Case No. 24-5794

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILL McLEMORE, et al.,

Appellants,

vs.

ROXANA GUMUCIO, et al.

Appellees

Appeal from the United States District Court for the
Middle District of Tennessee
No. 3:23-cv-01014

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
Timothy Sandefur
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Counsel for Amicus Curiae
Goldwater Institute

October 15, 2024

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Goldwater Institute, a nonprofit corporation organized under the laws of Arizona, states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Rule 29(a) Statement

Counsel for all parties received timely notice of the intent to file the brief and consented in writing to its filing. Therefore, under Federal Rule of Appellate Procedure 29(a)(2), a motion for leave to file is not necessary.

The Goldwater Institute's counsel authored this brief in its entirety. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no other person—other than the amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

The Goldwater Institute ("GI") is a nonpartisan public policy and research foundation dedicated to the principles of limited government, economic freedom, and individual responsibility. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs to advance, *inter alia*, economic liberty as an essential constitutional right. In that capacity, GI has represented parties and appeared as amicus in cases challenging occupational licensing requirements and other monopolistic practices under state and federal constitutions, *see, e.g., Hedrick v. City of Holiday Island,* Case No. 08WCV-23-85 (Carroll Cnty. Cir. Ct.), *appeal pending*; *Singleton v. N.C. Dep't. of Health & Hum. Servs*., No. 260PA22 (N.C. Sup. Ct., pending); *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954 (9th Cir. 2021); *Niang v. Carroll*, 879 F.3d 870 (8th Cir. 2018). GI scholars have also published extensively on the legal issues raised by occupational licensing, *see, e.g.,* Flatten, *Protection Racket: Occupational Licensing Laws and The Right to Earn a Living* (Goldwater Institute, 2016)[1]; Slivinski, *Bootstraps Tangled in Red Tape* (Goldwater Institute Policy Report No. 272, Feb. 23, 2015)[2]; Sandefur, *The Right to Earn a Living* (2010), and federal and state courts have

[1] https://www.goldwaterinstitute.org/protection-racket-occupational-licensing-laws-and/.
[2] https://www.goldwaterinstitute.org/wp-content/uploads/cms_page_media/2015/4/15/OccLicensingKauffman.pdf .

cited this scholarship in their opinions. *See, e.g., Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 982–83 (5th Cir. 2022) (Ho, J., concurring); *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 96 n.24 (Tex. 2015) (Willett, J., concurring). GI believes its legal experience and policy expertise will aid this Court in considering this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Professional communicators—whether they be radio talk show hosts,[3] newspaper columnists,[4] tour guides,[5] bakery owners,[6] or website designers[7]—are protected by the First Amendment. The District Court acknowledged that auctioneers are "professional communicator[s]." Slip Op. at 13. Yet it held that auctioneers *do not* enjoy First Amendment protection because their speech is just conduct, not speech.

2. The speech of cashiers[8] and pharmaceutical wholesalers[9] is protected by the First Amendment. The District Court likened the speech of an auctioneer to the speech of "a cashier[] or a pharmaceutical wholesaler[]." Slip Op. at 14. Yet it

[3] *Gardner v. Martino*, 563 F.3d 981 (9th Cir. 2009).
[4] *Rosemond v. Markham*, 135 F. Supp.3d 574 (E.D. Ky. 2015).
[5] *Edwards v. D.C.*, 755 F.3d 996 (D.C. Cir. 2014).
[6] *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm'n*, 584 U.S. 617 (2018).
[7] *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).
[8] *Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017).
[9] *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012).

concluded that this case raises no "First Amendment issue," because the licensing requirement here is merely a "commercial regulation." *Id.* at 13.

3. Under the "commercial speech" doctrine, the First Amendment provides "significant" protection to speech that "propose[s] a commercial transaction." *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 925 (6th Cir. 2003). The District Court acknowledged that "[a]n auction consists of parties proposing a series of alternative transactions to each other before settling on one that actually goes into effect; it is little more than a competition between commercial utterances." Slip Op. at 16. Yet it concluded that the commercial speech doctrine does *not* apply, because this case only involves "transactional activity." *Id*. at 13.

4. Performances are quintessential First Amendment speech. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975). This is true even if they're done in a commercial context. *Felix v. Young*, 536 F.2d 1126, 1134 n.16 (6th Cir. 1976). The District Court admitted that auctioneering is a "dramatic form[] of communication," Slip Op. at 13, and that's true: auctioneering is far more than the impassive exchange of data. For centuries, it has been recognized as a distinctive kind of performance, one that combines information with cheerleading, persuasion, eloquence, comedy, or sophistication. It is not just pure speech for hire; it is an artistic style. Yet the District Court held that this art form is only "'commerce or con-

duct,'" with a merely "'incidental'" relationship to speech, and therefore not protected by the First Amendment. *Id.* at 11 (quoting *Sorrell v. IMS Health Inc*., 564 U.S. 552, 567 (2011)).

All of this was legal error requiring reversal.

ARGUMENT

I. Auctioneers are engaged in constitutionally protected speech because they are professional communicators.

A. Even if auctioneers combine speech and conduct, such combinations get First Amendment scrutiny—which the District Court failed to apply.

The District Court premised its dismissal on the belief that Tennessee's auctioneer licensing requirement "regulate[s] transactions, not speech." Slip Op. at 13. But that's not true. Auctioneering is inherently speech, because it is synonymous with communicative acts. Indeed, it is essentially a *hired performance* designed to attract commercial attention as well as to communicate and settle the terms of a bargain. It is therefore, *at a minimum*, commercial speech.

Commercial speech is defined as communication "that does *no more* than propose a commercial transaction." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (citation omitted; emphasis added). Auctioneers do *much* more than propose commercial transactions, as explained in Section I.C below, so the full protections accorded to "pure speech" should apply. But even if an auctioneer

only engages in "commercial speech," that is still protected by the First Amendment.

Auctioneers engage in what the statute calls "a series of invitations … for offers to members of the audience to purchase." Tenn. Stat. § 62-19-101(2). Of course, "invitation to purchase" is a synonym for "advertisement," and advertisements *just are* commercial speech. *44 Liquormart,* 517 U.S. at 489. That means an auctioneer's practice is subject, at *least*, to the "significant" protections accorded commercial speech. *ETW Corp.*, 332 F.3d at 925. Yet the District Court refused to apply commercial speech doctrine, and insisted on treating this as nothing but a conduct case. Slip Op. at 14. That was legal error.

It's true that an auctioneer could be said to engage in a blend of speech and conduct—i.e., of advertisement plus brokerage, where brokerage means temporarily holding goods for sale or transferring the proceeds of a sale. But even something that's mere conduct is protected by the heightened scrutiny applicable to communicative rights, if the regulation of that conduct has consequences for speech. For example, bookselling is a mere "transaction"—but regulations of booksellers are subject to speech scrutiny. *Smith v. California*, 361 U.S. 147, 149–50 (1959); *Wexler v. City of New Orleans*, 267 F. Supp.2d 559, 564–68 (E.D. La. 2003). Or, to use an example the District Court used: pharmaceutical wholesalers might be thought to be engaged solely in "transactions"—but, in fact, they enjoy

First Amendment protections when promoting pharmaceuticals. *See Caronia*, 703 F.3d at 162–69; *Amarin Pharma, Inc. v. U.S. FDA*, 119 F. Supp.3d 196, 222–36 (S.D.N.Y. 2015). Tour guides could be said to be engaged in conduct—guiding, directing, and escorting—but tour guides are obviously engaged in speech, so regulation of their business is subject to First Amendment scrutiny. *See Edwards*, 755 F.3d at 1000–05.[10]

The case that most directly addresses the conduct/speech distinction is *Thomas v. Collins*, 323 U.S. 516 (1945), which involved a Texas statute that required a license to engage the business of a paid "labor organizer." The statute defined that term as "any person who for a pecuniary or financial consideration solicits memberships in a labor union or members for a labor union." *Ex parte Thomas*, 174 S.W.2d 958, 959 (Tex. 1943). The state argued that the law was not a speech

[10] *Edwards* found a licensing requirement for tour guides in Washington, D.C., unconstitutional because the government failed to meet its burden of "establish[ing] the challenged [rule's] efficacy," 755 F.3d at 1003, and because the licensing requirement was broader than necessary: "nowhere in the record is there any evidence unscrupulous businesses, which engage in unfair or unsafe practices, could not be *more* effectively controlled by regulations that punish fraud or restrict the manner in which tour guides may solicit business." *Id.* at 1009. In *Kagan v. City of New Orleans,* 753 F.3d 560 (5th Cir. 2014), the Fifth Circuit upheld a similar licensing requirement, although it, too, applied First Amendment scrutiny. *Edwards* rightly observed that *Kagan* "either did not discuss, or gave cursory treatment to, significant legal issues. 755 F.3d at 1009 n.15. Here, however, the District Court did worse: it didn't apply First Amendment scrutiny at all.

restriction, but a restriction on conduct,[11] and the Texas Supreme Court agreed: "[i]t applies only to those organizers who for a pecuniary or financial consideration solicit [union] membership," said that court; "[i]t affects only the right of one to engage in the business as a paid organizer." *Id*. at 961. The state court also found—as the District Court did here—that the law imposed a minimal burden, and protected the public against fraud. *Id*. And, again like the District Court here, the Texas Supreme Court conceded that the licensing requirement affected speech, but only "indirectly and to [the] limited extent" necessary to protect the public from fraud. *Id.* at 962.

The U.S. Supreme Court reversed, however, finding that the licensing requirement violated the First Amendment. The statute prohibited an unlicensed person from "invit[ing]" people to join a union, and "there [could] be no doubt" that this was a "restriction upon [the] right to speak." 323 U.S. at 534. That the statute only applied when a person did this speech for money made no difference.

In a concurring opinion, Justice Jackson explored the conduct/speech distinction in greater detail. Warning against the risk of "associating … speaking with some other factor which the state may regulate so as to bring the whole within official control," he observed that when speech and conduct combine, and the state

[11] Indeed, the state likened it to a law regulating "business practices, like selling insurance, dealing in securities, acting as commission merchant, pawnbroking, etc." 323 U.S. at 526.

seeks to regulate the conduct, "the constitutional remedy would be to stop the evil [conduct], but permit the speech." *Id*. at 547. In other words, when speech and conduct are blended, courts should err on the side of protecting speech by *increasing* their scrutiny of the regulations, instead of blinding themselves to a speech restriction by waving the whole thing off as conduct. *See id.* at 548 ("the remedy is not to allow Texas improperly to deny the right of free speech but to apply the same rule and spirit to free speech cases whoever the speaker."). If courts were to do the latter, legal protections for speech would quickly become "hollow," because it would be simple for legislatures to simply categorize speech as conduct and regulate it that way. *Id.* at 547.

Here, however, the District Cout took that latter path. It concluded that because the statute defines auctioneering as conduct, the state can treat it as mere "transactional activity." Slip Op. at 13. It found that because the law only applies to people who communicate invitations to buy (just as the statute in *Collins* applied only to people who communicated invitations to join), it is *not* a speech restriction. *Id.* In other words, instead of applying greater scrutiny to what it viewed as a combination of speech and non-speech elements, it committed the same error the Texas Supreme Court committed in *Collins:* applying lesser scrutiny because the state called speech "conduct."

Federal courts usually strive not to take such a formalistic approach to the speech/conduct distinction. That's because the line between the two isn't always clear. Speech is a kind of conduct—and something that's typically conduct can be done expressively (burning a draft card, for example, *United States v. O'Brien,* 391 U.S. 367 (1968)). Since the First Amendment protects the right to exchange truthful information about goods and services for sale, *see, e.g., 44 Liquormart, supra; Linmark Associates, Inc., v. Willingboro Twp.*, 431 U.S. 85 (1977), even restrictions on non-communicative conduct can and must trigger Free Speech scrutiny if those restrictions touch on speech in a significant way.

Some commercial transactions are so closely connected to speech that they become a form of expression in and of themselves. The obvious case is the sale of books or newspapers. In *Wexler*, the city of New Orleans required a permit for people to sell books from a table on the sidewalk. 267 F. Supp.2d at 564. The city argued this was merely a regulation of activity, of no greater First Amendment significance than regulating the sale of widgets. But the court recognized this as a shortsighted perspective, because "book selling plays a significant role in the distribution of books and that its commercial nature does not diminish its protection." *Id*. at 565. Since the sidewalk on which the plaintiffs were selling was a public forum, *id.*, the court found that the restriction on their sales was subject to First Amendment scrutiny. *Id.* at 566. Many other cases, too, have vindicated free

speech by protecting the right to buy and sell books or advertisements, even though the latter might be called qualitatively commercial. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd*., 502 U.S. 105 (1991); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).[12] As this Court said in *ETW Corp*., 332 F.3d at 925, "disseminating the work of others who create expressive materials also come[s] wholly within the protective shield of the First Amendment.").

One distinction is that auctioneers speak in order to sell, whereas booksellers sell "the work of others." *Id.* But that makes little difference, because those who sell their own speech—what the District Court called "professional communicator[s]," Slip Op. at 13—are *more* entitled to First Amendment protection than those who disseminate others' speech.

In any event, courts have recognized that communication that proposes a commercial transaction is protected by the First Amendment. That simply *is* commercial speech.[13] *44 Liquormart,* 517 U.S. at 504. And the Constitution protects the right to convey truthful information about commercial goods and services just

[12] This is merely a manifestation of the fact that, as the Court put it in *Lynch v. Household Finance Corp*., 405 U.S. 538, 552 (1972), "the dichotomy between personal liberties and property rights is a false one."

[13] The District Court acknowledged that "an auction is as clear an example of commercial speech as one is likely to find," Slip Op. at 16, but then backed away from that conclusion, and *declined* to apply the appropriate scrutiny because it thought that *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014), rendered that unnecessary.

as it does the right to convey political arguments. *Linmark Assocs.,* 431 U.S. at 95–97. That alone warrants reversal here. But the District Court committed other errors, too.

B. The District Court's examples—pharmaceutical wholesalers and cashiers—show why Plaintiffs are right: their speech *is* constitutionally protected.

The most striking evidence of the District Court's confusion regarding the First Amendment's protections for the communicative rights of auctioneers are the two examples that it invoked, while overlooking their real significance. The court said "[a]n auctioneer's speech is no less transactional, and no more protected, than … a pharmaceutical wholesaler's." Slip Op. at 14. But the First Amendment *does* protect the speech of pharmaceutical wholesalers and cashiers—and the reasons why are instructive.

1. Pharmaceutical wholesalers

In *Caronia* and *Amarin Pharma,* courts addressed the First Amendment rights of pharmaceutical wholesalers who ran afoul of an FDA rule barring them from telling physicians about so-called "off-label" uses of medicines,[14] even though both the medicines and the off-label uses are legal. The FDA said that

[14] "Off-label" uses are uses of legal medicines for purposes that were not contemplated by the FDA when it approved the sale of the medicine. Off-label uses are legal; Medicare even pays for them. Beck, *Off-Label Use in the Twenty-First Century: Most Myths and Misconceptions Mitigated*, 54 UIC J. Marshall L. Rev. 1, 32–34 (2021).

communicating about those off-label uses wasn't speech, but only conduct. *See Caronia*, 703 F.3d at 158; *Amarin Pharma,* 119 F. Supp. 3d at 208. The Second Circuit, however, rejected that: "'Speech in aid of pharmaceutical marketing ... is a form of expression,'" it said. "Here, the proscribed conduct for which Caronia was prosecuted was precisely his speech in aid of pharmaceutical marketing." *Caronia,* 703 F.3d at 162 (quoting *Sorrell*, 564 U.S. at 557).

Likewise, in *Amarin Pharma*, the FDA prosecuted the pharmaceutical wholesaler for telling doctors about off-label uses for certain medicines, and claimed this wasn't speech—just conduct. 119 F. Supp.3d at 223. But the court said that "the only conduct on which that action would be based are truthful and non-misleading statements," and that meant the test for commercial speech had to apply. *Id.* at 223, 227–29. It, too, concluded that the prosecution was unconstitutional.

It's possible that the District Court had in mind *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), a case this Court cited in *Liberty Coins*, but in *Thompson*, too, the Court found that the restriction *violated the First Amendment*. That case involved a regulation that gave a limited exemption from the FDA's drug approval requirements, so there was no dispute that (to paraphrase the District Court here) it was aimed at transactions rather than at speech. Nevertheless, it was subject to First Amendment scrutiny, because obtaining that exemption

required a pharmacy to refrain from promoting and advertising its products. *See id.* at 363. Since advertising and promoting are speech—specifically, commercial speech—the Court found that First Amendment scrutiny mut apply. *Id.* at 366. The Court rejected the government's argument that advertising was a "proxy" for manufacturing; the restriction was a limitation on speech, pure and simple. *Id.* at 370–71. And the restriction failed even the relatively lenient commercial speech standards, because the government could achieve its legitimate purposes in ways less restrictive of speech: for example, it could more directly regulate the actual compounding of drugs, rather than simply banning speech by those whom the FDA did allow to compound drugs. *See id.* at 372.

The logic of *Thompson* militates in favor of Plaintiffs here. First, an auctioneer is not like a pharmacy, which manufactures and then advertises: an auctioneer simply communicates for money. Thus the licensing law is more clearly a speech restriction than was the regulation at issue in *Thompson*. Second, Tennessee could achieve its legitimate interest in preventing fraud and fake bids through means less restrictive of speech: in fact, it already does, because fraud is already illegal, under laws that don't target speech or use speech as a but-for factor. For example, Tenn. Stat. § 62-19-112(b)(11) forbids "[k]nowingly using false bidders, cappers or pullers," and Section 62-19-112(b)(12) prohibits "conduct … that demonstrates improper, fraudulent, incompetent or dishonest dealings." These

statutes show that the state can already forbid wrongful conduct, without imposing a licensing requirement on a category defined by speech. *Thompson* noted that the FDA could achieve its legitimate goals of protecting patients and the public by "rely[ing] solely on the non-speech-related provisions of the [statute], such as the requirement that compounding only be conducted in response to a prescription or a history of receiving a prescription," 535 U.S. at 372, and the same is true here.

It's worth emphasizing that even if an auctioneer's business might combine speech and non-speech elements, the statute here does *not* target the non-speech elements. It does not aim at warehousing or showcasing items or holding cash receipts in escrow. It simply requires a license for a person to engage in a particular kind of speech. It defines "[p]rincipal auctioneer," for example, as a person who takes money to "offer[] and execute[] a listing contract, sale, purchase, or exchange of goods," Tenn. Stat. § 62-19-101(9), where that "sale" is done by means of an "oral, written, or electronic … series of invitations … to purchase." *Id*. § 62-19-101(2). Thus the *only* transactions that fall within the statutory definition are those whereby a person is hired to engage in communicative actions—the commercial speech in which an auctioneer engages. This is a licensing law for *performers of a certain type*—not a law that regulates a business, and then happens to have secondary consequences for speech.

On this point, the District Court's statement that the statute "is drafted with the recognition that its purpose is to regulate transactions, not speech," because "[a] license is not required to work as a copywriter or a graphic designer for an auction company … [or] to run advertisements for some[one] else's auctions in one's publication" is bewildering. Slip Op. at 13. The fact that the speech restriction here only targets one particular kind of speech instead of another doesn't make it less constitutionally offensive. If Tennessee were to require a government permit to publish a book, but not to publish pamphlets or newspaper articles, that wouldn't be any less a violation of the rule against prior restraints. In *Linmark Associates*, for example, the ban on "for sale" signs in front yards still left people free to advertise their homes for sale in a newspaper or on the radio, 431 U.S. at 93—yet the Court still found that it violated the First Amendment.

The District Court here saw the copywriter/graphic designer example as proving that the license only applies to conduct, not speech—because "an auction, under the express definition of Tennessee's statutes, is a type of 'sales transaction.'" Slip Op. at 13–14 (quoting the statute). But the state cannot define speech as conduct and then use that *ipse dixit* statutory definition to bootstrap itself into the power of regulating speech.

2. Cashiers

The District Court also said that because "nearly every transaction that occurs in the American economy" is done through "'oral, written, or electronic exchange,'" the fact that auctioneers engage in communication is simply irrelevant, and the licensing requirement just targets speech. *Id.* at 14 (quoting the statute). "An auctioneer's speech," it said, "is no less transactional, and no more protected, than a cashier's." *Id*. But that's entirely backwards.

First, as noted above, when speech and non-speech elements combine, courts take *more* care*,* not less, to protect the speech elements within that combination. *See Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 538 n.10 (6th Cir. 2012) (reversing because "[o]nce [the District Court] determined that sampling and continuity programs were a regulation of conduct, it was required to analyze those provisions of the Act under [the speech scrutiny of] *United States v. O'Brien*, which it did not do."). Here, however, the District Court took *less* care to protect the speech, out of a concern to preserve the regulation of conduct.

Yet by the District Court's logic, practically *all* speech could be regulated by the state (including, certainly, the speech at issue in *Collins, supra*). If "nearly every transaction" is done through speech, and if that means judicial solicitude for free speech rights must yield, then an extremely broad range of communication could be classified as conduct that's merely incidental to some transaction. That's

anathema to free speech law, and certainly to the commercial speech doctrine. The Constitution says that when transactions are facilitated through communication, the transaction can be regulated by the government, but any regulation of the communication must satisfy heightened scrutiny.

Second, that's exactly what *Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017), said—and it's extraordinary that the District Court cited that case to support its conclusion, given that *Schneiderman* actually found the restriction there to be unconstitutional—and that it concerned the free speech rights of cashiers!

That case involved a law forbidding merchants from posting signs saying they would provide a discount for buyers paying with cash, instead of credit cards. The state argued that this was simply the regulation of a transaction, but the Court found otherwise, precisely because it regulated the *speech* element of the combination: "[i]n regulating the communication of prices rather than prices themselves," the Court said, the law "regulates speech." *Id*. at 48. In other words, although the District Court expressed incredulity at the idea that "a cashier's" speech might be protected by the First Amendment, Slip Op. at 14, that's exactly what *Schneiderman* held.

Of course, like the cashiers and merchants in *Schneiderman*, auctioneers communicate prices. And instead of regulating the prices (or other aspects of the

transactions) themselves, the statute here requires people to get a license to engage in the communication. It therefore fails under the analysis of *Schneiderman*.[15]

C. Auctioneers are performers.[16]

Finally, the speech of auctioneers does not merely facilitate a transaction the way a cashier's does. A cashier simply reports a fact. But an auctioneer is also engaged in a performance—one that goes far beyond merely transferring information from its source to a recipient. Auctioneers engage in expressive performances, narration, or persuasion, which are constitutionally protected forms of expression.[17]

---

[15] The District Court quoted a line from *Schneiderman* to the effect that "[i]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." 581 U.S. at 47. But *Schneiderman* said this in order to distinguish a law that regulates prices, and therefore falls on the "conduct" side of the divide, from laws that "tell[] merchants nothing about the amount they are allowed to collect," but restrict what they can *say* about the price. *Id.* The latter kind of law, said the Court, is a speech restriction.

[16] While the Plaintiffs engage in online auctions, rather than the in-person performances described in this section, they are nonetheless engaged in protected expression because they compose narratives, videos, and persuasive descriptions of the items for sale. *See* Appellants' Opening Brief at 4–5. In any event, this case presents a facial challenge to the statute, *see id.* at 17, and Plaintiffs have standing to assert an overbreadth challenge. *Kiser v. Reitz*, 765 F.3d 601, 607–08 (6th Cir. 2014). Because the statute "proscrib[es] a 'substantial' amount of constitutionally protected speech judged in relation to [its] plainly legitimate sweep," it violates the First Amendment. *Parents Defending Educ. v. Olentangy Local Sch. Dist. Bd. of Educ.*, 109 F.4th 453, 470 (6th Cir. 2024) (citation omitted).

[17] Auctioneers do not, however, *set the price* of items for sale; that's done by bidders. In this sense, the auctioneer does report a fact—namely, the current bid. But that means that they are even more entitled to First Amendment protection than the cashiers and merchants involved in *Schneiderman*, who presumably dictated the

The Supreme Court has refused to accept "[the] suggestion that the constitutional protection for a free press applies only to the exposition of ideas," because "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right." *Winters v. New York*, 333 U.S. 507, 510 (1948). And auctioneering is a combination of information, persuasion, and entertainment entitled to First Amendment protection.

Courts have also been laudably reluctant to narrow the circle of activities entitled to First Amendment protection, acknowledging that even the "painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll" are protected, despite lacking any "'particularized message.'" *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (citation omitted). Auctioneers, of course, engage in particularized and stylized messaging.

An auctioneer's job, after all, isn't just to write down numbers, but to "establish[] a general ambience conducive to participation," which "often requires a virtuoso performance [by the] auctioneer." Smith, *Auctions: The Social Construction of Value* 121 (1989). Much scholarship has been devoted to "the performance of auctioneers and the *theatre* of the event," Heath, *The Dynamics of Auction: Social*

---

prices of their goods. In any event, this distinction points up the significance of *Schneiderman*'s holding that while the state can regulate prices, it can't regulate statements *about* prices without satisfying First Amendment scrutiny. The Tennessee statute doesn't even purport to regulate prices—just speech.

Interaction and the Sale of Fine Art 74 (2013) (emphasis added), and this scholarship recognizes that "the ways in which particular auctioneers perform their part can make an important contribution to the excitement of the event and the willingness of buyers to participate." *Id.*

For centuries, auctioneers have engaged in spectacle, showmanship, and expressive innovation that have made some of them celebrities and figures of folklore. The eighteenth-century auctioneer James Christie, after whom Christie's auction house is named, remains legendary today for his eloquence and enthusiasm. "Known for his persuasive manner and verbal flourishes, [he] brought an element of showmanship to proceedings. In one satirical cartoon he was dubbed 'Eloquence, or The King of Epithets'; in another—'The Specious Orator'—he is shown in characteristic pose, leaning forward from his rostrum, gavel in hand, cajoling a bidder to part with '£50,000—a mere trifle.'" Oldham, *James Christie: The Eloquent Auctioneer,* Royal Academy (Sept. 8, 2016).[18]

A century ago, jewelry auctioneer Herman G. Briggs was celebrated as a "profound judge of human nature, ready on a second's notice to adapt his arguments to all kinds of people," and "ready to detect the half formed wish of a possible purchaser and [wield] the nimble tongue that makes the wish blossom into a bid." Briggs, *Notable Achievements in Jewelry Auctioneering,* The Keystone

[18] https://www.royalacademy.org.uk/article/james-christie-eloquent-auctioneer.

Weekly (Jan. 16, 1917) at 73. In the early twentieth century, tobacco auctioneers transformed the art; auctioneer "Speed" Riggs became a celebrity in the 1930s for his mesmerizing chanting style which clocked in at more than 460 words per minute. Mansfield, *The Development of the Bright-Leaf Tobacco Auctioneer's Chant, in Arts in Earnest: North Carolina Folklife* 105 (Patterson & Zug, eds. 1995). His success brought him nationwide fame on the radio, and he became "The Voice of Lucky Strike [cigarettes]." Yeargin, *North Carolina Tobacco* 52–57 (2008). His distinctive style—imitated by many who came afterwards—had commercial value: it "cause[d] the sales to build up an excitement or momentum that encourage[d] competition and result[ed] in higher selling price, and [held] the attention of the buyers." Mansfield, *supra* at 106.

Not all auctioneers are as spectacular and outlandish as that, however.[19] Different styles of performance are considered appropriate in different contexts. The fine-art auctioneers Tobias Meyer of Sotheby's and Jussi Pylkkänen of Christie's, both now retired, cultivated a smooth, sophisticated tone that gained them great admiration. Meyer was deemed "the James Bond of the art market" because of his

[19] In *Smooth Talkers: The Linguistic Performance of Auctioneers and Sportscasters* (1996), Koenraad Kuiper examines many different auctioneering traditions, which range from the sophisticated art auction in which the auctioneer "does not cajole the buyers," *id.* at 42, to the boisterous, shouting style of the southern tobacco auction, *id.* at 49–50, to the New Zealand wool auction style in which auctioneers remain relatively silent and bidders do the speaking. *Id.* at 52–53.

"grace at the rostrum … cocktail-party diplomacy," and "great sense of humor." Mason, *That Cool, That Suit: Sotheby's 007,* N.Y. Times (May 20, 2001).[20] Pylkkänen also became a celebrity through his poise and "glossy self-confidence." Reyburn, *He Sold the World's Most Expensive Artwork. Now He's Calling It a Day*, N.Y. Times (Dec. 5, 2023).[21]

These examples vindicate one researcher's description of auctioneers as "oral performers [who] are evaluated for their performance … using traditional resources in [their] own personal ways." Kuiper, *Smooth Talkers, supra* at 98–99. And that "evaluation" is quite literal. Auctioneers hold regular competitions, to compare their performance skills. For example, at the World Livestock Auctioneer Championship, held every year since 1963, participants are graded based on such factors as "Poise," "Body Language and Eye Contact," "Rhythm [and] Timing," and "Voice Quality and Control."[22] These are features of artistic expression, not

[20] https://www.nytimes.com/2001/05/20/style/that-cool-that-suit-sotheby-s-007.html.
[21] https://www.nytimes.com/2023/12/05/arts/design/jussi-pylkkanen-christies.html
[22] *See* Livestock Marketing Association, *2025 LMA Convention and World Livestock Auctioneer Championship Rules and Procedures*, https://www.lmaweb.com/Events/WLAC/Entry-Rules-Procedures.

found in a mere communication of prices.[23] The same is true of the carefully orchestrated videos or written, persuasive narrations used in Plaintiffs' online auctions.

It's true that auctioneers are hired to engage in these performances, but hired expression is still protected speech. In *303 Creative LLC*, 600 U.S. at 587–89, for example, the Court held that a person hired to create a website to celebrate a same-sex wedding was engaged in speech—not even commercial speech, but "pure" speech, *id.* at 583—even though she was paid to do so. In *Masterpiece Cakeshop*, 584 U.S. at 632–33, a baker hired to make a distinctive cake to celebrate a wedding was engaged in First Amendment-protected expression. *See further Brush & Nib Studio*, 448 P.3d at 908–12 (creator of custom wedding invitations was engaged in pure speech regardless of the fact that it was for hire). And, of course, nude dancers convey a message protected by the First Amendment, even though they're paid to do so. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991).[24]

---

[23] The 2024 winner of the Livestock Marketing Association competition was Wade Leist. His performance can be viewed at https://youtu.be/Bgx18vzTUhI?si=Wqhmhk-uTDc1OCOg. This is not the mere transmission of commercial information.

[24] Advertising routinely crosses the line from mere commercial promotion into full-fledged artistic expression. A music video, for example, is in one sense an advertisement for the album—yet the Kentucky Supreme Court acknowledged in *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001), that videos are "in essence mini-movies" entitled to full constitutional protection. *See further* La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205, 1230–36 (2004).

The fact that auctioneering is performative and theatrical increases, rather than diminishes, its constitutional protection. Obviously if someone were to hire an acting troupe to perform, say "the controversial rock musical *Hair*," the troupe's performance would be entitled to First Amendment protection, *see Conrad*, 420 U.S. at 547—and would not lose that protection if the actors ended the show by urging audience members to buy things.[25] "Speech is protected even though it is carried in a form that is sold for profit." *ETW Corp.*, 332 F.3d at 924. The fact that Georgia O'Keefe and Alphonse Mucha were hired by advertisers to produce their art[26] doesn't render their work any less constitutionally protected.[27]

Auctioneers are performers just like actors, dancers, or musicians, and the fact that they're hired to use their skills to advertise goods for sale doesn't change that. Auctioneering is an expressive, even theatrical activity, and auctioneers are creative professionals. Somone who hires an auctioneer is hiring a *performer* to

[25] In fact, the charity organization Broadway Cares regularly holds fund-raising auctions immediately after the conclusion of live stage performances. *See Joy and Spectacular Fundraising Mark Long-Awaited Return of Annual Celebration*, Behind the Scenes (Spring 2024) at 5, https://broadwaycares.org/behindthescenes/.
[26] Cascone, *Georgia O'Keeffe Once Painted Hawaii-Inspired Ads for Dole Foods—and Now They're Coming to New York*, Artnet (Jan, 24, 2018), https://news.artnet.com/art-world/georgia-okeeffe-hawaii-paintings-1205534; *Mucha Advertising Posters*, Mucha Foundation, https://www.muchafoundation.org/en/gallery/themes/theme/advertising-posters/object/41.
[27] Recall that the advertisement in *New York Times v. Sullivan* "concluded with an appeal for funds." 376 U.S. at 257.

present a kind of *display*—a spectacle—that will attract business and result in a transaction.

Yet even while the District Court acknowledged that auctioneers are "professional communicator[s]," it disregarded all this, and dismissed the activity of an auctioneer as a merely "communicat[ing] that an item is for sale." Slip Op. at 13. Of course, even if it were true that all an auctioneer does is communicate that items are for sale, First Amendment scrutiny still would apply, because that's quintessential commercial speech. Yet the District Court refused to even apply the commercial speech doctrine. And the reality is that auctioneers do far more than that. They're engaged in performative, even *artistic* communication, that goes far beyond a dispassionate exchange of data. The District Court's choice to view auctioneering as merely "transactional activity," *id.*, which can be regulated free of First Amendment concerns, makes no sense. It should be reversed.

II. The *Liberty Coins* "holding oneself out" theory is simply not relevant here.

The District Court erred, too, in its application of the "hold oneself out" rule of *Liberty Coins, supra*.

That case dealt with the question of so-called "speech triggers," that is, laws whereby a regulation of an activity comes into effect only when the regulated party engages in speech—as in *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28

(2010), where the regulation is aimed at non-communicative conduct, but "the conduct triggering coverage under the statute consist[ed] of communicating a message." In *Liberty Coins,* the Ohio law regulated precious metals dealers, but only if the regulated party "held herself out" to be a precious metals dealer. The question was whether *Holder* forbade that. This Court said the *Holder* rule didn't apply, because the Ohio law did *not* depend exclusively on a communicative act. Instead, it applied "[based] on whether the business in question holds itself out to the public, which can occur by [speech, *or by*] *... simply conducting business in a manner that is visible to the public, or otherwise making its wares available to the public.*" 748 F.3d at 697 (emphasis added).

In other words, even *without* communicating, a business could still violate the statute, because it was illegal to "have a storefront with *or without* signage," or even to "function as an open, public, and visible business," without a license. *Id*. (emphasis added). And since the Ohio law applied "regardless of whether [a dealer] advertise[s]," it didn't regulate speech. *Id.*

That logic cannot apply here. The *Holder* "speech trigger" theory was fashioned to resolve situations where a regulation of conduct is switched on or off based on a communicative act—and that's not the case here. Tennessee's law doesn't regulate conduct; it regulates auctioneering, which *is the practice of com-*

municating. One can no more imagine an auctioneer operating "without" communication, or "simply conducting business" absent communication, than one can imagine a married bachelor or a square circle. For that reason, *Liberty Coins* is simply inapposite. Dealing in precious metals isn't speech—it's conduct—so Ohio could regulate it, even if doing so had an incidental effect on speech. But here, the business is inherently communicative—it's impossible to describe it in terms other than communicative acts.

Liberty Coins therefore addressed a question that isn't raised here. This case involves a law that governs a business that *just is speech*. This case is one in which a person is hired to communicate—which was not true in *Liberty Coins,* but was true in the tour guide case, *Edwards*, 755 F.3d at 1001–02, or the solicitation cases, such as *Riley v. National Federation of the Blind.*, 487 U.S. 781 (1988), and *Lovell v. City of Griffin,*, 303 U.S. 444 (1938), or the cases in which creative artists were hired to engage in expression, such as *303 Creative*, 600 U.S. at 587–89, and *Masterpiece Cakeshop*, 584 U.S. at 632–33. In all those cases, of course, First Amendment scrutiny applied.

The District Court's choice not to apply even the commercial speech doctrine, on the grounds that *Liberty Coins* made that unnecessary, was reversible error.

CONCLUSION

The judgment should be *reversed*.

Respectfully submitted this 15th day of October, 2024 by:

/s/ *Timothy Sandefur*
Timothy Sandefur
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

Counsel for Amicus Curiae Goldwater Institute

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,542 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Times New Roman in 14 point font.

/s/ *Timothy Sandefur*
Timothy Sandefur
Attorney for Amicus Curiae
Goldwater Institute
Dated:

CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 15th day of October 2024 on all counsel of record.

/s/ *Kris Schlott*
Kris Schlott, Paralegal