IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RUSS MCKAMEY,	)	
	)	
Plaintiff,	)	
	)	
	)	
V.	)	**Case No. 3:24-cv-00363**
	)	
	)	
JONATHAN SKRMETTI, Attorney General for the State of Tennessee, *in his official capacity*; and	)	
	)	
	)	
CARTER LAWRENCE, Commissioner of the Tennessee Department of Commerce and Insurance and State Fire Marshal, *in his official capacity*;	)	
	)	
	)	
Defendants.	)	

PLAINTIFF'S AMENDED EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

COMES NOW the Plaintiff Russ McKamey, by and through undersigned counsel, and pursuant to Rule 15(a)(1)(B), hereby amends his Motion for Preliminary Injunction under Rule 65 of the Federal Rules of Civil Procedure.

Mr. McKamey revises and reiterates his urgent request that this Honorable Court issue a preliminary injunction (1) prohibiting Defendant Skrmetti from compelling Mr. McKamey's compliance with the Request for Information ("RFI") issued November 15, 2023; (2) prohibiting Defendant Lawrence from entering Mr. McKamey's property pending resolution of the claims in this case or entry of a declaratory judgment of the same; and (3) prohibiting both Defendants

from retaliating against Mr. McKamey for exercising his constitutional rights as expressed hereunder.

Defendant Skrmetti's pursuit of the RFI violates Mr. McKamey's Fifth Amendment rights. Defendant Lawrence has violated Mr. McKamey's Fourth and First Amendment rights and further retaliated against Mr. McKamey for exercising his Fourth and First Amendment rights. In his Complaint, Mr. McKamey seeks both declaration of his rights and affirmative relief.

Mr. McKamey is likely to succeed on the merits of his claims for relief. Due to the constitutional nature of Mr. McKamey's injuries, Defendants' conduct will cause irreparable harm if not immediately enjoined pending final resolution of this case. This request will cause no harm to the Defendants and will serve the public interest.

In further support of this urgent request for an injunction pending resolution of his claims, Mr. McKamey relies upon and hereby incorporates and adopts by reference his Complaint with all exhibits including his affidavit pursuant to Rules 65(b)(1)(A) and Rule 10(c) of the Federal Rules of Civil Procedure.

A Memorandum of Law in support of this Amended Motion has been filed contemporaneously herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following this 2nd day of May 2024 via the Court's electronic filing system:

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	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF AMENDED EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

This Honorable Court should issue a preliminary injunction prohibiting Defendant Skrmetti from forcing Mr. McKamey to comply with the Request for Information ("RFI"), prohibiting Defendant Lawrence from entering Mr. McKamey's property, and prohibiting both Defendants from retaliating against Mr. McKamey for invoking his constitutional rights.

Background

In support of this urgent request, Mr. McKamey relies upon and hereby incorporates and adopts by reference his Amended Complaint with all exhibits including his affidavit pursuant to Rules 65(b)(1)(A) and Rule 10(c) of the Federal Rules of Civil Procedure.

Legal Standard

On a Fed. R. Civ. P. 65 motion for preliminary injunction, courts must "consider four factors in determining whether a preliminary injunction should issue: (1) whether the moving party has shown a likelihood of success on the merits; (2) whether the moving party will be irreparably injured absent an injunction; (3) whether issuing an injunction will harm other parties to the litigation; and (4) whether an injunction is in the public interest." *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021). "These factors are not prerequisites, but are factors that are to be balanced against each other." *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002).

"[T]he first two factors 'are the most critical.'" *Baker v. Chandler*, 2023 U.S. App. LEXIS 26259, *2 (6th Cir. Oct. 3, 2023) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). "When a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.' *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2023) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)).

In "constitutional cases, the first factor is typically dispositive" because "when constitutional rights are threatened or impaired, irreparable injury is presumed" and "no cognizable harm results from stopping unconstitutional conduct, so it is always in the public interest to prevent violation of a party's constitutional rights." *Id.* (internal citations, quotation marks, and brackets omitted). Thus, courts "focus [their] analysis on the plaintiffs' likelihood of success on the merits." *Id.*

"When constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. V. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). "When a constitutional violation is

likely…the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party's constitutional rights." *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010). "[I]f a plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Déjà vu of Nashville, Inc. v. Metro Gov't of Nashville & Davidson County*, 274 F.3d 377, 400 (6th Cir. 2001)."

Discussion

I. Mr. McKamey stands a strong likelihood of success on the merits.

Mr. McKamey has demonstrated strong proof that Defendants "acting under color of state law caused the deprivation of [his] constitutional right[s]." *Small v. Brock*, 963 F.3d 539, 541 (6th Cir. 20202). Mr. McKamey is likely to succeed on each of his claims for injunctive and declaratory relief against Defendants.

I-A. Count One for Fifth Amendment violation by Defendant Skrmetti.

"The [Fifth Amendment] privilege may be asserted 'in any proceeding, civil, or criminal, administrative or judicial, investigatory or adjudicatory." *Convertino v. United States DOJ*, 795 F.3d 587, 592 (6th Cir. 2015) (internal quotation omitted). "The test for a valid invocation of the Fifth Amendment [...] is whether the witness has 'reasonable cause to apprehend danger from a direct answer.'" (*Id.*) "The scope of the privilege protects the witness from compelled disclosure 'not merely… [of] evidence which may lead to criminal conviction,' but also of 'information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." (*Id.*)

As noted in *McKinley v. City of Mansfield*, a plurality of the United States Supreme Court held in *Chavez v. Martinez* that, for the purposes of a § 1983 action, "mere coercion does not violate the…Self-Incrimination Clause absent use of the compelled statements in a criminal case." *McKinley*, 404 F.3d 418, 430 (6th Cir. 2005) (quoting *Chavez*, 538 U.S. 760, 769 (2003)). Both *McKinly* and *Chavez*, however, involved the "failure to read *Miranda* warnings". *Id.* at fn. 13. The doctrine from these cases rests on facts fundamentally different from those here. This is not a failure-to-warn case. This is beyond coercion. Here, Defendant Skrmetti's office will seek compulsion and contempt against Mr. McKamey unless he waives his privilege against self-incrimination. This situation is completely untenable under the Fifth Amendment.

The Fifth Amendment protects against compelled self-incrimination. *United States v. Fields,* 44 F.4th 490, 498 (6th Cir. 2022) (abrogated on other grounds). Answers are "compelled" with the meaning of the Fifth Amendment when the witness "is required to answer over his valid claim of privilege." *Id.* (quoting *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984)). Because each question in the RFI is preceded by Defendant Skrmetti's statement that he has "reason to believe" Mr. McKamey violated the Tennessee Consumer Protection Act – which is a criminal offense in Tennessee – Mr. McKamey validly can invoke and has invoked his Fifth Amendment right. (*See* Exhibit 3 to Amended Complaint: RFI at p. 2).

Before undersigned counsel began to represent Mr. McKamey, his previous counsel agreed to February 15, 2024 and April 8, 2024 deadlines to respond to the RFI. (*See* Amended Complaint at ¶ 89). Upon the substitution of undersigned counsel, Mr. McKamey expressly invoked his Fifth Amendment rights to not participate in the RFI. (*See* Amended Complaint at ¶ 83). Nevertheless, Defendant Skrmetti expressly disregarded that invocation and demanded that Mr. McKamey produce the requested information under oath and appear for a sworn deposition

regarding facts that *Defendant Skrmetti* believes will expose Mr. McKamey to criminal liability. (*See* Amended Complaint at ¶ 91). On January 18, 2024, Defendant Skrmetti's office stated it "will pursue enforcement of our RFI" if Mr. McKamey did not comply by the April 8, 2024 deadline. (*Id.*) This is why Mr. McKamey filed his action on March 29, 2024 and the original Motion for Preliminary Injunction on April 1, 2024.

Moreover, Mr. McKamey "does not have to await the consummation of threatened injury to obtain preventive relief [...] [i]f the injury is certainly impending that is enough." *Michgian State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1184 (6th Cir. 1986) (internal quotation omitted). The violation of Mr. McKamey's Fifth Amendment right has likely already occurred and will occur again without an injunction from this Court.

To underscore imminence of this threat to Mr. McKamey, contrast his claims hereunder with the Supreme Court's holding in *Younger* that, "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible' they do not allege a dispute susceptible to resolution by a federal court." In his Amended Complaint incorporated by reference, Mr. McKamey has explained in great detail how Defendant Skrmetti's actions are explicitly designed to verify and exploit what he clearly believes to be criminal liability for Mr. McKamey.

Therefore, Mr. McKamey stands a strong likelihood of success on the merits of Count One.

I-B. Count Two for Facial Challenge to T.C.A. § 47-18-106.

"A facial challenge [...] must establish that no set of circumstances exists under which [the statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). This is one of those rare cases which meets that "difficult" standard. *Id.*

T.C.A. § 47-18-106 is only applicable in situations which also trigger the Fifth Amendment rights of the subject of the investigation. In order to issue an RFI under the statute, Defendant Skrmetti must have "reason to believe" that a person has violated the Tennessee Consumer Protection Act, is about to do so, or is in the process of doing so. (*See* T.C.A. § 47-18-106(a)). Alternatively, Defendant Skrmetti may issue an RFI under the statute if he has "reason to believe" that the public interest requires investigation into whether a person has violated the Tennessee Consumer Protection Act. (*Id.*) In all such scenarios, there is "reason to believe" by law enforcement that the subject has committed at least one Class B misdemeanor offense, which could put them in jail for up to six months. The only information that would even be *relevant* under an RFI would be information that is either direct evidence of or would "furnish a link in the chain of evidence" – *Convertino*, 795 F.3d 587, 592 (6th Cir. 2015) – of a potential Tennessee Consumer Protection Act violation, which, again, is a criminal offense under T.C.A. § 47-18-104(a).

Accordingly, the statute is irreconcilable with the Fifth Amendment. Under no circumstance can the two harmonize. This is why Mr. McKamey stands a strong likelihood of success on the merits of his facial challenge in Count Two.

I-C. Count Three for Fourth Amendment violation by Defendant Lawrence.

With certain exceptions inapplicable here, the Fourth Amendment guarantees Mr. McKamey to be free of warrantless searches of his property. This is a clearly established right under the United States Constitution. When Mr. McKamey instructed Defendant Lawrence that he would not be submitting the sworn affidavit demanded of him because no law required it, he also, through counsel, referred Defendant Lawrence's office to the part of the Tennessee Code requiring a warrant for entry onto property for inspection. (*See* Amended Complaint at ¶ 72-76).

Defendant Lawrence's office responded that "continued inspections will occur" until the affidavit was received. (*See* Amended Complaint at ¶ 75). This response was explicitly at "the direction of Assistant Commissioner Gary Farley." (*See* Exhibit 8 to Amended Complaint).

Therefore, Mr. McKamey stands a reasonable likelihood of success on the merits of his Fourth Amendment violation claim in Count Three.

I-D. Count Four for Defendant Lawrence retaliation against exercising the Fourth Amendment.

A retaliation claim requires proof that (1) Mr. McKamey engaged in protected conduct, (2) Defendant Lawrence took an adverse action against him that would deter a person of ordinary firmness from engaging in that protected conduct, and (3) Defendant Lawrence was motivated, at least in part, to take the adverse action because of his protected conduct. *Thomas v. Burt*, 2023 U.S. App. LEXIS 18683, *4-5 (6th Cir. Jul. 21, 2023) (citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc)).

Mr. McKamey clearly exercised, through counsel, his Fourth Amendment right to be free of warrantless searches by referring Defendant Lawrence to T.C.A. § 68-120-117 for the "requisite process of 'monitoring'" Mr. McKamey's property. (*See* Amended Complaint at ¶ 74-75). Being free of warrantless searches is protected conduct.

The statute cited by Mr. McKamey to Defendant Lawrence provides, "In the event that a building official is denied permission to make an inspection and a warrant is required by the Constitution of the United States or the state of Tennessee to perform such inspection, a building official may obtain an administrative inspection warrant in accordance with the procedures outlined in this section." (*See* T.C.A. § 68-120-117(b)). The statute further requires the officer to submit an "affidavit" to an "official authorized by law to issue search warrants" stating the following:

> **(1)** The agency has the statutory authority to conduct the inspection;
>
> **(2)** Probable cause exists to believe that a violation of law has occurred or is occurring. For the purposes of this section, probable cause is not the same standard as used in obtaining criminal search warrants. In addition to a showing of specific evidence of an existing violation, probable cause can be found upon a showing of facts justifying further inquiry, by inspection, to determine whether a violation of any state law or local building, fire, or life safety code is occurring. This finding can be based upon a showing that:
>
> > **(A)** Previous inspections have shown violations of law and the present inspection is necessary to determine whether those violations have been abated;
> >
> > **(B)** Amended Complaints have been received by the agency and presented to the issuing officer, from persons who by status or position have personal knowledge of violations of law occurring on the named premises;
> >
> > **(C)** The inspection of the premises in question was to be made pursuant to an administrative plan containing neutral criteria supporting the need for the inspection; or
> >
> > **(D)** Any other showing consistent with constitutional standards for probable cause in administrative inspections;
>
> **(3)** The inspection is reasonable and not intended to arbitrarily harass the persons or business involved;
>
> **(4)** The areas and items to be inspected are accurately described and are consistent with the statutory inspection authority; ***and***
>
> **(5)** The purpose of the inspection is not criminal in nature and the agency is not seeking sanctions against the person or business for refusing entry.

(*See* T.C.A. § 68-120-117(c) (emphasis added)).

In response, Defendant Lawrence's office stated "continued inspections will occur" which is a direct, adverse action against Mr. McKamey. (*See* Amended Complaint at ¶ 75). But for Mr. McKamey engaging in the protected conduct of invoking his Fourth Amendment right, Defendant Lawrence would not have confirmed that "continued inspections will occur" because the November 15, 2023 inspection report had already been completed. (*See* Exhibit 6 to

Amended Complaint). There was no legitimate reason for Defendant Lawrence to threaten Mr. McKamey with "continued" warrantless searches of his property other than to intimidate Mr. McKamey into submitting an unnecessary affidavit. This adverse action was in direct response to Mr. McKamey invoking his Fourth Amendment right. (*See* Amended Complaint at ¶ 79).

Therefore, Mr. McKamey submits that he stands a strong likelihood of success on the merits of his retaliation claim in Count Four.

I-E. Count Five for retaliation against exercising the First Amendment.

"As the First Amendment protects freedom of association and the corollary right not to associate, so too does it protect freedom of speech and the corollary right not to speak." *Wilkens v. Daniels*, 744 F.3d 409, 414 (6th Cir. 2014). "To state a First Amendment retaliation claim, [plaintiff must] allege that (1) he engaged in protected conduct, (2) a defendant took an adverse action against him that would deter a person of ordinary firmness from engaging in that protected conduct, and (3) the defendants were motivated, at least in part, to take the adverse action because of his protected conduct." *Thomas v. Burt*, 2023 U.S. App. LEXIS 18683, *4-5 (6th Cir. Jul. 21, 2023) (citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc)).

By refusing to submit a sworn affidavit at the demand of Defendant Lawrence, Mr. McKamey was engaging in his right not to speak which is protected conduct under the First Amendment. In direct response to Mr. McKamey's exercising this right, Defendant Lawrence's office stated that "continued inspections will occur" until the completed affidavit was received. (*See* Amended Complaint at ¶ 75). Because this affidavit is not otherwise required by law, the adverse action would not have occurred but for Mr. McKamey invoking his right not to sign it – in other words, not to speak. Because the inspection responding to the 2023 anonymous Amended Complaint had already been completed, there was no legitimate reason for Defendant

Lawrence to engage in "continued inspections" other than to intimidate Mr. McKamey into submitting the otherwise unnecessary affidavit. If the intent of Defendant Lawrence's office was not to deter Mr. McKamey from exercising his First Amendment right not to speak, why was the statement that "continued inspections will occur" made in direct response to Mr. McKamey's refusal to complete the affidavit? There is no reasonable interpretation other than Defendant Lawrence wanted the affidavit signed and sought to deter Mr. McKamey from refusing to do so.

Therefore, Mr. McKamey stands a strong likelihood of success on the merits of his retaliation claim in Count Five.

I-F. Counts Six through Eight for Declaratory Judgments.

The Federal Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction [...] any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, ***whether or not further relief is or could be sought***."

28 U.S.C. § 2201 (emphasis added).

At the heart of this case are question of federal law involving Mr. McKamey First, Fourth, and Fifth Amendment rights under the United States Constitution. Apart from subject matter jurisdiction, all this is required for a case to be considered under the Declaratory Judgment Act is "an actual controversy". *Severe Records, LLC v. Rich*, 658 F.3d 571, 580 (6th Cir. 2011). "An actual controversy exists where a plaintiff has 'sustained or is immediately in danger of sustaining some direct injury as a result of [a law].'" *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 920 (6th Cir. 1998) (quoting *Miyazawa v. City of Cincinnati*, 45 F.3d 126, 127 (6th Cir. 1995)).

I-F-1. Count Six for Declaratory Judgment of Fifth Amendment rights.

Even if this Court finds that Mr. McKamey's Fifth Amendment right has not yet been violated by Defendant Skrmetti in the course of enforcing compliance with the RFI, it is clear that the RFI implicates Mr. McKamey's Fifth Amendment privilege from compelled self-incrimination and that his privilege guarantees him protection from being forced to comply with the RFI. It is further clear that this Court has subject matter jurisdiction to declare rights under the Fifth Amendment to the United States Constitution as a question of federal law and Defendant Skrmetti is a proper defendant because it is he who, in his official capacity, has violated and seeks to further violate Mr. McKamey's Fifth Amendment right. Mr. McKamey's likelihood of success on his declaratory judgment request is arguably even stronger than his other claims for relief, which are also strong.

I-F-2. Count Seven for Declaratory Judgment of Fourth Amendment rights.

Even if this Court finds that Mr. McKamey's Fourth Amendment right has not yet been violated by Defendant Lawrence in the course of "continued inspections" of Mr. McKamey's property without a warrant, it is clear that such inspections implicate Mr. McKamey's Fourth Amendment right to be free of warrantless searches by law enforcement. It is further clear that this Court has subject matter jurisdiction to declare rights under the Fourth Amendment to the United States Constitution as a question of federal law and Defendant Lawrence is a proper defendant because it is he, in his official capacity, and TDCI policymakers who have violated and seeks to further violate Mr. McKamey's Fourth Amendment right. Mr. McKamey's likelihood of success on his declaratory judgment request is arguably even stronger than his other claims for relief, which are also strong.

I-F-3. Count Eight for Declaratory Judgment of First Amendment rights.

Eve if this court finds that Mr. McKamey's First Amendment right has not yet been violated by Defendant Lawrence or other policymakers of TDCI by the compulsion to complete and submit a sworn affidavit not otherwise required by law, it is clear that such demand implicates Mr. McKamey First Amendment right not to speak. It is further clear that this Court has subject matter jurisdiction to declare rights under the First Amendment to the United States Constitution as a question of federal law and Defendant Lawrence is a proper defendant because it is he, in his official capacity, and TDCI policymakers who have violated and seeks to further violate Mr. McKamey's First Amendment rights. Mr. McKamey's likelihood of success on his declaratory judgment request is arguably even stronger than his other claims for relief, which are also strong.

II. <u>A finding of irreparable injury to Mr. McKamey is mandated</u>.

If "a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001). Defendant Skrmetti's office indicated it would take further steps in violation of the Fifth Amendment and in retaliation against Mr. McKamey's invocation of his constitutional rights as soon as April 8, 2024. (*See* Amended Complaint at ¶ 88, 113). Defendant Lawrence's office stated that further steps in violation of the First and Fourth Amendment and in retaliation against Mr. McKamey's invocation of his constitutional rights "will occur." (*See* Amended Complaint at ¶ 11, 75, 79).

Because Mr. McKamey has clearly demonstrated in detail the impairment and further threats to his constitutional rights, this Honorable Court must find that injuries Defendants are causing to Mr. McKamey are irreparable.

III. Prohibiting further invasion of Mr. McKamey's constitutional rights serves the public interest and will cause harm to no one.

The preliminary injunction factors of harm to others and public interest "merge when the Government is the opposing party." *Niken v. Holder*, 556 U.S. 418, 435 (2009).

It is well-established that "the public interest is served by preventing the violation of constitutional rights." *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004). Granting Mr. McKamey preliminary injunctive relief from Defendant Skrmetti's continued quest to compel compliance with the RFI and Defendant Lawrence's warrantless entry onto Mr. McKamey's property would honor "a core constitutional commitment, recognized since the nation's earliest days." *Reid*, 476 F. Supp. 3d at 709.

As stated in the original and Amended Complaint, "Defendants are free to investigate whatever they and other State leadership believe to be within the scope of their duties to protect the public, but they cannot be permitted to disregard Mr. McKamey's rights in the course of such investigation." (*See* Amended Complaint at ¶ 15). Defendant Skrmetti can continue whatever investigatory efforts he deems appropriate. This action merely seeks to halt Mr. McKamey's compelled participation in violation of his constitutional rights.

Conclusion

For at least all of these reasons, Mr. McKamey respectfully requests this Honorable Court enter a preliminary injunction prohibiting Defendant Skrmetti from compelling Mr. McKamey's compliance with the RFI, prohibiting Defendant Lawrence from entering Mr. McKamey's property, and prohibiting further retaliation against Mr. McKamey pending resolution of the claims in this case or entry of a declaratory judgment of the same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following this 2nd day of May 2024 via the Court's electronic filing system:

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