UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

PHILLIP LAWSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 3:24-cv-00538**
	)	**Judge William L. Campbell. Jr.**
TRE HARGETT, et al.,	)	**Magistrate Judge Alistair Newbern**
	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiffs' Response confirms that the Complaint should be dismissed.

***Standing*.** Plaintiffs lack standing to challenge § 2-7-115(c) or to sue Hargett and Goins. (MTD Mem., ECF 50, at 332-34.)[1] As Plaintiffs acknowledge, (Pls.' Resp., ECF 58, at 576), this Court previously held that any injury stemming from § 115(c) is not redressable by enjoining Hargett and Goins. *Ashe v. Hargett*, 2024 WL 923771, at *14 (M.D. Tenn. March 4, 2024) ("*Ashe I*"). Plaintiffs offer no reason for the Court to reach a different result here.

Plaintiffs claim to have "cured" their last lawsuit's standing "problem[] by naming the DAs as Defendants." (Pls.' Resp., ECF 58, at 567.)[2] But as Defendants have explained, Plaintiffs also lack standing to sue the DAs. (MTD Mem., ECF 50, at 334-37). First, Plaintiffs improperly sued DAs in districts for which there is no named Plaintiff. *See Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1033-34 (6th Cir. 2022) (concluding that plaintiffs lacked standing to sue a DA for a district in which no plaintiff resided or intended to engage in potentially prosecutable conduct).

Second, even for the DAs in the three districts for which there *is* a named Plaintiff, the complaint's allegations fail to establish a credible threat of prosecution. Plaintiffs maintain that they "feared that voting in a primary election would subject them to prosecution under Section 115" and that this fear is "reasonably founded in fact." (Pls.' Resp., ECF 58, at 573.) What alleged facts? Saying that their fear is reasonable does not make it so. The best "imminent enforcement" argument Plaintiffs can muster is based on an alleged conversation *two years ago* in which DA Jody Pickens allegedly told Plaintiff Hart "there was heat on him to prosecute." (Pls.'

[1] All record pincites refer to the "Page ID" numbers in the ECF file stamps.

[2] Plaintiffs wrongly suggest that, in *Ashe I*, Defendants stated that the proper defendants were DAs. (Pls.' Resp., ECF 58, at 566). Only Hargett and Goins were sued in *Ashe I*, and Defendants argued that Plaintiffs lacked standing as to them. That argument doesn't imply that Plaintiffs *would* have standing to sue any DA.

Resp., ECF 58, at 574; *see* Compl., ECF 1, at 6, ¶ 16.)[3] Hart, however, voted in the March 2024 primary. (Goins Decl., ECF 51-1, at 391, ¶ 13). And whatever happened two years ago cannot show a credible threat of prosecution *now*. *See Murthy v. Missouri*, __ S. Ct. __2024 WL 3165801, at *8 (June 26, 2024) (explaining that "because the plaintiffs are seeking only forward-looking relief, the past injuries are relevant only for their predictive value").

Citing the Sixth Circuit's decision in *Tennessee v. Department of Education*, 104 F.4th 577 (6th Cir. 2024), Plaintiffs argue that an injury is imminent for purposes of standing when "conduct that 'allegedly violates the law' would continue 'in the relatively near future.'" (Pls.' Resp., ECF 58, at 571-72.) But APA standing analyses differ from pre-enforcement 1983 challenges. And, unlike in *Tennessee*, Plaintiffs do not explain how their intended conduct runs afoul of the law. *Crawford v. Dep't of Treasury*, 868 F.3d 438, 454 (6th Cir. 2017). Nor have Plaintiffs alleged "a certain threat of prosecution" if they do "indeed engage in that conduct." *Id.* at 455. The remaining Sixth Circuit cases on which Plaintiffs rely are distinguishable and predate *Murthy*.[4]

Plaintiff League of Women Voters likewise lacks standing. (MTD Mem., ECF 50, at 337-41.) Plaintiffs argue that "impairment of mission and diversion of resources because of the challenged statutes" confers organizational standing. (Pls.' Resp., ECF 58, at 581.) But the Supreme Court's recent decision in *FDA v. Alliance for Hippocratic Medicine*, 144 S. Ct. 1540

[3] Plaintiffs also claim to fear prosecution because "anyone," including the Republican Party, could pursue a grand-jury indictment under Tenn. Code Ann. § 40-12-104. (Pls.' Resp., ECF 58, at 568 & n.3.) If that argument sufficed, then pre-enforcement standing would always exist. And what's more, "it is a bedrock principle that a federal court cannot redress 'injury that results from the independent action of some third party not before the court.'" *Murthy*, 2024 WL 3165801, at *8 (quotations omitted).

[4] *See Kareem v. Cuyahoga Cnty. Bd. of Elec.*, 95 F.4th 1019 (6th Cir. 2024) (evidence of past enforcement); *Block v. Canepa*, 74 F.4th 400 (6th Cir. 2023) (same); *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015) (same); *Green Party of Tenn. v. Hargett*, 791 F.3d 684 (6th Cir. 2015) (same); *Platt v. Bd. of Comm'rs*, 769 F.3d 447 (6th Cir. 2014) (pure First Amendment claim, which is analyzed differently).

(2024), forecloses that argument. There, the Court made clear that spending money, time, energy, and resources drafting citizen petitions, engaging in public advocacy, and conducting studies to rebut the government's claims did not suffice to establish organizational standing. *See id.* at 1563-64.[5] Moreover, as the Sixth Circuit recently reiterated, "*Havens* addressed . . . standing to seek *damages*—not . . . standing to seek an *injunction*." *Tenn. Conf. of the NAACP v. Lee*, 2024 WL 3219054, at *13 (6th Cir. June 28, 2024).

Plaintiffs' attempts to cure the League's associational-standing shortcomings likewise fail. To establish associational standing, Plaintiffs needed to allege specific facts showing that a named member had standing. (MTD Mem., ECF 50, at 340-41.) They cannot remedy this default through briefing and belated declarations. *Waskul v.Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 440 (6th Cir. 2020). But even if they could, the allegations in Gould's declaration relating to Cynthia Arnold would be of no help. Nowhere is there any indication Ms. Arnold is a member, or that she in fact faces a current or certain risk of prosecution. In short, Plaintiffs' new declaration cannot possibly establish a certain threat of prosecution under § 115(b). *Crawford*, 868 F.3d at 454-55.

Sovereign immunity. For many of the same reasons Plaintiffs lack standing, Defendants are also entitled to sovereign immunity. (MTD Mem., ECF 50, at 341-43.) Resisting that

[5] Plaintiffs assert that *Alliance for Hippocratic Medicine* is "distinguishable." (Pls.' Resp., ECF 58, at 577 n.9.) The Court, they say, "determined that the Alliance's costs were simply part of its litigation strategy," and "not a part of a non-litigation mission." (*Id.*) But the Alliance was only one of several plaintiff organizations, and the Court did not engage in any organization-specific assessment of their missions. *See Alliance for Hippocratic Medicine*, 144 S. Ct. at 1552. Rather, it acknowledged that the organizations collectively alleged "impair[ment]" of their "ability to provide services and achieve their . . . missions." *Id.* at 1563. And it said that this was not enough, in part because if "standing exist[ed] when an organization diverts its resources in response to a defendant's actions," "all the organizations in America would have standing to challenge almost every . . . policy that they dislike, provided they spend a single dollar opposing those policies." *Id.* at 1564. That reasoning applies with full force here.

conclusion, Plaintiffs point to *Russell v. Lundergan-Grimes*, 784 F.3d 1037. (Pls.' Resp., ECF 58, at 583). But there, the Kentucky Attorney General had prosecutorial authority, and the Kentucky Secretary of State often partnered with him. 784 F.3d at 1047-48. Here, Hargett and Goins lack prosecutorial authority. Plaintiffs also contend that their claims against the DAs fall within the *Ex parte Young* exception because they "name as defendants state officials who administer and enforce the challenged law." (Pls.' Resp., ECF 58, at 583.) But to invoke that exception, Plaintiffs must show more than enforcement authority; they must show that enforcement is "likely." *Doe v. DeWine*, 910 F.3d 842, 848 (6th Cir. 2018). The DAs therefore also enjoy sovereign immunity.

First Amendment overbreadth claim. Plaintiffs devote the bulk of their overbreadth argument to disputing the applicability of the *Anderson-Burdick* standard. As Defendants explained, that standard governs "*voting-rights* claims." (MTD Mem., ECF 50, at 344 (emphasis added).) So "[i]f . . . [Plaintiffs'] claim is premised on the right to vote," that standard governs. (*Id.*) Far from being "to the contrary," *Lichtenstein v. Hargett*, explicitly recognized that the *Anderson-Burdick* standard is used "to resolve challenges to . . . the way the state conducts primaries"—e.g., "to decide whether a state infringed a party's rights by regulating the voters who could vote in its primary." 83 F. 4th 575, 590-91 (6th Cir. 2023). Section 2-7-115 regulates who can vote in a party primary. So, *Anderson-Burdick* squarely applies, and, as Defendants have discussed, Plaintiffs' allegations fall short under that standard. (MTD Mem., ECF 50, at 345-46.)

And to the extent Plaintiffs have pleaded theories not subject to *Anderson-Burdick*, those contentions also fall short. Plaintiffs have raised a facial challenge. "[T]hat decision comes at a cost." *Moody v. NetChoice, LLC*, Nos. 22-277 and 22-555, 2024 WL 3237685, at *1 (U.S. July 1, 2024). "Even in the First Amendment context, facial challenges are disfavored." *Id.* at *17. And they are "hard to win" because they require "inquiry into how a law works in *all of its*

applications." *Id.* at *8. To succeed in their facial challenge Plaintiffs needed to allege that § 2-7-115 "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." *Id.* at *17. Plaintiffs, though, come nowhere close. Indeed, Plaintiffs have not alleged *any* unconstitutional applications, nor have they acknowledged the constitutional applications Defendants offered. (MTD Mem., ECF 50, at 350). Plaintiffs, then, necessarily have not alleged that § 2-7-115's constitutional applications are outweighed by its allegedly unlawful applications. The upshot: no matter the legal standard that applies, Plaintiffs' overbreadth claim fails.

Vagueness claim. Plaintiffs maintain that "[t]he touchstone of [their] Complaint is straightforward: the State has imposed an unconstitutionally vague criminal penalty that chills individuals both from voting in primaries and also from engaging in other forms of core political expression." (Pls.' Resp., ECF 58, at 585.) But, for one, because Plaintiffs failed to allege that § 2-7-115 infringes the First Amendment, they cannot plead a facial vagueness challenge to the statute. (MTD Mem., ECF 50, at 346-47.) For two, the statute is not vague—and has not caused any problems for the last 50 years. Each of the terms used in § 2-7-115(b) is commonly used and easily defined, and that the law's scienter requirement alleviates any vagueness concerns. (*Id.* at 347-49). Plaintiffs have no persuasive response—they lean on their preliminary-injunction filings. But those filings, too, fail to account for Defendants' construction of § 2-7-115(b) and seek to downplay the law's scienter requirement. Finally, Plaintiffs do not even attempt to show that the law is *facially* invalid for vagueness. They largely ignore the numerous constitutional applications of the law—dooming their disfavored facial challenge. (MTD Mem., ECF 50 at 349-50).

CONCLUSION

The Court should grant Defendants' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been filed electronically on July 9, 2024. Parties may access this filing through the Court's electronic filing system.

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