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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

TENNESSEANS FOR SENSIBLE ELECTION LAWS,	)	
Plaintiff,	)	
v.	)	**No. 20-0312-III**
HERBERT H. SLATERY III, in his official capacity as TENNESSEE ATTORNEY GENERAL and GLENN FUNK, in his official capacity as DISTRICT ATTORNEY GENERAL FOR THE 20th JUDICIAL DISTRICT OF TENNESSEE,	)	
Defendants.	)	

MEMORANDUM AND ORDER: (1) GRANTING DEFENDANTS' MOTION TO DISMISS CLAIM FOR CRIMINAL INJUNCTIVE RELIEF FOR LACK OF SUBJECT MATTER JURISDICTION; (2) BUT DENYING DISMISSAL OF CLAIMS FOR A DECLARATORY JUDGMENT AND 42 U.S.C. § 1988(b) RECOVERY OF ATTORNEYS' FEES AND COSTS

After studying the law and the *Complaint*, and considering argument of Counsel, it is ORDERED that the *Defendants' Motion to Dismiss* is granted in part, and paragraph 3 of the *Prayer for Relief* of the *Complaint*, seeking ultimately for this Court to enjoin criminal enforcement of Tennessee Code Annotated section 2-19-142, is dismissed because chancery courts in Tennessee do not have subject matter jurisdiction to enjoin criminal proceedings. As well, it is ORDERED that the Defendant Davidson County District Attorney General is dismissed without prejudice from this action depending upon

the outcome of any appellate review. These dismissals are without prejudice because the Plaintiff does not presently seek an injunction by this Court against criminal prosecution but only prospectively after there has been entered an "unappealable final judgment." *Complaint*, p. 12, ¶ 3 of the *Prayer For Relief* (Mar. 18, 2020); *see also Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 753 (Tenn. 2006) ("[O]nce this [Supreme] 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.") (citation omitted).

As to the remainder of the *Defendants' Motion to Dismiss*, it is ORDERED that it is denied, and, except for paragraph 3 of the *Prayer for Relief*, the claims in the *Complaint* remain pending and litigation of those may proceed.

The law and analysis on which this ruling is based are as follows.

The *Complaint*

This lawsuit was filed by a political campaign committee [1] challenging the constitutionality of Tennessee Code Annotated section 2-19-142 (the "Statute"). It 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,

[1] The Plaintiff describes itself as "a registered Tennessee multicandidate political campaign committee" whose "mission is to ensure that Tennessee's election laws protect the rights of all Tennesseans to participate in democracy and support candidates of their choosing without unreasonable governmental interference." *Complaint*, at ¶ 1, p. 1

> charge, allegation, or other matter contained therein with respect to such candidate is false.

The penalty for violating the Statute is a sentence of up to 30 days in jail and/or a fine not to exceed $50.00. TENN. CODE ANN. § 40-35-111(c)(3).

The Plaintiff asserts in its *Complaint* that it is distinctly at risk under section 2-19-142 because of a device the Plaintiff uses in its campaign literature. For emphatic and memorable communication in its campaign materials opposing candidates, the Plaintiff uses the literary device of knowingly stating a literally false statement about a candidate in the context of satire, parody and hyperbole. So, for example, the *Complaint* explains that the Plaintiff has described in its literature one State Representative as "Hitler", who supported eugenics, i.e. state-sponsored chemical castration of convicted sex offenders. The Plaintiff's analysis in its *Complaint* is that, "Because Representative Griffey is not, in fact, 'literally Hitler,' and because Tennesseans for Sensible Election Laws knows that Representative Griffey is not literally Hitler, Tennesseans for Sensible Election Laws' campaign literature would violate § 2-19-142, thus subjecting members of Tennesseans for Sensible Election Laws to **criminal prosecution** carrying a sentence of up to thirty days in jail and/or a fine not to exceed $50.00. See Tenn. Code Ann. § 40-35-111(e)(3) [emphasis in original]." *Complaint,* at ¶ 7, p. 3.

The Plaintiff further asserts in paragraphs 29-31 of the *Complaint* that the harm it faces is palpable based upon:

> — multiple Tennessee officeholders' indication that speech with which they disagree will be officially designated "fake news." See Andrew Blake, *Tennessee lawmakers advance measure to designate CNN, Washington Post as 'fake news' outlets*, THE WASHINGTON TIMES

(Feb. 27, 2020), https://www.washingtontimes.com/news/2020/feb/27/tennessee-lawmakers-advance-measure-to-recognize-c/;

— the Tennessee Attorney General has formally opined that "a prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections," See Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009); and

— Tennessee Code Annotated section 2-19-142 has both been actively enforced, *see, e.g.*, *Jackson v. Shelby Cty. Civil Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518 (Tenn. Ct. App. Jan. 10, 2007), and used as a basis for civil liability, *see, e.g.*, *Murray v. Hollin*, No. M2011-02692-COA-R3CV, 2012 WL 6160575, at *1 (Tenn. Ct. App. Dec. 10, 2012).

The Plaintiff asserts four causes of action of violations on the face of the Statute and the Statute as applied to the Plaintiff. The four violations alleged under the First and Fourteenth Amendments to the United States Constitution are: viewpoint discrimination, content-based and identity-based discrimination, freedom of speech, and overbreadth. In addition, the Plaintiff asserts section 2-19-142 violates Article I, section 9 of the Tennessee Constitution both facially and upon application of the Statute to the Plaintiff.

The *Complaint* is filed against the Tennessee Attorney General in his official capacity as defender of the constitutionality and validity of all legislation of statewide application and as a required party under Tennessee Code Annotated section 29-14-107(b). *Complaint* at ¶ 17, p. 6. The Plaintiff has also filed its claims against the Davidson County District Attorney as the official who is responsible for prosecution of violations of state criminal laws which occur in Davidson County where the Plaintiff is registered and conducts its operations. *Complaint* at ¶ 18, p. 7.

The Plaintiff's *Prayer for Relief* seeks

— a declaratory judgment that section 2-19-142 violates the U.S. and Tennessee Constitutions (¶ 2);

— that upon the rendering of an unappealable final judgment, this Court enjoin the continued enforcement of Section 2-19-142 (¶ 3); and

— that pursuant to 42 U.S.C. § 1988(b) the Plaintiff be awarded its reasonable costs and attorneys fees associated with prosecuting this lawsuit (¶ 4).

No answers have been filed to the lawsuit. Instead, the case is before the Court on a preliminary motion to dismiss filed on April 17, 2020, by both Defendants.

Defendants' Motion to Dismiss

The *Defendants' Motion To Dismiss* is filed pursuant to Tennessee Civil Procedure Rule 12.01(1) for lack of subject matter jurisdiction. This kind of motion calls into question a court's "lawful authority to adjudicate a controversy brought before it and should be viewed as a threshold inquiry." *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 445 (Tenn. 2012). When a court's subject matter jurisdiction is challenged, the burden is on the plaintiff to demonstrate that the court has the requisite jurisdiction to hear and adjudicate plaintiff's claims. *See Staats v. McKinnon*, 206 S.W.3d 532, 543 (Tenn. Ct. App. 2006).

At the outset, the Defendants' argument focuses on the Plaintiff's request in paragraph 3 of its *Prayer for Relief* for this Court to ultimately issue an injunction to prevent criminal enforcement of section 2-19-142 following entry of an unappealable final judgment. Citing on the first page of their *Motion To Dismiss* to the cases of *Clinton*

Books Inc. v. City of Memphis, 197 S.W.3d 749, 754 (Tenn. 2006); *Carter v. Slatery*, M2015-00554-COA-R3-CV, 2016 WL 1268110 at *7 (Tenn. Ct. App. Feb. 19, 2016); and *Memphis Bonding Co., Inc. v. Criminal Court of Tennessee 30th Dist*., 490 S.W.3d 458, 467 (Tenn. Ct. App. 2015), the logic of the Defendants' argument for dismissal of the entire lawsuit is as follows:

1. chancery court lacks jurisdiction to grant injunctive relief regarding the enforcement of a criminal statute;

2. absent subject matter jurisdiction to grant injunctive relief, the Court also lacks jurisdiction to grant declaratory relief;

3. accordingly the *Complaint* should be dismissed for lack of subject matter jurisdiction.

Memorandum In Support Of Motion To Dismiss, April 17, 2020 at pp. 3-5.

The Defendants base the first step of their argument that chancery courts lack jurisdiction to enjoin the enforcement of a criminal statute on Article VI, Section 8 of the Tennessee Constitution and Tennessee Code Annotated sections 16-10-102 and 40-1-107—108. These provide that exclusive and original jurisdiction of all criminal matters is in the circuit and criminal courts.

From this law the Defendants extrapolate and rely upon, at pages 4 and 6 of their *Memorandum in Support of Motion to Dismiss*, April 17, 2020, and pages 1-2 of their *Reply in Support of Motion to Dismiss*, May 5, 2020, case law[2] to support the second step of their

[2] The cases cited are *Clinton Books Inc. v. City of Memphis*, 197 S.W.3d 749, 754 (Tenn. 2006) *(citing Alexander v. Elkins*, 179 S.W. 310, 311 (1915); *Zirkle v. City of Kingston*, 396 S.W.2d 356,363 (Tenn. 1976) (citing *Gibson Suits in Chancery* § 36, n. 62 (5th ed. 1955) (emphasis added)); *J.W. Kelly & Co. v. Conner*, 123 S.W. 622, 637 (1909)); *Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics and Campaign Finance*, 2019 WL 6770481 at *26; *Carter v. Slatery*, M2015-00554-COA-R3-CV, 2016 WL 1268110 at *7 (Tenn. Ct. App. Feb. 19, 2016); *Memphis Bonding Co. Inc. v. Criminal Court of*

argument that chancery courts do not have subject matter jurisdiction under a declaratory judgment claim to determine and declare the validity of criminal laws.

The Defendants also challenge the other bases for chancery court jurisdiction asserted by the Plaintiff of Tennessee Code Annotated section 1-3-121; 42 U.S.C. § 1983 and § 1988(b); and the Tennessee Constitution.

Court's Analysis

As noted above in outlining the Defendants' first argument, the lynchpin for dismissal of the entire *Complaint* is the premise that the Plaintiff's prayers for injunctive and declaratory relief are conjoined such that lack of jurisdiction of a chancery court to enjoin enforcement of a criminal statute necessarily eliminates jurisdiction to adjudicate declaratory relief with respect to the constitutionality of the criminal statute. The outline of Defendants' argument provided above is quoted again as follows:

1. chancery court lacks jurisdiction to grant injunctive relief regarding the enforcement of a criminal statute;

2. absent subject matter jurisdiction to grant injunctive relief, the Court also lacks jurisdiction to grant declaratory relief;

3. accordingly the *Complaint* should be dismissed for lack of subject matter jurisdiction.

The lynchpin second step, however, is, respectfully speaking, the fallacy in the Defendants' argument.

Tennessee 30th Dist., 490 S.W.3d 458,467 (Tenn. Ct. App. 2015); *see also Spoone v. Mayor & Aldermen of Morristown*, 206 S.W.2d 422 (1947); *State v. FirstTrust Money Services, Inc*., 931 S.W.2d 226, 229 (Tenn. Ct. App. 1996); *Brackner v. Estes*, 698 S.W.2d 637, 637, 639 (Tenn. Ct. App. 1985).

As explained in a case the Defendants rely upon: *Tennesseans for Sensible Election Laws v. Tennessee Bureau of Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481 at *25-26 (Tenn. Ct. App. Dec. 12, 2019)[3] (referred to hereinafter as "*TSEL-2019 Decision*"), the Court in that case affirmed the trial court's dismissal of one of the parties, the District Attorney, on the grounds that chancery courts in Tennessee lack subject matter jurisdiction to enjoin criminal proceedings. But in doing so, the *TSEL-2019 Decision* recognized that the claim to enjoin enforcement of a criminal statute was not consolidated and conjoined with the other claim in the lawsuit for a declaratory judgment that the statute was unconstitutional. The declaratory judgment claim had been decided by the chancery court, and a civil injunction against the Election of Registry Finance was affirmed.

The *TSEL-2019 Decision* separated the claim for injunction of criminal enforcement of the statute from the claim for declaratory judgment, and proceeded to rule upon the declaratory judgment claim as coming within the subject matter jurisdiction of the chancery court. The ruling issued by this Court adopts and incorporates herein the reasoning and authorities of the *TSEL-2019 Decision*, quoting extensively from the *Decision* as follows.

> On appeal, TSEL asks this Court to remand with instructions for the trial court to extend its injunction, which already applies to the Registry, to

[3] The Defendants cite favorably at page 4 of their April 17, 2020 *Memorandum* to the *TSEL-2019 Decision* but then on page 2 of their May 5, 2020 *Reply* the Defendants discount the case because it is unpublished. *But see* TN R S CT Rule 4(G)(1) (West 2020) ("(G)(1) An unpublished opinion shall be considered controlling authority between the parties to the case when relevant under the doctrines of the law of the case, res judicata, collateral estoppel, or in a criminal, post-conviction, or habeas corpus action involving the same defendant. Unless designated "Not For Citation," "DCRO" or "DNP" pursuant to subsection (E) of this Rule, unpublished opinions for all other purposes shall be considered persuasive authority. Unpublished opinions of the Special Workers' Compensation Appeals Panel shall likewise be considered persuasive authority.").

the Davidson County District Attorney General's office. We conclude that such relief is inappropriate at this stage. In *Clinton Books*, the Tennessee Supreme Court addressed whether a chancery court has subject matter jurisdiction to issue a temporary injunction barring enforcement of a criminal statute. The Court discussed "the general rule prohibiting state equity courts from enjoining enforcement of a criminal statute." 197 S.W.3d at 753.

> The 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. *See, e.g.*, *Alexander v. Elkins*, 132 Tenn. 663, 179 S.W. 310, 311 (1915); *J.W. Kelly & Co. v. Conner*, 122 Tenn. 339, 123 S.W. 622, 637 (1909). A lawsuit seeking injunctive relief due to an allegedly invalid criminal statute asks the chancery court, rather than the court that will enforce the criminal law, to enjoin the officers of the state from prosecuting persons who are conducting a business made unlawful by a criminal statute until the chancery court can determine the statute's validity. *J.W. Kelly & Co.*, 123 S.W. at 631. Permitting a court of equity to interfere with the administration of this state's criminal laws, which that court is without jurisdiction to enforce, would cause confusion in the preservation of peace and order and the enforcement of the State's general police power. Id. at 637.
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> ....
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> ... Courts of equity, however, may enjoin the enforcement of a criminal statute that **this Court** has adjudged unconstitutional. *Alexander*, 179 S.W. at 311; *also Planned Parenthood [of Middle Tenn. v. Sundquist]*, 38 S.W.3d [1,] 15 [(Tenn. 2000)] (holding that with regard to the Tennessee Constitution, we are the court of last resort, subject to the qualification that we refrain from impinging upon the minimum level of protection established by the United States Supreme Court's interpretations of the federal constitution). Once we have concluded that a criminal statute is unconstitutional, a person is not subject to criminal prosecution for acts committed in violation of the statute. *Alexander*, 179 S.W. at 311-12. Therefore, once this Court has concluded that a criminal statute is unconstitutional, no controversies are required to be settled by a criminal court, and the equity court is not invading the criminal court's jurisdiction by issuing an injunction. *Id.*

Id. at 752-53 (emphasis added). On appeal, TSEL relies on the final paragraph quoted above to suggest that this Court can now extend the injunction to the District Attorney General.

The Tennessee Court of Appeals is not a limited court of equity, but neither is it a criminal court nor the court of last resort. Accordingly, *Clinton Books* does not clearly answer whether this Court can require the chancery court to enjoin a District Attorney General from pursuing a criminal prosecution, upon finding a statute unconstitutional on appeal, when the chancery court lacked jurisdiction to do so in the first instance.

We note that "the general rule prohibiting state equity courts from enjoining enforcement of a criminal statute," 197 S.W.3d at 753, is not strictly limited to chancery courts. In *Clinton Books*, the Supreme Court extended the same rule for courts of equity to the circuit court of Shelby County. *Id*. Even though most circuit courts have original jurisdiction over criminal offenses, the situation is different in Shelby County, where criminal courts are separate from circuit courts, and the circuit courts do not hear criminal matters. *Id*. As a result, the circuit court was acting as a court of equity, and "the general rule that courts of equity lack jurisdiction to enjoin enforcement of a criminal statute that is alleged to be unconstitutional equally applie[d] to the Shelby County Circuit Court under the circumstances of [that] case." *Id.* at 753-54. In another case, the Court of Criminal Appeals similarly held that a general sessions court exercising equity jurisdiction could not enjoin prosecution of a criminal case. *State v. Osborne*, 712 S.W.2d 488, 492 (Tenn. Crim. App. 1986).

In *Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996) abrogated on other grounds by *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008), this Court declared an act criminalizing homosexual conduct unconstitutional, but we declined to enter an injunction against its enforcement by the District Attorney General, stating, "It is clear that this Court may not enjoin pending or threatened prosecutions for the violation of the criminal laws of this State." *Id*. (citing *Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S.W. 565 (1927); *Lindsey v. Drane*, 154 Tenn. 458, 285 S.W. 705 (1926); *Brackner v. Estes*, 698 S.W.2d 637 (Tenn. App. 1985)). Likewise, when this Court considered the issues at the intermediate level in *Clinton Books*, we stated that "[u]nder Tennessee law, a civil court does not have authority to enjoin the enforcement of a criminal statute." *Clinton Books, Inc. v. City of Memphis*, No. W2003-01300-COA-R3-CV, 2004 WL 2492279, at *4 (Tenn. Ct. App. Nov. 3, 2004) *aff'd* 197 S.W.3d 749 (Tenn.

2006). We described this as "the long-standing established law concerning a civil court's enjoining prosecution under criminal law." *Id*.

Finally, we find some guidance in *Erwin Billiard Parlor v. Buckner*, 300 S.W. 565 (Tenn. 1927), where 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. *Id*. at 566. However, the Court explained:

> This jurisdiction of the chancery court does not, however, include the power to issue an injunction against officers of the state or county charged with the enforcement of penal laws. And pending such a proceeding for a determination as to the construction or constitutionality of a penal statute, such officers may proceed in the discharge of the duties of their office without hindrance.

Id. (citation omitted). Accordingly, "[t]he chancellor was correct in declining to issue an injunction against the defendants." *Id*. But more importantly, on appeal, the Supreme Court held that a decree would be entered holding the act unconstitutional and void, "but the injunctive relief sought will be denied." *Id.*

Likewise, in *J.W. Kelly & Co. v. Conner*, 123 S.W. 622 (Tenn. 1909), petitioners filed suit in chancery court for the purpose of enjoining the District Attorney General and sheriff from instituting and prosecuting criminal actions against them on the basis that the relevant statutes were unconstitutional. On appeal, the Supreme Court found it "well established" that "the chancery court has no jurisdiction to enjoin pending or threatened prosecutions for violation of the criminal laws of the state." *Id*. at 627. Notably, because the chancery court lacked authority to act, the Supreme Court did not do so on appeal either. Instead, it added, "This conclusion disposes of the case. The chancery court having no jurisdiction to entertain and determine the case upon the merits, this court cannot do so; and we do not decide anything in regard to the merits or other questions than the one just disposed of. The only decree we can and will pronounce is one of dismissal and adjudging costs." *Id*. at 637.

Considering these authorities, we agree with the chancery court's implicit conclusion that it lacked jurisdiction to enjoin the District Attorney

> General, and we will not extend the trial court's injunction to the District Attorney General on appeal.

Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics & Campaign Fin., No. M201801967COAR3CV, 2019 WL 6770481, at *24-26 (Tenn. Ct. App. Dec. 12, 2019).

While the Defendants attempt in their *Reply* to marginalize the *TSEL-2019 Decision* as unpublished, this Court is not dissuaded from its reliance on the acknowledgment in the *TSEL-2019 Decision* that a chancery court has jurisdiction to issue a declaratory judgment on a constitutional challenge to a criminal statute while as to the same statute it does not have jurisdiction to enjoin criminal enforcement. Although the *TSEL-2019 Decision* is unpublished, its analysis is from a court superior to this one, and is based on reported decisions, and does a good job of sorting out the law on this point.

Moreover, it is important not to lose sight that there is a Tennessee Supreme Court case and recent Court of Appeals decisions which explicitly find that a chancery court has subject matter jurisdiction to declare the constitutionality of a criminal statute. *See, e.g. Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S.W. 565, 566 (1927) ("We are of the opinion that a person so situated is entitled to bring and maintain an action for the determination of the proper construction or constitutionality of such a [criminal] statute, under the provisions of the Declaratory Judgments Law, and the bill in the present cause was properly filed against the sheriff, in view of the averment of the bill that the sheriff had given notice of his intention to proceed against complainants. This jurisdiction of the chancery court does not, however, include the power to issue an injunction against officers

of the state or county charged with the enforcement of penal laws. *Lindsey v. Drane*, supra. And pending such a proceeding for a determination as to the construction or constitutionality of a penal statute, such officers may proceed in the discharge of the duties of their office without hindrance."); *Grant v. Anderson*, No. M201601867COAR3CV, 2018 WL 2324359, at *7 (Tenn. Ct. App. May 22, 2018), *appeal denied* (Oct. 10, 2018) ("Declaratory relief may be granted with respect to a penal or criminal statute. *See Erwin Billiard Parlor v. Buckner*, 300 S.W. 565, 566 (Tenn. 1927) (holding that pool room proprietors could seek declaratory judgment that act declaring the operation of pool and billiard rooms for pay and profit was unconstitutional); *see also* W. E. Shipley, Annotation, *Validity, Construction, and Application of Criminal Statutes or Ordinances as Proper Subject for Declaratory Judgment*, 10 A.L.R.3d 727, § 2 (1966) ('[I]t now seems reasonably well settled that in an otherwise proper case declaratory relief may be granted notwithstanding the fact that the declaration is as to the validity or construction of a statute having criminal or penal provisions . . . .')"); *Blackwell v. Haslam*, No. M2011-00588-COA-R3CV, 2012 WL 113655, at *3 (Tenn. Ct. App. Jan. 11, 2012) ("We have concluded that the chancery court has subject matter jurisdiction over the petition for declaratory relief on the constitutionality of Tennessee Code Annotated § 39–17–1307(b)(1)(B) [criminal statute] as applied to the Petitioner.").

In addition, though, to the reasoning of the *TSEL-2019 Decision* and the foregoing caselaw, there is also a very fundamental principle on which this Court bases its decision to dismiss the claim to enjoin enforcement of the criminal statute but to proceed with the

claims for declaratory judgment relief and for 42 U.S.C. § 1988(b) recovery. That principle is to discern the gravamen of the complaint in ruling on subject matter jurisdiction.

As explained in *Carter v. Slatery*, No. M2015-00554-COA-R3-CV, 2016 WL 1268110 (Tenn. Ct. App. Feb. 19, 2016), the existence of subject matter jurisdiction depends upon "the nature of the cause of action and the relief sought." *Id*. at *3. "When a court's subject matter jurisdiction is questioned, the first step is to ascertain the nature or gravamen of the case [citations omitted]. Then, the court must determine whether the constitution, the general assembly, or the common law have conferred on it the power to adjudicate cases of that sort [citations omitted]." *Id*.

The prohibition against chancery courts of equity becoming involved in criminal proceedings and prosecutions is that courts of equity are not equipped to handle criminal prosecutions and proceedings, "courts of equity are not constituted to deal with crime and criminal proceedings." *Carter v. Slatery*, No. M2015-00554-COA-R3-CV, 2016 WL 1268110 *4 (Tenn. Ct. App. Feb. 19, 2016). The Tennessee Constitution and statutes have set up courts outside of equity to handle the specialty of criminal proceedings.

The gravamen of the *Complaint* in this case, however, is not a crime that has been committed or a prosecution of a crime. This is not a case brought by the State to prosecute and punish, and it is not a lawsuit by a charged or convicted criminal defendant to challenge the validity of a sentence. In those circumstances "courts of equity are not constituted to deal with crime and criminal proceedings." *Carter v. Slatery*, No. M2015-00554-COA-R3-CV, 2016 WL 1268110 *4 (Tenn. Ct. App. Feb. 19, 2016). *See also Mitchell v. Campbell*, 88 S.W.3d 561, 565 (Tenn. Ct. App. 2002) ("declaratory proceedings under

Tenn. Code Ann. § 4-5-225 . . . cannot be used to challenge the validity of a criminal conviction or sentence.").

Instead, the gravamen of the *Complaint* in this case is the classic chancery court case of seeking a declaratory judgment to declare a statute unconstitutional. As explained in the iconic case of *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837 (Tenn. 2008), the declaratory judgment procedure is not derived from common law which prohibited a lawsuit in law or equity absent an actual or present injury. Of recent, statutory origin, declaratory judgment actions "have gained popularity as a proactive means of preventing injury to the legal interests and rights of a litigant." *Id.*

> "Declaratory judgments" are so named because they proclaim the rights of the litigants without ordering execution or performance [footnote omitted]. 26 C.J.S. *Declaratory Judgments* § 1 (2001). Their purpose is to settle important questions of law before the controversy has reached a more critical stage. 26 C.J.S. *Declaratory Judgments* § 3 (2001). The chief function is one of construction. *Hinchman v. City Water Co.*, 179 Tenn. 545, 167 S.W.2d 986, 992 (1943) (quoting *Newsum v. Interstate Realty Co.*, 152 Tenn. 302, 278 S.W. 56, 56–57 (1925)). . . .
>
> In its present form, the Tennessee Declaratory Judgment Act grants courts of record the power to declare rights, status, and other legal relations. Tenn. Code Ann. § 29–14–102 (2000). The 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. Tenn. Code Ann. § 29–14–103 (2000). Of particular relevance to this case, the Act provides that "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." *Id.*

Id.

That is what is at issue and is the gravamen of the *Complaint* in this case: a proactive means of preventing injury to the legal interests and rights of a litigant. Not in

issue is a past criminal proceeding, and therefore the claim for a declaratory judgment in this case of the unconstitutionality of the Statute does not intrude on the exclusive and original jurisdiction of criminal matters in the circuit and criminal courts.

Application of the foregoing distinction to the case law cited by the Defendants eliminates any confusion and provides a coherent, logical explanation for the outcomes in those cases, as follows, where chancery court does not have jurisdiction because of the existence of a present or previous criminal proceeding.

Beginning with *Carter v Slatery*, No. M2015-00554-COA-R3-CV, 2016 WL 1268110, at *7 (Tenn. Ct. App. Feb. 19, 2016), that case was filed by an inmate challenging his first degree murder convictions based upon subsequent court statutory interpretations. Unlike the present case, in *Carter* there had already been a criminal prosecution and conviction, and a subsequent chancery decision would involve itself in a reopening and revision of a criminal proceeding. "[W]e conclude that the chancery court lacked subject matter jurisdiction to enter a declaratory judgment regarding the legality or constitutionality of the ***criminal judgments entered against Carter***." *Id.* at *7 (Tenn. Ct. App. Feb. 19, 2016) (emphasis added).

The same is true with respect to *Zirkle v. City of Kingston*, 217 Tenn. 210, 396 S.W.2d 356 (1965), where the Plaintiff landowner's complaint for injunction and declaratory judgment relief came after annexation/eminent domain had been exercised by the City. The *Zirkle* court concluded there was no chancery court subject matter jurisdiction because the gravamen of the action had already been established and exercised through the eminent domain statutory scheme and an adequate remedy at law.

Along these same lines is *J.W. Kelly & Co. v. Conner*, 123 S.W. 622 (1909) in which the sheriff had publicly and officially announced his intent to criminally prosecute offenders. A chancery court declaration at that juncture was determined to be an intrusion on criminal proceedings. Additionally, this case was decided before the Declaratory Judgment Act, Tennessee Code Annotated sections 29-14-101 *et seq.*, was enacted, and at that time the law did not provide a litigant a declaratory judgment alternative.

Memphis Bonding Co. v. Criminal Court of Tennessee, 440 S.W.3d 458 (Tenn. Ct. App. 2015), as well, is distinguishable from the present case because *Memphis Bonding* clearly relates to matters exclusively within the purview of the criminal courts in issue in the case. In dispute was the validity of proposed rules of practice and procedure for the criminal courts governing bonding companies in which the criminal judges were named as defendants. The case particularly was decided on the principle that trial courts have inherent authority to administer their own affairs. *Id*. at 453.

Clinton Books, Inc. v. City of Memphis, 197 S.W.3d 749 (Tenn. 2006), also cited by the Defendants, is not instructive because it only concerned injunctive relief. The declaratory judgment claim had not been properly consolidated as part of the lawsuit.

Another example is the case of *Rayner v. Tennessee Dep't of Correction*, No. M201700223COAR3CV, 2017 WL 2984269 (Tenn. Ct. App. July 13, 2017) where the Court dismissed Inmate Rayner's challenge to the constitutionality of Tennessee Code Annotated sections 40–35–501 and 39–13–523 which are part of the Tennessee Criminal Sentencing Reform Act of 1989. Tennessee Code Annotated section 39–13–523 sets out the punishment for certain sex offenses, including child rape. Mr. Rayner's constitutional

arguments, the Court reasoned, amounted "to nothing more than a challenge to his criminal sentence. It is well settled that 'declaratory proceedings under Tenn. Code Ann. § 4–5–225 . . . cannot be used to challenge the validity of a criminal conviction or sentence.' (citations omitted)." *Id.* at *3.

In contrast are *Davis Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993) and *Blackwell v. Haslam*, 2012 WL 113655 (Tenn. Ct. App. 2012) in which the plaintiffs were not being prosecuted and were not challenging a conviction but had proactively filed a declaratory judgment action to avoid prosecution on the basis that the statute in issue in each case was unconstitutional. Jurisdiction of the chancery court to decide the constitutionality of a criminal statute was upheld.

A fair reading of the *Complaint* in this case is that there are no pending or already adjudicated criminal proceedings or prosecution of the Plaintiff. Moreover, the Plaintiff is not even presently seeking a preliminary injunction nor a permanent injunction of enforcement of a criminal statute from this Court at the conclusion of the trial court proceedings. Instead, the Plaintiff has sought prospectively to have this Court enjoin the Defendants' enforcement of Tennessee Code Annotated section 2-19-142 only after "an unappealable final judgment" has been rendered. *Complaint*, p. 12, ¶ 3.

Accordingly, in this case criminal proceedings are not the gravamen. Instead, the gravamen of the *Complaint* is a proactive determination of the constitutionality of a statute. Such a claim comes within the jurisdiction of the chancery court as stated in the Declaratory Judgment Act, Tennessee Code Annotated section 29-14-102, "to construe or determine the validity of any . . . statute . . . provided that the case is within the court's jurisdiction."

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.[4] For these reasons, the Defendants' motion to dismiss the entire lawsuit must be denied. As sorted out in the *TSEL-2019 Decision*, only the Plaintiff's claim to enjoin criminal enforcement of the Statute must be dismissed because that would intrude upon the exclusive jurisdiction of the criminal and circuit courts. Because the claim to enjoin the criminal enforcement is only prospective – after the rendering of a "final unappealable judgment" – dismissal of that claim is without prejudice.

[4] To the extent the Plaintiff seeks civil injunctive relief if section 2-19-142 is invoked and enforced in a civil action, the Court adopts the Plaintiff's authorities and analysis at page 15 of its May 1, 2020 *Response* that this Court has subject matter to enjoin the civil enforcement, quoting the *Response* as follows:

> *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.

Plaintiff's Response In Opposition To Motion To Dismiss, p. 15 (May 1, 2020).

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. In so concluding, the Court notes that the "filter" or "governor" on section 1-3-121 is its standing requirement, i.e. "a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief . . . [emphasis added]." The Plaintiff's standing, however has not been challenged by the Defendants. Adopting the reasoning and authorities stated at pages 9-12 of *Plaintiff's Response in Opposition to Motion to Dismiss*, May 1, 2020, the Court concludes that Tennessee Code Annotated section 1-3-121 provides a separate and independent basis of subject matter jurisdiction of this Court for the declaratory judgment claims sought in paragraph 2 of the *Prayer For Relief*.

Having established subject matter jurisdiction under both Tennessee Code Annotated sections 29-14-102 and 1-3-121, the Plaintiff, then, is able to state a claim for the remedy under 42 U.S.C. § 1988(b). More specifically, section 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, the Plaintiff has alleged—in four independent respects—that section 2-19-142 infringes upon Plaintiff's federally protected rights under the First and Fourteenth Amendments to the United States Constitution. *See Complaint*, at pp. 10–12.

As to the Plaintiff's argument of an independent basis for subject matter jurisdiction under the Tennessee Constitution, it is not necessary for this Court to reach that issue

having determined that Tennessee statutes: 29-14-102 and 1-3-121 provide subject matter jurisdiction for this Court to decide the declaratory judgment claims and to enjoin civil enforcement of the Statute.

Based upon the foregoing analysis and authorities, the Defendants' motion to dismiss this case for lack of subject matter jurisdiction is denied, except for paragraph 3 of the *Prayer for Relief* of the *Complaint* pertaining to ultimately enjoining criminal enforcement of Tennessee Code Annotated section 2-19-142 which is dismissed without prejudice.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc: Due to the pandemic, and as authorized by the April 24, 2020, Tennessee Supreme Court Order *In Re: COVID-19 Pandemic*, through May 31, 2020, copies will be sent only electronically to those whose email addresses are on file with the Court. If you fit into this category but nevertheless require a mailed copy, call 615-862-5719 to request a copy by mail.

For those who do not have an electronic address on file with the Court, your envelope will be hand-addressed and mailed with the court document enclosed, but if you have an email address it would be very helpful if you would provide that to the Docket Clerk by calling 615-862-5719.

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