No. 24-5794

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILL MCLEMORE, ET AL.,

Plaintiffs-Appellants,

v.

ROXANA GUMUCIO, ET AL.,

Defendants-Appellees.

On appeal from the United States District Court
for the Middle District of Tennessee
No. 3:23-cv-1014

Tennessee Auctioneer Commission's Response

Jonathan Skrmetti
Attorney General & Reporter
J. Matthew Rice
Solicitor General
Gabriel Krimm
Senior Assistant Solicitor General
Nicholas Gregory Barca
Senior Assistant Attorney General
Jessica C. Simon
Laurel Hall
Assistant Attorneys General
State of Tennessee
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
Gabriel.Krimm@ag.tn.gov
(615) 532-5596
Counsel for the
Auctioneer Commission

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ORAL ARGUMENT REQUEST

Defendants-Appellees Roxana Gumucio, John Lillard, Jeff Morris, Larry Sims, Ed Knight, Dwayne Rogers, and Jay White — each sued in his or her respective official capacity as Executive Director, Assistant Director, Chair, Vice Chair, or Member of the Tennessee Auctioneer Commission — respectfully request oral argument to help resolve this appeal. This case involves complex and important issues concerning the scope of the First Amendment and its relation to State police power.

INTRODUCTION*

The district court rightly dismissed this lawsuit, and this Court should affirm that decision. In his second attempt to negate the popular laws licensing his chosen profession, Plaintiff Will McLemore claims those laws violate his First Amendment "freedom of speech." U.S. Const. amend. I. He rests that claim on the fact that he sells professional auctioneering services, and those services — like everything else — require communication. *See, e.g.*, Open. 18, 23–24. Unsurprisingly, a large body of precedent forecloses this First Amendment theory. And regardless, the complaint fails to allege facts supporting a plausible right to relief.

The State of Tennessee can license and regulate professional conduct, even when that conduct involves "speech." Practically all human conduct utilizes words or images to some degree, but that does not mean courts must subject all regulation to heightened First Amendment scrutiny. Courts must instead reserve such scrutiny for cases where the government has directly regulated expression *as such* by using laws or enforcement actions to target the spread of messages.

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* Pincites to district court filings use the PageID file-stamp pagination. Pincites to circuit court filings use the documents' native pagination.

This is no such case. The challenged law regulates who may offer professional auctioneering services to the public. It reaches speech only insofar as it must to regulate conduct effectuated by language. In cases concerning similar laws regulating other professions, this Court and others have applied deferential "rational basis" review. The district court followed that line of precedent, and this Court should do the same.

The Auctioneers' competing request for heightened scrutiny lacks merit. They attempt to paint the auctioneer-licensing law as "content- and speaker-based," and in so doing they assume the law directly regulates speech. But the law does not target the Auctioneers' expression, whether in advertising "narratives" or in the form of the auctions themselves. Because the law at most "incidentally burdens" expressive communication, this Court's precedent calls for rational basis review.

Even under heightened scrutiny, however, the Auctioneers free speech claims would still fail. Like other States, Tennessee has regulated professional auctioneering for decades. And as with other professions, the State has exceedingly strong interests to protect. This Court can and should recognize those interests as a matter of law, and it can determine the statute pursues those interests appropriately based on the pleadings.

What the Auctioneers malign as nonsensical carveouts are actually tailoring provisions. Because those provisions neatly align the law's means with its ends, this regime clears heightened judicial review.

But the Court could also assume the free speech theory has merit and still affirm due to shortcomings in the pleadings. Each Auctioneer presses a unique, pre-enforcement claim that must independently present a justiciable controversy while evading Tennessee's sovereign immunity. McLemore and his Company's claims fail to do so because neither sues to protect a personal constitutional right. And although the Company's Employees' claims might be justiciable, they have not alleged the facts necessary to make their claims plausible.

The district court thus did not err in dismissing this case before discovery. The Auctioneers have not pleaded viable claims; this Court should affirm the order of dismissal.

BACKGROUND

This lawsuit challenges economic regulations maintained by the people of Tennessee for over half a century.

Auctioneer Licensing. Nearly six decades ago, Tennessee's General Assembly passed a law "defin[ing], regulat[ing], and licens[ing]

auctioneers" and "creat[ing]" a "Commission" to oversee their conduct. 1967 Tenn. Pub. Acts ch. 335, R.19-1 at 150. The law sought to ensure that those purporting to be auctioneering professionals "ha[d] a general knowledge of ethics" and other matters, including "the [Tennessee] statutes" governing "auctions" and related subjects. *Id.* at 157. It granted the Auctioneer Commission power to issue auctioneering licenses, while requiring that licensees be "reput[able], trustworthy, honest and competent to transact the business of an auctioneer." *Id.* This statute thus aimed to "safeguard the . . . public" by targeting more than out-and-out fraud. *Id.* It gave Tennesseans a prophylactic against all forms of "bad faith, dishonesty, [and] incompetenc[e]." *Id.* at 161.

As the terms of the law indicate, "the business of an auctioneer" entails more than just speaking. *Id.* at 157. Of course, an auction sale (like any sale) requires some use of language: the seller "invit[es]" buyers to "offer" prices for an item and "accept[s] . . . the highest or most favorable offer." Tenn. Code Ann. § 62-19-101(2). But the auction *process* can get much more complicated, especially when rare items are involved. For instance, it can be difficult for the seller to know how to solicit bids in a way that entices favorable offers. *See* Compl., R.1 at 5–6. And potential

buyers may find it difficult to verify that the bidding process has not been rigged. Some auctions also require compliance with special rules, like the state laws governing transfers of real estate or vehicles. *See* Tenn. Code Ann. §§ 62-19-102(a)(2), 62-19-128. These challenges push some sellers to hire a professional to represent them in the auction process. *See* Compl., R.1 at 3. When that happens, the transaction will come to depend on that intermediating fiduciary's "honesty" and "competenc[e]." Tenn. Code Ann. § 62-19-111(d).

By licensing such professional auctioneering services, Tennessee law adopts a common approach to regulating auctioneering — and countless other professions. In fact, several neighboring States passed similar auctioneer-licensing laws soon after Tennessee. *See* 1973 Ala. Laws 1236 (codified as amended at Ala. Code § 34-4-1 *et seq.*); 1975 Ga. Laws 53 (codified as amended at Ga. Code Ann. § 43-6-1 *et seq.*); 1973 N.C. Sess. Laws 552 (codified as amended at N.C. Gen. Stat. § 85b-1 *et seq.*); 1973 W. Va. Acts 112 (codified as amended at W. Va. Code § 19-2c-1 *et seq.*). And dozens of States have licensed professional auctioneering to some degree at one time or another. *See, e.g.*, Ky. Rev. Stat. Ann. § 330.030;

La. Stat. Ann. § 37:3101; Me. Stat. tit. 32, § 285; Ohio Rev. Code Ann. § 4707.02; Wash. Rev. Code Ann. § 18.11.070; Wis. Stat. § 480.08.

These States have not singled out auctioneering; they treat it like any other profession. Every lawyer knows he needs a bar admission to practice law. *See Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216, 221 (3d Cir. 2015) (citing *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957)). And States have adopted licensing as the preferred method for regulating everything from medicine and architecture to plumbing and interior design. *See Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 691 (6th Cir. 2014); *Byrum v. Landreth*, 566 F.3d 442, 449 & n.7 (5th Cir. 2009); *see also* Ky. Rev. Stat. Ann. tit. XXVI ("Occupations and Professions"); Mich. Comp. Laws ch. 333, art. 15 ("Occupations"); Ohio Rev. Code Ann. tit. XLVII ("Occupations—Professions"). Just like auctioneering, those services require communication through language, imagery, and other media. *See, e.g.*, *Crownholm v. Moore*, No. 23-15138, 2024 WL 1635566, at *1 (9th Cir. Apr. 16, 2024) (citing *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psych.* (*NAAP*), 228 F.3d 1043, 1054 (9th Cir. 2000)). But just like auctioneering, they stand subject to regulation through the States' "police power[]." *City of*

New Orleans v. Dukes, 427 U.S. 297, 303 (1976); *see Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

Tennessee's auctioneer-licensing laws employ that power in a measured way. The relevant statute lays out several licensing tiers and imposes distinct qualifications on each. *See* Tenn. Code Ann. §§ 62-19-101, 111. The base level, called "bid caller auctioneer," requires just "sixteen . . . hours of classroom or online instruction on the basic fundamentals of auctioneering," as well as "other proof as necessary . . . to assess the" applicant's "integrity, reputation, and competency." *Id.* §§ 111(a)(1)(B), (d). The next level, "affiliate auctioneer," requires an additional "thirty-four . . . hours of . . . instruction" and successful completion of an exam. *Id.* § 111(b)(2); *see id.* § 111(e). And after practicing as an affiliate for six months, a licensee can progress to "principal auctioneer," so long as he or she "[h]as obtained a high school diploma or . . . equivalency credential" and completed another exam. *Id.* § 111(c); *see id.* § 111(e). A principal auctioneer can conduct auctions independently or with help from licensed "bid callers" and "affiliates." *See id.* §§ 101, 102(b), 115.

To help clarify what it means to conduct an "auction," the law has also defined the term "auction." *Id.* § 62-19-101(2). Consistent with lay

usage, Tennessee law distinguishes auctions from other sales by swapping the price offer from seller to buyer. *See id.* But despite its popular association with fast-talking live performance, Tennessee has for decades regulated auctioneering "by means of" any "oral or written exchange." 1978 Tenn. Pub. Acts ch. 569, R.19-2 at 169.

Still, the law does not reach every transaction that might be labeled an "auction" in common vernacular. Instead, it restricts the Commission's purview to *professional* auctioneering through a list of common-sense limitations. *See* Tenn. Code Ann. § 62-19-103. The licensing requirement does not apply to various court-appointed officers or government agents. *See id.* § 62-19-103(1)–(3), (6). It does not apply in various amateur or non-profit settings. *See id.* § 62-19-103(4)–(5), (12). It does not apply when federal regulations would supersede. *See id.* § 62-19-103(8). And it does not apply in circumstances governed by more specific and pertinent State regulations. *See id.* § 62-19-103(10). Consistent with the law's stated aims, it applies only to professional auctioneering.

The Law's Updates. Of course, as a profession's technology changes, regulations must keep apace. So when Tennessee auctioneers started using the internet, Tennessee law had to adjust.

The Commission took the first step. In 2001, it issued a regulation clarifying the law's stance on the use of computers. In the Commission's view, the term "oral or written exchange" did *not* turn on the medium used. 1978 Tenn. Pub. Acts ch. 569, R.19-2 at 169. So the Commission put auctioneers on notice: the use of a computer did not nullify the auctioneering law's "requirements." Electronic Media Rule, R.19-3 at 181. "Any electronic media or computer-generated auction originating from within Tennessee" had to "conform" to Tennessee's auctioneering law. *Id.*

Yet questions continued to arise, specifically with respect to popular websites like eBay. By 2006, such websites allowed any ordinary person to sell goods through a bidding format with a pre-set deadline. *See* Op. Tenn. Att'y Gen. 06-053 (Mar. 27, 2006). Reflecting a view that this did *not* implicate the concerns underlying Tennessee's regulatory regime, the General Assembly explicitly excluded this type of "auction" from the law's ambit. The legislature accomplished this by expanding the law's amateur-oriented exceptions to include "[a]ny fixed price or timed listings that allow bidding on an Internet web site but which do not constitute a simulcast of a live auction." 2006 Tenn. Pub. Acts ch. 533 (codified as amended at Tenn. Code Ann. § 62-19-103(9)). Far from an "infamous"

capitulation to eBay, Open. 25, this amendment allowed *any* unlicensed person to make sales through that particular format.

By 2019, however, the statute needed a more comprehensive overhaul. *See* 2019 Tenn. Pub. Acts ch. 471, R.19-4 at 189–96. And although the effort was not limited to addressing technology, it did codify and clarify the developments above. Specifically, the legislature defined the statute's use of the term "fixed . . . timed listing," 2006 Tenn. Pub. Acts ch. 533, to mean "offering goods for sale with a fixed ending time and date that does not extend based on bidding activity," 2019 Tenn. Pub. Acts ch. 471, R.19-4 at 190. And the legislature also elevated the Commission's longstanding interpretation of the term "auction" to encompass "exchange[s]" accomplished through "electronic" means. *Id.* at 189 (codified at Tenn. Code Ann. § 62-19-101(2)).

McLemore's Litigation. This new law had at least one unintended consequence: it prompted Will McLemore's campaign to override Tennessee's preferred policies through litigation in federal court.

"McLemore is a licensed auctioneer" and "the president and sole member of . . . McLemore Auction Company." Compl., R.1 at 3. His Company was among the first to embrace the practice of auctioneering online.

Open. 4. And this earned McLemore a seat on the legislatively created "Task Force" that inspired the auctioneering law's 2019 modernizing amendments. 2018 Tenn. Pub. Acts ch. 941; *see* First Task Force Meeting (June 19, 2018) at 1:40[1]; Tennessee House of Representatives, Floor Debate (April 30, 2019) at 2:13:05–2:19:22[2]; *see also* Tennessee General Assembly, HB 797 Videos (House debates)[3]; Tennessee General Assembly, SB 1361 Videos (Senate debates).[4]

Over the course of four Task Force meetings, McLemore consistently dissented from the direction the group was headed, particularly as it related to clarifying the Commission's oversight of auctioneering done through an extended-time online format. *See, e.g.*, First Task Force Meeting at 41:05–53:05, 58:35–1:01:10; Second Task Force Meeting (Aug. 27, 2018) at 28:30–32:50[5]; Third Task Force Meeting (November 5, 2018) at 22:06–30:32[6]; Fourth Task Force Meeting (Nov. 26, 2018) at 30:59–

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[1] https://www.youtube.com/watch?v=4HNfyZnyikQ
[2] https://tnga.granicus.com/player/clip/17318?view_id=414&redirect=true
[3] https://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB0797&ga=111
[4] https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1361&GA=111
[5] https://www.youtube.com/watch?v=UpDp7OBc0Wc (*cited at* Open. 42)
[6] https://www.youtube.com/watch?v=_JRUrRJgPA8 (*cited at* Open. 8)

1:14:38.[7] He highlighted how his business model serves a particular niche of the market by conducting full-service, extended-time online auctions rather than fixed-time listings (like eBay). *See* Second Task Force Meeting at 1:35:45–1:38:50; Third Task Force Meeting at 21:16–24:30. And he stressed the costs regulation imposes on businesses and consumers, *see* Third Task Force Meeting at 1:51:23–1:54:31, while repeatedly expressing his understandable but mistaken view that the law did not already apply to his business model, *see, e.g.*, *id.* at 30:05–30:31; *cf.* Open. 2 (repeating this error); Mot. Dismiss Resp., R.22 at 214 (same).

Other members of the Task Force heard and rebutted McLemore's grievances, *see, e.g.*, Fourth Task Force Meeting at 30:59–1:14:38, and their views eventually prevailed, *see supra* at 10–11. So McLemore took his policy arguments to court, dressing them up as constitutional rights.

McLemore's first lawsuit progressed through summary judgment before reaching a dead end in this Court. McLemore challenged the licensing law on Free Speech Clause and "dormant" Commerce Clause grounds, and the district court granted McLemore summary judgment on the Commerce Clause theory alone. *See McLemore v. Gumucio*

[7] https://www.youtube.com/watch?v=XCg-YAGTpLw

(*McLemore I*), 593 F. Supp. 3d 764, 782 (M.D. Tenn. 2022), *vacated* No. 22-5458, 2023 WL 4080102 (6th Cir. June 20, 2023). But the district court made an error that this Court easily spotted: it never "addressed . . . why the federal courts should be deciding" McLemore's claims "at all." 2023 WL 4080102, at *2. As was apparent to this Court, McLemore faced no "actual or imminent" threat of prosecution. *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). He was a Tennessee auctioneer who had to "obtain a . . . license in any event," so the Commission could not take enforcement action against McLemore for conducting his auctions online. *Id.* This Court thus "remand[ed] with instructions to dismiss the case for lack of jurisdiction." *Id.* at *3.

But that did not deter McLemore; he simply filed another lawsuit. Just like the first time, McLemore listed himself and his Company as plaintiffs. *See* Compl., R.1 at 1; Am. Compl., No. 3:19-cv-530 (M.D. Tenn.), D.50 at 1025. But unlike the first suit, three of McLemore's employees joined in as well. *See* Compl., R.1 at 1. McLemore also narrowed the suit by dropping his Commerce Clause theory. *See id.* at 9–11. But he, his Company, and his Employees still contended that the licensing requirement violated the First Amendment. *See id.*

The District Court's Decision. This do-over suit moved through the district court much faster than the prior litigation. Rather than granting preliminary relief and summary judgment to the Auctioneers, the district court dismissed their complaint for failure to state a claim. *Compare see McLemore I*, 593 F. Supp. 3d at 768, 782–83, *with McLemore v. Gumucio* (*McLemore II*), No. 3:23-cv-1014, 2024 WL 3873415, at *8 (M.D. Tenn. Aug. 19, 2024), *and* Order, R.31 at 263.

It reasoned that the free speech theory lacked merit under this Court's decision in *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014), a markedly similar case upholding Ohio's licensing of "precious metals dealer[s]." *McLemore II*, 2024 WL 3873415, at *5. The court explained that *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*), 585 U.S. 755 (2018), had not abrogated *Liberty Coins*, because *NIFLA* only concerned state-compelled speech, not state professional "licensure authority." *McLemore II*, 2024 WL 3873415, at *6. The court also rejected the Auctioneers' argument for special protection due to the "speech-centered" nature of their profession. *Id.* It asked only whether the law at issue was "rationally related to a legitimate government . . .

interest." *Id.* at *8. And after holding the law cleared that bar, the district court dismissed the complaint. *See id.*

The Auctioneers appealed; this Court should affirm.

ARGUMENT SUMMARY

The district court had several sound bases for dismissing this lawsuit. It chose the most obvious: *Liberty Coins* dictates rational basis review, and the Auctioneers "identify no reason why" the law "fail[s] that test." *Id.* This Court has several times confirmed that States may license and regulate professional conduct so long as they have a rational basis. And that principle holds for licensing laws that incidentally burden "speech" without targeting expression. This precedent perfectly squares with Supreme Court jurisprudence and the bulk of persuasive caselaw. The Auctioneers' attempts to muddy the jurisprudential water all fail under close inspection. And even under heightened review, the law still passes constitutional muster.

If the Court disagrees, it should still "affirm" dismissal on alternative "grounds." *Dixon v. Clem*, 492 F.3d 665, 673 (6th Cir. 2007) (quoting *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 629 (6th Cir. 2002)). No Auctioneer has adequately pleaded a

plausible Civil Rights Act claim, accompanied by a viable theory of standing, that also evades the Commission's sovereign immunity. McLemore and his Company's economic injuries do not constitute a threat to their *own* constitutional rights. And although the Employees may have personal rights at stake, they have not pleaded facts to make their claims "plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

ARGUMENT

I. The Auctioneers' free speech theory lacks merit.

The Auctioneers claim Tennessee's licensing law unconstitutionally burdens their freedom of speech, but they have overestimated the First Amendment's purview and underestimated the law's justifications. The auctioneer-licensing law does not warrant heightened scrutiny because regulating "conduct . . . carried out by means of language" has "never been deemed an abridgement of free[] . . . speech." *United States v. Hansen*, 599 U.S. 762, 783 (2023) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). If this Court did apply heightened review, however, the law would still pass constitutional muster. It imposes "a relatively undemanding" requirement to serve a compelling consumer-protection interest. *McLemore II*, 2024 WL 3873415, at *8.

A. The auctioneer-licensing law does not warrant heightened First Amendment scrutiny.

The district court correctly determined that binding precedent requires rational-basis review. *See id.* at *5. The Auctioneers seek heightened First Amendment scrutiny as a means of "[c]onstitutionalizing" the regulation of their profession. *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023), *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024). But that "is not something federal courts should do lightly," *id.*, and it is not justified here. The Auctioneers challenge government "regulations targeting *conduct*," not any manner of "speech." *Lichtenstein v. Hargett*, 83 F.4th 575, 583 (6th Cir. 2023). Their contrary arguments notwithstanding, this law receives "no heightened First Amendment scrutiny." *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 429 (6th Cir. 2019).

1. Laws that license and regulate professional conduct receive deferential judicial review.

The First Amendment prohibits the U.S. "Congress [from] mak[ing]" any "law . . . abridging the freedom of speech." U.S. Const. amend. I. The federal courts have applied that prohibition to the States through the Fourteenth Amendment's protection of "substantive" due process. *See McCloud v. Testa*, 97 F.3d 1536, 1541 n.7 (6th Cir. 1996).

But to say that States cannot "abridge the freedom of speech" only raises a more difficult question: What does it mean for a state government to "abridge the freedom of speech"?

The courts have spent a century trying to answer that question in a way that squares with background principles of popular government. "Freedom of speech secures freedom of thought and belief." *NIFLA*, 585 U.S. at 780 (Kennedy, J., concurring). But the "spoken [and] written" word also pervades "most" human affairs. *Giboney*, 336 U.S. at 502. So if the mere use of language while engaging in an activity could secure that activity special constitutional protection, States would effectively cede their traditional "police powers" to regulate "their local economies." *Liberty Coins*, 748 F.3d at 694 (quoting *Dukes*, 427 U.S. at 303). Such an "'expansive interpretation' of the First Amendment 'would make it practically impossible ever to enforce'" even the most basic economic regulations. *Norwegian Cruise Line Holdings Ltd. v. Surgeon Gen.*, 50 F.4th 1126, 1136 (11th Cir. 2022) (quoting *Giboney*, 336 U.S. at 502).

The courts have thus rejected that interpretation as unsupported by law or logic and inconsistent with "history and tradition." *Vidal v. Elster*, 602 U.S. 286, 301 (2024); *Expressions Hair Design v.*

Schneiderman, 581 U.S. 37, 47 (2017). They have read the Free Speech Clause to afford heightened protection only when government "directly regulate[s] speech." *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020). And this occurs only when expression has been "target[ed] . . . *because*" it communicates a message. *Lichtenstein*, 83 F.4th at 588 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992)); *see NRA v. Vullo*, 602 U.S. 175, 187 (2024); *NIFLA*, 585 U.S. at 766; *Sorrell v. INS Health, Inc.*, 564 U.S. 552, 564 (2011); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

Binding precedent therefore holds that "[s]tates may regulate . . . conduct, even though that conduct incidentally involves speech." *Del Castillo v. Secretary*, 26 F.4th 1214, 1222 (11th Cir. 2022) (quoting *NIFLA*, 585 U.S. at 768); *see Liberty Coins*, 748 F.3d at 697; *accord United States v. Pinelli*, 890 F.2d 1461, 1472 (10th Cir. 1989). To be sure, a person's "conduct" is "brought about through speaking and writing" in "most instances." *Giboney*, 336 U.S. at 502; *see Rumsfeld v. F. for Acad. & Institutional Rts., Inc.* (*FAIR*), 547 U.S. 47, 62 (2006). But merely "integrat[ing]" language into one's conduct does not implicate core free-speech concerns. *Giboney*, 336 U.S. at 498; *see Nat'l Ass'n for Advancement of*

Multijurisdiction Practice v. Howell, 851 F.3d 12, 20 (D.C. Cir. 2017); *Castille*, 799 F.3d at 220–23. Instead, Courts ask whether the government's lawmaking or law-enforcement decisions have directly targeted "expression," whether conveyed through language or through unambiguous "'symboli[sm].'" *FAIR*, 547 U.S. at 61, 65 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)); *see Lichtenstein*, 83 F.4th at 583–85. Government action not fitting that description receives "no heightened First Amendment scrutiny." *EMW*, 920 F.3d at 429; *see Bevan & Assocs., LPA, Inc. v. Yost*, 929 F.3d 366, 374 (6th Cir. 2019).

Any other rule would upset our federal system and run the risk of frustrating the democratic process the First Amendment exists to serve. Although the term "heightened scrutiny" has taken several different meanings, they all require unelected judges to be satisfied that a law reflects not just acceptable, but adequately reasoned, policy. *See Lichtenstein*, 83 F.4th at 597–98; *infra* Part I.B. And to make that determination, judges must partake in something akin to a legislative process. That is, courts require government lawyers to produce arguments and evidence substantiating a political decision. *See Billups v. City of Charleston*, 961 F.3d 673, 688 (4th Cir. 2020). And courts can effectively

veto that political decision under a highly subjective weighing of government "interests" against legislative "tailor[ing]." *Id.* at 685.

Countless cases have foreclosed such invasive judicial review in the context of professional licensing, a practice "[l]ong ago" recognized as falling within the States' traditional regulatory domain. *Liberty Coins*, 748 F.3d at 692 (citing *Dent*, 129 U.S. at 122). As one of the most common methods of economic regulation, licensing restricts who may "function[] as [a] business[] open to the public" selling certain goods or services. *Id.* at 697; *see Tiwari v. Friedlander*, 26 F.4th 355, 363 (6th Cir. 2022). And by reaching some goods and services but not others, every licensing regime necessarily addresses conduct that incorporates certain messages. *See Howell*, 851 F.3d at 19–20; *Young v. Ricketts*, 825 F.3d 487, 494 (8th Cir. 2016). But it is the conduct — not the messages — that implicate the typical licensing law. *See Del Castillo*, 26 F.4th at 1220 (citing *Locke v. Shore*, 634 F.3d 1185, 1189–92 (11th Cir. 2011)). And so long as the inhibition of messages remains "incidental," *id.*, it does not deliberately "tilt public debate in a preferred direction," *Sorrell*, 564 U.S. at 578–79. Absent such a threat to "ideas or viewpoints," the courts have no basis

for applying heightened scrutiny. *R.A.V.*, 505 U.S. at 387 (quoting *Simon & Schuster*, 502 U.S. at 116).

Courts will thus uphold licensing rules as "constitutional if they 'have a rational connection [to] [a person's] fitness or capacity to practice' the [licensed] profession." *Howell*, 851 F.3d at 20 (quoting *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in the result)); *see Schware*, 353 U.S. at 239. That standard applies here.

2. The law at issue licenses and regulates professional conduct, not speech.

The Auctioneers invite this Court to stray from the abovementioned precedent. This Court should reject that invitation for several reasons.

To begin, the auctioneering law requires "a license to *practice*," not "a license to speak." *Abramson v. Gonzalez*, 949 F.2d 1567, 1573 (11th Cir. 1992) (emphasis added). The Auctioneers have not even tried to hide this — they have baked it into their claims. They want relief from "enforc[ement]" of a law that "require[s]" them to get "licens[ed]" before "'*conduct*[*ing*]'" online "auction[s]." Compl., R.1 at 11 (quoting Tenn. Code Ann. § 62-19-101(2)) (emphasis added). And their own filings show that conducting an auction is not some form of "expression" targeted for conveying an identifiable message. *Lichtenstein*, 83 F.4th at 584. It is a

service-based business that can produce economic "harm." *Id.* at 583. And that harm quite clearly stands "apart from [any] message" any auctioneer seeks to "convey[]." *Id.*

In fact, the Auctioneers emphasize that their "business" generates revenue by integrating language with fiduciary services. *Liberty Coins*, 748 F.3d at 697; *cf. Young*, 825 F.3d at 492 (addressing real estate brokers). As professional auctioneers, they want to help people maximize the sale price of hard-to-value property, like rare muscle cars and custom pickup trucks. *See* Kimball Decl., R.14-1 at 106; Brajkovich Decl., R.14-3 at 111. This can put large sums of money at stake in a single transaction. *See, e.g.*, Kimball Decl., R.14-1 at 106. And the auctioneer's job is to "generate" as much "demand" as possible for whatever "items" the client wants to sell. Prelim. Inj. Br., R.8-1 at 48. The challenge of maximizing profit while navigating other applicable regulations is what generates demand for the Auctioneers' services. *See* Compl., R.1 at 5. Were that not the case, there would be no professional auctioneering.

Tennessee's ability to regulate the auctioneering profession does not shrink just because auctioneers have "to speak." *Id.* at 1. Practically all conduct requires some use of language. *FAIR*, 547 U.S. at 62. And

the fact that the Auctioneers use advertisements (or "narratives") does not set their business apart from any other. Compl., R.1 at 5. If and when their narration is not "part of [their] professional services," they may narrate to their hearts' content. *Del Castillo*, 26 F.4th at 1226; *see Howell*, 851 F.3d at 19–20. And so long as they get the required auctioneering licenses, Tennessee law "do[es] not dictate what [their narratives] can . . . sa[y]." *NAAP*, 228 F.3d at 1055.

This Court has applied rational basis review under similar facts. In *Liberty Coins*, this Court confronted a free speech challenge to Ohio's licensing of "precious metals" dealers. 748 F.3d 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 business card[s]." *Id.* at 686–87. But this Court rejected that theory on its way to reversing a preliminary injunction. *See id.* at 685. It reasoned that the licensing statute restricted "holding out" to distinguish regulated professionals from amateurs, which is a method of "proscrib[ing] business conduct and economic activity, not speech." *Id.* at 697. And 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.

A recent Eleventh Circuit decision hews even closer to the facts presented here. *Del Castillo v. Secretary*, 26 F.4th 1214 (11th Cir. 2022), concerned Florida's licensing of "dieticians," which was challenged by an unlicensed "health coach" on a theory similar to the one pressed in this case. *Id.* at 1216. The *Del Castillo* court held that "govern[ing] the practice of an occupation" does not raise free speech concerns "so long as [the] inhibition of" expression is "incidental" to "an otherwise legitimate regulation." *Id.* at 1220 (quoting *Locke*, 634 F.3d at 1191). The court recognized that being a dietician or health coach "involve[d] some speech," mainly "convey[ing] . . . recommendations" about what clients should eat. *Id.* at 1226. But it held the law's impacts on that speech were an acceptable side-effect "of regulating . . . profession[al] conduct." *Id.*

In reaching this decision, the Eleventh Circuit invoked its own precedent regarding a law that licensed "interior designers." *Id.* (citing *Locke*, 634 F.3d 1189). That law had specifically licensed "designers" who were practicing in "commercial" (as opposed to residential) "settings." *Locke*, 634 F.3d at 1189. The challengers wanted to expand their 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 freedom of speech. *See id.* at 1191. But the Eleventh Circuit observed that licensing itself did not raise First Amendment concerns. *See id.* (citing *Lowe*, 472 U.S. at 232 (White, J., concurring in the result)). "[T]he license requirement govern[ed] 'occupational conduct'" and thus "d[id] not implicate constitutionally protected activity." *Id.* (quoting *Wilson v. State Bar*, 132 F.3d 1422, 1429 (11th Cir. 1998)). So the court refused to apply heightened scrutiny. *See id.*

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" — another 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 *FAIR*, 547 U.S. at 62); *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" only "incidental[ly]" burdened Ford's speech as "part of an integrated course of [illegal] conduct." *Id.* at 498, 506–07. And just recently in *360 Virtual Drone Services LLC v. Ritter*, 102 F.4th 263 (4th Cir. 2024), the Fourth Circuit held a law licensing surveyors was "aimed at conduct" and "survive[d] . . . First Amendment challenge." *Id.* at 278.

The takeaway from each case is the same: "[t]he power of government to regulate . . . is not lost" just because professional conduct "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 in the result)), *abrogated on other grounds by NIFLA*, 585 U.S. 755. The fact that auctioneering entails speech does not justify heightened review.

3. The Auctioneers' contrary arguments misinterpret the applicable precedent.

The Auctioneers have raised no compelling argument for subjecting the licensing requirement to heightened scrutiny. They employ four

separate strategies to this end, but none holds up to close inspection.

First, the Auctioneers expend much effort attempting to cast the licensing law as "content- and speaker-based" while assuming throughout this discussion that the law targets and regulates speech. Open. 24; *see id.* at 24–28. They observe that the law applies to "certain subject matter[] but not others" based on what is being sold and how a person is selling it. *Id.* at 24 (quoting *Otto*, 981 F.3d at 862); *see id.* at 24–26 (citing Tenn. Code Ann. §§ 62-19-101, 103); *see id.* at 28 (citing *Sorrell*, 564 U.S. at 567; *Kirchmeyer*, 961 F.3d at 1070–71). And they say that if the law "were content-neutral" the Court would still have to apply "intermediate scrutiny." *Id.* at 26 (citing *Planet Aid v. City of St. Johns*, 782 F.3d 318, 326 (6th Cir. 2015); *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 703 (6th Cir. 2020), *abrogated in part by City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61 (2022)).

But the precedent they use applies only to laws that "directly regulate[s] speech" by targeting the expression of messages. *Otto*, 981 F.3d at 865; *see Virtual Drone*, 102 F.4th at 275. *Every* law governs "certain subject matter[]." Open. 24 (quoting *Otto*, 981 F.3d at 862); *see Byrum*, 566 F.3d at 449 n.7. That does not mean every law receives heightened

First Amendment scrutiny. *See Int'l Outdoor*, 974 F.3d at 705 (citing *Sorrell*, 564 U.S. at 567). Instead, strict scrutiny applies when the government "treats different *messages* differently, not [when] it treats different *conduct* differently." *Lichtenstein*, 83 F.4th at 588; *see Castille*, 799 F.3d at 222–23 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)). And intermediate scrutiny applies only to "*speech* regulation[s]" that do not otherwise qualify for strict scrutiny review. *Int'l Outdoor*, 974 F.3d at 703 (emphasis added); *see Erotic Serv. Provider Legal Educ. & Rsch. Proj. v. Gascon*, 880 F.3d 450, 459–60 (9th Cir. 2018).

The auctioneer-licensing law fits neither category, *see supra* Part I.A.2, and the Auctioneers' disjointed argument helps illustrate why their take on the law must be wrong. They concede that intermediate scrutiny applies to "content-neutral restrictions on [commercial] speech." Open. 26. But there would be practically *no* "content-neutral" commercial regulations if a law's limited subject matter could render it content-based. Commercial speech restrictions typically do not operate across the whole economy — they govern distinct sectors like dentistry or pharmacy. *See Parker v. Bd. of Dentistry*, 818 F.2d 504, 509 (6th Cir. 1987) (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S.

748 (1976)). And if such laws could be said to "restrict[] . . . speech" by imposing incidental burdens, Open. 26, the Auctioneers' "argument" for strict scrutiny would "ha[ve] no stopping point," *Lichtenstein*, 83 F.4th at 587. Every law that "ha[d] an[y] effect on speech" would require strict scrutiny by necessary implication. *Sorrell*, 564 U.S. at 567.

The First Amendment's text and history leave no room for such sweeping judicial oversight. The Amendment provides heightened judicial review to prevent the government from "abridging the freedom of speech" — not from passing any law that impacts any person's use of language. U.S. Const. amend. I. And the government only abridges the freedom of speech when it "direct[s]" its regulatory power *at* the spread of ideas or information. *Norwegian*, 50 F.4th at 1135 (quoting *Sorrell*, 564 U.S. at 567); *see Expressions*, 581 U.S. at 47–48; *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2014).

This occurs when the government tells businesses what "words" they can "use[]," rather than what "services" they can "perform." *Parker*, 818 F.2d at 506; *see Kiser v. Kamdar*, 831 F.3d 784, 787 (6th Cir. 2016); *accord Otto*, 981 F.3d at 866–67 & nn.4–5; *Abramson*, 949 F.2d at 1573–77. It occurs when the government dictates who can "disclose[]" certain

"information" to whom and for what purpose. *Sorrell*, 564 U.S. at 557; *see Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 27 (2010). It occurs when the government makes rules "restrict[ing] access to traditional public [speech] fora." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). And it occurs when the government otherwise "restrict[s]" protected messaging based on the "time, place, [or] manner" of delivery. *Planet Aid*, 782 F.3d at 323; *see City of Austin*, 596 U.S. at 72 (citing *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 643–44 (1981)).

But "[t]he Supreme Court has never applied exacting free-speech scrutiny to laws that [restrict] conduct based on the harm that [it] causes apart from the message it conveys." *Lichtenstein*, 83 F.4th at 583. Instead, binding precedent asks whether the government has directly targeted "oral . . . or written expression." *Id.* at 582; *see Holder*, 561 U.S. at 28. "As long as a [restriction] on conduct is 'unrelated to the suppression of free expression,'" it will not receive searching judicial review. *Lichtenstein*, 83 F.4th at 584 (quoting *Texas v. Johnson*, 491 U.S. 397, 407 (1989)). Instead, "if the person engaging in the [restricted] conduct '*intends* . . . to express an idea,'" the law will receive a "'relatively lenient'" form of intermediate scrutiny. *Id.* at 583–84 (emphasis added) (quoting

O'Brien, 391 U.S. at 376; *Johnson*, 491 U.S. at 407); *see id.* at 584 (citing *FAIR*, 547 U.S. at 66). And where (as here) the targeting of "conduct [merely] imposes 'incidental burdens'" on *related* expression, the Court must apply rational basis review. *Id.* at 583 (quoting *Sorrell*, 564 U.S. at 567); *see Bevan*, 929 F.3d at 374 (citing *Liberty Coins*, 748 F.3d at 693); *Norwegian*, 50 F.4th at 1141; *supra* Part I.A.1.

Second, the Auctioneers implicitly grapple with this problem by attempting to paint the licensing rule as directed at speech. Specifically, they say the law "restricts speech" by preventing them from "craft[ing] narratives" without a license. Open. 22–23. But this discussion conspicuously omits any reference to the actual statute. *See id.* at 22–24. And that's because the auctioneer-licensing provision does *not* regulate the Auctioneers' expressive "narratives" in any direct way.

To be clear, no one needs a Tennessee auctioneering license to describe "the historical significance of an item" or the "importance of an artist." *Id.* at 4–5. Nor does the Commission try to license everyone who "take[s] pictures" of cars in flattering "light" at "the Nashville Fairgrounds." *Id.* at 23. The Auctioneers only need licenses to conduct "the[ir auctioneering] business." *Young*, 825 F.3d at 492. Whether and how they

use "narratives" as part of that business is largely left up to them. *Cf. Norwegian*, 50 F.4th at 1140 (drawing a similar line with respect to Covid-vaccine information).

Several of the Auctioneers own cases help illustrate the difference between the licensing measure at issue and laws that "directly regulate speech." *Otto*, 981 F.3d at 865. They point to cases analyzing rules *made* just for signs and billboards *because* signs and billboards convey "messages." *Int'l Outdoor*, 974 F.3d at 707, *cited at* Open. 24, 26; *see Norton Outdoor Advert., Inc. v. Vill. of St. Bernard*, 99 F.4th 840, 842 (6th Cir. 2024), *cited at* Open. 23, 34. They point to cases addressing rules *made* just for "solicitation" *because* of its association with the spread of certain ideas. *Planet Aid*, 782 F.3d at 324 (quoting *Vill. of Schaumburg v. Citizens for Better Env't,* 444 U.S. 620, 633 (1980)), *cited at* Open. 26; *see Bevan*, 929 F.3d at 369 (citing *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988)), *cited at* Open. 23, 34. Most importantly, they cite to cases where the government directly dictated what information certain people could or had to "communicat[e]." *Otto*, 981 F.3d at 863, *cited at* Open. 19, 24, 27; *see NIFLA*, 585 U.S. at 761–65, *cited at* Open. 29, 35–36; *Expressions Hair*, 581 U.S. at 47–48, *cited at* Open. 33–34; *Sorrell*, 564 U.S. at 557,

cited at Open. 18–19, 23, 27–28, 33; *Holder*, 561 U.S. at 27–28, *cited at* Open. 17; *Kiser*, 831 F.3d at 785, *cited at* Open. 12–13, 26, 37, 39–40, 44; *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 748–49 (8th Cir. 2019), *cited at* Open. 11–12, 20–22; *Wollschlaeger v. Governor*, 848 F.3d 1293, 1302–03 (11th Cir. 2017) (en banc), *cited at* Open. 20, 28.

Tennessee's auctioneer-licensing requirement does not do anything like that. It does not seek to silence any "particular message" the Auctioneers may want to "communicat[e]" through their narratives. *Otto*, 981 F.3d at 863. Nor does it compel the Auctioneers to promote any "message" they would rather not "convey." *Lucero*, 936 F.3d at 751. In fact, the licensing provision does not mention "narratives" or otherwise dictate how auctioneers may "advertis[e]." *Bevan*, 929 F.3d at 373. And even if it could be "applied" in such a speech-conscious manner, the Auctioneers' lawsuit has never accused the Commission of doing that. *Holder*, 561 U.S. at 28 (citing *Cohen v. California*, 403 U.S. 15 (1971)).

Neither have the Auctioneers sought to challenge the legal rules that actually do regulate speech in auctioneer advertising. To be clear, the auctioneering law *does* prohibit unlicensed persons from "advertis[ing]" themselves as auctioneering professionals. Tenn. Code Ann.

§§ 62-19-102(a)(1), 103(4). It also (1) prohibits licensed auctioneers from "making false promises through . . . advertising," (2) compels various advertising disclosures, and (3) empowers the Commission "to promulgate rules with regard to advertising auctions." *Id.* §§ 112(b)(2), 118(c)(2); *see* Tenn. Comp. R. & Regs. 0160-01-.20. But the Auctioneers have not challenged those provisions, and it is not hard to see why. To do so, they would have to assert a First Amendment right to engage in "false, misleading, or deceptive" speech. *Kiser*, 831 F.3d at 788.

Third, the Auctioneers try to depict the act of holding an auction as *itself* a "pure" form of "speech." Open. 17; *see id.* at 20–22, 27–28. But just as "[t]he government cannot regulate speech by relabeling it as conduct," *Otto*, 981 F.3d at 865, a business cannot escape regulation by relabeling conduct involving language as "speech," *see Left Field Media LLC v. City of Chicago*, 822 F.3d 988, 990 (7th Cir. 2016). The Auctioneers' attempt to separate acts of "pure speech" from conduct is a fool's errand from the outset. Open. 17 (citing *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 931 (5th Cir. 2020)); *see Otto*, 981 F.3d at 865 (citing *Wollschlaeger*, 848 F.3d at 1308–09). The binding precedent does not do that. *See supra* at 19–22. And the cases that do are both wrong and inapposite.

To understand why, the Court should start with *Hines v. Pardue*, 117 F.4th 769 (5th Cir. 2024), which is the most recent case — and the most strikingly errant. There, the Fifth Circuit nullified a Texas law prohibiting veterinarians from "engaging in the[ir] practice" on any animal before "establish[ing] a veterinarian-client-patient relationship" by "'examining the animal'" or "'visit[ing] the premises on which [it] is kept.'" *Id.* at 772 (quoting Tex. Occ. Code § 801.351(b)). The *Hines* court reached heightened scrutiny primarily by misapplying *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), in which the Supreme Court held that a restriction on "provid[ing] material support to [terrorists]" *cleared* strict scrutiny when "applied" to target "support . . . in the form of speech." *Id.* at 28. In a discussion that ultimately proved superfluous, the *Holder* court explained that "the generally applicable law" had been "*directed* at" speech "*because* of . . . [the] particular [disfavored] message" it "communicated." *Id.* at 28 (emphasis added) (citing *Cohen*, 403 U.S. at 18–19). And the *Hines* court took this to mean that Texas's veterinary-practice regulation required heightened scrutiny because it was "'trigger[ed]'" by the veterinarian "shar[ing] his opinion." *Hines*, 117 F.4th at 778 (quoting *Cohen*, 403 U.S. at 18).

But *Holder* says practically the opposite. In fact, *Holder* takes pains to explain that "pure . . . speech" cannot always be separated from "conduct." 561 U.S. at 28. "Written or verbal speech can constitute . . . conduct." *Virtual Drone*, 102 F.4th at 274; *see Hansen*, 599 U.S. at 783. And sometimes "nonverbal action can constitute speech." *Virtual Drone*, 102 F.4th at 274; *Lichtenstein*, 83 F.4th at 584. Courts thus should not ask whether "communication of a message" somehow "'trigger[s]'" a government action. *Hines*, 117 F.4th at 778 (quoting *Cohen*, 403 U.S. at 18). They must instead ask whether the action "target[s]" that communication "*because of* 'the ideas . . . express[ed].'" *Lichtenstein*, 83 F.4th at 588 (quoting *R.A.V.*, 505 U.S. at 385); *see Holder*, 561 U.S. at 28; *Virtual Drone*, 102 F.4th at 273.

Pacific Coast Horseshoeing School, Inc. v. Kirschmeyer, 961 F.3d 1062 (9th Cir. 2020), further illustrates the odd results that follow from a *Hines*-like analysis. In *Kirschmeyer*, the Ninth Circuit confronted a California law that limited student "enroll[ment] in private postsecondary schools" by requiring students to demonstrate aptitude before committing to pay a threshold amount for certain degrees. *Id.* at 1066. California made the mistake of arguing the law "d[id] not implicate speech

at all," and the Ninth Circuit rejected that categorical position. *Id.* at 1068. But in so doing, the *Kirschmeyer* court also equated "vocational training" with "speech" under *Holder* and held that the law's application to a horseshoeing class was "content discrimination." *Id.* at 1069, 1073.

It is difficult to see how heightened scrutiny would not follow this sort of analysis in *every* case concerning *any* law that regulates *any* limited subject. *See supra* at 29–30. And therein lies the fundamental problem with both *Kirschmeyer* and *Hines*. That is, both opinions deem the conduct of conveying a message as "protected speech" *before* asking whether the law at issue targets the message or the conduct. *See Hines*, 117 F.4th at 778; *Kirschmeyer*, 961 F.3d at 1069–73. Although it strains credulity to suggest Texas sought to silence veterinary "opinion[s]," *Hines*, 117 F.4th at 778, or California aimed to mute speech on "the art and craft of horseshoeing," *Kirschmeyer*, 961 F.3d at 1065, that's exactly what the reasoning in these cases implies. And if that is true in those two instances, how could it not be true with respect to the regulation of any business that sells "advice" or even just conveys information? *Del Castillo*, 26 F.4th at 1226.

Enter *Billups v. City of Charleston*, 961 F.3d 673 (4th Cir. 2020), the Auctioneers' most heavily relied upon case. *See* Open. 11, 21, 27, 32, 34, 37, 43–44. In *Billups*, the Fourth Circuit negated a local ordinance licensing tour guides on the theory that "speaking to visitors" on "public sidewalks" is "protected speech." 961 F.3d at 683. The Ordinance "d[id] not prescribe topics [for] guides [to] discuss" or otherwise "empower the City to monitor" what the guides were saying. *Id.* at 677. Instead, it subjected would-be licensees to a "written examination . . . on Charleston's history," and it applied only to tours conducted as part of a tour-giving "business." *Id.* at 676, 684.

But the Fourth Circuit applied heightened scrutiny anyway, forgetting that "[w]ords can . . . violate laws directed not against speech but against conduct." *R.A.V.*, 505 U.S. at 389; *see Billups*, 961 F.3d at 685. In fact, the *Billups* court recognized the "significant interest[s]" the law served: "protecting Charleston's tourism industry and visitors from harms perpetrated by unknowledgeable or fraudulent tour guides." 961 F.3d at 686. And at no point did the *Billups* court identify any particular messages the law could be colored as "target[ing]." *Lichtenstein*, 83 F.4th at 588. But according to the *Billups* court, that did not matter: the law

regulated "an activity which, by its very nature, depends on speech or expressive conduct." 961 F.3d at 683. And because the Fourth Circuit thought other "less-speech-restrictive alternatives" might be available, it prohibited the people of Charleston from regulating tour guides in the way they deemed best through the democratic process. *Id.* at 690.

Like *Hines* and *Kirchmeyer*, the *Billups* decision gets the law wrong. Regulations must at times "distinguish between" courses of conduct by reference to the language used in certain actions. *Liberty Coins*, 748 F.3d at 692. But a law still only incidentally burdens "speech" when it targets conduct that includes (or entirely consists) of using language. *EMW*, 920 F.3d at 429. That is because "abridging the freedom of speech" means *targeting* the expression of a message. U.S. Const. amend. I; *see Lichtenstein*, 83 F.4th at 583–88. Any other approach allows the First Amendment to swallow the rest of the law. *See supra* at 29–30. Any other approach stifles the democratic process ostensibly served by the freedom of speech. *See supra* Part I.A.1.

In any event, this Court can easily distinguish *Hines*, *Kirschmeyer*, and *Billups* on the facts. In all three cases, the plaintiffs connected the challenged law to "speech" itself and traditional contexts in which people

do express substantive messages. *See Hines*, 117 F.4th at 778 (veterinary practice); *Kirschmeyer*, 961 F.3d at 1066 (education); *Billups*, 961 F.3d at 683 (public sidewalks). The business of auctioneering does not fit in any of those archetypal domains. *See supra* at 4–5.

Finally, the Auctioneers openly seek a broad exercise of judicial veto by arguing for intermediate scrutiny *even if* the licensing law only incidentally burdens speech. Open. 28–29, 40 & n.14. They seem not to appreciate the gravity of this argument, through which the ubiquity of "spoken [and] written" language would make it "practically impossible" to pass a law *not* subject to heightened review. *Giboney*, 336 U.S. at 502. Regardless, they again have the precedent wrong.

To be fair, the Auctioneers are not the only ones. Several other States have conceded the application of "intermediate scrutiny" to "incidental" speech burdens. *Kirschmeyer*, 961 F.3d at 1072 n.7; *see Brokamp v. James*, 66 F.4th 374, 391 (2d Cir. 2023); *Cap. Associated Indus., Inc. v. Stein,* 922 F.3d 198, 207 (4th Cir. 2019). And some courts have said some form of intermediate scrutiny applies. *See Vizaline*, 949 F.3d at 932. This Court, however, does not count itself among them.

This Court applies "no heightened First Amendment scrutiny" to "regulation[s] of professional conduct that only incidentally burden . . . speech." *EMW*, 920 F.3d at 429; *see Lictenstein*, 83 F.4th at 584, 587; *Bevan*, 929 F.3d at 374 (citing *Liberty Coins*, 748 F.3d at 693). The Auctioneers attempt to dispose of this precedent in a footnote. *See* Open. 29 n.10. But their focus on the legal pedigree of informed consent comes to nothing. This Court applies rational-basis review to informed consent laws "*because*" they regulate professional conduct and "only incidentally burden[]" speech. *EMW*, 920 F.3d at 429 (emphasis added); *see NIFLA*, 585 U.S. at 770; *Virtual Drone*, 102 F.4th at 276. By contrast, it applies heightened scrutiny only in cases concerning the targeted "restriction" or "regulation[] *of* protected" expression, *Richland Bookmart, Inc. v. Knox Cnty.*, 555 F.3d 512, 520 (6th Cir. 2009), which includes the targeted restriction of conduct that is *also* inherently "communicative," *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 538 n.10 (6th Cir. 2012); *see supra* at 20.

The Auctioneers make no argument that professional auctioneering, as a whole, is "inherently expressive." *Lichtenstein*, 83 F.4th at 594. Just like *Liberty Coins*, this case concerns a law licensing "professional

conduct that only incidentally burdens professional speech." *EMW*, 920 F.3d at 429; *see Liberty Coins*, 748 F.3d at 691–92; *Del Castillo*, 26 F.4th at 1226; *see supra* at 24–27. This case thus warrants "no heightened First Amendment scrutiny." *EMW*, 920 F.3d at 429.

B. The law passes muster, even under heightened review.

Even if the Court applies heightened review, it should still affirm the dismissal of this lawsuit. The district court "subject[ed]" the auctioneer-licensing law "to rational basis review," and the Auctioneers have consistently declined to argue that the law "fail[s] that test." *McLemore II*, 2024 WL 3873415, at *8; *see* Open. 37–44. But regardless, the licensing law passes any conceivably applicable level of scrutiny.

Of course, the First Amendment jurisprudence offers many different forms of "heightened" scrutiny. *See Lichtenstein*, 83 F.4th at 596–98; *see also, e.g.*, *Reed*, 576 U.S. at 163 (content-based speech restrictions); *McCullen*, 573 U.S. at 477 (restrictions to govern speech in traditional public fora); *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (restrictions to govern speech in limited public fora); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986) (time-, place-, and manner-of-speech restrictions); *Parker*, 818 F.2d at 509 (restrictions to govern

commercial speech); *O'Brien*, 391 U.S. at 376–77 (regulations targeting conduct that is also "symbolic speech"). The list also includes "vari[ous]" different forms of "intermediate scrutiny." *Virtual Drone*, 102 F.4th at 275 n.5. And the cases even "use[] the phrase 'narrow tailoring' to describe several different 'means-ends' tests." *Lichtenstein*, 83 F.4th at 597. Yet the Auctioneers have argued for "heightened scrutiny" of "any form" without showing *which* "form" should actually apply. Open. 39. And dismissal is *not* "improper" just because the "case involve[s]" any form of "heightened scrutiny." *Id.* at 37.

On the contrary, this Court has affirmed pleading-stage dismissal under a rubric the Auctioneers call "intermediate scrutiny." *Id.* at 40 n.14; *see Lichtenstein*, 83 F.4th at 601; *see also Virtual Drone*, 102 F.4th at 271 (describing the *O'Brien* standard as "more relaxed"). And it has effectively equated that form of "intermediate scrutiny" with several others. *See Richland Bookmart*, 555 F.3d at 520–21. This shows that, while intermediate forms of scrutiny do place burdens of persuasion on the State, the State can meet those burdens "at the pleading stage" just as with "rational basis" review. *Lichtenstein*, 83 F.4th at 599. This is

because courts can rely either on "specific evidence" or sheer "common sense" to guide their analysis. *Virtual Drone*, 102 F.4th at 277.

That situation presents itself here. To begin, the State's regulatory interests have all been vetted and blessed as a matter of law. "Very many are the interests which the state may protect against the practice of an occupation." *Liberty Coins*, 748 F.3d at 692 (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)). And that is why "individuals are often prohibited from doing to (or for) others what they are permitted to do to (or for) themselves." *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 285 (2d Cir. 2015). When it comes to an occupation like auctioneering, the State has a strong "interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible," whether they are operating online or off. *Liberty Coins*, 748 F.3d at 692 (quoting *Thomas*, 323 U.S. at 545 (Jackson, J., concurring)); *see Dent*, 129 U.S. at 122; *supra* Part I.A.2; Second Task Force Meeting at 46:50–49:50. Courts have recognized those interests as valid foundations for myriad licensing laws. *See Parker*, 818 F.2d at 508 (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)).

In fact, the Supreme Court has "recognize[d] that the States have a *compelling* interest in the practice of professions within their boundaries." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (emphasis added). And that is because a person's "fitness or capacity to practice [a] profession" has obvious implications for his or her clients. *Castille*, 799 F.3d at 221; *see Sensational Smiles*, 792 F.3d at 285; First Task Force Meeting at 33:20–33:59. That is why so many courts — including this one — have described a State's interest in this area as "at least substantial" if not "stronger." *Stein*, 922 F.3d at 209 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978)); *see Parker*, 818 F.2d at 508 (citing *Middlesex Cnty.*, 457 U.S. 423). "[E]nsuring the competency and honesty of those who hold themselves out as . . . professional[s]" is among the most well-recognized roles of government. *Young*, 825 F.3d at 495. And such "public interest" rationales may be even stronger now than they were in this regime's infancy. 1967 Tenn. Pub. Acts ch. 335, R.19-1 at 157; *see* Second Task Force Meeting at 57:18–57:30; 2:29:31–2:31:03.

The Auctioneers' attempts to question the State's interests all miss the mark. They claim the law was driven purely by economic protectionism, not consumer protection. *See* Open. 42 (citing *Craigmiles v. Giles*,

312 F.3d 220 (6th Cir. 2002)). And although this Court should reconsider its precedent on that subject, *see Powers v. Harris*, 379 F.3d 1208, 1219 (10th Cir. 2004), the State has never relied on protectionism to justify this regime, *see* First Task Force Meeting at 25:24–26:02; *supra* at 3–12.

Nor has it relied on the idea that "online auctioneers" pose "a [unique] problem," as the Auctioneers' briefing seems to suggest. Open. 41. On the contrary, the paucity of reported "complaints" about "online auctions with extended time endings" could be easily attributed to the relative unpopularity of this auctioneering format or the prior ambiguities of Tennessee law. Compl., R.1 at 6; *see* First Task Force Meeting at 54:32–54:50; Second Task Force Meeting at 32:57–35:36; Third Task Force Meeting at 1:08:45–1:13:15; Fourth Task Force Meeting at 51:50–54:50. But the ills addressed by the licensing statute can arise within that format just the same as in-person auctioneering. *See* Second Task Force Meeting at 46:50–49:50; *supra* at 9–12. And this created "a real need to . . . overs[ee] . . . online auctions" that operate like the in-person auctions Tennessee has long regulated. Open. 42 (quoting Second Task Force Meeting at 34:25–34:32).

The Auctioneers thus err by focusing on Tennessee's interest in licensing "online auctioneering" as though "online auctioneering" presented some separate public problem to solve. It presents the *same* problems as "in-person auctioneering." *See* First Task Force Meeting at 33:20–33:59; Fourth Task Force Meeting at 33:16–41:55; *supra* at 9. If Tennessee can license the former, it can license the latter.

The Auctioneers commit related mistakes on the tailoring side of the analysis. That is, in comparing the law's extension to online auctioneering with the "host of [licensing] exemptions," the Auctioneers do not grapple with (or even acknowledge) the statute's objectives. Open. 42.

To be clear, the exemptions to licensure are what makes the statute *fit* the State's interests by ensuring that it regulates professional auctioneering *and only* professional auctioneering. *See supra* at 8. That limited interest explains why the licensing requirement does not apply to various court-appointed officers or government agents. Tenn. Code Ann. § 62-19-103(1)–(3), (6). It explains why the licensing requirement does not apply in various amateur or non-profit settings. *See id.* § 62-19-103(4)–(5), (12). It explains why the requirement does not apply when federal regulations would supersede. *See id.* § 62-19-103(8). And it explains why the

requirement does not apply in circumstances governed by more specific and pertinent State laws. *See id.* § 62-19-103(10).

The exemptions thus "leave open ample avenues for" any "actual speech" the act of auctioneering could be said to express. *Lichtenstein*, 83 F.4th at 599 (citing *McCullen*, 573 U.S. at 477). And in fact, the Auctioneers' fixation on "[t]he infamous eBay exemption" helps prove this very point. Open. 25. The exemption does not extend any sort of special immunity to eBay as a company; it extends to a *format* of product "listings" commonly used on eBay. Tenn. Code Ann. § 62-19-103(9). If that format constitutes "auctioneering," and if auctioneering constitutes speech, why do the Auctioneers criticize this "glaring exemption" instead of just *using* it? Open. 42. Were they to conduct their "auctions" within the parameters of this exemption, they would not need auctioneering licenses. *See* Third Task Force Meeting at 23:17–23:30, 52:27–52:48. So what makes this a *burden* on the Auctioneers' "speech" rather than an outlet for whatever message they want to express?

The answer is nothing. The Auctioneers have no "message" to express through the extended-time bidding format that they cannot equally express through the fixed-time bidding format. *Lichtenstein*, 83 F.4th at

583. But they do have a business rationale for doing the former instead of the latter. Specifically, Will McLemore thinks that fixed-time bidding "do[es] a worse job for . . . client[s], because" the "[in]ab[ility] to extend bidding" means the highest price may not be attained. Third Task Force Meeting at 23:44–23:50; *see id.* at 52:48–53:07. That is why McLemore can sell his services at a higher price for one form and not the other. *Cf.* Second Task Force Meeting at 1:35:47–1:38:20 (explaining the Company's different services). And it is those services — not the Auctioneers' "speech" — that the law at issue regulates. *See supra* at 3–5.

Of course, the Auctioneers have never challenged the licensing *criteria* as insufficiently tailored, and that's because the statute leaves no room for this argument. Becoming a Tennessee auctioneer does not require years of expensive education. It does not require long waits or the payment of exorbitant fees. Instead, the process entails a sensible and progressive amount of training and experience as one moves up the ranks of the profession. *See* Tenn. Code Ann. § 62-19-111(a)(1)(B), (b)(2), (c)(2). And it requires the Commission to verify an auctioneer's "integrity" and "competency" by traditional and commonplace means. *See id.* § 111(d).

The Auctioneers could satisfy those requirements, or they could express themselves through countless alternative avenues. Tennessee law does not let them do both, and "the First Amendment leaves" that policy "choice to [Tennessee's] legislators." *Lichtenstein*, 83 F.4th at 597.

II. The Auctioneers' complaint contains other critical defects.

The district court got the free speech question right. But if the Court thinks the Auctioneers have a viable First Amendment theory, it should still "'affirm'" the district court's "dismiss[al]" on other "'grounds.'" *Dixon*, 492 F.3d at 673 (quoting *Abercrombie*, 280 F.3d at 629). The Court's *de novo* review extends to endorsing any purely legal reason to throw out this lawsuit. *See Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012). And in addition to presenting a bunk First Amendment theory, the complaint also fails to "allege[]" the "facts" needed to justify discovery. *Id.* Specifically, McLemore and his Company have failed to cure the standing issues that doomed their prior litigation. And none of the Auctioneers have pleaded a viable cause of action under the Civil Rights Act.

A. McLemore and his Company face no actionable threat of prosecution for their speech.

McLemore and his Company lack standing to sue the Commission.

If this lawsuit continues, they should not be allowed to participate.

The fact that only one plaintiff needs standing for a suit to "move forward," Open. 16 (quoting *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 710 (6th Cir. 2015)), does not mean courts can "dispense[]" standing "in gross," *Murthy v. Missouri*, 144 S. Ct. 1972, 1988 (2024) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)). Standing derives from the jurisdictional limits of Article III, which allow federal courts to adjudicate discrete cases and controversies arising between adverse litigants. *See Doe v. Lee*, 102 F.4th 330, 342 (6th Cir. 2024) (citing *Haaland v. Brackeen*, 599 U.S. 255, 293 (2023)). It follows that one plaintiff cannot piggyback off another's standing. Instead, *each* "plaintiff" must "establish [his own] standing" defendant-by-defendant, right-by-right, and "remedy-by-remedy." *Tenn. Conf. of NAACP v. Lee*, 105 F.4th 888, 902–04 (6th Cir. 2024); *see Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 253 (6th Cir. 2018).

Those requirements have special force in a case like this one, where multiple plaintiffs seek individualized protection from state law. To evade Tennessee's sovereign immunity from process and judgment, each Auctioneer must seek prospective injunctive relief against each

defendant. *See Ernst v. Rising*, 427 F.3d 351, 358–59 (6th Cir. 2005) (citing *Ex parte Young*, 209 U.S. 123, 155–56 (1908)). That relief must be limited to personalized protection from each defendant's "specified un[constitutional] actions." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 44 (2021). And it can "extend[no] further than necessary to remedy [each successful] plaintiff's injury." *L.W.*, 83 F.4th at 490 (quoting *Kentucky v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023)); *see Kallstrom v. City of Columbus*, 136 F.3d 1055, 1069 (6th Cir. 1998). The Auctioneers thus lack a collective right to litigate. Each one can only "move forward" by pleading a personal constitutional harm. *Parsons*, 801 F.3d at 710.

The precedent the Auctioneers cite to the contrary does not meaningfully grapple with this issue. *See* Open. 16 (citing *Ne. Ohio Coal. for Homeless v. Husted*, 837 F.3d 612, 623 (6th Cir. 2016)). Its reasoning is based on the premise that multiple plaintiffs present "identical claims." *Husted*, 837 F.3d at 623. But while that might occur in other contexts — such as suits challenging federal agency rulemaking under the Administrative Procedure Act, *see Tennessee v. Dep't of Ed.*, 104 F.4th 577, 593 n.15 (6th Cir. 2024) — it never occurs in suits like this one, seeking preemptive injunctions under the Civil Rights Act, 42 U.S.C. § 1983.

That is because unlike the federal government, which has extensively waived its sovereign immunity from process, *see* 5 U.S.C. § 702, no State can face process under the Civil Rights Act without its consent, *see Ernst*, 427 F.3d at 358. The Auctioneers therefore must bring their claims against the individual members of the Commission and align those claims with the "historical" principles of equity. *Jackson*, 595 U.S. at 44. While those principles allow for "decree[s]" dictating the Commission members' "'behavior . . . towards'" each Auctioneer separately, *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1032 (6th Cir. 2022) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)), they do not allow "court order[s] that go[] beyond" individualized harm, *L.W.*, 83 F.4th at 490. Each Auctioneer therefore must plead and prove a personalized threat to his *own* speech. Any Auctioneer failing to plead that threat cannot proceed to discovery.

That poses a problem for McLemore and his Company, which this Court has already addressed. To plead standing while evading sovereign immunity, McLemore and the Company must clear two well-established hurdles. *First*, they "must [each] plead . . . 'an intention to engage in a course of conduct arguably affected with a constitutional interest[] but

proscribed by'" state law. *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)). *Second*, they must each plead "a 'certainly impending' threat of prosecution" for violating that state law's proscriptions. *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 435 (6th Cir. 2024) (emphasis omitted) (quoting *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 454 (6th Cir. 2017)).

But neither McLemore nor the Company can clear either hurdle. This is because the Commission only licenses "individual[s]" who conduct "auction[s]," Tenn. Code Ann. §§ 62-19-101(1)–(4), (9), (11), and McLemore "is an auctioneer licensed . . . in Tennessee," *McLemore I*, 2023 WL 4080102, at *1; *see* Compl., R.1 at 3. As a person who has no intent "to give up [his] license[]" to conduct *offline* auctions, McLemore necessarily has the right to conduct *online* auctions. Fourth Task Force Meeting at 56:14; *see id.* at 56:00–57:07; *McLemore I*, 2023 WL 4080102, at *2. And as a firm with a licensed principal auctioneer as its "president and sole member," the Company has the right to conduct online auctions through McLemore. Compl., R.1 at 3; *see* Tenn. Code Ann. § 62-19-102; 2019 Tenn. Pub. Acts ch. 471, R.19-4 at 190. This means that neither

McLemore nor the Company has pleaded "an intention" to exercise speech rights in a manner "proscribed by" the auctioneering law. *Russell*, 784 F.3d at 1049 (quoting *Babbitt*, 442 U.S. at 298). And it likewise necessarily follows that neither has pleaded any "threat of prosecution," much less a threat that is "certainly impending." *Friends*, 108 F.4th at 435 (emphasis omitted) (quoting *Crawford*, 868 F.3d at 454).

This Court said just as much when it brought McLemore's prior lawsuit to an end. In response to the prior panel decision "vacat[ing] . . . and remand[ing] with instructions to dismiss," McLemore petitioned for rehearing to request further proceedings on remand. *McLemore I*, 2023 WL 4080102, at *3; *see* Reh'g Pet., No. 22-5458, D.44 (6th Cir. July 3, 2023). In that petition, McLemore argued the panel had "overlooked" his First Amendment claim as a potential basis for more litigation. *Id.* at 2. But this Court denied McLemore's request, implying that it had *not* overlooked his First Amendment claim — that claim just failed for "lack of jurisdiction" as well. *McLemore I*, 2023 WL 4080102, at *3; Order, No. 22-5458, D.45 (6th Cir. Aug. 18, 2023). Rather than permitting him to press his free speech theory in the prior lawsuit, this Court reiterated its

instruction to dismiss *all* claims as nonjusticiable. *See* Mandate, No. 22-5458, D.46 (6th Cir. Aug. 28, 2023).

McLemore did not contest this challenge to his standing below. *See* Mot. Dismiss Reply, R.23 at 220 (citing Mot. Dismiss Resp., R.22 at 209–10). That should settle the issue. *See Norton*, 99 F.4th at 844.

As for McLemore and the Company's assertion of "financial and reputational harm," Open. 15, that does not fit the rubric they must satisfy — and their own citations again help illustrate why. They cite to one case concerning a past financial injury, which cannot apply to a pre-enforcement challenge. *See id.* (citing *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 635–36 (2023)). And they cite to another case about a past and ongoing reputational injury brought "under the Administrative Procedure Act." *Parsons*, 801 F.3d at 706, *cited at* Open. 15. Neither case aimed to enjoin "a credible threat of" an unconstitutional state "prosecution." *Russell*, 784 F.3d at 1049 (quoting *Babbitt*, 442 U.S. at 298). Neither case offers McLemore or the Company what they need to establish standing.

Moreover, to the extent either McLemore or the Company could be thought to rely on the *Employees'* speech injuries, that theory would also fail — because it proves far too much. In the district court, the Company

claimed its speech was "suppresse[d]" because its employees needed licenses. Mot. Dismiss Resp., R.22 at 209. But the Company offered no binding or persuasive authority to buttress that position, and that's because no well-informed court would ever endorse it. The Company's argument boils down to the proposition that any restriction on its choice of *agents* for its speech constitutes a cognizable injury to the speech right itself. If that were the case, the Company could manufacture a free speech injury from practically *any* restriction on who it hires: Child labor and immigration laws would "stifle" the Company's speech just as much as Tennessee's auctioneer-licensing statute. *Id.*; *see also* Tenn. Code Ann. § 50-5-103 (restricting employment of children); *id.* § 50-1-103(b) (restricting employment of undocumented aliens).

The First Amendment jurisprudence does not work that way. The Company may have a First Amendment right to free speech, but it does not have a First Amendment right to speak through whomever it wants. In this case, it can speak through Will McLemore. *See supra* at 55. And it faces no "'substantial risk' of enforcement of the statute against" it regardless. *McLemore I*, 2023 WL 4080102, at *2 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *see supra* at 56.

B. None of the Auctioneers have alleged facts stating a plausible Civil Rights Act claim.

Analytical defects and jurisdictional issues aside, the Auctioneers have also failed to plead facts establishing a "plausibl[e]" cause of action. *Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 480 (6th Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

A plaintiff with standing still needs to justify discovery by alleging actionable facts. *See Keen v. Helson*, 930 F.3d 799, 802 (6th Cir. 2019). And "the Civil Rights Act" only "allow[s] individuals to vindicate violations of *their* [*own*] constitutional rights." *Susselman v. Washtenaw Cnty. Sheriff's Off.*, 109 F.4th 864, 870 (6th Cir. 2024) (emphasis added). "To succeed" on such a claim, "a plaintiff must . . . identify a constitutional right" and "then show that a [state officer] deprived *him* of [it]." *Id.* (emphasis added). But none of the Auctioneers have done that.

For McLemore and the Company, the right-of-action problems mirror the jurisdictional issue. This Court has correctly read the Civil Rights Act to grant a right to relief "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)). This means McLemore and the Company must each plead a threat to

their *own* speech, rather than the speech of somebody else — no matter how closely related. *See id.* at 1096; *see Jaco v. Bloechle*, 739 F.2d 239, 241 (6th Cir. 1984). That poses a problem for both McLemore and the Company, because McLemore has the license necessary to conduct online auctions, *see* Compl., R.1 at 3, and the Company has the licensed personnel necessary to do so as well, *see supra* at 55.

As for the Employees, they simply do not allege sufficient "factual matter" to "nudge[]" their claims from "conceivable to plausible." *Twombly*, 550 U.S. at 556, 570. "Nothing but legal conclusions suggest[]" that the Employees are actually violating the law. *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 684 (6th Cir. 2011). And by not including the supporting factual allegations in the complaint, the Employees have failed to state viable claims to relief.

This issue boils down to what the *complaint* says about what the Employees actually do. In their view, it is enough to allege they "are conducting online auctions without licenses" and they cannot avail themselves of the "exemptions" from the licensing requirement. Open. 14; *see* Compl., R.1 at 8. But those are exactly the sort of "conclusory statements" and "naked assertions" that require "further factual

enhancement" to justify discovery. *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 [licensure] exemption," Prelim. Inj. Reply, R.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 complaint's sufficiency. *Bates*, 958 F.3d at 480. Without them, the Court cannot "draw [a] reasonable inference that the [Commission members are] liable" to the Auctioneers. *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 either, or that the Auctioneers "may amend their complaint to incorporate the material in their declarations." Open. 14 n.7 (citing Kimball Decl., R.14-1; Smith Decl., R.14-2; Brajkovich Decl., R.14-3). "For decades, it has been 'black-letter law' that courts must not review outside materials when evaluating a complaint's sufficiency." *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 the Employees actually do. *See id.* Absent such amendment, the complaint will state no claim to relief.

* * *

This lawsuit "trivializes the freedom" the Auctioneers claim to defend, while attempting to use it as a weapon against the democratic process our speech protections serve. *FAIR*, 547 U.S. at 62. "'[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market,' and the people lose when [unelected judges are] the one[s] deciding which [policy] ideas should prevail." *NIFLA*, 585 U.S. at 772 (citation omitted) (quoting *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). This Court "would paralyze state governments if [it] undertook a probing review of each of their actions, constantly asking them to 'try again.'" *Powers*, 379 F.3d at 1218. A plaintiff must clear a high bar to justify such judicial scrutiny, and the Auctioneers have not cleared that bar in this case. *See supra* Part I.

In this case, the people of Tennessee sought to "regulate[] [auctioneering] one way," and the Auctioneers brought this lawsuit to have courts "regulate it another way." *Giboney*, 336 U.S. at 504. This

Court should affirm that the law at issue does "not violate the Federal Constitution." *Id.* "While the creation of . . . a libertarian paradise may be a worthy goal," the Auctioneers should be directed to "turn to the [Tennessee] electorate for its institution." *Powers*, 379 F.3d at 1222.

CONCLUSION

The Court should affirm the district court's judgment.

Dated: November 7, 2024

Respectfully Submitted,

Jonathan Skrmetti
Attorney General & Reporter

J. Matthew Rice
Solicitor General

/s/ Gabriel Krimm
Gabriel Krimm
Senior Assistant Solicitor General

Nicholas Gregory Barca
Senior Assistant Attorney General

Jessica C. Simon
Laurel Hall
Assistant Attorneys General

State of Tennessee
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
Gabriel.Krimm@ag.tn.gov
(615) 532-5596
Counsel for the
Auctioneer Commission

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's type-volume limitations because it contains 12,916 words, excluding portions omitted from the Court's required wor,d count.

This brief complies with the Court's typeface requirements because it has been prepared in Microsoft Word using fourteen-point Century Schoolbook font.

/s/ Gabriel Krimm
Gabriel Krimm

CERTIFICATE OF SERVICE

On November 7, 2024, I filed an electronic copy of this brief with the Clerk of the Sixth Circuit using the CM/ECF system. That system sends a Notice of Docket Activity to all registered attorneys in this case. Under 6 Cir. R. 25(f)(1)(A), "[t]his constitutes service on them and no other service is necessary."

/s/ Gabriel Krimm
Gabriel Krimm

DESIGNATION OF RELEVANT DOCUMENTS

The following record documents are relevant to this appeal:

Document	R.	Pages
Complaint	1	1–19
Auctioneers' Mot. Prelim. Inj.	8	44–62
Comm'n Prelim. Inj. Resp.	12	71–95
Auctioneers' Prelim. Inj. Reply with Exs.	14	97–112
Comm'n Mot. Dismiss	18	118–20
Comm'n Mot. Dismiss Br. with Exs.	19	121–96
Auctioneers' Mot. Dismiss Resp.	22	202–17
Comm'n Mot. Dismiss Reply	23	218–25
Opinion re. Prelim. Inj. & Mot. Dismiss	30	245–62
Order of Dismissal	31	263–64
Judgment	32	265
Notice of Appeal	33	266