IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
Nashville Division

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

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Victor Ashe, Phil Lawson, and the League of Women Voters of Tennessee (the "League") respectfully submit this response to Defendants' Motion to Dismiss. Defendants move to dismiss on the basis of lack of standing, sovereign immunity, laches, and the statute of limitations. This Court should reject all four arguments and deny the motion to dismiss.

Plaintiffs have standing because Defendants are the state officials charged with investigating and recommending prosecution of violations of election law, including the statute at issue in this case, Tenn. Code. Ann. § 2-7-115(b) ("Section 115(b)"), and with overseeing elections, including instructions to put up or not put up the sign required by Tenn. Code Ann. § 2-7-115(c) ("Section 115(c)"). An injunction preventing Defendants from engaging in their prosecutorial work or instructing county election officials not to put up the sign would redress Plaintiffs' injury. Likewise, since Defendant Hargett has already threatened prosecutions under Section 115(b), only to have the legislature act upon his threat by passing Section 115(c) and requiring signs across the state, there is very much a "realistic possibility" that Defendants will take legal or administrative action against Plaintiffs, which is sufficient to satisfy the *Ex Parte Young* exception to sovereign immunity.

Nor does laches bar Plaintiffs' claims. Defendants make no argument that they have been prejudiced in a manner necessary to invoke laches, as the relief requested would only require that they not enforce unconstitutional laws and will not affect the mechanics of the March primary and subsequent primaries. Plaintiffs also did not unreasonably delay in bringing this lawsuit under the circumstances because the legislature just enacted Section 115(c), officials recently discussed and brought prosecutions, the political climate changed, and Defendants will not need to revamp the election process. Defendants' statute of limitations argument is also meritless, as Plaintiffs' claims seek prospective relief from a continuing violation of their constitutional rights.

Ultimately, Defendants' argument confuses form for substance. The reality is that an injunction against Defendants will redress Plaintiffs' injuries, at least in part, and there has been no unreasonable delay or prejudice. The Motion to Dismiss should be denied.

ARGUMENT

I. Plaintiffs Each Have Standing To Sue Defendants.

Despite Defendants arguments to the contrary, each of the Plaintiffs have established standing to sue the Defendants.

A. Plaintiffs Ashe and Lawson Have Standing.

To establish standing, Plaintiffs Ashe and Lawson must show: (1) "that [they] ha[ve] suffered an 'injury in fact': that is, some invasion of [their] legal interests that is both 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical;'" (2) "that there is a 'causal connection' between [their] injury and the[Defendants'] actions;" and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Price v. Medicaid Dir.*, 838 F.3d 739, 745 (6th Cir. 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).; *see also Ass'n of Am. Physicians & Surgeons v. United States Food & Drug Admin.*, 13 F.4th 531, 537 (6th Cir. 2021); *Davis v. Colerain Twp., Ohio*, 51 F.4th 164, 171 (6th Cir. 2022). Plaintiffs have established each of these elements, and Defendants' arguments to

the contrary are meritless.

First, Defendants do not (and cannot) dispute that Plaintiffs Ashe and Lawson have an injury-in-fact.[1] A plaintiff can "establish an injury-in-fact based on its 'intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute.'" *Tenn. State Conf. of the N.A.A.C.P. v. Hargett*, 441 F. Supp. 3d 609, 625 (M.D. Tenn. 2019) (quoting *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979)). There can be no question that Plaintiffs Ashe and Lawson have an injury-in-fact because the statute threatens criminal sanctions if they vote in the primary election, and Plaintiffs Ashe and Lawson fear prosecution if they exercise their fundamental constitutional right to vote in either political party primary. *See id.* (plaintiffs suffered injury-in-fact where statute placed plaintiffs at risk of civil fines and criminal sanctions for engaging in voter registration activities and communications).

In addition, despite Defendants' contentions to the contrary, Plaintiffs Ashe and Lawson have established a causal connection between their injury-in-fact (the threat of prosecution for exercising their right to vote) and Defendants' actions (the investigation and enforcement of election laws). Defendants argue that Plaintiffs do not have "an actual, credible, concrete or reasonable fear of prosecution" from the named Defendants. Br. at 6. But Plaintiffs Ashe and Larson need only show that their injury "fairly can be traced to the challenged action," and "[t]he causation need not be proximate" at the pleading stage. *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 713 (6th Cir. 2015). Causation exists here because each of the Defendants plays a role in investigating and enforcing the State's election laws.

Specifically, under Tennessee law, the Attorney General (Defendant Skrmetti) is

[1] In a separate part of the brief focused on laches, Defendants note that the State of Tennessee did not prosecute under Section 115(b) for close to fifty years. But Defendants do not deny that (a) Defendant Hargett gave a public speech, covered by media, noting that people could be prosecuted, (b) that subsequently prosecutions were brought, and (c) that the legislature then passed Section 115(c). As explained below, those are precisely the types of actions that may have emboldened prosecutors.

empowered to request that the State Coordinator of Elections (Defendant Goins) conduct investigations into, and report violations of, election laws including Section 115(b). *See* Tenn. Code Ann. § 2-11-202(a)(5)(C)(i); *Tenn. State Conf. of the N.A.A.C.P.*, 441 F. Supp. 3d at 623 (explaining that the Tennessee Attorney General is "at least[] empowered to request that the Coordinator conduct investigations under the Act."). The State Coordinator of Elections (Defendant Goins), in turn, has the express duty to "investigate or have investigated by local authorities the administration of the election laws and report violations to the district attorney general or grand jury for prosecution . . . ." Tenn. Code Ann. § 2-11-202(a)(5)(A)(i). In other words, Defendant Goins is charged with investigating or ordering investigations into possible violations of Section 115(b), all with the express statutory aim of prosecuting such conduct. And the Tennessee Secretary of State (Defendant Hargett) oversees the State's election process and appoints the state's Coordinator of Elections (Goins), who serves at the pleasure of the Secretary; thus, the Secretary of State has authority over investigations into alleged election law violations by the Coordinator of Elections. *Id.* § 2-11-201(a); *see Tenn. State Conf. of the N.A.A.C.P.*, 441 F. Supp. 3d at 622. In short, Defendants' role in investigating election law violations plainly is traceable to any prosecutions that arise from such investigations. *See Parsons*, 801 F.3d at 714 (finding causation for standing purposes where the defendant's conduct was a "motivating factor" that caused the plaintiff's injury, even though the defendant did not "giv[e] a direct order" for a third party to carry out the injury).

Furthermore, Defendants' arguments as to redressability are meritless. An injury is redressable if a court order can provide "substantial and meaningful relief." *Parsons*, 801 F.3d at 715 (quoting *Larson v. Valente*, 456 U.S. 228, 243 (1982)). "The relevant standard is likelihood—whether it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC) Inc.*, 528 U.S. 167, 181 (2000). Enjoining each of the Defendants would mean that all three state

officials with authority to investigate or order others to investigate and refer prosecutions are stopped from doing so. That is likely to redress Plaintiffs' injury. *See Brown v. Kemp*, 86 F.4th 745, 770 (7th Cir. 2023) (where, in the context of a pre-enforcement challenge of claims brought under the First and Fourteenth Amendments, the court explained that while "it would … be possible that a few rogue law enforcement officers might still mistakenly try to enforce the [law, t]hat possibility does not undercut redressability or standing. We can expect the vast majority of officials to comply with a federal court injunction and declaratory judgment"); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 169 (2000) (where a remedy encourages defendants to discontinue violations, the remedy affords redress: "Insofar as the[] [civil penalties] encourage defendants to discontinue current violations and deter future ones, the[] [civil penalties] afford redress to citizen plaintiffs injured or threatened with injury as a result of ongoing unlawful conduct.").

Indeed, Defendants do not even attempt to challenge Plaintiffs' standing to bring a First Amendment claim related to the sign required by Section 115(c), which Plaintiffs allege deters voting behavior and expressive conduct that accompanies voting. Rather, Defendants focus on what they call "an anti-enforcement injunction," *e.g.*, Br. at 6, not the prohibition of the signs mandated by Section 115(c). Defendants make no arguments about why an injunction against them involving the signage would not redress Plaintiffs' First Amendment claim related to the signage.[2] That failure is crucial, because an injunction as to Section 115(c) would in fact redress Plaintiffs' First Amendment claims as they related to the signage required by that section. Defendant Hargett oversees Tennessee's election process and is charged with administration of the elections. Compl.

[2] The only references in the Motion about Section 115(c) are two footnotes stating that the law "simply requires signage that provides information as to the requirements and implications of" Section 115(b), and that "an injunction as to the signage would not redress the alleged fear of prosecution from these Defendants." Br. at 8 n.1, 13 n.3. Thus Defendants limit any argument as to Section 115(c) to fear of prosecution.

¶ 19. The process and administration of the elections includes the requisite posting of signs under Section 115(c). Defendant Goins is charged under Tennessee law with "[a]dvis[ing] election commissions, primary boards, and administrators of elections as to the proper methods of performing their duties," Tenn. Code Ann. § 2-11-202(a)(3), and with providing other materials such as an election laws manual, instructions, and training. *Id.* §§ 2-11-202(a)(7)–(9).[3] If Hargett and Goins are enjoined from enforcing Section 115(c), they will necessarily not advise, train, instruct, and otherwise administer elections officials to put up the sign Section 115(c) requires.[4] Plaintiffs' injunction against Defendants will thus necessarily give Plaintiffs the relief they seek under the First Amendment—a point, again, that Defendants do not contest.[5]

Instead, relying on *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021 (6th Cir. 2022), Defendants contend that Plaintiffs lack standing because Defendants do not have direct authority to prosecute violations of Section 115(c). Br. at 7.[6] Ironically, however, that very

[3] Defendant Goins is also charged under state law with "obtain[ing] and maintain[ing] uniformity in the application, operation and interpretation of the election code" which would include obtaining uniformity in the operation and application of Section 115(c). *See* Tenn. Code Ann. § 2-11-201(b).

[4] Defendant Skrmetti can request that Defendant Goins investigate and report violations of election laws. Failure to put up a sign would violate Section 115(c), so Skrmetti too has power to enforce Section 115(c). He too should be enjoined from making such a request.

[5] Though Plaintiffs meet the standing threshold for their First Amendment claim, Plaintiffs further note that "[w]ithin the context of the First Amendment, the [United States Supreme] Court has enunciated other concerns that justify a lessening of prudential limitations on standing." *Secretary of State of Md. v. J. H. Munson Co.*, 467 U.S. 947, 956–57 (1984) (noting that because litigants may be fearful of bringing claims, when "there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.")

[6] Defendants also quote Ashe and Lawson's declarations to contend that Ashe and Lawson fear prosecution from the political parties and not Defendants. Br. at 6. That argument takes the declarations out of context. In both instances, the relevant quotations were part of pointing out that neither Ashe nor Lawson know if they would be considered bona fide members of their respective parties, and that they therefore fear they could be prosecuted if a party were to determine that they are not bona fide. Of course the political parties are not the ones who would actually prosecute—Defendants correctly state that local District Attorneys do that. But since the parties determine their members, they could ask someone to investigate and refer for prosecution, and under state law Defendants are the state officials charged with conducting such investigations and making prosecutorial referrals.

case shows why Plaintiffs Larson and Ashe have standing. In *Universal Life*, a religious organization, its ministers, and couples who wished to get married brought a pre-enforcement challenge to a Tennessee law that banned persons who received their ordinations online from performing civil marriages. 35 F.4th at 1028. The Sixth Circuit found that the plaintiffs in *Universal Life* did not have standing to sue the Tennessee Attorney General because the Attorney General could not initiate prosecutions, command the District Attorneys to initiate them, or even "indirectly entice" prosecution. *Id.* at 1032 ("Tennessee's Attorney General is limited to handling appeals, reporting court decisions, offering advisory opinions, suing to recover public funds, and defending the constitutionality of state statutes."). The Sixth Circuit also stated that the plaintiffs came "closer" to alleging that the Attorney General's interpretative opinions about the at-issue ordinations caused them harm, but the plaintiffs had not shown a "viable" judicial remedy that "would at least partially relieve their injury" because the opinions had already been published. 35 F.4th at 1032–33.

Here, the situation is different. Unlike the Attorney General in *Universal Life*, the Defendants here *can* "entice" prosecutions. Defendants Skrmetti and Goins are expressly authorized under law to direct investigations into election code violations—including violations of Section 115(b)—and refer them for prosecution. *See* Tenn. Code Ann. §§ 2-11-202(a)(5)(A)(i), 2-11-202(a)(5)(C)(i). And Defendant Hargett also plays an integral role in enforcing the election code, given his duty to oversee the State's election process and appoint Goins, who serves at his pleasure.[7] Moreover, there absolutely is a "viable remedy" Plaintiffs seek against Defendants which would "at least partially relieve their injury": the prevention of prosecutions under Section 115(b). If anything, the Sixth Circuit's reasoning in *Universal Life* underscores the reasons why

[7] Such enforcement is particularly salient given the context surrounding the challenged law. Investigations into potential violation(s) of Section 115(b) have recently been conducted, Hargett made public comments emphasizing an intent to begin enforcement of Section 1115(b), and the legislature, which appoints Hargett, passed Section 115(c) which went into effect in May 2023.

Plaintiffs have standing against Defendants.

Defendants suggest that Plaintiffs should sue all thirty-two District Attorneys General in the state. This ignores that standing "'is not intended to be a particularly high bar[.]'" *Brasfield & Gorrie,* 534 F. Supp. 3d at 754–55. Functionally, Defendants are the ones charged with enforcing elections laws and referring prosecutions, and an injunction against them would be meaningful relief that would foreclose most, if not all, potential prosecutions. For example, if Defendant Skrmetti cannot recommend an investigation, Defendant Goins cannot investigate or recommend prosecution, and Defendant Hargett cannot enforce the law generally, then all of the state officials who are actually charged with investigating and recommending prosecutions under Section 115(b) will be stopped from doing so. It is highly unlikely that the Knox County District Attorney, or any other District Attorney in the state, will prosecute under Section 115(b) without any instruction from Defendants and in the face of an injunction against the state officials.

B. Plaintiff League of Women Voters Has Standing.

Defendants also challenge the League's standing on the basis that the League has not "suffered an injury in its own right," that its allegations are "mere conjecture," and that the failure to have a named plaintiff who is an injured member defeats the League's representational standing. Br. at 8-10. The Court need not even consider these arguments because, in cases involving multiple plaintiffs, courts need not consider the standing of co-plaintiffs as long as any one plaintiff has sufficiently alleged standing for each claim asserted and form of relief requested. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n. 2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *see also Sch. Dist. of City of Pontiac*, 584 F.3d 253, 261 (6th Cir. 2009) ("Since at least one Plaintiff in this action has standing, there is no need to consider whether the education association Plaintiffs also have standing."); *Memphis A. Phillip Randolph Inst. v. Hargett*, 485 F.

Supp. 3d 959, 975 (M.D. Tenn. 2020) (Richardson, J), *vacated and remanded by* 2 F.4th 548 (6th Cir. 2021) ("As set forth below, the Court concludes that at least one plaintiff has standing to challenge the first-time voter restriction, and so the Court may proceed to grant (as it finds appropriate) relief on this aspect of the Motion.").

Moreover, standing "'is not intended to be a particularly high bar; instead, the doctrine serves to prevent a litigant from raising another's legal right.'" *Brasfield*, 534 F. Supp. 3d at 754–55 (E.D. Ky. 2021) (citing 59 Am. Jur. 2d Parties § 29 (2020)). The League has articulated specific harm to both itself directly and to its members, each of which is sufficient to find standing.

As to direct harm, the League has sufficiently pled harm to the organization both on a "frustration of mission" basis as well as a "diversion of resources" basis. In *Havens Realty Corp*., the Supreme Court recognized the critical role organizations play in challenging unconstitutional laws when those laws frustrate or impair the mission of the organization itself:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, *there can be no question that the organization has suffered injury in fact.* Such concrete and demonstrable *injury to the organization's activities*—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (emphasis added). The Sixth Circuit has also long recognized organizational standing where an organization experiences a "frustration" of its mission due to an unconstitutional law. *See, e.g.*, *Hughes v. Peshina*, 96 F. App'x 272, 274 (6th Cir. 2004) (finding organization had "alleged a distinct and palpable injury and has sufficiently established its standing" where it "devoted its efforts to investigating whether [defendants] had violated the law, thus diverting its resources away from the other housing services it provides *and frustrating its mission of insuring fair housing practices*." (emphasis added)); *League of Women Voters of Michigan v. Johnson*, 352 F. Supp. 3d 777, 801 (E.D. Mich. 2018), *rev'd and remanded with regard to third-party intervenors only*, 2018 WL 10096237 (6th Cir.

Dec. 20, 2018) ("An organization suffers an injury in fact *when its mission is 'perceptibly impaired' by the challenged action*, which it may show through a 'demonstrable injury to the organization's activities' and a 'consequent drain on the organization's resources.'" (emphasis added)); *Friends of Georges, Inc. v. Mulroy*, No. 2:23-CV-02163-TLP-tmp, 2023 WL 3790583, at *11 (W.D. Tenn. June 2, 2023) (finding organizational standing where plaintiff organization argued that statute impaired its mission); *see also Havens*, 455 U.S. at 369 (finding organizational standing where plaintiff alleged that its counseling and referral services had been frustration, "with a consequent drain on resources").

The League has alleged such a "frustration of mission" and "perceptible impairment" of its activities: "[G]iven the League's core mission and activities to educate and assist voters, the statute prevents LWVTN from fulfilling its primary function of providing voter information because it does not know how to inform its members and the general public accurately and effectively on voting issues related to the upcoming primaries . . . ." Compl. ¶ 18. The League has also alleged a diversion of resources, namely that it "need[s] to budget approximately $3000 to adequately respond to the voter confusion, intimidation, and uncertainty created by these laws ahead of the 2024 primary election" —"money that [it] would otherwise use on voter registration and get-out-the-vote efforts." *Id.*

Recognizing that the League has adequately pled diversion of resources, Defendants rely on *Fair Elections Ohio* to argue that such an expenditure is insufficient to confer standing. *Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014). This argument, however, has been rejected by both this Court and the Sixth Circuit. In *Online Merchants Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021), the Sixth Circuit held that expenditures by the plaintiff organization responding to the purportedly illegal action satisfied organizational standing requirements. 995 F.3d at 547–49. The *Online Merchants Guild* defendants—much like Defendants here—argued that the plaintiff's "expenditures [failed] to establish direct organizational standing because they fall within its

mission to advocate for the interests of online merchants." *Id.* at 548.[8] The Sixth Circuit found that defendants' "sweeping proposition" that there is no diversion of resources, and thus no injury-in-fact, where an organizational plaintiff's new expenditures are actually part of the organization's mission, would contradict "various earlier—and thus controlling—cases . . . from this circuit, not to mention Supreme Court precedent, *all of which affirm that within-mission organizational expenditures are enough to establish direct organizational standing.*" *Id.* (emphasis added).[9]

Even more recently, a court in this district rejected the exact same argument (also made by the Tennessee Attorney General):

> The State Defendants' challenges to TN NAACP's standing are without merit. They contend that TN NAACP cannot establish standing based on direct harm because the alleged resource expenditures are (1) self-inflicted and (2) fall within its mission. . . . *The State Defendants' second argument – that TN NAACP cannot establish standing based on direct harm because the alleged resource expenditures fall within its mission – has been expressly rejected by the Sixth Circuit.*

Tenn. Conf. of the NAACP v. Lee, No. 3:20-CV-01039, 2022 WL 982667, at *4–5 (M.D. Tenn. Mar. 30, 2022) (Campbell, J.) (emphasis added) (citing *Online Merchants Guild*); *see also League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 728–29 (S.D. Ohio 2020) (finding organizational standing despite the fact that there was "not a change in law" but rather a "significant change in circumstances") (rejecting application of *Fair Elections Ohio* to the facts of the case). The Court should similarly reject Defendants' arguments here and find that the League has organizational standing to pursue its claims.

With respect to representative standing, an organization "has standing to bring suit on

[8] *See* Br. at 9–10 ("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*." (emphasis added)).

[9] *See also Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 806 (E.D. Mich. 2020) ("Contrary to defendant's suggestion that the Sixth Circuit rejected the diversion of resources theory of standing in *Fair Elections Ohio v. Husted*, the theory is alive and well in this Circuit. As plaintiffs point out, a multitude of cases support this theory." (citing cases)).

behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Commn*, 432 U.S. 333, 343 (1977). Defendants do not challenge representative standing on the basis of the second or third elements; rather, they argue that the "League has not established that any of its members have a reasonable fear of prosecution for violating § 2-7-115(b)." Br. at 10.

As discussed above, the enactment of sections 115(b) and 115(c)—together with the public statements of Defendant Hargett and others—establishes the reasonable fear of prosecution on behalf of the individual plaintiffs and League members who "identify as independent voters" and "may be subject to prosecution given the vague terms of the statute." Compl. ¶ 18. What is more, these recent actions "are likely to prevent some League members from voting" altogether. *Id.* Defendants also argue that the League's representative standing claims are doomed by the fact that "no member of the League of Women Voters *is a plaintiff in this case*." Br. at 10 (emphasis added). This argument, however, plainly contradicts the Supreme Court's representational standing precedent, which makes clear that "neither the claim asserted nor the relief requested *requires the participation of individual members in the lawsuit*." *Hunt*, 432 U.S. at 343 (emphasis added). The League has pled that it has members who "self-identify as Democrats, other members who self-identify as Republicans, and others who identify as independent voters" and that the challenged law is "likely to prevent" at least some of those members from voting. Compl. ¶ 18. Because those members have standing, the League has representative standing. Whether or not those individual members participate in the lawsuit is immaterial.[10]

[10] Defendants' argument against the League focuses on standing. To the extent their sovereign immunity argument is also directed against the League, it fails for the same reasons stated herein as to the First Amendment claim and Plaintiffs Ashe and Lawson. There is a realistic possibility Defendants will take administrative action against the League and/or its members.

II. Plaintiffs' Claims Are Not Barred By Sovereign Immunity.

Defendants next argue that they are entitled to sovereign immunity. While ostensibly a separate legal issue from standing, Defendants' actual argument is the same. Defendants contend that because they are not the officials who actually prosecute criminal defendants, there is no connection between them and Plaintiffs' injury to provide standing, nor is there a "realistic possibility" of any Defendant taking prosecutorial action against Plaintiffs to satisfy the *Ex Parte Young* exception to sovereign immunity. This argument fails.

While the State of Tennessee is entitled to sovereign immunity, state officers, such as Defendants, may be enjoined under *the Ex Parte Young* framework for "their future actions on behalf of the state if those actions would violate the federal constitution." *Universal Life*, 35 F.4th at 1040. To sue state officers like the Defendants, Plaintiffs merely need to show that "there is a realistic possibility the official will take legal or administrative actions against the plaintiff's interests, like promulgating regulations or even administering a database." *Id.* at 1040–41 (internal quotation and citation omitted).

Defendants argue that they have sovereign immunity because there is not a realistic possibility any of them will violate the constitution by taking legal or administrative action against Ashe and Lawson's interests. Br. at 11–13. This argument ignores the clear role all three Defendants play in the enforcement of Section 115(b) and the meaningful relief Plaintiffs would obtain if Defendants are enjoined, as discussed above. For the reasons discussed above with regard to standing, there is a "realistic possibility" that Defendants Hargett and Goins will "take legal or administrative actions against [Plaintiffs'] interests," such as advise, train, and instruct election officials to put up the sign, which satisfies the *Ex Parte Young* exception to sovereign immunity. *See Universal Life*, 35 F.4th at 1040–41. Also, Defendants are charged under state law with investigating election violations and referring them for prosecution. In *Universal Life*, the Sixth Circuit held that even just promulgating regulations or administering a database is sufficient to be

a "legal or administrative action against the plaintiff's interests" sufficient for the *Ex Parte Young* exception to sovereign immunity to apply. *Id.* Defendants here are charged with doing much more than that: Defendant Hargett gave a speech covered by media warning about prosecution under Section 115, the first ever prosecutions were brought, and the legislature passed a law requiring a sign threatening prosecution at all voting places in the state. This conduct establishes, at a minimum, a realistic possibility Defendants will take action against Plaintiffs. This Court should reject the sovereign immunity argument.[11]

III. The Equitable Doctrine of Laches Does Not Bar Plaintiffs' Claims

Defendants' argument that all of Plaintiffs' claims are barred by the doctrine of laches also fails for several reasons. First, Defendants have not been prejudiced by any alleged delay by Plaintiffs, and prejudice is a required element of laches in the Sixth Circuit. Second, Defendants' argument that Plaintiffs unreasonably delayed in bringing this case ignores the allegations in the Complaint, which comprise the circumstances for considering whether any delay was unreasonable at the pleading stage. Finally, even if unreasonable delay and prejudice were present here, the Court should exercise its discretion to not apply laches in this case.

A. Legal Standard

"The applicability of laches in a particular context often is, to say the least, an unpredictable matter." *Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 792 (M.D. Tenn. 2020) (Richardson, J.) (citing Eli J. Richardson, *Eliminating the Limitations of Limitations Law*,

[11] The recent flurry of activity and recent legislative enactment also undercut any relevance to the fact that Plaintiff Ashe co-sponsored the original legislation for Section 115(b) in 1972. That fact has no legal salience. Legislators are allowed to change their position, especially more than fifty years later, as President Biden recently did when he signed the Respect for Marriage Act that repealed the Defense of Marriage Act he had voted for decades before. Ashe did not sponsor or vote for Section 115(c); nor did he control the Republican Party's recent changes to its definition of bona fide member. Given the recent changes that have led the law to be used to intimidate voters, as opposed to just prevent cross-over voting, Ashe's sponsoring of the law in a completely different context has no relevance to his standing here.

29 Ariz. St. L. J. 1015, 1065–67 (1997)). In the Sixth Circuit, "laches is 'a negligent and unintentional failure to protect one's rights.'" *United States v. City of Loveland, Ohio*, 621 F.3d 465, 473 (6th Cir. 2010) (quoting *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991)). "In a larger sense, laches is principally a question of the inequity of permitting a [particular] claim to be enforced." Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L. J. at 1066 (internal quotation marks omitted).

Assuming that the doctrine is applicable, a "party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Hargett*, 473 F. Supp. 3d at 793 (quoting *City of Loveland*, 621 F.3d at 473). "The first element is sometimes articulated in a somewhat different manner, *i.e.*, as *unreasonable delay in asserting one's rights.*" *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 753 (M.D. Tenn. 2020) (Richardson, J.) (citing *Operating Engineers Local 324 Health Care Plan v. G & W Const. Co.*, 783 F.3d 1045, 1053 (6th Cir. 2015)). "As laches is an affirmative defense, the burden of establishing both of these elements is on the party raising the defense. . . ." *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 439 (6th Cir. 2006). But even if both required elements are present, "dismissal under the laches doctrine 'is not mandatory and is appropriate only in the sound discretion of the court.'" *Lichtenstein*, 489 F. Supp. 3d at 753 (quoting *Stiltner v. Hart*, No. 5:13-CV-203-KKC-HAI, 2018 WL 3717209, at *1 (E.D. Ky. Jan. 24, 2018)).

B. Defendants Have Not Established Prejudice

In this case, the application of the second element of laches—"prejudice to the party asserting it"—is more straightforward than the application of the first element. In the context of laches, there are two types of possible prejudice (1) the delay has resulted in the loss of evidence which would support the defendant's position; or (2) the defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed. *Lichtenstein*, 489 F. Supp. 3d at 754 (quoting *Blake v. City of Columbus*, 605 F. Supp. 567, 571 (S.D. Ohio 1984)). Even assuming

for the sake of argument that Plaintiffs unreasonably delayed in bringing their claims, Defendants have not shown that they suffered either form of prejudice as a result of that delay.

Defendants make no effort to show a loss of evidence favorable to their position. Instead, they rely on the second category, arguing that they have been prejudiced because "preservation of the electoral process is a legitimate and valid state goal." Br. at 15 (citing *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973)). This confuses prejudice from delay with a general legitimate state purpose. It is true that Defendants have a legitimate interest in preserving the integrity of primary elections, and political parties have a First Amendment right to freedom of association. *Id.* But that is insufficient to establish prejudice under the second category unless Defendants can show a change in their position that would not have occurred absent Plaintiffs' alleged delay. *See Lichtenstein*, 489 F. Supp. 3d at 754 (quoting *Blake*, 605 F. Supp. at 571). Defendants would have made the same arguments defending the constitutionality of the statute regardless of when Plaintiffs filed this lawsuit. *Cf. Aguayo v. Christopher*, 865 F. Supp. 479, 491 (N.D. Ill. 1994) ("The Government argues instead that it would be prejudiced from the consequences of a decision favorable to Aguayo. But those consequences are no different now than they were when Aguayo emigrated to the United States in 1962 . . . ."). Whether or not Defendants have a legitimate interest in enforcing the challenged law,[12] some other form of administrative complication resulting from the allegedly delayed filing is necessary to show prejudice. *See Mich. Chamber of Com. v. Land*, 725 F. Supp. 2d 665, 681–82 (W.D. Mich. 2010) ("[T]he Secretary does not come close to establishing the second element of laches: she fails to show how her office, or the State of Michigan or its voters or citizens or corporations generally, have been meaningfully prejudiced by the

[12] Defendants' claim to a legitimate interest in enforcing this law in order to preserve the integrity of primary elections presumes that the law is constitutional. If the law is unconstitutional, no such interest exists. *See Wineries of the Old Mission Peninsula Ass'n v. Township of Peninsula, MI*, No. 22-1534, 2022 WL 22236853, at *3 (6th Cir. Aug. 23, 2022) (maxim that a state suffers irreparable injury if enjoined from effectuating statutes does not apply the statutes are unconstitutional) (citing *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (per curiam)).

plaintiffs' undue delay. It is true that [t]he state has a compelling interest in the orderly process of elections. . . . In our case, however, the Secretary has not alleged, let alone provided evidence of, some substantial administrative or logistical difficulties, confusion, disorganization, or expense which would be caused if the court allowed the plaintiffs to press these admittedly delayed constitutional claims.") (quotation marks omitted). Defendants have wholly failed to show any such administrative complication.

Furthermore, although the amount of prejudice that a party must demonstrate may vary with the length of the delay, here Defendants have submitted no declarations or other evidence in support of any increased administrative burden. *Cf. Hargett*, 473 F. Supp. 3d at 800 (the defendant's declaration showing some prejudice was sufficient to invoke laches given the facts of the case). Nor have Defendants provided evidence that they have incurred more expense in responding to the motion than they would have absent the delay, though that would fall short of establishing prejudice anyway. *A.S. v. Lee*, No. 3:21-cv-0600, 2021 WL 3421182, at *7 (M.D. Tenn. Aug 5, 2021) (Richardson, J.) ("if a delay in the filing of a motion for [a Temporary Restraining Order] inconvenienced the non-movant, or required it to concentrate more resources on responding to the motion than it otherwise would have had to, that would fairly be characterized as 'prejudice' but probably would not constitute a cognizable kind of prejudice in this context").

Defendants cannot make the necessary showing of prejudice because this is a case where "an injunction against enforcement of the Law would not directly or perceptibly require Defendants, or anyone else, to scramble to revamp election procedures or do anything else. Instead, such an injunction would require only that Defendants not do something, *i.e.*, not do anything to enforce the Law." *Lichtenstein*, 489 F. Supp. 3d at 756. There is no evidence in the record that enjoining the display of the sign required by Section 115(c) and enforcement of the criminal prohibition at issue would require Defendants to "scramble to revamp" the March 2024 primary election. Rather, it would require Defendants to do nothing. Defendants have thus failed to

establish prejudice warranting the application of laches.

C. There Has Been No Unreasonable Delay

Defendants maintain that the first element of laches—lack of diligence or unreasonable delay by Plaintiffs—"is clearly satisfied here." Br. at 14. But their confidence is misplaced. Defendants allude to the age of Section 115(b), coupled with the number of years Plaintiffs Ashe and Lawson have been voting and the League has existed, and state that the passage of that time in and of itself "shows a lack of diligence." *Id.* at 14–15.

But while the age of a law subject to constitutional challenge can be a factor in determining whether there has been unreasonable delay, *Hargett*, 473 F. Supp. 3d at 796, no set length of time is per se unreasonable. Rather, one must look to the facts and circumstances of each case. *See, e.g.*, *Walter Bledsoe & Co. v. Elkhorn Land Co.*, 219 F.2d 556, 559 (6th Cir. 1955) ("Laches involves more than a failure to assert a claim. It contemplates a delay that is unreasonable under the circumstances, during which period material changes in conditions or the relations of the parties were induced or resulted, and where it would be unjust and inequitable to the adverse party to disturb the status quo thus created."); *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843 (D.C. Cir. 1982) ("Laches does not depend solely on the time that has elapsed between the alleged wrong and the institution of suit; it is principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.") (internal quotation marks omitted); *Equal Emp't Opportunity Comm'n v. Liberty Loan Corp.*, 584 F.2d 853, 857 (8th Cir. 1978) ("We are unwilling to rule that any set length of delay is per se unreasonable, but rather look to the facts of each case to determine reasonableness.").

Courts have held that changes in the applicable law are a valid reason for a perceived delay in bringing a claim. *See, e.g.*, *In re Beaty*, 306 F.3d 914, 927 (9th Cir. 2002) (holding that a delay in bringing a claim until a favorable change in law is a reasonable delay for purposes of laches);

Dickinson v. Ind. State Election Bd., 933 F.2d 497, 502 (7th Cir. 1991) (holding that laches did not foreclose a challenge to the apportionment of two voting districts where the plaintiffs delayed bringing the challenge until statutory amendment made it easier to show impermissible vote dilution).

Defendants' argument that the age of the law satisfies the first element of laches ignores the facts alleged in the Complaint and sworn in the Declarations accompanying the Motion for a Preliminary Injunction. The changing circumstances of both the individual Plaintiffs and the political environment more broadly explain why Plaintiffs did not unreasonably delay in filing their Complaint when they did. Defendants also ignore that Section 115 was recently amended to add Section 115(c), breathing life back into a statute that, to Plaintiffs' knowledge, had lay dormant for fifty years. *Cf. Universal Life*, 35 F.4th at 1035 (holding that a recent statutory amendment supported a fear of prosecution).[13] Indeed, the sponsor of the bill that added Section 115(c) acknowledged that the stated purpose of the new law was to inform people who likely did not know of its full implications that now individuals are being prosecuted under it.[14] This change in law was preceded by statements from Defendant Hargett, the State's top elections officer, informing the public it could be prosecuted under Section 115(b), further supporting Plaintiffs'

[13] Absent the statements of Defendant Hargett and the enactment of Section 115(c), Defendants surely would have argued that Plaintiffs lacked standing because they did not have a reasonable fear of prosecution at all, let alone from these specific defendants, but that, too, would fail. *See, e.g.*, *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 695–96 (6th Cir. 2015) (rejecting State's argument that the plaintiffs lacked standing to challenge a dormant law because State had not disavowed future enforcement); *Mayle v. State of Illinois*, 956 F.3d 966, 970 (7th Cir. 2020) (holding that the court correctly dismissed challenges to adultery and fornication laws for lack of standing where "[t]hose laws no longer are enforced, so [the plaintiff] could not show a reasonable fear of prosecution"). *Cf. Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1049 (6th Cir. 2015) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) ("past enforcement [of a statute] against the same conduct is good evidence that the threat of enforcement is not chimerical")).

[14] Compl. ¶ 41 (citing H.B. 0828, 113th Gen. Assemb. 27th Sess. (Tenn. 2023), https://tnga.granicus.com/player/clip/28402?view_id=703&redirect=true&h=3d7777e0d1fe502e02ad334c0d4ea8ee). Chairman Rudd also admitted that the full scope of the law was "up for conjecture." *Id.* at ¶ 42.

fears of prosecutions in this new political environment. Compl. ¶ 39. These legal, factual, and political changes demonstrate that Plaintiffs did not unreasonably delay in challenging the constitutionality of Section 115.

The approximately six months from when Section 115(c) was enacted until Plaintiffs filed this lawsuit was not an unreasonable delay. It is reasonable for Plaintiffs to have taken time to consider the implications of the law and the changing political and legal landscape and how these changes could affect them (and in the case of the League, its members); weigh the risks that a politically unpopular lawsuit could present for them and their families; and retain counsel to seek advice in regard to these issues, their potential legal claims, and the likelihood of success in bringing a challenge. In turn, it was reasonable for counsel to take time to assemble an appropriate legal team for a substantial constitutional challenge, prepare quality pleadings, and file the case.

Moreover, the time Plaintiffs took in bringing these matters is not unreasonable when measured against the timing of the March primary election. This is not a situation where a filing delay left only days for Defendants to respond and the Court to conduct a legal analysis. *Cf. A.S.*, 2021 WL 3421182, at *3–4 (denying TRO where the plaintiff waited at least a month – possibly more – before filing suit challenging law affecting schools two business days before the start of the school year). Nor is it a situation where Defendants will need to take significant affirmative action regarding the voting process close to an election if Plaintiffs' lawsuit is successful. *Cf. Hargett*, 473 F. Supp. 3d at 800 (noting declaration of state official regarding funding gap and need to perform accelerated training and printing of absentee ballots). Here, as discussed above, Defendants need take no action; they need simply not enforce the unconstitutional law. *See Lichtenstein*, 489 F. Supp. 3d at 756. Under these circumstances, any perceived delay filing this lawsuit was not unreasonable, as Plaintiffs filed their complaint over three months before the next primary election, providing a reasonable amount of time for Defendants to act.

There has been no unreasonable delay on the part of Plaintiffs in bringing this challenge to

Sections 115(b) and (c).[15] Absent prejudice and unreasonable delay, laches does not bar Plaintiffs' claims.

D. The Court Should Exercise Its Discretion and Not Apply Laches

Even if the Court determines that both elements of laches are met, the Court should exercise its discretion and not apply laches in this case. As noted above, Defendants argue no cognizable prejudice to warrant the application of laches. But even if some prejudice does exist, "[t]he degree of such prejudice would be so minor that the Court in its discretion [should] decline to apply laches despite the existence of its two elements." *Lichtenstein*, 489 F. Supp. 3d at 757.

Moreover, the societal interest in the Court adjudicating the constitutionality of this law further supports restraint in applying laches here. *See Env't Defense Fund v. Tenn. Valley Auth.*, 468 F.2d 1164, 1182 (6th Cir. 1972) ("Consideration of the public interest also requires us to reject the defense of laches."); Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L. J. at 1016 ("Limitations law ultimately aims at reconciling the delicate balance between plaintiffs' and society's interest in the pursuit of meritorious claims on the one hand, and defendants' and society's interest in avoiding the burdens of old claims on the other hand."). Other courts in this circuit have declined to apply laches to prospective injunctive relief in similar contexts. *See, e.g.*, *Daunt v. Benson*, 425 F. Supp. 3d 856, 876 (W.D. Mich. 2019) (ruling that

[15] Should the Court be inclined to apply laches based on the information available at this stage of the proceeding, the highly factual nature of this question entitles Plaintiffs to discovery to further respond to Defendants' affirmative defense. *See Am. Addiction Ctrs. v. Nat'l Ass'n of Addiction Treatment Providers*, 515 F. Supp. 3d 820, 839 (M.D. Tenn. 2021) (Richardson, J.) ("The facts evidencing unreasonableness of the delay, lack of excuse, and material prejudice to the defendant, are seldom set forth in the complaint, and at this stage of the proceedings cannot be decided against the complainant based solely on presumptions."); *Kenyon v. Clare*, No. 3:16-CV-00191, 2016 WL 6995661, at *4 (M.D. Tenn. Nov. 29, 2016) (citation omitted) ("Federal Rule of Civil Procedure 12(b)(6) is not the proper vehicle for bringing such a [motion]."). *Am. Nat. Property and Cas. Co. v. Tosh*, No. 5:12–CV–00051, 2013 WL 1311399, at *3 (W.D. Ky. Mar. 27, 2013) ("Because they are inherently fact specific, district Courts throughout this circuit and others have found that challenges to an action based on the doctrine of laches are not amenable to dismissal at the pleading stages.") (internal quotation marks omitted, citing cases).

laches did not apply to prospective injunctive relief in a case challenging exclusion from a redistricting commission); *Ohio A. Philip Randolph Institute v. Smith*, 335 F. Supp. 3d 988, 1002 (S.D. Ohio 2018) (three-judge panel declined to apply laches to request for prospective equitable relief in gerrymandering case). Given the importance and broad sweep of the constitutional issues in this case, this Court should likewise decline to apply laches.

IV. The Statute of Limitations Does Not Bar Plaintiffs' Section 115(b) Claim

Defendants' statute of limitations defense suffers from a similar faulty premise as their laches defense. Defendants look to the age of Section 115(b), Plaintiffs Ashe and Lawson's voting histories, and to the League's 40-year existence, and conclude that Plaintiffs' claims are barred by the one-year statute of limitations in Tennessee Code Annotated Section 28-3-104(a)(3).[16] But even assuming that Tennessee's one-year statute of limitations generally applies to Section 1983 actions, it does not apply to the unconstitutional conduct at issue in this case. Plaintiffs in this case do not seek to redress old injuries resulting from civil rights violations at the hands of the State. This is not a Section 1983 case seeking retrospective damages. Rather, the alleged injury here is a prospective deprivation of Plaintiffs' constitutional rights, to be addressed by a declaratory judgment and injunctive relief.

The statute of limitations does not bar claims concerning continuing or prospective deprivation of constitutional rights like those at issue here. *See Kuhnle Bros., Inc. v. Cnty. of Geauga*, 103 F.3d 516, 520–22 (6th Cir 1997). "Ordinarily, the limitations period starts to run 'when the plaintiff knows or has reason to know of the injury which is the basis of his action.'" *Id.* at 520 (quoting *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984)). But in *Kuhnle*, after the district court granted the defendant summary judgment on a Section 1983 claim, the Sixth Circuit

[16] As with laches, "statutes of limitations are related to time, not because there is anything per se wrong with a time lapse, but rather because a time lapse affects the balance of the relevant interests." Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L. J. at 1023.

reversed in part, holding that one alleged injury, involving an ordinance that created an unconstitutional prohibition, was ongoing and thus the claims were not barred by the statute of limitations. *Id.* at 518, 522. The court held that "[a] law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within [the statute of limitations period]. '[T]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.'" *Id.* at 522 (quoting *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd in part on other grounds sub nom. Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990)).

To determine whether there is a continuing violation, courts use a three-part test: (1) "the defendant's wrongful conduct must continue after the precipitating event that began the pattern;" (2) "injury to the plaintiff must continue to accrue after that event;" and (3) "further injury to the plaintiffs must have been avoidable if the defendants had at any time ceased their wrongful conduct." *Tolbert v. State of Ohio Dept. of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999) (citing *Kuhnle Bros.*, 103 F.3d at 522). Even assuming that the enactment of Section 115(b) was the "precipitating event that began the pattern"—the best-case scenario for Defendants—the test is still satisfied, as injury to the Plaintiffs has and will continue in the time since Section 115(b) was enacted and further injury can be avoided if Section 115(b) and Section 115(c) are repealed or voided. *See League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 734, 741 (N.D. Ohio 2006) ("Here, plaintiffs challenge many allegedly long standing aspects of Ohio's election that they assert remain in effect. In addition, LWV alleges injuries in the past, present, and potentially in the future. Finally, these injuries are allegedly the direct result of defendants' conduct and, consequently, would not have occurred absent that conduct. Thus, the violations LWV alleges are continuing and the statute of limitations poses no bar to plaintiffs' suit."), *aff'd in part and rev'd in part on other grounds by League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 472 n.9 (6th Cir. 2008) (acknowledging that the district court had rejected a statute of limitations defense).

Moreover, application of the statute of limitations to Plaintiffs' request for prospective relief would not fulfill the stale claims purpose of the statute of limitations. *See Havens Realty Corp.*, 455 U.S. at 380 ("Statutes of limitations such as that contained in [the Fair Housing Act] are intended to keep stale claims out of the courts. Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application . . . which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act.") (internal citations omitted).

For these reasons, Plaintiffs' claims are not barred by the statute of limitations.

V. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

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Respectfully submitted:

/s/ *R. Culver Schmid*
R. Culver Schmid, BPR No. 011128
Baker, Donelson, Bearman, Caldwell
& Berkowitz, PC
265 Brookview Centre Way, Suite 600
Knoxville, TN 37919
Tel.: (865) 971-5103
cschmid@bakerdonelson.com

Gary Shockley, BPR No. 010104
Baker, Donelson, Bearman, Caldwell
& Berkowitz, PC
1600 West End Avenue, Suite 2000
Nashville, TN 37203
Tel.: (615) 726-5600
gshockley@bakerdonelson.com

Eric G. Osborne, BPR No. 029719
Christopher C. Sabis, BPR No. 030032
William L. Harbison, BPR No. 007012
Frances W. Perkins, BPR No. 040534
Micah N. Bradley, BPR No. 038402
Sherrard Roe Voigt & Harbison, PLC
150 3rd Avenue South, Suite 1100
Nashville, TN 37201
Tel.: (615) 742-4200
eosborne@srvhlaw.com
csabis@srvhlaw.com
bharbison@srvhlaw.com
fperkins@srvhlaw.com
mbradley@srvhlaw.com

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
Tel.: (202) 579-4582
john.haubenreich@protectdemocracy.org

Orion Danjuma (admitted *pro hac vice*)
The Protect Democracy Project
82 Nassau St. #601
New York, NY 10038
Tel.: (202) 579-4582
orion.danjuma@protectdemocracy.org

Collin P. Wedel (admitted *pro hac vice*)
Sidley Austin LLP
555 W. Fifth St., Suite 4000
Los Angeles, CA 90013
Tel.: (213) 896-6000
cwedel@sidley.com

Jillian Sheridan Stonecipher (admitted *pro hac vice*)
Rebecca B. Shafer (admitted *pro hac vice*)
Sidley Austin LLP
One South Dearborn
Chicago, IL 60603
Tel.: (312) 853-7000
jstonecipher@sidley.com
rshafer@sidley.com

Counsel for Plaintiff League of Women Voters of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2024 a true and exact copy of the foregoing is being served via the Court's CM/ECF system and email upon the following:

Dawn Jordan
Special Counsel
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, Tennessee 37202
Dawn.Jordan@ag.tn.gov

Zachary L. Barker
Assistant Attorney General
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202
Zachary.Barker@ag.tn.gov

/s/ Eric G. Osborne
Eric G. Osborne