IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

TENNESSEANS FOR SENSIBLE ELECTION LAWS, *Plaintiff-Appellee,* *v.* TENNNESSEE BUREAU OF ETHICS AND CAMPAIGN FINANCE, REGISTRY OF ELECTION FINANCE, and DAVIDSON COUNTY DISTRICT ATTORNEY GENERAL, *Defendants-Appellants.*	§ § § § § § § § § § § § § § §	M2018-01967-COA-R3-CV Case No.: 18-821-III

BRIEF OF APPELLEE AND CROSS-APPELLANT TENNESSEANS FOR SENSIBLE ELECTION LAWS

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III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. PLAINTIFF'S ISSUES AS APPELLEE

Pursuant to Rule 27(b) of the Tennessee Rules of Appellate Procedure, the Plaintiff submits its own competing Statement of the Issues Presented for Review:

(1) Whether, after affording the Defendants a *sua sponte* opportunity to present evidence despite Defendants having expressly waived that right and disclaimed any need to do so, the trial court abused its discretion by granting the Plaintiff's Motions in Limine when the Defendants violated the trial court's straightforward Pre-Trial Order regarding evidence disclosure, ignored basic Rules of Evidence, and flouted an applicable Local Rule providing for the timely pre-trial exchange of exhibits in an effort to effect a "trial by ambush";[1]

(2) Whether Tennessee Code Annotated § 2-10-117 violates the First and Fourteenth Amendments to the United States Constitution and article I, § 19 of the Tennessee Constitution, either facially or as applied; and

(3) Whether the trial court's uncontested ruling that Tennessee Code Annotated § 2-10-121 violates the First and Fourteenth Amendments to the United States Constitution and article I, § 19 of the Tennessee Constitution, both facially and as applied, has become moot even though the marginally updated version of the statute continues to discriminate on the basis of political association and Plaintiff would be subject to criminal prosecution for violating it absent an injunction.

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[1] R. at 345.

B. Plaintiff's Issues as Cross-Appellant

The Plaintiff also advances two additional claims as Cross-Appellant pursuant to Rules 3(h) and 13(a) of the Tennessee Rules of Appellate Procedure:

(4) Whether the Defendant District Attorney should be enjoined from enforcing Tennessee Code Annotated §§ 2-10-117 and 2-10-121; and

(5) Whether the Plaintiff is entitled to attorney's fees regarding this appeal.

IV. STATEMENT REGARDING RECORD CITATIONS

Plaintiff's Brief uses the following designations:

(1) Citations to the Technical Record are abbreviated as "R. at [page number]."

(2) Citations to the Supplemental Record are abbreviated as "Supp. R. at [page number]."

(3) Citations to the September 26, 2018, Transcript of Proceedings are abbreviated as "Transcript at [page number]."

(4) Defendants' Brief is cited as "Appellants' Brief at [page number]."

Record citations and citations to authority are footnoted throughout Plaintiff's Brief unless including a citation in the body of the brief improves clarity.

V. APPLICABLE STANDARDS OF REVIEW

(1) The trial court's rulings on the Plaintiff's Motions in Limine are subject to review for "clear abuse" of the trial court's "wide discretion."[2]

(2) Whether either challenged statute satisfies the requisite level of constitutional scrutiny is a question of law that this Court reviews de novo.[3]

[2] *Pullum v. Robinette*, 174 S.W.3d 124, 137 (Tenn. Ct. App. 2004) ("An appellate court will not reverse a trial court's decision on the admissibility of evidence, **including a ruling on a motion in limine, absent clear abuse**. *Heath v. Memphis Radiological Prof'l Corp.*, 79 S.W.3d 550 (Tenn. Ct. App. 2002). Similarly, an appellate court will not reverse a trial court's exercise of discretion in ruling on an evidentiary motion in limine **unless the trial court abused the wide discretion given it to handle such motions**.") (emphases added).

[3] *Sherrod v. Tenn. Dep't of Human Servs.*, No. M2005-01106-COA-R3-CV, 2008 WL 2894691, at *5 (Tenn. Ct. App. July 25, 2008) ("A trial court's rulings on questions of constitutional law are reviewed de novo by an appellate court.").

VI. INTRODUCTION

This case involves two Tennessee election statutes that were permanently enjoined and declared unconstitutional due to six independent constitutional infirmities. Separately, this case involves Defendants' flagrant and repeated violations of court orders, Rules of Evidence, and a Local Rule regarding pre-trial evidence disclosure. Of note, Defendants' violations also occurred *even after* the trial court afforded the Defendants an unrequested mulligan that gave them an opportunity to remedy their prior, fatal position that they would not and did not need to introduce any evidence in this case at all.

The first challenged statute, Tennessee Code Annotated § 2-10-117, expressly exempts partisan political speakers—"committee[s] 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"—from its ambit while forbidding non-partisan political speakers like the Plaintiff from making direct campaign contributions during the most critical period before Election Day.[4] As a consequence, § 2-10-117 selectively forbids disfavored non-partisan PACs—but not favored partisan PACs controlled by political parties—from responding to late-breaking developments and supporting their favored candidates during the time when voters are most likely to be paying attention.

[4] *See* TENN. CODE ANN. § 2-10-117 ("No multicandidate political campaign committee other than a committee 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 shall make a contribution to any candidate after the tenth day before an election until the day of the election.")

The second challenged statute—Tennessee Code Annotated § 2-10-121—levies a discriminatory tax against disfavored political speakers like the Plaintiff based solely on their constitutionally protected political association. Critically, the Defendants have never contested the Plaintiff's claim that § 2-10-121 violates the federal and state Constitutions. They also did not even attempt to introduce evidence to support § 2-10-121's constitutionality before the trial court. And even now, Defendants do not appeal the trial court's ruling that § 2-10-121 violated both the First and Fourteenth Amendments to the United States Constitution and article I, § 19 of the Tennessee Constitution, both facially and as applied.

Instead, Defendants insist only that because the General Assembly has since amended Tennessee Code Annotated § 2-10-121 to add political parties to the list of those who are required to pay the discriminatory tax at issue, the Plaintiff's challenge has become moot. However, § 2-10-121's central defect—that it levies a discriminatory tax against disfavored political speakers based solely on their constitutionally protected political association—still remains, and Plaintiff's challenge to § 2-10-121 remains a live case and controversy as a result.

After holding a bench trial, the trial court specifically determined that the challenged statutes violate both the First and Fourteenth Amendments to the federal Constitution and article I, § 19 of the Tennessee Constitution, both facially and as applied.[5] Now—despite initially taking the position that they would not and did not need to

[5] R. at 338–46.

present evidence *at all*[6]—Defendants appeal the trial court's judgment almost entirely on the basis that the trial court erroneously excluded their evidence after they "inexplicably failed to comply with orders to give the Plaintiff fair notice of Defendants' proof,"[7] thereby depriving the Plaintiff of "a meaningful opportunity to engage in the trial."[8]

Regardless of the Defendants' evidentiary missteps and this Court's ultimate ruling regarding them, however, the Defendants contend that this Court should adjudicate the Plaintiff's constitutional claims in this appeal on their merits. *See* Appellant's Brief at 27 ("Because the State made an offer of proof, however, this Court has a sufficient record on appeal to decide Plaintiff's challenge to the constitutionality of Tennessee Code Annotated § 2-10-117, and it should do so in the interests of judicial economy."). The Plaintiff agrees. Accordingly, because both Parties agree that this Court should address Plaintiff's constitutional challenges on the merits, the Plaintiff respectfully submits that this Court should do so.

Critically, whether or not the Defendants' proposed evidence is considered, neither Tennessee Code Annotated § 2-10-117 nor § 2-10-121 is narrowly tailored to further any compelling or important governmental interest. Indeed, there is no serious dispute that significantly less restrictive means of accomplishing the government's claimed interests are both feasible and readily available. Accordingly, neither statute can

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[6] R. at 341.

[7] R. at 338.

[8] *Id.*

withstand constitutional scrutiny.

Here, both challenged statutes impose a significant political speech penalty against disfavored political speakers like the Plaintiff—a non-partisan, multicandidate political campaign committee—while expressly favoring and exempting favored political speakers from the same restrictions and liabilities. Indeed, disfavored political speakers like the Plaintiff are forbidden from participating equally in the political process under threat of *criminal prosecution* and substantial civil liability.[9] Specifically, a disfavored speaker's non-compliance with § 2-10-117 or § 2-10-121 can subject the speaker to criminal prosecution carrying a sentence of up to thirty days in jail and an additional civil penalty of up to $10,000.00 per violation.[10]

Thus, as to the merits of the Plaintiff's claims, the central issue presented for this Court's review is whether the Defendants were properly enjoined from enforcing §§ 2-10-117 and 2-10-121. And because the Defendants have utterly failed to meet their burden of overcoming the statutes' presumptive unconstitutionality whether or not their evidence is excluded, the trial court's judgment should be affirmed. After

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[9] *See* TENN. CODE ANN. § 2-19-102 ("A person commits a Class C misdemeanor if such person knowingly does any act prohibited by this title"); TENN. CODE ANN. § 40-35-111(e)(3) ("The authorized terms of imprisonment and fines for misdemeanors are: . . . Class C misdemeanor, not greater than thirty (30) days or a fine not to exceed fifty dollars ($50.00), or both, unless otherwise provided by statute."); TENN. CODE ANN. § 2-10-110(a)(2) ("A Class 2 offense is punishable by a maximum civil penalty of not more than ten thousand dollars").

[10] TENN. CODE ANN. § 2-10-110(a)(2).

so holding, and consistent with the Tennessee Supreme Court's ruling in *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 753 (Tenn. 2006), this Court should remand with instructions that the trial court's injunction against both statutes be extended to the Davidson County District Attorney's Office. The Plaintiff should additionally be awarded its reasonable attorney's fees regarding this appeal.

VII. STATEMENT OF FACTS AND OF THE CASE

A. PLAINTIFF'S POLITICAL ACTIVITIES

The Plaintiff, Tennesseans for Sensible Election Laws, is a non-partisan, non-profit group of concerned citizens who care about protecting Tennessee's democratic process.[11] Its mission is to ensure that Tennessee's election laws protect the rights of all Tennesseans to participate in democracy and support candidates of their choosing without unreasonable governmental interference.[12]

The Plaintiff attempts to further its mission through substantial advocacy efforts, including by publishing op eds and essays on state election law issues,[13] providing analysis of state election law issues for local media,[14] contributing directly to and making direct expenditures against certain election-related measures,[15] and conducting candidate surveys gauging the positions held by diverse candidates running in state and local races on state election law issues that are core to the Plaintiff's mission.[16] Most pertinently, as far as the instant lawsuit is concerned, Tennesseans for Sensible Election Laws also makes "direct contributions . . . in support of and in opposition to candidates and measures in furtherance of its mission," including by "contribut[ing] directly to

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[11] R. at 1, ¶ 1.

[12] *Id.*

[13] R. at 27–28; R. at 30–32.

[14] R. at 35.

[15] R. at 38.

[16] R. at 40–45.

favored state and local candidates for public office and mak[ing] direct expenditures in opposition to candidates who are hostile to its agenda."[17]

Because the Plaintiff is a non-partisan multicandidate political campaign committee,[18] however—and for that reason alone—the Plaintiff is subject to the requirements of Tennessee Code Annotated § 2-10-117, which provides that

> [n]o multicandidate political campaign committee other than a committee 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 shall make a contribution to any candidate after the tenth day before an election until the day of the election.

Id. (emphasis added).

Although the Plaintiff attempted in good faith to comply with § 2-10-117, the statute's pre-election political speech penalty—from which partisan PACs are expressly exempt—poses a constant and sometimes suffocating inconvenience.[19] For instance, to avoid non-compliance, the statute has forced the Plaintiff to accelerate its candidate selection process and make contributions prematurely, only to see the candidate it supported withdraw before election day.[20] The Plaintiff has also had contributions returned by candidates[21] after they were received during what the Defendant Registry describes as § 2-10-117's "blackout

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[17] R. at 2, ¶ 3; R. at 47–50.

[18] R. at 6, ¶ 17. *See also* R. at 284, ¶ 17.

[19] R. at 14–15, ¶¶ 49–50.

[20] R. at 15, ¶ 51; R. at 126; R. at 289, ¶ 51.

[21] R. at 15–16, ¶ 53; R. at 128.

period[,]"[22] during which time the Defendant Registry advises that a multicandidate political campaign committee like the Plaintiff "is prohibited from making a campaign contribution for state or local public office, unless the committee is a political party PAC."[23] Under circumstances when there is a short time period between when an election is announced and when the election takes place—just 44 days in the case of the most recent Metro mayoral election, for instance[24]—§ 2-10-117's ten-day blackout period also substantially restricts the available time period during which the Plaintiff is permitted to participate directly in the political process at all.

In some instances, § 2-10-117 has also operated to deprive the Plaintiff of its right to make important, desired campaign contributions altogether. In advance of the 2018 Republican Primary election, for instance, the Plaintiff wanted to make a supplemental $500.00 contribution to one of its favorite candidates, who was running in an unusually competitive Tennessee House race.[25] The candidate—a constitutional lawyer named Joseph Williams—had completed one of the Plaintiff's candidate surveys,[26] expressed views on multiple election laws that were consistent with the Plaintiff's mission,[27] and received the

[22] R. at 83, item #16.

[23] *Id.* (emphasis added).

[24] R. at 16, ¶ 54.

[25] R. at 3, ¶¶ 6–7.

[26] R. at 44–45.

[27] *Id.*

Plaintiff's endorsement.[28] Further, during Tennessee's early voting period—which coincides with § 2-10-117's blackout period—Mr. Williams was "still actively soliciting and accepting campaign contributions from both individuals and eligible campaign committees in support of [his] candidacy."[29] He was also "making ad buys and other expenditures in a final push to get out the vote and earn voters' support before election day"—all of which were "enabled by campaign contributions."[30] Mr. Williams further stated that: "If Tennesseans for Sensible Election Laws were permitted to make another campaign contribution in support of my candidacy at the present time, I would accept the contribution and use it toward ad buys, get-out-the-vote efforts, and other expenditures in advance of election day."[31] Notably, but unsurprisingly, Mr. Williams also was not the only candidate who was still actively soliciting direct contributions during the relevant blackout period.[32]

As a consequence of § 2-10-117, however, the Plaintiff was forbidden from contributing to Mr. Williams's candidacy during the most critical period before Election Day. Indeed, making such a contribution would have subjected the Plaintiff to potential criminal prosecution carrying a sentence of up to thirty days in jail and an additional civil

[28] R. at 54–55.

[29] R. at 57, ¶ 3.

[30] R. at 57, ¶ 4.

[31] R. at 57, ¶ 6.

[32] R. at 130.

penalty of up to $10,000.00.[33] Significantly, this threat also was not just theoretical; indeed, the Defendant Registry had threatened crippling civil liability and issued a "Show Cause" notice for alleged violations of § 2-10-117 against other non-partisan PACs like the Plaintiff before—including during the previous election cycle.[34] If the Plaintiff had been among the Government's favored class of political speakers, however—for instance, a partisan PAC—then the Plaintiff would have been free to make its desired campaign contribution to Mr. Williams without restriction. *See* TENN. CODE ANN. § 2-10-117.

B. PLAINTIFF'S CONSTITUTIONAL CHALLENGES

To secure its right to participate freely in the political process on the same basis as favored political speakers, on July 26, 2018, the Plaintiff filed a Verified Complaint for Injunctive and Declaratory Relief that sought to enjoin the Defendants' enforcement of Tennessee Code Annotated § 2-10-117 and to have the statute declared unconstitutional—both facially and as applied—based on its wealth of constitutional infirmities.[35] The Plaintiff's Verified Complaint also sought to enjoin Defendants' enforcement of another statute—§ 2-10-121—that similarly singled out multicandidate political campaign committees like the Plaintiff for disparate, negative treatment based solely on their constitutionally protected political association.[36]

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[33] *See* TENN. CODE ANN. §§ 2-19-102, 40-35-111(e)(3), 2-10-110(a)(2).

[34] R. at. 63, ¶¶ 13(b)–(c).

[35] R. at 1–131.

[36] R. at 21, ¶¶ 79–80; R. at 22, ¶¶ 3–4.

C. INITIAL TRIAL COURT PROCEEDINGS

On July 31, 2019, the trial court held a hearing on the Plaintiff's Application for a Temporary Injunction.[37] Both the Plaintiff and the Defendants filed complete briefing in advance of the hearing.[38] In their briefing, the Defendants specifically claimed that "[s]ection 2-10-117's restriction favoring certain speakers is necessary to prevent corruption or the appearance of corruption,"[39] that § 2-10-117's speech penalty "survive[s] both exacting and strict scrutiny," and that "[t]he temporal restriction of Section 2-10-117 is the least restrictive means to serve the State's compelling interests."[40] By contrast, the Defendants did not advance any argument supporting the constitutionality of § 2-10-121, either before or since.[41]

After the Parties' briefing was completed, an extensive "oral argument was conducted on July 31, 2018, on [Plaintiff's] application for

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[37] R. at 147.

[38] R. at 132–45; R. at 156–86.

[39] R. at 169.

[40] *Id.*

[41] The Defendants' pre-trial brief, which appears to have been omitted from the record, did not defend Tennessee Code Annotated § 2-10-121's constitutionality and, instead, ignored the statute entirely. *See* **Attachment A.** This Court enjoys discretion to consider Defendants' pre-trial brief, however, because "public and court records can be the subject of judicial notice." *State v. Ballard*, No. M1998-00201-CCA-R3-CD, 2000 WL 1369508, at *7 (Tenn. Crim. App. Sept. 22, 2000) (citing NEIL P. COHEN ET AL., TENN. L. OF EVID. § 201.3, at 43 (Michie, 3d ed. 1995)).

a temporary injunction . . . ."[42] The Plaintiff "also moved that the trial of this action on the merits be advanced and consolidated with the hearing of the application pursuant to Tennessee Civil Procedure Rule 65.04(7)."[43] The Defendants did not object to doing so.

Plaintiff's Application for a Temporary Injunction was ultimately denied on grounds unrelated to the merits of its claims. Further,

> during the Parties' July 31, 2018 hearing on the Plaintiff's Application for a Temporary Injunction, the State Defendants, through counsel, stated that they would not and did not need to present evidence in this matter. Accordingly, the parties mutually agreed to submit this case for immediate decision on the merits without additional evidence beyond the exhibits introduced into the record by the parties in advance of the July 31, 2018 hearing.[44]

Thus, upon agreement of the Parties, and with the affirmative consent of Defendants' counsel, the trial court issued a Memorandum and Order on August 1, 2018, that provided:

> It is further ORDERED that by September 5, 2018, the Court shall issue a final order on the merits. **This disposition of the case has been consented to by Counsel who agree the issues are matters of law and that an evidentiary record is not necessary.**[45]

Because the challenged statutes are presumptively unconstitutional, though, and because the Defendants had the heavy

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[42] R. at 236.

[43] *Id.*

[44] R. at 341.

[45] R. at 237 (emphasis added).

burden of proving otherwise, an evidentiary record was necessary to sustain the statutes' constitutionality. Accordingly, on August 24, 2018—without the Defendants even asking for relief from their fatal concession—the trial court afforded the Defendants a *sua sponte* mulligan and issued an Order "Revising in Part [Its] 8/1/18 Memorandum and Order to Schedule a Trial On Limited Fact Issues."[46] The Plaintiff strenuously objected to the trial court's unprompted Order, which afforded Defendants unrequested relief from their counsel's critical, voluntary waiver of Defendants' right to present evidence—relief that is not afforded even to unrepresented litigants, much less litigants who are represented by multiple attorneys.[47]

The trial court ultimately overruled the Plaintiff's objection, relieved the Defendants of their waiver, and scheduled a bench trial to afford the Defendants a fresh opportunity to meet their evidentiary burden.[48] Rather than taking advantage of that second chance, however, the Defendants "inexplicably failed to comply with orders to give the Plaintiff fair notice of Defendants' proof"[49] and attempted to "effect [] a trial by ambush . . . ."[50]

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[46] R. at 239–48.

[47] R. at 249–62.

[48] R. at 277–80.

[49] R. at 338.

[50] R. at 345.

D. PRE-TRIAL PROCEEDINGS

In advance of the Parties' scheduled bench trial, the trial court ordered the Parties to comply with a straightforward, minimal, and reasonable pre-trial Order that would ensure timely evidence disclosure.[51] The trial court's pre-trial Order specifically instructed the Defendants—who had the burden of proof—to furnish "a list of exhibits and witnesses they expect to introduce at trial with a brief description as to what the Defendants expect the witnesses will testify about at trial."[52]

The Defendants filed their List of Exhibits and Witnesses on September 14, 2018.[53] With respect to their witness list, Defendants disclosed that they expected to present only: "Drew Rawlins, Executive Director of the Tennessee Bureau of Ethics and Campaign Finance."[54] This bare disclosure did not comply with the trial court's pre-trial Order to include a "brief description as to what the Defendants expect [Mr. Rawlins] will testify about at trial,"[55] and in direct contravention of that Order, the Defendants did not include any description of Mr. Rawlins' expected testimony at all.[56] The Defendants also never made any attempt to remedy or cure the omission in advance of trial even after the Plaintiff filed a motion in limine regarding the matter.

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[51] R. at 279.

[52] *Id.* (emphasis added).

[53] Supp. R. at 6.

[54] *Id.*

[55] R. at 279.

[56] Supp. R. at 6.

To circumvent cross-examination at trial, the Defendants further proposed to have six undesignated, separate witnesses testify by affidavit. Specifically, the Defendants indicated that they would introduce six witnesses' "Affidavit[s]"[57] as trial exhibits. As to those proposed hearsay affidavits, Defendants also declined, again, to include the mandated "brief description as to what the Defendants expect the witnesses will testify about at trial."[58]

In total, the Defendants identified 24 exhibits on its exhibit list.[59] At the time they did so, however—and until the afternoon immediately preceding the Parties' scheduled 9:00 a.m. trial—the Defendants declined to provide the Plaintiff a single one of them.

By contrast, the Plaintiff timely furnished its witness and exhibit list on September 21, 2018, and all of the Plaintiff's proposed exhibits had long since been provided.[60] Given Defendants' seriously inadequate disclosures, however, the Plaintiff had no reasonable way of predicting what, if any, rebuttal testimony or exhibits it might ultimately need for trial. Nonetheless, the Plaintiff indicated that it intended to call: "Any witnesses called by Defendants, if necessary for rebuttal."[61] To provide fair notice and comply with its equal obligation to provide a "brief description as to what the Plaintiff expects the witnesses will testify

[57] Supp. R. at 6–7, (a)(1)–(a)(6).

[58] R. at 279.

[59] Supp. R. at 6–8.

[60] Supp. R. at 11–12.

[61] Supp. R. at 11.

about at trial,"[62] the Plaintiff additionally stated that it would call any of Defendants' witnesses: "for the purpose of establishing that next-day disclosure is feasible under Tennessee law and that the Challenged Statutes are not narrowly tailored to achieve the purposes that the Defendants have advanced."[63]

In conjunction with Plaintiff's disclosure of its witness and exhibit list, the Plaintiff timely filed three Motions in Limine five days before the Parties' scheduled bench trial[64] in compliance with Local Rule 30(a). Plaintiff's First Motion in Limine sought to exclude the testimony of Drew Rawlins on the basis that the Defendants had flagrantly violated the trial court's pre-trial Order by failing to provide a "brief description as to what the Defendants expect the witnesses will testify about at trial."[65] Plaintiff's Second Motion in Limine sought to exclude the Defendants' six witness "affidavits" on the basis that "testimony by affidavit is hearsay that deprives the Plaintiff of the opportunity to cross-examine the Defendants' witnesses, *see* Tenn. R. Evid. 801(c), whose anticipated testimony also has not been disclosed as required."[66] Plaintiff's Third Motion in Limine sought to exclude defense exhibits 7–24 based on both their conditional irrelevance and on the basis that several of them—none of which had actually been produced—were

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[62] R. at 279.

[63] Supp. R. at 11.

[64] R. at 325–31.

[65] R. at 279; R. at 325–26.

[66] R. at 327–28.

inadequately described.[67]

Three days before the Parties' scheduled bench trial, the Defendants still had not furnished the Plaintiff with any of its exhibits, notwithstanding a straightforward Local Rule on the matter.[68] Accordingly, on September 24, 2018—now just two days before the scheduled trial—Plaintiff's counsel e-mailed all three of the Defendants' attorneys to request that the Defendants exchange their exhibits. Specifically, Plaintiff's counsel wrote:

> [Subject:] **Local Rule 29.01 Exchange of Exhibits**
>
> Generals,
>
> We look forward to seeing you all on Wednesday morning.
>
> Local Rule 29.01(b) contemplates the exchange of exhibits at least 72 hours before trial. You already have ours, so we'd be grateful if you'd send us yours at your earliest convenience,

[67] R. at 329–31.

[68] Local Rule 29.01 of the Davidson County Courts of Record provides as follows:

> **29.01 - Required Exchange of Witnesses and Documents**
>
> At least seventy-two (72) hours (excluding weekends and holidays) before the trial of a civil case, opposing counsel shall either meet face-to-face or shall hold a telephone conference for the following purposes:
>
> a. to exchange names of witnesses, including addresses and home and business telephone numbers (if not included in interrogatory answers) including anticipated impeachment or rebuttal witnesses; and
>
> b. to make available for viewing and to discuss proposed exhibits. . . . .

since we don't have any of them.

We appreciate your time.

All the best,

-Daniel Horwitz[69]

Defendants flatly ignored Plaintiff's request for compliance, and by the following afternoon—less than 24 hours before the Parties' trial was scheduled to begin—not a single one of Defendants' exhibits had been exchanged. Accordingly, at 11:56 a.m. on September 25, 2018—approximately twenty-one hours before the Parties' scheduled 9:00 a.m. bench trial on September 26, 2018[70]—the Plaintiff filed a Fourth Motion in Limine seeking to exclude the Defendants' unexchanged exhibits given Defendants' violation of the applicable Local Rule and Defendants' inexplicable refusal to provide Plaintiff's counsel Defendants' exhibits despite Plaintiff's written request for compliance.[71]

The Defendants did not file written responses to any of the Plaintiff's Motions in Limine. Nonetheless, a hearing on Plaintiff's Motions in Limine was both scheduled[72] and held[73] before the Parties' September 26, 2018, bench trial, and Defendants' counsel was permitted to oppose Plaintiff's motions orally. During the hearing, Plaintiff's

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[69] R. at 337.

[70] R. at 279.

[71] R. at 334–37.

[72] R. at 333.

[73] Transcript at 4–26.

counsel detailed and reiterated several bases for granting the Plaintiff's Motions in Limine that had been advanced in the Plaintiff's written filings, both during Plaintiff's initial presentation[74] and in rebuttal.[75]

As to the Plaintiff's First Motion in Limine—governing the absent description of Drew Rawlins' testimony—the Defendants argued that even though they had not provided the mandated description of his testimony, "it's safe to say that's pretty obvious as to what [Drew Rawlins] was going to testify is [sic] the actions of the Registry of Election Finance."[76]

As to the Plaintiff's Second Motion in Limine—governing the undescribed hearsay affidavits—the Defendants argued that the undescribed hearsay affidavits should be admitted because "there was no way that we could have these witnesses available today," and because some of them "are extremely busy at this moment."[77] Notably, though, despite having been offered an opportunity to do so, the Defendants never objected to the scheduled trial date and had never previously expressed any difficulty regarding it.

As to the Plaintiff's Third Motion in Limine—wherein the Plaintiff had moved the trial court to exclude certain exhibits because they were conditionally irrelevant and because several were inadequately described—the Defendants argued that "it's the Court that decides

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[74] Transcript at p. 4, line 19 – p. 7, line 9.

[75] Transcript at p. 18, line 8 – p. 20, line 25.

[76] Transcript at 13, lines 9–12.

[77] Transcript at 14, lines 6–19.

whether or not a particular exhibit is relevant, not opposing counsel," and they stated further that: "I don't know how else to describe legislative history."[78] In rebuttal, Plaintiff's counsel emphasized why, indeed, the exhibits should be deemed conditionally irrelevant and provided several examples of how legislative history could be adequately described.[79]

Last, as to the Plaintiff's Fourth Motion in Limine—governing the Defendants' failure to produce its exhibits either three days before trial in compliance with the applicable Local Rule,[80] or two days before trial after Plaintiff's counsel specifically requested the exhibits in compliance with the applicable Local Rule,[81] or even 24 hours before trial[82]—the Defendants intimated that the Local Rules were a "game" and asserted, incoherently, that rather than politely requesting that opposing counsel furnish Defendants' trial exhibits, alerting them of the problem, and affording them an opportunity to address the matter without the need for judicial intervention, Plaintiff should have rushed to court and filed its Fourth Motion in Limine five days before trial—before the Defendants had even violated the 72-hour rule at issue. Alternatively, Defendants contended that Plaintiff's counsel should have gone to the State Library and Archives to track down and locate its unfurnished exhibits rather than spending the days before trial preparing for trial, arguing:

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[78] Transcript at 15, lines 6–17.

[79] Transcript at 19, lines 5–22.

[80] *See* Local R. 29.01 of the Davidson Cty. Cts. of R.

[81] R. at 337.

[82] R. at 334–37.

> [I]f we're going to play the game of the local rules, Your Honor, and argue that our exhibits should be excluded because we didn't comply with the local rule, well, counsel's motion doesn't comply with the local rule, because Local Rule 30 says that that motion in limine is supposed to be filed five days before the trial.
>
> But we're not going to play that game, Your Honor. The simple matter of the fact is that all of the exhibits, the documentary exhibits that we listed on September 14th and provided to counsel on September 14th are public records that could have been obtained at any time by plaintiff's counsel without obtaining them from us. We provided specific sites to where newspaper articles could be found. To the extent that they could not be downloaded off the internet, they were available at the State library and archives.[83]

Defendants' counsel then repeated again—falsely—that the undisclosed exhibits "were all public records"[84] that could have been found at the State Library and Archives, even though the Defendants' six proposed hearsay affidavits—which are available for this Court's review in the Exhibit Notebook at #10, #16, #17, #22, #23, and #24—plainly were not, and, in some cases, had been created literally one day before the Parties' trial. *See, e.g.*, Exhibit #16 (Affidavit of Richard H. Williams) ("Sworn to and subscribed to before me this 25th day of September, 2018.").

After oral argument on the Plaintiff's Motions in Limine closed, the court ruled from the bench as follows:

> The Court grants the motions in limine for the reasons stated in the plaintiff's oral arguments and in their briefing,

[83] Transcript at 16, lines 5–25.

[84] Transcript at 16, line 25.

> including but not limited to, that the State failed to comply with measures that this Court had put in its order to regulate and provide structure and fair notice when we were having a bench trial on an expedited basis.
>
> The Court was careful and thoughtful in crafting regulations so that the trial of this case would be fair, even though it was expedited, and the State has not complied with the Court's order. The State did not provide a description of the testimony that would be given by its witness.
>
> The Court had also put in footnote 1 of its order that if there were difficulties or problems complying with the deadlines, that relief should be sought from the Court, and the Court anticipated or acknowledged that that was a possibility. The State never came forward and asked for any additional time or measures in which to put their evidence on before the Court, other than the limited bench trial that the Court had set up. These are in addition to the reasons that are stated by the plaintiff in their oral argument and their briefing.
>
> The Court concludes that the way that the State has proceeded, it has the effect of a trial by ambush, and it doesn't provide an opportunity for the other side to defend against the proof that the plaintiff seeks -- that the defendant, the State, seeks to offer.
>
> So for all of these reasons, the Court grants the motions in limine.[85]

After granting the Plaintiff's Motions in Limine, the trial court permitted the Defendants to make a complete offer of proof. As a result, the scheduled trial was conducted outside the trial court's presence, and all of the Defendants' exhibits were filed and marked for identification. Of note, during Defendants' offer of proof, the Plaintiff attempted to introduce a rebuttal exhibit that Plaintiff did not know in advance of trial

[85] Transcript at p. 21, line 16 – p. 23, line 2.

would be necessary because Drew Rawlins' anticipated testimony had never been disclosed. Nonetheless, *Defendants' counsel* objected to the introduction of the exhibit on the basis that "**pursuant to the local rules, those exhibits were supposed to have been exchanged at least 72 hours before the trial.**"[86] Accordingly, to satisfy the Defendants' objection, the Plaintiff withdrew the exhibit and struck it from the record.[87]

On October 11, 2018, the Court issued a written Memorandum and Order that attached and expressly incorporated by reference "the transcript of the Court's [bench] ruling during the September 26, 2018 hearing and the arguments of Counsel therein."[88] The Memorandum and Order further detailed the bases for its rulings on the Plaintiff's four Motions in Limine as follows:

> The Order providing the parties with an opportunity to seek modification of the Court's proposed expedited schedule was filed over 30 days before the trial date set for September 26, 2018. At no time did the State Defendants ever seek to modify and/or change the expedited schedule.
>
> It was not until oral argument in defense of the Plaintiff's multiple Motions In Limine that the State Defendants argued for the first time that certain witness testimony was impossible to present in court because of (1) the expedited schedule in this case; (2) the various schedules of their witnesses[] and (3) the distance for which some of the State's witnesses would have to travel. None of these arguments were ever raised with the Court or opposing Counsel prior to the September 26, 2018 trial date despite the previous Memorandum and Order — over 30 days earlier — providing

[86] Transcript at 79, lines 12–15 (emphasis added).

[87] Transcript at 83, lines 14–19.

[88] R. at 341.

the State Defendants with an opportunity to seek modification of the proposed expedited schedule or any other relief a party needed.

Upon review of the Plaintiff's Motions in Limine filed in advance of the September 26, 2018 bench trial, and after considering the arguments of counsel regarding the Plaintiff's Motions in Limine, the Court finds that the State Defendants inexplicably failed to comply with the measures that the Court included in its September 4, 2018 Order to regulate and provide structure and fair notice in advance of the September 26, 2018 bench trial.

The Court finds that the State Defendants did not comply with the Court's September 4, 2018 Order and the Local Rules of Court. The Defendants did not provide a description of the testimony that would be given by their witnesses at trial, and they did not timely provide the Plaintiff the State Defendants' trial exhibits.

The Court finds that the State Defendants never came forward and asked for any additional time or measures in which to put their evidence on before the Court.

The Court finds that the way that the State has proceeded, it has the effect of a trial by ambush, and it does not provide a fair opportunity for the Plaintiff to defend against the proof that the Defendants seek to offer.

For these reasons, and for the additional reasons set forth in the Plaintiff's Motions in Limine and advanced by Plaintiff's counsel during oral argument on the Plaintiff's Motions in Limine, the transcript of which is incorporated herein by reference, the Court has issued the above rulings.[89]

Next, the trial court adopted the standards of review that Plaintiff's pre-trial brief argued must govern its respective constitutional claims,[90]

[89] R. at 344–46 (emphasis added).

[90] R. at 346.

and because "[t]he Plaintiff's First, Second, Third, and Fourth Motions in Limine [we]re granted," it held that:

> 2. The State Defendants having failed to introduce any evidence at the trial of this matter, the Court finds that the State has insufficient facts of record to withstand the Plaintiff's claims. Thus, the Court concludes as follows from the September 26, 2018 bench trial.
>
> > a. The State Defendants failed to meet their burden of proof as to Tenn. Code Ann. § 2-10-117's and Tenn. Code Ann. § 2-10-121's constitutionality, and accordingly, judgment in favor of the Plaintiff is granted.
> >
> > b. A declaratory judgment that Tenn. Code Ann. § 2-10-117 and Tenn. Code Ann. § 2-10-121, both facially and as applied, violate the First and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the Tennessee Constitution is entered.
> >
> > c. The Defendant Tennessee Bureau of Ethics and Campaign Finance, Registry of Election Finance is permanently enjoined from enforcing Tenn. Code Ann. § 2-10-117 and Term. Code Ann. § 2-10-121.[91]

Last, the trial court ruled that the Defendant Davidson County District Attorney would be "dismissed from this action without prejudice pending the conclusion of appellate review."[92] An attorney's fee award—which Defendants do not challenge on appeal—was also entered on October 24, 2018.[93] On October 29, 2018, Defendants timely appealed.[94]

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[91] R. at 339.

[92] R. at 340, ¶ 3.

[93] R. at 410–20.

[94] R. at 421.

VIII. SUMMARY OF ARGUMENT

The trial court correctly granted all four of the Plaintiff's Motions in Limine. The Defendants unmistakably violated the trial court's pre-trial Order, Rules of Evidence, and an applicable Local Rule providing for the timely pre-trial exchange of exhibits. Consequently, in granting the Plaintiff's Motions in Limine, the trial court did not err at all, much less engage in "clear abuse" of its "wide discretion." *Pullum v. Robinette*, 174 S.W.3d 124, 137 (Tenn. Ct. App. 2004) (citing *Heath v. Memphis Radiological Prof'l Corp.*, 79 S.W.3d 550 (Tenn. Ct. App. 2002).

As to the merits of the Plaintiff's claims, the trial court also correctly held that Tennessee Code Annotated § 2-10-117 suffers from several independent constitutional infirmities and cannot withstand constitutional scrutiny. Section 2-10-117 imposes a heavy and unlawful political speech penalty based solely on the identity of the speaker—a defect that triggers strict constitutional scrutiny under both the federal and state Constitutions. Section 2-10-117 also unconstitutionally discriminates based on both a speaker's political association and the content of a disfavored speaker's political speech, both of which trigger strict scrutiny as well. Section 2-10-117 additionally imposes a temporal ban on political speech that cannot pass muster under *Buckley*'s "closely-drawn" test. As a consequence of all of these defects, § 2-10-117 is presumptively unconstitutional, and whether Defendants' proposed evidence is considered by this Court or not, as a matter of law, § 2-10-117 is not narrowly tailored to achieve any of the purported governmental interests that the Defendants have advanced to support it.

Section § 2-10-121's discriminatory tax based on political

association suffers from similar constitutional defects. Those defects were then partially cured by a statutory change that the General Assembly enacted after the trial court issued its injunction in this matter. Nonetheless, even in its modified form, § 2-10-121 continues to discriminate unconstitutionally based solely on disfavored groups' constitutionally protected political association. The Defendants have also failed to muster any evidence whatsoever to overcome § 2-10-121's presumptive, ongoing unconstitutionality.

Given the unconstitutionality of both § 2-10-117 and § 2-10-121, the trial court's Order declaring the statutes unconstitutional should be affirmed. The trial court's injunction should also be extended to the Defendant Davidson County District Attorney's Office, which was dismissed from this action only "without prejudice pending the conclusion of appellate review."[95] *See Clinton Books, Inc*, 197 S.W.3d at 753. The Plaintiff's unchallenged fee award should additionally be increased to compensate the Plaintiff for its reasonable attorney's fees associated with this appeal.

IX. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GRANTING THE PLAINTIFF'S MOTIONS IN LIMINE.

"An appellate court will not reverse a trial court's decision on the admissibility of evidence, including a ruling on a motion in limine, absent clear abuse." *Pullum*, 174 S.W.3d at 137 (citing *Heath*, 79 S.W.3d 550).

[95] R. at 340, ¶ 3.

"Similarly, an appellate court will not reverse a trial court's exercise of discretion in ruling on an evidentiary motion in limine unless the trial court abused the wide discretion given it to handle such motions." *Id.*

Here, in light of Defendants' flagrant and inexplicable violations of the trial court's pre-trial Order, Rules of Evidence, and a critical Local Rule, the trial court did not abuse its discretion by granting any of the Plaintiff's Motions in Limine.

1. The trial court did not abuse its discretion by excluding the testimony of Drew Rawlins after the Defendants violated a straightforward Pre-Trial Order in an effort to effect a "trial by ambush."

In its September 4, 2018 pre-trial Order, the trial court ordered the Defendants to furnish "a list of exhibits and witnesses they expect to introduce at trial with a brief description as to what the Defendants expect the witnesses will testify about at trial."[96] The Defendants did not comply with this Order.

Instead, Defendants disclosed only that "Drew Rawlins, Executive Director of the Tennessee Bureau of Ethics and Campaign Finance" would be called as a witness.[97] However, Defendants did not provide the requisite "brief description as to what the Defendants expect the witnesses will testify about at trial,"[98] prompting Plaintiff's First Motion in Limine. Defendants' explanation for their non-compliance is that the

[96] R. at 279 (emphasis added).

[97] Supp. R. at 6.

[98] R. at 279.

subject of Mr. Rawlins testimony should have been divined by the Plaintiff because: "it's safe to say that's pretty obvious as to what [Drew Rawlins] was going to testify is [sic] the actions of the Registry of Election Finance."[99] Notably, though, during the Defendants' offer of proof, Mr. Rawlins testimony vastly exceeded this "obvious" scope.[100]

In granting the Plaintiff's First Motion in Limine, the trial court both expressly and appropriately considered:

> (1) That no adequate explanation for the Defendants' flagrant non-compliance with the Court's pre-trial Order had been offered;
>
> (2) The importance of the Defendants' non-disclosure to the trial of this matter;
>
> (3) That adjudication of the Plaintiff's claims had already been delayed once in order to afford the Defendants an opportunity to introduce evidence that they had voluntarily waived the right to present; and
>
> (4) That further delay risked preventing the proceedings from being completed in advance of the "upcoming November 6, 2018 election," which one of the challenged statutes directly affected.

See R. at 338–39; 341–46.

Given this context, by granting the Plaintiff's First Motion in Limine, the trial court did not abuse its "wide" discretion—much less "clear[ly]" abuse it—or err in any regard. *See Pullum*, 174 S.W.3d at 137. The trial court's order granting Plaintiff's First Motion in Limine should be affirmed accordingly.

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[99] Transcript at 13, lines 9–12.

[100] Transcript at 40–110.

2. The trial court did not abuse its discretion by rejecting the Defendants' attempt to have undesignated witnesses provide hearsay testimony by affidavit, rather than calling the witnesses at trial where they would be subject to cross-examination.

Nor did the trial court abuse its discretion by granting the Plaintiff's Second Motion in Limine, which sought to exclude proposed hearsay testimony by affidavit.

As a threshold matter, for the same reasons noted above, the Defendants failed to describe their witnesses' proposed testimony by affidavit in compliance with the trial court's pre-trial Order, too, *see* Supp. R. at 6-7, and each affidavit could have been properly excluded on that basis alone.

More importantly, though: There is no hearsay exception that permits litigants to testify by affidavit—rather than testifying subject to cross-examination—simply because litigants fail to bring their own witnesses to trial. *See* Tenn. R. Evid. 803. Affidavits cannot be cross-examined, and all of Defendants' proposed affidavits constituted "statement[s], other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See* Tenn. R. Evid. 801(c). Accordingly, the affidavits were hearsay, and the Plaintiff's Second Motion in Limine was properly granted as a consequence. *See id. See also Williams v. State*, 542 S.W.2d 827, 832–33 (Tenn. Crim. App. 1976) (noting that an "affidavit constitutes hearsay if offered to prove the truth of its contents"). *Cf. F.T.C. v. Nat'l Bus. Consultants, Inc.*, 376 F.3d 317, 322 (5th Cir. 2004) ("[A]ffidavits are hearsay under Rule 801 of the Federal Rules of

Evidence. They do not qualify as a hearsay exception under either Rule 803 or Rule 804."). Indeed, as to the Plaintiff's Second Motion in Limine, the only way the trial court could have abused its discretion is if it had denied the motion, because "[h]earsay is not admissible except as provided by these rules or otherwise by law." *See* Tenn. R. Evid. 802.

Nor was the Defendants' claimed "need" to provide hearsay testimony by affidavit due to the "busy schedules" of its "exhibit" witnesses—one of whom was present for the trial and watched it from inside the courtroom—plausible or called to anyone's attention until the day of trial. Instead, as the trial court properly observed:

> The Order providing the parties with an opportunity to seek modification of the Court's proposed expedited schedule was filed over 30 days before the trial date set for September 26, 2018. At no time did the State Defendants ever seek to modify and/or change the expedited schedule.
>
> It was not until oral argument in defense of the Plaintiff's multiple Motions In Limine that the State Defendants argued for the first time that certain witness testimony was impossible to present in court because of (1) the expedited schedule in this case; (2) the various schedules of their witnesses' and (3) the distance for which some of the State's witnesses would have to travel. None of these arguments were ever raised with the Court or opposing Counsel prior to the September 26, 2018 trial date despite the previous Memorandum and Order — over 30 days earlier — providing the State Defendants with an opportunity to seek modification of the proposed expedited schedule or any other relief a party needed.[101]

The Plaintiff's Second Motion in Limine was properly granted as a result.

[101] R. at 344–45.

3. The trial court did not abuse its discretion by excluding the Defendants' conditionally irrelevant exhibits.

The Defendants' briefing fails to address the Plaintiff's Third Motion in Limine in any regard, resulting in waiver of any claim of error even if the issue is ultimately raised in Reply. *See Hughes v. Tenn. Bd. of Prob. & Parole*, 514 S.W.3d 707, 724 (Tenn. 2017) ("Issues raised for the first time in a reply brief are waived."). Regardless, the Plaintiff's Third Motion in Limine—governing the conditional relevancy of the Defendants' proposed evidence—was properly granted as well.

"In First Amendment cases, application of the least-restrictive-means (or 'narrow tailoring') test to a given set of facts is well understood to be a question of law." *United States v. Friday*, 525 F.3d 938, 949 (10th Cir. 2008) (citing *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1249 (10th Cir. 2000)). *See also 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 . . . ."); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 304 (4th Cir. 2013) ("The inquiry into whether [a challenged law] is narrowly tailored is a purely legal question: Whether a regulation meets the 'narrowly tailored' requirement is of course a question of law.") (cleaned up).

In the Plaintiff's pre-trial brief, the Plaintiff contended—with substantial basis—that the challenged statutes could not come close to satisfying the Constitution's narrow tailoring requirement for several

independent reasons.[102] As a result, the Plaintiff noted—correctly—that the exhibits that the Defendants sought to introduce would be irrelevant to the ultimate adjudication of the Plaintiff's claims if less restrictive means of achieving the government's claimed interests already existed. *See* R. at 319 ("as a matter of law, no amount of evidence can prove that the less restrictive alternatives to Tennessee Code Annotated § 2-10-117 that already exist are infeasible.").

The Plaintiff's pre-trial briefing conclusively established that less restrictive means were available in existing law. *See* R. at 320–23. Given this context, a conditional relevance objection to the Defendants' proposed exhibits was entirely appropriate. *See* Tenn. R. Evid. 104(b) ("When the relevance of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition. In the court's discretion, evidence may be admitted subject to subsequent introduction of evidence sufficient to support a finding of the fulfillment of the condition."). Here, the relevance of the Defendants' proposed exhibits turned entirely upon the impossible task of demonstrating—factually—that less restrictive alternatives that already existed were unavailable.

As a consequence, the Defendants could not establish by a preponderance of the evidence that they would be able to establish the preliminary facts necessary to establish the relevance of their proposed exhibits. *See State v. Stamper*, 863 S.W.2d 404, 406 (Tenn. 1993) ("the

[102] R. at 319–23.

appropriate standard of proof for preliminary facts required for the admission of evidence is proof by a preponderance of the evidence."). The Plaintiff's Third Motion in Limine was properly granted as a result, and the trial court neither abused nor clearly abused its wide discretion by granting it.

4. The trial court did not abuse its discretion by excluding the Defendants' untimely exchanged exhibits after Defendants knowingly and deliberately violated a Local Rule providing for the pre-trial exchange of exhibits.

Last, the trial court properly granted the Plaintiff's Fourth Motion in Limine given Defendants' inexplicable refusal to furnish the Plaintiff with their exhibits at least 72 hours in advance of trial in violation of the relevant local rule. *See* Davidson Cty. Cir. Ct. Local R. 29.01(b). Notably, the Defendants do not dispute that they violated the rule. Instead, they insist that "there was no expectation by either the parties or the court that Local Rule 29.01 would apply . . . ." *See* Appellants' Brief at 19.

This is a gross misrepresentation for multiple reasons.

First, when the Defendants still had not furnished their exhibits just two days before the scheduled bench trial, Plaintiff's counsel e-mailed the Defendants' attorneys and requested compliance with the Local Rule.[103] Thus, the record proves unmistakably that the Plaintiff did expect that Local Rule 29.01 would apply, and before filing its Fourth Motion in Limine, the Plaintiff specifically communicated that expectation to Defendants' counsel, who ignored it.

Second, during the Defendants' offer of proof, the Defendants

[103] R. at 337.

themselves lodged an objection under Local Rule 29.01(b).[104] Specifically, while cross-examining Drew Rawlins, the Plaintiff attempted to introduce a rebuttal exhibit that the Plaintiff did not know—in advance—would be necessary because Mr. Rawlins' anticipated testimony had never been disclosed. Nonetheless, relying on Local Rule 29.01(b), Defendants' counsel objected to the exhibit being introduced because: "pursuant to the local rules, those exhibits were supposed to have been exchanged at least 72 hours before the trial."[105] Accordingly, the Plaintiff withdrew the exhibit.[106]

In other words: The Plaintiff specifically communicated its concern about Defendants' compliance with the Local Rule to Defendants' counsel in advance of trial,[107] and the Defendants' themselves further contended, during their offer of proof, that "pursuant to the local rules, [] exhibits were supposed to have been exchanged at least 72 hours before the trial."[108] Even so, the Defendants now represent on appeal that: "there was no expectation by either the parties or the court that Local Rule 29.01 would apply . . . ." *See* Appellants' Brief at 19. Defendants' representation is false, and flagrantly so. The truth of the matter is that despite having been informed, in advance, that the Local Rule applied and later invoking it themselves, Defendants considered the local rules a

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[104] Transcript at 79, lines 12–15.

[105] *Id.*

[106] Transcript at 83, lines 14–19.

[107] R. at 337.

[108] Transcript at 79, lines 12–15.

"game" that they were "not going to play,"[109] other than selectively.

Given this context, the trial court was well within its discretion to forbid the Defendants from effecting a "trial by ambush."[110] Litigants are obligated to disclose their exhibits to opposing counsel before trial, and the Defendants' intimation that Plaintiff's counsel should have gone to the State Library and Archives in search of Defendants' unfurnished exhibits—six of which were exclusively in the Defendants' possession—rather than spending the three days before trial preparing for trial is ridiculous.[111] The Defendants' intimation that the trial court "failed to consider any of the[] relevant factors" with respect to potential remedies for Defendants' strategic rule violations is also belied by the fact that the trial court's detailed written order—made plainly available for the Court's review at R. at 338–46—directly addressed every single one. The Plaintiff's Fourth Motion in Limine was properly granted as a result.

B. TENNESSEE CODE ANNOTATED § 2-10-117 IS NOT NARROWLY TAILORED TO ACHIEVE ANY COMPELLING OR IMPORTANT GOVERNMENTAL INTEREST.

Tennessee Code Annotated § 2-10-117's speaker-based discrimination, its discrimination based on political association, and its content discrimination all trigger strict constitutional scrutiny under both the federal and Tennessee Constitutions. Further, § 2-10-117's temporal restriction on political speech must satisfy *Buckley's* "closely-drawn" test. Regardless of which standard of review is applied,

[109] Transcript at 16, lines 5–14.

[110] Transcript at p. 21, line 16 – p. 23, line 2.

[111] Transcript at 16, lines 3–25.

however—and regardless of whether or not the Defendants' proposed evidence is considered—§ 2-10-117 cannot withstand constitutional scrutiny because it is fatally over-inclusive and under-inclusive, and because significantly less restrictive means are readily available to achieve the Government's asserted disclosure interests.

1. Applicable Standards of Constitutional Scrutiny

a. The Plaintiff's challenge to Tennessee Code Annotated § 2-10-117's speaker-based discrimination is subject to strict scrutiny.

Tennessee Code Annotated § 2-10-117 contains an explicit speaker preference for favored speakers (party-controlled PACs) while discriminating against disfavored speakers (non-partisan PACs) like the Plaintiff. More specifically, multicandidate political campaign committees 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 that expressly permits them to make direct contributions during the ten days prior to election. *Id.* By contrast, PACs like the Plaintiff that are not party-controlled are subject to potential criminal prosecution carrying a sentence of up to thirty days in jail and an additional civil penalty of up to $10,000.00 if they do the same.[112] Significantly, a wealth of directly applicable U.S. Supreme Court precedent reflects that such speaker-based discrimination is flagrantly—and perhaps insurmountably—unconstitutional. *See, e.g.*, *Thomas v. Chicago Park Dist.*, 534 U.S. 316,

[112] *See* TENN. CODE ANN. §§ 2-19-102, 40-35-111(e)(3), 2-10-110(a)(2).

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) ("[W]e 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) ("[T]he 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*, 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) ("[D]ecisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

Critically, during the proceedings before the trial court, the

Defendants also forthrightly acknowledged that § 2-10-117's facial, speaker-based discrimination reflects a deliberate content preference for speech by partisan speakers, which Defendants claim is appropriate because the Government is better able to predict where party-controlled PAC contributions will be directed. Specifically, the Defendants argued, § 2-10-117's speaker preference is acceptable 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.[113]

As the Supreme Court held in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015), such a restriction must satisfy 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).

b. The Plaintiff's challenge to Tennessee Code Annotated § 2-10-117's discrimination based on political association is subject to strict scrutiny.

By censoring political campaign committees based solely on whether or not they are party-affiliated, Tennessee Code Annotated § 2-10-117 also expressly discriminates on the basis of political

[113] R. at 166.

association. Here, the Plaintiff—a non-partisan organization—is not forbidden from making contributions within the critical ten-day period before an election because it is a *PAC*. Instead it is prohibited from making contributions within the relevant "blackout" period 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.*

Unsurprisingly, "political 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 [] plainly presupposes a freedom not to associate." *Id.* at 623.

Here, § 2-10-117 punishes disfavored political organizations like the Plaintiff with a significant speech penalty during the most critical period before Election Day solely because they are non-partisan. Such discrimination on the basis of political association triggers strict scrutiny. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (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 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968))).

c. The Plaintiff's challenge to Tennessee Code Annotated § 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*, 135 S. Ct. at 2227. "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 ("[P]olitical 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 contributions to candidates, but not on other forms of political speech, Tennessee Code Annotated § 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 both civil and criminal penalty from

exercising this right.

During the proceedings below, the Defendants themselves detailed why § 2-10-117 is a restriction based on the "message expressed." *See Reed*, 135 S. Ct. at 2227. Specifically, the Defendants insisted that even though the Plaintiff is prohibited from engaging in its desired form of communicative expression, the Government generously allows the Plaintiff to engage in other, Government-approved forms of expression as an alternative. *See* R. at 168 ("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 asserted that it considers these forms of communicative expression to be *preferable*. *See id.* ("Unlike making monetary contributions, these forms of support are visible . . . ."). *But see Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."). As a result, there is little doubt that § 2-10-117 both is—and is designed to be—a restriction on speech that is based on the "idea or message expressed," and that it specifically targets a certain type of speech based on its communicative content. *Reed*, 135 S. Ct. 2226-27.

d. The Plaintiff's challenge to Tennessee Code Annotated § 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*, 486 U.S. at 425.

"When [a state] restricts speech, [it] bears the burden of proving the constitutionality of its actions." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 210 (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*, 881 F.3d 378, 391 (5th Cir. 2018). Under that test, a challenged regulation 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)).

McCutcheon, 572 U.S. at 218.

Here, because Tennessee Code Annotated § 2-10-117 "is poorly tailored to the Government's interest . . . , it impermissibly restricts participation in the political process." *Id.* Specifically, § 2-10-117

imposes a categorical ban on the Plaintiff's direct 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 also 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*, 394 U.S. 147, 163 (1969) ("[T]iming 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. Wis. Right to Life*, 551 U.S. 449, 462 (2007) ("groups . . . cannot predict what issues will be matters of public concern . . . ."); *Human Life of Wash. 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 Tex. v. Reisman*, 764 F.3d 409, 431 (5th Cir. 2014) ("[T]he 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) ("[B]lack-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*, 881 F.3d at 391 (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).

e. The Plaintiff's challenge to Tennessee Code Annotated § 2-10-117 under article I, § 19 of the Tennessee Constitution 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.

"Consequently, the strict scrutiny standard is also applicable to [the] equal protection analysis in this case." *Id.*

2. Tennessee Code Annotated § 2-10-117 is not sufficiently narrowly tailored to achieve any of the Government's claimed interests.

Tennessee Code Annotated § 2-10-117 is both fatally overinclusive—censoring far more speech than necessary to accomplish the Government's asserted disclosure interests—and fatally underinclusive with respect to those who are targeted for censorship. Accordingly, § 2-10-117 is not sufficiently narrowly tailored to satisfy either strict scrutiny or *Buckley*'s "closely-drawn" test. The trial court properly declared it unconstitutional and enjoined it accordingly.

a. Tennessee Code Annotated § 2-10-117's political speech penalty is fatally overinclusive, given that several less restrictive alternatives to it already exist.

Even assuming that some legitimate, evidence-based need prompted the legislature to enact Tennessee Code Annotated § 2-10-117, no amount of evidence—whether admitted or not—can prove that the less restrictive alternatives to § 2-10-117 that already exist 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, the Government's asserted interest in ensuring that candidate contributions are disclosed to voters before election day, *see* Appellants' Brief at 32, can be achieved simply by requiring disclosure during the current "blackout" period. Such disclosure—including next-

day disclosure—is plainly feasible, both legally and technologically. Indeed, existing Tennessee law already permits, contemplates, and *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).

As such, "next business day" disclosure of contributions is a feasible and readily available alternative to a categorical pre-election blackout ban that would neatly address the Government's asserted interest in transparency. *Id.* Thus, the Defendants' proposed evidence—some of which aimed to demonstrate that an online disclosure system is neither available nor feasible statewide in Tennessee—is immaterial to whether "next business day" disclosure is a feasible alternative to § 2-10-117. Existing Tennessee law already reflects that "next business day" disclosure can be accomplished and required "by telegram, facsimile machine, hand delivery or overnight mail delivery." *See* TENN. CODE ANN. § 2-10-105(h)(1)–(2). Accordingly, a significantly less restrictive alternative to pre-election censorship already exists.

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 their final campaign finance report the day before an election, rather than being required to file their final campaign finance reports to address a period that concludes ten days before an election. *See* TENN. CODE ANN. § 2-10-105(c)(1). Defendants' lone witness candidly conceded that the General Assembly could pursue this common

sense alternative,[114] and indeed, employing it would perfectly achieve the Government's asserted interest in "informing the electorate and in preventing corruption or the appearance of corruption." *See* Appellant's Brief at 34. Accordingly, the notion that the only way to achieve the Government's claimed transparency interests is to mandate an admittedly arbitrary final disclosure deadline and then forbid—under penalty of civil and criminal sanction—non-party PACs from making any direct contributions during the days that follow that deadline is farcical. *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"). Even so, § 2-10-117 categorically forbids the Plaintiff from making contributions of any amount within the ten-day period before an election—even low amounts that would not be subject to disclosure if they were made at any other time. *Id.* Thus, the notion that forbidding the Plaintiff from making any direct contribution during the ten-day period before an election—no matter how small—is essential to further the Government's claimed transparency interests is absurd, and the statute fails to satisfy narrow tailoring as a consequence.

Fourth, the Defendants 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 (or individuals, who may also contribute during the relevant blackout

[114] Transcript at p. 85, line 12 – p. 86, line 21.

period) *never* do. Indeed, even if all of Defendants' proposed evidence had been admitted, none of it would have come close to supporting this conclusion. If such evidence exists, the Defendants failed to produce it, and because they had the burden of doing so, Defendants' defense of § 2-10-117 fails accordingly.

b. Tennessee Code Annotated § 2-10-117 is fatally underinclusive with respect to the speakers who are targeted for censorship.

Beyond just censoring too broadly, Tennessee Code Annotated § 2-10-117 is also underinclusive with respect to the Government's asserted disclosure and anti-corruption interests. *But 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."). Specifically, § 2-10-117 is grossly underinclusive with respect to those who are targeted for pre-election censorship.

As noted above, with respect to the Government's claimed need to censor non-partisan PACs alone, the Defendants indicated that their asserted interests in pre-election disclosure did 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.[115]

[115] R. at 166.

But even if this assertion were accurate, and even if the Government's asserted interest in being able to predict "which candidates will receive support" were compelling (and it is not)—§ 2-10-117 would still be fatally underinclusive. Specifically, it is equally "unclear which candidates will receive support from any given" *individual* or *non-multicandidate PAC* just before an election. *Id.* Nonetheless, only non-partisan, multicandidate PACs like the Plaintiff are targeted for § 2-10-117's pre-election speech penalty. By contrast, all individuals and standard political campaign committees, whether partisan or not—which are permitted to make contributions without restriction during the "blackout" period that voters cannot see until after Election Day—are not. *But see Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. at 194 ("[D]ecisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

Due to § 2-10-117's glaring over-inclusiveness and under-inclusiveness with respect to the Government's asserted transparency interests, the Defendants cannot prove that § 2-10-117 is 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."[116] The absence of constitutionally mandated narrow tailoring also remains fatal regardless of whether or not Defendants' proposed evidence is considered. Accordingly, as a matter of law, § 2-10-117 is unconstitutional.

[116] R. at 240.

C. TENNESSEE CODE ANNOTATED § 2-10-121 REMAINS UNCONSTITUTIONAL EVEN AS AMENDED.

The Plaintiff's challenge to Tennessee Code Annotated § 2-10-121 has not become moot. Specifically, the amended version of the statute only partially cured the statute's central constitutional defect: A tax against some—but not other—political speakers based solely on their political association. Accordingly, the trial court's injunction prohibiting enforcement of this unconstitutionally discriminatory tax remains necessary.

1. Plaintiff's Uncontested Challenge to Tennessee Code Annotated § 2-10-121's Constitutionality

With respect to the Plaintiff's successful challenge to Tennessee Code Annotated § 2-10-121's constitutionality under both the federal and Tennessee Constitutions, the Defendants appeal only a single, narrow issue: Whether the Plaintiff's challenge has become moot due to a statutory change. *See* Appellant's Brief at 6, 25–27. Thus, the Defendants do not appeal the merits of the trial court's multi-pronged declaratory judgment or injunction regarding § 2-10-121.[117] They also do not contest the trial court's holding that strict scrutiny applies to § 2-10-121's discrimination based on political association.[118]

Notably, the Defendants also failed to contest Plaintiff's claim that § 2-10-121 was unconstitutional in any regard during the proceedings before the trial court. In its Complaint, the Plaintiff alleged that: "By

[117] R. at 339.

[118] R. at 340.

assessing fees to non-party PACs but exempting both 'any statewide political party as defined in § 2-1-104 or subsidiaries of the political party' **and individual political speakers**, § 2-10-121 is unconstitutional both facially and as applied . . . because it discriminates on the basis of a speaker's political association."[119] The Plaintiff also alleged that "[b]y discriminating against disfavored speakers and assessing a fee against disfavored political speakers as a precondition to being permitted to make campaign contributions at all, Tenn. Code Ann. § 2-10-121 violates Tenn. Const. art. I, § 19."[120] In its pre-trial briefing, the Plaintiff further detailed at length why § 2-10-121 is a presumptively unconstitutional discriminatory tax based upon protected political association that triggers strict scrutiny.[121] Plaintiff additionally observed that less restrictive means—applying the tax "equally to **all speakers**, or else, not at all"—were readily available.[122]

In response, however, neither Defendants' pre-trial brief nor their briefing in advance of the hearing on the Plaintiff's Application for a Temporary Injunction so much as mentioned § 2-10-121.[123] At the trial of this matter, the Defendants also declined to introduce or even propose a shred of evidence that had any bearing upon § 2-10-121's presumptive constitutionality. *See* Exhibits #1–26. In other words: Plaintiff's claims

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[119] R. at 21, ¶ 80 (emphasis added).

[120] R. at 21, ¶ 83.

[121] R. at 312–13, 315–16.

[122] R. at 323 (emphasis added).

[123] *See* R. at 156–86; **Attachment A**.

regarding § 2-10-121 were effectively uncontested.

2. Tennessee Code Annotated § 2-10-121's Ongoing Defects As Amended

At the time Plaintiff filed suit, Tennessee Code Annotated § 2-10-121 exempted partisan PACs and other political speakers—including all non-multicandidate PACs and individuals—from its discriminatory tax. Specifically, the statute provided that:

> No later than January 31 of each year, each multicandidate political campaign committee registered with the registry of election finance shall pay a registration fee to be determined by rule promulgated pursuant to § 4-55-103(1). . . . This section shall not apply to any statewide political party as defined in § 2-1-104 or subsidiaries of the political party.[124]

After the trial court declared § 2-10-121 unconstitutional and enjoined its enforcement, though, the General Assembly eliminated the statute's exemption for partisan PACs alone and amended the statute to read, in full, as follows:

> No later than January 31 of each year, each multicandidate political campaign committee registered with the registry of election finance shall pay a registration fee to be determined by rule promulgated pursuant to § 4-55-103(1). Payment of the registration fee by one (1) affiliated political campaign committee includes any disclosed affiliated committees registering separately; payment of the registration fee by a statewide political party, as defined in § 2-1-104, includes any disclosed subsidiaries of the political party registering separately. For any multicandidate political campaign committee registering a new committee during any year, the committee shall pay the appropriate registration fee at the time that it certifies its political treasurer. All fees collected

[124] R. at 8, ¶ 24; R. at 285, ¶ 24.

> under this section shall be retained and used for expenses related to maintaining an electronic filing system.

See SB 234, 2019 Tenn. Pub. Acts, ch. 77 (effective Apr. 1, 2019).

Even as amended, however, favored political speakers remain exempt from Tennessee Code Annotated § 2-10-121's discriminatory tax, which is based exclusively on a speaker's constitutionally protected political association. Most critically, while multicandidate PACs like the Plaintiff must pay an annual assessment, *see id.*, non-multicandidate PACs—which are defined at Tennessee Code Annotated § 2-10-102(12) as: "Any corporation or any other organization making expenditures, except as provided in subdivision (4), to support or oppose a measure" or " Any committee, club, corporation, association, or other group of persons which receives contributions or makes expenditures to support or oppose any candidate for public office or measure during a calendar year in an aggregate amount exceeding one thousand dollars ($1,000)"—do not. *See* TENN. CODE ANN. § 2-10-102(12)(A)–(B). As a consequence, Defendants' assertion that: "**All** PACs are now required to pay the annual registration fee, rendering Plaintiff's challenge to the statue [sic] moot" is factually—and materially—inaccurate, and Defendants' mootness claim fails as a result. *See* Appellants' Brief at 26 (emphasis added). Nor do individual political speakers have to pay the Government annually in order to exercise their constitutional right to make direct campaign contributions—an underinclusive defect that Plaintiff's Complaint also specifically challenged as being fatal.[125]

[125] R. at 21, ¶ 80.

During the trial of this matter, the Defendant's lone witness conceded that Tennessee Code Annotated § 2-10-121's tax "just applies to multi-candidate committees," and that it "does not apply to standard political campaign committees."[126] This unequal, unexplained, and undefended discriminatory treatment—which turns solely on the number of candidates and measures a PAC supports and the level of support provided—also was not addressed by the amended version of the statute. Nor does the amended version of § 2-10-121 address the statute's independent underinclusivity with respect to individuals.

Thus, even as amended, § 2-10-121 remains discriminatory and fatally underinclusive. Further, a less restrictive alternative—applying the tax "equally to **all speakers**, or else, not at all"—remains readily available.[127] In lieu of assessing a discriminatory tax against disfavored political speakers, the Defendants also failed to meet their burden of proving, with evidence, why the General Assembly could not simply appropriate the "between 45,000 and 50,000" dollars that § 2-10-121 generates annually to fund the State's disclosure system from another source.[128] As a consequence, unless and until these constitutional defects are cured, § 2-10-121 will continue to be an unconstitutional tax against some—but not other—political speakers based solely on their political association for which an injunction is warranted.

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[126] Transcript at 99, lines 12–17.

[127] R. at 323 (emphasis added).

[128] Transcript at p. 99, line 18 – p. 100, line 2.

D. THE DISTRICT ATTORNEY SHOULD BE ENJOINED FROM ENFORCING TENNESSEE CODE ANNOTATED §§ 2-10-117 AND 2-10-121.

Violating any provision of Title 2—which encompasses Tennessee's election statutes—is an offense punishable as a Class C misdemeanor. *See* TENN. CODE ANN. § 2-19-102 ("A person commits a Class C misdemeanor if such person knowingly does any act prohibited by this title"). And although enjoining a District Attorney from enforcing a criminal provision typically presents separation of powers issues, in *Clinton Books, Inc.*, 197 S.W.3d at 753 (Tenn. 2006), the Tennessee Supreme Court held that "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.*

Here, to respect the separation of powers, the Defendant District Attorney was "dismissed from this action without prejudice pending the conclusion of appellate review."[129] Because this Court's conclusion that the challenged statutes are unconstitutional will enable the trial court to apply its injunctions to the Defendant District Attorney, however, *see id.*, upon affirming the trial court's judgment as to the unconstitutionality of both statutes, this Court should remand with instructions that the trial court's injunctions be extended to the Davidson County District Attorney's Office.

[129] R. at 340, ¶ 3.

E. THE PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES FOR DEFENDING THIS APPEAL.

The Defendants do not contest that the Plaintiff was properly awarded attorney's fees based on its successful constitutional challenge to either statute. Nor do they contest any component of the Plaintiff's fee award in this appeal. Accordingly, the Plaintiff's fee award should be affirmed. The Plaintiff is also entitled to an upward adjustment of its fee award with respect to this appeal, having expressly raised its entitlement to an appellate fee award in its Statement of the Issues and having advanced and defended meritorious constitutional claims in this appeal. *Cf. Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 410 (Tenn. 2006).

X. CONCLUSION

For the foregoing reasons, the trial court's judgment should be **AFFIRMED**; this Court should remand this case with instructions to apply the trial court's injunctions against the Defendant District Attorney; and the Plaintiff should be awarded its reasonable attorney's fees regarding this appeal.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-X) contains 14,272 words pursuant to § 3.02(a)(1)(a), as calculated by Microsoft Word, and it was prepared using 14-point Century font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2019, a copy of the foregoing was sent via the Court's electronic filing system and/or via email to the following parties:

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