UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

VICTOR ASHE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 3:23-cv-01256**
	)	**Judge Richardson**
TRE HARGETT, et al.,	)	**Magistrate Judge Newbern**
	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants, Secretary of State Tre Hargett, Coordinator of Elections Mark Goins, and Attorney General Jonathan Skrmetti, who are sued in their official capacities only, hereby submit this response in opposition to Plaintiffs' Motion for Preliminary Injunction.

INTRODUCTION

Plaintiffs, Victor Ashe, Phil Lawson, and the League of Women Voters of Tennessee, have sued to challenge the constitutionality of Tenn. Code Ann. § 2-7-115(b) and (c), which pertain to primary elections, and seek a preliminary injunction to prevent the enforcement of the law. But Plaintiffs are not entitled to preliminary injunctive relief. A Preliminary Injunction would not accord the Plaintiffs the relief they seek because these Defendants do not enforce the laws. Further, the provisions of Section 2-7-115(b) have been in place for more than half a century, and while Section 2-7-115(c) is a new amendment, it merely requires signage at polling places regarding the requirements of Subsection (b). Plaintiffs are unlikely to succeed on the merits of their claims and will not suffer irreparable harm in the absence of a preliminary injunction; meanwhile, an injunction *would* cause harm to the State and to the public interest. For these reasons, as more

fully discussed below, Plaintiff's Motion for Preliminary Injunction should be denied.

ARGUMENT

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002). In its determination of whether to grant a motion for preliminary injunction, the Court looks to four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the injunction. *Id.*

All these factors weigh against granting Plaintiffs preliminary injunctive relief. First, and as Defendants have argued in support of their motion to dismiss, Plaintiffs lack standing to sue, Defendants are entitled to sovereign immunity, and Plaintiffs' claims are untimely. Because this Court is unlikely even to *reach* Plaintiffs' claims, Plaintiffs are unlikely to succeed on the merits of those claims. *See Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 256 n.4 (6th Cir. 2018) (stating that likelihood of success on the merits "necessarily includes a likelihood of the court's reaching the merits, which in turn depends on a likelihood that plaintiff has standing") (citation and internal quotation marks omitted). Furthermore, Plaintiffs' constitutional claims lack substantive merit in any event.

Second, Plaintiffs will not suffer irreparable harm in the absence of a preliminary injunction. Again, the substantive provisions of the statute have been in place for over 50 years—without having caused Plaintiffs any harm at all. Third, consideration of the remaining equities—harm to the State and to the public interest if an injunction were issued—favors denying Plaintiffs'

motion.

I. Plaintiffs Are Unlikely to Succeed on the Merits of their Claims.

A. The Court is unlikely to reach Plaintiffs' claims, which should be dismissed.

1. Plaintiffs Lack Standing to Sue.

Article III of the U.S. Constitution limits the jurisdiction of federal courts to cases and controversies, and a series of "justiciability doctrines" enforce that limitation. *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997). One of these doctrines is standing, which requires the plaintiff to demonstrate that (1) he has suffered an injury in fact, (2) there is a causal connection between the injury and the conduct complained of, and (3) it is likely the injury will be redressed by a favorable decision. *Kiser v. Reitz*, 765 F.3d 601, 607 (6th Cir. 2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). In short, "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Id.* (quoting *Lujan*, 504 U.S. at 565 n.2). The Supreme Court has "repeatedly reiterated that 'threatened injury must be certainly impending to constitute an injury in fact,' and that 'allegations of possible future injury' are not sufficient.'" *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). *See Reform Am. v. City of Detroit*, 37 F.4th 1138, 1148 (6th Cir. 2022); *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 981 (6th Cir. 2020) (per curiam).

When plaintiffs bring suit under the Declaratory Judgment Act, 28 U.S.C. § 2201, they are

not excused from the requirements of Article III. *See Fieger v. Mich. Supreme Court*, 553 F.3d 955, 961 (6th Cir. 2009). While plaintiffs do not have to subject themselves to liability before challenging a statute under the Declaratory Judgment Act, they must nevertheless demonstrate "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.'" *Kiser*, 765 F.3d at 608 (quoting *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

Furthermore, "standing is not dispensed in gross." *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1031 (6th Cir. 2022) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). Plaintiffs must demonstrate standing for each of their claims, and they must show "how the requested relief against *each* of the defendants could redress plaintiffs' alleged injuries-in-fact." *Id.* (emphasis in original).

a. Plaintiffs Victor Ashe and Phil Lawson lack standing.

Plaintiffs Ashe and Lawson allege that they fear prosecution for violating § 2-7-115(b), but their allegations do not suffice to show that they have an actual, credible, concrete, or reasonable fear of prosecution *from any of the Defendants*. Indeed, Plaintiff Ashe specifically alleges his fear "that the people in control of today's Tennessee Republican Party . . . could seek to prosecute him," and Plaintiff Lawson alleges his fear "that the people in control of today's Tennessee Democratic Party . . . could prosecute him." (Compl., ECF No. 1, PageID# 3-5.) Plaintiffs do not—and cannot—allege, however, that either the Republican or Democratic Party has any prosecutorial authority.

i. Plaintiffs have not shown a credible threat of prosecution from Defendant Hargett.

As discussed, Plaintiffs must show how the requested relief against *each* of the defendants could redress their alleged injury-in-fact. Plaintiffs seek an anti-enforcement injunction against

all Defendants, (Compl., ECF No. 1, PageID# 19), but as to Defendant Tre Hargett, Plaintiffs allege only that Secretary Hargett "oversees the State's election process. Under Tennessee law, he is charged with the administration of elections in Tennessee." (Compl., ECF No. 1, PageID# 6.) Nowhere do Plaintiffs allege, nor could they, that Secretary Hargett has authority to prosecute anyone for anything—let alone to prosecute violations of § 2-7-115(b). *See* Tenn. Code Ann. § 8-7-103(1); *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209 (Tenn. 1999) ("The District Attorney General and only the District Attorney General can make the decision whether to proceed with a prosecution for an offense committed within his or her district.").

Under a section of their Complaint titled "Threats of Prosecution," Plaintiffs allege that Secretary Hargett made the following public statement in April 2022: "People need to understand when you go vote in a primary, you are supposed to vote in the primary in which you are a member of the party. . . . The DA could actually prosecute that if people are willingly going in and voting in the other party." (Compl., ECF No. 1, PageID# 10.) Notably, however, this statement reflects only that a *district attorney* could prosecute; it does not claim any authority or intention on the part of Secretary Hargett to prosecute. It is therefore insufficient to establish that Plaintiffs Ashe and Lawson have standing, because it fails to show how Secretary Hargett has caused Plaintiffs' alleged injury or how an anti-enforcement injunction against Secretary Hargett would redress Plaintiffs' alleged injury—i.e., their fear of being prosecuted. *See Universal Life Church*, 35 F.4th at 1032 ("We need specific, plausible allegations about what the [defendant] has done, is doing, or might do to injure plaintiffs."; *see also id.* (holding plaintiffs lacked standing when they could not show that an anti-enforcement injunction against the governor would give them relief).

ii. Plaintiffs have not shown a credible threat of prosecution from Defendants Goins and Skrmetti.

Defendants Mark Goins and Jonathan Skrmetti likewise lack authority to prosecute violations of § 2-7-115(b) —so Plaintiffs Ashe and Lawson can have no reasonable fear of prosecution from them. Plaintiffs allege that Coordinator Goins has a duty to "investigate or have investigated . . . the administration of the election laws and report violations to the district attorney general." (Compl., ECF No. 1, PageID# 6 (quoting Tenn. Code Ann. § 2-11-202(a)(5)(A)(i)).) But authority to investigate and report is not authority to *prosecute*. Consequently, injunctive relief against Coordinator Goins would not redress Plaintiffs' fear of prosecution. *See Universal Life*, 35 F.4th at 1033 (holding that allegation defendant was "indirectly enticing" district attorneys to prosecute by issuing opinions failed redressability requirement; even without the opinions, "the district attorneys general would still have the same duty to prosecute according to law") (citation and internal quotation marks omitted)

So, too, with respect to Defendant Skrmetti. Plaintiffs allege only that the Attorney General "is empowered to request that [Coordinator Goins] conduct investigations into, and report violation of, election laws." (Compl., ECF No. 1, PageID# 6 (citing Tenn. Code Ann. § 2-11-202(a)(5)(C)(i)).) Again, authority to investigate and report is not authority to prosecute, and Plaintiffs allege only that Attorney General Skrmetti has authority to *ask the Coordinator of Elections* to investigate and report. Even assuming a sufficient injury, Plaintiffs Ashe and Lawson have not satisfied the traceability and redressability prongs for establishing standing.

iii. Victor Ashe Sponsored the Legislation.

Victor Ashe can hardly be heard to complain about this law. Mr. Ashe sponsored the law that was passed in 1972 and also the amendment to the legislation in 1974. *See,* Public Acts 1972, Ch. 740; Public Acts 1974, Ch. 801 (attached). In addition, Mr. Ashe is an attorney, albeit one on

inactive status. Mr. Ashe did not allege, nor could he, that he has been the subject of any prosecution since this law was passed. Mr. Ashe should not be allowed to complain about his own legislation.

b. Plaintiff League of Women Voters also lacks standing.

Where a plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways. "Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert "standing solely as the representative of its members." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 142 S.Ct. 2141, 2157 (2023) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Article III standing prevents organizational plaintiffs from bringing lawsuits on public-policy issues if success would not give the organization, or one of its members, "some relief other than the satisfaction of making the government comply with the law." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 460 (6th Cir. 2014). "This limit would be eviscerated if an advisor or organization can be deemed to have Article III standing merely by virtue of its efforts and expense to advise others how to comport with the law, or by virtue of its efforts and expense to change the law." *Id.*

Plaintiff League of Women Voters appears to proceed down both paths, but neither leads to establishing the organization's standing to sue. First, the League claims that it has suffered an injury in its own right. The League alleges that "the statute prevents [it] from fulfilling its primary function of providing voter information," because it cannot inform its members and the general public on voting issues "without . . . subjecting [itself] to an impossible reporting standard for promulgating 'erroneous' information." (Compl., ECF No. 1, PageID# 5-6 & n.2 (citing Tenn. Code Ann. § 2-2-142(h)).) This is not an allegation of actual injury; it is mere conjecture. The provisions of Section 2-7-115(b) were enacted over 50 years ago. *See* Tenn. Code Ann. § 2-715

(1972) (added by 1972 Tenn. Pub. Acts, ch. 840, § 1). And § 2-2-142(h), which has been in effect since April 2020,[1] imposes no liability—civil or criminal. Plaintiffs do not allege that the League has encountered any difficulties over the past 50 years informing its members and the public about voting issues, primary elections, or § 2-7-115(b).

The League also alleges that it "will need to budget approximately $3,000" to educate voters "ahead of the 2024 primary election." (Compl., ECF No. 1, PageID# 5-6.) But this is not an "injury" sufficient to confer standing. In *Fair Elections Ohio*, 770 F.3d 456, the plaintiff voter organization similarly alleged that their instructions and training had to be changed and that they had to divert limited resources to address a new issue for their members. *Id.* at 459-60. But the Sixth Circuit held that this was not enough to show an injury-in-fact. *Id.* Merely spending money on voter education, which is something that League of Women Voters already does as a part of its mission—and has presumably done for years while § 2-7-115(b) has been in place—is not an injury for purposes of standing.

Second, the League claims injury on behalf of its members. It alleges that its members "may be subject to prosecution" for violating the statute and that "Sections 115(b) and (c) are likely to prevent some League members from voting." (Compl., ECF No. 1, PageID# 5-6.) This is not an allegation of a concrete injury that is actual or imminent. Again, the provisions of Section 2-7-115(b) have been in effect since 1972, and for that same amount of time, it has been a crime to do any act prohibited by Title 2 or to vote in any manner "where or when such person is not entitled to under" Title 2. *See* Tenn. Code Ann. §§ 2-1902, 2-1907 (1972) (added by 1972 Tenn. Pub. Acts, ch. 740, § 1). Section 2-7-115(c)'s required signage, therefore, merely reflects a 50-year-old law. Plaintiffs who allege that their injury is a prospective prosecution must plead facts

[1] *See* 2020 Tenn. Pub. Acts, ch. 654.

sufficient to establish a "reasonable" fear of prosecution. *Block v. Canepa*, 74 F.4th 400, 409 (6th Cir. 2023). The League has not established that any of its members have a reasonable fear of prosecution for violating § 2-7-115(b). *Cf. Block*, 74 F.4th at 409 (finding alleged fear of prosecution to be reasonable when the plaintiff submitted documents indicating prosecution of other individuals for the same conduct).

Further, no member of the League of Women Voters is a plaintiff in this case. The inability to identify or allege a League member who was prevented from voting at any time over the last 50 years demonstrates the speculative nature of the League's allegation and is fatal to its claim of associational standing. *See Tennessee Protection & Advocacy, Inc. v. Bd. of Educ. of Putnam County, Tennessee*, 24 F. Supp. 2d 808, 816 (M.D. Tenn. 1998) (holding that where an organization does not have a named plaintiff who has suffered the alleged injury, then the organization has no standing to maintain an action on behalf of the public).

2. Defendants Are Entitled to Sovereign Immunity.

Defendants are all sued in their official capacities only, (Compl., ECF No. 1, PageID# 6-7), and therefore enjoy sovereign immunity from suit. The exception to sovereign immunity under *Ex Parte Young*, 209 U.S. 123 (1908), does not apply.

The Eleventh Amendment provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United State by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI; *see Russell v. Lunder-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015). The sovereign immunity guaranteed by this Amendment deprives federal courts of subject-matter jurisdiction when a citizen sues their own State, unless the State abrogates that sovereign immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-100 (1984). Tennessee

has not waived its immunity under the Eleventh Amendment with respect to civil-rights suits. *See* Tenn. Code Ann. § 20-13-102(a); *American Civil Liberties Union v. Tennessee*, 496 F.Supp. 218 (M.D. Tenn. 1980); *Hair v. Tennessee Consolidated Retirement System*, 790 F.Supp. 1358 (M.D. Tenn. 1992).

A suit against a state official in his official capacity is considered to be a suit against the State. *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989); *Wells v. Brown*, 891 F.2d 591, 592-94 (6th Cir. 1989). "However, there is an exception to the State's sovereign immunity under *Ex Parte Young*, 209 U.S. 123 (1908), whereby 'a suit challenging the constitutionality of a state official's action is not one against the State.'" *Russell*, 784 F.3d at 1046-47. "In order to fall under the *Ex Parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law." *Id.* at 1047.

The exception does not apply, however, "when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional statute." *Id.* Merely claiming that a state official has an obligation to execute the laws is not sufficient to show that the exception applies. *Id. See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 445 (6th Cir. 2019). A defendant need not have "direct criminal enforcement authority," *Universal Life*, 35 F.4th at 1040, but there must be "'a realistic possibility the official will take legal or administrative actions against the plaintiff's interests[,]'" *EMW Women's Surgical Ctr.*, 920 F.3d at 445 (quoting *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1048 (6th Cir. 2015)); *see also Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007) ("[S]tate officials must have a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty.").

As discussed above with respect to Plaintiffs' lack of standing, none of the named

Defendants has authority to prosecute violations of § 2-7-115(b). While such authority is not necessary for the *Ex Parte Young* exception to apply, Plaintiffs have not sufficiently shown that there is a "realistic possibility" of any Defendant taking any legal or administrative action against their interests. As discussed, Plaintiffs have alleged only that Defendant Goins has investigative and reporting authority for "the administration of the election laws" and that Defendant Skrmetti has the power to ask Director Goins to exercise such authority. (Compl., ECF No. 1, PageID# 6-7.) But Plaintiffs have not alleged that Goins or Skrmetti has taken—or a realistic possibility that they will take—any legal or administrative action with respect to § 2-7-115(b). Plaintiffs have alleged that Defendant Hargett "gave a speech" a year and a half ago "in which he emphasized his intent to begin enforcing Section 115(b)." (Compl., ECF No. 1, PageID# 10). But as discussed, Plaintiffs further alleged only that Secretary Hargett referred to a *district attorney's* ability to prosecute; Plaintiffs have not alleged that Secretary Hargett himself claimed or has *any* enforcement authority with respect to § 2-7-115(b)—let alone a realistic possibility that he will exercise such authority. The *Ex Parte Young* exception does not apply.

3. Because Enjoining These Defendants Would Provide No Relief to Plaintiffs, An Injunction Would Be Improper.

"[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Whole Woman's Health*, 141 S. Ct. 2494, 2495. (2021) (Court refused review in case where plaintiffs had not shown that the defendants could or would enforce the statute at issue). Any injunction that the court issues has to be limited to providing the requested relief. Further, a valid remedy "ordinarily operate[s] with respect to specific parties,'" not on "legal rules in the abstract.'" *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (cleaned up). And any remedy "must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Here, as noted above, Defendants have no authority to enforce the statutes. A

Preliminary Injunction ordering Defendants not to enforce the challenged law would not provide the requested relief. It would be meaningless because the Defendants have no enforcement authority in the first place. Thus, an injunction would not "redress the [alleged] injury," so an injunction is not proper. *Whole Women's Health, supra; Kiser, supra; Clapper, supra.*[2]

4. Plaintiffs' Claim against Tenn. Code Ann. § 2-7-215(b) Is Barred by the Statute of Limitations.

Plaintiffs' Complaint challenges the constitutionality of Subsection (b) and (c) of Tenn. Code Ann. § 2-7-115. But as discussed above, Subsection (b) of the statute has been in place since 1972; consequently, the one-year statute of limitations applicable to this action necessarily limits Plaintiffs' challenge to Subsection (c), which was enacted in 2023. *See* 2023 Tenn. Pub. Acts, ch. 473.

"In Tennessee, civil actions for . . . injunctive relief must be commenced within one year of the accrual of the cause of action." *Irick v. Ray*, 628 F.3d 787, 798 (6th Cir. 2010) (citing Tenn. Code Ann. § 28-3-104(a)(3) and *Cox v. Shelby State Community College*, 48 Fed. App'x 500, 506-07 (6th Cir. 2002)). For claims under 42 U.S.C. § 1983, the statute-of-limitations period begins on the date of the alleged constitutional violation. *Hayes v. Cowans*, No. 14-2366-STA-DKV, 2014 WL 2972298, at *8 (W.D. Tenn. July 2, 2014) (citing *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007)). Subsection (b) of Tenn. Code Ann. § 2-7-115 has been in place for more than half a century. Plaintiffs Ashe and Lawson, according to their own allegations, have been voting in various primary elections for many years (Plaintiff Ashe at least since 1972 when he sponsored the legislation). (Compl., ECF No. 1, PageID# 3-4.) Plaintiff League of Women Voters has

[2] And § 2-7-115 (c) simply requires signage that provides information as to the requirements and implications of § 2-7-115 (b); an injunction as to the signage would not redress the alleged fear of prosecution from these Defendants, which is not possible anyway.

existed for more than 40 years. *League of Women Voters Tennessee*, 708 F.2d 725 (Table) (6th Cir. 1983). Plaintiffs have therefore been subject to § 2-7-115(b) for far more than a year, and any claim against the statute has long since accrued; yet Plaintiffs did not file this action until November 29, 2023. Plaintiffs' claims against § 2-7-115(b) are barred as untimely.

5. Plaintiffs' Claims Are Barred by Laches.

All of Plaintiffs' claims—including their challenge to § 2-7-115(c)—are also barred by laches, "'an equitable doctrine which may be applied to deny relief to a party whose unconscionable delay in enforcing his rights has prejudiced the party against home the claim is asserted.'" *Memphis A. Phillip Randolph Institute v. Hargett*, 473 F.Supp.3d 789, 792 (M.D. Tenn. 2020) (quoting Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L. J. 1015, 1065-67 (1997)).

> Laches generally applies only to equitable claims, although in some cases it will be applied to actions at law. Inevitably, laches has been compared to statutes of limitations, even to the point of being deemed a "quasi statute of limitations." Nevertheless, the two differ markedly in their mode of operation. Unlike statutes of limitations, laches is a flexible concept which eschews mechanical rules and instead is based on fairness.

Id. at 792-93. In order to show that laches applies, a defendant must show (1) a lack of diligence by the plaintiff, and (2) prejudice to the defendant. *United States v. City of Loveland, Ohio*, 621 F.3d 465, 473 (6th Cir. 2010); *see Memphis*, 473 F.Supp.3d at 793.

The first element is clearly satisfied here. Again, § 2-7-115(b) has been in effect for more than half a century, and the age of the law in question is relevant to the laches inquiry. *Crookston v. Johnson*, 841 F.2d 396, 398-99 (6th Cir. 2016); *Memphis*, 473 F.Supp.3d at 796. As discussed, Plaintiffs are not new to the voting process. Plaintiff Ashe was involved in voting at least as early as 1972, when he sponsored the legislation that he now complains about (and presumably has known about the law since that time); Plaintiff Lawson has voted for many years, (Compl., ECF

No. 1, PageID# 4-5); and Plaintiff League of Women Voters has existed for more than 40 years. *League of Women Voters, supra*. Their failure to challenge Subsection (b) of the statute until now shows a lack of diligence.

But Plaintiffs have also not been diligent in challenging Subsection ©, even though it was not added to the statute until May 2023. Plaintiffs waited six months to file their lawsuit—while the State has necessarily been preparing for the 2024 Presidential primary election and other primary elections. *See* Tenn. Code Ann. §2-11-(1)(6-19) (Duties of Election Coordinator).

The second element is also satisfied, because Defendants are prejudiced.by this lawsuit challenging an election statute. The preservation of the electoral process is a legitimate and valid state goal. *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973). In addition, the State has a legitimate interest in preserving the integrity of primary elections to ensure that the party's primary is not "raided" by another party seeking to influence the party's candidate. *Id.* at 760. Political parties have a First Amendment right to identify the people who constitute the association and to "select the standard-bearer who best represents the party's ideologies and preferences." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). The State has a duty to protect that freedom of association. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357-58 (1997). By seeking to prevent the State from enforcing § 2-7-115(b) and (c), which serves to protect the political parties' rights, Plaintiffs' action prejudices the State.

Because Plaintiffs were not diligent in bringing their action and Defendants are prejudiced by it, this action is barred by laches.

B. Plaintiffs are unlikely to succeed on their claims anyway, because § 2-7-115(b) and (c) are constitutional.

Even if the Complaint were not dismissed, Plaintiffs are unlikely to succeed on their claims anyway because § 2-7-115(b) and (c) are constitutional.

1. Subsections (b) and (c) of the statute do not violate due process.

In Count One of the Complaint, Plaintiffs claim that § 2-7-115(b) and (c) violate due process under the Fourteenth Amendment because their "operative terms" are vague. (Complaint, ECF No. 1, PageID# 16-18.) , Plaintiffs allege that the terms "bona fide member," "allegiance," and "affiliate" in § 2-7-115(b) are "undefined and fundamentally unclear." (*Id.* at PageID# 16-17, ¶¶ 81-83.)

A statute is not unconstitutionally vague if it defines the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement." *United States v. Dunning*, 857 F.3d 342, 348 (6th Cir. 2017); *see Libertarian Party v. Husted*, 751 F.3d 403, 421 (6th Cir. 2014) (to satisfy due process, "the statute or regulation . . . [must] provide a person of ordinary intelligence fair notice of what is prohibited"). In determining whether a law provides sufficient guidance, the courts look to the words used in the statute. *Platt v. Board of Commissioners on Grievances and Discipline of Ohio Supreme Court*, 894 F.3d 235, 246 (6th Cir. 2018). "[W]e can never expect mathematical certainty from our language," so even if a law has flexibility and reasonable breadth, it is not considered to be vague. *Id.* at 246-47. Also, when the common meaning of the statutory words provides sufficient notice, the statute's failure to define the term does not render the statute vague. *Id.* When the challenged language is used commonly in both legal and common settings, it will be considered to be sufficiently clear. *Id.*

Plaintiffs purport to bring a facial challenge to § 2-7-115(b) and (c); assuming they can do so, however,[3] there is no term in § 2-7-115(b) that a person of ordinary intelligence would have

[3] "Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). "In other words, the statute must be judged on an as-applied

difficulty understanding. Indeed, Plaintiffs' failure to allege any actual voter confusion with the statute over the past 50 years provides strong support for that conclusion. Under § 2-7-115(b)(1), a registered voter is entitled to vote in a primary election if the voter is "a bona fide member of and affiliated with the political party in whose primary the voter seeks to vote." If the voter is not a bona fide member and affiliated with the political party, § 2-7-115(b)(2) provides that when the voter seeks to vote, the voter need only "declare[] allegiance to the political party in whose primary the voter seeks to vote" and "state[] that the voter intends to affiliate with that party."

Plaintiffs acknowledge that the term "bona fide," in common parlance, means "made in good faith," or "sincere" and "genuine." (Pls.' Memorandum, ECF No. 22, PageID# 106 (citing Black's Law Dictionary).) The Supreme Court has applied the term to political parties. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1997) (stating that "[t]he State surely has a valid interest in making sure that minor and third parties who are granted access to the ballot are *bona fide*") (emphasis added). And the Middle District has applied the term to party membership. *See Newsom v. Golden*, 602 F.Supp.3d 1073, 1083 (M.D. Tenn. 2022) (observing that "whether [the plaintiff] is truly a *bona fide* Republican has nothing to do with his qualifications under Article I, § 2, cl.2 of the Constitution") (emphasis added). A person of ordinary intelligence, intending to vote in a particular party's primary, would have no trouble knowing whether they were a "sincere" or "genuine" member of that party. The term "affiliate" is also commonly understood. As Plaintiffs point out, it means "a condition of being united, being in close connection, allied, or attached as a member or branch." (Pls.' Memorandum, ECF No. 22, PageID# 107 (citing Black's Law Dictionary).) A person of ordinary intelligence would know what it means

basis, and a facial challenge before the statute has been applied is premature." *Nat'l Rifle Ass'n of Amer. v. Magaw*, 132 F.3d 272, 292 (6th Cir. 1997).

to "affiliate" with a particular political party.

And there can be no serious debate that the term "allegiance" is widely used and commonly understood. After all, citizens have been pledging "allegiance" to the flag of the United States for more than a century. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6-7 (2004) (observing that the Pledge of Allegiance was first conceived in 1892 and codified by Congress in 1942). In common usage, it means "loyalty or devotion" to some person, group, or cause. Webster's New Universal Unabridged Dictionary, 55 (1996).

Furthermore, the Supreme Court "has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." *Colatti v. Franklin*, 439 U.S. 379, 395 (1979). And here, the statutes that make it a criminal offense to violate § 2-7-115(b) include a scienter requirement. *See* Tenn. Code Ann. § 2-19-102 (requiring that a person act "knowingly"); Tenn. Code Ann. § 2-19-107 (requiring that a person act "intentionally and knowingly."). The wording of the statutes does not, therefore, encourage arbitrary or discriminatory enforcement. Since there is a requirement that the violation be knowing and/or intentional and the words used in § 2-7-115(b) are understandable by the ordinary person, the statute is not void for vagueness.

2. Subsections (b) and (c) of the statute are not overbroad and thus do not violate the First Amendment.

In Count Two of the Complaint, Plaintiffs claim that § 2-7-115(b) and (c) suffer from overbreadth and thus violate their freedom of speech under the First Amendment. (Compl., ECF No. 1, PageID# 18-19.) Plaintiffs allege that "[b]y combining a prominently threatening sign with an impossibly vague law, Section 115 penalizes or deters an extraordinary range of protected voting conduct," as well as "expressive conduct that accompanies voting." (*Id.* at PageID # 18, ¶¶ 92-93.)

In the context of a First Amendment overbreadth claim, a law fails to survive the facial challenge only if a substantial number of its applications are unconstitutional, judged in relation to the law's plainly legitimate sweep. *Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442. 449 n.6 (2008); *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). Courts exercise restraint in facial challenges, which are disfavored for a variety of reasons: (1) they often rest on speculation (which is the case here); (2) they run contrary to the fundamental principles that courts should not decide a question of law in advance of the need to decide it and should not formulate a law that is broader than it needs to be; and (3) they threaten to short-circuit the will of the people, because "a ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Washington State Grange*, 552 U.S. at 450-51. The court "must not go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases." *Id.* at 450. And the "strong medicine" of overbreadth analysis is generally not applied "where the parties fail to describe the instances of arguable overbreadth of the contested law." *Id.* at 449 n.6.

Plaintiff's overbreadth challenge to § 2-7-115(b) and (c) will fail—first because the statute has a plainly legitimate sweep. The Constitution grants States broad power to prescribe the time, place, and manner of state elections. Art. I, § 4, cl. 1; *Tashijan v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *Timmons*, 479 U.S. at 358. Primaries constitute a critical juncture in the electoral process. *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000). The respective parties have a First Amendment associational right to form political parties for the advancement of common political goals and ideals. *Colorado Republican Federal Campaign Comm'n v. Federal Election Commission*, 518 U.S. 604, 616 (1996). The parties also have the right to select their "standard bearer" for the general election. *Eu*, 489 U.S. at 224. It is incumbent on the State to protect those interests. *Timmons*, 520 U.S. at 357-58. The States have the right to ensure the

orderly process of primary elections, which includes protecting against cross-over voting and "party raiding." *Rosario*, 410 U.S. at 760-61 (1973).

Second, Plaintiffs cannot show that a substantial number of the statute's applications are unconstitutional when "judged in relation to the statute's plainly legitimate sweep." *Washington State Grange*, 552 U.S. 449 n.6. As discussed above, Subsection (b)'s terms are not vague or indefinite. And Subsection (c) merely calls for polling-place signage that informs primary voters of the requirements of Subsection (b). Plaintiffs are therefore wrong in asserting that it is "impossible to determine whether a statute reaches too far" because they do not know what the statute covers. (Pls.' Memorandum, ECF No. 22, PageID# 112.) Plaintiffs' contention that prospective primary voters "might turn away from the polls" out of fear or confusion regarding § 2-7-115(b)'s requirements, (*id.* at PageID# 113), amounts to nothing more than speculation. Indeed, even if a voter had a real concern about their bona fide party membership under Subsection (b)(1), they could simply declare allegiance to the party and state their intention to affiliate under Subsection (b)(2). And Plaintiffs' suggestion that § 2-7-115(b)'s requirements "could also chill political expression generally," (Pls.' Memorandum, ECF No. 22, PageID# 113), is entirely fanciful.

c. Plaintiffs Will Not Suffer Irreparable Harm if No Injunction Issues.

A preliminary injunction is also not warranted because Plaintiffs will not suffer irreparable harm in the absence of an injunction. Again, § 2-7-115(b)'s provisions have been in place for 50 years—there is no reason now to suddenly conclude that the statute causes harm, let alone irreparable harm. As discussed above, the statute does not violate Plaintiffs' constitutional rights. And again, if Plaintiffs Ashe and Lawson are concerned that their "bona fide" membership in a party may be questioned for purposes of primary voting, they need only declare allegiance to that

party at the primary election and state that they intend to affiliate with the party. *See* Tenn. Code Ann. 2-7-115(b)(2). The Plaintiff League of Women Voters may likewise offer that same advice to its members. Insofar as the Plaintiff League of Women Voters complains about the loss or diversion of approximately $3,000 to educate the voting public, (Compl., ECF No. 1, PageID# 6), such alleged financial harm is not irreparable for purposes of seeking injunctive relief. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992).

d. The Issuance of an Injunction Would Harm the State and the Public Interest.

A preliminary injunction would, however, cause harm to the State and the public interest. Whenever a state government is enjoined by a court from enforcing its own laws, it suffers a form of irreparable injury. *See generally Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 (recognizing that enjoining a State from enforcing its laws would "seriously and irreparably harm the State"). Furthermore, the public has a significant interest in the enforcement of laws enacted by their duly elected representatives. *See Priorities USA v. Nessel*, 860 F. App'x 419, 423 (6th Cir. 2021) (stating that "the public interest necessarily weighs against enjoining a duly enacted statute").

CONCLUSION

For the reasons stated, Plaintiffs' Motion for Preliminary Injunction should be denied.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter

/s/ *Dawn Jordan*
DAWN JORDAN
Special Counsel

ZACHARY L. BARKER
Assistant Attorney General

Public Interest Division
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-6440
Dawn.Jordan@ag.tn.gov
Zachary.Barker@ag.tn.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been filed electronically on January 3, 2024. Parties may access this filing through the Court's electronic filing system.

R. Culver Schmid, BPR No. 011128
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
265 Brookview Centre Way, Suite 600
Knoxville, TN 37919

Collin P. Wedel
Sidley Austin LLP (LA Office)
555 West 5th Street Suite 400
Los Angeles, CA 90013

Gary Shockley, BPR No. 010104
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
1600 West End Avenue, Suite 2000
Nashville, TN 37203

Eric G. Osborne, BPR No. 029719
Christopher C. Sabis, BPR No. 030032
William L. Harbison, BPR No. 007012
Frances W. Perkins, BPR No. 040534
Sherrard Roe Voigt & Harbison, PLC
150 3rd Avenue South, Suite 1100
Nashville, TN 37201
Counsel for Plaintiffs Victor Ashe and Phil Lawson

John E. Haubenreich, BPR No. 029202
The Protect Democracy Project
2020 Pennsylvania Avenue NW, #163
Washington, DC 20006

Orion Danjuma
The Protect Democracy Project
82 Nassau St. #601
New York, NY 10038

Jillian Sheridan Stonecipher
Rebecca B. Shafer
Sidley Austin LLP
One South Dearborn
Chicago, IL 60603
Counsel for Plaintiff League of Women Voters of Tennessee

/s/ *Dawn Jordan*
DAWN JORDAN
Special Counsel