IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

OFF THE WAGON TOURS, LLC, HONKY TONK PARTY EXPRESS, LLC, SPROCKETT TOURS, LLC, HELL ON WHEELS NASHVILLE, LLC, and NASHVILLE PARTY BARGE, LLC,	)	
Plaintiffs,	)	
v.	)	Case No. 20-0766-I
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, and	)	
GOVERNOR WILLIAM B. LEE,	)	
Defendants.	)	
CITIZENS FOR LIMITED GOVERNMENT AND CONSTITUTIONAL INTEGRITY, INC., d/b/a TENNESSEE STANDS, GARY P. HUMBLE, and RODNEY J. LUNN, JR.,	)	
Intervening Plaintiffs,	)	
v.	)	
GOVERNOR WILLIAM B. LEE, in his official capacity,	)	
Defendant.	)	

STATE DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant Governor William B. Lee, in his official capacity, hereby submits this Memorandum of Law in support of his Motion to Dismiss Intervening Plaintiff's First Amended Complaint in its entirety and with prejudice for lack of subject matter jurisdiction and failure to state a claim pursuant to Tenn. R. Civ. P. 12.02(1) and (6).

INTRODUCTION

The novel coronavirus ("COVID-19") pandemic is a public health crisis unlike anything seen in the State of Tennessee for over 100 years. The illness was first diagnosed in China on December 31, 2019. Since then the disease has spread worldwide. Only two weeks later—on January 14, 2020—the United States had its first confirmed case. A mere six weeks later, on March 4, 2020, the Tennessee Department of Health confirmed that a Tennessee resident had contracted the disease. As of December 23, 2020, there are over half a million confirmed cases of COVID-19 in Tennessee, and over six thousand Tennesseans have died from COVID-19.[1]

This serious and rapidly evolving situation required an equally serious and rapid response. Governor Lee responded by implementing necessary emergency measures to protect and preserve the health and lives of Tennessee residents including authorizing county mayors to issue mask mandates. At issue here is the statute authorizing the Governor's Executive Orders issued to prevent the community spread of COVID-19. Intervening Plaintiffs argue that this statute—Tenn. Code Ann. § 58-2-107—violates art. I, art. II §§ 2, 3, art. III, § 10 and art. VII, § 1 of the Tennessee Constitution. Apparently oblivious to the risks their position presents to public safety, Intervening Plaintiffs ask this Court to declare Tenn. Code Ann. § 58-2-107 facially unconstitutional and to

[1] *See* Tennessee COVID-19 Unified Command Dashboard (arcgis.com) (last accessed December 23, 2020).

issue a permanent injunction enjoining the Governor from utilizing Tenn. Code Ann. § 58-2-107. First Amend. Comp. at p.13.

However, none of the Intervening Plaintiffs can demonstrate the requisite standing necessary to assert a facial challenge to the constitutionality of Tenn. Code Ann. § 58-2-107 and such challenge should be dismissed for lack of subject matter jurisdiction. Additionally, the Tennessee General Assembly has appropriately afforded the Governor broad authority and discretion to implement emergency measures in response to the COVID-19 public health crisis, including measures that may temporarily curtail constitutional rights where necessary. Accordingly, Plaintiffs have failed to state a claim that Tenn. Code Ann. § 58-2-107 is facially unconstitutional and such claim should be dismissed.

BACKGROUND

On March 11, 2020, the World Health Organization characterized the COVID-19 outbreak as a pandemic.[2] On March 12, 2020, Governor Lee declared a state of emergency to facilitate the response to COVID-19.[3] On March 22, 2020 the Governor issued an executive order to mitigate the spread of COVID-19. Based on the spread of the virus in Tennessee and recommendations from President Trump and the CDC, Executive Order No. 17 prohibited people from participating in social gatherings of 10 or more people and closed or limited the services of restaurants, bars, and gyms.[4]

[2]*See* World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19 – March 11, 2020*, https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last updated March 11, 2020).

[3]Executive Order No. 17.

[4]*Id.*

On March 30, 2020, the Governor determined further measures were necessary to limit community spread of COVID-19.[5] The Governor issued an order extending Executive Order No. 17, closing businesses that provide close-contact personal services, and closing entertainment venues.[6] Also on March 30, the Governor issued another order urging Tennesseans to stay at home unless engaged in essential activity and closing non-essential businesses.[7] And finding it was "beneficial to clarify and strengthen" his previous order, the Governor issued a new order on April 2, 2020 requiring Tennesseans to stay at home unless engaging in essential activity or services.[8] Finally, on April 13, 2020 the Governor extended to April 30 the expiration date of Executive Order Nos. 17 and 22.[9]

These measures taken by Governor Lee and Tennessee citizens initially yielded positive results, and so in response, on April 28, 2020, Governor Lee issued Executive Order No. 30 which repealed Executive Order Nos. 17, 21, 22, 23 and 27 and ordered that people be able to return to work[10] but still prohibited social gatherings of more than 10 people and ordered that entertainment venues remain closed until May 29, 2020.[11]

[5]Executive Order No. 21.

[6]*Id.*

[7]Executive Order No. 22, at ¶¶ 1-2. Executive Order No. 22 also preserved the restrictions implemented by Executive Order Nos. 17 and 21. *Id.* at ¶ 7.

[8]Executive Order No. 23.

[9]Executive Order No. 27.

[10]On April 24, 2020, Governor Lee issued Executive Order No. 29 which allowed restaurants to reopen for on-site dining in accordance with operational guidelines issued by the Governor's Economic Recovery Group.

[11]Executive Order No. 30 at ¶¶ 1, 2 and 11(b). On May 7, 2020 Governor Lee issued Executive Order No. 35 which repealed paragraph 11 of Order No. 30 and replaced it with a new paragraph 11.

On May 22, 2020, Governor Lee issued Executive Order No. 38 which, among other things, authorized the six metro county health department to issue their own guidelines and/or regulations as to how businesses would open or remain limited and/or closed per local authorities. On July 3, 2020, Governor Lee issued Executive Order No. 54 which authorized county mayors to issue mask mandates in their counties within the guidelines stipulated in that Executive Order. The provisions of that Executive Order have subsequently been extended by Governor Lee to February 27, 2021.[12] To date, however, Governor Lee has not extended the provisions of Executive Order NO. 54 beyond that date.

Pursuant to the provisions of Executive Order No. 54, on July 8 2020, the Williamson County Mayor issued a mask mandate requiring all citizens to wear face coverings in public places, however, that mandate expired on August 29, 2020.[13] When the number of COVID-19 cases in Williamson County began to significantly increase, the Williamson County Mayor re-instated the mask mandate effective October 24 and that mandate is currently set to expire December 29, 2020.[14]

Intervening Plaintiffs are a nonprofit corporation and two individuals who are residents of Williamson County. *See* First Amend. Intervn. Compl. at ¶¶ 4-6.

STANDARD OF REVIEW

A motion to dismiss for lack of subject matter jurisdiction calls into question the court's "lawful authority to adjudicate a controversy brought before it and should be viewed as a threshold inquiry. *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 445 (Tenn. 2012).

[12] *See* Executive Order No. 73.

[13] *See* https://www.williamsoncounty-tn.gov/DocumentCenter/View/20959/COVID-19-Mask-Mandate-Expiring-Aug29-2020-2 (last accessed October 8, 2020).

[14] *See* SKM_C300i20103016080 (brentwoodtn.gov) (last accessed December 23, 2020).

When the court's subject matter jurisdiction is challenged, the burden is on the plaintiff to demonstrate that the court has the requisite jurisdiction to hear and adjudicate plaintiff's claims. *See Staats v. McKinnon*, 206 S.W.3d 532, 543 (Tenn. Ct. App. 2006). A challenge to the court's subject matter jurisdiction may be either a facial challenge or a factual challenge. A facial challenge is a challenge to the complaint itself. *See Schutte v. Johnson*, 337 S.W.3d 767, 769 (Tenn. Ct. App. 2010). Accordingly, when a facial challenge is asserted, the factual allegations in the plaintiff's complaint are presumed to be true. *Staats v. McKinnon*, 206 S.W.3d at 543-43. A factual challenge, however, challenges the court's jurisdiction as a matter of fact, i.e., it "attacks the facts serving as the basis for jurisdiction." *Schutte v. Johnson*, 337 S.W.3d at 770.

A motion to dismiss for failure to state a claim upon which relief can be granted "challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." *Webb v. Nashville Area Habitat for Humanity, Inc*., 346 S.W.3d 422, 426 (Tenn. 2011). In determining whether to grant a Rule 12.02(6) motion, a trial court "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Id*. A complaint "need not contain detailed allegations of all the facts giving rise to the claim," but it "must contain sufficient factual allegations to articulate a claim for relief." *Abshure v. Methodist Healthcare-Memphis Hosps*., 325 S.W.3d 98, 103-04 (Tenn. 2010). "The facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level." *Id*. at 104. However, courts are not required to accept as true assertions that are merely legal arguments or "legal conclusions" couched as facts. *Riggs v. Burson*, 942 S.W.2d 44, 47-48 (Tenn. 1997). Thus, the "undisputed material facts at issue when considering a Rule 12 motion are those stated in the complaint" and a "plaintiff is in control of his

or her own fate, at least as far as the material facts are concerned." *Findley v. Hubbard*, No. M2017-01859-COA-R3-CV, 2018 WL 3217717, at *6 (Tenn. Ct. App. July 2, 2018).

STANDARD OF REVIEW FOR CONSTITUTIONAL CHALLENGE

When examining the constitutionality of a statute, courts are bound by the "presumption that an act of the General Assembly is constitutional." *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). The Supreme Court recently articulated the "general burden" a plaintiff faces in challenging the constitutionality of a statute:

> "In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional." "[I]n reviewing [a] statute for a possible constitutional infirmity, we are required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute."
>
> "The Court must uphold the constitutionality of a statute whenever possible[.]" "[T]he Court must be controlled by the fact that our Legislature may enact any law which our Constitution does not prohibit, and the Courts of this State cannot strike down one of its statutes unless it clearly appears that such statute does contravene some provision of the Constitution."

Fisher v. Hargett, No. M2020-00831-SC-RDM-CV, 2020 WL 4515279 at 20 (Aug. 5, 2020) (quoting *Willeford v. Klepper*, 597 S.W.3d 454, 465 (Tenn. 2020) (citations omitted)). Further, "[i]t is well-recognized . . . that '[a] facial challenge to a legislative [a]ct is . . . the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid." *State v. Crank*, 468 S.W.3d 15, 24-25 (Tenn. 2015) (quoting *Davis-Kidd Booksellers, Inc*., 866 S.W.3d at 525 (second alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Thus, "[i]f even one set of circumstances exists in which the state can constitutionally apply the statute[] . . . plaintiffs' claim fails." *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015).

ARGUMENT

I. Intervening Plaintiffs Lack Standing to Assert a Facial Challenge to the Constitutionality of Tenn. Code Ann. § 58-2-107.

Standing is a threshold requirement for actions seeking declaratory relief. *Colonial Pipeline v. Morgan*, 263 S.W.3d 827, 838 (Tenn. 2008). The requirement of standing is "rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). Plaintiffs have the burden "clearly to allege facts demonstrating that [they are] proper part[ies] to invoke judicial resolution of the dispute." *Warth v. Seldin*, 422 U.S. 490, 518 (1975). The inquiry into whether plaintiffs have standing should be "especially rigorous" where, as here, Plaintiffs seek to have the actions of a sovereign state declared unconstitutional. *Crawford v. U.S. Dept. of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017) (citing *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013)); *In re Abbott*, 601 S.W.3d 802, 809 (Tex. 2020) (standing inquiry must be especially rigorous where the suit "seek[s] to correct an alleged violation of the separation of powers" by another branch of government).

In *Am. Civil Liberties Union of Tennessee v. Darnell*, 195 S.W. 3d 612 (Tenn. 2006), the Tennessee Supreme Court clearly spelled out the elements a plaintiff must show to establish standing. In doing so, the Tennessee Supreme Court stated, "Courts employ the doctrine of standing to determine whether a particular litigant is entitled to have a court decide the merits of a dispute or of particular issues." *Darnell*, 195 S.W.3d at 619 (citations omitted). The Tennessee Supreme Court further stated:

> Grounded upon "concern about the proper—and properly limited—role of the courts in a democratic society," *Warth [v. Seldin]*, 422 U.S. [490,] 498 [(1975)], the doctrine of standing precludes courts from adjudicating an action at the instance of one whose rights have not been invaded or infringed." *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn.Ct.App.2001), *perm. app. denied* (Tenn. April 30, 2001).

* * *

> The doctrine of standing restricts "[t]he exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, ... to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.* 454 U.S. 464, 473, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Without limitations such as standing and other closely related doctrines "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth,* 422 U.S. at 500.

Id. at 619-620.

The Court then held that, to establish standing, a plaintiff must show three "*indispensable*" elements "'*by the same degree of evidence*' as other matters on which the plaintiff bears the burden of proof." 195 S.W. 3d at 620 (emphasis added) (citing *Petty v. Daimler/Chrysler Corp.,* 91 S.W. 3d 765, 767 (Tenn. Ct. App. 2002)). Thus, to survive a facial challenge presented in a motion to dismiss, "[t]he facts pleaded [with respect to standing], and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level." *Webb v. Nashville Area Habitat for Humanity, Inc.,,* 346 S.W.3d 422, 427 (Tenn. 2011) (quoting *Abshure v. Methodist Healthcare-Memphis Hosps.,* 325 S.W.3d 98, 103–104 (Tenn. 2010)).

The first essential element required to establish standing is that a plaintiff must show a distinct and palpable injury, with conjectural or hypothetical injuries being insufficient. *Darnell,* 195 S.W.3d at 620. " 'The sort of distinct and palpable injury that will create standing must be an injury to a recognized legal right or interest.'" *Metro. Gov't of Nashville v. Bd. of Zoning Appeals of Nashville*, 477 S.W.3d 750, 755 (Tenn. 2015) (quoting *State v. Harrison*, 270 S.W.3d. 21, 27-28 (Tenn. 2008)). Moreover, the injury complained of must be "if not actual, then at least imminent." *Calfee v. Tenn. Dep't of Transp.,* No. M2016-01902-COA-R3-CV, 2017 WL

2954687, at *9 (Tenn. Ct. App. July 11, 2017) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). " 'In other words, the harm must have already occurred or it must be likely to occur 'imminently.'" *Id.* (quoting *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015)); *see also Town of Collierville v. Town of Collierville Bd. of Zoning Appeals*, No. W2013-02752-COA-R3-CV, 2015 WL 1606712, at *4 (plaintiff is required to show that he or she "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant").

"In determining whether a plaintiff has a personal stake sufficient to confer standing, the focus should be on whether the complaining party has alleged an injury in fact, economic or otherwise, which distinguishes that party, in relation to the alleged violations from the undifferentiated mass of the public." *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001). Further, "it is a well settled rule that an Act of the Legislature is presumed to be constitutional and within legislative power, and unless those who attack the constitutionality of the Act show themselves to be within a special class, which on account of the Act suffers some special financial loss or damage to their property, which is not common to all citizens affected by the Act, they may not successfully assail the constitutionality of the Act." *State Dep't of Human Servs. v. Priest Lake Cmty. Baptist Church*, No. M2006-00302-COA-R3-CV, 2007 WL 1828871, at *6 (Tenn. Ct. App. June 25, 2007) (citation omitted); *see also State v. Johnson*, 762 S.W.2d 110, 118 (Tenn. 1988) (person has no standing to contest the constitutionality of a statutory provision unless the provision he claims to be deficient has been used to deprive him of his rights); *Parks v. Alexander*, 608 S.W.2d 881, 885 (Tenn. Ct. App. 1980) (person challenging constitutionality of a statute must show "that he personally has sustained or is in immediate danger of sustaining, some

direct injury . . . and not merely that he suffers in some indefinite way in common with people generally").

Second, not only must a plaintiff sufficiently allege a distinct and palpable injury, a plaintiff also must demonstrate that there is a causal connection between the alleged injury and the challenged conduct. *Am. Civil Liberties Union of Tennessee v. Darnell*, 195 S.W. 3d 612, 620 (Tenn. 2006) "While the causation element is not onerous, it does require a showing that the injury to a plaintiff is 'fairly traceable' to the conduct of the adverse party." *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013). In analyzing this element, courts should focus on whether " 'the line of causation between the illegal conduct and injury [is] too attenuated.'" *Darnell*, 195 S.W.3d at 621 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

Additionally, the "fairly traceable" requirement for conferring standing under Tennessee law is echoed in the federal analysis of standing under Article III of the U.S. Constitution. *See Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196, 203 (Tenn. 2009) ("The justiciability doctrines recognized by Tennessee courts mirror the justiciability doctrines employed by the United State Supreme Court and the federal courts."). Accordingly, federal case law interpreting the "fairly traceable" requirement of standing is persuasive authority for purposes of analyzing standing under Tennessee law. *See Bowers v. Estate of Mouger*, 542 S.W.3d 470, 481 (Tenn. Ct. App. 2017) (analysing the issue of standing and noting that, although "not binding precedent, '[f]ederal case law interpreting rules similar to our own are persuasive authority for purposes of construing the Tennessee rule.'") (quoting *Harris v. Chern*, 33 S.W.3d 741, 745 n.2 (Tenn. 2000)).

In analyzing standing at the federal level, the Sixth Circuit has held that a plaintiff who has caused his or her own injury cannot draw a "fairly traceable" connection between the self-inflicted

injury and the defendant's challenged conduct. *Buchholz v. Tanick*, 946 F.3d 855, 866 (6th Cir. 2020) (holding that "[a] self-inflicted injury, by definition, is not traceable to anyone but the plaintiff."). In that case, plaintiff sued a debit collector for alleged violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*., alleging that two letters he had received from a debt collector caused him to feel an "undue sense of anxiety" that he would be sued if he did not promptly pay the debts. 946 F.3d at 859-60. The Sixth Circuit rejected his claim, finding that plaintiff's anxiety, even if it was a cognizable injury, was insufficient to confer standing because it was self-inflicted, i.e., it resulted from plaintiff's own decisions not to pay his debts and was not "fairly traceable" to any complained-of conduct of the defendant. *Id*. at 866-67.

Finally, the third essential element to establish standing is a showing that the "alleged injury is capable of being redressed by a favorable decision of the court." *Id.* This requires an injury "apt to be redressed by a remedy that the court is prepared to give." *City of Chattanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn. 2001). In other words, "it must be *likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560 (emphasis added).

Intervening Plaintiffs assert the following factual allegations as evidence of their particularize injury establishing their standing to assert a facial challenge to the constitutionality of Tenn. Code Ann. § 58-2-107: (1) Plaintiff Lunn has been refused entry into various establishments in Williamson County because of his inability to wear a mask due to his asthma, Amend. Intvn. Compl. at ¶ 27; (2) Businesses have refused to allow the Intervening Plaintiffs to transact business in their establishments and Plaintiffs have been harassed by employees and customers, *id*. at ¶¶ 28, 31; (3) Plaintiff Humble withdrew his children out of public schools and homeschool because of the mask mandate imposed by the Williamson County Board of Education,

id. at ¶¶ 33-35; (4) Plaintiff Humble's home was vandalized and he has received numerous death threats on social media because of his public stance against the mask mandate, *id* at ¶ 36; and (5) "arrest and prosecution has already occurred for violations of various local mandates, and the threat of arrest and prosecution are apparent." *Id*. at ¶ 40.

But Intervening Plaintiffs' allegations that the "threat of arrest and prosecution are apparent" are insufficient to establish an "injury-in-fact" for purposes of standing. The Intervening Plaintiffs do not allege that they have been arrested and prosecuted, or even threatened with arrest and/or prosecution. And while "an actual arrest, prosecution, or other enforcement action is not a prerequisite" to establish an injury-in-fact, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014), "[p]revious exposure to illegal conduct, by itself and without a showing of continuing and present adverse effects, does not establish an injury for the purpose of seeking declaratory or injunctive relief. *Hightower v. City of Grand Rapids*, 256 F.Supp.3d 742, 749 (W.D. Mich. 2017) (citing *Grendall v. Ohio Supreme Court*, 252 F.3d 828, 832 (6th Cir. 2001). Thus, in order to satisfy the "injury-in-fact" requirement for purposes of a pre-enforcement challenge, Plaintiffs must allege " 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

Here, neither of the Intervening Plaintiffs alleges that they intend to engage in a course of conduct "arguably affected with a constitutional interest but prescribed by statute."[15] More significantly, Intervening Plaintiffs do not allege any threat of imminent enforcement against them. And in the absence of "some other indication of imminent enforcement," the Intervening Plaintiffs

[15] Indeed, Intervening Plaintiffs' amended complaint is devoid of allegations of any action that they intend to take.

must "point to some combination of the following factors" in order to establish a credible threat of prosecution:

> (1) a history of past enforcement against the plaintiffs or others; (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct; and/or (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action.

Plunderbund Media, L.L.C. v. DeWine, 753 Fed. Appx. 362, 366-67 (6th Cir. 2018) (quoting *McKay v. Federspiel*, 823 F.3d at 869 (internal citations omitted)).

Here, the Intervening Plaintiffs' complaint, even construed in the light most favorable to Intervening Plaintiffs, fails to allege or point to evidence which would establish any of these factors. Specifically, none of the Intervening Plaintiffs allege that they have been arrested or threatened with arrest. Indeed, other than the naked assertion that "arrest and prosecution have already occurred", Intervening Plaintiffs do not identify the basis of such alleged arrest and prosecution (i.e., the law or ordinance allegedly violated), nor do they identify when or where such alleged arrest and prosecution occurred. Nor do Intervening Plaintiff allege receipt of enforcement warning letters, or any other type of warning, regarding their specific conduct. As such, Intervening Plaintiffs have not sufficiently alleged "substantial risk that the harm will occur," *SBA List*, 134 S.Ct. at 2341 (internal quotation marks omitted) and, therefore have not established the first and second factor. The Organizational Plaintiffs also cannot establish the third factor as there is no ability for a private complainant to initiate either an enforcement or administrative action under the challenged statute.[16] *See, e.g., SBA List*, 134 S.Ct. at 165-66.

[16] Tenn. Code Ann.§ 58-2-120 provides that "[i]n the event of an emergency declared pursuant to this chapter, any person or representative thereof violating any order, rule or regulation promulgated pursuant to this chapter commits a Class A misdemeanor."

Accordingly, because Intervening Plaintiffs have failed to establish any of the three factors, they have failed to establish a credible threat of prosecution—and correspondingly have failed to establish injury-in-fact, a necessary element for purposes of a pre-enforcement standing analysis. *See Chad Parker v. Wolfe,* 2020 WL 7295831, at *11; *W.O. v. Beshear*, 459 F.Supp.3d 833 (E.D. Ky. 2020); *Bechade v. Baker*, No. 20-11122, 2020 WL 5665554, at *2-3 (D. Mass. Sept. 23 2020).

Additionally, assuming arguendo that Intervening Plaintiffs' remaining allegations establish the first essential election of standing—a particularized injury—they fail to establish the second essential element as none of these alleged injuries are "fairly traceable" to the Governor's exercise of authority pursuant to Tenn. Code Ann. § 58-2-107. For example, the Governor's Executive Orders which delegate authority to County Mayors to issue orders or measures requiring or recommending the wearing of masks within their jurisdictions, specifically provides that "there shall be *no* requirement that a facer covering be worn . . . by *someone who has trouble breathing due to an underlying health condition* or another bona fide medical or health-related reason for not wearing a face covering; . . .." (emphasis added). *See* fn. 12, *supra*. Consistent with this Executive Order, the mask mandate issued by the Williamson County Mayor specifically includes an exemption for "[a]ny person who cannot safely wear a face covering because he/she has trouble breathing due to an underlying health condition or another bona fide medical or health-related reason for not wearing a face covering." *See* fn. 14, *supra*. Thus, the "injuries" allegedly suffered by Plaintiff Lunn are due to the conduct of third parties, i.e., business owners, establishments, doctors, etc., who have acted contrary to the Governor's Executive Order and the Williamson County Mayor's order and to the extent these private businesses and medical professionals have chosen to exclude all individuals who wear masks, notwithstanding the medical exemption, this behavior is not "fairly traceable" to the Governor. Rather, it is behavior that is "the result of the

independent action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

Similarly, Plaintiff Humble's alleged injuries concerning the Williamson County Board of Education's mask mandate are the result of Plaintiff Humble's own actions and not those of the Governor or any other state official. Plaintiff Humble does not allege that he sought any exemption to the School Board's mask mandate, nor does he allege that his children were suspended, expelled, disciplined or any other action taken against them for refusing to wear a face covering at school. Rather, Plaintiff Humble made the decision, on his own accord, to remove his children from schools operated by the Williamson County Board of Education; he cannot now use this alleged "self-inflicted" injury to manufacture standing in this case. *See Buchholz*, 946 F.3d at 866; *see also Clapper v. Amnesty Intern. USA*, 568 U.S. at 418 (noting that "respondents cannot manufacture standing merely by inflicting harm on themselves").

And with respect to Intervening Plaintiffs' allegations of harassment, vandalism and threats on social media, again, these injuries are not "fairly traceable" to the Governor. Nothing in the Governor's Executive Orders requires businesses or private individuals to "harass", "vandalize" or otherwise "threaten" the Intervening Plaintiffs either for not wearing a mask or for their "stance" against the mask mandate. *See Cangelosi v. Edwards*, No. 20-1991, 2020 WL 6449111, at *5 (E.D. La. Nov. 3, 2020).

Intervening Plaintiffs' allegations, in addition to failing to meet the "fairly traceable" requirement for standing, also fail to meet the third essential element—the "redressability" requirement. Again, to meet this requirement, "it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). And as several courts have found, "it is too speculative to

conclude that Plaintiffs' injuries – specifically, the injuries that result from simply wearing a mask—will be alleviated by an injunction prohibiting" enforcement of Tenn. Code Ann. § 58-2-107 and any mask mandate issued pursuant thereto. *See, e.g., Chad Parker, et al. v. Tom Wolf*, --F.Supp.3d--, 2020 WL 7295831, at *10 (M.D. Pa. Dec. 11, 2020); *Cangelosi v. Edwards*, 2020 WL 6449111, at *5. Indeed, it is *likely* that Intervening Plaintiffs' requested relief would have *no* impact on whether local businesses would continue to require customers to wear masks even without the threat of enforcement—and given that the COVID-19 pandemic is only worsening in Tennessee—it is rather *likely* that Intervening Plaintiffs would still be required to wear a mask in those places.

Additionally, an injunction prohibiting the Governor from exercising his emergency powers pursuant to Tenn. Code Ann. § 58-2-107 would have no effect on the Commissioner of the Tennessee Department of Health whom the General Assembly has authorized to "[p]rescribe such rules and regulations as may be deemed proper for the prevention of . . . other epidemic diseases into the state", Tenn. Code Ann. § 68-1-201(2), or on local county boards of health who are authorized by statute to "[a]dopt rules and regulations as may be necessary or appropriate to protect the general health and safety of the citizens of the county." Tenn. Code Ann. § 68-2-601(f)(3). Nor would such an injunction have any effect on the authority of local boards of education to exercise the authority granted to them in Tenn. Code Ann. § 49-1-302(j), 49-2-203 and 49-6-4002 and 4006 to require students to wear face coverings while on school property. In short, the requested declaratory and injunctive relief would simply not alleviate the injuries Intervening Plaintiffs claim to suffer from being required to wear a mask and Intervening Plaintiffs therefore fail to meet the redressability requirement for purposes of standing.

Finally, the only other injury the Intervening Plaintiffs have alleged is that the laws—specifically art. I, art. II §§ 2, 3, art. III, § 10 and art. VII, § 1 of the Tennessee Constitution—are not being followed with respect to the delegation of emergency powers to the Governor. But this injury is one that is common to all citizens of the State and not just the Intervening Plaintiffs.

The Tennessee Supreme Court has held that a plaintiff claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, has not demonstrated an injury sufficient to establish standing.

> *Standing also may not be predicated upon an injury to an interest that the plaintiff shares in common with all other citizens.* Were such injuries sufficient to confer standing, the State would be required to defend against "a profusion of lawsuits" from taxpayers, and a purpose of the standing doctrine would be frustrated. (emphasis added.)

Darnell, 195 S.W.3d at 620 (internal citations omitted); *see also City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013). Consequently, a plaintiff challenging the constitutionality of a statute is required to show that he or she " 'personally has sustained or is in immediate danger of sustaining, some direct injury and merely that he [or she] suffers in some indefinite way in common with people generally.'" *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001) (quoting Parks v. Alexander, 608 S.W.2d 881, 885 (Tenn. Ct. App. 1980)). Here, Intervening Plaintiffs' claims that Tenn. Code Ann. § 58-2-107 is an unconstitutional delegation of legislative authority that violates the separation of powers doctrine. But this alleged injury is one that is shared by all citizens and "standing cannot be based on an alleged injury that a plaintiff has in common with all other citizens." *Durham v. Haslam*, No. M2014-02404-COA-R3-CV, 2016 WL 131035, at *5 (Tenn. Ct. App. Apr. 1, 2016) (citations omitted).

For these reasons, Intervening Plaintiffs lack standing to challenge the constitutionality of Tenn. Code Ann. § 58-2-107 and Intervening Plaintiffs' First Amended Complaint should be dismissed for lack of subject matter jurisdiction pursuant to Tenn. R. Civ. P. 12.02(1).

II. This Court Should Abstain from Ruling on the Facial Challenge to the Constitutionality of Tenn. Code Ann. § 58-2-107.

The Tennessee Supreme Court has held that courts should not decide constitutional issues unless resolution is absolutely necessary for determination of the case and the rights of the parties. Thus, if an issue can be resolved on non-constitutional grounds, "courts should avoid deciding constitutional issues." *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995); *see also Furlong v. Furlong*, 370 S.W.3d 329, 336 (Tenn. Ct. App. 2011) ("[W]e avoid deciding constitutional issues when a case can be resolved on non-constitutional grounds."(internal quotation marks omitted)). As discussed supra, Intervening Plaintiffs have failed to establish the requisite standing to assert a facial challenge to the constitutionality of Tenn. Code Ann. § 58-2-107 and this Court should dismiss their Amended Complaint without addressing the constitutionality of Tenn. Code Ann. § 58-2-107.

However, to the extent that this Court determines that Intervening Plaintiffs have sufficiently alleged and established standing, the Attorney General respectfully submits that this Court should abstain from ruling on the Intervening Plaintiffs' facial challenge to the constitutionality of Tenn. Code Ann. § 58-2-107, as this very same issue is currently on appeal to the Tennessee Court of Appeals in *Allen v. Lee*, Davidson County Chancery Court No. 20-405-IV. In that case, the Davidson County Chancery Court specifically held that Tenn. Code Ann. § 58-2-107 was facially constitutional and did not violate the doctrine of separation of powers. *See* May 26, 2020 Memorandum Op. (copy attached). Thus, in order to avoid inconsistent rulings and to

conserve judicial resources, this Court should abstain or otherwise hold in abeyance Intervening Plaintiffs' constitutional challenge during the pendency of this appeal.

III. Tenn. Code Ann. § 58-2-107 Is Facially Constitutional.

To the extent this Court determines that Intervening Plaintiffs have established the necessary standing and that it should not abstain from ruling on their challenge to Tenn. Code Ann. § 58-2-107 as an unconstitutional delegation of legislative authority in violation of art. I, art. II §§ 2, 3, art. III, § 10 and art. VII, § 1 of the Tennessee Constitution, such challenge still fails. That statute gives the Governor specific powers in the case of an emergency in order to protect the health and safety of Tennessee citizens, including the powers to suspend laws prescribing the procedures for conduct of state business that hinder necessary emergency actions, commandeer property subject to applicable requirements for compensation if necessary to cope with the emergency, compel evacuation from any threatened area when necessary, and take measures concerning the conduct of civilians. Tenn. Code Ann. § 58-2-107.

In Tennessee, the doctrine of separation of powers stems from Article II, Section 2 of the Tennessee Constitution, which states that "[n]o person or persons" in the legislative, executive, and judicial branches of government "shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." This provision "prohibits an encroachment by any of the [branches of government] upon the powers, functions and prerogatives of the others." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 843 (Tenn. 2008). The "powers, functions and prerogatives" of the branches of government are generally divided as follows: the legislative branch has "the authority to make, order, and repeal law," the executive branch has "the authority to administer and enforce law," and the judicial branch has "the authority to interpret and apply law." *Id.*

But "the doctrine of separation of powers is not absolute." *Id.* This is because "while the three branches of government are independent and co-equal, they are to a degree interdependent as well, with the functions of one branch often overlapping that of another." *Bredesen v. Tennessee Judicial Selection Comm'n*, 214 S.W.3d 419, 434 (Tenn. 2007). Thus, although the legislative branch "may not delegate to an executive branch agency the exercise of the legislature's discretion as to what the law shall be," the legislative branch *may* delegate to the executive branch "the authority to implement the expressed policy of particular statutes." *Gallaher*, 104 S.W.3d at 464; *see also Tasco Developing & Bldg. Corp. v. Long*, 368 S.W.2d 65, 68 (Tenn. 1963) ("Obviously it would be impractical for the Legislature to cover by statutory enactment the detail and minutia required for . . . adequate regulation of [executive enforcement of the law], or to attempt to set up standards that would necessarily involve the same details."). Such delegated authority includes the "power to promulgate rules and regulations which have the effect of law." *Bean v. McWherter*, 953 S.W.2d 197, 199 (Tenn. 1997); *see also Leeper v. State*, 526 S.W. 962, 967 (Tenn. 1899) ("The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.").

To determine whether a statutory delegation of authority to the executive branch is constitutional, courts must consider "whether the statute contains sufficient standards or guidelines to enable both the agency and the courts to determine if the agency is carrying out the legislature's intent." *Gallaher*, 104 S.W.3d at 464 (quoting *Bean*, 953 S.W.2d at 199). Tennessee courts have approved delegations of authority that rely on limiting standards that are quite generalized. *See, e.g., Bean*, 953 S.W.2d at 200 (upholding a statute allowing the executive branch to identify which animals are "inherently dangerous" and regulate them accordingly); *West v. Tennessee Hous. Dev.*

Agency, 512 S.W.2d 275, 280-81 (Tenn. 1974) (upholding a statute authorizing the executive branch to use all powers "necessary and convenient" to make mortgages available for low and moderate income housing); *State v. Grainger*, No. M2012-02545-CCA-R3CD, 2014 WL 2803526, at *4-5 (Tenn. Crim. App. June 18, 2014) (upholding a statute authorizing the executive branch to impose "specialized conditions" of parole if they are "necessary to protect the public"); *State v. Russell*, No. M2010-01386-CCA-R3CD, 2012 WL 927703, at *7-8 (Tenn. Crim. App. Mar. 15, 2012) (upholding a statute authorizing the executive branch to create "standards and guidelines regarding the regulation of hunting or fishing"—the violations of which would be "punishable as a Class B misdemeanor"). The limiting standard requirements may also be "relaxed when the discretion to be exercised relates to or regulates for the protection of the public's health, safety, and welfare." *Bean*, 953 S.W.2d at 199. In other words, separation of powers principles are at their nadir when the Governor is exercising clearly-defined emergency powers conferred upon him by the General Assembly.

In Tenn. Code Ann. § 58-2-107(a)(2), the General Assembly has authorized the Governor to "issue executive orders, proclamations, and rules" during a state of emergency that are not laws but that [17]have the "force and effect of law." The General Assembly has interwoven throughout

[17] Contrary to Plaintiffs' assertions, the General Assembly has not delegated its law-making authority to the Governor by virtue of the language contained in Tenn. Code Ann § 58-2-107(a)(2). Rather, the General Assembly has simply provided that the Governor's executive orders, proclamations and rules implementing this statute shall have the force and effect of law – which is no different than similar statutory directives to executive branch agencies. *See Houck v. Minton*, 212 S.W.2d 891 (Tenn. 1948) (holding that rules and regulations promulgated pursuant to statutory directive and not inconsistent with such states have the force of law); *see also Crosslin v. Alsup*, 594 S.W.2d 379, 380 (Tenn.1980) (stating that "[t]he rules governing practice and procedure in the trial and appellate courts of Tennessee were promulgated by joint action of the General Assembly and the Supreme Court[, and therefore, they] have the force and effect of law"); *Tenn. Dep't of Human Servs. v. Vaughn*, 595 S.W.2d 62, 63 (Tenn.1980) (stating that Tennessee procedural rules "are 'laws' of this state, in full force and effect, until such time as they are superseded by legislative enactment or inconsistent rules promulgated by this Court and adopted by the General Assembly"); *Woodside v. Woodside*, No. 01-A-01-9503-PB00121, 1995 WL 623077, at *8 (Tenn. Ct. App. Oct. 25, 1995) (noting that on Tennessee Supreme Court has authority to promulgate rules governing the practice of law and when it promulgates a rule, it has the force and effect of law).

the emergency statutes the limiting standards that courts may use to assess the validity of any executive action made pursuant to this delegation of authority. Any orders, proclamations, and rules issued under Tenn. Code Ann. § 58-2-107(a)(2) must be issued "[p]ursuant to the authority vested in the governor under subdivision (a)(1)." Subdivision (a)(1) states that, to "address[] the dangers presented to this state and its people by emergencies," the Governor "may assume direct operational control over all or any part of the emergency management functions within this state" and "has the power through proper process of law to carry out" the emergency statutes. Tenn. Code Ann. § 58-2-107(a)(1). The General Assembly has defined the Governor's "emergency management" functions as requiring the "preparation for, the mitigation of, the response to, and the recovery from emergencies and disasters." Tenn. Code Ann. § 58-2-101(8). And these powers are not continually or even often accessible. The General Assembly limited the use of the Governor's authority to occurrences meeting the limited definition of emergency: natural, technological, and manmade occurrences that may result in substantial injury to persons or property, including disease outbreaks and epidemics. Tenn. Code Ann. § 58-2-101(7). The General Assembly has also provided that "all action taken" under the emergency statutes must be made "with due consideration of the orders, rules, actions, recommendations, and requests of federal authorities relevant thereto and, to the extent permitted by law, shall be consistent with such orders, rules, actions, recommendations, and requests." Tenn. Code Ann. § 58-2-118. Furthermore, the General Assembly has specifically limited the Governor's emergency authority by confining his response to measures the General Assembly has deemed necessary. Tenn. Code Ann. § 58-2-107.

Read together, these statues limit the times at, the manner in, and the purposes for which the Governor may exercise emergency authority. Any exercise of emergency authority must (1)

be exercised pursuant to the statutory delegation; (2) prepare for, mitigate, respond to, or recover from an emergency; (3) coincide with the existence of an emergency as defined by the General Assembly; (4) be consistent with federal action where feasible; and (5) take the form of regulations specifically authorized by the General Assembly. These limiting standards are more than adequate to enable the court to determine whether the Governor's actions carry out the General Assembly's intent. *See West*, 512 S.W.2d at 280-81.

But the Tennessee General Assembly gave the Governor further specific guidance about what he can and cannot do in responding to an emergency. For example, while the Governor can "[s]uspend any law, rule or regulation," he may only do so if they are the rules of a state agency or if they prescribe the procedures for conducting state business and "if strict compliance with any such law, order, rule, or regulation would in any way, prevent, hinder or delay necessary action in coping with the emergency." Tenn. Code Ann. § 58-2-107(e)(1). This language clearly demonstrates that while the General Assembly has vested broad discretion in the Governor, it is not standardless discretion, and "it is the scope of the emergency, not the Governor's arbitrary discretion, that determines the extent of the Governor's powers under the statute." *Wolfe v. Scarnati*, 233 A.2d at 705.

Similar guidance and standards can be found through the additional powers articulated in Tenn. Code Ann. § 58-2-107(e). For example, the Governor may "commandeer or utilize any private property," but only if he "finds this necessary to cope with the emergency" and "[s]ubject to applicable requirements for compensation". Tenn. Code Ann. § 58-2-107(e)(4). He can suspend or limit the sale, dispensing or transportation of alcoholic beverages, explosives or combustibles but not "firearms, ammunition or firearm or ammunition components." Tenn. Code Ann. § 58-2-107(e)(8). He can authorize the use of "forces already mobilized . . . to assist the

private citizens of the state in clean up and recovery operations" but only when "proper permission to enter onto or into private property has been obtained from the property owner." Tenn. Code Ann. § 58-2-107(e)(12). And he can provide limited liability protection to health care providers, including hospitals and community mental health care centers but only to if they are licensed, certified or authorized under titles 33, 63 or 68 and if they render services within the limits of their license, certification, or authorization to victims or evacuees of such emergencies. Tenn. Code Ann. § 58-2-107(l)(2). Moreover, such protection may not include any act or omission caused by gross negligence or willful misconduct. *Id.*

Finally, the Governor's powers set forth in Tenn. Code Ann. § 58-2-107 cannot be viewed in isolation but must be construed in light of the provisions of the entire Act—and in particular, the legislative intent, policy and purpose expressly declared therein. In enacting the provisions of Public Chapter 946 of the Acts of 2000, the General Assembly made specific findings concerning the State's vulnerability "to a wide range of emergencies, including natural, technological, terrorist acts, and manmade disasters, all of which threaten the life, health, safety of its people; damage and destroy property, disrupt services and everyday business and recreational activities; and impede economic growth and development." Tenn. Code Ann. § 58-2-102(a). The General Assembly then declared that

> it is the intent of the general assembly to reduce the vulnerability of the people and property of this state; to prepare for efficient evacuation or shelter-in-place of threatened or affected persons; to provide for the rapid and orderly provision of relief to persons and for the restoration of services and property; and to provide for the coordination of activities relating to emergency preparedness, response, recovery, and mitigation among and between agencies and officials of this state, with similar agencies and officials of other states, with local and federal governments, with interstate organizations, and with the private sector.

Tenn. Code Ann. § 58-2-101(b). The General Assembly further expressly declared that while it is "State policy for responding to disasters to support local emergency response efforts", in the case of a major or catastrophic disaster, "the state must be capable of providing effective, coordinated, and timely support to communities and the public" and, therefore, Public Chapter 946 "fulfills a compelling state interest." Tenn. Code Ann. § 58-2-102(c).

Finally, the General Assembly declared in Tenn. Code Ann. § 58-2-103(a)(2) that

> [b]ecause of the existing and continuing possibility of the occurrence of emergencies and disasters resulting from natural, technological, or manmade causes, including acts of terrorism and the recovery therefrom; in order to ensure that preparations of this state will be adequate to deal with, reduce vulnerability to, and recover from such emergencies and disasters; to provide for the common defense and to protect the public peace, health, safety, and to preserve the lives and property of the people of the state, it is hereby found and declared to be necessary to: . . . [c]onfer upon the governor, TEMA, and the governing body of each political subdivision of the state the emergency powers provided herein; . . ..

And the General Assembly further declared that it is the "purpose of this chapter and the policy of the state that all emergency management functions of the state be coordinated to the maximum extent with comparable functions of the federal government, including its various departments, agencies of other states and localities, and private agencies of every type, to the end that the most effective preparation and use may be made of the manpower, resources, and facilities of the nation for dealing with any emergency that may occur" Tenn. Code Ann. § 58-2-103(b).

These express declarations of legislative intent, policy and purpose provide additional standards with which the Governor must comply in exercising the emergency powers granted to him under Tenn. Code Ann. § 58-2-107. Thus, when viewed as a whole, the General Assembly's delegation of emergency powers to the Governor in Tenn. Code Ann. § 58-2-107 is governed by

a limiting standard adequate to inform the Governor of the limits of his authority and to enable the Court to determine whether the Governor's actions carry out the General Assembly's intent.

Furthermore, in enacting the emergency statutes, the General Assembly recognized a time-tested principle of republican government: *salus populi suprema lex esto*—the safety of the people is the supreme law. M. Tullius Cicero, *De Legibus*, Book III, Part III, sub. 8. Since the Roman Republic, statesmen have understood that individual freedoms may, in rare instances and by necessity, yield to the public welfare. John Locke expressed the same notion, explaining that in certain limited and extreme circumstances the executive has the prerogative to act in his discretion for the good of the society where the existing law does not deal with a present difficulty. John Locke, *Second Treatise of Government* 53 (Jonathan Bennett ed., 2017). He even acknowledged that "it is appropriate that the laws themselves should in some cases give way to the executive power, or rather to the fundamental law of nature and government that 'All the members of the society are to be preserved as much as may be.'" *Id*. This, Locke noted, justified destroying a house—normally an illegal act—to stop the spread of a fire. *Id*.

America's founders were well-acquainted with these concepts when they wrote the Constitution. Even the founders "least conversant in Roman story[knew] how often that republic was obliged to take refuge in the absolute power of a single man." Alexander Hamilton, *Federalist No. 70*, 1788 WL 484, at *1 (March 18, 1788); *see also Notes of Major William Pierce (Georgia) in the Federal Convention of 1787*, H. Doc. No. 398 at p. 96 (U.S. Bicent.), 1927 WL 61637, at *6 (Jan. 1, 1927) (comparing General George Washington to Cincinnatus). Thomas Jefferson understood that "[t]he laws of necessity, or self-preservation, of saving the country when in danger, are of higher obligation." "Letter from Thomas Jefferson to John Colvin" (Sept. 20, 1810), 11 *The Works of Thomas Jefferson*, 146, 147 (Paul Liecester Ford Ed., 1905). Other founders similarly

recognized the fundamental importance of protecting the public welfare. *See, e.g.*, Alexander Hamilton, *Federalist No. 23*, 1787 WL 351, at *1 (Dec. 18, 1787) ("The authorities essential to the common defense . . . ought to exist without limitation.").

Our State recognized and adopted these principles in its infancy. The Tennessee Supreme Court cited Cicero's maxim when interpreting our first Constitution's Declaration of Rights, noting that in extreme cases public necessity justified an officer using—and even destroying—private property to promote the public welfare, such as when the burning of a house would defeat the attack of an enemy. *Barrow v. Page*, 6 Tenn. 97, 98-99 (1818). And later the Court explained that the State's police power was not premised only on its ability to prevent one man from injuring another, but also on the principle that "every man, when he enters society, gives up part of his natural freedom, result[ing in] laws which, in certain cases, authorize the infliction of penalties, the deprivation of liberty, and even the destruction of life." *Arutanoff v. Metro. Gov. of Nashville & Davidson County*, 223 Tenn. 535, 540, 448 S.W.2d 408, 410-11 (1969) (quoting Broom's Legal Maxims, 8th ed., H. Chitty, p. 7).

Our sister states also recognize that in extraordinary cases the police power may temporarily swell to protect the welfare of the state. *See, e.g., McInnery v. Ervin*, 46 So.2d 458, 463 (Fl. 1950); *Davenport v. East Texas Refining Co.*, 127 S.W.2d 312, 316 (Tx. Ct. Civ. App. 1939); *Peck v. City of Michigan City*, 49 N.E. 800, 803 (Ind. 1898); *Deems v. City of Baltimore*, 30 A. 648, 650 (Md. 1894) ("Every well-organized government has the inherent right to protect the health and provide for the safety and welfare of its people. It has not only the right, but it is a duty and obligation which the sovereign power owes to the public; and, as no one can foresee the emergency or necessity which may call for its exercise, it is not an easy matter to prescribe the precise limits within which it may be exercised."); *Boon v. State*, 1 Ga. 618, 631 (1846)

("Occasions might occur . . . when, from the necessity of the case, their fundamental principles would have to be disregarded. In such an emergency, the maxim, '*salus populi suprema lex*,' would be the law of the case.").

The General Assembly codified these time-tested and widely-accepted principles when it delegated specific authority to the Governor to respond to occurrences "that result[] or may result in substantial injury or harm to the population." Tenn. Code Ann. § 58-2-101(7). Embracing its duty to protect Tennesseans from all manner of emergencies, the General Assembly determined the Governor is best equipped to respond to the constantly-changing needs of the State during an emergency. The Tennessee and U.S. Supreme Court have long recognized that the

> "Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impractical. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, some relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."

Dep't of Public Welfare v. National Help "U" Ass'n, 270 S.W.2d 337, 339-40 (Tenn. 1954) (quoting *Opp Cotton Mills v. Administrator of Wage and Hour Division*, 312 U.S. 126, 145 (1941).

Finally, the Tennessee Supreme Court has specifically addressed whether an act for "the protection of the public health" constituted an unconstitutional delegation of legislative authority in violation of the separation of powers. In *Gamble v. State*, 333 S.W.2d 816 (Tenn. 1960), the plaintiff had been indicted for failing to have his children immunized against polio as ordered by the Davidson County Board of Health pursuant to a private act. *Id*. at 817. The 1901 private act created and established the Board of Health for Davidson County and empowered the Board "to make such rules and regulations as they should deem necessary and proper for the protection of

public health." *Id*. at 818. In challenging his indictment, the plaintiff argued that the act was an unconstitutional delegation of legislative authority in violation of the separation of powers.

The Supreme Court rejected this argument, stating:

> Among all the objects sought to be secured by government, none is more important than the preservation of the public health; and, an imperative obligation rests upon the state through its proper instrumentalities or agencies to take all necessary steps to accomplish the objective. Statutes enacted for this purpose should be liberally construed and the most extensive power may be conferred on administrative boards, either state or local, to carry out such purpose. The guide set forth in subsection (1) is the preservation of the public health and the protection of persons and property from extraordinary conditions. Because of varied facts which might affect this policy, the legislature wisely did not undertake to enumerate them, but required them to be ascertained and applied by the [board]. We see nothing seriously wrong with this provision. A statute which confers discretion on an executive officer or board without establishing any standards is a delegation of legislative power and is unconstitutional; *but, when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative objective sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations.* (emphasis added).

333 S.W.2d at 821 (quoting *State ex rel. Anderson v. Fadely*, 308 P.2d 537, 548 (Kan. 1957) (internal citations omitted)). Under this binding precedent, the emergency powers granted to the Governor by the General Assembly in Tenn. Code Ann. § 58-2-107 are clearly facially valid and constitutional.

Other jurisdictions have reached the same conclusion about statutes delegating emergency powers. Most recently, the Kentucky Supreme Court held that KRS Chapter 39A—the statute granting the Governor powers for statewide emergencies—did not raise separation of powers issues or otherwise violate the nondelegation provisions of the Kentucky Constitution. *See*

Beshear v. Acree, No. 2020-SC-0313-OA, 2020 WL 6736090, at *16-22 (Ky. Nov. 12, 2020). Similarly, the Pennsylvania Supreme Court held that its own governor's stay-at-home order did not violate the separation of powers, *Friends of DeVito v. Wolf*, No. 68 MM 2020, 227 A.3d 872 (Pa. 2020), and the New Jersey Supreme Court has upheld its legislature's broad delegation of emergency powers in the Disaster Control Act against a separation of powers challenge. *Worthington v. Fauver*, 88 N.J. 183, 208-09 (N.J. 1982). New York has approved a delegation that allowed the governor to suspend "any statute . . . if compliance . . . would prevent hinder, or delay action necessary to cope with the disaster." *People v. Haneiph*, 745 N.Y.S.2d 405, 408 (N.Y. Crim. Ct. June 25, 2002) (quoting N.Y. Exec. Law § 29-a (McKinney)) (upholding executive order that suspended Speedy Trial statute in wake of September 11th attacks). And the Court of Appeals of Louisiana held its legislature's delegation of the authority to declare an emergency and issue emergency orders did not violate the separation of powers. *State v. Pearson*, 975 So.2d 646, 653 (La. Ct. App. 2007).

The General Assembly's delegation of emergency powers to the Governor is governed by a limiting standard adequate to inform the Governor of the limits of his authority and enable the Court to determine whether the Governor's actions carry out the General Assembly's intent. Accordingly, Plaintiffs have failed to state a claim that Tenn. Code Ann. § 58-2-107 is an unconstitutional delegation of legislative authority that *facially* violates the separation of powers doctrine and such claim should be dismissed.

CONCLUSION

For these reasons, Governor Lee respectfully requests that this Court dismiss with prejudice Intervening Plaintiffs' Amended Complaint for lack of subject matter jurisdiction and failure to state a claim pursuant to Tenn. R. Civ. P. 12.02(1) and (6).

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

/s/ Janet M. Kleinfelter
JANET M. KLEINFELTER (BPR 13889)
Deputy Attorney General
Public Interest Division
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-7403
Janet.kleinfelter@ag.tn.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum has been sent by email transmission to:

W. Gary Blackburn
Bryant Kroll
213 Fifth Avenue North, Suite 300
Nashville, TN 37219

Allison Bussell
Andrew McClanahan
Will Ayers
Assistant Metropolitan Attorneys
108 Metropolitan Courthouse
P.O. Box 196300
Nashville, TN 37219

This 23rd day of December 2020.

/s/ Janet M. Kleinfelter
JANET M. KLEINFELTER
Deputy Attorney General