

TENNESSEANS FOR)
SENSIBLE ELECTION LAWS,)
Plaintiff-Appellee,)
))
v.) **M2020-01292-COA-R3-CV**
))
HERBERT H. SLATERY III,)
in his official capacity as)
TENNESSEE ATTORNEY) **Davidson Chancery No.**
GENERAL) **20-312-III**
))
and)
))
GLENN FUNK, in his official)
Capacity as DISTRICT)
ATTORNEY GENERAL FOR)
THE 20th JUDICIAL)
DISTRICT OF TENNESSEE,)
Defendants-Appellants.)

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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ARGUMENT

I. The Chancery Court Lacked Subject-Matter Jurisdiction to Rule on the Constitutionality of Tenn. Code Ann. § 2-19-142.

Defendants have explained why the chancery court lacked subject-matter jurisdiction to rule on the constitutionality of Tenn. Code Ann. § 2-19-142. (Br. Defendants-Appellants, 12-16.) Plaintiff disagrees but appears to have missed the point of Defendants' position. Defendants have not raised the issue of sovereign immunity, as Plaintiff suggests. (Br. Appellee/Cross-Appellant, 36.) Nor do Defendants contend that criminal statutes cannot be the subject of a declaratory judgment. (Br. Appellee/Cross-Appellant, 36-37.) Instead, Defendants maintain that a chancery court cannot issue a declaratory judgment on the constitutionality of a criminal statute because the Declaratory Judgments Act does not permit courts to issue declaratory judgments outside their jurisdictional scope.

Plaintiff's argument ignores the express limitation in the Declaratory Judgments Act on the judicial power conferred to "[c]ourts of record *within their respective jurisdictions*." Tenn. Code Ann. § 29-14-102(a) (emphasis added). Plaintiff's view of the Act would instead confer on the chancery court near-limitless jurisdiction to construe, or determine the constitutionality of, statutes. But courts "must avoid constructions which would render portions of the statute meaningless or superfluous." *Leab v. S & H Mining Co.*, 76 S.W.3d 344, 349 n.3 (Tenn. 2002) (citing *Culbreath v. First State Bank Nat'l Ass'n*, 44 S.W.3d 518, 524 (Tenn. 2001)).

Plaintiff's view also runs afoul of the principles established by the Supreme Court that (1) the Declaratory Judgment Act does not confer an independent basis for jurisdiction, *Hill v. Beeler*, 286 S.W.2d 868, 871 (Tenn. 1956), and (2) the Act only “conveys the power to construe or determine the validity of any written instrument, statute, ordinance, contract, or franchise, *provided that the case is within the court's jurisdiction*,” *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837 (Tenn. 2008).

More importantly, Plaintiff's interpretation of the Declaratory Judgments Act would give a chancery court wide latitude to issue advisory opinions, as it did here. There is no disagreement that a chancery court lacks jurisdiction to enjoin the enforcement of a criminal statute. *See Clinton Books Inc. v. City of Memphis*, 197 S.W.3d 749, 754 (Tenn. 2006). Nor is the declaration of a particular chancery court binding upon a criminal court. So if Plaintiff were right, then a chancery court could issue declarations that would have no practical effect, i.e., that would neither enjoin a district attorney general from prosecuting under a challenged statute nor bind a criminal court when ruling on a constitutional challenge to an indictment. The plain text of the Declaratory Judgments Act forecloses such a pointless expenditure of judicial resources.

The outcome required by the plain text makes practical sense. Tennessee's circuit courts and criminal courts have experience in criminal matters, much the same as juvenile courts have experience in juvenile matters. Those courts are best equipped to rule on the constitutionality of statutes within their respective fields, and the

Declaratory Judgments Act implements this common-sense approach by explicitly limiting the power to construe or determine the constitutionality of statutes to “[c]ourts of record within their respective jurisdictions.” Tenn. Code Ann. § 29-14-102(a).

Nor does 42 U.S.C. § 1983 expand the subject matter jurisdiction of the chancery court. In our federalist system, “[t]he requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented.” *Howlett by and through Howlett v. Rose*, 496 U.S. 356, 372 (1990). Thus the enactment of a federal cause of action does not curb Tennessee’s authority to establish the jurisdiction of its own courts. *See Missouri v. Lewis*, 101 U.S. 22, 30 (1879). As recognized by this Court, “[b]y the enactment of § 1983, Congress did not intend nor attempt to tamper with or alter jurisdiction of state courts, and it is our opinion that federalism would have prevented it from doing so.” *Tennessee Downs, Inc. v. William L. Gibbons*, 15 S.W.3d 843, 846 (Tenn. Ct. App. 1999); *see also Giles v. Harris*, 189 U.S. 475 (1903). Thus 42 U.S.C. § 1983 did not confer jurisdiction upon the chancery court here.

II. Plaintiff Lacked Standing to Challenge the Constitutionality of Tenn. Code Ann. § 2-19-142.

Defendants have also explained why Plaintiff failed to demonstrate that it had standing to challenge the constitutionality of Tenn. Code Ann. § 2-19-142. (Br. Defendants-Appellants, 16-21.) Plaintiff’s rebuttals are unavailing.

A. Statutory standing cannot reduce the minimum requirements of constitutional standing.

Plaintiff contends that it has statutory standing under Tenn. Code Ann. § 1-3-121 and is therefore excused from the requirements of constitutional standing. (Br. Appellee/Cross-Appellant, 42-52.) But this contention is based on a fundamental misapprehension.

Tennessee recognizes the concepts of both constitutional standing and non-constitutional standing. *See City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013). When Plaintiff asserts that it has statutory standing, it is invoking non-constitutional standing. Non-constitutional standing typically involves prudential concerns. *See In re Estate of Smallman*, 398 S.W.3d 134, 148-49 (Tenn. 2013). Constitutional standing—which Defendants maintain Plaintiffs do *not* have—concerns a matter’s justiciability; under the United States and Tennessee Constitutions, justiciability is an irreducible, unwaivable, minimum prerequisite for a case to proceed. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *City of Chattanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn. 2001). When a statute designates who may bring an action, this statutory, i.e., non-constitutional, standing becomes an *additional* jurisdictional prerequisite alongside the minimum requirements of constitutional standing. *See Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004).

But a statute cannot reduce the requirements of constitutional standing, as now-Chief Justice John Roberts has explained:

If, as the Court has repeatedly reiterated, the standing requirement is a constitutional limitation on the jurisdiction

of the federal courts, it is a limitation that Congress as well as the courts must respect.

....

If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional.

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, Duke Law Review, Vol 42:1219, 1226 (citations omitted); *see also Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 488, n.24 (1982).

The same is true under Tennessee law. Legislatively creating a cause of action cannot diminish the requirements of constitutional standing: “A declaratory judgment is not a ticket to bypass standing. Standing must still be established in a declaratory judgment action.” *Massengale v. City of East Ridge*, 399 S.W.3d 118, 127 (Tenn. Ct. App. 2012) (citing *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837-38 (Tenn. 2008).) Plaintiff’s invocation of statutory standing is therefore irrelevant here; statutory standing does not excuse or overcome a lack of constitutional standing.

B. Plaintiff lacks standing.

Plaintiff has not demonstrated standing, even on appeal. The challenged statute creates only a criminal offense, and Plaintiff has yet to identify an instance where Tenn. Code Ann. § 2-19-142 formed the basis of a criminal prosecution. That alone should end the standing inquiry. Plaintiff’s strained attempts to transmute oblique references to § 2-19-142 in non-criminal contexts into actual enforcement of the statute only

highlight Plaintiff's lack of standing. (Br. Appellee/Cross-Appellant, 24-30.)

To excuse its failure to identify even a single instance of criminal prosecution under the statute, Plaintiff suggests that “[i]dentifying the full universe of § 2-19-142’s enforcement would have required—at minimum—taking discovery from all district attorneys and court clerks across all of Tennessee’s judicial districts.” (Br. Appellee/Cross-Appellant, 26.) But that is not a valid excuse.

Plaintiff had the burden of establishing standing, *Massengale*, 399 S.W.3d at 124, yet it was Plaintiff who filed for summary judgment immediately after the Answer was filed. (II, 209; II, 218.) And it was Plaintiff who opposed Defendants’ motion to permit time to conduct ordinary discovery. (III, 425-433; III, 436-455.) Plaintiff’s conscious decision not to seek discovery in this case does not relieve it from the minimum requirements of standing.

Plaintiff’s “individual claim for standing” argument likewise fails. In support of its assertion that this Court should “not closely scrutinize” the standing issue, Plaintiff cites cases in which federal courts have permitted pre-enforcement claims to proceed. (Br. Appellee/Cross-Appellant, 53.) But each of those cases involved newly enacted, “non-moribund” statutes. *See N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996); *Platt v. Bd. of Comm’rs on Grievances & Discipline*, 769 F.3d 447, 451 (6th Cir. 2014). Here, the current version of the statute was enacted in 1974, *see* 1974 Tenn. Pub. Acts, ch. 704, § 1, and despite its having been in effect for 40-plus years, Plaintiff cannot identify a prosecution brought under it. Plaintiff thus

lacks a credible fear of prosecution that standing requires in this context. *See, e.g., Poe v. Ullman*, 367 U.S. 497 (1961) (finding that plaintiffs lacked standing to challenge a Connecticut statute that had only been the subject of a prosecution once in 80 years). Plaintiff's federal cases, involving a new statute designed to target currently ongoing behavior, are clearly distinguishable.

Furthermore, Plaintiff agreed in the chancery court that the *McKay* analysis controls—which requires that Plaintiff demonstrate a history of past enforcement of the statute, enforcement warnings sent specifically to plaintiffs about their specific conduct, or an attribute that makes enforcement of the statute more likely. *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016). (V, 653-654.) None of the *McKay* requirements are present here.

Lastly, Plaintiff asserts that the non-prosecution Declaration from the Davidson County District Attorney General's Office is irrelevant, because Defendants did not submit declarations from all 31 of Tennessee's District Attorneys General. (Br. Appellee/Cross-Appellant, 59-61.) But Plaintiff brought this action against only *one* district attorney: the Davidson County District Attorney General. (I, 1.) And Plaintiff explained why:

The Davidson County District Attorney General's Office is responsible for the prosecution of all alleged violations of state criminal laws that occur within Tennessee's 20th Judicial District, where the Plaintiff is registered as a multicandidate political campaign committee and conducts its core operations.

(I, 5-6.)

So Plaintiff's own rationale for naming only the Davidson County District Attorney General shows why the Declaration from the Davidson County District Attorney General's Office defeats standing. The only named Defendant with enforcement authority has disavowed prosecution in this context. And again, it was not Defendants' burden to defeat standing anyway; the burden to demonstrate standing falls on Plaintiff. *See American Civil Liberties Union of Tennessee v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006). While Plaintiff claims that its "examples of § 2-19-142's enforcement 'd[id] not purport to be exhaustive'" (Br. Appellee/Cross-Appellant, 26), the responsibility for identifying actual enforcement to satisfy the minimum requirements of standing was Plaintiff's alone.

III. Tennessee Code Annotated § 2-19-142 Is Constitutional.

Even assuming the chancery court had subject-matter jurisdiction and Plaintiff had standing, Tenn. Code Ann. § 2-19-142 is, as Defendants have discussed, constitutional. (Br. Defendants-Appellants, 21-28.) Plaintiff replies in part that by "now assert[ing it]—for the first time on appeal—" Defendants have waived the claim that that statute survives constitutional scrutiny because the government has an interest proscribing defamation, which is not constitutionally protected speech. (Br. Appellee/Cross-Appellant, 64-65.) Not so.

Defendants made this argument in the chancery court in their response to Plaintiff's motion for summary judgment. (V, 625.) At the hearing on that motion, Defendants also raised the specific interests identified in the caselaw they had cited in their response, including "confusion and undue influence and ensuring that an individual's right

to vote is not undermined by fraud in the election process.” (VII, 965-967.) Issues, not arguments, can be forfeited on appeal, *see Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991), but regardless, these arguments were properly before the chancery court, so they are properly before this Court as well.

Furthermore, even a simple comparison of constitutionally acceptable restrictions illustrates that § 2-19-142 satisfies both the Tennessee and United States Constitutions. Under both constitutions, prohibitions against false and malicious defamations are acceptable content-based restrictions. *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978); *United States v. Alvarez*, 567 U.S. 709, 717 (2012). And by recognizing the common-sense reality that false and malicious statements will be made only in opposition to a candidate, the statute does not engage in impermissible viewpoint-based discrimination. Defamation is not constitutionally protected speech, and as the statute codifies a criminal cause of action limited solely to defamation, Plaintiff’s attempt to apply strict scrutiny fails.

But the Court need not even engage in this constitutional analysis. Plaintiff complained that the statute prohibited it from engaging in ordinary satire and was therefore unconstitutional. (I, 1-12.) As Defendants have pointed out, the statute was intended to criminalize defamation in the context of election literature; it was never intended to criminalize satire and parody. (Br. Defendants-Appellants, 21-24.) Courts are obligated to preserve a statute’s constitutionality whenever possible. *See Davis-Kidd Book Sellers, Inc. v. McWherter*, 866 S.W.2d 520, 529-30 (Tenn. 1993). Here, the chancery court did not honor that

obligation; it should have construed § 2-19-142 as the legislature intended and placed it beyond constitutional suspicion.

IV. Plaintiff's "Cross-Appeal" Issues Are Without Merit.

Plaintiff raises three issues as a "cross-appellant." (Br. Appellee/Cross-Appellant, 16.) None has merit.

A. Plaintiff does not have third-party standing for its substantial-overbreadth claim.

Although the chancery court did not reach this issue, Plaintiff argues that it has third-party standing on behalf of unidentified third parties for its substantial-overbreadth claim. (Br. Appellee/Cross-Appellant, 51.) But as Defendants have discussed, § 2-19-142 is limited in application and scope to comport with constitutional limitation, so substantial overbreadth is simply inapplicable here. (Br. Defendants-Appellants, 26-27.) In any event, a substantial-overbreadth claim does not eliminate the minimum requirements of standing.

In support of its third-party-standing argument, Plaintiff cites *Speech First v. Schlissel*, 939 F.3d 756 (6th Cir. 2019). In *Speech First*, however, the Sixth Circuit expressly rejected the very contention Plaintiff is making here: "Even where a litigant challenges a law or regulation as overbroad, that litigant must still 'show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action.'" *Speech First*, 939 F.3d at 764 (citing *Laird v. Tatum*, 408 U.S. 1, 13 (1972)). The Sixth Circuit has also foreclosed Plaintiff's arguments regarding potential chill: "In order to have standing, . . . a litigant alleging chill must still establish that a concrete harm—i.e., enforcement of a challenged statute—occurred or is

imminent.” *Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 610 (6th Cir. 2008).

As discussed above and in Defendants’ opening brief, Plaintiff has not demonstrated the concrete harm required by *Speech First* and *Morrison*. The challenged statute has been effective for 40+ years, and the record contains no evidence that its prohibition has ever been enforced. Plaintiff has not even identified a third-party that would have standing here. Plaintiff is not relieved of the burden to demonstrate an imminent injury-in-fact simply by raising a substantial-overbreadth claim.

B. Plaintiff’s issue that it has jurisdiction under the Tennessee Constitution is waived.

Plaintiff argues that jurisdiction was conferred upon the chancery court by the Tennessee Constitution. (Br. Appellee/Cross-Appellant, 42.) The chancery court did not decide this issue, and Plaintiff’s argument on appeal consists only of a single, conclusory paragraph indicating that the argument was made in the chancery court. (*Id.*) That is insufficient under Rule 27, which calls for an argument to set forth “the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief.” Tenn. R. App. P. 27(a)(7)(A). The Court should therefore deem this issue waived. *See Murray v. Miracle*, 457 S.W.3d 399, 402-03 (Tenn. Ct. App. 2014); *Bean v. Bean*, 40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000).

In any event, jurisdiction was not conferred to the chancery court by the Tennessee Constitution either. Chancery courts are legislatively created inferior courts. TN Const. art 6, § 1. And the Tennessee

Constitution vests sole authority to set the jurisdiction of an inferior court with the Legislature. TN Const. art 6, § 8. So while chancery courts exercise judicial power, “what shall be the matter[s] over which they shall exercise their powers subject to certain limitations involved in other clauses of the Constitution, is left to legislative discretion.” *See Terry v. Evans*, 225 S.W.2d 255 (Tenn. 1949). Accordingly, by vesting the power to set a chancery court’s jurisdiction with the Legislature, the Tennessee Constitution does not serve as an independent basis for jurisdiction here.

C. Plaintiff is not entitled to an award of attorneys’ fees on appeal.

Plaintiff asserts that it is entitled to an award of attorneys’ fees on appeal. (Br. Appellee/Cross-Appellant, 74.) Plaintiff was awarded attorneys’ fees in the chancery court, and as Defendants have explained, that award was in error because Plaintiff should not have prevailed below. (Br. Defendants-Appellants, 28.) For the same reason, Plaintiff is not entitled to an award of attorneys’ fees on appeal.

CONCLUSION

For the reasons stated here and in Defendants-Appellants' opening brief, the judgment of the chancery court should be reversed and its award of attorneys' fees and costs should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief consists of 3,701 words in compliance with
Tenn. Sup. Ct. R. 46.

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