IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTY-EIGHTH JUDICIAL DISTRICT, GIBSON COUNTY

STEPHEN L. HUGHES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 24475**
	)	**Chancellor Michael Mansfield,**
	)	**Chief Judge**
BILL LEE, in his official capacity as Governor of the State of Tennessee, et al.,	)	**Judge M. Wyatt Burk**
	)	**Judge Lisa Nidiffer Rice**
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Before the Court is the Motion of Defendants Bill Lee, Governor of the State of Tennessee, and Jonathan Skrmetti, Attorney General and Reporter of the State of Tennessee (collectively "State Defendants"), to Dismiss the First Amended Complaint of Plaintiffs Stephen L. Hughes, Duncan O'Mara, Elaine Kehel (collectively "Individual Plaintiffs"), Gun Owners of America, Inc. ("GOA"), and Gun Owners Foundation ("GOF"). The additional Defendants named in the First Amended Complaint are not involved in the instant motion. Counsel for Plaintiffs and State Defendants appeared before this Court[1] in Trenton, Tennessee, on June 22, 2023. Having considered the briefs, the arguments of counsel, and the applicable caselaw, we are ready to issue our decision. For the reasons that follow, State Defendants' Motion to Dismiss is **DENIED**.

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Katelyn Orgain, Clerk & Master
By: Katelyn Orgain D.C.M.

[1] Presiding over this matter is a three-judge panel appointed by the Tennessee Supreme Court pursuant to Tenn. Code Ann. §§ 20-18-101 *et seq.* and Supreme Court Rule 54. *See* Order, at 1, No. ADM2021-00775 (Tenn. Mar. 28, 2023).

ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

The following statements summarize allegations contained in Plaintiffs' First Amended Complaint. They do not constitute findings or conclusions of the Court.

Many gun owners represented by GOA and GOF, like Individual Plaintiffs, desire to be able to carry a firearm in a public park or other area enumerated in Tenn. Code Ann. § 39-17-1311(a). First Am. Compl., ¶¶ 7, 17–18, May 8, 2023 (citing Hughes Affidavit; O'Mara Affidavit; Kehel Affidavit). They are unable to do so, however, without risk of being detained by law enforcement and potentially charged with a criminal offense because of prohibitions contained in Tenn. Code Ann. §§ 39-17-1307(a), -1311(a). First Am. Compl., ¶¶ 7, 17–18. Some of these prohibited categories of locations, such as subsections 39-17-1311(b)(H)–(I) provide a limited affirmative defense to a criminal charge; others are entirely off-limits to the possession of firearms, regardless of whether an individual has a permit to carry. First Am. Compl., ¶ 17. Tenn. Code Ann. § 39-17-1311(a) defines the activities Individual Plaintiffs wish to engage in as an offense—and potentially a felony offense—placing the risk and burden of defending serious, criminal charges on Individual Plaintiffs and GOA's and GOF's other members and supporters. First Am. Compl., ¶ 18. Thus, Individual Plaintiffs are forced to disarm themselves when entering these enumerated places in order to avoid detention and prosecution. First Am. Compl., ¶ 19. As a result, Individual Plaintiffs suffer the infringement of their constitutional rights and a heightened risk to their personal safety. First Am. Compl., ¶ 19. But for the existence of these statutes, Plaintiffs would carry firearms in the enumerated places for lawful purposes, including self-defense and defense of others. First Am. Compl., ¶ 20.

The Tennessee Constitution invests Governor Lee with the "supreme executive power of this state." First Am. Compl., ¶ 88. Accordingly, he has the constitutional duty to "take care

that the laws be faithfully executed." First Am. Compl., ¶¶ 8, 88. Governor Lee also appoints the Commissioner of the Department of Safety, the Commissioner of the Tennessee Bureau of Investigation, and the Commissioner of the Tennessee Department of Conservation and Environment, all of whom serve at the pleasure of the Governor and possess the law enforcement authority to enforce, investigate, and prosecute alleged infractions of the statutes at the heart of this suit. First Am. Compl., ¶¶ 8, 88. Moreover, Governor Lee possesses the sole authority to issue executive orders directing the law enforcement policies to be enforced by these various state officials and employees relative to the challenged provisions. First Am. Compl., ¶ 88.

Attorney General Skrmetti has the statutory duty to prosecute and defend all criminal appeals, including those involving the enforcement of criminal statutes—and thus the criminal statutes that are the subject of this civil action. First Am. Compl., ¶¶ 9, 89. The Attorney General likewise must "defend the constitutionality and validity of all legislation of statewide applicability." First Am. Compl., ¶ 9. Further, when a district attorney general "peremptorily and categorically refuses to prosecute all instances of a criminal offense," Attorney General Skrmetti may prosecute that offense in the trial courts. First Am. Compl., ¶ 89. Additionally, the Attorney General has the statutory duty and authority to issue formal attorney general opinions that constitute official state interpretations of Tennessee statutes that are used by state officials and agencies. First Am. Compl., ¶ 89. The Attorney General's office has issued such opinions for the challenged provisions under consideration in this case. First Am. Compl., ¶ 89.

LEGAL STANDARDS

State Defendants move for dismissal of this case under Tennessee Rule of Civil Procedure 12.02(6), which provides for dismissal in the event of a "failure to state a claim upon which relief may be granted." A motion made under Rule 12.02(6) "tests 'only the legal

sufficiency of the complaint, not the strength of the plaintiff's proof or evidence.'" *Elvis Presley Enterprises, Inc. v. City of Memphis*, 620 S.W.3d 318, 323 (Tenn. 2021) (quoting *Webb v. Nashville Area Habitat for Human., Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011)); *Dobbs v. Guenther*, 846 S.W.2d 270, 273–74 (Tenn. Ct. App. 1992) (citing *Sanders v. Vinson*, 558 S.W.2d 838, 840 (Tenn. 1977). As such, a plaintiff's allegations are taken as true. *Id.* (citing *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002)). And all inferences that the Court might reasonably draw from those allegations are drawn in the plaintiff's favor. *Webb*, 346 S.W.3d at 426 (quoting *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31–32 (Tenn. 2007)). "[L]egal arguments or 'legal conclusions' couched as facts," however, are not factual allegations and therefore "are not taken as true." *Estate of Haire v. Webster*, 570 S.W.3d 683, 690 (Tenn. 2019) (quoting *Moore-Pennoyer v. State*, 515 S.W.3d 271, 276 (Tenn. 2017)). By the very act of filing a motion to dismiss, a defendant—for the purposes of that motion—"admit[s] the truth of all of the relevant and material allegations contained in the complaint, but . . . assert[s] that the allegations fail to establish a cause of action." *Elvis Presley Enterprises, Inc.*, 620 S.W.3d at 323 (quoting *Leach v. Taylor*, 124 S.W.3d 87, 90 (Tenn. 2004)). Accordingly, we are compelled to "grant a motion to dismiss only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Id.* (quoting *Crews*, 78 S.W.3d at 857).

State Defendants additionally move for dismissal under Tennessee Rule of Civil Procedure 12.02(1), invoking a "lack of jurisdiction over the subject matter." Subject matter jurisdiction concerns a court's very authority to resolve the case before it. *Minyard v. Lucas*, 576 S.W.3d 351, 355 (Tenn. 2019) (citing *Chapman v. DaVita, Inc.*, 380 S.W.3d 710, 712–13 (Tenn. 2012). Such authority may "only be conferred on a court by constitutional or legislative act."

Northland Ins. Co. v. State, 33 S.W.3d 727, 729 (Tenn. 2000) (citing *Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977); *Computer Shoppe, Inc. v. State*, 780 S.W.2d 729, 734 (Tenn. Ct. App. 1989)); *Minyard*, 576 S.W.3d at 355 (citing *Chapman*, 380 S.W.3d at 712–13) ("Subject matter jurisdiction is conferred and defined by the Tennessee Constitution and statutes."). A determination on the particular nature of a case is essential to whether a court may properly assert subject matter jurisdiction over it. *See Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994) (citing *Cooper v. Reynolds*, 77 U.S. 308 (1870); *Turpin v. Conner Bros. Excavating Co.*, 761 S.W.2d 296, 297 (Tenn. 1988)); *State ex rel. Comm'r of Dep't of Transp. v. Thomas*, 336 S.W.3d 588, 602 (Tenn. Ct. App. 2010) (quoting *Northland Ins. Co.*, 33 S.W.3d at 729). A court must ascertain what a plaintiff is seeking, on what basis or bases the plaintiff is seeking it, and whether state law authorizes the court to give the plaintiff what he seeks. *In re Estate of Trigg*, 368 S.W.3d 483, 489 (Tenn. 2012) (citing *Northland Ins. Co.*, 33 S.W.3d at 729; *Landers*, 872 S.W.2d at 675) ("Determining whether subject matter jurisdiction exists in a particular case requires the courts to examine (1) the nature or gravamen of the cause of action, (2) the nature of the relief being sought, and (3) the constitutional or statutory provisions relied upon by the plaintiff.").

ANALYSIS

Plaintiffs filed this action under the Declaratory Judgment Act, Tenn. Code Ann. §§ 29-14-101 *et seq.*, seeking to constitutionally invalidate and enjoin the application of Tenn. Code Ann. § 39-17-1307(a) and Tenn. Code Ann. § 39-17-1311 in light of the decision of the Supreme Court of the United States in *New York State Rifle and Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). *See* First Am. Compl., ¶¶ 61–87 & Prayer for Relief, at 30. The instant motion, however, does not implicate the merits of Plaintiffs' First Amended Complaint. State

Defendants assert rather that Plaintiffs lack standing to bring their claims against State Defendants and, additionally, that Attorney General Skrmetti is not otherwise a required party to this action under the Declaratory Judgment Act. As we explain below, the Court finds these arguments unpersuasive.

I. Whether State Defendants Are Shielded by Tennessee's Sovereign Immunity

In the course of their arguments, State Defendants raise the point of sovereign immunity, *see* Mem. of Law in Supp. of Gov. Lee's & Gen. Skrmetti's Mot. to Dismiss First Am. Compl., at 17, May 24, 2023 [hereinafter "State Defs.' MTD"], and we find that doctrine to be an appropriate place to begin. If applicable, as discussed below, the Court has no authority to hear Plaintiffs' claims.

"Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." Tenn. Const. art. 1, § 17. The Tennessee Supreme Court has interpreted this clause as prohibiting suits "against the State unless explicitly authorized by statute" and thereby "upholding the doctrine of sovereign immunity." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 849 (Tenn. 2008) (citing *N. British & Mercantile Co. v. Craig*, 62 S.W. 155, 157 (Tenn. 1900); *State v. Bank of Tenn.*, 62 Tenn. (3 Baxt.) 395, 403 (1874)). In other words, "[t]he sovereign State of Tennessee is immune from lawsuits 'except as it consents to be sued.'" *Smith v. Tenn. Nat'l Guard*, 551 S.W.3d 702, 708 (Tenn. 2018) (quoting *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000)). The Court of Appeals has explained the relation between this doctrine and that of subject matter jurisdiction:

> Subject matter jurisdiction and sovereign immunity are two different legal concepts. However, courts may lack subject matter jurisdiction because of the doctrine of sovereign immunity. Sovereign immunity is jurisdictional immunity from suit, which acts as a jurisdictional bar to an action against the state by precluding a court from exercising subject-matter jurisdiction. The doctrine of sovereign immunity divests the courts of subject matter jurisdiction.

Mobley v. State, No. W2017-02356-COA-R3-CV, 2019 WL 117585, at *3 (Tenn. Ct. App. Jan. 7, 2019) (quoting *Colonial Pipeline Co.*, 263 S.W.3d at 851; *White v. State ex rel. Armstrong*, No. M1999-00713-COA-R3-CV, 2001 WL 134601, at *3 (Tenn. Ct. App. Feb. 16, 2001)) (alterations and internal quotation marks omitted).

Here, Plaintiffs are suing State Defendants in their official capacities. A lawsuit against an officer of the State of Tennessee in his official capacity is a suit against the State. *Cox v. State*, 399 S.W.2d 776, 778 (Tenn. 1965) (quoting *Kornman Co. v. Moulton*, 360 S.W.3d 30 (Tenn. 1962); *Brooksbank v. Leech*, 332 S.W.2d 210 (Tenn. 1959)); *see Williams v. Nicely*, 230 S.W.3d 385, 389 (Tenn. Ct. App. 2007) (relying on *Cox* for the same proposition). Thus, as a general matter, the State's sovereign immunity applies to this action as against State Defendants unless such immunity is waived. *See Smith*, 551 S.W.3d at 708; *Colonial Pipeline Co.*, 263 S.W.3d at 849. And, as State Defendants point out,[2] the Tennessee Supreme Court has already held that the Declaratory Judgment Act "does not contain an explicit waiver of sovereign immunity." *Colonial Pipeline Co.*, 263 S.W.3d at 853. Plaintiffs, however, point to Tenn. Code Ann. § 1-3-131, which provides, "Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action." *See* Pls.' Resp. to Mot. to Dismiss by Defs.' Gov. Bill Lee & Attorney General Jonathan Skrmetti, at 11, June 13, 2023 [hereinafter "Pls.' Resp."]. As Plaintiffs note, Pls.' Resp., at 11, the Supreme Court has construed Tenn. Code Ann. § 1-3-131 as waiving sovereign immunity. *Recipient of Final Expunction Order in McNairy County Circuit Court Case No. 3279 v. Rausch*, 645 S.W.3d

[2] State Defendants only raise this point with respect to Attorney General Skrmetti, *see* State Defs.' MTD, at 17, but the Court considers it in light of Governor Lee as well because if the Governor is immune to suit then this Court lacks the authority to hear the claims against him regardless of the specific arguments made.

160, 168 (Tenn. 2022) ("The General Assembly clearly and unmistakably waived sovereign immunity by enacting Tennessee Code Annotated section 1-3-121."). Thus, because Plaintiffs seek declaratory and injunctive relief on a constitutional basis regarding the enforcement of the challenged statutes, sovereign immunity is no bar to their claims.

II. Whether Attorney General Skrmetti Is a Proper Party Under the Declaratory Judgment Act

The Court next examines whether the Attorney General is a proper party to this action because of the command of the Declaratory Judgment Act, which states:

> In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is of statewide effect and is alleged to be unconstitutional, the attorney general and reporter shall also be served with a copy of the proceeding and be entitled to be heard.

Tenn. Code Ann. § 29-14-107(b). Citing this provision, Plaintiffs allege Attorney General Skrmetti "is a proper party to a declaratory judgment action seeking to invalidate and/or enjoin the application of a criminal statute to a citizen." First Am. Compl. ¶ 9. They also cite a number of cases for this proposition, most notably *Cummings v. Beeler*, 223 S.W.2d 913, 916 (Tenn. 1949) (emphasis added) ("[The statute] prescribes who are necessary parties to a declaratory judgment proceeding. In this Code section the Attorney General of the State is required to be 'served with a copy of the proceeding' when the constitutionality of an act is attacked. *We have construed this section to require the Attorney General to be a party defendant* in any proceeding where the constitutionality of the Act of the legislature is before the Court on declaratory judgments proceeding."). First Am. Compl. ¶ 9. But State Defendants argue, relying on the plain language of the statute, that the Declaratory Judgment act requires "only *notice* to the Attorney General." State Defs.' MTD, at 14–15 (emphasis in original). It does not, they contend, require making him a party to this litigation. State Defs.' MTD, at 14. State

Defendants in turn provide a number of cases for their proposition, such as *State v. Chastain*, 871 S.W.2d 661, 666 (Tenn. 1994) (explaining that Tenn. Code Ann. § 29-14-107 requires "notice to the state attorney general" "when the constitutional validity of a general state law is challenged in a declaratory judgment action"), and *Laferney v. Livesay*, No. E2021-00812-COA-R3-CV, 2022 WL 17099058, at *7 (Tenn. Ct. App. 2022) (stating the same). State Defs.' MTD, at 16–17. They argue that the Tennessee Supreme Court merely "temporarily deviated" from a plain reading of Tenn. Code Ann. § 29-14-107(b) when the Court held that the Attorney General should be made a party to a declaratory judgment action, and cabin that interpretation to "a handful of cases from the mid-20th century." State Defs.' MTD, at 15.

Plaintiffs respond by saying State Defendants are confusing the issue. They agree that the Declaratory Judgment Act only requires notice and not the addition of the of the Attorney General as a party. Pls.' Resp., at 8. But this requirement, as construed by the Tennessee Supreme Court, makes the Attorney General a *proper* party under that Act. Pls.' Resp., at 8. Plaintiffs continue, and state that the Supreme Court's holding in *Beeler* requires the Attorney General to be named as a party defendant in constitutional challenges to state statutes. Pls.' Resp., at 8–9. They conclude by stating that there is no distinction to be made in the present case between a required party and a proper party because Attorney General Skrmetti is named as a defendant and that he is a required party under *Beeler*. Pls.' Resp., at 10. In reply, State Defendants argue that Plaintiffs' preferred interpretation simply cannot be controlling because the courts have treated parties as compliant with the Declaratory Judgment Act when the parties gave notice to the Attorney General but did not name him as a party. State Defs.' Reply, at 11.

The Supreme Court indeed states in *Beeler*, 223 S.W.2d at 917, that "the Attorney General" was "a necessary and proper party defendant" in the declaratory judgment action before

it. But the Court actually relies upon a prior case for its construction of the precursor to Tenn. Code Ann. § 29-14-107(b). *See Beeler*, 223 S.W.2d at 916. In the case cited by the Court for their previous statutory construction, *Buena Vista Special School District v. Board of Election Commissioners of Carroll County*, 116 S.W. 1008, 1009 (Tenn. 1938), the Court simply states without analysis that "the Attorney General of the State should be made a party" under the Declaratory Judgment Act because the constitutionality of a statute was challenged. State Defendants make a compelling argument for why a plain reading of the statute is a superior construction.[3] *See* State Defs.' Reply, at 10–11. But such arguments are irrelevant if our Supreme Court has construed the statute differently. Bryan A. Garner, et al., *The Law of Judicial Precedent* § 2, at 33 (2016) (quoting *Riley v. Kennedy*, 553 U.S. 406, 425 (2008)) (alteration in original) ("The decisions of a state's high court furnish binding precedents to guide all the courts over which it exercises appellate jurisdiction. The judges of all the inferior courts are bound to accept and follow those precedents completely, without regard to their own previous decisions or their independent views of the law. It is firmly established law that a state's high court is 'unquestionably the "ultimate exposito[r] of state law."'"); *see also State v. Odom*, 137 S.W.3d 572, 601 (Tenn. 2004) ("However, this court, being inferior to our supreme court, is bound by its decisions and must abide with its 'order, decrees and precedents.'"); *State v. Booker*, No. E2018-01439-CCA-R3-CD, 2020 WL 1697367, at *33 (Tenn. Crim. App. Apr. 8, 2020), *overruled on other grounds*, 656 S.W.3d 49 (Tenn. 2022) (citation omitted) ("While we understand the Defendant's argument, we must reject his invitation as we are bound by court precedent.").

The only question for this Court then is whether our Supreme Court's construction in *Beeler* and *Buena Vista Special School District* remains good law and therefore controlling here.

[3] Apart from the plain meaning of notice, State Defendants also explain that the provision differentiates between notice and making someone a party because when municipal ordinances are challenged, the municipality must be made a party. *See* Tenn. Code Ann. § 29-14-107(b).

We believe it is. State Defendants correctly characterize more recent decisions tending to show that the Supreme Court has stepped away from the view articulated in those cases. *See, e.g., In re Adoption of E.N.R.*, 42 S.W.3d 26, 33 (Tenn. 2001) (citing Tenn. Code Ann. § 29–14–107(b)) ("The Office of the Attorney General must be notified of any effort to challenge the constitutionality of Tennessee statutes. Such notice is specifically required at the trial level by [the Declaratory Judgment Act]."). The Supreme Court has also commented that "the district attorney general *complied* with Tenn. Code Ann. § 29–14–107 by giving notice to the Office of the State Attorney General that the constitutionality of a state law was being questioned." *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 660 (Tenn. 1994) (emphasis added); *see also City of Memphis v. Shelby Cnty.*, 469 S.W.3d 531, 560 (Tenn. Ct. App. 2015) ("The City failed to notify the Tennessee Attorney General of any constitutional challenge in accordance with Tennessee Code Annotated section 29-14-107(b) . . . ."). But the Supreme Court has never repudiated its construction in *Beeler*. And this Court cannot ignore that reality even if it might speculate on what the Supreme Court would do today. Garner, et al., *The Law of Judicial Precedent*, § 2, at 30 ("Sometimes the Supreme Court appears poised to overturn its own precedent. But even then, as long as the precedent is still 'good law,' [lower] courts must follow it.").

Accordingly, we hold that the Attorney General was properly added as a defendant in this matter because under the construction of the Declaratory Judgment Act in *Beeler*, Plaintiffs were required to so.

III. Whether Plaintiffs Have Standing to Bring Their Claims Against State Defendants

In Tennessee, "the province of a court is to decide, not advise, and to settle rights, not to give abstract opinions." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 203 (Tenn. 2009) (quoting *State v. Wilson*, 70 Tenn. (2 Lea) 204, 210 (1879)). One

doctrine utilized by our courts to ensure the appropriate exercise of judicial power is standing. *See id.* "Courts use the doctrine of standing to determine whether a litigant is entitled to pursue judicial relief as to a particular issue or cause of action." *City of Memphis v. Hargett*, 414 S.W.3d 88, 97 (Tenn. 2013) (citing *ACLU of Tenn. v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006); *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976)). It is "rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "Grounded upon 'concern about the proper—and properly limited—role of the courts in a democratic society,' the doctrine of standing precludes courts from adjudicating 'an action at the instance of one whose rights have not been invaded or infringed.'" *Darnell*, 195 S.W.3d at 619–20 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001)). Standing thus presents a threshold issue. *Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020) (citing *City of Memphis*, 414 S.W.3d at 96) ("The question of standing is one that ordinarily precedes a consideration of the merits of a claim.").

The doctrine also directs the court to focus on the party bringing the lawsuit rather than the merits of the claim. *Fisher*, 604 S.W.3d at 396 ("The proper focus of a determination of standing is a party's right to bring a cause of action, and the likelihood of success on the merits does not factor into such an inquiry."); *see also Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 149 (Tenn. 2022) (quoting *Warth*, 422 U.S. at 500) ("While standing 'often turns on the nature and source of the claim asserted,' it 'in no way depends on the merits' of the claim.).

> Our jurisprudence recognizes two categories of standing that govern who may bring a civil cause of action: non-constitutional standing and constitutional standing. Non-constitutional standing focuses on considerations of judicial restraint, such as whether a complaint raises generalized questions more properly addressed by another branch of the government, and questions of statutory interpretation, such as whether a statute designates who may bring a cause of

> action or creates a limited zone of interests. Constitutional standing, the issue in this case, is one of the "irreducible . . . minimum" requirements that a party must meet in order to present a justiciable controversy.

City of Memphis, 414 S.W.3d at 98 (citations & footnote omitted). Constitutional standing requires a plaintiff to establish three elements:

> 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court.

Fisher, 604 S.W.3d at 396 (citing *City of Memphis*, 414 S.W.3d at 97).

Here, State Defendants assert Plaintiffs lack standing because neither the Governor nor the Attorney General enforce the statutes challenged by Plaintiffs. State Defs.' MTD, at 7. Thus, according to State Defendants, Plaintiffs have no causal connection between their alleged injuries and the actions of State Defendants. State Defs.' MTD, at 7–8. Further, they argue that Plaintiffs' alleged injuries are incapable of being redressed by a favorable ruling because an injunction against State Defendants would have no practical effect on whether those challenged statutes are actually enforced against Plaintiffs. State Defs.' MTD, at 8–9. Plaintiffs respond by arguing that State Defendants are sufficiently connected to the enforcement of these statutes by their responsibilities and authority such that the requirements of standing are satisfied. Pls.' Resp, at 13–19.

A. *Lack of Causal Connection Between Alleged Injury and Challenged Conduct*

"While the causation element is not onerous, it does require a showing that the injury to a plaintiff is 'fairly traceable' to the conduct of the adverse party." *Fisher*, 604 S.W.3d at 396 (quoting *City of Memphis*, 414 S.W.3d at 97). The actions of the defendant must not be too remote from the alleged injury. *See Little v. City of Chattanooga*, 650 S.W.3d 326, 345–46

(Tenn. Ct. App. 2022) ("Here, Plaintiffs' alleged injury—the deprivation of city funds—is not 'fairly traceable' to the allegedly ultra vires annexations. It is speculative at best to conclude that, but for the other annexations, the City would have provided the services that Plaintiffs allege they are entitled to."); *Bowers v. Estate of Mounger*, 542 S.W.3d 470, 480 (Tenn. Ct. App. 2017) (quoting *ACLU v. Darnell*, 195 S.W.3d 612, 619–21 (Tenn. 2006)) ("Is the line of causation between the illegal conduct and injury too attenuated?").

1. Governor Lee

In their First Amended Complaint, Plaintiffs emphasize that Governor Lee "holds the 'supreme executive power of this state.'" First Am. Compl. ¶ 88 (quoting Tenn. Const. art. III, § 1). They point to his constitutional duty to "take care that the laws be faithfully executed." First Am. Compl. ¶ 88 (quoting Tenn. Const. art. III, § 10). Plaintiffs also highlight Governor Lee's authority to appoint, remove, and replace the Commissioners of the Tennessee Department of Safety, the Tennessee Bureau of Investigations, and the Tennessee Department of Conservation and Environment. First Am. Compl. ¶ 88. Thus, Plaintiffs allege, Governor Lee has the sole authority in Tennessee to issue executive orders directing the law enforcement policies to be enforced by these various state officials and employees relative to the challenged statutes. First Am. Compl. ¶ 88. State Defendants insist these allegations constitute nothing more than generalities that are insufficient to connect Governor Lee to the enforcement of those statutes. State Defs.' MTD, at 9. Indeed, State Defendants point to ample authority for the proposition that the Governor's role as head of the executive branch is simply insufficient. In a finding that the plaintiffs lacked standing to pursue their claims against Governor Lee, the United States Court of Appeals for the Sixth Circuit explained that

> a general allegation about the Governor's "take care" power does not suffice to invoke [the court's] jurisdiction. We need specific, plausible allegations about

> what the Governor has done, is doing, or might do to injure plaintiffs. . . . in other words, they have not explained how the *Governor* caused the injury.

Universal Life Church Monastery Storehouse v. Nabors, 35 F.4th 1021, 1031–32 (6th Cir. 2022) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Ass'n of Am. Physicians & Surgeons*, 13 F.4th 531, 543–44 (6th Cir. 2021)) (emphasis in original); *see also Children's Healthcare Is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996) (quoting *1st Westco Corp. v. School Dist. of Philadelphia*, 6 F.3d 108, 113 (3d Cir. 1993)) ("General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law."); *cf. Woods v. Rausch*, No. 21-0018-II, at *8 (Tenn. Ch. Ct. Davidson Cnty. Nov. 30, 2021) (holding Governor Lee's role as head of the executive branch did not constitute a direct role in the enforcement of an allegedly unconstitutional statute in the context of sovereign immunity).

Plaintiffs respond that the Governor can direct the action of these commissioners and their respective departments by executive order. Pls.' Resp., at 13–14. The mere fact that the executive branch is organized into a hierarchical administrative structure, according to Plaintiffs, does not diminish Governor Lee's ultimate enforcement authority with respect to the challenged statutes. Pls.' Resp., at 14–15. State Defendants assert in their Reply, however, that Plaintiffs make no mention of the Governor's executive orders and therefore the Court ought not to consider such an argument because we may "not consider any additional factual or legal contentions that were not contained in the original pleadings." Reply in Supp. of Gov. Lee's and General Skrmetti's Mot. to Dismiss First Am. Compl., at 5, June 20, 2023 (quoting *Ryan v. Soucie*, No. E2018-01121-COA-R3-CV, 2019 WL 3238642, at *6 (Tenn. Ct. App. 2019)) [hereinafter "State Defs.' Reply"]; *see also SNPCO, Inc. v. City of Jefferson City*, 363 S.W.3d 467, 472 (Tenn. 2012) (citations omitted) ("A motion to dismiss . . . . requires the court to

review the complaint alone."); *Highwood Props, Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009) ("The resolution of the motion is determined by an examination of the pleadings alone."). We disagree.[4] Plaintiffs clearly allege that Governor Lee "holds the sole authority in the state to issue executive orders directing the law enforcement policies to be enforced by these various state officials." First Am. Compl. ¶ 88. The issue is appropriate for our consideration. We must therefore resolve whether Governor Lee's authority over the Defendant Commissioners—who, State Defendants agree, *see* State Defs.' Reply, at 4, enforce various aspects of the challenged states—is fairly traceable to the direct enforcement of the allegedly unconstitutional statutes in a manner that Governor Lee's role as the supreme executive is not.

The Defendant Commissioners are "appointed by the governor and hold office at the governor's pleasure." Tenn. Code Ann. § 4-3-2002 (Commissioner of the Department of Safety); *see also* Tenn. Code Ann. § 4-3-112(a)–(b) ("The commissioners shall be appointed by the governor . . . . [and] shall hold office at the pleasure of the governor."). Put simply, to serve at the Governor's pleasure, without additional qualification, means that the Governor may remove the Commissioner "at any time with or without cause." *Cf. Tenn. Dep't of Corr. v. Pressley*, 528 S.W.3d 506, 514–15 (Tenn. 2017). And it is axiomatic that "[t]he power to remove is the power to control." *Silver v. United States Postal Serv.*, 951 F.2d 1033, 1039 (9th Cir. 1991). "For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935); *cf.* The Federalist No. 78. Ultimate responsibility for the tasks and decisions of the commissioners therefore lies with the head of Tennessee's executive branch. In short, "[t]he buck stops" with the Governor. *Cf.*

[4] State Defendants also object to Plaintiffs raising for the first time in their Response Governor Lee's "political advocacy" with respect to firearm laws. *See* Pls.' Resp., at 14–15 & n.2; State Defs.' Reply, at 4–5. On this issue, we agree with State Defendants and do not consider Plaintiffs' argument.

"The Buck Stops Here" Desk sign, Harry S. Truman Presidential Library and Museum, *available at* https://www.trumanlibrary.gov/education/trivia/buck-stops-here-sign.

Indeed, the Governor's inclusion in this suit in particularly appropriate when, as here "enforcement and administration responsibilities are diffused among different agencies and levels of state and local government." *Doe v. Haslam*, Nos. 3:16-cv-02862 & 3:17-cv-00264, 2017 WL 5187117, at *9 (M.D. Tenn. Nov. 9, 2017) (citing *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982)). In *Allied Artists*, the Sixth Circuit explained that similar suits to this one "may properly be brought against a governor to challenge an unconstitutional law, '[e]ven in the absence of specific state enforcement provisions,' if 'the substantial public interest in enforcing [the unconstitutional law] places a significant obligation upon the Governor to use his general authority to see that state laws are enforced.'" 679 F.2d at 665 & n.5. In consideration of the relief requested and the claims stated in the Petition, as amended, the undersigned find a "substantial public interest" is apparent. The Court further notes that the interest of judicial economy, while not dispositive, is nevertheless served by allowing a constitutional challenge to proceed against the Governor rather than requiring the naming of every state and local official who might enforce a particular statute. Accordingly, we hold the enforcement of Tenn. Code Ann. §§ 39-17-1307, -1311 is fairly traceable to the actions of Governor Lee.

2. Attorney General Skrmetti

Plaintiffs allege Attorney General Skrmetti has the authority to prosecute and enforce the statutes challenged in their First Amended Complaint—when such criminal prosecutions reach the appellate level. First Am. Compl. ¶ 89. Plaintiffs also allege the Attorney General has the authority to enforce state law in trial courts if the local district attorney general "peremptorily

and categorically refuses to prosecute all instances of a criminal offense without regard to facts or circumstance." First Am. Compl. ¶ 89 (quoting Tenn. Code Ann. § 8-7-106(a)(2)). Plaintiffs further allege the Attorney General has the statutory duty and authority to issue formal opinions that constitute official state interpretations of Tennessee statutes that are used by state officials and agencies for law enforcement purposes when there is no controlling judicial opinion, as has been done for the statutes being challenged in this case. First Am. Compl. ¶ 89; *see generally* Op. Tenn. Att'y Gen. No. 18-04 (Jan. 31, 2018).

As with the Governor, however, State Defendants assert Plaintiffs' allegations are inadequate to establish a causal connection between Attorney General Skrmetti and enforcement of the challenged statutes. State Defs.' MTD, at 7. They argue rather that the Attorney General has no authority to enforce Tenn. Code Ann. § 39-17-1307 or Tenn. Code Ann. § 39-17-1311. State Defs.' MTD, at 7. State Defendants point out that Attorney General Skrmetti is a member of the judicial branch and is appointed by the Tennessee Supreme Court. State Defs.' MTD, at 7–8 (citing Tenn. Const. art. VI, § 5). They acknowledge the Attorney General directs Tennessee's civil litigation, attends to both civil and criminal litigation in the state appellate courts, all State litigation in federal courts, gives state officials legal advice in the discharge of their official duties, and defends the constitutionality of Tennessee's laws. State Defs.' MTD, at 8 (citing Tenn. Code Ann. §§ 8-6-109, -110). But, State Defendants continue, Tennessee's Attorney General, unlike the attorneys general of many other states, does not oversee the day-to-day operations of local prosecutors or officials charged with the enforcement of Tennessee's criminal law.[5] State Defendants argue this lack of enforcement authority means Plaintiffs cannot

[5] State Defendants acknowledge some limited exceptions where the Attorney General does have prosecutorial authority. *See* State Defs.' MTD, at 8 & n.2.

demonstrate that their alleged constitutional injuries are fairly traceable to Attorney General Skrmetti. State Defs.' MTD, at 8.

Plaintiffs respond that State Defendants are incorrect that enforcement of the challenged statutes does not implicate the Attorney General because he has the responsibility to enforce a particular criminal statute when a local district attorney "peremptorily and categorical refuses to enforce that statute." Pls.' Resp., at 18–19. Plaintiffs also point out that the Attorney General was required by law to be a party to this action, thereby creating a sufficient connection for standing. Pls.' Resp., at 17. It is this last argument that is strongest and ultimately persuasive to this Court. We find it inconceivable that, if a plaintiff is required by law to add a particular party to a lawsuit, the plaintiff would lack standing against that same party. *See* Tenn. Code Ann. § 29-14-107(b); *Beeler*, 223 S.W.2d at 916. At minimum, a sufficient nexus between the statute and the responsibilities of the Attorney General is recognized by the requirement that he be made a party.

Accordingly, we hold the enforcement of Tenn. Code Ann. §§ 39-17-1307, -1311 is fairly traceable to Attorney General Skrmetti.

B. *Capability of Being Redressed by Favorable Ruling*

The second element of standing challenged by State Defendants is that the alleged injury must actually be capable of redress should Plaintiffs prevail. *See Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 767 (Tenn. Ct. App. 2002); *Metro. Air Research Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992). In other words, would a declaration or injunction from this Court prevent, at least within the realm of State Defendants' conduct, the allegedly unconstitutional enforcement of Tenn. Code Ann. §§ 39-17-1307, -1311 if Plaintiffs prevail? We are persuaded that such an order would. As already

discussed, all state officials answerable to the Governor would be bound by his inability to enforce those provisions. And by requiring the Attorney General's presence in this case, the Declaratory Judgment Act ties his responsibilities to allegedly unconstitutional statutes. *See* Tenn. Code Ann. § 29-14-107(b); *Beeler*, 223 S.W.2d at 916.

Accordingly, we hold Plaintiffs' claims are redressable by a favorable decision from this Court. We, therefore, also hold that Plaintiffs have standing to pursue their claims against State Defendants in this case.

CONCLUSION

The Court holds that the sovereign immunity of the State of Tennessee does not apply to Plaintiffs' claims against State Defendants. The Court also holds that the Declaratory Judgment Act requires Attorney General Skrmetti to be made party to this action. The Court further holds that Plaintiffs have standing to pursue their claims against State Defendants. For these reasons, State Defendants' Motion to Dismiss is hereby **DENIED**.

It is so ORDERED.

CHANCELLOR MICHAEL MANSFIELD, Chief Judge

JUDGE M. WYATT BURK

JUDGE LISA NIDIFFER RICE

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JUDGE M. WYATT BURK

JUDGE LISA NIDIFFER RICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document has been forwarded to the following by regular US Mail, postage pre-paid, and/or electronic mail to:

John I. Harris III
3310 West End Avenue, Suite 460
Nashville, TN 37203
615-244-6670
jharris@slblawfirm.com
Attorney for Plaintiffs

Cody N. Brandon
P.O. Box 20207
Nashville, TN 37202
615-532-7400
Cody.Brandon@ag.tn.gov
Attorney for Defendants

Floyd Flippin
P.O. Box 160
Humboldt, TN 38343
fflippin@flippinlawpc.com
Attorney for Sheriff Thomas

This the 30 day of August, 2023.

Katelyn Organ
D.C.M.