IN THE UNITED STATE DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

RUSS MCKAMEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:24-cv-363**
	)	
JONATHAN SKRMETTI, Tennessee Attorney General and Reporter in his official capacity; and	)	**Judge Trauger**
	)	**Magistrate Judge Newbern**
CARTER LAWRENCE, Commissioner of the Tennessee Department of Commerce and Insurance and State Fire Marshal, in his official capacity,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Court should deny Plaintiff Russ McKamey's request for a preliminary injunction. The law allows such an "extraordinary and drastic remedy" only upon a "*clear showing*" of an entitlement to equitable relief. *Enchant Christmas Light Maze & Mkt. v. Glowco, LLC*, 958 F.3d 532, 539 (6th Cir. 2020) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1977)). McKamey has not carried that burden. The Fifth Amendment does not sustain his blanket refusal to cooperate with a civil investigation. McKamey also does not establish that contemplated fire-safety inspections of his property would constitute a "search" under the Fourth Amendment, let alone a search in violation of that amendment. And although McKamey proclaims that state officials have retaliated against him for asserting his First and Fourth Amendment rights, the alleged facts and material underlying communications disprove this at every turn. Lacking a deprivation of rights, McKamey fails to identify any immediate, irreparable harm—particularly given his two-week delay in serving Defendants after moving for an "emergency" preliminary injunction. The equities and public interest likewise cut against discretionary equitable relief, showing only that the public needs to be protected from McKamey.

BACKGROUND

I. McKamey Manor

Russ McKamey runs a haunted house named McKamey Manor in Summertown, Tennessee. (Dkt. 1 ¶ 1.) He claims it is an "immersive theater experience in the genre of horror." (*Id.*) Others call it a "torture chamber." (*Id.* ¶ 39.)

There are many problematic behaviors associated with McKamey Manor. Aspects of the "immersive . . . experience" may resemble false imprisonment or kidnapping. (*Id.* ¶¶ 1, 5 95.) It is unclear whether participants can withdraw consent. (*Id.* ¶¶ 26, 62, 65, 95.) It is unclear whether the lengthy waiver participants must sign is legal. (*Id.* ¶¶ 26, 52-58, 65, 91-92; Dkt 1-3 at 1; Dkt.

1-6 at 7.) There is cause for concern that participants have been sexually assaulted as well as physically and mentally harmed. (Dkt. 1 ¶¶ 41-44, 47-49, 55, 60-61, 63.) And a $20,000 reward McKamey has offered for completing the experience might not have existed. (Dkt. 1-3 at 2; Dkt. 1-6 at 7.)

On October 12, 2023, Hulu released a documentary about McKamey Manor that highlighted these problematic behaviors. (Dkt. 1 ¶ 8.) Defendants Jonathan Skrmetti and Carter Lawrence then began examining McKamey Manor's business and fire-safety practices. (Dkt. 1-4; 1-7).

II. General Skrmetti's Involvement with McKamey Manor

Jonathan Skrmetti is the Tennessee Attorney General and Reporter. Tenn. Code Ann. § 8-6-101. He is responsible for attending to the "trial and direction of all civil litigated matters and administrative proceedings" in which the State may be interested. *Id.* § 8-6-109(b)(1). The Consumer Protection Division ("Consumer Protection") of the Attorney General's Office investigates and enforces civil provisions of the Consumer Protection Act that prohibit "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce." *Id.* §§ 47-18-104(a), -106 to -108. If Consumer Protection has "reason to believe" that "any unlawful act or practice" may be occurring, it may submit requests for information to the suspected individuals or commercial entities. *Id.* §§ -103(18), -106(a). Such requests may require written responses, oral examinations under oath, and the production of documents. *Id.* § -106(a).

Subjects may oppose or seek to modify the investigative requests in state court. *Id.* § -106(b). Likewise, Consumer Protection may ask a court to compel responses to the requests. *Id.* § -106(c)-(d). But Consumer Protection may not seek to compel "any natural person" to waive his or her privilege against self-incrimination. *Id.* § -106(g).

Under this statutory authority, Consumer Protection sent McKamey requests for information that focused on three areas of concern: (1) the ability of participants to withdraw consent; (2) practices surrounding the use of the waiver; and (3) the existence of the $20,000 prize. (Dkt. 1-3; Dkt. 1-4 at 7-14.) The requests sought written responses, document production, and verbal testimony from McKamey or anyone with relevant knowledge. (Dkt. 1-4 at 7-14.)

McKamey initially moved the Davidson County Chancery Court for a protective order that would give him until February 25, 2024, to respond to the written requests and until April 8, 2024, to appear for testimony. Petition 1, 3, *In Re Investigation McKamey Manor*, No. 23-1492-IV (Davidson Ch. Ct. Nov. 25, 2023) (attached as Ex. 1). Consumer Protection did not file a response opposing this request. Docket, *In Re Investigation McKamey Manor*, No. 23-1492-IV (attached as Ex. 2.) On March 29, 2024—the same day McKamey filed this federal-court lawsuit against General Skrmetti—McKamey voluntarily nonsuited his state-court petition. (*Id.*)

III. Commissioner Lawrence's Involvement with McKamey Manor

Carter Lawrence is the Commissioner for the Department of Commerce and Insurance and the State Fire Marshal. The Department of Commerce and Insurance is tasked with "preventing . . . fires" as well as enforcing laws relating to the "[p]revention of fires"; "[i]nstallation and maintenance of . . . fire alarm systems and fire extinguishing equipment"; "regulation of fire escapes"; and "[m]eans and adequacy of exit, in case of fire . . . in all . . . places in which numbers of persons live, work, or congregate . . . for any purpose." Tenn. Code Ann. §§ 68-102-101 to -102. It is also required to "promulgate rules establishing minimum statewide building construction safety standards." *Id.* § 68-120-101(a). One of the rules that it has promulgated adopts the 2012 International Fire Code ("IFC") and International Building Code ("IBC") as the "minimum

standards for fire prevention, fire protection, and building construction safety" in Tennessee. Tenn. Comp. R. & Regs. 0780-02-02-.01(1)(a), (f).

The Fire Prevention Division ("Fire Prevention") of the Department of Commerce and Insurance monitors compliance with the IFC and IBC by inspecting buildings after receiving a complaint or whenever it is deemed "necessary." Tenn. Code Ann. §§ 68-102-112, -116. At an inspection, if Fire Prevention finds that something may pose a threat to "the safety and welfare of the public," such as a violation of the IFC or IBC, then Fire Prevention may use "any . . . remedy available" to resolve the threat. *Id.* §§ 68-102-117(b), 68-120-107(a).

In 2019, Fire Prevention inspected McKamey Manor and found multiple violations of the IFC and IBC, including that a barn next to three CONEX trailers (large metal shipping containers) did not have a fire alarm, exit signs, or smoke detectors (Dkt. 1-6 at 2-4). These shortcomings violated IBC §§ 411.3, 411.5, and 411.7; IBC § 907.2.12.2; and IFC § 907.2.11.2. (*Id.*; *see* Ex. 3; Ex. 4 at 7.) Fire Prevention explained that McKamey must either fix these violations or stop using the barn for "shows." (Dkt. 1-6 at 5.) In response, McKamey informed Fire Prevention that he would no longer "use the barn for any other purpose than storage." (*Id.*) With that assurance, Fire Prevention closed the 2019 complaint. (*Id.* at 2.)

On November 21, 2023, Fire Prevention opened a new investigation into McKamey's use of the barn and CONEX trailers. (Dkt. 1-7 at 1-3.) Inspectors examined McKamey Manor with McKamey. (*Id.* at 4.) Nothing suggests that McKamey did not consent to the inspection. McKamey admitted that, in the past three years, three participants had been in the barn, and participants had been in one of the CONEX trailers. (*Id.*) This inspection revealed violations of the IFC and IBC similar to those found in 2019, including that the barn and adjacent CONEX trailers were not equipped with a fire alarm, exit signs, smoke detectors, or portable fire

extinguishers. (*Id.* at 2-4). These shortcomings violated IBC §§ 411.3, 411.5, 411.6, and 411.7; IBC § 907.2.12.2; and IFC §§ 906.1 and 907.2.12. (*Id.*; *see* Ex. 3; Ex. 4.) Fire Prevention informed McKamey that he had to provide a Plan of Corrective Action ("POCA") that would address these violations. (Dkt. 1-7 at 4.) At the time of inspection, McKamey "stated he was willing to provide a letter documenting that he will cease to use any of the property for special amusement purposes and participants will not be allowed to enter the structures." (*Id.*)

McKamey submitted a POCA consisting of one sentence: "Will not use barn for anything besides personal storage." (*Id.* at 5.) Fire Prevention told McKamey that it would accept his POCA if he also submitted an affidavit stating he would not use the barn or CONEX trailers for special amusement purposes and would not allow participants in those areas. (Dkt. 1-8; Ex. 5.) Fire Prevention sent McKamey a proposed affidavit and invited him to write his own if he preferred. (*Id.* at 2; Ex. 5 at 3-5.). McKamey then questioned the basis of Fire Prevention's authority to request an affidavit and monitor his property pending compliance with the IBC and IFC. (Dkt. 1 ¶ 72; Ex. 6 at 4.) Fire Prevention explained that its authority came from Tennessee Code Annotated, Title 68, Chapter 120. (Dkt. 1 ¶ 73; Ex. 6 at 2.) McKamey responded by "refer[ing]" Fire Prevention to "T.C.A. § 68-120-117 for the requisite process of 'monitoring' [his] property" and stating "[u]ltra vires surveillance . . . by your client/office will not be tolerated." (Ex. 6 at 2; *see* Dkt. 1 ¶ 75.)

Fire Prevention then explained why the proffered one-sentence POCA was inadequate. (Dkt. 1-9.) McKamey had already violated a "substantially similar POCA" from 2019 "and utilized the barn for purposes beyond storage." (*Id.*) Because of this, Fire Prevention could not rely on McKamey's "statement alone" to approve the POCA. (*Id.*) Fire Prevention suggested two options that would make the POCA acceptable: bring the facility into code compliance or submit

an affidavit that those structures would not be used. (*Id.*) It left open the opportunity for McKamey to provide an alternative "acceptable POCA." (*Id.*) Finally, Fire Prevention stated that, until it received an acceptable POCA, "continued inspections would occur." (*Id.*)

IV. Current Lawsuit

After these interactions, McKamey filed the instant eight-count Complaint against General Skrmetti and Commissioner Lawrence.[1] In Counts 1 and 6, he alleges that General Skrmetti has violated his Fifth Amendment privilege against self-incrimination. (Dkt. 1 ¶¶ 106-14, 150-57.) In Count 2, he challenges the Consumer Protection investigation statute—Tenn. Code Ann. § 47-18-106—as facially unconstitutional under the Fifth Amendment. (*Id.* ¶¶ 115-23.) In Counts 3 to 5 and 7 to 8, he alleges that Commissioner Lawrence violated his First Amendment right to refrain from speaking, violated his Fourth Amendment protection from unwarranted searches, and retaliated against him for exercising these rights. (*Id.* ¶¶ 124-49, 158-71.) He seeks injunctive relief, declaratory relief, costs, and attorneys' fees. (Dkt. 1, Prayer for Relief ¶¶ 1-12.) McKamey now moves for an "emergency" preliminary injunction, asserting a likelihood of success on all eight counts. (Dkts. 8, 9.) To support his motion, he cites the Complaint and its exhibits. (Dkt. 9 at 1.)

REASONS FOR DENYING INJUNCTIVE RELIEF

There is no basis to grant McKamey's requested relief. A preliminary injunction is an "extraordinary remedy." *Tenn. Scrap Recyclers Ass'n. v. Bredesen*, 556 F.3d 442, 447 (6th Cir. 2009). It "should not be granted unless the movant, by a *clear showing*, carries the burden of persuasion." *Glowco*, 958 F.3d at 539 (citation omitted). To do so, a plaintiff must establish four

[1] About a week after filing this lawsuit, McKamey also sued Hulu and other private defendants for approximately $8,400,000 in damages. *See* Complaint, *McKamey v. Hulu. LLC*, No. 1:24-cv-37 (M.D. Tenn. Apr. 8, 2024), Dkt. 1.

factors: (1) that he is likely to succeed on the merits; (2) that he will suffer irreparable harm without the injunction; (3) that the balance of equities favors him; and (4) that the injunction is in the public interest. *Id.* at 535-36; *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (clarifying that the plaintiff must establish all four factors).[2] Even then, the Court retains discretion to deny or limit relief as it deems appropriate. *See Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982); *cf. GMA Accessories, Inc. v. Positive Impressions, Inc.*, 181 F.3d 82 (2d Cir. 1999) (unpublished) (noting that the district court could have denied equitable relief even if the plaintiff "had otherwise satisfied all of the prerequisites"). McKamey has not carried the burden of persuasion at any step of the analysis.

I. McKamey Has No Likelihood of Success on His Claims.

McKamey's failure to show likelihood of success on the merits is "fatal to [his] quest for a preliminary injunction." *Glowco*, 958 F.3d at 539 (cleaned up). McKamey's claims misstate how one may assert a Fifth Amendment privilege, fail to meet the high bar for facial challenges, do not show an unconstitutional search has even been contemplated, and fall short of every requirement to show retaliation. For each of these reasons, McKamey has not shown a likelihood of success.

A. The Fifth Amendment claim (Count 1) will not succeed.

McKamey is unlikely to succeed on the merits of his claim that responding in any way to Consumer Protection's requests for information would violate his Fifth Amendment privilege against self-incrimination. (Dkt. 1 ¶¶ 106-14; Dkt. 9 at 3-4.) McKamey fundamentally misunderstands how this right can be asserted. The Fifth Amendment does not provide blanket

[2] To the extent other Sixth Circuit case law excuses a plaintiff from establishing all four factors, it is inconsistent with Winter and should be disregarded. *See D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 328-29 (6th Cir. 2019) (Nalbandian, J., concurring).

immunity that allows McKamey to entirely avoid participating in a statutorily authorized investigation. It merely protects him from answering specific questions or requests that would incriminate him. Because McKamey fails to identify particular requests for information that are both testimonial and incriminating, his attempted blanket assertion of the Fifth Amendment is ineffective.

Under the Fifth Amendment's protection, a witness may refuse to answer a question that would "support a conviction [for that witness] under a . . . criminal statute" or "would furnish a link in the chain of evidence needed to prosecute the" witness. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). "To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cnty.*, 542 U.S. 177, 189 (2004). "[B]efore permitting a witness to assert a Fifth Amendment privilege, courts must determine if the witness has 'reasonable cause' to apprehend a real danger of incrimination." *United States v. McAllister*, 693 F.3d 572, 583 (6th Cir. 2012) (citation omitted). Because this determination requires a context-specific analysis, "there is a presumption against blanket assertions of Fifth Amendment privilege." *Id.* "Only in 'unusual cases,' where the danger of self-incrimination exists 'in answering any relevant question,' may a court sustain a blanket assertion of a witness's right against self-incrimination." *Doe v. D.C.*, No. 1:19-cv-01173, 2021 WL 11132750, at *2 (D.D.C. Aug. 19, 2021) (citation omitted); *c.f. McAllister*, 693 F.3d at 583-84 (approving use of a blanket assertion where the witness appeared before the district court, and the court found that, aside from a question for his name, "every question" the witness would be asked "could have likely subjected him to criminal prosecution").

This is not an "unusual case" where a danger of self-incrimination exists in the answer to any relevant question. Consumer Protection has requested three forms of information from

McKamey: written responses, in-person responses, and document production. (Dkts. 1-3, 1-4.) McKamey has not identified a single request for information that is both testimonial and incriminatory. That alone unseats his claim. *See United States v. Conces*, 507 F.3d 1028, 1040 (6th Cir. 2007) ("To the extent that [a witness] vaguely contends that any sort of response to the Government's post-judgment discovery requests might tend to incriminate him, his 'blanket assertion' of a Fifth Amendment privilege is impermissible, and he has failed to 'demonstrate [a] real danger[ ] of incrimination' if he were to respond to any particular discovery request." (citation omitted)).

Furthermore, many requests seek information that is either not incriminatory or not testimonial. To be incriminatory, information must indicate that the witness engaged in criminal activity. *Zambon v. Crawford*, No. 3:17-CV-507, 2019 WL 4264370, at *5-6 (E.D. Tenn. Sept. 9, 2019). Background information about the identity of someone who worked with the witness or the date when an event occurred is not incriminatory. *Id.*; *see Hiibel*, 542 U.S. at 190 ("In this case petitioner's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him . . . ."). In the requests for written and in-person responses, Consumer Protection asks McKamey about when he established McKamey Manor in Tennessee, the identities of the people who have worked with him, how many people are on his waitlist, and the identities of people who have attempted to win the $20,000 prize. (Dkt. 1-4 at 9-14.) Answering such requests for identifying and contextual information would not indicate that McKamey committed a crime. *Zambon*, 2019 WL 4264370, at *5-6. Thus, he cannot assert a blanket refusal to respond to any questions. *Id.*; *see Doe v. D.C.*, 2021 WL 11132750, at *2; *c.f. McAllister*, 693 F.3d at 583-84.

Determining whether a request for documents is impermissibly testimonial is a bit more involved because it usually does not matter whether pre-existing documents contain testimonial information. What matters, instead, is whether the act of producing the documents would be testimonial. Normally, even if documents contain testimonial information, they should still be produced. *United States v. Koubriti*, 297 F. Supp. 2d 955, 963 (E.D. Mich. 2004). Any testimonial aspect of a "voluntarily compiled" document is irrelevant for Fifth Amendment purposes because, even if the witness himself created it, "no compulsion [was] present" when the document was made." *Id.*; *see United States v. Hubbell*, 530 U.S. 27, 36 (2000) ("Because the papers had been voluntarily prepared prior to the issuance of the summonses, they could not be 'said to contain compelled testimonial evidence . . . .'" (quoting *Fisher v. United States*, 425 U.S. 391, 409-10 (1976)). But it is still possible for the production of documents to become compelled testimony if the very act of production would be used (1) to prove "that the documents exist," (2) to prove that the documents are "in control of the person producing them," or (3) to authenticate the documents. *Koubriti*, 297 F. Supp. 2d at 968 (quoting *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir. 1985)).

Consumer Protection seeks at least one set of documents—all versions of the waiver signed by participants—that does not meet any of these three criteria. (Dkt. 1-4 at 7.) The waiver undisputedly exists and is already known to be in McKamey's possession, custody, or control. (Dkt. 1-3; *see also* Dkt. 1-6 at 7 (referring to the waiver as the "McKamey Manor contract").) McKamey's act of production alone is unnecessary for authentication because the participants who signed the waivers could authenticate them. Fed. R. Evid. 901(b)(2). Thus, responding to this request would not be an act of compelled testimony. *Koubriti*, 297 F. Supp. 2d at 963. Because at least one of the requests seeks information not protected by the Fifth Amendment, McKamey

cannot assert a blanket refusal to respond to any request. *Doe v. D.C.*, 2021 WL 11132750, at *2; *c.f. McAllister*, 693 F.3d at 583-84.

If McKamey wishes to assert his privilege against self-incrimination in his responses to the requests for information, he absolutely may. Indeed, Consumer Protection is statutorily required to allow that. Tenn. Code Ann. § 47-18-106(g). But it must be on a "question-by-question basis," *In re Stallman*, 576 B.R. 563, 567 (Bankr. W.D. Mich. 2017), which will allow a reviewing official to determine if there is "reasonable cause" for his fear of self-incrimination. *McAllister*, 693 F.3d at 583 (citation omitted). And, once he asserts the privilege, Consumer Protection may ask a court to review the validity of his assertion. *See* Tenn. Code Ann. § 47-18-106(b)-(d).

McKamey has not alleged facts showing he is entitled to a blanket assertion of his Fifth Amendment privilege against self-incrimination and is therefore unlikely to succeed on the merits of his claim that it would be unconstitutional to require him to respond to Consumer Protection's individual requests for information.

B. The facial challenge to the investigation statute (Count 2) will not succeed.

McKamey is unlikely to succeed in his claim that no set of circumstances exist in which Consumer Protection's investigation statute, Tenn. Code Ann. § 47-18-106, could be applied without violating the Fifth Amendment. This statute can be constitutionally applied to all legal and commercial entities and, often, to individuals. It is facially constitutional.

"Facial challenges are disfavored" by courts because they often require speculative, premature interpretations of statutes and run "contrary to the fundamental principle of judicial restraint" that a court should not anticipate a question of law. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). "A facial challenge to a law's constitutionality is an effort 'to invalidate the law in each of its applications, to take the law off

the books completely.'" *Speet v. Schuette*, 726 F.3d 867, 871 (6th Cir. 2013) (citation omitted). Such challenges "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented." *Id.* at 451. It is proper then that plaintiffs face an incredibly high bar when bringing a facial challenge. They "must establish 'that no set of circumstances exist under which [the statute] would be valid.'" *Speet*, 726 F.3d at 872 (quoting *United States v. Stevens*, 559 U.S. 460 (2010)). "If 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 (6th Cir. 2015).

McKamey's facial challenge fails for four reasons. First, the investigation statute explicitly *protects* the privilege against self-incrimination belonging to a "natural person." Tenn. Code Ann. § 47-18-106(g). And it provides a procedure for a person to seek state-court review of the investigation requests, which would allow a court to prevent Fifth Amendment violations. *Id.* § -106(b). A statute that safeguards Fifth Amendment rights does not violate the Fifth Amendment.

Second, the investigation statute can be applied to corporations and other legal and commercial entities without violating the Fifth Amendment because those entities have no Fifth Amendment privilege against self-incrimination. *See In re Custodian of Records of Variety Distributing, Inc.*, 927 F.2d 244, 247 (6th Cir. 1991) (noting that corporations possess "no such privilege"); *see also In re L. Sols. Chicago LLC*, 629 S.W.3d 124, 134 (Tenn. Ct. App. 2021) (affirming a trial court's order compelling a corporation to respond to Consumer Protection's requests for information); *In re Wall & Assocs., Inc.*, No. M2020-01687-COA-R3-CV, 2021 WL 5274809, at *1 (Tenn. Ct. App. Nov. 12, 2021) (same) (no perm. app. filed). This is true even if the corporation consists of a single person. *United States v. B & D Vending, Inc.*, 398 F.3d 728, 733-35 (6th Cir. 2004).

Third, the privilege against self-incrimination does not categorically prevent a state government from questioning a witness. The witness possessing the privilege must assert it and, conversely, can waive it at any time. *Convertino v. U.S. Dep't of Just.*, 795 F.3d 587, 592-96 (6th Cir. 2015); *see Mitchell v. United States*, 526 U.S. 314, 321 (1999) ("The privilege is waived for the matters to which the witness testifies . . . ."). A witness could voluntarily respond to requests for information issued under the investigation statute without any Fifth Amendment violation.

Fourth, as discussed above, Part I.A, the Fifth Amendment is not a blanket barrier to state investigation—witnesses may be compelled to answer questions if they do not call for testimonial or incriminating responses. *Doe v. D.C.*, 2021 WL 11132750, at *2; *McAllister*, 693 F.3d at 583-84. Even if Consumer Protection has "reason to believe" that a person engaged in "an unlawful act," Tenn. Code Ann. § 47-18-106(a), the recipient of a request for information may be completely innocent, and their non-incriminating responses would not implicate the Fifth Amendment.

Not merely one, but at least four circumstances exist in which the investigation statute can be constitutionally applied. Thus, McKamey is unlikely to succeed on his facial challenge.

C. The Fourth Amendment claim (Count 3) will not succeed.

McKamey is unlikely to succeed on the merits of his claim that Fire Prevention's notice of its intent to authorize "continued inspections" of his property violates his Fourth Amendment protections against warrantless searches. (Dkt. 1 ¶¶ 124-34; Dkt. 9 at 5-6.) The allegations do not

show that the contemplated inspections of his property would qualify as a search requiring a warrant, much less that Fire Prevention intends to flout the Fourth Amendment.[3]

"The Fourth Amendment prohibits unreasonable searches and seizures." *Bambach v. Moegle*, 92 F.4th 615, 628 (6th Cir. 2024). And searches "without a warrant are presumptively unreasonable." *Id.* (citation omitted). But not every examination of a property is a search. For example, the visual observation of property without entering it is usually not a "search." *See California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."); *Dow Chem. Co. v. United States*, 476 U.S. 227, 234 (1986); *United States v. Mathis*, 738 F.3d 719, 730-31 (6th Cir. 2013). Neither is approaching and knocking on the front door of a home. *See Florida v. Jardines*, 569 U.S. 1, 8 (2013). And not every search requires a warrant, such as a search that occurs after a person "voluntarily consents." *United States v. Higgins*, 127 F. App'x 201, 204 (6th Cir. 2005).

Here, there is no guarantee that there will be an inspection. McKamey claims that Fire Prevention has "stat[ed] that warrantless 'continued inspections will occur.'" (Dkt. 1 ¶ 129.) The email that McKamey quotes disproves this claim. "[W]hen a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations." *Patel v. AR Grp. Tennessee, LLC*, No. 3:20-CV-00052, 2022 WL 2678733, at *5 (M.D. Tenn. July 11, 2022) (quoting *Williams v. CitiMortgage, Inc.*, 498 Fed. Appx. 532, 536 (6th Cir. 2012)). In that email, the statement "continued inspections will occur" sits in the context of a conditional sentence

[3] McKamey suggests Fire Prevention could employ the administrative warrant process in Tenn. Code Ann. § 68-120-117(b), (Dkt. 1 ¶ 130), but this process is only available to "local government . . . official[s]," not to a state-level agency like Fire Prevention, Tenn. Code Ann. § 68-120-117(a)(1)-(2).

that McKamey neglected to quote in its entirety. (Dkt. 1-9.) The full sentence says as follows: "At the direction of Assistant Commissioner Gary Farley, continued inspections will occur until an acceptable POCA is received, or the facility is brought into compliance with adopted codes and standards and inspected by the SFMO [State Fire Marshal's Office]." (*Id.*) Continued inspections are not inevitable; they depend on future action or inaction by McKamey.

Even if McKamey chooses not to bring his facility into compliance, his allegations do not show that any future inspections would violate the Fourth Amendment. "Continued inspections" may mean that Fire Prevention inspectors will visually inspect McKamey's properly from a public location, which would be constitutionally permissible. *Ciraolo*, 476 U.S. at 213; *Mathis*, 738 F.3d at 730-31. It may also mean that Fire Prevention inspectors will knock on McKamey's door and only inspect his property if he permits them to do so, which would also be constitutionally permissible. *Jardines*, 569 U.S. at 8; *Higgins*, 127 F. App'x at 204. As these examples demonstrate, assessing how the Fourth Amendment applies to this claim is largely theoretical because stating there may be "continued inspections" is not a breach of the Fourth Amendment "complete upon its utterance." (Dkt. 1 ¶ 129.) Thus, the Fourth Amendment claim is also unlikely to succeed.

D. The First and Fourth Amendment retaliation claims (Counts 4, 5) will not succeed.

McKamey is unlikely to succeed on the merits of his claim that Fire Prevention's mere mention of "continued inspections" amounted to retaliation for exercising his First and Fourth Amendment rights. The alleged facts and material underlying communications do not show a constitutional violation.

The test for retaliation contains three elements: (1) there must be protected conduct; (2) a defendant must have taken an adverse action that would have deterred "a person of ordinary

firmness from engaging in the protected conduct"; and (3) plaintiff must show that "the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Spearman v. Williams*, No. 22-1309, 2023 WL 7000971, at *5 (6th Cir. July 17, 2023) (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019).[4] All three elements must be met to show retaliation. *Soldan v. Robinson*, No. 22-1351, 2023 WL 7183154, at *3 (6th Cir. May 26, 2023). McKamey's allegations establish none of them.

1. McKamey has not engaged in protected conduct under the First or Fourth Amendment.

First Amendment. McKamey alleges that he exercised his First Amendment right not to speak by declining to sign an affidavit supporting his POCA. (Dkt. 1 ¶¶ 76, 142-146; Dkt. 1-7; Dkt. 1-8; Dkt. 1-9.) But First Amendment protections against compelled speech do not extend to this requested affidavit.

While the First Amendment protects the right not to speak, there "is no right to refrain from speaking when 'essential operations of government may require it for the preservation of an orderly society.'" *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) (quoting *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring)). Such essential operations include IRS forms used to report cash transactions, *id.* at 876, IRS requirements that a tax return "be verified by a written declaration that is made under penalties of perjury," *Hettig v. United States*, 845 F.2d 794, 795-96 (8th Cir. 1988), federal sex-offender reporting requirements, *United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014), judicial orders requiring parties to respond to discovery requests, *Conces*, 507 F.3d at 1040, and criminal investigations requiring

[4] McKamey falters on the final element. He states that it only requires him to show a defendant "was motivated, at least in part, to take the adverse action because of [McKamey's] protected conduct." (Dkt. 9 at 6, 8.) But, in *Nieves v. Bartlett*, the Supreme Court held that a retaliatory "motive must *cause* the injury." 139 S. Ct. at 1722. In other words, "it is not enough to show that an official acted with a retaliatory motive." *Id.*

witnesses to incriminate other people, *Smithwick v. Detective*, No. 2:18-CV-01057-MJH, 2019 WL 1458993, at *4 (W.D. Pa. Apr. 2, 2019).

The operations of Fire Prevention are similarly essential. "Nothing is more dangerous than fire, and considerations of public welfare easily sustain drastic regulatory fire legislation." *Jackson v. Bell*, 226 S.W. 207, 209 (Tenn. 1920). Thus, Commissioner Lawrence could compel[5] the requested affidavit without violating McKamey's First Amendment rights. *See Sindel*, 53 F.3d at 878; *Arnold*, 740 F.3d at 1035. McKamey's refusal to provide the affidavit is not protected conduct.

Fourth Amendment. McKamey claims that he exercised his Fourth Amendment right to refuse a warrantless search by "referring Defendant Lawrence to T.C.A. § 68-120-117 for the 'requisite process of monitoring' Mr. McKamey's property." (Dkt. 9 at 6; *see* Dkt. 1 ¶¶ 74-75, 137; Ex. 6 at 1.) But citing the administrative warrant statute does not amount to refusal to consent to a possible future search.

A person may refuse to give a government actor permission to conduct a "warrantless consent search" of his or her home. *United States v. Drayton*, 536 U.S. 194, 206-07 (2002). But to qualify as protected conduct, a person must actually refuse the search, either verbally or by some meaningful physical action—such as avoiding answering the door when police come knocking.

[5] To be clear, Commissioner Lawrence has not yet compelled McKamey to speak. After Fire Prevention determined that McKamey had broken his 2019 commitment to not use his property in a way that would violate applicable codes, *see supra* Background Part III, it sought more than McKamey's bare assurance of future compliance. (Dkts. 1-7, 1-8, 1-9.) Enabled by the statutory authority to turn to "any . . . remedy available" when the "safety and welfare of the public may be threatened," Tenn. Code Ann. § 68-102-117(b), Fire Prevention merely *asked* McKamey to provide an affidavit to support his most recent POCA. (Dkts. 1-8, 1-9; Ex. 5 at 2 (requesting that McKamey sign an attached affidavit or provide one of his own).) This was not the only option available to McKamey. Indeed, Fire Prevention left the door open for him to suggest alternative cures for his violations of the IBC and IFC. (Dkt. 1-9.)

Clemente v. Vaslo, No. 09-13854, 2010 WL 4636250, at *6-7 (E.D. Mich. Nov. 5, 2010), *aff'd*, 679 F.3d 482, 494 (6th Cir. 2012). Here, during an ongoing discussion about the scope of Fire Prevention's authority to request an affidavit, McKamey's counsel stated: "I'll refer you to T.C.A. § 68-120-117 (attached) for the requisite process of "monitoring" my client's property. Ultra vires surveillance by your client/office will not be tolerated." (Ex. 6 at 1.) Simply "referring" someone to a statute and objecting to hypothetical "ultra vires" surveillance is not a refusal to give consent to a search that had not even been requested. *Cf. Clemente*, 2010 WL 4636250, *6-7. McKamey has not yet refused consent to a requested search, so his retaliation claim fails on the first element.

2. Continued inspections would not deter protected conduct.

McKamey's argument that the possibility of continued inspections would deter a person of ordinary firmness from engaging in protected conduct fails for two reasons. (Dkt. 9 at 8-9.) First, even "threats . . . are generally not sufficient to satisfy the adverse action requirement." *Wood v. Eubanks*, 25 F.4th 414, 429 (6th Cir. 2022) (citation omitted). Here, Fire Prevention said continued inspections would occur only because McKamey Manor is not code compliant. (Dkt. 1-9). McKamey could avoid inspections entirely by complying with the IBC and IFC. *Supra* Part I.C. Thus, Fire Prevention's discussion of future inspections does not "satisfy the adverse action requirement." *Wood*, 25 F.4th at 429.

Second, even if constitutionally permissible inspections did occur, McKamey has not shown they would rise to the level of an adverse action. To be adverse, an action should have some form of adverse impact—such as a deprivation of a privilege. *See Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 477-79 (2022). The inspections, however, might consist of nothing more than someone driving by McKamey's home. *Supra* Part I.C. Past inspections consisted of McKamey consensually showing the inspectors around and answering a few questions. (Dkt.1-6

at 5-6; Dkt. 1-7 at 4.) Such minimally intrusive behavior would have no adverse or deterrent effect on McKamey. Indeed, the two prior inspections did not deter him from disregarding international building codes. (Dkts. 1-6, 1-7.) Future inspections would not deter him from exercising his First or Fourth Amendment rights. *See Dyer v. Hardwick*, No. 10-cv-10130, 2012 WL 4762119, at *23 n.6 (E.D. Mich. Aug. 3, 2012) (finding it "doubtful" a jury would find that a "'piece by piece' property inspection would deter a person of ordinary firmness"), *report and recommendation adopted in part, rejected in part on other grounds*, 2012 WL 3695671 (E.D. Mich. Aug. 23, 2012).

3. Ongoing code violations, not protected conduct, triggered the possibility of future inspections.

Finally, McKamey wrongly argues that Commissioner Lawrence lacked a "legitimate reason" other than retaliation "to engage in 'continued inspections.'" (Dkt. 9 at 9.) The attachments to the Complaint disprove this argument. *Patel*, 2022 WL 2678733, at *5.

To establish this element, McKamey must show that but for his refusal to submit an affidavit and his citation to the administrative warrant statute, there would be no further inspections. *See Nieves*, 139 S. Ct. at 1722. But the record shows that McKamey's ongoing code violations were the prompt for any future inspections. In the 2019 report, Fire Prevention advised McKamey that if he ever "intends to use the barn for the entertainment purposes" then Fire Prevention would pursue "legal action." (Dkt. 1-6 at 5.) The 2023 report explained that McKamey's use of his barn and other buildings violated international building codes and would require corrective action. (Dkt. 1-7 at 4.) The February 2, 2024 emails state that "continued inspections" would occur until Fire Prevention received an "acceptable POCA . . . or the facility is brought into compliance with adopted codes and standards"—in other words, the inspections would stop if the facility was used in a code-compliant manner. (Dkt. 1-9.) The ongoing code violations have led to all past inspections and are the reason there may be future inspections.

McKamey has failed to show that his alleged protected acts are the but-for cause for these inspections and is therefore unlikely to succeed on the merits of his First and Fourth Amendment retaliation claims. *Nieves*, 139 S. Ct. at 1722.

E. The declaratory judgment requests (Counts 6, 7, 8) will not succeed.

Whether McKamey is likely to receive declaratory relief is irrelevant in a motion for a preliminary injunction. The Declaratory Judgment Act "is not a cause of action." *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 515 (6th Cir. 2019). It is a "procedural" statute that "enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (citation omitted).

Moreover, McKamey is unlikely to receive declaratory relief in Counts 6, 7, and 8. For a court to issue declaratory relief, it "must 'have jurisdiction already' under some other federal statute." *Toledo v. Jackson*, 485 F.3d 836, 839 (6th Cir. 2007) (citation omitted). But McKamey is unlikely to succeed on the merits of any of his actual claims. *See supra* Part I.A-D. Because he lacks viable underlying claim, he could not receive declaratory relief.

II. McKamey Will Not Suffer Irreparable Harm without an Injunction.

The second factor of the preliminary injunction test—irreparable injury—also weighs against injunctive relief because McKamey has shown no risk of irreparable injury pending the resolution of this lawsuit. "To merit a preliminary injunction, an injury 'must be both certain and immediate,' not 'speculative or theoretical.'" *D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019) (citation omitted). The alleged injuries here are neither certain nor immediate.

There is no certain Fifth Amendment violation because McKamey fails to show that he has been or will be prevented from asserting his Fifth Amendment right not to incriminate himself in

response to any of the requests for information, *supra* Part I.A-B.[6] And there is no showing of immediacy. The initial deadlines of December 15, 2023, for responses and February 6, 2024, for testimony, have long since passed. (Dkt. 1-4 at 1.) Similarly, the April 8, 2024 deadline that McKamey identified as cause for urgency has also passed (Dkt. 1 ¶¶ 88, 113; Dkt. 9 at 11), and it was McKamey himself who proposed that date of availability for witness testimony. (Ex. 1 at 1, 3.)

There is also no certainty of injury underlying McKamey's First and Fourth Amendment claims because nothing in the Complaint or record suggests that Fire Prevention would search McKamey's property without his permission. *See supra* Part I.C-D. And there is no immediacy because no dates for further inspections have even been proposed.

McKamey argues that he will suffer irreparable injury by way of a lost constitutional right if a preliminary injunction is not granted. (Dkt. 9 at 10.) But this argument presumes the merits of his constitutional claims. *Bonnell v. Lorenzo*, 241 F.3d 800, 825 (6th Cir. 2001). And as discussed above, Part I, McKamey is unlikely to succeed on those claims.

McKamey's unhurried approach to this lawsuit refutes the claimed urgency in his request for emergency injunctive relief. Despite alleging causes of actions that accrued, at the very latest, on January 5, 2024, and February 2, 2024, (Dkt. 1 ¶¶ 75, 83), McKamey waited until March 29, 2024, to bring this lawsuit (Dkt. 1). Despite asserting on April 1, 2024, that an "emergency" required a preliminary injunction (Dkts. 8, 9), McKamey did not seek a temporary restraining order and waited until April 15, 2024—a full two weeks—to even serve process on General Skrmetti

[6] That McKamey might be injured by disclosing the requested information about his business practices seems even less plausible now that McKamey has filed a separate lawsuit against Hulu and voluntarily subjected himself to discovery that may encompass these very topics. *See* Complaint, *McKamey v. Hulu. LLC*, No. 1:24-cv-37 (M.D. Tenn. Apr. 8, 2024), Dkt. 1.

and Commissioner Lawrence (Dkts. 11, 12). The lack of an immediate and certain injury dooms his motion. *D.T.*, 942 F.3d at 327.

III. Enjoining General Skrmetti and Commissioner Lawrence Would Harm the Public Interest.

The third and fourth preliminary injunction factors—balance of equities and the public interest—also weigh heavily against an injunction. *Nashville Cmty. Bail Fund v. Gentry*, 446 F. Supp. 3d 282, 304-05 (M.D. Tenn. 2020) (noting these elements "merge when the Government is the opposing party" (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009))). McKamey seeks a preliminary injunction (1) preventing General Skrmetti from compelling his compliance with Consumer Protection's requests for information, (2) prohibiting Commissioner Lawrence (and presumably any Fire Prevention inspectors) from entering his property, and (3) prohibiting both Defendants from "retaliating" against him. (Dkt. 8; Dkt. 9 at 11.) Such relief would pose substantial risk to public safety and welfare.

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (C.J. Roberts, in chambers) (citation omitted), *cited with approval in Online Merchants Guild v. Cameron*, 995 F.3d 540, 560 (6th Cir. 2021); *see Priorities USA v. Nessel*, 860 F. App'x 419, 423 (6th Cir. 2021) ("[W]e have also recognized that 'the public interest lies in a correct application' of the law and 'upon the will of the people . . . being effected in accordance with [state] law.'" (citation omitted)). This is especially true where "public safety interests" are at risk. *King*, 567 U.S. at 1303; *see Tracy Rifle & Pistol LLC v. Harris*, 637 F. App'x 401, 402 (9th Cir. 2016) (finding the "balance of equities does not tip in Plaintiffs' favor where, as here, serious public safety risks are implicated and the harm to Plaintiffs is relatively slight"). Furthermore, in "exercising their sound discretion, courts of equity should pay particular regard for the public

consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (citation omitted).

If the Court enjoins General Skrmetti from compelling McKamey to respond to Consumer Protection's requests for information, it exposes consumers to a serious and ongoing risk of injury. The Complaint—with little attempt at denial or alternative explanation—describes many risks that McKamey may pose to participants, including various forms of physical and mental harm (Dkt. 1 ¶¶ 41-44, 47-49, 55, 60-61, 63), abuse of consent (*id.* ¶¶ 26, 62, 65, 95), improper use of a waiver (*id.* ¶¶ 26, 52-58, 65, 91-92; Dkt 1-3 at 1; Dkt. 1-6 at 7), and potential deception about a $20,000 reward (Dkt. 1-3 at 2; Dkt. 1-6 at 7).

Similarly, enjoining Fire Prevention from inspecting McKamey Manor would create an obvious risk of harm to public safety. McKamey has admitted that participants have entered a barn and other structures that lack the following basic fire-safety requirements: (1) a fire detection system, (2) exit signs, (3) emergency alarm systems, and (4) a fire extinguisher. (Dkt. 1 ¶ 69; Dkt. 1-7 at 4; Ex. 3; Ex. 4.) Fire Prevention's inspections help ensure that these structures on McKamey's property are used in a safe and code-compliant manner.

McKamey's argument that the public interest is served by protecting constitutional rights fails because there has been no constitutional violation, and there is no certain or immediate risk of future violation. *See Cameron*, 995 F.3d at 560 ("As for the public interest, this factor favors the state when a challenged law is likely constitutional.").

IV. McKamey's Motion to Enjoin General Skrmetti and Commissioner Lawrence from "Retaliating" Against Him Is Impermissibly Vague.

McKamey's request for an injunction preventing "Defendants from retaliating" against him is too vague for the Court to grant relief. (Dkt. 8 at 1; Dkt. 9 at 11.) "An injunction order 'must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable

detail—and not by referring to the complaint or other document—the act or acts restrained or required."' *James B. Oswald Co. v. Neate*, --- F.4th ----, 2024 WL 1546441, at *7 (6th Cir. Apr. 10, 2024) (quoting Fed. R. Civ. P. 65(d)(1)). These requirements "prevent uncertainty and confusion" for those enjoined so they can "avoid 'a contempt citation.'" *Id.* (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476-77 (1974) (per curiam)). Retaliation is a legal term that can encompass any number of actions, and a finding of retaliation depends on nuanced issues of timing and context. *See supra* Part I.D. Courts have decided that similar malleable legal terms like "competing," "interfering," "discriminating," and "monopolizing" are "impermissibly vague" for the purposes of relief under Fed. R. Civ. P. 65(d). *Union Home Mortg. Corp. v. Cromer*, 31 F.4th 356, 363-64 (6th Cir. 2022) (collecting cases) (citations omitted). Similarly, this request to enjoin "further retaliation" lacks sufficient detail to comply with Fed. R. Civ. P. 65(d) and should be denied. (Dkt. 9 at 11.)

CONCLUSION

McKamey's Emergency Motion for Preliminary Injunction should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was filed and served by operation of the Court's ECF/PACER system on this the 25th day of April 2024, upon:

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