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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

ALLISON POLIDOR, ERICA BOWTON, and MARYAM ABOLFAZLI,	)	
Plaintiffs,	)	
v.	)	**Case No. 23-1132-II**
CAMERON SEXTON, in his official capacity as the Speaker of the Tennessee House of Representatives; TAMMY LETZLER, in her official capacity as the Chief Clerk of the House of Representatives; BOBBY TROTTER, in his official capacity as the Sergeant-At-Arms; MATT PERRY, in his official capacity as the Colonel of the Tennessee Highway Patrol,	)	
Defendants.	)	

MEMORANDUM AND ORDER

The matter was initiated on August 23, 2023, upon Plaintiffs Allison Polidor, Erica Bowton, and Maryam Abolfazli (collectively, the "Plaintiffs") filing of a Verified Complaint and Emergency Motion for Temporary Restraining Order seeking to enjoin Cameron Sexton, in his official capacity as the Speaker of the Tennessee House of Representatives, Tammy Letzler, in her official capacity as the Chief Clerk of the House of Representatives, Bobby Trotter, in his official capacity as the Sergeant-At-Arms, and Matt Perry, in his official capacity as the Colonel of the Tennessee Highway Patrol (collectively, the "Defendants"), from enforcing a rule of the House of Representatives. After reviewing the materials submitted, on that same date, the Court entered a Temporary Restraining Order enjoining Defendants from enforcing the portion of the rules that states "No…signs…shall be permitted in the galleries of the House of Representatives" (the "TRO"). On August 24, 2023, Defendants filed a Motion to Dissolve or Stay Temporary

Restraining Order and Motion for Expedited Hearing of same. On August 25, 2023, the Court granted the Motion for Expedited Hearing and moved up the hearing on the temporary injunction from September 5, 2023, to August 28, 2023, combining the two proceedings. Pursuant to the deadline set by the Court in that Order, Defendants timely filed a Response in Opposition to Plaintiffs' Request for a Temporary Injunction, and Plaintiffs timely filed a Response in Opposition to Defendants' Motion to Dissolve or Stay the Temporary Restraining Order.

The Court has reviewed the filings, the parties' briefing, the relevant legal authority, and the parties' arguments. Having considered the record in this matter, and the argument of counsel, the Court is now ready to rule.

PRELIMINARY FACTUAL FINDINGS BASED UPON THE RECORD

On August 8, 2023, Governor Bill Lee called on the Tennessee General Assembly to convene a special session to consider measures that would enhance public safety. The Governor issued a Proclamation with recitals introducing the purpose and subject of the special session as follows:

> **WHEREAS**, public safety is of prime importance to Tennesseans, and enhancing public safety requires a multi-faceted approach that likewise protects Constitutional rights; and
>
> **WHEREAS**, Tennessee and our nation continue to experience acts of mass violence; and
>
> **WHEREAS**, Tennesseans are experiencing mental health issues to an unprecedented degree, and this crisis affects not only those suffering from mental health issues, but also society at large; and
>
> **WHEREAS**, in response to Executive Order 100, the Tennessee Bureau of Investigation identified barriers to timely and accurate information sharing throughout the criminal justice system, particularly regarding information that should be entered in state and national crime databases; and
>
> **WHEREAS**, it is in the best interest of Tennessee that the General Assembly convene to expeditiously address these concerns.

The Proclamation then listed seventeen categories of items to be included in the special session, and an eighteenth category regarding appropriations for any resulting legislation (the "Proclamation").

The General Assembly opened that special session on August 21, 2023 and adopted "Permanent Rules of Order of the Tennessee House of Representatives, One Hundred Thirteenth General Assembly, First Extraordinary Session" ("Rules of Order"). Rule 4, which is at issue herein, provides:

> **4. ORDER IN GALLERY OR LOBBY.** In case of any disturbance or disorderly conduct in the gallery or lobby, the Speaker or the Chair of the Committee of the Whole shall have power to order the same to be cleared. No voice or noise amplification devices, flags, signs, or banners shall be permitted in the galleries of the House of Representatives.

The Rules of Order regulate the use of signs in the House galleries as well as the public galleries in House committee rooms. *See* Rule 83(21).

The House's prior "Permanent Rules of Order of the Tennessee House of Representatives, One Hundred Thirteenth General Assembly" included this same paragraph, without the last sentence. The sentence "No voice or noise amplification devices, flags, signs, or banners shall be permitted in the galleries of the House of Representatives" was added to the Rules of Order specifically applicable to the special session.

Additionally, previously, the House had posted on a stand at the entrance to the galleries of the House chamber, since the early 2000s, a sign entitled "Rules of the Gallery," which provided that "No Signs, Banners, or Place Cards of Any Type Will Be Permitted." However, this sign's restrictions were "self-policed," and the House had not enacted such a ban in the regular session House rules. The Senate does not have a similar rule in its special session rules.

Plaintiffs are long-time Tennessee residents currently living in Nashville or Brentwood.

Defendant Cameron Sexton is the elected Speaker of the House of Representatives and is the presiding officer of the House who presides over the debate and adoption of the Rules of Order. Under the Rules of Order, the Speaker shall have power to enforce order and decorum in the House. *See* Rules 2, 4. Defendant Tammy Letzler is the Chief Clerk of the Tennessee House of Representatives. Under the Rules of Order, the Chief Clerk "shall keep open the Office of the Clerk during and between sessions of the General Assembly on a permanent basis and shall transact efficiently such business as is assigned or required by law or rules of the House, both during and between sessions." *See* Rule 9. Defendant Bobby Trotter is the Chief Sergeant-At-Arms of the Tennessee Legislature. The Sergeant-At-Arms maintains order and decorum in the House galleries. *See* Rule 9. Under the Rules of Order, the "Chief Sergeant-At-Arms shall take an oath to support the Constitution of the United States and of the State of Tennessee and to truly and faithfully discharge the duties of the office to the best of their knowledge and ability." *Id*. Defendant Matt Perry is the Colonel, or chief executive officer, of the Tennessee Highway Patrol. The Tennessee Highway Patrol, through its Capitol Protection Unit, is the law enforcement entity for the State Capitol grounds, including the House of Representatives, its galleries and committee meeting rooms. The Tennessee Highway Patrol is the law enforcement agency responsible for enforcing the Rules of Order. *See* Tenn. Code Ann. § 4-3-2006.

On August 22, 2023, the Tennessee General Assembly met for a special session to address issues related to public safety. All three Plaintiffs attended the House of Representatives Civil Justice Subcommittee meeting at 1:00 p.m. When the Civil Justice Subcommittee meeting began, Plaintiffs were sitting in the gallery, quietly holding a small 8.5 by 11-inch piece of paper that said "1 KID > ALL THE GUNS." Soon thereafter, an official approached Plaintiffs and requested they put away the signs. When Plaintiffs refused, Tennessee Highway Patrol troopers then escorted

them out of the gallery.

Plaintiffs filed a complaint on August 23, 2023 as well as an emergency motion for a restraining order seeking to enjoin the Defendants from enforcing Rule 4, but only as it pertained to signs in the galleries of the House of Representatives. In their complaint, they bring claims for violation of their First Amendment rights to free speech and to assemble under both the Tennessee and U.S. Constitutions. The temporary injunction request is limited to the First Amendment free speech claim.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Injunctive Relief

Under Rule 65.04 of the Tennessee Rules of Civil Procedure, "[a] temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual." Tenn. R. Civ. P. 65.04(2).

In considering a request for a temporary injunction, a trial court must apply a four-factor test, adopted from the standard applied in federal courts. Those factors are: (1) the likelihood that the plaintiff will succeed on the merits; (2) the threat of irreparable harm to the plaintiff if the injunction is not issued; (3) the balance between the harm and the injury that granting the injunction would inflict on the defendant; and (4) the public interest. *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020). To demonstrate the factor of likelihood of success on the merits, the quantum of proof is that the movant must "clearly show . . . that its rights are being or will be violated." Tenn. R. Civ. P. 65.04(2); *Moody v. Hutchinson*, 247 S.W.3d 187, 199 (Tenn. Ct. App. 2007).

Additionally, the Court recognizes that an injunction is an extraordinary and unusual remedy that should only be granted with great caution, *Malibu Boats, LLC v. Nautique Boat Co.*, 997 F.Supp.2d 866, 872 (E.D. Tenn. 2014), and that no irreparable injury exists to justify a temporary injunction if the movant has a full and adequate remedy, such as monetary damages, available for an injury. *Tennessee Enamel Mfg. Co. v. Hake*, 194 S.W.2d 468, 470 (Tenn. 1946); *Fort v. Dixie Oil Co.*, 95 S.W.2d 931, 932 (Tenn. 1936). The grant or denial of a request for temporary injunction is discretionary with the trial court. *Fisher*, 604 S.W.3d at 395.

Likelihood of Success on the Merits

Plaintiffs allege that their rights to free speech as protected by the U.S. and Tennessee Constitutions were denied by the Rules of Order and the enforcement of same by Defendants when Plaintiffs were removed from the committee hearing room for silently holding signs.

The Court notes that the Tennessee Constitution confers on the House of Representatives the power to "determine the rules of its proceedings." Tenn. Const. Art. II, § 12. Defendants argue that the Constitution protects against incursions by other branches in the General Assembly's exercise of its lawful powers and that temporarily enjoining the ban on signs erodes the separation of powers. However, "[t]he legislature has unlimited power to act in its own sphere, except so far as restrained by the Constitution of the state and of the United States." *Mayhew v. Wilder*, 46 S.W.3d 760, 774 (Tenn. Ct. App. 2001) (quoting *Bank of Commerce & Trust Co. v. Senter*, 149 Tenn. 569, 260 S.W. 144, 146 (1924)). "The power of the legislature is limited only by the Constitution," and is not immune from judicial review. *Id*. (quoting *Quinn v. Hester*, 135 Tenn. 373, 186 S.W. 459, 460 (1916)). Although such incursions are "rare," the courts may "hold an act of the Legislature unconstitutional," and "may provide a remedy where the action (or inaction) of the executive or legislative branches deprive the people of their constitutional rights." *Id*. at 773.

The Court reviews Plaintiffs' request to convert the TRO to a temporary injunction with those principles in mind.

Article I, Section 19 of the Tennessee Constitution provides:

> The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

The First Amendment of the United States Constitution prohibits the government from "abridging the freedom of speech." U.S. Const. Amend. I. It is well recognized that the First Amendment guarantees the right to freedom of speech and of assembly, and freedom to petition the government for a redress of grievances. *Brown v. State of La.*, 383 U.S. 131, 141, 86 S. Ct. 719, 724, 15 L. Ed. 2d 637 (1966). "Simply because the government may own a piece of property, however, does not mean that property is open to all types of expressive activity at all times." *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010). "[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use which it is lawfully dedicated." *Id*. (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). To determine the constitutionality of a government restriction on speech on publicly-owned property, we consider three questions: (1) whether the speech is protected under the First Amendment; (2) what type of forum is at issue and, therefore, what constitutional standard applies; (3) whether the restriction on speech in question satisfies the constitutional standard for the forum. *Id*. (citing *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 559 (6th Cir. 2007)).

It is undisputed that Plaintiffs' silent sign-holding is a form of speech that is protected under the First Amendment. However, Defendants argue that the forum at issue qualifies as a nonpublic forum subject to relaxed constitutional scrutiny and that, in this context, the Rules of

Order meet that scrutiny.

The Supreme Court has recognized three types of public fora: the traditional public forum, the designated public forum, and the limited public forum. *Miller*, 622 F.3d at 533 (citing *Pleasant Grove v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 1132, 172 L.Ed.2d 853 (2009)). In contrast, a nonpublic forum is a government-owned property that is not by tradition or governmental designation "a forum for public communication." *Id*. (quoting *Helms v. Zubaty*, 495 F.3d 252, 256 (6th Cir. 2007)). The type of forum determines the applicable constitutional standard for restrictions on expressive activities. *Id*. (citing *Summum*, 129 S.Ct. at 1132).

Restrictions on speech in a traditional public forum, such as sidewalks and parks, receive strict scrutiny; the government may exclude a speaker from such a forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Miller*, 622 F.3d at 533 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)). It is undisputed that the House galleries are not a traditional public forum.

The government creates a designated public forum when it opens a piece of public property to the public at large, treating it as if it were a traditional public forum, and government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum. *Miller*, 622 F.3d at 533 (quoting *Summun*, 129 S.Ct. at 1132). As for a limited public forum, a government entity may "create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Id*. (quoting *Summum*, 129 S.Ct. at 1132). Restrictions on speech in a limited public forum receive lesser scrutiny than those in a designated public forum; the government may restrict speech in a limited public forum as long as the restrictions do "not discriminate against speech on the basis of viewpoint" and are "reasonable

in light of the purpose served by the forum." *Id*. (quoting *In Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106–07, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001)). Lastly, a nonpublic forum is a publicly-owned property that is not by tradition or governmental designation "a forum for public communication." *Id*. (quoting *Helms*, 495 F.3d at 256). The government may limit access to a nonpublic forum "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id*. (quoting *Helms*, 495 F.3d at 256).

Plaintiffs allege that the forum at issue may potentially be considered a designated public forum upon the development of further facts, but regardless, that Defendants cannot meet even the lowest level of scrutiny applicable to limited or nonpublic forums as the sign ban is patently unreasonable. In considering what type of forum is at issue and thus what type of scrutiny is applicable, although not binding, the Court finds persuasive the district court case *Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50, 56 (D.D.C. 2000), relied on by both sides of the dispute. The court in *Bynum* concluded that the inside of the United States Capitol is a nonpublic forum for First Amendment analysis purposes. The *Bynum* court noted that "the inside of the Capitol is not open to meetings by the public at large," and "[t]he fact that Congress allows the public to observe its proceedings and visit the inside of the Capitol does not make the Capitol a designated public form." *Bynum*, 93 F. Supp. 2d at 56. Accordingly, the Court finds it likely, following the analysis in *Bynum*, the House galleries are a nonpublic forum and thus the lowest level of scrutiny applies for the purposes of evaluating Plaintiffs' motion to convert the TRO to a temporary injunction.

The government may restrict First Amendment activity in a nonpublic forum so long as the restrictions are "viewpoint neutral" and "reasonable in light of the purpose served by the forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S. Ct. 3439, 3451, 87

L. Ed. 2d 567 (1985). As to viewpoint neutrality, the Court notes that the Senate did not implement a ban on signs in its rules for the special session. (Second Decl. Stella Yarbrough, Ex. 4). In the Proclamation the Governor called a special session for specific topics related to public safety, acts of mass violence, and mental health issues. Given that the ban was only enacted in the House for this particular special session, where prior protests over gun policies have recently taken place, and given that the purpose of the special session was to address specifically enumerated topics, it could be inferred that the sign ban was enacted to exclude certain viewpoints. However, the rule is viewpoint neutral as written, and there is no direct evidence in the limited record before the Court that the House enacted this rule in a way that is directed more towards one point of view than another.

As to reasonableness, a restriction is "reasonable" where it is "wholly consistent with the [government's] legitimate interest in preserv[ing] the property… for the use to which it is lawfully dedicated." *Perry Educ. Ass'n*, 460 U.S. at 50–51. Plaintiffs argue that the rule banning signs is unreasonable and does not further the purpose of the forum; a sign the size of an average piece of paper cannot obstruct the view of participants or committee members and is not disruptive to the proceedings. Further, that the Rules of Order do not prevent similar language that can be worn on a button or t-shirt. Defendants argue that the General Assembly has an interest in preventing disruption and maintaining decorum where it conducts legislative business and that the House has always implemented a ban on signs in its galleries. As evidence of same, Defendants point to the Declaration of Doug Himes, Ethics Counsel and Research Director for the House of Representatives, who testified that the House had implemented "Rules of the Gallery" since the early 2000s, which were posted at the entrance to the galleries of the House chamber and provided that "No Signs, Banners, or Place Cards of Any Type Will Be Permitted." (Himes Decl., ¶¶6-9).

However, Mr. Himes also testified that these rules were "mostly 'self-policed,'" and the other photographs attached to his declaration showing the public holding signs in the House galleries demonstrate that these rules were not being enforced. (*Id*. at ¶10). Moreover, this Rule was not included in the regular House session rules; only until this special session, which was limited to certain topics and subject matter, did the House implement a ban on all signs. Additionally, the examples Mr. Himes gives of prior sign usage that was arguably disruptive to the House's legislative business included actions by the sign holders that created a disruption, not necessarily the signs themselves. For instance, prior sign holders "hoisted signs that obstructed the views of other visitors" or were "thrown from the gallery onto the House floor while Representatives, staff and other individuals were present" even hitting him with one. (Himes Decl., ¶¶13, 16).

Here, the purpose of the forum is to hold a special session and allow legislators to discuss and decide proposed bills related to public safety and other topics while also allowing the public to participate in and access that process. Although the Court appreciates the General Assembly's desire to maintain decorum and prevent disruptions in its proceedings, the Court cannot conclude that the rule banning signs is reasonable in light of the purposes it could legitimately serve. The rule is so broad that it encompasses behavior that is not disruptive, as is the case here. Again, *Bynum* is instructive on this point. The restriction at issue there was a Capitol Police regulation that banned "demonstration activity" in the U.S. Capitol, including "parading, picketing, speechmaking, holding vigils, sit-ins, or other expressive conduct that convey[s] a message supporting or opposing a point of view or has the intent, effect or propensity to attract a crowd of onlookers, but does not include merely wearing Tee shirts, buttons or other similar articles of apparel that convey a message." 93 F.Supp.2d at 53. The plaintiff, a pastor leading a "prayer tour" of individuals who were taking a few moments of quiet prayer at various locations in the building,

was found to be engaging in "demonstration activity." That court invalidated the regulation, finding "[w]hile the regulation is justified by the need expressed in the statute to prevent disruptive conduct in the Capitol, it sweeps too broadly by inviting the Capitol Police to restrict behavior that is in no way disruptive. . ." *Id.* at 57. Similarly here, the Court finds the rule banning all signs overbroad and not designed for the purpose for which it was created—to prevent disruption. It is therefore not reasonably related to the purpose of the forum and Plaintiffs have shown a likelihood of success on the merits of their facial First Amendment challenge to Rule 4 as it relates to banning all signs.

Irreparable Harm to Plaintiffs

Where constitutional rights are threatened or impaired, for even minimal periods of time, irreparable injury "unquestionably" occurs. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016); *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (citing *ACLU of Ky. v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003)). Thus, constitutional injuries presume irreparable harm to Plaintiffs.

In support of their showing irreparable harm, Plaintiffs have submitted declarations and video footage that demonstrates they were peaceably viewing and participating in the legislative proceedings and were removed from the forum after they would not put away their signs. Plaintiffs argue that they will suffer irreparable harm as their expression will be totally silenced and that Defendants are not harmed as they have no legitimate government interest in violating First Amendment rights, and that Plaintiffs conduct of silently holding small signs cannot be said to have disrupted the House proceedings.

The Court concludes the risk of irreparable harm to Plaintiffs based on a likely constitutional injury weighs heavily in favor of the issuance of a temporary injunction.

Balance of Harm to the State

Defendants contend the harm to the State resulting from a grant of injunctive relief would hamstring the House's ability to enforce its duly enacted regulations and maintain order and decorum during its proceedings. Further, that temporarily enjoining the ban on signs harms the public and the coordinate branches of government by eroding the separation of powers. While the Court recognizes the General Assembly's constitutional authority to determine the rules of its proceedings and that granting an injunction is an extraordinary and unusual remedy that should only be granted with great caution, *Malibu Boats, LLC*, 997 F.Supp.2d at 872, such power is not without check nor immune from judicial review.

Having concluded that Plaintiffs are likely to succeed on the merits of their constitutional challenges, the Court finds the State has no interest in enforcing an unconstitutional restriction, and it is at minimal risk of irreparable harm.

Public Interest

It is in the public interest to avoid the violation of constitutional rights. *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009) (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)). As the Sixth Circuit has held:

> …"even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989). When a constitutional violation is likely, moreover, the public interest militates in favor of injunctive relief because "it is always in the public interest to prevent violation of a party's constitutional rights." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998)

Miller, 622 F.3d at 540.

Thus, weighing all four factors under Rule 65.04, and based upon the foregoing facts of record and law, the Court finds a temporary injunction is warranted during the pendency of this case.

Based on the foregoing, the Court converts the TRO to a temporary injunction which shall remain in place until further order of the Court. The State's motion to dissolve or stay is therefore DENIED.

It is so ORDERED.

s/ Anne C. Martin

ANNE C. MARTIN
CHANCELLOR, PART II

cc by U.S. Mail, email, or efiling as applicable to:

Stella Yarbrough
Lucas Cameron-Vaughn
Jeff Preptit
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
syarbrough@aclu-tn.org
lucas@aclu-tn.org
jpreptit@aclu-tn.org

Jonathan Skrmetti, Attorney General and Reporter
Steven J. Griffin, Assistant Attorney General
Cody N. Brandon, Assistant Attorney General
T. Austin Watkins, Associate Chief Deputy
Office of the Tennessee Attorney General and Reporter
P.O. Box 20207
Nashville, TN 37202
Steven.griffin@ag.tn.gov
Cody.Brandon@ag.tn.gov
Austin.Watkins@ag.tn.gov