IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

AMY FROGGE, *et al.*	§	
	§	
Plaintiffs-Appellees,	§	
	§	
v.	§	Case: M2020-01422-COA-R3-CV
	§	
SHAWN JOSEPH, *et al.*	§	Davidson County Chancery Court
	§	Case No. 20-420-IV
Defendants-Appellants.	§	

REPLY BRIEF OF PLAINTIFFS/CROSS-APPELLANTS AMY FROGGE, JILL SPEERING, AND FRAN BUSH

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III. INTRODUCTION

As Cross-Appellants, the Plaintiffs raised one issue for this Court's review: "Whether the Plaintiffs should recover their attorney's fees regarding this appeal."[1] The Plaintiffs asserted that they were entitled to an award of appellate attorney's fees on the grounds that they prevailed on meritorious federal constitutional claims below—including a federal constitutional claim regarding which the Defendants waived any opposition—and that they have defended those meritorious claims through this appeal.[2] The Plaintiffs also observed that Metro has not challenged the Plaintiffs' fee award, and that neither Defendant appealed it.[3]

In response, the Defendants all but abandon any pretense that they should prevail on the merits of the federal constitutional claims that enabled the Plaintiffs' fee award. Instead, the Defendants assert that fees should be denied because the Plaintiffs were not injured—in a constitutional sense—by a legislative resolution that unconstitutionally censored them individually, subjected them to and threatened them with individual liability for damages, and prevented them from honestly communicating with their constituents and one another regarding a matter of undisputed public importance: Joseph's poor performance as Metro's Director of Schools. *But see Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("[I]t is well-settled that 'loss of First

[1] Plaintiffs' Brief at 18.

[2] *Id.* at 78–79.

[3] *Id.* at 73–76.

Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."), and citing *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."))). Joseph additionally contends that fees should not be awarded to the Plaintiffs because (he asserts) the Plaintiffs have not adequately responded to a legally frivolous qualified immunity claim that Joseph raised for the first time on appeal. As detailed below, all of the Defendants' arguments are unpersuasive.

IV. ARGUMENT

"A party that properly recovers fees in the trial court need not show that an appeal is independently meritless: the rationale supporting fees in the trial court carries over and supports the defense of the award on appeal." *Milan Supply Chain Sols., Inc. v. Navistar, Inc.*, 627 S.W.3d 125, 161 (Tenn. 2021). Thus, where a prevailing party wins fees below and requests them on appeal, fees are properly awarded on appeal as well. *See id. See also Nandigam Neurology, PLC v. Beavers*, No. M2020-00553-COA-R3-CV, 2021 WL 2494935, at *14 (Tenn. Ct. App. June 18, 2021) (slip op.) ("[A]s a matter of first impression, we conclude that the TPPA allows for an award of reasonable attorney's fees incurred on

appeal, provided that the court dismisses a legal action pursuant to a petition filed under this chapter and that such fees are properly requested in an appellate pleading." (citing Tenn. Code Ann. § 20-17-107; *Killingsworth v. Ted Russell Ford*, 205 S.W.3d 406, 409 (Tenn. 2006))), *no app. filed*.

This principle also holds especially true when it comes to constitutional litigation. As the United States Supreme Court has explained, "[t]he purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (cleaned up). Accordingly, "one who succeeds in obtaining an injunction under [§ 1983] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968); *see also Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) ("In *Newman,* . . . we held that **in absence of special circumstances a district court not merely 'may' but must award fees to the prevailing plaintiff** . . . ." (citing *Newman*, 390 U.S. at 402)) (emphasis added). The Tennessee Supreme Court has read the U.S. Supreme Court's instructions on the matter the same way. *See Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52, 56 (Tenn. 1992) ("[T]he cases interpreting that statute state that the prevailing party should receive an award, unless there are 'special circumstances' that would render an award unjust.") (collecting cases).

In their respective briefs, neither Defendant contests that the Plaintiffs prevailed below regarding their federal constitutional claims—including an overbreadth claim regarding which both Defendants waived

opposition. Instead, the Defendants insist that the Plaintiffs should be denied their attorney's fees for reasons unrelated to the merits of this action. For the reasons detailed below, however, the Defendants' arguments are uniformly meritless.

A. JOSEPH'S NEW ARGUMENT REGARDING THE TRIAL COURT'S FEE AWARD REMAINS WAIVED AND MERITLESS.

Joseph complains that "Appellees have never explained how a private individual can be liable for an alleged violation of their right to free speech[,]" which he styles as a "significant argument[][.]"[4] The argument is less "significant" than Joseph imagines it to be, though, and it lacks merit for several reasons.

First, as the Plaintiffs noted in their briefing and throughout this litigation, Joseph committed the constitutional violations at issue in this case while acting as a government official. *See* Plaintiffs' Brief at 49 n.86 ("Joseph's severance agreement was ratified while Joseph was a government official . . . ."). The trial court also made that finding below, *see* R. at 608 ("Defendant Joseph was undisputedly the Director of Metro Nashville Public Schools—and thus a governmental actor—at the time the constitutional tort at issue here was committed."), and Joseph has not challenged it. Consequently, within the context of this litigation, Joseph is not a "private individual."

Second, Joseph himself has argued (albeit for the first time on appeal) that *as a government official*, he should be afforded qualified immunity in this non-damages action. *See* Joseph's Brief at 23 (arguing

[4] *See* Joseph's Reply at 10–11.

that even though the United States Supreme Court has made clear that qualified immunity only applies to damages actions, by failing to apply qualified immunity to Joseph in this case, the trial court's fee award "undermines the policy rationale for shielding government employees and officials who act in reasonable reliance on the law"). As the Plaintiffs observed in their Brief, the argument is both newly asserted and legally frivolous.[5] As relevant here, though, it is also in conflict with the lone claim that Joseph now maintains in his Reply: that he should be treated as a private (rather than governmental) actor with respect to the Plaintiffs' § 1983 claims.

Third, as the appellant in this case, it is Joseph's job—not the Plaintiffs'—to identify error in the trial court's ruling regarding attorney's fees. Accordingly, the Plaintiffs have no obligation to "explain[]" the propriety of the trial court's ruling to Joseph,[6] which he seemingly has not reviewed. If Joseph desires clarity as to why the fee award against him would be proper *even if he were treated as a private actor*, though, then he should look to the trial court's thorough and unchallenged holding on the matter, wherein the trial court explained:

> Even if Defendant Joseph had not been acting directly as a state actor, he engaged in concerted action with state actors regarding this matter—the facts of which are uncontested—which independently gives rise to a cause of action under § 1983. *See, e.g., Memphis, Tennessee Area Local, Am. Postal Workers Union, AFL-CIO v. City of Memphis*, 361 F.3d 898, 905 (6th Cir. 2004) ("Private persons may be held

[5] *See* Plaintiffs' Brief at 76–78.

[6] *See* Joseph's Reply at 11.

liable under § 1983 if they willfully participate in joint action with state agents.") (citing *Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980); *United States v. Price*, 383 U.S. 787 (1966) (stating that to act under color of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.); *Hooks v. Hooks*, 771 F.2d 935, 943 (6th Cir.1985) ("Private persons jointly engaged with state officials in a deprivation of civil rights are acting under color of law for purposes of § 1983.")). *See also Rudd v. City of Norton Shores, Michigan*, No. 19-1226, 2020 WL 5905062, at *5 (6th Cir. Oct. 6, 2020) ("private parties who conspire with public actors to violate constitutional rights "act['under color' of law for purposes of § 1983.") (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Dennis v. Sparks*, 449 U.S. 24, 28 (1980)); *Vance v. Billingsly*, 487 F. Supp. 439, 442 (E.D. Tenn. 1980) ("once concerted action has been made out, an independent cause of action lies against the private individual which cannot be defeated by defenses available only to the public officials.").

In addition, Defendant Joseph was undisputedly the Director of Metro Nashville Public Schools—and thus a governmental actor—at the time the constitutional tort at issue here was committed.[7]

For all of these reasons, Joseph's newly asserted qualified immunity argument regarding the trial court's fee award remains waived; it additionally remains foreclosed by United States Supreme Court precedent; and the Plaintiffs certainly did not fail to respond to it.

B. NEITHER DEFENDANT APPEALED THE TRIAL COURT'S FEE AWARD.

As detailed at length in the Plaintiffs' Brief, neither Defendant even

[7] R. at 608.

appealed the trial court's fee award.[8] And while Metro—which has not raised its own challenge to the award, but has instead purported to adopt newly asserted arguments raised by Joseph *that cannot apply to Metro*[9]—maintains that "[o]nce the final order has been entered and an appeal has been perfected, all prior orders are subject to review[,]"[10] Metro misapprehends the jurisdictional defect involved.

To reiterate that defect: Both Defendants' notices of appeal reflect that "[n]either Defendant appealed the trial court's November 25, 2020 order awarding the Plaintiffs attorney's fees[,]"[11] which was the final order in this case. Thus, the trial court's November 25, 2020 final order was not a "prior order[] . . . subject to review" under either Defendant's notice of appeal,[12] because both notices reflect the Defendants' intention to appeal the trial court's interlocutory September 15, 2020 order alone.[13]

Given this context, the trial court's November 25, 2020 final order is not within either Defendant's notice of appeal, both of which specifically and exclusively designate the trial court's September 15, 2020 order as the only order they were appealing. Under these circumstances, the trial court's November 25, 2020 order is not within this Court's appellate subject matter jurisdiction. *See, e.g.*, *Howse v. Campbell*, No.

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[8] *See* Plaintiffs' Brief at 74–76.

[9] *See id.* at 73–74.

[10] *See* Metro's Reply at 11 n.4.

[11] *See* Plaintiffs' Brief at 74–76.

[12] *See* Metro's Reply at 11 n.4.

[13] R. at 458–61.

M1999-01580-COA-R3-CV, 2001 WL 459106, at *3 (Tenn. Ct. App. May 2, 2001) ("In accordance with Tenn. R. App. P. 4(d), we will treat Mr. Howse's October 18, 1999 notice of appeal regarding his claims against Dr. Butler as being timely filed. However, because this notice of appeal does not, and indeed could not, state that Mr. Howse desires to appeal from the March 22, 2000 order dismissing his claims against the remaining defendants, it applies only to Mr. Howse's claims against Dr. Butler."), *no app. filed*. Further, as this Court has made clear, that jurisdictional defect cannot be "excuse[d]." *See id.* ("[W]e cannot use Tenn. R. App. P. 2 to excuse Mr. Howse from this oversight. Accordingly, we have determined that Mr. Howse has not properly perfected an appeal from the March 22, 2000 dismissal of his claims against all the defendants except Dr. Butler."). *See also Cox v. Shell Oil Co.*, 196 S.W.3d 747, 760 (Tenn. Ct. App. 2005) (citing *Goad v. Pasipanodya*, No. 01A01–9509–CV–00426, 1997 WL 749462, at *2 (Tenn. Ct. App. Dec. 5, 1997), *no app. filed*); *Hall v. Hall*, 772 S.W.2d 432, 436 (Tenn. Ct. App. 1989); Crook *v. Despeaux*, No. W2007-00941-COA-R3-CV, 2008 WL 4936526, at *4 n.6 (Tenn. Ct. App. Nov. 19, 2008), *reh'g denied* (Dec. 19, 2008)).

Accordingly, the trial court's unchallenged fee award must be affirmed as a final and unappealed order. *See id.* The trial court's unappealed fee award should also carry over to this appeal. *See Milan Supply Chain Sols.*, 627 S.W.3d at 161 ("A party that properly recovers fees in the trial court need not show that an appeal is independently meritless: the rationale supporting fees in the trial court carries over and supports the defense of the award on appeal.").

C. THE DEFENDANTS' DECISION NOT TO FILE AN ANSWER AND TO ADMIT EVERY ALLEGATION IN THE PLAINTIFFS' COMPLAINT IS NOT A "PROCEDURAL" MATTER.

Joseph (and Joseph alone) additionally complains that "Appellees declare that the Defendants have effectively admitted certain facts by failing to deny them in an Answer to the Complaint," which Joseph styles as a "procedural argument[][.]"[14] To be clear, though, by failing to file an answer, the Defendants did not just "effectively" admit the facts alleged in the Plaintiffs' Complaint.[15] Instead, the Defendants actually and *conclusively* admitted them. *See* Tenn. R. Civ. P. 8.04 ("Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading[.]"); *Vanderschaaf v. Bishara*, No. M2017-00412-COA-R3-CV, 2018 WL 4677455, at *6 (Tenn. Ct. App. Sept. 28, 2018) (holding that a responding party "neither admitted nor denied these allegations; thus they are deemed admitted" (citing Tenn. R. Civ. P. 8.04; *Dyer v. Farley*, No. 01-A-01-9506-CH00229, 1995 WL 638542, at *10 (Tenn. Ct. App. Nov. 1, 1995), *as amended* (Nov. 17, 1995))), *app. denied* (Tenn. Jan. 16, 2019); *James S. Cox & Assocs. v. Walters*, No. 4, 1988 WL 9812, at *2 (Tenn. Ct. App. Feb. 10, 1988) ("Any fact or allegation admitted in a pleading is a judicial admission and is conclusive against the parties until withdrawn or amended." (citing *John P. Saad & Sons, Inc. v. Nashville Thermal Transfer Corp.*, 642 S.W.2d 151 (Tenn. App. 1982); *Bowers v. Potts*, 617 S.W.2d 149 (Tenn. App. 1981); *Hewgley*

[14] *See* Joseph's Reply at 9.

[15] *Id.*

v. General Motors Acceptance Corp., 286 S.W.2d 355 (Tenn. Ct. App. 1955))). Thus, all of the facts in the Plaintiffs' Complaint—including the Plaintiffs' jurisdictional allegations, the Plaintiffs' merits allegations, and the allegations supporting the Plaintiffs' fee award—are conclusively admitted. *See id.*

Neither was admitting case-dispositive facts a mere "procedural" matter. Instead, it was a decision that is dispositive of the merits of the Defendants' standing defenses, the merits of the Plaintiffs' claims, and the merits of the attorney's fee award that followed the trial court's merits ruling. Put simply:

1. The conclusively admitted facts in the Plaintiffs' Complaint established both the Plaintiffs' federal constitutional injuries and their individualized standing to sue[16] under multiple theories. *Compare, e.g.*,

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[16] Joseph asserts that the Plaintiffs "were unable to produce precedent from this state or the Sixth Circuit" to support their claim that traditional standing requirements are relaxed in First Amendment pre-enforcement and overbreadth cases, having cited cases from other federal circuits instead. *See* Joseph's Reply at 8 n.1. Beyond being false, though, *see, e.g.*, Plaintiffs' Brief at 47–48, 49, 51, 58–59, the issue carries no import. The relevant doctrine comes directly from the United States Supreme Court. *See id.* at 34–35 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" (quoting *Dombrowski*, 380 U.S. at 486)); *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975)); *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984)).

R. at 1, ¶ 1 (alleging that the Plaintiffs' ability to truthfully criticize Defendant Joseph was being censored "under penalty of personal liability"); R. at 5, ¶ 17 ("The School Board Censorship Clause effects a prior restraint upon the Plaintiffs' right and ability to make a vast number of constitutionally protected 'comments regarding Dr. Joseph and his performance as Director of Schools.'"); R. at 5–6, ¶ 21 ("The School Board Censorship Clause censors and forbids, under penalty of personal liability, a vast amount of constitutionally protected and non-tortious speech."); R. at 8, ¶ 38 ("The School Board Censorship Clause inhibits the flow of information between the Plaintiffs and public officials and prevents the Plaintiffs from doing the jobs that they were elected to do."); *with* Plaintiffs' Brief at 49–53 (detailing several independent grounds for

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Separately, Metro complains that "Plaintiffs do not address *California v. Texas* in their responsive brief at all." Metro's Reply at 5 n.1. That case has no plausible bearing on this one, though, which involves actual injuries—specifically, the Plaintiffs being censored by a content-based, viewpoint-based, and speaker-based governmental gag order that exposed them to individual damages liability if they spoke out truthfully regarding a matter of public concern—that are traceable to the Defendants. *See, e.g.*, R. at 624–25 (finding, in unchallenged and unappealed order, that staying the trial court's order enjoining the Defendants from enforcing the School Board Censorship Clause would "place[] the Plaintiffs at risk and irreparably harm[]" them (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("[I]t is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."))).

Plaintiffs' claims of individual standing to prosecute their First Amendment claims); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) ("An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984))); *Connection Distrib. Co.*, 154 F.3d at 288 ("[I]t is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod*, 427 U.S. at 373)).

2. The conclusively admitted facts in the Plaintiffs' Complaint established the Plaintiffs' standing to sue on behalf of third parties. *Compare* R. at 1, ¶ 1 (alleging that "the clause contravenes the First Amendment and deprives the Plaintiffs' constituents of their right to hear and receive information from their elected representatives"); R. at 7, ¶ 31 ("The School Board Censorship Clause contravenes the First Amendment rights of the Plaintiffs' constituents to hear and receive information and ideas from their elected representatives."); *with Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and press) * * * necessarily protects the right to receive * * *.'") (collecting cases); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by

these appellees."); *Banks v. Wolfe Cty. Bd. of Educ.*, 330 F.3d 888, 896 (6th Cir. 2003) (noting the First Amendment's focus on "not only . . . a speaker's interest in speaking, but also with the public's interest in receiving information" (quoting *Chappel v. Montgomery Cty. Fire Prot. Dist. No. 1*, 131 F.3d 564, 574 (6th Cir. 1997)). *See also Wood v. Georgia*, 370 U.S. 375, 395 (1962) ("The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance."); *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

3. The conclusively admitted facts in the Plaintiffs' Complaint established the Defendants' liability under 42 U.S.C. § 1983, *see, e.g.*, R. at 6, ¶ 25 ("The School Board Censorship Clause effects a content-based and speaker-based prior restraint of the Plaintiffs' constitutionally protected free speech rights in both their official and individual capacities."); R. at 7, ¶ 30 ("The School Board Censorship Clause forbids a vast amount of constitutionally protected and non-tortious speech and is unconstitutionally overbroad.").

4. The conclusively admitted facts in the Plaintiffs' Complaint established the Plaintiffs' entitlement to a fee award under 42 U.S.C. § 1988(b). *Compare* R. at 9, ¶ 3, *with* 42 U.S.C. § 1988(b) ("In any action

or proceeding to enforce a provision of sections . . . 1983, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.]").

Joseph also misconstrues the elementary rules of procedure that make the Defendants' decision not to answer the Plaintiffs' Complaint fatal. He claims, first, that the "Defendants filed their respective Motions to Dismiss in lieu of an Answer[,]"[17] neglecting to mention that both Defendants' motions were untimely filed after the Defendants' answer deadline expired.[18] Even ignoring that fact, though, Joseph does not dispute that both Defendants additionally failed to file an answer to the Plaintiffs' Complaint "within 15 days after" the trial court denied their respective motions to dismiss. *See* Tenn. R. Civ. P. 12.01. And while Joseph contends that the trial court's non-final September 15, 2020 order "dispens[ed] with the need for [him] to file a formal answer[,]"[19] there is no actual rule of procedure that relieved him (or Metro) of such an obligation.

Instead, Tennessee's Rules of Civil Procedure contrarily provide—with unmistakable clarity—(a) that a "responsive pleading shall be

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[17] *See* Joseph's Reply at 9.

[18] *See* Plaintiffs' Brief at 27 ("Neither the Plaintiffs nor the trial court agreed to extend the Plaintiffs' answer deadline a fourth time, though. . . . Instead of answering the Plaintiffs' Complaint by their July 17, 2021 Answer deadline, Metro filed an untimely motion to dismiss the Plaintiffs' Complaint on July 24, 2020, and Joseph filed an untimely motion to dismiss the Plaintiffs' Complaint on July 27, 2021." (citing R. at 123–24, 192–93)).

[19] Joseph's Reply at 10.

served within fifteen (15) days" of the trial court's order denying the Defendants' motions to dismiss, *see* Tenn. R. Civ. P. 12.01; and, (b) that by failing to answer the allegations in the Plaintiffs' Complaint, the Defendants admitted them. *See* Tenn. R. Civ. P. 8.04 ("Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading[.]"). Here, after failing to timely move for dismissal, the Defendants also failed to serve a responsive pleading within 15 days of their motions to dismiss being denied or at any time thereafter. Accordingly, having failed to deny any of the Plaintiffs' allegations in a responsive pleading, the Plaintiffs' averments "are admitted[.]" *See* Tenn. R. Civ. P. 8.04. Thus, at this juncture—more than a year later, and following the Defendants' own decision to pursue this appeal—the Defendants are stuck with the case-dispositive consequences of their strategic decisions.

D. THE DEFENDANTS' FAILURE TO CONTEST THE PLAINTIFFS' FACIAL OVERBREADTH CLAIM BELOW IS DISPOSITIVE OF THIS APPEAL.

The Defendants do not contest the trial court's ruling that they failed to address, respond to, or construct an argument opposing the Plaintiffs' overbreadth claims during the proceedings below, resulting in waiver. *See* R. at 339 ("As to the Plaintiffs' overbreadth claims, and their claims with respect to art. I, section 19 of the Tennessee Constitution, and their legislative immunity claims, neither Defendant has addressed, responded to, or constructed any argument to oppose those claims. . . . Accordingly, the Defendants' opposition to these claims is waived, and the Nondisparagement Clause is invalidated on each of these grounds." (citing *Sneed v. Bd. of Prof'l Resp. of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn.

2010))). As a federal constitutional claim cognizable under 42 U.S.C. § 1983, the Plaintiffs' meritorious overbreadth claims also gave rise to a fee award under 42 U.S.C. § 1988(b). Accordingly, the Plaintiffs' overbreadth claim is dispositive of this appeal, because new issues—particularly new constitutional issues—cannot be raised by litigants for the first time on appeal. *See, e.g.*, *Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996) ("Under Tennessee law, issues raised for the first time on appeal are waived."); *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 457 (Tenn. 1995) ("issues of constitutionality should not first surface on appeal") (citation omitted); *City of Elizabethton v. Carter Cty.*, 321 S.W.2d 822, 827 (Tenn. 1958) ("We do not have any sympathy for the practice of raising constitutional questions for the first time on appeal[.]").

Notwithstanding this context, though, Metro appears to believe that despite its waiver below, it may freely contest the Plaintiffs' overbreadth claim for the first time on appeal. As grounds, Metro asserts that it is challenging the claim on the basis that the Plaintiffs lacked standing to bring it, and that "issues of subject matter jurisdiction cannot be waived."[20]

Again, Metro misses the issue. The issue is that the Plaintiffs' overbreadth claim—including the Plaintiffs' standing to maintain that claim based on the jurisdictional facts underlying it, and including the Plaintiffs' entitlement to a fee award regarding it—were all raised and fully litigated below. When the time came to contest the Plaintiffs' facial

[20] *See* Metro's Reply at 11.

overbreadth claim, though, the Defendants failed to do so. The Defendants also failed to appeal the Plaintiffs' fee award regarding that claim thereafter.

To be sure, Metro is correct that standing claims are non-waivable as a general matter. Where, as here, a trial court's standing determination is premised upon unchallenged jurisdictional facts, though, a trial court's ruling is not subject to de novo review simply because standing presents a question of subject matter jurisdiction. Instead, jurisdictional facts are reviewable for clear error. *See* Plaintiffs' Brief at 19 (observing that "all jurisdictional facts found by the trial court regarding the Plaintiffs' standing are reviewed for clear error" (citing *Thomas v. City of Memphis*, 996 F.3d 318, 323 (6th Cir. 2021) ("We generally review de novo a district court's decision to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). If the lower court, however, 'does not merely analyze the complaint on its face, but instead inquires into the factual predicates for jurisdiction, the decision on the Rule 12(b)(1) motion resolves a 'factual' challenge rather than a "facial" challenge, and we review the district court's factual findings for clear error.'") (internal citation omitted); *Pederson v. La. State Univ.*, 213 F.3d 858, 869 (5th Cir. 2000) ("If the district court resolves any factual disputes in making its jurisdictional findings, the facts expressly or impliedly found by the district court are accepted on appeal unless the findings are clearly erroneous.") (cleaned up)).

Here, the jurisdictional facts underlying the Plaintiffs' overbreadth claim—like all other facts alleged by the Plaintiffs—were unchallenged by the Defendants. The jurisdictional allegations in the Plaintiffs'

Complaint were also admitted by virtue of the Defendants' failure to deny them. *See* Tenn. R. Civ. P. 8.04. The Plaintiffs additionally introduced jurisdictional evidence supporting their facial overbreadth and other claims through the Affidavit of Plaintiff Amy Frogge, which was similarly uncontested.[21] In response to the Plaintiffs' motion for summary judgment, both Defendants admitted that all of the Plaintiffs' asserted material facts were undisputed, too.[22] Finally, following all of this, neither Defendant raised as an issue on appeal any challenge to a single fact—jurisdictional or otherwise—determined by the trial court in their Statement of the Issues.[23]

Under these circumstances, the jurisdictional facts underlying the Plaintiffs' overbreadth claim and the legal merits of that claim have been fully litigated; neither Defendant has contested them; and any challenge to the Plaintiffs' overbreadth claims has been waived. Thus, the Plaintiffs' facial overbreadth claims—including their factual jurisdictional prerequisites—are not subject to challenge by the Defendants for the first time on appeal. *See Metro. Gov't of Nashville & Davidson Cty. v. Jones*, No. M2020-00248-COA-R3-CV, 2021 WL 1590236, at *2 (Tenn. Ct. App. Apr. 23, 2021), *no app. filed*. Similarly, because the trial court's November 25, 2020 attorney's fee order was not appealed by either Defendant, the order is now final and unappealable. As such, the trial court's fee award—including its jurisdictional basis—is

[21] R. at 171–76.

[22] R. at 125–27, 188–90.

[23] *See* Metro's Brief at 7; Joseph's Brief at 6.

not subject to relitigation and must be affirmed. *See Goeke v. Woods*, 777 S.W.2d 347, 350 (Tenn. 1989) ("In the instant case, Mr. Woods did not appeal the dismissal of the Rule 60 motion for lack of jurisdiction. It became final and binding on the parties. It is not necessary for us to address whether the trial court's jurisdictional ruling was correct. It is the preclusive effect of the unappealed final judgment, erroneous or otherwise, which is at issue.").

V. CONCLUSION

For the foregoing reasons, the trial court's judgment should be **AFFIRMED**, and the Plaintiffs should be awarded their appellate attorney's fees.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-V) contains 4,986 words pursuant to § 3.02(a)(1)(b), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2021, a copy of the foregoing was served via the Court's electronic filing system upon:

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