CASE NO. 24-5794

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILL MCLEMORE; MCLEMORE AUCTION COMPANY, LLC, *et al.*,

Plaintiffs-Appellants,

v.

ROXANNA GUMUCIO, in her official capacity as Executive Director of the Tennessee Auctioneer Commission, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville, No. 3:23-cv-01014 *(Hon. Aleta Arthur Trauger)*

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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October 15, 2024

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case interests Cato because it concerns whether the government can require licensure for a profession engaged in "pure speech" consistent with the First Amendment.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Since the creation of the market square, there have been boisterous, loquacious individuals who have solicited bids for unique items. Merchants have long relied on them to create interest in their products and help sell their wares. Today, Will McLemore practices that time-honored profession with a novel twist. McLemore (though his company McLemore Auction Company) hosts his auctions online. In fact, McLemore was one of the first online auction houses in Tennessee.

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. Pursuant to Sixth Circuit Local Rule 29-2(a), all parties have been notified and have consented to the filing of this brief.

Until recently, McLemore ran his auctions without needing a state-issued license. But in 2019, that changed.

Tennessee law now requires that auctioneers acquire a license before hosting online auctions. TENN. CODE ANN. § 62-19-102(a). The law defines "auction" mostly by reference to speech. The law provides:

> Auction means a sales transaction *conducted by oral, written, or electronic exchange* between an auctioneer and members of the audience, consisting of a series of invitations by the auctioneer for offers to members of the audience to purchase goods or real estate, culminating in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience.

Id. at § 62-19-101(2) (emphasis added).[2] But the law also defines an "auction" as requiring a commercial transaction. *Id*.

McLemore and a group of other auctioneers brought this case to challenge the law under the First Amendment. One key question in the case is whether Tennessee's regulation of a communicative, commercial activity imposes a burden on speech or instead only on conduct. The district court answered "conduct," denied McLemore's request to be exempt from licensure, and upheld the law under rational basis review. That decision was wrong.

[2] Conducting an online auction without a license is a Class C misdemeanor, *id*. § 62-19-121, and violators are subject to a civil fine of up to $2,500. *Id*. § 62-19-126.

Amicus writes separately to stress two points to this Court. First, pure speech is protected by the First Amendment, even when that speech advertises a product for sale. In *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), the Supreme Court set out a framework for determining what constitutes "pure speech." This Court should apply that test here. If it does, this Court will find that auctioneering is pure speech protected by the First Amendment and entitled to heightened scrutiny. As such, the district court was wrong to review Tennessee's licensure law under rational basis review.

Second, protecting sellers' speech rights does not threaten the state's ability to regulate economic conduct. The number of pure speech activities is ever growing. But that has not caused courts to mistakenly invalidate legitimate regulations of conduct. Instead, courts are doing the hard work of discerning which laws target protected speech and which laws target regulable conduct. And courts are likewise doing the hard work of determining when regulations of pure speech might nonetheless be justifiable under heightened scrutiny. This work is crucial to protect the First Amendment rights of millions of American artists, essayists, writers, bloggers, and other creative commercial actors. Courts that engage in it have followed in the Supreme Court's footsteps by protecting sellers' speech rights. This court should not hesitate to do the same.

For these reasons, and the reasons set forth by Plaintiff-Appellants, this Court should reverse the district court's opinion.

ARGUMENT

I. AUCTIONEERING IS PURE SPEECH PROTECTED BY THE FIRST AMENDMENT.

Courts have held time and again that the First Amendment protects pure speech. *See, e.g.*, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010); *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) ("pure speech activities are rigorously protected regardless of meaning") (quotation marks omitted). Pure speech is a dynamic concept, and the activities it includes are ever-expanding as we create new ways to communicate. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981) (dance); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–03 (1952) (movies); *Kaplan v. California*, 413 U.S. 115, 119 (1973) ("pictures, . . . paintings, drawings, and engravings"). The First Amendment protects these activities because "the freedom to think and speak is among our inalienable human rights." *303 Creative*, 600 U.S. at 584.

In *303 Creative*, the Supreme Court added designing custom wedding websites to the long list of pure speech activities. *Id*. at 597. In doing so, the Court identified four key characteristics of a wedding website that made it pure speech:

(1) it contained "images, words, symbols, and other modes of expression"; (2) it was an "original, customized creation"; (3) it was created "to communicate ideas"; and (4) it "involve[d] [the creator's] speech." *Id*. at 587–88 (internal citations omitted).[3]

Auctioneering fits the test for "pure speech" from *303 Creative* point-by-point. First, online auctions convey a particular meaning using "words, symbols, and images."[4] At base, the job of an auctioneer is to tell a story. The auctioneer's story, in turn, sells the product. Skilled auctioneers are no different from skilled orators or essayists; through their words, they imbue a narrative into otherwise lifeless trinkets.

Robert Brunk (a famous auctioneer from Asheville, North Carolina) recounts in his memoir his favorite moments from his multi-decade career as an auctioneer. ROBERT BRUNK, A QUESTION OF VALUE: STORIES FROM THE LIFE OF AN AUCTIONEER (2024). His stories emphasize the narrative ability that skilled auctioneers employ when auctioning wares.

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[3] The Court in *303 Creative* identified still more activities (or creations) that qualify as pure speech. These include flag flying, *Shurtleff v. Boston*, 142 S. Ct. 1583 (2022), video games, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011), and parades, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995).

[4] Tennessee's auctioneering law echoes this language. *See* TENN. CODE ANN. § 62-19-101(2) ("Auction means a sales transaction conducted by oral, written, or electronic exchange between an auctioneer and members of the audience.").

An auctioneer first gathers information about the item he is selling. Auctioneers must be searching in their analysis; otherwise, they cannot properly convey an item's true value. This analysis requires that auctioneers "examin[e] objects as cultural expressions," discover "[w]hat values and beliefs [give] rise to the existence of [an] object," and understand "why people [would] wish to own [for example] a dented silver spoon or badly worn rug." *Id*. at 27. This process is especially important when the auctioneer is not well versed in the item he is hired to advertise.

Robert Brunk describes a moment like this in his memoirs. In 1985, Brunk was hired by a man (Tom Kempson) in rural Tennessee to auction a large portion of his estate. "As we walked through the house, . . . I felt sufficiently qualified until I saw several floor-to-ceiling cases crowded with rifles, muskets, fowling pieces, pistols, and revolvers, a mixture of nineteenth-century and modern firearms." *Id*. at 9. Brunk never owned a gun. In fact, Brunk came from a family who abhorred firearms. However, Brunk relished the challenge. He spent countless hours with Kempson learning about the guns and the particularities of Kempson's collection. They discussed the craftsmanship: "how a gunsmith working at his forge in rural Tennessee in 1780 could make an impossibly straight barrel with only hand tools and a string; how the placement of the elements of a flintlock mechanism must work in perfect harmony to ignite the powder;" and how "[m]any of Tom's rifles bore the

signatures of their makers and carried long histories of ownership in Tennessee families, important provenance to prospective bidders and signs of a strong collection." *Id*. at 10, 11–12.

Brunk's experience auctioning Kempson's gun collection is standard fare for the industry. But collecting information is only the first step. An auctioneer's next job is to incorporate that information into a cohesive and compelling narrative. Much like a speechwriter, an auctioneer writes out and rehearses each item's story until it is honed and precise. Each auctioneer adopts their own chant—that "singsong, fast-talking style of calling for bids." *Id.* at 33. An auctioneer's chant "is a form of music: the rhythm and cadence as the ground, the words as a melody of sorts, sung allegro (fast and lively) or as an ostinato (a short repeated pattern)." *Id*. at 32. Using his chant, an auctioneer weaves information about an item into a cohesive, melodic story.

These qualities are no less important for auctions hosted on a text-based online platform. On text-based platforms, auctioneers convey an item's story through the written word by employing expressive writing techniques. In addition, online auctioneers use images and other graphics to depict the items they are auctioning, a limitation their offline counterparts do not share. This requires online auctioneers to choose specific camera angles and imaging techniques to convey information about an item to potential bidders. Whether in speech or text, auctioneering is just one type

of narrative expression, and it deserves no less First Amendment recognition than any other.

Second, online auctions are original, custom creations; no two auctions are the same. This is because no two items are the same. The art of auctioneering lies in recounting each item's unique ownership, history, and meaning—its story. Indeed, the story behind the item may be more important to the auctioneer's message than the item itself. For example, an item's connection to certain historical events may distinguish it from other items that look superficially identical. It is the auctioneer's job to tell each item's unique story. Auctioneering, then, is as original and customized as other modes of tailored storytelling, such as on-the-scene reporting, ghostwriting, or designing wedding websites. And it warrants the same First Amendment protections.

Third, the goal of an auction is to communicate ideas. Auctions communicate an item's story through "images, words, or symbols" to elicit a sale. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980) (finding that the First Amendment protects advertisements and other commercial speech).

Online auctions warrant no less First Amendment recognition than other commercial advertisements.[5]

Finally, auctions involve an auctioneer's own speech. Auctioneers create narratives about their clients' items. The curation and narrative decisions associated with communicating each item's story are wholly the auctioneers' and qualify as their protected expression. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2401 (2024). That is true even when auctioneers express a story as told to them by an item's owner. The First Amendment protects more than a speaker's original ideas; "an individual 'does not forfeit constitutional protection simply by combining multifarious voices' in a single communication." *303 Creative*, 600 U.S. at 588 (quoting *Hurley*, 515 U.S. at 569). To the extent that an auctioneer's narrative involves others' speech, it is still protected by the First Amendment.

Looking at the four factors set forth in *303 Creative*, auctioneering checks every box. It is a form of pure speech protected by the First Amendment. However, the district court resisted this conclusion, finding that Tennessee's auctioneering law regulated commercial transactions, not speech. *McLemore v. Gumucio*, No. 3:23-cv-01014, 2024 U.S. Dist. LEXIS 147577, at *17–18 (M.D. Tenn. Aug. 19, 2024). The

[5] Even if this Court were to find that auctioneering is commercial speech, Appellants have explained why the law discriminates based on conduct and speaker. *See* Pet. Br. at 24. As such, this Court should apply strict scrutiny.

court observed that "an auction, under the express definition of Tennessee's statutes, is a type of 'sales transaction'" and that government "routinely regulates transactional activity." *Id*. at 18–19. For these reasons, the court applied rational basis review and upheld the law.

This conclusion was wrong. To be sure, Tennessee's auctioneering law defines "auctioneering" and an "auction" as requiring the "sale" of a good or a "sales transaction." *See generally* TENN. CODE ANN. § 62-19-102. But the nature of pure speech does not hinge upon the "terms" section of a given law. If what Tennessee law defines as a "sales transaction" is, in fact, pure speech, the First Amendment demands that courts apply heightened scrutiny. That is the case here.[6]

Tennessee has burdened auctioneers' First Amendment rights by requiring a license to practice their speech-based profession. The law threatens criminal penalties for auctioneers who practice without a license. And auctioneers must acquire a license at their own cost and on their own time. That burden warrants this

[6] Even if Tennessee's licensure scheme did regulate a mixture of speech and conduct, as applied to appellants' online auctions, the law only targets protected expression. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (finding that a law prohibiting a mixture of conduct and speech was triggered in that case by the plaintiffs' "communicating a message," therefore warranting strict scrutiny as applied to plaintiffs); *see also Upsolve, Inc. v. James*, 604 F. Supp. 3d 97, 113–14 (S.D.N.Y. 2022) (finding pursuant to *Humanitarian Law* that "if a 'generally applicable law' is 'directed' at a plaintiff 'because of what his speech communicated'. . . then that law directly burdens [a] plaintiff's speech."). No matter the interpretation, Tennessee's auctioneering law functions to burden appellants' First Amendment speech rights.

Court's application of heightened scrutiny. This Court should overturn the district court's decision to the contrary.

II. THIS COURT SHOULD FOLLOW ITS SISTER CIRCUITS IN STRIKING DOWN LICENSURE REQUIREMENTS FOR PURE SPEECH PROFESSIONS.

Just because a profession involves pure speech, that does not make the profession immune from regulation. Courts have been able to protect professional (pure) speech while still allowing state legislatures ample room to regulate economic activity. The Supreme Court has instructed lower courts to do no less. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 767, 769 (2018) ("Speech is not unprotected merely because it is uttered by 'professionals.' . . . While drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it."); *NAACP v. Button*, 371 U.S. 415, 439 (1963) ("[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."). And while drawing the line between pure speech and conduct may sometimes be difficult, this Court is well equipped to distinguish the two and should do so with care and an eye towards protecting free expression.

One example of a court taking the proper approach is *Upsolve, Inc. v. James*, 604 F. Supp. 3d 97. Upsolve is an organization that wished to train non-lawyers to give free advice about "debt collection lawsuits" to low-income New Yorkers. *Id.* at 104. However, New York prohibits the unlicensed practice of law, which included

rendering the type of legal advice that Upsolve and its members sought to provide. Upsolve brought an as-applied challenge to the law, arguing that this particular application of the state's prohibition on non-lawyers "rendering . . . legal advice and opinions" violated Upsolve's (and its members') free speech rights. *Id*. at 105, 109–10.

The district court agreed. In so holding, the court drew a careful line separating the portions of the law that targeted pure speech and the portions that targeted conduct. *Id.* at 112. The line that the court drew was simple: Rendering "advice" was speech protected by the First Amendment; "drafting" pleadings and "filing" legal documents was not. *Id.* at 112, 114. To the extent that the law banned people from purely giving advice, strict scrutiny applied. *Id.* at 114 (citing *Humanitarian Law*, 561 U.S. at 27–28).

The district court's decision in *Upsolve* was consistent with Supreme Court precedent. The Court has often held that the government may permissibly regulate (or even criminalize) certain conduct that flows from speech, but it may not criminalize protected expression. *See Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)) ("'[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'"). Accordingly,

the government may regulate fraud, defamation, perjury, and other harms resulting from protected expression; no one can claim a First Amendment right to vandalize a building with graffiti or defraud consumers. But the government may not burden pure speech absent the occurrence of these harms.[7]

To be sure, sometimes a pure speech activity may raise legitimate public safety concerns that are entirely unrelated to the content of the expression at issue. When that is the case, the answer is not to ignore the fact that the activity is pure speech or to apply rational basis review. Rather, courts must recognize that the activity is pure speech, apply heightened scrutiny, and then evaluate whether the safety regulations can overcome heightened scrutiny review. The Ninth Circuit's "tattooing-speech cases" demonstrate the proper approach.

The Ninth Circuit has held that tattooing is pure speech protected by the First Amendment. *Anderson*, 621 F.3d at 1055 ("[T]attooing is [a] purely expressive activity fully protected by the First Amendment."). In *Anderson*, the Ninth Circuit considered whether a municipal ban on tattooing violated the First Amendment rights of commercial tattoo artists. The court held that it did. In so holding, the court

[7] For example, the government may criminalize the possession or sale of certain goods. The legitimate regulation of firearms (consistent with the Second Amendment) is one example. When the government regulates firearm sales or possession, an auctioneer cannot claim a First Amendment right to auction those items. But the government infringes on First Amendment rights when it bans or burdens the freedom to advertise, write about, or speak about legally sold goods.

concluded that "the tattoo itself is pure First Amendment speech" and that "the business of tattooing" is no different and no less protected than the tattoo itself. *Id.* at 1060, 1063 (internal quotations omitted). The court came to this conclusion after considering both the expressive nature of tattooing and the legitimate health concerns that come with piercing skin to produce art. Ultimately, the court determined that these health and safety concerns were a "legitimate state interest," but were best considered under heightened scrutiny—whether the law was a reasonable time, place, and manner restriction. *See id.* at 1065–66. That is, health and safety concerns did not give the city *carte blanche* to prohibit tattooing altogether while avoiding First Amendment scrutiny. *Id.*

The Ninth Circuit is not alone in recognizing tattoo artists' speech rights. Other states and circuits have recognized that the First Amendment protects tattooing. *See Brush & Nib Studios, LC v. City of Phx.*, 247 Ariz. 269, 284–85 (Ariz. 2019) ("[T]his Court has concluded that tattoos are pure speech."); *Buehrle v. City of Key W.*, 813 F.3d 973, 976 (11th Cir. 2015) ("We join the Ninth Circuit in holding that the act of tattooing is sheltered by the First Amendment."). But this has not led to a public safety disaster; the practice of tattooing is still regulated in these jurisdictions. *See e.g.*, Cal. HEALTH & SAFETY CODE § 119314 (setting forth sanitation and other requirements for body art facilities). Courts have rightly held

that the government must ensure its laws are sufficiently tied to the legitimate health and safety interests that it seeks to vindicate.

When a speech activity poses no danger to the public, courts have rightly struck down licensure requirements under heightened scrutiny. In *Billups v. City of Charleston*, the Fourth Circuit considered whether a municipal licensure scheme for Charleston tour guides violated the First Amendment. 961 F.3d 673 (4th Cir. 2020). The court concluded that commercial tour guiding was protected speech. Like the Ninth Circuit in *Anderson* and the Supreme Court in *303 Creative*, the court in *Billups* rejected the city's argument that it was simply regulating economic conduct. "The Ordinance . . . cannot be classified as a restriction on economic activity that incidentally burdens speech. Rather, it completely prohibits unlicensed tour guides from leading visitors on paid tours—an activity which, by its very nature, depends upon speech or expressive conduct." *Id*. at 683. And much like in *Anderson*, the court in *Billups* found that the licensure regime could not survive heightened scrutiny. *Id.* at 690.

Like the Fourth Circuit, the D.C. Circuit also recognizes that commercial tour guides have free speech rights when acting within their profession. In *Edwards v. District of Columbia*, the appeals court considered whether the District's tour guide licensure requirement violated the First Amendment. 755 F.3d 996 (D.C. Cir. 2014). The court determined that it did. In doing so, the court held that even when a tour

guide's speech is not tailored to a particular client and even when it is sold for a fee, it is still protected by the First Amendment. *Id*. at 358 n.3.[8] Finding that the regulation did not survive heightened scrutiny, the court facially invalidated the District's licensure scheme.

Other states and circuits have recognized a broad range of pure speech rights related to certain speech-based professions. *See e.g.*, *Brush & Nib Studios.*, 247 Ariz. at 448 (wedding invitations); *Cressman*, 798 F.3d at 952 (paintings, drawings, and original artwork). And contrary to some critics,[9] these jurisdictions have not seen a revival of the *Lochner* era.[10] Rather, these courts have diligently engaged in the work of distinguishing pure, protected speech from nonexpressive conduct, often in cases implicating important state interests.

The auctioneer plaintiffs in this case seek the same speech protections from this Court that other circuits have been willing to grant for professions containing significantly more conduct than speech. Tennessee's auctioneering law, as it stands now, does not regulate conduct. The law requires a license to engage in pure speech.

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[8] *Edwards* was a pre-*NIFLA*, 585 U.S. 755, decision and, as such, applied a different formula regarding professional speech. But the decision still represents a willingness to protect speech sold for a fee above-and-beyond what the district court below was willing to recognize.

[9] Robert Post, *Public Accommodations and the First Amendment: 303 Creative and 'Pure Speech,'* UNIV. OF CHI. SUP. CT. REV. 251, 295 (2023).

[10] *Lochner v. New York*, 198 U.S. 45 (1905).

Tennessee no doubt may regulate certain harms that can result from auctioneering (such as fraud), but it may not burden the right to auctioneer alone by imposing a licensure requirement. This Court should affirm sellers' First Amendment rights to offer advice, create art, and craft true-to-life stories.

CONCLUSION

For the foregoing reasons, as well as those presented by Plaintiffs-Appellants, this Court should reverse the district court's decisions.

Respectfully submitted,

Dated: October 15, 2024

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. R. 29(a)(2) because it contains 3,910 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief 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 it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ Thomas A. Berry

October 15, 2024

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ Thomas A. Berry

October 15, 2024