherein the Sixth Circuit ruled that a state law that forbade the selling of caskets without a funeral director's license flunked the rational basis test. *Id*. at 222. The Sixth Circuit held that economic protectionism is never a legitimate governmental interest. *Id*. at 228-29. The Court was only able to identify the state's improper, protectionist motive by taking each of the state's proffered justifications and examining them as either implausible or contradicted by evidence. It would thus certainly have been inappropriate to have dismissed the case before Plaintiffs were even offered the chance to obtain evidence.

The rational basis test creates a rebuttable presumption of constitutionality that a plaintiff is entitled to rebut based on evidence. See Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 Geo. Mason U. Civ. Rts. L.J. 43, 83 (Fall, 2014). It does not render the government's unsupported justifications invulnerable to scrutiny. *See American Exp. Travel Related Services Co., Inc. v. Kentucky*, 641 F.3d 685, 689 (6th Cir. 2011) (quoting *United States v. Carolene Prods. Co.,* 304 U.S. 144, 152 (1938) ("regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional *unless in light of the facts made known or generally assumed* it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.") (emphasis added)). That means there must be actual factfinding. The Court should not dismiss even a rational basis case before Plaintiffs get a chance to meet their burden.

Conclusion

This Court should deny the motion to dismiss.

Dated: September 3, 2019.

Respectfully submitted,

s/ B. H. Boucek
BRADEN H. BOUCEK