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IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY, TENNESSEE

TENNESSEANS FOR SENSIBLE ELECTION LAWS, *Plaintiff,* *v.* TENNNESSEE BUREAU OF ETHICS AND CAMPAIGN FINANCE, REGISTRY OF ELECTION FINANCE, and DAVIDSON COUNTY DISTRICT ATTORNEY GENERAL, *Defendants.*	)	Case No.: 18-821-III

PLAINTIFF'S PRE-TRIAL BRIEF AND MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

On September 4, 2018, this Court ordered the Plaintiff to file:

> [A] pre-trial brief which, in addition to any matters the Plaintiff wishes to present to the Court, addresses the standards of review/scrutiny to be applied to each constitutional challenge to the Statutes and whether the District Attorney should be dismissed from this lawsuit as outlined in the Court's August 24, 2018 Memorandum and Order.

September 4, 2018 Order.

For the reasons provided below, the following standards of review apply:

(1) The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's speaker-based discrimination is subject to strict scrutiny;

(2) The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's temporal restriction on political speech is subject to *Buckley*'s "closely-drawn" test;

(3) The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's discrimination based on political association is subject to strict scrutiny;

(4) The Plaintiff's challenge to Tenn. Code Ann. § 2-10-121's discrimination based on political association is subject to strict scrutiny;

(5) The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's content discrimination is subject to strict scrutiny; and

(6) The Plaintiff's challenge to the Statutes under Tenn. Const. art. I, § 19 is subject to strict scrutiny.

Additionally, the District Attorney should not be dismissed from this action, because the District Attorney may be sued pursuant to Tenn. Code Ann. § 1-3-121. In the alternative, the District Attorney should only be dismissed from this action without prejudice pending a final judgment as to the constitutionality of Tenn. Code Ann. § 2-10-117. *See Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 753 (Tenn. 2006) ("once this Court has concluded that a criminal statute is unconstitutional, no controversies are required to be settled by a criminal court, and the equity court is not invading the criminal court's jurisdiction by issuing an injunction.").

Further, for the reasons set forth below, the Plaintiff is also entitled to summary judgment.

II. Procedural History and Defendants' Briefing

On July 31, 2018, this Court held a hearing on the Plaintiff's application for a temporary injunction. During that hearing, the Defendants argued that the Plaintiff's challenges are subject to "exacting scrutiny." In its written response to the Plaintiff's

application for a temporary injunction, the Defendants similarly argued that strict scrutiny governed this matter. *See Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction*, p. 10 ("Section 2-10-117 serves compelling governmental interests of ensuring a fully informed electorate and preventing corruption or its appearance, and it is narrowly tailored to achieve its goals. The statute easily clears not only the exacting scrutiny standard, but also strict scrutiny's high bar."). *See also id.* at 16 ("speech may be limited by laws that survive both exacting and strict scrutiny, which Section 2-110-117 does."); *id.* (arguing that "[t]he temporal restriction of Section 2-10-117 is the least restrict means to serve the State's compelling interests."); *id.* at 24 ("The constitutional analysis instead turns on timing and speaker restrictions, which . . . survive strict scrutiny.").

After the conclusion of the Parties' hearing on the Plaintiff's application for a temporary injunction, the Defendants asserted—on the record—that they did not need to submit any evidence to prevail in this action. They further agreed to submit the matter for immediate decision on the merits. As a result, this Court issued an order indicating that the matter would be so submitted. *See* August 1, 2018 Order, p. 3.

By Order dated September 4, 2018, this Court ordered a bench trial "on the limited issues identified in the August 24, 2018 Memorandum And Order requiring evidentiary proof." September 4, 2018 Order, p. 3. In turn, the August 24, 2018 Order contemplates a bench trial on "facts such as the lack of statewide broadband and other such arguments in defense of its 9-day blackout period." August 24, 2018 Order, p. 6. The Court's September 4, 2018 Order additionally ordered the Defendants to file an Answer to the Plaintiff's Complaint and submit a pre-trial brief, which the Defendants filed on September 14, 2018. *See Defendants' Pre-Trial Brief.*

In their pre-trial briefing, the Defendants have modified their previous and repeatedly stated position that the instant challenge is subject to either "strict" or "exacting" scrutiny. Instead, the Defendants claim, "[r]egardless of how Plaintiff parses out its constitutional challenge, the simple fact is that Tenn. Code Ann. § 2-10-117 is a restriction on campaign contributions." *See Defendants' Pre-Trial Brief*, p. 3. Accordingly, the Defendants insist, "the appropriate standard of review to apply to Plaintiff's First Amendment challenge to the constitutionality of Tenn. Code Ann. § 2-10-117 is the standard first articulated in *Buckley*: it must be 'closely drawn' to match a 'sufficiently important interest.'"[1] *Id.* at p. 5.

The Defendants are mistaken that *Buckley*'s "closely drawn" standard governs every claim in this action. There is a material difference between "a restriction on campaign contributions" generally, *see id.* at p. 3, and a restriction on campaign contributions that is limited to certain disfavored speakers and expressly discriminates on the basis of political association. *See, e.g., Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional"). Of note, the Defendants have also previously acknowledged the reality that Tenn. Code Ann. § 2-10-117 is a

[1] In so arguing, the Defendants also assert, wrongly, that the Plaintiff has not asserted any Equal Protection claim. *See Defendants' Pre-Trial Brief*, p. 5, n. 1. However, the Plaintiff expressly lodged its claims under both "the First and Fourteenth Amendments" by design, *see* Complaint, pp. 19-21, as applicable precedent instructs that those claims are "closely intertwined." *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (noting that "we have frequently condemned such discrimination among different users of the same medium for expression," and that "the equal protection claim in this case is closely intertwined with First Amendment interests."). To the extent that the Defendants were unclear what the Plaintiff has alleged: The Plaintiff's expressly pleaded "First and Fourteenth Amendment" claims alleging speaker discrimination and discrimination based on political association—causes of action 1, 2, and 5—include Equal Protection claims. The Plaintiff previously argued as much in its *Memorandum in Support of their Application for a Temporary Injunction*. *See id.*, p. 6 (citing *Juzwick v. Borough of Dormont, Pennsylvania*, No. CIV.A. 01-310, 2001 WL 34369467, at *3 (W.D. Pa. Dec. 12, 2001), for the proposition that: "'Speaker' discrimination lies at the intersection of the First and Fourteenth Amendments. The Supreme Court, on numerous occasions, has condemned government actions that have discriminated based upon the identity of the speaker.").

"restriction favoring certain speakers." *See Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction*, p. 14. Nonetheless, Defendants' pre-trial brief ignores that serious constitutional infirmity without explanation.

With respect to the District Attorney, the Defendants additionally contend that his office—sued in its official capacity only—should be dismissed from this matter. *See Defendants' Pre-Trial Brief*, pp. 1-3. However, the Defendants' briefing fails to address the central jurisdictional basis for hailing his office into court: Tennessee's 2018 enactment of Tenn. Code Ann. § 1-3-121, which provides that: "Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages." *Id.*

The Defendants have also failed to acknowledge that the general rule against enjoining the enforcement of a criminal statute is subject to significant exceptions. *See, e.g., Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 753 (Tenn. 2006) ("Courts of equity, however, may enjoin the enforcement of a criminal statute that this Court has adjudged unconstitutional. . . . Therefore, once this Court has concluded that a criminal statute is unconstitutional, no controversies are required to be settled by a criminal court, and the equity court is not invading the criminal court's jurisdiction by issuing an injunction.").

III. Applicable Standards of Review

For the reasons detailed below, the following standards of review apply to this case:

(1) The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's speaker-based discrimination is subject to strict scrutiny;

(2) The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's temporal restriction on political speech is subject to *Buckley*'s "closely-drawn" test;

(3) The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's discrimination based on political association is subject to strict scrutiny;

(4) The Plaintiff's challenge to Tenn. Code Ann. § 2-10-121's discrimination based on political association is subject to strict scrutiny;

(5) The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's content discrimination is subject to strict scrutiny; and

(6) The Plaintiff's challenge to the Statutes under Tenn. Const. art. I, § 19 is subject to strict scrutiny.

1. The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's speaker-based discrimination is subject to strict scrutiny.

Tenn. Code Ann. § 2-10-117 contains an explicit speaker preference for favored speakers (party-controlled PACs) and discriminates against disfavored speakers (non-party PACs). More specifically, PACs that are "controlled by a political party on the national, state, or local level or by a caucus of such political party established by members of either house of the general assembly" receive a waiver permitting them to make contributions during the ten days prior to election. *Id.* By contrast, PACs like the Plaintiff that are not party-controlled may not. *Id.* The Defendants have also forthrightly acknowledged that this restriction reflects a content preference for speech by favored partisan speakers, because it claims the government is better able to predict where their contributions will be directed. Specifically, the Defendants have argued, Tenn. Code Ann. § 2-10-117's speaker preference is necessary because:

> It is intuitive and self-evident that PACs "controlled by a political party on the national, state, or local level or by a caucus of such political party established by members of either house of the general assembly" will make contributions to their respective party's candidates. By contrast, it is entirely unclear which candidates will receive support from any given non-political party PAC.

Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction, p. 11.

As the Supreme Court held in *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230, 192 L. Ed. 2d 236 (2015), such a restriction is subject to strict constitutional scrutiny. *Id.* ("Because '[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content,' we have insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference[.]'") (internal citations omitted).

A wealth of directly applicable U.S. Supreme Court precedent additionally reflects that such speaker-based discrimination is flagrantly—and perhaps insurmountably—unconstitutional. *See, e.g., Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional"); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("we have frequently condemned such discrimination among different users of the same medium for expression."); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) ("the Government may not suppress political speech on the basis of the speaker's corporate identity."); *id.* at 340 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others."); *Juzwick v. Borough of Dormont, Pennsylvania*, No. CIV.A. 01-310, 2001 WL 34369467, at *3 (W.D. Pa. Dec. 12, 2001) ("'Speaker' discrimination lies at the intersection of the First and Fourteenth Amendments. The Supreme Court, on numerous

occasions, has condemned government actions that have discriminated based upon the identity of the speaker.") (internal citation omitted); *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175–76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech."). *Cf. Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 194 (1999) ("decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

2. The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's temporal restriction on political speech is subject to *Buckley*'s "closely-drawn" test.

The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, (1971). Accordingly, political speech represents "an area in which the importance of First Amendment protections is 'at its zenith.'" *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

"When [a state] restricts speech, [it] bears the burden of proving the constitutionality of its actions." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014) (plurality opinion) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)). "Generally, [l]aws that burden political speech are subject to strict scrutiny . . . ." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874 (8th Cir. 2012) (internal quotation marks omitted) (alteration in original) (quoting *Citizens United*, 558 U.S. at 340). However, "temporal limits on contributions are subject to

Buckley's 'closely-drawn' test." *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 391 (5th Cir. 2018).

Here, Tenn. Code Ann. § 2-10-117 imposes a categorical ban on the Plaintiff's contributions to candidates during what the U.S. Supreme Court has recognized as the most "crucial phase" before an election. *Citizens United*, 558 U.S. at 337. As far as campaigns are concerned, being able to speak during the days leading up to an election is widely recognized to be indispensable. *See, e.g., id.* at 334 ("[T]he public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others."); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 163 (1969) ("timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 462 (2007) ("groups . . . cannot predict what issues will be matters of public concern . . . ."); *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1019 (9th Cir. 2010) (recognizing "the unique importance of the temporal window immediately preceding a vote.").

Given the importance of the period preceding an election, an abundance of authority reflects that regulations that impose temporal restrictions on campaign activity during the critical period before election day cannot withstand constitutional scrutiny. *See, e.g., Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 431 (5th Cir. 2014) ("the 60–day limit 'places a severe burden on speech because it may even preclude expression necessary to provide an immediate response to late-breaking events.'")

(quoting *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1009 (9th Cir. 2003)); *Family PAC v. McKenna*, 685 F.3d 800, 812 (9th Cir. 2012) ("Washington's limit nonetheless imposes a significant burden, because it limits contributions during the critical three-week period before the election, when political committees may want to respond to developing events."); *Emison v. Catalano*, 951 F. Supp. 714, 723 (E.D. Tenn. 1996) ("black-out provisions like the one challenged here do not provide the least intrusive means of achieving the elimination of political corruption"); *State v. Dodd*, 561 So. 2d 263, 266 (Fla. 1990) ("The statute at issue here prohibits *all* contributions and solicitations during a crucial portion of an election year. As a result, the present case is vastly different from *Buckley*."); *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 391 (5th Cir. 2018) (striking down temporal limit as unconstitutional); *Missourians for Fiscal Accountability v. Klahr*, 892 F.3d 944 (8th Cir. 2018) (holding that 30-day formation deadline for campaign committees violated First Amendment).

3–4. The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's and Tenn. Code Ann. § 2-10-121's discrimination based on political association is subject to strict scrutiny.

Tenn. Code Ann. § 2-10-117 expressly discriminates on the basis of political association. Here, the Plaintiff—a non-partisan organization—is not forbidden from making contributions within the ten days before an election because it is a *PAC*. Instead it is prohibited from making contributions within the ten days before an election because it is a *non-partisan* PAC that is not "controlled by a political party on the national, state, or local level or by a caucus of such political party established by members of either house of the general assembly . . . ." *Id.* In the same vein, Tenn. Code Ann. § 2-10-121 assesses the Plaintiff an annual PAC tax that applies to non-partisan multicandidate campaign

committees but does "not apply to any statewide political party as defined in § 2-1-104 or subsidiaries of the political party.").

"[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). Additionally, the Plaintiff's "right to select its members is protected by the freedom of association guaranteed by the First Amendment." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984). Further, "[f]reedom of association therefore plainly presupposes a freedom not to associate." *Id.* at 623.

Here, Tenn. Code Ann. § 2-10-117 punishes disfavored political organizations like the Plaintiff with significant censorship during the most critical period before an election solely because they are non-partisan. Accordingly, this defect is subject to strict scrutiny. *See, e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451, 128 S. Ct. 1184, 1191, 170 L. Ed. 2d 151 (2008) ("election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are 'narrowly tailored to serve a compelling state interest.'") (quoting *Clingman v. Beaver*, 544 U.S. 581, 586 (2005)); *Riddell v. Nat'l Democratic Party*, 508 F.2d 770, 776 (5th Cir. 1975) ("Substantial burdens on the right . . . to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest.") (citing *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968)).

Tenn. Code Ann. § 2-10-121's selective non-partisan PAC tax triggers strict scrutiny as well, because it discriminates among different speakers based on their political association—charging some but not others for the right to contribute to multiple candidates. "The Supreme Court has explained that the government cannot 'penalize[ ]' a person for engaging in 'constitutionally protected speech or associations' because such indirect regulation of speech would 'allow the government to produce a result which it could not command directly.'" *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 925 (M.D.N.C. 2018) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)). Discriminatory taxes that turn on First Amendment protected activity are also scrutinized particularly heavily. As the Supreme Court explained in *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 659–60 (1994):

> Regulations that discriminate . . . among different speakers within a single medium, often present serious First Amendment concerns. *Minneapolis Star*, for example, considered a use tax imposed on the paper and ink used in the production of newspapers. We subjected the tax to strict scrutiny for two reasons: first, because it applied only to the press; and, second, because in practical application it fell upon only a small number of newspapers. *Minneapolis Star, supra*, 460 U.S., at 585, 591–592, 103 S.Ct., at 1375–1376; *see also Grosjean, supra* (invalidating Louisiana tax on publications with weekly circulations above 20,000, which fell on 13 of the approximately 135 newspapers distributed in the State). The sales tax at issue in *Arkansas Writers' Project*, which applied to general interest magazines but exempted religious, professional, trade, and sports magazines, along with all newspapers, suffered the second of these infirmities. In operation, the tax was levied upon a limited number of publishers and also discriminated on the basis of subject matter. *Arkansas Writers' Project, supra*, 481 U.S., at 229–230, 107 S.Ct., at 1727–1728. Relying in part on *Minneapolis Star*, we held that this selective taxation of the press warranted strict scrutiny. 481 U.S., at 231, 107 S.Ct., at 1728–1729.

Id.

5. The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's content discrimination is subject to strict scrutiny.

"Government regulation of speech is content based if a law applies to particular

speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. *See also Citizens United*, 558 U.S. at 340 ("political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.") (quotations omitted).

By imposing restrictions only on direct campaign contributions, but not on other forms of political speech, Tenn. Code Ann. § 2-10-117 imposes content-based suppression of a single, quintessential, and uniquely important form of political expression: direct campaign contributions. "Making a contribution, like joining a political party, serves to affiliate a person with a candidate." *Buckley v. Valeo*, 424 U.S. 1, 22 (1976). Within the ten days before an election, however, the Plaintiff is prohibited under civil and criminal penalty from doing so.

The Defendants have all but conceded that Tenn. Code Ann. § 2-10-117 is a restriction based on the "message expressed." *Reed*, 135 S. Ct. at 2227. Specifically, the Defendants have insisted that even though the Plaintiff is prohibited from engaging in its desired form of communicative expression, the Government generously allows it to engage in other forms of expression as an alternative. *See Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction*, p. 13 ("Plaintiff could phone bank, canvass, publish opinion pieces or blogs, distribute materials, or publicly demonstrate for or against any candidate or measure on any day leading up to an

election."). Indeed, the Defendants assert that based on their visibility, these forms of communicative expression are *preferable*. *See id*. ("Unlike making monetary contributions, these forms of support are visible . . . .").

As a result, there is little doubt that Tenn. Code Ann. § 2-10-117 is—and is deliberately designed to be—a restriction on speech that is based on the "idea or message expressed" and specifically targets a certain type of speech based on its communicative content. *Reed*, 135 S. Ct. 2226-27. As importantly, because Tenn. Code Ann. § 2-10-117 closes off an "entire medium of expression" to non-partisan speakers before an election, the statute would also be subject to heightened scrutiny even if it were not content-based. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. . . . Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent-by eliminating a common means of speaking, such measures can suppress too much speech.").

6. The Plaintiff's challenge to the Statutes under Tenn. Const. art. I, § 19 is subject to strict scrutiny.

The Tennessee Supreme Court "has held that Article I, Section 19 is 'a substantially stronger provision than that contained in the First Amendment to the Federal Constitution.'" *State v. Smoky Mountain Secrets, Inc.*, 937 S.W.2d 905, 910, n. 4 (Tenn. 1996) (quoting *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978)). Our Supreme Court has additionally noted that "the strict scrutiny standard" applies to discrimination based on the identity of speakers. *Id*. at 912 ("Regulations which discriminate on the basis of the classification of speakers may violate equal protection even if the regulations do not

violate the underlying protected right. . . . Consequently, the strict scrutiny standard is also applicable to equal protection analysis in this case.").

IV. Whether the District Attorney May Be Enjoined from Prosecuting Violations of the Challenged Statutes

1. Tenn. Code Ann. § 1-3-121 confers broad jurisdiction to seek declaratory or injunctive relief against a District Attorney.

The Defendants contend that the Defendant District Attorney's Office—which is sued in its official capacity only—should be dismissed from this matter. *See Defendants' Pre-Trial Brief*, pp. 1-3. In so arguing, the Defendants cite a century's worth of caselaw that stands for the general proposition that our Supreme Court has held "that the chancery courts of Tennessee, neither under their inherent **nor statutory jurisdiction**, have any such power or jurisdiction" to enjoin threatened criminal proceedings. *J.W. Kelly & Co. v. Conner*, 123 S.W. 622, 636 (1909) (emphasis added).

Of note, *Kelly*'s reference to a defect of "statutory jurisdiction" necessarily contemplates that the General Assembly is empowered to confer jurisdiction to enjoin criminal proceedings by statute. Also notable is that none of the cases that Defendants have cited in support of *Kelly*'s longstanding holding on the matter predate 2018. *See Defendants' Pre-Trial Brief*, pp. 1-3. This is significant, because in 2018, the General Assembly did enact a statute conferring broad jurisdiction to grant injunctive relief "in any action brought regarding the legality or constitutionality of a governmental action" by "any affected person who seeks declaratory or injunctive relief." *See* Tenn. Code Ann. § 1-3-121 (emphasis added).

The Plaintiff recalls that during the Parties' hearing on the Plaintiff's application for a temporary injunction, the Defendants intimated that if Tenn. Code Ann. § 1-3-121

truly means what it says, then the statute would be unconstitutional under the Separation of Powers doctrine. However, because the Attorney General's office has the duty to defend—rather than challenge—the constitutionality of the General Assembly's enactments, it is not clear to the Plaintiff that the Defendants' counsel is even empowered to make that argument. Regardless, because the Defendants' briefing ignores the matter despite the Plaintiff having invoked Tenn. Code Ann. § 1-3-121 as the primary basis for suing the District Attorney in this case, the claim appears to have been abandoned.

2. District Attorneys may be enjoined from enforcing a criminal statute that has been adjudged unconstitutional.

The Defendants' briefing additionally fails to confront the fact that the general rule against enjoining the enforcement of a criminal statute is subject to significant exceptions. Among them: "Courts of equity [] may enjoin the enforcement of a criminal statute that this Court has adjudged unconstitutional." *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 753 (Tenn. 2006). Accordingly, "once this Court has concluded that a criminal statute is unconstitutional, no controversies are required to be settled by a criminal court, and the equity court is not invading the criminal court's jurisdiction by issuing an injunction." *Id.*

For the reasons advanced throughout this brief, criminally enforcing the Challenged Statutes is unconstitutional, because the Challenged Statutes themselves are unconstitutional. Accordingly, even if Tenn. Code Ann. § 1-3-121 did not confer the jurisdiction that it does, the District Attorney should only be dismissed from this action without prejudice pending a final judgment as to the constitutionality of Tenn. Code Ann. § 2-10-117.

V. Standard for Summary Judgment

"Summary judgment should be granted if the nonmoving party's evidence at the summary judgment stage is insufficient to establish the existence of a genuine issue of material fact for trial." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015), *cert. denied*, 136 S. Ct. 2452 (2016). In the instant case, this Court has already determined that:

> [B]ecause the Statutes at issue restrict speech, the Defendants bear the burden of proof as to the constitutionality of the challenged Statutes and this burden can not be met by "mere speculation or conjecture" as to the government interests at stake in restricting the speech.

August 24, 2018 Order, p. 3.

Accordingly, the Plaintiff does not bear the burden of proof at trial, *see id.*, and under these circumstances, *Rye* instructs that:

> [W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense.

Id. at 264.

Here, summary judgment is warranted, because the Plaintiff can affirmatively negate an essential element of the Defendants' claim. Specifically, for the reasons that follow, the Plaintiff can demonstrate that the Challenged Statutes are not narrowly tailored as a matter of law.

VI. The Plaintiff is Entitled to Summary Judgment

The Plaintiff is entitled to summary judgment because the Challenged Statutes are incapable of satisfying any degree of heightened constitutional scrutiny—even the less

protective form of scrutiny that the Defendants desire. Specifically, because readily available alternatives to blanket temporal, speaker-based censorship exist under current Tennessee law, no amount of evidence would enable the Defendants to overcome the constitutional requirement of narrow tailoring.

Given that the challenged statutes in the instant case burden specific disfavored speakers from engaging in a specific type of disfavored political speech and association, this is a strict scrutiny case in several regards. *See supra*, pp. 6-15. As the Supreme Court explained in *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014), however, narrow tailoring is required to justify speech restrictions even if a more forgiving standard of review is applied. More specifically, as to *Buckley*'s "closely drawn" test—which the Defendants themselves request—the Court noted that the challenged regulations must be:

> "[C]losely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S., at 25, 96 S.Ct. 612. In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' ... that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (quoting *In re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982)). Here, because the statute is poorly tailored to the Government's interest . . . , it impermissibly restricts participation in the political process.

Id.

In the instant case, there is no "genuine issue" for trial for several reasons. Most prominently, as a matter of law, no amount of evidence can prove that the less restrictive alternatives to Tenn. Code Ann. § 2-10-117 that <u>already exist</u> are infeasible. *See United States v. Doe*, 968 F.2d 86, 88 (D.C. Cir. 1992) ("Whether [a challenged] regulation meets the 'narrowly tailored' requirement is of course a question of law . . . ."). Several reasons

support this inevitable conclusion:

First, existing Tennessee law permits, contemplates, and, indeed, *requires* "next business day" disclosure "by telegram, facsimile machine, hand delivery or overnight mail delivery" of high-dollar contributions during the ten-day period before an election. *See* Tenn. Code Ann. § 2-10-105(h)(1)-(2).[2] Accordingly, existing Tennessee law reflects that "next business day" disclosure of contributions is a feasible and readily available alternative to a temporal blackout ban that would further the government's claimed interest in transparency. *Id.* Accordingly, the Defendants' assertion that "the evidence will demonstrate at trial[that] a[n] [] online disclosure system is neither available nor

[2] Tenn. Code Ann. § 2-10-105(h) provides, in full, that:

> (1) During the period beginning at twelve o'clock (12:00) midnight of the tenth day prior to a primary, general, runoff or special election or a referendum and extending through twelve o'clock (12:00) midnight of such election or referendum day, each candidate or political campaign committee shall, by telegram, facsimile machine, hand delivery or overnight mail delivery, file a report with the registry of election finance or the county election commission, whichever is required by subsections (a) and (b), of:
>
> > (A) The full name and address of each person from whom the candidate or committee has received and accepted a contribution, loan or transfer of funds during such period and the date of the receipt of each contribution in excess of the following amounts: a committee participating in the election of a candidate for any state public office, five thousand dollars ($5,000); or, a committee participating in the election of a candidate for any local public office, two thousand five hundred dollars ($2,500). If the committee is participating in the election of candidates for offices with different reporting amounts, the amount shall be the lowest for any candidate in whose election the committee is participating or in which any committee is participating to which it makes or from which it receives a transfer of funds; and
> >
> > (B) Such report shall include the amount and date of each such contribution or loan reported, and a brief description and valuation of each in-kind contribution. If a loan is reported, the report shall contain the name and address of the lender, of the recipient of the proceeds of the loan, and of any person who makes any type of security agreement binding such person or such person's property, directly or indirectly, for the repayment of all or any part of the loan.
>
> **(2) Each report required by subdivision (h)(1) shall be filed by the end of the next business day following the day on which the contribution to be reported is received.**
>
> (3) The registry shall develop appropriate forms for the report required by subdivision (h)(1) and make such forms available to the candidates and the county election commissions.

Id. (emphasis added).

feasible statewide in Tennessee" is immaterial to the question of whether "next business day" disclosure is a feasible alternative to Tenn. Code Ann. § 2-10-117. *See Defendants' Pre-Trial Brief*, p. 7. Existing Tennessee law already reflects that "next business day" disclosure can be accomplished "by telegram, facsimile machine, hand delivery or overnight mail delivery." *See* Tenn. Code Ann. § 2-10-105(h)(1)-(2).

Second, existing Tennessee law allows and contemplates the regular filing of campaign finance reports generally. Tenn. Code Ann. § 2-10-105(c)(1). As such, there is no reason why candidates (and PACs) could not be required to file a campaign finance report the day before an election—rather than being required to file their final campaign finance report ten days before an election. *See* Tenn. Code Ann. § 2-10-105(c)(1). Such a requirement would perfectly achieve the government's stated interest in ensuring that voters are afforded a complete opportunity to review a candidate's contributions before election day. Accordingly, the notion that the only way to achieve this interest is to forbid—under penalty of civil and criminal sanction—non-party PACs from making direct contributions during the ten days before a candidate's election is demonstrably meritless. *See* Tenn. Code Ann. § 2-10-105(c)(1).

Third, Tennessee law *never* requires disclosure of donors who contribute less than $100.00 to candidates. *See* Tenn. Code Ann. § 2-10-107(a)(2)(A)(i) (providing only for disclosure of contributions of "more than one hundred dollars"). Nonetheless, Tenn. Code Ann. § 2-10-117 categorically forbids non-party PACs from making contributions of any amount within the ten-day period before an election—even low amounts that would not be subject to disclosure no matter when they were made. *Id.* Consequently, because contributions of less than $100.00 are not subject to disclosure at all, the notion that categorically forbidding the Plaintiff from making any contribution during the ten-day

period before an election—no matter how small—is essential to further the government's claimed interest in pre-election disclosure is farcical, and the statute fails to satisfy narrow tailoring because it is so fatally underinclusive. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011) ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.").

Fourth—and worst of all—the statute is grossly and unconstitutionally underinclusive with respect to those who are targeted for censorship. *Id.* The Defendants' pre-trial briefing conspicuously ignores Tenn. Code Ann. § 2-10-117's speaker-based discrimination. In a previous filing, however, the Defendants have indicated that its interests in pre-election disclosure do not apply to partisan PACs because:

> It is intuitive and self-evident that PACs "controlled by a political party on the national, state, or local level or by a caucus of such political party established by members of either house of the general assembly" will make contributions to their respective party's candidates. By contrast, it is entirely unclear which candidates will receive support from any given non-political party PAC.

Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction, p. 11.

Even if the Defendants' claimed interest in having clarity as to "which candidates will receive support" were compelling—and it is not—Tenn. Code Ann. § 2-10-117 would still remain fatally underinclusive. Specifically, it is equally "unclear which candidates will receive support from any given" *individual* just before an election. Nonetheless, only non-partisan PACs are targeted for Tenn. Code Ann. § 2-10-117's speech penalty, while individuals are not. *But see Greater New Orleans Broad. Ass'n, Inc. v. United States,* 527 U.S. 173, 194 (1999) ("decisions that select among speakers conveying virtually identical

messages are in serious tension with the principles undergirding the First Amendment.").

Due to these glaring defects, the Defendants cannot introduce sufficient admissible evidence to prove that the Challenged Statutes are closely drawn to achieve either: (1) "Tennessee's interests in informing the voters before Election Day," or (2) the prevention of "actual corruption or its appearance." August 24, 2018 Order, p. 2. Accordingly, as a matter of law, the challenged statutes fail to withstand constitutional scrutiny due the absence of narrow tailoring, and the Plaintiff's Motion for Summary Judgment should be granted.

Independently, the Defendant also cannot plausibly demonstrate that contributions by non-party PACs before an election ***always*** give rise to the appearance of corruption, while contributions by party-PACs and individuals ***never*** do. If such evidence exists, the Defendants must produce it. *See Rye*, 477 S.W.3d at 257 (noting that "the movant can challenge the opposing party to 'put up or shut up' on a critical issue") (alterations omitted); *see also id.* at 264 (holding that the party that does not bear the burden of persuasion may win summary judgment "by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense.").

Finally, as to Tenn. Code Ann. § 2-10-121, less restrictive alternatives are readily available as well: the tax could be applied equally to all speakers, or else, not at all.

VI. Conclusion

For the foregoing reasons, each constitutional claim presented triggers either strict scrutiny or "closely drawn" scrutiny; the District Attorney should not be dismissed from this action; and the Plaintiff's Motion for Summary Judgment should be **GRANTED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2018, 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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