

No. 25-

IN THE
Supreme Court of the United States

WILL MCLEMORE, *et al.*,

Petitioners,

v.

ROXANNA GUMUCIO, IN HER OFFICIAL CAPACITY
AS EXECUTIVE DIRECTOR OF THE TENNESSEE
AUCTIONEER COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Nat’l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 768 (2018) (*NIFLA*), this Court rejected the professional speech doctrine, which gave government “unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.” Yet in the seven years since, “the division between speech and conduct has not been evenly applied throughout the country, particularly when it comes to licensing schemes that determine which individuals can speak about certain topics.” *Richwine v. Matuszak*, 148 F.4th 942, 953 (7th Cir. 2025) (citing conflicting decisions from federal courts of appeals). The decision below deepened that acknowledged circuit split. The questions presented are:

1. Whether a burden on speech must be incidental merely because it is imposed by an occupational licensing law.
2. Whether a law that imposes incidental burdens on speech must satisfy intermediate scrutiny.

PARTIES

Petitioners (Plaintiffs-Appellants below) are Will McLemore; McLemore Auction Company, LLC; Ron Brajkovich; Justin Smith; and Blake Kimball.

Respondents (Defendants-Appellees below) are 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, in his official capacity as Chair of the Tennessee Auctioneer Commission; Ed Knight, in his official capacity as Vice Chair of the Tennessee Auctioneer Commission; and Larry Sims, Dwayne Rogers, and Jay White in their official capacities as members of the Tennessee Auctioneer Commission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner McLemore Auction Company, LLC, certifies that it has no parent corporation and no publicly held company owns 10% or more of its stock. Petitioners Will McLemore, Ron Brajkovich; Justin Smith; and Blake Kimball are individuals.

STATEMENT OF RELATED PROCEEDINGS

The proceedings in the federal district and appellate courts identified below are directly related to the above-captioned case in this Court.

McLemore v. Gumucio, No. 3:23-cv-01014 (M.D. Tenn. Aug. 19, 2024).

McLemore v. Gumucio, No. 24-5794 (6th Cir. Aug. 12, 2025).

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PETITION FOR A WRIT OF CERTIORARI

Seven years ago, this Court rejected the professional speech doctrine, which lower courts applied to grant government “unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.” *Nat’l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 768 (2018) (*NIFLA*). Yet, as the decision below shows, that doctrine is alive and well in some parts of the country today. The Sixth Circuit panel below refused to apply First Amendment scrutiny to a licensing requirement for online auctioneers by recasting their speech as professional conduct. Its decision calls for this Court’s review for three reasons.

First, the decision below deepened an acknowledged circuit split on whether a burden on speech must be incidental merely because it’s imposed as part of an occupational licensing law. As the Seventh Circuit put it in another case just months ago, “the division between speech and conduct has not been evenly applied throughout the country, particularly when it comes to licensing schemes that determine which individuals can speak about certain topics.” *Richwine v. Matuszak*, 148 F.4th 942, 953 (7th Cir. 2025).

Second, the decision below contravenes this Court’s precedents. This Court has never countenanced a diluted First Amendment standard for occupational licensing laws. Quite the opposite: it has emphasized that “Speech is not unprotected merely because it is uttered by professionals.” *NIFLA*, 585 U.S. at 767. And even if the panel below were correct that the burdens on speech were “incidental,” it still erred in applying only rational basis review. *See Free*

Speech Coalition, Inc. v. Paxton, 145 S. Ct. 2291, 2306 (2025) (laws that impose an incidental burden on speech must be subjected to intermediate scrutiny).

Third, this case is an excellent vehicle for this Court to address an important question. The rise in both the number of occupational licensing laws and the number of Americans who speak for a living puts both on a collision course. This Court's intervention is thus needed to provide clarity not just for online auctioneers, but also for journalists, advice columnists, tour guides, and other Americans who speak for money. This case presents an exceptional vehicle for this Court's review since speech isn't incidental to an online auction; it's the essence of an online auction. And this case's procedural procedure enables this Court to focus its limited resources on resolving the important question of whether full First Amendment scrutiny applies to this occupational licensing law.

This Court should grant the petition.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–21a) is reported at 149 F.4th 859. The opinion of the district court (App. 22a–44a) is not reported but is available at 2024 WL 3873415.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on August 12, 2025. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the U.S. Constitution, as incorporated against the states by the Fourteenth Amendment, provides: “Congress shall make no law . . . abridging the freedom of speech.” Tennessee law makes it unlawful for a person to “[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by the commission.” Tenn. Code Ann. § 62-19-101(a)(1). An auction is 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).

STATEMENT OF THE CASE

I. Factual Background

A. Online Auctions and Online Auctioneers

Will McLemore is a pioneer in his field. In 2006, McLemore founded McLemore Auction Company, LLC, and became one of the first online auctioneers in Tennessee.¹ See Complaint, ECF No. 1 *McLemore v. Gumucio*, 3:23-cv-01014, ¶ 7 (M.D. Tenn. Sept. 25, 2023).

1. McLemore Auction Company lists items on its website and allows consumers to bid on them. See McLemore Auction Company, <https://www.mclemoreauction.com/> (last visited October 31, 2025).

Popularized by companies such as eBay, online auctions allow consumers to bid on items from their homes and avoid the clamor and din associated with traditional auctions.² Yet because consumers in online auctions (unlike those in traditional auctions) can't physically inspect the items up for auction, they must rely on online auctioneers to furnish accurate and enticing descriptions of the items being sold. *Id.* ¶ 23. Online auctioneers craft narratives, images, and descriptions to inform bidders of the characteristics of items up for auction. *Id.* For instance, an online auctioneer may highlight an item's historical significance or tout the accomplishments of an artist who created the work that's up for auction. *See id.* ¶¶ 24–25.

McLemore's online auctions, for example, have highlighted the work of acclaimed speaker designer Jim Thiel, who used the auctioned items in his laboratory before his death. *Id.* ¶ 26. This type of information helps bidders understand the significance of items up for auction and ensures that the online auctions at McLemore Auction Company are as informative, enticing, and interesting as possible. *Id.* ¶ 28.

The success of McLemore Auction Company is largely due to those who work for it. Petitioners Ron Brajkovich, Justin Smith, and Blake Kimball contribute to the company's success by exhibiting creativity in their roles as online auctioneers.³ *See* Declarations in Support of Mot.

2. Online auctions do not refer to live auctions on interactive platforms like Zoom.

3. For ease of reference, "Online Auctioneers" refers to all Petitioners, "McLemore" refers to Petitioners Will McLemore and McLemore Auction Company, LLC, and "Unlicensed Online

for Prelim. Inj., ECF No. 14-1, 14-2, 14-3, *McLemore v. Gumucio*, 3:23-cv-01014 (M.D. Tenn., Oct. 31, 2023); *See also* Opp. to Mot. to Dismiss, ECF No. 22, at 3 & n.5, 5–7 (incorporating declarations). Blake Kimball, for example, has at times taken a role similar to a film director by selecting backdrops or lighting for cars that are up for auction. Declaration of Blake Kimball, ECF No. 14-1, ¶ 3. This included putting dome lights on a Dodge Charger to “capture its majestic appearance at night.” *Id.* Because Tennessee did not require a license for online auctioneers until recently, Petitioners Brajkovich, Smith, and Kimball do not hold an auctioneer’s license. *See* Compl. ¶¶ 44–47.

B. Tennessee’s Regulation of Online Auctions

With the rise of e-commerce, the Tennessee General Assembly in 2006 exempted online auctions for “fixed price or timed listings that allow bidding on an internet website, but do not constitute a simulcast of a live auction” from its regulation of auctioneers. 2006 Tenn. Pub. Ch. 533, codified at Tenn. Code Ann. § 62-19-103(9).

Yet by 2016, the Commission sought to regulate online auctions. After the Commission determined that Mr. McLemore’s extended-time online auctions fell under the statutory exemption for online auctions, Compl. ¶ 31, it proposed a rule change to regulate extended-time online auctions.⁴ *See* Tenn. Comp. R. & Regs. 0160-01-.28

Auctioneers” refers to Petitioners Ron Brajkovich, Justin Smith, and Blake Kimball. The “Commission” or “the government” refers to all Respondents.

4. In a “fixed-timed” auction, the goods offered for sale have a fixed ending time. App. 25a. By contrast, an “extended-time”

(Online Auctions, expired). But the Joint Committee for Government Operations voted a negative recommendation on the portion of the rule that would have regulated online auctions. Joint Government Operations Committee, Rule Filed in October 2016, (Dec. 15, 2016) 4:09:51–4:10:47.⁵

In 2017, the General Assembly considered bills that would have regulated extended-time, but not fixed-time, online auctions. *See* Tenn. SB 0814; Tenn. HB 0747. The bills did not pass. Undeterred, similar bills were introduced in 2018. *See* Tenn. SB 2081; Tenn. HB 2036. Rather than pass the bills to regulate online auctions, the General Assembly enacted legislation to create an Auctioneer Modernization Task Force to study the need to amend the law. *See* 2018 Pub. Ch. 941. The Task Force was directed to study different auction platforms and recommend changes to auctioneer licensing laws. *Id.* Yet Task Force members publicly admitted that they did not know how members of the public were harmed by online auctions. Compl. ¶ 33. That observation matched the Task Force’s own data, which showed that only 15 of 117 complaints against auctioneers in the three preceding years involved online auctions and only three of those involved extended-time online auctions. Compl. ¶ 34. The vice president of the Tennessee Auctioneer Association put forth a different reason for licensing online auctioneers. He 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.

auction allows the period for sale to extend as long as bidders keep bidding. *Id.*

5. https://tnga.granicus.com/player/clip/12457?view_id=315&redirect=true (last visited November 5, 2025).

and Ins., Auctioneer Task Force Meeting (Aug. 27, 2018) at 34:25–34:32.⁶

The Task Force recommended regulating online auctions, and the General Assembly enacted a licensing requirement for online auctioneers (“Online Auction Law”). *See* 2019 Tenn. Pub. Ch. 471 (codified at Tenn. Code Ann. § 62-19-101 et seq.). The Online Auction Law amended the auctioneering law to include online auctions consisting of “electronic” exchange between an online auctioneer and members of the audience.

Auction means 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). The Online Auction Law also changed the 2006 exemption and defined “timed listings” to exclude online auctions that are “extend[ed] based on bidding activity.” *Id.* § 62-19-101(12). In practice, this meant that the type of auctions conducted by the Online Auctioneers are subject to the Online Auction Law, while sites like eBay, which conduct fixed-time online auctions, remained exempt. Compl. ¶ 40. Although members of the Task Force admitted that

6. <https://www.youtube.com/watch?v=UpDp7OBc0Wc&t=7347s> (last visited, November 2, 2025).

“leaving the fixed time and leaving the extended time as being different is somewhat problematic,” Tenn. Dep’t of Comm. and Ins., Auctioneer Task Force Meeting (Nov. 05, 2018) at 32:36-32:43,⁷ they explained that they were “carving” out fixed-time auctions from the law so that “we don’t kick an eBay’s nest.” *Id.* at 41:16-22.

The Online Auction Law subjects Petitioners to Tennessee’s regulatory framework for auctioneers. Under that framework, it is unlawful for a person to “[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). “All auctions arranged by or through a principal auctioneer must be conducted exclusively by individuals licensed under this chapter.” *Id.* § 62-19-101(b). Conducting an online auction without a license is a Class C misdemeanor, *Id.* § 62-19-121, and violators are subject to a civil fine of up to \$2,500. *Id.* § 62-19-126. The Online Auctioneers must therefore obtain a license to conduct online auctions or face criminal and civil penalties.

C. Procedural History

The Online Auctioneers initiated this lawsuit in 2023, alleging that the Online Auction Law violates their rights under the Free Speech Clause under the First and Fourteenth Amendment to the United States Constitution.⁸

7. https://www.youtube.com/watch?v=_JRURJgPA8 (last visited November 2, 2025).

8. McLemore and his company asserted their First Amendment rights in an earlier case that did not involve the Unlicensed Online Auctioneers. The Sixth Circuit dismissed the

See Complaint, ECF. No. 1, *McLemore v. Gumucio*, 3:23-cv-01014, at ¶¶ 51–64 (M.D. Tenn., Sept. 25, 2023); see also *id.* at ¶¶ 5 (noting that the federal court had jurisdiction under 28 U.S.C. §§ 1331 and 1343). The Commission moved to dismiss, arguing that the Petitioners lacked standing and that their First Amendment claims failed on the merits. App. 5a–6a. The district court granted the Commission’s motion. The court first assured itself of its jurisdiction to hear the case. See App. 31a–35a. It found that standing for the Unlicensed Online Auctioneers presented a “straightforward question” since they were challenging a licensing requirement for online auctioneers. App. 31a–33a (citing Tenn. Code Ann. § 62-19-102(a)). The Court also found that McLemore and his company had standing to press their case, and noted that the debate was “academic” since their claim was identical to that of the Unlicensed Online Auctioneers. See App. 34a (citing *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 623 (6th Cir. 2016)). Turning to the merits, the district court acknowledged that an “auction is as clear an example of commercial speech as one is likely to find.” App. 42a. But it refused to apply heightened First Amendment scrutiny because the Online Auction Law was “an economic regulation that burdens speech only insofar as that speech is made in facilitation of the economic transaction.” App. 43a. The court concluded that the Online Auction Law satisfied rational basis review and dismissed the case.

case on the grounds that McLemore lacked standing to bring a dormant Commerce Clause challenge “without reopening the question of whether Tennessee’s statutes comport with the First Amendment.” App. 26a. So the court did not “ultimately resolve[] the First Amendment-based claim on the merits.” App. 27a.

The Sixth Circuit affirmed. It saw no reason to adopt any of the Commission’s jurisdictional arguments, *see* Appellees’ Br. at 51–62, No. 24-5794 (6th Cir. Nov. 7, 2024), and proceeded to the merits on the Online Auctioneers’ First Amendment claim. App. 6a–7a. The Court framed the threshold question as whether the Online Auction Law, as an occupational licensing statute, “regulates . . . speech or simply regulates economic activity.” App. 8a. And, in analysis that mirrors that of the district court, it held that “burdens on speech are merely incidental” because the Online Auction law “regulates economic activity.” App. 8a. The panel stressed that “regulation of professional auctioneering is plainly authorized by the state police power.” App. 13a. In the panel’s view, the Online Auction Law didn’t “censor” the Online Auctioneers’ speech; it “only prevents them from conducting an auction without a license.” App. 12a. The panel concluded that the Online Auction Law imposed incidental burdens on speech, applied rational basis review, and affirmed the district court’s dismissal. App. 12a–14a. In a concurrence, Judge Bush opined that, given past practices of regulating auctioneering as a part of the government’s police powers, the panel’s conclusion was also supported by “the history and tradition of the First Amendment.” App. 15a; App. 19a–21a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. Federal Circuit Courts are Divided on the First Question Presented

The decision below deepened an acknowledged circuit split on the first question presented. As the Seventh Circuit recently observed, “the division between speech

and conduct has not been evenly applied throughout the country, particularly when it comes to licensing schemes that determine which individuals can speak about certain topics.” *Richwine v. Matuszak*, 148 F.4th 942, 953 (7th Cir. 2025) (citing decisions from the Fourth, Fifth, Ninth, and Eleventh Circuits). With its decision below, the Sixth Circuit joined the Eleventh Circuit in declining to apply ordinary First Amendment principles to a restriction on speech—merely because that restriction comes in the form of an occupational licensing law. By contrast, the Fourth, Fifth, and Second Circuits recognize that government may not get a free pass to restrict speech merely by doing so as part of an occupational licensing law. The Ninth Circuit’s jurisprudence varies panel by panel, and the Seventh Circuit, while noting that its sibling circuits are in flux, has declined to address the question. This Court’s intervention is sorely needed to ensure that First Amendment protections are “evenly applied throughout the country.” *Id.*

1. Like the Sixth Circuit, the **Eleventh Circuit** refuses to apply full First Amendment scrutiny for Americans who confront speech restrictions that come in the form of occupational licensing laws. In *Del Castillo v. Secretary, Florida Department of Health*, the Eleventh Circuit rejected a claim that a Florida law requiring a license to practice as a dietician or nutritionist violated an unlicensed professional’s First Amendment rights to provide advice on diet and nutrition to her clients. 26 F.4th 1214, 1216 (11th Cir. 2022). In so doing, the court both purported to disavow the professional speech doctrine and adopted it in another form. *Id.* at 1218 (acknowledging that the “*NIFLA* Court expressly rejected the professional speech doctrine.”) (internal quotation marks omitted). The

Eleventh Circuit refused to afford Del Castillo any level of First Amendment protection and instead recast her speech as “professional conduct.” *Id.* at 1225–26. And the Eleventh Circuit declined to name a single occupational licensing law that could trigger First Amendment scrutiny—perhaps because of its broad reasoning that “nutritional counseling” was not speech because it is “what a dietician or nutritionist does as part of her professional services.” *Id.* Thus, the Eleventh Circuit, like the Sixth Circuit in the decision below, dismisses the possibility that an occupational licensing law can impose a direct burden on speech.

2. By contrast, three circuit courts hold that occupational licensing laws are not exempt from robust First Amendment scrutiny. In *Billups v. City of Charleston*, the **Fourth Circuit** applied First Amendment scrutiny to invalidate a licensing requirement for tour guides. 961 F.3d 673, 690 (4th Cir. 2020). The court declined to mechanically classify the occupational licensing law as “a restriction on economic activity that incidentally burdens speech.” *Id.* at 683. It could hardly be otherwise. Licensing laws don’t get a free pass under the First Amendment, particularly where the government tries to license “activity which, by its very nature, depends upon speech or expressive conduct.” *Id.*

The panel below noted that it was not bound by *Billups* but still sought to distinguish it in two unpersuasive ways. First, the panel below pointed to the Fourth Circuit’s more recent decision in *360 Virtual Drone Servs. LLC v. Ritter*, 102 F.4th 263, 274 (4th Cir. 2024) (pet. for cert. filed, Sept. 9, 2024). *See* App. 11a–12a True, that panel applied a multi-factor “unpopular or dissenting” message and

harmful “economic and legal consequences” test that has no basis in this Court’s precedents. *360 Virtual Drone*, 102 F.4th at 278. But that error has no bearing on the circuit split since even the *360 Virtual Drone* panel recognized that the “fact that a regulation falls within a generally applicable licensing regime does not automatically mean it is aimed at conduct.” *Id.* at 274. Second, the panel below believed that “*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.” App. 11a (quoting *360 Virtual Drone*, 102 F.4th at 274). But the online auctioneers speak on private property, where they are afforded greater First Amendment protection than when they speak on government property. *Cf. U.S. Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114, 129–30 (1981) (observing that the government, “no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”) (internal quotation marks omitted). There is thus no principled way to reconcile the Fourth Circuit’s precedent in *Billups* with the Sixth Circuit’s decision below.

Like the Fourth Circuit, the **Fifth Circuit** refuses to withhold First Amendment scrutiny merely because the challenged law governs occupational conduct. In *Hines v. Pardue*, the court ruled for a veterinarian in a challenge to a law requiring veterinarians to physically examine an animal before they can practice veterinary medicine. 117 F.4th 769, 785 (5th Cir. 2024) (pet. for cert. filed, Feb. 24, 2025). It mattered not that the burden on the plaintiff’s speech came in the form of an occupational regulation. Courts don’t blindly “follow whatever label

a state professes,” but instead “consider a ‘restriction’s effect, as applied, in a very practical sense.” *Hines*, F.4th at 777 (quoting *Thomas v. Collins*, 323 U.S. 516, 536 (1945) (footnote omitted)). The Fifth Circuit applied the same logic in a challenge to a surveyor-license law. See *Vizaline LLC v. Tracy*, 949 F.3d 927, 932 (5th Cir. 2020). The court there held that the standard for determining whether an occupational licensing law regulates speech or conduct is this Court’s “traditional conduct-versus-speech dichotomy.” *Id.* In reaching that holding, the court rejected the notion, pressed by the district court, that licensing requirements only incidentally affected the plaintiff’s speech because they determine “*who* may engage in certain speech.” *Id.* at 932 (emphasis in original). Instead, the court noted that this Court’s decision in *NIFLA* “makes clear that occupational-licensing provisions are entitled to no special exception from otherwise-applicable First Amendment protections.” *Id.* at 931.

The **Second Circuit** recently joined the Fourth and Fifth Circuits in applying First Amendment scrutiny to an occupational licensing law that directly burdens speech. *Upsolve, Inc. v. James*, 22-1345, 2025 WL 2598725, at *5 (2d Cir., Sept. 9, 2025). That case concerned a nonprofit’s as-applied challenge to New York’s application of its unauthorized practice of law statute to the group’s speech. *Id.* at *1. Although the court vacated the district court’s preliminary injunction, it had no difficulty concluding that the court should apply intermediate scrutiny under the First Amendment. *Id.* at *7. Citing “analogous cases” in *Billups* and *Hines*, the Second Circuit joined the Fourth and Fifth Circuits in applying First Amendment scrutiny to a professional regulation. *Id.* at *5. Those circuits, unlike the Sixth and Eleventh Circuits, do not

apply rational basis review to a restriction of speech merely because that restriction comes in the form of an occupational licensing law.

3. Precedents from two other circuit courts underscore the need for this Court’s review. The standard in the **Ninth Circuit** varies from one panel to the next. In *Pacific Coast Horseshoeing School v. Kirchmeyer*, the court held that an educational licensing law “squarely implicate[d] the First Amendment” because it “regulate[d] what kind of educational programs different institutions can offer to different students.” 961 F.3d 1062, 1069 (9th Cir. 2020). Another Ninth Circuit panel took a different tack in *Crownholm v. Moore*, No. 23-15138, 2024 WL 1635566 (9th Cir. Apr. 16, 2024) (pet. for cert. filed, Sept. 9, 2024). Relying in part on the Eleventh Circuit’s precedent in *Del Castillo*, the Ninth Circuit declined to afford any First Amendment protections for unlicensed land surveyors who produce “drawing[s] that provide[] a visual image of property by depicting property boundaries, structures, and measurements.” *Id.* at *2 (brackets in original). In reaching that conclusion, the panel cited Ninth Circuit precedent holding that “psychoanalysis and performing conversion therapy are conduct, not speech, even though both *require* the use of spoken words.” *Id.* at *1 (citing *Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1054 (9th Cir. 2000); *Tingley v. Ferguson*, 47 F.4th 1055, 1077–78 (9th Cir. 2022)) (emphasis added).

The **Seventh Circuit**, while acknowledging the circuit split, declined to take sides in *Richwine v. Matuszak*. See *Richwine*, 148 F.4th at 953–54. The court affirmed a preliminary injunction in favor of a death doula in her

challenge to Indiana’s enforcement of its funeral services licensing law against her. *See id.* at 946, 958; *see also id.* at 946 (death doulas “discuss[] with [their] clients how they want to be remembered after death, help[] clients write letters to loved ones, and provide[] emotional support to the dying”). In concluding that Richwine was likely to succeed on her First Amendment claim, the court saw no need to discern whether the law produced a direct or incidental burden on her speech. *Id.* at 954. That’s because all agreed that the law imposed some burden on Richwine’s speech and triggered at least intermediate scrutiny—a standard the court concluded that the government was unlikely to meet. *Id.*; *see also infra* at II.B (intermediate scrutiny is the proper standard to evaluate regulations that impose incidental burdens on speech); *but see* App. 13a–14a (applying rational basis review after concluding that the Online Auction Law imposed incidental burdens on speech). More relevant here, the Seventh Circuit recognized a burgeoning circuit split on the first question presented here. *Richwine*, 148 F.4th at 953–54 (citing cases from the Fourth, Fifth, Ninth, and Eleventh Circuits). This Court should grant the petition to ensure that the “division between speech and conduct” is “evenly applied throughout the country, particularly when it comes to licensing schemes that determine which individuals can speak about certain topics.” *Id.* at 953.

II. The Decision Below is Inconsistent with This Court's Precedents

a. Occupational Licensing Laws are Entitled to No Special Exemption from Otherwise Applicable First Amendment Protections

This Court's precedents require courts to apply ordinary First Amendment principles in cases involving occupational licensing laws. In *Nat'l Inst. of Fam. and Life Advoc. v. Becerra*, this Court reviewed the professional speech doctrine, which lower courts used to apply reduced First Amendment protections to "a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others." 585 U.S. 755, 773 (2018) (*NIFLA*). Those courts, like the Sixth Circuit below, relied on Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985), as support for adopting a bespoke rule for professional regulations. See App. 10a, 13a; *Pickup v. Brown*, 740 F.3d 1208, 1227–31 (9th Cir. 2014); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988). Yet this Court, in rejecting the professional speech doctrine, dispelled the notion that "professional speech" is a "separate category of speech that is subject to different rules." *NIFLA*, 585 U.S. at 767. Rather, *NIFLA* directs courts "to adhere[] to the traditional conduct-versus-speech dichotomy" in evaluating First Amendment challenges to occupational licensing laws. *Vizaline*, 949 F.3d at 932 (citing *NIFLA*, 585 U.S. at 771–75).

It could hardly be otherwise. Governments across the nation routinely enact and enforce occupational licensing laws. See *infra* at III (discussing the proliferation of

occupational licensing laws). A special rule that requires courts to apply deferential review merely because the government is restricting speech as part of its power to license an occupation would endow it with “unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.” *NIFLA*, 585 U.S. at 773.

There is no merit to the contention that *NIFLA* draws an unprincipled distinction between what professionals can say rather than which Americans can speak. *See* App. 36a (district court’s conclusion that “*NIFLA* raises issues about what the government can require *as part of* its licensure authority, but nothing about it brings that licensure authority itself into doubt”) (emphasis in original).⁹ *NIFLA* itself disavowed many lower court opinions that applied the professional speech doctrine to occupational licensing laws. *See Vizaline*, 949 F.3d at 932–33 (collecting cases). And both the Second and Fifth Circuits squarely applied *NIFLA*’s logic to occupational licensing laws. *Id.* at 929; *Upsolve*, 2025 WL 2598725, at *5.

There’s no reason why an occupational licensing law can’t directly burden First Amendment rights. As this Court noted, “[g]enerally, speakers need not obtain a license to speak.” *Riley v. Nat’l Fed’n of the Blind of N.*

9. Because the dispute between the parties will remain regardless of the outcome of this Court’s forthcoming decision in *Chiles v. Salazar* (24-539), this Court should grant the petition. At a minimum, this Court should hold this petition pending its resolution of that case, which it’s presumably doing with three other petitions pending before this Court. *See Pardue v. Hines* (24-920); *Crownholm v. Moore* (24-276); *360 Drone Services, LLC v. Ritter* (24-279).

Carolina, Inc., 487 U.S. 781, 802 (1988). While government may choose to require a license for journalists, radio hosts, comedians, political activists, and the like, *see* Amicus Br. of Parties in Other First Amendment Cases, *Chiles v. Salazar* (24-539), at 18–20 (collecting examples), no one could seriously contend that those activities would lose all First Amendment protections simply because the government purports to regulate occupational conduct. The panel below presented a false dichotomy between statutes that regulate speech and ones that “simply regulates economic activity.” App. 8a (citation omitted). Yet “a great deal of vital expression” stems “from an economic motive.” *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011). “[T]he degree of First Amendment protection is not diminished merely because . . . speech is sold rather than given away.” *City of Lakewood v. Plain Dealer Pub’g Co.*, 486 U.S. 750, 756 n.5 (1988) (citation omitted); *see also* *Thomas v. Collins*, 323 U.S. 516, 531 (1945) (rejecting the assertion that “the First Amendment’s safeguards are wholly inapplicable to business or economic activity”). For instance, although this Court resolved *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018), on free exercise grounds, no one could seriously argue that an artistic cakeshop owner loses his First Amendment right only because the cake was created as part of a “sales transaction.” App. 10a–11a.

Nor is the Online Auction Law exempt from First Amendment scrutiny merely because the government is licensing speech rather than banning it outright. “Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.” *Sorrell*, 564 U.S. at 566. This Court has thus long applied the First Amendment to regulations that license speech.

See Collins, 323 U.S. at 525–32; *Riley*, 487 U.S. at 802, n.13 (“Nor are we persuaded by the dissent’s assertion that this statute merely licenses a profession, and therefore is subject only to rationality review.”).

There’s also little to support the contention that licensing laws do not pose First Amendment issues so long as they do not discriminate against a particular viewpoint. *See Gov’t Br., McLemore v. Gumucio*, 24-5794, at 34 (6th Cir., filed Nov. 7, 2024) (justifying the Online Auction Law on grounds that it “does not seek to silence any particular message the Auctioneers may want to communicate through their narratives”) (quotation marks and brackets omitted). Licensing laws typically restrict speech because of content, and the First Amendment looks at content-based speech restrictions with the same kind of skepticism as it views viewpoint-based ones. *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015) (“[I]t is well established that the First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”) (internal brackets and quotation marks omitted). Otherwise, legislators “might [] infer[]” that they may remedy a viewpoint-based speech restriction by reenacting a law with a “broader” prohibition of speech. *NIFLA*, 585 U.S. at 779 (Kennedy, J., concurring). For instance, although a campaign finance law would surely raise First Amendment concerns if it targeted a political viewpoint, a court wouldn’t reflexively bless such a law just because it applied with equal force to Republicans and Democrats alike.¹⁰

10. The Online Auction Law is a content-based restriction on speech. It applies only to speech that consists of a “series of

In the end, a “mere label of state law” does not shield a law from First Amendment scrutiny. *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (citing *NAACP v. Button*, 371 U.S. 415, 429 (1963)) (internal quotation marks deleted). Occupational licensing laws “can claim no talismanic immunity from constitutional limitations” and “must be measured by standards that satisfy the First Amendment.” *Id.* at 269.

Had the lower courts applied ordinary First Amendment principles, they would have found that the Online Auctioneers have pleaded a plausible First Amendment claim. *First*, the Online Auction Law facially restricts speech. The statute prohibits unlicensed individuals from conducting auctions, which it defines by reference to its communicative characteristics. Under the statute, an auction is 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). The Online Auctioneers have pleaded a First Amendment claim because the text unambiguously burdens speech.

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.” Tenn. Code Ann. § 62-19-101(2). And it’s riddled with exemptions, such as auctions concerning “nonrepairable or salvage vehicles,” livestock, and tobacco. *Id.* §§ 62-19-103(6)–(8), 62-19-103(10)–(11). But even if the law were content-neutral, the panel below still erred in applying rational basis review. *See* App. 13a–14a; *TikTok Inc. v. Garland*, 145 S. Ct. 57, 67 (2025) (content-neutral laws are subject to intermediate scrutiny).

See Sorrell 564 U.S. at 563–567 (discussing that the law on its face regulated speech). *Second*, even if the Online Auction Law prohibited the Online Auctioneers’ speech in a covert way, the First Amendment would apply all the same. That’s because statutes that don’t restrict speech on their face may still be applied in a way that restricts an individual’s First Amendment rights. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (First Amendment scrutiny applied to a facially neutral statute because “the conduct triggering coverage under the statute consist[ed] of communicating a message”).

The Online Auction Law is just that type of statute. Online Auctioneers must advertise in the course of their work. *See* Compl. ¶¶ 22–28 (Online Auctioneers must craft accurate and enticing narratives, images, and descriptions because consumers can’t see the auctioned items in person). And no matter how the government crafts the licensing statute, it can’t avoid the obvious fact that the conduct of an auction just *is* speech: it’s one solicitation after the other. *See* App. 42a (district court’s observation that “an auction is as clear an example of commercial speech as one is likely to find” as it “consists of parties proposing a series of alternative transactions to each other before settling on one that actually goes into effect”); *see also* App. 10a–11a (Sixth Circuit’s holding that the Online Auctioneers’ speech is merely “incidental” to the sales transaction, even though “Plaintiffs must speak to an audience or even craft narratives to sell products.”) (internal brackets and quotation marks omitted); Compl. at ¶ 21 (Respondent Gumucio testified that it is impossible to have an auction without an oral, written, or electronic communication). Speech is thus not incidental to online auctions; speech is the essence of an online auction. Had

the panel below applied traditional First Amendment principles, it would have had no basis to affirm the district court’s dismissal.¹¹

b. Laws that Impose Incidental Burdens on Speech Must Be Evaluated Under Intermediate Scrutiny

Even if the Online Auction Law imposed incidental burdens on speech, the panel below erred in applying rational basis review. *See* App. 13a–14a. As this Court recently observed, laws that impose an incidental burden on speech must be subjected to intermediate scrutiny. *Free Speech Coalition, Inc. v. Paxton*, 145 S. Ct. 2291, 2306 (2025). At a minimum, this Court should grant the petition and remand to the lower court to apply the correct standard. *See Sheetz v. County of El Dorado*, 144 S. Ct. 893, 902 (2024) (deciding the threshold question on proper standard and remanding to state court to adjudicate the merits).

11. In a concurring opinion, Judge Bush sought to “support the court’s holding based on . . . the history and tradition of the First Amendment.” App. 15a. The panel below declined to adopt the views expressed in the concurrence, which produces the “implication that any speech-burdening regulation which can be characterized as an exercise of the police power is exempt from First Amendment scrutiny.” *Tingley v. Ferguson*, 57 F.4th 1072, 1080 (9th Cir. 2023) (O’Scannlain, J., respecting the denial of rehearing en banc). If it were otherwise, a state could “evade First Amendment scrutiny for signage regulations simply by pointing out that building regulation is within the police power.” *Id.*; *see also United States v. Stevens*, 559 U.S. 460, 472 (2010) (Courts do not have “freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”).

A remand is even more important here because the Online Auctioneers pleaded a viable claim under intermediate scrutiny. That standard requires government to show that a law “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997); *see also Free Speech Coal.*, 145 S. Ct. at 2316 (intermediate scrutiny is “deferential but not toothless,” and “plays an important role in ensuring that legislatures do not use ostensibly legitimate purposes to disguise efforts to suppress fundamental rights”). Although preventing fraud is an important interest “in the abstract,” the Online Auction Law “furthers the state’s interests the way an atom bomb would further the eradication of a residential ant infestation.” *Richwine*, 148 F.4th at 942. The government hasn’t “been able to identify any harm” that the Online Auctioneers and their longstanding practice have caused. *Id.* at 957. And it’s hard to see how a blanket ban on unlicensed online auctioneers is properly tailored, since the government could presumably satisfy those interests just as well by enforcing existing consumer protection laws or enacting a certification program for online auctioneers. *See Billups*, 961 F.3d at 688–89.

The Online Auction Law also fails intermediate scrutiny because it’s “wildly underinclusive.” *NIFLA*, 585 U.S. at 774 (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 802 (2011)). The statute exempts fixed-time auctions, Tenn. Code Ann. § 62-19-101(12); *id.* § 62-19-103(9), which have garnered significantly more complaints from the public. *See* Compl. ¶¶ 2, 34 (four times as many complaints about fixed-time auctions).

Although intermediate scrutiny doesn't require a perfect fit, the Online Auction Law is so underinclusive that it "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Entertainment Merchants Assn.*, 564 U.S. at 802. The Online Auctioneers pleaded a viable First Amendment claim under intermediate scrutiny, a standard that the panel below refused to apply.

III. The Questions Presented are Important

The questions presented are extraordinarily important. Occupational licensing has ballooned in recent years. Where only about five percent of workers needed an occupational license in the 1950s, nearly one in four American workers today requires a license to earn a living in their chosen profession.¹² Despite the mounting evidence that occupational licensing does not improve the quality of services or public health and safety,¹³ over a

12. Jason Furman & Laura Giuliano, *New Data Show that Roughly One-Quarter of U.S. Workers Hold an Occupational License*, White House (Pres. Obama) (June 17, 2016), <https://obamawhitehouse.archives.gov/blog/2016/06/17/new-data-show-roughly-one-quarter-us-workers-hold-occupational-license>; see also Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, Vol. 31, *Journal of Labor Economics*, University of Chicago Press, 173 (2013) (estimating that 29% of workers were licensed in 2013).

13. The Department of the Treasury Office of Economic Policy, the Council of Economic Advisers and the Department of Labor, *Occupational Licensing: A Framework for Policymakers*, 13 (2015) (stating that "most research does not find that licensing improves quality or public health and safety.").

thousand occupations are licensed in the United States.¹⁴ At the same time, due to the rise in technology and the information age, more people earn a living by using, creating, and disseminating information.¹⁵

The Online Auction Law is just one example of the collision between the rise in occupational licensing and the growth in the number of Americans who speak for a living. Since 2013, federal courts have heard cases involving licensing regimes for tour guides, fortune tellers, health bloggers, and advice columnists. *See Edwards v. D.C.*, 755 F.3d 996, 1000 (D.C. Cir. 2014) (tour guides); *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, (4th Cir. 2013) (fortune tellers), abrogated by *NIFLA*, 585 U.S. at 773; *Cooksey v. Futrell*, 721 F.3d 226, 229–32 (4th Cir. 2013) (health blogger); *Rosemond v. Markham*, 135 F. Supp. 3d 574, 578 (E.D. Ky. 2015) (Psychology board in Kentucky sending cease and desist letter to a popular syndicated advice columnist for publishing parenting advice in newspapers). As those examples show, the mere fact that the government is regulating “economic activity” doesn’t mean that it’s not also restricting speech. On the contrary, licensing schemes can plainly burden a professional’s First Amendment rights. *But see* App. 12a (concluding that the Online Auction Law does not censor speech because Petitioners can “craft compelling descriptions and

14. National Conference of State Legislatures, *Occupational Licensing: Assessing State Policies and Practices Final Report*, 14 (2021).

15. Aaron Smith, *Gig Work, Online Selling and Home Sharing*, Pew Research Center, (November 17, 2016), <https://www.pewresearch.org/internet/2016/11/17/gig-work-online-selling-and-home-sharing/> (detailing the growth of the digital economy, including selling goods online).

narratives” as part of their work as online auctioneers, as long as they are licensed).

The decision below eviscerates otherwise applicable First Amendment protections for Americans who speak for a living. The panel’s reasoning invites government to stifle speech just by reconceptualizing it as a regulation of professional conduct. “Professors’ lectures could become ‘the practice of instruction’; musicians’ songs could become ‘the practice of composing’ and writers’ op-eds could become ‘the practice of journalism.’” *Richwine v. Matuszak*, 707 F. Supp. 3d 782, 803 (N.D. Ind. 2023), *aff’d*, 148 F.4th 942 (7th Cir. 2025). Such a result is not far-fetched. In 2016, a lawmaker in South Carolina introduced the “Responsible Journalism Registry Law,” which would have required journalists to register with the state and allowed government to revoke a journalist’s registration.¹⁶ But lawmakers “may no more silence unwanted speech by burdening its utterance than by censoring its content.” *Sorrell*, 564 U.S. at 566. Although the government may choose to enact a licensing scheme, the presence of a licensing requirement can’t “reduce a group’s First Amendment rights.” *NIFLA*, 585 U.S. at 773. Given the proliferation of occupational licensing and the increasing number of Americans who speak for a living, this Court’s intervention is needed to ensure that a state’s statutory power to license doesn’t override the individual’s constitutional right to free speech.

16. Melissa Chan, *South Carolina Lawmaker Wants to Register Journalists with the Government*, *Time* (Jan. 19, 2016), <https://time.com/4185928/journalist-registry-south-carolina-pitts/>.

IV. This Case Provides This Court with an Excellent Vehicle to Decide the Questions Presented

This case is a clean vehicle to address the relationship between occupational licensing laws and free speech. This case presents a facial challenge to a licensing law that regulates professionals who speak for a living. The plain text of the Online Auction Law prohibits unlicensed individuals from engaging in certain forms of communication. An auction, after all, is defined as “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).

Beyond the plain text of the statute, both lower courts and the Commission acknowledge that speech is integral to auctions. Commissioner Gumucio testified that it’s impossible to have an auction without an oral, written, or electronic communication. *See* Compl. ¶ 21. The district court noted that “an auction is as clear an example of commercial speech as one is likely to find.” App. 42a. It “consists of parties proposing a series of alternative transactions to each other before settling on one that actually goes into effect.” App. 42a; *see also* App. 10a (acknowledging that the Online Auctioneers “must speak to an audience or even craft narratives to sell products.”) (internal brackets and quotation marks deleted). More to the point, speech is an even more integral part of online auctions. Consumers are not physically present for online

auctions, so online auctioneers must rely on images and narratives to convey the information about the goods up for auction. *See* Compl. ¶¶ 21–28.

Both the text of the Online Auction Law and the practice of online auctioneers make this case a cleaner vehicle than one in which a facially neutral law prohibits speech in some of its applications. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (noting that the First Amendment applies when “the conduct triggering coverage under the statute consists of communicating a message”). The Court would not need to parse out some aspects of the Online Auction Law from others because the statute facially prohibits unlicensed individuals from engaging in a certain type of speech. Thus, the Court may proceed directly to the question of whether courts must apply heightened First Amendment scrutiny to occupational licensing laws that restrict speech.

The Sixth Circuit’s resolution of that question was central to its affirmance of the district court’s dismissal. The Sixth Circuit’s analysis revealed that it did not believe there could be overlap between a licensing law that regulates professional conduct and one that restricts speech. The court presented the “threshold question” as “whether the Online Auction Law, a state licensing statute, ‘regulates . . . speech or simply regulates economic activity.’” App. 8a (citation omitted). The Sixth Circuit’s decision to apply rational basis review was animated by its view that “the Online Auction Law is a licensing scheme that regulates professional conduct—not speech.” App. 9a, 11a.

Had the Sixth Circuit recognized that the Online Auction Law triggers First Amendment scrutiny because the conduct it regulates is speech, there would have been no basis for it to apply rational basis review. In fact, *both* of the panel's errors led it to apply an incorrect standard of review. Heightened scrutiny is appropriate both where a law imposes direct First Amendment burdens *and* where a law imposes incidental burdens on speech. *See supra* at II.B. Because the panel below applied the wrong standard in affirming dismissal, this case would not require this Court to go beyond the pleadings or to adjudicate whether the government could meet its burden under heightened scrutiny. Instead, this Court can focus its efforts on the important threshold question of whether a law that requires an occupational license for Americans who wish to engage in speech implicates the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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