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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

PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS

I. INTRODUCTION

The Plaintiff, Tennesseans for Sensible Elections Laws (TSEL), seeks a declaratory judgment that Tenn. Code Ann. § 2-19-142—a criminal defamation statute that selectively criminalizes political speech based on its content—violates both the First Amendment and Article I, § 19 of the Tennessee Constitution. TSEL has specifically sought declaratory relief pursuant to Tenn. Code Ann. § 29-14-102, Tenn. Code Ann. § 1-3-121, and 42 U.S.C. § 1983. *See* Plaintiff's Compl., ¶ 19. Upon entry of an unappealable final judgment, TSEL additionally seeks an injunction prohibiting Tenn. Code Ann. § 2-19-142's enforcement.

The Defendants—the Tennessee Attorney General and the District Attorney General for Tennessee's 20th Judicial District—seek dismissal of TSEL's Complaint on the basis that this Court lacks subject matter jurisdiction to award either the declaratory or injunctive relief that TSEL seeks. Because overwhelming and binding precedent establishes that: (1) TSEL's claim for declaratory relief is cognizable as to both Defendants; (2) TSEL's claim for injunctive relief is immediately cognizable as to the Tennessee Attorney General; and (3) TSEL's claim for injunctive relief will become

cognizable as to the Defendant District Attorney General, the Defendants' Motion to Dismiss TSEL's Complaint should be denied.

II. FACTUAL BACKGROUND

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* Exhibits B & C to Plaintiff's Compl. If published and distributed, however, TSEL's campaign literature would run afoul of Tenn. Code Ann. § 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.

Id. In the recent past, TSEL has 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* Plaintiff's Compl., ¶ 4. *See also id.* at Exhibit A (urging voters to: "Vote against Rep. Camper and Sen. Tate in the next election. After all, they have cauliflower for brains.").

Critically, beyond just threatening criminal liability, Tenn. Code Ann. § 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* Plaintiff's Compl., ¶ 34. *See also 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."); *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 . . . .").

Because Tenn. Code Ann. § 2-19-142 abridges TSEL's rights under the First and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the Tennessee Constitution, TSEL has filed this action seeking a declaration that Tenn. Code Ann. § 2-19-142 is unconstitutional both facially and as applied to TSEL. *See* Plaintiff's Compl., p. 12, ¶ 2 (seeking "a judgment declaring that Tenn. Code Ann. § 2-19-142 violates the First and Fourteenth Amendments to the United States Constitution and Tenn. Const. art. I § 19, both facially and as applied to the Plaintiff."). Further, upon entry of an unappealable final judgment, TSEL seeks to have "this Court enjoin Tenn. Code Ann. § 2-19-142's continued enforcement." *Id.* at ¶ 3. The Defendants now seek dismissal of TSEL's Complaint pursuant to Tenn. R. Civ. P. 12.02(1) on the sole basis that this Court lacks subject matter jurisdiction to provide any of the relief that TSEL is seeking. *See* Defendants' Memorandum In Support of Motion to Dismiss (hereafter, "Defendants' Motion to Dismiss"), pp. 3–7.

III. LEGAL STANDARD

"Subject matter jurisdiction involves a court's lawful authority to adjudicate a particular controversy." *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004) (citing *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000)). "Tennessee's courts derive subject matter jurisdiction from the state constitution or from legislative acts." *Id.*

In the instant case, TSEL has sought declaratory and injunctive relief under the following three independent legislative acts:

(1) The Tennessee Declaratory Judgment Act, which confers subject matter jurisdiction to declare constitutional rights. *See, e.g., Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853 (Tenn. 2008) ("the Declaratory Judgment Act grants subject matter jurisdiction to the Davidson County Chancery Court to address the constitutional issues."); *Grant v. Anderson*, No. M2016-01867-COA-R3-CV, 2018 WL 2324359, at *4 (Tenn. Ct. App. May 22, 2018), *appeal denied* (Oct. 10, 2018) (holding, in a case challenging the continuing validity of laws relating to the issuance of marriage licenses, that: "We conclude that the chancery court did have subject matter jurisdiction. In this instance, subject matter jurisdiction is derived from the Tennessee Declaratory Judgments Act. . . . The chancery court is a court of record, and the plaintiffs are seeking a declaration of their respective rights.").

(2) Tenn. Code Ann. § 1-3-121, which provides that:

> Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages.

Id. And:

(3) 42 U.S.C. § 1983, which provides for a "[c]ivil action for deprivation of rights" against state actors regarding rights secured by the federal Constitution, *see id.*, and which this Court also has subject matter jurisdiction to adjudicate. *See Blue Sky Painting Co. v. Phillips*, No. M2015-01040-COA-R3CV, 2016 WL 3947744, at *4 (Tenn. Ct. App. July 15, 2016) ("42 U.S.C. § 1983 provides a vehicle by which a court may be granted subject matter jurisdiction to address alleged constitutional violations.").

"If a complaint attacked on its face competently alleges any facts which, if true, would establish grounds for subject matter jurisdiction, the court must uncritically accept those facts, end its inquiry, and deny the dismissal motion." *Staats v. McKinnon*, 206 S.W.3d 532, 542–43 (Tenn. Ct. App. 2006) (citing *Great Lakes Educ. Consultants v. Fed. Emergency Mgmt. Agency,* 582 F. Supp. 193, 194 (W.D. Mich. 1984)). Further, where, as here, a court has subject matter jurisdiction over a plaintiff's claims, the judiciary is obligated to adjudicate them. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) ("the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'") (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (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.") (emphasis added).

IV. ARGUMENT

This Court has unconstrained subject matter jurisdiction to adjudicate TSEL's claims for declaratory relief against both Defendants. This Court also has unrestricted

subject matter jurisdiction to grant TSEL's claim for injunctive relief as to the Defendant Tennessee Attorney General's Office. Further, upon entry of an unappealable final declaratory judgment affirmed by the Tennessee Supreme Court, this Court will have unrestricted subject matter jurisdiction to grant TSEL's claim for injunctive relief as to the Defendant Davidson County District Attorney General. For all of these reasons, this Court has subject matter jurisdiction over this action, and the Defendants' Motion to Dismiss TSEL's Complaint for lack of subject matter jurisdiction should be denied.

A. THIS COURT HAS SUBJECT MATTER JURISDICTION TO DECLARE TENN. CODE ANN. § 2-19-142 UNCONSTITUTIONAL AS TO BOTH DEFENDANTS.

1. The Declaratory Judgment Act confers subject matter jurisdiction to declare and address constitutional rights.

This is a declaratory judgment action challenging Tenn. Code Ann. § 2-19-142's validity. Notably, Tennessee's Declaratory Judgment Act also "specifically authorizes trial courts to hear declaratory judgment actions . . . challenging a statute's validity." *Sanders v. Lincoln Cty.*, No. 01A01-9902-CH-00111, 1999 WL 684060, at *6, n.6 (Tenn. Ct. App. Sept. 3, 1999). *See also Campbell v. Sundquist*, 926 S.W.2d 250, 257 (Tenn. Ct. App. 1996), *abrogated on other grounds by Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008) (holding that the Declaratory Judgment Act is "an enabling statute to allow a proper plaintiff to maintain a suit against the State challenging the constitutionality of a state statute.").

Thus, notwithstanding the Defendants' contention to the contrary, there is no serious dispute that **"the Declaratory Judgment Act grants subject matter jurisdiction to the Davidson County Chancery Court to address [a statute's] constitutional issues**," *see Colonial Pipeline Co.*, 263 S.W.3d at 853 (emphasis added),

including the authority to issue "a declaration of unconstitutionality." *Id.* *See also Grant*, 2018 WL 2324359, at *4 (holding, in case challenging continuing validity of laws relating to the issuance of marriage licenses, that: "We conclude that the chancery court did have subject matter jurisdiction. In this instance, subject matter jurisdiction is derived from the Tennessee Declaratory Judgments Act. . . . The chancery court is a court of record, and the plaintiffs are seeking a declaration of their respective rights.").

Further, this Court's subject matter jurisdiction to issue declaratory relief applies to both Defendants. To begin, the Tennessee Attorney General is clearly a proper party with respect to the Plaintiff's claims for declaratory relief—and indeed, it would be "patently frivolous" for the Defendants to contend otherwise. *See Am. Civil Liberties Union of Tennessee v. State of Tenn.*, 496 F. Supp. 218, 220–21 (M.D. Tenn. 1980) ("The Attorney General further argues that he is not a proper party to this action because he is only a 'nominal' defendant and he has not enforced the barratry statute against plaintiffs. This argument is patently frivolous in light of T.C.A. s 8-6-109 (1980), which states that the Attorney General 'shall' defend the constitutionality of all legislation of statewide applicability, unless he is of the opinion that the legislation is not constitutional."). *See also id.* (citing *Peters v. O'Brien*, 152 Tenn. 466, 278 S.W. 660 (1925), for the proposition that the "Attorney General is [a] proper party in a declaratory judgment action to determine validity of a state statute"); *Sanders*, 1999 WL 684060, at *6 (holding that in cases challenging a statute's constitutional validity, Tennessee law "requires that the state attorney general be made a party to the proceeding.").

Further, declaratory relief can be secured against the Defendant Davidson County District Attorney as well. While it is true that—barring certain exceptions—"state courts of equity lack jurisdiction to enjoin the enforcement of a criminal statute that is alleged

to be unconstitutional," *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 752 (Tenn. 2006) (emphasis added), the Tennessee Supreme Court and the Tennessee Court of Appeals have made clear repeatedly that the same restriction does not apply to claims for declaratory relief. *See, e.g., Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *38 (Tenn. Ct. App. Dec. 12, 2019) (observing that in *Erwin Billiard Parlor v. Buckner*, 300 S.W. 565, 566 (Tenn. 1927), "suit was filed in chancery court against a District Attorney General and sheriff seeking a declaratory judgment that a statute was unconstitutional in addition to an injunction restraining the defendants from proceeding in the criminal court against the petitioners. **The Supreme Court held that the trial court had jurisdiction to consider the declaratory judgment action**.") (emphasis added)); *Campbell*, 926 S.W.2d at 256–66, *abrogated on other grounds by Colonial Pipeline Co.*, 263 S.W.3d 827 (holding that plaintiffs were **"entitled to maintain an action under the Declaratory Judgment Act** even though none of them have been prosecuted under the HPA," notwithstanding that "this Court may not enjoin pending or threatened prosecutions for the violation of the criminal laws of this State.") (emphasis added). This distinction also comports with the underlying basis for the rule, since a declaratory judgment does not interfere with "pending or threatened prosecutions for violation of the criminal laws of the state" in any regard. *J.W. Kelly & Co. v. Conner*, 123 S.W. 622, 626 (1909).

For the foregoing reasons, "the Declaratory Judgment Act grants subject matter jurisdiction to the Davidson County Chancery Court to address [Tenn. Code Ann. § 2-19-142's] constitutional issues," *see Colonial Pipeline Co.*, 263 S.W.3d at 853; the Plaintiffs' claims for declaratory are cognizable as to both Defendants; and the Defendants'

contention that this Court lacks subject matter jurisdiction to adjudicate TSEL's claims for declaratory relief is meritless. Accordingly, the Defendants' Motion to Dismiss should be denied, because this Court has subject matter jurisdiction to adjudicate the Plaintiff's claims for declaratory relief under the Declaratory Judgment Act.

2. Tenn. Code Ann. § 1-3-121 additionally confers subject matter jurisdiction to declare Tenn. Code Ann. § 2-19-142 unconstitutional.

As noted above, in *Colonial Pipeline*, 263 S.W.3d at 853, the Tennessee Supreme Court made clear beyond any reasonable dispute that as long as a plaintiff is not seeking monetary relief against the State—a claim that remains precluded by sovereign immunity—"the Declaratory Judgment Act grants subject matter jurisdiction to the Davidson County Chancery Court to address [a statute's] constitutional issues," including the authority to issue "a declaration of unconstitutionality." *Id.* This holding was not ambiguous. Accordingly, the Tennessee Court of Appeals has faithfully applied it, observing, for instance, that:

> *Colonial Pipeline* held that the Declaratory Judgment Act grants a court subject matter jurisdiction to address constitutional issues and, as necessary, "issue declaratory or injunctive relief against the Defendants in their individual capacity, so long as the court's judgment is tailored to prevent the implementation of unconstitutional legislation and does not 'reach the state, its treasury, funds, or property,'" and sovereign immunity is not waived in a declaratory judgment action.

Chalmers v. Carpenter, No. M2014-01126-COA-R3-CV, 2016 WL 4186896, at *3 (Tenn. Ct. App. Aug. 4, 2016).

Undeterred by the Tennessee Supreme Court's clear holding in *Colonial Pipeline* and its progeny, however, for years, the Tennessee Attorney General has boldly maintained—as it does in the instant case—that *Colonial Pipeline* means something other

than what it says.[1] Specifically, notwithstanding *Colonial Pipeline*'s express holding that "the Declaratory Judgment Act grants subject matter jurisdiction to the Davidson County Chancery Court to address [a statute's] constitutional issues[,]" 263 S.W.3d at 853, the Defendants contend that the Declaratory Judgment Act does not confer subject matter jurisdiction to challenge a statute's constitutionality at all. *See* Defendant's Motion to Dismiss, pp. 5–6 (arguing that *Colonial Pipeline's* holding that "[t]he Act also conveys the power to construe or determine the validity of any written instrument, statute, ordinance, contract, or franchise, *provided that the case is within the court's jurisdiction*"—a caveat that was specifically concerned with the continued validity of sovereign immunity regarding *damages* actions—supports the conclusion that "this court lacks subject matter jurisdiction to grant Plaintiff declaratory relief" and address Tenn. Code Ann. § 2-19-142's constitutional issues).

Notably, the Attorney General's longstanding position that Tennessee's courts lack subject matter jurisdiction to issue judgments declaring state statutes unconstitutional did not merely mischaracterize *Colonial Pipeline*, 263 S.W.3d at 853. It also contravened Tennessee's longstanding public policy of encouraging declaratory judgments and allowing important constitutional issues to be resolved on their merits without being obstructed by procedural technicalities. *See, e.g., id.* at 836 (observing that "declaratory judgment actions have gained popularity as a proactive means of preventing injury to the legal interests and rights of a litigant."); *id.* at 837 (noting that the purpose of declaratory judgment actions "is to settle important questions of law before the controversy has

[1] When pressed during oral argument before this Court in the past, the Office of the Attorney General has been somewhat more candid about its actual position on the matter: It believes that "*Colonial Pipeline* was wrongfully decided," and that it "is an overbroad decision." *See* **Exhibit A** (Transcript of Aug. 17, 2018 Hearing in *Zarate v. The Tennessee Board of Cosmetology and Barber Examiners*, Davidson County Chancery Court Case No. 18-534-II), p. 11, lines 9–13.

reached a more critical stage."); *id.* (holding that "[d]eclaratory judgment statutes are remedial in nature and should be construed broadly in order to accomplish their purpose."); *id.* at 844-45 (holding that "'[t]he importance of correctly resolving constitutional issues suggests that constitutional issues should rarely be foreclosed by procedural technicalities.'") (quoting *In re Adoption of Female Child*, 42 S.W.3d 26, 32 (Tenn. 2001) (in turn quoting *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 457 (Tenn. 1995)). Consequently, to dispense with any conceivable ambiguity regarding whether litigants have a cause of action to seek declaratory relief regarding constitutional issues, the Tennessee General Assembly enacted Tenn. Code Ann. § 1-3-121, which provides that:

> Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages.

Id.

Tenn. Code Ann. § 1-3-121—which took effect in 2018—is not susceptible to confusion. Instead, it provides in the clearest possible terms that "a cause of action shall exist under this chapter for any affected person who seeks declaratory . . . relief in any action brought regarding the legality or constitutionality of a governmental action," *id.*, which is precisely what TSEL is seeking here.

"Tennessee's courts derive subject matter jurisdiction . . . from legislative acts." *Osborn*, 127 S.W.3d at 739. *See also* Tenn. Const. art. I, § 17 ("Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."). As noted, Tenn. Code Ann. § 1-3-121 also unambiguously confers jurisdiction to adjudicate claims for "declaratory . . . relief in any action brought regarding the legality or

constitutionality of a governmental action." *Id.* As such, over and above the Tennessee Declaratory Judgment Act—which already conferred subject matter jurisdiction over declaratory judgment actions in constitutional cases, *see supra* pp. 6–9—Tenn. Code Ann. § 1-3-121 affords TSEL a separate and independent cause of action enabling this Court to adjudicate its claims for declaratory relief.

Inexplicably, however, even in the face of Tenn. Code Ann. § 1-3-121's unambiguous language, the Defendants maintain that (1) "nothing in this statute alters the existing law regarding chancery court jurisdiction or explicitly confers jurisdiction on state chancery courts," and (2) "while Tenn. Code Ann. § 1-3-121 may provide a cause of action for declaratory relief, it does not expand the jurisdiction of Tennessee's chancery courts." *See* Defendants' Motion to Dismiss, p. 6. These assertions are farcical. As the Tennessee Supreme Court has made clear, Tennessee's chancery courts have <u>always</u> had subject matter jurisdiction to issue declaratory judgments and to declare constitutional rights under state statutes. *See supra*, pp. 6–9. Further, one is left to wonder how a statute could more "explicitly confer[] jurisdiction" over constitutional causes of action than to state, without any qualification, that: "Notwithstanding any law to the contrary, a cause of action <u>shall exist</u> . . . ." Tenn. Code Ann. § 1-3-121 (emphasis added).

Accordingly, this Court has subject matter jurisdiction to adjudicate TSEL's claims for declaratory relief under Tenn. Code Ann. § 1-3-121, and the Defendants' Motion to Dismiss those claims for lack of subject matter jurisdiction should be denied.

3. 42 U.S.C. § 1983 confers subject matter jurisdiction to declare Tenn. Code Ann. § 2-19-142 unconstitutional.

"[S]tate courts of 'general jurisdiction' can adjudicate cases invoking federal statutes, such as § 1983, absent congressional specification to the contrary." *Nevada v.*

Hicks, 533 U.S. 353, 366 (2001). Further, as the Tennessee Court of Appeals has made clear: "**42 U.S.C. § 1983 provides a vehicle by which a court may be granted subject matter jurisdiction to address alleged constitutional violations**." *Blue Sky Painting Co.*, 2016 WL 3947744, at *4 (emphasis added).

More specifically, § 1983 "provides a remedy for violations of rights protected by the United States Constitution or by a federal statute." *King v. Betts*, 354 S.W.3d 691, 702 (Tenn. 2011). Toward that end, TSEL has alleged—in four independent respects—that Tenn. Code Ann. § 2-19-142 infringes upon TSEL's federally protected rights under the First and Fourteenth Amendments to the United States Constitution. *See* Plaintiff's Compl., pp. 10–12.

As such, 42 U.S.C. § 1983 independently confers a right to the declaratory relief that TSEL has sought in this action—claims for which this Court has indisputably been "granted subject matter jurisdiction[.]" *Blue Sky Painting Co.*, 2016 WL 3947744, at *4. *See also Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (noting circumstances in which government actors "can be sued directly under § 1983 for monetary, **declaratory**, or injunctive relief") (emphasis added); *Ward v. City of Norwalk*, 640 F. App'x 462, 467–68 (6th Cir. 2016) ("[S]overeign immunity does not bar plaintiffs' declaratory judgment claim against Judge Ridge and Clerk Boss in their official capacities."). *Cf. Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *27 (Tenn. Ct. App. Dec. 12, 2019) (affirming "in all respects" Davidson County Chancery Court's declaratory judgments in, *inter alia*, a § 1983 action). Indeed, despite the overlapping declaratory remedies available under state law, the Tennessee Supreme Court has held that in certain instances, § 1983 "provides a better and more efficient remedy than a

declaratory judgment." *Davis v. McClaran*, 909 S.W.2d 412, 421, n.8 (Tenn. 1995).

For all of these reasons, as to both Defendants, this Court has subject matter jurisdiction to adjudicate TSEL's claims under § 1983, and the Defendants' Motion to Dismiss those claims for lack of subject matter jurisdiction should be denied.

B. THIS COURT HAS SUBJECT MATTER JURISDICTION TO ENJOIN ENFORCEMENT OF TENN. CODE ANN. § 2-19-142 AS TO THE TENNESSEE ATTORNEY GENERAL AND, EVENTUALLY, AS TO THE DEFENDANT DISTRICT ATTORNEY.

The Defendants additionally assert that based on "[t]he long-standing rule in Tennessee is that state courts of equity lack jurisdiction to enjoin the enforcement of a criminal statute that is alleged to be unconstitutional," *Clinton Books*, 197 S.W.3d at 752, the Plaintiff's Complaint must be dismissed due to lack of subject matter jurisdiction. *See* Defendants' Motion to Dismiss, pp. 3-5. Defendants' argument, however, suffers from myriad fatal deficiencies.

First, as previously noted, any limitation on this Court's authority to provide injunctive relief does not affect its authority to provide declaratory relief in any regard. *See, e.g., Erwin Billiard Parlor*, 300 S.W. at 566 (holding that "[a] decree will accordingly be entered in this court declaring the said chapter 104 of the Private Acts of 1925 and its amendatory act unconstitutional and void, in accordance with the prayer of the bill, but the injunctive relief sought will be denied.") (emphases added); *Sundquist*, 926 S.W.2d at 256 (holding that declaratory relief could be provided, even though injunctive relief could not). Accordingly, the Defendants' asserted restriction cannot deprive this Court of subject matter jurisdiction to adjudicate the claims in TSEL's Complaint, even if it affects the availability and timing of the remedies that this Court can provide regarding them. *Id.* As such, even if the Plaintiff's claims for injunctive relief were dismissed, this Court

would still have subject matter jurisdiction over this action.

Second, although this Court may not enjoin "pending or threatened prosecutions for violation of the criminal laws of the state," *J.W. Kelly*, 123 S.W. at 626, Tenn. Code Ann. § 2-19-142 is both enforced and applies in civil contexts as well. *See, e.g., Jackson*, 2007 WL 60518, 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."); *Murray*, 2012 WL 6160575, at *1 ("Ms. Murray's libel case is brought under Tennessee Code Annotated Section 2–19–142 . . . ."). *Cf. Smith v. Owen*, 841 S.W.2d 828, 832 (Tenn. Ct. App. 1992) (observing that "the doctrine of negligence per se has been established as a just basis for civil liability" when a litigant violates a penal statute). Given the clear civil application of Tenn. Code Ann. § 2-19-142, *see id.*—and because the Tennessee Attorney General is a proper party to this action who is obliged to defend Tenn. Code Ann. § 2-19-142 in all its applications, *see, e.g., Am. Civil Liberties Union of Tennessee.*, 496 F. Supp. at 220–21; *see also* Tenn. Code Ann. § 8-6-109(b)(9)—all non-criminal applications of Tenn. Code Ann. § 2-19-142 can be enjoined without restriction.

Third, as the Defendants themselves concede, once "the Supreme Court has already adjudged [a] criminal statute unconstitutional," nothing restricts a chancery court's jurisdiction to enjoin its enforcement. *See* Defendant's Motion to Dismiss, p. 4. *See also Clinton Books, Inc.*, 197 S.W.3d at 753 ("once this Court has concluded that a criminal statute is unconstitutional, no controversies are required to be settled by a criminal court, and the equity court is not invading the criminal court's jurisdiction by

issuing an injunction."). Accordingly, TSEL has sought neither a preliminary injunction nor even a permanent injunction immediately following the trial of this action. Instead, TSEL has sought to have this Court enjoin the Defendants' enforcement of Tenn. Code Ann. § 2-19-142 only after "an unappealable final judgment" has been rendered. *See* Plaintiff's Compl., p. 12, ¶ 3. Consequently, in the event that TSEL's claims for injunctive relief are dismissed, the dismissal should be without prejudice, as the Parties agree that Tenn. Code. Ann. § 2-19-42 may be enjoined without restriction after the Tennessee Supreme Court has declared it unconstitutional.

C. TSEL HAS A RIGHT TO A REMEDY.

In *Marbury v. Madison*, the U.S. Supreme Court held that "every right . . . must have a remedy, and every injury its proper redress." 5 U.S. 137, 147 (1803). Likewise, the Tennessee Supreme Court has stated that Art. 11, § 7 of the Tennessee Constitution—which "ordains 'that all courts shall be open, and every man for an injury done him in his lands, goods, person, or reputation, shall have remedy by course of law, and right and justice administered without sale, denial, or delay'"—guarantees a remedy for "every possible injury which a man may sustain. . . ." *Townsend v. Townsend*, 7 Tenn. 1, 13 (1821) (quoting Art. 11, § 7). *See also id.* ("We must understand the meaning to be that, notwithstanding any act of the legislature to the contrary, every man shall have 'right and justice' in all cases, 'without sale, denial, or delay.'"); *Cherry v. Cherry*, No. 89-302-II, 1989 WL 155362, at *3 (Tenn. Ct. App. Dec. 20, 1989) (holding that "Art. 1, Sec. 12 and Art. 1, Sec. 17, Const. of Tenn constitute clear and unequivocal declarations of the public policy of this State to the effect that . . . every man shall have a remedy by due course of law for an injury sustained by him.") (cleaned up).

Here, the Defendants contend that notwithstanding the asserted unconstitutionality of a criminal defamation statute of statewide effect that selectively criminalizes political speech based on its content, TSEL has no right to judicial review or to any remedy contesting Tenn. Code Ann. § 2-19-142's constitutionality whatsoever. *See generally* Defendant's Motion to Dismiss. Thus, the Defendants assert, for all practical purposes, that if an unconstitutional state statute establishes a criminal offense, the statute can wholesale evade judicial review unless and until a criminal prosecution has been initiated, because no court has subject matter jurisdiction to review it. *See id*. *But see Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) ("When the 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.'") (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). *See also Am. Civil Liberties Union of Tennessee*, 496 F. Supp. at 221 ("it is well-established that a plaintiff does not have to wait until he is threatened with a prosecution before he may challenge a criminal statute that directly operates against him.") (collecting cases).

If accepted, the Defendants' position would deprive TSEL of their constitutional right to a meaningful remedy. Put differently: As the Defendants would have it, the holdings of *Marbury* and *Townsend* are empty words.

The Tennessee legislature, by contrast, has indicated its intent to provide a pre-prosecution judicial remedy for constitutional violations by enacting both Tenn. Code Ann. §§ 1-3-121 and 29-14-102. Congress did the same by enacting 42 U.S.C. § 1983. As such, in keeping with longstanding law guaranteeing litigants a right to a pre-prosecution

remedy for constitutional violations, the relief available to civil rights litigants under these statutes should be respected, and the Defendants' Motion to Dismiss should be denied.[2]

D. TENN. CODE ANN. § 1-3-121 EXPANDED EQUITABLE JURISDICTION TO PROVIDE INJUNCTIVE RELIEF REGARDING CONSTITUTIONAL CLAIMS.

Tenn. Code Ann. § 1-3-121 provides in clear terms that:

> Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages.

Id. There is also no reasonable dispute that the General Assembly has authority to change, modify, and expand the jurisdiction of Chancery courts as it deems appropriate. *See* Tenn. Const. art. VI, § 8 ("The jurisdiction of the Circuit, Chancery and other Inferior Courts, shall be as now established by law, until changed by the Legislature.").

Under other circumstances, the Attorney General has had little difficulty recognizing that "[t]he word 'notwithstanding' means without prevention or obstruction from or by and in spite of," Tenn. Op. Att'y Gen. No. 96-062 (Apr. 8, 1996), and that such language displaces "any preexisting law." *See id.* (observing that "[i]n the Federal Water Pollution Control Act, the phrase 'notwithstanding any other provision of law' was interpreted to mean that remedies established by the Act are not to be modified by <u>any preexisting law</u>.") (citing *Matter of Oswego Barge Corp.*, 664 F.2d 327, 340 (2nd Cir.

[2] Notably, if Tennessee law really did operate to immunize state criminal statutes and the officials who enforce them from § 1983 challenges through insurmountable jurisdictional barriers, federal law would preclude the defense. *See Martinez v. California*, 444 U.S. 277, 284, n. 8 (1980) ("A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced."). *See also Wilson v. Elliott Cty., Ky.*, 198 F. App'x. 471, 474 (6th Cir. 2006) ("While Elliott County may be immune from suit under Kentucky law, it is not thereby immune from federal suits.").

1981)). Consequently, Tenn. Code Ann. § 1-3-121—which provides that "a cause of action shall exist under this chapter for any affected person who seeks . . . injunctive relief in any action brought regarding the legality or constitutionality of a governmental action" *see id.* (emphases added)—applies "[n]otwithstanding any law to the contrary," including all preexisting jurisdictional restrictions limiting this Court's authority to enjoin enforcement of criminal statutes. *Id.*

To the extent that the Attorney General contends that applying Tenn. Code Ann. § 1-3-121 faithfully and as that statute is written poses constitutional concerns, it must make that position clear and certify it. *See* Tenn. Code Ann. § 8-6-109(b)(9) (noting Attorney General's duty "[t]o defend the constitutionality and validity of all legislation of statewide applicability, except as provided in subdivision (b)(10), enacted by the general assembly, except in those instances where the attorney general and reporter is of the opinion that such legislation is not constitutional, in which event the attorney general and reporter shall so certify to the speaker of each house of the general assembly"). Unless and until that occurs, however, the constitutionality of Tenn. Code Ann. § 1-3-121 is not in question. As such, the cause of action that Tenn. Code Ann. § 1-3-121 makes available "for any affected person who seeks . . . injunctive relief in any action brought regarding the legality or constitutionality of a governmental action," *see id.*, is fully redressable, including with respect to any action brought regarding the legality or constitutionality of action undertaken by a district attorney. *See id.*

E. THE TENNESSEE CONSTITUTION ITSELF PROVIDES SUBJECT MATTER JURISDICTION TO ADJUDICATE THE PLAINTIFF'S CLAIMS.

TSEL has alleged that: "By restricting speech based on its content, proscribing protected speech, and criminalizing speech based on the viewpoint of the speaker, Tenn.

Code Ann. § 2-19-142 violates Tenn. Const. art. I § 19, both facially and as applied to the Plaintiff." *See* Plaintiff's Compl., p. 12, ¶ 47. Based on this asserted violation of the Tennessee Constitution, TSEL has prayed that "[t]his Court issue a judgment declaring that Tenn. Code Ann. § 2-19-142 violates . . . Tenn. Const. art. I § 19, both facially and as applied to the Plaintiff." *Id.* at p. 12, ¶ 2. Critically, TSEL seeks equitable relief only, and no claim for damages has been asserted.

In addition to having statutory subject matter jurisdiction to adjudicate the Plaintiff's Tenn. Const. art. I § 19 claim, *see supra* pp. 6–14, this Court has subject matter jurisdiction to adjudicate the Plaintiff's Tenn. Const. art. I § 19 claim directly under the Tennessee Constitution. Admittedly, it has not yet been settled definitively that the Tennessee Constitution contemplates a private right of action for equitable relief. *Compare Anderson v. Clarksville Montgomery Cnty. Sch. Sys.*, No. 3:06-0324, 2006 WL 1639438, at *2 (M.D. Tenn. June 13, 2006) ("Even though there is no authority for the recovery of damages for a violation of the Tennessee Constitution, the Court has the inherent power to enjoin unconstitutional conduct.") (citation omitted); *with Peterson v. Dean*, CIV.A. 3:09-CV-628, 2009 WL 3517542, at *1 (M.D. Tenn. Oct. 23, 2009) ("The only thing clear at this point is that Tennessee does not allow for a private right of action for damages based on violations of the Tennessee Constitution, which is not at issue in this case. . . . [I]t does not seem clear to this Court that Tennessee courts have either recognized or proscribed a private right of action for injunctive relief, or whether they would be inclined to do so in the future. . . . The question of whether the Tennessee Constitution allows for a private right of action for injunctive relief as to an individual remains an unsettled issue of state law."). Instead, all that has been established is that Tennessee has not recognized a private cause of action <u>for damages</u> under the Tennessee

Constitution—a distinction that our Court of Appeals has emphasized repeatedly. *See, e.g., Lee v. Ladd*, 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992) ("we know of no authority for the recovery of damages for a violation of the Tennessee Constitution by a state officer.") (emphasis added); *Bowden Bldg. Corp. v. Tennessee Real Estate Comm'n*, 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999) ("Tennessee, however, has not recognized any such implied cause of action for damages based upon violations of the Tennessee Constitution.") (emphasis added); *Bennett v. Horne*, 89-31-II, 1989 WL 86555, at *2 (Tenn. Ct. App. Aug. 2, 1989) ("This court knows of no authority for the recovery of damages for a violation of article 1, section 7 of the Tennessee Constitution.") (emphasis added). *See also* Robert Dalton & David L. Hudson Jr., *Suffering Wrongs Without Remedies Damages and the Tennessee Constitution*, Tenn. B.J., November 2018, at 14, 15 ("Tennesseans might be able to obtain declaratory or injunctive relief to prevent future constitutional violations by government officials, but there is currently no remedy of any sort to compensate a citizen for 'an injury done him' by a governmental actor who has violated the provisions of the Tennessee Constitution.").

This unsettled authority has given rise to substantial uncertainty. As one federal court observed:

> After reviewing the relevant Tennessee case law and the parties' briefs, this Court respectfully disagrees with the Magistrate Judge's conclusion that it is "clear" Tennessee does not recognize a private right of action based upon violations of the Tennessee Constitution. The cases upon which Defendants rely either refused to recognize a private right of action for damages, or failed to identify specifically whether the claim in question sought damages or injunctive relief but resting their holdings on cases that declined to recognize a right of action to recover damages. Nor does the Court agree with the Plaintiffs' assertion that cases such as *Planned Parenthood* or *Steele* provide precedent for a private right of action for injunctive relief under the Tennessee Constitution. Those cases enjoined the enforcement of facially unconstitutional statutes as to everyone; they did not concern individual unconstitutional actions. *See Planned Parenthood*, 38 S.W.3d at

> 51–52 (enjoining enforcement of Tennessee statutes found to be unconstitutional as violative of fundamental privacy rights protected by the Tennessee Constitution); *Steele*, 527 S.W.2d at 73–74 (enjoining enforcement of a Tennessee statute found to violate Article 1, Section 3, of the Tennessee Constitution). In both cases, the statute rather than the official was the underlying target of the injunction. Given the foregoing analysis, it does not seem clear to this Court that Tennessee courts have either recognized or proscribed a private right of action for injunctive relief, or whether they would be inclined to do so in the future. The only thing clear at this point is that Tennessee does not allow for a private right of action for damages based on violations of the Tennessee Constitution, which is not at issue in this case.

Peterson, 2009 WL 3517542, at *1 (emphasis added).

This Court should settle the matter and hold, expressly, that the Tennessee Constitution allows a private right of action for equitable relief regarding Tennessee constitutional claims. Several considerations support this conclusion.

First, the Tennessee Supreme Court has made clear that certain provisions of the Tennessee Constitution—in particular, "our Bill of Rights"—are "self-executing." *Washington Cty. Election Comm'n v. City of Johnson City*, 350 S.W.2d 601, 603 (1961) ("there are some provisions of our Constitution, such as the inhibitions in our Bill of Rights, which are addressed not only to the Legislature and the Executive, but also to the Courts. They are self-executing."). *See also id.* at 605 ("we think the Chancellor properly held that this constitutional provision is self-executing"). In other words: The rights guaranteed by Tennessee's Declaration of Rights do not need enabling legislation in order to be enforceable.

Second, as the Middle District of Tennessee has observed, "[e]ven though there is no authority for the recovery of damages for a violation of the Tennessee Constitution, the Court has the inherent power to enjoin unconstitutional conduct." *Anderson*, 2006 WL 1639438, at *2. This ethic is longstanding within Tennessee's jurisprudence. As the

Tennessee Supreme Court observed nearly two centuries ago, state action that contravenes the restrictions set forth in the Tennessee Constitution are "a void exercise of power, which can and must be stopped by the judicial department of the State. There is no other place to which an appeal can be made, and, if the courts can not interfere, the constitution, if violated, is a dead letter." *Bradley v. Commissioners*, 21 Tenn. 428, 432 (1841) (emphasis added).

Third, the Tennessee Supreme Court has signaled in clear terms that it has authority to declare that statutes violate Tennessee's constitutional guarantees. *See, e.g., State v. Marshall*, 859 S.W.2d 289, 290 (Tenn. 1993) ("We are not called upon to decide whether this Court has the authority to declare that the statutes under consideration violate Article I, Section 19 of the Tennessee Constitution. This Court clearly does have such authority."). The Tennessee Supreme Court has also exercised its stated authority to provide both declaratory and injunctive relief with respect to statutory challenges, as has this Court. *See Steele v. Waters*, 527 S.W.2d 72, 73 (Tenn. 1975) (affirming "the decree of the Chancery Court of Davidson County, Tennessee declaring unconstitutional the second and third paragraphs of Chapter 377 of the Public Acts of 1973 (codified as an Amendment to T.C.A. s 49—2008) as being violative of . . . Article 1, Section 3, of the Constitution of Tennessee, and permanently enjoining the enforcement and execution of the statute."). Further, the Tennessee Supreme Court has expressly authorized a private right of action for equitable tort claims against state officers who are enforcing unconstitutional statutes. *See Colonial Pipeline*, 263 S.W.3d at 849–50 (noting that "[i]n *Stockton v. Morris & Pierce*, 172 Tenn. 197, 110 S.W.2d 480 (1937) [an action for replevin], we held that the doctrine of sovereign immunity does not bar suits against state officers to prevent them from enforcing an allegedly unconstitutional statute.").

Fourth, our Supreme Court has routinely held that the Tennessee Constitution and the federal Constitution contain "synonymous" provisions, *see, e.g., Willis v. Tennessee Dep't of Correction*, 113 S.W.3d 706, 711, n.4 (Tenn. 2003), and the federal Constitution indisputably permits litigants to bring claims for equitable relief for constitutional violations. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908). Indeed, the federal Constitution even permits private causes of action for damages regarding violations that arise directly under the federal Constitution. As the United States Supreme Court established in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971), "a person whose federal constitutional rights are violated by a federal officer can maintain a private cause of action for damages against the federal officer, even though no statute expressly creates such a cause of action." *Bowden Bldg. Corp. v. Tennessee Real Estate Comm'n*, 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999).

Fifth and finally, the Tennessee Supreme Court has lauded the U.S. Supreme Court's decisions permitting equitable claims arising under the federal Constitution. In *Colonial Pipeline Co.*, 263 S.W.3d 827, for example, the Tennessee Supreme Court observed that "the United States Supreme Court's seminal decision of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)," *id.* at 850—which allows for injunctions against state actors who act pursuant to an unconstitutional statute—has been regarded as "'one of the three most important decisions the Supreme Court of the United States has ever handed down,'" *id.* at n.16, "one of the cornerstones of our legal system," *id.,* and "indispensable to the establishment of constitutional government and the rule of law," *id.* at n. 18. Given this context, the notion that the Tennessee Supreme Court would only consider such judicial review of governmental action indispensable when it comes to federal constitutional violations strains the outermost bounds of credulity.

For all of these reasons, this Court should recognize that TSEL has a private right of action directly under the Tennessee Constitution to prosecute its equitable claims under Tenn. Const. art. I § 19.

V. CONCLUSION

For the foregoing reasons, the Defendants' Motion to Dismiss the Plaintiff's Complaint for lack of subject matter jurisdiction should be **DENIED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 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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