

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

WILL MCLEMORE, et al.,)
)
Plaintiffs,)
)
v.)
)
ROXANA GUMUCIO, et al.,)
)
Defendants.)

Case No. 3:23-cv-01014

**PLAINTIFFS’ RESPONSE IN OPPOSITION TO DEFENDANTS’ MOTION TO
DISMISS**

INTRODUCTION

Plaintiffs are online auctioneers who make a living through their speech. Yet Tennessee’s online auction licensing law prohibits unlicensed online auctioneers from conducting online auctions—which the law defines by reference to speech. *See McLemore v. Gumucio (McLemore I)*, No. 3:19-cv-00530, 2020 U.S. Dist. LEXIS 228082, at *56 (M.D. Tenn. Dec. 4, 2020) (noting that the court can “easily dispose” of the argument that the law regulates “mere conduct” because “conducting an auction necessarily involves speech”).¹ Defendants (“the Commission”) seek dismissal of the online auctioneers’ First Amendment claims by reciting arguments that this Court soundly rejected in *McLemore I*.

¹ As explained below, the district court’s judgment in *McLemore I* was vacated by the Sixth Circuit on other grounds.

The Commission’s arguments on jurisdiction and the merits both fail. The unlicensed online auctioneers (Plaintiffs Brajkovich, Smith, and Kimball) plainly have standing because the online auction licensing law subjects them to civil and criminal penalties if they wish to continue to earn a living through online auctions. *See McLemore I*, 2020 U.S. Dist. LEXIS 228082, at *20-21. That poses a significant problem for McLemore and his company because they stand to lose the services of trusted online auctioneers who have worked reliably for the company for years.

Although the Commission relies heavily on the Sixth Circuit’s eventual dismissal in *McLemore I*, *see* ECF No. 19 at 1 (mischaracterizing this case as a “do-over” and a “mulligan”), it never claims that Sixth Circuit’s decision precludes the challenge here. Nor could it: the Sixth Circuit never addressed McLemore’s First Amendment claim, and it had no need to decide whether the unlicensed online auctioneers—who were not even parties²—could challenge the online auction licensing law. *See McLemore I v. Gumucio*, No. 22-5458, 2023 U.S. App. LEXIS 15611, at *7 (6th Cir. June 20, 2023). The Sixth Circuit’s analysis focused on the challengers’ standing to raise a claim under the Dormant Commerce Clause—hardly surprising given that this Court enjoined that law solely on that ground.³ The Sixth Circuit’s decision provides no guidance on the online auctioneers’ right to raise a First Amendment claim. And it hardly calls for this Court

² To be sure, Blake Kimball was not a named plaintiff but was a member of the plaintiff association in *McLemore I*. The Commission conceded and the Court held that he had standing to challenge the online auction licensing law. *McLemore I*, 2020 U.S. Dist. LEXIS 228082, at *21.

³ The Commission’s characterization of Plaintiffs’ arguments is inaccurate. It’s not that “this Court somehow reserved the First Amendment claim, preventing it from merging into the final judgment that necessarily predicated the Commission’s appeal.” ECF No. 19 at 4 (cleaned up), but that this Court entered final judgment enjoining the Commission from enforcing the online auction licensing law on Dormant Commerce Clause grounds, and thus saw no need to reach the First Amendment issue.

to depart from the common-sense principle that those prohibited by law from earning a living have standing to challenge that law.

The Commission is just as wrong on the merits. As this Court held in *McLemore I*, the online auction licensing law *necessarily* restricts speech. And as the Supreme Court has repeatedly held, there is no First Amendment carve-out for professional speech. Thus, intermediate scrutiny is the “best-case scenario” for the Commission. *See McLemore I*, 2020 U.S. Dist. LEXIS 228082, at *60. Yet the government cannot satisfy heightened scrutiny at the pleadings stage, and the Commission doesn’t even try to do so here. For good reason: heightened scrutiny places the onus on the government to show that its restrictions on speech serve an important governmental interest and that it gave serious consideration to alternatives that were less restrictive of speech. Here, however, the government’s own task force conducted a comprehensive study and found no evidence supporting the speculative fears the Commission now raises in its Motion. And the Commission has never claimed that it had considered less speech-restrictive means to further its actual interests—whatever they might be.

This Court should deny the Commission’s Motion to Dismiss.⁴

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) can contain either a facial or factual attack on subject matter jurisdiction. *Ohio Nat’l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). “A facial attack on the subject-matter jurisdiction alleged in the complaint questions merely the sufficiency of the pleading.” *Gentek Bldg. Prods. v. Sherwin-Williams Co.*, 491 F.3d 320, 330

⁴ The online auctioneers incorporate the facts from their preliminary injunction briefing. *See* ECF Nos. 8-1 and 14.

(6th Cir. 2007). In contrast, a factual attack on subject matter jurisdiction challenges the factual allegations in the complaint. *Id.*; *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). “An attack is ‘factual’ rather than ‘facial’ if the defendant submits affidavits, testimony, or other evidentiary materials.” *Superior MRI Servs. v. All. HealthCare Servs.*, 778 F.3d 502, 504 (5th Cir. 2015) (*quoting Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981)).

The Commission has not submitted any evidentiary materials along with its Motion to Dismiss, nor does the Commission challenge the veracity of the online auctioneers’ allegations.⁵ Instead, the Commission only challenges the sufficiency of the allegations in online auctioneers’ Complaint. *See* Memorandum in Support of Mot. to Dismiss, ECF No. 19 at 8. Thus, the Commission’s attack on jurisdiction is best seen as facial rather than factual.

A court applies the same standard in reviewing a motion to dismiss under Rule 12(b)(6) and a motion to dismiss under Rule 12(b)(1) that raises a facial attack on jurisdiction. In both instances, the court must construe “the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012); *Ohio Nat’l Life Ins. Co.* 491 F.3d at 330. To survive a motion to dismiss under 12(b)(6), the plaintiff must allege facts in support of a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In other words, a court should deny a motion to dismiss when a plaintiff pleads facts that allow the court to “draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

⁵ The Commission did attach previous versions of Tennessee’s auction law to its Motion to Dismiss as exhibits, but those exhibits do not raise any factual disputes or challenge the veracity of online auctioneers’ factual allegations.

ARGUMENT

I. The Online Auctioneers Have Standing

“Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

A. The Unlicensed Online Auctioneers Have Standing

Plaintiffs Brajkovich, Smith, and Kimball (“Unlicensed Online Auctioneers”) have all properly alleged standing to raise their First Amendment claims in this Court. The unlicensed online auctioneers allege—and the Commission doesn’t dispute—that the online auction licensing law subjects them to civil and criminal penalties for continuing what they have done for years—conducting online auctions. The Commission only protests that it wishes to have more information of the online auctioneers’ daily activities. *See* Defs’ Memorandum in Support of Mot. to Dismiss, ECF No. 19 at 9.⁶ But such information is unnecessary—especially at the pleadings stage—because the licensing law facially restricts speech and because as the Commission’s executive director previously testified, it is impossible to conduct an online auction without speech. Verified Complaint (“VC”), ECF No. 1, at ¶ 21; *McLemore v. Gumucio*, No. 3:19-cv-00530, 2020 U.S. Dist.

⁶ The Commission has abandoned the argument it made in its preliminary injunction motion that the unlicensed online auctioneers must specifically disprove their entitlement to each exemption contained in the statute. *See* Defs’ Resp. to Prelim. Inj. Mot. ECF No 12 at 9; Defs’ Memorandum in Support of Mot. to Dismiss, ECF No. 19 at 9. In all events, the online auctioneers have averred that they cannot avail themselves of any of the exemptions listed in the online auction licensing law. *See* Kimball Decl., ECF. No. 14-1 at ¶ 4; Smith Decl., ECF No. 14-2 at ¶ 5; Brajkovich Decl., ECF No. 14-3, at ¶ 6.

LEXIS 228082, at *56 (M.D. Tenn. Dec. 4, 2020) (concluding that online auctions necessarily involve speech); *see also* Tenn. Code Ann. § 62-19-101(2) (defining an auction, in part, as “a sales transaction conducted by oral, written, or electronic exchange between an auctioneer and members of the audience.”).

There’s no serious dispute that the unlicensed online auctioneers fall within the ambit of the online auction licensing law. The law provides that all auctions “must be conducted exclusively by individuals licensed under this chapter,” Tenn. Code Ann. § 62-19-102(b), and that it is unlawful for the unlicensed online auctioneers to “[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by the commission.” Tenn. Code Ann. § 62-19-102(a)(1). The law thus subjects unlicensed online auctioneers to serious, real-world consequences, including criminal and civil penalties. Tenn. Code Ann. § 62-19-121; *Id.* § 62-19-126(a)(1)(3). Perhaps this is why the Commission conceded, and this Court held, that Mr. Kimball (as a member of the plaintiff association) suffered an injury that is traceable to the online auction licensing law in *McLemore I*. *See McLemore*, 2020 U.S. Dist. LEXIS 228082, at *20-21 (reasoning that Mr. Kimball’s injury stems from his being unlicensed and the fact that the online auction licensing law “would require [him] to have a license to continue operating online auctions.”). This Court further held that Mr. Kimball’s injury was redressable by a favorable court decision, *id.*, and the Commission fails to identify a single reason that calls for a different conclusion here.

Even if the unlicensed online auctioneers were required to provide more about their activities, they have done just that through their earlier filed declarations. *See* Pltfs’ Mot. for Prelim. Inj., ECF No. 14 and accompanying declarations. If this Court determines that the Commission is essentially raising a factual dispute relating to jurisdiction, it may examine all

materials in the record—including the declarations from the unlicensed online auctioneers. *See Dayton Area Chamber of Commerce v. Becerra*, No. 3:23-cv-156, 2023 U.S. Dist. LEXIS 175450, at *13 (S.D. Ohio Sep. 29, 2023); *citing Plunderbund Media, LLC v. DeWine*, 753 F. App’x 362, 366 (6th Cir. 2018); *cf. McCaleb v. Long*, No. 3:22-cv-00439, 2023 U.S. Dist. LEXIS 48496, at *5 (M.D. Tenn. Mar. 22, 2023) (when a defendant raises arguments in its motion for dismissal that overlap with those asserted in opposition to a pending motion for a preliminary injunction, a court may resolve both motions at once.”).⁷ The declarations—which the Commission itself relies on in its Motion, ECF No. 19 at 18—lend yet more support to the unlicensed online auctioneers’ standing by cataloguing the editorial discretion they exercise in the course of their work. *See Kimball Decl.*, ECF No. 14-1; *Smith Decl.*, ECF No. 14-2; *Brajkovich Decl.*, ECF. No. 14-3.

B. This Court Need Not Consider McLemore’s or McLemore Auction’s Standing but They Nonetheless Have Standing

This Court need not independently address the standing of McLemore or his company because “[o]nly one plaintiff needs to have standing in order for the suit to move forward.” *Parsons v. United States DOJ*, 801 F.3d 701, 710 (6th Cir. 2015). This is particularly true when the claims and relief sought by all the plaintiffs are identical. “When one party has standing to bring a claim, the identical claims brought by other parties to the same lawsuit are justiciable.” *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 623 (6th Cir. 2016). Here, the plaintiffs raise the same First Amendment claims and request the same relief. Therefore, although courts do not “impute” the standing of some plaintiffs to others, the case may proceed because the unlicensed online

⁷ If the Court deems it necessary for Plaintiffs to amend their complaint, the Plaintiffs request leave to file an amended complaint pursuant to Rule 15(a). Rule 15 motions to amend should be “freely granted” in the interest of justice. Fed. R. Civ. P.15(a)(2); *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 640 (6th Cir. 2018).

auctioneers have standing—regardless of whether other plaintiffs “have any standing of their own.” *McLemore I*, 2020 U.S. Dist. LEXIS 228082, at *18.

McLemore and McLemore Auction have standing anyway. The online auction licensing law makes it illegal for unlicensed online auctioneers to continue their craft—even though they have demonstrated their honesty, good faith, and competence through years of hard work. *See* VC, ECF No. 1, at ¶ 48. The online auction licensing law thus threatens significant financial and reputational harm to both McLemore and his company. *McLemore v. Gumucio*, No. 3:19-cv-00530, 2019 U.S. Dist. LEXIS 122525, at *36 (M.D. Tenn. July 23, 2019) (explaining the irreparable harm to McLemore as a result of online auction licensing law). Either is enough to establish an Article III injury. *See Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1374–75 (2023) (financial harm suffices to establish Article III injury); *Parsons*, 801 F.3d at 711. (Reputational injury is sufficient to establish injury-in-fact in a First Amendment case).

In the end, the Commission confesses that McLemore’s injuries “might be cognizable [] for standing purposes.” ECF No. 19 at 8. Yet it advances the theory that McLemore lacks a right of action because “he has every right to speak as a licensed auctioneer.” *Id.*⁸ That’s wrong on multiple fronts. For one, McLemore’s company speaks through the speech of the online auctioneers who work for it. So a law that suppresses the speech of the unlicensed online auctioneers also stifles the speech of McLemore Auction. What’s more, even though the

⁸ The Commission’s invocation of *Fox v. Saginaw Cnty.*, 67 F.4th 284, 293 (6th Cir. 2023), is puzzling. ECF No. 19 at 8. The Sixth Circuit’s decision was animated by the intuitive principle that, pursuant to the traceability requirement of Article III, a right to sue some defendants does not grant a plaintiff the general license to sue other defendants who have not injured him. Here, however, Defendants are all commissioners tasked with enforcing the online auction licensing law. So the online auctioneers’ injuries are traceable to all of them.

Commission attempts to write off McLemore Auction’s injury as a “business expense,” ECF No. 19 at 9, there’s nothing unusual about a civil right plaintiff’s efforts to redress pocketbook injuries through a First Amendment claim. *See, e.g., Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1226–27 (10th Cir. 2005). McLemore and his company also have standing.

II. Plaintiffs Have Properly Pleaded a First Amendment Claim

A. The Online Auction Licensing Law Suppresses Speech and is Thus Subject to Heightened Scrutiny

“The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws ‘abridging the freedom of speech.’” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The Commission unapologetically asserts that the problem for the online auctioneers is that “they seek to use language for professional purposes.” ECF No. 19 at 14. Yet the Supreme Court has never recognized a First Amendment carve-out for “professional speech.” *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018). On the contrary, Americans retain their First Amendment right to free speech even if they speak “with an expectation of compensation.” *See 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2316 (2023).

Other courts consistently follow these principles. The government doesn’t hold “unfettered power” to trample on an individual’s “First Amendment rights by simply imposing a licensing requirement.” *See Otto v. City of Boca Raton*, 981 F.3d 854, 867 (11th Cir. 2020). And First Amendment protections don’t turn “on whether the challenged regulation is part of an occupational-licensing scheme.” *Vizaline, LLC v. Tracy*, 949 F.3d 927, 932 (5th Cir. 2020). Despite the Commission’s efforts to distinguish *Billups v. City of Charleston*, 961 F.3d 673 (4th Cir. 2020), there’s no daylight between the tour guide law in that case and the online auction licensing law here. Both laws prohibit individuals from earning a living by engaging in “activity which, by its

very nature, depends upon speech or expressive conduct.” *Id.* at 683; *McLemore I*, 2020 U.S. Dist. LEXIS 228082, at *56-57 (“conducting an auction necessarily involves speech”); *see also id.* (explaining that the online auction licensing law also implicates the First Amendment by prohibiting an individual from acting as, advertising as, or representing to be an auctioneer in Tennessee without a license).⁹ Both laws are subject to First Amendment scrutiny.

Against all these cases, the Commission again relies heavily on the Sixth Circuit’s decision in *Liberty Coins v. Goodman*, which upheld a regulatory scheme that regulated professional conduct for precious metal dealers. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014). Yet, as this Court has already explained in *McLemore I*, 2020 U.S. Dist. LEXIS 228082, at *56, there are critical distinctions between this case and *Liberty Coins*. In brief, the law in *Liberty Coins* targeted conduct by regulating “all precious metals businesses operating in a manner that is open and accessible to the public... regardless of whether they advertise or post signage.” *Liberty Coins*, 748 F.3d at 697. By contrast, an “oral, written, or electronic exchange” between an online auctioneer and the audience (*i.e.*, speech) is what triggers the online auction licensing law. Tenn. Code Ann. § 62-19-101(2). As the Commission’s own executive director confirmed under oath, it is impossible to have an auction without an oral, written, or electronic communication. VC ¶ 21. At the day’s

⁹ The Commission asserts that by “holding themselves out as auctioneering professionals without licenses, they would be uttering the sort of misleading message the State can doubtless prohibit in a commercial context.” ECF No. 19 at 15–16 (quotation marks omitted). But the only reason that such a statement would be “misleading” in the first place is that the government has enacted an unconstitutional law that prohibits individuals from engaging in online auctioneering without a license.

end, the Commission can't shield the online auction licensing law from First Amendment scrutiny merely by "saying that the plaintiffs' speech is actually conduct." *Otto*, 981 F.3d at 861.¹⁰

The most charitable reading of the Commission's argument is that, in its view, the online auction licensing law places only "incidental burdens" on speech. *See* ECF No. 19 at 11-13; *see NIFLA*, 138 S. Ct. at 2373. As this Court noted in *McLemore I*, even if that "best-case scenario" for the Commission were true, it would still call for the application of intermediate scrutiny. *McLemore I*, 2020 U.S. Dist. LEXIS 228082, at *60. *See also Cap. Associated Indus. v. Stein*, 922 F.3d 198, 209 (4th Cir. 2019) ("For laws with only an incidental impact on speech, intermediate scrutiny strikes the appropriate balance between the states' police powers and individual rights."); *Brokamp v. James*, 66 F.4th 374, 391 (2d Cir. 2023) (stating that intermediate scrutiny is appropriate when a law regulates conduct that incidentally burdens speech). In all, the online auction licensing law must satisfy heightened scrutiny.

B. The Online Auctioneers Have Properly Pleaded that the Online Auction Licensing Law Does Not Satisfy Heightened Scrutiny

Heightened scrutiny places the burden on the Commission to establish that the online auction licensing law directly advances a "substantial" government interest that could not "be

¹⁰ The Commission's other cases require little discussion. *Tiwari v. Friedlander*, 26 F.4th 355 (6th Cir. 2022), for instance, was a due process and equal protection challenge against certificate of need laws applied to at home health care businesses and did not deal with any First Amendment issues or regulation of speech. *Id.* at 359. The Eleventh Circuit case relied on by the Commission resembles *Liberty Coins* in that the regulatory scheme there regulated conduct. "Assessing a client's nutrition needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment are not speech. They are 'occupational conduct'; they're what a dietician or nutritionist does as part of her professional services." *Castillo v. Secy, Fla. Dep't of Health*, 26 F.4th 1214, 1225-26 (11th Cir. 2022).

served as well by a more limited restriction.’” *Sorrell v. IMS Health*, 564 U.S. 552, 583 (2011) (citations omitted).

For starters, the Court should not even reach this question at the pleading stage. “[W]hen First Amendment rights are at stake, the government’s assertions cannot be taken at face value.” *Kiser v. Kamdar*, 831 F.3d 784, 789 (6th Cir. 2016). That’s because heightened scrutiny requires “a factual inquiry” that the “Court may not conduct at the motion to dismiss stage.” *McLemore I*, 2020 U.S. Dist. LEXIS 228082, at *60.

In any event, the Commission has not advanced—and therefore waived—any argument that the law survives heightened scrutiny. *See United States v. 2007 BMW 335i Convertible*, 648 F. Supp. 2d 944, 952 (N.D. Ohio 2009). The Commission couldn’t have met its burden even if it tried. At a minimum, heightened scrutiny requires the government to demonstrate a “a significant interest in restricting speech,” *First Choice Chiropractic, LLC v. Dewine*, 969 F.3d 675, 681 (6th Cir. 2020) (citation omitted), and “that alternative measures that burden substantially less speech would fail to achieve the government’s interests.” *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). As the online auctioneers extensively briefed in support of their preliminary injunction motion, ECF Nos. 8-1, 14, the online auction licensing law fails under both strict and intermediate scrutiny. That’s because the Commission can’t demonstrate an important governmental interest nor show that the law is properly tailored to meet that interest. For example, although the Commission offers vague allusions to “bad faith, dishonesty, and incompetence,” ECF No. 19 at 2 (citing 1967 Tenn. Pub. Acts ch. 335 (attached as Exhibit A)), it offers no evidence of such conduct (even assuming

that it would justify a licensing requirement) from an online auction—a topic comprehensively studied by the government’s task force. VC, ECF No. 1, at ¶¶ 33-34.¹¹

The Commission’s lack of evidence speaks volumes. As this Court found in *McLemore I*, “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. The Commission is incorrect that a rule it promulgated decades ago is to the contrary. See ECF No. 19 at 3 (citing Tenn. Comp. R. & Regs. 0160-01-18). That rule predates the 2006 statutory amendment, which exempted most online auctions, regardless of bidding format. VC, ECF No. 1, at ¶¶ 2, 30. As a result, when proponents of the online auction licensing law spoke in favor of the law, they stressed the need to “*include* online auctions.” Auctioneer Task Force (Nov. 5, 2018) (emphasis added).¹²

The online auction licensing law is also woefully tailored. *See Billups* 961 F.3d at 686-88. For one, the licensing law is littered with exemptions—such as carving out fixed-time online auctions such as eBay from the licensing requirement. *See* Tenn Code Ann. § 62-19-103(9); *Id.* § 62-19-101(12). Although the Commission claims that “soliciting bids on an item with a ‘fixed’ deadline was so dissimilar to a traditional auction that it did *not* fall within the auctioneering laws’ purview,” the only citation it offers for that conclusion is the text of the online auction licensing law, which doesn’t provide any reasoning for distinguishing among online auctions. ECF No. 19 at

¹¹ The online auctioneers do not challenge laws restricting traditional auctioneers not “because any effort to do so would doubtless fail,” ECF No. 19 at 18, but because they wish to continue the practice of *online* auctioneering.

¹² https://www.youtube.com/watch?v=_JRURJgPA8 (33:35 & 40:30).

3 (citing 2019 Tenn. Pub. Acts ch. 471, § 4(12)).¹³ The Commission also failed to give serious consideration to “less intrusive” alternatives—such as enforcing fraud laws or imposing a certification requirement—that could have furthered its interests just as well. *See Billups*, 961 F.3d at 690. The online auctioneers pleaded a violation of their First Amendment rights.

CONCLUSION

Although the Commission wishes to diminish the right of the online auctioneers to earn a living through their speech, the Constitution protects speech made in a commercial setting. “The Constitution ‘does not enact Mr. Herbert Spencer’s Social Statics.’ *Lochner v. New York*, 198 U.S. 45, 75, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (Holmes, J., dissenting). It does enact the First Amendment.” *Sorrell*, 564 U.S., at 567. The Commission’s Motion should be denied.

Dated: December 8, 2023

Respectfully submitted,

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¹³ What’s more, if fixed-time auctions truly did not fall within the purview of the auctioneer laws, then there would be no reason for *exempting* such auctions from those laws.

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2023, I submitted the foregoing Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss to the Clerk of the Court via the District Court's CM/ECF system, which served those documents on all counsel: Nicholas Gregory Barca and Gabriel Krimm (counsel for Defendants), and David L. Harbin and Wencong Fa (counsel for Plaintiffs).

s/ Wencong Fa
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