UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
(NASHVILLE DIVISION)

CHOOSING JUSTICE INITIATIVE & CAROL DAWN DEANER,

Plaintiffs,

v.

FLOYD S. FLIPPIN, in his official capacity as Chair of the Board of Professional Responsibility of the Supreme Court of Tennessee; SANDY GARRETT, in her official capacity as Chief Disciplinary Counsel of the Board of Professional Responsibility of the Supreme Court of Tennessee; and JUDGE CHERYL A. BLACKBURN, in her judicial capacity,

Defendants.

Case No. 3:20-cv-00745
Judge William L. Campbell, Jr.

PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION AND RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs Carol Dawn Deaner and the Choosing Justice Initiative (C.J.I.) seek to communicate with criminal defendants whose court-appointed lawyers are, in Plaintiffs' well-supported view, constitutionally inadequate. That speech is squarely protected by the First Amendment under the Supreme Court and Sixth Circuit precedents discussed in Plaintiffs' preliminary-injunction motion. *See* Doc. 25-1 at 8-19. Defendants make no attempt to engage with those precedents in their opposition to Plaintiffs' motion for a preliminary injunction or their motion to dismiss.[1] Instead, they urge this Court to abstain from exercising jurisdiction over this case and assert that injunctive relief is not warranted under the present circumstances. As explained below, those arguments are unavailing and cannot be squared with binding case law. And, perhaps more surprisingly, they also cannot be squared with Defendants' own theories of this case.

For instance, Defendants contend that this Court must abstain from deciding Plaintiffs' claims because the same issues are currently "the subject of an ongoing state proceeding" before Tennessee's Board of Professional Responsibility. Doc. 30 at 12; *see also* Doc. 31-1 at 11-15. But, only a few pages later, Defendants assert that the "[i]njunctive relief against the Board would be unnecessarily remote and speculative for lack of any imminent action to enjoin[.]" Doc. 30 at 19; Doc. 31-1 at 20. At no point do Defendants resolve that inconsistency. Nor do they reconcile their conflicting interpretations of

[1] Notably, Defendants' briefs mention *In re Primus*, 436 U.S. 412 (1978), just twice and do not discuss *NAACP v. Button*, 371 U.S. 415 (1963), or *ACLU v. Livingston Cty.*, 796 F.3d 636 (6th Cir. 2015), at all.

Tennessee Rule of Professional Conduct 4.2. At various points in their briefs, Defendants insist that Deaner violated Rule 4.2 because she "communicated with a represented criminal defendant without the permission of his counsel." Doc. 30 at 10 (quoting Doc. 18-4). Yet, at other points, they readily concede that Rule 4.2 "can be construed to allow communication with a represented criminal defendant." *Id.* at 20.

Defendants' shifting positions on these issues highlight that they cannot meet the high burden they face in this case: justifying a restriction on constitutionally protected speech even as they recognize that the speech does not cause any harm. Because Defendants have not satisfied that burden here, their motion to dismiss should be denied and Plaintiffs' motion for a preliminary injunction should be granted.

BACKGROUND

Plaintiffs' mission is to represent clients to address an urgent public-policy problem: the inadequate representation of indigent criminal defendants in Nashville's criminal courts. *See* Doc. 9-2, Declaration of Dawn Deaner ¶ 7 (discussing well-known shortcomings of Nashville's appointed-counsel system). This problem is particularly difficult to address in the ordinary course of criminal litigation because criminal defendants ordinarily may speak only through their lawyers and, therefore, cannot challenge the effectiveness of those lawyers until they have already been convicted, when the standard applicable to their challenges is very high. *See Strickland v. Washington*, 466 U.S. 668, 681 (1984). Given that difficulty, Plaintiffs seek to represent criminal defendants *before* they have been convicted for the limited purpose of moving the criminal courts in Nashville to

appoint constitutionally adequate, independently selected counsel. *E.g.*, Deaner Decl. ¶ 14. Plaintiffs filed this case to vindicate their First Amendment rights to engage in this crucial work.

The events that gave rise to this case are set forth in Plaintiffs' opening brief in support of their preliminary-injunction motion. *See* Doc. 25-1 at 2-7. Rather than re-summarize those events here, Plaintiffs simply note that Defendants mischaracterize these events in two crucial respects.

First, the events leading to this case began[2] with Deaner's representation of Ricky House, a criminal defendant whose case was pending in Judge Blackburn's court. House sent Deaner a letter detailing the poor performance of his appointed attorney and asking for help. *Id.* ¶ 15. Deaner met with House on October 23, 2019. *Id.* ¶ 16. At that meeting, House executed a limited-scope retainer agreement authorizing C.J.I. attorneys to represent him on a motion to substitute counsel in his criminal case. *Id.* At that point, contrary to Defendants' repeated, unsupportable assertions, Deaner was in fact representing House and, therefore, had "standing" to file papers on his behalf consistent with the retainer agreement he signed. *Contra, e.g.*, Doc. 30 at 4 ("[Deaner] was not Mr. House's attorney."); *id.* at 10 ("Ms. Deaner submitted an improper motion as if she had standing to file papers on Mr. House's behalf.").

[2] Defendants recite the facts of a different case with a similar procedural posture. *See* Doc. 30 at 5. It is unclear what Defendants think the relevance of this recitation is.

Second, Deaner's motion on House's behalf was entirely proper.[3] In that motion, Deaner explained that the attorney Judge Blackburn had appointed, Anthony Thompson, had visited House only twice in the year his case had been pending. *Id.* at 27. Each visit lasted less than an hour. House had been unable to reach Thompson by phone, and Thompson had not communicated with him by letter. *Id.* Thompson had not filed a motion to reduce the money-bail amount required for House's release, which he described as a "waste of time," *id.*, even though the Constitution "prohibit[s] the setting of money bail as a condition of release without inquiry into ability to pay and without meaningful consideration of other possible alternatives," *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2019 WL 633012, at *9 (M.D. Tenn. Feb. 14, 2019) (Campbell, J.), *aff'd*, 945 F.3d 991 (6th Cir. 2019). Thompson never discussed any investigation with House. Doc. 18-2 at 27. And so Deaner, on House's behalf, suggested that the court appoint Ryan Davis, who certified that he has was willing to take the case, and argued that Thompson's conduct thus far failed the Constitutional standard. *Id.* at 30. Although Defendants now say, without citation or support, that Deaner's motion was "questionable . . . as misrepresentation," Doc. 30 at 15, and although they criticize her for "disparag[ing] counsel," *id.* at 18, Defendants have never contended—let alone provided evidence—that any of Deaner's

[3] Although Judge Blackburn ordered that this motion be filed under seal, she has since publicly filed it in this case. See Doc. 18-2 at 26. In any event, her original sealing order—which was not justified by any compelling need for secrecy—was unconstitutional. *See Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593–94 (6th Cir. 2016) ("Shielding material in court records . . . should be done only if there is a 'compelling reason why certain documents or portions thereof should be sealed.'" (citation omitted)).

statements about Thompson's representation of House were inaccurate in any respect, nor have they offered any reason to believe her motion on his behalf was without merit.

ARGUMENT

I. This Court Should Not Abstain Under *Younger v. Harris*.

Defendants argue that *Younger v. Harris*, 401 U.S. 37 (1971), requires this Court to abstain from considering Plaintiffs' request for equitable relief. Doc. 30 at 12-19; Doc. 31-1 at 11-15. Their argument fails because it rests on a faulty premise: that there is currently an ongoing state disciplinary proceeding in which Plaintiffs may raise their constitutional arguments. But the Board has not filed any formal disciplinary charges against Deaner, it has not convened a hearing panel, and there is no way for Deaner to request a hearing under the Board's rules until the current investigation concludes. Accordingly, there is no state administrative proceeding at which Plaintiffs may argue their case and to which this Court may defer. *Younger* abstention is therefore inappropriate.

"The United States Supreme Court has emphasized on numerous occasions that abstention from jurisdiction is the exception, not the rule, and that federal courts have a 'virtually unflagging obligation to exercise the jurisdiction given them.' " *Sun Ref. & Mktg. Co. v. Brennan*, 921 F.2d 635, 638-39 (6th Cir. 1990) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). *Younger* created a narrow exception to the rule, but this exception "has become disfavored in recent Supreme Court decisions," *Walker v. City of Calhoun*, 901 F.3d 1245, 1254 (11th Cir. 2018), and "only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States."

Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77–78 (2013) (quoting *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989)). Generally, *Younger* abstention may be invoked only where three criteria are met: "(1) there must be on-going state judicial proceedings; (2) those proceedings must implicate important state interests; and (3) there must be an adequate opportunity in the state proceedings to raise constitutional challenges." *Sun Refining*, 921 F.2d at 639. Neither the first nor third criterion is met here.

The Supreme Court has held that in First Amendment cases where an unconstitutional enforcement action has been *threatened*, but no formal proceedings have commenced, a federal court may not abstain. In *Steffel v. Thompson*, 415 U.S. 452 (1974), the petitioner sued for declaratory relief after being threatened with arrest for distributing handbills protesting the Vietnam War. The Court declined to abstain, reasoning that

> while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a[n] [enforcement] proceeding.

Id. at 462. *Steffel* thus makes clear that federal equitable relief "is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state . . . statute[.]"[4] *Id.* at 475; *see also Haw. Hous. Auth. v. Midkiff*,

[4] Although *Steffel* concerned a state criminal statute, the Supreme Court has clarified that state administrative action is similarly subject to "pre-enforcement review." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014).

467 U.S. 229, 238–39 (1984) ("*Younger* is not a bar to federal court action when state judicial proceedings have not themselves commenced[.]").

The Sixth Circuit has allowed similar claims in a materially identical posture to proceed. *See, e.g.*, *Berry v. Schmitt*, 688 F.3d 290 (6th Cir. 2012) (reversing district court and allowing First Amendment claim seeking declaratory and injunctive relief from attorney discipline after issuance of a warning letter to proceed); *Kiser v. Reitz*, 765 F.3d 601 (6th Cir. 2014) (reversing district court and allowing First Amendment claim seeking declaratory and injunctive relief by dentist challenging Dental Board disciplinary enforcement after warning to proceed). Although these cases did not address *Younger* abstention specifically, they are in accord with cases from other circuits that have found abstention inappropriate in the preliminary investigative phase of a disciplinary action. *See, e.g.*, *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 1989) (*Younger* abstention does not apply in "the period between the threat of enforcement and the onset of formal enforcement proceedings"); *La. Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995) (following *Telco* and upholding district court's decision not to abstain where letters threatening enforcement had been sent but no formal proceedings commenced).

In *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508 (1st Cir. 2009), for instance, the First Circuit held that *Younger* abstention was inappropriate in a lawsuit brought by owners of an insurance company against the insurance commissioner of Puerto Rico during an ongoing misconduct investigation, but where formal charges had yet to be filed. After reviewing Supreme Court precedent, the court concluded that the "rule, requiring

commencement of 'formal enforcement proceedings' before abstention is required, better comports with the Supreme Court's decisions in *Younger* and its progeny. . . ." *Id.* at 519. Even though, as here, the Insurance Commissioner had concluded during the investigation that a violation had occurred, in the absence of formal charges, the investigation was "at too preliminary a stage to constitute a 'proceeding' triggering *Younger* abstention." *Id.*

Defendants assert that there is an "on-going state judicial proceeding" here because "the disciplinary complaint against Ms. Deaner is an ongoing matter before the Board."[5] Doc. 30 at 12; Doc. 31-1 at 11. In support, Defendants cite an affidavit by the Board's Deputy Chief Disciplinary Counsel, Steven J. Christopher. Doc. 18-3. But Christopher's declaration does not state that any formal proceedings have been instituted against Deaner, nor does it identify any forum where she may argue her case. Instead, it avers that upon Deaner's rejection of the Board's offer of diversion, "the file was returned to active investigative status, and as of the date of execution of this affidavit, the investigation remains open." *Id.* ¶ 8.

An "open investigation" with the Board does not constitute an ongoing judicial proceeding. Tennessee law states that "formal disciplinary proceedings before a hearing panel shall be commenced by Disciplinary Counsel by filing with the Board a Petition for Discipline . . . ." Tenn. Sup. Ct. R. 9-15.2(a). And, under Tennessee law and the Board's

[5] Defendants do not argue that House's criminal case before Judge Blackburn constitutes an on-going judicial proceeding for *Younger* purposes. Nor could they, for Deaner's request to appear in that case was denied. Therefore, even if *Younger* abstention were appropriate for the Board, this Court should not abstain from Plaintiffs' claim against Judge Blackburn because Deaner may not raise any arguments in her court.

rules, a matter will not be assigned to a hearing panel until *after* an answer to the petition has been served. Tenn. Sup. Ct. R. 9-15.2(d); *see also* Policies and Rules of the Board of Professional Responsibility of the Supreme Court of Tennessee, Rule 2.2(A), Ex. 1 p. 9 ("*Following service of the answer or upon failure to answer*, the matter shall be assigned by the Board Chair or the Vice-Chair to a hearing panel." (emphasis added)). Thus, under the Board's own rules, no "formal disciplinary proceedings" have been instituted here, and no hearing panel has been convened.

Nor is the institution of such proceedings before a hearing panel inevitable here. The rules make clear that a formal proceeding is just one of several potential outcomes of an investigation. As Rule 9 states, "[at] the conclusion of an investigation, Disciplinary Counsel may recommend dismissal, private informal admonition, private reprimand, public censure or prosecution of formal charges before a hearing panel." Tenn. Sup. Ct. R. 9-15.1(b). If the Board ultimately dismisses Deaner's case, no hearing will ever take place. If the Board pursues any other course, Deaner "may demand as of right that a formal proceeding be instituted before a hearing panel"—but only *after* the disposition is adopted by the Board at the conclusion of the investigation. Tenn. Sup. Ct. R. 9-15.1(e).

There is no disposition in Deaner's case that has triggered the right to a hearing. Instead, she has merely been offered pre-disposition diversion, and turned down that offer. The Board's July 2020 letter to Deaner states that, with respect to the Board's diversion offer, the Tennessee Supreme Court Rules "permit . . . twenty days to reject this disposition to request [sic] a formal hearing on this matter." Doc. 18-4 at 2. But contrary to the letter,

the Rule does not permit a respondent attorney to request a hearing upon rejecting an offer of diversion. Instead, "[i]n the event that a respondent attorney rejects a diversion recommendation the matter shall be returned for further proceedings under this Rule." Tenn. Sup. Ct. R. 9-13.7. Deaner's rejection of diversion has not led to the scheduling of a hearing nor the establishment of a panel.[6] Instead, as Christopher states in his affidavit, the matter remains in the nebulous pre-enforcement status of an "open investigation." Doc. 18-3 at 2-3. Unless formal disciplinary proceedings are instituted, or a disposition is recommended by Garrett and adopted or modified by the Board, there will be no hearing panel and no forum in which Plaintiffs may vindicate their constitutional rights.[7]

The fact that there are no formal charges, no panel, and no scheduled hearing distinguishes the present circumstances from every Sixth Circuit case where *Younger* has been found to apply to disciplinary proceedings. In *Danner v. Board Of Professional Responsibility of the Tennessee Supreme Court*, 277 F. App'x 575 (6th Cir. 2008), *O'Neill v. Coughlan*, 511 F.3d 638 (6th Cir. 2008), *Squire v. Coughlan*, 469 F.3d 551 (6th Cir. 2006), *Fieger v. Thomas*, 74 F.3d 740 (6th Cir. 1996), and *Berger v. Cuyahoga County Bar Association*, 983 F.2d 718 (6th Cir. 1993), either formal disciplinary proceedings had begun (*Danner* and *Fieger*),

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[6] The difference between rejecting an offer of diversion and contesting another disposition is demonstrated by *Henderson v. Board of Professional Responsibility of the Supreme Court of Tennessee*, where the court construed an attorney's letter rejecting public censure as a request for a hearing, even when not specifically articulated as part of the rejection. 125 S.W.3d 405, 409 (Tenn. 2003). Here, Deaner's letter rejecting diversion has not been similarly construed.

[7] In fact, Defendants apparently concede that proceedings are not currently in process, arguing that injunctive relief against the Board would be too "remote and speculative." Doc. 30 at 19; 31-1 at 20; *see also infra* Part III (addressing inconsistencies in Defendants' position).

or the investigative process offered a formal probable-cause hearing where the respondent could argue her case (*O'Neill*,[8] *Squire*, and *Berger*).[9] Neither of those factors is present here. The Board's investigative process does not provide Plaintiffs with an opportunity to raise their arguments at a hearing. *See* Tenn. Sup. Ct. R. 9. Accordingly, there is no ongoing state proceeding against Plaintiffs, much less an adequate one where they may argue their case.

As a result, Plaintiffs are currently languishing between *Steffel*'s Scylla of violating the Board's interpretation of its disciplinary rules, and Charybdis of forgoing their First Amendment right to communicate with prospective clients for the purpose of pro bono representation. They may not be forced to wait indefinitely with no way to argue their case as the Board mulls over how—or whether—to proceed. Plaintiffs are entitled to a federal forum to adjudicate their federal constitutional rights.

II. Judge Blackburn's Gag Order Is an Unconstitutional Prior Restraint.

Judge Blackburn's order limiting Deaner's communication with any prospective client who is currently represented by counsel for the purpose of challenging that counsel's effectiveness is a prior restraint on Deaner's constitutionally protected speech. Because Judge Blackburn's justifications for these restrictions fail on their own terms, let alone

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[8] Although the court did not address the fact of a probable-cause hearing in *O'Neill*, that case involved the same Ohio judicial disciplinary process that was at issue in *Squire*, where there was a probable-cause hearing available. 469 F.3d at 554; *see also* Ohio Gov. Bar. R. V (describing a "probable cause panel" to investigate grievances). In any event, the Sixth Circuit's reasoning in *O'Neill* turned on an Ohio Supreme Court case stating that the filing of a judicial disciplinary grievance commences a "judicial proceeding." Plaintiffs are unaware of any similar Tennessee case.

[9] Moreover, in its jurisprudence applying *Younger* to state disciplinary proceedings, the Sixth Circuit has repeatedly relied on *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), where, like *Danner* and *Fieger*, the Supreme Court found *Younger* abstention to apply *after formal disciplinary charges had been instituted.*

come close to satisfying the Supreme Court's extremely demanding standard for prior restraints, Judge Blackburn's order is unconstitutional. Her motion to dismiss this case should be denied.

A. Judge Blackburn's order, enforceable in contempt, that Deaner get permission from an adverse party before speaking is a prior restraint.

The Supreme Court has roundly rejected prior restraints on speech. *See, e.g.*, *Near v. State of Minn. ex rel. Olson*, 283 U.S. 697, 729 (1931). Courts determine whether a speech regulation is a prior restraint by considering four factors: whether (1) the restraint originates from a judicial order, rather than from legislation; (2) the restraint's purpose is to suppress speech before it is uttered, rather than punish it after; (3) the restraint's means of enforcement lies in contempt; and (4) the restraint offers a means to challenge it on constitutional grounds after the speech is uttered. *E.g.*, *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 468 (5th Cir. 1980) (en banc) (citing, *inter alia*, *New York Times Co. v. United States*, 403 U.S. 713, 733 (1971)); *see also McGlone v. Bell,* 681 F.3d 718, 733 (6th Cir. 2012) ("A prior restraint is any law forbidding certain communications when issued in advance of the time that such communications are to occur." (quotation marks and citations omitted)). Courts have specifically held that orders limiting contacts between attorneys and prospective clients are prior restraints. *E.g.*, *Gates v. Cook*, 234 F.3d 221, 227 (5th Cir. 2000) (holding that no-contact order is not "narrowly drawn to minimize prior restraints on speech" where order forbids "class members who wish to remain in contact with . . . attorneys [to] seek to exercise their right as individuals to consult with the counsel of their choice on matters of

great concern to them"). And that is true even where the orders allow speech with advance permission. *Bernard*, 619 F.2d at 466.

Judge Blackburn's order is a prior restraint. First, it is a judicial order entered in an individual case, rather than a legislative or quasi-legislative order governing more broadly. Second, its purpose is to suppress *future* speech: it limits all future contacts and does not punish any prior ones, which it leaves to the Board. Doc. 18-2 at 3; *see McGlone*, 681 F.3d at 733. Third, the order is enforceable in contempt. *See State v. Maddux*, 571 S.W.2d 819, 821 (Tenn. 1978) (explaining that although arguments against a trial court's rulings are permissible, it is "contumacious [to] refus[e] to abide by the rulings of the court"). Finally, under Tennessee law, the fact that the order was invalid would not be a defense in a contempt proceeding if Deaner were to violate the order. *Frye v. Frye*, 80 S.W.3d 15, 19 (Tenn. Ct. App. 2002) ("Defendant was required to obey the orders of the Trial Court, even if erroneous, unless or until they were dissolved by that court or reversed on appeal.").

Defendants do not contest any of the factors governing whether an order is a prior restraint. Instead, they argue only that Judge Blackburn's order is not a prior restraint because "Judge Blackburn permitted Ms. Deaner to communicate . . . with represented defendants, *on the condition that she obtain consent from current counsel* . . ." Doc. 30 at 15 (emphasis in original). Requirements to obtain consent from a *government* official operate as prior restraints of speech. *McGlone*, 681 F.3d at 733 (citing *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001)). Requiring consent from private, potentially adverse parties, is even worse. Courts require that any scheme

giving a party authority to deny permission for speech contain "narrow, objective, and definite standards to guide the . . . authority" because "discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981), and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149 (1969)). This is all the more troubling where, as here, a prior restraint requires advance permission from the party the speaker seeks to criticize, which all but guarantees suppression of "a particular point of view." *Id.*

B. Judge Blackburn's stated justifications for her order are insufficient to satisfy the Supreme Court's standard for prior restraints.

Prior restraints on speech are unconstitutional unless accompanied by extremely compelling reasons to justify them. *See Near*, 283 U.S. at 715; *New York Times Co.*, 403 U.S. at 729 (Stewart, J., concurring) (requiring the threat of "direct, immediate, and irreparable damage to our Nation or its people" to justify a prior restraint). Judge Blackburn's only justification for the prior restraint is that it "was designed to prevent a recurrence of the disruption that grew out of Deaner's communications with [her clients]." Doc. 30 at 15. To support her conclusion that "disruption" occurred, Judge Blackburn offers three contentions: (1) Deaner's communications with her clients violated Rule 4.2 (a position she may have abandoned, *see* Doc. 30 at 15 ("This condition *parallels* part of RPC 4.2, and Judge Blackburn cited RPC 4.2 . . . as authority for making it." (emphasis added)); (2) Deaner "interfer[ed]" with House's relationship with Thompson; and (3) Deaner

attempted to "usurp" the power of the court to appoint counsel. These justifications fail on their own terms.

First, Rule 4.2 simply does not forbid Deaner to contact people represented by counsel in these circumstances. As explained in more detail below, Rule 4.2 restricts attorneys *who are representing other parties in a matter* to speak to represented parties about the matter in which they are represented. *See infra* Part III; Doc. 25-1 at 14-16; *see also United States v. Gonzalez-Lopez*, 403 F.3d 558, 565–66 (8th Cir. 2005) (interpreting identical rule to permit contact with prospective client who is currently represented by counsel). Deaner was not representing anyone else when she communicated with House, and Plaintiffs aver no intent to communicate with parties while representing others in the future.

Second, Deaner's consultation with prospective clients effects no "interference" with any existing attorney–client relationships, let alone an interference sufficiently severe to justify curtailing First Amendment rights. House reached out to Deaner complaining, *inter alia*, that his attorney had barely communicated with him in over a year, which had caused him to pursue pro se motions to get a better lawyer. Deaner then consulted with him and, with his authorization, filed a motion on his behalf. Judge Blackburn's suggestion that *Deaner* was somehow the source of House's dissatisfaction is factually wrong. And even if it were not, no one has suggested, nor could they, that an attorney acts improperly if her competent, non-misleading, and otherwise-lawful advice leads a client to become dissatisfied with another attorney.

Finally, no usurpation of court authority is in the offing. Deaner proposes only to, after consultation with her clients, *move the court* for the appointment of constitutionally adequate counsel. This is no more a usurpation of Judge Blackburn's authority to appoint counsel than Plaintiffs' motion for a preliminary injunction is a usurpation of this Court's authority to determine whether plaintiffs are entitled to preliminary injunctions. According to Defendants, limiting a lawyer's ability to speak with prospective clients is "entirely justified" because that lawyer "had questioned the court's ability to perform impartially th[e] function [of appointing counsel]," Doc. 30 at 15, and merely raising questions about appointment of counsel for a person whose liberty is at stake constitutes "disruption." *Id.* Even setting aside the disturbing notion, for which Defendants provide no support, that it is improper to respectfully *question* the conduct of a government official, ample authority supports the proposition that Judge Blackburn, by virtue of being the judge presiding over the cases to which she appoints counsel, indeed is not able to perform that function impartially. The American Bar Association, the Attorney General of the United States, and many distinguished commentators have all said exactly that.[10] And Garrett herself, quoted

[10] *See, e.g.*, Eric Holder, U.S. Att'y Gen., *Remarks at the Brennan Legacy Awards Dinner*, Brennan Center for Justice (Nov. 17, 2009), http://www.brennancenter.org/analysis/attorney-general-eric-holder-indigent-defense-reform ("In some places judges assign cases to lawyers, which can influence the representation the lawyers provide."); *see also* ABA Standing Comm. on Legal Aid and Indigent Defendants, *Ten Principles of a Public Defense Delivery System* 2 (2002) ("Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense."); Eve Brensike Primus, *Culture As A Structural Problem in Indigent Defense*, 100 Minn. L. Rev. 1769, 1773–74, 1791 (2016); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 Yale L.J. 2150, 2168 (2013); Emanuel Celler, *Federal Legislative Proposals To Supply Paid Counsel to Indigent Persons Accused of Crime*, 45 Minn. L. Rev. 697, 712 (1961) ("[P]ublic defenders ought not to be appointed by the district court before which it would be their duty to practice.").

in Defendants' brief before this Court, wrote that Deaner's "conduct caused *no harm . . . to the proceedings*." Doc. 30 at 10 (quoting Doc. 18-4 at 1) (emphasis added).

Unable to justify the prior restraint on its own terms, Defendants argue that Plaintiffs' speech rights are "limited" because "their speech affects the administration of justice." Doc. 30 at 16 (relying on *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991), and *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005)). This argument is inapposite. Judge Blackburn's order does not limit Deaner from engaging in improper extrajudicial communications (the conduct at issue in *Gentile*) and it does not limit Deaner's speech in court (the conduct at issue in *Mezibov*). Instead, the order limits Deaner from being engaged by clients to present reasonable arguments to the forum meant to hear them. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 n.32 (1977). And the order forbids her from speaking to prospective clients who currently have lawyers no matter where that conversation occurs—not merely in court, where speech rights are limited. *See Neuberger v. Gordon*, 567 F. Supp. 2d 622, 634–35 (D. Del. 2008) (distinguishing *Mezibov* on the ground that it concerned only "the context of courtroom proceedings" and did not address an attorney's rights "in being retained by and in consulting with his clients," which was "protected conduct under the First Amendment"). Judge Blackburn's justifications fail.

III. The Board Defendants Should be Enjoined From Enforcing Rule 4.2 Against Pro Bono Attempts to Speak to Prospective Clients.

A. The Board Defendants are threatening to enforce the Rules against Plaintiffs if they engage in protected speech.

The Board's July 2020 letter stated that "communicat[ing] with a represented criminal defendant without the permission of his counsel . . . violat[es] . . . RPC 4.2." Doc. 18-4. As explained in Plaintiffs' opening brief, that interpretation of Rule 4.2 violates the First Amendment because it categorically restricts attorney solicitation without requiring that the solicitor act for pecuniary gain. *See* Doc. 25-1 at 14-19. Since Plaintiffs filed that brief, the Board has altered its position. Its new reading of Rule 4.2 is unconstitutional.

The Board's new position, according to a "statement" that it adopted last month, is that "the Board did not conclude that Ms. Deaner violated any ethical rules *solely* by speaking with a prospective client" who was represented by counsel; "rather, the Board's [conclusion] . . . resulted from her *subsequent* conduct with the represented party and before the tribunal." Doc. 30 at 21 (emphases added). According to the Board, Deaner's "communications with Mr. House . . . were *transformed* into a likely violation of RPC 4.2 by the filing of her request [to enter a notice of appearance]." Doc. 30 at 21 (emphasis added). This transformation occurs, the Board now claims, because although Rule 4.2 permits contacts for the purpose of "considering whether to take [a represented party's] case," *id.* at 20, as soon as the contacting attorney decides to *take* that person's case, she begins to "act[] in a representative capacity," *id.* at 21, and therefore violates Rule 4.2, which forbids contacting represented parties while currently representing another party. In other words,

the Board now says that Rule 4.2 restricts contacts only between attorneys who are currently involved in litigation and represented parties who are involved in the same litigation, but by speaking to a represented party in litigation and agreeing to represent her an attorney *becomes* a representative in the litigation, and therefore violates Rule 4.2 *by speaking to her own client*. The rule, according to the Board, allows attorneys to talk with represented parties to *decide* whether to represent them but not to *actually represent* them.

This head-spinning interpretation violates the Constitution. The First Amendment protects the rights of attorneys to help their clients "obtain meaningful access to the courts . . . ." *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977). To do that, attorneys must be able to communicate with a prospective client to "advise [him] that his legal rights have been infringed and refer him to a particular attorney or group of attorneys . . . for assistance." *In re Primus*, 436 U.S. 412, 432 (1978) (quotation marks and citation omitted). But then the attorneys also need to be able to *provide* that assistance. *Id.* According to the Board, an attorney may be disciplined for responding to an inquiry from a represented party, concluding that his Constitutional rights may be in danger, and filing a motion to protect those rights. The Board's new reading of Rule 4.2 is unconstitutional for the same reason its initial interpretation was.[11]

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[11] The Board writes in its brief that its "invocation of RPC 4.2 in [the] disciplinary proceeding was at least a colorable application of the rule. It was not an unconstitutional prior restraint." Doc. 30 at 22. It is unclear if Defendants mean to say that *because* the Board's interpretation was "colorable" it was constitutional. That contention would be meritless because (a) the Board's interpretation was not colorable and (b) even if it were a correct statement of state law that would not answer the federal-law question of whether it is constitutional. Regardless, Plaintiffs do not allege that the Board's interpretation constitutes a "prior restraint"; only Judge Blackburn's order is a prior restraint. The

The Board nonetheless contends that Plaintiffs are not entitled to a preliminary injunction because (a) "injunctive relief that would simply punctuate [the Board's own] statement would be inappropriate in large part because it would be redundant," Doc. 30 at 22, (b) the Board's prospective enforcement is "too remote and speculative," *id.* at 19, and (c) the Board may conclude in the future that speech materially identical to Deaner's does not violate the Rules after all, *id.* at 22. Each of these arguments is untenable.

First, Plaintiffs are seeking an injunction shielding them from enforcement of Rule 4.2 when they speak with represented parties for the purpose of representing them pro bono. The Board's "statement," in contrast, asserts that an attorney *does* violate Rule 4.2 if she contacts represented parties for the purpose of representing them pro bono whenever she is successful and ends up *representing* them. These positions are not redundant.

Second, there is nothing "remote" or "speculative" about Plaintiffs' fear that the Board will enforce the Rules of Professional Conduct against them if they engage in further speech. In *Berry v. Schmitt*, the Sixth Circuit held under materially identical circumstances that a suit seeking equitable relief from attorney discipline in violation of the First Amendment after issuance of a warning letter was cognizable and did not seek an advisory opinion. 688 F.3d 290, 297 (6th Cir. 2012) (finding that plaintiff had standing to pursue an injunction against disciplinary sanctions because "the last time [he] engaged in such speech, he was warned by the Inquiry Commission that his statement violated [the Rules of

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Board's interpretation of Rule 4.2, and its continued threat to enforce that rule against Plaintiffs if they persist in their constitutionally protected activity, nonetheless violates the First Amendment.

Professional Conduct] and that 'in the future,' he should 'conform [his] conduct to the requirements of the Rules of Professional Conduct'"). Here, the Board not only warned Deaner, it sent her a letter that it now describes as a "statement[] of the ethical rules *found to have been violated*," Doc. 30 at 10 n.4 (emphasis added), and proposed to take concrete action on the basis of that finding: requiring her to face the prospect of discipline if she did not agree to take continuing legal education classes.

Third, despite Defendants' assertion that the Board never interpreted Rule 4.2 to cover speaking to a represented party for the purpose of representing that party pro bono, *see* Doc. 30 at 20 ("Nothing in the Board's response to Ms. Deaner indicates that any prohibition extending to other defendants was contemplated."), its past conduct belies that assertion. The Board's July 2020 letter explicitly stated that Deaner violated Rule 4.2 by "communicat[ing] with a represented criminal defendant without the permission of his counsel." Doc. 18-4 at 1. Now, rather than simply conceding that Deaner's speech was actually permissible under the rules, the Board propounds a tortured, post-hoc rationale to justify its prior threat of discipline. The Board's attempt to amend its prior position is unavailing: Deaner's speech was either permissible under Rule 4.2 (in which case Plaintiffs should be free to engage in identical speech in the future) or it was prohibited (in which case, Plaintiffs would face a concrete threat of discipline if they engaged in identical speech in the future). The Board cannot have it both ways.

B. The Board's latest explanation of why Deaner violated Rule 4.2 is fatally vague.

The Board suggests that permissible communication is "transformed" into impermissible communication only in the "unique circumstances" of Deaner's contact with House. Doc. 30 at 21. As the Board put it in its brief, "[t]he degree to which future communications between [Plaintiffs] and represented defendants may implicate RPC 4.2 is *beyond anyone's ability to guess*." Doc. 30 at 22 (emphasis added). Even if the Board's new interpretation of Rule 4.2 were not unconstitutional on its own terms (which, as explained above, it is), the Board's reading of that rule would still be unconstitutionally vague. On that basis alone, the Board should be enjoined from enforcing Rule 4.2 against attorneys soliciting pro bono clients.

The First Amendment requires that regulations limiting speech do so "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citing, *inter alia*, *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 493 (1982)). The Board itself contends that it is beyond *anyone*'s ability to guess whether the specifically described speech that Plaintiffs intend to undertake will violate Rule 4.2. Its position, by definition, renders Rule 4.2 unconstitutionally vague.

C. Flippin and Garret are proper defendants and Deaner requests a clear, reasonable, and enforceable preliminary injunction.

The Board Defendants claim, without citation or support, that an injunction barring the enforcement of Rule 4.2 against attorneys who solicit clients for non-pecuniary

purposes is "simply too much" because it would "unnecessarily interfere with the Board's operations." Doc. 30 at 23. An injunction requiring compliance with the First Amendment, the Board says, "would give [Plaintiffs] a special dispensation from Tennessee's disciplinary rules." *Id.* And, the Board Defendants complain, Plaintiffs "could have named all members of the Board" but because they instead chose to name the person with authority to institute disciplinary action and the person with authority to dismiss such action they have sought "to compel these officials to act as gatekeepers on [their] behalf." Doc. 30 at 23. They apparently worry that in this "gatekeeper" role they may be compelled to "dismiss complaints without further regard for the severity of the underlying conduct . . . " *Id.*

These arguments are without merit. First, Plaintiffs request a very simple injunction: the Board Defendants may not discipline Plaintiffs for communicating with represented parties so long as Plaintiffs act without pecuniary gain as a significant motivation. Plaintiffs aver an intention to respond to inquiries seeking assistance on motions to substitute counsel, and Plaintiffs are clear that they do not intend to communicate with represented parties about matters in which they currently represent other parties. No "interfere[nce]" is in view: the injunction Plaintiffs seek would still allow the Board to enforce the Rules of Professional Conduct against attorneys who break them. And the Board Defendants do not contend that they lack the power to comply with this Court's injunction, and they do not argue that they are improper defendants for some other reason.

D. Plaintiffs satisfy the remaining preliminary-injunction factors.

Finally, Defendants suggest that Plaintiffs might not suffer irreparable harm absent a preliminary injunction because Deaner's contacts with House "were unusual," and, therefore, forbidding materially identical contacts in the future would not affect Plaintiffs' "core work." Doc. 30 at 19 (quoting Doc. 9-2). This is wrong. As Deaner's declaration shows, her interaction with Mr. House is representative of Plaintiffs' mission. *See* Doc. 9-2. But regardless, the Board's actions unquestionably meet the Supreme Court's standard for irreparable harm in First Amendment cases: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Defendants do not, and cannot, argue that Plaintiffs do not in fact want to speak with people represented by counsel. The mere fact that Plaintiffs may also want to do other things, and that they are still able to distribute literature and to communicate with represented defendants after their ineffective attorneys agree, does not mitigate—let alone eliminate—the threat of irreparable harm that the Board's actions are causing every day.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted, and Defendants' motion to dismiss should be denied.

Respectfully submitted,

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October 14, 2020

CERTIFICATE OF SERVICE

I hereby certified that on October 14, 2020, I filed the foregoing document using the CM/ECF system for the United States District Court for the Middle District of Tennessee, which caused that document to be served on Jonathan N. Wike, counsel for Defendants.

/s/ Charles Gerstein
CHARLES GERSTEIN