**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*. | ) | |

**REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Section 115(b) makes voting a felony unless a voter is a "bona fide member of *and* affiliated with" the relevant political party or "declares allegiance" to it. Section 115(c) makes polling places post threats of prosecution for violating Section 115(b). There is no way for voters to confirm their "bona fide[s]," nor if they have "declare[d] allegiance" sufficiently to avoid criminal scrutiny. Worse, the signs mandated by Section 115(c) misstate the law, sowing further confusion—which Defendants do not dispute. All told, Section 115 gives the State extraordinary discretion to prosecute voters while deterring an alarming range of protected conduct. The statute is void for vagueness under the Due Process Clause and overbroad under the First Amendment.[1]

Underneath their scattershot procedural arguments, Defendants do not defend the statute in a meaningful way. On due process, they contend the statute's terms are clear because dictionaries define them. But those definitions are far too nebulous to fairly prescribe felonious behavior. The record shows that no one—not even Defendants—knows what it means to be a "bona fide" member of, "affiliate[d]" with, or "allegian[t]" to a political party. On the First Amendment claim, Defendants do not dispute the statute's potential to punish and chill a wide array of protected conduct; they argue only that its illegitimate applications will not be "substantial" compared to its "legitimate sweep." Opp. 19. But there is *no* legitimate sweep: the main function of new signs threatening prosecutions is to frighten voters, not address a real danger.

Defendants offer even less on the remaining injunction factors. They do not dispute that "[a] restriction on the fundamental right to vote . . . constitutes irreparable injury." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). And the only interest they cite against an injunction

[1] The Tennessee Presidential Preference Primary is set for March 5, 2024. Tennessee Secretary of State, *Elections Calendar*, https://sos.tn.gov/elections/calendar. Early voting begins in Knox County on February 14, 2024. Knox County, *Knox County Tennessee Elections*, https://www.knoxcounty.org/election/election_schedule.php

is a generic goal to enforce the law, but the State has no "interest in the enforcement of unconstitutional laws." *FemHealth USA, Inc. v. City of Mount Juliet*, 458 F. Supp. 3d 777, 805 (M.D. Tenn. 2020) (Richardson, J.); *see also 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) (a state does not suffer irreparable injury if are unconstitutional statutes are enjoined (citation omitted)). A preliminary injunction is warranted.

## ARGUMENT

### I. The Opposition Confirms that Plaintiffs Are Likely to Succeed On the Merits.

#### A. Plaintiffs Are Likely To Establish That Section 115 Is Void for Vagueness.

A law is void when it is "so standardless that it invites arbitrary enforcement" from authorities who lack direction. *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Defendants do not dispute that Section 115(b) is so standardless that it could be deployed arbitrarily in politically motivated prosecutions, and that the statute itself fails to provide clear guardrails that would cabin such capriciousness. PI Br. 20-21. Instead, voters could find themselves facing criminal charges for lacking sufficient "bona fides" for their vote; worse, given the subjective and vague terms of the statute, they would have no way to exonerate themselves short of a jury trial. That alone is a sufficient basis for finding Plaintiffs have established a likelihood of success on their due process claim.[2]

Nor do Defendants dispute that Section 115(c) mandates *incorrect* notice by requiring signs that misstate Section 115(b) as requiring *either* bona fide membership *or* affiliation with the party, rather than *both* of those things. PI Br. 19. False notice cannot be fair notice. Pl. Br. 19.

[2] It is undisputed that heightened scrutiny applies. PI Br. 15-16.

Defendants contend Section 115 is not vague because its key terms are used in dictionaries and judicial decisions. Opp. 16-17. But that is true of all laws, and does not fix the vagueness problem. *See Kolender*, 461 U.S. at 359 (holding "credible and reliable" impermissibly vague). Moreover, the dictionary definitions here foster confusion, not clarity. Defendants argue, for instance, that "bona fide" means "sincere" and "genuine." Opp. 16. But the critical question—what makes someone a "sincere" and "genuine" *member of a political party*?—is left unanswered. Defendants do not point to *any* other definitive guidance on these terms or any resource that an average voter could consult to find comfort that their vote would be lawful.

With no way for voters to ensure their bona fides, Defendants offer that voters can avoid prosecution by simply "declar[ing] allegiance to the political party." Opp. 16. Setting aside that "allegiance" is also vague, this, too, only exacerbates the constitutional infirmity. Defendants fail to explain where, how, and to whom can a voter make such a declaration. And declaring "allegiance" to get a ballot is far graver than muttering a meaningless passphrase; the government cannot require a pledge of "allegiance" as a prerequisite to exercise constitutional rights. *See West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943) (requiring pledge of allegiance at school violates First Amendment; "no official . . . can prescribe what shall be orthodox[3] in politics . . . or force citizens to confess by word or act their faith therein").



Defendants fall back on the statute's mens rea requirement to try to save it. That effort also fails. A "scienter requirement cannot eliminate vagueness . . . if it is satisfied by an 'intent' to do something that is in itself ambiguous." *Nova Records, Inc.* v. *Sendak*, 706 F.2d 782, 789 (7th Cir. 1983); *see Smith v. Goguen* 415 U.S. 566, 580 (1974) (law making it a crime to "treat[] [the U.S.

[3] Not coincidentally, "orthodox" (*right opinion*, in Greek) and "bona fide" (*good faith*, in Latin) are roughly synonymous.

flag] contemptuously" was void for vagueness despite being limited to *intentional* contempt). To the extent Defendants suggest that the mens rea threshold renders the statute unenforceable, that only confirms that it has no effect beyond frightening voters. Regardless, a voter would be unable to prove their lack of criminal intent until *trial*, leaving nothing to prevent harassing investigations, indictments, and lengthy prosecutions by officials who dispute a voter's state of mind. That is not a regime the Constitution condones. *J.L. Spoons, Inc. v. Dragani*, 538 F.3d 379, 380 (6th Cir. 2008) (individuals cannot be forced to choose between exercising constitutional rights and "risk[ing] case-by-case litigation of their rights, putting them at substantial risk.").

**B. Plaintiffs Are Likely to Establish a First Amendment Violation.**

Defendants say that Section 115 sufficiently serves the State's interest in "protecting against cross-over voting and 'party raiding'" such that its "legitimate sweep" outweighs the many unconstitutional applications of the statute. Opp. 18-19. But Defendants cannot cite a single instance where the State enforced Section 115 for that purpose; nor have they submitted evidence about the prevalence and impact of such purportedly wrongful conduct that would justify the law's immense breadth. That Section 115 will sweep in protected First Amendment activity is not speculative. The *only* record evidence is that, by making it impossible for voters to know if they are allowed to vote and requiring signs that threaten prosecution if they guess wrong, Section 115 will punish actual voters and deter would-be voters. *See* ECF Nos. 22-1, 22-2, and 22-3.



**C. Plaintiffs Have Properly Pleaded Their Claims and Established Standing.**

Defendants contend that Plaintiffs will not succeed on the merits because their claims are not properly pleaded or directed against the right individuals. Opp. 4-6. Because those pleading challenges are addressed fully in Defendants' motion to dismiss and Plaintiffs' response, Plaintiffs incorporate their arguments in their response by reference. ECF No. 34, at 2-14. Suffice to say that

the Defendants share authority to investigate and refer voters for prosecution, as well as to administer and oversee posting of the threatening and inaccurate signs. Those undisputed powers give Plaintiffs the requisite injury, causation, and redressability under Article III to challenge the statutes impairing their fundamental rights. That other officials may have similar powers does not deprive plaintiffs of individual or organizational standing to purpose these claims for injunctive relief as to these defendants. *See N.A.A.C.P. v. Hargett*, 441 F.Supp.3d at 624-27. Nor have Defendants suffered prejudice, or been subject to unreasonable delay, to warrant the application of laches. ECF No. 34, at 14-24.

## II. The Remaining Preliminary Injunction Factors Favor Plaintiffs.

Defendants do not meaningfully dispute that Plaintiffs will be irreparably harmed if Section 115 remains on the books. Plaintiffs Ashe and Lawson, like many Tennesseans, cannot vote without potentially exposing themselves to investigation and criminal prosecution; Plaintiff LWVTN cannot perform its essential function of educating voters about applicable requirements. Furthermore, a preliminary injunction would not require the State to *do* anything; instead, it asks only to preserve the status quo by *not* posting a sign and *not* prosecuting voters under Section 115. The only interest Defendants assert is a general interest in the enforcement of laws. But "neither [Defendants] nor the public have an interest in the enforcement of *unconstitutional* laws." *FemHealth USA*, 458 F. Supp. 3d at 805 (emphasis added). Rather, "[t]he public interest is promoted by the robust enforcement of constitutional rights." *Id.* That is particularly true for the right to vote—the right "preservative of other basic civil and political rights," *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).



## CONCLUSION

For all these reasons, Plaintiffs' Motion for Preliminary Injunction should be granted.

Dated: January 17, 2024

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