

No. 22-5458
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILL McLEMORE, et al.,
Plaintiffs-Appellees,

v.

ROXANA GUMUCIO, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF OF THE DEFENDANTS-APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

Defendants request oral argument and submit that it would aid the decisional process. The State of Tennessee has an important interest in defending the validity of its duly enacted laws, and here Defendants appeal the District Court's holding that Tennessee's auctioneering statutes, insofar as they regulate online auctions, are unconstitutional in violation of the dormant Commerce Clause.

STATEMENT OF JURISDICTION

This is an appeal from a final judgment entered in the United States District Court for the Middle District of Tennessee on May 5, 2022. [Entry of Judgment, RE 123; PageID# 4722.] Jurisdiction over this appeal is vested in this Court pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in granting summary judgment to Plaintiffs and denying summary judgment to Defendants, based on its holding that Tennessee's auctioneering statutes, Tenn. Code Ann. §§ 62-19-101 to -128, as amended in 2019, apply extraterritorially in violation of the dormant Commerce Clause.

STATEMENT OF THE CASE

It has long been the public policy of the State of Tennessee to regulate the auctioneering profession in Tennessee and to require auctioneers to be licensed. *See* 1967 Tenn. Pub. Acts, ch. 335. The Tennessee Auctioneer Commission is a board created within the Tennessee Department of Commerce and Insurance to regulate auctions and auctioneering in Tennessee. Tenn. Code Ann. § 4-3-1304(1), (14); *see* Tenn. Code Ann. § 62-19-115(a) (providing that “[a]ny auctioneer licensed under this chapter may conduct auctions at any time or place in this state.”)

With the growth of electronic commerce, in 2001 the Auctioneer Commission promulgated a rule to regulate online auctions in Tennessee: “Any electronic media or computer-generated auction originating from within Tennessee shall conform to the requirements of Tennessee Code Annotated, Title 62, Chapter 19 et seq. (Auctioneer Licensing Law) and the Rules of the Tennessee Auctioneer Commission.” Tenn. Comp. R. & Regs. 0160-01-.18 (“Rule 18”).

In 2019, significant revisions were made to the auctioneering statutes, including the redefinition of “auction” to include electronic exchanges. *See* 2019 Tenn. Pub. Acts, ch. 471 (“PC 471”). Under Tenn. Code Ann. § 62-19-101(2), as amended, “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.

(emphasis added); *see* PC 471, § 4(2).

Under this post-2019 statutory scheme, “[a]ll auctions arranged by or through a principal auctioneer must be conducted exclusively by individuals licensed under this chapter.” Tenn. Code Ann. 62-19-102(b); *see* PC 471, § 5(b). And it is unlawful for any person to “[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by the commission.” Tenn. Code Ann. § 62-19-102(a)(1); *see* PC 471, § 5(a)(1). This scheme does allow for several exemptions, however, including—as pertinent here—one for “[a]ny fixed price or timed listings that allow bidding on an internet website, but do not constitute a simulcast of a live auction.” Tenn. Code Ann. § 62-19-103(9). “Timed listing” means “offering goods for sale with a fixed ending time and date that does not extend based on bidding activity.” Tenn. Code Ann. § 62-19-101(12); *see* PC 471, § 4(12).¹

Plaintiffs in this case include auctioneers located outside Tennessee, and they sued members of the Auctioneer Commission in 2019 to challenge the constitutionality of the amended auctioneering statutes. Plaintiffs alleged that insofar as it regulated online auctions, the statutory scheme violated the dormant Commerce Clause and the First Amendment, and they sought declaratory and

¹ This exemption had been added in 2006, *see* 2006 Tenn. Pub. Acts, ch. 533, § 1, but the term “timed listing” was undefined until 2019.

injunctive relief under 28 U.S.C. § 2201 and 42 U.S.C. § 1983. [Amended Complaint, RE 50, PageID## 1062-1068.]²

Plaintiffs McLemore Auction Company, LLC, (“McLemore Auction”) is a Tennessee limited liability company located in Nashville, Tennessee. [Am. Compl., RE 50, PageID# 1027; Answer to Am. Compl., RE 85, PageID# 1428.] Plaintiff Will McLemore is the president and sole member of McLemore Auction and is a Tennessee resident. [Am. Compl., RE 50, Page ID#1027; Answer to Am. Compl., RE 85, PageID# 1428.] McLemore holds a Tennessee auctioneer license first issued by the Commission in 1999. [Am. Compl. RE 50, PageID# 1030; Answer to Am. Compl., RE 85, PageID# 1431.]

McLemore and McLemore Auction contract with owners of tangible personal property to sell that property at auction through the website www.mclimoreauction.com (“McLemore Auction website”). [Am. Compl., RE 50, PageID## 1029-1030; McLemore & McLemore Auction Discovery Responses, RE 97-2, PageID# 4199.] They rely on independent contractors who do not hold

² Plaintiffs also brought claims under the Tennessee Constitution and the Privileges and Immunities Clause of the Fourteenth Amendment. In an Order issued on December 4, 2020, the District Court dismissed “Plaintiffs’ claims brought pursuant to the Privileges and Immunities Clause and Pursuant to Article I, § 19 of the Tennessee Constitution.” [Order, RE 84, PageID# 1426.] In its Memorandum Opinion, however, the Court stated that it would “refrain from ruling on Plaintiffs’ First Amendment and Article I, Section 19 of the Tennessee Constitution claims.” [Memorandum Opinion, RE 116, PageID# 4692.]

Tennessee auctioneer licenses to conduct auctions through their website. [Am. Compl., RE 50, PageID## 1029-1030; McLemore & McLemore Auction Disc. Resp., RE 97-2, PageID# 4199.] The auctions they conduct through their website do not have a fixed ending time; the ending time extends by five minutes if any bids are received within five minutes of a designated time. [Am. Compl., RE 50, PageID# 1030; McLemore & McLemore Auction Disc. Resp., RE 97-2, PageID# 4199.]

Plaintiff Purple Wave, Inc., (“Purple Wave”) is a Delaware corporation with its headquarters located in Manhattan, Kansas. [Am. Compl., RE 50, PageID# 1027; Answer to Am. Compl., RE 85, PageID# 1428.] Purple Wave also has an office in Kansas City, Missouri. [Purple Wave Deposition, RE 96-2, PageID## 3926-27.] Purple Wave does not own or lease any real or tangible personal property in Tennessee or have employees or independent contractors in Tennessee. [McKee & Purple Wave Discovery Responses, RE 88-16, PageID# 2775.] No employee or independent contractor of Purple Wave holds an auctioneer license issued by the Tennessee Auctioneer Commission. [Am. Compl., RE 50, PageID# 1053.]

Plaintiff Aaron McKee is the President and CEO of Purple Wave and is a resident of Kansas. [Am. Compl., RE 50, PageID# 1027; Answer to Am. Compl., RE 85, PageID# 1428.] McKee holds an auctioneer license issued by the State of Texas. [Purple Wave Dep., RE 88-14, PageID# 2599.] He does not hold a Tennessee auctioneer license. [Am. Compl., RE 50, PageID# 1053; Purple Wave

Dep., RE 88-14, PageID# 2599.] McKee does not own or lease any real or tangible personal property in Tennessee or have employees or independent contractors in Tennessee. [McKee & Purple Wave Disc. Resp., RE 88-16, PageID## 2774-75.]

McKee and Purple Wave contract with owners of tangible personal property to sell that property at auction through the website www.purplewave.com (“Purple Wave website”). [Am. Compl., RE 50, PageID# 1053; McKee & Purple Wave Disc. Resp., RE 88-16, PageID## 2795-96.] The auctions that McKee and Purple Wave conduct through their website do not have a fixed ending time; the ending time extends by five minutes if any bids are received within five minutes of a designated time. [Am. Compl., RE 50, PageID# 1053; McKee & Purple Wave Disc. Resp., RE 88-16, PageID## 2795-96). The Purple Wave website, including the auctions and advertisements posted there, is accessible in all states, including Tennessee. [Am. Compl., RE 50, PageID# 1054; Answer to Am. Compl., RE 85, PageID# 1445.]

McKee and Purple Wave have sold tangible personal property at auction through the Purple Wave website to Tennessee residents. [Am. Compl., RE 50, PageID# 1054; Purple Wave Dep., RE 88-14, PageID## 2648-49; Purple Wave Deposition Exhibits, RE 88-15, PageID## 2726-57.] McKee and Purple Wave have also sold tangible personal property at auction through the Purple Wave website on behalf of property owners who are in Tennessee. [Am. Compl., RE 50, PageID# 1054; Purple Wave Dep, RE 88-14, PageID## 2643-44; Purple Wave Dep. Exhibits,

RE 88-14, PageID## 2716-17.] And McKee and Purple Wave have sold tangible personal property at auction through the Purple Wave website where the property being sold is in Tennessee. [Am. Compl., RE 50, PageID# 1055; Purple Wave Dep., RE 88-14, PageID## 2644-2648; Purple Wave Dep. Exhibits, RE 88-15, PageID## 2718-25.] Purple Wave generates more than \$25,000 in annual revenues from the sale of tangible personal property at auction to Tennessee residents. [Am. Compl., RE 50, PageID# 1055; McKee & Purple Wave Disc. Resp., RE 88-16, PageID# 2799.]

When the tangible personal property to be sold at auction is located in Tennessee, one of Purple Wave's auction specialists typically travels to Tennessee to negotiate a listing contract with the owner, inspect the property, collect ownership documents, collect photographs or videos of the property, and create a detailed description of it. [McKee & Purple Wave Disc. Resp., RE 88-15, PageID## 2788-90, 2795-96; Purple Wave Dep., RE 88-14, PageID## 2645-47.] The auction specialist then transmits the contract, photographs or videos, description, ownership documents, and any other pertinent information to Purple Wave employees located outside of Tennessee for review and approval. [Purple Wave Dep., RE 88-14, PageID## 2610-12.] Once the auction is approved, a member of Purple Wave's web operations team, which is located outside of Tennessee, uses the photographs or

videos and description to create an auction listing and post it to the Purple Wave website. [Purple Wave Dep., RE 88-14, PageID## 2610-12, 2629-30, 2656.]

No employee or representative of the Commission has ever told McKee or Purple Wave that they are required to hold a Tennessee auctioneer license to conduct their online-auction business from the State of Kansas. [McKee & Purple Wave Disc. Resp., RE 88-16, PageID# 2776.] No employee or representative of the Commission has ever told McKee or Purple Wave that any of their employees or independent contractors are required to hold a Tennessee auctioneer license. [McKee & Purple Wave Disc. Resp., RE 88-16, PageID# 2776.]

Plaintiff Interstate Auction Association (“IAA”) is an unincorporated association whose membership includes auctioneers in Tennessee and other states, including McLemore, McKee, and employees and independent contractors of McLemore Auction and Purple Wave. [Am. Compl., RE 50, PageID## 1028, 1052; Answer to Am. Compl., RE 85, PageID## 1428, 1444; IAA Discovery Responses, RE 88-7, PageID## 2211-12.] No employee or representative of the Commission has ever told any out-of-state member of IAA that he or she is required to hold a Tennessee auctioneer license to conduct his or her online-auction business from his or her home state. [IAA Disc. Resp., RE 88-7, PageID## 2199-2200.] Purple Wave is the only out-of-state member of IAA that generates more than \$25,000 in annual

revenues from the sale of tangible personal property at auction to Tennessee residents. [IAA Deposition, RE 88-5, PageID## 2173-74.]

Ruling on the parties' cross-motions for summary judgment, the District Court granted Plaintiffs' motion and denied Defendants' motion. The Court held that, as amended by PC 471, Tennessee's auctioneer licensing requirement applied extraterritorially in violation of the Dormant Commerce Clause, even if the phrase "in this state" were read as part of the amended statute, Tenn. Code Ann. § 62-19-101(2). [Memorandum Opinion, RE 116, Page ID## 4678-4692.] Since the Court granted Plaintiffs' motion for summary judgment on the basis of the Dormant Commerce Clause, Plaintiffs' claims based on the First Amendment and Article I, Section 19 of the Tennessee Constitution were pretermitted. [*Id.*, Page ID# 4693.]

Defendants now appeal to this Court.

SUMMARY OF THE ARGUMENT

The District Court wrongly concluded that Tennessee's auctioneering statutes, as amended in 2019, apply extraterritorially in violation of the Dormant Commerce Clause. The court abandoned principles of statutory construction that should have led to a ruling in Defendants' favor, *i.e.*, a ruling that the statutory scheme must be construed to apply only in Tennessee—and not to conduct wholly beyond the State's borders. Among other things, the District Court failed to recognize and apply the

presumption against extraterritorial application of a state statute. Furthermore, the court failed to apply Tennessee rules of statutory construction that would have preserved the constitutionality of the amended statutes. The court also disregarded evidence of the State's intent not to reach conduct beyond its borders.

STANDARD OF REVIEW

This Court reviews de novo a trial court's grant of summary judgment, drawing reasonable inferences in favor of the nonmoving party. *Wilson v. Gregory*, 3 F.4th 844, 855 (6th Cir. 2021). Courts consider "all the facts in the light most favorable to the nonmovant and must give the nonmovant the benefit of every reasonable inference." *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 619 (6th Cir. 1999). "Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962).

ARGUMENT

Tennessee’s Auctioneer-Licensing Statutes, as Amended in 2019, Do Not Apply Extraterritorially in Violation of the Dormant Commerce Clause.

The District Court awarded Plaintiffs summary judgment based on its conclusion that Tennessee’s auctioneer-licensing requirements regulate commerce that occurs wholly outside of Tennessee and therefore violates the dormant Commerce Clause. Because the District Court erred in so holding, its judgment should be reversed and summary judgment should be awarded to the Defendants.

This Court has explained its approach to the “dormant” feature of the Commerce Clause as follows:

The Commerce Clause’s grant to Congress of the authority to “regulate Commerce with foreign Nations, and among the several States,” U.S. Const. art. I, § 8, cl. 3, connotes an unspoken limit on state authority “to enact laws imposing substantial burdens on such commerce,” *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 644 (6th Cir. 2010) (quoting *S.- Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87, 104 S. Ct. 2237, 81 L.Ed.2d 71 (1984)). To address claims brought under this “dormant” feature of the Commerce Clause, we typically employ a “two-tiered analysis.” *Id.* At the first tier, the court must determine whether the challenged state law is (virtually) *per se* invalid, because either it discriminates against interstate commerce, favors in-state interests, or regulates extraterritorially. *Id.*; *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 369-70 (6th Cir. 2013).

Online Merchants Guild v. Cameron, 995 F.3d 540, 552 (6th Cir. 2021) (emphasis added). Here, the District Court held that Tennessee’s auctioneering statutes were *per se* invalid because they regulate extraterritorially. [Mem. Op., RE 116, PageID## 4681-4692.] “A statute is extraterritorial if it ‘directly controls commerce occurring wholly outside the boundaries of a State and exceeds the inherent limits of the enacting State’s authority.’” *Am. Beverage*, 735 F.3d at 373 (quoting *Healy v. Beer Inst. Inc.*, 491 U.S. 324, 336 (1989)). Contrary to the District Court’s conclusion, Tennessee’s auctioneering statutes, as amended by PC 471, do not regulate extraterritorially.

A. The statutory scheme is entitled to the presumption against extraterritorial application.

This Court has recognized that statutes are generally presumed not to apply extraterritorially:

Unless the intent to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it. Thus, an extraterritorial effect is not to be given statutes by implication

BMW Stores, Inc. v. Peugeot Motors of America, 860 F.2d 212, 215 (6th Cir. 1988) (quoting 73 Am. Jur. 2d Statutes § 359). The District Court acknowledged the presumption against extraterritorial application but wrongly concluded that it “remains

a canon of construction confined to the international context.” [Mem. Op., RE 116, PageID# 4690, n.17.]

The District Court relied for this conclusion on *Sheehan v. Ash*, 574 B.R. 585, 593 (N.D. W.Va. 2017). But *Sheehan* relied on *Carolina Trucks & Equip., Inc. v. Volvo Trucks of North Am., Inc.*, 492 F.3d 484 (4th Cir. 2007), and *Carolina Trucks* was not confined to “the international context.” There the Fourth Circuit applied South Carolina’s “rules . . . that forbid giving *the state’s* laws extraterritorial reach.” *Id.* at 489 (emphasis added). And *Carolina Trucks* is no outlier. Other federal decisions have recognized this presumption in the interstate context. *See Oman v. Delta Air Lines, Inc.*, 889 F.3d 1075, 1079 (9th Cir. 2018) (citing *N. Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 162 P. 93, 94 (1916)); *Elyazidi v. SunTrust Bank*, 780 F.3d 227, 237 (4th Cir. 2015) (citing *Consumer Prot Div. v. Outdoor World Corp.*, 91 Md. App. 275, 603 A.2d 1376, 1382 (Md. Ct. Spec. App. 1992). And the case law is replete with state-court statements to the same effect.

In *Sullivan v. Oracle Corp.*, 254 P.3d 237 (Cal. 2011), for instance, the California Supreme Court observed:

However far the Legislature’s power may theoretically extend, we presume the Legislature did not intend a statute to be operative with respect to occurrences outside the state, . . . unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history.

254 P.3d at 248 (internal quotation marks omitted); *see also Jahnke v. Deere & Co.*, 912 N.W.2d 136 (Iowa 2018); *Tuttle v. Dobbs Tire & Auto Centers, Inc.*, 590 S.W.3d 307, 312 (Mo. 2019).

Here, the Tennessee statutes at issue regulate auctions and auctioneering in Tennessee—*i.e.*, the statutes apply to auctions originating from within Tennessee. The very subject matter suggests only territorial regulation, and indeed, neither PC 471 (the 2019 amendments) nor any other part of the statutory scheme contains or presents a clear expression or indication that the regulation of auctions, including online auctions, was intended to operate outside Tennessee. *See BMW*, 860 F.2d at 215; *Sullivan*, 254 P.2d at 248. On the contrary, every indication is that the legislature intended the statutes’ application to be limited to Tennessee.

First, the primary indication of statutory intent is the plain language of the statute, *Bryant v. Genco Stamping & Mfg. Co., Inc.*, 33 S.W.3d 761, 765 (Tenn. 2000), and Tenn. Code Ann. § 62-19-115(a) provides that “[a]ny auctioneer licensed under this chapter may conduct auctions at any time or place *in this state*” (emphasis added). This comports with the language of the Commission’s enabling statute, which lists the Commission among other “boards, commissions and agencies created to regulate professions, vocations and avocations *in this state*.” Tenn. Code Ann. § 4-3-1304(1), (14) (emphasis added).

Second, the plain language of PC 471 merely augmented the types of media covered by the auctioneer-licensing requirement. *Compare* Tenn. Code Ann. § 62-19-101(2) (2018) (defining “auction” with reference to “a sales transaction conducted by oral or written exchange”) *with* Tenn. Code Ann. 62-19-102(2) (2019) (defining “auction” with reference to “a sales transaction conducted by oral, written, or electronic exchange”). The amendment did not signal an intent to expand the whole statute’s territorial scope.

When PC 471 was enacted, the Commission had already promulgated a rule (Rule 18) providing that “[a]ny electronic media or computer-generated auction originating from within Tennessee shall conform to the requirements of [the regulatory scheme].” PC 471 legislatively supplied what had previously been administratively supplied—a clear indication that electronic exchanges would be regulated. But as Rule 18 reflects, this clarification was meant to apply only to auctions “originating from within Tennessee.” With the Internet in widespread use in 2019, the existing statutory definition of “auction” could leave unregulated many Tennessee auctioneers who would otherwise be subject to the Commission’s jurisdiction. And the Commerce Clause does not prohibit states from regulating otherwise regulable in-state transactions simply because they are connected to the Internet. *Ford Motor Co. v. Tex. Dep’t of Transportation*, 264 F.3d 493, 505 (5th Cir. 2001).

The District Court should have given greater weight to this history and sequence of enactments, in light of the general presumption against extraterritoriality. The Tennessee legislature can be presumed to have been aware of Rule 18, as well as the existing statutory scheme. *See Brundage v. Cumberland Cty.*, 357 S.W.3d 361 (Tenn. 2011) (“Guiding our inquiry is the presumption that the General Assembly was aware of its prior enactments and knew the state of the law at the time it passed the legislation.”) (internal quotation marks omitted). And that history supplies indispensable aid in determining legislative intent. *See Coffee Cty. Bd. of Educ. v. City of Tullahoma*, 574 S.W.3d 832, 845-46 (Tenn. 2019). Instead, the District Court faulted the Tennessee legislature for failing to specify that its enactment did not apply extraterritorially. [Mem. Op., RE 116, PageID# 4686.]

Tennessee’s auctioneering statutes, as amended by PC 471, are not extraterritorial, because they do not “directly control commerce occurring wholly outside the boundaries of [Tennessee].” *Am. Beverage*, 735 F.3d at 373. The 2019 amendments to the statutes merely extended their application to auctions conducted *in Tennessee* by electronic exchange. For the reasons discussed above, neither the intent nor the practical effect of the 2019 amendments was “to control conduct beyond the boundaries of the State.” *Healy*, 491 U.S. at 336.

B. The statutory scheme is entitled to the presumption of constitutionality.

When federal courts construe state statutes, they “apply the rules of construction that the state supreme court applies when construing its own statutes.” *Faber v. Ciox Health, LLC*, 944 F.3d 593, 602 n.7 (6th Cir. 2019) (citing *Jones v. City of Franklin*, 677 F. App’x 279, 286 (6th Cir. 2017)). When the Tennessee Supreme Court evaluates the constitutionality of a statute, it “begin[s] with the presumption that an act of the General Assembly is constitutional.” *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). And it is “required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute.” *In re Burson*, 909 S.W.2d 768, 775 (Tenn. 1995); see *Willeford v. Klepper*, 597 S.W.3d 454, 465 (Tenn. 2020) (quoting *State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014) (“The Court must uphold the constitutionality of a statute wherever possible.”). Accordingly, “[w]hen faced with a choice between two constructions, one of which will sustain the validity of the statute and avoid a conflict with the Constitution, and another which renders the statute unconstitutional, [a Tennessee court] must choose the former.” *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529-30 (Tenn. 1993).

Applying this presumption here must also lead to the conclusion that Tennessee’s auctioneering statutes do not apply extraterritorially in violation of the dormant Commerce Clause. Defendants maintain that the statutory scheme should be construed to apply only in Tennessee, which sustains the validity of the scheme

and avoids a constitutional issue; Plaintiffs claim that the scheme should be construed to apply extraterritorially, which would render it unconstitutional. Faced with this choice between competing constructions, the District Court should have applied Tennessee's rules of construction and chosen the former.

It did not. Indeed, the District Court seems to have done the opposite and indulged a presumption *against* the constitutionality of PC 471 to hold that it violates the Dormant Commerce Clause. The court did recognize that “under Tennessee law, courts must construe statutes in a way that sustains the statutes and avoids constitutional conflict.” [Mem. Op., RE 116, PageID# 4690.] But it proceeded to reject that rule, concluding that it “[could not] sustain the statute by conjuring up non-existent statutory language and limitations.” [*Id.*] As discussed above, however, nothing needs to be “conjured up” in order to conclude that Tennessee's regulation of online auctions under PC 471 was not meant to apply extraterritorially.

C. The District Court erred in holding to the contrary.

In addition to failing to recognize a presumption against extraterritorial application for state statutes and recognizing but failing to apply a presumption of constitutionality, as discussed above, the District Court made other fundamental errors in reaching its holding that PC 471 is unconstitutional.

First, and despite its stated intention to apply Tennessee rules of statutory construction, the District Court failed to carry out this obligation in full. Citing

principles applicable to the interpretation of *federal* statutes, the District Court declined to read the phrase “in this state” into § 62-19-102(a)(1) so as to give effect to the legislative intent that the auctioneering statutes not apply extraterritorially. [Mem. Op., RE 116, PageID# 4682 (citing *United States v. M/V Big Sam*, 693 F.2d 451, 455 (5th Cir. 1982)).] In *Connecticut Bank and Trust Co., N.A. v. Tenn. Dept. of Revenue*, 769 S.W.2d 205 (Tenn. 1989), the Tennessee Supreme Court stated:

In construing statutes, this Court must give effect to the legislative intent, which is fundamental and paramount. *See Mercy v. Olsen*, 672 S.W.2d 196, 200 (Tenn. 1984). It is within the power of a court whenever necessary to effectuate legislative intent *to supply language in construing an act, inserting such words and clauses as may reasonably appear to be called for*. *Scales v. State*, 181 S.W.2d 621, 181 Tenn. 440 (1944).

Id. at 208 (emphasis added).

As discussed, Tenn. Code Ann. § 62-19-101(1), as amended by PC 471, defines “auction” as “a sales transaction conducted by oral, written, or electronic exchange between an auctioneer and members of the audience.” And Tenn. Code Ann. § 62-19-102(a)(1) makes it unlawful to “[a]ct as, advertise as, or represent to be an auctioneer without holding a valid license issued by the commission.” Inserting “in this state” after the word “auctioneer” in Tenn. Code Ann. § 62-19-102(a)(1) would effectuate legislative intent. It would comport with Rule 18, which links the statutory licensing requirement to any “electronic media or computer-

generated auction originating from within Tennessee.”³ And if one is an “auctioneer in this state,” one is also conducting auctions “originating from within Tennessee.” By failing to supply this language in construing the act, the District Court did not faithfully follow Tennessee rules of statutory construction.

Second, the District Court erred in concluding, “[e]ven if [it] were inclined to read into the statute this geographical limitation,” that “‘in this state’ would not carry the limited meaning suggested by the State.” The District Court found that “the phrase ‘act[ing] as, advertis[ing] as, or represent[ing] to be an [online] auctioneer [in this state]’ does not necessarily and unambiguously exclude such acting, advertising, or representing by a person not physically present in the State.” [Mem. Op., RE 116, PageID# 4682.] By insisting on reading the statute too stingily, though, the District Court ran afoul of the requirement that it “indulge every presumption and resolve every doubt in favor of the constitutionality of the statute.” *In re Burson*, 909 S.W.2d at 775; *see Mitchell v. Mitchell*, 594 S.W.2d 699, 702 (Tenn. 1980) (Tennessee courts “will not declare a statute unconstitutional when [it is] reasonably able to do so otherwise to preserve its meaning and purpose through a constitutionally correct construction.”) Instead, and again, the District Court appears to have resolved every

³ Defendants are not saying that insertion of this language is *necessary* for proper construction of the statutes—for all the reasons discussed above. But insertion of this language in § 62-19-102(a)(1) would state with abundant clarity that no extraterritorial application is intended.

doubt *against* the constitutionality of the statute. [Mem. Op., RE 116, PageID## 4682-84.]

Third, the District Court erred in seeming to fault Defendants for attempting to “save” the auctioneering statutes’ regulation of online auctions.

It may be convenient for Defendants to assert the existence of a geographical limitation at this time, in an effort to save PC 471. But one can easily imagine that State (perhaps under different executive branch leadership) changing its tune in the future; in the throes of enforcement zeal, the State someday could insist that there is no such geographical limitation.

[Mem. Op., RE 116, PageID# 4687.] But this rationale applies a standard no executive administration could ever meet. The District Court’s approach stands starkly at odds with the Second Circuit’s approach in *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007), where the state attorney general’s stipulation that a statute would not be applied extraterritorially was accepted as genuine and persuasive. *See* 505 F.3d at 194.

In contrast, the District Court rejected Defendants’ assertion that the auctioneering statutes apply only in Tennessee, hypothesizing as follows:

Suppose, for example, that future Tennessee authorities wished to bring a particular enforcement action against an individual who, conducting an online auction from Alaska, happened to complete sales to winning online bidders in Tennessee who later lodge complaints. Imagine further that the individual insists that PC 471 contains a geographic limitation that precludes such enforcement against her. It is readily conceivable that the State, seeking to vindicate the Tennessee alleged victims, would insist that there is no geographic limitation. If so, it would be on firm ground (on this particular point); the individual

simply could not point to any geographic limitation, just as the State cannot do so here. Defendants should not be permitted to survive a Dormant Commerce Clause challenge on the basis of a purported geographical limitation in PC 471, and then have PC 471's enforcement tools at its disposal unhindered by any geographic limitation that a enforcement target could even discern in the statute (let alone determine the scope of).

[Mem. Op., RE 116, PageID# 4687.] This hypothetical is fundamentally flawed, though, for two reasons.

First because it compares the *licensing* scheme of the auctioneering statutes at issue here with a supposed consumer-protection enforcement action. The two are not comparable. *See SPGGC*, 505 F.3d at 194 (quoting *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007) (observing that “because consumer protection is a field traditionally subject to state regulation, ‘we should be particularly hesitant to interfere with the State's efforts under the guise of the Commerce Clause’”). Second because “future authorities” who might seek to apply even the licensing scheme under PC 471 to online auctions outside the State would hardly be on “firm ground.” Such an effort would run contrary to all the indicia of non-extraterritorial legislative intent discussed above, including the authorities’ very own regulation, Rule 18.

Fourth and finally, the District Court failed to abide by this Court’s observation in *Online Merchants* that cases finding an improper effect on activity wholly without the enacting state are *rare*. *See* 995 F.3d at 553. Despite the

evidence of legislative intent to limit the application of PC 471 to Tennessee and in the absence of any evidence of enforcement against any of the out-of-state Plaintiffs, the District Court held that PC 471 applies extraterritorially and is therefore unconstitutional. Central to the Court's reasoning was the notion that merely because the licensing regime applied to "electronic exchange[s]," and thus to communications over the Internet, the statutes necessarily applied extraterritorially. [Mem. Op., RE 116, PageID# 4680 (stating that "[c]ircuits outside the Sixth Circuit have recognized that, '[b]ecause the [I]nternet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate Internet activities without project[ing] its legislation into other States'") (citing *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d. 805, 841 (M.D. Tenn. 2013) and *Amer. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003)).]

But *this* Court has not recognized the virtual impossibility of a State's regulation of Internet activities without running afoul of the dormant Commerce Clause. And the Second Circuit—on which the District Court relied—has itself backed away from such a blanket statement. The decision in *SPGGC*, for example, goes far in the other direction: "The fact that an ordinary commercial transaction happens to occur in cyberspace does not insulate it from otherwise applicable state consumer protection laws." 505 F.3d at 195. Yet by embracing the skeptical notion that regulation of Internet communications must necessarily equate to extraterritorial

regulation, the District Court essentially sought *unconstitutionality* when it was required to do the opposite.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be reversed and the case remanded with instructions to award summary judgment to the Defendants.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains not more than 5,488 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in Microsoft Word using 14-point Times New Roman proportionally space typed font.

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The undersigned hereby certifies that a true and exact copy of the foregoing Brief has been served on all persons listed below by U.S. mail and by means of the Court's electronic notification system.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b), the following filings from the district court's records are designated as relevant to this appeal:

Record Entry and Page ID Range	DESCRIPTION OF ENTRY
RE 50, PageID ## 1025-1070	Amended Complaint
RE84, Page ID#1426	Order
RE 85, PageID ## 1427-1459	Answer to Amended Complaint
RE 88-5, PageID ## 2165-2193	IAA Deposition
RE 88-7, PageID ## 2199-2216	IAA Discovery Responses
RE 88-15, PageID ## 2698-2773	Purple Wave Deposition Exhibits
RE 88-16, PageID ## 2774-2803	McKee & Purple Wave Discovery Responses
RE 96-2, PageID ## 3917-4026	Purple Wave Deposition
RE 97-2, PageID ## 4196-4204	McLemore & McLemore Auction Discovery Responses
RE 116, Page ID ## 4670-4694	Memorandum Opinion
RE 123, PageID # 4722	Entry of Judgment