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

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| **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,*** | ) | **JUDGE RICHARDSON** |
| **Defendants.** | ) | |

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

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Defendants submit this Memorandum of Law in support of their Motion to Dismiss. For the reasons set forth below, this Court lacks subject matter jurisdiction over the Complaint and the Complaint fails to state a claim upon which relief can be granted. This Court should, therefore, dismiss Plaintiffs' action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

## BACKGROUND

In this action, Plaintiffs challenge the constitutionality of 2019 amendments to Tenn. Code Ann. §§ 62-19-101 *et seq.* that were made by 2019 Tenn. Pub. Acts Ch. 471 ("PC 471"). Plaintiffs seek declaratory and injunctive relief under 28 U.S.C. § 2201 and 42 U.S.C. § 1983 for purported violations of their rights to free speech under the U.S. and Tennessee Constitutions and for purported violations of the federal dormant Commerce Clause and the Privileges and Immunities Clause of the Fourteenth Amendment.

Since 1967, it has been the public policy of the State of Tennessee to regulate the auctioneering profession and to require auctioneers to be licensed. *See* 1967 Tenn. Pub. Acts Ch. 335. In 2006, the State added a new statutory exemption to the auctioneer licensing requirement for "[a]ny fixed price or timed listings that allow bidding on an internet website, but do not constitute a simulcast of a live auction."[1] 2006 Tenn. Pub. Acts Ch. 533, § 1. The 2006 Public Act did not define timed listing. In 2019, the State significantly revised the auctioneer licensing statutes. *See* 2019 Tenn. Pub. Acts Ch. 471. These revisions included *inter alia* adding a statutory definition of timed listing to clarify the scope of the statutory exemption for timed listings: "'Timed listing' means offering goods for sale with a fixed ending time and date that does not extend based on bidding activity." *Id.* § 4(12). These revisions also added the word "electronic" to the statutory definition of "auction," so that "auction" now means

[1] In 2006, the Tennessee Attorney General opined that Internet drop-off stores, which assist individuals in selling items through sites such as eBay, did not fall under the regulatory authority of the Tennessee Auctioneer Commission. *See* Op. Tenn. Att'y Gen. 06-053 (Mar. 27, 2006). In reaching that conclusion, the Attorney General opined that while eBay and similar Internet sites "perform some of the functions of an auctioneer, they do not fall within a literal reading of that term as defined in Tenn. Code Ann. § 62-19-101(3)." First, the Attorney General reasoned that "auctioneers" must be individuals, but "[c]omputers, not individuals, conduct Internet 'auctions.'" *Id.* at 3.

> More significantly, eBay's transactions do not fit the definition of "auction," although they often accomplish many of the same goals as a traditional auction. "Audience" and "participating audience" evoke the limited, definable, physically present group of people one associates with a traditional auction. The eBay "auction" is unlimited and not similarly identifiable. eBay does not so much make invitations for offers as notify purchasers as to the status of their bids. An eBay "auction" does not culminate in the acceptance of the highest or most favorable bid in the traditional sense, but rather in the highest bid that has been registered within a specified period.

*Id.* at 4.

> 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.* § 4(2). Other than adding the word "electronic," PC 471 did not substantially change the pre-2019 definition of "auction." *See* Tenn. Code Ann. § 62-19-101(2) (2009 & 2018 Supp.).

PC 471 also created new classifications of auctioneers and made it easier to become an auctioneer. An "auctioneer" now includes "a principal auctioneer, bid caller auctioneer, or public automobile auctioneer." *Id.* § 4(3). A "bid caller auctioneer" is a new category of licensee created by PC 471 and 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." *Id.* § 4(4). An applicant for a bid caller auctioneer license must be at least eighteen years of age and have completed sixteen hours of classroom or online instruction on the basic fundamentals of auctioneering at an auction school accredited by the Tennessee Auctioneer Commission. *Id.* § 10(a).

PC 471 also eliminated the apprentice auctioneer license and replaced it with an affiliate auctioneer license. An "affiliate auctioneer" is defined as "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.* § 4(1). An applicant for an affiliate auctioneer license must be at least eighteen years of age and have successfully completed thirty-four hours of classroom or online instruction on the basic fundamentals of auctioneering at an accredited auction school, in addition to the

sixteen hours of instruction required for bid caller auctioneers. *Id.* § 10(b). By contrast, the apprentice auctioneer license previously in effect required eighty hours of classroom instruction on the fundamentals of auctioneering at an accredited school. *See* Tenn. Code Ann. § 62-19-111(a)(2) (2009). Furthermore, an apprentice auctioneer was previously required to serve under the supervision of a licensed, full-time auctioneer for at least two years before he or she could apply to become an auctioneer, *see id.* § 62-19-111(b)(2), whereas an affiliate auctioneer is now required to serve under the supervision of a licensed, full-time principal auctioneer for only six months before he or she can apply to become a principal auctioneer, *see* 2019 Tenn. Pub. Acts Ch. 471, § 10(c)(2).

PC 471 also eliminated the auctioneer firm license and expanded the definition of "principal auctioneer" to mean

> 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.* § 4(9). An applicant for a principal auctioneer license must be at least eighteen years of age; have served as an affiliate auctioneer under the supervision of a licensed, full-time principal auctioneer for at least six months; and have a high school diploma, general equivalency diploma, or HiSET® diploma. *Id.* § 10(c).

PC 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(a)(1). The previous law contained similar prohibitions. *See* Tenn. Code Ann. § 62-19-102(a)(1) (2009). PC 471 also provides that "[a]ll auctions arranged by or through a principal

auctioneer must be conducted exclusively by individuals licensed under this chapter." *Id.* § 5(b). The previous law likewise contained a similar requirement. *See* Tenn. Code Ann. § 62-19-102(b) (2009).

Before 2019, Plaintiffs conducted online extended-time auctions without a Tennessee auctioneer license or employed others to conduct online extended-time auctions without a Tennessee auctioneer license. An extended-time auction is an auction in which the time of the auction closing extends based on bidding activity. (*See* Compl. ¶ 32). Plaintiffs relied on the exemption for timed listings in Tenn. Code Ann. § 62-19-103 to conduct online extended-time auctions without a Tennessee auctioneer license or to employ others to do so without a license. Plaintiffs intend to continue to conduct online extended-time auctions without a license or to employ others to do so. PC 471 makes clear, however, that online extended-time auctions are not timed listings and that an auctioneer license is required to conduct online extended-time auctions in Tennessee.

Although Plaintiffs have made clear that their intention is to have this Court strike down the State's entire regulatory scheme for auctioneers, including provisions that predate PC 471, their primary objections to the amendments made pursuant to PC 471 are the addition of the word electronic to the definition of auction and the addition of a statutory definition of "timed listing." For the reasons stated below, Plaintiffs' Complaint fails to state a claim upon which relief can be granted, because the State's regulatory scheme for auctioneers, including the amendments made pursuant to PC 471, constitutes reasonable regulation of in-state professional conduct, which in no way violates the First Amendment, dormant Commerce Clause, or Privileges or Immunities Clause. Additionally, this Court lacks jurisdiction over Plaintiffs' State

law claims and the free speech claims made by Plaintiffs Will McLemore and McLemore Auction Company.

## STANDARD OF REVIEW

"A Rule 12(b)(6) motion tests whether a cognizable claim has been pleaded in the complaint." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). "Rule 8(a) sets forth the basic federal pleading requirement that a pleading 'shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* "Though decidedly liberal, this standard does require more than bare assertions of legal conclusions." *LULAC v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007). "[A] Plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The factual allegations, assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief. *Id.* "To state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory." *LULAC*, 500 F.3d at 527 (citing *Twombly*, 550 U.S. at 562).

## ARGUMENT

### I. PLAINTIFFS' CLAIMS BROUGHT UNDER 28 U.S.C. § 2201 AND 42 U.S.C. § 1983 SHOULD BE DISMISSED.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988); *accord Mezibov v. Allen*, 411 F.3d 712, 716-17 (6th Cir. 2005). "If a plaintiff fails to make a showing on any essential element of a § 1983 claim, it must fail." *Redding v. St. Eward*, 241 F.3d

530, 532 (6th Cir. 2001). As discussed in detail below, Plaintiffs have failed to allege that they have been deprived of any right secured by the United States Constitution. Accordingly, Plaintiffs' § 1983 claims must be dismissed for failure to state a claim upon which relief can be granted. Plaintiffs' claims under 28 U.S.C. § 2201 must likewise be dismissed for failure to state a claim upon which relief can be granted, because they seek a declaration that Tennessee's statutory scheme for regulating the auctioneering profession violates rights secured by the Constitution, which it does not.

**A. Plaintiffs' Free Speech Claims Fail to State a Claim Upon Which Relief Can Be Granted, Because the State's Auctioneering Regulations Regulate Professional Conduct, Not Speech, and Are Rationally Related to a Legitimate Government Purpose.**

The State's regulatory and licensing scheme for auctioneers, codified at Tenn. Code Ann. §§ 62-19-101 *et seq.* and amended by PC 471, regulates professional conduct, not speech. As such, this Court should apply rational basis scrutiny to uphold these statutes, because they are rationally related to a legitimate government purpose. *See Bevan & Assocs., LPA, Inc. v. Yost*, --- F.3d ---, 2019 WL 2912353, *6 (6th Cir. Jul. 8, 2019); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 692-94 (6th Cir. 2014), *cert. denied*, 135 S.Ct. 950 (2015).

An auction is first and foremost "a sales transaction," 2019 Tenn. Pub. Acts Ch. 471, § 4(2), which falls squarely within the State's authority to regulate business conduct and economic activity, *see Liberty Coins,* 748 F.3d at 697. Auctioneers' conduct and activity with respect to sellers, including "offer[ing] and execut[ing] a listing contract, sale, purchase, or exchange of goods" in exchange "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," 2019 Tenn. Pub. Acts Ch. 471, § 4(9), likewise fall squarely within the State's authority to regulate business conduct and economic activity. At most, the State's regulation of the

auctioneering profession only incidentally burdens speech, which is permissible under the First Amendment. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, --- U.S. ---, 138 S.Ct. 2361, 2372 (2018) ("*NIFLA*"). The State is not relying on a professional speech exception to the First Amendment, which the Supreme Court specifically rejected in *NIFLA*. *See id.* at 2371. Rather, the State is relying on longstanding Supreme Court precedent, cited in *NIFLA*, holding that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.)).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const., Amend. I. The First Amendment is applicable to the States through the Fourteenth Amendment. *See NIFLA*, 138 S.Ct. at 2371. Under the Supreme Court's precedents, "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. . . . [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). "[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik*, 426 U.S. at 456. "Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees." *Id.* (internal citations omitted). "[A]nd professionals are no exception to this rule." *NIFLA*, 138 S.Ct. at 2373 (citing *Ohralik*, 436 U.S. at 456).

> Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny.

*Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring in judgment).[2] *See also Casey*, 505 U.S. at 884 (holding that state's informed consent requirement for abortions did not violate First Amendment; "[t]o be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.") (internal citations omitted).

**1. The State's Auctioneering Regulations Are Rationally Related to a Legitimate Government Purpose and Must Therefore Be Upheld.**

In *Liberty Coins*, the Sixth Circuit applied rational basis scrutiny to conclude that unlicensed precious metals dealers were unlikely to prevail on the merits of their First Amendment challenge to Ohio's Precious Metals Dealers Act ("PMDA") and therefore reversed the district court's order granting a preliminary injunction. The PMDA required persons acting as precious metals dealers to be licensed by the State and prohibited unlicensed individuals from holding themselves out as precious metals dealers. *Liberty Coins*, 748 F.3d at 686-88. Much like an auctioneer, holding oneself out as a precious metals dealer included advertisements and solicitations of customers for the purchase of precious metals. *Id.* at 687. The Court found that the PMDA was a valid business regulation. The Court explained that the PMDA was, "first and

[2] Although some courts mistakenly relied in part on Justice White's concurrence in *Lowe* to adopt a professional speech exception to the First Amendment, *see King v. Governor of New Jersey*, 767 F.3d 216 (3rd Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); *Moore-King v. County of Chesterfield, Va.*, 708 F.3d 560 (4th Cir. 2013), Justice White was plainly addressing government regulations of professional conduct that only incidentally burden speech and thus do not offend the First Amendment.

foremost, a licensing statute. It is a statute calculated to regulate individuals and entities that hold themselves out to the public as willing to purchase precious metals." *Id.* at 691. The Court further explained that "the PMDA uses 'holding oneself out' to distinguish those who Defendants wish to regulate and those who should and must remain free from regulation by nature of the infrequency and informality of their precious metals transactions." *Id.* at 692.

The Court determined that rational basis review applied to the PMDA. "Long ago, the Supreme Court recognized that '[t]he power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud.'" *Id.* at 692 (quoting *Dent v. West Virginia*, 129 U.S. 114, 122 (1889)). "[W]here a regulatory scheme neither implicates a fundamental right, nor creates a suspect classification, rational basis review applies." *Id.* at 693. The Court determined that the PMDA was a statute that neither burdened a fundamental right, nor created a suspect classification. *Id.* The PMDA "merely constitutes a regulatory scheme meant to protect the safety and welfare of the public through the regulation of professional conduct. Rational basis review therefore applies." *Id.*

> Under rational basis review, a law is upheld so long as it is rationally related to a legitimate government purpose. There is a strong presumption of constitutionality and the regulation will be upheld so long as its goal is permissible and the means by which it is designed to achieve that goal are rational.

*Id.* at 694. "[U]nder rational basis review, the government has no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid and may be based on rational speculation unsupported by evidence or empirical data." *Id.* (quoting *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 790 (6th Cir. 2005) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)) (internal quotation marks omitted).

Applying rational basis review, the Court found that Ohio had a legitimate government purpose "to protect consumers and the public from theft, fraud, money laundering, fencing, to restrict the flow of stolen goods, and to prevent terrorism." *Id.* The Court further found that the State's licensing requirement was rationally related to that legitimate government purpose. *Id.* at 694-95. The Court held that "it was reasonable for the Ohio legislature to have distinguished between businesses that hold themselves out to the public as formally, frequently, or routinely dealing in precious metals and those who merely purchase precious metals informally, infrequently, and for their own personal use." *Id.* at 695. The Court further held that "[i]t was reasonable for the legislature to have believed that a licensing requirement and the close monitoring of those who are licensed would curtail the amount of stolen goods in the marketplace and aid the police in their attempt to recover stolen goods in a timely manner." *Id.* Because the PMDA was a rational method for achieving the government's legitimate interest in protecting the public from theft or fraud, the Court held that the plaintiffs were unlikely to prevail on the merits and were thus not entitled to a preliminary injunction in their favor. *Id.*

The Court expressly declined to apply the more stringent test laid out in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980), for burdens on commercial speech. The Court concluded that the PMDA "proscribes business conduct and economic activity, not speech." *Liberty Coins*, 748 F.3d at 697. The Court held that the PMDA "does not burden the commercial speech rights of unlicensed precious metals dealers because such dealers do not have a constitutional right to advertise or operate an unlicensed business that is not in compliance with the reasonable requirements of Ohio law." *Id.*

> Such dealers cannot "hold themselves out" to the public without a license, regardless of whether they advertise. This case does not turn on advertising or solicitation, it turns on whether the business in question holds itself out to the public, which can occur by

> posting a sign, placing goods in an open window, simply conducting business in a manner that is visible to the public, or otherwise making its wares available to the public.

*Id.* Accordingly, the Court held that it was appropriate to apply rational basis review to conclude that the PMDA did not violate the plaintiffs' First Amendment rights. *Id.*

For First Amendment purposes, there is no meaningful difference between the statutes at issue in *Liberty Coins* and the statutes at issue in the instant case. As in *Liberty Coins*, Tennessee's statutes regulating the auctioneering profession, including the amendments contained in PC 471, are valid business regulations that should be reviewed under rational basis scrutiny and upheld because they are rationally related to a legitimate government purpose. Indeed, the business activities undertaken by the precious metals dealers in *Liberty Coins* were substantially like those of auctioneers—auctioneers merely deal with a broader range of items for sale. Rational basis review is appropriate because the auctioneering regulations neither burden a fundamental right, nor create a suspect classification, but "merely constitute[] a regulatory scheme meant to protect the safety and welfare of the public through the regulation of professional conduct." *Liberty Coins*, 748 F.3d at 693.

The State has a legitimate government purpose in promoting the integrity of competitive auctions, protecting sellers and consumers from unqualified auctioneers, and preventing fraudulent or deceptive practices in auctions conducted in the State. Indeed, it has been the public policy of the State since 1967 to regulate the auctioneering profession and to require auctioneers to be licensed. Potential risks that auctions pose include misrepresentations made to sellers during the course of executing a listing contract, misrepresentations made to the audience regarding the nature or quality of the item being auctioned, mishandling large sums of money and valuable property, and shill bidding in which the auctioneer employs a shill to drive up the

price of the auction, *see* Black's Law Dictionary (11th ed. 2019) (defining "by-bidder" a.k.a. "shill" as "[a]t an auction, a person engaged by the seller to bid on property for the sole purpose of stimulating bidding by potential genuine buyers, thereby inflating the price while being secured from risk by a secret understanding with the seller that he or she need not make good on bids").

It was reasonable for the legislature of Tennessee to believe that a licensing requirement for auctioneers would achieve the State's legitimate government purpose. *See Liberty Coins*, 748 F.3d at 694-95. It was likewise reasonable for the legislature to believe that requiring auctioneers to complete a reasonable number of hours of instruction on the basic fundamentals of auctioneering and to serve briefly under a licensed auctioneer would achieve the State's legitimate government purpose. *Id.* It was also reasonable for the legislature to believe that online auctions pose the same risks and should be regulated in the same manner as oral or written auctions. *Id.* Finally, it was reasonable for the legislature to distinguish between so-called extended-time auctions, which are auctions, and timed listings, which are not. (*See, e.g.*, Compl. ¶¶ 140 (quoting Mr. Allen as saying "the difference is an extended time auction is absolutely and unequivocally just like a live auction and a fixed time is not") & 151 (quoting Mr. Allen as saying "in an online soft close auction you are mimicking the exact behavior of an auctioneer")). *See also* Op. Tenn. Att'y Gen. 06-053, at 4 (Mar. 27, 2006) (A timed listing "does not culminate in the acceptance of the highest or most favorable bid in the traditional sense, but rather in the highest bid that has been registered within a specified period.") Unlike timed listings, so-called extended-time auctions, like traditional auctions, pose the risk that auctioneers will misrepresent the nature or quality of an item or employ shills to encourage additional bidding to keep the auction going indefinitely.

For these reasons, the State's statutes regulating the auctioneering profession, including the amendments made by PC 471, constitute a rational method for achieving the State's legitimate interest in promoting the integrity of competitive auctions, protecting sellers and consumers from unqualified auctioneers, and preventing fraudulent or deceptive practices in auctions conducted in the State. Accordingly, this Court should uphold the State's reasonable regulatory scheme under the rational basis scrutiny required by *Liberty Coins*.

As in *Liberty Coins*, Tennessee's auctioneering regulations "proscribe[] business conduct and economic activity, not speech." 748 F.3d at 697. An auction is first and foremost "a sales transaction," 2019 Tenn. Pub. Acts Ch. 471, § 4(2), which is business conduct and economic activity that falls squarely within the State's authority to regulate, without offending the First Amendment, *see Liberty Coins*, 748 F.3d at 697. Just as Ohio has authority to regulate sales of precious metals without offending the First Amendment, so too does Tennessee have authority to regulate auction sales without offending the First Amendment. The State's regulation of auctioneers' transactions with sellers likewise falls within the State's authority to regulate business conduct and economic activity, without offending the First Amendment. For instance, auctioneers "offer[] and execute[] a listing contract, sale, purchase, or exchange of goods" in exchange "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." 2019 Tenn. Pub. Acts Ch. 471, § 4(9). Again, this is "business conduct and economic activity, not speech." *Liberty Coins*, 748 F.3d at 697.

Plaintiffs attempt to frame their claims as free speech claims by focusing on language in the definition of auction referring to an "exchange between the auctioneer and the audience." 2019 Tenn. Pub. Acts Ch. 471, § 4(2). But the auctioneer's exchange with the audience is for the

purpose of completing a sales transaction. This is economic activity, not speech, just like the offer and acceptance in a traditional contract. *See Lowe*, 472 U.S. at 232 (White, J., concurring in judgment). Moreover, the statutory definition of auction included language about an exchange between the auctioneer and the audience before PC 471 was enacted. PC 471 merely added the term "electronic." But a sales transaction completed by electronic means is not speech any more than a sales transaction completed by oral or written means. Plaintiffs' transactions do not become speech merely because they are conducted online, rather than in person. If this Court finds that PC 471 violates the First Amendment because auction is defined as a sales transaction conducted by an exchange between the auctioneer and the audience, then the entire statutory scheme would violate the First Amendment and the auctioneering profession would be unregulable. This would be an untenable result, given that auctioneers are licensed and regulated in most states. *See* 7 Am. Jur. 2d *Auctions and Auctioneers* § 3 (2019) ("[M]ost states have enacted statutes requiring the licensing of persons who conduct an auction business.").

Similarly, Plaintiffs' claims do not become free speech claims merely because unlicensed auctioneers are prohibited from "advertis[ing] as" or "represent[ing] to be an auctioneer." 2019 Tenn. Pub. Acts Ch. 471, § 5(a)(1). The prohibition does not burden commercial speech rights of unlicensed auctioneers because such auctioneers do not have a constitutional right to advertise or operate an unlicensed business that is not in compliance with the reasonable requirements of Tennessee law. *Liberty Coins*, 748 F.3d at 697. The State may prohibit unlicensed auctioneers from advertising as auctioneers just as it may prohibit unlicensed lawyers from advertising that they provide legal services. Again, this is not a new prohibition. Unlicensed auctioneers were prohibited from advertising as or representing to be auctioneers before PC 471 was enacted.

The exemptions from the auctioneer licensing requirements further demonstrate that the State is regulating business conduct and economic activity rather than speech. Most of the activities that are exempted from the licensing requirements are auctions conducted by persons who are not in the business of auctioneering, such as persons acting under court order; trustees; governmental entities; political parties, churches, and charities; the Tennessee Department of Agriculture and the University of Tennessee; and individuals who earn less than $25,000 annually from online auctions. *See* Tenn. Pub. Acts Ch. 471, § 6. And most of the exemptions predate the enactment of PC 471. Like the Ohio statute at issue in *Liberty Coins*, the statutory exemptions from Tennessee's auctioneer licensing requirement demonstrate that the State is seeking to regulate only those who regularly engage in the business of auctioneering, rather than those who conduct auctions infrequently and informally.

**2. At Most, the State's Regulation of the Auctioneering Profession Imposes Only Incidental Burdens on Speech, Which Are Permissible Under the First Amendment.**

The rational basis scrutiny applied in *Liberty Coins* mirrors the level of scrutiny that courts have applied in cases that have addressed regulations of professional conduct that impose only incidental burdens on speech. As Justice White explained in his concurring opinion in *Lowe v. S.E.C.*, "Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession." 472 U.S. at 232. Where, as here, the State "enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny." *Id.* Under these circumstances, the licensing scheme "is not subject to scrutiny as a regulation of speech—it can be justified as a legitimate exercise of the power to license those

who would practice a profession, and it is no more subject to constitutional attack than state-imposed limits on those who may practice the professions of law and medicine." *Id.* at 233.

In *Ohralik*, the Supreme Court upheld an Ohio State Bar Association prohibition on lawyers' in-person solicitation of remunerative employment. The Court found that in-person solicitation was "a business transaction in which speech was an essential but subordinate component." *Id.* at 457. "While this does not remove the speech from the protection of the First Amendment, . . . it lowers the level of appropriate judicial scrutiny." *Id.* The Court determined that "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns," which "falls within the State's proper sphere of economic and professional regulation." *Id.* at 459. Accordingly, the lawyer's conduct was "subject to regulation in furtherance of important state interests." *Id.* The Court found that the State had a strong interest in protecting consumers, regulating commercial transactions, and maintaining standards among the licensed professions. *Id.* at 460. The Court held that it was "not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited," *id.* at 466, and therefore it was "not unreasonable, or violative of the Constitution, for [the] State to respond with what in effect is a prophylactic rule," *id.* at 467.

Here, as in *Ohralik*, an auction is "a business transaction in which speech [is] an essential but subordinate component." *Id.* at 457. And auctioneering, if it implicates free speech at all, is "a subject only marginally affected with First Amendment concerns," which "falls within the State's proper sphere of economic and professional regulation." *Id.* at 459. The auctioneering profession is therefore "subject to regulation in furtherance of important state interests." *Id.* The State has a strong interest in promoting the integrity of competitive auctions, protecting sellers

and consumers from unqualified auctioneers, and preventing fraudulent or deceptive practices in auctions conducted in the State. *Id.* at 466. And, as argued above, the measures taken by the State to advance this interest were reasonable. *Id.* Accordingly, as in *Ohralik*, the State's regulations do not violate the First Amendment.

Similarly, in *Hines v. Alldredge*, 783 F.3d 197 (5th Cir. 2015), *cert. denied*, 136 S.Ct. 534 (2015) ("*Hines I*"), the Fifth Circuit upheld a Texas statute that prohibited the practice of veterinary medicine unless the veterinarian had recently examined the animal or visited the premises on which the animal was kept. A veterinarian who gave veterinary advice online challenged the prohibition under the First Amendment. The Court determined that the statute did not "regulate the content of any speech, require veterinarians to deliver any particular message, or restrict what can be said once a veterinary-client-patient relationship is established." *Id.* at 201. The Court noted that "States have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Id.* (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108, (1992) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)) (internal quotation marks omitted). The Court held that "Texas's requirement that veterinarians physically examine an animal or the animal's premises before treating it (or otherwise practicing veterinary medicine) falls squarely within this long-established authority, and does not offend the First Amendment." *Id.* (citing *Ohralik*, 436 U.S. at 456). The Court determined that "the fact that this rule may have some impact on the veterinarian's speech" did not "dictate a different result," because "[t]he Supreme Court has long held that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* (quoting *Sorrell*, 131 S.Ct. at 2664) (internal quotation marks omitted). The Court explained that "[p]ursuant to this principle, there is a robust line of doctrine

concluding that state regulation of the practice of a profession, even though that regulation may have an incidental impact on speech, does not violate the Constitution." *Id.* The Court noted that "[w]hether Hines's First Amendment rights are even implicated by this regulation is far from certain," but concluded that "surely, if this restriction on the veterinarian's medical practice is within its scope, it is but incidental to the constraint, and denies the veterinarian no due First Amendment right." *Id.* at 202.

In a subsequent suit brought by Dr. Hines, the U.S. District for the Southern District of Texas found that the intervening *NIFLA* decision did not compel a different result.

> As *NIFLA* did not concern a content-neutral regulation of speech, the Supreme Court did not consider the standard applicable to such regulations. In addition, *NIFLA* did not modify the mode of analysis on which the Fifth Circuit relied to determine that the Texas statute is content-neutral. And *NIFLA* confirmed that states may regulate professional conduct in a manner that incidentally burdens speech.

*Hines v. Quillivan*, Opinion and Order, Case No. 1:18-cv-00155, Doc. 40, at 10 (S.D. Tex. Jun. 11, 2019) ("*Hines II*") (copy attached).

Here, as in the *Hines* cases, the State's regulatory scheme for auctioneers does not regulate the content of any speech or require auctioneers to deliver any particular message. *See Hines I*, 783 F.3d at 201. Once a license is obtained, an auctioneer is permitted to conduct auctions in this State, including auctions conducted by means of electronic exchange between the auctioneer and the audience, and is no longer prohibited from "act[ing] as, advertis[ing] as, or represent[ing] to be an auctioneer." 2019 Tenn. Pub. Acts Ch. 471, § 5(a)(1). The regulatory scheme falls squarely within the State's "broad power to establish standards for licensing practitioners and regulating the practice of professions" and does not offend the First Amendment. *Hines I*, 783 F.3d at 201 (quoting *Gade*, 505 U.S. at 108 (quoting *Goldfarb*, 421

U.S. at 792)) (internal quotation marks omitted). If the regulations have any impact on speech, the impact is merely incidental to the practice of the profession and denies the auctioneer no due First Amendment right. *See id.* at 202. Moreover, the prohibition against "act[ing] as, advertis[ing] as, or represent[ing] to be an auctioneer" without a license, 2019 Tenn. Pub. Acts Ch. 471, § 5(a)(1), is not an impermissible speech restriction because unlicensed auctioneers do not have a constitutional right to advertise or operate an unlicensed business that is not in compliance with the reasonable requirements of Tennessee law, *see Liberty Coins*, 748 F.3d at 697.

*NIFLA* does not support Plaintiffs' free speech claims in this case. In *NIFLA*, the Supreme Court struck down a California statute that required medical clinics that primarily served pregnant women to deliver government-drafted notices about the availability of public programs that provided free or low-cost abortions. The Court found that the required notices were content-based regulations of speech, which "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *NIFLA*, 138 S.Ct. at 2371 (quoting *Reed v. Town of Gilbert*, 576 U.S. ---, ---, 135 S.Ct. 2218, 2226 (2015)). This is because "governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (quoting *Reed*, 135 S.Ct. at 2226 (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)) (internal quotation marks omitted). "By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech." *Id.* (quoting *Riley v. Nat'l Fed'n of Blind of N. C., Inc.*, 487 U.S. 781, 795 (1988)).

By contrast, the auctioneering regulations at issue here are content-neutral and do not compel auctioneers to deliver any particular message. The regulations are content-neutral because they do not alter the content of auctioneers' speech. *See id.* The regulations merely require auctioneers to be licensed before they may lawfully practice the profession. They do not restrict any expression "because of its message, its ideas, its subject matter, or its content." *Id.* (quoting *Reed*, 135 S.Ct. at 2226 (quoting *Mosley*, 408 U.S. at 95)) (internal quotation marks omitted). Once licensed, an auctioneer may conduct auctions in this State and is no longer restricted from advertising as or representing to be an auctioneer. Any burden on speech is incidental to the regulation of professional conduct and does not amount to a content-based speech restriction. For these reasons, Plaintiffs' free speech claims fail to state a claim upon which relief can be granted.

**3. Plaintiffs Will McLemore and McLemore Auction Company Do Not Have Standing.**

Pursuant to Article III of the U.S. Constitution, the power of the judiciary extends only to cases and controversies. "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S.Ct. 1540, 1547 (2016). To establish Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted).

Plaintiff Will McLemore is a licensed Tennessee auctioneer. He and his company, Plaintiff McLemore Auction Company, are thus authorized to conduct auctions in Tennessee and

to advertise as and represent themselves to be auctioneers in Tennessee. PC 471 did not change that. McLemore and his company have not suffered an invasion of an interest protected by the First Amendment, because the alleged speech restrictions do not apply to them. They allege that they will be injured because, under the changes made by PC 471, they will be required to hire licensed auctioneers to replace their unlicensed employees and contractors. But that is not an injury stemming from any alleged violation of these Plaintiffs' free speech rights. The alleged violation of their employees' and independent contractors' free speech rights does not confer standing on these Plaintiffs to challenge PC 471 or any other auctioneering regulation under the First Amendment.

**B. Plaintiffs' Dormant Commerce Clause Claims Fail to State a Claim Upon Which Relief Can Be Granted, Because the State's Auctioneering Regulations Do Not Apply Extraterritorially and Do Not Discriminate Against or Unduly Burden Interstate Commerce.**

The U.S. Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3. "Although the Commerce Clause is written as an affirmative grant of authority to Congress, [the Supreme] Court has long held that in some instances it imposes limitations on the States absent Congressional action." *South Dakota v. Wayfair*, --- U.S. ---, 138 S.Ct. 2080, 2089 (2018). "Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *Id.* at 2090-91. For the reasons detailed below, the State's auctioneering regulations, including the amendments of PC 471, neither discriminate against interstate commerce, nor impose undue burdens upon it. Accordingly, Plaintiffs fail to state a claim upon which relief can be granted under the Commerce Clause.

**1. The State's Auctioneering Regulations Do Not Apply Extraterritorially.**

Plaintiffs' dormant Commerce Clause claims are premised primarily on the flawed presumption that, by merely adding the term electronic to the statutory definition of auction, the State's auctioneering regulations now apply extraterritorially. They do not. The amendments included in PC 471 fit into an existing statutory scheme that, by its express terms, applies only to the auctioneering profession in Tennessee and auctions conducted in Tennessee. The privilege that is conferred by an auctioneer license is the privilege to conduct auctions in this State. *See* Tenn. Code Ann. § 62-19-115 ("Any auctioneer licensed under this chapter may conduct auctions at any time or place in this state."). "A nonresident of this state may become an auctioneer or affiliate auctioneer *in this state* by conforming to this chapter." Tenn. Code Ann. § 62-19-117(a) (emphasis added). Nonresident auctioneers who choose to become licensed in Tennessee "shall maintain an escrow account for all funds belonging to others that come into the nonresident auctioneer's possession as a result of an auction sale *in this state*." Tenn. Code Ann. § 62-19-117(c) (emphasis added). The Tennessee Auctioneer Commission's regulatory authority is likewise confined to the territorial bounds of the State. *See, e.g.*, Tenn. Code Ann. § 62-19-118(c)(2) ("The commission has the authority to promulgate rules with regard to advertising auctions in this state.").

Plaintiffs McKee, Purple Wave, and out-of-state members of IAA are not subject to the requirements of Tenn. Code Ann. §§ 62-19-101 *et seq.*, as amended by PC 471, simply because they conduct online auctions from a location outside of Tennessee that can be accessed by anyone with an internet connection, including Tennessee residents. The out-of-state Plaintiffs do not allege that the Commission or any State official has indicated that they will be subject to the auctioneering regulations under these circumstances. Plaintiffs' forced reading of the statute that

presumes extraterritorial application, despite clear language to the contrary, is insufficient to state a claim upon which relief can be granted under the dormant Commerce Clause.

**2. The State's Auctioneering Regulations Do Not Unduly Burden Interstate Commerce.**

State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "[T]he party challenging the law bears the responsibility of proving that the burdens placed on interstate commerce outweigh the law's benefits." *Garber v. Martinez*, 888 F.3d 839, 845 (6th Cir. 2018). Hypothetical burdens are insufficient to support a dormant Commerce Clause challenge. *Id.* Here, the State regulates the auctioneering profession in Tennessee and auctions conducted in Tennessee to effectuate the legitimate local public interest of promoting the integrity of competitive auctions, protecting sellers and consumers from unqualified auctioneers, and preventing fraudulent or deceptive practices in auctions conducted in the State. The State is regulating purely in-State conduct—*i.e.*, auctions conducted in the State. The State's scheme for regulating in-State auctions did not become an undue burden on interstate commerce merely because the State added the term electronic to the statutory definition of auction. The burdens on interstate commerce, if any, are minimal, and they are certainly not clearly excessive in relation to the local benefits of regulating in-State auctions.

By regulating electronic auctions conducted in the State, Tennessee is not regulating the use of a channel or instrumentality of commerce. *See U.S. v. Faasse*, 265 F.3d 475, 481 (6th Cir. 2001) (explaining that the Commerce Clause authorizes Congress to regulate the use of channels or instrumentalities of interstate commerce). The State is not regulating the internet; rather, it is regulating the auctioneering profession in Tennessee and auctions conducted in Tennessee. The

dormant Commerce Clause simply does not prohibit the State from regulating professionals who practice their profession in the State merely because they practice their profession online. If that were true, then a Texas veterinarian could simply move his Texas veterinary medicine practice online to escape regulation by the State, *see Hines I*, 783 F.3d 197, and a Tennessee lawyer could provide advice on Tennessee law to Tennessee clients solely through a website to avoid regulation by the Board of Professional Responsibility. *See also Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 504-05 (5th Cir. 2001) (holding that Texas statute prohibiting auto manufacturers from owning dealerships did not unduly burden interstate commerce because it only incidentally regulated internet activities and need for national uniformity did not outweigh state's interest in regulating; "application of [the need for national uniformity] principle in circumstances like the instant case would lead to absurd results. It would allow corporations or individuals to circumvent otherwise constitutional state laws and regulations simply by connecting the transaction to the internet."); *Quik Payday, Inc. v. Stork*, 509 F. Supp. 2d 974, 984 (D. Kan. 2007) (adopting Fifth Circuit's reasoning in *Ford* to reject internet payday lender's argument that need for national uniformity outweighed state's interest in regulating loans to state residents). The dormant Commerce Clause does not require or support such a result. For these reasons, Plaintiffs have failed to state a claim for which relief can be granted under the dormant Commerce Clause.

**C. Plaintiffs' Privileges and Immunities Clause Claims Fail to State a Claim Upon Which Relief Can Be Granted, Because the State Does Not Deny Out-of-State Residents Fundamental Rights That It Provides to Its Own Residents.**

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. XIV, § 1. "The [Privileges and Immunities] Clause prohibits States from denying out-of-state

residents 'fundamental' rights provided to their own residents." *Garber*, 888 F.3d at 845. Plaintiffs do not allege that the State denies any rights to out-of-state residents that it provides to its own residents. Instead, Plaintiffs base their Privileges and Immunities Clause claims on the mere possibility that one member of the Supreme Court will someday convince a majority to overrule existing precedent. (*See* Compl. n.1). Moreover, the State provides out-of-state residents who are licensed in their home state the opportunity to apply for a Tennessee auctioneer license by reciprocity if they wish to also 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' Privileges and Immunities Clause claims fail to state a claim upon which relief can be granted.

## II. PLAINTIFFS' CLAIMS BASED ON PURPORTED VIOLATIONS OF THE TENNESSEE CONSTITUTION SHOULD BE DISMISSED.

In addition to claims under federal law, Plaintiffs have sought relief for purported violations of the Tennessee Constitution. Article 1, § 19 of the Tennessee Constitution provides that "[t]he free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Arguably, the Court would have authority under 28 U.S.C. § 1367(a) to exercise supplemental jurisdiction over Plaintiffs' free speech claims under the Tennessee Constitution, because they "are so related to" Plaintiffs' free speech claims under the First Amendment "that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). But, as argued above, Plaintiffs' fee speech claims based on the First Amendment fail to state a claim upon which relief can be granted and must therefore be dismissed. Accordingly, having dismissed Plaintiffs' free speech claims based on the First Amendment, the Court should decline to exercise supplemental jurisdiction and should instead

dismiss Plaintiffs' free speech claims based on the Tennessee Constitution. *See* 28 U.S.C. § 1367(c); *accord Street v. Corrections Corp. of Am.*, 102 F.3d 810, 818 (6th Cir. 1996); *Whittington v. Milby*, 928 F.2d 188, 194 (6th Cir. 1991).

Additionally, Plaintiffs' Tennessee constitutional claims must be dismissed because the Eleventh Amendment precludes federal supplemental jurisdiction over state law claims against state officers sued in their official capacities, even for declaratory and injunctive relief. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124-25 (1984); *see also George-Khouri Family L.P. v. Ohio Dep't of Liquor Control*, 2005 WL 1285677, *2 (6th Cir. May 26, 2005) ("A federal court cannot take supplemental jurisdiction over claimed state law violations by state officers. Appellants concede that the Eleventh Amendment bars a federal court from enjoining the actions of state officials on the basis of state law.") (internal citation omitted). Thus, even if Plaintiffs had made valid claims under federal law, the Eleventh Amendment would still bar the exercise of supplemental jurisdiction over the state law claims against state officers.

In any case, Plaintiffs' state law contentions fail to state a claim upon which relief can be granted and should be dismissed. Because the protections of Article 1, § 19 of the Tennessee Constitution are substantially similar to the protections of the First Amendment, *see Doe v. Doe*, 127 S.W.3d 728, 732 (Tenn. 2004), Plaintiffs' claims under the Tennessee Constitution should be dismissed for the same reasons that their claims under the First Amendment should be.

## CONCLUSION

For the reasons set forth above, Defendants respectfully submit that the Complaint should be dismissed. Thus, the Court should grant Defendants' motion in its entirety.