UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RACHEL WELTY, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No. 3:24-cv-00768
v.	)	
	)	
BRYANT C. DUNAWAY, et al.,	)	
	)	
Defendants.	)	

REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO STAY PROCEEDINGS

This Court should grant Defendants' motion to stay. On the one hand, Defendants will suffer unfair prejudice, particularly to their sovereign immunity, if forced to proceed in the district court during the pendency of the appeal. *See* Stay Mot. 2–4 (Doc. 48). And on the other, a stay pending appeal would not prejudice Plaintiffs and would advance judicial economy. *Id.* at 4–5.

Resisting these straightforward conclusions, Plaintiffs insist that "what is really going on here" is that Defendants only sought a stay to avoid filing an answer. Resp. at 7. That is plainly false. Defendants timely filed their answer in accordance with the Court's prior scheduling orders. *See* Answer (Doc. 51). What *is* really going on here is that Defendants are seeking to vindicate their sovereign immunity, which is an immunity not just from liability but *from suit itself*. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). The purpose of the immunity is vitiated if Defendants are erroneously subjected to the burdens of discovery and rigors of trial. *Id.*; *see also Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015) (recognizing that sovereign immunity acts as a jurisdictional bar that limits the scope of the federal judicial power). As Defendants have

argued, courts routinely recognize sovereign immunity as an important basis for granting a stay pending appeal. *See* Stay Mot. at 2–4.

Plaintiffs' other responses make little sense. They note that this Court has held there is Article III standing, and that this determination is "law of the case and is not pending appeal." Resp. at 4. This means, in their view, that sovereign immunity is "foreclosed" "until after a final judgment." *Id.* But Plaintiffs' view—that subject matter jurisdiction is law of the case, not part of an appeal, and cannot be raised again as an issue until after final judgment—is directly contradicted by Supreme Court and Sixth Circuit precedent. Subject-matter jurisdiction, including whether an Article III controversy exists, is necessarily part of the appeal pending before the Sixth Circuit. *See, e.g.*, *Murthy v. Missouri*, 144 S. Ct. 1972, 1981 (2024) (reversing a preliminary injunction for lack of Article III standing); *FDA. v. All. for Hippocratic Med.*, 602 U.S. 367, 397 (2024) (same); *Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Loc. 1199 v. Blackwell*, 467 F.3d 999, 1009–10 (6th Cir. 2006) (Gibbons, J.) (reversing a TRO on standing grounds); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at *any time* that it lacks subject-matter jurisdiction, the court must dismiss the action." (emphasis added)). The bottom line is that while there may be a close relationship between the analyses for pre-enforcement standing and *Ex parte Young*, Plaintiffs go too far in claiming that subject-matter jurisdiction has been decided as "law of the case." Resp. at 4. The law-of-the-case doctrine, as the Sixth Circuit recently emphasized, "has *no* applicability to rulings on subject-matter jurisdiction, which courts may revisit at any time." *Dickson v. Direct Energy, LP*, 69 F.4th 338, 349 (6th Cir. 2023) (emphasis added).

Plaintiffs also claim that it is not "conceivable" that the Sixth Circuit will disagree with this Court's prior order. Resp. at 5. But there is good reason to believe that Plaintiffs cannot overcome Defendants' sovereign immunity. Neither Plaintiff intends to violate the terms of the Act, as properly construed, nor have Plaintiffs presented evidence that there is an impending threat of prosecution. *See* Doc. 39 at 1–6.

In holding otherwise, this Court construed the Act broadly, in contravention of the limiting constructions offered by Defendants. *Contra Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered."). By rejecting Defendants' reading of the statute, this Court also ignored several bedrock principles of Tennessee statutory interpretation, like constitutional avoidance and avoiding the use of legislative history without first employing "all of the traditional tools of statutory construction." *State v. Deberry*, 651 S.W.3d 918, 930 (Tenn. 2022). Indeed, it is hard to square the Court's construction of the statute with the Tennessee Supreme Court's instruction that: "[I]n construing statutes, it is our duty to adopt a construction which will sustain a statute and avoid constitutional conflict if *any* reasonable construction exists that satisfies the requirements of the Constitution." *Brooks v. Bd. of Pro. Resp.*, 578 S.W.3d 421, 426 (Tenn. 2019) (emphasis added, quotation omitted); *see also Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529–30 (Tenn. 1993) (applying this rule in a First Amendment case).

Plaintiffs mischaracterize these arguments as "fact-based standing challenges," Resp. at 7, but statutory interpretation is a purely legal question. As Defendants have pointed out, Plaintiffs would not be prejudiced, and judicial economy would be advanced by a stay. Stay Mot. at 4–5. Because it is at least conceivable that the Sixth Circuit might view these questions of statutory interpretation differently, this Court should grant a stay. *Cf. Friends of George's Inc. v. Mulroy*, 108 F.4th 431, 434–38 (6th Cir. 2024) (reversing a preliminary injunction because—properly construed under Tennessee precedents—no plaintiff alleged an intent to violate the law).

Dated: November 12, 2024.

Respectfully submitted,

/s/ *Steven J. Griffin*
STEVEN J. GRIFFIN (BPR# 040708)
Senior Counsel for Strategic Litigation
MATTHEW D. CLOUTIER (BPR# 036710)
Assistant Solicitor General
DONNA L. GREEN (BPR# 019513)
Managing Attorney and Senior Assistant Attorney General
OFFICE OF TENNESSEE ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-9598
Steven.Griffin@ag.tn.gov
Matt.Cloutier@ag.tn.gov
Donna.Green@ag.tn.gov

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2024, a copy of the foregoing document was filed using the Court's electronic court-filing system, which sent notice of filing to the following counsel of record:

Daniel A. Horwitz
Melissa Dix
Sarah L. Martin
HORWITZ LAW, PLLC
4016 Westlawn Dr.
Nashville, TN 37209
(615) 739-2888
daniel@horwitz.law
melissa@horwitz.law
sarah@horwitz.com

Counsel for Plaintiffs

/s/ *Steven J. Griffin*
STEVEN J. GRIFFIN