IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

TENNESSEANS FOR SENSIBLE ELECTION LAWS,	§	Case No.: M2020-01292-SC-R11-CV
Plaintiff-Appellee,	§	
v.	§	Tennessee Court of Appeals Case No.: M2020-01292-COA-R3-CV
HERBERT H. SLATERY III, et al.,	§	Davidson County Chancery Court Case No.: 20-312-III
Defendants-Appellants.	§	

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF RULE 11 APPLICATION

INSTITUTE FOR JUSTICE
Paul V. Avelar
AZ Bar No. 023078
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
(480) 557-8300
pavelar@ij.org

SOUTHEASTERN LEGAL FOUNDATION
Braden H. Boucek
TN BPR No. 021399
GA Bar No. 39683
560 West Crossville Road
Roswell, GA 30075
(770) 977-2131
bboucek@southeasternlegal.org

Attorneys for Amici Curiae

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INTERESTS OF AMICI CURIAE

Founded in 1991, the Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, the Institute routinely files pre-enforcement challenges to laws that chill speech and that don't involve speech but do impose criminal penalties or other hardships on the exercise of rights. *E.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (pre-enforcement challenge to campaign finance law that chilled political speech); *Billups v. City of Charleston*, 961 F.3d 673 (4th Cir. 2020) (pre-enforcement challenge to licensing requirement for tour guides); *Sanchez v. Office of the State Superintendent of Educ.*, 959 F.3d 1121 (D.C. Cir. 2020) (pre-enforcement challenge to childcare provider licensing requirements that were not yet effective). The Institute is deeply concerned about the effect that the ruling below will have on the ability of Tennesseans to seek such pre-enforcement judicial review in Tennessee courts, which the Institute believes is vital to the protection of free speech and other rights.

Southeastern Legal Foundation (SLF), founded in 1976, is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic. In particular, SLF advocates to protect individual rights and the framework set forth to protect such rights in the Constitution, including the freedom of speech. This aspect of its advocacy is reflected in the regular representation of those challenging government overreach and guarding individual liberty. *See,*

e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files Amicus Curiae briefs regarding First Amendment freedoms and standing. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014); *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021).

This brief solely addresses the essential question of pre-enforcement standing. The ability to bring pre-enforcement challenges, especially to regulations of speech, is essential to allowing Tennesseans to protect their constitutional rights.

SUMMARY

The plain language of Tennessee Code section 2-19-142 criminally prohibits "false" statements in opposition to (but not in support of) a political candidate. Tennesseans for Sensible Election Laws ("TSEL") is an organization that engages in election speech, including through constitutionally protected political satire and hyperbole. It has violated this statute in past elections and will violate the statute again in future elections. TSEL therefore sued to have the statute declared unconstitutional, just as other, similar groups have successfully sued to have other, similar statutes declared unconstitutional. TSEL won its challenge. But the Court of Appeals imposed a standing rule that presumes government will not enforce its own laws and instead determined that TSEL was not allowed to challenge the constitutionality of the statute unless it faced a "certainly impending" threat of prosecution.

The U.S. Supreme Court has already ruled—in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59, 161 (2014), another case challenging a false statements in campaigns statute—that the standalone "certainly impending" standard is too restrictive of pre-enforcement standing. Instead, pre-enforcement standing exists whenever there is a "substantial risk" of harm. The Court of Appeals did not discuss, or even cite, *Susan B. Anthony*. The Court of Appeals also did not discuss U.S. Supreme Court and other federal precedent holding that a substantial risk of prosecution under a statute is to be presumed for purposes of pre-enforcement standing.

The Court of Appeals' rule forces TSEL, and all Tennesseans, to risk criminal penalties if they want to learn if their speech is legal or not. But it is long established that a person does not have to risk criminal sanctions to challenge unconstitutional laws through "pre-enforcement" challenges. The Court of Appeals' decision is contrary to the Tennessee Constitution, directly conflicts with U.S. Supreme Court justiciability precedent, and will result in the unjustified chilling of Tennesseans' speech.

This Court should grant the application for permission to appeal pursuant to Tennessee Rule of Appellate Procedure 11 in order to settle and secure the uniformity of decisions governing an important question of law and public interest: When can people turn to the Tennessee courts to protect the exercise of their constitutional rights?

ARGUMENT IN SUPPORT OF GRANTING REVIEW

Tennesseans need not run the risk of prosecution in order to have courts determine the constitutionality of laws that suppress protected

speech or conduct. "[I]t is not necessary that [a person] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Instead, people may seek pre-enforcement review, even in federal court, so long as they have "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citation omitted). Such a credible threat is presented by the mere existence of a criminal statute that is "recent and not moribund," *Doe v. Bolton*, 410 U.S. 179, 188 (1973), and that the government has not "disavowed any intention" of enforcing, *Babbitt*, 442 U.S. at 302.

While pre-enforcement challenges are essential to all constitutional rights, such challenges are especially important for protection of free speech, which is at issue in this case. Courts have long recognized that the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted). Such speech "must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). A law that criminalizes political speech must be afforded pre-enforcement review or it will remain left to chill speech. This is because "the alleged danger of [statutes that infringe First amendment rights] is, in large measure, one of self-censorship; a harm

that can be realized even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

The Court of Appeals' decision below cannot be reconciled with these principles. First, as explained in Section I, Tennessee courts exercise the fullest extent of "the judicial power" and are not bound by "case or controversy" restrictions on that power. Accordingly, Tennessee courts have at least as broad authority as the federal courts to hear pre-enforcement challenges to laws affecting constitutional rights. Second, as explained in Section II, the decision below adopts a strict view of standing to bring pre-enforcement challenges that conflicts with governing U.S. Supreme Court precedent and drastically curtails the availability of pre-enforcement review in the Tennessee courts. The standard imposed by the Court of Appeals thus does serious harm to both the exercise of constitutional rights and the exercise of judicial power in Tennessee.

I. TENNESSEE COURTS ARE NOT BOUND BY ARTICLE III STANDING REQUIREMENTS AND SHOULD NOT ADOPT RULES THAT ARE MORE RESTRICTIVE THAN THE FEDERAL COURTS.

Tennessee courts are not bound by the limitations of a case or controversy or other federal rules of justiciability, even when they address issues of federal law. Although Tennessee courts have chosen to follow federal justiciability doctrines, nothing in the Tennessee Constitution directly requires this. While this Court has self-imposed restrictions on the exercise of judicial power that largely mirror the restrictions on federal courts' power, there is no support in either the federal or state constitutions for those self-imposed restrictions to be more restrictive than the federal case or controversy requirements. But

the Court of Appeals has imposed a standing requirement for pre-enforcement challenges that is more restrictive than the federal standard for pre-enforcement challenges.

A. Article III standing does not apply to Tennessee courts.

Tennessee courts are courts of general jurisdiction, created by Article VI of the Tennessee Constitution. These courts exercise "[t]he judicial power of this state," Tenn. Const. art. VI, § 1, and only these courts may exercise the judicial power, *id*. art. II, § 1. Unlike the federal constitution, which further limits the exercise of the judicial power through Article III's case or controversy requirement, Tennessee's constitution does not have a case or controversy clause that further limits "Tennessee's courts' exercise of their judicial power." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cty.*, 301 S.W.3d 196, 202 (Tenn. 2009); *accord Miller v. Miller*, 261 S.W. 965, 971 (Tenn. 1924) (noting that the Constitution of Tennessee does not contain limitations similar to those in Article III, Section 2). Because "the constraints of Article III do not apply to state courts, . . . the state courts" including Tennessee's, "are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *see generally* F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 Nw. U. L. Rev. 57, 65-75 (2014) (observing variances in justiciability rules between federal and state courts and among the state courts).

B. There is no reason for Tennessee courts to be less open to suits than the federal courts.

Although there is no "direct, express limitation" on the judicial power in the Tennessee Constitution, this Court has "recognized and followed *self-imposed* rules" limiting the exercise of its power. *Norma Faye*, 301 S.W.3d at 202 (emphasis added). These self-imposed rules have largely taken the form of justiciability doctrines that "mirror the justiciability doctrines employed by the United States Supreme Court and the federal courts." *Id*. at 203. This approach leaves this Court to grapple with justiciability questions where the federal courts are not necessarily in accord with each other, especially when the Sixth Circuit conflicts with other federal, and arguably U.S. Supreme Court, decisions. *Id*. at 205-06.

When this Court is faced with justiciability questions, it does not mechanically follow the Sixth Circuit in lockstep, but rather adopts the federal decisions that best serve the "mandates of the Constitution of Tennessee." *See id.* at 206. This Court has, therefore, rejected Sixth Circuit justiciability precedents in favor of those from other circuits. In *Norma Faye*, this Court examined a variety of federal decisions to determine Tennessee's rule for voluntary cessation and mootness. *Id.* at 205-06. It ultimately rejected the Sixth Circuit's special "solicitude" for voluntary cessation by the government because it was "wary of adopting an approach to mootness through voluntary cessation that treats government litigants and private litigants differently." *Id*. at 206. Thus, the Tennessee rule on mootness by government voluntary cessation differs from Sixth Circuit rule. *Id.* ("[T]he mandates of the Constitution

of Tennessee and the interests of the parties are best served by holding that the burden of persuading a court that a case has become moot as a result of the voluntary cessation of the challenged conduct is and remains on the party asserting that the case is moot.").

As part of its search for justiciability rules that best serve the mandates of the Tennessee Constitution, this Court should determine that, because there is no case or controversy limitation on the exercise of the judicial power in Tennessee, there is no textual or historic support for justiciability doctrines that make Tennessee courts less open to Tennesseans than are the federal courts. *Cf.* Tenn. Const. art. I, § 17 (Tennessee's "open courts" provision, protecting "remedy by due course of law" for injuries and "right and justice administered without sale, denial, or delay," and providing for suits against the State "in such manner and in such courts" as provided by the Legislature). Here, the Court of Appeals mechanically applied Sixth Circuit precedent and determined that the Plaintiff lacked standing. But as discussed in Section II, this Sixth Circuit standard adopted by the Court of Appeals is out of line with the U.S. Supreme Court's precedents and with those of its sister circuits. The rule adopted by the Court of Appeals unduly closes the courtroom doors to Tennesseans seeking protection of their constitutional rights by the state courts. This Court should therefore grant review to reject the Court of Appeals' decision.

II. THE DECISION BELOW WRONGLY PREVENTS PRE-ENFORCEMENT CHALLENGES.

This Court should grant review to reject the decision below. The justiciability rule adopted by the Court of Appeals does not "best serve[]" "the mandates of the Constitution of Tennessee." *Norma Faye*, 301 S.W.3d at 206. As explained below in Section A, pre-enforcement challenges are vital to protecting individual rights, particularly free speech rights. Section B explains that the standing rule adopted below conflicts with U.S. Supreme Court precedent. Section C then demonstrates the proper rule: The mere existence of a criminal statute is sufficient to establish a credible threat of injury to a person who has demonstrated an intention to engage in activity or speech proscribed by the statute. Finally, Section D notes the Plaintiff here has additional evidence of the threat, even though such evidence is not necessary.

A. Pre-enforcement challenges are vital to protecting rights, particularly free speech rights.

As noted at the outset, the U.S. Supreme Court has long recognized that pre-enforcement challenges must be available to people to protect the exercise of constitutional rights. *Steffel*, 415 U.S. at 459. The threat that statutes will chill the exercise of constitutional rights is particularly acute when it comes to free speech. "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of [a] statute." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). This "self-censorship" harm "can be realized even without an actual prosecution." *Am. Booksellers Ass'n*, 484 U.S. at 393. When that happens, "[s]ociety as a whole [is] the loser." *Sec'y*

of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984). Pre-enforcement challenges therefore play a vital role in preventing such harms from happening by removing impediments to the "'open marketplace' of ideas protected by the First Amendment." *Citizens United*, 558 U.S. at 354 (citation omitted).

The decision below leaves the Plaintiff and Tennesseans with a Hobson's choice. They can either not speak in order to avoid any threat of criminal prosecution, or they can speak but then wait, and hope, that this administration, and the next, will not enforce a duly enacted criminal law that clearly proscribes their speech. This decision slams the courthouse door closed on would-be speakers unless they can satisfy the burden imposed by the Court of Appeals that threat of prosecution is "certainly impending." *Tennesseans for Sensible Election Laws v. Slatery*, No. M2020-01292-COA-R3-CV, 2021 WL 4621249, at *6 (Tenn. Ct. App. Oct. 7, 2021). But as shown below, that standard inverts the burden and conflicts with U.S. Supreme Court precedent.

B. The "certainly impending" standard adopted by the Court of Appeals conflicts with the U.S. Supreme Court's *Susan B. Anthony* precedent.

The Court of Appeals adopted a standard for pre-enforcement challenges that conflicts with the standards established by the U.S. Supreme Court. The Court of Appeals adopted the following rule for standing to bring a pre-enforcement challenge: "The mere possibility of prosecution, however—no matter how strong the plaintiff's intent to engage in forbidden conduct may be—does not amount to a credible threat of prosecution. Instead, the threat of prosecution must be certainly

impending to constitute injury in fact." *Id.* (internal emphasis, quotation marks, and citations omitted). The court took this standard from the Sixth Circuit's 2017 decision in *Crawford* v. *United States Department of Treasury*, 868 F.3d 438 (6th Cir. 2017). *Id. Crawford* had taken this standard from the U.S. Supreme Court's 2013 decision in *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013). *Crawford*, 868 F.3d at 454-55. Thus, the Court of Appeals—via the Sixth Circuit's *Crawford* case—adopted the *Clapper* standard for Tennessee. But the Court of Appeals did not mention that *Clapper* has been superseded by *Susan B. Anthony* since 2014. Indeed, *Clapper* never really stood for the point the Court of Appeals has now, wrongly, adopted.

Clapper did not actually determine that an allegation of future injury can support standing to sue only if the plaintiff can demonstrate that the injury is "certainly impending." *Clapper* involved a constitutional challenge to a provision of the Foreign Intelligence Surveillance Act authorizing "surveillance of individuals who are not 'United States persons' and are reasonably believed to be located outside the United States." 568 U.S. at 401. But the challenge was brought by U.S.-based organizations whose work allegedly required them to communicate with foreign contacts and who believed that "some of the people" they communicated with "are likely targets of surveillance" such that the government might be able to acquire their communications. *Id.* at 406. This meant that the plaintiffs themselves were in a class that could not be directly affected by the statute; their injury depended on government potentially surveilling "*other individuals*—namely, their

foreign contacts." *Id.* at 411. Nevertheless, the Court looked for a history of enforcement or specific facts about the government's surveillance targeting practices that might yet give rise to a substantial threat to the plaintiffs but found nothing. *Id. Clapper* therefore determined there was no standing to bring the claim because "respondents' speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable to" the challenged statute. *Id.* at 414.

Following *Clapper*, some questions remained as to the applicable standard for pre-enforcement challenges. Although *Clapper* had applied the "certainly impending" standard, the Court refused to say that was the proper standard generally. The Court admitted that its decisions "do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about" and that some decisions "found standing based on a 'substantial risk' that the harm will occur." *Id.* at 414 n.5; *see also id.* at 431-33 (Breyer, J., dissenting) (discussing the various standards used in the Court's pre-enforcement standing cases). And the Court held open the possibility that there were different standards governing pre-enforcement challenges, but did not address the issue because the *Clapper* plaintiffs did not meet any standard. *Id.* at 414 n.5.

The very next year, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), clarified the proper standard for pre-enforcement challenges. In contrast to *Clapper*, *Susan B. Anthony* involved a challenge by a speaker who was directly regulated by the challenged statute: a non-

profit organization that engaged in political speech that was subject to Ohio's false statements in campaigns law. 573 U.S. at 152-54. The Sixth Circuit had ruled there was not standing because there was not an "imminent threat of *future* prosecution." *Id.* at 156. But the U.S. Supreme Court reversed the Sixth Circuit and, clarifying its holding in *Clapper*, held that an "allegation of future injury may suffice if the threatened injury is certainly impending *or there is a substantial risk that the harm will occur*." *Id.* at 156 (citing *Clapper*, 568 U.S. at 414 & n.5) (emphasis added) (internal quotation marks omitted).

Following *Susan B. Anthony*, it is clear that "certainly impending" is not the governing standard when the plaintiff's conduct is proscribed by the challenged statute. As federal circuit courts other than the Sixth Circuit have subsequently recognized, *Clapper* does not require a "certainly impending" showing when the plaintiff's activities are directly regulated by the statute. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335-36 (5th Cir. 2020), *as revised* (Oct. 30, 2020) (explaining that *Clapper* involved plaintiffs who did not fall within the scope of the challenged statute and does not suggest that plaintiffs who are subject to the statute need evidence of "history of enforcement or specific facts about the government's targeting practices" because courts will continue to "assume a credible threat of prosecution in the absence of compelling contrary evidence"); *Blum v. Holder*, 744 F.3d 790, 798 n.11 (1st Cir. 2014) ("*Clapper* does not call into question the assumption that the state will enforce its own non-moribund criminal laws, absent evidence to the contrary."). Instead, *Susan B. Anthony* reiterates the U.S. Supreme

Court's long-standing standard for pre-enforcement claims brought by a plaintiff subjected to the challenged statute. These standards, as discussed below, find pre-enforcement standing where a plaintiff has (1) alleged an intention to engage in constitutionally protected conduct that is proscribed by a statute, and (2) the statute is neither moribund nor fully disavowed by the government as unenforceable.

C. Courts presume that statutes will be enforced, therefore a "credible threat of enforcement" is presumed.

Susan B. Anthony reaffirmed the proper rules governing pre-enforcement challenges: A plaintiff has standing to bring a pre-enforcement challenge when the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest; that conduct is proscribed by a statute; there exists a credible threat of prosecution under the statute; and a credible threat is presumed unless rebutted with evidence to believe otherwise.

Susan B. Anthony reaffirmed that *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979), establishes the federal pre-enforcement standard. *Susan B. Anthony*, 573 U.S. at 160. At issue in *Babbitt* was, *inter alia*, an Arizona statute that made it a criminal "unfair labor practice" to encourage consumers to "refrain from purchasing, consuming or using [an] agricultural product by the use of dishonest, untruthful and deceptive publicity." 442 U.S. at 301. The plaintiffs stated that they engaged in activities proscribed by the statute, that they intended to do so in the future, and that the threat of prosecution for doing so chilled their speech. *Id.* The State claimed, however, that it had

never enforced the statue and may never do so. *Id.* at 302 ("[The State] maintain[s] that the criminal penalty provision has not yet been applied and may never be applied to commissions of unfair labor practices, including forbidden consumer publicity.").

Despite the lack of prior enforcement, the *Babbitt* Court determined, and the *Susan B. Anthony* Court reiterated, that the existence of a criminal statute is sufficient to show a credible threat of injury for purposes of establishing standing for a pre-enforcement challenge. *Susan B. Anthony*, 573 U.S. at 160 (stating that *Babbitt* "concluded that the plaintiffs' fear of prosecution was not 'imaginary or wholly speculative'"); *Babbitt*, 442 U.S. at 302 (holding the threat of prosecution was credible based on the sole ground that "the State has not disavowed any intention of invoking the criminal penalty provision against [violators and thus the plaintiffs were] not without some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity"). This is a long-recognized rule. *See Am. Booksellers Ass'n*, 484 U.S. at 393 (permitting challenge where state had "not suggested that the newly enacted law will not be enforced" and Court saw "no reason to assume otherwise"); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that when statute was "recent and not moribund," parties "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968) (holding that pre-enforcement challenges are proper even without a particularized threat of enforcement, and even if the statute has not been recently enforced); *see also Susan B. Anthony*, 573 U.S. at

165 (noting that potential administrative action, not just criminal action, "may give rise to harm sufficient to justify pre-enforcement review").

Contrary to *Babbitt*, and now *Susan B. Anthony*, the Sixth Circuit, and now the Tennessee Court of Appeals, presumes a state statute will not be enforced and requires plaintiffs to prove some ill-defined, heightened "certainly impending" threat. This rule starkly conflicts with the overwhelming weight of other federal circuit authority, which, consistent with *Babbitt* and *Susan B. Anthony*, presume that "the threat is latent in the existence of the statute." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003). *E.g.*, *Speech First*, 979 F.3d at 336 (5th Cir. 2020); *Blum*, 744 F.3d at 798 n.11 (1st Cir. 2014); *St. Paul Area Chamber of Com. v. Gaertner*, 439 F.3d 481, 484-86 (8th Cir. 2006); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998).

Thus, in these other federal circuits, courts have held that the burden is on the government to prove the substantial threat of future enforcement is chimerical. *See, e.g.*, *Barilla v. City of Houston*, 13 F.4th 427, 433 (5th Cir. 2021) ("[W]e may assume a substantial threat of future enforcement absent compelling contrary evidence, provided that the [law is] not moribund.") (citing *Babbitt*, 442 U.S. at 302); *N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) ("[W]hen dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the

class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence."). In these circuits, the government cannot defeat standing through a mere expressed present intention to not prosecute the plaintiff, because such a standard would place "asserted First Amendment rights at the sufferance of" the government. *Hedges v. Obama*, 724 F.3d 170, 198 (2d Cir. 2013). After all, numerous cases recognize "'the danger in putting faith in government representations of prosecutorial restraint' where protected speech is concerned." *Tenn. State Conf. of the N.A.A.C.P. v. Hargett*, 441 F. Supp. 3d 609, 627 (M.D. Tenn. 2019) (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)).

Here, the Plaintiff faces a statute that it will violate with its speech, and the *government* has not proven that the threat of enforcement is chimerical or that the statute is moribund. The government has said that it has "no present intent . . . to prosecute [the Plaintiff], or any other person or organization, under Tenn. Code Ann. § 2-19-142 for engaging in political satire." *Tennesseans for Sensible Election Laws*, 2021 WL 4621249, at *2. But satire is in the eye of the beholder, *e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56-57 (1988) (literally false parody ad was protected by the First Amendment), and "'erroneous statement is inevitable in free debate,'" *Babbitt*, 442 U.S. at 301 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964)). The government's claim that it has "no present intent" to prosecute some violations of the statute is far from the required showing that the statute is moribund or that it will *never* be enforced against the Plaintiff. If anything, the use of the term

"present" in the government's claim of "no present intent" is a caveat providing room to change its intent in the future, again far from the full-throated disavowal required by law.

D. Plaintiff also offered additional evidence of a credible threat.

Plaintiff's speech is proscribed by a criminal statute and the government has not fully disclaimed that statute; that is enough for standing to bring a pre-enforcement challenge. Even if that were not enough, the Plaintiff also offered evidence demonstrating the statute is not moribund. *See* Rule 11 Petition at 22-23, 30. This evidence need not be reiterated here, but it does further demonstrate that the statute has not fallen into desuetude.

The Court of Appeals ignored both the fact that the statute is non-moribund and non-disclaimed, as well as the evidence that the statute, as part of the comprehensive Tennessee election law, continues to be relevant to State actors and entities. Instead, it applied a heightened standard requiring parties challenging a law to prove that prosecution is "certainly impending." Neither the Tennessee nor the federal constitution demands such a standard because that standard threatens the exercise of protected rights.

CONCLUSION

The Court of Appeals ruled that the Plaintiff, who is subject to a statute imposing criminal sanctions on its political speech, cannot yet challenge the constitutionality of that criminal statute. This Court has self-imposed justiciability doctrines based on a concern for the "intrinsic role of judicial power, as well as its respect for the separation of powers"

and to "promote judicial restraint." *Norma Faye*, 301 S.W.3d at 202-03. The Court of Appeals' refusal to determine the merits of this case is not judicial restraint, it is judicial abdication. Courts have "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Thus, when a "court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction." *Wilcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909); *accord Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (when a federal court has jurisdiction, it also has a "virtually unflagging obligation . . . to exercise" that authority). Whatever else the "judicial power" of Tennessee courts includes, it certainly includes jurisdiction to determine a challenge to a statute that prohibits the exercise of the Plaintiff's constitutional rights.

This Court should grant the application for permission to appeal pursuant to Tennessee Rule of Appellate Procedure 11. Granting review of the Court of Appeals' decision will allow this Court to bring uniformity to the Tennessee and federal pre-enforcement standing doctrines and settle the important question of law and public interest governing when Tennesseans may turn to the courts to protect their constitutional rights. Ultimately, this Court should, as have a majority of the federal courts, adopt the understanding that a "credible threat" is presumed from the very existence of a non-moribund statute when it proscribes a plaintiff's speech or conduct.

Respectfully submitted this 23rd day of December, 2021.

/s/ Braden H. Boucek

INSTITUTE FOR JUSTICE
Paul V. Avelar
AZ Bar No. 023078
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
(480) 557-8300
pavelar@ij.org

SOUTHEASTERN LEGAL FOUNDATION
Braden H. Boucek
TN BPR No. 021399
GA Bar No. 39683
560 West Crossville Road
Roswell, GA 30075
(770) 977-2131
bboucek@southeasternlegal.org

Attorneys for Amici Curiae
Institute for Justice and Southeastern Legal Foundation

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in Tenn. Sup. Ct. R. 46, § 3.02. My word processing system indicates that the sections of the brief subject to the 7,500 word limitation contain 5,045 words.

/s/ Braden H. Boucek
Braden H. Boucek

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2021, a true and exact copy of the foregoing was served via the Court's electronic filing system and forwarded by electronic mail to the following:

DANIEL A. HORWITZ, BPR #032176
LINDSAY E. SMITH, BPR #035937
HORWITZ LAW, PLLC
4016 WESTLAWN DR.
NASHVILLE, TN 37209
daniel@horwitz.law
(615) 739-2888

G.S. HANS, BPR #037422
STANTON FOUNDATION FIRST
AMENDMENT CLINIC
VANDERBILT LAW SCHOOL
131 21ST AVENUE SOUTH
NASHVILLE, TN 37203
gautam.hans@vanderbilt.edu

Attorneys for Tennesseans for Sensible Election Laws

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

JANET M. KLEINFELTER
Deputy Attorney General

ALEXANDER S. RIEGER (BPR 029362)
Assistant Attorney General

Public Interest Division
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-2408

/s/ Braden H. Boucek
Braden H. Boucek