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

ALLISON POLIDOR; ERICA BOWTON; and MARYAM ABOLFAZLI; Plaintiffs, vs. 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 of Arms; MATT PERRY, in his official capacity as the Colonel of the Tennessee Highway Patrol, Defendants.	)	**CH-23-1132-II** CHANCELLOR MARTIN

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISSOLVE OR STAY THE TEMPORARY RESTRAINING ORDER

This Court properly issued a temporary restraining order pursuant to Rule 65.03 of the Tennessee Rules of Civil Procedure on August 23, 2023. Plaintiffs Allison Polidor, Erica Bowton, and Maryam Abolfazli now move the Court to convert the temporary restraining order into a temporary injunction pursuant to Rule 65.04 of the Tennessee Rules

of Civil Procedure and DENY Defendants' Motion to Dissolve or Stay the Temporary Restraining Order.

I. ARGUMENT

The Court properly issued an *ex parte* temporary restraining order to maintain the status quo and prevent irreparable harm to Plaintiffs—namely the egregious violation of their rights to speak freely, assemble, and petition the government. Now, as when this Complaint was filed, all the temporary injunction factors weigh in Plaintiffs' favor and the Court should issue a temporary injunction enjoining Defendants from enforcing the Rules of Order of the Tennessee House of Representatives of the One Hundred Thirteenth General Assembly First Extraordinary Session ("Rules of Order") to the extent that they ban "signs […] in the galleries of the House of Representatives." (Hereinafter "the sign ban.").

A. The Temporary Restraining Order Was Properly Granted

i. The Court Acted to Preserve the Status Quo

The purpose of any kind of preliminary injunctive relief is to maintain the status quo during the pendency of litigation and, in doing so, prevent immediate and irreparable harm to the moving party. Defendants claim that a restriction on hand-held signs has been in place "for years" at the Legislature. (Defs.' Memo. at 3). But Defendants cite only a news article from 2017 in support.[1] (Attached at Ex. 1 to Second Yarbrough Dec.). Notably, no

[1] *See* Joel Ebert, Tennessee lawmakers to allow guns but prohibit 'hand-carried signs' in new building, The Tennessean (Dec. 21, 2017) *available at* https://www.tennessean.com/story/news/politics/2017/12/21/tennessee-lawmakers-allow-guns-but-prohibit-hand-carried-signs-new-building/971396001/)

actual existing or prior policy regarding signs for either chamber of the legislature was submitted for the Court's consideration as of the time of this filing. Even the 2017 news article itself concludes that while guns were allowed in the House galleries, "[P]rotesters have frequently been seen in recent years holding such signage, suggesting the ban [on signs] is loosely, if ever, enforced."[2] Defendants then fail to note that just a few months later, in January 2018, legislative leadership dropped the policy of banning signs—possibly due to a forthcoming opinion from the Attorney General that the policy was unconstitutional.[3] (Attached as Ex. 2 to Second Yarbrough Dec.). Instead, a policy allowing small signs that do not obstruct the view of visitors was adopted by legislative leaders in 2018.[4] This policy was also not submitted by Defendants.

Consistent with this 2018 policy allowing small signs, on August 21, 2023, when the Rules of Order for the Extraordinary Session were being debated, citizens held small signs in the House of Representatives galleries.[5] That House leadership thought it necessary to amend Rule 4 of the Permanent Rules of Order of the One Hundred and Thirteenth Legislative Session to specifically ban signs further undermines Defendants'

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[2] *Id*.
[3] Tom Humphrey, *Speakers quietly drop hand-held sign ban at Cordell Hull*, The Tennessee Journal (Jan. 18, 2018) *available at* https://onthehill.tnjournal.net/speakers-decide-permit-small-letter-sized-signs-cordell-hull/.
[4] *Id*.
[5] *What the first day of Tennessee's special legislative session looked like*, The Tennessean (Aug. 21, 2023), *available at* https://www.tennessean.com/picture-gallery/news/politics/2023/08/21/tennessee-lawmakers-convene-special-session-on-public-safety/70640488007/.

unsubstantiated assertion that signs were banned "for years." (Permanent Rules attached as Ex. 3 to Second Yarbrough Dec.).

ii. *Ex Parte* Relief Was Appropriate

As this Court correctly recognized in its August 25, 2023 Order, the Court is empowered by Tennessee law and the Tennessee Rules of Civil Procedure to act swiftly to issue *ex parte* injunctive relief when warranted. That is the purpose of Rule 65—and in particular Rule 65.03. The Court complied with its duty and acted properly to enjoin Defendants from further restricting Plaintiffs' constitutional rights. Plaintiffs' properly pleaded the immediate and irreparable harm they faced, *see* Polidor Dec., Bowton Dec., Abolfazli Dec., and further documented their attempts to provide notice to Defendants, *see* Yarbrough Dec. Moreover, Defendants have now been granted a hearing on this day, August 28, 2023 and will be able to raise any objections to the Court's temporary restraining order.

iii. There Is No Separation of Powers Issue

The Court did not violate the separation of powers: courts retain the ability to review actions of the other branches of government for compliance with the constitution. That *is* their power. *See Marbury v. Madison*, 5 US 137 (1803); *Mayhew v. Wilder*, 46 S.W.3d 760, 773 (Tenn. Ct. App. 2001)(reviewing General Assembly's then-policy for conducting legislative meetings in private for compliance with the Tennessee and United States Constitutions). "In certain limited cases the courts may provide a remedy where the action (or inaction) of the executive or legislative branches deprive the people of their

constitutional rights." *See Baker v. Carr*, 369 U.S. 186 (1962); *Mayhew*, 46 S.W.3d 760, 773 (Tenn. Ct. App. 2001). Here, Plaintiffs constitutional rights are being threatened by Defendants' enforcement of the sign ban, and that is a controversy that this Court is well-empowered—under separation of powers principles—to decide.

B. The Court Should Now Issue a Temporary Injunction

This Court properly granted the temporary restraining order and should grant a temporary injunction. Tennessee trial courts consider four factors in determining whether to issue a temporary injunction: (1) the probability that plaintiff will succeed on the merits; (2) the threat of irreparable harm to the plaintiff if the injunction is not granted; (3) the balance between this harm and the injury that granting the injunction would inflict on defendant; and (4) the public interest. *See Fisher v. Hargett*, 604 S.W.3d 381, 407 (Tenn. 2020). For the following reasons, a temporary injunction is proper.

i. Plaintiffs Are Likely to Succeed on the Merits of their Free-Speech Claim

Plaintiffs are likely to succeed on their free-speech claim. "Where, as here, the temporary injunction is sought on the basis of an alleged constitutional violation, the third factor—likelihood of success on the merits—often is the determinative factor." *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020)(citations omitted). Free-speech claims, such as the one here, require a three-step inquiry: first, [the Court] determine[s] whether the speech at issue is afforded constitutional protection; second, [the Court] examine[s] the nature of the forum where the speech was made; and third, [the Court] assess[es] whether the

government's action in shutting off the speech was legitimate, in light of the applicable standard of review. *Knight v. Montgomery Cnty., Tennessee*, 592 F. Supp. 3d 651, 658 (M.D. Tenn. 2022), *appeal dismissed sub nom*. *Knight v. Montgomery Cnty., TN*, No. 22-5249, 2022 WL 2348094 (6th Cir. May 11, 2022) (quoting *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 242 (6th Cir. 2015) (*internal citations omitted*)). Once the correct forum is identified, the Court applies the attendant level of scrutiny. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 809 (1985).

a. Plaintiffs' Signs Are Constitutionally Protected Speech

The Plaintiffs' signs, and the action of holding them, are protected by the First Amendment of the United States Constitution. U.S. Const. Amend. 1. "There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving "speech" protected by the First Amendment." *U.S. v. Grace*, 461 U.S. 171, 176 (1983)(collecting cases).

Plaintiffs' display of signs is also protected under Article I, Section 19 of Tennessee Constitution.

Article I, Section 19 provides:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. 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. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.

Tenn. Const. art. I, § 19. This provision of the Tennessee Constitution provides at least as much protection of the freedoms of speech and press as the First Amendment. *Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270, 288 (Tenn. Ct. App. 2007) (collecting cases). It could provide more. *Id*. (citing *Leech v. Am. Booksellers Ass'n, Inc.,* 582 S.W.2d 738, 745 (Tenn.1979)). In fact, the Tennessee Supreme Court has held that its protections of the freedoms of speech and press are "substantially stronger" than the First Amendment because "it is clear and certain, leaving nothing to conjecture and requiring no interpretation, construction, or clarification." *Id*. (quoting *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978)).

Defendants do not appear to dispute that Plaintiffs are engaged in protected speech activities.

b. The House Committee Hearing Rooms Are Likely Designated Public Fora

The United States Supreme Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). Under forum-analysis framework, a court will first determine whether the forum at issue should be categorized as either (i) a traditional public forum; (ii) a designated public forum; (iii) a limited public forum; or (iii) a nonpublic forum.

A traditional public forum is akin to streets, parks, and other public places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Such regulations survive only if they are narrowly drawn to achieve a compelling state interest. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983).

The second category of public property is the designated public forum—that is, government properties that have not traditionally been sites for public debate but have been intentionally opened up for "use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Perry Education Ass'n v. Perry Local Educator's Association*, 460 U.S. 37, 45-46 (1983). Regulation of such property is subject to the same strict scrutiny as that governing a traditional public forum. *Id*. at 46.

The third category is a limited public forum: a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. *Miller v. City of Cincinnati*, 622 F.3d 524, 534 (6th Cir. 2010). In these fora, "In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress

expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

Finally, there are nonpublic forums: "publicly-owned property that is not by tradition or governmental designation a forum for public communication." *Miller*, 622 F.3d at 535. "Access to a nonpublic forum…can be restricted as long as the restrictions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." Cornelius, 473 U.S. at 800 (quoting *Perry*, 460 U.S. at 46).

Governmental intent is the "touchstone" of a court's analysis in determining whether it has created a public forum. *Kincaid v. Gibson*, 236 F.3d 342, 348–349 (6th Cir.2001) (en banc). "To determine governmental intent, courts look to the government's policy and practice with respect to the forum as well as to the nature of the property at issue and its compatibility with expressive activity." *Miller v. City of Cincinnati*, 622 F.3d 524, 534 (6th Cir. 2010)(internal citations and quotations omitted).

In *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp. Rels. Comm'n*, 429 U.S. 167 (1976), the Supreme Court treated a school board meeting where members of the public could speak as a designated public forum, striking down a rule that prohibited teachers from speaking. "[T]he First Amendment plays a crucially different role when, as here, a government body has either by its own decision or under statutory command, determined to open its decision-making processes to public view and participation. In such case, the state body has created a public forum dedicated to the expression of views by the general public." *Id*. at 178-79 (Brennan, J., concurring).

Defendants contend that the legislative galleries are nonpublic fora because "the State has not intentionally opened the galleries [including the committee hearing rooms] for public expression." (Defs.' Memo. at 7). Paradoxically, however, they later assert that "citizens [like Plaintiffs] still have ample avenues to express their position—they can testify to the committees by simply signing up to do so." (Defs.' Memo. at 15).

Clearly, as the Defendants recognize in their own briefing, the House regularly opens the legislative committee hearing rooms to the public and invites constituents to speak. Their purpose is to allow citizens to partake in petitioning their government for reprieve and inform legislators about aspects of proposed legislation, including whether or not they, as constituents, approve. Whether this then creates a designated public forum is an issue that needs further factual development—and the consideration of the state legislature's written policies about access to the House galleries, at a minimum, which are not before the Court at this time.

c. The Sign Ban Fails Any Level of Scrutiny

For the purposes of issuing a temporary injunction, the sign ban fails even the most relaxed standard of scrutiny. Even in nonpublic fora, restrictions on speech must be reasonable and viewpoint neutral. *Perry*, 460 U.S. at 46. Defendants cite *Bynum v. U.S. Capitol Police Board*, 93 F. Supp. 2d 50 (D.D.C. 2000)—one of the few cases that analyzes a capitol building as a forum—in support of their argument that the House galleries are a nonpublic forum. While the U.S. and Tennessee State Capitol likely have longstanding differences with regard to public access and signage, and are therefore distinguishable,

even in *Bynum*, the district court struck down the regulation banning expressive conduct in the U.S. Capitol as "unreasonable" and "overbroad." The regulation "swe[pt] too broadly by inviting the Capitol Police to restrict behavior that is in no way disruptive, such as "speechmaking ... or other expressive conduct ...." *Bynum v. U.S. Capitol Police Bd*., 93 F. Supp. 2d 50, 57 (D.D.C. 2000).

In *Miller v. City of Cincinnati*, The Sixth Circuit similarly invalidated a restriction on First Amendment activities within Cincinnati's City Hall as "unreasonable" as it bore "little relationship" to the intended purpose of the space. 622 F.3d at 536.

The sign ban, here, is patently unreasonable. For one, signs are not banned in the Senate—and have, apparently, not disrupted the proceedings of the other chamber of the legislature.[6] The Senate Rules of Order for the One Hundred and Thirteenth General Assembly, First Extraordinary Session, do not contain a sign ban or anything approximating the House's sign ban. (Attached as Ex. 4 to Second Yarbrough Dec.). Nonetheless, the Senate and its various committees convened over 11 times during the special session—and do not seem to have not been disrupted or derailed by small signs being held by constituents. (Senate Calendar Attached as Ex. to Second Yarbrough Dec.).

In addition, the sign ban is a complete ban on all signs, regardless of size, how they are displayed, whether or not they contain offensive or vulgar speech, and regardless of whether they could possibly obstruct another's view of the proceedings. This regulation

[6] Erik Shelzig, *AG goes to bat for House ban on signs, doesn't mention Senate keeping old rules in place*, The Tennessee Journal, available at https://onthehill.tnjournal.net/ag-goes-to-bat-for-house-ban-on-signs-doesnt-mention-senate-keeping-old-rules-in-place/.

"sweeps too broadly by inviting the Capitol Police to restrict behavior that is in no way disruptive." *Bynum*, 93 F. Supp. 2d at 57.

Plaintiffs' removal from the House Subcommittee hearing on August 22, 2023 demonstrates the unreasonable nature of the sign ban perfectly: they sat silently, holding an 8 ½ by 11-inch piece of paper to their chests. Nonetheless, they were removed. Notably, even during their removal, the House Subcommittee continued to conduct its business. *See* Ex. 3 to Yarbrough Dec. If the forcible removal of several participants did not disrupt the House Subcommittee, it remains difficult to see how their small, handheld signs would cause any disruption at all.

As stated in Plaintiffs' Complaint, the sign ban still allows for written speech to be visible in the proceedings. Nothing in the sign ban would prevent someone from wearing obscenities on their shirt, pinning a sign to their hat, or wearing buttons, scarves, or even sandwich boards.

Lastly, the sign ban may not be viewpoint neutral. See *Perry*, 460 U.S. at 46. (regulations of speech must not be "an effort to suppress expression merely because public officials oppose the speaker's view."). Given that the ban was only enacted in the House, where prior protests over gun policies have taken place[7], and given that the purpose of the special session was to address specifically enumerated topics, like gun legislation, it stands

[7] Melissa Brown and Kirsten Fiscus, *'They're begging us to do something': Nashville lawmaker calls for gun reform as hundreds protest after Covenant shooting*, The Tennessean (Mar. 30, 2023), *available at* https://www.tennessean.com/story/news/politics/2023/03/30/after-nashville-school-shooting-hundreds-demand-gun-reform-in-nashville/70063649007/.

to reason that the sign ban was enacted to shelter legislators from viewing speech with which they disagreed. Even in 2017, according to Defendants' cited news article, First Amendment expert Ken Paulson stated that: "Any rational person would have to suspect that this [sign ban] is an attempt in part to limit dissent and to avoid embarrassment to lawmakers."[8] (Defs.' Memo. at 4).

For these reasons, Plaintiffs are likely to succeed on the merits of their free-speech claims. Even under the most relaxed standard of scrutiny, and treating the People's House as a nonpublic forum, the sign ban does not pass constitutional muster as it is patently unreasonable and potentially viewpoint discriminatory.

ii. Plaintiffs Are Likely to Succeed on the Merits of their Assembly and Petition Claim

Article I, Section 23 of the Tennessee Constitution states:

> That the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance.

"Inherent in such rights is the rights of citizens to demonstrate personally the intensity of their sentiments." *Daniels v. Traughber*, 984 S.W.2d 918, 924 (Tenn. Ct. App. 1998).

[8] *Supra*, at n. 1.

The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937). Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy. *Cox v. State*, 379 U.S. 536, 552 (1965). The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. *U.S. v. Cruikshank*, 92 U.S. 542, 552 (1875).

The sign ban prevents citizens from assembling in the House galleries and petitioning the government for a redress of grievances.

2. Plaintiff Will Suffer Irreparable Harm Absent Injunctive Relief

The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Plaintiffs will be irreparably harmed without injunctive relief from this Court. They will lose fundamental freedoms that, once deprived, they may never recover. Thus, this Court is empowered to protect them.

3. Defendants Will Suffer No Harm If This Court Enjoins Unconstitutional Action

Defendants' harms do not compare to the *per se* harms faced by Plaintiffs for deprivation of their constitutional rights. No legitimate interest of the Defendants is burdened by being enjoined from violating Plaintiffs' fundamental rights. This Court should grant Plaintiffs' request for a temporary injunction.

4. Injunctive Relief Is in The Public Interest

It is always in the public interest to prevent the violation of a party's constitutional rights. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979). Justice strongly compels this Court to protect Plaintiffs' fundamental freedoms and thus, the public interest. As such, the Court should enjoin Defendants from enforcing their unconstitutional rule.

For all of these reasons, this Honorable Court should DENY Defendants' motion to dissolve or stay the temporary restraining order and GRANT Plaintiffs' request for a temporary injunction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of the foregoing Response in Opposition to Defendants' Motion to Dissolve Or Stay The Temporary Restraining Order has been sent via electronic means, on this 28th day of August, 2023, to the following:

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