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DAVIDSON CO. CHANCERY CT.

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

TENNESSEANS FOR SENSIBLE ELECTION LAWS,	§	
Plaintiff,	§	
v.	§	Case No. 20-0312-III
HERBERT H. SLATERY III, *et al.*,	§	
Defendants.	§	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff, Tennesseans for Sensible Elections Laws, and pursuant to Tennessee Rules of Civil Procedure 56 and 57, respectfully moves this Court for summary declaratory judgment. As grounds for this motion, the Plaintiff has filed an accompanying *Statement of Undisputed Material Facts* and *Memorandum of Law*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2020, 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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NOTICE OF HEARING

This motion is set for hearing on July 17, 2020 at 9:00 a.m. If no response is timely filed and served, the motion shall be granted, and counsel need not appear in court at the time and date scheduled for the hearing.

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Tennessee Code Annotated § 2-19-142—a criminal defamation statute that applies specifically to political speech and turns on the viewpoint expressed—contravenes both the First Amendment to the United States Constitution and article I, section 19 of the Tennessee Constitution. Several independent defects compel this conclusion.

First, Tennessee Code Annotated § 2-19-142 punishes only false political speech *in opposition to* candidates for elected office, while permitting false speech *in support of* such candidates. Such viewpoint discrimination is incompatible with the First Amendment, and no compelling interest supports it.

Second, Tennessee Code Annotated § 2-19-142 exclusively penalizes false campaign literature opposing candidates seeking elected office, while permitting all other false campaign literature and all speech regarding non-candidates. Such content-based restrictions on speech similarly contravene the First Amendment.

Third, Tennessee Code Annotated § 2-19-142's criminalization of "false" speech

cannot be reconciled with the U.S. Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709 (2012), which held that a statement's falsity alone is insufficient to remove it from the ambit of protection guaranteed by the First Amendment.

Fourth, Tennessee Code Annotated § 2-19-142 is unconstitutionally overbroad because it prohibits a substantial amount of constitutionally protected speech, both in an absolute sense and relative to the statute's legitimate sweep, and because a substantial number of instances exist in which § 2-19-142 cannot be applied constitutionally.

Fifth, by restricting speech based on its content, by proscribing protected speech, and by criminalizing political speech based on viewpoint, Tennessee Code Annotated § 2-19-142 contravenes the more expansive protections of article I, section 19 of the Tennessee Constitution.

For all of these reasons, and because there is no material dispute that the Plaintiff has standing to maintain this action, Tennessee Code Annotated § 2-19-142 cannot withstand constitutional scrutiny. Accordingly, summary judgment should issue declaring Tennessee Code Annotated § 2-19-142 unconstitutional both facially and as applied to the Plaintiff.

II. FACTUAL BACKGROUND

Tennesseans for Sensible Election Laws ("TSEL"), a non-partisan multicandidate political campaign committee, has prepared and seeks to publish several campaign advertisements in opposition to two candidates for state office in Tennessee. *See* Ex. B & C to Plaintiff's Complaint. For example, TSEL wishes to circulate campaign literature in opposition to Tennessee State Representative Bruce Griffey (R-Paris), who recently introduced a bill to promote the state-sponsored chemical castration of certain disfavored

citizens. *See* Joel Ebert, *Republican Lawmaker Files Bill to Chemically Castrate Convicted Sex Offenders*, TENNESSEAN (Jan. 3, 2020), https://www.tennessean.com/story/news/politics/2020/01/03/tennessee-republican-lawmaker-files-bill-chemically-castrate-sex-offenders/2803880001/. Given what TSEL considers to be the abhorrent nature of Representative Griffey's legislation and the historical horror of similar eugenics policies, TSEL wishes to publish and circulate campaign literature in opposition to Representative Griffey that both urges voters to vote against him and indicates, among other things, that Representative Griffey is "literally Hitler." *See* Ex. B to Plaintiff's Complaint.

If published and distributed, however, TSEL's campaign literature would run afoul of Tennessee Code Annotated § 2-19-142, which provides that:

> It is a Class C misdemeanor for any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election if such person knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is false.

Specifically, because Representative Griffey is not, in fact, "literally Hitler," and because TSEL knows that Representative Griffey is not literally Hitler, TSEL's campaign literature would violate § 2-19-142, thus subjecting TSEL to criminal prosecution carrying a sentence of up to thirty days in jail.[1] *See* TENN. CODE ANN. § 40-35-111(e)(3) (current with laws from the 2020 1st Reg. Sess. of the 111th Tenn. Gen. Assemb., eff. through Apr. 2,

[1] Critically, beyond just threatening criminal liability, Tennessee Code Annotated § 2-19-142 also creates genuine risk of civil liability, and it both can be and has been enforced in civil contexts as well. *See, e.g.*, *Jackson v. Shelby Cty. Civil Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518, at *2 (Tenn. Ct. App. Jan. 10, 2007) ("Following a *Loudermill* hearing on August 21, 2002, Mr. Jackson was determined to have engaged in 'acts of misconduct, which are job related,' where he violated Tennessee Code Annotated § 2-19-142, the statutory provision prohibiting publication and distribution of campaign literature against a candidate in an election containing statements which the distributor/publisher knows to be false."), *no app. filed*; *Murray v. Hollin*, No. M2011-02692-COA-R3CV, 2012 WL 6160575, at *1 (Tenn. Ct. App. Dec. 10, 2012) ("Ms. Murray's libel case is brought under Tennessee Code Annotated Section 2–19–142 . . . ."), *perm. to app. denied* (Tenn. Apr. 9, 2013).

2020). TSEL is also subject to the same risks if it publishes its other proposed advertisements, *see* Ex. C to Plaintiff's Complaint, as is anyone else—including a newspaper—who distributes or republishes them. *See* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009) (advising that "a prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections"). In the recent past, TSEL also published and distributed satirical and hyperbolic campaign literature in opposition to candidates for state office while knowing—in advance of publication and distribution—that the satirical and hyperbolic statements, charges, and allegations contained in its campaign literature were false. *See* Ex. A to Plaintiff's Complaint; *It Shouldn't Be a Crime to Make Fun of Your State Representative. In Tennessee, It Is.*, TENNESSEANS FOR SENSIBLE ELECTION LAWS (Aug. 13, 2018), https://bit.ly/36Y6G9T (urging voters to: "**Vote against Rep. Camper and Sen. Tate in the next election**. After all, they have cauliflower for brains.").

III. STANDARD FOR SUMMARY JUDGMENT

Tennessee Rule of Civil Procedure 56.01 provides that:

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

More than 30 days having elapsed, the Plaintiff moves for summary judgment as to all claims and as to the Defendant's defenses.

Where, as here, the disputed issues turn on questions of law, summary judgment is almost always appropriate. *See B & B Enters. of Wilson Cty., LLC v. City of Lebanon*, 318 S.W.3d 839, 844 (Tenn. 2010) ("Summary judgments are appropriate in virtually every

civil case that can be resolved on the basis of legal issues alone." (citing *Green v. Green*, 293 S.W.3d 493, 513 (Tenn. 2009); *Fruge v. Doe*, 952 S.W.2d 408, 410 (Tenn. 1997); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993))). Separately, where questions of fact are raised, "[s]ummary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015) (citing Tenn. R. Civ. P. 56.04, 56.06), *cert. denied*, 136 S. Ct. 2452 (2016). Under such circumstances, to avoid summary judgment, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06.

Critically, "'[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.'" *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 210 (2014) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)). Thus, the State bears the burden of proof as to the merits of this matter, *see id.*, and as detailed below, *see infra*, at pp. 7–10, TSEL's claims regarding Tennessee Code Annotated § 2-19-142's content discrimination under the First Amendment and TSEL's Tennessee Constitution article I, section 19 claim trigger strict scrutiny. Accordingly, Tennessee Code Annotated § 2-19-142 is "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)) (internal quotation marks omitted).

When applying strict scrutiny, "the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives."

Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004). Further, mere conjecture is insufficient to carry a First Amendment burden. *See, e.g.*, *Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *16 (Tenn. Ct. App. Dec. 12, 2019) ("The Supreme Court has 'never accepted mere conjecture as adequate to carry a First Amendment burden.'" (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000))), *no app. filed*. *See also Republican Party of Minn. v. White,* 536 U.S. 765, 781 (2002) ("[I]t suffices to say that respondents have not carried the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of open-mindedness) on which the validity of the announce clause rests.") (citations omitted).

Thus, taken together:

> When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 183, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999) ("[T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction"); *Reno*, 521 U.S., at 879, 117 S. Ct. 2329 ("The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . ."); *Edenfield v. Fane*, 507 U.S. 761, 770–771, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *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) ("[T]he State bears the burden of justifying its restrictions . . ."); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) ("In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"). When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. "Content-based regulations are presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), and the Government bears the burden to rebut that presumption.

Playboy Entm't Grp., 529 U.S. at 816–17.

Independently, a movant may demonstrate its entitlement to summary judgment "by affirmatively negating an essential element of the nonmoving party's claim . . . ." *Rye*, 477 S.W.3d at 264. Thus, TSEL is entitled to summary judgment if it can demonstrate beyond material dispute that Tennessee Code Annotated § 2-19-142 is not narrowly tailored to further a compelling governmental interest. *See Reed*, 135 S. Ct. at 2226 ("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.") (collecting cases). TSEL is also entitled to summary judgment as to its overbreadth claim if it can demonstrate beyond material dispute that "'a substantial number of [Tennessee Code Annotated § 2-19-142's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)) (internal quotation marks omitted).

IV. APPLICABLE CONSTITUTIONAL STANDARDS

A. PLAINTIFF'S CONTENT DISCRIMINATION CLAIMS

1. Viewpoint Discrimination

TSEL asserts that because Tennessee Code Annotated § 2-19-142 punishes only false political speech *in opposition to* candidates for elected office while simultaneously permitting false political speech *in support of* such candidates, § 2-19-142 discriminates on the basis of viewpoint. Viewpoint discrimination is presumptively forbidden, *see Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)

("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (collecting cases), and it is regarded as "an egregious form of content discrimination[,]" *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Accordingly, viewpoint discrimination triggers strict scrutiny, which requires the Government to demonstrate that Tennessee Code Annotated § 2-19-142 is "narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. *See also Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248 (6th Cir. 2015) ("Both content- and viewpoint-based discrimination are subject to strict scrutiny." (citing *McCullen v. Coakley*, 134 S. Ct. 2518, 2530, 2534 (2014))). "No state action that limits protected speech will survive strict scrutiny unless the restriction is narrowly tailored to be the least-restrictive means available to serve a compelling government interest." *Id.* (citing *Playboy Entm't Grp.*, 529 U.S. at 813).

2. <u>Content Discrimination Generally</u>

TSEL asserts that because Tennessee Code Annotated § 2-19-142 exclusively penalizes false campaign literature opposing candidates seeking elected office while permitting, among other things, all other false campaign literature, all other false speech opposing candidates, and all speech regarding non-candidates, § 2-19-142 discriminates on the basis of speech's content. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) (citations omitted). Such a defect triggers strict scrutiny, which only permits the Government to "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable Commc'ns*

of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989).

3. Criminalization of Political Speech Based on "Falsity"

The mere fact that a statement is false does not remove it from the First Amendment's protection. *See Alvarez*, 567 U.S. at 723 ("Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." (citing G. ORWELL, NINETEEN EIGHTY–FOUR (1949) (Centennial ed. 2003))). To the contrary, "the Supreme Court has recognized that to sustain our constitutional commitment to uninhibited political discourse, the State may not prevent others from 'resorting to exaggeration, to vilification of men who have been, or are, prominent in church and state, and *even to false statement*.'" *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wash. 2d 618, 625 (1998) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)) (cleaned up). Accordingly, a statute's attempt to regulate falsity triggers strict scrutiny. *See generally Alvarez*, 567 U.S. 709 (holding that that the federal Stolen Valor Act constituted a content-based restriction on free speech that violated the First Amendment).

Tennessee Code Annotated § 2-19-142 also expressly criminalizes political speech—"an area in which the importance of First Amendment protections is 'at its zenith.'" *Meyer v. Grant*, 486 U.S. 414, 425 (1988). "For that reason[,] the burden that [Tennessee] must overcome to justify this criminal law is well-nigh insurmountable." *Id.* Additionally, given the chilling effect that arises where—as here—a speech restriction

carries the potential for criminal punishment, the Supreme Court has long indicated that especially heightened scrutiny is warranted. *See, e.g.*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 872 (1997) ("[T]he CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."); *Citizens United v. F.E.C.*, 558 U.S. 310, 349 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."); *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."). *See also Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 745 (9th Cir. 2012) ("The threat to infringement of such First Amendment rights is at its greatest when, as here, the state employs its criminalizing powers.").

4. <u>Article I, section 19 of the Tennessee Constitution</u>

Like its federal counterpart, article I, section 19 of the Tennessee Constitution demands strict scrutiny of content-based speech regulations. *See generally Doe v. Doe*, 127 S.W.3d 728, 737 (Tenn. 2004). Thus, where the Government fails to demonstrate that a content-based speech restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end[,]" the law must be invalidated as one that "violates free speech rights under Article I, section 19 of the Tennessee Constitution[.]" *Id.*

B. OVERBREADTH

TSEL asserts that because Tennessee Code Annotated § 2-19-142 restricts a substantial amount of protected speech in relation to the speech that it may restrict legitimately, § 2-19-142 is unconstitutionally overbroad. Under the overbreadth doctrine established by the U.S. Supreme Court, "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange*, 552 U.S. at 449 n.6).

V. ARGUMENT

A. PLAINTIFF'S FEDERAL CONSTITUTIONAL CLAIMS

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The Free Speech Clause has been incorporated against the states through the Due Process Clause of the Fourteenth Amendment, *see Gitlow v. New York*, 268 U.S. 652, 666 (1925)), and accordingly, it protects against State infringement of free speech protections. The First Amendment's protections are especially robust with respect to political speech, which lies at the core of the First Amendment and "must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 340. *See also id.* at 339–40 ("The First Amendment 'has its fullest and most urgent application to speech uttered during a campaign for political office.'") (citations and internal quotation marks omitted); *Meyer*, 486 U.S. at 425 (describing political speech as "an area in which the importance of First Amendment protections is 'at its zenith'").

1. <u>Viewpoint-Based Discrimination</u>

"Viewpoint discrimination is censorship in its purest form[,] and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting). As such, "[o]nce the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects[.]" *Id.* Despite being distinct in some respects, viewpoint discrimination is regarded as "an egregious form of content discrimination[,]" which triggers strict constitutional scrutiny as detailed above. *See Rosenberger*, 515 U.S. at 829. *See also Reed*, 135 S. Ct. at 2230 ("Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" (quoting *Rosenberger*, 515 U.S. at 829)).

With respect to the challenged statute at issue here, Tennessee Code Annotated § 2-19-142 provides that:

> It is a Class C misdemeanor for any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election if such person knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is false.

Thus, while Tennessee Code Annotated § 2-19-142 prohibits specified false political speech "in opposition to any candidate in any election," it does <u>*not*</u> prohibit false speech <u>*in support of*</u> such candidates. *See id.* In other words: Tennessee Code Annotated § 2-19-142 does not forbid false statements about candidates generally; instead, it prohibits false statements about candidates based on the specific viewpoint being expressed, with "opposition to" a candidate serving as the factor that determines whether

publishing campaign literature is lawful or "a Class C misdemeanor." *See id.*

This distinction is not trivial. Suppose, for example, that a candidate for reelection abstains from voting on controversial abortion legislation. Under such circumstances, a pro-choice PAC could lawfully distribute a mailer urging voters to "vote for" the candidate on the basis that she supported the legislation at issue, while a pro-life PAC would be subject to criminal sanction for distributing a mailer urging voters to "vote against" the candidate for the same reason. Under such circumstances, where the First Amendment's "marketplace of ideas" is concerned, *see Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2374, Tennessee Code Annotated § 2-19-142's one-sided approach to false speech skews the distribution of ideas and political campaign literature by prohibiting falsity only in one direction. *Cf. Patel v. Zillow, Inc.*, 915 F.3d 446, 448 (7th Cir. 2019) ("Suppose plaintiffs are right to think that the Zestimates for their properties are too low. Removing them from the database would skew the distribution, because all mistakes that favored property owners would remain, not offset by errors in the other direction.").

Indeed, even the *same* campaign literature containing a knowingly false "statement, charge, allegation, or other matter[,]" TENN. CODE ANN. § 2-19-142, can be considered either lawful or criminal depending on whether it expresses support for or opposition to a candidate. Consider, for instance, TSEL's proposed campaign mailer regarding Representative Bruce Griffey, which urges voters to "Vote **NO** on Bruce Griffey" because "He's *literally* Hitler." *See* Ex. B to Plaintiff's Complaint. The transparent purpose of the mailer is to urge voters who are likely to be disturbed by Representative Griffey's overlap with one of history's most vile despots to oppose him. If modified solely to reflect that voters should instead "Vote **FOR** Bruce Griffey" because "He's *literally* Hitler," though—a message that is undoubtedly attractive to at least some number of

Tennessee's voters, *see* Angele Latham, *Tennessee Sees Highest Rate of White Supremacy Events in Nation for 2018*, MTSU SIDELINES (2019), http://mtsusidelines.com/2019/07/tennessee-sees-highest-rate-of-white-supremacy-events-in-nation-for-2018/—the Plaintiff's mailer instantly transforms from a criminal offense into a lawful campaign advertisement. *See* TENN. CODE ANN. § 2-19-142. Such a viewpoint-based restriction cannot possibly be lawful, and unsurprisingly, it is not lawful under any circumstance. *See, e.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1936 (2019) (Sotomayor, J., dissenting) ("[W]hile many cases turn on which type of 'forum' is implicated, the important point here is that viewpoint discrimination is impermissible in them all." (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) ("The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint[.]"))). *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment) (decrying that "the government has singled out a subset of messages for disfavor based on the views expressed").

2. Content-based Discrimination Generally

More broadly, Tennessee Code Annotated § 2-19-142 suffers from another fatal content-based infirmity: It only applies to false campaign literature about candidates. Thus, it does not prohibit false political speech regarding elected officials who are not running for office or about non-candidates generally. *See id.* Nor does prohibit false political speech about political referenda, political issues, political parties, PACs, or false speech of any kind about anything else. *See id.*

In other words: Where political speech at the core of the electoral process is

concerned—"an area in which the importance of First Amendment protections is 'at its zenith,'" *see Meyer*, 486 U.S at 425—Tennessee law remarkably accords the speech *less* protection than speech about other topics and subjects it to criminal sanction to boot. *But see id.*; *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("[D]ebate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))), *superseded by statute on other grounds as recognized in McConnell v. F.E.C.*, 540 U.S. 93 (2003); *119 Vote No! Comm.*, 135 Wash. 2d at 626 ("[T]he First Amendment prohibits the State from silencing speech it disapproves, particularly silencing criticism of government itself. Threats of coerced silence chill uninhibited political debate and undermine the very purpose of the First Amendment." (citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. at 791 (1988); *Brown v. Hartlage,* 456 U.S. 45, 61 (1982); *Meyer*, 486 U.S. at 419–20)); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (collecting cases). The additional fact that Tennessee Code Annotated § 2-19-142 applies only to "campaign literature"—but not to other forms of speech—only exacerbates this infirmity. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. . . . Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.").

Put another way: Tennessee Code Annotated § 2-19-142 is a content-based

restriction on speech that targets both the topic discussed and the message expressed. *See Reed*, 135 S. Ct. at 2227 ("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." (citing *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663–2664 (2011); *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972))). As such, it is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Id.* at 2226.

3. <u>Tennessee Code Annotated § 2-19-142 cannot withstand strict scrutiny.</u>

Given the First Amendment's "heightened protections for political speech[,]" Tennessee has no legitimate—much less compelling—interest in allowing "government censors to vet and penalize political speech about . . . individual candidates." *Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826, 829–30 (Wash. 2007) (en banc). Further, even if such an interest existed, Tennessee Code Annotated § 2-19-142 would not be sufficiently narrowly tailored to achieve it. *Cf. Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474–76 (6th Cir. 2016) (finding that similar Ohio false campaign statements law could not withstand strict scrutiny for six independent reasons). Accordingly, Tennessee Code Annotated § 2-19-142 cannot survive strict scrutiny, *see id.,* and as the Sixth Circuit has noted in a recent decision striking down a similar (indeed, a far better tailored[2]) Ohio law,

[2] As the Sixth Circuit explained before enjoining the law, "Ohio's political false-statements laws prohibit[ed] persons from disseminating false information about a political candidate in campaign materials during the campaign season 'knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.'" *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 469–70 (6th Cir. 2016) (quoting OHIO REV. CODE § 3517.21(B)(10)). Thus, Ohio's since-invalidated law was at least viewpoint neutral—applying to false statements that promote either "the election . . . or defeat" of a candidate—and it also applied to "'[c]ampaign

several "[o]ther courts to evaluate similar laws post-*Alvarez* have reached the same conclusion[,]" *id.* at 476 (citing *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014) ("[N]o amount of narrow tailoring succeeds because [Minnesota's political false-statements law] is not necessary, is simultaneously overbroad and underinclusive, and is not the least restrictive means of achieving any stated goal."), *cert. denied*, 135 S. Ct. 1550 (2015); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (Mass. 2015) (striking down Massachusetts's law, which was similar to Ohio's); *see also Rickert*, 168 P.3d at 829–31 (striking down Washington's political false-statements law, which required proof of actual malice, but not defamatory nature)). *See also Magda v. Ohio Elections Comm'n*, 58 N.E.3d 1188, 1205 (2016) ("On its face and with particular application to the appellants' situation, R.C. 3517.21(B)(1) is overbroad and unconstitutional. R.C. 3517.21(B)(1) represents a broad-sweeping effort to control the election process beyond what is necessary to achieve election integrity. The Commission has not presented sufficient evidence that R.C. 3517.21(B)(1) is actually needed to achieve this aim or even that it does achieve this aim, beyond what counterspeech may feasibly remedy. In this instance, the statements on appellants' campaign materials could have been debunked readily and obviously with the counterstatement that Magda was not and has never been the Ashtabula County treasurer.").

Of note, several pre-*Alvarez* decisions are in accord as well. *See, e.g.*, *Rickert v. Pub. Disclosure Comm'n*, 129 Wash. App. 450, 466 (2005) ("The PDC has therefore failed to establish that RCW 42.17.530(1)(a) is narrowly tailored to further its interest in

materials' . . . broadly defined[,]" *id.* at 470, rather than merely "campaign literature[,]" *see* TENN. CODE ANN. § 2-19-142.

preventing dishonesty in elections. Moreover, RCW 42.17.530(1)(a) is unconstitutionally overbroad in that it covers every false statement of material fact made with actual malice—regardless of whether it is defamatory. *See 119 Vote No!*, 135 Wash.2d at 627–28. Thus, RCW 42.17.530(1)(a)'s prohibition against any false statement of material fact about a candidate chills protected political speech."), *aff'd*, 168 P.3d 826 (Wash. 2007); *Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1123 (D. Haw. 2001) (holding that "the Code of Fair Campaign Practices is not justified by a compelling interest and, thus, fails strict scrutiny"). *Cf. Comm. of One Thousand to Re-Elect State Senator Walt Brown v. Eivers*, 674 P.2d 1159, 1166 n.1 (1983) (en banc) (Linde, J., concurring) (noting, although constitutionality of the statute had not been placed at issue, that "ORS 260.532 is not confined to defamatory or even critical statements about a candidate, nor to a remedy for injury to reputation.").

a. Tennessee Code Annotated § 2-19-142 does not further a compelling governmental interest.

Because false speech generally enjoys First Amendment protection, the Government cannot plausibly have a compelling interest in restricting it. *See Alvarez*, 567 U.S. at 722 ("The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech . . . .").

> [T]here can be no doubt that there is affirmative constitutional value in at least some knowingly false statements of fact. Satirical entertainment such as The Onion, The Daily Show, and The Colbert Report thrives on making deliberate false statements of fact. Such media outlets play a significant role in inviting citizens alienated by mainstream news media into meaningful public debate over economic, military, political and social issues. However, even if such satirical writings and shows did not invite attention to and comment about issues of "public importance," would anyone with even a rudimentary knowledge of First Amendment law seriously argue that the satirical, false statements frequently contained in such writing and programming are categorically outside First Amendment protection? *See*

> *Sullivan*, 376 U.S. at 279 n. 19, 84 S. Ct. 710 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" (quoting John Stuart Mill, On Liberty 15 (Oxford: Blackwell 1947))). Further, whether it be method actors getting into character, satirists being ironic or sarcastic, poets using hyperbole, or authors crafting a story, creative persons often make factual statements or assertions which, as they are fully aware, are entirely untrue. Such creative uses of knowingly false speech are highly protected. *Cf. Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) (requiring obscenity statutes to apply only to works that "taken as a whole, do not have serious literary, artistic, political, or scientific value").
>
> Thus, false factual speech as a general category is not, and cannot be, proscribed under threat of criminal prosecution.

Alvarez, 617 F.3d 1198, 1213–14 (9th Cir. 2010), *aff'd*, 567 U.S. 709 (2012).

As such—and, indeed, expressly acknowledging the value of false speech—"the Supreme Court has recognized that to sustain our constitutional commitment to uninhibited political discourse, the State may not prevent others from 'resort[ing] to exaggeration, to vilification of men who have been, or are, prominent in church and state, and *even to false statement*.'" *119 Vote No! Comm.*, 135 Wash. 2d at 625 (quoting *Cantwell*, 310 U.S. at 310). *See also Sullivan*, 376 U.S. at 279 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" (quoting JOHN STUART MILL, ON LIBERTY 15 (Oxford: Blackwell 1947))); *Alvarez*, 567 U.S. at 723 ("Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." (citing G. ORWELL, NINETEEN EIGHTY–FOUR (1949) (Centennial ed. 2003))); *Hustler Magazine, Inc.*

v. Falwell, 485 U.S. 46, 54 (1988) ("Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate.").

Further, even when false speech presents a problem, the government's interest cannot be censorship. Instead, the appropriate remedy is counterspeech. *See, e.g.*, *Susan B. Anthony List*, 814 F.3d at 472 ("*Alvarez* confirms that the First Amendment protects the 'civic duty' to engage in public debate, with a preference for counteracting lies with more accurate information, rather than by restricting lies." (citing *Alvarez*, 567 U.S. at 727)). *See also Alvarez*, 567 U.S. at 726 ("The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest."). Thus, where the Government wishes to expose false speech, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Put another way: The Government cannot appoint itself the "final arbiter of truth in political debate[.]" *Rickert*, 168 P.3d at 827. The right and responsibility to discern fact from fiction during political campaign belongs exclusively to voters. *See Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us." (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943))). By allowing the State to prosecute alleged falsities and imposing a prior restraint

against them, Tennessee Code Annotated § 2-19-142 turns this fundamental constitutional principle on its head. Certainly, the Government's interest cannot be censorship compelled by the threat of criminal prosecution and imprisonment. *See, e.g.*, *Reno*, 521 U.S. at 872 ("[T]he CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."); *Citizens United*, 558 U.S. at 349 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."); *Dombrowski*, 380 U.S. at 494 ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."). *See also Sanders Cty. Republican Cent. Comm.*, 698 F.3d at 745 ("The threat to infringement of such First Amendment rights is at its greatest when, as here, the state employs its criminalizing powers.").

For all of these reasons, Tennessee Code Annotated § 2-19-142—which enforces censorship of generally protected political speech through the threat of criminal prosecution—cannot plausibly further any compelling governmental interest. *See, e.g.*, *Rickert*, 168 P.3d at 832 (finding that "government censorship . . . is not a constitutionally permitted remedy" and invalidating Washington law that prohibited false speech in elections). As a consequence, Tennessee Code Annotated § 2-19-142 fails to satisfy strict scrutiny as a matter of law. *See, e.g.*, *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002) ("Whether something qualifies as a compelling interest is a question of law.")

(citations omitted); *McRae v. Johnson*, 261 F. App'x 554, 557 (4th Cir. 2008) ("Whether something qualifies as a compelling interest is a question of law, as well as whether the challenged policy constitutes the least restrictive means of addressing a compelling government interest.") (cleaned up).

b. Tennessee Code Annotated § 2-19-142 is not narrowly tailored.

Assuming—for the sake of argument—that Tennessee Code Annotated § 2-19-142 did support some compelling interest relating to promoting election integrity, it must nonetheless be invalidated because, as a matter of law, it is not narrowly tailored to achieve any such interest. *See, e.g.*, *Hoevenaar v. Lazaroff*, 422 F.3d 366, 368 (6th Cir. 2005) ("[T]he district court's analysis of whether the prison regulations were the least restrictive means is a question of law, subject to de novo review."); *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 . . . ."). In particular, Tennessee Code Annotated § 2-19-142 is at once both fatally overinclusive—prohibiting far more speech than necessary to achieve the Government's supposed interest—and fatally underinclusive, providing insufficient protection to achieve the interest the Government purports to be promoting. *But see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring in the judgment) ("A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal."); *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.") (citations omitted). Accordingly, Tennessee Code Annotated § 2-19-142 is not sufficiently narrowly tailored to satisfy strict scrutiny. *See id.* Several independent reasons compel this conclusion.

First, as detailed above, Tennessee Code Annotated § 2-19-142 does not actually prohibit electoral dishonesty or promote honesty when it comes to campaign literature about candidates. Indeed, it does not even prohibit false statements about candidates generally. Instead, it prohibits only false statements "in opposition to" candidates, leaving false statements supporting candidates, false statements about referenda, false statements about political parties, false statements about PACs, and false statements about political issues unaffected. *See id. But see, e.g.*, *Rickert*, 168 P.3d at 831 (finding that a statute that exempted false statements candidates made about themselves from criminal prosecution was not narrowly tailored).

Second, Tennessee Code Annotated § 2-19-142 does not even succeed in proscribing knowingly false statements "in opposition to any candidate in any election[.]" Instead, it prohibits only the publication or distribution of false "campaign literature in opposition to any candidate in any election . . . ." *Id.* (emphasis added). Consequently, knowingly false statements made in opposition to a candidate that are broadcast on television or radio, during speeches or private conversations, or presented in countless other media all remain unprotected, *see* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009) ("Publication, broadcast and distribution are all different forms of communication . . . .")—allowances that render Tennessee Code Annotated § 2-19-142 fatally underinclusive with respect to the supposed interest being promoted. *See Entm't Merchants Ass'n*, 564 U.S. at 802 ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring

a particular speaker or viewpoint.") (collecting cases). Considered in this context, the only actual interest that Tennessee Code Annotated § 2-19-142 seems narrowly tailored to promote is to increase liability for newspapers and undermine civil safe harbor provisions that would otherwise govern retractions. *See* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009) ("[A] prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections. . . . We are not aware of anything that would preclude prosecution under Tenn. Code Ann. § 2-19-142 of a party who had retracted a false statement . . . .").

Third, Tennessee Code Annotated § 2-19-142 applies to all false statements in opposition to a candidate, including trivial and immaterial false statements that have nothing whatsoever to do with electoral issues. Thus, Tennessee Code Annotated § 2-19-142 treats "lying about a political candidate's shoe size" the same way as "lying about a candidate's party affiliation or vote on an important policy issue[.]" *See Susan B. Anthony List*, 814 F.3d at 475. As such, Tennessee Code Annotated § 2-19-142 is not narrowly tailored to protect the integrity of elections in any regard. *See id.*

Fourth, the timing of Tennessee Code Annotated § 2-19-142's enforcement process "is not narrowly tailored to promote fair elections." *See id.* at 474. *See also id.* at 475 ("[T]he law may not timely penalize those who violate it, nor does it provide for campaigns that are the victim of potentially damaging false statements."). Criminal proceedings carry uncertain length, and "[a] final finding that occurs after the election does not preserve the integrity of the election." *Id.* Further, an arrest during an election—in other words, "'a preelection probable-cause finding'"—may itself

> be viewed [by the electorate] as a sanction by the State," *Driehaus*, 134 S. Ct. at 2346 (quoting DeWine Amicus Br., 2014 WL 880938, at *13), that "triggers 'profound' political damage, even before a final [] adjudication,"

> *Ohio Elections Comm'n*, 45 F. Supp. 3d at 772 (quoting DeWine Amicus Br., 2014 WL 880938, at *6).

Id.

Fifth, Tennessee Code Annotated § 2-19-142 forbids "any person"—including commercial intermediaries and printers—to "publish or distribute or cause to be published or distributed" knowingly false campaign literature. *See* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009) ("[A] prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections. . . ."). *But see Susan B. Anthony List*, 814 F.3d at 475 ("[P]rosecuting a billboard company executive, who was simply the messenger, is not narrowly tailored to preserve fair elections."). *Cf. Higgins v. Ky. Sports Radio, LLC*, 951 F.3d 728, 739 (6th Cir. 2020) ("Merely repeating potentially false reviews generated by other users may be in bad taste. But it cannot by itself constitute defamation. And good thing too. If it could, any news article discussing a tendentious Twitter exchange could land its author in front of a jury. That would make the authors of the First Amendment cringe."). Indeed, Tennessee Code Annotated § 2-19-142 is so broad that it seemingly prohibits anyone who passively receives campaign literature that they know to be false from republishing it anywhere for any reason, even for the purpose of discussing its falsity.

Sixth, Tennessee Code Annotated § 2-19-142 is not even remotely restricted to defamatory statements, and it criminalizes far more speech than defamation law permits. Specifically, Tennessee Code Annotated § 2-19-142 provides no exceptions for rhetorical hyperbole, *see, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990); it does not exempt parody and satire, *see, e.g.*, *Hustler Magazine*, 485 U.S. at 57; it criminalizes substantially true but literally false statements, which are not defamatory as a matter of

law, *see, e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991); and it does not comport with Tennessee's requirement that a false statement constitute a serious threat to one's reputation in order to be actionable as defamation, *Loftis v. Rayburn*, No. M2017-01502-COA-R3-CV, 2018 WL 1895842, at *4 (Tenn. Ct. App. Apr. 20, 2018), *no app. filed*. Nor does Tennessee Code Annotated § 2-19-142 require any damages to sustain a violation. *See id*. *But see Hibdon v. Grabowski*, 195 S.W.3d 48, 68 (Tenn. Ct. App. 2005) ("Under Tennessee law, a plaintiff is required to prove actual damages in all defamation cases." (citing *Handley v. May*, 588 S.W.2d 772, 776 (Tenn. Ct. App. 1979))). Accordingly, Tennessee Code Annotated § 2-19-142 proscribes far more speech than even defamation law allows, and as such, the Attorney General's published guidance that § 2-19-142 "is consistent with the *New York Times [v. Sullivan]*" standard and that "a prosecution . . . under Tenn. Code Ann. § 2-19-142 would not be barred by the *New York Times* rule[,]" Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009), is flatly wrong.

Seventh, Tennessee Code Annotated § 2-19-142 is not the least restrictive means of ensuring that the truth takes center stage in elections. *See 281 Care Comm.*, 766 F.3d at 793. As detailed above, the proper remedy for false statements of fact in the political arena—counterspeech—already exists under the First Amendment. *Id*. Criminal prosecution is unduly punitive and unnecessary. *See id*.

In sum: Because there is no set of facts that would permit the Defendant to prove that Tennessee Code Annotated § 2-19-142 is narrowly tailored to further a compelling governmental interest, thereby overcoming its presumptive unconstitutionality, § 2-19-142 contravenes the First Amendment to the United States Constitution. Tennessee Code Annotated § 2-19-142 should be declared unconstitutional as a matter of law—both facially and as applied to the Plaintiff—as a consequence.

4. Plaintiff's Overbreadth Claim

By its express terms, Tennessee Code Annotated § 2-19-142—which the Attorney General characterizes as "a criminal cause of action for defamation involving campaign literature[,]" see Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009)—forbids "any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election if such person knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is false[,]" *see* TENN. CODE ANN. § 2-19-142. As such, Tennessee Code Annotated § 2-19-142 criminalizes far more speech than defamation law—which has been constitutionalized by the U.S. Supreme Court, *see Press, Inc. v. Verran*, 569 S.W.2d 435, 440 (Tenn. 1978) ("the Supreme Court of the United States has constitutionalized the law of libel")—allows.

Specifically, by prohibiting *any* false statement in opposition to a candidate, Tennessee Code Annotated § 2-19-142 restricts a substantial amount of protected speech—including established protections for rhetorical hyperbole,[3] parody and satire,[4] and substantially true but literally false statements.[5] Given that Tennessee Code Annotated § 2-19-142 does not require either damages to one's reputation or any demonstration that a false statement constituted "a serious threat to one's reputation," § 2-19-142 also contravenes Tennessee's state defamation law, which mandates both. *See*

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[3] *See, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990); *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 286 (1974); *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970).

[4] *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988). *See also Farah v. Esquire Magazine*, 736 F.3d 528, 536 (D.C. Cir. 2013) ("Despite its literal falsity, satirical speech enjoys First Amendment protection.").

[5] *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) ("The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. . . . It overlooks minor inaccuracies and concentrates upon substantial truth.").

Hibdon, 195 S.W.3d at 68 ("Under Tennessee law, a plaintiff is required to prove actual damages in all defamation cases." (citing *Handley*, 588 S.W.2d at 776)); *Loftis*, 2018 WL 1895842, at *4 ("As we have explained in earlier defamation cases, [f]or a communication to be libelous, it must constitute a serious threat to the plaintiff's reputation. A libel does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element of disgrace.") (cleaned up).

Thus, Tennessee Code Annotated § 2-19-142 criminalizes a substantial amount of protected speech, and its legitimate sweep is far narrower. In particular, Tennessee Code Annotated § 2-19-142 can only be applied lawfully—at most–to material false statements that are made with actual malice, are not substantially true, constitute a serious threat to a subject's reputation, and demonstrably harm the person's reputation, with applicable exclusions for rhetorical hyperbole, parody, and satire. Even then, its proscription against defamatory speech cannot be selectively applied on the basis of viewpoint, and it must bend to applicable privileges like the absolute legislative privilege, *see Miller v. Wyatt*, 457 S.W.3d 405, 409 (Tenn. Ct. App. 2014); the absolute litigation privilege, *see Simpson Strong-Tie Co., Inc. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 22 (Tenn. 2007); the absolute testimonial privilege, *Wilson v. Ricciardi*, 778 S.W.2d 450, 453 (Tenn. Ct. App. 1989); and any number of other established privileges against defamation liability, *see, e.g.*, *Jones v. State*, 426 S.W.3d 50, 56 (Tenn. 2013).

In sum: Relative to its legitimate sweep, Tennessee Code Annotated § 2-19-142 is significantly, hopelessly, and unconstitutionally overbroad. Accordingly, as a matter of law, Tennessee Code Annotated § 2-19-142 should be declared unconstitutional.

B. PLAINTIFF'S TENNESSEE CONSTITUTIONAL CLAIMS

The Tennessee Constitution provides, in pertinent part, that "[t]he free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on *any* subject, being responsible for the abuse of that liberty." TENN. CONST. art. I, § 19 (emphasis added). "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.*, 569 S.W.2d at 442). In all cases, however, "Article 1, section 19 provides protection of free speech rights at least as broad as the First Amendment." *Doe*, 127 S.W.3d at 732 (citing *Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn. 1979)).

As noted above, like the First Amendment, article I, section 19 demands strict scrutiny of content-based speech regulations. *See id.* at 737. As additionally noted above, Tennessee Code Annotated § 2-19-142 cannot survive strict scrutiny both because it does not further any compelling governmental interest and because it is not narrowly tailored to further any compelling governmental interest. *See supra*, pp. 16–26.

C. THE DEFENDANTS' NON-MERITS DEFENSES CONCERNING SUBJECT MATTER JURISDICTION

The Defendants have asserted, as an affirmative defense, that this Court "lacks subject-matter jurisdiction over the claims asserted in Plaintiff's Complaint." *See* Defendants' Answer, p. 7, ¶ 1. To the extent that the defense is premised upon the claims that the Defendants previously raised, litigated, and lost, the defense fails based on the Court's previous ruling on the matter. *See* Memorandum & Order, May 14, 2020, p. 19 ("This Court therefore concludes that pursuant to Tennessee Code Annotated section 29-

14-102 it has subject matter jurisdiction to adjudicate the declaratory judgment claims in this case."). *See also id.* at p. 20 ("The Court further concludes that it has subject matter jurisdiction of the Plaintiff's declaratory judgment claim pursuant to Tennessee Code Annotated section 1-3-121."). However, because the Defendants appear to raise three new defenses within the rubric of subject matter jurisdiction—that: (1) "Plaintiff lacks standing to assert its claims[,]" *see* Defendants' Answer, p. 7, ¶ 2; (2) "Plaintiff's claims are non-justiciable[,]" *id.* at ¶ 4; and (3) "Plaintiff's claims are not ripe for review[,]" *id.* at ¶ 5—the Plaintiff moves for summary judgment as to those claims.[6]

1. <u>The Plaintiff has standing to assert its claims.</u>

As this Court correctly observed, during earlier litigation in this case, "[t]he Plaintiff's standing . . . has not been challenged by the Defendants." *See* Memorandum & Order, May 14, 2020, p. 20. Traditionally, the Defendants' failure to raise such a defense would result in waiver. However, "[s]tanding is a component of subject matter jurisdiction in this case, so it cannot be waived." *Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004) (citing *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 639 (Tenn. 1996)). Accordingly, it is proper for this Court to confirm the Plaintiff's standing to bring this action, *see id.*, and for the reasons detailed hereafter, TSEL has standing to do so.

a. Relaxed Standing Principles Applicable to First Amendment Facial Overbreadth Challenges

Unlike traditional controversies, the Supreme Court has "fashioned [an] exception to the usual rules governing standing" in cases involving facial overbreadth challenges to

[6] The Defendants also plead three additional "defenses" that are not defenses. *See* Defendants' Answer, p. 7, ¶ 3 (denying liability); *id.* at ¶ 6 (claiming entitlement to attorney's fees); *id.* at ¶ 7 (reserving a right to amend).

statutes that restrict First Amendment freedoms. *Dombrowski*, 380 U.S. at 486 (citing *United States v. Raines*, 362 U.S. 17, 20 (1960)). Specifically, the Supreme Court has explained, "[t]he ordinary injury-in-fact requirement for standing is properly relaxed in the case of facial overbreadth challenges 'because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application."'" *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1034 n.18 (5th Cir. 1981) (quoting *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975) (in turn quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))). "This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

Thus, in First Amendment overbreadth cases, litigants have "standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute[.]" *Bigelow*, 421 U.S. at 816 (citing NAACP, 371 U.S. at 433). As such, "[a]nticipatory constitutional challenges should not lightly be dismissed for lack of a justiciable controversy because . . . they 'play a most vital role in modern efforts to enforce constitutional rights.'" *Red Bluff Drive-In*, 648 F.2d at 1034 n.18 (quoting *Int'l Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 817 (5th Cir. 1979)). *Cf. Speech First, Inc. v. Schlissel*, 939 F.3d 756, 766–67 (6th Cir. 2019) ("The distinction between facial and as-applied challenges bears legal significance when

assessing standing. In *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1182, 1192 (6th Cir. 1995), the court found that Central Michigan students had standing to challenge their university's discriminatory-harassment policy. The students hadn't been punished under the policy, nor had the university acted concretely so as to threaten them with punishment. *Id.* at 1182. Yet, because the students were bringing a facial overbreadth challenge, the court found that the students had standing, even if they had 'not yet [been] affected by [the policy.]' *Id.*").

Here, TSEL has asserted a facial First Amendment overbreadth challenge to Tennessee Code Annotated § 2-19-142. *See supra,* pp. 27–28. As such, in order to establish its standing, "[t]he critical inquiry is whether the plaintiff can allege an injury arising from the specific rule being challenged . . . ." *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007). TSEL easily satisfies this requirement, as its desired conduct is criminally proscribed by the statute it challenges as overbroad. *See* Plaintiff's Complaint, ¶¶ 3–9; **Exhibit D** (Affidavit of George Scoville III). *Cf. Speech First*, 939 F.3d at 766 ("The University contends that Speech First lacks standing because there is no 'credible threat' that its members would be subject to discipline for protected speech. In support, the University argues that there is no evidence in the record that a student has faced discipline for having an 'intellectual debate.' This misses the point. The lack of discipline against students could just as well indicate that speech has already been chilled. . . . Students who violate the Statement are subject to a range of consequences, including expulsion. . . . Thus, Speech First has established a concrete and objective threat of harm and therefore has standing to challenge the definitions."). Accordingly, the Plaintiff has standing to maintain this action. *See id.*

b. Standing Principles Applicable to Penal Statutes

"When contesting the constitutionality of a criminal statute, 'it is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). *See also Epperson v. Arkansas*, 393 U.S. 97, 89 (1968); *Evers v. Dwyer*, 358 U.S. 202 (1958). Instead, the Supreme Court has explained, "[w]hen [a] plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt*, 442 U.S. at 298 (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). With respect to state law claims, Tennessee law is in accord. *See Campbell v. Sundquist*, 926 S.W.2d 250, 255–56 (Tenn. Ct. App. 1996) ("The appellants argue that the plaintiffs do not have standing to maintain this action, because none of the plaintiffs have been prosecuted under the HPA; therefore, none of them have suffered an injury as a result of the statute. . . . We think the plaintiffs' status as homosexuals confers upon them an interest distinct from that of the general public with respect to the HPA, and that they are therefore entitled to maintain an action under the Declaratory Judgment Act even though none of them have been prosecuted under the HPA."), *abrogated on other grounds by Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008).

Here, TSEL has unmistakably alleged an intention to engage in a course of conduct proscribed by Tennessee Code Annotated § 2-19-142. This also is not a case where the risk of enforcement is merely "'imaginary or speculative,'" *see Babbitt*, 442 U.S. at 298

(quoting *Younger v. Harris*, 401 U.S. 37, 42 (1969); *Golden v. Zwickler*, 394 U.S. 103 (1969)), or where the Plaintiff has not claimed "'even that a prosecution is remotely possible,'" *Babbitt*, 442 U.S. at 299 (quoting *Younger*, 401 U.S. at 42). To the contrary, claims under Tennessee Code Annotated § 2-19-142 have actually been prosecuted *against one of the Plaintiff's own lawyers*,[7] who faced $1,000,000.00 in liability in a lawsuit that lasted years as a result of the liability that § 2-19-142 creates. *See* **Exhibit A** (Complaint); *see also Murray v. Hollin*, No. M2011-02692-COA-R3CV, 2012 WL 6160575, at *1–2 (Tenn. Ct. App. Dec. 10, 2012) ("Ms. Murray's libel case is brought under Tennessee Code Annotated Section 2–19–142, which provides: 'It is a Class C misdemeanor for any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election if such person knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is false.' On September 13, 2010, Ms. Murray filed an amendment to the amended complaint as to Mr. Hollins [sic] only. This amendment incorporates the allegations contained in the amended complaint and goes on to state that, on or after September 15, 2009, Mr. Hollin published the following 'false and/or misleading statements' about Ms. Murray on the 'We the People of District 5' website . . . . "), *perm. to app. denied* (Tenn. Apr. 9, 2013). State employees can and have been subject to termination for violating the statute as well, *see, e.g.*, *Jackson v. Shelby Cty. Civil Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518, at *2 (Tenn. Ct. App. Jan. 10, 2007) ("Following a *Loudermill* hearing on August 21, 2002, Mr. Jackson was determined

[7] *See Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics & Campaign Fin.*, No. M201801967COAR3CV, 2019 WL 6770481 (Tenn. Ct. App. Dec. 12, 2019) ("Daniel A. Horwitz and **Jamie R. Hollin**, Nashville, Tennessee, for the appellee, Tennesseans for Sensible Election Laws.") (emphasis added), *no app. filed.*

to have engaged in 'acts of misconduct, which are job related,' where he violated Tennessee Code Annotated § 2-19-142, the statutory provision prohibiting publication and distribution of campaign literature against a candidate in an election containing statements which the distributor/publisher knows to be false."), *no app. filed.*, and District Attorneys General have threatened enforcement of its criminal provisions. *Id.* ("In a letter dated July 31, 2002, William L. Gibbons, District Attorney General, (Mr. Gibbons) informed Mr. Jackson that '[u]nder Tennessee law, it is a crime for a person to publish or distribute, or cause to be published or distributed, any campaign materials in opposition to any candidate if that persons [sic] knows that any statement or other matter contained on the materials [sic] is false.' Mr. Gibbons further advised: '[u]nless you have reason to believe that Mr. Key is a member of the KKK, the publication and distribution of such materials appear to violate our state criminal law, and any such publication or distribution should cease immediately.'").

Nor is Tennessee Code Annotated § 2-19-142's criminal enforcement mechanism some forgotten dead letter. To the contrary, during the past two consecutive legislative sessions, bipartisan leadership in both the Tennessee House of Representatives and the Tennessee Senate have taken steps to increase the punishment for violating Tennessee Code Annotated § 2-19-142 to a higher-level misdemeanor offense carrying substantial jail time. *See* **Exhibit B** (S.B. 2255 § 1, 111th Gen. Assemb. (Tenn. 2019) ("AN ACT to amend Tennessee Code Annotated, Title 2; Title 4; Title 5 and Title 6, relative to campaigns. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE: SECTION 1. Tennessee Code Annotated, Section 2-19-142, is amended by deleting the language 'Class C misdemeanor' and substituting instead the language 'Class B misdemeanor'."), http://www.capitol.tn.gov/Bills/111/Bill/SB2255.pdf); **Exhibit C**

(S.B. 1400 § 1, 110th Gen. Assemb. (Tenn. 2017) ("AN ACT to amend Tennessee Code Annotated, Title 2, relative to elections. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE: SECTION 1. Tennessee Code Annotated, Section 2-19-142, is amended by deleting the language 'Class C misdemeanor' and substituting instead the language 'Class A misdemeanor'.), http://www.capitol.tn.gov/Bills/110/Bill/SB1400.pdf). Tennessee officeholders' indication that speech with which they disagree will be designated "fake news" compounds this concern. *See* Andrew Blake, *Tennessee lawmakers advance measure to designate CNN, Washington Post as 'fake news' outlets*, WASH. TIMES (Feb. 27, 2020), https://www.washingtontimes.com/news/2020/feb/27/tennessee-lawmakers-advancemeasure-to-recognize-c/.

Perhaps the most serious threat, however, arises from Tennessee's Attorney General itself—a Defendant in this action. As detailed above, notwithstanding Tennessee Code Annotated § 2-19-142's extensive constitutional infirmities, the Attorney General has advised that there are no constitutional limitations to prosecutions under § 2-19-142 because the statute "is consistent with the *New York Times* standard[,]" and as such, that "a prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections." Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009). *See also id.* (advising that "a prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not be barred by the *New York Times* rule.").

Tennessee has separate "district attorneys general from the state's 31 judicial districts." *See* TENN. DISTRICT ATT'YS GEN. CONFERENCE, https://www.tndagc.org/about.html (last visited June 7, 2020). Each has the power to prosecute violations of Tennessee Code Annotated § 2-19-142. And based on the Attorney General's published

guidance detailed above, the Defendant has advocated the position that there is absolutely no constitutional bar to doing so.

Further, even the risk of an allegation that Tennessee Code Annotated § 2-19-142 has been violated or an investigation regarding the statute results in constitutional harm for standing purposes. *See, e.g.*, *Susan B. Anthony List*, 814 F.3d at 474 (referencing concerns about "profound political damage" even before a final adjudication) (cleaned up).

Further still, Tennessee Code Annotated § 2-19-142 does not merely apply to creators or original publishers of campaign literature. To the contrary, it also prohibits all recipients of TSEL's proposed campaign literature from republishing it or distributing it to others, *see* TENN. CODE ANN. § 2-19-142 ("It is a Class C misdemeanor for any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election . . . .") (emphasis added). *See also* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009) (advising that "a prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections"). This proscription necessarily limits the reach of the Plaintiff's message and constitutes a First Amendment injury sufficient to confer standing by itself. *See, e.g.*, *Nickolas v. Fletcher*, No. CIV.A.3:06CV00043 KK, 2007 WL 2316752, at *2 (E.D. Ky. Aug. 9, 2007) ("[A] decrease in readership constitutes a First Amendment injury sufficient to confer standing." (citing *Meyer*, 486 U.S. at 422–23 ("The refusal to permit appellees to pay petition circulators restricts political expression" by "limiting the number of voices who will convey appellees' message and the hours they can speak and, therefore, ***limits*** *the size of the audience they can reach*.") (cleaned up))), *no app. filed*.

c. Standing Conferred by Statute

As the Tennessee Supreme Court has instructed: "[w]hen a statute creates a cause of action and designates who may bring an action, the issue of standing is interwoven with that of subject matter jurisdiction and becomes a jurisdictional prerequisite." *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 n.8 (Tenn. 2013) (quoting *Osborn*, 127 S.W.3d at 740). This principle carries particular significance in the instant case, given: (1) that the Plaintiff has asserted a statutory claim under the cause of action established by Tennessee Code Annotated § 1-3-121 ("Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages."); and (2) that this Court has already held "that it has subject matter jurisdiction of the Plaintiff's declaratory judgment claim pursuant to Tennessee Code Annotated section 1-3-121[,]" Memorandum & Order, May 14, 2020, p. 20.

Because there is no serious doubt that TSEL—which has paid to design and seeks to distribute campaign literature that contravenes Tennessee Code Annotated § 2-19-142—qualifies as an "affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action[,]" *see* TENN. CODE ANN. § 1-3-121; TSEL satisfies the "jurisdictional prerequisite" necessary to prosecute a cause of action under Tennessee Code Annotated § 1-3-121, and it has standing to maintain this action as a consequence. *See City of Memphis*, 414 S.W.3d at 98.

2. <u>The Plaintiff's claims are ripe for review.</u>

The Tennessee Supreme Court has instructed that "'[t]he standing question [] bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention[.]" *Am. Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 620 n.7 (Tenn. 2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)). The Defendants do not explain the basis for their belief that "Plaintiff's claims are not ripe for review[,]" *see* Defendants' Answer, p. 7, ¶ 5, and no basis for that assertion is apparent. Here, TSEL has paid for professionally developed campaign literature opposing candidates for office in a forthcoming election. Absent a judicial declaration that Tennessee Code Annotated § 2-19-142 abridges TSEL's First Amendment rights and its rights under article I, section 19 of the Tennessee Constitution, publishing or distributing that campaign literature would contravene Tennessee Code Annotated § 2-19-142 and subject TSEL to the prospect of both civil and criminal liability. In other words: Far from being unripe, TSEL's claims present a "prototypical case" for review. *See State v. Price*, 579 S.W.3d 332, 338 (Tenn. 2019) ("The prototypical case of hardship comes from the claimant who faces a choice between immediately complying with a burdensome law or risking serious criminal and civil penalties.") (cleaned up).

Ripeness has two prongs. *Id.* The first prong examines "the fitness of the issues for judicial decision" to ensure that a ruling would be "based on an existing legal controversy." *Id.* (cleaned up). Given that TSEL has already developed its non-compliant campaign literature and seeks now to publish and distribute it without risking a criminal or civil sanction for doing so, all that is left to do is declare the Parties' rights and adjudicate their current controversy over whether Tennessee Code Annotated § 2-19-142—which unambiguously prohibits such publication and distribution—can

withstand constitutional scrutiny. Accordingly, the first prong of the ripeness inquiry is easily established.

"The second prong of the ripeness analysis takes into account 'whether withholding adjudication . . . will impose any meaningful hardship on the parties.'" *Price*, 579 S.W.3d at 338. As emphasized above, "[t]he prototypical case of hardship comes from the claimant who faces a choice between immediately complying with a burdensome law or risking serious criminal and civil penalties." *Id.* (cleaned up). As noted, that is precisely the situation here.

Further, "[i]n the context of a free-speech overbreadth challenge like this one, a relaxed ripeness standard applies to steer clear of the risk that the law 'may cause others not before the court to refrain from constitutionally protected speech or protection.'" *Carey v. Wolnitzek*, 614 F.3d 189, 196 (6th Cir. 2010) (quoting *Broadrick*, 413 U.S. at 612); *see also Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.") (collecting cases). This case, as detailed at length above, presents precisely such a challenge.

Further still, it is worth emphasizing that if TSEL had waited *any longer at all* for this matter to ripen, the Defendants would undoubtedly claim that this lawsuit was not merely ripe, but *overripe*, and that in keeping with the *Purcell* principle, this Court must withhold adjudication at least preliminarily on the basis that an upcoming election was so "'imminen[t]'" that it left "'inadequate time to resolve [ ] factual disputes' and legal disputes." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (quoting *Purcell Maricopa Cty. Recorder*, 549 U.S. 1, 5–6 (2006)). Indeed, the Defendants advanced that position successfully the last time the Parties had a dispute of this nature. *See*

Tennesseans for Sensible Election Laws, 2019 WL 6770481, at *3 ("According to the trial court's order, the court deemed it inappropriate to issue a preliminary injunction with only two days remaining before the primary election because other nonpartisan political campaign committees similar to TSEL would not have time to seek relief before the court, and TSEL would have an advantage in the August 2 primary that no other nonpartisan political campaign committee would have."). As a consequence, to enable adequate time for a motion to dismiss to be adjudicated and an Answer to be filed, and to permit time for resolution of factual and legal issues and other parties to seek relief if desired, *see id*., *see also Crookston*, 841 F.3d at 398, TSEL appropriately initiated this action after its injury ripened but before an election was imminent.

For all of these reasons, the Parties' existing and immediate controversy is ripe for review.

3. <u>The Plaintiff's claims are justiciable.</u>

The Defendants maintain that "Plaintiff's claims are non-justiciable." Defendants' Answer, p. 7, ¶ 4. The Defendants' Answer, however, provides few clues as to which of the "several varieties of the doctrine" of justiciability—which include "the prohibition against advisory opinions, standing, ripeness, mootness, the political question doctrine, and the exhaustion of administrative remedies"—Defendants believe is implicated. *See West v. Schofield*, 460 S.W.3d 113, 135 (Tenn. 2015) (Wade, J. concurring) (citing *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cty*., 301 S.W.3d 196, 203 (Tenn. 2009)).

Here, given that two specific justiciability doctrines—standing and ripeness—are expressly raised by the Defendants, *see* Defendants' Answer, p. 7, ¶¶ 2 & 5, the Plaintiff assumes that these are the justiciability doctrines that the Defendants believe function as

a bar to justiciability in this case. Because the Plaintiff has standing to maintain its claims in this action, however, *see supra*, pp. 30–38, and because the Plaintiff's claims are ripe for review, *see supra*, pp. 38–41, the Plaintiff's claims are justiciable, and this Court may safely adjudicate them. Indeed, where—as here—a court has subject matter jurisdiction over a plaintiff's claims, the judiciary is obligated to adjudicate them. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) ("[T]he Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821))); *Cohens*, 19 U.S. at 404 ("With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); *Associacao Brasileira de Medicina de Grupo v. Stryker Corp.*, 891 F.3d 615, 618 (6th Cir. 2018) (noting courts' "'virtually unflagging obligation . . . to exercise the jurisdiction given them" (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976))). *See also Jackson v. Smith*, 387 S.W.3d 486, 494 (Tenn. 2012) (holding that "[t]he power to fully and finally adjudicate cases and controversies is constitutionally assigned to the judiciary of this state," and that "courts must decide the cases brought before them based on the law existing at the time of their decisions and on the facts presented to them.") (citations omitted) (emphasis added). Given this context, it comes as no surprise that so many courts have adjudicated similar claims without difficulty. *See, e.g.*, *Susan B. Anthony List*, 814 F.3d at 474–76; *281 Care Comm.*, 766 F.3d at 785; *Lucas*, 34 N.E.3d at 1257; *Rickert*, 168 P.3d at 829–31; *Magda*, 58 N.E.3d at 1205; *Rickert*, 129 Wash. App. at 466; *119 Vote No!*, 135 Wash.2d at 627–28; *Ancheta*, 135 F. Supp. 2d at 1123.

VI. CONCLUSION

"The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office[,]" and "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S at 339–40 (cleaned up). With this context in mind, Tennessee Code Annotated § 2-19-142—a criminal defamation statute that: (1) applies exclusively to political speech about candidates for office, (2) discriminates on the bases of both content and viewpoint, (3) is not narrowly tailored to achieve any compelling governmental interest, and (4) criminalizes far more speech than is constitutionally permissible—cannot be sustained.

For the foregoing reasons, there is no genuine dispute as to Tennessee Code Annotated § 2-19-142's unconstitutionality, and the Plaintiff has standing to challenge it. Accordingly, TSEL's Motion for Summary should be **GRANTED**, and Tennessee Code Annotated § 2-19-142 should be **DECLARED** unconstitutional both facially and as applied to the Plaintiff.

Respectfully submitted,

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I hereby certify that on this 10th day of June, 2020, 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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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

TENNESSEANS FOR SENSIBLE ELECTION LAWS,	§	
Plaintiff,	§	
v.	§	Case No. 20-0312-III
HERBERT H. SLATERY III, *et al.*,	§	
Defendants.	§	

PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Tennessee Rule of Civil Procedure 56.03, the Plaintiff respectfully submits this Statement of Undisputed Material Facts, together with supporting record references where applicable, in support of its accompanying Motion for Summary Judgment:

Fact #1: This lawsuit centers upon political campaign literature that Tennesseans for Sensible Election Laws has previously published in opposition to candidates for elected office in Tennessee and that Tennesseans for Sensible Election Laws wishes to publish opposing Tennessee State Representatives Bruce Griffey and Rick Staples in their upcoming 2020 election campaigns. The political campaign literature at issue is attached [to Plaintiff's Complaint] as Exhibits A–C.[1]

Response:

[1] Plaintiff's Complaint, ¶ 22; Defendants' Answer ¶ 22 ("Defendants admit the allegations of paragraph no. 22 to the extent that they assert Plaintiffs' stated purpose in bringing this action . . . .").

Fact #2: Tenn. Code Ann. § 2-19-142 provides that:

> It is a Class C misdemeanor for any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election if such person knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is false.[2]

Response:

Fact #3: One or more Tennessee District Attorneys General has threatened to enforce Tennessee Code Annotated § 2-19-142's criminal penalty and demanded that publication or distribution of materials that violate Tennessee Code Annotated § 2-19-142 cease.[3]

Response:

[2] Tenn. Code Ann. § 2-19-142.

[3] *Jackson v. Shelby Cty. Civil Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518, at *1 (Tenn. Ct. App. Jan. 10, 2007).

Fact #4:

> In a letter dated July 31, 2002, William L. Gibbons, [a] District Attorney General, (Mr. Gibbons) informed [a citizen] that
>
> > [u]nder Tennessee law, it is a crime for a person to publish or distribute, or cause to be published or distributed, any campaign materials in opposition to any candidate if that persons [sic] knows that any statement or other matter contained on the materials [sic] is false [by operation of Tennessee Code Annotated § 2-19-142].
>
> Mr. Gibbons further advised:
>
> > [u]nless you have reason to believe that Mr. Key is a member of the KKK, the publication and distribution of such materials appear to violate our state criminal law, and any such publication or distribution should cease immediately.[4]

Response:

Fact #5: Government officials have also enforced Tenn. Code Ann. § 2-19-142 in civil contexts.[5]

Response:

[4] *Id.*

[5] *Id.* at *2 ("Following a Loudermill hearing on August 21, 2002, Mr. Jackson was determined to have engaged in 'acts of misconduct, which are job related,' where he violated Tennessee Code Annotated § 2-19-142, the statutory provision prohibiting publication and distribution of campaign literature against a candidate in an election containing statements which the distributor/publisher knows to be false. On August 23, Mr. Key informed Mr. Jackson in writing that his employment with the Clerk's Office would be terminated as of 4:30 that afternoon.").

Fact #6: Tenn. Code Ann. § 2-19-142 has additionally been used as a predicate for asserting private claims of civil liability.[6]

Response:

Fact #7: One of the individuals who has been sued for allegedly violating Tenn. Code Ann. § 2-19-142 is Jamie Hollin, who is one of the Plaintiff's attorneys and agents.[7]

Response:

[6] *See* **Exhibit A**. *See also Murray v. Hollin*, No. M2011-02692-COA-R3CV, 2012 WL 6160575, at *1–2 (Tenn. Ct. App. Dec. 10, 2012) ("Ms. Murray's libel case is brought under Tennessee Code Annotated Section 2–19–142, which provides: It is a Class C misdemeanor for any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election if such person knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is false.").

[7] *See id. See also Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481 (Tenn. Ct. App. Dec. 12, 2019) ("Daniel A. Horwitz and **Jamie R. Hollin**, Nashville, Tennessee, for the appellee, Tennesseans for Sensible Election Laws.") (emphasis added), *no app. filed.*

Fact #8: In consecutive legislative sessions, Tennessee legislators of both political parties have introduced legislation to raise the criminal penalty for violating Tenn. Code Ann. § 2-19-142.[8]

Response:

Fact #9: The Defendant Tennessee Attorney General has formally opined that prosecutions may be brought under Tenn. Code Ann. § 2-19-142—including "against a newspaper or other news medium"—without "rais[ing] any constitutional objections."[9]

Response:

[8] *See* **Exhibit B** (S.B. 2255 § 1, 111th Gen. Assemb. (Tenn. 2019) ("AN ACT to amend Tennessee Code Annotated, Title 2; Title 4; Title 5 and Title 6, relative to campaigns. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE: SECTION 1. Tennessee Code Annotated, Section 2-19-142, is amended by deleting the language 'Class C misdemeanor' and substituting instead the language 'Class B misdemeanor'."), http://www.capitol.tn.gov/Bills/111/Bill/SB2255.pdf); **Exhibit C** (S.B. 1400 § 1, 110th Gen. Assemb. (Tenn. 2017) ("AN ACT to amend Tennessee Code Annotated, Title 2, relative to elections. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE: SECTION 1. Tennessee Code Annotated, Section 2-19-142, is amended by deleting the language 'Class C misdemeanor' and substituting instead the language 'Class A misdemeanor'.), http://www.capitol.tn.gov/Bills/110/Bill/SB1400.pdf).

[9] *See* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009).

Fact #10: Given the extraordinarily serious criminal sanctions that Tennesseans for Sensible Election Laws faces both for publishing its prior campaign literature and if it continues to publish its desired campaign literature, Tennesseans for Sensible Election Laws has filed the instant action seeking, *inter alia*: (1) A declaration that Tenn. Code Ann. § 2-19-142 violates the First and Fourteenth Amendments to the United States Constitution both facially and as applied; and (2) A declaration that Tenn. Code Ann. § 2-19-142 violates Tenn. Const. art. I § 19 both facially and as applied.[10]

Response:

[10] Plaintiff's Complaint, ¶ 10; Defendants' Answer ¶ 10 ("Defendants admit the allegations of paragraph no. 10 to the extent that they assert Plaintiffs' stated purpose in bringing this action . . . ."). *See also* **Exhibit D** (Affidavit of George Scoville III).

Respectfully submitted,

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I hereby certify that on this 10th day of June, 2020, 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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By: /s/ Daniel A. Horwitz

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

PAMELA MURRAY, **Plaintiff,**	)	
v.	)	**No.** 10C3063
JAMIE HOLLINS, MIKE PEDEN, JAN MORRISON, ANDY REUTER, SAM McCULLOUGH, AMY BRYSON, PRECILLA EATON, LARRY EATON, TOM HAZELIP, TERI MISSILDINE, JAMES HARNEY, and BRENDA ROSS, individually and as members of "WE THE PEOPLE OF DISTRICT 5"	)	

COMPLAINT FOR DEFAMATION OF CHARACTER

Comes now Plaintiff and, for Complaint in this cause, would show the Court as follows:

I. NATURE OF THE CLAIM

1. Plaintiff Pamela Murray brings this action against the Defendants named herein for compensatory and punitive damages arising out of their intentional and malicious misconduct in defaming her through knowingly false and defamatory extra-judicial statements published in writing in the form of neighborhood petitions and

election campaign material, as well as on the internet, which has severely damaged her personal and public reputation.

II. THE PARTIES

2. Plaintiff Pamela Murray is a citizen and resident of Nashville and Davidson County, Tennessee. At all times material to this cause, Plaintiff was the duly elected representative to the Metropolitan Council of Nashville and Davidson County from District 5, a position she held from 2003 to November, 2009. By virtue of her office, Plaintiff is a public figure for purposes of pursuing claims for defamation of character.

3. Defendant Jamie Hollins is a citizen and resident of Nashville and Davidson County. At all times material to this cause, Defendant Hollins was a resident and registered voter in Councilmanic District 5. An attorney by profession, Defendant Hollins was the chief organizer of the unincorporated political association known as "We the People of District 5" and the author and publisher of many of the defamatory statements against Plaintiff which are the subject of this action. Defendant Hollins is being sued both in his individual capacity and as an officer of "We the People of District 5."

4. Defendant Mike Peden is a citizen and resident of Davidson County, Tennessee. At all times material to this cause, Defendant Peden was a property owner in Councilmanic District 5 but was not a resident nor a registered voter in this District. A real estate investor and developer by profession, Defendant Hollins was an active participant with Defendant Hollins in the unincorporated political association known as

"We the People of District 5" and the author and publisher of many of the defamatory statements against Plaintiff which are the subject of this action. Defendant Peden is being sued both in his individual capacity and as a member of "We the People of District 5."

5. Defendant Jan Morrison is a citizen and resident of Davidson County, Tennessee. At all times material to this cause, Defendant Morrison was a resident and registered voter in Councilmanic District 5. Defendant Morrison was a homemaker and was an active participant with Defendant Hollins in the unincorporated political association known as "We the People of District 5." She was the author and publisher of many of the defamatory statements against Plaintiff which are the subject of this action. Defendant Morrison is being sued both in her individual capacity and as a member of "We the People of District 5."

6. Defendant Andy Reuter is a citizen and resident of Davidson County, Tennessee. At all times material to this cause, Defendant Reuter was a resident and registered voter in Councilmanic District 5. Associated with several local real estate investors and developers, Defendant Reuter was an active participant with Defendant Hollins in the unincorporated political association known as "We the People of District 5" and the author and publisher of many of the defamatory statements against Plaintiff which are the subject of this action. Defendant Reuter is being sued both in his individual capacity and as a member of "We the People of District 5."

7. Defendant Sam McCullough is a citizen and resident of Davidson County, Tennessee. At all times material to this cause, Defendant McCullough was a resident and

registered voter in Councilmanic District 5. An unsuccessful candidate in 2007 for Plaintiff's Council seat in District 5 and owner of rental properties in the neighborhood, Defendant McCullough was an active participant with Defendant Hollins in the unincorporated political association known as "We the People of District 5" and the author and publisher of many of the defamatory statements against Plaintiff which are the subject of this action. Defendant McCullough is being sued both in his individual capacity and as a member of "We the People of District 5."

8. Defendant Amy Bryson is a citizen and resident of Davidson County, Tennessee. At all times material to this cause, Defendant Bryson was a resident and registered voter in Councilmanic District 5. A real estate agent and real estate investor by profession, Defendant Bryson was an active participant with Defendant Hollins in the unincorporated political association known as "We the People of District 5" and author and publisher of the defamatory statements against Plaintiff which are the subject of this action. Defendant Bryson is being sued both in her individual capacity and as a member of "We the People of District 5."

9. Defendant Precilla Eaton is a citizen and resident of Davidson County, Tennessee. At all times material to this cause, Defendant Precilla Eaton was a resident and registered voter in Councilmanic District 5. A real estate investor by profession, Defendant Precilla Eaton was an active participant with Defendant Hollins in the unincorporated political association known as "We the People of District 5" and author and publisher of many of the defamatory statements against Plaintiff which are the

subject of this action. Defendant Precilla Eaton is being sued both in her individual capacity and as a member of "We the People of District 5."

10. Defendant Larry Eaton is a citizen and resident of Davidson County, Tennessee. At all times material to this cause, Defendant Larry Eaton was a resident and registered voter in Councilmanic District 5. In 2003, Plaintiff defeated Larry Eaton in the election for council representative for Councilmanic District 5. A real estate investor by profession, Defendant Larry Eaton was an active participant with Defendant Hollins in the unincorporated political association known as "We the People of District 5" and author and publisher of many of the defamatory statements against Plaintiff which are the subject of this action. Defendant Larry Eaton is being sued both in his individual capacity and as a member of "We the People of District 5."

11. Defendant Tom Hazelip is a citizen and resident of Davidson County, Tennessee. At all times material to this cause, Defendant Hazelip was a resident and registered voter in Councilmanic District 5. A real estate investor by profession, Defendant Hazelip was a prime mover with Defendant Hollins in the unincorporated political association known "We the People of District 5" and author and publisher of many of the defamatory statements against Plaintiff which are the subject of this action. Defendant Tom Hazelip is being sued both in his individual capacity and as a member of "We the People of District 5."

12. Defendant Teri Missildine is a citizen and resident of Davidson County, Tennessee. At all times material to this cause, Defendant Missildine was a resident and registered voter in Councilmanic District 5. Defendant Missildine was an active

participant with Defendant Hollins in the unincorporated political association known as "We the People of District 5." She was the author and publisher of many of the defamatory statements against Plaintiff which are the subject of this action. Defendant Missildine is being sued both in her individual capacity and as a member of "We the People of District 5."

13. Defendant James Harney is a citizen and resident of Davidson County, Tennessee. At all times material to this cause, Defendant Harney was a resident and registered voter in Councilmanic District 5. A real estate investor by profession, Defendant Harney was an active participant with Defendant Hollins in the unincorporated political association known as "We the People of District 5." He was the author and publisher of many of the defamatory statements against Plaintiff which are the subject of this action. Defendant Harney is being sued both in his individual capacity and as a member of "We the People of District 5."

14. Defendant Brenda Ross is a citizen and resident of Davidson County, Tennessee. At all times material to this cause, Defendant Ross was a resident and registered voter in Councilmanic District 5. An employee of a local non-profit corporation, Defendant Ross was an active participant with Defendant Hollins in the unincorporated political association known as "We the People of District 5" and author and publisher of many of the defamatory statements against Plaintiff which are the subject of this action. Defendant Ross is being sued both in her individual capacity and as a member of "We the People of District 5."

THE FACTS

15. In the Spring of 2009, Plaintiff was publicly criticized by Defendant Jamie Hollins in the local print media and/or television and radio and/or on the Internet for allegedly misrepresenting her residency status in Councilmanic District 5 and her employment status as being within Tennessee.

16. Defendant Jamie Hollins then organized an unincorporated political association of voters and/or property owners in Councilmanic District 5 under the name of "We the People of District 5." All of the named Defendants hereinabove were members of, or representatives of, "We the People of District 5." Each of these Defendants was unhappy with Plaintiff's sponsorship of various zoning legislation which may have had an adverse effect on their plans for future real estate developments within Councilmanic District 5. The sole purpose of this organization was to defame the character of Plaintiff and to organize a petition for a recall election to unseat Plaintiff from her position as Council Representative for District 5.

17. "We the People of District 5," with Defendant Jamie Hollins as President, began meeting in May, 2009, on a regular basis in the late evenings at the home of Defendant Tom Hazelip at 200 Trentland Street, and the house of James Harney at 302 Hancock Street, and at other locations, to plan for a special election for the recall of Plaintiff as Council Representative for District 5.

18. During these meetings, which continued from May through November, 2009, Defendant Hollins and the other named Defendants conspired not only to publish false statements regarding Plaintiff's character, her residency, and her employment status

in order to initiate a petition for a special election to recall Plaintiff and also to promote the candidacy of Defendant Hollins as her replacement as Council Representative for District 5. These statements were made and published with actual malice.

19. Beginning in mid-August, 2009, Defendants conspired to draft the following false and defamatory statements impugning the character, veracity, and integrity of Plaintiff and published these defamatory statements by hand-delivery, door-to-door, to each registered voter's house in the Councilmanic District 5.

"Detroit City Limit
Home of Metro Council Member"

. . .

"Our Current Council Member

- Lives and works in Detroit, Michigan
- Supports out-of-town landlords instead of our neighbors
- Misused nearly $40,000 of your tax dollars
- Is under investigation for lying about working in Detroit since 2003"

. . .

This publication, in the form of election campaign literature, was paid for by "We the People of District 5." [See Exhibit A attached hereto and incorporated by reference herein.]

20. In addition, the Defendants published the defamatory statement on petition cards that Plaintiff should be removed as Council Representative "because of the dereliction of her duties and responsibilities to represent the citizens and residents of Councilmanic District 5 while "living and working in Detroit, Michigan." Each of the Defendants hand-delivered these petition cards and campaign literature to registered voters in District 5. [See Exhibit B attached hereto and incorporated by reference herein.]

21. Each of the above defamatory statements is untrue and was known by each Defendant to be untrue when they were published door-to-door throughout Councilmanic District 5 by each Defendant named herein.

22. In addition, Defendant Jamie Hollins published these defamatory statements about Plaintiff on his website and on the Internet, which statements can still be seen and read as of the date the Complaint is filed.

23. Plaintiff has been contacted by friends and colleagues as far away as Ghana, West Africa, who had seen these defamatory statements on the Internet.

24. In addition, Defendant Mike Peden sent e-mails to state officials in Michigan accusing Plaintiff of ethics violations which were untrue and known by Defendant Peden to be untrue when he sent them. This was done for the express purposes of disrupting Plaintiff's relationship as a professional consultant with certain state agencies and non-profit agencies in Michigan.

25. The foregoing statements made and published by the named Defendants herein about Plaintiff inflicted devastating harm to her personal and professional reputation, causing her to become temporarily suspended from her consulting work, causing her to lose her seat as Council Representative for District 5 to Defendant Jamie Hollins, resulting in public humiliation and embarrassment and mental distress for having been publicly defamed as being the first elected official in Davidson County to be the subject of a successful recall election.

26. At the time Defendants published these remarks about Plaintiff with actual malice, that is, they knew the statements to be false and they acted maliciously and

recklessly in their lack of care and disregard for the truth and accuracy of their statements about Plaintiff.

27. As a direct and proximate result of Defendants' widespread publication, republication, and distribution of these false statements about Plaintiff, she has suffered, and continues to suffer, mental anguish, embarrassment, humiliation, and emotional suffering and injury to reputation, loss of earning capacity, and loss of enjoyment of life for which she is entitled to judgment.

IV. CAUSE OF ACTION

A. Libel

28. Plaintiff incorporates by reference the allegations contained in paragraphs 1-27 and does hereby further allege and aver as follows:

29. T.C.A. §2-19-142 provides as follows:

> "It is a Class C misdemeanor for any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election if such person knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is false."

30. At the time Defendants drafted and published the statements about Plaintiff described above with actual malice, that is, the statements were false and therefore in violation of T.C.A. §2-19-142 when the statements were made.

31. Defendants' unlawful dissemination, publication, and republication of these statements in campaign material and elsewhere around the world on the Internet

recklessly and maliciously defames Plaintiff and holds her open to ridicule in the eyes of the public and of her peers.

32. As a result of Defendants' unlawful acts as stated herein, and their libelous attack upon the person and reputation of Plaintiff, she has suffered and continues to suffer damage, both personally and to her personal and professional reputation, and her reputation in the community, all to her irreparable harm, for which her only remedy is an action for libel and damages resulting therefrom.

33. Defendants' libelous publication, republication, and dissemination of the statements in question have damaged Plaintiff in an amount to be determined by a jury.

B. Libel and Abuse of Process

34. On August 31, 2009, Defendant Teri Missildine filed a complaint with the Metropolitan Clerk's Office against Plaintiff for an alleged violation of the ethical standards of conduct for members of the Metropolitan Council. This complaint was not notarized as required by law, nor did it contain a summary of facts which allegedly gave rise to the complaint, nor an explanation of why those facts constitute a violation of the standard of conduct. [See copy of Ethics Complaint dated 8/31/09, attached hereto as Exhibit C and incorporated by reference herein.]

35. On September 1, 2009, the Metropolitan Clerk wrote the Defendant Missildine to resubmit her complaint with her notarized signature and provide more detailed information to support her allegation of an ethics violation by Plaintiff. [See

copy of Metro Clerk's letter to Defendant Missildine dated 9/1/09, attached hereto as Exhibit D and incorporated by reference herein.]

36. Because Defendant Missildine did not resubmit her "ethics complaint" as requested by the Metropolitan Clerk, it was never investigated, and was subsequently dismissed.

37. The purpose of filing this false ethics complaint against Plaintiff was to provide some basis for the false statements made by Defendants that Plaintiff was under investigation for lying about working in Detroit.

38. The filing of this ethics complaint was knowingly done with malice and without probable cause to further tarnish Plaintiff's character and reputation for the purpose of removing Plaintiff from the office of Council Representative for District 5 through a recall election.

39. These actions of Defendant Missildine described in paragraphs 34-38 above constitute abuse of process, as well as defamation of character, for which Plaintiff is entitled to judgment.

PRAYER FOR RELIEF

WHEREFORE, Premises Considered, Plaintiff prays:

1. that she have a trial by jury;

2. that she be awarded compensatory damages against each Defendant in the amount of $500,000.00;

3. that she be awarded punitive damages against each Defendant in the amount of $500,000.00; and

4. that Plaintiff have such other general and equitable relief as may be necessary and proper in this cause, including the costs of this cause.

Respectfully Submitted,

By: _____

Joseph Howell Johnston #4706
P.O. Box 120874
Acklen Station
Nashville, TN 37212
615-383-2119
ATTORNEY FOR PLAINTIFF

SENATE BILL 2255
By Johnson

HOUSE BILL 2343

By Lamberth

AN ACT to amend Tennessee Code Annotated, Title 2; Title 4; Title 5 and Title 6, relative to campaigns.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 2-19-142, is amended by deleting the language "Class C misdemeanor" and substituting instead the language "Class B misdemeanor".

SECTION 2. This act shall take effect July 1, 2020, the public welfare requiring it.

HOUSE BILL 1341
By Camper

SENATE BILL 1400

By Tate

AN ACT to amend Tennessee Code Annotated, Title 2, relative to elections.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 2-19-142, is amended by deleting the language "Class C misdemeanor" and substituting instead the language "Class A misdemeanor".

SECTION 2. This act shall take effect July 1, 2017, the public welfare requiring it.

E-FILED
6/10/2020 8:01 PM
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

TENNESSEANS FOR SENSIBLE ELECTION LAWS, *Plaintiff,* *v.* HERBERT H. SLATERY III, *et al.*, *Defendants.*	§ § § § § § § § § §	Case No. 20-0312-III

AFFIDAVIT OF GEORGE S. SCOVILLE III

1. My name is George S. Scoville III, I have personal knowledge of the facts affirmed in this Affidavit, I am competent to testify regarding them, and I swear under penalty of perjury that they are true.

2. I am the Treasurer of Tennesseans for Sensible Election Laws, which is the Plaintiff in Case No. 20-0312-III.

3. I have personal knowledge of Tennesseans for Sensible Election Laws' activities and intentions, including its planned publication and distribution of campaign literature in opposition to two candidates for state office in advance of the upcoming 2020 state primary and general elections.

4. During the 1st Quarter of 2020, I engaged two political media design firms—Greenlight Media Strategies and LZBTH WLSN DSGNS—on behalf of Tennesseans for Sensible Election Laws to design political campaign literature for use in the 2020 state primary and general elections.

5. The firms were paid $1,000.00 and $2,500.00, respectively, to design the print and online campaign literature that is attached to this Affidavit as Collective

Attachment #1.

6. These expenditures were reported in Tennesseans for Sensible Election Laws' 1st Quarter campaign finance disclosure report, which is attached to this Affidavit as Attachment #2.

7. I know that the statements in the attached campaign literature are false. The deliberate falsehoods in the attached campaign literature, however, are critical to their content and provide essential value through satire, comparison, and hyperbole.

8. I am aware that Tennessee Code Annotated § 2-19-142 criminalizes the distribution and publication of knowingly false campaign literature like the attached advertisements under circumstances when the content of the literature reflects opposition to a candidate for election.

9. I am aware that Tennessee Code Annotated § 2-19-142 has been actively enforced by the government, *see Jackson v. Shelby Cty. Civil Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518, at *1 (Tenn. Ct. App. Jan. 10, 2007), and that at least one District Attorney General has expressly warned that violating Tennessee Code Annotated § 2-19-142 "is a crime." *Id.*

10. I am aware that Tennessee Code Annotated § 2-19-142 has been used as a basis for claims of civil liability, and that Jamie Hollin—one of Tennesseans for Sensible Election Laws' attorneys—recently faced a $1 million, multi-year lawsuit for allegedly violating Tennessee Code Annotated § 2-19-142. *See Murray v. Hollin*, No. M2011-02692-COA-R3CV, 2012 WL 6160575, at *1–2 (Tenn. Ct. App. Dec. 10, 2012).

11. Tennesseans for Sensible Election Laws and its agents are concerned that unless Tennessee Code Annotated § 2-19-142 is declared unconstitutional and unenforceable, publishing and distributing its false campaign literature in opposition to

Representatives Griffey and Staples will expose them to criminal liability, civil liability, or both.

Further affiant sayeth not.

Pursuant to Tenn. R. Civ. P. 72, I declare under penalty of perjury that the foregoing is true and correct.

George S. Scoville III
George S. Scoville III (Jun 10, 2020 16:39 CDT)

George S. Scoville III

Jun 10, 2020

Date Signed: _____

Attachment #1

Bruce Griffey is

LITERALLY HITLER.

Bruce Griffey: an agenda the Nazis would love.

You would think in 2020 we've moved on from Nazi-style population control, but here we are.

State Rep. Bruce Griffey filed legislation in the Tennessee General Assembly that would require a person convicted of a sexual offense involving victims under 13 to undergo castration as a condition of parole. He would even make them pay for it!

No doubt, the crimes in question are unspeakably terrible. But so is forced castration. Bruce Griffey's bill is the kind of thing you would see in Nazi Germany, not Tennessee.

Let's vote out Bruce Griffey, and have a state rep who represents Tennessee values, but without the Nazi stuff.

Vote NO on Bruce Griffey

He's *literally* Hitler.

NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE'S COMMITTEE, BUT WE DON'T THINK IT SHOULD BE A CRIME NOT TO TELL YOU THAT.

/tn4sense /@tn4sense /@tn4sense

Paid for by Tennesseans for Sensible Election Laws,
George S. Scoville III | Treasurer
P.O. Box 24316
Nashville, TN 37202

TSEL

Early Voting is July 17 – August 1.

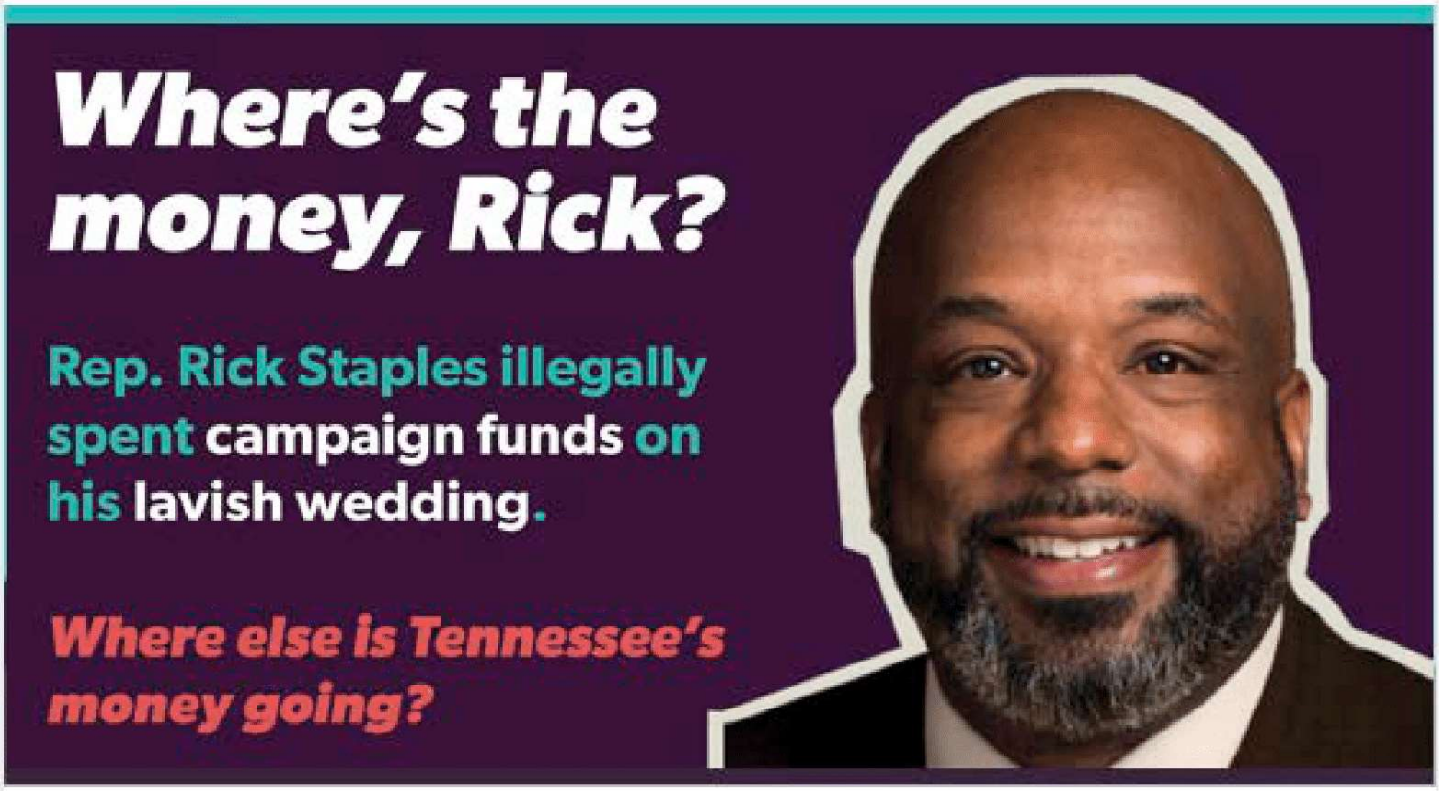
Election Day is Thursday, Aug. 6.

About social issues, elections or politics

Tennesseans for Sensible Election Laws
Sponsored • Paid for by **Tennesseans for Sensible Election Laws**

Representative Rick Staples may not look like a Millennial, but that didn't stop him from illegally blowing thousands of campaign dollars on avocado toast, expensive sunglasses, Hot Yoga classes, and extra fruit for his açaí bowls.

Add your name and help us tell Rick Staples to act his age — and stop breaking Tennessee's laws.



Tell Rep. Rick Staples to stop breaking the law!
Sign your name to protect our fair elections.
tn4sense.org

See Ad Details

About social issues, elections or politics

Tennesseans for Sensible Election Laws
Sponsored • Paid for by **Tennesseans for Sensible Election Laws**

Who knew? Representative Rick Staples must be a gambling expert — that's why he blew thousands of dollars in campaign funds playing roulette, Texas hold 'em, blackjack, stud, Caribbean stud, Spanish 21, rummy, and war during a recent Vegas vacation (probably).

Add your name to our petition and help us call Rick Staples' bluff — and tell him to stop breaking the law.

Tell Rep. Rick Staples to stop breaking the law!
Sign your name to protect our fair elections.
tn4sense.org

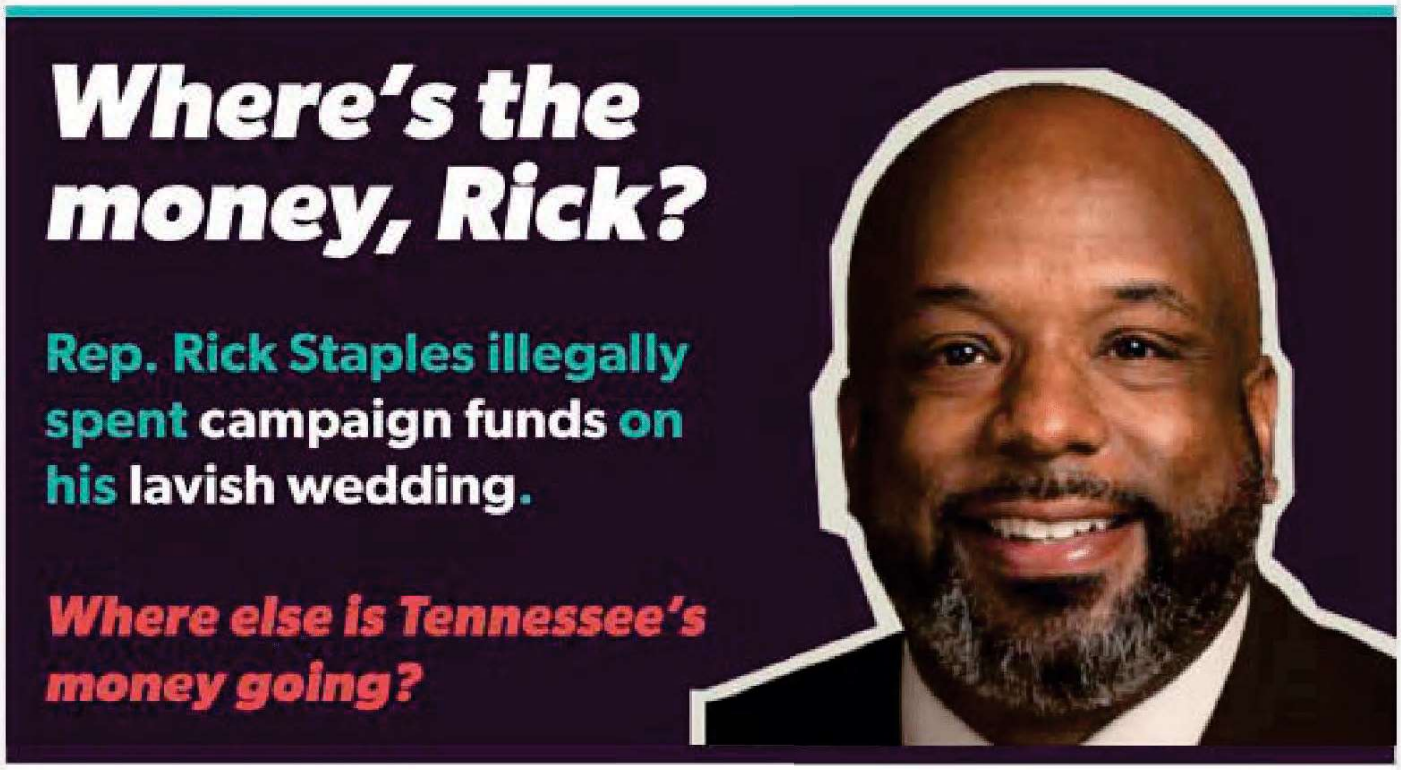
See Ad Details

About social issues, elections or politics

Tennesseans for Sensible Election Laws
Sponsored • Paid for by **Tennesseans for Sensible Election Laws**

What hasn't Representative Rick Staples spent campaign dollars on? He's used campaign money to bankroll gambling trips, football outings, honeymoons, and exotic vacations — if there's a trip, Rick's been on it.

Tennessee deserves a lawmaker who's not permanently checked out on vacation. Help teach Rick Staples the value of an honest day's work.



Tell Rep. Rick Staples to stop breaking the law!
Sign your name to protect our fair elections.
tn4sense.org

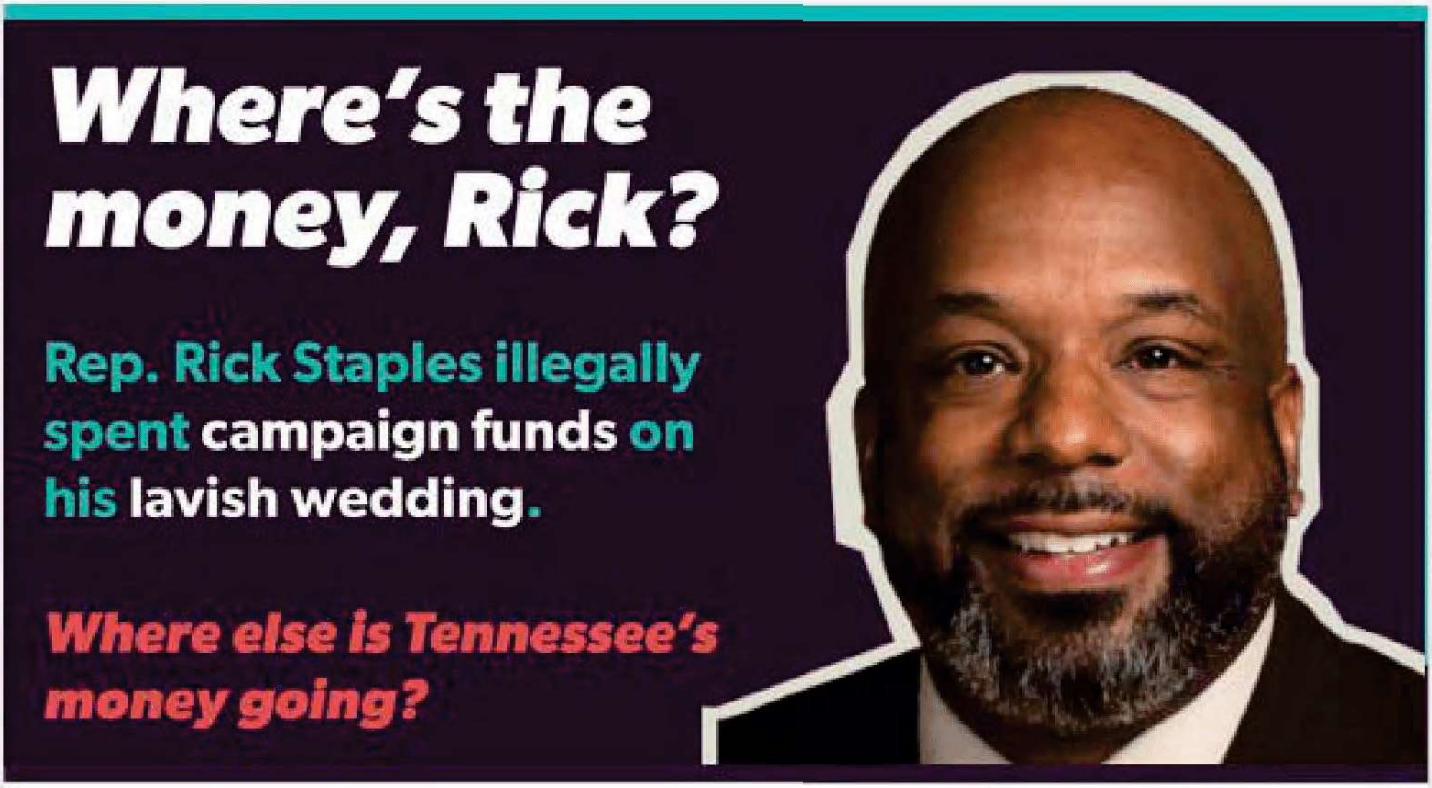
See Ad Details

About social issues, elections or politics

Tennesseans for Sensible Election Laws
Sponsored • Paid for by **Tennesseans for Sensible Election Laws**

Everyone knows Representative Rick Staples has a way with words — but he's got a way with check stubs, too. Staples illegally spends campaign funds on lavish dinners, elegant trips, football tickets, and anything else he can get his hands on.

Doesn't Tennessee deserve better?



Tell Rep. Rick Staples to stop breaking the law!
Sign your name to protect our fair elections.
tn4sense.org

See Ad Details

Attachment #2

Beginning Balance

Beginning Balance	$24,027.83

Receipts

Monetary Contributions, Unitemized	$4.30
Monetary Contributions, Itemized	$0.00
TOTAL CONTRIBUTIONS (other than adjustments, loans, and interest)	**$4.30**
Contribution Adjustments	$0.00
Loans Received	$0.00
Interest Received This Reporting Period	$0.00
TOTAL RECEIPTS	**$4.30**

Disbursements

Expenditures, Unitemized

Purpose	Amount
BANK FEES	$0.70
DESIGN SERVICES	$1,000.00
DESIGN SERVICES	$2,500.00

Expenditures, Itemized	$0.00
Loan Payments	$0.00
Obligation Payments	$0.00
TOTAL EXPENDITURES **(other than adjustments)**	**$3,500.70**
Expenditures, Adjustments	$0.00
TOTAL DISBURSEMENTS	**$3,500.70**

Ending Balance

ENDING BALANCE	**$20,531.43**

Outstanding Loans

TOTAL OUTSTANDING LOAN BALANCE	$0.00

In-Kind Contributions

In-Kind Contributions are not included in the report ending balance.

Unitemized	$0.00
Itemized	$0.00
TOTAL IN-KIND CONTRIBUTIONS	**$0.00**

Obligations

Obligations are not included in the report ending balance.

Unitemized	$0.00
Itemized	$0.00
Obligations, Outstanding from Previous Reports	$0.00
TOTAL OBLIGATIONS OUTSTANDING	**$0.00**

Affidavit of George Scoville and Attachments

Final Audit Report 2020-06-10

Created:	2020-06-10
By:	Daniel Horwitz (daniel.a.horwitz@gmail.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAAxzd3C0Er1hB6sKI748MplrGRens5sWTe

"Affidavit of George Scoville and Attachments" History

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