

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

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|-----------------------------|---|----------------------------------|
| MELISSA SALMON,             | § |                                  |
|                             | § |                                  |
| <i>Plaintiff-Appellant,</i> | § |                                  |
|                             | § |                                  |
| <i>v.</i>                   | § | M2024-00377-COA-R3-CV            |
|                             | § |                                  |
| FELLOWSHIP BIBLE            | § | Williamson County Chancery Court |
| CHURCH OF WILLIAMSON        | § | Case No.: 2023-CV-53127          |
| COUNTY,                     | § |                                  |
|                             | § |                                  |
| <i>Defendant-Appellee.</i>  | § |                                  |

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**REPLY BRIEF OF APPELLANT**

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Date: September 10, 2024

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Tenn. Code Ann. § 50-1-108 \_\_\_\_\_ 18, 21, 22, 23

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### III. ARGUMENT

#### **A. THE TRIAL COURT ERRED BY GRANTING THE DEFENDANT’S MOTION TO DISMISS.**

The Defendant asserts that the trial court correctly granted the Defendant’s motion to dismiss because “there was no ‘actual controversy’” to adjudicate here. Br. of Appellee at 6. But Mrs. Salmon’s Complaint pleaded sufficient facts to demonstrate the existence of an actual controversy as to whether the challenged provisions in the Parties’ contract are void as contrary to Tennessee public policy. And this Court has made clear that such a dispute constitutes “an actual controversy” under the Declaratory Judgment Act. *Karsonovich v. Kempe*, No. M2017-01052-COA-R3-CV, 2018 WL 1091735, at \*3 (Tenn. Ct. App. Feb. 27, 2018) (“[Plaintiff’s] complaint for declaratory judgment pleaded sufficient facts to demonstrate an actual controversy existed for the court to address: whether [the challenged] provision in the [the parties’ contract] was . . . void against public policy.”).

Because the Parties had an actual controversy, the trial court “ruled on the merits of the complaint.” *Id.* That alone “illustrates that there was a controversy for the trial court to decide.” *Id.* Thus, the trial court erred by finding that “there is no actual controversy in this case[,]”<sup>1</sup> as there was such a controversy and the trial court’s own order confirms that “there was an actual controversy which it subsequently ruled on.” *Id.*

The Defendant alternatively suggests that it is *proper* to grant a

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<sup>1</sup> *Id.* at 162.

Rule 12.02(6) motion when a defendant is correct about the merits of the case. Br. of Appellee at 6–7. As support, the Defendant cites this Court’s unpublished 2007 opinion in *Highwoods Properties, Inc. v. City of Memphis*, No. W2007-00454-COA-R3-CV, 2007 WL 4170821, at \*14 (Tenn. Ct. App. Nov. 27, 2007), *aff’d on other grounds*, 297 S.W.3d 695 (Tenn. 2009), along with that case’s string-cite to several opinions that did not address the issue presented here.<sup>2</sup> *Id.*

There are four problems with the Defendant’s argument:

First, *Highwoods* did not hold that it is proper to grant Rule 12.02(6) motions in declaratory judgment cases. Instead, it held that the trial judge there “did not commit reversible error” by doing so, *id.* at \*14, which is meaningfully different.

Second, this Court has observed that its unpublished opinion in *Highwoods* conflicts with its published, precedential decision in *Cannon Cnty. Bd. of Educ. v. Wade*, 178 S.W.3d 725, 730 (Tenn. Ct. App. 2005). See *Parsley v. City of Manchester*, No. M2021-00200-COA-R3-CV, 2021 WL 6139210, at \*4 (Tenn. Ct. App. Dec. 29, 2021) (citing *Cannon Cnty. Bd. of Educ.* for the “prevailing rule,” and then signaling that *Highwoods* conflicts with it). Further, to the extent there was once ambiguity about which line of authority was correct, this Court has since resolved it, holding that *Highwood’s* approach is “error” even if sometimes harmless. See *Chambless v. Rutledge*, No. E2023-00173-COA-R3-CV, 2024 WL 1955772, at \*4 (Tenn. Ct. App. May 3, 2024), *appeal denied* (Aug. 13,

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<sup>2</sup> “It is axiomatic that judicial decisions do not stand for propositions that were neither raised by the parties nor actually addressed by the court.” *Staats v. McKinnon*, 206 S.W.3d 532, 550 (Tenn. Ct. App. 2006).

2024); *see also id.* at \*5 (“the trial court erred in dismissing that part of the Chamblesses’ declaratory judgment action pursuant to Rule 12.02(6).”).

Third, the rule set forth in *Cannon Cnty. Bd. of Educ.*, 178 S.W.3d at 730, is the rule that the Tennessee Supreme Court has adopted. *See id.* (citing *Frazier v. City of Chattanooga*, 1 S.W.2d 786 (Tenn. 1928)); *see also Kivett v. Runions*, 231 S.W.2d 384, 385–86 (Tenn. 1950) (“The chancellor sustained the second and third ground of the demurrer, but held that under *Frazier v. City of Chattanooga*, 156 Tenn. 346, 1 S.W.2d 786, the complainant was entitled to a declaration. . . . The chancellor’s decree is affirmed.”). And because “[v]ertical *stare decisis* is absolute, as it must be in a hierarchical system[,]” this Court is obliged to follow it. *Nat’l Republican Senatorial Comm. v. Fed. Election Comm’n*, No. 24-3051, 2024 WL 4052976, at \*4 (6th Cir. Sept. 5, 2024) (quoting *Ramos v. Louisiana*, 590 U.S. 83, 124 n.5 (2020) (Kavanaugh, J., concurring in part)).

Fourth, the contrary rule that the Defendant advocates—that motions to dismiss should be granted in declaratory judgment actions whenever they involve a legal dispute and a defendant’s merits position is correct—misconstrues the relief-clarifying “purpose of a declaratory judgment action.” *Cannon Cnty. Bd. of Educ.*, 178 S.W.3d at 730. Adopting the Defendant’s position also would undermine a century of judicial policy that aims to make the Declaratory Judgment Act “of real service to the people and to the profession.” *Hodges v. Hamblen Cnty.*, 277 S.W. 901, 902 (Tenn. 1925).

For these reasons, the trial court’s order granting the Defendant’s motion to dismiss was “error,” and “the trial court erred in dismissing [Mrs. Salmon’s] declaratory judgment action pursuant to Rule 12.02(6).” *Chambless*, 2024 WL 1955772, at \*4–5.

**B. THE TRIAL COURT’S ERROR WAS NOT HARMLESS.**

“[A]lthough disposing of a declaratory judgment action on a Rule 12.02(6) motion is disfavored, [this Court’s] prevailing approach has been to deem it harmless error if the trial court also rules on the merits of the declaratory judgment action.” *Chambless*, 2024 WL 1955772, at \*4. Here, though, the error was not harmless. Thus, vacating the trial court’s premature merits ruling and remanding is the appropriate remedy. There are several reasons why.

*First*, as the Defendant concedes, the trial court did not even issue a complete merits ruling. Br. of Appellee at 9, n.1. According to the Defendant, that means that a merits issue presented here is not “ripe” for this Court’s review. *Id.*

That is not the correct framing, though. Because the trial court dismissed Mrs. Salmon’s entire Complaint,<sup>3</sup> this appeal from the trial court’s final order is certainly “ripe.” But the Defendant wants this Court to overlook the trial court’s error and treat it as “harmless” because the trial court also “addressed the merits of the declaratory judgment claim in its ruling.” *Id.* at 8 (quoting *Chambless*, 2024 WL 1955772, at \*[4]). Following that approach would be problematic here, though, because as the Defendant concedes, the trial court actually did *not* fully address the

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<sup>3</sup> R. (Vol. 1) at 172.

merits of Mrs. Salmon’s claims. Br. of Appellee at 9, n.1. Thus, accepting the Defendant’s position would require this Court—contrary to its longstanding practice—to adjudicate in the first instance merits questions that the trial court has never adjudicated. *But see Mid-S. Maint. Inc. v. Paychex Inc.*, No. W2014-02329-COA-R3-CV, 2015 WL 4880855, at \*14 (Tenn. Ct. App. Aug. 14, 2015) (“Generally, when the trial court fails to address an issue in the first instance, this Court will not consider the issue, but will instead remand for the trial court to make a determination in the first instance.”).

To circumvent this problem, the Defendant appears to want this Court to address this case’s merits questions on a piecemeal basis—addressing the issues that the trial court adjudicated while (presumably) remanding for resolution the unadjudicated issues that the Defendant characterizes as “not ripe.” Br. of Appellee at 9, n.1. But “piecemeal appellate litigation” is “disfavored.” *State v. Gilley*, 173 S.W.3d 1, 5 (Tenn. 2005). Thus, the appropriate remedy here is to reverse the trial court’s erroneous dismissal order and remand with instructions to consider this case’s merits issues in the normal course. Afterward—if a later appeal is even necessary<sup>4</sup>—this Court can adjudicate all of the merits questions presented by this case at once.

Second, the trial court’s error below—adjudicating, prematurely, this case’s merits issues at the motion-to-dismiss stage before Mrs. Salmon could fully brief them—was not harmless. As Mrs. Salmon

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<sup>4</sup> It may not be, given that a favorable ruling on the as-yet-unadjudicated merits issues would pretermite the other merits issues in this case.

observes, the trial court’s error “deprived Mrs. Salmon of the opportunity to brief her merits arguments, contravening her procedural due process rights.” Appellant’s Principal Br. at 17. Thus, remanding is appropriate so the trial court can “consider the merits questions presented here in the normal course[.]” *id.*—that is: at the summary judgment stage after affording the parties the opportunity to present complete merits briefing.

The Defendant’s contrary position is unserious. The Defendant maintains that “any error was harmless because the Chancery Court also ruled on the merits” of this case. Br. of Appellee at 8. At the same time, though, the Defendant urges this Court to find that Mrs. Salmon’s merits arguments “are unpreserved and waived on appeal” because they were not fully briefed below. *Id.* at 11. But Mrs. Salmon’s merits arguments *were not appropriate to present in response to the Defendant’s motion to dismiss*, which concerned only whether Mrs. Salmon had “state[d] a claim upon which relief can be granted.” Tenn. R. Civ. P. 12.02(6).

Given these circumstances, the trial court’s error was prejudicial. As this Court has explained: “It is well-settled that ‘[d]ue process requires that parties . . . be allowed to present their claims or defenses at a meaningful time and in a meaningful manner.’” *Vasudeva v. Barker*, No. M2023-01121-COA-R3-CV, 2024 WL 3272798, at \*2 (Tenn. Ct. App. July 2, 2024) (cleaned up). Thus, the trial court’s error having deprived Mrs. Salmon of a meaningful opportunity to be heard, the proper remedy is to vacate the trial court’s merits ruling and remand. *Cf. Houbbadi v. Smith*, No. M2023-01162-COA-R3-CV, 2024 WL 3811786, at \*2 (Tenn. Ct. App. Aug. 14, 2024) (vacatur is proper where inmate litigants are deprived of an opportunity to be heard by video).

Third, because the Defendant has not yet answered, this Court's precedent reflects that remanding is proper regardless. *Blackwell v. Haslam*, No. M2011-00588-COA-R3-CV, 2012 WL 113655, at \*10 (Tenn. Ct. App. Jan. 11, 2012); *Cannon Cnty. Bd. of Educ.*, 178 S.W.3d at 730–31.

Fourth, notwithstanding the Defendant's shifting position on whether it has raised a constitutional challenge, the Defendant has raised an as-applied constitutional challenge to Section 29-34-103, and the Attorney General is entitled to be heard before this case's constitutional issues are adjudicated. *Blackwell*, 2012 WL 113655, at \*10.

For these reasons, this Court should vacate and remand.

**C. IF THIS COURT ADDRESSES THE MERITS, THE DEFENDANT'S AS-APPLIED CONSTITUTIONAL CHALLENGE IS WAIVED.**

As Mrs. Salmon has noted, the Attorney General must be given notice of as-applied constitutional challenges, and a litigant's failure to do so waives them. Appellant's Principal Br. at 45, 51–52. The Defendant does not contest these propositions. Br. of Appellee at 9–11. Instead, it claims that it “only and consistently asserted that Salmon's interpretation and suggested application of the statute would be unconstitutional. As such, no notification to the Attorney General was necessary.” *Id.* at 9.

There are several problems with this claim.

First, the Defendant did not “only and consistently” assert that position. To the contrary, the Defendant's motion to dismiss began by asserting that “Defendant moves to dismiss Plaintiff's complaint because (1) retrospective application of TENN. CODE ANN. 29-34-103 impairs the

obligations of the Settlement Agreement contracts, which is an impermissible violation of the Tennessee and United States Constitutions[.]”<sup>5</sup> After that, the Defendant opened its oral argument by claiming that Section 29-34-103 is “a statute passed by the Legislature in derogation of the Tennessee Constitution”<sup>6</sup> and “the Constitution of the State of Tennessee is clear that you can’t pass a law that impacts contracts in the past.”<sup>7</sup>

Second, however it characterizes its argument, the Defendant was (and still is) asserting an as-applied constitutional challenge. The argument that Section 29-34-103 does not apply to the challenged provisions is materially different from the argument that applying Section 29-34-103 to the challenged provisions would violate the Tennessee and federal Constitutions. The latter argument can only be characterized as an as-applied constitutional challenge. The Defendant also made that argument below<sup>8</sup> and presses it on appeal. Br. of Appellee at 9 (“Salmon’s interpretation and suggested application of the statute would be unconstitutional.”).

Because the Defendant has not given the Attorney General notice of its as-applied challenge, though, the Defendant’s constitutional argument is waived. That means that—if this Court agrees with Mrs. Salmon that Section 29-34-103’s text is not limited to settlement agreements that post-date May 15, 2018—then Section 29-34-103 voids

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<sup>5</sup> R. (Vol. 1) at 45.

<sup>6</sup> R. (Vol. 2) at 14:11–16.

<sup>7</sup> *Id.* at 15:19–21.

<sup>8</sup> R. (Vol. 1) at 45; R. (Vol. 2) at 14:11–16; *id.* at 15:19–21.

the challenged provisions *regardless of any potential constitutional infirmity as applied*, because the Defendant’s as-applied constitutional challenge is waived.

**D. ELIMINATING THE DEFENDANT’S AS-APPLIED CONSTITUTIONAL CHALLENGE MAKES THIS CASE AN EASY REVERSE.**

Stripped of an as-applied constitutional challenge, the merits question presented in this case is reduced to a simple question: Does Section 29-34-103 apply to the Parties’ settlement agreement? The answer is yes, for several reasons.

First, Section 29-34-103’s text is not and does not purport to be restricted to any particular time period. That legislative choice was deliberate, differing not only from other, similar statutes that have voided contract terms on public policy grounds, *see* Appellant’s Principal Br. at 47–49, but also differing from a similar statute that the General Assembly enacted *the same day*, *see* Appellant’s Principal Br. at 46–47.

Second, Section 29-34-103 states unambiguously that it applies: “Notwithstanding any law to the contrary . . . .” *Id.* That broad mandate alone settles the controversy.

To be sure, applying Section 29-34-103 to all qualifying settlement agreements—including those predating its enactment—introduces questions about Section 29-34-103’s constitutionality as applied to settlement agreements executed before May 15, 2018. But the Defendant’s as-applied constitutional challenge is waived here. *See supra* at 14–16. Thus, this Court need not reach those constitutional questions, and it should reverse instead.

**E. MRS. SALMON HAS NOT WAIVED ANY MERITS ISSUE.**

The Defendant insists that this Court should deem Mrs. Salmon’s merits claims “unpreserved and waived on appeal” because she did not fully brief them in response to the Defendant’s motion to dismiss. Br. of Appellee at 11. The Defendant is wrong.

It is true that a party who invites error or fails to timely object to one cannot be granted relief. Tenn. R. App. P. 36(a). But Mrs. Salmon *did* timely object to the trial court considering the merits issues in this case prematurely. She did so in her written materials, emphasizing the “prevailing rule” against granting motions to dismiss in declaratory judgment actions and asking this Court to reach the merits issues in this case “at a later stage in the proceedings.”<sup>9</sup> She also repeated her objection during oral argument.<sup>10</sup> The Defendant’s counsel contrarily urged the trial court to err by pressing forward prematurely, though, and the trial court obliged.

Under these circumstances, the Defendant’s position that it should *benefit* from having cultivated error is preposterous. Mrs. Salmon advocated the correct ruling on the Defendant’s motion to dismiss: to deny it and allow the Parties’ merits claims to be briefed on “cross motions for summary judgment.”<sup>11</sup> Instead of adhering to this Court’s precedent, though, the trial court did what the Defendant asked—an approach that the Defendant now characterizes as “harmless error.”

By convincing the trial court to adjudicate this case’s merits issues

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<sup>9</sup> R. (Vol. 1) at 119–20.

<sup>10</sup> R. (Vol. 2) at 22:18–23:7.

<sup>11</sup> R. (Vol. 2) at 23:4.

prematurely, though, the Defendant deprived Mrs. Salmon of a fair opportunity to brief the merits issues presented here. That chronology does not constitute a “waiver” of Mrs. Salmon’s merits claims. Instead, it was a straightforward violation of Mrs. Salmon’s due process rights. *Luker v. Luker*, 578 S.W.3d 450, 461 (Tenn. Ct. App. 2018) (a litigant “deserves a meaningful due process opportunity to present his or her case.”). Nor was having her due process rights violated—over Mrs. Salmon’s repeated objections to premature adjudication—the “tactical decision” that the Defendant imagines. Br. of Appellee at 12.

Mrs. Salmon’s merits arguments also were not waived anyway. Despite noting that it was improper to address the merits issues in this case prematurely, Mrs. Salmon’s response to the Defendant’s motion to dismiss argued that: (1) based on *Pandharipande v. FSD Corp.*, 679 S.W.3d 610, 631 (Tenn. 2023), her claim was not one for retrospective application;<sup>12</sup> (2) Section 29-34-103 “may apply retrospectively without presenting constitutional concerns regardless”;<sup>13</sup> and (3) “important textual differences between Tenn. Code Ann. § 29-34-103 and Tenn. Code Ann. § 50-1-108—which were enacted during the same legislative session—evidence the General Assembly’s intent that Tenn. Code Ann. § 29-34-103 apply on a forward-looking basis to all qualifying settlement agreements regardless of when they were executed[.]”<sup>14</sup> These are the same merits arguments that Mrs. Salmon has presented in this appeal. Thus, they are all preserved.

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<sup>12</sup> R. (Vol. 1) at 122–23.

<sup>13</sup> *Id.* at 124.

<sup>14</sup> *Id.* at 125.

Nor *could* the merits arguments that Mrs. Salmon raises on appeal have been waived below, given that the trial court adjudicated the merits issues she now challenges. Even when a plaintiff has outright failed to respond to a motion to dismiss, a plaintiff is not precluded from challenging on appeal the legal grounds set forth in the trial court’s order. *Heyward v. Cooper*, 88 F.4th 648, 654–55 (6th Cir. 2023). Instead, when “a plaintiff fails to respond to a motion to dismiss, the plaintiff is limited on appeal to challenging the legal grounds that the [trial] court has given for its decision.” *Id.* at 654; *see also Lunneen v. Vill. of Berrien Springs, Michigan*, No. 22-2204, 2023 WL 6162876, at \*12 (6th Cir. Sept. 21, 2023) (“As the district court decided this issue below, the purpose of the waiver doctrine (to ease our review and prevent surprise issues) is not served in this case and does not preclude review.”).

“[C]hallenging the legal grounds that the [trial] court has given for its decision” is exactly what Mrs. Salmon has done here. Thus, Mrs. Salmon would be entitled to challenge the reasoning in the trial court’s order even if she had ignored the Defendant’s motion to dismiss entirely.

For these reasons, the Defendant’s waiver claims fail.

**F. THE DEFENDANT’S MERITS ARGUMENTS ARE UNPERSUASIVE.**

Turning to the merits of this case, the Defendant makes some contrary arguments and ignores others. In all cases, the Defendant’s positions are unpersuasive.

**1. The trial court’s erroneous Contract Clause ruling is undefended.**

The Defendant asserts that this Court should “make short shrift of Salmon’s purported reliance on federal constitutional jurisprudence . . .

.” Br. of Appellee at 13. As justification, the Defendant asserts that “[a]t no point does Salmon address whether the Statute is reasonable or necessary” and insists that the issue should be deemed waived as a result. *Id.*

The Defendant has things exactly backwards. It is not Mrs. Salmon’s burden to establish that Section 29-34-103—a statute designed to prevent bad actors from covering up child sexual abuse—does *not* contravene the Contract Clause. That is because “[s]tatutes enacted by the legislature are presumed constitutional.” *In re Est. of Jenkins*, 97 S.W.3d 126, 131 (Tenn. Ct. App. 2002) (citing *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996)). Thus, proving that Section 29-34-103 contravenes the Contract Clause was (and remains) *the Defendant’s* burden. *See, e.g., Dutra v. Trustees of Bos. Univ.*, 96 F.4th 15, 19–20 (1st Cir. 2024) (“[t]he burden rests on the challenger” in a Contract Clause challenge); *Emerachem Power, LLC v. Gerregano*, No. E2019-00292-COA-R3-CV, 2020 WL 2820335, at \*9 (Tenn. Ct. App. June 1, 2020) (“The Entities bear the burden of proving that the statute is unconstitutional.”).

The Defendant has not even attempted to meet this burden. Br. of Appellee at 13. Nor does the Defendant contest Mrs. Salmon’s observation that “[t]he trial court’s opinion below neither applied the correct test nor purported to do so[.]” Appellant’s Principal Br. at 55. Thus, the trial court’s erroneous Contract Clause analysis<sup>15</sup> is undefended.

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<sup>15</sup> R. (Vol. 1) at 158–59.

**2. The trial court's erroneous Tennessee constitutional analysis is undefended and unanswered.**

Mrs. Salmon has similarly explained why the trial court's Tennessee constitutional analysis was wrong. Appellant's Principal Br. at 56–57. The Defendant makes no effort to defend the trial court's analysis in response. *See generally* Br. of Appellee. Indeed, the Defendant does not even respond to Mrs. Salmon's Tennessee constitutional arguments. *Id.* Thus, the trial court's judgment should be reversed.

**3. The Defendant has failed to respond to Mrs. Salmon's argument that Section 29-34-103 is remedial.**

Mrs. Salmon has explained why Section 29-34-103 is a remedial statute that declares pre-existing public policy and does not impair vested rights. Appellant's Principal Br. at 59–63. Once more, the Defendant makes no effort to defend the trial court's contrary analysis and does not respond. *See generally* Br. of Appellee. Thus, reversal is warranted.

**4. The Defendant unpersuasively argues that the legislature did not intend Section 29-34-103 to apply comprehensively.**

The Defendant encourages this Court to disregard the fact that Tenn. Code Ann. § 50-1-108—which governs contracts designed to conceal workplace sexual harassment, and which the General Assembly enacted the same day as Section 29-34-103—“contains a prospective-only provision, while [Section 29-34-103] does not.” Br. of Appellee at 14. As justification, the Defendant asserts that “the statutes are not very similar at all.” *Id.*

The Defendant's claims of dissimilarity are specious, though. The Defendant argues that Section "50-1-108 does not apply to settlement agreements. It applies to nondisclosure agreements entered into as a condition of employment." *Id.* This is a distinction without a difference, however. The salient point is that both statutes establish that Tennessee public policy voids contract provisions designed to conceal certain sexual misconduct. When enacting the two statutes, though, the legislature determined that Section 50-1-108 "shall apply to agreements executed or renewed on or after" its effective date while omitting that limitation from Section 29-34-103.

Under the Defendant's view, that legislative choice was meaningless. Thus, the Defendant asserts that this Court should pretend that Section 29-34-103 contains the same limitation that it "shall apply to agreements executed or renewed on or after" its effective date. But it doesn't. And that distinguishes Section 29-34-103 not only from a similar statute enacted by the same legislature on the same day; it also distinguishes Section 29-34-103 from a host of other Tennessee statutes voiding contract provisions on public policy grounds that contain date limitations that the General Assembly omitted from Section 29-34-103. *See* Appellant's Principal Br. at 48. It distinguishes Section 29-34-103 from similar legislation on which it was modeled, too. *Id.* at 48–49.

With these considerations in mind, "[i]f the legislature had intended section [29-34-103] to" affect only contracts beginning in 2018 onward, "it undoubtedly would have said so." *Emergency Med. Care Facilities, P.C. v. Div. of TennCare*, 671 S.W.3d 507, 519 (Tenn. 2023). It didn't, though. Instead, the legislature said that Section 29-34-103

applies comprehensively “[n]otwithstanding any law to the contrary[.]” *Id.*

That is why the non-dispositive canon of construction noted in *Shell v. State*, 893 S.W.2d 416, 419 (Tenn. 1995), does not control here. Section 29-34-103’s broad mandate is exceptionless and applies notwithstanding any contrary law. Thus, it “should be read and applied as it reads,” and because it “in fact contemplates a past event as having effect in a present situation, it should be so construed and applied.” *United Inter-Mountain Tel. Co. v. Moyers*, 426 S.W.2d 177, 181 (Tenn. 1968). Further, “legislative history” matters to the inquiry, *see Shell*, 893 S.W.2d at 419, and the legislature’s intent that Section 29-34-103 and Section 50-1-108 function differently is manifest. The Defendant’s contrary arguments fail accordingly.

**5. Mrs. Salmon’s argument is not for retrospective application.**

In *Pandharipande*, 679 S.W.3d at 631, the Tennessee Supreme Court observed that “there is no retroactivity at issue” when a litigant “does not seek to impose” a new restriction to “past” conduct. Thus, the Tennessee Supreme Court concluded that because the litigant there was “not attempting to apply the 2018 amendments to conduct that occurred before the amendments became effective, [the respondent’s] argument regarding retroactivity fails.” *Id.*

This case presents the same situation. The Defendant’s citationless claim that retroactivity for purposes of “statutory construction” means something different than retroactivity for purposes of “contractual construction” also makes little sense. Br. of Appellee at 15–16.

Trying another approach, the Defendant argues alternatively that “Salmon’s attempted application would apply to conduct—the parties’ agreement not to discuss the alleged incident—that occurred prior to the effective date of the Statute.” Br. of Appellee at 16. But the “conduct” in question here has not occurred. Here, Mrs. Salmon wishes to speak *in the future*, and she seeks a declaration that Section 29-34-103 will protect her when she does. By contrast, Mrs. Salmon does not seek to use Section 29-34-103 to immunize prior conduct, such as past statements that predate its enactment. Thus, “there is no retroactivity at issue here.” *Pandharipande*, 679 S.W.3d at 631.

What the Defendant is talking about is not retrospectivity at all, but something else entirely. According to the Defendant, because, in the past, the parties executed a contract “not to discuss the alleged incident,” no future law can affect the parties’ contract, given that such legislation would have the result of modifying or abrogating a contract that is already in effect. That emphatically is not the law, though. *See e.g., Sherwin-Williams Co. v. Morris*, 156 S.W.2d 350, 352 (Tenn. Ct. App. 1941) (“All contracts are subject to be interfered with, or otherwise affected by, subsequent statutes and ordinances enacted in the bona fide exercise of police power.”); *J.L. Mac-TN, Inc. v. State*, No. M2003-01057-COA-R3-CV, 2004 WL 350652, at \*6 (Tenn. Ct. App. Feb. 24, 2004) (“the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end ‘has the result of modifying or abrogating contracts already in effect.’”) (cleaned up). The Defendant’s contrary claim fails accordingly.

**G. THE DEFENDANT’S SEALING ARGUMENTS ARE MERITLESS.**

The Defendant insists that the trial court’s blanket sealing order—which sealed (among other things) “a host of inarguably non-confidential documents, like a *Tennessean* article<sup>16</sup> and a copy of Public Chapter No. 962[,]”<sup>17</sup> see Principal Br. of Appellant at 68—was proper. Br. of Appellee at 17. But as Mrs. Salmon has observed, the trial court erred in finding that any compelling interest supported sealing. That is because Mrs. Salmon advocated transparency, while the Defendant—the sealing proponent—lacked standing to assert the argument the trial court cited as its justification for wholesale sealing: that sealing was necessary to prevent “potential harm to Plaintiff and her family[.]”<sup>18</sup>

The Defendant has no answer to this problem. It continues to advocate for sealing and to defend the trial court’s sealing order as necessary “to avoid potential harm to ‘Plaintiff and her family, particularly the minor child, E.S.’” *Id.* “But standing is not dispensed in gross.” *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). That means a litigant “must demonstrate standing for each claim he seeks to press.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006). And given that the Defendant—as “the proponent of the seal” who “must demonstrate that the seal is necessary to preserve a compelling interest[.]” see *In re Est. of Thompson*, 636 S.W.3d 1, 19, n.16 (Tenn. Ct. App. 2021)—is neither “the Plaintiff” nor “her family[.]” the Defendant cannot press claims on their behalf. The trial court’s sealing order—and the

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<sup>16</sup> R. (Vol. 1) at 25–27.

<sup>17</sup> *Id.* at 36–37.

<sup>18</sup> *Id.* at 170.

Defendant’s attempt to defend it—fail accordingly.

The Defendant’s argument that the already-published-to-the-public records filed in *this* Court should stay sealed fares no better. The Defendant offers no authority to overcome the rule that “unsealing a document cannot be undone, for ‘[s]ecrecy is a one-way street’ and ‘[o]nce information is published, it cannot be made secret again.’” *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 449 (5th Cir. 2019) (quoting *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008)). In its place, the Defendant posits that “Salmon’s argument would mean that no records ever could be sealed because they all essentially start out as unsealed.” Br. of Appellee at 18.

This is nonsense. Sealed records do not “start out as unsealed.” *Id.* That is why this Court requires that parties who wish to seal documents lodge them “under conditional seal” instead of filing them on the public docket. Tenn. Ct. App. R. 15(e). Any other approach would make the documents publicly accessible and preclude a court from lawfully sealing them. Thus, this Court erred by ordering that an already unsealed and publicly available filing “be made secret again.” *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1220 (Fed. Cir. 2013).

#### **H. THIS CASE SHOULD BE REASSIGNED ON REMAND.**

“The development of the concept of public access to judicial proceedings . . . arose in part as a reaction to secret proceedings in the Star Chamber and other prerogative courts.” *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 n.6 (6th Cir. 1983). Here, the secret proceeding below—in which Judge Johnson “misapplied this

Court's controlling precedent, misapplied constitutional standards, misapplied sealing standards, and illicitly concealed her erroneous rulings from public view[.]" Appellant's Principal Br. at 71—bears astonishing similarity to "the abuses of the secret proceedings of the English Star Chamber." *State v. Jordan*, 325 S.W.3d 1, 52 (Tenn. 2010) (cleaned up).

That alone merits reassignment. But the fact that Judge Johnson has already decided what the proper outcome in this case should be even before allowing Mrs. Salmon to make her merits arguments solidifies the matter, given that it evidences actual prejudgment. *Groves v. Ernst-W. Corp.*, No. M2016-01529-COA-T10B-CV, 2016 WL 5181687, at \*4 (Tenn. Ct. App. Sept. 16, 2016) ("it helps to remain mindful that the underlying intent of the recusal rules is [] 'to guard against the prejudgment of the rights of litigants . . . .'"). This case should be reassigned accordingly.

#### **IV. CONCLUSION**

The trial court's judgment should be reversed.

Respectfully submitted,

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## **CERTIFICATE OF ELECTRONIC FILING COMPLIANCE**

Under Tennessee Supreme Court Rule 46, § 3.02, the relevant sections of this brief contain 5,000 words pursuant to § 3.02(a)(1)(a), 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 10th day of September, 2024, a copy of the foregoing was served via the Court's electronic filing system, via email, and/or via USPS mail, postage prepaid, to the following parties:

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