

TENNESSEANS FOR SENSIBLE ELECTION LAWS

VS

SLATTERY, et al.

May 07, 2020

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P R O C E E D I N G S

(WHEREUPON, the above-captioned matter was heard in open court via videoconference as follows:)

COURT OFFICER: Okay. All right. So we are ready to begin so I'm gonna open court and we will get going on this case. Part III of the Davidson County Chancery Court is now in session. All persons having business before the Court, draw near, give attention and you shall be heard. God save the United States and this Honorable Court. The case is Tennesseans for Sensible Elections Laws versus Herbert Slatery, et al.

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THE COURT: Thank you. Good morning. This is Chancellor Lyle and I want to thank you all for your patience in getting connected this morning. There will be a little reverb feedback on my audio. What we had happen is the Metro laptop that I've been using for Zoom, the software, this morning we had a problem with it. And later on today, they're going to install the software again. So then we are using my home computer but we had an issue with the Zoom audio; therefore, you can see me

1 and I've called into a bridge line that we have and 09:28:47
2 will be participating audio by telephone. So by the 09:28:52
3 harness this morning, we've all connected. 09:28:58

4 How we're going to proceed is I had 09:29:01
5 Mrs. Smith send you all an e-mail stating that the 09:29:04
6 movants in the case, the defendants, would have an 09:29:07
7 hour and 15 minutes. They'll need to split that up 09:29:10
8 between their argument in chief and their reply. And 09:29:15
9 then we will have the plaintiffs respond. And you've 09:29:19
10 been given an hour's time on that. 09:29:23

11 Let me say, I've read the papers; they 09:29:27
12 were excellent. Mr. Seamon and I also did some 09:29:30
13 research on our own. I've read the cases you've 09:29:35
14 cited to. And some of these, including the Blackwell 09:29:39
15 case, came out of this court so I'm very familiar 09:29:41
16 with them and look forward to our argument. 09:29:43

17 Before we begin, a couple of just 09:29:47
18 logistics: Because we are on Zoom, I'm going to ask 09:29:50
19 you that if you have an objection, reserve that and 09:29:54
20 bring it to the Court's attention during your time so 09:30:00
21 that way we won't interrupt either speaker. The one 09:30:03
22 exception to that is that the court reporter can 09:30:09
23 interrupt at anytime so, Sarah, if you cannot hear us 09:30:11
24 or if there's a disconnection, just please let us 09:30:16
25 know and Mr. Seamon will stop the proceedings and 09:30:21

1 then we can handle it that way. 09:30:25

2 THE REPORTER: Thank you. 09:30:26

3 THE COURT: I'm now going to turn to our 09:30:27

4 attorneys and ask them to state on the record who 09:30:30

5 will be speaking on your behalf. And if you would, 09:30:35

6 spell your name for the court reporter. So let's 09:30:40

7 start with the movants, the defendants, if you tell 09:30:43

8 the Court who will be addressing in our proceeding 09:30:47

9 today. 09:30:51

10 MS. GROOVER: My name is Kelley Groover 09:30:51

11 and I will be representing the defendants today. My 09:30:54

12 name is spelled K-E-L-L-E-Y; G-R-O-O-, "V" as in 09:30:57

13 victory, -E-R. 09:31:03

14 THE COURT: All right. Thank you, Ms. 09:31:05

15 Groover. And you will be the only attorney speaking 09:31:08

16 on behalf of the movants today? 09:31:10

17 MS. GROOVER: That is correct. 09:31:15

18 THE COURT: All right. Let me now turn 09:31:16

19 to the plaintiffs. We had a number of persons on the 09:31:17

20 papers that were excellent. Who will be your 09:31:20

21 speakers today? 09:31:24

22 MR. RYAN: Good morning, Your Honor. My 09:31:24

23 name is James Ryan and I will be arguing on behalf of 09:31:28

24 the plaintiffs this morning. My name is spelled 09:31:31

25 J-A-M-E-S, R-Y-A-N. 09:31:34

1 THE COURT: Will there be anyone besides 09:31:37
2 you, Mr. Ryan? 09:31:39
3 MR. RYAN: No, Your Honor. 09:31:42
4 THE COURT: Okay. Very good. Before we 09:31:43
5 get started with Ms. Groover's argument, are there 09:31:46
6 any matters that the parties need to bring to the 09:31:49
7 Court's attention, any preliminary matters? 09:31:51
8 Movants, any preliminary matters? 09:31:54
9 MS. GROOVER: No, Your Honor. 09:31:57
10 THE COURT: Okay. And Mr. Ryan, any 09:31:57
11 preliminary matters? 09:32:00
12 MR. RYAN: No, Your Honor. 09:32:01
13 THE COURT: This argument will be a 09:32:02
14 little bit different. Normally, I'm very interactive 09:32:04
15 and I ask my questions as the attorneys present their 09:32:08
16 arguments. Because of our remote technology, I'm not 09:32:12
17 going to do that. I will wait until each side 09:32:17
18 concludes their argument and I'll ask my questions at 09:32:20
19 that time. 09:32:20
20 All right. Ms. Groover, if you are ready 09:32:23
21 to proceed, the Court is as well. 09:32:25
22 MS. GROOVER: Thank you, Your Honor. As 09:32:28
23 I said, my name is Kelley Groover and I'm with the 09:32:30
24 Tennessee Attorney General's Office. I am 09:32:33
25 representing the defendants today. And before the 09:32:35

1 Court is the defendants' motion to dismiss based on a 09:32:38
2 lack of subject matter jurisdiction. And as Your 09:32:41
3 Honor knows where the issue of subject matter 09:32:45
4 jurisdiction is raised, the burden is then upon the 09:32:49
5 plaintiff to establish that subject matter 09:32:52
6 jurisdiction does, in fact, exist. 09:32:55

7 So the statute at issue here, Tennessee 09:32:56
8 Code Annotated 2-19-142, is a criminal statute that 09:33:00
9 makes it a violation to publish false campaign 09:33:05
10 literature and a violation of the statute may result 09:33:09
11 in a criminal prosecution. Specifically, it is a 09:33:12
12 Class C misdemeanor. 09:33:15

13 The plaintiff in this case is requesting 09:33:16
14 relief from this court in the form of both an 09:33:19
15 injunction and a declaratory judgment. However, Your 09:33:21
16 Honor, the problem is that this is a chancery court 09:33:27
17 which does not have the subject matter jurisdiction 09:33:30
18 over a criminal statute. With regard to the 09:33:33
19 criminal -- or, excuse me, with regard to the 09:33:37
20 injunction, the plaintiff has conceded in its 09:33:40
21 response that this court does not have the subject 09:33:43
22 matter jurisdiction to enjoin potential criminal 09:33:46
23 prosecution. So what we're left with here, 09:33:50
24 essentially, is the issue of whether or not this 09:33:52
25 court has the subject matter jurisdiction to issue a 09:33:54

1 declaratory judgment declaring the statute
2 unconstitutional.

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3 Admittedly, there is some conflict in the
4 case law here with regard to this issue. However,
5 thankfully for us, we have some guidance from our
6 Tennessee Supreme Court rules as to what case is the
7 binding precedent. And the cases that control here
8 are the cases that the State has pointed out in its
9 briefing; specifically, the Supreme Court precedent
10 of the Zirkle and Hill cases and the later Court of
11 Appeals' decisions of Carter versus Slatery and
12 Memphis Bonding Company.

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13 I do want to briefly discuss Memphis
14 Bonding because it is a case that is particularly
15 instructive here. It is a 2015 published decision
16 from the Court of Appeals. And I would draw the
17 Court's attention specifically to around page 467 of
18 this decision. Around that page, there is some
19 discussion of the Court of Appeals' previous decision
20 in Blackwell versus Haslam as Your Honor has already
21 mentioned.

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22 In the Blackwell case, the Court of
23 Appeals found that a chancery court could have
24 subject matter jurisdiction to declare a criminal
25 statute unconstitutional. The Blackwell court based

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1 that decision on its reading of the Supreme Court 09:35:13
2 decisions in Clinton Books and Davis-Kidd. However, 09:35:15
3 as the Memphis Bonding case points out, neither of 09:35:20
4 those Supreme Court decisions actually address the 09:35:23
5 issues of whether or not a chancery court may issue a 09:35:26
6 declaratory judgment against a criminal statute. The 09:35:30
7 Blackwell court read the Court's silence there as 09:35:32
8 essentially a tacit expansion of a chancery court's 09:35:41
9 subject matter jurisdiction. 09:35:42

10 However, the Memphis Bonding decision 09:35:43
11 explicitly rejects that reasoning. And what Memphis 09:35:45
12 Bonding states is that the earlier Supreme Court 09:35:50
13 decisions of Zirkle and Hill were not abandoned by 09:35:52
14 the Supreme Court's decision in Clinton Books and 09:35:55
15 Davis-Kidd and so Zirkle and Hill are still the 09:35:59
16 controlling authority here. And because Memphis 09:36:02
17 Bonding is a later published Court of Appeals' 09:36:04
18 decision, it effectively overturns the decision in 09:36:08
19 the Blackwell case. So the rule according to Memphis 09:36:12
20 Bonding and the Zirkle and Hill decisions is that a 09:36:16
21 chancery court only has subject matter jurisdiction 09:36:19
22 to issue a declaratory judgment regarding a criminal 09:36:21
23 statute or any statute where the court would also 09:36:25
24 have the subject matter jurisdiction to issue an 09:36:28
25 injunction. 09:36:31

1 And as the plaintiffs have conceded in
2 their response, this court is without the subject
3 matter jurisdiction to issue an injunction against
4 the District Attorney to restrain it from prosecuting
5 this criminal statute.

6 The plaintiffs here also point to the
7 Erwin Billiard case which is a 1927 Supreme Court
8 decision. And I would point out a couple of things
9 with this decision. First, the plaintiffs in this
10 case, their property rights were at issue which is
11 one of the narrow exceptions where a chancery court
12 does have jurisdiction. Property rights are not at
13 issue in this case. But I would also point out that
14 this is a -- while it is a Supreme Court decision, it
15 is from 1927 and the Zirkle and Hill cases follow
16 that which explicitly state that this court does not
17 have jurisdiction here.

18 The plaintiffs also rely on three
19 separate statutes, and they say that each of these
20 statutes confers subject matter jurisdiction upon
21 this court. The first of those statutes is the
22 Declaratory Judgments Act. And the plaintiffs rely
23 very heavily on the Colonial Pipeline case to suggest
24 that that statute confers jurisdiction upon this
25 court. However, I would point out, first, that

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1 Colonial Pipeline does not deal with a criminal
2 statute so there's not any discussion in that case of
3 whether or not a chancery court has subject matter
4 jurisdiction over a criminal statute.

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5 And I would also point out that what that
6 case, in fact, says, which we have quoted in our
7 opening memorandum, is that while the statute does
8 give a court the ability to assess the validity of a
9 statute, a court can only do so where it already
10 otherwise has jurisdiction. And as the Hill versus
11 Beeler case states, the Declaratory Judgment Act does
12 not serve as an independent basis for jurisdiction.

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13 The second statute that plaintiffs rely
14 on is 42 U.S.C. 1983, which is, of course, the
15 Federal Civil Rights Statute. In our briefing, we
16 have pointed to some cases which explicitly state
17 that Section 1983 does not expand the jurisdiction of
18 a state chancery court. Again, the burden here is on
19 the plaintiffs to establish this court does have
20 subject matter jurisdiction. And plaintiffs in their
21 response have not pointed to any court authority to
22 contradict the cases that we have cited in our brief.

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23 Last, the plaintiffs rely on a relatively
24 new statute, Tennessee Code Annotated 1-3-121 and
25 state that this statute also confers subject matter

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1 jurisdiction on this court. But again, much like the 09:39:09
2 Declaratory Judgment Act, this statute does not serve 09:39:13
3 as an independent basis for jurisdiction. There is 09:39:15
4 no language in the statute involving subject matter 09:39:19
5 jurisdiction. Plaintiff here seems to conflate the 09:39:25
6 creation of a cause of action with a statute 09:39:28
7 conferring jurisdiction. Simply because a plaintiff 09:39:31
8 may have a cause of action doesn't mean that action 09:39:34
9 may be filed in any court the plaintiff chooses. 09:39:38

10 For example, if my neighbor causes damage 09:39:41
11 to my property, I have a cause of action against my 09:39:43
12 neighbor. But if those damages exceed \$25,000, I 09:39:48
13 can't file that in the General Sessions Court. So 09:39:53
14 simply because a cause of action may exist, the rules 09:39:56
15 about venue and jurisdiction still apply and the 09:39:59
16 action must be filed in the appropriate court. 09:40:02

17 In conceding that this court does not 09:40:05
18 have subject matter jurisdiction to provide an 09:40:09
19 injunction, the plaintiff has proposed a rather 09:40:11
20 creative solution. The plaintiff seems to be 09:40:15
21 proposing that this court issue a declaratory 09:40:18
22 judgment that it can then take up to the Supreme 09:40:22
23 Court, and then once the Supreme Court has affirmed 09:40:24
24 that decision, we could come back to this court and 09:40:26
25 this court would then be free to issue an injunction 09:40:29

1 as that is one of the narrow exceptions where a 09:40:33
2 chancery court can do so. The problem with that, of 09:40:38
3 course, is, first, this court does not have the 09:40:40
4 subject matter jurisdiction to issue the declaratory 09:40:42
5 judgment order but, also, plaintiff at -- does not 09:40:46
6 have an appeal as of right to the Supreme Court so 09:40:48
7 there's no guarantee plaintiff would ever arrive at 09:40:51
8 the Supreme Court; nor is there a guarantee they 09:40:54
9 would be ultimately successful. So this is a rather 09:40:57
10 hypothetical, tenuous, proposed solution. 09:41:00

11 But perhaps the bigger problem with this, 09:41:03
12 Your Honor, is as plaintiff -- as plaintiff has 09:41:06
13 stated in their response, a declaratory judgment from 09:41:07
14 this court would not be effective in restraining a 09:41:09
15 District Attorney from bringing a criminal 09:41:14
16 prosecution against the plaintiff. So, in other 09:41:15
17 words, the plaintiff is not afforded any meaningful 09:41:18
18 relief by this court issuing a declaratory judgment. 09:41:22
19 If criminal charges were to be brought against this 09:41:24
20 plaintiff, if they had a declaratory judgment from 09:41:29
21 this court, they could take it into the criminal 09:41:30
22 court, but the criminal court would not necessarily 09:41:33
23 be bound by that decision. So essentially what the 09:41:35
24 plaintiff here is asking for is an advisory opinion 09:41:38
25 from this court, which this court, of course, cannot 09:41:41

1 give. 09:41:45

2 Lastly, the plaintiff seems to state that 09:41:45
3 if they are not able to bring this cause of action 09:41:49
4 here in a chancery court and get all the relief they 09:41:52
5 want from the chancery court that they have no legal 09:41:55
6 recourse whatsoever, which is just simply not the 09:41:58
7 case. There are other courts that do have 09:42:01
8 jurisdiction over criminal statutes and we are simply 09:42:03
9 stating this matter must be dismissed because it's 09:42:06
10 simply in the inappropriate court. So that's all 09:42:10
11 that I have, Your Honor. 09:42:13

12 THE COURT: I do have some questions that 09:42:15
13 I would like to ask you. Ms. Groover, can you hear 09:42:18
14 me okay? 09:42:21

15 MS. GROOVER: Yes, I can. 09:42:22

16 THE COURT: All right. Let me take you 09:42:24
17 to the cases of Zirkle, and Memphis Bonding, and 09:42:26
18 Grant versus Anderson which is a more recent case 09:42:34
19 that was Court of Appeals Judge McBrayer, and I want 09:42:38
20 to discuss those with you. So when I looked over 09:42:42
21 Zirkle and Memphis Bonding, they seemed in a way to 09:42:47
22 be outlier cases or cases that were confined more to 09:42:50
23 their facts. In Zirkle, we had eminent domain 09:42:54
24 emphasized in that case, is that that is a matter 09:42:59
25 that chancery court doesn't have jurisdiction over; 09:43:02

1 it's a circuit matter. And then when you look at the 09:43:07
2 Memphis Bonding case, a similar situation because we 09:43:11
3 were talking about rules of the criminal courts, 09:43:15
4 things that are very specific to the criminal courts 09:43:19
5 and that they should be deciding and have input on. 09:43:23

6 So I take that context of Zirkle and 09:43:26
7 Memphis Bonding, I look at that context and then I go 09:43:32
8 to the Grant versus Anderson case, the 2018 case. 09:43:36
9 And in there, Judge McBrayer said that -- and it's 09:43:41
10 dicta, but there are cases that say that this court 09:43:47
11 needs to be guided by dicta by a higher -- from a 09:43:51
12 higher court. It says that, obviously, if the 09:43:55
13 plaintiffs had had standing then they would be 09:43:56
14 entitled to seek declaratory relief on the 09:44:01
15 constitutionality of a penal or criminal statute; 09:44:05
16 that links back all the way to our 1927 Erwin 09:44:08
17 Billiard case. 09:44:14

18 And so if you go from Erwin Billiard to 09:44:15
19 Blackwell, you take Zirkle and Memphis Bonding and -- 09:44:18
20 and put them in the niche of their facts and then 09:44:24
21 come around up to Grant, it appears that the 09:44:28
22 plaintiffs do have the ability in chancery court to 09:44:36
23 challenge the constitutionality of a statute that 09:44:42
24 pertains to a penal -- or that penalizes, let's say, 09:44:47
25 political speech based on its content. 09:44:55

1 So having said that, tell me what your
2 response is to confining Zirkle and Memphis Bonding
3 to their facts. And then also, if you would, comment
4 upon Judge McBrayer's dicta in Grant versus Anderson.

5 MS. GROOVER: So I think what's helpful
6 here is to recall that the -- this particular
7 plaintiff has once before challenged a criminal
8 provision in the statute. And Your Honor should
9 remember that was in front of your court. And what
10 happened in that case, as we've cited to in our
11 brief, is this court did not issue an injunction
12 against the District Attorney there. The issue was
13 then taken before the Court of Appeals. And the
14 Court of Appeals in its opinion has some rather
15 lengthy discussion of it and ultimately affirms that
16 this court did not have jurisdiction to issue an
17 injunction, and so it affirmed this court's decision
18 with regard to the injunction.

19 So I think then you have to look to the
20 holdings in Zirkle, Hill, and Memphis Bonding that
21 say that a chancery court's ability to issue a
22 declaratory judgment is tied to its ability to issue
23 an injunction. So I think with there being such
24 clear precedent here regarding this exact plaintiff
25 bringing a very similar case in this very court

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1 stating that this court does not have the subject 09:46:36
2 matter jurisdiction to bring -- to issue that 09:46:40
3 injunction, and you pair that with this precedent -- 09:46:42
4 binding precedent which states that this court's 09:46:47
5 subject matter jurisdiction in a declaratory judgment 09:46:50
6 context is directly tied to its ability to issue an 09:46:54
7 injunction. I think when you look at those two 09:46:56
8 things together then that's the reasoning to follow. 09:46:59

9 THE COURT: Thank you. Let me follow up 09:47:06
10 on that a little bit. It seems like there are so 09:47:07
11 many parallels here between this case and Grant 09:47:11
12 versus Anderson. In Grant, of course, was decided or 09:47:16
13 went off more on the standings. But if I put that 09:47:19
14 aside, then it seems that Grant does provide me, at 09:47:23
15 least in dicta, that there is -- confining Zirkle and 09:47:29
16 Memphis Bonding to their facts. 09:47:38

17 Any other thoughts about Zirkle and 09:47:42
18 Memphis Bonding that they can go outside of eminent 09:47:46
19 domain and criminal court rules? And I guess what 09:47:52
20 I'm thinking there, those are such specific areas. 09:47:55
21 When you think about eminent domain, that's, you 09:47:59
22 know, never been a chancery matter. And then in 09:48:03
23 Memphis Bonding, again, that was rules of court which 09:48:08
24 are very much tied to the specific court. Anything 09:48:12
25 you want to say about the significance of those facts 09:48:16

1 or is it not significant? 09:48:19

2 MS. GROOVER: I think the holding in 09:48:21
3 Zirkle is not fact-dependent because, ultimately, the 09:48:23
4 ruling there is that you need an underlying judgment 09:48:29
5 in order for the declaratory judgment. And Colonial 09:48:33
6 Pipeline agrees with that position. So again, the 09:48:37
7 Court's authority -- or subject matter jurisdiction 09:48:40
8 here really is tied to the ability to enjoin the 09:48:41
9 statute, and I think it's very clear that that 09:48:45
10 subject matter jurisdiction here does not exist. 09:48:48

11 THE COURT: The concession by the 09:48:50
12 plaintiffs concerning the injunction is a parallel to 09:48:54
13 Grant versus Anderson. And when I read Grant versus 09:48:59
14 Anderson, I take guidance from that that I could -- 09:49:03
15 if I denied the motion to dismiss that I could use 09:49:07
16 the same measure, same remedy that we did in Grant 09:49:13
17 versus Anderson because of Judge McBrayer's, I guess, 09:49:19
18 discussion of that and affirming that. Any comments, 09:49:24
19 thoughts about that, if the defendants were -- if I 09:49:27
20 didn't dismiss the case but provided that the remedy 09:49:32
21 of -- I'll just use a vernacular term -- nonsuiting 09:49:40
22 the injunction that would be without prejudice to 09:49:45
23 come back if they prevail? I know you had argued 09:49:47
24 that that's an advisory decision, but putting that 09:49:52
25 argument aside, can we draw any guidance from Grant 09:49:55

1 versus Anderson on doing that? 09:50:00

2 MS. GROOVER: Again, I think that really 09:50:03

3 what controls here are these other decisions that 09:50:06

4 we've cited. So there is this dicta from Grant, but 09:50:09

5 I think what really controls is this notion of the 09:50:13

6 Court needing the subject matter jurisdiction to 09:50:17

7 issue an injunction. So, yes, there is this dicta, 09:50:19

8 but I think what ultimately does control are the 09:50:23

9 holdings from Memphis Bonding, and Zirkle, and Hill. 09:50:26

10 THE COURT: I always do this when we're 09:50:31

11 talking about constitutionality and I do it often 09:50:34

12 with other cases but the law has to make sense, it 09:50:38

13 has to be practical, it has to be workable. So let's 09:50:43

14 push back from the details of the cases and I want to 09:50:47

15 ask you is it workable, is it feasible, is it 09:50:51

16 practical to say that chancery court cannot make a 09:50:57

17 decision about the constitutionality of a statute 09:51:03

18 where the statute refers to a penal sanction? I 09:51:10

19 mean, the -- I guess the consequence of that would be 09:51:17

20 that you would have, what, criminal courts deciding 09:51:20

21 if something is constitutional? Is that the way it 09:51:24

22 would work? 09:51:28

23 MS. GROOVER: A criminal court or a 09:51:28

24 federal district court which has both civil and 09:51:31

25 criminal jurisdiction. The problem with allowing a 09:51:34

1 chancery court to decide or to declare a criminal 09:51:36
2 statute unconstitutional is that it -- that it then 09:51:39
3 cannot issue an injunction and so, again, the 09:51:41
4 plaintiff is not obtaining any sort of meaningful 09:51:45
5 relief. 09:51:47

6 THE COURT: With respect to your argument 09:51:50
7 that this court would be unable to enjoin a District 09:51:52
8 Attorney from enforcing the action, I want to take us 09:51:58
9 back to the concept, the purpose of a declaratory 09:52:01
10 judgment action. That procedural or statutory remedy 09:52:07
11 is used so that litigants don't first have to be 09:52:14
12 charged by the District Attorney, or by someone, or 09:52:21
13 have that proceed. They can come in, and if there is 09:52:25
14 the threatened harm, then they can obtain a 09:52:29
15 declaratory judgment action. Does that in any way 09:52:34
16 salvage, provide support for this court to exercise 09:52:37
17 jurisdiction in this case? 09:52:44

18 MS. GROOVER: No. Because, again, it 09:52:45
19 wouldn't restrain the District Attorney from pursuing 09:52:47
20 a criminal prosecution, which plaintiff, itself, has 09:52:50
21 stated in its response so it just isn't -- it's not 09:52:54
22 helpful to the plaintiff. 09:52:58

23 THE COURT: Practically, if the Court 09:53:01
24 were to rule that this was unconstitutional that were 09:53:03
25 affirmed on appeal, then how would the District 09:53:06

1 Attorney be able to proceed? That would be unlawful. 09:53:10

2 MS. GROOVER: I would refer to -- I 09:53:15

3 believe it's the J.W. Kelly case. I'm sorry, it will 09:53:19

4 take me a moment to find it. 09:53:24

5 THE COURT: And I might can find that. I 09:53:26

6 know what you're talking about. Let me look through 09:53:27

7 the papers here. 09:53:30

8 MS. GROOVER: And this is actually coming 09:53:32

9 straight from the plaintiff's response. And 09:53:34

10 plaintiff stated a declaratory judgment does not 09:53:36

11 interfere with pending or threatened prosecutions for 09:53:41

12 violations of the criminal laws of the state in any 09:53:44

13 regard. And that partially quotes from the J.W. 09:53:47

14 Kelly decision which is a Supreme Court decision, I 09:53:51

15 believe. 09:53:55

16 THE COURT: And so tell me the legal 09:53:55

17 significance of that applied to our situation where 09:53:57

18 we don't have any criminal prosecution pending and 09:54:01

19 we've had these plaintiffs come in early on and seek 09:54:05

20 a determination that this is a declaration; that this 09:54:09

21 statute is unconstitutional and therefore 09:54:15

22 unenforceable. 09:54:17

23 MS. GROOVER: Well, this is significant 09:54:19

24 because when a plaintiff comes into a court seeking 09:54:21

25 some sort of relief, that -- the relief that they're 09:54:23

1 seeking needs to actually be effective for them 09:54:26
2 somehow. So if the relief that this court is able to 09:54:29
3 give can't do anything to prevent a criminal 09:54:33
4 prosecution, again, the plaintiff is not receiving 09:54:39
5 any sort of meaningful relief here. 09:54:40

6 THE COURT: If the Court issues an order, 09:54:43
7 decision that this is unconstitutional and that's 09:54:46
8 affirmed, then how would a district attorney have 09:54:48
9 authority to prosecute under the statute? 09:54:50

10 MS. GROOVER: Well, I think the answer is 09:54:52
11 in the question. It would need to be affirmed. And 09:54:54
12 it would need to be affirmed all the way up to the 09:54:57
13 Supreme Court, which, again, the plaintiff does not 09:55:00
14 have an appeal as of right to the Supreme Court and 09:55:03
15 there's no guarantee of ever -- of ever reaching that 09:55:08
16 court. 09:55:08

17 THE COURT: But in this case, we don't 09:55:08
18 have a prosecution. 09:55:10

19 MS. GROOVER: Uh-huh. 09:55:10

20 THE COURT: That may be going on in other 09:55:11
21 cases if -- but we don't have a prosecution in this 09:55:14
22 case and so if it were appealed and affirmed, all 09:55:18
23 we're doing is declaring that the statute is 09:55:22
24 unconstitutional, and at that point it couldn't be 09:55:25
25 enforced by the District Attorney so. Okay. I 09:55:30

1 understand your position. I just wondered, 09:55:33
2 practically speaking, how this is an advisory 09:55:36
3 decision if the Court were to determine that it is 09:55:41
4 unconstitutional; at that point, when it goes up and 09:55:45
5 it's affirmed, it's not enforceable. 09:55:48
6 Okay. Ms. Groover, thank you very much. 09:55:50
7 You will have time to reply. I appreciate your 09:55:52
8 patience with the Court's questions and thank you for 09:55:58
9 your excellent papers. 09:56:01
10 MS. GROOVER: Thank you. 09:56:02
11 THE COURT: Is there anything that you 09:56:03
12 want to say before I turn to the other side and hear 09:56:04
13 their argument? 09:56:07
14 MS. GROOVER: No, Your Honor. 09:56:08
15 THE COURT: Thank you. 09:56:09
16 All right. Mr. Ryan, if you will proceed 09:56:11
17 with your argument. 09:56:13
18 MR. RYAN: Thank you, Your Honor. As 09:56:15
19 stated earlier, Your Honor, my name is James Ryan, 09:56:19
20 and I along with Cole Browndorf, Paige Tenkhoff, 09:56:22
21 Amber Banks, Gautam Hans are here with the Vanderbilt 09:56:27
22 Law School First Amendment Clinic representing the 09:56:29
23 plaintiff before the Court this morning, along with 09:56:32
24 co-counsel, Daniel Horwitz. 09:56:33
25 Your Honor, we would like to highlight 09:56:36

1 one fact that bears most significantly on the Court 09:56:38
2 today, and that is this action is not only seeking 09:56:41
3 injunctive relief, but as the Court noted, is also 09:56:48
4 seeking declaratory relief. Your Honor, this is a 09:56:51
5 crucial distinction because, although there might be 09:56:53
6 outstanding precedent suggesting that parties cannot 09:56:53
7 seek injunctive relief alone against the District 09:56:57
8 Attorney, the case law suggests that the declarations 09:57:00
9 regarding these constitutional issues are well within 09:57:03
10 this Court's power to adjudicate. And as the Court 09:57:07
11 has noted, you know, there's -- time and time again, 09:57:11
12 the Tennessee courts have recognized that the 09:57:13
13 Declaratory Judgment Act does confer subject matter 09:57:17
14 jurisdiction on this court, the power to adjudicate 09:57:18
15 cases involving a declaration that a statute is 09:57:22
16 unconstitutional. 09:57:22

17 I would like to highlight, for example, 09:57:27
18 in 1999 in the Sanders' decision, the Tennessee Court 09:57:30
19 of Appeals noted that the Declaratory Judgment Act 09:57:34
20 does, in fact, grant subject matter jurisdiction on 09:57:36
21 the trial courts in the state of Tennessee to address 09:57:39
22 challenges such as this. I believe that opposing 09:57:44
23 counsel tries to distinguish Colonial Pipeline from 09:57:48
24 that as the Court has noted. However, the Colonial 09:57:52
25 Pipeline was a Supreme Court opinion and it 09:57:57

1 unambiguously held that the Declaratory Judgment Act 09:57:59
2 confers power on the chancery court to adjudicate 09:58:03
3 claims such as the one the plaintiff is bringing 09:58:08
4 right now. And I would direct Your Honor to page 6 09:58:10
5 of our -- of our brief at the bottom. And -- and as 09:58:16
6 I -- as I noted, it is unambiguous that this -- 09:58:21
7 this -- this case held the Declaratory Judgment Act 09:58:27
8 does confer. 09:58:28

9 Furthermore, in Chalmers, the -- the 09:58:30
10 Court -- the Tennessee court expressly stated that 09:58:35
11 Colonial Pipeline held that the Declaratory Judgment 09:58:39
12 Act grants the Court of Chancery subject matter 09:58:42
13 jurisdiction. And the -- and the Court in Sundquist 09:58:45
14 also wrote, essentially, that the Declaratory 09:58:50
15 Judgment Act must be liberally construed except when 09:58:56
16 the plaintiff will be seeking monetary damages. And, 09:58:59
17 obviously, that is not the case here. We are only 09:59:02
18 seeking equitable relief. And -- and the Court in 09:59:05
19 that case also noted that the remedial purpose of the 09:59:09
20 Declaratory Judgment Act makes it an enabling statute 09:59:14
21 to allow a proper plaintiff to maintain a cause of 09:59:16
22 action against the State challenging the 09:59:20
23 constitutionality of a statute. So this case law, 09:59:22
24 which, of course, is further cited in our purposes, 09:59:25
25 unequivocally shows that this court has the power to 09:59:28

1 adjudicate the plaintiff's claims under the
2 Declaratory Judgment Act.

3 And, Your Honor, the Court has the power
4 to declare this in regards to both defendants named
5 here. And -- and I would just like to point out
6 one -- one thing, Your Honor, that I think is a
7 misconception, that we are conceding that we cannot
8 be granted an injunction. That is not our position
9 at all.

10 With -- with regards to the District
11 Attorney, we believe -- or it is our position that
12 2-19-142 can be declared unconstitutional and then
13 subsequently be enjoined, as the Court has noted as a
14 practical matter.

15 It is our position that if there's any
16 concession here at all, I would point the Court to, I
17 believe it's page 4 and 5 of the defendants' opening
18 brief where they concede that this -- once this law
19 is declared unconstitutional, injunctive relief is
20 invariably allowed. And that -- that was in the
21 opinion cited by the defendant in *Tennesseans for*
22 *Sensible Election Laws* just held last year. There,
23 the Court noted that the trial court had jurisdiction
24 to grant a declaratory judgment against -- and I --
25 and I -- and I emphasize this -- the District

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1 Attorney regardless of any constitutional prohibition 10:00:51
2 regarding injuncture (sic) -- an injunction against 10:00:55
3 the DA. 10:00:57

4 And so I would -- I would also like to 10:00:58
5 highlight one important factor that I think the 10:01:00
6 opposing counsel completely glosses over in both -- 10:01:04
7 both today's hearing and in their papers. There are 10:01:09
8 two defendants named here, Your Honor. And the 10:01:12
9 distinction between the two remedies and the two 10:01:15
10 defendants is very important. The Tennessee Attorney 10:01:18
11 General is not tasked with enforcing the underlying 10:01:21
12 statute in this case. He is charged with defending 10:01:25
13 its constitutionality. There is no threat, as 10:01:29
14 opposing counsel has noted, of criminal prosecution 10:01:31
15 by the attorney general. So any concern articulated 10:01:37
16 in J.W. Kelly, as opposing notes, there's no -- 10:01:39
17 there's no concern about a civil court enjoining a 10:01:45
18 criminal court because -- which is a basis for this 10:01:48
19 jurisdictional rule in regards to the District 10:01:49
20 Attorney. 10:01:49

21 We have named the Attorney General as a 10:01:51
22 defendant as it is their job to defend the 10:01:54
23 constitutionality, not because they will effect -- 10:01:57
24 effectively seek criminal prosecution. And in that 10:02:01
25 regard, Your Honor, we cite, I believe -- I forget 10:02:05

1 what page it's on but we cite case law in our papers 10:02:07
2 that all noncriminal applications of 2-19-142 can be 10:02:12
3 enjoined without restrictions. For example, in 10:02:17
4 several instances, this statute has been used as a 10:02:20
5 basis for tortuous action; in one case on the theory 10:02:22
6 of negligence, per se. So the argument that the 10:02:26
7 Attorney General can't be enjoined here is -- is 10:02:28
8 not -- is not the case. The -- the -- the only 10:02:31
9 threat to the plaintiff in this case is not only 10:02:35
10 criminal prosecution but also civil liability. 10:02:38

11 And because we are seeking both remedies, 10:02:42
12 the -- this court does have the power to adjudicate 10:02:44
13 the claims. And to further support this, Your Honor, 10:02:50
14 the intent of the -- the intent of the General 10:02:52
15 Assembly is clear with the enactment of 1-3-122. I 10:02:54
16 think it's a little dismissive to say that that 10:02:58
17 statute does not confer jurisdiction on this court. 10:03:02
18 The statute is very, very clear. In fact, it starts 10:03:05
19 off by saying notwith- -- notwithstanding any law to 10:03:09
20 the contrary, and it provides the cause of action for 10:03:12
21 any affected person who seeks declaratory or 10:03:17
22 injunctive relief an action that's brought 10:03:23
23 challenging the constitutionality of state statutes. 10:03:24
24 And so if the Court were to accept as a practical 10:03:26
25 matter that the words notwithstanding any law to the 10:03:29

1 contrary did not give this court a power to 10:03:34
2 adjudicate the claim, those words would not mean what 10:03:37
3 they say. And they're -- it -- I guess it's -- I 10:03:42
4 suppose it's a canonical argument, but the General 10:03:47
5 Assembly would not be creating a cause of action 10:03:52
6 without a place to adjudicate the claims. 10:03:55

7 And as I noted, the statute is 10:03:58
8 unambiguous. It provides a cause of action. If -- 10:04:00
9 if you -- if the Court were to accept the opposing 10:04:03
10 counsel's contention that this doesn't confer 10:04:07
11 jurisdiction, the -- the books -- or the statute 10:04:10
12 would be collecting dust on the shelf and so it 10:04:12
13 would -- it would effectively be illusory. 10:04:15

14 And I think with respect to 1983, Your 10:04:19
15 Honor, as cited in our papers, 1983, we cite the Blue 10:04:24
16 Sky decision. It does create a vehicle by which a 10:04:29
17 court of the chancery can have subject matter 10:04:34
18 jurisdiction. And I would like to point out on 10:04:38
19 the -- I think it's page 5 of the -- of the opening 10:04:41
20 brief for the defendant. The 1983 concern is -- it 10:04:47
21 is only in regard to injunctions. And so I think 10:04:53
22 that's why it's tied into all these arguments is that 10:04:57
23 it's an important fact that we're seeking both 10:05:03
24 declaratory and injunctive relief. 10:05:06

25 And, lastly, Your Honor, I just want to 10:05:06

1 note, as note -- as cited in our papers, the 10:05:08
2 Tennessee Constitution's Bill of Rights is 10:05:10
3 self-executing, and cases in the past that have 10:05:13
4 adjudicated this primarily have been only for money 10:05:16
5 damages. We -- as noted earlier, we're not seeking 10:05:21
6 money damages. 10:05:24

7 And I would direct you to page (sic) 20 10:05:25
8 and 21 of our response for -- for a -- I think a 10:05:27
9 fairly useful string cite in that regard. And so, 10:05:32
10 Your Honor, I would just like to really highlight the 10:05:38
11 fact that the -- the Court obviously points out Grant 10:05:40
12 and Erwin, and I think the Carter -- I think it's the 10:05:46
13 Memphis Building (sic). Those -- those are not 10:05:52
14 binding here. It's -- it's the Colonial -- it's the 10:05:54
15 Colonial Pipeline decision, and those are 10:05:57
16 unambiguous. They -- they clearly give the plaintiff 10:06:01
17 here a right to seek a declaration that this statute 10:06:03
18 is unconstitutional. And we would simply request 10:06:07
19 that the Court deny the defendants' motion to dismiss 10:06:11
20 as it's unequivocal that the Court has the power to 10:06:11
21 adjudicate the plaintiff's claims. Thank you. 10:06:18

22 THE COURT: I do have a few questions 10:06:19
23 here. Can you hear me okay? 10:06:20

24 MR. RYAN: Yes, Your Honor. 10:06:23

25 THE COURT: All right. Is Grant versus 10:06:24

1 Anderson supportive of your position that the Court 10:06:28
2 should deny dismissal, or is part of it supportive 10:06:30
3 and part of it's not, or is it not supportive? Tell 10:06:35
4 me your views on Grant with respect to your 10:06:38
5 opposition to dismissal. That's the Judge McBrayer 10:06:41
6 decision that was handed down that the Court referred 10:06:47
7 to earlier. It's a more recent decision. And 10:06:51
8 although it did focus on standing, there are some 10:06:54
9 parallels to this case. It was a May 2018 decision. 10:06:57
10 MR. RYAN: Yes, Your Honor. I -- I -- I 10:07:00
11 think Grant is -- is very helpful in -- in defending 10:07:02
12 our position. As Your Honor noted, that this -- 10:07:05
13 this -- this case seems to string back other cases 10:07:08
14 almost a hundred years now supporting the position 10:07:13
15 that the courts of chancery do have the unequivocal 10:07:16
16 power to declare statutes unconstitutional. 10:07:21
17 And -- and I would also like to note that 10:07:23
18 the other -- the other cases that I have cited today, 10:07:27
19 Your Honor, there's not just the Grant decision. 10:07:31
20 There is the Sanders' decision; there's the Colonial 10:07:33
21 Pipeline decision; there's the Chalmers' decision; 10:07:37
22 there's the Campbell v. Sundquist decision. All 10:07:39
23 these cases seem to indicate that a court of chancery 10:07:42
24 has the unequivocal power to declare a statute 10:07:45
25 unconstitutional. And I really, really want the 10:07:45

1 Court to highlight that this -- bulk of these cases 10:07:53
2 and claims by the opposing counsel are with regard to 10:07:57
3 the District Attorney. The Attorney General is named 10:07:59
4 here as well. And I -- and I -- I think that that is 10:08:01
5 an important fact. 10:08:04

6 THE COURT: In the cases that you've 10:08:08
7 cited to the Court for the proposition that the 10:08:09
8 Chancery Court has jurisdiction -- subject matter 10:08:14
9 jurisdiction over declaratory judgment actions 10:08:18
10 concerning constitutionality of statutes, I'm very 10:08:21
11 familiar with Colonial Pipeline. We use that 10:08:25
12 frequently in this court and so I know the facts of 10:08:26
13 that and what it related to. Campbell versus 10:08:29
14 Sundquist, I've used that case many times. I didn't 10:08:34
15 look it up beforehand, our argument today. Does it 10:08:38
16 involve a criminal statute? Do you remember what the 10:08:41
17 factual context that Campbell was because Colonial 10:08:45
18 Pipeline is not exactly a parallel to what we have, 10:08:49
19 where we have a statute that, you know, criminalizes 10:08:53
20 conduct. Is Campbell versus Sundquist more along 10:08:58
21 those lines? I just can't recall and I can look it 10:09:02
22 up later if you don't remember. 10:09:05

23 MR. RYAN: I believe that Campbell versus 10:09:07
24 Sundquist involved a civil action. I am not entirely 10:09:10
25 sure. 10:09:12

1 THE COURT: Okay. 10:09:12

2 MR. RYAN: I think it was the HBA on -- 10:09:13

3 THE COURT: I can look -- I can look it
4 up. But that -- 10:09:16
10:09:18

5 MR. RYAN: Right. 10:09:20

6 THE COURT: -- that was my -- go ahead. 10:09:21

7 MR. RYAN: I was just gonna say, Your
8 Honor, I still think that regardless of whether
9 this -- the underlying statute, of course, is a
10 criminal statute, but I think -- you know, I -- I
11 just want the Court to note that, you know, I -- I
12 can't stress this enough, that the -- the District
13 Attorney is in charge with defending the
14 constitutionality of this and so these cases, whether
15 criminal or not, the Court has the power to
16 adjudicate cases claiming a statute is
17 unconstitutional. And for -- and to address this in
18 another forum would run afoul to the enactment of
19 1-3-121. It -- it just -- it just doesn't logically
20 follow that these cases I cite -- I've cited today
21 and then the recent enactment -- which I am not sure
22 the exact date of the enactment. I believe it was
23 2018 -- follows the Grant decision. 10:10:04
10:10:09
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10:10:20

24 So the General Assembly has clearly 10:10:22
25 indicated that their interest is to provide a cause 10:10:24

1 of action for claims is exactly how the plaintiff 10:10:28
2 is -- is -- is, I guess, bringing. So with that, 10:10:30
3 I -- 10:10:35

4 THE COURT: Okay. With respect to pages 10:10:35
5 14 through -- let's see -- 16 of your papers that 10:10:39
6 were filed, your response that was filed on May 10:10:46
7 1st -- 10:10:49

8 MR. RYAN: Yes. 10:10:50

9 THE COURT: -- this taps into the 10:10:51
10 argument that you're making that the Attorney General 10:10:53
11 will not be the one to enforce -- criminally 10:10:55
12 prosecute the statute. And so if we put aside the 10:10:58
13 District Attorney for a moment, this court certainly 10:11:03
14 has subject matter jurisdiction with respect to a 10:11:05
15 claim against the Attorney General to declare this 10:11:09
16 action unconstitutional. With that premise, you've 10:11:11
17 proposed in your papers that -- with the District 10:11:19
18 Attorney that the Court can wait and then if this 10:11:24
19 case is affirmed on appeal, if you were to prevail, 10:11:26
20 that at that point issues concerning the Attorney -- 10:11:33
21 the District Attorney could be taken up. Can you 10:11:37
22 explain to me practically how that works? 10:11:39

23 And let me ask my question better. I 10:11:42
24 understand the legal argument that you're making 10:11:45
25 where you say, Chancellor, focus on this one 10:11:47

1 defendant, the Attorney General, and there aren't any 10:11:52
2 issues, any jurisdictional issues with respect to you 10:11:55
3 adjudicating a declaratory judgment claim about 10:11:59
4 constitutionality of a statute with respect to the 10:12:03
5 Attorney General. That's our premise. 10:12:04

6 Explain to me what you're proposing on 10:12:07
7 the District Attorney because I did take that 10:12:10
8 somewhat as a concession, and I may have 10:12:13
9 misinterpreted or misunderstood so tell me exactly 10:12:18
10 what you are proposing there. 10:12:21

11 MR. RYAN: Yes, Your Honor. And I would 10:12:22
12 like to point to the decision in *Tennesseans for* 10:12:24
13 *Sensible Election Laws* to address your argument or 10:12:28
14 your -- your concern about the District Attorney. It 10:12:30
15 is our position that this court has unequivocal power 10:12:34
16 to also declare the statute unconstitutional based 10:12:37
17 off that decision against the District Attorney. And 10:12:41
18 so once that happens, it enjoined -- it -- you -- the 10:12:42
19 Court is able to enjoin that statute as well. And 10:12:46
20 it -- I -- I understand the concern that that is a 10:12:51
21 concession. 10:12:53

22 But like I noted, I -- we really believe 10:12:54
23 that our argument is more nuisance than that. If the 10:12:58
24 Court can declare this statute unconstitutional as to 10:13:01
25 the Attorney General and to -- and to the District 10:13:05

1 Attorney, it -- it logically follows that the -- the 10:13:07
2 statute would then be unconstitutional and not be -- 10:13:09
3 and the Court would not be able to enforce. And so I 10:13:13
4 don't know if that answers your question but that is 10:13:16
5 our position with respect to that -- that section of 10:13:19
6 the brief that you're citing. 10:13:22

7 THE COURT: Yeah. That -- that does help 10:13:23
8 because I'm just wondering, practically speaking, if 10:13:26
9 we don't have the District Attorney prosecuting your 10:13:30
10 clients, the plaintiff, you know, at -- at this point 10:13:35
11 or persons under the statute then I'm not sure if, 10:13:39
12 practically speaking, what the State is proposing on 10:13:43
13 that. So anyway, I'll -- I'll follow up with them. 10:13:48

14 MR. RYAN: And, Your Honor, I'd just like 10:13:50
15 to highlight one more note on that. I think I 10:13:52
16 mentioned this earlier, but the threat of criminal 10:13:55
17 prosecution by the District Attorney is not the only 10:14:00
18 thing that can happen -- 10:14:02

19 THE COURT: Right. 10:14:02

20 MR. RYAN: -- to the plaintiff here. And 10:14:03
21 so I think it's very important that this -- this 10:14:04
22 statute has been used in the past on the theory of 10:14:06
23 negligence, per se -- 10:14:10

24 THE COURT: Yeah. 10:14:11

25 MR. RYAN: -- which -- which would not 10:14:12

1 have anything to do with the District Attorney at 10:14:13
2 all. It would be in regards to the Attorney General. 10:14:15
3 So enjoining the enforcement of this statute as in 10:14:17
4 regard to the Attorney General is unambiguously clear 10:14:20
5 the Court has the power to do that. 10:14:23

6 THE COURT: Okay. Let me ask you about 10:14:26
7 the cases that the Attorney General relies upon very 10:14:30
8 heavily, Zirkle and the Memphis Bonding. The Court 10:14:35
9 had looked at those in terms of their factual context 10:14:43
10 and had inquired of the Attorney General, well, are 10:14:47
11 these just confined to their facts. 10:14:51

12 MR. RYAN: Well -- 10:14:51

13 THE COURT: Tell me, how do you fit 10:14:54
14 Zirkle and Memphis Bonding in, and particularly 10:14:56
15 Zirkle, with the other cases that you've cited and 10:15:00
16 the fact that this Erwin case and Colonial Pipeline 10:15:06
17 are -- are older? 10:15:09

18 MR. RYAN: Yes, Your Honor. So I -- it 10:15:11
19 is -- it -- it is my belief that the board -- the 10:15:13
20 Memphis Bonding, that involved a case in which it 10:15:18
21 involved another court's local rules -- 10:15:21

22 THE COURT: Yes. 10:15:23

23 MR. RYAN: -- and so that -- that would 10:15:24
24 have no bearing on this court. And I believe 10:15:25
25 opposing counsel cited Carter v. Slatery. That 10:15:29

1 involved a pro se declaratory judgment, I believe, 10:15:34
2 challenging the validity of his con- -- of his 10:15:38
3 conviction after a judgment. It -- 10:15:41
4 THE COURT: Right. 10:15:43
5 MR. RYAN: -- it did not -- it did not 10:15:43
6 challenge the constitutionality of a statute. 10:15:46
7 THE COURT: Right. 10:15:48
8 MR. RYAN: And so I -- I would then cite 10:15:49
9 the Court back to Grant and -- and also in -- I -- I 10:15:51
10 suppose that the Court has noted that's in dicta, but 10:15:54
11 I think that Grant in tandem with the other cases 10:15:57
12 I've cited make it absolutely clear that the 10:16:00
13 Declaratory Judgment Act in fact confers the power on 10:16:03
14 this court to adjudicate the claims under a 10:16:07
15 declaration that the statute is unconstitutional. 10:16:11
16 And -- and I -- and I'd like to say -- 10:16:13
17 THE COURT: What -- what do you do about 10:16:13
18 Zirkle? What -- what do you do about Zirkle? 10:16:16
19 MR. RYAN: Quite frankly, Your Honor -- 10:16:19
20 THE COURT: How does it fit into this? 10:16:22
21 MR. RYAN: I think that Zirkle was -- is 10:16:24
22 different in regard to the case because, as I noted, 10:16:27
23 I believe Zirkle was a damages only claim, as I 10:16:31
24 believe opposing counsel said, and we aren't seeking 10:16:34
25 damages here at all. And so I think the cases are 10:16:38

1 distinguishable in that regard. And like I said, 10:16:41
2 it -- especially in our -- my argument about the 10:16:44
3 Tennessee Constitution, it just shows that the -- 10:16:48
4 when there are damages sought versus when there are 10:16:51
5 equitable relief sought that the -- the power is much 10:16:55
6 different. And so I -- I -- I would point the Court 10:16:59
7 to the -- to the distinguishing facts in all of the 10:17:01
8 cases that opposing counsel has cited. 10:17:03

9 THE COURT: Okay. Let me see. Tennessee 10:17:06
10 Code Annotated Section 1-3-122, we don't have a 10:17:12
11 definitive appellate ruling on the statute and it's 10:17:16
12 still working its way through the appellate courts. 10:17:22
13 The question is what is the scope and extent of 10:17:28
14 that -- that statute. You read it pretty broadly and 10:17:32
15 what we've seen in these arguments that are kind of 10:17:38
16 bubbling up from the Chancery Court is that if you 10:17:43
17 read it that broadly, it's going to eviscerate and 10:17:48
18 eat up all these boundaries, helpful boundaries we 10:17:52
19 have about jurisdiction. What is your response to 10:17:58
20 that? 10:18:01

21 MR. RYAN: Your Honor, like I noted 10:18:03
22 earlier, I think the statute is very unambiguous. It 10:18:05
23 says notwithstanding any law to the contrary right 10:18:11
24 in -- in the first proviso. And so if the Court were 10:18:16
25 to hold that this did not also create jurisdiction, 10:18:20

1 then this statute would be illusory. It would mean
2 nothing. There would be nowhere to bring this claim
3 other than the -- the defendants' position in a
4 federal court. That is just not -- that is a
5 practical matter and it's -- it's -- it doesn't
6 make -- it doesn't make sense. Because if the -- the
7 General Assembly, after all the cases regarding these
8 types of challenges, wants it to promote litigation
9 such as the ones that the plaintiffs are bringing
10 now. This statute, which is, I must note, is
11 unambiguously clear, has to create jurisdiction as
12 well. That -- that is our position.

13 THE COURT: Well, I've previously done
14 legislative research on this and there was a question
15 asked -- and I don't have in it front of me but I
16 used it in another case, I cited to it in another
17 case. The question was asked of the person who was
18 proposing the bill whether this was going to do away
19 with traditional notions of qualifying for
20 declaratory relief or injunctive relief, and the
21 speaker said, well, no, it's not going to do away
22 with that. Is this an ambiguous statute where I
23 would go to legislative history? And I know
24 sometimes I can even look at if it's unambiguous, but
25 is it your position that there's not an ambiguity

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10:19:47

1 here so I need not consult legislative history? 10:19:51

2 MR. RYAN: Yes, Your Honor. Of course, 10:19:55

3 you would start with the text here. And -- and I -- 10:19:56

4 it is our position that the statute is very -- is 10:19:58

5 very unambiguous. But even if the statute is -- has 10:20:02

6 some ambiguity in it, the -- I believe the 10:20:05

7 legislative history that you're citing was -- I think 10:20:08

8 the statute was amended after, or something along 10:20:11

9 those lines, and they -- 10:20:14

10 THE COURT: Yes. 10:20:15

11 MR. RYAN: -- put the last -- they have 10:20:16

12 put the last line in here, which I'll quote for the 10:20:18

13 record: A cause of action shall not exist under this 10:20:20

14 chapter to seek damages. 10:20:23

15 THE COURT: Yes. 10:20:24

16 MR. RYAN: And so I think that like -- 10:20:25

17 like the other things in my argument today, damages 10:20:27

18 versus equitably -- equitable relief is very 10:20:32

19 different. And so even if there's some ambiguity, 10:20:36

20 the legislative history supports the position that 10:20:40

21 this statute is unambiguous, it -- essentially. 10:20:43

22 THE COURT: And most of those arguments 10:20:46

23 have concerned standing because it does contain the 10:20:47

24 word affected person. And the debates have been 10:20:52

25 about, well, if it has affected, does that import all 10:20:56

1 of the previous law concerning standing. But in this 10:20:59
2 case, we don't have a standing challenge before me; 10:21:03
3 that's not what -- what's been offered so those 10:21:06
4 debates about affected and whether that imports 10:21:09
5 standing really don't apply. 10:21:13

6 And that's another way, I guess, to 10:21:18
7 distinguish it from that question that was asked on 10:21:21
8 the floor about the scope and extent of it. So you 10:21:23
9 would import standing notions but not -- not other 10:21:26
10 ones. Okay. 10:21:30

11 Let me see if -- 10:21:31

12 MR. RYAN: And -- and, Your Honor, I'd 10:21:31
13 like to -- 10:21:33

14 THE COURT: Yes, go ahead. 10:21:33

15 MR. RYAN: -- point out one more thing. 10:21:34

16 THE COURT: Yes. 10:21:34

17 MR. RYAN: The -- just one note. Federal 10:21:36
18 courts cannot adjudicate claims brought strictly 10:21:38
19 under the Tennessee Constitution and we -- we have 10:21:41
20 brought a claim under the Tennessee Constitution so 10:21:43
21 there's no other forum for that claim. I just wanted 10:21:46
22 to point that out. 10:21:49

23 THE COURT: And if you would, give me 10:21:51
24 your encapsulated argument on that. You said it's -- 10:21:53
25 it's really a direct cause of action and you've given 10:21:56

1 me a bunch of string cites but refresh me on that. 10:22:00

2 MR. RYAN: Yep. Yes, Your Honor. I 10:22:05

3 would -- I would again direct the Court to page 20. 10:22:08

4 I believe it's the bottom of page 20 into the -- 10:22:10

5 about the middle of the page -- 10:22:12

6 THE COURT: I've got it. 10:22:12

7 MR. RYAN: Yep. 10:22:13

8 THE COURT: Okay. 10:22:13

9 MR. RYAN: So it is our position that the 10:22:14

10 prior case law has primarily dealt with actions, 10:22:17

11 again, only seeking damages, and so it has been held 10:22:21

12 that the Tennessee Constitution is self-executing 10:22:25

13 with regards to its Bills of Rights. And so just 10:22:29

14 like the Federal Constitution as a corollary, the -- 10:22:33

15 the -- if it's self-executing, then the equitable 10:22:38

16 relief can be granted in that regard; especially, if 10:22:42

17 its self-executing. And the case is there to 10:22:47

18 distinguish because we're not seeking damages so I 10:22:48

19 would just point that out for the Court. 10:22:50

20 THE COURT: All right. You have answered 10:22:53

21 all of my questions. Thank you for your patience 10:22:55

22 with the Court. This will be your last opportunity 10:22:58

23 to provide any argument. Is there anything that we 10:23:02

24 haven't covered, anything else that you want to argue 10:23:05

25 to the Court? 10:23:10

1 MR. RYAN: No. No, Your Honor. I would 10:23:12
2 just like to finally note that -- and conclude, that 10:23:14
3 as we noted, the distinctions between the two 10:23:17
4 remedies here is very important for the Court's 10:23:21
5 decision today and so is the distinction between the 10:23:24
6 two defendants. The case law is very, very clear in 10:23:27
7 regards to the Declaratory Judgment Act. And the -- 10:23:32
8 the -- the opposing counsel cases that are cited in 10:23:36
9 the papers, they are distinguishable based on their 10:23:38
10 facts. 10:23:41

11 And so, Your Honor, if the Court has no 10:23:41
12 further questions, we would simply request that the 10:23:44
13 Court deny the defendants' motion to dismiss as this 10:23:46
14 court has the unequivocal power to adjudicate the 10:23:50
15 plaintiff's claims. Thank you, Your Honor. 10:23:55

16 THE COURT: Thank you, Mr. Ryan. 10:23:57

17 At this time, I'm going to return to Ms. 10:23:59
18 Groover. And are you ready to provide the Court with 10:24:01
19 a reply? 10:24:04

20 MS. GROOVER: Yes, Your Honor. 10:24:05

21 THE COURT: All right. If you will 10:24:06
22 proceed. 10:24:08

23 MS. GROOVER: I just have a few things 10:24:09
24 that I'd like to address. Going back to the case of 10:24:10
25 Colonial Pipeline, I just want to point out again 10:24:15

1 this is a case that dealt strictly with a civil 10:24:17
2 issue; as are the rest of the cases that the 10:24:20
3 plaintiff is pointing to here: Grant, Campbell. 10:24:23
4 These were all cases dealing with civil issues. And 10:24:27
5 quoting directly from Colonial Pipeline, quote: The 10:24:31
6 act, meaning the Declaratory Judgment Act, also 10:24:33
7 conveys the power to construe or determine the 10:24:35
8 validity of any written instrument, statute, 10:24:38
9 ordinance, contract, or franchise provided that the 10:24:40
10 case is within the court's jurisdiction. 10:24:44

11 Also, subject matter jurisdiction is a 10:24:48
12 threshold issue. It's something the plaintiff must 10:24:51
13 have from the very beginning. It's not something the 10:24:54
14 plaintiff can establish by going through the court 10:24:56
15 system and getting a final judgment from the Supreme 10:24:59
16 Court to then come back here and get an injunction. 10:25:01
17 They have to establish on the front end that subject 10:25:04
18 matter jurisdiction exists. 10:25:10

19 I also want to address briefly that -- 10:25:13
20 the issue that they've raised regarding the Attorney 10:25:15
21 General as -- as a defendant here. As they've noted, 10:25:19
22 the Attorney General does not enforce this statute. 10:25:21
23 And I would disagree with the position that this 10:25:25
24 statute creates a civil cause of action. It may be 10:25:28
25 cited to in a couple of civil cases that plaintiffs 10:25:32

1 have cited but it's not the basis for the holding in 10:25:35
2 any of these cases. 10:25:38

3 And additionally, these cases involved 10:25:40
4 private parties and not government actors. So 10:25:45
5 plaintiff in their complaint has not alleged that 10:25:49
6 there is a credible threat of a civil action against 10:25:49
7 them; nor can you point to any language in the 10:25:53
8 statute that establishes that the Attorney General 10:25:55
9 would have some sort of civil action against these 10:25:56
10 plaintiffs. So essentially, the Attorney General is 10:25:59
11 named here because of his role in defending 10:26:03
12 constitutionality of a statute. So this goes again 10:26:07
13 back to the issue of relief: What relief is the 10:26:09
14 plaintiff really getting here if the Attorney General 10:26:12
15 is restrained from something it can't do anyway. 10:26:14

16 They also point to the Court of Appeals' 10:26:20
17 decision in the previous Tennesseans for Sensible 10:26:22
18 Election Laws case and how there was a declaratory 10:26:26
19 judgment issued there. I would point out the statute 10:26:28
20 at issue in that case was one that also had a civil 10:26:30
21 component, a civil enforcement component by the 10:26:34
22 Registry of Election Finance so a violation of that 10:26:37
23 statute could subject someone to a misdemeanor 10:26:41
24 prosecution but also subject them to civil penalties 10:26:44
25 which could be assessed by the Registry of Election 10:26:47

1 Finance, so that statute contained a civil penalty 10:26:51
2 that is not expressed in the language of the statute 10:26:55
3 here. 10:26:58

4 THE COURT: Hello? 10:27:07

5 MS. GROOVER: Yes. I'm sorry. I'm still 10:27:08
6 here. 10:27:10

7 THE COURT: Oh, okay. I thought so. You 10:27:10
8 had gone out on -- on my video for just a moment. 10:27:12
9 Take -- take your time. 10:27:15

10 MS. GROOVER: Yes. And lastly, I just 10:27:17
11 want to quote directly again from -- from Memphis 10:27:18
12 Bonding. And Memphis Bonding, again, here is the 10:27:23
13 controlling case as it is the later published case. 10:27:25
14 And directly from the holding of this case, not dicta 10:27:29
15 from this case but the holding is -- the Court says 10:27:32
16 quote: Because Memphis Bonding Company's underlying 10:27:36
17 claim for injunctive relief regarding the local rules 10:27:39
18 could not be brought in chancery court, the Chancery 10:27:43
19 Court could not exercise subject matter jurisdiction 10:27:45
20 over the declaratory judgment aspect of the case 10:27:47
21 either. And really, this distills the issue here 10:27:51
22 before the Court. 10:27:56

23 THE COURT: And the quote that I had 10:27:57
24 focused on, to put that in context in that case, was 10:27:59
25 to allow the Chancery Court to review the validity or 10:28:03

1 enjoin the enforcement of the local rules of the 10:28:07
2 criminal court would interfere with the inherent 10:28:09
3 power of the criminal court to administer its 10:28:13
4 affairs. That's where I analyzed that this was 10:28:19
5 confined very much to its facts because it talked 10:28:22
6 about interfering with the inherent power of another 10:28:26
7 court. 10:28:28

8 MS. GROOVER: So I -- I -- I can see 10:28:29
9 where you're coming from, Your Honor, but I think 10:28:32
10 when that's read in tandem with Zirkle -- which 10:28:36
11 again, opposing counsel stated that I said that that 10:28:40
12 case was just about damages. I don't recall saying 10:28:42
13 that. What I recalling saying about Zirkle is that 10:28:45
14 the holding there is not confined -- it's not 10:28:47
15 factually confined. What the holding there says is 10:28:48
16 this broader concept that a chancery court only has 10:28:52
17 subject matter jurisdiction where it could issue an 10:28:56
18 injunction, and the Court cannot do so here. 10:28:59

19 THE COURT: I read Zirkle a couple of 10:29:01
20 days ago so my recollection of it was that it was an 10:29:05
21 eminent domain and that we didn't have prosecution of 10:29:10
22 a criminal statute involved in that case. Is my 10:29:13
23 recollection incorrect? Can you remind me of the 10:29:18
24 context of Zirkle? 10:29:21

25 MS. GROOVER: I believe that that is 10:29:23

1 correct, Your Honor -- 10:29:25

2 THE COURT: Okay. 10:29:26

3 MS. GROOVER: -- but -- but the principle 10:29:27
4 is a general principle that does apply here. 10:29:29

5 THE COURT: So on -- on your side of the 10:29:34
6 ledger, we don't have any cases that are on point 10:29:37
7 that say -- where we have a statute involving a 10:29:41
8 criminal penalty and we have the Supreme Court saying 10:29:46
9 a chancery court cannot enforce that, can -- cannot 10:29:52
10 rule on the constitutionality because they're unable 10:29:57
11 to enjoin criminal enforcement? 10:30:02

12 MS. GROOVER: Right. The cases that 10:30:04
13 plaintiff -- 10:30:04

14 THE COURT: Yeah. 10:30:04

15 MS. GROOVER: -- is pointing to here 10:30:06
16 either involve some sort of criminal statute or one 10:30:06
17 of the very narrow exceptions. 10:30:09

18 THE COURT: Yeah. I'm talking about the 10:30:11
19 cases that you cite to because Memphis Bonding has to 10:30:13
20 do with the inherent power of the criminal courts; 10:30:15
21 Zirkle has to do with eminent domain so that -- 10:30:19
22 that's what I was searching for. Do you have a case 10:30:23
23 that supports -- that -- that arises out of a statute 10:30:26
24 that has a criminal penalty? 10:30:31

25 MS. GROOVER: I think -- I think the only 10:30:36

1 one here would be the previous Court of Appeals' 10:30:38
2 decision in the Tennessee for Sensible Election 10:30:41
3 Laws' case -- 10:30:43
4 THE COURT: Yeah. 10:30:44
5 MS. GROOVER: -- where there is -- there 10:30:46
6 is a criminal component to that statute -- 10:30:47
7 THE COURT: Yes. 10:30:47
8 MS. GROOVER: -- where the Court clearly 10:30:49
9 does say that the court doesn't have the subject 10:30:51
10 matter jurisdiction to enjoin it. And when that's 10:30:53
11 read in tandem with these other Supreme Court 10:30:55
12 precedents where a court's declaratory -- ability to 10:30:58
13 declare a statute unconstitutional is dependent on 10:31:00
14 its ability to enjoin the statute. When you read 10:31:02
15 those two things together, that's -- that's the 10:31:06
16 conclusion that -- that we arrive at. 10:31:09
17 THE COURT: Okay. That -- that is very 10:31:11
18 helpful. I do not have any other questions. Wait, 10:31:13
19 let me -- no, I do. I'm sorry. On their argument 10:31:18
20 about the Tennessee Constitution, what's your 10:31:22
21 response to that? Is that a basis for the Court to 10:31:25
22 assert subject matter jurisdiction? The plaintiffs 10:31:28
23 have argued to the Court that there isn't another 10:31:31
24 forum for that; they can't go into Federal Court. 10:31:35
25 What's -- what's your position on that argument about 10:31:38

1 the Tennessee Constitution? 10:31:40

2 MS. GROOVER: Yes. So again, the 10:31:42
3 plaintiff has misstated our position saying that we 10:31:44
4 said they could only go to Federal Court. They could 10:31:48
5 also go to a state criminal court and that state 10:31:50
6 criminal court could adjudicate the issue. It's not 10:31:55
7 often done but it can be done. 10:31:58

8 THE COURT: Okay. All right. Any- -- 10:32:01
9 anything further from the movants, Ms. Groover? 10:32:02

10 MS. GROOVER: No, Your Honor. 10:32:05

11 THE COURT: That completes our oral 10:32:11
12 argument on the motion to dismiss that's been brought 10:32:14
13 by the defendants. The Court is going to take the 10:32:17
14 matter under advisement. This is an important issue 10:32:21
15 to both sides and it does require legal analysis of a 10:32:24
16 number of cases and different grounds on which the 10:32:30
17 plaintiffs -- the plaintiff asserts that I have 10:32:34
18 subject matter jurisdiction. 10:32:36

19 Given the matters that I have in court 10:32:38
20 and under advisement, the Court will issue its 10:32:41
21 decision by May 27th. It's my recollection of my 10:32:46
22 review from the file that we don't have anything 10:32:51
23 pending and that that amount of time to prepare the 10:32:53
24 decision shouldn't be a problem. But let me, since I 10:32:57
25 have counsel on line here, inquire and make sure 10:33:00

1 that's the case. 10:33:04

2 So plaintiffs, is there anything that the 10:33:05
3 Court doesn't know about that's not apparent from the 10:33:07
4 file that's going on in the case that makes this 10:33:11
5 time-critical and the Court needs to move more 10:33:13
6 quickly in issuing its decision? 10:33:18

7 MR. HORWITZ: This is Daniel Horwitz. 10:33:23
8 There's nothing imminent. I think May 27th will be 10:33:23
9 just fine. We anticipate moving for summary judgment 10:33:27
10 fairly quickly after an answer is filed if we get to 10:33:31
11 that point, but there's -- there's nothing between 10:33:35
12 now and May 27th that's -- that's urgent. 10:33:36

13 THE COURT: All right. Thank you. 10:33:39

14 And let me ask the Attorney General's 10:33:40
15 Office. Ms. Groover, is there anything that's 10:33:42
16 time-critical from your standpoint that should cause 10:33:45
17 the Court to issue the decision before May 27th? 10:33:48

18 MS. GROOVER: No, Your Honor. 10:33:52

19 THE COURT: All right. Thank you again 10:33:54
20 very much. I apologize for the late start. And I'm 10:33:58
21 going to have our Zoom court administrator, Mr. 10:34:03
22 Seamon, adjourn the proceedings. 10:34:08

23 COURT OFFICER: Okay. Thank you, 10:34:10
24 everyone. This hearing is adjourned. 10:34:11

25 (WHEREUPON, the foregoing proceedings

1 were concluded at 10:34 a.m.)

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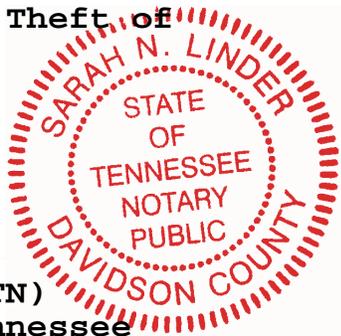
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