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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

TENNESSEEANS FOR SENSIBLE ELECTION LAWS, Plaintiff, v. 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.	)	Case No. 20-0312-III

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants Herbert H. Slatery III and Glenn Funk, in their official capacities, hereby submit the following response in opposition to Plaintiff's Motion for Summary Judgment. Defendants also rely in opposition upon: their Response to Plaintiff's Statement of Undisputed Material Facts in support of its motion for summary judgment; Defendants' Statement of Disputed Additional Material Facts; and the Declaration of Davidson County Deputy District Attorney General Roger D. Moore.

INTRODUCTION AND BACKGROUND

Plaintiff is a multicandidate political action committee that advocates against certain election and campaign finance policies by—among other things—filing lawsuits seeking to challenge the constitutionality of state statutes. Defendant Herbert H. Slatery III is Attorney General and Reporter for the State of Tennessee and is tasked with defending the constitutionality of state statutes. *See* Tenn. Code Ann. § 8-6-109(b)(9). Defendant Glenn Funk is the duly elected District Attorney General for the 20th Judicial District of Tennessee and has the duty of prosecuting violations of state criminal statutes. *See* Tenn. Code Ann. § 8-7-103.

Plaintiff brought this action seeking a declaration that Tenn. Code Ann. § 2-19-142 violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section 19 of the Tennessee Constitution and requesting a permanent injunction enjoining enforcement of that statute. Tenn. Code Ann. § 2-19-142 makes it 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."

In their Answer, at 7, Defendants raised, in part, as a defense that:

1. The Court lacks subject-matter jurisdiction over the claims asserted in Plaintiff's Complaint; and

2. Plaintiff lacks standing to assert its claims.

While Defendants attempted to pursue discovery from Plaintiff regarding standing, Plaintiff filed a motion for summary judgment arguing that Tenn. Code Ann. § 2-19-142 (1) constitutes unconstitutional viewpoint discrimination; (2) constitutes an unconstitutional content-based restriction; (3) violates the First Amendment's guarantee of free speech; (4) is overbroad; and (5) violates the free speech protections of Article I, Section 19 of the Tennessee Constitution.

The Record in this case for purposes of Plaintiff's motion for summary judgment, in part, includes: Plaintiff's Complaint exhibits, Plaintiff's Responses to Defendants' First Set of Discovery; and the Declaration of Davidson County Deputy District Attorney General Roger D. Moore (Filed by Defendants).

LEGAL STANDARD

A party may be awarded summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact *and* that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. (emphasis added). However, a court reviewing such a motion must "view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor." *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000).

ARGUMENT

Plaintiff has moved for summary judgment and accordingly has the burden of establishing that it is entitled to a judgment in its favor as a matter of law. Plaintiff has not met this burden. Plaintiff has not established a credible threat or history of prosecution and therefore has failed to meet the requirements for standing. As detailed below, Plaintiff also has failed to demonstrate how Tenn. Code Ann. § 2-19-142 violates either the United States or Tennessee Constitutions. Accordingly, Plaintiff's motion must be denied.

I. PLAINTIFF LACKS STANDING TO CHALLENGE TENN. CODE ANN. § 2-19-142.

Plaintiff's challenge to Tenn. Code Ann. § 2-19-142 rests on its professed desire to engage in political satire, and lampoon candidates for office whom it objects to. *See* Plaintiff's SJ Memorandum at 3. *See also* Complaint at ¶¶ 4-8, Exs. A-C. As its most concrete example,

Plaintiff asserts that it

> [w]ishes to publish and circulate campaign literature in opposition to [the candidacy] of Representative [Bruce] Griffey that both urges voters to vote against him and indicates, among other things, that Representative Griffey is "literally Hitler."

Plaintiff's SJ Memorandum at 3; Complaint Ex. B. However, because Representative Griffey is *not* "literally Hitler"—a fact which Plaintiff (and everyone else) knows—Plaintiff claims that it would violate Section 142 and be "subject[ed] . . . to criminal prosecution carrying a sentence of up to thirty days in jail." *Id*. Yet, Plaintiff presents no competent evidence that demonstrates such a threat exists.[1] Accordingly, Plaintiff lacks standing to bring this action.

The concept of standing requires a plaintiff to demonstrate "three 'indispensable' elements."

> First, a party must show an injury that is "distinct and palpable"; injuries that are conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general citizenry are insufficient in this regard. Second, a party must demonstrate a causal connection between the alleged injury and the challenged conduct. . . . The third and final element is that the injury must be capable of being redressed by a favorable decision of the court.

City of Memphis v. Hargett, 414 S.W.3d 88, 98 (Tenn. 2013) (citations omitted)); to establish standing, a plaintiff must show these three "indispensable" elements "by the same degree of evidence" as other matters on which the plaintiff bears the burden of proof. *ACLU v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006), citing *Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 767 (Tenn.Ct.App.2002), *perm. app. denied* (Tenn. Sept. 9, 2002). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that to show an "injury in fact," a plaintiff must

[1] Indeed, insofar as Plaintiff is concerned about their 2018 assertion that Representative Camper and Senator Tate "have cauliflower for brains," *see* Complaint at ¶ 4, Exh. A, its apprehension is unfounded. Apart from being a patently satirical statement that no one would accept as the literal truth, it also was published more than one year ago, and prosecution would be barred by the statute of limitations for misdemeanors. *See* Tenn. Code Ann. § 40-2-102(a).

establish "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical'"; citations omitted). Put another way, "[a]bstract injury is not enough," to meet the standing requirement. Plaintiff must face "concrete . . . actual or imminent" harm. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). *See also* Mem. of Court (entered 7/10/20) at 9 ("[a] plaintiff must establish a concrete harm: 'i.e., enforcement of a challenged statute occurred or is imminent.'").

This holds true in the context of a free-speech claim. A plaintiff must satisfy the "injury-in-fact" requirement by alleging "'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.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (emphasis added; quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). *See also* Mem. of Court (entered 7/10/20) at 10. To establish a "credible threat," the mere assertion of a "'subjective chill' on protected speech [is] insufficient"; a plaintiff must present some evidence of "imminent enforcement" of the statute in question. *McKay v. Federspiel*, 823 F.3d 862, 868-69 (6th Cir. 2016) (quoting *Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012) (internal quotation marks and alterations omitted). This may be accomplished by "point[ing] to some combination" of the following factors:

> (1) a history of past enforcement against the plaintiffs or others, (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct, and/or (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action.

Id. at 869 (citations omitted).

Plaintiff fails to do so.

A. There is No History of Past Enforcement Against Plaintiff Or Others.

As to the first factor, Plaintiff does not allege or demonstrate in the Record by any

evidentiary showing that *it* has been subjected to past enforcement of Tenn. Code Ann. §2-19-142. Nor does Plaintiff demonstrate in the Record that Section 142 has previously been enforced against anybody else. (*See* Response to Plaintiff's SUMF# 3, 4: Defendant's SDAMT# 11-13, 17). In fact, as attested by Davidson County Deputy District Attorney General, Roger D. Moore, District Attorney General Glenn Funk has never prosecuted anyone or any organization—or threatened to do so—under Section 142. *See* Moore Declaration at ¶¶ 4-6.

Plaintiff attempts to manufacture standing by pointing to *Jackson v. Shelby Cty. Civil Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518 (Tenn. Ct. App. Jan. 10, 2007), but that citation is inapt. In *Jackson*, plaintiff challenged the decision of the Shelby County Civil Service Board to terminate his employment for distributing political signs reading: "Just Say 'No' to Bill KKKey Criminal Court Clerk." *Id*. at *1. That is not a "criminal prosecution" that Plaintiff professes to fear. *See* Plaintiff's SJ Memorandum at 3. Further, while the *Jackson* decision reflects that—in July of 2002—Shelby County District Attorney General William L. Gibbons informed the plaintiff that "the publication and distribution of such materials appear to violate our state criminal law, and any such publication or distribution should cease immediately," *id*., there is no evidence that Mr. Jackson ever was *prosecuted* for anything, and thus there was no enforcement of the statute there.

Plaintiff may argue in reply that General Gibbons' letter to Mr. Jackson amounted to a *threat* to prosecute, but—even if such interpretation is accurate (notwithstanding the lack of such a threat in the letter itself)—the first *McKay* factor does not address "threats" against others; it speaks only to "past enforcement against . . . others." *McKay*, 823 F.3d at 869. Moreover, such an alleged "threat"—made over eighteen (18) years ago—does not constitute an "actual or imminent" threat. *Lujan*, 504 U.S. at 560. (See Response to Plaintiff's SUMF# 3-4; Defendants'

SDAMF# 13). Nor does a single isolated event constitute a "history." *McKay*, 823 F.3d at 869. Finally, in construing Tenn. Code Ann. § 2-19-142 in the context of Mr. Jackson's appeal, the Court of Appeals affirmatively stated that the statute "is not blatantly unconstitutionally overbroad." *Id*. at *3.

Plaintiff fares no better with its citation to *Murray v. Hollin*, M2011-02692-COA-R3CV, 2012 WL 6160575, at *1 (Tenn. Ct. App. Dec. 10, 2012). Like *Jackson*, *Murray* was not a criminal prosecution brought on behalf of the State, but an unsuccessful civil defamation action brought by a Metro Council member. *Id*. at *1-*2. Defamation is a common law tort.[2] While the plaintiff in *Murray* invoked Tenn. Code Ann. § 2-19-142 in her complaint, the statute itself provides no private right-of-action and there is no recitation in the *Murray* decision that the defendants were prosecuted for their allegedly defamatory flyers. To the contrary, the Court of Appeals affirmed the summary judgment dismissal of the plaintiff's case applying solely tort defamation law, *id*. at *13, rendering a *criminal* prosecution—with a higher burden of proof—an impossibility.

B. There Are No Enforcement Letters Sent To Plaintiff Regarding Its Specific Conduct.

Plaintiff also fails to satisfy the second *McKay* factor. As attested by Deputy District Attorney General Moore, the Davidson County District Attorney General's Office has never threatened to prosecute Plaintiff and has no intention to prosecute Plaintiff (or any other person or entity), under Section 142 for engaging in political satire. *See* Moore Declaration at ¶¶ 6-7.

In discovery response, Plaintiff only could cite to negative comments left by certain individuals on (what appears to be[3]) Plaintiff's Facebook page to the effect that "[s]traight up lying

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[2] *See McGuffey v. Belmont Weekday School*, No. M2019-01413-COA-R3-CV, 2020 WL 2754896 at *19 (Tenn. Ct. App. Apr. 8, 2020).

[3] Defendants are speculating as to what these documents are as Plaintiff provided them without explanation or context. This is an example of the type of clarifying information

should get you thrown in jail."[4] That, however, is merely the very type of First Amendment political expression by private citizens that Plaintiff professes to protect. It does not rise to the level of a "credible" threat of "imminent enforcement" by a government prosecutor. *McKay*, 823 F.3d at 869.[5]

C. There Is No Statutory Language That Makes Enforcement Easier Or More Likely.

Lastly, there is nothing in Section 142 "that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action." *Id*. Again, the statute contains no private right of action which would enhance the possibility of a criminal prosecution.

As this Court has stated, "'[t]he potential for prosecution must be likely or must be objectively reasonable under circumstances.'" Mem. of Court (entered 7/10/20) at 10 (quoting 16 Am. Jur. 2d Constitutional Law § 138). Here, Plaintiff has failed to show *any* likelihood of prosecution, and its fear of prosecution is far from reasonable—especially in the face of an affirmative declaration by the Davidson County District Attorney General's Office that it will *not* be prosecuted for engaging in political satire. *See* Moore Declaration at ¶¶ 6-7. In fact, it is clear from the exemplars supplied by Plaintiff that none of them "could . . . reasonably be understood as describing actual facts about [the candidates] or actual events in which [they] participated." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988). Accordingly, Plaintiff presents an

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Defendants desired to seek through a 30.02(6) deposition. Plaintiff's production includes numerous other documents for which Defendants want such clarification.

[4] *See* Exh. C (at Attachment #1) to Plaintiff's Response to Motion for Case Management Order; Int. Response #2, 0002.

[5] Further, since Plaintiff contends that "only pure issues of law comprise the July 17, 2020 motion for summary judgment," Mem. of Court (entered 7/10/20) at 9, this evidence is irrelevant.

alleged harm that is only "conjectural" or "hypothetical"—if not completely unreasonable. *Lujan*, 504 U.S. at 560. Therefore, Plaintiff has not established standing to bring this action.

II. TENN. CODE ANN. § 2-19-142 IS CONSTITUTIONAL.

A. Tenn. Code Ann. § 2-19-142 Should Be Construed According to Relevant Defamation Case Law.

When a statute is challenged, Tennessee courts have an affirmative duty to "adopt a construction which will sustain a statute and avoid constitutional conflict if *any* reasonable construction exists that satisfies the requirements of the Constitution." *State v. Sliger*, 846 S.W.2d 262, 263 (Tenn. 1993) (emphasis added). Also, "[w]hen faced with a choice between two constructions, one of which will sustain the validity of the statute and avoid a conflict with the Constitution, and another which renders the statute unconstitutional, we *must choose* the former." *Davis-Kidd Book Sellers, Inc. v. McWherter*, 866 S. W .2d 520, 529-30 (Tenn. 1993) (emphasis added) (citations omitted). "The most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage *beyond its intended scope*." *Howard*, 504 S.W.3d at 269 (emphasis added). Courts are also to avoid "a construction that leads to absurd results." *State v. Welch*, 595 S.W.3d 615, 621(Tenn. 2020). A reasonable and constitutional construction of Tenn. Code Ann. § 2-19-142 that "sustains" the statute while also avoiding both absurdity and "coverage beyond its intended scope" is readily available and plain in the language of the statute itself.

Despite Plaintiff's characterization to the contrary, Tenn. Code Ann. § 2-19-142 is a codification of a criminal cause of action for defamation and should be construed as such. "Courts presume that every word in a statute has a meaning and a purpose . . . ." *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013). In this respect, close attention should be paid to the language of Section 142, which prohibits the "public[cation] or distribut[ion]" of a "statement, charge, [or]

allegation" that the publisher or distributor "know[s] . . . is false." The statute, therefore, prohibits the knowing expression of factual falsehoods. Yet, satire and parody clearly fall outside the boundaries of the statute because—by definition—such statements are not objectively factual. *See Hustler Magazine*, 485 U.S. at 50 (defining parody and satire as "speech [which] could not reasonably have been interpreted as stating actual facts about the public figure involved"). Thus, declaring that Representative Griffey is "literally Hitler," or asserting that Representative Camper and Senator Tate "have cauliflower for brains," is metaphorical. Metaphor is not fact; it is a rhetorical exercise intended to denote one kind of object or idea in the place of another to suggest a likeness or analogy between the two.

Indeed, in drafting Tenn. Code Ann. § 2-19-142, the general assembly chose language that mirrors the "actual malice" standard announced by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).[6] This is no accident but an indication of its intent to create a statutory action for defamation. Accordingly, prosecutions under Tenn. Code Ann. § 2-19-142 are subject to the same well-tested constitutional guardrails established for civil lawsuits for defamation, except that potential defendants are afforded even greater protection as any prosecutor would have a higher burden of proof than a civil litigant *and* would be required to prove the higher "actual knowledge" half of the actual malice standard rather than the lower "reckless disregard" for the truth.

The right to free speech is one of several rights enshrined in the United States and Tennessee Constitutions. However, the right is not absolute, and courts have long recognized a "few historic categories" of speech that may be regulated by the government; defamation is among

[6] "Actual malice" refers to a false statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280.

them. *U.S. v. Alvarez*, 567 U.S. 709, 717 (2012).[7] Defamation is "malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person." BLACK'S LAW DICTIONARY (11th ed. 2019). But where the alleged defamed person is a public figure, false statements harmful to one's reputation are not enough. A litigant must also prove the defamatory statement was made with "actual malice," that is, made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280. Because Tenn. Code Ann. § 2-19-142 deals with false *factual* speech opposing candidates for public office, the objects of the defamatory speech with which it is concerned are "public figures" for purposes of defamation. In recognition of this, the statutory language makes plain that potential prosecutions are limited only to those involving a defamatory statement made against a candidate with *actual knowledge* of the statement's factual falsity—a standard even more narrow than the First Amendment requires.

But the protections of defamation jurisprudence do not end there. Case law also states that any statement—in order to be defamatory—must be a statement that a listener might reasonably understand as being true. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1970). Again, Plaintiff wants to engage in "hyperbole and satire" not literal statements of fact. Compl. at ¶ 40. Statements such as "this candidate has cauliflower for brains" or "this candidate is literally Hitler" could not "reasonably be understood as describing actual facts about [the candidates]" *Hustler Magazine*, 485 U.S. at 57, because they are both absurd and impossible. These examples of "rhetorical hyperbole" are therefore not the type of defamatory statements that would be actionable

[7] Plaintiff references the *Alvarez* case for the proposition that Tenn. Code Ann. § 2-19-142 violates the First Amendment because "falsity alone" is not enough to penalize speech. As the language of Tenn. Code Ann. 2-19-142 makes plain, however, the speech at issue must be both defamatory *and* made with actual knowledge of its falsity—one of the exceptions the *Alvarez* case specifically acknowledges in the cite above.

under Tenn. Code Ann. § 2-19-142. *Letter Carriers v. Austin*, 418 U.S. 264, 284–286 (1974). Excluded, too, are statements of opinion that cannot be proven false. *Milkovich*, 497 U.S. at 19-20.

Although, "strict scrutiny" analysis applies when a statute affects core political speech, in this case, Plaintiff's strict scrutiny argument is a red herring. The Court does not need to apply strict scrutiny analysis, because the plain language of Section 142 does not reach Plaintiff's conduct of satire/parody/lampoon. Again, under the rules of statutory construction, the Chancery Court must "ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Howard*, 504 S.W.3d at 269. Plaintiff's conduct falls outside the boundaries of the statute. Thus, strict scrutiny is not an issue the Court needs to address.

B. Tenn. Code Ann. § 2-19-142 is Not an Impermissible Content-Based Restriction.

Plaintiff asserts that Tenn. Code Ann. § 2-19-142 is an example of an impermissible content-based restriction on speech. However, as explained above, Tenn. Code Ann. § 2-19-142 is a codification of a criminal cause of action for defamation and defamation is one of the areas where content-based restrictions are permitted. *U.S. v. Alvarez*, 567 U.S. 709, 717 (2012).

Plaintiff insists that Tenn. Code Ann. § 2-19-142 impermissibly disallows all false statements made against a candidate while permitting false statements in any other context. This is incorrect. Tenn. Code Ann. § 2-19-142 restricts *only* factually defamatory statements. Additionally, defamation is potentially actionable in *any* context because it is not constitutionally protected speech and those who make defamatory statements are subject to civil liability. The passage of Tenn. Code Ann. § 2-19-142 does not abrogate common law defamation in all other contexts. *See State v. Welch*, 595 S.W.3d 615, 621 (Tenn. 2020). There are also numerous other

statutes that create a criminal cause of action for making false statements. *Se,e e.g.,* Tenn. Code Ann. §§ 39-16-702, 39-14-120, 39-16-502. The notion that false statements in one particular context are being singled out while all other types of actionable false speech are permitted is demonstrably false. The state is not required to address all forms of constitutionally unprotected false statements in one statute.

C. Tenn. Code Ann. § 2-19-142 is Not an Impermissible Viewpoint-Based Restriction.

Plaintiff alleges that Tenn. Code Ann. § 2-19-142 constitutes impermissible viewpoint-based discrimination because it prohibits only false speech made *in opposition* to a candidate, but not in favor of a candidate. Again, Section 142 does not encompass Plaintiff's professed conduct, so its argument is of no consequence. Moreover, as explained above, defamation involves false statements being made that are harmful to someone's reputation. Thus, the statute's reach is logically limited to statements made in opposition to a candidate. Were Tenn. Code Ann. 2-19-142 to encompass *all* false statements, it would encompass non-defamatory speech and would encroach upon statements that are constitutionally protected and necessarily take the statute out of the defamation context. In *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016), the Sixth Circuit struck down Ohio's false statements law on this very basis. *Id.* at 475 (finding that under the Ohio statute non-defamatory statements would be actionable).[8] The specific language of Tenn. Code Ann. § 2-19-142 both demonstrates the General Assembly's intent to limit

[8] The Sixth Circuit found Ohio's statute to be constitutionally infirm in other ways that are not present here. Specifically, Ohio's statute allowed any member of the public to file a complaint against someone and there was no process to weed out frivolous complaints or those made maliciously. *Id.* at 474. The law also required an administrative process that could "linger" up to 6 months before a referral for criminal prosecution was made. The Court found this was too long of a delay. *Id.* Tenn. Code Ann. § 2-19-142 contains none of these provisions.

prosecutions to cases involving defamatory statements and it should be narrowly construed to keep it in the bounds of the Constitution.

D. Tenn. Code Ann. § 2-19-142 is Not Overbroad.

Plaintiff also argues that Tenn. Code Ann. 2-19-142 is overbroad "because it prohibits a substantial amount of constitutionally protected speech." But, the overbreadth doctrine is "strong medicine" that should be employed only as a "last resort" and any claim of overbreadth must "be 'substantial' before the statute involved will be invalidated on its face." *New York v. Ferber*, 458 U.S. 747, 769 (1982). As explained above, the only thing the statute prohibits are defamatory comments made with actual knowledge of the falsity of the statements. A regulation of speech "if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Broaderick v. Oklahoma*, 413 U.S. 601, 615 (1973) (citations omitted). Neither the United States nor Tennessee Constitutions afford protection for defamatory speech putting it within the State's "power to proscribe." Also, the Tennessee Court of Appeals itself held in *Jackson v. Shelby Cty. Civil Serv. Merit Bd.*, 2007 WL 60518, at *4-5, that Tenn. Code Ann. § 2-19-142 "is not blatantly unconstitutionally overbroad." Accordingly, the statute is not overbroad and does not encompass constitutionally protected forms of speech.

E. The Tennessee Constitution Does Not Afford Additional Protection in the Context of Defamation.

Plaintiff argues that Tenn. Code Ann. § 2-19-142 violates art. I, Sect. 19 of the Tennessee Constitution and notes that "Article I, Section 19 is 'a substantially stronger provision than that contained in the First Amendment to the Federal Constitution.'" *State v. Smoky Mountain Secrets, Inc.*, 937 S.W.2d 905, 910 n.4 (Tenn. 1996) (quoting *Press, Inc.*, 569 S.W.2d 435, at 442)(Tenn.

1978)). However, Plaintiff has not pointed to any precedent that would support that Article I, Section 19 demands a different analysis than the United State Constitution in this particular instance or articulated why defamatory statements are afforded greater protection under the Tennessee Constitution.

CONCLUSION

For the reasons stated above, Plaintiff's Motion for Summary Judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2020, a copy of the foregoing was sent by electronic mail transmission and/or first class U.S. mail, postage prepaid to:

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