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.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

A few months ago, this Court dismissed attempts by Plaintiffs Victor Ashe, Phil Lawson, and the Tennessee League of Women Voters (the "League") to facially invalidate statutory provisions at the core of the State's power—the regulation of primary elections. *See Ashe v. Hargett*, No. 3:23-cv-01256, 2024 WL 923771 (M.D. Tenn. 2024). Now, Plaintiffs are back, challenging the same provisions with effectively the same claims and the same flawed theories. Like in the prior suit, these claims should never leave the gate: Plaintiffs lack standing to sue the Defendants, and sovereign immunity bars the asserted claims.

Regardless, Plaintiffs fail to state a viable claim. They fail to explain how a statute that in no way restricts speech poses a problem under the First Amendment's overbreadth doctrine. With no First Amendment claim, Plaintiffs cannot even raise a *facial* vagueness challenge. Even if they could, Plaintiffs do not allege any unconstitutionally vague applications of § 2-7-115(b) and (c), let alone show that those provisions are "impermissibly vague in all of [their] applications." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests.*, 455 U.S. 489, 497 (1982).

Because no amount of discovery can cure Plaintiffs' flawed theories, the Court should dismiss this case with prejudice.

BACKGROUND

The "administration of the electoral process is a matter that the Constitution largely entrusts to the States." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). "The Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (quoting *Tashijian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)). This "broad power" of the States to

regulate the electoral process extends to the regulation of party primaries: "States have a major role to play in structuring and monitoring the election process, including primaries." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000); *see Democratic Party of U.S. v. LaFollette*, 450 U.S. 107, 124 n.28 ("Obviously, States have important interests in regulating primary elections."). And the manner in which one State regulates its primary elections may often differ from that of another State. *See Tashijian*, 479 U.S. at 222 & n.11 (noting the debate over the relative merits of closed and open primaries).

In 1972, Victor Ashe (a plaintiff in this litigation) sponsored legislation to protect the integrity of Tennessee's primary elections. The description of this legislation in the Public Acts states that it is "AN ACT to restate, supplement, consolidate, clarify, and revise the election laws of this State and other matters related to them in order to establish a uniform law of elections protecting ***the freedom and purity of elections*** …" (emphasis added) *See* 1972 Tenn. Pub. Acts 1972, ch. 740, attached hereto. A couple years later, the General Assembly—again, with legislation sponsored by Plaintiff Victor Ashe—amended the law to delete the last sentence which required the voter to indicate on which basis he is voting in his application for a ballot. 1974 Tenn. Pub. Acts 1974, ch. 801.

The provisions, as amended, are codified at Tenn. Code Ann. § 2-7-115(b) and (c), which provide as follows:

> (b) A registered voter is entitled to vote in a primary election for offices for which the voter is qualified to vote at the polling place where the voter is registered if:
>
> (1) The voter is a bona fide member of and affiliated with the political party in whose primary the voter seeks to vote; or
>
> (2) At the time the voter seeks to vote, the voter declares allegiance to the political party in whose primary the voter seeks to vote and states that the voter intends to affiliate with that party.

> (c)(1) On primary election days, a sign that is a minimum of eight and one-half inches by eleven inches (8.5"x11") with a yellow background and bold, black text containing the following language must be posted in each polling place:
>
> It's the Law! Please Read...
> It is a violation of Tennessee Code Annotated, Section 2-7-115(b), and punishable as a crime under Tennessee Code Annotated, Section 2-19-102 or Section 2-19-107, if a person votes in a political party's primary without being a bona fide member of or affiliated with that political party, or to declare allegiance to that party without the intent to affiliate with that party.
>
> (2) The officer of elections at each polling place shall ensure that the sign prescribed by subdivision (c)(1) is posted in a prominent, highly visible location within the polling place.

Subsection 115(c) requires the officer of elections at each polling place to post the sign. (*Id.* at ¶ 68.).

These provisions sought to deter cross-over voting—"wherein a voter who supports a particular political party casts a ballot in the primary election of a different political party." (Compl., ECF No. 1, ¶ 2.) Cross-over voting often occurs to strategically subvert a political party's selection of their preferred candidate. The idea is that members of one party can sabotage another party's primary by voting for a candidate that they believe will lose to their own party's candidate in the general election. Said another way, voters for one party "cross over" to vote in another party's primary to support a perceived weaker candidate so that their own party's candidate will win the general election. The General Assembly sought to mitigate this practice to "protect[] the freedom and purity of elections," 1972 Pub. Acts, ch. 740, sec. 1, and enable each party (and its members) "to select a standard bearer who best represents the party's ideologies and preferences" without strategic manipulation by the opposing party. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). And Tennessee is no outlier—similar restrictions on cross-over voting exist throughout the country. *See, e.g.*, N.J. Stat. Ann. § 19:23-45; Nev. Rev. Stat. Ann. § 293.287; Fla. Stat. Ann. § 101.021; 25 Pa. Stat. Ann. § 299; *see also Clingman*, 544

U.S. at 586 n.1 (identifying more than 20 States with semi-closed primary laws).

In 2023, (more than fifty years after its enactment), Plaintiffs Victor Ashe, Phil Lawson, and the League brought suit to challenge the constitutionality of § 2-7-115(b) and (c), raising the same First and Fourteenth Amendment claims pressed here. This Court rejected that challenge. On March 4, 2024, the Court dismissed the action for lack of standing. *See Ashe*, 2024 WL 923771, at *14. Plaintiffs declined to appeal.

Instead of appealing, they filed this suit on May 1, 2024, adding new plaintiffs and defendants. Plaintiffs claim that because § 2-7-115(b) and (c) do not define the terms "bona fide," "affiliated," or "allegiance," the provisions are void for vagueness under the Fourteenth Amendment. (Compl., ECF No. 1, ¶ 4-5.) Plaintiffs also claim that § 2-7-115(b) and (c) violate their rights under the First Amendment. (*Id.* at ¶ 6.) Plaintiffs have sued the Tennessee Secretary of State, Tre Hargett; the Tennessee Coordinator of Elections, Mark Goins; and the District Attorneys General for 24 Tennessee Judicial Districts. (*Id.* at ¶¶ 28-53.)

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard demands "more than the bare assertion of legal conclusions," requiring Teachers to allege "either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Hughes v. Sanders*, 469 F.3d 475, 477 (6th Cir. 2006) (quotation omitted). When a complaint fails to allege "*fact*[*s*]" that "'raise the right to relief above the speculative level,'" *Rondigo, LLC v. Twp. of Richmond*, 641 F.3d 673, 684 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 555), defendants are "spar[ed] . . . a time-consuming

and expensive discovery process." *Agema v. Allegan*, 826 F.3d 326, 332 (6th Cir. 2016).

"Article III standing is a question of subject matter jurisdiction properly decided under 12(b)(1)." *Am. BioCare Inc. v. Howard & Howard Att'ys*, 702 F. App'x 416, 419 (6th Cir. 2017). The same goes for sovereign immunity. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015) (sovereign immunity). Facial attacks to subject-matter jurisdiction are governed by the same standard applied to Rule 12(b)(6) challenges. *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012). Factual attacks to subject-matter jurisdiction allow courts to "weigh the evidence and satisfy itself as to the existence of its power to hear the case." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994).

ARGUMENT

The Complaint should be dismissed because Plaintiffs lack standing to sue; Defendants have sovereign immunity; and Plaintiffs have failed to state a claim on which relief can be granted.

I. Plaintiffs Lack Standing to Sue the Defendants.

"[U]nder our constitutional system[, federal] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). Article III limits federal-court jurisdiction to "Cases" and "Controversies." U.S. Const. art. III § 2, cl. 1. The requirement that a plaintiff demonstrate standing "gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (internal quotation marks omitted). Plaintiffs must show that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

An Article III injury can sometimes be established *before* the enforcement of a statute. But

to do so, a plaintiff must prove "an intention to engage in a course of conduct arguably affected with a constitutional interest[] but proscribed by" some provision of the Act. *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 454 (6th Cir. 2017) (quotations omitted). And it must then prove "a *certain* threat of prosecution if the plaintiff does indeed engage in that conduct." *Id.* at 455.

Furthermore, because "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 claim they seek to press," *id.* (cleaned up). They must "address[] the injury in fact question on a provision-specific basis." *Prime Media v. Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007), and show "how the requested relief against *each* of the defendants could redress [their] alleged injuries-in-fact." *Id.* (emphasis in original). Plaintiffs have not carried their burden.

A. All Plaintiffs lack standing to challenge Subsection (c) of § 2-7-115.

As this Court previously recognized, "Plaintiffs do not have standing to sue Defendants under Section 115(c)." *Ashe*, 2024 WL 923771, at *14. Section 2-7-115(c) requires the officer of elections at each polling place to post a sign informing voters of the restrictions on cross-over voting. That requirement—which is "impose[d] . . . *only* on the officer of elections"—does not somehow cause an injury to Plaintiffs. *Id.* (emphasis added). The sign "does not require or prohibit anything (beyond what is already required/prohibited in Section 115(b))." *Id.* "Nor does Section 115(c) threaten any civil fines or criminal punishment against individual voters." *Id.* Plaintiffs, then, can point to no injury tied to § 2-7-115(c). And even if they could, no injunction against the named Defendants could redress that injury. The statute requires "the officer of elections at each polling place" to post the sign. Tenn. Code Ann. § 2-7-115(c)(2). But no "officer of elections" is named as a Defendant.

B. All Plaintiffs lack standing to sue Secretary Hargett and Coordinator Goins.

Plaintiffs seek an injunction against all Defendants based on alleged "threats of prosecution." (Compl., ECF No. 1, ¶¶ 6, 70.) But two of the named Defendants have no prosecutorial authority.

Secretary Hargett cannot prosecute Plaintiffs. 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). "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." *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209 (Tenn. 1999); *see also* Tenn. Code Ann. § 8-7-103(1). Tennessee law simply "does not give [Secretary Hargett] a role in the enforcement of individual criminal laws." *Doe v. Lee*, No. 23-5248, 2024 WL 2179378, at *4 (6th Cir. May 15, 2024). Plaintiffs cannot establish standing based on a threat-of-enforcement theory against a defendant that cannot actually enforce the law against Plaintiffs. *Id.*; *see also Universal Life*, 35 F.4th at 1032 ("We need specific, plausible allegations about what the [defendant] has done, is doing, or might do to injure plaintiffs.").

Coordinator Goins likewise lacks authority to prosecute Plaintiffs. So, again, Plaintiffs face no certain threat of prosecution from him. *Doe*, 2024 WL 2179378, at *4. 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, ¶ 29 (quoting Tenn. Code Ann. § 2-11-202(a)(5)(A)(i)).) True enough, but authority to investigate and report is not authority to *prosecute*. Indirect actions that may (or may not) contribute to a prosecution do not suffice to establish Article III standing in the pre-enforcement context. *See Universal Life*, 35 F.4th at 1033 (holding that allegation that 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)).

When it comes to these two Defendants, this lack of prosecutorial authority is dispositive. "[F]or purposes of traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to *allegedly unlawful conduct of the defendant*, not to the provision of law that is challenged." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (emphasis added) (cleaned up). Because Plaintiffs "do[] not claim to have suffered an injury *that the defendant caused* . . . there is no case or controversy" between the parties to this suit. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (emphasis added) (quotations omitted). The upshot is that this Court was correct when it previously recognized that Plaintiffs cannot "establish standing [to sue Secretary Hargett or Coordinator Goins] because they have not shown that their purported injury (i.e., fear of prosecution under 115(b)) is fairly traceable to Defendants or likely to be redressed by an injunction prohibiting Defendants from doing something they already lack the power to do—namely, prosecuting Plaintiffs under 115(b)." *Ashe*, 2024 WL 923771, at *6-8. Plaintiffs' new complaint changes nothing.

C. The Individual Plaintiffs lack standing to challenge Subsection (b) of § 2-7-115 against the Defendant District Attorneys General.

1. The Individual Plaintiffs cannot show a threat of prosecution from District Attorneys General in districts in which they do not reside.

The Individual Plaintiffs face no threat of prosecution from District Attorneys General in jurisdictions in which they do not reside. Plaintiffs Ashe and Lawson live in Knox County (6th Judicial District) (Compl., ECF No. 1, ¶¶ 15, 18); Plaintiff Palmer lives in Roane County (9th Judicial District) (*id.* at ¶19); and Plaintiff Hart lives in Madison County (26th Judicial District)

(*id.* at ¶16). None of the individual Plaintiffs live (or vote) in the judicial districts of the other Defendant District Attorneys General—Judicial Districts 1, 2, 4, 5, 7, 8, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 22, 25, 27, 30, and 32. Accordingly, the Individual Plaintiffs have no standing to sue the District Attorneys General for these 21 judicial districts. *See supra* Part I.B; *see also Universal Life*, 35 F.4th at 1033-34 (concluding that plaintiffs lacked standing to sue a district attorney for a district in which no plaintiff resided or intended to engage in potentially prosecutable conduct).

2. Individual Plaintiffs fail to allege injury from the District Attorneys General for Judicial Districts 6, 9, and 26.

Plaintiffs Ashe, Lawson, Palmer, and Hart—who live and vote in the 6th, 9th, and 26th Judicial Districts—allege that they fear "prosecution" for violating § 2-7-115(b), but their allegations do not suffice to establish "a *certain* threat of prosecution." *Crawford*, 868 F.3d at 455. "When a plaintiff brings a pre-enforcement challenge, 'an allegation of future injury may suffice' to show an injury in fact 'if the threatened injury is 'certainly impending', or there is a substantial risk that the harm will occur.'" *Block v. Canepa*, 74 F4th 400, 408-09 (6th Cir. 2023). Further, courts analyzing pre-enforcement challenges do not assume that every breach of the law will result in prosecution. *See McKay v. Federspiel*, 823 F.3d 862, 868 (6th Cir. 2016). Instead, courts assess the imminence of enforcement through a holistic, four-part framework—the "*McKay* factors." *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 550 (6th Cir. 2021). Specifically, the Court requires "some combination" of the following factors: "(1) 'a history of past enforcement against the plaintiffs or others'; (2) 'enforcement warning letters sent to the plaintiffs regarding their specific conduct'; (3) 'an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action'; and (4) the 'defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff.'" *Id.* (quoting *McKay*, 823 F.3d at 869). Each of those factors cuts against

standing for the individual Plaintiffs.

No History of Past Enforcement. "A threat of future enforcement may be 'credible' when the same conduct has drawn enforcement actions or threats of enforcement in the past." *Kiser v. Reitz*, 765 F.3d 601, 609 (6th Cir. 2014). But Plaintiffs point to no comparable conduct that has resulted in enforcement. The provisions of Section 2-7-115(b) have been in effect since 1972, yet Plaintiffs allege no prior enforcement whatsoever—much less enforcement for the conduct that Plaintiffs wish to engage in.

No Warning Letters. If "enforcement letters" had been "sent to" Plaintiffs "regarding [their] specific conduct," they might have had a stronger case for standing. *Online Merchs.*, 995 F.3d at 550 (quotations omitted). But no such letters were sent.

Indeed, Plaintiffs Ashe, Lawson, and Palmer nowhere allege that they have been threatened with prosecution from the District Attorney General in their district. Plaintiff Ashe 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, ¶ 15, 18.) But neither the Republican or Democratic Party has any prosecutorial authority. Plaintiff Palmer merely states that he does not want to be "embarrassed." (Compl., ECF 1, ¶ 19). Plaintiff Hart claims that the District Attorney General in his district told him in ***2022*** that there "was heat on him to prosecute," but there are no allegations that there was any actual threat, and the fact that there has been no prosecution shows that there is no a "certainly impending" prosecution.

No Attributes Making Enforcement Easy. Nor does the Act "allow[] any member of the public to initiate an enforcement action." *Online Merchs.*, 995 F.3d at 550. The "universe of potential" enforcers is limited to "state officials who are constrained by . . . ethical obligations."

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 164 (2014). The enforcement mechanism here mirrors the standard approach for criminal laws and, therefore, poses no unique enforcement threat against the individual Plaintiffs.

Disavowal of Enforcement. Finally, there has been no "refusal to disavow enforcement of the challenged statute against" the individual Plaintiffs. *Online Merchs.*, 995 F.3d at 550 (quotations omitted). The Complaint does not allege that these Plaintiffs even requested any District Attorney General to "disavow enforcement" of the Act as to them. *Id.* Therefore, this factor of the *McKay* test weighs against standing.

In short, the individual Plaintiffs did not allege any—much less, "some combination"—of the *McKay* factors and therefore did not allege a certain threat of prosecution.

D. Plaintiff League of Women Voters lacks standing to challenge Subsection (b) of § 2-7-115 against any Defendant.

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)). Plaintiff League of Women Voters appears to proceed down both paths, but neither leads to establishing the organization's standing to sue.

1. The League has not shown that it suffered an injury in its own right.

An organization can establish standing through "the same inquiry" that applies to "individual[s]," because organizations (just like people) can suffer legally redressable harms. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). But Article III standing prevents organizational plaintiffs from bringing lawsuits on public-policy issues if success would not give the organization "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). The organization must show that its "ability to further its goals has been 'perceptively [sic] impaired' so as to constitute far more than simply a setback to the organization's abstract social interests." *Greater Cincinnati Coal. for the Homeless v. City of Cincinnati*, 56 F.3d 710, 716 (6th Cir. 1995) (quoting *Havens*, 455 U.S. at 379).

As in the prior case, the League asserts "two injuries": (1) "it may need to divert its resources away from expenditures it would make in the absence of Defendants' conduct" and (2) "it cannot fulfill its organizational mission without knowing what Section 115(b) prohibits." *Ashe*, 2024 WL 923771 at *9. Both fail.

First, the League cannot establish an injury through a diversion-of-resources theory that rests on *Havens Realty*. For one, "in *Havens*, the plaintiff organization sought damages, not an injunction" like that sought by the League here. *Husted*, 770 F.3d at 460 n.1. For two, the League "relies on an overly speculative fear as triggering the League's anticipated diversion of organizational resources." *Ashe*, 2024 WL 923771 at *10. Section 2-7-115(b) has been in effect for 50 years, and there is no basis to infer "widespread intimidation or confusion currently exists among voters." *Id.* at *11. Accordingly, "there is no clear impetus for the League to divert its resources." *Id.* For three, Plaintiff cannot "tie its alleged injury to a legally recognized right." *Ashe*, 2024 WL 923771 at *12; *Fair Elections Ohio*, 770 F.3d at 460, n.1. Unlike in *Havens*, the League has not pointed to any statute that grants it the right to clearer information (or any information at all), and there are no allegations that any Defendants have interfered with any rights by providing false information. *Husted*, 770 F.3d at 460, n.1. For any one of those reasons, the diversion-of-resources theory fails.

Second, the League cannot establish standing by merely claiming that § 2-7-115(b) "statute

prevents [it] from fulfilling its primary function of providing voter information." (Compl., ECF No. 1, ¶24 (citing Tenn. Code Ann. § 2-2-142(h)).) As Plaintiffs assert in the Complaint, the League's mission is empowering voters, defending democracy, helping citizens to vote, educating voters, and encouraging voters to be active participants in democracy through engaging with elected officials and their policy decisions. (Compl., ECF 1, ¶ 20.) The "enforcement of Section 115(b) would not hamstring the League's ability to engage in any of the conduct that (according to the Complaint) furthers its mission." *Ashe*, 2024 WL 923771 at *13. The League is not in the business of dispensing legal advice. *See id.* ("the League's purpose is not to offer legal advice"). Not to mention that 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 can educate the voters about the law, suggest that they seek legal advice if they are concerned about their potential actions, and encourage them to speak to their elected officials if they are concerned about the law. Section 2-7-115(b) does not impair or impede the League's mission. See *Ashe*, 2024 WL 923771, at *13 ("The enforcement of Section 115(b) does not 'perceptibly impair' [the League's] mission. Rather, the League may continue to engage in all of the conduct described above as furthering its mission regardless of its purported confusion as to what Section 115(b) prohibits.").

The Sixth Circuit has already stated that the limits on organizational standing "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." 770 F.3d at 460. And this Court has already rejected the League's impairment-of-mission arguments. The League lacks standing.

2. The League has not shown representative standing.

The League alleges that unnamed 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, ¶ 24.)

Although Supreme Court precedent has recognized associational standing in certain cases, *but see Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 542 (6th Cir. 2021) (questioning the viability of associational standing), the doctrine comes with its own set of requirements. To invoke associational standing, an organization must show that "its members would otherwise have standing to sue in their own right"; the "interests" that the suit "seeks to protect are germane to the organization's purpose"; and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

The League cannot make that showing here. In fact, the League fails the most basic requirement: It never "identif[ies] a member who has suffered (or is about to suffer) a concrete and particularized injury." *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 851 (W.D. Tenn. 2023). To satisfy the first element of the associational-standing test, Plaintiff "must do more than identify a likelihood that" one of the defendants "will harm an unknown member"; the organization must actually "identify a member who has suffered (or is about to suffer) a concrete and particularized injury from [at least one of] the defendant[s'] conduct." *Ass'n of Am. Physicians*, 13 F.4th at 543. That is, "an association cannot just *describe* the characteristics of specific members with cognizable injuries; it must identify at least one by name." *Do No Harm v. Pfizer Inc.*, 96 F.4th 106, 115 (2d Cir. 2024). "Standing . . . requires . . . a factual showing of perceptible harm," so Plaintiff must specifically "identify members who have [or will] suffer[] the

requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (internal citations omitted). The mere "possib[ility] . . . that one individual will meet all of th[e] criteria . . . does not suffice." *Id.*; *see also Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 602 (8th Cir. 2022) (same). Because Plaintiff failed to point to even "one specifically-identified member [who will] suffer[] an injury-in-fact," *Am. Chem. Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006), it cannot establish associational standing.

Setting aside the failure to identify a member, the League has not alleged facts showing that any member "inten[ds] to engage in a course of conduct" proscribed by § 2-7-115(b) or "a *certain* threat of prosecution if the plaintiff does indeed engage in that conduct." *Crawford*, 868 F.3d at 454-55 (quotations omitted). Thus, the associational-standing argument fails on all fronts.

II. Defendants Are Entitled to Sovereign Immunity.

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

Generally, a State is not "amenable to the suit of an individual without its consent." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). 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, 28 S. Ct. 441, 52 L.Ed. 714 (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.* A plaintiff must show that the state official has threatened and is "about to commence proceedings" in order to overcome the sovereign immunity defense. *EMW Women's Surgical Center v. Beshear*, 920 F.3d 421, 445 (6th Cir. 2019). Plaintiffs have not met this burden.

A. Defendants Hargett and Goins do not have authority to prosecute.

Merely claiming that a state official has an obligation to execute the laws is not sufficient to show that the *Ex Parte Young* exception applies. *Id.* 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[,]'" *id.* (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, Secretary Hargett and Coordinator Goins do not have authority to prosecute violations of § 2-7-115(b). Nor have Plaintiffs pointed to any legal or administrative action Secretary Hargett and Coordinator Goins can take against them. 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, ¶ 71.) But Secretary Hargett made reference 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 to Defendants Hargett and Goins.

B. Plaintiffs have not shown that the Defendant District Attorneys General have enforced or threatened to enforce the statute.

Plaintiffs have named 24 District Attorneys General as Defendants, but the only allegation Plaintiffs make regarding any District Attorney General's enforcing or threatening to enforce § 2-7-115(b) is that the District Attorney General for the 15th Judicial District, Jason Lawson, issued a letter threatening enforcement. (Compl., ECF 1, ¶ 23). But, as discussed above, no Plaintiff has standing to sue the District Attorney General for Judicial District 15, and there are no allegations that the District Attorneys General in the remaining judicial districts have enforced or threatened to enforce the statute. Plaintiff Gabe Hart does allege that the District Attorney General for Judicial District 26, Jody Pickens, told Hart that he "could be prosecuted" and that "there is heat on me to prosecute you." (Compl., ECF 1, ¶ 16.) But there is no allegation that General Pickens has actually ever enforced the statute; there is also no allegation that General Pickens has really threatened Plaintiff Hart—he has allegedly stated only that he had "heat" on him to prosecute. Further, Plaintiff Hart has not met his burden to show that General Pickens is "*about to commence proceedings*." *EMW Women's Surgical*, 920 F.3d at 445. Plaintiffs' allegations pertain to things that happened to Plaintiff Hart in 2022—two years ago. (Compl., ECF No. 1, ¶¶ 16, 17.) Yet Plaintiffs do not allege any actual or imminent prosecution; Plaintiffs do not show that there is any prosecution that is "certainly impending"—accordingly, they have failed to show that prosecution of Plaintiff Hart is a *realistic* possibility.

III. Plaintiffs Have Failed to State a Claim on which Relief Can Be Granted.

A. Plaintiffs fail to state a First Amendment overbreadth claim.

Plaintiffs claim that § 2-7-115(b) and (c) violate their "constitutional rights guaranteed by the First and Fourteenth Amendments to engage in the political process and exercise their fundamental right to vote," asserting that § 2-7-115(b) and (c) "violate the First Amendment's

overbreadth doctrine." (Compl., ECF No. 1, ¶¶ 6, 128). Specifically, the Complaint alleges that "Section 115 penalizes or deters an extraordinary range of protected voting conduct," as well as "expressive conduct that accompanies voting." (*Id.* at ¶¶ 125-126.) Through any lens, this claim fails.

For starters, it is far from clear what right Plaintiffs seek to vindicate. If, as some of their allegations suggest, their claim is premised on the right to vote, a First Amendment overbreadth theory is the wrong legal theory. As the Sixth Circuit has made clear, voting-rights claims—even those that might implicate First Amendment rights—are subject to the Supreme Court's *Anderson-Burdick* framework, not the usual First Amendment analyses. *Lichtenstein v. Hargett*, 83 F.4th 575, 589 (6th Cir. 2023) (observing that the Sixth Circuit and Supreme Court have applied the *Anderson-Burdick* framework to "three types of claims: ballot-access claims, political-party associational claims, and voting-rights claims"); *see also Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020) (Readler, J., concurring in the judgment) ("Following the Supreme Court's lead, we have thus utilized that framework where it is alleged that a state election law burdens voting.").

Applying First Amendment standards to every claimed impingement of the right to vote would make hash of scores of voting-rights cases. "Election laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Voter-ID requirements and limitations on early voting, for example, burden voting in some sense. But laws like these are routinely upheld without facing First Amendment scrutiny. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 533 U.S. 181 (2008) (Voter-ID); *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016) (early-voting limitation). Plaintiffs cannot repackage a voting-rights claim as a First Amendment overbreadth claim. And that is reason enough to dismiss: The Complaint raises only a First Amendment overbreadth claim under a non-cognizable theory.

But even if this Court were inclined to treat Plaintiffs' First Amendment claim as a properly presented right-to-vote claim, dismissal would still be warranted. Under the *Anderson-Burdick* framework, a plaintiff needs to allege a burden on the right to vote that cannot be overcome by countervailing state interests. *Cf. Lichteinstein*, 83 F.4th at 590 (explaining that, to decide whether an election-related law violates the Constitution, courts "must identify the 'character and magnitude' of the harm to the rights and compare that harm to the 'precise interests' that the state used to justify the law" (quotations omitted)); *Daunt v. Benson*, 999 F.3d 299, 313 (6th Cir. 2021) (recognizing that courts have not "shied away from disposing of *Anderson-Burdick* claims at the motion-to-dismiss stage"). And, unlike in the overbreadth context, a plaintiff bringing a right-to-vote claim cannot premise their claim on harm to other unidentified individuals. *Compare Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 584 (1987) (explaining that the overbreadth doctrine allows plaintiffs to sue based on threats to the rights of others), *with Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 385-89 (6th Cir. 2020) (requiring the plaintiffs themselves to establish injury in fact in the voting-rights context).

Plaintiffs' allegations here fall short. They allege—in conclusory fashion—that § 2-7-115(b) "penalizes or deters an extraordinary range of protected voting conduct." (Compl., ECF No. 1, ¶ 125.) They do not explain what "protected voting conduct" is impaired. They do not identify the severity of any burden § 2-7-115(b) might impose. And they do not meaningfully acknowledge the State's well-established and compelling interests in "preserving the integrity of the electoral process" and "ensuring that its elections are run fairly and honestly." *Thompson v. Dewine*, 959 F.3d 804, 811 (6th Cir. 2020). Instead, they allege that § 2-7-115(b) will deter the "direct voting behavior" of unidentified "voters who have never voted before" and "voters who may wish to switch parties." (Compl., ECF No. 1, ¶¶ 102-03.) Plaintiffs, in other words, allege

the existence of a possible burden on the voting rights of unidentified non-plaintiffs, and nothing more. That does not suffice to state a claim.

Finally, to the extent Plaintiffs' First Amendment claim is premised on the right to speech or expressive conduct, their allegations still fall well below what is needed to state a claim. Plaintiffs say that § 2-7-115(b) will "deter or penalize a host of expressive conduct that accompanies voting." (Compl., ECF No. 1, ¶ 127.) They also claim that it will "prevent[] Plaintiffs and similarly situated voters from participating in the political process and chill[] their freedom of political speech." (*Id.*) But Plaintiffs do not identify exactly what expressive conduct is supposedly restricted. And they fail to even hint at how § 2-7-115(b) could possibly "deter or penalize" their "speech" or "expressive conduct." And that is unsurprising, given the narrow focus of § 2-7-115(b). The provision "prohibits no spoken or written expression whatsoever," *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 765 (M.D. Tenn. 2020). So again, Plaintiffs' First Amendment claim necessarily fails.

B. Plaintiffs failed to state a void-for-vagueness claim.

1. Plaintiffs cannot raise a facial vagueness challenge.

Plaintiffs cannot plead a facial vagueness challenge. Generally, a litigant "to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982). Under that established principle, "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *Hoffman Ests.*, 455 U.S. at 495 n.7 (citation omitted). That is, for "vagueness challenges to statutes not threatening First Amendment interests," "the statute must be judged on an as-applied basis, and a facial challenge before the statute has been applied is premature." *NRA v. Magaw*, 132 F.3d 272, 292 (6th Cir. 1997); *United States v. Kettles*, 2017 WL

2080181, at *3-4 (M.D. Tenn. May 15, 2017) (Trauger, J.).

As explained in Part III.A, Plaintiffs cannot allege that "First Amendment freedoms are . . . infringed by [the Act], so the vagueness claim must be evaluated as the statute is applied to the facts of this case." *Chapman v. United States*, 500 U.S. 453, 467 (1991). That means that Plaintiffs must raise as-applied challenges; a facial vagueness challenge is not cognizable. *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).

2. § 2-7-115(b) is not void-for-vagueness.

In any event, § 2-7-115(b) is not unconstitutionally vague. The Due Process Clause's "void for vagueness" doctrine ensures that a "person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited" by the law. *Grayned v. Rockford*, 408 U.S. 104, 108 (1972). But "perfect clarity and precise guidance" are not required. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). The law is full of "flexible" "standards," *id.*, and "[c]lose cases can be imagined under virtually any statute," *United States v. Williams*, 553 U.S. 285, 306 (2008). "[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. *Platt v. Board of Comm'rs on Grievances and Discipline*, 894 F.3d 235, 246 (6th Cir. 2018). None of the terms in § 2-7-115(b) are so vague that a "person of ordinary intelligence" would not have "a reasonable opportunity to know what is prohibited," *Grayned*, 408 U.S. at 108—a reality confirmed by the nearly half of a century that this law has been on the books without incident.

Each of the terms pointed to in § 2-7-115(b) is commonly used and easily defined. Dictionaries define "bona fide" to mean "[m]ade in good faith; without fraud or deceit," or "[s]incere; genuine." *Bona Fide*, Black's Law Dictionary (11th ed. 2019); *see also, e.g.*, Webster's New Universal Unabridged Dictionary (1996) (similarly defining "bona fide" to mean "sincere"

or "genuine"). The term "affiliate" is defined it to mean "to adhere or belong to an organization or group," or "to be a part of something." *Affiliate*, Oxford English Dictionary; *see also* Webster's Third New International Dictionary 35 (1993) (defining the verb "affiliate" primarily as "to attach as a member or branch"); Merriam-Webster's Collegiate Dictionary (10th ed. 1993) (similar). Finally, "allegiance" is commonly defined to mean "loyalty or devotion" to some person, group, or cause. Webster's New Universal Unabridged Dictionary (1996); *see also* Webster's New Twentieth Century Dictionary (2d ed. 1970) (defining allegiance to mean "loyalty and devotion in general, as to a church, *a political party*, a principle, a leader" (emphasis added)).

Putting these definitions together, a clear picture emerges. The first provision—§ 2-7-115(b)(1)—allows voters to participate in a party's primary election when they sincerely and in good faith adhere to that party. And the second provision—§ 2-7-115(b)(2)—permits a voter to vote in a party's primary when, "at the time the voter seeks to vote," he or she adheres to and expresses loyalty to that party. Understood this way, § 2-7-115(b) does exactly what the General Assembly sought to do: deter voters of one party from "crossing over" to vote in the other party's primary to strategically subvert that party's election of their preferred candidate. *Supra*, Background. This is not a statute that is "so technical or obscure that an individual . . . would be oblivious to its prohibitions and criminal penalties." *United States v. Anderson*, 605 F.3d 404, 413 (6th Cir. 2010).

And the applicable scienter requirements—particularly when combined with the "good faith" and "sincerity" components of the statutory language—"alleviate [any] vagueness concerns." *Gonzales v. Carhart*, 550 U.S. 124, 149-50 (2007). The Supreme Court has repeatedly recognized that a scienter requirement "mitigate[s] a law's vagueness, especially with respect to the adequacy of notice . . . that [the] conduct is proscribed." *Hoffman Ests.*, 455 U.S. at 499; *see*

also Colatti v. Franklin, 439 U.S. 379, 395 (1979) (recognizing "that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea"). And here, the statutes that make it a criminal offense to violate § 2-7-115(b) include just such requirements. *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."). These "knowing" and "intentional" scienter requirements "mitigate[]" any vagueness by limiting any punishment to voters who understand that they are violating § 2-7-115(b)'s restrictions *Hoffman Ests.*, 455 U.S. at 499. They likewise "guard[] against capricious enforcement" by requiring voters to "actually have intended" the cross-over voting "the statute seeks to guard against." *Wright v. New Jersey*, 469 U.S. 1146, 1152 n.5 (1985) (Brennan, J., dissenting) (cleaned up); *see also Posters 'N' Things v. United States*, 511 U.S. 513, 526 (1994).

3. Plaintiffs fail to allege *facial* invalidity.

A final point on vagueness: Even if § 2-7-115(b) could be considered impermissibly vague in certain applications, Plaintiffs failed to carry their burden of establishing facial invalidity.

Generally, "litigants mounting a facial challenge to a statute . . . must establish that *no set of circumstances* exists under which the statute would be valid." *United States v. Hansen*, 143 S. Ct. 1932, 1939 (2023) (quotation omitted). That means "the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Hoffman Ests.*, 455 U.S. at 497. In vagueness challenges implicating First Amendment rights and in other narrow circumstances, this vague-in-all-applications requirement has been relaxed. *United States v. Requena*, 980 F.3d 30, 41 (2d Cir. 2020). But Plaintiffs claim does not implicate a First Amendment right. *Supra* Part III.A. And if it did, Plaintiffs never explain what standard the court should apply to decide the facial vagueness claim involving First Amendment rights. That failure reaffirms that the

established vague-in-all-its-applications standard applies. And Plaintiffs cannot satisfy that standard.

Numerous unambiguous applications of § 2-7-115(b) exist. For example, if a candidate running as a republican were to vote in their district's democratic primary, or vice versa, that conduct would fall squarely within the scope of § 2-7-115(b). Or if a voter professes their intention to manipulate the primary of an opposing party by voting for a candidate perceived as weak and less likely to win the general election, that would fall within § 2-7-115(b). Examples abound. Thus, at a minimum, Plaintiffs cannot allege *facial* invalidity.

IV. This Court Should Abstain and Allow State Courts to Interpret § 2-7-115(b).

At bottom, Plaintiffs' challenge opportunistically rests on the absence of case law in Tennessee courts interpreting the allegedly vague language. Of course, there is a solution: Allow the Tennessee State courts to construe the State statute in the first instance, which may result in an interpretation "that would avoid or modify the constitutional question." *Zwickler v. Koota*, 389 U.S. 241, 249 (1967). When faced with a "federal constitutional claim . . . premised on an unsettled question of state law," the appropriate course is abstention under the *Railroad Commission of Texas v. Pullman* doctrine to "provide the state courts an [o]pportunity" to weigh in. *Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 83 (1975); *see R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Doing so "affords the [Tennessee] courts the respect they are due as . . . equals in a federalist judicial system." *Gottfried v. Med. Plan. Servs.*, 142 F.3d 326, 332 (6th Cir. 1998).

Here, Plaintiffs' vagueness theory implicates "an unsettled question of state law": the proper interpretation of various terms in § 2-7-115(b). *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999). A Tennessee court's interpretation of those terms could "remove the federal issue by making unnecessary a constitutional decision." *Traughber v. Beauchane*, 760 F.2d 673, 682 (6th Cir. 1985); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 511 (1972). This Court should

abstain from an interpretation and constitutional analysis of § -115(b) that would likely result in a "forecast rather than a determination." *Railroad Comm'n of Texas*, 312 U.S. at 499.

CONCLUSION

For the reasons stated, Defendants' Motion to Dismiss should be granted.

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 June 10, 2024. Parties may access this filing through the Court's electronic filing system.

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