

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

BONGO PRODUCTIONS, LLC, ROBERT)
BERNSTEIN, SANCTUARY PERFORMING)
ARTS LLC, and KYE SAYERS,)

Plaintiffs,)

v.)

Civ. Action
No. 3:32-cv-00490
Judge Trauger

CARTER LAWRENCE, Tennessee State Fire)
Marshal, in his official capacity,)
CHRISTOPHER BAINBRIDGE, Director of)
Codes Enforcement, in his official capacity,)
GLENN R. FUNK, District Attorney General)
for the 20th Judicial District, in his official)
capacity, and NEAL PINKSTON, District)
Attorney General for 11th Judicial District, in)
his official capacity,)

Defendants.)

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Bongo Productions, LLC, Robert Bernstein, Sanctuary Performing Arts LLC, and Kye Sayers, hereby respectfully move this Court for a preliminary injunction enjoining enforcement of H.B. 1182/S.B.1224, 112th Gen. Assemb., 1st Reg. Sess. (Tenn. 2021) (“the Act”), enacted by the Tennessee General Assembly this spring. Absent an order from this Court, the Act will go into effect on July 1, 2021.

The Act requires all businesses and other entities with restrooms open to the public with formal or informal policies that allow transgender people to use the restroom that accords with their identity to post a stigmatizing and controversial warning sign stating “NOTICE: THIS FACILITY MAINTAINS A POLICY OF ALLOWING THE USE OF RESTROOMS BY

EITHER BIOLOGICAL SEX, REGARDLESS OF THE DESIGNATION ON THE RESTROOM.” As set forth in the accompanying memorandum of law and factual declarations, Plaintiffs do not agree with this characterization of their restroom policies, and do not want to be compelled to communicate the General Assembly’s viewpoint about sex and gender. The Act compels Plaintiffs to engage in unwanted controversial speech or risk six months in jail or a \$500 fine.

Plaintiffs have set forth specific facts in sworn declarations showing the irreparable injury that will result to Plaintiffs—along with transgender and intersex people throughout Tennessee—if the Act goes into effect. As set forth fully in the accompanying Memorandum of Law and attached sworn declarations, without injunctive relief, Plaintiffs will be forced to display a stigmatizing and misleading notice that mischaracterizes their policies, forces them to use the government’s terminology (to which they object), and forces them to communicate that allowing transgender people to use the restroom is so alarming as to require a warning “NOTICE.” This mandate violates Plaintiffs’ First Amendment right against compelled speech. The threat of the Act’s penalties for noncompliance—which include jail time and civil fines—likewise constitutes irreparable harm.

Plaintiffs therefore seek a preliminary injunction under Federal Rule of Civil Procedure 65(a) blocking enforcement of the Act to protect Plaintiffs from irreparable harm and to safeguard their constitutional rights.

The issuance of a preliminary injunction is warranted because, as set forth in Plaintiffs’ Memorandum of Law and accompanying declarations: (1) Plaintiffs are likely to succeed on the merits of their claims that the Act violates the First Amendment; (2) Plaintiffs will suffer irreparable harm if the Act takes effect; (3) an injunction would cause no harm to others; and (4)

the public interest will be served by emergency injunctive relief. *Am. C.L. Union Fund of Mich. v. Livingston Cnty.*, 796 F.3d 636, 642 (6th Cir. 2015).

First, the Act requires that Plaintiffs display on the walls of their businesses a warning notice that communicates the Tennessee General Assembly's viewpoint as to the nature of sex and gender, using the misleading and controversial phrase "biological sex," which is frequently used by those seeking to restrict rights for transgender people. Plaintiffs do not want to communicate this message. The Supreme Court has long recognized that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988) (First Amendment presumes "that speakers, not the government, know best both what they want to say and how to say it"). The ideological speech compelled by the Act is subject to strict scrutiny, which it cannot meet. *See Nat'l Inst. of Fam. Life Advoc. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2372 (2018) (citing *Zauderer v. Office of Disciplinary Counsel of S. Ct. of Ohio*, 471 U.S. 626, 671) (more deferential First Amendment standard applies only to compelled disclosures of non-controversial information).

Second, as discussed above, if the Act takes effect, it will cause irreparable harm by forcing Plaintiffs to display a controversial, government-scripted message not based in fact that will signal to transgender and intersex people that they are unwelcome, thereby alienating Plaintiffs' customers and staff. The Act will further create confusion as to Plaintiffs' actual policies, all to respond to a specious concern that allowing transgender people to use the restroom that accords with their gender identity is somehow so alarming as to require a warning notice. Those business owners who refuse to display the warning notice face criminal and civil penalties.

Third, Defendants will suffer no harm if the Act is enjoined and the status quo preserved. Defendants stand to lose only the ability to enforce a law that is not currently in effect, does not serve any state interest, and is likely to be held unconstitutional. *See Planned Parenthood Ass’n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987). The balance of equities thus weighs decisively in Plaintiffs’ favor.

Finally, granting an injunction in this case will serve the public interest. As the Sixth Circuit has made clear, “[w]hen 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.” *Am. C.L. Union Fund of Mich.*, 796 F.3d at 649 (alteration in original) (internal quotation marks omitted).

Plaintiffs respectfully request that, should this Court grant preliminary injunctive relief, the Court exercise its discretion to waive the Federal Rule of Civil Procedure 65(c) security requirement.

For the foregoing reasons, and as set forth in the accompanying memorandum of law and declarations, Plaintiffs respectfully request that this Court GRANT this motion for a preliminary injunction. Plaintiffs request oral argument and believe it would be helpful to the Court when considering the issues raised by the motion. Under Local Rule 7.01(a)(3), briefing should be concluded within twenty-one days after service of the summons and complaint, unless otherwise ordered by the Court. Plaintiffs are mindful that the Act is effective as of July 1—just six days after service of the summons and complaint—and that the Act provides only thirty days for compliance if Plaintiffs or other similarly situated entities are notified that they are in violation. Plaintiffs accordingly ask that the Court set oral argument as soon as possible after the conclusion of briefing.

Dated: June 25, 2021

Respectfully submitted,

/s/ Thomas H. Castelli

Thomas H. Castelli (No. 24849)

Stella Yarbrough (No. 33637)

American Civil Liberties Union

Foundation of Tennessee

P.O. Box 120160

Nashville, TN 37212

Tel: (615) 320-7142

tcastelli@aclu-tn.org

syarborough@aclu-tn.org

Rose Saxe*

Emerson Sykes*

American Civil Liberties

Union Foundation

125 Broad Street, 17th Floor

New York, NY 10004

Tel: (212) 549-2500

rsaxe@aclu.org

esykes@aclu.org

Attorneys for Plaintiffs

*Application for admission *pro hac vice* pending

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on June 25, 2021, a true and correct copy of the foregoing has been served by e-mail according to the agreement and instructions from the Attorney General's Office to tnattygen@ag.tn.gov.

/s/ Thomas H. Castelli

Thomas H. Castelli (No. 24849)
American Civil Liberties Union
Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Tel: (615) 320-7142
tcastelli@aclu-tn.org

Attorney for Plaintiffs