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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

TENNESSEANS FOR SENSIBLE ELECTION LAWS,	)	
Plaintiff,	)	
v.	)	Case No. 18-0821-III
TENNESSEE BUREAU OF ETHICS AND CAMPAIGN FINANCE, REGISTRY OF ELECTION FINANCE	)	
and	)	
DAVIDSON COUNTY DISTRICT ATTORNEY GENERAL,	)	
Defendants.	)	

DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant the Tennessee Bureau of Ethics and Campaign Finance, Registry of Election Finance (the "Registry") moves for summary judgment under Tenn. R. Civ. P. 56.04. Summary judgment is appropriate for three reasons. First, Plaintiff's requested relief is barred by the jurisdictional doctrine of sovereign immunity. Second, this Court's injunction does not preclude the Registry from enforcing Tenn. Code Ann. § 2-10-121 (2019), the current version of the statute. And third, because the current version of the statute mandates enforcement and has never been declared unconstitutional, the Registry's enforcement cannot be considered willful for purposes of contempt. Accordingly, as a matter of law, the Registry is entitled to summary judgment, and Plaintiff's Petition for Contempt should be dismissed with prejudice.

PROCEDURAL AND FACTUAL BACKGROUND

On July 26, 2018, Plaintiff filed suit challenging the constitutionality of Tenn. Code Ann. §§ 2-10-117 and -121. (*See* Verified Compl. for Inj. and Decl. Relief.) Plaintiff sought declaratory relief and injunctive relief prohibiting Defendants from enforcing the challenged statutes. (*Id.*) At the time the complaint was filed, Tenn. Code Ann. § 2-10-121 provided, in relevant part, that:

> No later than January 31 of each year, each multicandidate political campaign committee registered with the registry of election finance shall pay a registration fee to be determined by rule promulgated pursuant to § 4-55-103(1) . . . . All fees collected under this section shall be retained and used for expenses related to maintaining an electronic filing system. This section shall not apply to any statewide political party as defined in § 2-1-104 or subsidiaries of the political party.

Tenn. Code Ann. § 2-10-121 (2018).

On October 11, 2018, this Court declared both statutes unconstitutional and enjoined the Registry from enforcing them. (Mem. and Order, Oct. 11, 2018.) This Court also dismissed the Defendant District Attorney General from the action. (*Id.* at 2.) This Court, however, did not enjoin all collection of registration fees, nor did it describe the precise conduct it was enjoining; it stated only that the Registry was prohibited "from enforcing Tenn. Code Ann. Section 2-10-117 & Tenn. Code Ann. Section 2-10-121." (*Id.* at 2.) The Registry subsequently appealed. (*See* Notice of Appeal.)

While that appeal was pending, though, the General Assembly amended Tenn. Code Ann. § 2-10-121—the law Plaintiff challenged. The amended statute removed the exemptions for statewide political parties and subsidiaries:

> No later than January 31 of each year, each multicandidate politiical campaign committee registered with the registry of election finance shall pay a registration fee to be determined by rule promulgated pursuant to § 4-55-103(1). Payment of the registration fee by one (1) affiliated political campaign committee includes any disclosed affiliated committees registering separately; payment of the registration fee by a statewide political party, as defined in § 2-1-104, includes any disclosed

> subsidiaries of the political party registering separately. . . . All fees collected under this section shall be retained and used for expenses related to maintaining an electronic filing system.

Tenn. Code Ann. § 2-10-121 (2019).

In its December 12, 2019 opinion, the Court of Appeals declined to address the constitutionality of Tenn. Code Ann. § 2-10-121 (2019). *See Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *13 (Tenn. Ct. App. Dec. 12, 2019) (stating the court did not "consider the constitutionality of the statute as amended.") Instead, the Court of Appeals determined that the appeal was not mooted by the statutory amendment and affirmed this Court's decision enjoining the Registry from enforcing the prior version of the law. *Id.* at *39.

Upon remand, Plaintiff did not seek any relief relating to the amended statute. Nor did this Court modify its injunction or consider the constitutionality of the recently amended statute. Accordingly, given the non-discretionary language in the statute as amended and the absence of any declaration that the statute as amended was unconstitutional, the Registry began enforcing the amended statute. Plaintiff then contacted Defendant and threatened a contempt motion. (*See* Mem. for Relief from J., at 3, fn. 1.) In response, on January 25, 2021, the Registry moved for relief from judgment, seeking to clarify that this Court only enjoined the 2018 version of the statute, not the statute as amended. (*Id.*) The next day, January 26, 2021, Plaintiff filed a petition for contempt. (*See* Pet. for Contempt.) Again, Plaintiff did not challenge the constitutionality of Tenn. Code Ann. § 2-10-121 as amended and did not seek declaratory or injunctive relief. (*See generally id.*) Plaintiff instead presumed that this Court's injunction declaring the prior version of Tenn. Code Ann. § 2-10-121 unconstitutional also applied to the statute as amended even though the constitutionality of the amended version was not considered by this Court or the Court of

Appeals. (*Id.*) On December 14, 2021, this Court denied the Registry's Motion for Relief from Judgment. (*See* Order on Def.'s Mot. for Relief from J.) The Registry now moves for summary judgment.

STANDARD OF REVIEW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. When the moving party does not bear the burden of proof at trial, that party may show that it is entitled to judgment as a matter of law by either "affirmatively negating an essential element of the nonmoving party's claim" or by "demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015). To survive summary judgment in such a case, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts" and must instead "demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party." *Id.* at 265.

ARGUMENT

This Court should deny Plaintiff's petition for contempt and should grant summary judgment in favor of the Registry. As a threshold matter, the jurisdictional doctrine of sovereign immunity bars Plaintiff's attempt to hold the Registry in contempt. But even if this Court disagrees, Plaintiff's contempt petition should still be denied, and the Registry remains entitled to judgment in its favor. There is only one material fact here, and it is undisputed: the Registry has enforced Tenn. Code Ann. § 2-10-121 (2019). (Def.'s Statement of Undisputed Material Fact,

Fact #1.) This Court's prior injunction, though, did not enjoin—or even consider—Tenn. Code Ann. § 2-10-121 (2019). It follows that the Registry cannot be held in contempt based on its enforcement of Tenn. Code Ann. § 2-10-121 (2019). It also follows that because the statute as amended mandates enforcement and has never been enjoined or declared unconstitutional, the Registry has no choice but to enforce it. The Registry's conduct thus cannot be considered willful as required for a finding of contempt. For these reasons, the Registry is entitled to summary judgment as a matter of law, and the Petition for Contempt should be dismissed with prejudice.

I. Sovereign Immunity Bars Plaintiff's Petition for Contempt as a Matter of Law.

Plaintiff named the "Tennessee Bureau of Ethics and Campaign Finance, Registry of Election Finance" as a Defendant in its petition. Under the doctrine of sovereign immunity, however, it is "elementary" that a State[1] cannot be sued in its courts without its consent. *Memphis & C. R. Co. v. Tennessee*, 101 U.S. 337, 340 (1879).

Article I, § 17 of the Tennessee Constitution provides that suits may be brought against the State only in such manner and in such courts as the legislature may by law direct. The Tennessee Supreme Court has interpreted this Article as a grant of sovereign immunity to the State. *See, e.g.*, *Quinton v. Bd. of Claims*, 54 S.W.2d 953, 957 (Tenn. 1932). "The last clause of article 1, § 17 of the Constitution," the Supreme Court explained, "provides that suits may be brought against the state in such manner and in such courts as the Legislature may by law direct." *Id.* The Court further observed that "[t]his provision carries the positive implication that suits shall not be brought otherwise, or at all, unless the authority be affirmatively given by statute." *Id.*; *see also Coffman*

[1] For the purposes of sovereign immunity the "'State' includes 'the departments, commissions, boards, institutions and municipalities of the State.'" *Davison v. Lewis Bros. Baker*, 227 S.W.3d 17, 19 (Tenn. 2007) (quoting *Metro. Gov't of Nashville & Davidson Cnty. v. Allen*, 415 S.W.2d 632, 635 (Tenn. 1967)).

v. City of Pulaski, 42 S.W.2d 429 (Tenn. 1967); *Memphis & C.R. Co., ex rel. Watson*, 101 U.S. 337 (1880); *cf. Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989); *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1989).

Courts may not amend or abridge the State's sovereign immunity. *Austin v. City of Memphis*, 684 S.W.2d 624, 637 (Tenn. Ct. App. 1984); *Jones v. L & N R.R. Co.*, 617 S.W.2d 164 (Tenn. Ct. App. 1981). Instead, the bar to suits against the State should be strictly construed. *State ex rel. Allen v. Cook*, 106 S.W.2d 858, 860–61 (Tenn. 1937). Accordingly, "[t]he [S]tate cannot be subjected to litigation at the suit of individuals unless the words of the act are so plain, clear, and unmistakable as to leave no doubt of the intention of the Legislature that it should be done." *Id.*

Plaintiff here cannot identify any "plain, clear, and unmistakable" authority for holding the Registry in contempt. Plaintiff cites only to Tenn. Code Ann. § 29-9-102(3), which reads:

> The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following case:
>
> * * *
>
> (3) The willful disobedience or resistance of any officer of the such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts.

Missing from this statutory text, though, is any express legislative statement that the State is subject to litigation under this statute. And that is for good reason—the remedies for civil contempt include imprisonment until compliance or the payment of damages. *See* Tenn. Code Ann. § 29-9-103; 29-9-105; *Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 511 (Tenn. 2005). Obviously, it is physically impossible to imprison the Registry, and Plaintiff has failed to seek civil contempt against any individuals alleged to have acted ultra vires. So

imprisonment is not an option. And as for damages, it is well settled that sovereign immunity bars any attempt to recover monetary damages from the state without express legislative consent. *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853-54 (Tenn. 2008) (concluding that "sovereign immunity does not bar a declaratory judgment or injunctive relief against state officers to prevent the enforcement of an unconstitutional statute, *so long as the plaintiff does not seek monetary damages*" (emphasis added)). And again, Plaintiff has identified no such "express legislative consent" here.

This Court is, therefore, barred by the doctrine of sovereign immunity from hearing the petition for contempt against the Registry as a matter a law. Summary judgment is appropriate for that reason.

II. This Court's Order Does Not Enjoin the Registry from Enforcing the Statute as Amended.

Even if this Court concludes that sovereign immunity does not bar it from hearing Plaintiff's contempt petition, it should deny the petition for another reason: the Registry has not violated this Court's prior order. That order pertained to a version of Tenn. Code Ann. § 2-10-121 that is no longer in effect—the statute this Court considered has been replaced by an amended version. And that amended version, like all other state statutes, is clothed with a presumption of constitutionality. *See Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009) (citations omitted). State agencies, as creatures of statute, must comply with the presumptively constitutional statutes governing them. *See Tenn. Cable Television Ass'n v. Tenn. Public Service Com'n*, 844 S.W.2d 151, 168 (Tenn. Ct. App. 1992). Thus, the Registry must comply with Tenn. Code Ann. § 2-10-121 so long as that law has not been enjoined.

Here, no court has enjoined the enforcement of Tenn. Code Ann. § 2-10-121 as amended. This Court declared the prior version of the statute unconstitutional on October 11, 2018—months

before the current version of the statute existed. The constitutionality of the 2019 version of the statute was not, and could not have been, addressed in the trial proceedings. Nor was it addressed on appeal. *See Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics and Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *13 (Tenn. Ct. App. Dec. 12, 2019) (recognizing that the court was "not asked to consider the constitutionality of the statute as amended"). Indeed, because this Court did not reach the constitutionality of Section 121 as amended, it would have been improper for the Court of Appeals to reach the issue. *See Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147 (Tenn. 1991) (citations omitted) (noting that "issues not raised in the trial court cannot be raised for the first time on appeal"). The Court did of course conclude that Plaintiff's claim was not moot despite the amendment, but that conclusion did not somehow transmute Plaintiff's constitutional challenge against Tenn. Code Ann. § 2-10-121 (2018) into a challenge against Tenn. Code Ann. § 2-10-121 (2019). So because neither this Court, nor the Court of Appeals has declared the current, amended version of Tenn. Code Ann. § 2-10-121 unconstitutional or enjoined its enforcement, the Registry's enforcement of that statute—which again is required by its plain terms—was not "disobedience" of a "lawful command," which is required for a finding of contempt of court. *See* Tenn. Code Ann. § 29-9-102(3).

Nor has any court enjoined the conduct the Registry engaged in—the collection of registration fees. Rather than enjoining that sort of conduct, this Court spoke only of "enforcing Tenn. Code Ann. Section 2-10-117 & Tenn. Code Ann. Section 2-10-121." ((Mem. and Order, at 2.) Had this Court described the specific conduct to be enjoined rather than stopping at the statutory reference alone, it is possible that the injunction could impact the statute as amended. For example: if the Court's order had stated that "the Registry is enjoined from collecting registration fees from multicandidate political campaign committees," a statutory amendment that

required the enjoined conduct could possibly fall within the injunction's umbrella. But since the injunction did not describe the conduct enjoined, it must necessarily begin and end with Tenn. Code Ann. §§ 2-10-121 (2018) and -117.

This Court's order, then, enjoined only the enforcement of a prior version of Tenn. Code Ann. § 2-10-121 and declined to enjoin the collection of registration fees apart from the specific statutory language of Tenn. Code Ann. § 2-10-121 (2018). To assume that this statute-specific injunction also prevents enforcement of subsequent amended versions of the statute would turn the presumption of constitutionality afforded to state statutes on its head by considering them presumptively invalid. That assumption would also undermine the separation of powers. The General Assembly is charged with enacting laws and executive-branch agencies are tasked with enforcing them. Courts may only prevent enforcement of these laws when they are contrary to the Tennessee or United States Constitution and when the question of the law's constitutionality is properly before the court. Here, at no point in either the underlying proceedings or the contempt proceedings has Plaintiff has sought to have Tenn. Code Ann. § 2-10-121 (2019) declared unconstitutional. Nor would this Court be empowered to do so; any civil action challenging the constitutionality of a state statute must now be heard by a three-judge panel. *See* Tenn. Code Ann. § 20-18-101(a).

In sum, this Court's injunction must be construed to avoid undermining the presumption of constitutionality afforded to state statutes. Thus, the injunction's reference to "Tenn. Code Ann. Section 2-10-121" must necessarily refer only to the statute this Court considered and not the subsequent version enacted after its order. Because this Court enjoined Tenn. Code Ann. § 2-10-121 (2018) and not Tenn. Code Ann. § 2-10-121 (2019), the Registry cannot be held in contempt

for enforcing a presumptively valid statute that was not the subject of this Court's injunction.[2] Summary judgment is thus appropriate here for this reason as well.

III. The Registry Cannot be Held in Contempt for Complying with an Effective Statute.

Finally, even if this Court concludes that sovereign immunity does not bar consideration of Plaintiff's contempt petition and that the Registry's enforcement of Tenn. Code Ann. § 2-10-121 (2019) was in violation of its injunction, a contempt finding would still not be warranted. It is well settled that to support a finding of civil contempt, the violation of a lawful order must be "willful." *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 356-57 (Tenn. 2008). In the civil-contempt context, willful conduct "[c]onsists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent." *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Trust*, 209 S.W.3d 602, 612 (Tenn. Ct. App. 2006). Conduct, in other words, "is 'willful' if it is the product of free will rather than coercion" and "a person acts 'willfully' if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing. *Id.*

Here, the Registry did not "willfully" violate this Court's order. State agencies like the Registry are creatures of statute; that is, they "have no inherent or common-law power of their own." *State ex rel. Comm'r of Transp. v. Med. Bird Black Bear White Eagle*, 63 S.W.3d 734, 768-69 (Tenn. Ct. App. 2001) (citations omitted). The Registry, then, can only exercise authority as

[2] Alternatively, because this Court's injunction did not specifically describe the enjoined conduct or include a citation as to year for which version of the statute it actually enjoined—even after remand from the Court of Appeals—the injunction is susceptible to more than one reasonable interpretation and cannot therefore support a finding of contempt. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 356 (Tenn. 2008) (citing *City of Gary v. Major*, 822 N.E.2d 165, 170 (Ind. 2005); *Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of Dep't of Mental Retardation*, 424 Mass. 430, 677 N.E.2d 127, 137 (1997); *Ex parte Slavin*, 412 S.W.2d 43, 45 (Tex. 1967).

the General Assembly directs by statute. And when a statute imposes a mandatory duty upon a governmental agency, it has no discretion to disobey. *See id.*; *see also In re Sentinel Trust Co.*, 206 S.W.3d 501, 519 (Tenn. Ct. App. 2005); *Mayhew v. Mayhew*, 376 S.W.2d 324, 327 (Tenn. Ct. App. 1963). The amended version of Tenn. Code Ann. § 2-10-121 imposes just such a mandatory duty on the Registry; it provides that:

> No later than January 31 of each year, each multicandidate pollical campaign committee registered with the registry of election finance *shall* pay a registration fee to be determined by rule promulgated pursuant to § 4-55-103(1). Payment of the registration fee by one (1) affiliated political campaign committee includes any disclosed affiliated committees registering separately; payment of the registration fee by a statewide political party, as defined in § 2-1-104, includes any disclosed subsidiaries of the political party registering separately . . . All fees collected under this section *shall* be retained and used for expenses related to maintaining an electronic filing system.

Tenn. Code Ann. § 2-10-121 (2019) (emphasis added). The duties as set forth by the General Assembly in enforcing this mandatory statutory requirement are similarly non-discretionary:

> The bureau of ethics and campaign finance *shall*:
>
> (1) Promulgate such rules and regulations, pursuant to the Uniform Administrative Procedures Act, compiled in chapter 5 of this title, as are necessary to implement title 2, chapter 10; title 3, chapter 6; title 8, chapter 17; and title 8, chapter 50, part 5; provided, however, that all rules that relate exclusively to the registry of election finance shall be initiated and proposed to the board of directors of the bureau by a majority of the members of the registry of election finance and all rules that relate exclusively to the ethics commission shall be initiated and proposed to the board of directors of the bureau by a majority of the members of the ethics commission. Subject to the limitations contained in this subdivision (1), all rulemaking authority delegated by this chapter shall be vested in the bureau of ethics and campaign finance;
>
> (2) Collect or receive all filings required to be made pursuant to title 2, chapter 10; title 3, chapter 6; title 8, chapter 17; or title 8, chapter 50, part 5, and assign the issues contained in title 2, chapter 10; title 3, chapter 6; title 8, chapter 17; or title 8, chapter 50, part 5, as appropriate, to the registry of election finance or the ethics commission, and further collect all fees, fines and moneys assessed by the registry of election finance or the ethics commission; and

> (3) Promulgate rules prescribing all forms for filings, complaints, registrations, statements and other documents that are required to be filed under the laws administered and enforced by the ethics commission or the registry of election finance, with the objective of making the documents as simple and understandable as possible for both the person filing the document and the average citizen of this state.

Tenn. Code Ann. § 4-55-103 (emphasis added). The amended version of Tenn. Code Ann. § 2-10-121 thus leaves nothing to the Registry's discretion—its plain terms mandate enforcement and the Registry has no choice but to follow that mandate so long as the statute has not been declared unconstitutional. And as explained above, the amended version of Tenn. Code Ann. § 2-10-121 has never been declared unconstitutional. Plaintiff has not sought that relief during either the underlying proceedings or the contempt proceedings, and this Court would not be empowered to grant that relief even if Plaintiff had requested it. *See* Tenn. Code Ann. § 20-18-101(a) (requiring challenges to the constitutionality of state laws to be heard by a three-judge panel).

All of this means that the Registry's enforcement of a presumptively constitutional statute that has never been enjoined and that requires enforcement by its express terms cannot be "willful." Tennessee's Supreme Court illuminates that the Registry has no choice but to comply with a statute yet to be declared unconstitutional:

> The general public welfare, and more especially the peace and good order of society, will not admit of ministerial officers being the judge of the constitutionality of statutes and ordinances. Their failure and refusal to enforce the law as written, in the absence of any proper adjudication of unconstitutionality, would be intolerable.

Bricker v. Sims, 259 S.W.2d 661, 664-65 (Tenn. 1953). And because willfulness is an absolute requirement for contempt, *see Konvalinka*, 249 S.W.3d at 356-57, summary judgment is appropriate here.

CONCLUSION

For the reasons stated above, this Court should grant summary judgment to the Registry and dismiss Plaintiff's Petition for Contempt with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2021, a copy of the foregoing was sent by electronic mail transmission and/or first class U.S. mail, postage prepaid to:

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