Case No. 22-5458

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, No. 3:19-cv-00530 (Richardson, J.)

BRIEF OF APPELLEES WILL MCLEMORE, MCLEMORE AUCTION, AARON MCKEE, PURPLE WAVE AUCTION, AND THE INTERSTATE AUCTION ASSOCIATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Plaintiffs-Appellees certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation. Plaintiffs-Appellees further certify that no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs respectfully submit that oral argument would not be helpful in this case. This is a straightforward appeal of a pure legal ruling made under existing law. The district court ruled based on the face of the statute that PC 471 was extraterritorial, under well established principles of constitutional law. Its interpretation is entitled to great weight on appeal. Even if this were a matter of statutory interpretation as the state argues, it remains a pure question of law. Oral argument is unlikely to illuminate this Court's analysis for that reason.

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, R. 123, PageID # 4722.) Plaintiffs brought a civil rights lawsuit under the United States Constitution, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. § 2201, alleging violations of the First and Fourteenth Amendments and the Commerce Clause. The district court had jurisdiction over those claims pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Was the district court correct in concluding, based on the plain language of PC 471, that Tennessee imposed an extraterritorial licensure requirement when it sought to regulate online, or "electronic," auctions?

STATEMENT OF THE CASE

I. Tennessee's Regulation of Auctioneering

Tennessee created the Tennessee Auction Commission (Commission) with the goal of regulating the profession of auctioneering in 1967. (Mem. Op., R. 116, PageID # 4671.) The state could hardly have predicted that within a few decades, consumers, entrepreneurs, and clients alike would turn to the internet to engage in the business of auctioneering. To account for the explosion of online auctions, in 2006, the Attorney General issued an opinion finding that internet drop off stores which rely on online auctions like eBay do not easily fit within the statutory definition of an "auction" or "auctioneer." Op. Tenn. Att'y Gen. 06-053 (2006).[1]

Per the opinion, while online auction websites may "perform some of the functions of an auctioneer, they do not fall within a literal reading of that term as defined in Tenn. Code Ann. § 62-19-101(3)." *Id.* at 4. Foreshadowing the problems with trying to identify where an online auction occurs,[2] the Attorney General thought it "credible" that "eBay and similar sites come[] close enough" under existing code, but "the more appropriate course" was to "leave the decision of whether or not to

[1] Rule 18, presented by the state as existing in the awareness of Tennessee's legislature (Appellant Br. at 18), was not mentioned by the Attorney General.

[2] The Opinion observed that "'audience' and 'participating audience' evoked the limited, *definable, physically present group* of people one associates with a traditional auction." *Id*. (emphasis added).

regulate Internet auction-type sites to the considered judgment of the General Assembly." *Id*. at 5-6.

That same year, the legislature enacted a regulation exemption for all "fixed price or timed listings that allow bidding on an Internet website but that does not constitute a simulcast of a live auction." (Mem. Op., R. 116, PageID # 4671.) Under the so-called eBay exemption (Defs.' Resp. to Pls.' Statement of Undisputed Material Fact (SUMF), R. 114 at ¶ 130, PageID # 4656), online auctions were not subject to Tennessee's licensure requirement. The state was soon to worry that it had given away the (virtual) store.

This touched off a multiyear effort to license online auctions. "In 2016, the [Tennessee Auction] Commission proposed a rule [Rule 28] that would have excluded online extended-time auctions (*i.e.*, auctions whereby the ending time can be extended based on bidding activity) from such exemption." (Mem. Op., R. 116, PageID # 4671.) "But on December 15, 2016, before the rule became effective, the Joint Committee for Government Operation pulled it out for specific review and ultimately rejected it." (Id.) Rule 28 then expired in May of 2017 when 2017 Public Chapter No. 452 went into effect. *See* 2017 Pub. Act 52 § 1(c).

"In 2017, the Tennessee General Assembly again considered a bill that would have required extended-time, but not fixed time [an auction with bidding that necessarily ends at a specific time, with no possibility of the bidding time being

extended], online auctions to be licensed." (Mem. Op., R. 116, PageID # 4671.) That bill also failed. (Id.) The issue was then raised again in 2018, and a Task Force was created to study the regulation of online auctions. (Id.) The Task Force met four times and "analyzed three years of complaint data, which revealed very few complaints for online auctions in general (11 overall in three years) and even fewer for extended-time auctions—three overall and none in 2018." (Id.)

The Task Force then issued recommendations. It recommended "that 'electronic' exchanges be added to the definition of an auction (so that 'electronic' (*i.e.*, online) auctions may be regulated)." It further recommended that the term, 'timed listing' under the eBay exemption, be redefined to mean "'offering goods for sale with a fixed ending time and date which does not extend based on bidding activity.'" (Mem. Op., R. 116, PageID # 4672.)

Legislators then proposed a bill amending Tennessee's auctioneering statutes (codified at Tenn. Code Ann. § 62-19-101 *et seq.*). (Id.) Per the Task Force recommendations, Section 4(2) of the bill effectively amended the definition of 'auction' contained at Tenn. Code Ann. § 62-19-101(2) to include 'electronic' exchanges, whereas it had formerly only embraced oral and written exchanges. (Id.) It also redefined "timed listings" so as to exclude extended-time auctions from the eBay exemption. (Id.)

The general applicability provision was found in Section 5(a)(1) of the bill. It "restated the existing law (set forth in Tenn. Code Ann. § 62-19-102(a)(1)) in providing that 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.'" (Id.)

PC 471 also contains a list of other exemptions (listed in Tenn. Code Ann. § 62-19-103), some of which are specific to online auctions. Exemptions are based on the type of auction and/or the identity of the party conducting the auction. (Id. at PageID # 4673.)

> These exemptions include, among others, "[a]n auction conducted by or under the direction of a governmental entity"; "[a]n auction conducted on behalf of a political party, church, or charitable corporation or association"; "[a]n auction conducted for the sale of livestock'; 'an auction for the sale of tobacco"; "[a]ny fixed price or timed listings that allow bidding on an Internet website but do not constitute a simulcast of a live auction"; "[a]n in person or simulcast auction who primary business activity is selling nonrepairable or salvage vehicles in this state"; and "[a]n individual who generates less than twenty-five thousand dollars ($25,000) in revenue a calendar year from the sale of property in online auctions."

(Id.) Because these exemptions apply to the entire statutory scheme, "they apply to the new general requirement that persons conducting extended-time auctions be licensed." (Id.)

II. Plaintiffs Will McLemore and McLemore Auction

Plaintiff Will McLemore is the president of Plaintiff McLemore Auction Company, LLC (McLemore Auction). (Mem. Op., R. 116, PageID # 4673.)

McLemore Auction is a limited liability company with a physical location in Nashville, Tennessee. (Id.) "McLemore and McLemore Auction contract with owners of tangible personal property to sell that property at auction through the website www.mclemoreauction.com." (Id.) McLemore Auction uses the extended-time auction format exclusively and relies on unlicensed independent contractors to conduct auctions through its website. (Id. at PageID # 4673-74.)

III. Plaintiffs Aaron McKee and Purple Wave

Plaintiff Aaron McKee is the president and CEO of Plaintiff Purple Wave, Inc. (Purple Wave). (Id. at PageID # 4674.) Purple Wave is a privately held corporation, incorporated in Delaware, and physically located in Manhattan, Kansas. (Id.) No employee of Purple Wave holds any license issued by the Tennessee Auctioneer Commission. (Id.) "McKee and Purple Wave contract with owners of tangible personal property to sell that property at auction through the website www.purplewave.com." (Id.) Purple Wave's website uses an extended-time auction format. (Id.) Purple Wave's website is accessible in all states, including Tennessee. (Pls.' Resp. to Defs.' SUMF, R. 106 at ¶ 21, PageID #4495.) Purple Wave's employees frequently contract for and sell items at auction through its website that are: sold to Tennessee residents (id. at ¶ 22, PageID #4495); owned by Tennessee sellers (id. at ¶ 23, PageID #4495); and located in Tennessee. (Id. at ¶ 24, PageID

#4495.) Purple Wave generates more than $25,000 in annual revenues from the sale of property at auction to Tennessee residents. (Id. at ¶ 25, PageID #4496.)

IV. Plaintiff Interstate Auction Association

Plaintiff Interstate Auction Association (IAA) is an unincorporated association comprised primarily of licensed and unlicensed auctioneers. (Mem. Op., R. 116, PageID # 4674 (citing Pls.' Resp. to Defs.' SUMF, R. 106 at ¶ 5, PageID # 4492).) The IAA's members are dedicated to online auctioneer freedom. Plaintiff McLemore organized it in response to PC 471. (Id.)

V. Proceedings Below

Plaintiffs filed a complaint in the district court for the Middle District of Tennessee on June 26, 2019. Plaintiffs filed a motion for a temporary restraining order and a preliminary injunction requesting the district court enjoin the state from enforcing its licensure regime with respect to online websites. (Id.) The district court "entered a temporary restraining order (TRO) that enjoined the state from applying Tennessee's auctioneering laws and licenses to 'electronic' exchanges, or online auction websites, or against Plaintiffs" on June 28, 2019. (Id. at PageID # 4674-75.)

After a hearing on July 10, 2019, the district court found that Plaintiffs were likely to succeed on the merits of their Commerce Clause claim, and that other preliminary injunction factors weighed in favor of granting the relief requested by Plaintiffs. (Id. at PageID # 4675.) On December 4, 2020, the district court dismissed

Plaintiffs' Privileges and Immunities claim under Defendants' 12(b)(6) Motion but denied Defendants' Motion as to Plaintiffs' First Amendment and Commerce Clause claims. (Id.)

On March 23, 2022, the district court granted Plaintiffs' Motion for Summary Judgment "to the extent Plaintiffs challenge PC 471 on Dormant Commerce Clause grounds."[3] (Mem. Op., R. 116, PageID # 4693.) On May 3, 2022, the district court issued a permanent injunction. (Order & Permanent Inj., R. 122, PageID # 4720-21.) The state timely appealed on May 20, 2022. (NOA, R. 124, PageID # 4723.)

STANDARD OF REVIEW

Summary judgment is reviewed de novo. *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008). "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).

[3] The district court declined to rule on Plaintiffs' free speech claim. (Mem. Op., R. 116, PageID # 4693.)

When interpreting state statutes, federal courts must follow the rules of construction employed by the respective state. *First Choice Chiropractic, LLC v. DeWine*, 969 F.3d 675, 680 (6th Cir. 2020). The district court's determination on the law in its home state is, "as a rule, entitled to great weight on review." *BMW Stores, Inc. v. Peugeot Motors of Am.*, 860 F.2d 212, 215 (6th Cir. 1988) (quotation omitted).

SUMMARY OF ARGUMENT

The district court correctly held that PC 471 is extraterritorial because it applies to anyone who acts as, advertises as, or represents to be an auctioneer. When applied to the online context, the state is requiring licenses out of persons who are wholly out of state. The state faults the district court for declining to insert an in-state limitation, but it cannot when the Tennessee General Assembly did not supply one. When the General Assembly intended in-state reach, as it did with exceptions to the online auction licensure requirement, it wrote that into PC 471.

What the state demands is thus not *interpretation*, but *revision*. Only legislatures are capable of devising what it means for an online auction to be "in state." This concern is particularly weighty in the online context given the difficulties inherent in defining where an online auction is located.

But statutory interpretation hurts the state's argument. The legislative history and larger background show that the state intended PC 471 to have a broad reach

with no geographic limitation expressed. Furthermore, the state's proposed in-state standards have changed over time, and none fit PC 471.

Finally, even under *Pike*, the state's online auction license delivers negligible benefits, far outweighed by the burdens PC 471 places upon interstate commerce.

ARGUMENT

I. The district court correctly held that the state violated the Commerce Clause by imposing a licensure requirement on those who act as, advertise as, or represent to be an auctioneer online.

The removal of state trade barriers was a "principal reason" the Constitution was adopted. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019). Thus, the power to regulate commerce among the several states was afforded to Congress under the Commerce Clause. U.S. Const. Art. I, § 8.

The Commerce Clause has a negative component that limits the power of states to "erect barriers against interstate trade." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). Because Congress has exclusive purview over interstate commerce, a state or local law may be held unconstitutional if it places an undue burden on interstate commerce. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). This arises out of a concern over states burdening interstate commerce. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) ("[T]he Clause has long been

recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.").

A state commits a *per se* violation of the Commerce Clause if it enacts an extraterritorial law. *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 373 (6th Cir. 2013) (citing *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 645 (6th Cir. 2010)). When not a *per se* violation, then the inquiry moves on to the *Pike* balancing test. *See Snyder*, 735 F.3d at 376 n.7; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Under *Pike*, courts inquire whether the burdens exceed the benefits. 397 U.S. at 142. While "no clear line separate[es]" *per se* violations, the "overall effect" on commerce is the "critical consideration" under both extraterritoriality and *Pike*. *Brown-Forman Distillers Corp. v. N.Y. State Liquor*, 467 U.S. 573, 579 (1986).

The district court concluded that Tennessee acted extraterritorially when it extended its auction license to online, or "electronic," auctions. Extraterritorial laws regulate conduct occurring wholly outside the state. *Int'l Dairy Foods Ass'n*, 622 F.3d at 645. Under extraterritoriality, the question is whether the "practical effect of the regulation is to control conduct beyond the boundaries of the State." 491 U.S. 324, 336 (1989) (citing *Brown-Forman*, 476 U.S. at 579); *see Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945) (invalidating regulation where its "practical effect … is to control train operations beyond the boundaries of the state exacting it"). An extraterritorial law is *per se* invalid. *See Healy*, 491 U.S. at 332 (1989).

A. The district court correctly found that PC 471 regulates extraterritorially.

The court properly determined that PC 471 was not ambiguous and regulated extraterritorially based on its plain language, which has no geographic limitation. (Mem. Op., R. 116, PageID # 4691.) The exceptions further demonstrate that PC 471 was designed to project extraterritorially. This ruling is entitled to great weight. It was not error to read PC 471 according to its plain language.

1. The district court correctly held that PC 471 textually lacks an in-state limit.

The district court properly interpreted PC 471 according to its plain language. With the enactment of PC 471, Tennessee sought to regulate any online auction company or person who acted as, advertised as, or represented to be an auctioneer. That necessarily embraces wholly out of state conduct as website that act, advertise, or represent in other states are accessible anywhere, including Tennessee.

As the district court recognized, states must be exceptionally careful when regulating the internet to avoid acting extraterritorially. (Mem. Op., R. 116 at PageID # 4680 ("Circuits 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.'").) The internet, like other industries—railroads, trucks, highways—is so thoroughly imbued with an interstate element that states must take special care when

regulating them. *See Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981); *Cyberspace Comm'cns, Inc. v. Engler*, 55 F. Supp. 2d 737, 744 (E.D. Mich. 1999) ("Like the nation's railways and highways, the Internet is by nature an instrument of interstate commerce."). Unlike roads or railroads, the internet doesn't merely cross across state lines; it is both everywhere and nowhere. *See Reno v. ACLU*, 521 U.S. 844, 850-51 (1997) (finding that the internet is "located in no particular geographical location but available to anyone, anywhere in the world") (citation omitted).

The *Backpage.com* decision relied upon by the district court illustrates the complications of regulating the internet. *See Backpage.com,* 939 F. Supp. 2d at 841-45. In *Backpage.com*, the district court found that a Tennessee law that criminalized advertising or publishing an offer for a commercial sex act with a minor was extraterritorial because, like PC 471, it projected a Tennessee law out-of-state by prohibiting online advertisements with no geographic limit. *Id.* at 841. The court rejected the state's invitation to narrowly construe the law by limiting its application to within Tennessee when no such limit appeared in the text itself or was evident from any legislative proceedings. *Id*. at 842.

As the district court recognized, the obvious difficulties in regulating the internet without running afoul of the Commerce Clause require that "a legislature [] *make the narrow geographic scope of its laws explicit* to stay within the confines of the Dormant Commerce Clause when regulating Internet activity." (Mem. Op., R.

116, PageID # 4683 (emphasis added).)[4] In enacting PC 471, Tennessee failed to heed the lessons from *Backpage.com*. Like the law at issue in *Backpage.com*, PC 471 applies to all websites that "act as, advertise as, or represent to be an auctioneer." (R. 4-2, PC 471 § 5(a)(1), PageID #63.) It also applies to all auctions "arranged by or through a principal auctioneer"—essentially anyone who so much as offers or executes an auction or manages an auction company—and requires they be conducted "exclusively" by licensed persons. (Id. § 5(b), PageID #64, 4(9), PageID # 63.) As in *Backpage.com*, 939 F. Supp. 2d at 842, the state included no geographic limitation in the text of the law. Unwittingly or not, it projected its licensure requirement out-of-state.

When regulating the internet, states must define the scope of their statutes. The district court was correct in holding that, under PC 471, any online auction website is "acting as or advertising as or representing to be" an auctioneer by virtue of having a website promoting the business. (Mem. Op., R. 116, PageID # 4686.)

[4] Extraterritorial cases may have been rare (Appellant Br. at 24 (citing *Online Merchants Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021)) but are bound to increase in the internet age. *See* Braden H. Boucek, *That's Why I Hang My Hat in Tennessee: Alcohol and the Commerce Clause*, 2018-2019 Cato. Sup. Ct. Rev. 119, 127. The district court did not "fail[] to abide by this Court's observation" in *Online Merchants* (Appellant Br. at 24) because this Court did not instruct lower courts to keep low the number of extraterritorial holdings by rewriting the text of statutes with out-of-state reach. The district court otherwise acknowledged and addressed *Online Merchants*. (Mem. Op., R. 116, PageID # 4692 at n.19.)

The district court's determination is entitled to "great weight on review." *BMW Stores, Inc.*, 860 F.2d at 215 (quoting *Avery v. Maremont Corp.*, 628 G.2d 441, 446 (5th Cir. 1980)). Online auction websites like those run by Plaintiffs are available to anyone with internet access, including in Tennessee. There is no option to shut their websites off at the state border.

Purple Wave, which proclaims on its website that it is a "true auction" website, faces a real problem. (Mem. Op., R. 116, PageID # 4689.) Now that online auctions fall under the state's jurisdiction, Purple Wave is clearly "acting as or advertising as or representing to be" an auctioneer. Like the law in *Backpage*, PC 471 does not define "at what point the offense of offering to sell or selling an advertisement" for an online auction has been consummated, "a determination that becomes complicated when dealing with interstate actors and a nationwide platform." *Backpage.com*, 939 F. Supp. 2d at 842. This is the exact sort of projection of a regulatory scheme onto wholly out-of-state commerce that states may not impose.

Making matters worse, the licensing requirement would still apply to out-of-state companies like Purple Wave even if the district court had agreed to write in an in-state limit. When it advertises itself to be a "true" auction company (Mem. Op., R. 116 at PageID # 4689), Purple Wave is "act[ing] as an auctioneer—conduct within the scope of PC 471—without ever conducting any computer-generated auctions," in Tennessee. (Id. at PageID #4689 n.14.)

The state faults the district court for concluding that the law would apply to an Alaskan auctioneer on this basis, contending that the district court conflates a consumer protection action with a licensing action. (Appellant Br. at 14.) But it is the state that has those two concepts confused. It is the *licensure* provision that applies based on representing oneself to be an auctioneer, and under the district court's example, the Alaskan is *representing* to be an auctioneer "in this state," thus triggering the licensure provision.[5] No one doubts that Tennessee could initiate a consumer protection action should the Alaskan commit fraud upon a Tennessean, but that is beside the point. The existence of an alternative consumer protection method only underscores how unnecessary it was to require a license at all.

With no actual ambiguity within PC 471, the district court was left only to analyze it based on its plain text. And its text lacks a geographic limitation, at least in its general applicability section. Its exemptions, however, do contain limitations, indicating that the larger geographic omission was intentional.

[5] The state secondarily asserts that any future authority who tried to impose a license on the Alaskan would not be on "firm ground" given "all the indicia of non-extraterritorial legislative intent." (Appellant Br. at 24.) The state has never cited to any legislative history supporting this statement, and the Commission regulated Everything But The House (EBTH), an out-of-state company from Ohio, for advertising in Tennessee. (Defs.' Resp. to Pls.' SUMF, R. 114, PageID # 4661-63, ¶¶ 224-228.) Future authorities might not feel bound by Rule 18 any more than past ones did.

2. The text of PC 471's exemptions contain in-state limitations.

The exceptions to PC 471 show that the absence of an in-state limitation is no accident. "[W]here the legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the legislature acted purposefully in the subject included or excluded." *State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013) (quotation omitted); *see Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 35 (Tenn. 1997) ("Omissions are significant when statutes are express in certain categories but not others.").

PC 471 does contain in-state limits. They are just found in its *exemptions*, which rather proves the point about its extraterritorial application. PC 471 contains two, both specific to online or simulcast auctions of nonrepairable or salvage vehicles. Both limit the exception to when the primary business activity is "*in this state*." (R. 4-2, PC 471 § 6(10), (11), PageID # 64.) Still more, PC 471 contains two other exemptions specific to online auctions which both *lack* an in-state requirement: one for the eBay exemption and the other for operators who make less than $25,000. (R. 4-2, PC 471 § 6(9)(12), PageID # 64.) The state certainly knew how to write, "in this state," when it wanted to regulate (or not regulate) online auctions in-state.

Only one way exists to read the law that Tennessee actually wrote. The state did not wish to regulate online auctions of nonrepairable or salvage when sold in-state. This signals an intent *to regulate* online auctions of nonrepairable and salvage

vehicles when sold out-of-state. Contrast this with when the state *never* wanted to regulate online auctions, such as with eBay style auctions, or with small-time operators. Then no geographic limit was expressed. It makes no sense to read a general in-state limit to the general application statute that would obviate the in-state language where it exists and insert an in-state language where it does not. The state's invitation to write an across-the-board in-state restriction overrides deliberate legislative choices. *See Najo Equip. Leasing, LLC v. Comm'r of Revenue*, 477 S.W.3d 763, 769 (Tenn. Ct. App. 2015) (courts cannot interpret statutes in a manner that would make any part "inoperative, superfluous, void, or insignificant") (quoting *Nissan N. Am., Inc. v. Haslip*, 155 S.W.3d 104, 106 (Tenn. Ct. App. 2004)).

Exemptions were raised at a March 12, 2019, senate hearing. (Transcript, R. 4-14, PageID # 553-560.) When it became clear that the bill specifically exempted two online auction companies—Copart[6] and Ritchie Brothers[7]—senators demanded to know what made those two companies special. (Id. at PageID # 555.) One senator unpersuasively suggested that the reason for the companies' special treatment was

[6] Copart describes itself on its publicly available website https://www.copart.com/ as "a global leader in 100% online car auctions featuring used, wholesale and repairable vehicles." Proponents of the licensing of online auctions assured other legislators that Copart and eBay would be exempt. (Transcript, R. 4-6, PageID # 156:25-157:2.)

[7] Richie Bros describes itself on its publicly available website https://www.rbauction.com/ as "the world's largest auctioneer of heavy equipment and trucks."

that they "deal in multiple states and they're under … significant other licensing and registration," (Id. at PageID # 557 (5:1-4)), which is of course equally true of out-of-state competitors who received far fewer accommodations.

The exemptions for in-state, nonrepairable or salvage vehicle auction companies implicate the sort of protectionism the Commerce Clause was designed to prevent.[8] *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986) (holding that economic protectionism is illegitimate when designed to convey advantages on local merchants).

The text means what it says. The state meant to broadly regulate online auctions and exempt companies with in-state connections. *State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013) ("[W]here the legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the legislature acted purposefully in the subject included or excluded.") (quoting *State v. Loden*, 920 S.W.2d 261, 265 (Tenn. Ct. App. 1995)).

3. PC 471 is not ambiguous.

The state cannot, and does not, argue that the text of PC 471 confines it in-state. Rather, the state argues that the courts should slip one in under the guise of

[8] A state may impermissibly regulate extraterritorially "regardless of the purpose with which it was enacted." *Edgar v. Mite Corp.*, 457 U.S. 624, 642 (1982) (plurality) (internal quotation marks omitted). But when a protectionist motive is on display, it is powerful evidence that a law is extraterritorial.

statutory interpretation. (Appellant Br. at 20.) But courts only reach statutory interpretation when the text is ambiguous. The district court rejected the idea that it was, even as it afforded the state's interpretation "great weight." (Mem. Op., R. 116 at PageID # 4686) (citing *Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009); *Frazier v. State*, 495 S.W.3d 246, 252 (Tenn. 2016).) This was more than the state's interpretation deserved. Under Tennessee law, an agency's interpretation of a statute is a "question of law subject to de novo review." *Pickard v. Tenn. Water Quality Control Bd.*, 424 S.W.3d 511, 523 (Tenn. 2013) (quotations omitted).[9]

A "statute is ambiguous when "the parties derive different interpretations from the statutory language." (Mem. Op., R. 116 at PageID # 4685 (quoting *Howard*, 504 S.W.3d at 270 (quoting *Owens*, 908 S.W.2d at 926).) But a party cannot "create an ambiguity" by advancing an unreasonable interpretation. *Id.* (citing *Frazier*, 495 S.W.3d at 252 (quoting *Powers v. State*, 343 S.W.3d 36, 50 n.20 (Tenn. 2011)) (internal quotation marks omitted)); *see also Steppach v. Thomas*, 346 S.W.3d 488,

[9] While courts may look at an agency's regulation to determine legislative intent, it is "not controlling." This principle applies when the agency's regulation is an "interpretation of a statute." *See Najo Equip. Leasing*, 477 S.W.3d at 769-70. But Rule 18 was not interpreting *this* statute—the one we are interpreting—as it was promulgated nearly two decades prior. When an agency's interpretation is "erroneous, the court is impelled to depart from it." *Id.* (quotation omitted). That holds particular force when, as here, the agency only resorts to a moribund regulation as a litigation tactic midstream.

507 (Tenn. 2011) (a statute is ambiguous when it can convey more than one meaning).

The state does not point to any actual ambiguity in the statute. It demands that the courts *supply* language that PC 471 lacks to cure its unconstitutionality. (Appellant Br. at 21.) But it never establishes that PC 471 is ambiguous in the first place. Additionally, the state is wrong; under Tennessee law, courts may not "rewrite a law to conform it to constitutional requirements." *Davis-Kidd Booksellers v. McWhereter*, 866 S.W.2d 520, 526 (Tenn. 1993) (quotation omitted).[10] Courts have no duty to supply language to a clear statute. (Mem. Op., R. 116, PageID # 4685 ("[I]t is simply not part of our function as judges to re-write, in the guise of statutory construction, unambiguous statutory language in order to cure what to us seems to be statutory deficiencies.") (quoting *United States v. M/V Big Sam*, 693 F.2d 451, 455 (5th Cir. 1982)).)

The closest the state gets to suggesting that PC 471 is ambiguous is to point to *prior* enactments pertaining to the auctioneering profession: Tenn. Code Ann.

[10] The state's reliance on *Scales v. State*, 181 S.W.2d 621 (Tenn. 1944) to argue that the district court should have literally written, "in this state," into the statute is misplaced. (Appellant Br. at 21.) Statutory interpretation is only possible when reasonable, when the statute is ambiguous, and when it furthers legislative intent. Even if met here, courts cannot supply an in-state standard to PC 471 because they would need to devise a specific standard for who or what is in-state. This is explained more fully below.

§ 62-19-115(a) (providing that "[a]ny auctioneer licensed under this chapter may conduct auctions at any time or place in this state"), and a regulation, Tenn. Comp. R. & Regs. 0160-01-.18 (Rule 18) (applying to "[a]ny electronic media or computer-generated auction originating from within Tennessee"). (Appellant Br. at 16-17.) But neither provision creates any ambiguity. First, neither Section 115 nor Rule 18 are part of PC 471. They are just other enactments pertaining to auctioneering.[11] Second, they address different things. Section 115 merely states that licensed auctioneers can conduct auctions in Tennessee, but it does not say or "even suggest[], that a license is required only for auctioneers or auctions 'in this state.'" (Mem. Op., R. 29 at PageID # 791; R. 116 at PageID # 4686, n.11 (incorporating the court's prior reasoning).)

Third, the mere fact that the words, "in this state," exist somewhere in the auctioneering chapter does not mean that those words are absorbed into PC 471 as if by "osmosis." (Mem. Op., R. 29 at PageID # 791; Mem. Op., R. 116 at PageID # 4686, n.11.) If anything, Section 115 demonstrates that if the General Assembly wanted to limit PC 471 in-state, it knew how to write the words.

[11] The state also cites a third statute: Tenn. Code Ann. § 4-3-1304(1), (14) (Appellant Br. at 16.) This argument was not made below (Defs.' Mem., R. 88-1 at PageID # 1475) and is waived. *Conlin v. Mortgage Elec. Registration Sys., Inc.*, 714 F.3d 355, 360 n.5 (6th Cir. 2013). Furthermore, this statute is even further afield from PC 471 than Section 115.

Rule 18 does even less to create any ambiguity since it was enacted in 2001. The district court was correct that it is entitled to "little weight under the circumstances, in particular the timeline involved. Rule 18 was issued nearly 20 years ago, and thus it is manifestly not probative in interpreting a statute passed last year." (Mem. Op., R. 116 at PageID # 4689.) Rule 18 merely states that a person must have a license to operate a computer-generated auction that "originates" within the state. It does not and cannot address PC 471's application to anyone who acts as, advertises as, or represents to be, an online auctioneer, as recognized by the district court. (Mem. Op., R. 116 at PageID # 4689.)

The state cites *Brundage v. Cumberland Cnty.*, 357 S.W.3d 361 (Tenn. 2011), to argue that the General Assembly must have been aware of Rule 18 (Appellant Br. at 18), but that case merely recognized a presumption that the General Assembly was aware of "its prior enactments." Rule 18, a regulation, is not an enactment of the General Assembly. Any presumption is easily rebutted because, as will be shown below in the legislative history portion of this brief, no one thought online auctions were regulated prior to PC 471, and certainly not under Rule 18.

Indeed, the state *itself* did not appear to notice Rule 18 until the middle of this case, after it had lost the preliminary injunction. (Mem. Op., R. 116 at PageID # 4684 (Defendants "take another stab" at devising an in-state limit with Rule 18); *id.*

("[f]or the first time," Defendants raise Rule 18); *id.* at PageID # 4691 ("Defendants' newly asserted argument regarding Rule 18 [. . .]").)

4. Only the legislature, not the courts, can decide what makes an online auction in-state.

Even if an in-state standard fell under statutory interpretation, courts lack the authority to choose on behalf of Tennessee's legislature *what* the in-state standard should be.

Regulating the borderless space of online auctions poses inherent extraterritorial problems. A *regular* auction has many components: auctioneer, auction firm, client, bidder, and property. Which must be in-state to qualify? With an online auction, it gets tricker still. (*See* Mem. Op., R. 116, PageID # 4687 (even with a limit "the scope of authority to regulate activity occurring 'in this State' is blurred … when the regulated activity occurs over the Internet.") The state's "origination" standard does not simplify matters. At least a written or oral auction happens in one place. The server "originating" the auction may be in one place or several. (McKee Dep., R. 96-2, PageID # 3964-65 (testifying that Purple Wave uses Amazon Web Services that provides web services "on a lot of different servers around the world").) Some aspects of an online auction occur without any human interaction. (Pls.' Resp. of Purple Wave to Defs.' Int. 14, R. 88-16, PageID # 2780.)

The state expects the courts to undertake a whopper of a task. The state demands that courts add a whole new, in-state element to PC 471. It *also* asks courts

to arbitrarily choose a standard about *who or what* needs to be in-state in order to qualify. Finally, it expects courts to figure out how to apply a standard to the technology surrounding automated servers, all without legislative input.

Would PC 471 apply when the principal auctioneer is doing the "arranging" in-state? (R. 4-2, PC 471 § 5(b), PageID #64.) Or when the auction will be conducted in-state? Or of property in-state? A Tennessee client? What if Plaintiff Mclemore arranges for an auction of property in Kentucky from his Nashville office on behalf of an Ohio client? The state asks courts to figure this all out even though *it* couldn't figure out what it meant to be in-state under its own standard when asked to explain by the district court at the preliminary injunction hearing. *See infra*.

The district court properly declined to engage in an exercise for which it was uniquely ill suited. The task of deciding what a person needs to do to qualify as being in-state is challenging in the online context, but the chore belongs to Tennessee's legislature. The district court cannot be faulted for refusing to "draw a line that is not really there." (Id. at PageID # 4683.)

B. Statutory interpretation demonstrates that PC 471 is extraterritorial.

Canons of statutory interpretation only further bolster the case that PC 471 is extraterritorial. The district court accurately adhered to the rules of construction followed by Tennessee courts. (Mem. Op., R. 116 at PageID # 4685 (citing cases).) Tennessee courts employ various sources when interpreting an ambiguous statute,

including "the broader statutory scheme, the history and purpose of the legislation, public policy, historical facts preceding or contemporaneous with the enactment of the statute, and legislative history." *See Wallace*, 546 S.W.3d at 53. These sources, in particular the history of the legislative hearings and the Task Force meetings, as well as the Commission's actions and the state's shifting positions, undercut the state's interpretation.

1. Legislative history from the General Assembly and Auctioneer Task Force show that PC 471 was limited in-state.

The legislative history surrounding PC 471 does not support the state's proposed interpretation to limit PC 471 in-state. The state asserts in conclusory fashion that the legislative history demonstrates an intent to limit PC 471 to auctioneers in-state. (Appellant Br. at 24-25.) Yet the state fails to cite any actual legislative history in support, despite the district court previously faulting the state for failing to direct it to any supporting legislative history. (Mem. Op., R. 116 at PageID # 4682-4683.) The district court cited a bundle of examples proving that PC 471 was not drafted "with an eye toward geographic boundaries." (Id. at PageID # 4689-90.) The state delivers no response.

The district court barely scratched the surface. The regulation of online auctions was a process that began with a proposed rule change in 2016, continuing through 2019. (Mem. Op., R. 116 at PageID # 4671-73.) Collectively, these

proceedings evince an intent to license online auctions without concern for geographic limits.

a. The 2016 Government Operations Committee.

Support for the 2016 rule came from two witnesses, both of whom were affiliated with the Tennessee Auctioneer's Association (TAA). (Gov. Ops. Transcript, R. 4-5, PageID #117:8-21.) Both cited a need to protect the public from unscrupulous auctioneers. (Id. at PageID # 118-120; *id.* at PageID ## 140-43.) No mention was made of a geographic limitation (or of Rule 18) which would have, after all, frustrated their stated goal, because it would have still left Tennesseans exposed to any online auction that made the easy choice to originate the auction elsewhere and avoid a license, hardly a difficult feat these days.

The only limitation that concerned anybody centered on the eBay exception. The proposed rule designed to curb it by limiting its application to online auctions that end at a fixed time.[12] (Id. at PageID # 123-26.) But this had nothing to do with geography, and less to do with consumer protection. Even in 2016, Allen openly acknowledged on behalf of the TAA that "both situations [fixed ending v. extended-time ending] are equally fraught with the possibility of malfeasance." (Id. at PageID # 126:6-8.) But this was the only limitation that worried anyone. Otherwise, the

[12] As distinguished from extended time auctions, or online auctions where a new high bid resets the bidding clock.

purpose was to regulate as much of the online auction space as the state could in the name of protecting consumer protection, but really existing licensees, goals that would have been undermined by staying in-state. After the Rule failed, licensed auctioneers, by and through the TAA, continued to lobby for the regulation of online auctions. (Id. at PageID # 151:19-24.)

b. The 2017 legislative proposal.

Commission members openly seethed at the Rule's failure. (*See, e.g.*, Transcript, June 19, 2017, R. 95-3, PageID ## 3595 (3:23-25) ("I'm telling you, this is going to bite everybody here in the butt if something's not done about it."); *id*. at PageID ## 3595-96 (3:25-4:3) ("[Y]ou might as well take your auctioneer license, put them in a hat and throw them down the river because without something done, Ladies and Gentlemen, it is over."); Allen Dep., R. 95, PageID # 3418-19 (63:20-64:15).)

In 2017, the Tennessee General Assembly considered bills (Tenn. SB0814/ Tenn. HB0747) that would have required extended-time, but not fixed-time, online auctions to be licensed. Under the bills, private online auction companies like eBay and Copart "would be exempted." (Transcript, R. 4-6, at PageID # 157 (3:1-2); *see also id*. at PageID # 157 (3:12-13) (saying that the TAA wanted everyone to "compete on the same level playing field").) These bills failed.

Just as with the 2016 rule, no geographic limitation was ever raised. Instead, the overwhelming priority was the regulation of as much of the online auction space as was politically achievable.

c. The 2018 legislative proposal.

In 2018, the General Assembly again considered bills (Tenn. SB2081/Tenn. HB2036) that would have required extended-time, but not fixed-time, online auctions to be licensed. These legislative proposals were discussed at the Commission meeting on February 12, 2018, where the TAA made it clear that the regulation of online auctions was a "must." (Transcript, R. 4-7, PageID # 194 (26:24-25), 195 (27:6-10).) Allen, on behalf of the TAA, stated that "the elephant in the room is online auction and the regulation of it by the auction industry and Tennessee Auction Commission and our goal is to try to ultimately get some understanding about who can conduct an auction and who can't." (Id. at PageID # 197 (29:3-8).) Still no geographic limitation was raised. The intent was to regulate as much of the online auction space as possible.

The bills were amended to create the Auctioneer Modernization Task Force (the Task Force) to study the need to protect Tennesseans. *See* 2018 PC 941; Tenn. SB2018.

d. The 2018 Task Force.

The Task Force met in 2018.[13] Plaintiff McLemore was a Task Force member, as was the president of the TAA. (Transcript, R. 95-4, PageID # 3608.) At the August 27, 2018 meeting, members publicly stated that online auctions needed to be regulated because it was a growing business. (Transcript, R. 4-10, PageID # 256, 284.) The discussion again centered on the need to regulate an emergent form of auctioneering or just give up on licensure altogether. No regard was paid to limiting that concern to in-state auctions.

Members did discuss the practicalities of how to regulate a nationwide platform, putting the topic of regulating out of state squarely on the table. (*See* Transcript, R. 4-10, PageID # 283 (65:16-19) ("[T]hat ship has sailed, that there are thousands of companies online selling all kind of surplus property in Tennessee *and elsewhere* that I don't know how you get that group in.") (emphasis added).)

If geographic limitations were even a consideration, this was the time to talk about it. The Task Force even questioned how to "get the entire world of all the online platforms," and how to "stop them from operating in Tennessee or stop Tennessee businesses from using them." (Id. at PageID # 285 (67:9-17), 288 (70:6-8).) But no geographic limitation was ever seriously debated. (*See id.* at PageID #

[13] Videos of the four task force meetings are available at <https://www.tn.gov/commerce/regboards/auction-law-tf.html>.

293-94 (75:25-76:3) (emphasizing that the law must apply based on whether a person was in the auction business, without suggesting a geographic limitation).)[14]

At the August meeting, the Task Force members appeared to discuss and apparently dismiss Rule 18. One member brought up "a rule . . . that addresses the location of the server." (Id. at PageID # 278 (60:21-23).) Yet Plaintiff McLemore pointed out, to no disagreement, that the rule "predates the 2006 exemption of timed auctions" so that the rule essentially became "irrelevant." (Id. at PageID # 278-79 (60:21-61:3).) The first member added, "and servers are all over the place" and may be in "multiple places." (Id. at PageID # 279 (61:11-12, 17).) This exchange illustrates that the Task Force did not envision the state's proposed geographic limitation. The Task Force that ultimately recommended the broad regulation of "electronic" auctions knew online servers may be in "multiple places" without geographic limits. (Id.)

[14] The state claimed that PC 471 won't restrict online postings "from Kansas" (Defs.' Resp. to Pls.' MSJ, R. 107, PageID # 4513.) But the president of the TAA and who was on the Task Force testified that it was essential to license online auctions, "[e]ven though the company may be operating out of Kansas." (Allen Dep., R. 95, PageID # 3492 (137:16-20).) Plaintiff Purple Wave is a company in Kansas. (Mem. Op., R. 116, PageID # 4673.) The district court was right to refuse to credulously accept the state's "convenient" position, leaving behind "enforcement tools … unhindered by any geographic limitation." (Mem. Op., R. 116, PageID # 4673.)

Again, the only limitation surrounded the regulation of eBay, not geography. During the November 5 and November 26, 2018 meetings, Task Force members, including Plaintiff McLemore, questioned regulating extended-time online auctions, but not eBay style auctions. The president of the TAA (Transcript, R. 95-4, PageID #3607) responded that the extended/fixed time distinction was a "compromise," to "leave the eBay law in place and define what a timed listing is." (Transcript, R. 4-11, PageID # 359 (25:18-20), 364 (30:4-9) ("[W]e don't kick eBay's nest. And what we're trying to do is find a compromise without a lot of disparate groups about what they're wanting and what they're not wanting.").) Other Task Force members explained that they would like to license *all* online auctions but that it was not politically possible. (Transcript, R. 4-12, PageID # 464 (28:13-15) ("[W]e would love to go as far as you would like to[.]"); PageID # 464-65 (28:22-29:3) ("[T]here's only so far that we can get with this. And we're willing as auctioneers to settle for this definition . . . we'll never get the legislature to allow us to agree to oversee all auctions whether fixed or not fixed.").)

Again and again, the intent was to regulate as much of the growing business model as possible with the only limitation couched around satisfying political realities, not the Commerce Clause. The Task Force history is decisive evidence that PC 471 was intended to regulate out-of-state.

2. The Commission's regulatory history further shows that PC 471 was intended to regulate extraterritorially.

The Commission's actual history of regulatory enforcement against online auction companies is another forceful indicator that the state's in-state interpretation is faulty. When interpreting a statute, Tennessee courts look to the "historical facts preceding or contemporaneous with the enactment of the statute." *See Wallace*, 546 S.W.3d at 53.

In 2015, the state entered a consent order with Everything But The House (EBTH), an online auction company. (Defs.'Resp. to Pls.' SUMF, R. 114, PageID # 4661, 63, ¶¶ 224, 228.) The order found (1) that EBTH was an "unlicensed company *from Ohio*, conducting online auctions and doing business in Tennessee without the proper licensure to do so" and (2) that EBTH "*advertised online*" a sale of property. (Id. at PageID # 4661-62, ¶¶ 225-27 (citing R. 94-3, at PageID # 3337) (emphasis added).) The order concluded, as a matter of law, EBTH acted unlawfully because it "[a]ct[ed] as or advertise[d] or represent[ed] to be an auctioneer . . . without holding a valid license." (EBTH Order, R. 94-3, at PageID # 3338.) The order contains no findings about where EBTH's auction originated.

When renewing the complaint against PCI on September 18, 2017, Defendant Morris remarked: "We're going to continue to come under fire from auction houses *all over the country* that are doing this exact thing and [fining them] is the only thing that we can do to stop them from not being licensed." (Transcript, R. 104-2, PageID

4446 (6:7-11) (emphasis added).) As recently as May of 2020, Morris continued to express anxiety over online auction companies "that come in *and out* of Tennessee." (Transcript, R. 104-4, PageID # 4458 (3:21) (emphasis added).)

The record is entirely one-sided: the state wanted to regulate online auctions, period, not just those "originating" in Tennessee. Not once can the state cite an example of any legislator or Task Force member expressing a desire to limit its regulations in-state or referencing the origination standard. Not even the Commission charged with its enforcement considered Rule 18, with good reason. It is pointless to try and regulate online auctions (or protect existing licensees) if the regulation could be skirted by placing computers or servers out of state.

3. The state's actions since the enactment of PC 471 further undermine the state's proposed interpretation.

The effort to interpret an in-state limitation in PC 471, now under the guise of Rule 18, is a "'convenient litigation position' or '*post hoc* rationalizatio[n]'" that the court correctly dismissed. *See Kisor v. Wilkie,* 139 S. Ct. 2400, 2417 (2019) (citations omitted).

The state itself struggled to explain and maintain a consistent, in-state standard. At the preliminary injunction hearing, the court pressed the state to clarify its proposed "in this state" standard. The court directly asked the state whether it proposed to regulate based on (1) where the *auctioneer* was physically present, (2) where the *business* was located, or (3) whether the auction reached Tennessee

consumers. The state "was not clear, and in fact equivocated[.]" (Mem. Op., R. 29, PageID # 793.) The state said that "[i]nternet makes it trickier," but that "probably" the answer was "the auctioneer, the business" was in Tennessee. (Id. at PageID # 794.) Whatever the state's position was at that time, it was different from where the action originates.

When the Court pushed the state past its guesswork by asking if a Mississippi auctioneer who "clicked a few buttons" in Memphis would need a license, the state then said it was "probably" where the *business* was. (Id. ("[T]hat's probably Mississippi's jurisdiction to regulate or not regulate.").) The state was clearly making it up, but more importantly, it adopted a standard: business location. That is not the same standard as where the computer *originates* an auction (Rule 18), subsequently adopted by the state in its motion to dismiss. (Defs.' Mem. In Support of Mot. Dismiss, R. 53 (invoking Rule 18).) Not only does this next iteration of an in-state limitation fail to save PC 471, *see infra.* at I.C, but it also contradicts the answers the state previously gave. If "origination" was the standard, then the state would have answered differently when asked about "click[ing] a few buttons."

As the district court appreciated, the state only turned to Rule 18 after it lost the preliminary injunction on Commerce Clause grounds. (Mem. Op., R. 116, PageID # 4684.) The state disinterred Rule 18 out of "convenien[ce]," and that

should cast doubt on the state's statutory interpretation methods. (Id. at PageID # 4686.)

If Rule 18 was a standard, then the state has been regulating online auctions since 2001. But that is patently not the case. The executive director of the Commission, Roxana Gumucio, swore that prior to the enactment of PC 471, online auctions were unregulated. (Gumicio Decl, R. 20-2, PageID # 716-17, ¶¶ 10-11, 14.) She affirmed this again as the state's 30(b)(6) designee. (Gumucio/Rule 30(b)(6) Dep., Doc. 94 at PageID # 3173 (39:15-20).) Consistent with Gumucio's statements, the state itself first took the stance that online auctions were unregulated prior to the enactment of PC 471. (*See* Defs.' Resp. to Pls.' Mot. for T.R.O. and Prelim. Inj., R. 13, PageID # 632 ("In 2019, the legislature extended [the auctioneer license] to auctions that are conducted by electronic exchange with potential purchasers."); *see also* Defs.' Pre-Hr'g Br., R. 20, PageID # 697; Defs.' Mem. In Support of Mot. Dismiss, R. 32, PageID # 826).)

Furthermore, discovery in this case factually undermines the state's purported intent to regulate in state. In September 2019, an Ohio auctioneer who wanted to have an online auction sent an inquiry into the state, asking if he needed a license. (Hunter email, R. 104-5 at PageID # 4462-63.) State personnel internally related they believed the answer was "*you are required to be licensed* however there is

litigation pending."[15] (Id. at PageID # 4462 (emphasis added).) The state complains that the district court held it to an unfair standard (Appellant Br. at 23), but it cannot put forth so many varied (and inconsistent) standards and ask the courts to accept it.[16]

The Commission further earned the skepticism of the district court when it appeared think it had some authority to regulate online auctions even after the district court issued a preliminary injunction. On February 24, 2020, well after the district court had issued the injunction, the Commission was still claiming the authority to regulate online auctions when considering complaints. (Transcript, R. 104-3, PageID # 4450-51 (6:24-7:13) ("*That's a big deal* … if there is any extension of time, *then we do regulate those internet auctions*.") (emphasis added).)

The district court was rightly worried about how the state will act when "in the throes of enforcement zeal." (Mem. Op., R. 116, PageID #4687.) It hardly treated

[15] The email string referred to "one similar a while back," and "the on-line auction issue" (R. 104-5, PageID #: 4462), so this was apparently a recurring question with a correspondingly identical response.

[16] Nor has the state, unlike the Attorney General in *SPGG, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007), offered a formal stipulation that would be subject to factfinding, and its litigation positions have notably shifted throughout. The only sworn testimony about the state's enforcement history comes from the Commission's executive director who swore repeatedly that the state did not generally regulate online auctions prior to PC 471, despite Rule 18 having been on the books since 2001. (*See* Gumucio Decl., R. 20-2, PageID # 716, ¶ 10; Gumucio/30(b)(6) Dep., R. 94, PageID # 3173 39:15-20.)

the state unfairly when it refused to accept the shifting and unsworn assurances of the state "as genuine and persuasive" considering the record. (Appellant Br. at 23.)

4. Presumptions fail to save PC 471.

Under the extraterritoriality canon, courts presume that a legislature does not intend a statute to have extraterritorial reach. (*See* Mem. Op., R. 116, PageID # 4690 n.17.) The state faults the district court for relying on cases that addressed this canon in the international context, yet it cites no Tennessee cases that ruled differently under Tennessee law. (*See* Appellant's Br. at 15 (citing cases from California, Missouri, and Iowa).) On the contrary, Tennessee courts do not appear to have formally adopted a presumption against extraterritoriality. *See* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. Davis L. Rev. 1389, 1403, 1413, 1421 n.170 (2020) (writing that Tennessee is among 17 states that have "rejected a presumption against extraterritoriality").

Instead, Tennessee courts treat statutory silence on territorial reach with anything but a presumption towards an in-state limitation. In *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512 (Tenn. 2005), the Tennessee Supreme Court decided the question of whether a statute was confined in-state as part of its ordinary process of statutory interpretation. The court considered the need to effectuate the statute's purpose as well as the duty to avoid a constitutional conflict when a reasonable interpretation is available. *Id*. at 522. The court treated legislative silence

as an indication that the law was *not* intended to be limited in-state. Thus, the court ruled that the Tennessee's Trade Practices Act (TTPA) was *not* geographically confined in-state because, like PC 471, "[t]he act does not contain any language indicating that the legislature intended that the scope of the act be limited to intrastate commerce." *Id*. Providing further support, the court recognized that the purpose of the law was, similar to PC 471's, consumer protection, and thereby concluded that legislative silence about an in-state limitation suggested that it applied to interstate commerce in order to promote that purpose. *Id*. ("Had the legislature intended such a limitation, the legislature could have simply included the limitation in the act.").

Based on the Tennessee Supreme Court's pronouncement about how to interpret a consumer protection statute that lacks a geographic limit, the district court was right: "[t]here is no indication that Tennessee courts indulge a presumption against extraterritorial application of its laws when construing Tennessee statutes." (Mem. Op., R. 116, PageID # 4690 n.17.) The state quotes dicta from a footnote in *BMW Stores*. (*See* Appellant Br. at 14 (quoting *BMW Stores*, 860 F.2d at 215 n.1).) But that case concerned a question of *Kentucky* law and long predated the *Tennessee* Supreme Court's ruling in *Eastman Chemical*.[17] The absence of an expressed

[17] If anything, this case more closely resembles *Link-Belt Constr. Equip. Co., L.P. v. Rd. Mach. & Supplies Co*., which rejected the argument that "the Sixth Circuit has consistently held that, absent an indication that the state legislature intended otherwise, state regulatory statutes . . . will not be applied extraterritorially." No. 10-103-KSF, 2011 U.S. Dist. LEXIS 41404, at *23, *25 (E.D. Ky. Apr. 15, 2011)

limitation in PC 471, combined with the fact that an in-state limit would undermine the law's purposes, indicate that this Court should not presume anything in the state's favor.

Nor does the presumption of constitutionality save PC 471. (Appellant Br. at 19.) Tennessee law recognizes a duty to construe statutes to avoid unconstitutionality, but only so long as a reasonable construction is available. *See Davis-Kidd Booksellers*, 866 S.W.2d at 529. The district court was aware of this presumption. (Mem. Op., R. 116 at PageID # 4690.) The district court could not "sustain the statute by conjuring up non-existent statutory language and limitations." (Id.) The interpretations urged by the state cannot be accommodated under the guise of constitutional avoidance because they would not be "consistent with the legislature's intent and purpose." *Eastman Chemical*, 172 S.W.3d at 522.

C. Rule 18 and its origination standard also fail.

A similar problem plagues the state's final effort to devise an in-state limitation based on where the auction originates under Rule 18. Under the rule, "[a]ny electronic media or computer-generated auction originating from within Tennessee shall conform to the requirements of Tennessee Code Annotated, Title

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("Based on the language of the statute, it does not appear to make a difference whether the retailer being evaluated is located in Kentucky or in another state.").

62, Chapter 19 *et seq*. (Auctioneer Licensing Law) and the Rules of the Tennessee Auctioneer Commission." Tenn. Comp. R. & Regs. 0160-01-.18.

The district court correctly ruled that Rule 18 cannot provide an in-state standard under PC 471 without forcing a change in the statute's application. (Mem. Op., R. 116 at PageID # 4689 (citing *Eastman Chem. Co.*, 151 S.W.3d at 507).) As explained above, when Purple Wave advertises online, Tennesseans can read it, and PC 471 applies to anyone who represents or advertises to be an online auctioneer. PC 471 is not triggered by where a computer "originates" an auction, whatever that may mean in today's context. Rule 18 cannot be made to fit PC 471, hardly surprising since it was enacted in 2001, nearly two decades before PC 471.

Rule 18 just layers the additional complication of trying to identify where an online auction "originates." During the early years of the internet, when locations were much more ascertainable, courts recognized the problems with trying to confine an internet regulation based on origination. *See PSInet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (holding that if a regulation could be confined intrastate then it would "have no local benefit"); *Cyberspace Commc'ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 751 (E.D. Mich. 1999) ("Although the Act by its terms regulates speech that 'originates' or 'terminates' in Michigan, all Internet speech is, as stipulated by Defendants available everywhere including Michigan."); *Am. Booksellers Found. v. Dean*, 202 F. Supp. 2d 300, 304 (D. Vt. 2002) (striking down

restriction on "electronic communications . . . committed at either the place where the communication originated or the place where it was received").

Does an online auction "originate" where the client and auctioneer enter a business agreement? If the auction business contracts with a web company to set up a website and run the auction, does the auction originate where the auction business is located or the web company? Or where the auctioneer performing the auction is located? Is it where the property being auctioned is located? Or where the servers are, which might be in many places and change? Rule 18 does not say. The legislature would have said if it meant to localize PC 471 to an online auction's point of origination, and it then would have explained how, but it did not.

It is all too easy to imagine an online auction company looking to skirt an onerous licensing requirement by simply administering it in a different state.[18] It is all too impossible to imagine that this was what the General Assembly intended when it sought to license online auctions.

II. PC 471 also fails the *Pike* test.

Plaintiffs respectfully submit that PC 471 fails the *Pike* test under the undisputed record as an alternative basis for affirmance. *See Bennett v. Spear*, 520

[18]According to one study (License to Work), Tennessee has the most burdensome license for auctioneers in the nation, requiring 756 lost days to education and experience, when the national average is 94. <https://ij.org/report/license-work-2/ltw-occupation-profiles/ltw2-auctioneer/>.

U.S. 154, 166 (1997) ("A respondent is entitled …to defend the judgment on any ground supported by the record[.]").[19]

Under *Pike*:

> If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Snyder, 735 F.3d at 376 (citing *Pike*, 397 U.S. at 142). Impermissible burdens on interstate commerce are unconstitutional, even when they fall "alike to the people of all the states, including the people of the State enacting such statute." *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891).

As for benefits, the district court correctly found that the state's interest in consumer protection was meager because the Task Force found, based on an analysis of three years of complaints, that there really is no threat to consumers posed by online auctions. (Mem. Op., R. 29, PageID # 802 (concerns over threats to consumers "appear to be somewhat illusory").)

As summarized by the district court :

> The data collected by the Task Force revealed that in the past three years only *three* consumer complaints regarding extended time online auctions were made to the Committee. (R. No. 4-12 at 41). . . . Therefore, the evidence leads the Court to conclude the reason the number of complaints are slight is more likely because online

[19] The district court did not ultimately reach a final ruling under the *Pike* analysis, although it provided an alternate basis for its preliminary injunction. (Mem. Op., R. 29, PageID # 799.)

> auctions are not substantially harming Tennessee consumers. Further, the majority of the eleven complaints made regarding online auctions involved fixed-timed auctions, yet the legislature did not amend the statute to regulate this type of online auction. Additionally, at a house hearing on a bill to amend the auctioneer licensing regime, Representative Gravitt described the Committee's position as extended-time online auctions needed to be regulated "so everyone can compete on the same level playing field as someone that goes out here and participated in live auctions" rather than out of a concern for the protection of Tennessee consumers. (R. No. 4-6 at 3).

(Op., R. 29, PageID # 802-03.)

The district court's ruling was also before the state directed *all* auctions to proceed online for nearly a year during COVID, which then were entirely unregulated because of the injunction. The state reported no detriment. (Defs.' Resp. to Pls.' SUMF, R. 114, PageID # 4663, ¶¶ 263-266.) Online auctions continue to be unregulated under the injunction, with no ill effects readily discernible.

PC 471, with its onerous and unusual licensing requirement, and its bevy of head scratching exemptions, stands out among state-regulated auctions. As the district court observed, "twenty states do not regulate the auctioneering profession in the first place, giving rise to the suggestion that unregulated auctioneering does not pose an obvious and serious threat of harm to consumers." (Op., R. 29, PageID # 807 (citing License to Work).)

The exemptions in PC 471 "belie[]" the state's interest in consumer protection. (Op., R. 29, PageID # 803.) Extended-time auctions, the sort regulated by the state, generated *fewer* consumer complaints than the kind the state exempts.

The president of the TAA acknowledged that consumers face no different harms based on how an online auction closes. (Allen Dep., R. 95, PageID # 3397 (42:10-18).) Requiring a license for online auctions when the state does not have a similar requirement for all online auctions or, for that matter, all forms of e-commerce, undermines what little benefit the state could hope to claim. There is no reason why the state should exempt auctions based on ending format when this feature has nothing to do with consumer harms, and everyone acknowledged it to be a fig leaf distinction.

The exemption reveals what has been obvious all along. PC 471 is not about protecting *consumers* but licensed *auctioneers*. As the district court concluded, the contention that this PC 471 is about protecting licensed auctioneers, not consumers, has "considerable support." (Mem. Op., R. 29, PageID # 804.) Protectionism is not a benefit to the public whatsoever. *See Craigmiles v. Giles*, 312 F.3d 220, 228-29 (6th Cir. 2002) (Protectionism is an illegitimate governmental interest.").

The state's reliance on Rule 18 spells ultimate doom for PC 471 under *Pike*. *See PSInet*, 362 F.3d at 240 (holding that if internet regulation "can be construed in a manner that does not directly violate the Commerce Clause, the statute still fails under the Dormant Commerce Clause analysis of [*Pike*]."). That is, if the state only regulates online auctions originating in-state, then PC 471 would deliver no benefit to consumers. Shady operators would have an easy way to evade regulation by

setting up computers in another state. It is not difficult to arrange for a computer service to administer an online auction in a different state. As recognized in *Backpage.com*, 939 F. Supp. 2d at 844, Tennessee is highly sensitive to burdens on commerce given that it "is one of only two states in the nation that border eight other states." Pushing the unscrupulous to run for the borders does not protect Tennesseans.

The district court ruled that PC 471 "likely seriously burden[s] interstate commerce." (Mem. Op., R. 29, PageID # 805.) Tennessee's license is the most burdensome in the country. *Supra* at 42 n. 18. The court analyzed the statutory requirements; the state presented no facts to alter this finding at the summary judgment stage. PC 471 regulates all forms of advertisement that commonly appear on webpages. (R. 4-2, PageID # 63 (PC 471 § 5(a)(1)).) It squarely prohibits Purple Wave from publicly posting that it is a "true auction company" on its website if even a single computer in Tennessee can access it. (Mem. Op., R. 116 at PageID # 4689.) That makes Purple Wave liable unless each employee who "conduct[s]" auctions, (R. 4-2, PageID # 64 (PC 471 § 5(b)))—meaning setting up images and software online—becomes licensed in Tennessee because Purple Wave "cannot simply turn off its website at the Tennessee border." (Op., R. 29, PageID # 798.)

Many obvious ways exist to protect consumers that would advance the state's purported interests "in a non-extraterritorial fashion" other than requiring a license

for only some types of online auctions. *See Snyder*, 735 F.3d at 376. Fraud is already a crime. *See* Tenn. Code Ann. § 39-14-101. Local District Attorneys are uniquely incentivized to pursue fraudsters because the District Attorneys are allowed to keep the funds they collect and spend them on such things as salary increases and office equipment. *See* Tenn. Code Ann. § 40-3-202(5), (6). Fraud involving an online auction also would be a federal crime. *See* 18 U.S.C. §1343 (wire fraud). Civil enforcement is also available; the Tennessee Attorney General's Office enforces "the Tennessee Consumer Protection Act and other consumer laws in order to protect[] consumers and businesses from those who engage in unfair or deceptive business practices."[20] The FTC, with clear jurisdiction over interstate commerce, makes fraud easy to report.[21]

No evidence suggests that these existing mechanisms are not effective. If they weren't, consumers sure weren't complaining even though auctioneers surely were. If that changes, the state can bolster those enforcement efforts or devote more resources to them. *See Snyder*, 735 F.3d at 375 (noting Plaintiff's suggestion that state could employ "vigorous enforcement" of its fraud statute as an alternative for achieving its goal). The state can achieve its legitimate goal without requiring a

[20] <https://www.tn.gov/attorneygeneral/working-for-tennessee/protecting-consumers.html>.

[21] <https://www.ftc.gov/faq/consumer-protection/submit-consumer-complaint-ftc>.

license for only *some* types of online auctions. A license is the classic "meat cleaver [when] a scalpel will do." (Mem. Op., R. 29, PageID # 804 (quoting *Churchill Downs Inc. v. Trout*, 979 F. Supp. 2d, 746, 755 (W.D. Tex. 2013).)

CONCLUSION

The ruling of the district court should be affirmed. If not, then the matter should be remanded to the district court to consider all remaining unresolved claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains not more than 13,000 words, excluding the parts of the 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 spaced typed font.

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CERTIFICATE OF SERVICE

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

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On this the 22nd day of September, 2022.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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

Record Entry & PageID Range	Description of Entry
R. 4, PageID ##12-60	Complaint
R. 4-1, PageID ##62-69	Complaint Ex. 1 - PC 471
R. 4-5, PageID ##105-154	Complaint Ex. 4 – Transcript of December 15, 2016
R. 4-5, Page ID ## 155-168	Complaint Ex. 5 – Transcript of March 28, 2017
R. 4-10, PageID ## 219-334	Complaint Ex. 9 – Transcript of August 27, 2018
R. 4-11, PageID ## 335-102	Complaint Ex. 10 – Transcript of November 5, 2018
R. 4-12, PageID ## 437-546	Complaint Ex. 11 – Transcript of November 26, 2018
R. 4-14, PageID # 553-560	Complaint Ex. 13 – March 12, 2019 Senate Transcript
R. 14, PageID ## 634-640	Temporary Restraining Order
R. 20, PageID ## 689-711	Defendants' Prehearing Brief
R. 20-2, PageID ## 715-717	Declaration of Roxana Gumucio
R. 29, PageID ## 781-809	Memorandum Opinion on Preliminary Injunction
R. 32, PageID ## 814-858	Memorandum of Law in Support of Motion to Dismiss
R. 50, PageID ## 1025-1070	Amended Complaint
R. 53, PageID # 1074-1098	Memorandum of Law in Support of Motion to Dismiss
R. 83, PageID ## 1382-1425	Memorandum Opinion on Motion to Dismiss

R. 88-1, PageID ## 1466-1487	Memorandum of Law in Support of Defendants' Motion to Dismiss
R. 88-5, PageID ## 2165-2193	IAA Deposition Transcript
R. 88-7, PageID ## 2199-2216	IAA Discovery Responses
R. 88-15, PageID ## 2698-2773	Purple Wave Deposition Exhibits
R. 88-16, PageID ## 2774-2803	McKee & Purple Wave Discovery Responses
R. 94, PageID ## 3135-3307	TAC 30(b)(6) Deposition Transcript
R. 94-1, PageID ## 3308-26	TAC 30(b)(6) Deposition, Ex. 5 - Jaspar
R. 94-2, PageID ## 3327-34	TAC 30(b)(6) Deposition, Ex. 6 - PCI
R. 94-3, PageID ## 3335-50	TAC 30(b)(6) Deposition, Ex. 7 - EBTH
R. 94-4, PageID ## 3351-53	TAC 30(b)(6) Deposition, Ex. 10 - Letter to Licensees re: PC 471
R. 94-5, PageID ## 3354-55	TAC 30(b)(6) Deposition, Ex. 11 - Letter to Licensees re: COVID-19
R. 95, PageID ## 3356-3527	David Allen Deposition Transcript
R. 95-1, PageID ## 3528-42	Allen Deposition, Ex. 1 - Rule 28
R. 95-2, PageID ## 3543-92	Allen Deposition, Ex. 2 - December 15, 2016, Gov Operations Hearing Transcript
R. 95-3, PageID ## 3593-3605	Allen Deposition, Ex. 5 - June 19, 2017, Task Force Meeting Transcript
R. 95-4, PageID ## 3606-71	Allen Deposition, Ex. 6 - June 19, 2018, Task Force Meeting Transcript
R. 95-5, PageID ## 3672-3787	Allen Deposition, Ex. 7 - August 27, 2018, Task Force Meeting Transcript
R. 96-2, PageID ## 3917-4026	Purple Wave Deposition Transcript
R. 97-2, PageID ## 4196-4204	McLemore & McLemore Auction Discovery Responses
R. 106, PageID ## 4491-99	Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts

R. 114, PageID ## 4649-4667	Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts
R. 116, PageID ## 4670-4694	Memorandum Opinion on Motion for Summary Judgment
R. 122, PageID ## 4720-21	Order & Permanent Injunction
R. 123, PageID # 4722	Entry of Judgment