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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILL MCLEMORE; MCLEMORE AUCTION COMPANY, LLC; RON BRAJKOVICH; JUSTIN SMITH; BLAKE KIMBALL,

Plaintiffs-Appellants,

v.

ROXANNA GUMUCIO, in her official capacity as Executive Director of the Tennessee Auctioneer Commission; JOHN LILLARD, in his official capacity as Assistant Director of the Tennessee Auctioneer Commission; JEFF MORRIS, Chair of the Tennessee Auctioneer Commission, in his official capacity; LARRY SIMS, member of the Tennessee Auctioneer Commission, in his official capacity; ED KNIGHT, Vice Chair of the Tennessee Auctioneer Commission, in his official capacity; DWAYNE ROGERS, member of the Tennessee Auctioneer Commission, in his official capacity; JAY WHITE, in his official capacity as a member of the Tennessee Auctioneer Commission,

Defendants-Appellees.

No. 24-5794

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 3:23-cv-01014—Aleta Arthur Trauger, District Judge.

Argued: March 20, 2025

Decided and Filed: August 12, 2025

Before: CLAY, BUSH, and BLOOMEKATZ, Circuit Judges.

COUNSEL

ARGUED: Wencong Fa, BEACON CENTER OF TENNESSEE, Nashville, Tennessee, for Appellants. Gabriel Krimm, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellees. **ON BRIEF:** Wencong Fa, Ben Stormes, BEACON

CENTER OF TENNESSEE, Nashville, Tennessee, for Appellants. Gabriel Krimm, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellees. Thomas A. Berry, CATO INSTITUTE, Washington, D.C., Timothy Sandefur, GOLDWATER INSTITUTE, Phoenix, Arizona, for Amici Curiae.

CLAY, J., delivered the opinion of the court in which BUSH and BLOOMEKATZ, JJ., concurred. BUSH, J. (pp. 11–14), delivered a separate concurring opinion.

OPINION

CLAY, Circuit Judge. Plaintiffs, a group of auctioneering professionals in the state of Tennessee, appeal the district court's dismissal of their First Amendment claim against the Tennessee Auctioneer Commission and its members under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below, we **AFFIRM**.

I. BACKGROUND

A. Legislative and Factual History

In 1967, the Tennessee General Assembly passed a state law to define and regulate the auctioneering profession. *See* 1967 Tenn. Pub. Acts ch. 335. Under this law, the Tennessee Auctioneer Commission ("the Commission") was charged with issuing professional licenses to auctioneers who were "reput[able], trustworthy, honest and competent to transact the business of an auctioneer . . . to safeguard the interest of the public." Ex. A, 1967 Tenn. Pub. Acts ch. 335, R. 19-1, at Page ID #157. Broadly speaking, this regime requires auctioneers to become licensed in Tennessee, and a person may not "[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by the [C]ommission." Tenn. Code. Ann. § 62-19-102(a)(1).[1] Persons may become licensed auctioneers after successful completion of a licensure exam or course of instruction ranging from sixteen to thirty-four hours, depending on the

[1]The Tennessee statute only applies to auctioneering professionals, as opposed to various amateur, non-profit, court-appointed, or government actors who may engage in auctioneering. *See* Tenn. Code. Ann. § 62-19-103.

auctioneer's desired title and role, ranging from "bid caller auctioneer" to "affiliate auctioneer" to "principal auctioneer."[2] *See* Tenn. Code. Ann. § 62-19-111.

This statutory scheme underwent various updates throughout the years to keep pace with changing technology and the rise of online auctions. Since 2019, the Tennessee statute has defined an "auction" to mean:

> [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.

Tenn. Code. Ann. § 62-19-101(2) (emphasis added). Among other exemptions, this definition excludes online listings for a "fixed price," where the seller has set a predetermined price for the item, as well as "timed listings that allow bidding on an internet website, but do not constitute a simulcast of a live auction." Tenn. Code. Ann. § 62-19-103(9). The term "timed listing" is understood to mean an online listing "offering goods for sale with a fixed ending time and date that does not extend based on bidding activity," such as with items sold through platforms such as eBay. *See* 2019 Tenn. Pub. Acts ch. 471, R.19-4, at Page ID #190; Tenn. Code. Ann. § 62-19-101(12). Unlike timed listings, auctioneers hosting *extended-time auctions* are subject to Tennessee's license requirement because of their apparent similarity to conventional auctions and increased potential for escalatory bidding. Conducting an online auction without a license, or otherwise violating the statute, is a Class C misdemeanor. Tenn. Code. Ann. § 62-19-121.

Plaintiffs Will McLemore, Ron Brajkovich, Justin Smith, and Blake Kimball are professional auctioneers employed by the Tennessee-based McLemore Auction Company, LLC, who conduct extended-time auctions online. Plaintiff McLemore, the company's president and founder, is a licensed auctioneer under Tennessee law. Plaintiffs Brajkovich, Smith, and Kimball are all unlicensed ("the unlicensed auctioneers"). Over a series of Task Force meetings to implement the 2019 auctioneering law (the "Online Auction Law"), McLemore advocated against the law's application to extended-time online auctions, but his views did not prevail.

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[2]Principal auctioneers also require a high school diploma or equivalent credential to become licensed and must serve as an affiliate auctioneer under supervision for at least six months. Tenn. Code. Ann. § 62-19-111(c).

B. Procedural History

In his first lawsuit, Plaintiff McLemore alleged that the Online Auction Law's licensing requirement was unconstitutional under either the First Amendment or Dormant Commerce Clause. The district court granted his Motion for Summary Judgment on the latter theory but did not resolve the First Amendment issue. *See McLemore v. Gumucio*, 593 F. Supp. 3d 764, 782–83 (M.D. Tenn. 2022). On appeal, this Court vacated the district court's decision for a lack of standing and remanded to dismiss on jurisdictional grounds. *See McLemore v. Gumucio*, No. 22-5458, 2023 WL 4080102, at *3 (6th Cir. June 20, 2023). The case was then dismissed.

On September 25, 2023, Plaintiffs Brajkovich, Smith, and Kimball joined McLemore in filing another lawsuit against the Commission and its members ("the Commission" or "Defendants"), alleging that Tennessee's licensing scheme violates the First Amendment. On October 3, 2023, Plaintiffs filed a Motion for Preliminary Injunction to enjoin the Commission from enforcing the licensing scheme against extended-time auctions conducted online. On November 22, 2023, Defendants filed a Motion to Dismiss arguing that Plaintiffs lacked standing, and that their First Amendment claim failed on the merits. On August 19, 2024, the district court granted Defendants' Motion to Dismiss and denied Plaintiffs' Motion for Preliminary Injunction. The district court reasoned that *Liberty Coins, LLC v. Goodman* negated Plaintiffs' First Amendment claim by subjecting it to rational basis review rather than heightened scrutiny. 748 F.3d 682 (6th Cir. 2014). This appeal followed.

II. DISCUSSION

A. Standard of Review

We review *de novo* the district court's dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007); *Kiser v. Kamdar*, 831 F.3d 784, 787 (6th Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). These allegations, viewed in the light most

favorable to Plaintiffs, "must be enough to raise a right to relief above the speculative level." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *Twombly*, 550 U.S. at 555.

B. Analysis

Plaintiffs argue that speech by unlicensed auctioneers conducting business online is "pure speech" protected by the First Amendment, and that Tennessee's Online Auction Law unconstitutionally burdens this right. *See* Appellants' Br., ECF No. 15, 17–18. They allege that the Law constitutes a content-based speech restriction by distinguishing between the rights of licensed auctioneers, who may host extended-time auctions online, and unlicensed auctioneers, who may not. Plaintiffs also take issue with the Law's various exemptions for auctions of fixed price goods, intangible property, and nonprofit items, in an attempt to argue that the Law discriminates based on content or the speaker's identity. Plaintiffs further explain that online auctioneers must "craft[] narratives" and use "editorial discretion" to make their items "more enticing to [online] buyers," which they allege is hindered by the state's enforcement of the Online Auction Law. *See id*. at 23–24. They contend that the district court misconstrued *Liberty Coins* in holding that the Online Auction Law regulates business conduct as opposed to speech, thereby applying rational basis review and dismissing their complaint for failure to state a claim. 748 F.3d at 682. Plaintiffs urge this Court to apply heightened scrutiny to the Online Auction Law and remand to the district court.

In response, Defendants describe the Online Auction Law as a legitimate regulation of Plaintiffs' economic and professional conduct, not their speech, and endorse the district court's interpretation of *Liberty Coins*. We agree with Defendants.

As an initial matter, Plaintiffs' attempt to characterize the professional conduct of auctioneers as "pure speech" or "commercial speech" is misplaced. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023) (associating "pure speech" with "images, words, symbols, and other modes of expression" entitled to strong First Amendment protection); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience" and entitled to some constitutional protections, albeit less than those reserved for pure speech).

Their First Amendment claim does not turn on classifications of speech. Rather, the threshold question we must resolve is whether the Online Auction Law, a state licensing statute, "regulates . . . speech or simply regulates economic activity." *Liberty Coins*, 748 F.3d at 695. We hold that it regulates economic activity, and that its burdens on speech are merely incidental to that regulation. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 768 (2018) (hereinafter "NIFLA").

In the instructive case, *Liberty Coins*, we reached a similar conclusion in the context of the Precious Metals Dealers Act (the "PMDA"), an Ohio statute requiring all persons "engaged in the business of purchasing" precious metals to obtain a license before "hold[ing] [themselves] out to the public as willing to purchase" such metals. 748 F.3d at 687. Plaintiff Liberty Coins, an unlicensed business and dealer of precious metals, challenged the PMDA as facially violating the speech rights of businesses by requiring them to obtain a license before conducting their operations in public. *See id*. at 685–86. Liberty Coins alleged that the PMDA's license requirement placed an unconstitutional burden on commercial speech and necessitated heightened scrutiny review, but we deemed that argument misplaced. *See id*. at 695. This Court reasoned that commercial speech rights do not extend to *unlicensed* dealers operating businesses "that [are] not in compliance with the reasonable requirements of Ohio law." *Id*. at 697. In other words, the PMDA's requirement that precious metals dealers become licensed before holding themselves out as such to the public was a proscription on "business conduct and economic activity, not speech." *Id*. This regulation served the undeniably sound purpose of protecting consumers from theft, fraud, money laundering, terrorism, and the dealing of stolen goods, amid other concerns. *See id*. at 693–94 (describing the PMDA as "a regulatory scheme meant to protect the safety and welfare of the public through the regulation of professional conduct"). Thus, because the PMDA served a valid government purpose and did not burden a fundamental right or create a suspect classification, we applied rational basis review to conclude that the PMDA did not violate the plaintiff's First Amendment rights. *Id*. at 693–95.

Like the PMDA, the Online Auction Law is a licensing scheme that regulates professional *conduct*—not *speech*. *See id.* at 693, 697. As noted by the Supreme Court, "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). This stands true for all types of conduct. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (stating that "it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed"). Notably, professional conduct is not protected by the First Amendment merely because it involves language. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 429 (6th Cir. 2019); *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring) (noting that "[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech"). We instead ask whether the state law targets "speech as speech," or merely "professional conduct" with an incidental burden on speech. *See NIFLA*, 585 U.S. at 768, 770. The latter applies here, since the Online Auction Law "incidentally burdens [Plaintiffs'] speech only as part of [Tennessee's] regulation of professional conduct [for auctioneers]."[3] *EMW Women's*, 920 F.3d at 446. While Plaintiffs must speak to an audience or even "craft[] narratives" to sell products, their speech is incidental to the underlying sales transaction.[4] Appellants' Br., ECF No. 15, 23.

Plaintiffs argue that *Liberty Coins* is inapposite "because metal dealers, unlike online auctioneers, don't necessarily engage in speech." Appellants' Br., ECF No. 15, 29. They liken the instant facts to those in *Billups v. City of Charleston*, a Fourth Circuit decision where the court reviewed a licensing ordinance for Charleston tour guides under intermediate scrutiny. 961 F.3d 673 (4th Cir. 2020). *Billups* does not bind us. But even so, this argument is unavailing for two main reasons. First, it presupposes that metal dealers such as those in *Liberty Coins*, as well as other professionals, do not engage in speech like auctioneers. We cannot think of a

[3]Of course, regulations targeting the sale of speech itself do not escape the First Amendment's ambit. *See Thomas v. Collins*, 323 U.S. 516 (1945) (holding unconstitutional a law requiring pro-union advocates to obtain a license before giving paid speeches). In the present matter, however, the statute only regulates the sale of property at auction, not the sale of an auctioneer's speech.

[4]The Online Auction Law requires licensing for the practice of auctioneering, which involves conducting or facilitating a "sales transaction." Tenn. Code. Ann. § 62-19-101(2).

profession that does not involve speech to some degree, and auctioneers are not in a class of their own merely because they conduct their business primarily through the use of language. *See Giboney*, 336 U.S. at 502 (noting that most "course[s] of conduct" are "brought about through speaking or writing"). Second, and more importantly, Plaintiffs' argument fails even under Fourth Circuit precedent. As the Fourth Circuit recently explained, *Billups* turned on the fact that the city's ordinance "aimed at speech taking place in a traditionally public sphere," namely "public sidewalks and streets," "where First Amendment Rights are at their apex." *360 Virtual Drone Servs. LLC v. Ritter*, 102 F.4th 263, 274 (4th Cir. 2024). The Fourth Circuit has declined to apply *Billups* to professional services, such as Plaintiffs' auctioneering, that take place "in the private sphere," involve no "unpopular or dissenting" message, and carry harmful "economic and legal consequences" if rendered improperly. *See id.* at 278.

Importantly, the Online Auction Law does not censor Plaintiffs' freedom of expression or instruct Plaintiffs *how* to advertise their products for auction online; it simply prevents unlicensed members of the profession from transacting with consumers and the public.[5] *See Lichtenstein v. Hargett*, 83 F.4th 575, 588 (6th Cir. 2023) (emphasizing the import of asking "whether a law treats different *messages* differently, not whether it treats different *conduct* differently"). This incidental burden on Plaintiffs' speech is simply the government's regulation of auction sales. *See Sorrell*, 564 U.S. at 567. Certainly, the Online Auction Law does not prevent Plaintiffs from "craft[ing] compelling descriptions and narratives" for their products at a sanctioned auction. Appellants' Br., ECF No. 15, 23. It only prevents them from conducting an auction without a license.

Moreover, the regulation of professional auctioneering is plainly authorized by the state police power, which affords Tennessee "broad power to establish standards for licensing practitioners." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975); *see also Liberty Coins*, 748

[5]Many courts have acknowledged the state's broad power to restrict the commercial conduct of unlicensed professionals. *See generally Young v. Ricketts*, 825 F.3d 487, 495 (8th Cir. 2016) (noting that a licensing scheme was "rationally related to the legitimate State interest in ensuring the competency and honesty of those who hold themselves out as providing professional [] services"); *Off. of Pro. Regul. v. McElroy*, 824 A.2d 567, 571 (Vt. 2003) (upholding a law restraining an unlicensed broker "from publishing misleading statements about his own status as a broker"); *Martinez v. Goddard*, 521 F. Supp. 2d 1002 (D. Ariz. 2007) (upholding a law preventing unlicensed contractors from engaging in construction work).

F.3d at 692 (noting that the state's "regulatory power is often exercised through the enactment of licensing statutes"). Tennessee has exercised that regulatory power by imposing a general licensing requirement for commercial auctioneers such as Plaintiffs. *See Lowe*, 472 U.S. at 232 (White, J., concurring) (noting that "generally applicable licensing provisions limiting the class of persons who may practice [a] profession" should not be construed as "a limitation on freedom of speech"). Under that regime, Plaintiffs must abide by the "relatively undemanding" requirements of Tennessee law to become licensed auctioneers. Order, R. 30, at Page ID #261. Because Tennessee's licensing scheme does not implicate a suspect classification or fundamental right, we apply rational basis review. *Liberty Coins*, 748 F.3d at 693. Under that standard, we uphold "[r]egulations on entry into a profession . . . [as] constitutional if they 'have a rational connection with the applicant's fitness or capacity to practice' the profession." *Lowe*, 472 U.S. at 228 (White, J., concurring).

This permissive standard bears "a strong presumption of constitutionality," and Defendants need only show that the statute is "rationally related to a legitimate government purpose." *Id*. at 694. In their appellate brief, Defendants assert that the Tennessee General Assembly endeavored in 1967 to hold auctioneers to certain professional and ethical standards to safeguard the public from fraud. Ex. A, 1967 Tenn. Pub. Acts ch. 335, R. 19-1, at Page ID #161 (aiming to protect Tennesseans from "improper, fraudulent or dishonest dealings"). The law continued to evolve over the years in light of technological changes and the rise of internet platforms. Then, in 2019, the legislature sought to extend these protections to auctions conducted through "electronic" means, Tenn. Code Ann. § 62-19-101(2), while exempting fixed timed listings, which apparently do not implicate the same concerns.

In applying rational basis review, the district court properly stated that "Tennessee has a legitimate interest in addressing fraud and incompetence in the auctioneering field." Order, R. 30, at Page ID #261; *see Liberty Coins*, 748 F.3d at 694 (noting that "such a government purpose is legitimate, even compelling"). Further, the exemption for online timed listings "is rationally supported by extended-time auctions' greater similarity to conventional auctions and greater vulnerability to escalatory bidding strategies, including fraudulent ones." Order, R. 30, at Page

ID #261. Accordingly, the Online Auction Law withstands rational basis review, and the district court did not err by granting Defendants' motion to dismiss under Rule 12(b)(6).

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** the judgment of the district court.

CONCURRENCE

JOHN K. BUSH, Circuit Judge, concurring. Auctioneers speak, so one might first think that auctioneer licensing runs afoul of the First Amendment guarantee of "freedom of speech." *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). But the Free Speech Clause must be understood like any other constitutional provision: text requires context. The majority ably relies on one type of context—case law—to explain why that initial reading of the First Amendment is incorrect. I write separately to support the court's holding based on another type of context—the history and tradition of the First Amendment.

First, the relevant case law in a nutshell. Free-speech doctrine distinguishes between conduct and speech. Only regulations of the latter receive heightened scrutiny under the First Amendment. But these categories sometimes overlap. Expressive conduct, like burning a draft card or designing a website, can receive the heightened protection we give speech. *See United States v. O'Brien*, 391 U.S. 367 (1968); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). And some written or verbal speech, like a drug prescription, is tied so closely to conduct that the state may regulate it without facing heightened scrutiny even when the necessary consequence of that regulation is a burden on speech. *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 47 (2017); *see also Thomas v. Collins*, 323 U.S. 516, 547 (1945) (Jackson, J., concurring) ("[T]he constitutional remedy would be to stop the evil, but permit the speech, if the two are separable; and only rarely and when they are inseparable to stop or punish [the] speech.").

As relevant here, when a speaker "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of [a] client," that "is properly viewed as engaging in the practice of a profession," which we categorize as conduct. *Lowe v. S.E.C.*, 472 U.S. 181, 229 (1985) (White, J., concurring). Under Tennessee law, an auctioneer is a seller's agent. *Johnson v. Haynes*, 532 S.W.2d 561, 564 (Tenn. Ct. App. 1975). Because an auctioneer's speech functions to create a binding agreement between the property owner and the highest bidder,

Green v. Crye, 11 S.W.2d 869, 870 (Tenn. 1928), the state may burden that speech insofar as the burden is a necessary consequence of the state's regulation of auction sales.[1]

That may be true under the case law, but what about the original meaning of the constitutional text? The freedom of speech had an understood content when Americans ratified the First Amendment. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 565 n.28 (2021) (Alito, J., concurring in the judgment). While the outer limits of this guarantee are open to debate, the history shows us some basics. Simply put, if American governments in the founding era routinely prohibited a type of communication, it probably does not fall within the freedom of speech that the Constitution protects. *Cf. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 28–30 (2022).

The Supreme Court applied this logic in *Vidal v. Elster*, 602 U.S. 286 (2024). There, the plaintiff argued that the federal government's trademark regime violated the freedom of speech because a trademark necessarily discriminates based on content—only a mark's owner may use it. True, the Court acknowledged, a trademark regime "necessarily requires content-based distinctions." *Id.* at 295. But at the same time, "despite its content-based nature, trademark law has existed alongside the First Amendment from the beginning." *Id.* at 299. The Court resolved this apparent conflict between clear history and modern doctrine in favor of the history: the "longstanding, harmonious relationship" between trademark law and the First Amendment "suggest[ed] that heightened scrutiny need not always apply in this unique context." *Id.* The Court concluded that "history and tradition establish that the particular restriction before us . . . does not violate the First Amendment." *Id.* at 310. If modern doctrine conflicts with how the ratifiers of the Constitution would have understood their rights, then the doctrine has room to improve. If we cannot adjust the doctrine, *Vidal* directs us to carve out an exception when the government makes a sufficient historical showing that a constitutional right does not extend to the conduct that it seeks to regulate.

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[1]Indeed, the statute targets auctioneering speech only in the context of an auction. It does not regulate how one may advertise a legitimate auction. And it does not require a license to use auctioneering speech in other contexts, like at a competition or in a music video. *See* Goldwater Inst. Br. at 22 (discussing the World Livestock Auctioneer Championship); Autotuned Vids, *Auctioneer Contest with Autotune*, https://youtu.be/-PO-F_P3OW0.

Justice Barrett disagreed with the *Vidal* majority. She believed the majority should not have relied on history and tradition in that case because "federal trademark law did not exist at the founding—and American trademark law did not develop in earnest until the mid-19th century." *Id.* at 312 (Barrett, J., concurring in part). Indeed, the first case to adjudicate a trademark dispute came in 1837, too late in Justice Barrett's view to support "a claim about the original meaning of the Free Speech Clause." *Id.*

Here, however, the evidence from the founding era is much stronger. At common law, British auctioneers had legal responsibilities to both the seller, and, "after knocking down the hammer," to the buyer. *Simon v. Motivos*, 97 Eng. Rep. 1170, 3 Burr. 1921 (K.B. 1766). This understanding crossed the Atlantic: James Kent, a renowned expositor of American common law and Chancellor of New York's highest court, said that the issue was "settled" and that *Simon* had been "repeatedly recognised, and considered as the established doctrine in respect to auction sales of lands and chattels, by the English and American courts." 2 James Kent, *Commentaries on American Law* 427 (1827). Sitting as Chancellor, Kent held that "the auctioneer is a competent agent to sign for the purchaser either of lands or goods at auction; and the insertion of his name as the highest bidder in the memorandum of the sale by the auctioneer, immediately on receiving his bid, and striking down the hammer, is a signing within the statute [of frauds], so as to bind the purchaser." *McComb v. Wright*, 4 Johns. Ch. 659, 663–64 (N.Y. 1820).

Given that auctioneering commanded significant legal obligations, perhaps it comes as no surprise that auctioneer licensing was common at the founding. Auctioneers in Britain needed a license. 1 William Blackstone, Commentaries *320. Starting in 1730, auctioneers in Pennsylvania did, too.[2] By 1773, at least three other colonies had joined Pennsylvania in

[2] *See* "An Act for Regulating Peddlers, Vendues, &c," Ch. 308, *in* 4 *The Statutes at Large of Pennsylvania* 141 (1897) (eff. Feb. 14, 1730). The legislature explained that "sundry persons . . . have taken upon themselves to set up lotteries and also to sell and retail goods . . . by way of vendue at unseasonable times in the public streets of the said city of Philadelphia, in deceit of the buyers and to the great annoyance of its inhabitants by reason of the many idle and disorderly persons assembling themselves together in the night-time in the open streets at the said vendues or public sales." *Id.* at 143.

licensing their auctioneers.[3] And for a short period during the American Revolution, some states restricted auction sales altogether.[4]

The ratification of the First Amendment appears to have had no impact on auctioneer licensing regimes. In 1794, Congress enacted a statute requiring all auctioneers nationwide to have a license—it found licensing necessary to implement its power to tax auction sales. 1 Stat. 397. And by the end of 1796, at least eight of the thirteen original states had enacted licensing regulations for auctioneers.[5] Indeed, Chancellor Kent referred to the licensing of auctioneers as one of the core aspects of a state's police power. *See Livingston v. Van Ingen*, 9 Johns. 507, 580 (N.Y. 1812).

In short, the evidence is strong that the Constitution's ratifiers did not consider the ability to chant at auctions part of the natural right to free speech recognized by the First Amendment. Like trademark rules, auctioneer licensing laws encompass part of the "unique context" in which "heightened scrutiny need not always apply." *Vidal*, 602 U.S. at 299. Here, what case law indicates, history and tradition confirm: auctioneer licensing laws do not infringe the freedom of speech codified in the Constitution.

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[3] *See* 1757 R.I. Acts & Resolves 59 ("Whereas Mr. William Coddington . . . represented unto this Assembly, That all Vendue-Masters within the Colony, have, by the Laws thereof, always had, since the Appointment of such Officers, the sole Right of selling Goods, Wares, and Merchandizes, at Public Auction, except such Things as the Sheriffs have seized by Execution."); "An Act to Regulate the Sale of Goods at Public Vendue, Auction or Outcry, Within This Colony," Ch. 1516, *in Laws of the City of New York* 637 (1774) (eff. 1772); "An Act . . . to Limit the Number of Auctioneers," Ch. 44, 1773 Mass. Acts and Resolves 248.

[4] *See, e.g.*, "An Act to Prevent the Selling of Goods at Public Vendue," Aug. 1777 R.I. Acts & Resolves 5 ("[I]n a Time of Scarcity, it often happens, that one Person bidding upon another has a Tendency to enhance the Price of such Goods much beyond the real Value, to the great Damage of the Public: And some People have been wicked enough to bid upon their own Goods for the Purpose of raising the Price."); "An Act to Prevent Forestalling, Regrating, Engrossing, and Public Vendues," Ch. 11, May 1777 Va. Acts 65; "An Act to Prohibit the Sale of Goods, Wares, and Merchandises by Public Vendue . . . ," Ch. 26, 1777 Pa. Laws 80.

[5] *See* "An Act to Regulate Auctions in Baltimore-Town in Baltimore County," Ch. 61, 1784 Md. Laws 412; "An Act Concerning Corporations," 1796 Va. Acts 13; "An Act for the Better Regulating of Vendues Within This State," *in Digest of the Laws of the State of Georgia* 570 (1802) (eff. Dec. 8, 1794); "An Ordinance for Regulating the Public Vendues in This State. . . ," *in The Public Laws of the State of South Carolina* 363 (1790) (eff. Mar. 17, 1785); "An Act Empowering the Town of Providence to Choose as Many Vendue-Masters, or Auctioneers, As They Shall Think Necessary," June 1796 R.I. Acts & Resolves 7; "An Additional Supplement . . . Respecting Public Auctions and Auctioneers," Ch. 1389, *in* 2 *Laws of Commonwealth of Pennsylvania* 519 (1810) (eff. Mar. 27, 1790); "An Act for the Regulation of Sales by Public Auction," Ch. 4, 1784 N.Y. Laws 590; "An Act to Regulate the Sale of Goods at Public Vendue," Ch. 8, 1795 Mass. Acts and Resolves 323.