

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

WILL MCLEMORE, et al.,)
)
Plaintiffs,)
)
v.)
)
ROXANA GUMUCIO, et al.,)
)
Defendants.)

Case No. 3:23-cv-01014

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs are online auctioneers who speak for a living. Online auctioneers routinely engage in speech not only through communication about prices, but also by crafting narratives, images, and descriptions that are designed to influence bidding activity by informing the audience about unique conditions and characteristics of goods and real estate. The online auction licensing law here, however, effectively prohibits the unlicensed practice of online auctioneering for the first time since Tennessee permitted it to flourish in 2006.

The online auction licensing law violates the First Amendment to the United States Constitution. As the Supreme Court reiterated just last term, an individual does not lose his First Amendment right to speak merely because “he accepts money in return.” *303 Creative, LLC v. Elenis*, 143 S. Ct. 2298, 2316 (2023). Because online auctioneering necessarily involves speech, the online auctioneers’ right to earn an honest living is entitled to robust First Amendment protection.

The First Amendment requires the government to both substantiate its claim that its restriction on speech furthers an important government interest *and* show that the restriction is carefully tailored to that interest. The government cannot satisfy either requirement here. As explained below, the government's own data show that the unlicensed online auctioneers—who have been serving Tennesseans for over a decade—have *not* generated significant concern from their customers. The licensing law fares even worse when it comes to tailoring. It is woefully underinclusive because it exempts large online auction companies like eBay from the licensing requirement. And the government cannot show that it seriously considered workable alternatives, such as ramping up enforcement of state laws that already prohibit deceptive business practices.

The online auctioneers would also suffer irreparable harm without a preliminary injunction. Plaintiffs Brajkovich, Smith, and Kimball are unlicensed online auctioneers who now face civil and criminal liability merely for continuing to serve satisfied customers in online auctions as they have done for many years. The licensing law threatens McLemore and McLemore Auction Company, LLC, with the economic, reputational, and personal costs associated with losing unlicensed online auctioneers who have worked reliably for the company. The government can claim no real harm in being enjoined from enforcing an unconstitutional law, and the vindication of constitutional rights is always in the public interest. This Court should grant Plaintiffs' Motion for Preliminary Injunction.

STATEMENT OF FACTS

Will McLemore is a pioneer in the field of auctioneering. In 2006, Mr. McLemore started McLemore Auction Company, LLC, a Nashville-based business that was one of the first to conduct online auctions in Tennessee. Verified Complaint (VC) ¶ 7. McLemore Auction's success over

the years stems—in large part—from individuals who have worked dependably for the company for years. Among those individuals are Ron Brajkovich, Justin Smith, and Blake Kimball—all of whom have been performing first-rate work as online auctioneers. All three are unlicensed, as Tennessee did not require online auctioneers to possess a license before it enacted the law here. VC ¶¶ 9–11, 30–31.¹

A central part of online auctioneering is speech. As the executive director of the Tennessee Auctioneer Commission testified, it is impossible to have an auction without an oral, written, or electronic communication. *Id.* ¶ 21. Online auctioneers engage in speech not only to convey information about bids and products, but also to craft narratives to make items listed for auction more appealing to would-be buyers. Unlike traditional brick-and-mortar auctions, online auctions do not feature items that buyers can see or touch. *Id.* ¶ 22. That makes it even more imperative for online auctioneers to craft narratives, images, and descriptions that are designed to influence bidding activity by informing the audience about unique conditions and characteristics of goods and real estate. *Id.* ¶ 23.

The online auctioneers at McLemore Auction have created many narratives about items that its auctioneers have listed for auction. These narratives—which could portray an item’s significance in a multitude of ways—are designed to generate more demand for the auctioned items. *Id.* ¶ 28. As just one example, McLemore Auction previously created a listing that underscored that the items were previously owned by Jim Thiel. *Id.* ¶ 26. Mr. Thiel was a revered speaker designer who used the auctioned items in his lab before his death, and the online

¹ For ease of reference, this memorandum uses “online auctioneers” to refer to all plaintiffs. It uses “the Commission” or “the government” to refer to all defendants, who are officers or members of the Tennessee Auctioneer Commission and sued in their official capacities.

auctioneers at McLemore Auction chose to craft a narrative about him in hopes of making the items more desirable to high-end enthusiast. *Id.* More recent examples include listings for a Mississippi home with “breathtaking sunset views and seamless boating access . . . to the Gulf of Mexico,” “[p]remium Walnut slabs[] ideal for crafting enthusiasts,” and “growing-up essentials” for toddlers from “the comforting embrace of our bassinets to the endless imaginative possibilities of bulk Lego lots.”² Without such narratives, listings for auctioned items would be less informative, less interesting, and less enticing to buyers. *Id.* ¶ 28.

Tennessee allowed online auctions to flourish for over a decade. In 2006, the General Assembly enacted an exemption to the auctioneering laws for “fixed price or timed listings that allow bidding on an internet website, but do not constitute a simulcast of a live auction.” 2006 Tenn. Pub. Ch. 533, codified at Tenn. Code Ann. § 62-19-103(9). In practice, this exempted almost all online auctioneers from a licensing requirement—no matter if those online auctioneers conducted fixed-time or extended-time online auctions. The Tennessee Auctioneer Commission confirmed the scope of the exemption when it determined that Mr. McLemore’s extended-time online auctions fell under the statutory exemption for a timed listing that does not constitute a simulcast of a live auction. VC ¶ 31.

Even so, both legislators and lobbyists clamored to impose a licensing requirement on online auctions. The vice president of the Tennessee Auctioneer Association testified that “there’s a real need to look at oversight for online auctions because we can all agree that’s not going to diminish in its activity.” Tenn. Dep’t of Comm. and Ins., Auctioneer Task Force Meeting

² McLemore Auction Company, <https://www.mclimoreauction.com/> (last visited Oct. 1, 2023).

(Aug. 27, 2018) at 34:25–34:32.³ In 2018, the Tennessee General Assembly enacted legislation creating the Tennessee Task Force on Auction Law Modernization. *See* 2018 Pub. Ch. 941. The Task Force compiled statistics breaking down the number of complaints about auctioneers over three fiscal years (FY 2016–18). *See* Tenn. Dep’t of Comm. and Ins., Auctioneer Law Modernization Task Force.⁴ The numbers showed that only 15 of the 117 complaints about auctioneers during that time were about online auctions, and even fewer (three of the 117) of the complaints were about the extended-time online auctions that McLemore Auction conducts.

Despite the dearth of evidence that unlicensed online auctions—which had been free to flourish for the preceding 13 years—were harmful to Tennesseans, the General Assembly pressed forward with a licensing requirement for online auctions. *See* 2019 Tenn. Pub. Ch. 471 (PC 471).⁵ PC 471 changed existing Tennessee auctioneer laws by defining an auction as a sales transaction “conducted by oral, written, or *electronic* exchange between an auctioneer and members of the audience, consisting of a series of invitations by the auctioneer for offers to members of the audience to purchase goods or real estate” Tenn. Code Ann. § 62-19-101(2) (emphasis added). PC 471 further eliminated the exemption that permitted the online auctioneers to flourish between 2006 and 2019. Although the timed-listing exemption in Section 62-19-103(9) previously exempted both fixed-time and extended-time auctions from the licensing requirement, PC 471 narrowed the exemption for online auctions to eBay-style “timed listings” by redefining the term to exclude online auctions that are “extend[ed] based on bidding activity.” *See id.* § 62-19-101(12). This

³ <https://www.youtube.com/watch?v=UpDp7OBc0Wc&t=7347s> (last visited Oct. 1, 2023).

⁴ <https://www.tn.gov/commerce/regboards/auction-law-tf/additional-resources-.html> (last visited Oct. 1, 2023).

⁵ The online auctioneers use “PC 471” and “the online auction licensing law” interchangeably in this memorandum.

means that while online auctioneers who work for McLemore Auction must obtain a license because they conduct extended-time online auctions, those who work for eBay, which conducts fixed-time online auctions, remain exempt from the licensing requirement.

Shortly before the Tennessee online auction licensing law went into effect in 2019, Will McLemore and McLemore Auction filed a civil rights lawsuit in this Court.⁶ *See McLemore v. Gumucio*, 3:19-cv-00530 (M.D. Tenn. Filed Jun. 26, 2019) (Judge Richardson). McLemore raised federal claims under the Free Speech Clause of the First Amendment, the Dormant Commerce Clause, the Privileges or Immunities Clause of the Fourteenth Amendment, and a free speech claim under the Tennessee Constitution. Several motions followed. As relevant here, this Court denied the Commission’s motion to dismiss McLemore’s First Amendment claim. The Court noted that “conducting an auction necessarily involves speech,” and declined to decide whether the online auction licensing law should be analyzed under strict- or intermediate-scrutiny because dismissal was improper under either standard. *See McLemore v. Gumucio*, 19-cv-530, 2020 U.S. Dist. LEXIS 228082, at *56 (M.D. Tenn. Dec. 4, 2020) (“*McLemore I*”). The Court also issued a series of injunctions that prevented the online auction law from ever taking effect. *See McLemore I*, 593 F.Supp.3d 764, 783 (M.D. Tenn. 2022) (granting Plaintiffs’ Motion for Summary Judgment and permanently enjoining enforcement of the online auction licensing law), vacated by *McLemore v. Gumucio*, No. 22-5458, 2023 U.S. App. LEXIS 15611 (6th Cir. Jun. 20, 2023); *McLemore I*, 2019 U.S. Dist. LEXIS 122525, at *7–8, 40 (M.D. Tenn. Jul. 23, 2019) (discussing the Court’s previous

⁶ McLemore and McLemore Auction were joined in that lawsuit by co-plaintiffs Aaron McKee, Purple Wave, and the Interstate Auction Association (IAA), who are not parties in this case. Mr. Kimball was a member of the IAA, but none of unlicensed online auctioneers—Ron Brajkovich, Justin Smith, and Blake Kimball—were parties to that lawsuit.

issuance of a temporary restraining order and granting Plaintiffs’ Motion for Preliminary Injunction).⁷ The Court’s rulings were based on its conclusion that the online auction licensing law violated the Dormant Commerce Clause, so it “refrain[ed] from ruling on” McLemore’s First Amendment claim “to save scarce judicial resources and to avoid deciding unnecessary constitutional questions.” *McLemore I*, 593 F.Supp.3d at 782. On appeal, the Sixth Circuit held that none of the plaintiffs in *McLemore I* had standing to press a claim under the Dormant Commerce Clause, and dismissed the entire case for lack of jurisdiction—ostensibly because it erroneously believed that “the [district] court dismissed the plaintiffs’ First Amendment claim as moot.” *McLemore I*, 2023 U.S. App. LEXIS 15611, at *5, rehearing denied by *McLemore v. Gumucio*, 2023 U.S. App. LEXIS 21912 (6th Cir., Aug. 18, 2023). Now without the benefit of this Court’s prior injunction and under the imminent threat of civil and criminal enforcement, the online auctioneers filed this case and now move for preliminary relief.

STANDARD OF REVIEW

Courts balance four factors when considering a motion for a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction. *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012). In First Amendment

⁷ This Court’s permanent injunction enjoined the Commission from applying Tennessee’s auctioneering laws, licenses, and regulations to “sales transaction[s] conducted by . . . *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.” *McLemore I*, 19-cv-530, ECF No. 122 (M.D. Tenn. May 3, 2022).

cases, the critical inquiry is usually whether plaintiffs have shown a likelihood of success on the merits because the issues of public interest and harm to the parties largely depend on the constitutionality of government action. *Id.* at 819. A court may rely on facts contained in a verified complaint in deciding whether to issue a preliminary injunction. *Barron v. PGA Tour, Inc.*, 670 F.Supp.2d 674, 677 n.3 (W.D. Tenn. 2009).

ARGUMENT

I. The Online Auctioneers are Likely to Prevail on the Merits

A. The Online Auctioneers Have Standing to Press Their Claims in This Court

This Court has jurisdiction to hear the online auctioneers' First Amendment claim. Plaintiffs seeking to press their claim in a federal court must demonstrate that they (1) suffer a concrete injury that (2) is traceable to the defendants' actions and (3) redressable by a favorable court decision. *See Parsons v. United States DOJ*, 801 F.3d 701, 710 (6th Cir. 2015). "[O]nly one plaintiff needs to have standing in order for the suit to move forward." *Id.*

Plaintiffs Brajkovich, Smith, and Kimball plainly have standing to have their First Amendment claim heard in this Court. Without this Court's prior injunction, the defendant commissioners are now free to levy criminal and civil penalties on them merely because they are unlicensed and wish to continue to earn a living by conducting online auctions. *See* Tenn. Code Ann. § 62-19-121 (a violation of the Tennessee auctioneering laws is punishable as a Class C misdemeanor); *id.* § 62-19-126(a)(3) (each citation shall contain an assessment of a civil penalty of up to \$2,500). Plaintiffs McLemore and McLemore Auction also have standing because they suffer similar injuries caused by the Commission's enforcement of the online auction licensing law. Because McLemore and McLemore Auction can no longer employ unlicensed online auctioneers

that have worked reliably for them for years, the online auction licensing law threatens grave economic and reputational harm on McLemore and his company. *See Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1374–75 (2023) (financial harm suffices to establish Article III injury); *Parsons*, 801 F.3d at 711 (reputational injury is sufficient to establish injury-in-fact in a First Amendment case).⁸ The online auctioneers have standing to have their claim heard in this Court.

B. The Online Auction Licensing Law Violates the First Amendment

The online auctioneers are likely to succeed on the merits of their First Amendment claim. As this Court held in *McLemore I*, the online auction licensing law restricts speech, and is subject to either strict- or intermediate-scrutiny. *See McLemore I*, 2020 U.S. Dist. LEXIS 228082, at *57. Strict scrutiny is the proper standard to apply to the multitude of content- and speaker-based distinctions here. *See Planet Aid v. City of St. John*, 782 F.3d 318, 328 (6th Cir. 2015) (holding that the challenged ordinance was content-based because it “does not ban or regulate all unattended, outdoor receptacles. It bans only those unattended, outdoor receptacles with an expressive message on a particular topic—charitable solicitation and giving”). The online auction licensing law does not ban every “oral, written, or electronic exchange”; it bans such exchanges “between an auctioneer and members of the audience, consisting of a series of invitations by the auctioneer

⁸ Because only one plaintiff needs to have standing, the Court need not independently analyze the standing of Plaintiffs McLemore and McLemore Auction to bring suit. If it did so, however, it should hold that neither plaintiff is precluded from having their claim heard in this Court. Preclusion requires that an earlier claim have been decided on the merits in an earlier proceeding. *See SunTrust Bank v. Bennett*, 517 B.R. 95, 100–01 (Bankr. M.D. Tenn. 2014). Preclusion should not be applied where “it would result in manifest injustice to a party or violate an overriding public policy.” *United States v. LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977). The Sixth Circuit did not adjudicate McLemore’s and McLemore Auction’s First Amendment claim in *McLemore I* based on its misapprehension that this Court had already dismissed it as moot. *McLemore I*, 2023 U.S. App. LEXIS 15611, at *5.

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.” Tenn. Code Ann. § 62-19-101(2). The online auction licensing law also discriminates on the basis of content through a host of exemptions. It allows unlicensed online auctioneers to communicate when they are conducting a fixed-time online auction; it prohibits unlicensed online auctioneers from communicating when they are conducting an extended-time online auction. *See id.* §§ 62-19-101(12), 62-19-103(9) (exempting, from the licensing requirement, any online auction that “offer[s] goods for sale with a fixed ending time and date that does not extend based on bidding activity”).

The online auction licensing law cannot be properly categorized as a regulation “of professional conduct that incidentally burden[s] speech.” *National Inst. of Family & Life Advocates v. Beccera* (“*NIFLA*”), 138 S. Ct. 2361, 2373 (2018); *McLemore I*, 2020 U.S. Dist. LEXIS 228082, at *57 (regulations of conduct that incidentally burden speech are subject to intermediate scrutiny). That is because the licensing law bears little resemblance to a “tort[] for professional malpractice,” *NIFLA*, 138 S. Ct. at 2373, and instead dictates who may or may not speak even if they offer identical or virtually identical services. *See, e.g.*, Tenn. Code Ann. § 62-19-103(12) (exempting any “individual who generates less than twenty-five thousand dollars (\$25,000) in revenue a calendar year from the sale of property in online auctions”). In short, the licensing law “regulates speech as speech.” *NIFLA*, 138 S. Ct. at 2374.

In any event, the online auction fails under either strict- or intermediate-scrutiny. *See Billups v. City of Charleston*, 961 F.3d 673, 684–85 (4th Cir. 2020). Both standards require the government to substantiate an important government interest *and* show that its speech restrictions

are carefully tailored toward furthering that interest. *See id.* at 685. The government cannot do either here. *First*, it cannot substantiate a significant consumer protection interest in enforcing a licensing requirement on online auctions for the first time in nearly two decades because the unlicensed practice of online auctioneers has flourished to the *benefit* of Tennesseans during that time. *Second*, even if the government could establish a significant interest in suddenly restricting the speech of online auctioneers, the licensing law is inadequately tailored to further that interest. For instance, the licensing law restricts the speech of online auctioneers who engage in extended-time online auctions, but it exempts other online auctions that have generated more complaints. The government also failed to give serious consideration to alternatives—such as enforcing fraud laws or imposing a certification requirement—that would have served any important government interest just as well. *See Billups*, 961 F.3d at 690 (holding that tour guide licensing ordinance violated the First Amendment because the government failed to use “less intrusive tools” to further its interest or “consider different methods that other jurisdictions have found effective”).

i. The Online Auction Licensing Law Fails Both Strict- and Intermediate-Scrutiny Because the Commission Cannot Substantiate a Compelling or Significant Interest

Both strict and intermediate scrutiny require the government to substantiate its interest in restricting speech. As the Sixth Circuit has explained, although intermediate scrutiny does not require the same showing that strict scrutiny demands, it is “not toothless” and “requires some showing of an important or substantial interest that the regulations are essential to address.” *Hamilton Bogart’s, Inc. v. Michigan*, 501 F.3d 644, 653 (6th Cir. 2007). When the government defends “a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.” *Turner Broad Sys. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks omitted). The government must

“demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Id.*

The Commission cannot meet that burden here. If there were evidence of a significant problem prompted by the unlicensed practice of online auctioneering, that evidence would have been readily available to the Commission. After all, online auctions have flourished in Tennessee for almost two decades. The General Assembly enacted the online auction licensing law in 2019—13 years after it first exempted online auction companies like McLemore Auction from the licensing requirement. *See* VC ¶¶ 30–31. In practice, this Court’s injunction further exempted online auctions from the licensing requirement in the past four years—a period in which there were ostensibly many more online auctions prompted by the COVID-19 pandemic. Yet the government’s evidence consists of a task force report revealing that the unlicensed practice of auctioneering has *not* presented a problem for Tennessee consumers. The task force compiled three years of data and found that the extended-time online auctions now subject to the licensing requirement gave rise to only three of the 117 complaints about auctioneers. If the online auction licensing law were truly prompted by an interest in consumer protection, this Court should “have expected to be directed to more than a handful of complaints.” *United States v. Playboy*, 529 U.S. 803, 822 (2000).

ii. The Online Auction Licensing Law is Improperly Tailored under Strict- or Intermediate Scrutiny

By “demanding a close fit between ends and means, the tailoring requirement” of the First Amendment “prevents the government from too readily sacrificing speech for efficiency.” *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (internal quotation marks and brackets omitted). Under intermediate scrutiny, a law that restricts speech must not “burden substantially more

speech than is necessary to further the government’s legitimate interests.” *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

The online auction licensing law is inadequately tailored because it contains a host of exemptions that “diminish the credibility of the government’s rationale for restricting speech in the first place.” *City of Ladue v. Gilleo*, 512 U.S. 43, 52–53 (1994); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (explaining that the speech restriction was so “woefully underinclusive as to render belief in” the government’s stated purpose “a challenge to the credulous”). Here, the online auction licensing law is littered with exemptions. *See, e.g.*, Tenn. Code Ann. § 62-19-103(4) (exempting an “auction conducted by or on behalf of a political party, church, or charitable corporation or association, if the individual conducting the sale receives no compensation and does not . . . hold their self out as available to engage in the sale of goods at auction”); *id.* § 62-19-103(6) (exempting an “auction conducted for the sale of livestock sponsored through or in cooperation with the state department of agriculture or the University of Tennessee extension”); *id.* § 62-19-103(12) (exempting “[a]n individual who generates less than twenty-five thousand dollars (\$25,000) in revenue a calendar year from the sale of property in online auctions.”).

Perhaps most notably, although the licensing law requires licenses for Plaintiffs because they conduct extended-time online auctions, it exempts eBay and other fixed-time online auction companies from the licensing requirement. *See id.* § 62-19-103(9) (exempting any “fixed price or timed listings that allow bidding on an internet website, but do not constitute a simulcast of a live auction”); *id.* § 62-19-101(12) (defining “timed listing” as “offering goods for sale with a fixed ending time and date that does not extend based on bidding activity”). These exemptions render

belief in a consumer protection rationale “a challenge to the credulous.” *Republican Party of Minn.*, 536 U.S. at 780. Tennessee’s Auctioneer Law Modernization Task Force found that complaints about extended-time online auctioneers represented a trivial fraction of the already small number of complaints about online auctions. *See* VC ¶ 34 (noting that, in three years, there were 117 complaints about auctioneers, 15 complaints about online auctions, and only three complaints related to online auctions with extended-time endings). Therefore, the licensing law fails the First Amendment’s tailoring requirement because it is woefully underinclusive.

The online auction licensing law is also inadequately tailored because the Commission cannot show that it “seriously undertook to address the problem with less intrusive tools readily available to it.” *McCullen*, 573 U.S. at 494. For instance, the government can protect consumers from unscrupulous auctioneers by ramping up enforcement of existing laws prohibiting deceptive solicitation or fraud. *See Billups*, 961 F.3d at 688–89. The Tennessee Consumer Protection Act, for example, protects consumers against “[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce.” Tenn. Code Ann. § 47-18-104(a). Still another less intrusive tool available to the government is a voluntary auctioneer certification program that would encourage consumers to go to online auctioneers “who satisfy standards established by the [government]— all without infringing the Plaintiffs’ free speech rights.” *Billups*, 961 F.3d at 690. Because the government cannot show that it gave serious consideration to any of these alternatives, the online auctioneers are likely to prevail on the merits of their First Amendment claims.

II. The Online Auctioneers Will Suffer Irreparable Harm Absent Preliminary Relief

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Beyond

that, Plaintiffs Brajkovich, Smith, and Kimball are threatened with criminal and civil penalties for merely continuing their practice of earning a living through their speech. The online auction licensing law subjects those online auctioneers to criminal penalties of up to 30 days in jail and civil fines of up to \$2,500 for each violation of the Tennessee auctioneering laws. *See* Tenn. Code Ann. § 62-19-121 (a violation of the Tennessee auctioneering laws is punishable as a Class C misdemeanor); *id.* § 62-19-126(a)(3) (each citation shall contain an assessment of a civil penalty of up to \$2,500). Will McLemore and McLemore Auction would also suffer irreparable harm. The online auction licensing law prohibits unlicensed online auctioneers who have worked reliably for McLemore Auction from continuing to conduct online auctions. VC ¶ 48. The online auction licensing law therefore imposes significant personal and economic harm on Mr. McLemore because it “threaten[s] his business and cost[s] his business goodwill and customers.” *McLemore I*, 2019 U.S. Dist. LEXIS 122525, at *36.

III. The Balance of Harms and Public Interest Weigh in the Online Auctioneers’ Favor

The balance of harms and the public interest both tip in favor of granting the online auctioneers’ request for preliminary relief. “[I]f the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinder.” *Deja Vu of Nashville, Inc. v. Metro Gov’t of Nashville and Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001). Further, “it is always in the public interest to prevent violation of a party’s constitutional rights.” *Id.* (quotations omitted).

As this Court noted in *McLemore I*, the assertion that preliminary relief would cause substantial harm to Tennessee consumers is “belied somewhat by the evidence.” *See McLemore I*,

2019 U.S. Dist. LEXIS 122525, at *38. “[O]nline extended-time auctions up until this point have gone unregulated without any substantial harm to Tennessee consumers.” *Id.*

IV. No Security Should Be Required

This Court should not require a bond since the matter involves a constitutional issue affecting the public. *See McLemore I*, 2019 U.S. Dist. LEXIS 122525, at *39–40 (citing *Stand Up Am. Now v. City of Dearborn*, No. 12-11471, 2012 U.S. Dist. LEXIS 48478, at *1 (E.D. Mich. Apr. 5, 2012)). Further, a bond requirement would make little sense here because no financial harm would befall the Commission if this Court were to enjoin it from enforcing the online auction licensing law until this case can be fully adjudicated. The online auctioneers are merely seeking to continue what has been permitted in Tennessee since 2006; they seek to earn a living without the threat of civil and criminal punishment.

CONCLUSION

For all these reasons, Plaintiffs’ Motion for Preliminary Injunction should be granted.

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Respectfully submitted,

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CERTIFICATE OF CONFERRAL

The parties have been unable to confer on the relief requested in this motion because Defendants have not made an appearance. Plaintiffs presume that their motion will be opposed and intend to confer with Defendants once they have appeared in this case.