IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

HAMILTON COUNTY, TENNESSEE, by and through LARRY L. HENRY, as CHAIRMAN of the HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS, *Plaintiff*, *v.* HOPE ALEXANDER, PATRICIA BAZEMORE, HEIDI DAVIS, JOY DAY, FRANK EATON, HOWARD HAYES, LANDON HOWARD, SAM MCKINNEY, SHANE PINSON, OCCUPY CHATTANOOGA, JOHN DOES and MARY DOES, *Defendants*.	**Case 1:12-CV-00008** **Hon. Curtis L. Collier** **Oral Argument Requested**

DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendants Hope Alexander, Patricia Bazemore, Heidi Davis, Joy Day, Frank Eaton, Howard Hayes, Landon Howard, Sam McKinney, Shane Pinson, and Occupy Chattanooga hereby move to dismiss this action for lack of subject-matter jurisdiction.

As elaborated more fully in Defendants' Memorandum of Law, Defendants contend that, under *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this action does not present a case or controversy sufficient to invoke the jurisdiction of the federal courts.

Dated: January 30, 2012

Respectfully Submitted,

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Plaintiff,

v.

HOPE ALEXANDER, PATRICIA BAZEMORE, HEIDI DAVIS, JOY DAY, FRANK EATON, HOWARD HAYES, LANDON HOWARD, SAM MCKINNEY, SHANE PINSON, OCCUPY CHATTANOOGA, JOHN DOES and MARY DOES,

Defendants.

Case 1:12-CV-00008
Hon. Curtis L. Collier

DEFENDANTS' MOTION FOR ORAL ARGUMENT ON MOTION TO DISMISS

Pursuant to the Court's stated preference regarding oral argument, Defendants hereby move for oral argument on their motion to dismiss. Defendants believe that oral argument would be helpful to this Court because of the weighty question of federal jurisdiction implicated.

Dated: January 30, 2012

Respectfully Submitted,

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

INTRODUCTION

Occupy Chattanooga is part of a nationwide and international movement of demonstrations aimed at calling attention to income inequality and irresponsible actions on the part of wealthy corporate actors. The movement espouses nonviolence and thus far the few dozen individuals who have gathered in Chattanooga to express their views as part of the Occupy movement have been able to do so without incident.

The Hamilton County Commission wishes to restrict the activities of the demonstrators and accordingly enacted an ordinance that imposes various restrictions on public demonstrations. The County then instituted this action against several alleged members of Occupy Chattanooga, Occupy Chattanooga itself, and unnamed "Doe" defendants. The lawsuit seeks both a declaratory

judgment that the County's new ordinance is valid and an order that Defendants pay the County's costs and attorneys' fees for this case.

This tactic is an inappropriate use of the federal courts. Since the Supreme Court's decision in *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983), it has been black-letter law that federal courts lack jurisdiction over a state or local government's suit for a declaration of the validity of its own law. Such a suit fails to present a genuine case or controversy. Moreover, permitting such suits would authorize local governments to drag their political opponents into court to seek advisory opinions, rather than waiting for concrete disputes to develop. In addition to exceeding the federal courts' constitutionally circumscribed jurisdiction, lawsuits of this type would needlessly burden the resources of the courts, would fail to ensure the concrete adverseness between parties that is necessary for effective adjudication and vigorous support of the competing positions, and would force uninterested third parties to pay for a government's exercise in verifying the validity of its own laws.

When and if a concrete dispute arises, there will be ample opportunity to test the validity of the County's new ordinance. Until then, advising a local government as to the validity of its laws is the job of the government's own legal advisors, not the federal courts. This Court should therefore dismiss this case for lack of jurisdiction.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On September 17, 2011, the protest movement Occupy Wall Street began in New York City; the loosely-organized movement opposes the excesses and excessive influence of corporations in society. *See* Ishaan Tharoor, *Occupy Wall Street Protests Spread*, Time, Dec. 7, 2011. Since its inception in September, the Occupy movement has spread to hundreds of cities

around the world including cities throughout Europe, Africa, Asia, and North America. *See* Karla Adam, *Occupy Wall Street Protests Continue Worldwide*, Wash. Post., Oct. 16, 2011.

Here in Chattanooga, a few dozen demonstrators coalesced in the fall of 2011 as Occupy Chattanooga, which espouses goals and nonviolent tactics similar to those of Occupy Wall Street. *See* Facebook Profile, Occupy Chattanooga, *at* http://www.facebook.com/OccupyCHA#!/OccupyCHA?sk=info. Some of the Occupy Chattanooga demonstrators have camped out overnight on the lawn of the Hamilton County courthouse. *See* John Pless, *Occupy Chattanooga Movement Pitches Courthouse Tents*, News Channel 9, Nov. 9, 2011, *available at* http://www.newschannel9.com/articles/courthouse-1006410-occupy-people.html.

On January 4, 2012, the Hamilton County Commission enacted "A Resolution Setting and Establishing Rules and Regulations for Use of Hamilton County Owned Grounds and Facilities by the General Public," Ordinance No. 112-13, Cmpt. Ex. A, which placed new restrictions on the activities of demonstrators like those of Occupy Chattanooga. Among its provisions, the Ordinance requires "activities" at County courthouses, justice buildings or other County properties to be approved by the County seven days in advance. *Id*. at 1. The Ordinance prohibits "tables, chairs, grills, open fires, or other apparatus" at such activities (with exceptions for elderly and disabled participants) and requires signs advertising any activities to be posted "in an approved manner" and in approved locations. *Id*. at 2. The Ordinance also prohibits activities that disrupt the business of courts or offices in the court buildings. *Id*. at 2. And it prohibits "tents or other temporary housing structures . . . to accommodate overnight sleeping," except on County campsites. *Id*. at 2.

Less than a week after the Ordinance was enacted, the County sued the unincorporated association Occupy Chattanooga, along with unnamed "Does" and nine named individuals whom

the County alleges "on information and belief" to have "occupied, used, or maintained a campsite" at the County Courthouse "since on or before November 9, 2011." Cmpt. ¶¶ 9-17; *see also id*. ¶ 27. The complaint ascribes various legal positions to Defendants, and avers that they failed to secure approval for their demonstrations beginning November 9, 2011, even though the Ordinance requiring pre-approval was not enacted until January 4, 2012. *Id*. ¶¶ 25, 28-30.

The lawsuit's express goal is to obtain a federal declaratory judgment that the Ordinance is constitutional—in the words of the Complaint, to obtain a declaration "(a) that the [Ordinance] may be applied consistent with constitutional protections under the federal and state constitutions" and "(b) that those present on the Courthouse lawn are not entitled to camp on the Courthouse lawn overnight, erect or maintain monuments or markers without approval, maintain open burnings, or damage or deface government property." Cmpt ¶ 2. The Complaint's request for relief spells out a longer and more detailed series of declarations that the County seeks; the gravamen of this list is that the County asks for a judgment that it "may lawfully enforce" its Ordinance. *Id*. ¶ 46(a) & (f); *accord, id.* ¶ 46(b) (seeking declaration that County "may lawfully remove tents" in accordance with the Ordinance); *id*. ¶ 46(c)-(e) (seeking declaration that County "may lawfully prohibit" certain activities in accordance with the Ordinance). In short, the County asks this Court to declare the validity of its Ordinance. Additionally, the County seeks to recover both its costs and attorneys' fees from the Defendants. *Id*. at 13.

ARGUMENT

Federal Courts Lack Jurisdiction Over Suits Like This One Seeking To Have A State Or Local Law Declared Valid.

Jurisdiction is a threshold question in every federal case, including lawsuits seeking declaratory judgments. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *Fieger v. Mich. S. Ct.*, 553 F.3d 955, 961 (6th Cir. 2009). In *Franchise Tax Board v. Construction*

Laborers Vacation Trust, 463 U.S. 1 (1983), the Supreme Court unanimously held that federal courts lack jurisdiction over a lawsuit seeking a declaration that a state or local law is valid in spite of possibly conflicting federal law. That principle controls and disposes of this case.

In *Franchise Tax Board*, a state taxing authority sued to obtain from a state court a declaratory judgment that a particular tax levy was valid. *Id.* at 5-7. When the defendant, a trust established to administer construction workers' vacation benefits, removed the case to federal court, the question arose whether federal courts could take jurisdiction over the case—a question that the Supreme Court explained would have the same answer whether the suit arrived in federal court via removal or was originally filed there. *See id.* at 8, 22. The Court held that a declaratory judgment action *by a government seeking to have its own law validated* fell outside of the federal judicial power. *Id.* at 20-22. The Court explained:

> There are good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law. States are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation. They have a variety of means by which they can enforce their own laws in their own courts, and they do not suffer if the preemption questions such enforcement may raise are tested there.

Id. at 21.

Although the situation does not often arise, federal appellate and district courts have faithfully applied *Franchise Tax Board* to reject abstract lawsuits seeking to have a state or local law upheld. *See Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1089-90 (9th Cir. 2002) (holding no federal jurisdiction under *Franchise Tax Board* over a suit seeking a declaration that a particular law of Guam was valid based on the powers apportioned to the branches of the Guamanian government by federal law); *Missouri ex rel. Mo. Hwy. & Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1333, 1336 (8th Cir. 1997) (holding no federal jurisdiction under

Franchise Tax Board over a state's suit seeking a declaration that it could constitutionally deny permission for the Ku Klux Klan to participate in the state's Adopt-A-Highway program); *Carlisle Tp. Bd. of Trustees v. Hynolds LLC*, 303 F. Supp. 2d 873, 874, 876-77 (N.D. Ohio 2004) (holding no federal jurisdiction under *Franchise Tax Board* over a township's lawsuit seeking a declaration that its adult-establishment zoning ordinance was valid); *City of Arab v. Arab Elec. Co-op, Inc.*, No. CV-92-N-0379-M, 1992 WL 695226, at *2-3 (N.D. Ala. July 6, 1992) (holding no federal jurisdiction under *Franchise Tax Board* over a lawsuit in which several municipalities sought a declaration that they could lawfully impose certain taxes); *Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of Los Angeles*, 611 F. Supp. 315, 318 (C.D. Cal. 1984) (holding no federal jurisdiction under *Franchise Tax Board* over City's suit seeking declaration upholding its regulation of expressive activity in Los Angeles International Airport); *see generally* 13B Wright, Miller & Cooper, *Fed. Practice & Proc.: Jurisdiction* § 3566, at 286 (3d ed. 2008) ("[T]here is no federal jurisdiction of a suit by a state for a declaration of the validity of state law[.]").

Hamilton County's lawsuit falls squarely within the prohibition of *Franchise Tax Board* and its progeny. The complaint does not disguise that it seeks a declaratory judgment that its Ordinance is valid and may be lawfully enforced. *See, e.g.,* Cmpt. ¶ 2 (seeking declaration "that the [Ordinance] may be applied consistent with constitutional protections under the federal and state constitutions"); *id.* ¶ 46(a) (seeking declaration "that Hamilton County may lawfully enforce" its Ordinance). Such relief would contravene the rule of *Franchise Tax Board*, which in turn reflects one of the oldest limitations on the authority of the federal judiciary: the prohibition on advisory opinions. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (citing *Muskrat v. United States,* 219 U.S. 346 (1911), and *Hayburn's Case,* 2 Dall. 409

(1792)); *see generally* 13 *Wright, Miller, and Cooper, Fed. Practice & Proc.: Jurisdiction* § 3529.1, at 293 (3d ed. 2008) ("The oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions.").

The facts of this case illustrate the wisdom of the *Franchise Tax Board* rule as a check against abstract litigation seeking advisory opinions. Hamilton County has not attempted to enforce the Ordinance's camping prohibition against the Defendants or (to Defendants' knowledge) anyone else. Neither Defendants nor (to Defendants' knowledge) anyone else has been asked to obey the Ordinance and refused to do so. The County's reasons for choosing these particular Defendants are opaque, but the Complaint gives no reason to believe—beyond the boilerplate recitation "upon information and belief"—that any or all of these Defendants are violating the Ordinance by camping out at the County Courthouse, that they intend to violate the Ordinance by camping out there in the future, or that, assuming they are violating the Ordinance to begin with, they would continue to do so if ordered by law enforcement to stop. Given the abstract nature of the County's lawsuit and the absence of a concrete interest on the part of the Defendants, there is no reason to believe that these Defendants would have an interest in vigorously defending this lawsuit on the merits and thus providing "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions[.]" *Baker v. Carr*, 369 U.S. 186, 204 (1962). For many if not all of the Defendants, the only reason to defend this lawsuit at all is the possibility of having to pay the County's costs and legal fees. *See* Cmpt. at 13.

The County's request for costs and fees highlights the absurdity of the suit, which seeks to make the Defendants, who have no demonstrated interest in the validity of the Ordinance, financially responsible for a judgment in which they have no stake. This gambit turns the "case

or controversy" requirement of Article III jurisdiction on its head: rather than a concrete clash of interests having given rise to a lawsuit, here it is the County's lawsuit that *creates* the Defendants interest in the lawsuit—an interest in avoiding monetary liability for costs and fees if the Ordinance is upheld. Forcing uninterested parties to defend lawsuits on pain of financial penalty is no way to conduct constitutional litigation.

If a local government could march into court whenever it passed a law to sue anyone potentially affected by a law in order to get a judgment of the law's validity, the consequences would be troubling for the courts, the parties, and the administration of justice. The courts would be burdened with declaratory lawsuits not attached to a genuine dispute. Defendants in such cases would be faced with the unpleasant choice between going to the trouble and (where pro bono services are unavailable) expense of acquiring legal representation, or suffering a default judgment that forces them to underwrite the costs of the government's exercise in vindicating its own law. And battles over the constitutionality of laws would proceed without a sharply defined conflict that would motivate vigorous litigation and ensure that each of the opposing positions receives a full airing.

The County's attempt to get a preemptive declaration of the validity of its law is thus inappropriate under *Franchise Tax Board*. Litigation over the Ordinance might not *ever* prove necessary, should no one violate the Ordinance or any violators cease upon receiving an appropriate order from law enforcement. Should litigation ultimately be necessary, the County would have ample opportunity to vindicate its position—for instance, the County could defend the Ordinance in court if some future protest group seeks to enjoin the Ordinance because they believe its enforcement curtails their rights, or the County could defend the Ordinance if the County issues a citation to a violator of the Ordinance who then seeks to avoid liability on the

ground that the Ordinance is invalid. *See, e.g., Franchise Tax Bd.*, 463 U.S. at 21 ("[Governments] have a variety of means by which they can enforce their own laws in their own courts[.]"); *Mo. Hwy. & Transp. Comm'n*, 112 F.3d at 1336 ("The State is not prejudiced by an inability to sue in federal court before the [defendant] decides whether it will challenge the State's denial of its application; in fact, should the [defendant] decide not to sue, the entire litigation may be avoided. If the [defendant] does sue, we see no reason why the State's exposure would be any greater for having waited until the [defendant] came to court."). These circumstances would present live, concrete controversies appropriate for federal adjudication. By contrast, in this lawsuit the County boxes with shadows—and seeks to have someone else pay for the bout. Under *Franchise Tax Board*, this Court may not adjudicate such a case.

CONCLUSION

For these reasons, this Court should dismiss the case for lack of jurisdiction.

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