IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

PAMELA MOSES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. CT-1579-19**
	)	**Division I**
	)	
	)	**Judge Felicia Corbin-Johnson**
MARK GOINS, TRE HARGETT, and JONATHAN SKRMETTI, in their official capacities,	)	**Judge Suzanne S. Cook**
	)	**Judge Barry Tidwell**
	)	
	)	
Defendants.	)	

REPLY IN SUPPORT OF THE MOTION OF
DEFENDANT JONATHAN SKRMETTI FOR JUDGMENT ON THE PLEADINGS

Attorney General Skrmetti has previously explained why he is entitled to judgment on the pleadings. Because the Attorney General does not enforce, and has no duty to enforce, the voter-restoration statutes Plaintiff challenges, the Attorney General enjoys sovereign immunity and Plaintiff lacks standing to sue him. (Att'y Gen. Mem. at 7-13.) Plaintiff fails to overcome either hurdle.

I. Sovereign Immunity Bars Plaintiff's Claims against the Attorney General.

Plaintiff claims that the Attorney General's sovereign immunity has been abrogated by Tenn. Code Ann. § 1-3-121 and that her declaratory-judgment action may proceed against the Attorney General under the *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008), exception to sovereign immunity. (Pl.'s Resp. at 5-11.) Neither assertion holds merit.

A. Section 1-3-121 does not abrogate the Attorney General's immunity here.

Plaintiff says that the waiver of sovereign immunity in § 1-3-121 "encompasses Plaintiff's claims against Defendant Skrmetti" because she is "seeking declaratory and injunctive relief in an action regarding the constitutionality of [permanent disenfranchisement] statutes." (Pl.'s Response at 6-7.)[1] But this assertion mises the primary point—§ 1-3-121 allows a plaintiff to challenge the legality or constitutionality of "a governmental action," and Plaintiff has alleged no governmental action *by the Attorney General*.

The statute's singular reference to "governmental action" requires that a discrete action must have been taken against a plaintiff by a governmental actor. *Cf. Recipient of Final Expunction Ord. in McNairy Cnty. Cir. Ct. Case No. 3279 v. Rausch*, 645 S.W.3d 160, 169 (Tenn. 2022) (permitting § 1-3-121 claim where plaintiff challenged "the legality *of the TBI's action*" in refusing to expunge his records (emphasis added)). This language does not permit challenges to any statute the government passes. Nor does it permit a plaintiff to sue a defendant who has not acted with respect to the law; the State's sovereign authority is exercised only through governmental officials acting through their constitutionally delegated and divided authority. The Tennessee Supreme Court made that clear by noting that § 1-3-121's narrow waiver was "consistent with our reasoning in *Colonial Pipeline*" "that 'sovereign immunity does not bar a declaratory judgment or injunctive relief against state officers to prevent the enforcement of an unconstitutional statute.'" *Id.* at 168 n.10 (quoting *Colonial Pipeline*, 263 S.W.3d at 854 (emphasis added)).

[1] The Attorney General maintains that Plaintiff failed to invoke this Court's jurisdiction under § 1-3-121 by failing to cite the statute in her complaint.

Plaintiff insists that she *has* alleged governmental action by the Attorney General via her allegation that the "Defendants" denied her "the 'right to vote'"—and that the Court must "accept all factual allegations in the complaint as true." (Pl.'s Resp. at 8 (quoting Second Am. Compl., at 5, ¶ 16).) But this latter proposition does not apply to conclusory allegations—like Plaintiff's allegation here that the Attorney General (as one of several "Defendants") denied her the right to vote. *See Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 40 (Tenn. Ct. App. 2006) ("Although we are required to construe the factual allegations in Plaintiffs' favor, and therefore accept the allegations of fact as true, we are not required to give the same deference to conclusory allegations.") (internal citation omitted). Plaintiff's complaint includes no *factual* allegation that the Attorney General took any action to enforce the voter-restoration statutes against Plaintiff. And Plaintiff fails to point to any provision in the challenged statutes directing the Attorney General to enforce them; nor does she claim that the Attorney General has authority to enforce election or voter-restoration laws generally.

B. Plaintiff cannot rely on the *Colonial Pipeline* exception.

Plaintiff contends that the *Colonial Pipeline* exception applies to her claims, asserting that the Attorney General "cites no precedent supporting the argument that the '*Colonial Pipeline* exception' contains any requirement of direct enforcement responsibility." (Pl.'s Resp. at 9.) But that assertion ignores *Colonial Pipeline* itself. This "narrow" exception to sovereign immunity, which tracks the federal rule under *Ex parte Young*, only reaches officials "responsible for enforcing" an allegedly unconstitutional statute, *Colonial Pipeline*, 263 S.W.3d at 852-53 (quotation omitted), and allows a plaintiff to challenge a state officer's "authority to impose laws violative of the constitution," *id.* at 853. Plaintiff has failed to allege that the Attorney General is responsible for enforcing the voter-restoration statutes or that the Attorney General has engaged

in conduct "grounded in an unconstitutional statute." *Id.* The *Colonial Pipeline* exception therefore does not apply.[2]

Plaintiff points to the Supreme Court's 1949 decision in *Cummings v. Beeler*, 223 S.W.2d 913 (Tenn. 1949), for the proposition that the Attorney General must be made "a party defendant" to a suit challenging the constitutionality of a statute under the Tennessee Declaratory Judgment Act. (Pl.'s Resp. at 9-10.) But Plaintiff fails to account for the Supreme Court's *prior* decision in *Cummings v. Shipp*, 3 S.W.2d 1062 (Tenn. 1928), and its more recent decisions in *State v. Superior Oil, Inc.*, 875 S.W.2d 658 (Tenn. 1994), *In re M.L.P.*, 281 S.W.3d 387 (Tenn. 2009), and *Chattanooga-Hamilton Cnty. Hosp. Auth. v. UnitedHealthcare Plan of the River Valley, Inc.*, 475 S.W.3d 746 (Tenn. 2015), all of which support the contrary proposition that the Act requires only that the Attorney General be given *notice* of the proceeding—to protect the public's interest in the result of the suit. *See Shipp*, 3 S.W.2d at 1063; *Superior Oil*, 875 S.W.2d at 659-60; *In re M.L.P.*, 281 S.W.3d at 393-94; *UnitedHealthcare Plan*, 475 S.W.2d at 755; *see also* Tenn. R. Civ. P. 24.04, Advisory Comm'n Comment.

Plaintiff asserts that in three "recent cases," federal district courts have rejected the Attorney General's argument that he is not a proper defendant to a declaratory-judgment proceeding challenging the constitutionality of a Tennessee statute. (Pl.'s Resp. at 10-11.) Those three decisions, however, predate—and were effectively overruled by—the Sixth Circuit's decision in *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021 (6th Cir. 2022).

[2] Even if *indirect* enforcement of an allegedly unconstitutional statute were sufficient under *Colonial Pipeline*, Plaintiff's allegations would still be inadequate. "An indirect theory of traceability requires that the government cajole, coerce, command." *Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir. 2021). Plaintiff's complaint contains no such allegations against the Attorney General.

As further discussed below, the court concluded in *Nabors* that "[t]he relevant question is not whether the Attorney General may defend the constitutionality of the statute, but whether he can prosecute plaintiffs under it." *Id.* at 1032.

II. Plaintiff Lacks Standing to Sue the Attorney General.

Plaintiff claims that she has standing to sue the Attorney General because she "has alleged an injury fairly traceable to Defendant Skrmetti's conduct that can be redressed by a favorable court order against the Attorney General." (Pl.'s Resp. at 11.) But for much the same reason the Attorney General enjoys sovereign immunity, Plaintiff also lacks standing to sue the Attorney General.

Plaintiff says that *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013)—a decision involving a challenge to Tennessee's voter-identification law—"offers the clearest path for rejecting Defendant Skrmetti's standing argument." (Pl.'s Response at 11.) But *City of Memphis* provides no path—let alone a "clear" path—to finding that Plaintiff has standing to sue the Attorney General here. The primary issue in *City of Memphis* was whether the plaintiffs had shown an injury-in-fact that allowed them to proceed in the case. *City of Memphis*, 414 S.W.3d at 97-101. While the Attorney General was one of the three defendants in that case, the question whether the Attorney General was a proper party defendant was simply not addressed. *See City of Memphis*, 414 S.W.3d at 98-99. Indeed, the court's scant discussion of the traceability and redressability elements of standing considered all three defendants *collectively*. *See id.* at 99 (concluding that the individual plaintiffs had "alleged facts that demonstrate a fairly traceable

causal connection between their claimed injuries and the challenged conduct"—i.e., "the Defendants' enforcement of the Act").[3]

As she does with respect to sovereign immunity, Plaintiff insists that she has "alleged sufficient facts to demonstrate that her injury is fairly traceable to Defendant Skrmetti's alleged conduct" by alleging that "she has 'been denied [voting] registration' by defendants, including Defendant Skrmetti." (Pl.'s Resp. at 13 (alteration in original).) Again, though, such an allegation is merely conclusory insofar as it may pertain to the Attorney General—Plaintiff has made no specific factual allegation regarding the Attorney General's enforcement of the voter-restoration statutes.

Plaintiff says that her "Attorney General-specific allegations about the Attorney General's role in interpreting state election law suffices to establish standing"—namely, the Attorney General's role in issuing opinions interpreting Tennessee law. (Pl.'s Resp. at 14.) But that cannot be right. By that logic Plaintiff would have standing to sue any sitting judge in Tennessee—even this Court—since judges also issue opinions that similarly play "a role in enforcing th[e] laws." (Pl.'s Resp. at 14.) *Cf.* Tenn. Const., art VI, §§ 3-5 (listing Tennessee Supreme Justices, Tennessee appellate and trial court judges, and the Attorney General as officers under Tennessee's judicial branch).

Indeed, the Sixth Circuit's decision in *Nabors* makes clear that Plaintiff is *not* right. In that case, the district court had ruled that the Attorney General was a proper defendant because of his duty to defend the constitutionality of a state statute in a declaratory-judgment proceeding. *See*

[3] The same applies to *Falls v. Goins*, 673 S.W.3d 173 (Tenn. 2023), on which Plaintiff also relies. (Pl.'s Resp. at 11.) The Attorney General was one of the three defendants in that case, but the question whether the Attorney General was a proper party defendant was likewise not addressed in the decision. 673 S.W.3d at 178-84.

Universal Life Church Monastery Storehouse v. Nabors, 508 F. Supp. 3d 221, 238-39 (M.D. Tenn. 2020). But the Sixth Circuit reversed that ruling, holding that the plaintiffs lacked standing to sue the Attorney General. *Nabors*, 35 F.4th at 1032. Because the Attorney General lacked enforcement authority and could not prosecute the plaintiffs under the challenged statute, "plaintiffs [had] not shown standing to seek equitable relief against the Attorney General decreeing that he refrain from enforcement." *Id.* The Sixth Circuit specifically rejected the plaintiffs' claim that the Attorney General's issuance of "interpretive opinions" provided standing, concluding that this assertion "fails the redressability requirement." *Id.* at 1033. Likewise here—even absent the Attorney General's opinions, Plaintiff would still be barred from restoring her voting rights under the existing statutory provisions.

Nor has Plaintiff demonstrated traceability of her injury to the Attorney General's issuance of opinions. Plaintiff claims that it is a "reasonable inference" that her injury is traceable to the Attorney General because "the opinions of the attorney general may be persuasive" and "government officials rely upon them for guidance." (Pl.'s Resp. at 14-16.) But that claim fails to raise Plaintiff's "right to relief beyond the speculative level." *West v. Schofield*, 468 S.W.3d 482, 489 (Tenn. 2015) (quotation omitted). The Attorney General has no authority to deny anyone voting registration. Period. And the Attorney General does not assume an enforcement role with respect to the voter-restoration statues by issuing opinions pursuant to his statutory duty. *See* Tenn. Code Ann. § 8-6-109(b)(6).

Plaintiff maintains that her injury is traceable to the Attorney General because he has issued opinions without "account[ing] for the plain language of" Tenn. Const. art. I, § 5[4] and by

[4] Article I, Section 5 provides: "The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction

"endorsing" the disenfranchisement of convicted felons "without distinguishing between those convicted by a jury and those convicted via a guilty plea." (Pl.'s Resp. at 15-16.) But this argument overlooks that Tenn. Const. art. IV, § 2, authorizes the General Assembly to enact laws "excluding from the right of suffrage persons who may be convicted of infamous crimes." That provision contains *no* conviction-by-jury requirement.

Plaintiff also suggests that she satisfies the causation element because the Attorney General could request the Coordinator of Elections to conduct an investigation under Tenn. Code Ann. § 2-11-202. (Pl.'s Resp. at 16.) However, the ability to *request an investigation* under that statute is not sufficient to confer standing. *See Ashe v. Hargett*, No. 3:23-CV-10256, 2024 WL 923771, at *6-7 (M.D. Tenn. Mar. 4, 2024).

by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction."

CONCLUSION

For the reasons stated here and in his opening memorandum, the Court should grant the Attorney General's motion for judgment on the pleadings and dismiss him as a party.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 10th day of July, 2024, a true and exact copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing report. Parties may access this filing through the Court's electronic filing system. Additionally, a copy of the foregoing has been electronically mailed to the following:

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