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

WILL MCLEMORE, *et al.*, *Plaintiffs*, v. ROXANA GUMUCIO, *in her official capacity as* EXECUTIVE DIRECTOR *of the* TENNESSEE AUCTIONEER COMMISSION, *et al.*, *Defendants*.	Case No. 3:23-cv-1014 District Judge Aleta A. Trauger

MEMORANDUM OF LAW IN SUPPORT OF THE AUCTIONEER COMMISSION'S MOTION TO DISMISS

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INTRODUCTION

The Court should dismiss this redundant and meritless lawsuit. Four years ago, Plaintiff Will McLemore sued the Tennessee Auctioneer Commission[1] in this Court, claiming the State's auctioneering laws were violating his constitutional rights. After multiple injunctions, costly discovery, and summary judgment, the Sixth Circuit held this Court had lacked jurisdiction from the outset. *See McLemore v. Gumucio* (*McLemore III*), No. 22-5458, 2023 WL 4080102 (6th Cir. June 20, 2023). Mere months later, McLemore has returned to this Court for a do-over. He says the circuit judges overlooked his "free speech" claims, and he attempts to bolster his case by joining three Employees as co-plaintiffs.

The Court should nip this in the bud. A Sixth Circuit panel has already determined that McLemore and his Company cannot challenge the law's online-auctioneering provision while claiming to hold the necessary license for independent reasons. And although McLemore's Employees say that they do not have state-issued licenses, their threadbare pleadings omit the facts to show that they need them. In addition to those threshold pleading defects, the complaint presents a First Amendment theory that is out-of-line with circuit precedent. The Free Speech Clause does not prevent the Commission from licensing professional auctioneers — whether or not they choose to operate over the internet.

For any and all of these reasons, the Court should grant the Commission's motion and dismiss the Auctioneers'[2] mulligan lawsuit with prejudice.

BACKGROUND

Most people know what an auction is and how it differs from an ordinary sale. In an ordinary sale, the seller prices a product, and any buyer can purchase the product after agreeing to pay

[1] By "Commission" this brief means all Defendants, sued in their official capacities.
[2] By "Auctioneers" this brief means all Plaintiffs: McLemore, his Company, and his Employees.

its stated price. In an auction, the roles are reversed; the seller "invit[es]" buyers to "offer" potential prices, and then he "accept[s] . . . the highest or most favorable offer." Tenn. Code Ann. § 62-19-101(2).

That process can get hectic and complicated, especially when rare items are involved. Indeed, it can be difficult to know how to solicit bids in a way that promotes the most interest and engagement from potential buyers. *See* Compl., D.E. 1 at 5–6.[3] And some auctions may require compliance with special rules, like the state laws that govern transfers of real estate. *See* Tenn. Code Ann. § 62-19-102(a)(2); *see also id.* § 62-19-128 (concerning automobile auctions). To navigate those challenges and countless others, some sellers prefer to hire a professional to act as their representative in the auction process. *See* Compl., D.E. 1 at 3.

Several States license this professional auctioneering, and Tennessee has long been one of those States. *See* Tenn. Code Ann. § 62-19-102. In 1967, the General Assembly passed a law "defin[ing], regulat[ing], and licens[ing] auctioneers" and "creat[ing]" a "Commission" to oversee their professional conduct. 1967 Tenn. Pub. Acts ch. 335 (attached as Exhibit A). The legislation's goal was to ensure that people holding themselves out as auctioneering professionals "ha[d] a general knowledge of ethics" and other matters, including "the [Tennessee] statutes" governing "auctions" and related subjects. *Id.* § 12. Legislators also tasked the Commission with ensuring that licensees were "reput[able], trustworthy, honest and competent to transact the business of an auctioneer . . . in such a manner as to safeguard the . . . public" interest. *Id.* The point was to go further than redressing only out-and-out fraud by giving Tennesseans a prophylactic against lesser forms of "bad faith, dishonesty, [and] incompetenc[e]." *Id.* § 13(i); *see id.* § 15.

Consistent with those aims, the Commission has *not* allowed online auctioneering to

[3] Pincites to record materials reference the PageID numbers in the ECF file stamps.

"flourish[]" unregulated in this State. Compl., D.E. 1 at 1. Well before the advent of the internet, Tennessee asserted authority to regulate auctions held by means of any "oral or written exchange." 1978 Tenn. Pub. Acts ch. 569, § 1 (attached as Exhibit B). And when such "exchanges" began to take place with the help of computers, the Commission made clear that this did not nullify the law's "requirements." Tenn. Comp. R. & Regs. 0160-01-.18 (effective May 14, 2001) (attached within Exhibit C). While some online sales were not properly categorized as "auctions," *see* Tenn. Code Ann. § 62-19-103(9), those that did qualify as "auctions" had to comply with the general regulatory regime, *see id.* § 62-19-102(a)(1).

In 2019, Tennessee legislators reaffirmed that determination with several amendments to the auctioneering statutes. As relevant here, they codified the Commission's reading of "oral or written" exchange to include "electronic" exchange, which covers any exchange carried out over the internet. 2019 Tenn. Pub. Acts ch. 471, § 4(2) (attached as Exhibit D). At the same time, they clarified that soliciting bids on an item with a "fixed" deadline was so dissimilar to a traditional auction that it did *not* fall within the auctioneering laws' purview. *Id.* § 4(12). The bottom line was clear: the State would continue to license professional auctioneering — as traditionally defined and practiced — whether it occurred over the internet or not.

Unhappy with that policy, Will McLemore filed a federal lawsuit. *See McLemore III*, 2023 WL 4080102, at *1. He asserted free speech claims from the beginning, *see* Compl., No. 3:19-cv-530 (M.D. Tenn.), D.E. 4 at 49–52, but that theory never got him much traction. Instead, after a hurried temporary restraining order, this Court issued pre- and post-judgment injunctions based solely on McLemore's claim that Tennessee law violated the "dormant Commerce Clause," *see McLemore v. Gumucio* (*McLemore I*), No. 3:19-cv-530, 2019 WL 3305131, at *11 n.11 (M.D. Tenn. July 23, 2019); *McLemore v. Gumucio* (*McLemore II*), 593 F. Supp. 3d 764, 782 (M.D.

Tenn. 2022). And after deeming that basis sufficient to support all the relief McLemore wanted, the Court implicitly "dismissed the . . . First Amendment claim as moot" and entered a final judgment in McLemore's favor. *McLemore III*, 2023 WL 4080102, at *2.

What took this Court many words to explain, however, took the Sixth Circuit few words to undo. In a succinct, unanimous opinion, an appellate panel lamented that this Court's "lengthy" analysis had "not addressed" one unavoidable question: "why the federal courts" had the power to "be deciding [McLemore's] case" in the first place. *Id.* That oversight turned out to be critical, because regardless of how Tennessee's auctioneering laws applied to web-based transactions, McLemore would still be a licensed "in-state auctioneer" who could legally hold online auctions. *Id.* He thus had no basis for seeking relief to stop a prosecution that was not forthcoming, so the panel "vacate[d] . . . all [this Court's] orders" and directed it to dismiss the case completely. *Id.*

Believing the Sixth Circuit's analysis did not cover his concern for free speech, McLemore petitioned for a panel rehearing to request further proceedings on remand. *See* No. 22-5458, D.E. 44 (6th Cir. July 3, 2023). In that petition, he argued the panel had "overlooked" his First Amendment claim, which had not been "dismissed based on mootness or anything else." *Id.* at 2. According to McLemore, this Court somehow "reserv[ed]" the First Amendment claim, preventing it from merging into the final judgment that necessarily predicated the Commission's appeal. *Id.* at 3. He thus asked the Sixth Circuit to "alter its order" by giving "instructions remanding the First Amendment claim" for further vetting and (another) final judgment. *Id.* at 4.

That request was summarily denied. *See* No. 22-5458, D.E. 45 (6th Cir. Aug. 18, 2023). Rather than permitting useless litigation on McLemore's ambitious free speech theory, the Sixth Circuit referred this Court back to the panel's original instruction to dismiss *all* claims in the case. *See* Mandate, No. 22-5458, D.E. 46 (6th Cir. Aug. 28, 2023).

Undeterred, McLemore has filed this additional lawsuit, focusing only on his free speech theory. *See* Compl., D.E. 1 at 9–11. As before, he claims to be "a licensed auctioneer" permitted to conduct online auctions in Tennessee. *Id.* at 3. But he also alleges he is "president and sole member of Plaintiff McLemore Auction Company," which has three unlicensed Employees: Plaintiffs Ron Brajkovich, Blake Kimball, and Justin Smith. *Id.*; *see id.* at 8. These five Auctioneer plaintiffs assert that "speech" is "an essential part" of their business. *Id.* at 5. And that is mainly because the Company uses advertisements (called "narratives," *id.*) to "generate . . . demand for" the "items" it sells at auction, Prelim. Inj. Br., D.E. 8-1 at 48. The Auctioneers say that the burden of getting licensed trenches on their right to that "narrative" speech, and they seek an order from this Court preventing "enforce[ment]" of Tennessee's licensing law. Compl., D.E. 1 at 11; *see* Prelim. Inj. Mot., D.E. 8 at 44.

Yet despite the Employees' "long" and "reliabl[e]" service, the complaint alleges few *facts* about what they actually do for the Company. Compl., D.E. 1 at 9. Instead, it simply asserts that "they face imminent civil and criminal punishment" for trying "to earn an honest living through speaking." *Id.* at 2. It does not attribute to them any "narratives" or even a concrete intent to craft "narratives." *See id.* at 5–9. And while it claims they "cannot avail [themselves] of any of the exemptions" to licensure, *id.* at 8, it omits the factual allegations that would support such a sweeping legal conclusion.

The complaint thus brings McLemore right back to where he started four years ago. Its allegations cannot justify "launching . . . discovery," *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013), and regardless, its First Amendment theory lacks merit. For the reasons given below, the Court should dismiss this lawsuit with prejudice and put an end to McLemore's effort to avoid regulation.

ARGUMENT

Not a single plaintiff in this case has pleaded a viable claim to relief. To state a claim in federal court, a complaint must offer more than "conclusory allegations . . . that the defendant violated" (or will violate) "the law." *Id.* Instead, it must "plead enough 'factual matter' to raise a 'plausible' inference of wrongdoing." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). And absent allegations of "fact" that would sustain a "'right to relief,'" *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 684 (6th Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)), the Court may not speculate its way into "a[n] . . . expensive discovery process," *Agema v. City of Allegan*, 826 F.3d 326, 332 (6th Cir. 2016).

That is exactly what the Auctioneers ask for here. Relying heavily on "[t]hreadbare recitals" and "legal conclusions" that deserve no assumption of truth, *Iqbal*, 556 U.S. at 678; *see Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 480 (6th Cir. 2020), their complaint skips the factual allegations needed to plead standing or any present cause of action, *see infra* Part I. And even ignoring that problem, the First Amendment theory finds no support in governing law. *See infra* Part II. There is thus no basis for this lawsuit; the Court should order it dismissed.

I. The Auctioneers have not justified judicial review of the Tennessee law that prohibits auctioneering without a license.

The complaint does not allege facts stating a claim to pre-enforcement relief. Despite what the Auctioneers might think, *see* Prelim. Inj. Br., D.E. 8-1 at 53–54 & n.8; Prelim. Inj. Reply, D.E. 14 at 100, "standing is *not* dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (emphasis added). Every plaintiff must demonstrate his own standing for every claim and every remedy he seeks. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 253 (6th Cir. 2018). And a similar principle applies to the merits of any claim under the Civil Rights Act: the "cause of action is entirely personal to the direct victim of [a] constitutional tort." *Chambers v.*

Sanders, 63 F.4th 1092, 1100 (6th Cir. 2023) (quoting *Claybrook v. Birchwell*, 199 F.3d 350, 357 (6th Cir. 2000)). Each plaintiff must thus allege a threat to his *own* rights to state a claim for an injunction protecting those rights.

In this case, each Auctioneer seeks protection from prosecution for doing business without the required license. *See* Compl., D.E. 1 at 4 (citing *Ex parte Young*, 209 U.S. 123 (1908)). This means each Auctioneer must plead a threat to *his* speech, rather than the speech of somebody else — however closely they may be related. *See Chambers*, 63 F.4th at 1096; *see Jaco v. Bloechle*, 739 F.2d 239, 241 (6th Cir. 1984). Because the Auctioneers have not sufficiently alleged a threat to *any* of their speech, they lack standing and actionable claims to relief from this Court.

A. McLemore and his Company face no actionable threat to their interests.

The Sixth Circuit threw out McLemore's first lawsuit for challenging a statute that has not "affected [his] auctioneering." *McLemore III*, 2023 WL 4080102, at *1. Yet despite his opportunity to replead, this suit suffers from the very same fatal flaw. Neither McLemore nor his Company can derive standing from the threat of prosecution, and neither of them have actionable claims to protect their Employees' free speech.

1. McLemore's speech, and that of the Company, are not at risk.

It is easy to see why the Sixth Circuit denied McLemore's petition for rehearing, having already determined that he lacked standing to sue. *See* No. 22-5458, D.E. 45 (6th Cir. Aug. 18, 2023). The prior lawsuit, like this one, challenged Tennessee's licensure of online auctioneering. *See* Compl., D.E. 1 at 2. But when a plaintiff sues to enjoin a state agent from enforcing state law, the complaint "must plead . . . 'an intention'" to break that law as well as "'a credible threat of prosecution.'" *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1049 (6th Cir. 2015) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Will McLemore has never pleaded either — in fact, he has pleaded just the opposite.

Specifically, McLemore's pleading confirms he can conduct online auctions with the license he "must obtain" to do *offline* auctions. *McLemore III*, 2023 WL 4080102, at *2. As before, he alleges he *has* that license, *see* Compl., D.E. 1 at 3, which removes any "credible threat of prosecution." *Russell*, 784 F.3d at 1049 (quoting *Babbit*, 442 U.S. at 298); *see* Tenn. Code Ann. § 62-19-115(a). Since McLemore Auction Company does not need a license — it just needs a licensed principal auctioneer, *see* Prelim. Inj. Resp., D.E. 12 at 73 (citing 2019 Tenn. Pub. Acts ch. 471, § 4(9)) — the Sixth Circuit's conclusion from the prior case still holds: Neither McLemore nor his Company have standing to prevent a prosecution that would infringe on their First Amendment rights. *See McLemore III*, 2023 WL 4080102, at *2.

2. McLemore cannot sue to protect his Employees' free speech.

Implicitly recognizing as much, McLemore now stresses the "economic . . . costs" he stands to suffer because his *Employees* cannot "conduct online auctions." Compl., D.E. 1 at 9; *see* Prelim. Inj. Br., D.E. 8-1 at 54. But while those might be cognizable injuries for standing purposes, they do not grant McLemore a general "license to sue." *Fox v. Saginaw Cnty.*, 67 F.4th 284, 293 (6th Cir. 2023). McLemore still needs a right of action to redress those injuries, *see Keen v. Helson*, 930 F.3d 799, 802 (6th Cir. 2019), and the Civil Rights Act does not provide one to him here.

To be sure, the statute offers relief to any person "depriv[ed]" of rights "secured by" federal law. 42 U.S.C. § 1983. But such claims flow only to those persons whose rights are being violated. *Claybrook*, 199 F.3d at 357. McLemore asserts that Tennessee law threatens free speech, but such a claim must spring from *his* speech, not his Employees'. *Purnell v. City of Akron*, 925 F.2d 941, 948 n.6 (6th Cir. 1991). The fact that he has every right to speak as a licensed auctioneer therefore strips him of any actionable claims against the Commission. *See Ziegler v. Aukerman*, 512 F.3d 777, 782 (6th Cir. 2008) (citing *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006)). The

auctioneering laws may have an impact on his bottom line, but not every business expense amounts to a "constitutional tort." *Claybrook*, 199 F.3d at 357.

*

The upshot is that McLemore and the Company lack viable claims. They cannot draw a line from their own interests to any lawful relief, because the Commission's actions pose no threat to *McLemore's* expression, and he cannot sue to vindicate his *Employees'* freedom of speech.

B. The Employees plead no intent to violate the law.

The complaint does no better to state a claim on behalf of the Employees. This Court's limited jurisdiction allows the employees to pursue an injunction that protects their personal constitutional rights to freedom of speech. *See Russell*, 784 F.3d at 1049 (citing *Babbitt*, 442 U.S. at 298). But their allegations do not meet the federal courts' pleading standards. "Nothing but legal conclusions suggest[]" the Commission will "unlawful[ly]" prosecute them. *Rondigo*, 641 F.3d at 684. And by not supporting those conclusions with concrete allegations of fact, the Employees have failed to state any viable claims to relief.

Again, the issue boils down to what the complaint says about what the Employees actually do. In their view, it is enough to allege they "are unlicensed online auctioneers" who "can't avail themselves of the exemptions" from the licensing requirement. Prelim. Inj. Reply, D.E. 14 at 98–99; *see* Compl., D.E. 1 at 8. But those are exactly the sort of "conclusory statements" and "naked assertions" that require "further factual enhancement" to justify the discovery process. *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917, 932 (6th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678). While the Employees need not "specifically disprove their entitlement to each exemption," Prelim. Inj. Reply, D.E. 14 at 99, they must at least say what they *in fact* do for the Company. Only those "well-pleaded fact[s]" "must [be] accept[ed] as true" when assessing the sufficiency of the complaint. *Bates*, 958 F.3d at 480. Without them, the Court cannot "draw

[a] reasonable inference that the [Commission] is liable" to the Auctioneers in any way. *Hensely Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

It is no response to say the complaint has been bolstered by subsequent filings. In a tardy attempt to support preliminary relief, each Employee submitted a declaration of real-world facts. *See* Kimball Decl., D.E. 14-1; Smith Decl., D.E. 14-2; Brajkovich Decl., D.E. 14-3. But "[f]or decades, it has been 'black-letter law' that courts must not review outside materials when evaluating [the] sufficiency" of a complaint. *Cotterman v. City of Cincinnati*, No. 21-3659, 2023 WL 7132017, at *5 (6th Cir. Oct. 30, 2023) (quoting *Bates*, 958 F.3d at 483). And that rule holds even when such materials are on the same docket. *See id.* If the Employees want the benefit of their declarations, they should amend the complaint to say what they actually do. *See id.* Absent such amendment, the complaint will plead no actionable set of facts.

II. The Auctioneers' theory of a free speech violation should be rejected.

The defects identified above would normally counsel dismissal without prejudice. But for entirely separate reasons, any effort to (yet again) replead would be futile. Even assuming an imminent threat of prosecutions, such prosecutions would not violate the First Amendment.

A. The Court must ask only whether the Tennessee law has a rational basis.

"[T]he First Amendment provides" protection against government action that impermissibly "'abridg[es] the freedom of speech.'" *Lichtenstein v. Hargett*, 83 F.4th 575, 582 (6th Cir. 2023) (quoting U.S. Const. amend. I). It does not abrogate Tennessee's "traditional 'police power[]'" to pass laws that "'protect' the well-being of its residents." *Norwegian Cruise Line Holdings Ltd v. State Surgeon Gen.*, 50 F.4th 1126, 1142 (11th Cir. 2022) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)). Nor does it cover every "course of conduct" that happens to be "carried out by means of language." *Id.* at 1135 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)); *accord United States v. Hansen*, 599 U.S. 762, 783 (2023) (citing *Giboney*

v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)). Indeed, the "spoken [and] written" word pervades "most" human affairs. *Giboney*, 336 U.S. at 502. But just because an action is "brought about through speaking" does mean courts can strictly scrutinize its regulation. *Id.*

That is exactly what the Auctioneers want out of this case. They say Tennessee law "imposes content-[] and speaker-based" speech "restrictions," Compl., D.E. 1 at 10, but that is only because they equate "speech" with professional auctioneering. They place particular focus on their need to "create narratives, images, and descriptions" to pique the interest of potential bidders, making "the invitation . . . to purchase . . . [more] informative, . . . interesting, and . . . enticing." *Id.* at 5–6. And since "it is impossible to auctioneer without communicating" these narrative "messages," *id.* at 2; *see id.* at 5, the Auctioneers say they "earn [their] living through speech" and the State cannot "forc[e]" them "to get a license," *id.* at 1.

The same could be said of countless other businesses, and the federal courts have widely rejected those arguments. Most recently, the Eleventh Circuit nixed a challenge to a Florida law requiring dieticians to get licenses from the State. *See Del Castillo v. Secretary*, 26 F.4th 1214, 1226 (11th Cir. 2022). An unlicensed "health coach" had sued to prevent the law's enforcement, claiming it violated her speech right to give diet advice. *Id.* at 1216. But the Eleventh Circuit held that "govern[ing] the practice of an occupation" does not raise any First Amendment concerns, at least "so long as [the] inhibition of" speech is "incidental" to "an otherwise legitimate regulation." *Id.* at 1220 (quoting *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011)). Although the practice of dietetics "involve[d] some speech" — mainly in "convey[ing] . . . recommendations" to clients about what they should eat — the burdens on that speech were an acceptable side-effect "of regulating the profession's [overall] conduct." *Id.* at 1226.

In reaching this decision, the court invoked its own circuit precedent regarding a licensing law imposed on "interior designers." *Id.* (citing *Locke*, 634 F.3d 1185). The law at issue had targeted "designers" (as opposed to decorators) who were practicing in "commercial" (as opposed to residential) settings. *Locke*, 634 F.3d at 1189. The plaintiffs wanted to expand their interior design businesses from residential to commercial settings without meeting "Florida's license requirement." *Id.* at 1190. They thus tried to argue that the law trenched on their free speech and could not clear heightened First Amendment review. *See id.* at 1191. Yet the Eleventh Circuit observed that professional licensing generally did *not* raise First Amendment concerns. *See id.* (citing *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring)). "Because the license requirement govern[ed] 'occupational conduct, and not a substantial amount of protected speech,' it d[id] not implicate constitutionally protected activity" and was therefore not subject to heightened scrutiny. *Id.* (quoting *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1429 (11th Cir. 1998)).

Similar cases from other circuits go the same way. In *National Association for the Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216 (3d Cir. 2015), the Third Circuit held that Pennsylvania's attorney-licensing law did "not compel speakers to seek approval" for their "speech," *id.* at 223. "[I]nstead," it merely "impose[d] general prerequisites to practicing law" — a profession that necessarily operates through language. *Id.* In *Young v. Ricketts*, 825 F.3d 487 (8th Cir. 2016), the Eighth Circuit rejected a similar challenge to Nebraska's license requirement for real estate brokers. The court held the law did "no[t] direct[ly] restrict[] . . . speech" but instead targeted "engag[ing] in the business of [a] broker" — another business "'carried out by means of language.'" *Id.* at 492 (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 62 (2006)); *see id.* at 493. In *Ford Motor Company v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001), the Fifth Circuit explained that a law

preventing Ford from "market[ing] preowned vehicles," *id.* at 498, only "incidental[ly]" burdened Ford's speech as "part of an integrated course of [illegal] conduct," *id.* at 506–507. And in *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1st Cir. 2007), the First Circuit explained that a restriction on licensed liquor stores' joint "advertising" did not "implicate any protected [free speech] interest," *id.* at 7.

The takeaway from each case is exactly the same: "[t]he power of government to regulate the professions is not lost" just because "the practice of a profession entails speech." *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (quoting *Lowe*, 472 U.S. at 228 (White, J., concurring)), *abrogated on other grounds by Nat'l Inst. of Family & Life Advocs. v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018). In other words, language is not some magic shield against the State's over-arching police power.

The Sixth Circuit has also adopted this principle. In *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014), the court considered whether licensing "precious metal[]" dealers imposed an unconstitutional restriction on their speech, *id.* at 686. In the dealers' view, the need to obtain a license before "hold[ing themselves] out to the public" improperly burdened speech in their "storefront . . . signage, newspaper advertisements, and" even "business card[s]." *Id.* at 686–87. But the Sixth Circuit rejected that theory on its way to reversing a preliminary injunction. *See id.* at 685. It reasoned the licensing statute restricted "holding out" to distinguish regulated professionals from amateurs, who made "infrequent[t] and informal[] . . . precious metals transactions." *Id.* at 692. Because this economic regulation did not "burden" the dealers' "fundamental right[s]," it could pass constitutional muster on account of its "rational[ity]" alone. *Id.* at 693.

The Sixth Circuit has expounded on its logic more recently by confirming that licensing laws are "presumpti[vely] . . . valid[]." *Tiwari v. Friedlander*, 26 F.4th 355, 361 (6th Cir. 2022)

(quoting *Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 689 (6th Cir. 2011)). To overcome this presumption, a "challenger [must] show that there is 'no rational connection between the enactment and a legitimate government interest.'" *Id.* (quoting *Am. Express*, 641 F.3d at 689). This standard "epitomizes a light judicial touch," requiring "the law [to] stand" so long as "any plausible reason" could support it. *Id.* And that reason need not have "inspire[d] the enacting legislators," or consist of anything but "'rational speculation.'" *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). "Many cases [thus] uphold [licensing] laws," covering every profession from "physicians" to "street vendors." *Id.* at 363 (collecting case). And this case should follow that arc based on the scenario presented by the Auctioneers' pleadings.

Indeed, the complaint amply illustrates how the Auctioneers want to "do[] more than" just "exercis[e] a right" to speak. *Giboney*, 336 U.S. at 503. They do not need auctioneering licenses to describe "breathtaking sunset views" for the sake of self-expression or public debate. Prelim. Inj. Br., D.E. 8-1 at 49. They need auctioneering licenses to describe products as part of "the[ir auctioneering] business," *Young*, 825 F.3d at 492, which Tennessee's lawmakers have seen fit to license and regulate. If not for the business aspect, the Auctioneers could speak to their hearts' content; and so long as they get auctioneering licenses, their "narratives" can say practically whatever they want. *Cf. Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1055 (9th Cir. 2000) (applying similar logic to psychoanalysts). The Auctioneers' problem is they seek to use language for professional purposes. *See* Compl., D.E. 1 at 5. They thus are "not really challenging [any] prohibition on" their narratives; they are challenging the regulation of their business. *Ford*, 264 F.3d at 506 n.7. Even if that business requires speech, "rational basis review applies" to such a challenge. *Liberty Coins*, 748 F.3d at 693.

B. The Court should not subject the law to heightened constitutional scrutiny.

Attempting to reach heightened scrutiny anyway, the Auctioneers say Tennessee law targets their speech under *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018) and the Fourth Circuit's decision in *Billups v. City of Charleston*, 961 F.3d 673 (4th Cir. 2020), *see* Prelim. Inj. Br., D.E. 8-1 at 55. Neither case gets them where they want to go; the Court should reject this maneuver.

In *NIFLA*, the Supreme Court held that a California law likely ran afoul of the First Amendment by requiring health clinics to provide information on abortion services. *See* 138 S. Ct. at 2378. But the Court also reaffirmed that States may impose "restrictions directed at commerce or conduct" even if they "incidental[ly] burden[]" speech. *Id.* at 2373 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011)). "[D]rawing the line between speech and conduct can be difficult," but it was not particularly difficult in *NIFLA*. *Id.* at 2373. "By compelling" dissemination of the government's "message," the California law bore directly on the "content[] of . . . speech." *Id.* at 2371 (quoting *Riley v. Nat'l Fed'n of Blind N.C., Inc.*, 487 U.S. 781, 795 (1988)); *see also Del Castillo*, 26 F.4th at 1221 (explaining *NIFLA*'s reasoning).

The Tennessee law at issue here does no such thing. The complaint at no point alleges the Auctioneers must "'alte[r] the content' of [their] speech" to say what the Tennessee government wants said. *NIFLA*, 138 S. Ct. at 2371 (quoting *Riley*, 487 U.S. at 795). It comes closest with the allegation that they cannot "represent to be . . . auctioneer[s] without holding" valid, government-issued "license[s]." Compl., D.E. 1 at 7 (quoting Tenn. Code Ann. § 62-19-102(a)(1)). But that (again) primarily regulates conduct, for which language is nothing more than a means. *See Liberty Coins*, 748 F.3d at 692. And the speech at issue is not protected anyway, as those without licenses cannot be Tennessee auctioneers. *See* Tenn. Code Ann. § 62-19-101(a)(1); *David Witherspoon, Inc. v. Wood*, 588 S.W.2d 558, 559 (Tenn. Ct. App. 1979). By holding themselves out as

auctioneering professionals without licenses, they would be uttering the sort of "misleading" message the State can doubtless prohibit in a "commercial" context. *First Choice Chiropractic, LLC v. DeWine*, 969 F.3d 675, 681 (6th Cir. 2020) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)). Neither *NIFLA* nor any other precedent gives the Auctioneers any right to do that.

Although *Billups* is admittedly more relevant, it still cannot sustain the free speech theory pressed in this case. The *Billups* case arose from the City of Charleston's decision to require a license for anyone giving professional street-walking tours. *See* 961 F.3d at 676–77. The plaintiffs flunked the licensing exam on "knowledge of [Charleston] and its history." *Id.* at 677 (quoting Code of the City of Charleston § 29-59(b)). They then sued for their right to guide tours anyway, asserting the licensing law trenched on their freedom of speech. *See id.* at 679. The Fourth Circuit eventually bought that argument, holding Charleston was regulating the tour guides' speech directly. *See id.* at 682–84. And because the license exam could not clear heightened constitutional scrutiny, the Fourth Circuit held that it violated the First Amendment. *See id.* at 684–90.

Yet it is notable that the "profession" at issue in *Billups* involved *nothing but* expression through speaking. Unlike the Auctioneers here — who sell goods on behalf of their clients, *see supra* at 1–2 — the Charleston tour guides merely "sp[oke] to visitors" about the city from the traditional public fora of "sidewalks and streets." *Id.* at 683. It thus did not matter that they charged a fee or could be regulated for running a business. *See id.* That business, "by its very nature, depend[ed] on speech," the regulation of which implicated the First Amendment. *Id.*

To the extent *Billups* could be applied outside its facts, its reasoning conflicts with binding and persuasive precedent. A business generally does *not* get First Amendment protection for being "carried out by means of language." *FAIR*, 547 U.S. at 62 (quoting *Giboney*, 336 U.S. at 502).

And business conduct is *not* protected speech just because the business wants "to express an idea." *Lichtenstein*, 83 F.4th at 583 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). The question in every case is whether a message is being "targeted" for government "'suppression,'" *id.* at 584 (quoting *Texas v. Johnson*, 491 U.S. 397, 407 (1989)), or instead just collaterally restricted for being wrapped up in a market transaction, *see Liberty Coins*, 748 F.3d at 692; *accord Del Castillo*, 26 F.4th at 1225–26; *Castille*, 799 F.3d at 220–21; *Young*, 825 F.3d at 492–94; *Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Howell*, 851 F.3d 12, 19–20 (D.C. Cir. 2017); *Ford*, 264 F.3d at 506 n.7; *Wine & Spirits*, 481 F.3d at 7; *Psychoanalysis*, 228 F.3d at 1055. If the Fourth Circuit meant to reject that dichotomy in *Billups*, this Court cannot follow *Billups*'s lead. Sixth Circuit law applies in this Court, *see Transmatic, Inc. v. Gulton Indus., Inc.*, 601 F.2d 904, 913 n.22 (6th Cir. 1979), and it calls for a "light judicial touch," *Tiwari*, 26 F.4th at 361.

C. Tennessee has valid reasons for licensing professional auctioneering.

Tennessee's auctioneering laws clear that deferential standard. To disprove a law was rationally enacted, a plaintiff must "negative every [legitimate] basis" for it. *Beach Commc'ns*, 508 U.S. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Indeed, "'[t]he Constitution does not prohibit . . . stupid laws'" or laws that have failed to "deliver[] on [their] promises." *Tiwari*, 26 F.4th at 365 (quoting *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring)). A law thus survives baseline constitutional scrutiny so long as there was "an evil at hand for correction" and the law could have been deemed "a rational way to correct it." *Psychoanalysis*, 228 F.3d at 1051.

That describes the "legislative measure" challenged here. *Id.* Tennessee has decided to license *all* professional auctioneering, whether it is done by "oral, written, or electronic" means. Tenn. Code Ann. § 62-19-101(2). The Auctioneers focus solely on auctions held over the internet, but they make no effort to distinguish that format from any of the others. *See* Compl., D.E. 1 at

1–2; Prelim. Inj. Br., D.E. 8-1 at 47, 56–58. It thus does not matter how many "complaints" the Commission has tallied that specifically discuss "online auctions with extended time endings." Compl., D.E. 1 at 6. Even assuming it's a disproportionately low share, it would still be rational to treat all "extended time" auctions the same. *Cf. Locke*, 634 F.3d at 1196 (licensing interior designers for the same reason as architects). Of course, the Auctioneers don't question the bases for licensing *all* professional auctioneering, *see* Compl., D.E. 1 at 10–11; Prelim. Inj. Br., D.E. 8-1 at 47, 56–58, because any effort to do so would doubtless fail. Tennessee has maintained its licensing regime for almost six decades, and its "public interest" rationales are still cogent, to say the very least. *See* 1967 Tenn. Pub. Acts ch. 335, § 12.

Professional auctioneers help people maximize the sale price of hard-to-value property, like rare muscle cars, *see* Kimball Decl., D.E. 14-1 at 106, and custom Chevy pickups, *see* Brajkovich Decl., D.E. 14-3 at 111. This can put large sums at stake in a single transaction, *see, e.g.*, Kimball Decl., D.E. 14-1 at 106, raising the risk that an unscrupulous auctioneer might make "substantial misrepresentation[s]" falling short of actionable fraud, 1967 Tenn. Pub. Acts ch. 335, § 13(a); *see* Tenn. Code Ann. § 62-19-112(b)(1). And the auctioneer's position as an intermediary between sellers and buyers gives him the opportunity to misuse funds "belonging to others." 1967 Tenn. Pub. Acts ch. 335, § 13(d); *see* Tenn. Code Ann. § 62-19-112(b)(4); *see also Witherspoon*, 588 S.W.2d at 559 (concerning an out-of-state auctioneer who "refused to remit the purchase price of [a] piece of equipment which sold"). Tennessee law aims to prevent such incidents from ever occurring by reserving the profession to those with demonstrated competence and honesty. *See* Tenn. Code Ann. § 62-19-111(d). If that were deemed irrational, the State could not license practically any profession at all.

Indeed, the most basic rationale for professional licensing is to "to discourage . . . 'scam artists'" from "tak[ing] advantage of" the public. *Moore-King*, 708 F.3d at 573 (quoting J.A. 143). And licensing provides a degree of preventative protection against wrongs that might be hard to spot or redress by after-the-fact enforcement. The average person's "ignorance and incapacity" to understand certain trades and transactions can indeed justify a State-imposed baseline of "skill and learning" across an industry. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). And while that logic naturally applies to fields like law and medicine, *see id.*, courts routinely accept its transplantation to other areas, *see Liberty Coins*, 748 F.3d at 694–95; *Del Castillo*, 26 F.4th at 1218; *Young*, 825 F.3d at 495; *Locke*, 634 F.3d at 1195; *Psychoanalysis*, 228 F.3d at 1053; *cf. Tiwari*, 26 F.4th at 363 (collecting cases). Because auctioneering involves pursuing a client's best interests — and being trusted to employ expertise with integrity along the way — it was rational for the General Assembly to license auctioneering, like so many other States have also done for so long.

* * *

Although the Auctioneers and their counsel may want to forget this, "the *Lochner*[*v. New York*, 198 U.S. 45 (1905)] era has long passed" into history. *Psychoanalysis*, 228 F.3d at 1051. The First Amendment is not a vehicle for *Lochner*'s revival, and this Court cannot "pass on the wisdom of" Tennessee law. *Giboney*, 336 U.S. at 504. Despite what the Auctioneer's theory implies, the Free Speech clause grants no "right . . . to take advantage of speech" as a means of avoiding the State's general power to regulate business. *Id.* at 501. *That* is what this lawsuit is all about; and *that* is why this Court should promptly dismiss it.

CONCLUSION

The Court should grant the Commission's motion and dismiss this lawsuit with prejudice.

Dated: November 22, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I filed the above document using the Court's CM/ECF system on November 22, 2023, which electronically served a copy to all counsel of record, namely:

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