No. 24-5794

In the
United States Court of Appeals
for the Sixth Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

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INTRODUCTION

In its brief, the Commission barely hides its distaste for the First Amendment.[1] It calls heightened scrutiny a "judicial veto," Gov't Br. 41, and frets that "unelected judges" will conduct "invasive judicial review." *Id.* at 20–21, 62. But it's good that our Constitution's separation of powers calls on courts to protect individual rights. The Online Auctioneers are entitled to assert their First Amendment claim in federal court. As the district court held, there's no merit to the Commission's call for the Unlicensed Online Auctioneers to provide more detailed descriptions of their daily work. That's because the statutory text supplies the definition of auctioneering and subjects the Unlicensed Online Auctioneers to criminal and civil penalties—which the Commission has never disavowed. And McLemore would suffer financial and reputational harms from the loss of individuals who have diligently worked for his company for years.

The Online Auctioneers properly pleaded a First Amendment claim. The plain text of the Online Auction Law, unlike the text of laws in the cases cited by the Commission, restricts speech. And on the point that the Online Auction Law has the

[1] Appellants use the same shorthand they used in their opening brief. "Online Auctioneers" refers to all Appellants, "McLemore" refers to both Will McLemore and his company, the "Unlicensed Online Auctioneers" refers to Brajkovich, Smith, and Kimball, and "Commission" refers to all Appellees. Appellants use "Online Auctioneers' Br." to refer to their opening brief, and (as the Commission does) use native pagination when citing appellate briefs and PageID file stamp pagination when citing documents filed in the district court.

effect of restricting the Online Auctioneers' speech, the Commission hangs its hat on its assertion that three sibling courts, in three recent decisions, got the law wrong. It's the Commission that has adopted a misguided view of the First Amendment. The Commission contends that the Online Auction Law is a regulation of conduct that imposes only "incidental burdens" on speech. But the burden can't be incidental where, as here, speech is expressly targeted by statute and an integral part of the Online Auctioneers' profession. The district court acknowledged that auctioneering is a clear example of commercial speech but felt bound to apply rational basis given this Court's decision in *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014). But *Liberty Coins* provides no guidance in this case, and the Commission's argument to the contrary only recites arguments that the Online Auctioneers debunked in their opening brief.

The Commission can't satisfy First Amendment scrutiny at the pleading stage, and it's unlikely to do so at a later proceeding for three reasons. First, the Commission itself notes the paucity of complaints about online auctions and can only speculate about the harm that the Online Auction Law supposedly prevents. Second, the Commission offers unpersuasive and legally irrelevant explanations for the many exemptions that undercut the interests that the law purports to serve. Third, the Commission fails to even discuss less intrusive alternatives that it can readily implement to serve any of the interests it recites. This Court should reverse.

ARGUMENT

I. The District Court Correctly Held that the Online Auctioneers have Standing and a Viable Cause of Action under Section 1983

A. The Unlicensed Online Auctioneers Have Standing and a Viable Cause of Action under Section 1983

1. The district court correctly held that it had jurisdiction to hear the case. Memorandum Opinion, RE 30, Page ID # 251–55. The Commission no longer disputes that the Unlicensed Online Auctioneers have standing to press their case, but now contends that they failed to plead facts establishing a plausible cause of action. Gov't Br. 59. The Commission is wrong. "The burden of demonstrating that the complaint fails to adequately state a claim falls on the [Commission]." *Elec. Merch. Sys. LLC v. Gaal*, 58 F.4th 877, 882 (6th Cir. 2023) (citing *Taylor v. City of Saginaw*, 922 F.3d 328, 331 (6th Cir. 2019)). The Commission fails to meet this burden. The Commission has never submitted any factual material to contest the Unlicensed Online Auctioneers' allegations that they conduct online auctions without licenses and can't claim any exemption that would shield them from criminal and civil liability. *See* Complaint, RE 1, Page ID # 8; *cf. Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012) (when defendants mount a factual attack on jurisdiction, "the court can actually weigh evidence to confirm the existence of the factual predicates for subject-matter jurisdiction.") (citations omitted). So the district court properly "construe[d] the complaint in the light most

favorable to the plaintiff and accept[ed] all allegations as true." *Taylor*, 922 F.3d at 331; *see also* Memorandum Opinion, RE 30, Page ID # 250 (noting that the government mounts a facial, rather than factual, attack on jurisdiction).

The Commission's other argument fares no better. The Commission has abandoned its previous argument that the Unlicensed Online Auctioneers must spell out each statutory exemption that doesn't apply to them. Gov't Br. 61. But the Commission's new argument—a vague request for the Unlicensed Online Auctioneers to say what they do for the company—suffers the same faults. *Id.* There was no need for the Unlicensed Online Auctioneers to provide detailed logs of their daily activities because, as the district court noted, "[t]he Tennessee licensure statute does not adopt any complex or exacting definition of when it applies." *See* Memorandum Opinion, RE 30, Page ID # 252. The Unlicensed Online Auctioneers cited the relevant statutory provisions in their Complaint. *See* Complaint, RE 1, Page ID # 6–9. And there's no need for them to spell out each statutory provision in their Complaint, which provided enough notice for the Commission to call them "professional auctioneers." Gov't Br. 23; *see also id.* at 62 (implying that the Unlicensed Online Auctioneers' declarations, which aver that the Online Auctioneers perform activities prohibited by the plain text of the law, would establish a plausible cause of auction).

Precedent confirms that there's no obligation for plaintiffs to provide pages of factual allegations to establish a cause of action. A plaintiff challenging a farm loan forgiveness program that excluded white farmers from loan forgiveness, for example, need not allege more than that he's a white farmer who holds loans that would have been eligible for forgiveness but for his race. *See Wynn v. Vilsack*, 545 F.Supp.3d 1271, 1275 (M.D. Fla. 2021). None of the Commission's cases say otherwise. See *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 681–84 (6th Cir. 2011) (plaintiffs' 54-page complaint in a discrimination claim revealed only that a person who plaintiffs claimed to be similarly situated was "*dissimilarly* situated in several relevant respects") (emphasis in original); *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917, 931 (6th Cir. 2014) (assertion of defendants' wrongdoing was based on plaintiffs' mere "information and belief" rather than factual allegations); *Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 480 (6th Cir. 2020) (plaintiffs didn't show that defendants fell within the statutory definition of debt collectors rather than only security-interest enforcers).

More to the point, courts undertaking a 12(b)(6) analysis may take judicial notice of matters of public record. *Elec. Merch. Sys.*, 58 F.4th at 883. In *McLemore I*, the Commission conceded that one of the Unlicensed Online Auctioneers (as a member of the associational plaintiff in that case) suffered an injury that is traceable to the Online Auction Law. *See McLemore v. Gumucio*, 19-cv-530, 2019 U.S. Dist.

LEXIS 122525, at *20–21 (M.D. Tenn. Jul. 23, 2019) ("*McLemore I*"), vacated on other grounds by *McLemore v. Gumucio*, No. 22-5458, 2023 U.S. App. LEXIS 15611 (6th Cir. Jun. 20, 2023) (reasoning that Mr. Kimball's injury stems from his being unlicensed and the fact that the Online Auction Law "would require [him] to have a license to continue operating online auctions").

In the end, federal pleading standards don't require the Online Auctioneers to multiply the costs of litigation by inserting extraneous allegations in their pleadings. The Unlicensed Online Auctioneers stated a viable cause of action by alleging that they perform online auctions—an activity that is defined by statute and, for those who are unlicensed, proscribed by law. *See* Complaint, RE 1, Page ID # 8–9.

2. Even if the Commission had offered factual evidence to contest the Unlicensed Online Auctioneers' allegations, the case should still move forward. Courts can consider a plaintiff's declarations offered in response to a factual attack on jurisdiction. *Carrier Corp.*, 673 F.3d at 440. Each of the Unlicensed Online Auctioneers offered declarations at the district court, Declaration of Blake Kimball, RE 14-1, Page ID # 105–06; Declaration of Justin Smith, RE 14-2, Page ID # 108; Declaration of Ron Brajkovich, RE 14-3, Page ID # 110–11, which the Commission itself relies upon in this appeal. *See* Gov't Br. 23, 61. The Commission doesn't dispute that the declarations establish a plausible cause of action and instead asks the Unlicensed Online Auctioneers to amend their Complaint to gain the benefit of

the declarations. *See id.* at 61–62. But that itself would be a basis for vacating the district court's judgment. Because the lower court based its decision on the merits, its judgment ostensibly acts as a dismissal with prejudice. *See Pratt v. Ventas Inc.*, 365 F.3d 514, 522–23 (6th Cir. 2004). In the end, however, this Court need not consider these alternative arguments because the Unlicensed Online Auctioneers' Complaint has plainly stated a plausible cause of action.

B. McLemore and His Company Have Standing and a Viable Cause of Action under Section 1983

1. McLemore and his company have standing and a viable cause of action under Section 1983. The Commission doesn't dispute that financial and reputational harms are cognizable injuries. Gov't Br. 57. Precedent belies the Commission's contention that McLemore wouldn't suffer precisely those harms from the loss of valuable individuals who work for the company. For instance, the Commission suggests that companies have no right to challenge laws that bear directly on who they may hire. *See id.* at 58. But it's well-established that companies can challenge such laws—like ones that force general contractors to engage in race-based subcontracting before they may successfully bid on government contracts. *See City of Richmond v. J.A. Croson*, 488 U.S. 469, 477–83 (1989). The Commission points to this Court's decision in *Chambers v. Sanders*, 63 F.4th 1092, 1100 (6th Cir. 2023) to say that a cause of action is "entirely personal to the direct victim of the alleged

constitutional tort." Gov't Br. 59. But it fails to explain why that case—which involved plaintiffs' claim that the wrongful conviction of their father deprived them of their due process right to "familial association"—bears on the analysis here. *Chambers*, 63 F.4th at 1095–96. Unlike the plaintiffs in *Chambers*, McLemore pleaded financial and reputational injuries, which would befall him and his company if unlicensed online auctioneers could no longer work for it. *See* Complaint, RE 1, Page ID # 8–9.

2. The Commission's argument that *McLemore I* precludes McLemore from bringing this case rests on a series of omissions. *See* Gov't Br. 56–57. The Commission starts by alleging that McLemore didn't contest this challenge to his standing below, but it bases this allegation only by pointing to a different part of McLemore's brief. Gov't Br. 57 (citing Mot. Dismiss Resp., RE 22, Page ID # 209–10). As McLemore stated below, he's not precluded from asserting a claim that was never raised in the *McLemore I* appeal. Mot. Dismiss Resp., RE 22, Page ID # 203 & n.3. While the Commission calls this case a "do over suit," Gov't Br. 14, it doesn't even mention—much less dispute—the district court's observation that "neither the district court nor the Sixth Circuit ultimately resolved the First Amendment-based claim on the merits." Memorandum Opinion, RE 30, Page ID # 248. And because standing isn't adjudicated in gross, the Commission fails to explain how a lack of exterritorial enforcement would affect an online auctioneer's ability to challenge the

Online Auction Law on free speech grounds. *See McLemore v. Gumucio*, No. 22-5458, 2023 U.S. App. LEXIS 15611, at *6–7 (6th Cir. Jun. 20, 2023).[2]

3. In any event, the one-plaintiff rule allows this Court to hear the case with all appellants in it. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 623–24 (6th Cir. 2016); *see also id.* at 622–23 (noting that a court may proceed even if claim preclusion applied to some of the plaintiffs). The Commission attempts to distinguish *Husted* by stating that "[i]ts reasoning is based on the premise that multiple plaintiffs present 'identical claims.'" Gov't Br. 53 (quoting *Husted*, 837 F.3d at 623). But that's precisely the case here because each of the Online Auctioneers is pleading a First Amendment claim. *See* Complaint, RE 1, Page ID # 9–11. There's simply no support that the proposition in *Husted*—which was itself not an APA case—only applies in "suits challenging federal agency rulemaking under the Administrative Procedure Act" and never in suits seeking prospective relief under Section 1983. Gov't Br. 53; *see Husted*, 837 F.3d at 620 (applying one-plaintiff rule in a case where plaintiffs sought prospective relief); *Pool v. City of Houston*, 978 F.3d 307, 312, 314 & nn. 7, 10 (5th Cir. 2020) (same).

[2] The Commission is wrong to suggest that Tennessee law has always regulated online auctions. Gov't Br. 12; *but see* Online Auctioneers' Br. 6–8. Regardless, the Commission doesn't base any of its jurisdictional arguments on this claim—perhaps because there's no dispute that the unlicensed practice of online auctioneering is *now* illegal in Tennessee.

II. The Online Auctioneers Properly Pleaded a First Amendment Claim

A. The Online Auction Law is Subject to Heightened Scrutiny Because It Stifles Speech

1. The Online Auction Law is subject to strict scrutiny because it imposes content-based and speaker-based restrictions on pure speech

a. The Online Auction Law regulates pure speech for two reasons. First, it facially targets speech by kicking in whenever there's an "exchange"—oral, written, or electronic—"between an auctioneer and members of the audience." Tenn. Code Ann. § 62-19-101(2). Second, even if the law were facially neutral, it would still produce the effect of stifling the Online Auctioneers' speech.

First, the Online Auction Law triggers First Amendment scrutiny because it facially targets speech. *See* Tenn. Code Ann. § 62-19-101(2). The Commission offers no meaningful response. The Commission relies on multiple cases that don't involve facial claims at all. *Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1217 (11th Cir. 2022); *Virtual Drone Servs., LLC v. Ritter*, 102 F.4th 263, 270 & n.2 (4th Cir. 2024). Many of the cases that did involve facial claims featured laws that were vastly different from the one here, which expressly targets "oral, written, or electronic" exchanges. The law in *Lichtenstein v. Hargett*, for example, prohibited persons who didn't work for an election commission from "giv[ing] an application for an absentee ballot to any person." 83 F.4th 575, 580 (6th Cir. 2023) (citing Tenn.

Code Ann. § 2-6-202(c)(3)). And neither of the two other laws the Commission cites defined the prohibition solely by reference to speech. *Locke v. Shore*, 634 F.3d 1185, 1189 (11th Cir. 2011) (defining "interior design" as "designs, consultations, studies, drawings, specifications, and administration of design construction contracts relating to nonstructural interior elements of a building or structure") (citation omitted); *National Association for the Advancement of Multijurisdiction Practice (NAAMJP) v. Castille*, 799 F.3d 216, 218 (3d Cir. 2015) (specifying the standards for admission of lawyers by reciprocity). The closest the Commission comes is the Eighth Circuit's decision in *Young v. Ricketts*, 825 F.3d 487, 494 (8th Cir. 2016), but the Court there failed to confront the argument that the law defined the profession in a way that necessarily implicated speech, and instead engaged in a professional speech analysis that was subsequently discarded by the Supreme Court. *See id.* at 492–94; *see also infra* at II.A.3.b.

Second, the Online Auction Law has the effect of stifling the Online Auctioneers' speech. Much like tour guides and veterinarians, the Online Auctioneers engage in speech as an integral part of their profession. Online Auctioneers' Br. 19–24. The Commission simply disagrees with decisions of the Fourth, Fifth, and Ninth Circuits. Gov't Br. 36–40. But it's the Commission that gets the First Amendment wrong. Supreme Court precedent contradicts the Commission's suggestion that the government's motive is critical in First

Amendment cases. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *see infra* II.A.3.c. Precedent also refutes the Commission's contention that "a law still only incidentally burdens speech when it targets conduct that includes or entirely consists of using language." Gov't Br. 40 (cleaned up); *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (explaining that the First Amendment applies when "the conduct triggering coverage under the statute consists of communicating a message").

Perhaps recognizing the weight of the authorities against it, the Commission attempts to distinguish the Online Auctioneers' practice. Gov't Br. 40–41. But the Commission never offers any factual basis for its conclusory assertion that cases in sibling courts involve "traditional contexts in which people [ ] express substantive messages" and this case does not. *Id.* To name just one example, the Online Auctioneers craft enticing descriptions of goods just as a tour guide might for landmarks. *See* Complaint, RE 1, Page ID # 5–6.

The Commission's attempt to distinguish the decisions in *Telescope* and *Otto* also misses the mark. Gov't Br. 33–34. The broader point of those cases is that government doesn't have unfettered control over speech merely because it's purporting to regulate the conduct of professionals. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751–52 (8th Cir. 2019) (explaining that it doesn't matter that videographers are expressing their views through a for-profit enterprise and rejecting government's argument that it is merely regulating conduct); *Otto v. City of Boca*

Raton, 981 F.3d 854, 861 (11th Cir. 2020) (rejecting "attempt to regulate speech by recharacterizing it as professional conduct").

Many of the cases marshaled by the Commission provide no support for its argument. In *Lichtenstein*, for instance, a divided panel of this Court held that a law prohibiting the distribution of a government form burdened "nobody's ability to engage in actual speech." *Lichtenstein*, 83 F.4th at 579; *see also id.* at 582 (noting that it was undisputed that the law at issue regulated conduct). The Court stressed that the form might well constitute the government's own speech and that the challengers were free to circulate their own pamphlets conveying the same information. *Id.* at 589.

Two of the other cases the Commission cites don't provide much help to its argument. One used a novel "economic consequences" test—untethered to Supreme Court caselaw—to determine whether the First Amendment should apply in the first place. *Virtual Drone*, 102 F.4th at 275. And the analysis in the other mirrors the Commission's error in concluding that what a person does "as part of her professional services" must be "occupational conduct" and therefore can't also be speech. *Del Castillo*, 26 F.4th at 1225–26.

In the end, the Commission's brief reveals precisely why the Online Auctioneers have stated a First Amendment claim. It suggests that the Online Auctioneers can craft narratives as long as they are not doing so while earning a

living. Gov't Br. 24 (asserting that the Online Auctioneers "may narrate to their hearts' content" when "their narration is not part of their professional services") (cleaned up).

b. The Online Auction Law is subject to strict scrutiny because it imposes speech- and content-based restrictions on speech. Online Auctioneers' Br. 24–26. And the district court's judgment must be reversed even if the Online Auction Law were content-neutral because the district court would have still erred in failing to apply intermediate scrutiny. *Id.* at 26. The Commission responds by doubling down on its misguided view that the law's differential treatment pertains only to conduct. Gov't Br. 29. As the Online Auctioneers have already pointed out, the Online Auction Law regulates pure speech. *See supra* at II.A.1.a.

2. The Online Auction Law is not merely a regulation of conduct with an incidental burden on speech and heightened scrutiny would be warranted even if it were

a. The Online Auction Law isn't merely a regulation of conduct with an incidental burden on speech. As the Online Auctioneers explained, regulations of conduct with an incidental burden on speech include laws against discriminatory hiring, ordinances against setting outdoor fires, and other laws that might only "sweep up some speech at their margins." Online Auctioneers' Br. 27. Here, as stated in the statutory text and in the Commission director's sworn testimony, the Online Auction Law "sanction[s] speech directly, not incidentally" because "the only

'conduct' at issue is speech." *Otto*, 981 F.3d at 865 (citation omitted); *see* Tenn Code Ann. § 62-19-101(2) (defining an auction as a form of written, oral, or electronic exchange); Complaint, RE 1, Page ID # 5 (noting deposition testimony).

There is thus no basis for the Commission's bold claim that a law only incidentally burdens speech when it targets conduct that "entirely consists of using language." Gov't Br. 40 (parenthesis omitted). Neither case the Commission cites supports its argument. In *Lichtenstein*, this Court reviewed a prohibition on the unauthorized distribution of a government form. *Lichtenstein*, 83 F.4th at 579. The prohibited conduct there hardly consisted entirely of language, and arguably none at all. *See id.* In *EMW Women's Surgical Center, P.S.C. v. Beshear*, this Court upheld a Kentucky law that required doctors to display and describe the ultrasound images to their patients before performing an abortion. 920 F.3d 421, 423 (6th Cir. 2019). This Court's conclusion rested on "the Supreme Court's" specialized "abortion precedent" given the "unique act" of abortion. *Id.* at 430 (citation omitted). Even outside of that unique context, the Kentucky law didn't *restrict* speech but required "the disclosure of truthful, non-misleading, and relevant information." *Id.* at 424. Unlike the Unlicensed Online Auctioneers in this case, doctors remained free to say what they wanted—including advising patients not to view the images. *Id.* at 424; *see also Upsolve Inc. v. James*, 604 F.Supp.3d 97, 113 & n.10 (S.D.N.Y. 2022) (distinguishing New York's unauthorized practice of law regime from informed

consent laws because the regime, as applied to the plaintiffs, "*only* affect[ed] speech: barring legal advice by nonlawyers"), *appeal filed* Jun. 22, 2022, No. 22-1345.

b. Yet another reason that the Online Auction Law isn't merely a regulation with an incidental burden on speech is that it restricts speech based on content and speaker. *See* Online Auctioneers' Br. 24–26. As the Ninth Circuit put it in analysis that could just as easily be applied here, the law's content-based exemptions "demonstrate that the Act does more than merely impose an incidental burden on speech." *Pac. Coast Horseshoeing Sch. v. Kirchmeyer*, 961 F.3d 1062, 1070–71 (9th Cir. 2020).

c. Because the Online Auction Law imposes more than incidental burdens on speech, this Court need not wade further into the circuit split on the proper standard of review for laws that incidentally burden speech. But if it did, this Court should remand the case for factual development. That's because this Court held that heightened scrutiny should apply in *Richland Bookmart, Inc. v. Knox Cnty*., 555 F.3d 512, 520–22 (6th Cir. 2009). The Commission trots out more recent decisions that have applied a more lenient standard. Gov't Br. 42. But one panel of this Court can't overrule another. *United States v. Caseslorente*, 220 F.3d 727, 736 (6th Cir. 2000). And the Commission's cases arise in vastly different contexts. One involves informed consent—which has long been thought of as a special category in free speech precedent. Online Auctioneers' Br. 29 & n.10; *see EMW*, 920 F.3d at 426

(evaluating law "against the backdrop of thirty-five years of evolving Supreme Court precedent concerning the constitutionality of abortion-informed-consent statutes"). The other is an election law case in which the Court observed the law "burden[ed] nobody's ability to engage in actual speech." *See Lichtenstein*, 83 F.4th at 579.

Even if laws imposing incidental burdens could be upheld at the pleading stage, the Online Auction Law shouldn't. Hypothesizing facts is different from ignoring contrary facts. Here, members of a government-created task force admitted that they didn't know how the public was harmed by online auctions, *see* Complaint, RE 1, Page ID # 6, and the trial court judge in *McLemore I* noted that "online extended-time auctions up until this point have gone unregulated without any substantial harm to Tennessee consumers." *McLemore I*, 2019 U.S. Dist. LEXIS 122525, at *38.

3. The government's brief and the district court's dismissal are based on their misunderstanding of this Court's decision in *Liberty Coins* and the Supreme Court's decisions in other cases

a. The district court incorrectly thought that this Court's decision in *Liberty Coins* dictated the outcome in this case. Memorandum Opinion, RE 30, Page ID # 257–59. *Liberty Coins* involved only a facial challenge and the law at issue didn't define the profession (precious metal dealing) by reference to speech. *See* Online Auctioneers' Br. 30–31. This case, however, involves both a profession that the government defines by referring to speech and a claim that the Online Auctioneers

before this Court engage in classic First Amendment activity in the course of their work. *See id.* at 31–33. And the *Liberty Coins* decision stressed that the case didn't "turn on advertising or solicitation." *Liberty Coins*, 748 F.3d at 697. But the Commission itself stressed that online auctioneers must "solicit bids in a way that entices favorable offers." Gov't Br. 4.

The Commission all but concedes the point. Rather than respond to the Online Auctioneers' arguments, the Commission recycles assertions that the Online Auctioneers have already debunked in their opening brief. *See* Gov't Br. 24–25. The Commission's failure to defend the district court's misreading of *Liberty Coins* is fatal to its position. After all, the district court acknowledged that, but for its reading of *Liberty Coins*, it would have reviewed the Online Auctioneers' First Amendment claim under heightened scrutiny. Memorandum Opinion, RE 30, Page ID # 259–61; *see also id.* at Page ID # 260 (An "auction is as clear an example of commercial speech as one is likely to find").

b. The Commission's half-hearted defense of the district court's professional speech analysis is also unpersuasive. As the Commission would have it, the Court should refuse to apply First Amendment scrutiny merely because speech is a part of the Online Auctioneers' "professional services." Gov't Br. 24 (citation omitted). That assertion flatly contradicts *National Inst. of Family & Life Advocates v. Becerra,* which held that the government doesn't gain "unfettered power to reduce

a group's First Amendment rights by simply imposing a licensing requirement." 585 U.S. 755, 773 (2018) *(NIFLA)*. The Commission first contends that *NIFLA* applies only to "state-compelled speech," Gov't Br. 14, but later concedes that the case is also instructive where the government "directly dictate[s] what information" people could communicate. *Id.* at 33. Perhaps the Commission means that a licensure requirement breaks the link between the government and its prohibition on speech, but it can't square that view with precedent. *See Billups v. City of Charleston*, 961 F.3d 673, 683 (4th Cir. 2020) (rejecting the argument that the licensing scheme was a business regulation of conduct that merely imposed incidental burdens on speech).

The Commission prudently abandons any defense of the district court's reasoning that First Amendment rights oscillate depending on whether professionals speak in advisory or "transaction-focused" roles. Memorandum Opinion, RE 30, Page ID # 259. The Supreme Court in *NIFLA* never held that professionals in advisory roles were entitled to *special* First Amendment protection but corrected lower court decisions that relegated the speech of advisors to second-tier status. *See NIFLA*, 585 U.S. at 767. *NIFLA* made plain that "occupational-licensing provisions"—whether directed at professionals in advisory roles or transaction-focused ones—"are entitled to no special exception from otherwise-applicable First Amendment protections." *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 931 (5th Cir. 2020).

c. The Commission ostensibly doubles down on the district court's purpose-based analysis when it asserts that the Online Auction Licensing Law doesn't "target" messages. Gov't Br. 40. But content-based restrictions on speech are presumptively invalid regardless of whether the government evinces "'animus toward the ideas contained' in the regulated speech." *Reed*, 576 U.S. at 165 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)); *see* Online Auctioneers' Br. 36–37. Nor must the government act with a "censorial motive" to "target speech based on its communicative content." *Reed*, 576 U.S. at 163, 166. Because the Online Auction Law is content-based on its face, *see* Online Auctioneers' Br. 24–26, "an innocuous justification" will not "transform" the law "into one that is content neutral." *Reed*, 576 U.S. at 166.

B. Heightened Scrutiny Warrants Reversal of the District Court's Dismissal

1. Dismissal is improper in cases involving heightened scrutiny because the government bears the burden of justifying its law

Because heightened scrutiny applies to the Online Auctioneers' First Amendment claim, this Court should reverse the district court's dismissal. Online Auctioneers' Br. 37–38. The Commission doesn't dispute the Online Auctioneers' primary argument: If the Online Auction Law imposes more than "incidental burdens" on speech, the district court was wrong to dismiss at the pleading stage. *See id.* Nor would precedent support any contrary argument. This Court

unequivocally stated that because the "government bears the burden of satisfying" intermediate scrutiny in a free speech case, it's not the court's role to decide the merits of a First Amendment claim at the pleadings stage. *Kiser v. Kamdar*, 831 F.3d 784, 789–90 (6th Cir. 2016).

The Commission retreats to its contention that this case can be decided at the pleading stage by applying a lesser standard that's applicable to regulations of conduct with incidental burdens on speech. Gov't Br. 44–45. But the contention falls flat at the start because the Online Auction Law imposes more than mere incidental burdens on speech. *See supra* II.A.2. Even if the incidental burdens test applied, the Commission's cases lend little support to its argument. The Fourth Circuit's decision in *Virtual Drone* wasn't decided at the pleadings stage at all, *Virtual Drone*, 102 F.4th at 270, and even if the standard in *Lichtenstein* applied, it wouldn't call on this Court to mechanically endorse the Online Auction Law where an Article III judge has already found no discernable harm justifying it. *See McLemore I*, 2019 U.S. Dist. LEXIS 122525, at *38 ("[O]nline extended-time auctions up until this point have gone unregulated without any substantial harm to Tennessee consumers.").

2. The Online Auction Law cannot survive any form of heightened scrutiny

a. The Commission can't satisfy its burden at the pleading stage, and the record here casts doubt on its ability to ever do so for three independent reasons. *See*

Online Auctioneers' Br. 40–44. For instance, the Commission has nothing more than "speculation or conjecture" to substantiate the harms it recites in its brief. *Kiser*, 831 F.3d at 789 (citation omitted); *see McLemore I*, 2019 U.S. Dist. LEXIS 122525, at *38 ("[O]nline extended-time auctions up until this point have gone unregulated without any substantial harm to Tennessee consumers."). It acknowledges "the paucity of reported complaints about online auctions with extended time endings," but guesses that the task force's inconvenient findings "could be easily attributed to the relative unpopularity of this auctioneering format or the prior ambiguities of Tennessee law." Gov't Br. 47 (internal quotation marks omitted). The Commission's hypothesis is questionable on its own terms. After all, task force members sought to regulate online auctions because it was "not going to diminish in its activity." Auctioneer Task Force Meeting (Aug. 27, 2018) at 34:25–34:32.

The Commission also conflates an interest in regulating live auctions with an interest in regulating online auctions. Gov't Br. 47–48. Yet First Amendment precedents make it plain that record evidence must support not just the necessity of any regulation, but the "necessity for [the] regulation" before the Court. *Kiser*, 831 F.3d at 789 (citation omitted); *Hines v. Pardue*, 117 F.4th 769, 781 (5th Cir. 2024) (noting that state's expert testimony was insufficient where it established that a physical exam *could* detect conditions that may not have otherwise been discovered, but didn't identify any evidence of actual harm caused by telemedicine without a

prior physical examination). Perhaps that's why the Commission asks this Court to revisit prior precedent and uphold economic protectionism as a legitimate government interest. Gov't Br. 47; *see also* Tenn. Dep't of Comm. and Ins., Auctioneer Task Force Meeting (Aug. 27, 2018) at 34:25–34:32 (statement from Tennessee Auctioneers Association's Vice President 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"). But that precedent remains, and economic protectionism isn't good enough to sustain any law—let alone one that burdens the Online Auctioneers' fundamental First Amendment rights. *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

b. The Online Auction Law is also inadequately tailored because it contains a host of exemptions that undercut the interests that the law purports to serve. The Commission asserts that the exemptions limit the law's scope to "professional auctioneering," Gov't Br. 48, but this circular argument does not define professional auctioneering other than by citing the statutory scheme. *See id.* Even beyond its circular reasoning, the Commission's argument is tenuous at best. After all, it's hard to think of any auctioneer—exempted or not—who doesn't confront the "challenge of maximizing profit while navigating other applicable regulations." *Id.* at 23. What's more, the Online Auction Law separately exempts "individual[s] who generate[] less than twenty-five thousand dollars ($25,000) in revenue a calendar

year from the sale of property in online auctions." Tenn. Code Ann. § 62-19-103(12). The statute thus belies the Commission's assertion that the exemption for churches that generate over $25,000 a year in revenue, for instance, is merely an exemption for "amateur" auctioneers. § 62-19-103(4); Gov't Br. 48. The Commission notes that exemptions apply in "various" non-profit settings, but never explains why it applies to some non-profits and not others. Gov't Br. 48.

The Commission makes two points in its attempt to salvage the eBay exemption. It says that the exemption applies to a different format and that the Online Auctioneers should change their business to take advantage of it. *Id.* at 49. But the Commission nowhere explains how these points are relevant to the tailoring analysis, and caselaw confirms that they are not. *See City of Ladue v. Gilleo*, 512 U.S. 43, 45, 52–53 (1994) (holding that a sign ordinance was fatally underinclusive where it prohibited homeowners from displaying any signs on their property except "residence identification" signs, "for sale" signs, and signs warning of safety hazards and where it allowed churches and nonprofit organizations to erect signs that were prohibited at residences). What matters is that the Online Law's arbitrary exclusion of fixed-time auctions from the Online Auction Law renders belief in a consumer protection rationale "a challenge to the credulous." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also* Tenn. Dep't of Comm. and Ins., Auctioneer Task Force Meeting (Nov. 05, 2018) at 32:36-32:43 & 41:16-22

(explaining that "leaving the fixed time and leaving the extended time as being different is somewhat problematic," and that it was done to avoid "kick[ing] an eBay's nest.").

c. The Online Auction Law fails heightened scrutiny because the Commission never tried to address its perceived problems with less intrusive tools readily available to it. *See* Online Auctioneers' Br. 43–44. The Commission's failure to dispute this point is devasting to its argument. *See, e.g.*, *Billups*, 961 F.3d at 688–89. The Commission trots out a list of interests that purportedly justify the Online Auction Law. Gov't Br. 45–46. But it never explains how less intrusive alternatives such as enforcement of consumer protection laws or voluntary certification programs for auctioneers wouldn't serve the government's interests just as well.

d. Finally, the Commission's belief that its licensure scheme "entails a sensible and progressive amount of training and experience" doesn't cure the inadequately tailored law. Gov't Br. 50. The Unlicensed Online Auctioneers have long served satisfied customers without licenses and believe that there is no need to waste valuable time and money in both obtaining a license and keeping it. Memorandum Opinion, RE 30, Page ID # 246 (noting that the Commission imposes renewal fees and continuing education requirements on those wishing to renew their license). In any event, the "First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social

costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010). In enacting the First Amendment, the American people have already adjudged that "the benefits of its restrictions on the Government outweigh the costs." *Id.* The Constitution rightly "forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Id.*

CONCLUSION

This Court should reverse the district court's judgment dismissing the case and remand this case for further proceedings.

DATED: December 6, 2024

Respectfully submitted,

s/ Wencong Fa

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit of Fed. R. App. P. 32(a)(7)(b)(i) and 6th Cir. R. 32 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the document contains 6,225 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface using Times New Roman 14-point font.

DATED: December 6, 2024

/s/ Wencong Fa
Wencong Fa

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Wencong Fa
Wencong Fa