

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

CURB RECORDS, INC. and MIKE CURB
FOUNDATION,

Plaintiffs,

v.

WILLIAM LEE, as Governor of the State of
Tennessee, in his official capacity; CARTER
LAWRENCE, as Commissioner of the Tennessee
Department of Commerce and Insurance, in his
official capacity; WILLIAM B. HERBERT IV, as
Director of the Nashville Department of Codes and
Building Safety, in his official capacity; and GLENN
FUNK, as District Attorney General for the 20th
Judicial District of Tennessee, in his official capacity,

Defendants.

Civil Action No. 3:21-cv-0500

Chief Judge Crenshaw

Magistrate Judge Holmes

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Local Rule 7.01(a)(2), Plaintiffs Curb Records, Inc. ("Curb Records") and the Mike Curb Foundation (the "Foundation") respectfully submit this memorandum of law in support of their motion for a preliminary injunction.

I. INTRODUCTION

Plaintiffs Curb Records and the Foundation move the Court to preliminarily enjoin enforcement of Tennessee Public Chapter No. 453, which they refer to as the "Compelled Sign Law" or "the Law." *See* 2021 Tenn. Pub. Act ch. 453 (signed into law on May 17, 2021, to be codified in Tennessee Code Annotated, Title 68, Chapter 120, Part 1). The Compelled Sign Law

forces these businesses to post highly visible red and yellow signs that express a negative message about transgender people to their employees and customers, which is the opposite of the welcoming and inclusive message Plaintiffs wish to express. The Law compels Curb Records and the Foundation to publicly endorse a climate of fear and non-acceptance of transgender people that contradicts the companies' values. In so doing, the Compelled Sign Law violates settled First Amendment law and, unless enjoined, will cause Plaintiffs to suffer irreparable harm both to their business interests and to their fundamental right not to be compelled by the government "to speak a particular message." *Nat'l Inst. of Fam. Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2371 (2018).

The Compelled Sign Law puts Curb Records and the Foundation in the position of being forced to make a negative statement about transgender people regardless of whether they post the signs or not. On the one hand, if they post signs as the Law requires because they permit transgender people to use restrooms based on their gender identity, they are sending a public message that is demeaning to transgender people. On the other hand, if Plaintiffs do not post the signs they are sending a message that transgender people are not welcome to use their restrooms on a nondiscriminatory basis, because the Law's text and history creates a perception that the absence of the sign means that the transgender people are not permitted to use restrooms based on their gender identity. Either way, Plaintiffs are compelled to speak in a manner that is inconsistent with their corporate values, which the First Amendment does not permit.

The Compelled Sign Law also makes it impossible for Curb Records to comply with Title VII, which prohibits discrimination against any transgender employees. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020). Curb Records must, and does, permit employees to use restrooms consistent with their gender identity. But if Curb Records complies with the Law by posting the

required signs, it will violate Title VII by subjecting any transgender workers to disparate treatment and a hostile work environment. Under settled law, when a state law conflicts with a federal law, as the Compelled Sign Law does here, federal law controls, and the state law may not be enforced. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (holding that “state law that conflicts with federal law is without effect”) (internal citations and quotation marks omitted).

Because the Compelled Sign Law violates both the First Amendment and the Supremacy Clause and because enforcing the Law will cause Plaintiffs to suffer irreparable harm and is against the public interest, Plaintiffs ask this Court to grant their motion for a preliminary injunction.

II. BACKGROUND

A. The Compelled Sign Law

The Compelled Sign Law was introduced in the Tennessee General Assembly on February 10, 2021. The primary sponsor was Representative Tim Rudd. The bill passed in the House of Representatives on March 29, 2021 and passed in the Senate on April 29, 2021. The Compelled Sign Law was signed into law by Governor Bill Lee on May 17 and became effective on July 1, 2021.

The Law provides that “[a] public or private entity or business that operates a building or facility open to the general public and that, as a matter of formal or informal policy, allows a member of either biological sex to use any public restroom within the building or facility shall post notice of the policy at the entrance of each public restroom in the building or facility.”

The statute prescribes that the sign must be at least eight inches wide and six inches tall and be formatted to so that the top third of the sign consists of the word “NOTICE” in yellow letters on a red background. The lower two thirds of the sign must contain the following text in boldface, block letters in black type on a white background: “THIS FACILITY MAINTAINS A

POLICY OF ALLOWING THE USE OF RESTROOMS BY EITHER BIOLOGICAL SEX,
REGARDLESS OF THE DESIGNATION ON THE RESTROOM.”

The Law defines the term “policy” to mean “the internal policy of a public or private entity or such policy as the result of a rule, ordinance, or resolution adopted by an agency or political subdivision of this state.”

The Law provides that the term “public restroom”:

(A) Includes a locker room, shower facility, dressing area, or
other facility or area that is:

- (i) Open to the general public;
- (ii) Designated for a specific biological sex; and
- (iii) A facility or area where a person would have a
reasonable expectation of privacy; and

(B) Excludes a unisex, single-occupant restroom or family
restroom intended for use by either biological sex.

The legislative history of the Compelled Sign Law and the circumstances surrounding its enactment demonstrate that the intended discriminatory purpose of the Law is to require businesses and other entities to issue a warning by posting the specifically-worded sign if they allow transgender people to use a sex-separated restroom that matches their gender identity, rather than the sex they were assigned at birth.

During a hearing on the Law before the House Public Service Subcommittee, Representative Rudd stated that the bill was necessary to “protect[] women and children against” people who could “tak[e] advantage of policies, executive orders, or legislation[] that [] allow the ‘opposite biological sex’ to enter a [multi-occupancy] restroom, shower, or locker room.” *Debate*

of H.B. 1182 Before the H. Pub. Serv. Comm. at 19:50, 112th Gen. Assemb. (Mar. 10, 2021), available at https://tnga.granicus.com/MediaPlayer.php?view_id=610&clip_id=24150. Representative Rudd further stated that with “new [laws] . . . giving transgenders [sic] [more] rights . . . I don’t want women . . . or children calling me next year [about] how they have been raped or molested [while using the bathroom facility].” *Id.* at 31:49. During a later hearing, Representative Rudd stated that the bill was suggested by a constituent at a fundraiser, and that the bill was necessary to respond to executive orders regarding rights for transgender people “coming out of Washington.” *Debate of H.B. 1182 Before the H. State Gov’t Comm.* at 1:14:40, 112th Assemb. (Mar. 23, 2021), available at http://tnga.granicus.com/MediaPlayer.phpview_id=610&clip_id=24337 &meta_id=575940.

The Compelled Sign Law was enacted amid a flurry of hostile legislation targeting transgender people during the 2021 Tennessee legislative session. Including the Compelled Sign Law, Governor Lee signed a total of five bills into law that specifically single out transgender Tennesseans for various forms of discrimination. No other state has enacted so many bills targeting transgender people in a single legislative session.

Other legislation targeting transgender people adopted in 2021 includes laws: (1) banning gender-affirming healthcare for transgender youth, *see* 2021 Tenn. Pub. Act ch. 460 (signed into law on May 18, 2021, to be codified in Tennessee Code Annotated, Title 63, Chapter 1, Part 1); (2) prohibiting transgender students from competing in sex-specific school sports based on their gender identity, *see* 2021 Tenn. Pub. Act ch. 40 (signed into law on March 26, 2021, to be codified in Tennessee Code Annotated, Title 49, Chapter 6, Part 3); (3) authorizing lawsuits against public schools that permit transgender students to use restrooms based on their gender identity, *see* 2021 Tenn. Pub. Act ch. 452 (signed into law on May 14, 2021, to be codified in Tennessee Code

Annotated, Title 49, Chapter 2); and (4) requiring school districts to notify parents of any instruction on sexual orientation or gender identity and allow them to opt their children out of such instruction, *see* 2021 Tenn. Pub. Act ch. 281 (signed into law on May 3, 2021, to be codified in Tennessee Code Annotated, Title 49, Chapter 6, Part 13).

The legislative history of the Compelled Sign Law further demonstrates that, in addition to singling out transgender people for adverse treatment, the Law was not enacted to address any real problem or actual public need. During the House floor debates on HB 1182, Representative Mike Stewart asked Representative Rudd, “Has anybody come to you with the need for this bill? What’s the public policy underlying the bill?” Discussion of H.B. 1182 Before H. Floor Sess., 18th Legis. Day at 1:49:30, 112th Gen. Assemb. (Mar. 29, 2021), available at http://tnga.granicus.com/MediaPlayer.php?view_id=610&clip_id=24423&meta_id=579987. Representative Rudd replied, “No one has come to me except I was at a . . . two years ago, I was at an event in Murfreesboro, for a . . . I think it’s crisis pregnancy, and an individual come up to me and suggested this. I didn’t run it at the time, and now with everything going on with executive orders and policies, I think it’s good for everyone involved at least to put some notice . . .” *Id.*

Representative Stewart asked whether any other states have adopted similar legislation. Representative Rudd stated: “I don’t know. I didn’t base it on any other states. I based it on a need here.” *Id.* at 1:50:30. Representative Stewart continued: “Do you know of any other state, locality, city, village, town, any entity, anywhere in the world, that’s passed such a, that’s seen the need for such a bill, and passed it?” *Id.* at 1:50:40. Representative Rudd stated: “No, I did not research that. I only saw a need for it to be here, to protect, that firmly protects both sexes. It’s very shocking and can endanger people if they walk into a restroom that’s marked men or women and the opposite sex is standing there. It could scare them. It could provoke violence. This way it at least lets people

know that they're using a facility for both sexes, that it protects them just not to be surprised by this. At least it makes a minimal effort to let people know." *Id.* at 1:50:52.

Representative Stewart then stated: "I just want to be sure you have every opportunity to provide a rational basis for this bill that no other entity or government anywhere in the world seems to have seen the need for. Is there any other rational basis you'd like to articulate as long as we're on the floor?" *Id.* at 1:51:22. Representative Rudd stated: "Tennessee's always on the cutting edge of protecting its citizens, and I see this as the cutting edge for this particular subject." *Id.*

B. The Impact Of The Compelled Sign Law On Curb Records And The Mike Curb Foundation

Grammy award-winning record producer Mike Curb started his career almost six decades ago in California and founded Curb Records, which has operated for almost three decades in Nashville, Tennessee, and is one of the most successful independently-owned record labels in the world. Curb Records has launched the careers of numerous stars. Mike Curb's companies have achieved more than 300 No. 1 records and Curb Records has been honored by Billboard magazine as Country Music Label of the Year. (Curb Dec. ¶ 2.)

Both Curb Records and the Foundation have as core values anti-discrimination and respect for equality. Both entities seek to promote inclusion for all. This includes equal treatment of transgender persons, whether they are employees, customers, or visitors. (Curb Dec. ¶¶ 8-9)

Curb Records and the Foundation, directly or through other controlled entities, own and/or have operations in multiple office buildings, recording studios, and historic properties in Nashville. Many properties owned or operated by Curb Records and the Foundation maintain separate men's and women's restrooms that are open to both employees and visitors. Members of the public regularly visit Curb Records and Foundation properties. Some of the historic properties owned by Foundation entities offer tours to visitors. (Curb Dec. ¶ 14.)

Both Curb Records and the Foundation permit individuals to use sex-separated shared restrooms in accordance with their gender identity. Like other men, transgender men are permitted to use men’s restrooms, and like other women, transgender women may use women’s restrooms. (Curb Dec. ¶ .) Neither entity asks employees or visitors about their “biological sex” or whether they are transgender before they use public restrooms—nor could they. *Id.* Neither entity is aware of any complaints, problems, or disruptions arising from their permitting individuals to use sex-separated shared restrooms in accordance with their gender identity. (Curb Dec. ¶ 15.)

The Compelled Sign Law forces Plaintiffs to post a stigmatizing and discriminatory notice on any shared sex-separated restrooms that could be used by employees, customers, or visitors. By requiring entities that allow transgender women to use women’s restrooms and transgender men to use men’s restrooms to post a public warning, it stigmatizes transgender persons and encourages members of the public to view transgender identity as fraudulent or unreal. The required language, stating that the facility “maintains a policy of allowing the use of restrooms by either biological sex, regardless of the designation on the restroom,” falsely conveys that permitting transgender people to use the restroom based on their gender identity is equivalent to permitting a man to use the women’s restroom and a woman to use the men’s restroom. In other words, the warning sign conveys that allowing transgender people to use restrooms in a nondiscriminatory manner authorizes either men or women to use either restroom, even though the restrooms are designated as men or women only. In effect, the Law brands transgender people as imposters who seek to pass themselves off as the other sex and whose mere presence in restrooms requires a mandatory warning to ensure that others are not endangered or deceived. *See Fair and Just Prosecution, Joint Statement from Elected Prosecutors and Law Enforcement Leaders Condemning the Criminalization of Transgender People and Gender-Affirming*

Healthcare (June 2021) (a copy of which is attached as part of the Appendix) at 2) (explaining that “[t]he goal” of state laws that seek to exclude transgender people from public restrooms is to “to reinforce stigmatizing falsehoods that trans people pose a public safety threat and to prevent trans people from freely living, working, and traveling in these communities.”).

By promulgating this negative view of transgender people, the Compelled Sign Law encourages discrimination against transgender persons and deprives them of full and equal access to employment and educational opportunities and places open to the public. The Compelled Sign Law contributes to hostility toward transgender people in public places including workplaces in Tennessee that maintain nondiscriminatory access to restrooms. It embodies the position of the State of Tennessee that transgender people should be feared, rejected, and treated with hostility, and that businesses, schools and universities, government agencies, and other institutions should be punished for treating transgender employees, students, customers, and visitors in a fair and nondiscriminatory manner.

Curb Records and the Foundation do not wish to convey the damaging and intolerant message prescribed by the mandated signs to their employees, customers, visitors, or to the public at large, and they do not wish for their facilities to be commandeered by the State to spread that message. (Curb Dec. ¶¶ 16-17.) The Compelled Sign Law also interferes with Plaintiffs’ business interests and the goodwill they have established, and risks driving away customers and visitors that Plaintiffs want to attract by forcing Plaintiffs to convey a message that conflicts with Plaintiffs’ corporate values of inclusion, equality, and respect for all people. (Curb Dec. ¶ 13).

III. ARGUMENT

A. Legal Standard

Plaintiffs seek a preliminary injunction to prevent the enforcement of the Compelled Sign

Law under two independent constitutional grounds. The standard for issuing a preliminary injunction requires this Court to balance four factors: “(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.” *Am. C.L. Union Fund of Mich. v. Livingston Cnty.*, 796 F.3d 636, 642 (6th Cir. 2015) (internal quotation marks and citation omitted).

B. Plaintiffs Are Likely To Succeed On the Merits Of Their Claims

1. The Compelled Sign Law Violates Settled First Amendment Law

"Under the compelled-speech doctrine, the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees." *New Doe Child 1 v. Congress of United States*, 891 F.3d 578, 593 (6th Cir. 2018) (internal citations and quotation marks omitted). The Compelled Sign Law requires Plaintiffs and other affected businesses to convey a specific, highly contested viewpoint about transgender people. Under settled First Amendment law, that requirement may be upheld only if it is narrowly tailored to further a compelling governmental interest. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (explaining that viewpoint discrimination is an “egregious form of content discrimination” and is “presumptively unconstitutional”). Because the State cannot meet that test here, the Law is invalid and should be enjoined.

a. The Compelled Sign Law Is A Content- And Viewpoint-Based Restriction On Speech

The Compelled Sign Law violates one of the most fundamental principles of First Amendment law: the government may not “compel[] individuals to speak a particular message.” *Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2371 (2018); *see also*

Wooley v. Maynard, 430 U.S. 705, 713 (1977) (holding that the government may not force an individual “to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public”). Like the state laws struck down in *NIFLA* and *Wooley*, the Compelled Sign Law unconstitutionally forces Plaintiffs and other business owners to speak an ideological message.

In *NIFLA*, a California law required crisis pregnancy centers, which sought to dissuade women from obtaining abortions, to post notices about the availability of abortion services. The *NIFLA* Court held that this requirement compelled the centers to “alter the content of their speech”—in particular, to express a pro-abortion message that directly contradicted the anti-abortion message they wished to send. *Id.* at 2371 (cleaned up and citation omitted). As the Court explained, under longstanding precedent, laws that restrict speech based on its content “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). Because the California law could not meet that stringent test, it was invalid. *See id.* at 2375-76.

NIFLA is controlling here. Like the requirement that pregnancy centers seeking to deter abortions must post information about how to obtain abortions, the Compelled Sign Law requires Plaintiffs to post a “government-drafted script” that “alters the content” of Plaintiffs’ speech—in this case, from a pro-transgender message to an anti-transgender message. *Id.* at 2371. Plaintiffs wish to send a message of inclusion and equality for all employees and customers, including those who are transgender. Curb Dec. at ¶¶ 9, 16. Instead, the Compelled Sign Law requires them to send a message that is offensive and demeaning to transgender people, that misrepresents Plaintiffs’ core values, and that falsely stigmatizes transgender people as a threat to others.

The notice required by the Compelled Sign Law tendentiously portrays transgender people—and businesses that provide transgender people with equal access to restrooms—in a negative light. Plaintiffs want transgender people to be treated equally, including being permitted to use the restrooms that correspond to their gender identity, just as other employees and customers are permitted to do. Curb Dec. at ¶¶ 9, 16. Transgender women may use the women’s restroom, just as other women do, and transgender men may use the men’s restroom, just as other men do. *Id.* The touchstones are respect for a transgender person’s identity and equal treatment for all. *Id.*

Virtually every federal court to consider the issue has held that permitting transgender individuals to use restrooms that correspond to their gender identity is an essential aspect of treating transgender people equally and does not eliminate or undermine the existence of sex-segregated facilities. *See, e.g. Whitaker by Whitaker v. Kenosha Unified School Dist. No. 1 Bd. of Education*, 858 F.3d 1034, 1055 (7th Cir. 2017) (“allowing transgender students to use facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls”); *Adams by and through Kasper v. School Board of St. Johns County*, 968 F.3d 1286, 1303 (11th Cir. 2020) (rejecting argument that allowing a transgender boy “access to the boys’ restroom threatens the time-honored convention of separate bathrooms for men and women”); *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020) (“Grimm does not challenge sex-separated restrooms; he challenges the Board’s discriminatory exclusion of himself from the sex-separated restroom matching his gender identity”), *cert denied.*, No. 20-1163, 2021 WL 2637992 (June 28, 2021).

In contrast, the sign required by the Compelled Sign Law sends the inaccurate message that permitting transgender people to use facilities based on their gender identity is tantamount to abolishing separate facilities for men and woman. Simply put, the Law forces Plaintiffs to

communicate that the presence of a transgender woman in a women's restroom means that the restroom is no longer a women's restroom and no longer private or safe, and vice-versa for transgender men. These contentions are highly ideological and deeply offensive to Plaintiffs and many other business owners, as well as to many employees and customers in this State.

As the Supreme Court has repeatedly held, the government violates the First Amendment when it requires private speakers to convey the government's own preferred political messages, as the Compelled Sign Law does here. The Supreme Court has explained that while laws that silence speech are harmful to our democracy and to the search for truth, "[w]hen speech is compelled, . . . additional damage is done. In that situation, individuals are coerced into betraying their convictions." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 31*, 138 S. Ct. 2448, 2464 (2018). That damage is even more egregious when a law does not simply mandate speech on a particular topic, but requires the speaker to convey a particular viewpoint as well. Viewpoint-based laws that *compel* speech are particularly disfavored because they force individuals to "be an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Wooley*, 430 U.S. at 715. Such a law is "the most aggressive form of viewpoint discrimination" because it "compel[s] an individual to utter what is not in [his] mind and indeed what [he] might find deeply offensive." *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (internal citations and quotation marks omitted).

The Compelled Sign Law runs squarely afoul of this well-settled law. The Compelled Sign Law forces Plaintiffs to be an instrument for conveying an ideological viewpoint—that the mere presence of transgender people in shared restrooms poses a threat to others that is offensive to Plaintiffs' deeply held beliefs about equality and dignity. Curb Dec. at ¶¶ 16-17. It forces Plaintiffs to endorse what they believe to be a harmful and invidious viewpoint regarding a vulnerable

minority group and to associate Plaintiffs' businesses with a message that is the exact opposite of the image and values Plaintiffs wish to convey. *Id.*

Plaintiffs are forced to speak the State's discriminatory message regardless of whether they post the prescribed notices or decline to do so. Under the Law, entities that discriminate against transgender people with respect to restroom access are not required to post the prescribed signage. For this reason, the Law places Curb Records and the Foundation in a dilemma with no solution: If they post the required notices, they will be directly spreading the State's stigmatizing message. If, on the other hand, they do not post the notices, transgender persons and others who are aware of the Compelled Sign Law may inaccurately believe that Curb Records and the Foundation discriminate against transgender people by forbidding them access to restrooms based on their gender identity. The very existence of the Compelled Sign Law forces Plaintiffs to spread the State's message that transgender persons are inferior and should not be permitted to use and enjoy shared public spaces on equal terms with other people.

b. The Compelled Sign Law Requires, And Fails, Strict Scrutiny

As a content- and viewpoint-based restriction on speech, the Compelled Sign Law requires, and cannot survive, strict scrutiny. *See NIFLA*, 138 S.Ct. at 2371. To meet that demanding test, the burden rests entirely on Defendants to demonstrate that the Law's restriction on speech is narrowly tailored to serve a compelling governmental interest. *See id.* Defendants cannot meet this test. The Law itself contains no explanation of its purpose, and the bill's sponsors in the Legislature referred only to an alleged need to "push back" against federal civil rights protections for transgender people and to protect public safety.

Neither of those asserted justifications passes muster. Opposition to federal law protections for transgender people is not a legitimate, much less compelling, governmental interest. To the

contrary, as explained below, Plaintiff Curb Record's inability both to comply with Title VII of the Federal Civil Rights Act, which prohibits discrimination against any transgender employees, and the Compelled Sign Law, which mandates such discrimination, is an additional reason to enjoin the Law. Similarly, while protecting public safety is a weighty interest, the Legislature had no evidence of any connection between permitting transgender people to use restrooms consistent with their gender identity and any risk to public safety, nor does any such evidence exist. Thus, with respect to that interest, the State cannot show any rational connection between the Law and public safety at all, much less the required narrow tailoring.

c. The Compelled Sign Law Fails Even The Relaxed *Zauderer* Test

Defendants cannot save the Compelled Sign Law by claiming that the Law falls within the safe harbor for laws that simply require posting of “purely factual and uncontroversial information.” *Zauderer v. Office of Disciplinary Counsel of the S. Ct. of Ohio*, 471 U.S. 626, 651 (1985); *see also Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 525-26 (6th Cir. 2012) (distinguishing between laws that require the disclosure of “factual information” about the dangers of cigarettes not “in dispute within the scientific or medical community” and those that require “subjective” and “highly controversial” warnings). There is simply no credible claim that the government-scripted message required by the Compelled Sign Law conveys “purely factual and uncontroversial information.” To the contrary, it falsely equates permitting transgender individuals to use facilities based on their gender identity with the abolition of sex-separated facilities. As many federal courts have recognized, such a policy does no such thing. *See, e.g., Whitaker*, 858 F.3d at 1055; *Adams*, 968 F.3d at 1303; *Grimm*, 972 F.3d at 618. At a minimum, such a contention is not “uncontroversial.”

In addition, the very premise that a public warning is required simply because transgender persons may use the same restrooms as others is both “subjective” and “highly controversial.” As the legislators who promoted the Compelled Sign Law admitted, there is no evidence that permitting transgender people to use restrooms congruent with their gender identity poses any risk to public health or safety. Curb Records and the Foundation are not aware of any complaints, problems, or disruptions arising from their permitting individuals to use sex-separated shared restrooms in accordance with their gender identity. (Curb Dec. ¶ 15.) In sum, there is no evidence or support for the proposition that the Compelled Sign Law was enacted in response to any actual problem.

Even assuming the more relaxed test in *Zauderer* applied, the Compelled Sign Law would fail it. Under *Zauderer*, a disclosure requirement must still “remedy a harm that is potentially real not purely hypothetical,” and the state “has the burden to prove that the unlicensed notice is neither unjustified nor unduly burdensome.” *NIFLA*, 138 S. Ct. at 2377 (internal citations and quotation marks omitted). In *NIFLA*, the Supreme Court held that a second provision of the challenged law, requiring certain facilities to post notices stating that they were unlicensed, failed even under *Zauderer* because “California has not demonstrated any justification for the unlicensed notice that is more than purely hypothetical.” *Id* at 2378 (internal citations and quotation marks omitted).

The same conclusion applies here. Defendants have not demonstrated any justification for the Compelled Sign Law other than “purely hypothetical” concerns that rest on fears and misinformation. There is not a shred of evidence, nor did the Legislature even purport to consider any, that transgender people pose any threat to public safety, or that the Law was responding to any other real problem or concern. Nonetheless, the Law requires that Plaintiffs and others must

post highly visible and inflammatory “warnings” to alert the public to the possible presence of transgender persons. Even under *Zauderer*, such a law is both unjustified and unduly burdensome.

2. The Compelled Sign Law Conflicts With And Is Therefore Preempted By Federal Law

Plaintiff Curb Records also challenges the Compelled Sign Law on the ground that it is preempted by federal law. Curb Records is likely to prevail on that claim.¹

a. The Compelled Sign Law Conflicts With Title VII

The Compelled Sign Law is preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Under the Supremacy Clause of the United States Constitution, when a federal law and a state law conflict, the state law is preempted. U.S. Const. art. VI, cl. 2. Federal courts have jurisdiction ““over suits to enjoin state officials from interfering with federal rights’ by enforcing state laws that are preempted by federal law.” *Chase Bank USA, N.A. v. City of Cleveland*, 695 F.3d 548, 554 (6th Cir. 2012) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14 (1983)). “The federal law with purported preemptive effect need not expressly provide a cause of action against preempted state law; the cause of action is implied under the Supremacy Clause.” *Id.*

The Compelled Sign Law requires employers such as Curb Records to post the required signage on shared public restrooms, including those accessible to employees, if the employer permits transgender men to use men’s restrooms and transgender women to use women’s restrooms. Because the prescribed signs must state that such restrooms are accessible by “either biological sex,” the Law requires employers to constantly subject their employees to the

¹ Curb Records has more than met the minimum employee requirements for each working day in each of twenty or more calendar weeks in the current and preceding calendar year necessary to be subject to Title VII. *See* Curb Dec. at ¶ 18.

discriminatory message that transgender men are not men and transgender women are not women and that their mere presence in shared restrooms poses a potential threat to the privacy and safety of other workers. Title VII prohibits employers from discriminating on the basis of sex, including by discriminating against transgender employees. *See Bostock*, 140 S. Ct. at 1741. The Compelled Sign Law’s requirement that employers subject their transgender employees to such discriminatory treatment directly conflicts with Title VII’s prohibition on sex discrimination “with respect to . . . compensation, terms, conditions, or privileges of employment.” 42 U.S.C. § 2000e-2(a)(1). Tennessee’s Compelled Sign Law is therefore preempted by federal law.

b. The Compelled Sign Law Requires Employers To Discriminate Based On Sex In Violation of Title VII

In *Bostock v. Clayton County*, the Supreme Court held that “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.” *Bostock*, 140 S. Ct. at 1741. An employer who fires a transgender woman (a person identified as male at birth but whose gender identity is female) but “retains an otherwise identical employee who was identified as female at birth . . . intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. . . . [T]he individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.” *Id.* at 1741-42. *Bostock* affirmed the Sixth Circuit’s earlier decision that Title VII protects transgender employees. *See Equal Emp. Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018), *aff’d sub nom. Bostock v. Clayton Cnty.* 140 S. Ct. 1731 (2020) (“Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex . . .”).

It is also well-established that when an employer provides employees with facilities such as restrooms, the employer must provide those facilities under substantially equivalent conditions,

without discrimination based on sex. Failure to do so violates Title VII when it constitutes a “materially adverse change in the terms and conditions of . . . employment.” *Stuart v. Metro. Gov't of Nashville & Davidson Cnty.*, 679 F. Supp. 2d 851, 857–59 (M.D. Tenn. 2009), *vacated* (Apr. 20, 2010) (holding that a reasonable jury could find that “policy guaranteed the plaintiff’s similarly-situated male peers a level of privacy and comfort [in accessing restroom, locker, and shower facilities] that the plaintiff could not expect”). *See also Wedow v. City of Kansas City*, 442 F.3d 661, 671–72 (8th Cir. 2006) (recognizing that “providing substantially inferior [restroom and shower] facilities” for women can violate Title VII”); *Lynch v. Freeman*, 817 F.2d 380, 388 (6th Cir. 1987) (same).

An employer discriminates based on sex in violation of Title VII when it forbids transgender men from using men’s restrooms that are available to other male employees or transgender women from using women’s restrooms that are available to other female employees. *See, e.g., Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016). As several circuits have held in the related context of Title IX, denying individuals full and equal access to restrooms based on their gender identity, or requiring transgender persons to use single-user unisex restrooms when others are not required to do so, discriminates on the basis of sex.² *See, e.g., Whitaker*, 858 F.3d at 1049-50; *Adams*, 968 F.3d at 1304; *Grimm*, 972 F.3d at 619.

The Equal Employment Opportunity Commission has also addressed this issue, explaining that “employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee’s gender identity. In other words, if an employer has separate

² Federal courts interpret Title VII and Title IX consistently with one another. *Nelson v. Christian Bros. Univ.*, 226 Fed.Appx. 448, 454 (6th Cir. 2007) (“Generally, courts have looked to Title VII . . . as an analog for the legal standards in both Title IX discrimination and retaliation claims.”); *see also Fuhr v. Hazel Park Sch. Dist.*, 710 F.3d 668, 673 n. 2 (6th Cir. 2013).

bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities." U.S. Equal Emp. Opportunity Comm'n, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* (June 15, 2021), available at <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>. See also *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (concluding in an EEOC decision involving a federal employee that Title VII is violated where an employer denies an employee equal access to a common restroom corresponding to the employee's gender identity).

Just as employers may not bar transgender workers entirely from using restrooms based on their gender identity, employers also may not require transgender workers to access those restrooms under discriminatory circumstances that constitute a materially adverse change in the terms and conditions of employment. The Compelled Sign Law does just that. It requires employers, which otherwise comply with Title VII by providing equal access to restrooms for transgender employees, to post a discriminatory and stigmatizing notice which falsely conveys that the mere presence of transgender individuals in shared restrooms poses a potential threat to others and requires a highly visible "warning" that must be posted outside every shared restroom. Conditioning transgender employees' access to restrooms on viewing such discriminatory messages materially and adversely affects their employment conditions and increases the risk that they will be subjected to harassment, intimidation, or even violence in the workplace. See *Fair and Just Prosecution*, *supra*, at 2) ("These bills have no legitimate public safety justification and will only increase harassment and violence against trans people forced to use facilities that do not align with their gender identity.").

Compliance with the Compelled Sign Law not only forces employers to directly subject workers to disparate treatment in violation of Title VII, it also subjects employers to liability for creating a hostile work environment based on sex. *See, e.g., Kline v. City of Kansas City, Mo., Fire Dep't*, 175 F.3d 660, 668 (8th Cir.1999) (holding, with respect to hostile environment claim, that it was error to exclude evidence of unequal bathroom facilities provided to female fire department employees). The Compelled Sign Law mandates employers to subject transgender workers to discriminatory messages that are “sufficiently severe or pervasive” that they alter the conditions of employment and “create an abusive working environment.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citation and internal quotation marks omitted).

The Compelled Sign Law requires employers to expose transgender workers to the State’s required discriminatory message on a daily basis. Every time they need to use the restroom, transgender employees are told that the State of Tennessee and their employer believe that their mere presence in a shared restroom requires a public warning. By forcing employers to participate in this daily mistreatment of their transgender employees, Tennessee compels them to create an objectively hostile work environment.

c. The Compelled Sign Law Directly Conflicts with Title VII and Therefore is Preempted

Federal laws are “the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. For this reason, “state law that conflicts with federal law is ‘without effect.’” *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

Title VII expressly sets forth the circumstances under which its requirements preempt contrary state law: “Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State

or political subdivision of a State, *other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.*” 42 U.S.C. § 2000e-7 (emphasis added). Thus, Title VII preempts state laws that are “inconsistent with the purposes of the federal statute” or “require the doing of an act which is unlawful under Title VII.” *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 292 (1987).

The Compelled Sign Law conflicts with Title VII in both ways. First, as shown above, it requires employers to perform an act that is unlawful under Title VII. The only way an employer may avoid posting the required notice is to deny transgender employees access to shared restrooms based on their gender identity, which violates Title VII. On the other hand, if the employer permits transgender workers to use restrooms based on gender identity, the Compelled Sign Law requires posting a discriminatory notice that materially and adversely alters the conditions of employment in violation of Title VII. No matter what the employer does, complying with the Compelled Sign Law requires it to violate Title VII.

Second, the Compelled Sign Law is fundamentally inconsistent with the purposes of Title VII. “In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment” *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). Because the Compelled Sign Law requires employers to discriminate in a manner that Title VII prohibits, it is preempted by federal law and may not be enforced.

C. Plaintiffs Will Suffer Irreparable Injury Absent the Requested Injunction

Plaintiffs seek a preliminary injunction to avoid the irreparable injury they will suffer if the Law goes into effect or is enforced against them. These injuries include losses to their business interests and the constitutional injury they will be made to suffer by choosing between facing

criminal penalties or speaking a message with which they disagree.

The Compelled Sign Law adversely affects the Plaintiffs' business interests by driving away customers and visitors that Plaintiffs wish to attract. Plaintiffs communicate specific corporate values—including a commitment to equality, inclusion, and respect for all people—to potential customers and visitors. Plaintiffs have established goodwill with their customers and visitors by affirming those corporate values in word and deed, including through corporate practices that affirm the dignity of transgender persons. By compelling Plaintiffs to post signs that contradict those values, Defendants will irreparably injure Plaintiffs by eroding that goodwill. The Sixth Circuit has recognized that loss of customer goodwill constitutes irreparable harm. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992) (“The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute.” (quoted in *Tri-County Wholesale Distributors, Inc. v. Wine Group, Inc.*, 565 Fed. Appx. 477, 483 (6th Cir. 2012); *Langley v. Prudential Mortg. Capital Co., LLC*, 554 F.3d 647, 649 (6th Cir. 2009))).

The Compelled Sign Law also forces Plaintiffs to choose between suffering criminal penalties or speaking a message with which they disagree, thereby creating a constitutional injury. If Plaintiffs do not comply with the terms of the Law by posting the discriminatory signage, they risk imprisonment, fines, or both. The Law is to be codified in Tennessee Code Annotated, Title 68, Chapter 120, Part 1. *See* 2021 Tenn. Pub. Acts. ch. 453. A violation of Chapter 120 constitutes a Class B misdemeanor. Tenn. Code. Ann. § 68-120-108. The authorized terms of punishment for Class B misdemeanors in Tennessee are imprisonment for a term not greater than six months, a fine not to exceed five hundred dollars, or both. Tenn. Code. Ann. § 40-35-111(e)(2). By forcing Plaintiffs to choose between suffering these penalties or communicating a message that is odious

to their values, the Law violates Plaintiffs' First Amendment rights. Such a violation constitutes an irreparable, constitutional injury.

"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) (quoted in *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)). The Sixth Circuit has made clear that "if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Am. C.L. Union of Ky. v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003). The Law would violate Plaintiffs' First Amendment right to free speech and therefore constitutes an irreparable injury.

D. The Injunction Will Not Cause Substantial Harm to Defendants or the Public

The balance of equities weighs heavily in favor of Plaintiffs. As described in the preceding section, Plaintiffs stand to suffer irreparable business and constitutional injuries absent an injunction. By contrast, Defendants will suffer no injury from an injunction. An injunction will merely maintain the status quo. The State has no compelling interest in enforcing the Compelled Sign Law by requiring anyone, including Plaintiffs, to post misleading and discriminatory notices on the public restrooms of businesses. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886) (quoted in *Lemon v. Kurtzman*, 411 U.S. 192, 198 (1973); *Rosborough Mfg. Co. v. Trimble*, 301 F.3d 482, 491 (6th Cir. 2002)). An injunction will not harm the public or its interests either. As set forth above, Defendants have no legitimate interest in preventing transgender individuals from using a public restroom that accords with their gender identity or in requiring a warning to others when they do.

E. The Injunction Will Serve the Public Interest by Avoiding Unconstitutional Injury to Transgender People and Avoiding Public Confusion

An injunction here will serve the public interest. By granting an injunction, the court will prevent irreparable harm to Plaintiffs' businesses and protect transgender people from discrimination. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (finding that preventing employment discrimination vindicates the public interest); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1359 (6th Cir. 1975) ("[T]he eradication of discrimination by race and sex promotes public interests and transcends private interests."); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (quoting *Connection Distrib. Co.*, 154 F.3d at 288)). *See also Midwest Retailer Associated, Ltd. v. City of Toledo*, 563 F. Supp. 2d 796, 812 (N.D. Ohio 2008) (temporary restraining order serves the public interest where the ordinance would irreparably harm specific businesses). The Law also sows public confusion and perpetuates misinformation about Plaintiffs' businesses and about transgender persons, which is against the public interest. Plaintiffs have invested in their reputation as inclusive and open to all. *See Aero-Motive Co. v. U.S. Aeromotive, Inc.*, 922 F. Supp. 29, 47 (W.D. Mich. 1996) (preventing consumer confusion and protecting plaintiff's investment in promoting its name and reputation is in the public interest); *see also ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 916, 937 (6th Cir. 2003) (recognizing a public interest in avoiding confusion).

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully ask the Court to issue an order preliminarily enjoining Defendants from enforcing the Compelled Sign Law.

Respectfully submitted,

/s/ William L. Harbison

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CERTIFICATE OF SERVICE

A copy of the foregoing will be served along with the Summons and Complaint.

/s/ William L. Harbison