

No. 25-575

In the Supreme Court of the United States

WILL MCLEMORE, ET AL.,

Petitioners,

v.

ROXANNA GUMUCIO, IN HER OFFICIAL CAPACITY AS
EXECUTIVE DIRECTOR OF THE TENNESSEE AUCTIONEER
COMMISSION, ET AL.,

Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit*

**BRIEF OF THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

Thomas A. Berry
Counsel of Record
Alexander M. Xenos
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

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QUESTIONS PRESENTED

1. Whether a burden on speech must be incidental merely because it is imposed by an occupational licensing law.
2. Whether a law that imposes incidental burdens on speech must satisfy intermediate scrutiny.

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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward that end, Cato’s Robert A. Levy Center for Constitutional Studies publishes books and studies about legal issues, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs in constitutional law cases.

This case interests Cato because it concerns whether the government can require licensure for a profession engaged in “pure speech” consistent with the First Amendment. It implicates both the right to speak freely and the right to earn a living in one’s chosen occupation.

¹ Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party’s counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

From the earliest market squares, sellers have relied on skilled voices to spark interest, draw bids, and move goods. Today, Will McLemore practices that time-honored profession through a modern medium. Through his company, McLemore Auction Company, he hosts his auctions online. In fact, McLemore was one of the first online auction houses in Tennessee. Until recently, McLemore ran his online auctions without needing a state-issued license. But in 2019, that changed.

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

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

Id. § 62-19-101(2) (emphasis added).²

McLemore and a group of other auctioneers brought this case to challenge the law under the First Amendment. The district court dismissed the challenge because it viewed Tennessee’s online-auctioneer licensing law as an economic regulation that only incidentally burdens speech, applied rational-basis review, and concluded the statute was constitutional. The Sixth Circuit affirmed.

The First Amendment, as incorporated to the states through the Fourteenth Amendment, provides that the government “shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. The text of the First Amendment contains no caveats. Its protection of speech is not limited to the political, the literary, the philosophical, or the artistic. The Constitution considers freedom of speech to be a fundamental individual right, regardless of the content or purpose of that speech. Accordingly, this Court has repeatedly rejected licensing rules and professional codes of conduct that constrain speech. In one such case, this Court explained that First Amendment “freedoms are delicate and vulnerable, as well as supremely precious in our society.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). As such, this Court must remain extra vigilant against the use of licensing

² Conducting an online auction without a license is a Class C misdemeanor, § 62-19-121, and violators are subject to a civil fine of up to \$2,500, § 62-19-126(a).

regimes to thwart these delicate and vulnerable speech rights.

Furthermore, these licensing regimes act as prior restraints, which “are the most serious and least tolerable infringement on First Amendment rights.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). “[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.” *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316, n.13 (1980) (emphasis in original).

Amicus writes separately to urge this Court to grant the petition for certiorari for three reasons. First, pure speech, like auctioneering, is fully protected by the First Amendment. Second, protecting sellers’ speech rights does not threaten the state’s ability to regulate economic conduct. Third, the issues presented in this case are of national importance and can only be resolved by this Court.

Pure speech is rigorously protected by the First Amendment, regardless of meaning and even when that speech advertises a product for sale. In *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), this Court set out a framework for determining what constitutes “pure speech.” That test should be applied here. If it does, this Court will find that auctioneering is pure speech protected by the First Amendment and entitled to heightened scrutiny. As such, the district court was wrong to review Tennessee’s licensure law under rational basis review.

Courts must undertake the difficult task of distinguishing between laws that target protected speech and those that regulate conduct. And courts likewise must do the hard work of determining when regulations of pure speech might nonetheless be justifiable under heightened scrutiny. This work is crucial to protecting the First Amendment rights of millions of American artists, essayists, writers, bloggers, and other creative commercial actors. This Court should grant the petition for a writ of certiorari, reverse the decision below, and reestablish that governments cannot skirt the First Amendment through licensing regimes.

ARGUMENT

I. PURE, PROFESSIONAL SPEECH IS PROTECTED BY THE FIRST AMENDMENT, NECESSITATING HEIGHTENED SCRUTINY.

The First Amendment “rigorously” protects pure speech, regardless of meaning. *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015); *see, e.g., 303 Creative*, 600 U.S. at 586–88; *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010). This Court has recognized that there are countless ways to convey pure speech.³ *See, e.g., Shurtleff v. City of Bos.*, 596 U.S. 243 (2022) (flag flying); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (video games); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual*

³ “The concept of pure speech is fairly capacious.” *Cressman*, 798 F.3d at 952.

Grp. of Bos., Inc., 515 U.S. 557 (1995) (parades); *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981) (dance); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975) (theater); *Kaplan v. California*, 413 U.S. 115, 119 (1973) (“pictures, . . . paintings, drawings, and engravings”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–03 (1952) (movies). The First Amendment protects these activities because “the freedom to think and speak is among our inalienable human rights.” *303 Creative*, 600 U.S. at 584.

In *303 Creative*, this Court added designing custom wedding websites to the long list of pure speech activities. *Id.* at 597. In doing so, this Court identified four key characteristics of a wedding website that made it pure speech: (1) it contained “images, words, symbols, and other modes of expression”; (2) it was an “original, customized creation”; (3) it was created “to communicate ideas”; and (4) it “involve[d] [the creator’s] speech.” *Id.* at 587–88 (internal citations omitted).

Famous auctioneer Robert Brunk’s memoir highlights the narrative ability that skilled auctioneers employ. ROBERT BRUNK, A QUESTION OF VALUE: STORIES FROM THE LIFE OF AN AUCTIONEER (2024). His stories demonstrate why auctioneering is a form of free speech. At its core, the job is one of crafting stories and communicating ideas.

Auctioneers incorporate deep analysis into a cohesive, compelling narrative. Much like a speechwriter, an auctioneer writes out and rehearses each item’s story until it is honed and precise. Each auctioneer adopts their own chant—that “singsong, fast-talking style of calling for bids.” *Id.* at 33. An auctioneer’s chant “is a form of music: the rhythm and cadence as the ground, the words as a melody of sorts, sung allegro (fast and lively) or as an ostinato (a short repeated pattern).” *Id.* at 32. Using their chants, auctioneers weave information about an item into a cohesive, melodic story.

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

Thus, auctioneering fits *303 Creative*’s test for “pure speech.” First, online auctions convey a particular meaning using “words, symbols, and images.”⁴ At base, the job of an auctioneer is to tell a

⁴ Tennessee’s auctioneering law echoes this language. See TENN. CODE ANN. § 62-19-101(2) (“Auction means a sales

story. The auctioneer's story, in turn, sells the product. Skilled auctioneers are little different from skilled orators or essayists; through their words, they imbue a narrative into otherwise lifeless trinkets.

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

Third, the goal of an auction is to communicate ideas. Auctions communicate an item's story through "images, words, or symbols" to elicit a sale. The story is an expression of ideas, containing some mode of thought, designed to appeal to buyers. The auctioneer convinces sellers that an item is meant to fulfill or embody those ideas. Thus, at a minimum, online

transaction conducted by oral, written, or electronic exchange between an auctioneer and members of the audience.").

auctions warrant no less First Amendment recognition than other commercial advertisements. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980) (finding that the First Amendment protects advertisements and other commercial speech).

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

Whether in speech or text, auctioneering is just one type of narrative expression, and it deserves no less First Amendment recognition than any other. Looking at the four factors set forth in *303 Creative*, auctioneering checks every box. It is a form of pure speech protected by the First Amendment. However, the court below resisted this conclusion, finding that Tennessee's auctioneering law regulates professional *conduct*, not *speech*. *See* Pet. App. 9a. The court

concluded that any burden on expression is merely incidental to a permissible exercise of the State’s police power. *See id.* at 8a–11a. For these reasons, the court applied rational basis review and affirmed the dismissal below. *Id.* at 13a–14a.

That conclusion was wrong. To be sure, Tennessee’s auctioneering law defines “auctioneering” and an “auction” as requiring the “sale” of a good or a “sales transaction.” *See generally* TENN. CODE ANN. § 62-19-102. But the nature of pure speech does not hinge upon the “terms” section of a given statute. If what Tennessee law defines as a “sales transaction” is, in fact, pure speech, the First Amendment demands that courts apply heightened scrutiny. That is the case here.⁵ Indeed, even if the burden on speech is merely incidental, intermediate/heightened scrutiny is required, not rational basis review. *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 477–78, 483 (2025).

Pure speech doesn’t lose protection “merely because it is uttered by professionals.” *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755, 767 (2018)

⁵ Even if Tennessee’s licensing scheme is understood to regulate a mix of speech and conduct, its application to petitioners’ online auctions still targets protected expression. Even a facially conduct-based statute triggers First Amendment scrutiny when “the conduct triggering coverage under the statute consists of communicating a message.” *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010). That is precisely the case here. No matter the interpretation, Tennessee’s auctioneering law functions to burden appellants’ First Amendment speech rights.

(*NIFLA*). “To the contrary, professional speech may be entitled to ‘the strongest protection our Constitution has to offer.’” *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (quoting *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618, 634 (1995)). First Amendment protections for professional speech are vital to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” *NIFLA*, 585 U.S. at 757 (quoting *McCullen v. Coakley*, 573 U.S. 454, 476 (2014)). Thus, a state cannot “reduce . . . First Amendment rights by simply imposing a licensing requirement.” *Id.* at 768. Yet Tennessee has done just that, requiring auctioneers to obtain a license to practice their speech-based profession or face criminal prosecution. And auctioneers must acquire that license at their own expense and on their own time. That burden warrants this Court’s application of heightened scrutiny. This Court should grant certiorari and overturn the Sixth Circuit’s decision to the contrary.

II. PROTECTING SPEECH DOES NOT UNDERMINE REGULATION OF ECONOMIC CONDUCT.

Courts have been able to protect professional, pure speech while still allowing state legislatures ample room to regulate economic activity. This Court has instructed courts to do no less. *See NIFLA*, 585 U.S. at 769 (“While drawing the line between speech and conduct can be difficult, this Court’s precedents have long drawn it.”); *Button*, 371 U.S. at 439 (“[A] State

may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.”). Courts are well-equipped to handle this task and should do so with an eye toward protecting free expression.

The government may permissibly regulate (or even criminalize) certain conduct that flows from speech, but it may not criminalize protected expression. Accordingly, the government may regulate fraud, defamation, perjury, and other harms resulting from protected expression; no one can claim a First Amendment right to vandalize a building with graffiti or defraud consumers. But the government may not burden pure speech absent such harms.

Sometimes a pure speech activity may raise legitimate public safety concerns entirely unrelated to the content of the expression at issue. When that is the case, the answer is not to ignore the fact that the activity is pure speech or to apply rational basis review. Rather, courts must evaluate whether the safety regulations can overcome heightened scrutiny. The Ninth Circuit’s “tattooing-speech cases” demonstrate the proper approach.

In *Anderson*, the Ninth Circuit concluded that “the tattoo itself is pure First Amendment speech,” *Anderson*, 621 F.3d at 1060 (internal quotations omitted), and that “the business of tattooing” is no different and no less protected than the tattoo itself, *id.* at 1063. The court reached this conclusion after considering both the expressive nature of tattooing

and the legitimate health concerns associated with piercing the skin to create art.

Other states and circuits have also recognized that the First Amendment protects the business of tattooing. *See Brush & Nib Studios, LC v. City of Phoenix*, 247 Ariz. 269, 284–85 (Ariz. 2019) (“this Court has concluded that tattoos are pure speech”); *Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (“the act of tattooing is sheltered by the First Amendment”). Yet this has not led to a public safety crisis; tattooing is still regulated in these jurisdictions. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 119314 (setting forth sanitation and other requirements for body art facilities).

Courts have rightly held that the government must ensure its laws are sufficiently tied to the legitimate health and safety interests that it seeks to vindicate. When a speech activity poses no danger to the public, courts have rightly struck down licensure requirements under heightened scrutiny. In *Billups v. City of Charleston*, the Fourth Circuit considered whether a municipal licensure scheme for Charleston tour guides violated the First Amendment. 961 F.3d 673 (4th Cir. 2020). The court concluded that commercial tour guiding was protected speech. *Id.* at 682. Like the Ninth Circuit in *Anderson* and this Court in *303 Creative*, the court in *Billups* rejected the city’s argument that it was simply regulating economic conduct: “The Ordinance . . . cannot be classified as a restriction on economic activity that incidentally

burdens speech. Rather, it completely prohibits unlicensed tour guides from leading visitors on paid tours—an activity which, by its very nature, depends upon speech or expressive conduct.” *Id.* at 683. And, as in *Anderson*, the court in *Billups* found that the licensure regime could not withstand heightened scrutiny. *Id.* at 690.

Like the Fourth Circuit, the D.C. Circuit also recognizes that commercial tour guides have free speech rights when acting within the scope of their profession. In *Edwards v. District of Columbia*, the appeals court considered whether the District’s tour guide licensure requirement violated the First Amendment. 755 F.3d 996 (D.C. Cir. 2014). The court determined that it did.⁶ *Id.* at 1002–09. Finding that the regulation did not survive heightened scrutiny, the court invalidated the District’s licensure scheme. *Id.*

Other states and circuits have recognized a broad range of pure speech rights related to speech-based professions. *See, e.g., Brush & Nib Studios*, 247 Ariz. at 274 (wedding invitations). And contrary to some critics, these jurisdictions have not seen a revival of the *Lochner* era. Rather, these courts have diligently distinguished pure, protected speech from

⁶ *Edwards* was a pre-*NIFLA* decision and, as such, applied a different formula regarding professional speech. Yet the court there was still willing to protect such speech above-and-beyond what the district court below here was willing to recognize.

nonexpressive conduct, often in cases implicating important state interests.

The auctioneer plaintiffs in this case seek the same speech protections many circuits have been willing to grant to professions involving significantly more conduct than speech. As these other circuits and states have demonstrated, such protections do not undermine legitimate economic regulation.

III. THIS CASE WARRANTS REVIEW TO PROTECT LIBERTY.

The decision below poses a significant threat to the freedom of speech and extends far beyond auctioneers, threatening the constitutional rights of millions of Americans who speak for a living. The Sixth Circuit's rule allows governments to treat speech as "conduct" simply by placing it inside an occupational-licensing scheme. If left untouched, First Amendment protection for entire categories of expression could be diminished, not through careful tailoring, but through definitional maneuvering.

Many of the professions that states impose licensing restrictions on, such as auctioneers, do not raise the traditional health-and-safety concerns that the police power was historically invoked to address. They raise concerns about *speech*. Yet under the Sixth Circuit's rule, legislatures may diminish speech protections for these professions simply by relabeling speech as professional conduct within a licensing statute.

If states may define inherently communicative activities as “conduct,” then nearly all commercial or professional speech can be treated as highly regulable conduct. That would allow legislatures and licensing boards to sidestep First Amendment scrutiny solely through labeling.

Occupational licensing boards, often composed of or influenced by market incumbents, have powerful incentives to suppress new speakers and would-be competitors. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) (“[P]rivate parties have used licensing to advance their own interests in restraining competition at the expense of the public interest.”). Although licensing can serve legitimate ends, like preventing fraud or incompetence, it is frequently deployed to confer economic favors on politically connected interests. *See, e.g., Merrifield v. Lockyer*, 547 F.3d 978, 991–92 (9th Cir. 2008). The result is predictable: consumers pay more, innovation stagnates, and entrepreneurs are denied the opportunity to earn a living. *See, e.g., Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002). The Sixth Circuit’s rule gives legislators a simple but dangerous tool: define the communicative activity as part of a licensed “profession,” claim that the law regulates “conduct,” and avoid First Amendment review entirely.

Without intervention, legislatures and licensing boards will treat the decision below as a blueprint for suppressing speech. States may expand licensing

requirements into ever more domains where speech is the primary product. The First Amendment became part of our Constitution to prevent such governmental control over communication. Courts must safeguard that guarantee against forms of regulation that, however neutral in appearance, strike at the heart of expressive liberty.

CONCLUSION

This Court should grant certiorari, reverse the decision below, and reaffirm that governments cannot sidestep the First Amendment by labeling speech professional conduct.

Respectfully submitted,

Thomas A. Berry
Counsel of Record
Alexander M. Xenos
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

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