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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

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

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Plaintiff has moved for summary judgment on all of its claims and regarding the Defendants' two non-merits defenses. Seeking to avoid summary judgment, the Defendants have now filed untimely[1] responses opposing the Plaintiff's Motion for Summary Judgment.

For the reasons detailed below, the Plaintiff's Motion should be granted. As an initial matter, the Defendants have neither responded to the Plaintiff's position on the Defendants' ripeness defense nor advanced any argument regarding it. As a result, summary judgment as to that defense should be granted to the Plaintiff. Similarly, the Plaintiff has statutory standing to maintain this action under both Tennessee Code Annotated § 29-14-102 (the Declaratory Judgment Act) and § 1-3-121. The record

[1] As detailed below, the Defendants' response to the Plaintiff's Statement of Undisputed Material Facts and their papers in opposition to the Plaintiff's Motion were due, together, by no later than July 10, 2020. Defendants' Response to the Plaintiff's Statement of Undisputed Material Facts was not filed until July 12, 2020 at 8:56 p.m., however, and the Defendants' papers in opposition to Plaintiff's Motion were filed on July 13, 2020 at 6:07 p.m., leaving the Plaintiff just two days to prepare this Reply.

additionally confirms the Plaintiff's standing to seek redress of both its own and others' constitutional injuries arising from Tennessee Code Annotated § 2-19-142—a facially unconstitutional and unconstitutionally overbroad criminal defamation statute that applies specifically to political speech and turns on the viewpoint expressed.

The ripeness of this action and the Plaintiff's belatedly contested standing to maintain this action having been established, summary judgment is also proper as to the merits of the Plaintiff's claims. Several reasons support this conclusion:

First, Tennessee Code Annotated § 2-19-142 does not further any compelling governmental interest. Indeed, the Defendants have not even alleged in their Response that it does. *See generally* Defs.' Resp. in Opp. to Pl.'s Mot. for Summ. J. ("Defs.' Resp.").

Second, even if preventing defamation were a compelling governmental interest, Tennessee Code Annotated § 2-19-142 would not be narrowly tailored to achieve it. In particular, § 2-19-142 is simultaneously both fatally overinclusive—prohibiting far more speech than necessary—and fatally underinclusive, providing insufficient protection to achieve the lone interest that the Government purports to be promoting.

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

Fourth, notwithstanding the Defendants' half-hearted intimation that a "reasonable and constitutional" limiting construction of Tenn. Code Ann. § 2-19-142 is available—specifically, that Tenn. Code Ann. § 2-19-142 should be construed "according to relevant defamation case law," *see* Defs.' Resp. at 9—such a limiting construction is impossible under the circumstances. In particular, this Court lacks authority to cure

Tenn. Code Ann. § 2-19-142's myriad deficiencies and judicially amend a criminal statute:

(1) to cover all litigants, rather than just "candidate[s] in any election";

(2) to cover all publications, rather than just "campaign literature"; and

(3) to modify the statute from one that recognizes the Government—which is legally incapable of being defamed, *see 281 Care Comm. v. Arneson*, 638 F.3d 621, 634 (8th Cir. 2011) ("A government entity cannot bring a libel or defamation action." (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 291 (1964)))—as the only proper criminal plaintiff, to one that recognizes the Government as an improper criminal plaintiff under any circumstances.

For all of these reasons, the Plaintiff's Motion for Summary Judgment should be granted as to the Defendants' non-merits defenses and with respect to the Plaintiff's merits claims. Accordingly, Tennessee Code Annotated § 2-19-142 should be declared unconstitutional, both facially and as applied to the Plaintiff, and future civil enforcement[2] of Tennessee Code Annotated § 2-19-142 should be permanently enjoined.

II. DEFENDANTS' UNTIMELY AND NON-COMPLIANT FILINGS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

By rule: "Any party opposing the motion for summary judgment must, **not later than five days before the hearing**, serve and file a response to each fact set forth by the movant. . . . Such response **shall be filed with the papers in opposition to the motion for summary judgment.**" Tenn. R. Civ. P. 56.03 (emphases added).

[2] The Plaintiff does not presently seek an injunction by this Court against criminal prosecution; it is only seeking such an injunction prospectively upon entry of an "unappealable final judgment." Compl. at 12, ¶ 3 of the Prayer For Relief; *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).

Additionally, where—as here—"the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." Tenn. R. Civ. P. 6.01.

Here, the Plaintiff's Motion having been set for hearing on July 17, 2020, both the Defendants' Response to the Plaintiff's Statement of Undisputed Material Facts and their "papers in opposition to the motion for summary judgment" were due by "not later than" July 10, 2020. *See id.*; *see also* Tenn. R. Civ. P. 56.03. Notwithstanding that deadline, however, the Defendants' Response to the Plaintiff's Statement of Undisputed Material Facts was filed on July 12, 2020 at 8:56 p.m., and the Defendants' Response to the Plaintiff's Motion was filed separately on July 13, 2020 at 6:07 p.m. It also was not served until more than two hours after that, at 8:21 p.m. *See* **Attachment #1**.

Under these circumstances, this Court has discretion to disregard the Defendants' untimely filings. *See Owens v. Bristol Motor Speedway, Inc.*, 77 S.W.3d 771, 775 (Tenn. Ct. App. 2001) ("[P]laintiff's response to the defendant's statement of material facts and the memorandum of law in support thereof were not filed until the day before the hearing and could have been disregarded on that basis alone. *See* Tenn. R. Civ. P. 56.03 (requiring nonmoving party to file response no later than five days before the summary judgment hearing)."). *See also Key v. Blount Mem'l Hosp., Inc.*, No. E2010-00752-COA-R3-CV, 2011 WL 2135358, at *12 (Tenn. Ct. App. May 31, 2011) ("The decision whether to strike materials filed in opposition to a motion for summary judgment as non-compliant with Tenn. R. Civ. P. 56.03 is reviewed for abuse of discretion."). Without unduly belaboring the point, the litigation deadlines established by Tenn. R. Civ. P. 56.03 are not voluntary, different rules do not apply to governmental defendants, and this is not the first time that defense counsel has failed to comply with critical litigation deadlines to the Plaintiff's

detriment. *See Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *6 (Tenn. Ct. App. Dec. 12, 2019) ("The trial court found that the State did not comply with the court's order or the local rules of court, as it failed to provide a description of the testimony that would be given by its witness, and it did not timely provide its trial exhibits to TSEL. The order repeated the trial judge's observation that the State's course of action had 'the effect of a trial by ambush, and it does not provide a fair opportunity for the Plaintiff to defend against the proof that the Defendants seek to offer.'").

This Court should also exercise its discretion to disregard the Defendants' responses—at least in part—based on their failure to contest or assert material facts with "a specific citation to the record," Tenn. R. Civ. P. 56.03—opting instead to cite, for example, a Wikipedia link, *see* Defs.' Statement of Undisputed Material Facts ("SUMF") at 15, or claiming that an asserted material fact is disputed on the basis that "Defendants have not independently verified the accuracy of the transmission of the letter as reported in the Court of Appeals' opinion," *id.* at 3.

III. DEFENDANTS' RIPENESS DEFENSE

The Defendants raised in their Answer a defense that: "Plaintiff's claims are not ripe for review." *See* Defs.' Answer ¶ 5. Thereafter, the Plaintiff moved for summary judgment regarding the Defendants' ripeness defense on several bases. *See* Plaintiff's Mem. in Supp. of Mot. for Summ. J. at 39–41.

In response to the Plaintiff's Motion, the Defendants have not addressed the Plaintiff's arguments regarding their ripeness defense. *See generally* Defs.' Resp. They also have not supported or even attempted to support their ripeness defense in any

regard. *See id.* Thus, the Defendants having failed to construct any argument on the issue in response to the Plaintiff's Motion, the Plaintiff's Motion should be granted as to the Defendants' ripeness defense for the reasons advanced in the Plaintiff's motion, and the defense should independently be deemed waived going forward. *See, e.g.*, *Sneed v. Bd. of Prof'l Responsibility of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010) ("It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.").

IV. FACTS RELEVANT TO PLAINTIFF'S STANDING

The Tennessee legislature has "established a criminal cause of action for defamation involving campaign literature." Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009). Specifically,

> Tenn. Code Ann. § 2-19-142 provides that it is a "Class C misdemeanor for any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election if such person knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is false."

Id. (quoting Tenn. Code Ann. § 2-19-142).

There is no material dispute that Tenn. Code Ann. § 2-19-142—a facially viewpoint-based censorship statute—has been used to suppress and punish political speech in Tennessee. For example:[3]

[3] These examples—all in the record—do not purport to be exhaustive. The Defendants have never asked that the Plaintiff recount all instances of Tenn. Code Ann. § 2-19-142's enforcement, although they represent that the Plaintiff's discovery responses support that conclusion. *See* Defs.' SUMF at 14. What the Defendants actually sought, first, was to have the Plaintiff identify "any" instances of "any" citizen of Tennessee being subject to criminal prosecution under Tenn. Code Ann. § 2-19-142," *see* Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order Ex. C at Bates No. 002. After the Plaintiff did so, the Defendants discounted the response on the basis that they do not deem a letter from a District Attorney to a citizen alleging a violation of Tenn. Code Ann. § 2-19-142—and additionally demanding that further "publication

1. In 2014, an individual and multiple political organizations were sued under Tenn. Code Ann. § 2-19-142 by the campaign committee for Representative Steve Cohen, a current member of Congress. *See* Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order Ex. C at Bates Nos. 0067–68 ("10. All Defendants are in violation of Tennessee law, specifically the following, and are causing damage to the Plaintiffs . . . **2-19-142. Knowingly publishing false campaign literature**." (emphasis in original)). The lawsuit resulted in a restraining order being granted that included "restraining the Defendants in this cause from: . . . b. Distributing literature, disseminating information or in any way communication or implying any misleading information regarding the political party affiliation of a candidate or group" and further mandated that "f. Defendants shall take immediately action to remove from public view and/or access all items identified to be restrained in this pleading." *See id.* at Bates No. 0072.

2. In 2010, a failed city council candidate utilized Tenn. Code Ann. § 2-19-142 to maintain a multi-year, $1,000,000.00 lawsuit against twelve (12) citizens—including one of the Plaintiff's attorneys—who had opposed her as "members of 'WE THE PEOPLE OF DISTRICT 5.'" *See* Pl.'s SUMF Ex. A at 10–13.

3. Also in 2010, yet another such lawsuit[4] was maintained against an

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or distribution should cease immediately" based on the statute, *see id.*—to be a meaningful threat of enforcement. *See* Defs.' Resp. at 6. The Defendants also asked for production of documents that the Plaintiff does not have. None of these responses indicate that criminal prosecutions have not been maintained or threatened—an inquiry that would require examination of two decades' worth of records from all District Attorneys across all of Tennessee's judicial districts and may well not be ascertainable in light of the availability of expungement for Class C misdemeanors.

[4] Defendants complain that the record only contains "*one* case" of private litigants filing suit under Tennessee Code Annotated § 2-19-142. *See* Defs.' SUMF at 7. This is not at all accurate. The record actually contains examples of the following three such lawsuits against many more defendants:

1. *Murray v. Vibbert*, No. 10C3711 (Davidson Cty. Cir. Ct.), *see* Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order Ex C. at Bates No. 0048–0054;

individual citizen for certain "statements [published] by hand-delivery door-to-door to registered voters . . . ." *See* Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order Ex. C. at Bates Nos. 0051–0052.

4. In 2002, a government official's "employment with the Clerk's Office was terminated because, in violation of Tennessee Code Annotated § 2-19-142, he created and distributed political signs [that violated Tennessee Code Annotated § 2-19-142] during the July 2002 election . . . ." *Jackson v. Shelby Cty. Civil Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518, at *3 (Tenn. Ct. App. Jan. 10, 2007). *See also id.* at *2 ("Following a *Loudermill* hearing on August 21, 2002, Mr. Jackson was determined to have engaged in 'acts of misconduct, which are job related,' where he violated Tennessee Code Annotated § 2-19-142, the statutory provision prohibiting publication and distribution of campaign literature against a candidate in an election containing statements which the distributor/publisher knows to be false.").

5. Also in 2002, with respect to the same individual:

> In a letter dated July 31, 2002, William L. Gibbons, District Attorney General, (Mr. Gibbons) informed Mr. Jackson that
>
> > [u]nder Tennessee law, it is a crime for a person to publish or distribute, or cause to be published or distributed, any campaign materials in opposition to any candidate if that persons [sic] knows that any statement or other matter contained on the materials [sic] is false.
>
> Mr. Gibbons further advised:

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2. *Cohen for Congress Committee v. M. Latroy Williams, et al.*, No. CT 00348-14 (Shelby Cty. Cir. Ct.), *see id.* at Bates Nos. 0065–72; and

3. *Murray v. Hollin et al.*, Pl.'s SUMF Ex. A.

These lawsuits also do not include civil claims brought by the Shelby County Civil Service Merit Board, *see* Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order Ex. C. at Bates Nos. 0029—0034. They additionally are not and do not purport to be exhaustive examples of Tennessee Code Annotated § 2-19-142's enforcement for the reasons set forth above in footnote 3.

> [u]nless you have reason to believe that Mr. Key is a member of the KKK, the publication and distribution of such materials appear to violate our state criminal law, and any such publication or distribution should cease immediately.

Id. at *1.

Nor is Tenn. Code Ann. § 2-19-142 some dust-collecting dead letter that has fallen into desuetude. To the contrary, in 2009, the Tennessee Attorney General's Office—a Defendant in this action—issued and continues to maintain formal guidance that Tenn. Code Ann. § 2-19-142 is a perfectly constitutional political speech restriction, and that even "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).

Further, during each of the past two legislative sessions, elected officials holding leadership positions in both major political parties have introduced legislation to increase the potential sentence for violators to six months and up to one year in jail, respectively. *See* Pl.'s SUMF ¶ 8. *See also* Defs. Response to Pl.'s SUMF ¶ 8 ("Defendants do not dispute for purposes of ruling on the motion for summary judgment only that legislation has been introduced, *but not enacted*, to attempt to raise the criminal penalty for violating Tenn. Code Ann. § 2-19-142."). Given multiple Tennessee officeholders' indication that speech with which they disagree will be deemed "fake news," *see* Andrew Blake, *Tennessee Lawmakers Advance Measure to Designate CNN, Washington Post as "Fake News" Outlets*, WASH. TIMES (Feb. 27, 2020), https://www.washingtontimes.com/news/2020/feb/27/tennessee-lawmakers-advancemeasure-to-recognize-c/, several elected officials' eagerness to inflict criminal penalties upon those who "falsely" oppose them is increasingly concerning.

Disturbingly, punishing violators of Tenn. Code Ann. § 2-19-142 also appears to be rather popular with at least some members of the public. For example, after the Plaintiff published what the Parties agree was wholly innocuous campaign literature in opposition to two candidates for state office who had advocated for increased penalties under Tenn. Code Ann. § 2-19-142, the Plaintiff was met with several responses advocating substantial punishment. *See, e.g.*, Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order Ex. C. at Bates No. 0006 ("Straight up lying should get you thrown in jail."); *id.* at Bates No. 0007 ("You don't have my support, if you lie about your opposition, you should face stiff penalties"); *id.* at Bates No. 0008 ("Knowingly publishing any false information deserves punishment."); *id.* at Bates No. 0009 ("If a politician tells an outright lie about his opponent, I think they should face jail time. This is not a 1st amendment issue.").

Of note, the Defendant Attorney General has never withdrawn its formal guidance that Tenn. Code Ann. § 2-19-142 is a constitutional political speech restriction. *See* Tenn. Op. Att'y Gen. No. 09-112. It has also maintained that position throughout this litigation. *See* Tenn. Code Ann. § 8-6-109(b)(9) (affording the Defendant Attorney General an opportunity to refuse to defend a statewide statute upon certification to the General Assembly "in those instances where the attorney general and reporter is of the opinion that such legislation is not constitutional[.]").

Similarly, with respect to the Defendant Davidson County District Attorney, the Plaintiff alleged in its Complaint that:

> Defendant Davidson County District Attorney General is the Office of the District Attorney General for Tennessee's 20th Judicial District. The Davidson County District Attorney General's Office is responsible for the prosecution of all alleged violations of state criminal laws that occur within Tennessee's 20th Judicial District, where the Plaintiff is registered as a multicandidate political campaign committee and conducts its core operations. **Because Tenn. Code Ann. § 2-19-142 "is a Class C**

> **misdemeanor," *id.*, and independently pursuant to the broad criminal prohibition set forth in Tenn. Code Ann. § 2-19-102 ("A person commits a Class C misdemeanor if such person knowingly does any act prohibited by this title"), the Davidson County District Attorney General's responsibilities include prosecuting violations of Tenn. Code Ann. § 2-19-142**.

Pl.'s Compl. ¶ 18 (emphasis added).

In their Answer, the Defendants—including the Defendant Davidson County District Attorney—admitted this allegation. *See* Defs.' Answer ¶ 18 (responding to Paragraph 18 of the Plaintiff's Complaint, in full, as follows: "Defendants submit that the statutes cited in paragraph no. 18 speak for themselves."); Tenn. R. Civ. P. 8.04 ("Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading"). Indeed, the Defendants admitted it <u>*conclusively*</u>. *See Irvin v. City of Clarksville*, 767 S.W.2d 649, 653 (Tenn. Ct. App. 1988) ("Admissions in pleadings are judicial admissions that are conclusive on the pleader until withdrawn or amended."). As such, no proof was necessary regarding it. *See id.* ("[W]hen the allegations in a complaint are admitted in the answer, the subject matter of the allegations is removed as an issue, and no proof is necessary."). Precedent is also in accord. *See, e.g.*, *Black v. Blount*, 938 S.W.2d 394, 402 (Tenn. 1996) (noting that Tennessee law "*requires* district attorney generals to conduct prosecutions for 'conduct proscribed as harmful by the general criminal laws.'" (emphasis in original)). So, too, is the Defendants' Response to the Plaintiff's Motion. *See* Defs.' Resp. at 2 ("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.") (citing Tenn. Code Ann. § 8-7-103).

Notwithstanding the above admissions, however, just five days before the scheduled hearing on the Plaintiff's Motion for Summary Judgment, a representative of

the Defendant Davidson County District Attorney General declared—for the first and only time on July 10, 2020[5]—its "present," *partial* intention not to enforce Tenn. Code Ann. § 2-19-142 with respect to "political satire." *See* Decl. of Roger D. Moore ¶ 7 ("General Funk has no **present** intent for his Office to prosecute Tennesseans for Sensible Election Laws, or any other person or organization, under Tenn. Code Ann. § 2-19-142 **for engaging in political satire**." (emphases added)). To be sure, however, Tenn. Code Ann. § 2-19-142's criminalization of "political satire" is not its only—or even its primary—constitutional infirmity, nor is it the only infirmity regarding which the Plaintiff has asserted that Tenn. Code Ann. § 2-19-142 is injurious and overbroad. *See* Compl. ¶ 15 (alleging that "Tennesseans for Sensible Election Laws enjoys a constitutional right to publish and distribute satirical, **parodical, hyperbolic, and other literally false political campaign literature** in opposition to candidates for elected office in Tennessee without having to fear of criminal liability[.]" (emphasis added)). Instead, as the Plaintiff has detailed in its pending Motion:

> Tennessee Code Annotated § 2-19-142 criminalizes a substantial amount of protected speech, and its legitimate sweep is far narrower. In particular, Tennessee Code Annotated § 2-19-142 can only be applied lawfully—at

[5] Given that the newly developed, "present," partial intention set forth in General Moore's declaration indisputably came about several months after this case was initiated, the declaration would appear relevant to a claim of mootness, not one of standing, because "standing is to be determined as of the commencement of suit . . . ." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571 n. 5 (emphasis added). Because the declaration neither disclaims all enforcement of Tenn. Code Ann. § 2-19-142, nor binds any of the other District Attorneys in Tennessee, nor binds civil litigants who are able to rely on Tenn. Code Ann. § 2-19-142, however, any such claim of mootness based on a voluntary policy change would necessarily fail, and the Defendants have not even attempted to meet their "heavy burden" of establishing it. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("[T]he standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, (1968)). *See also Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019) ("A defendant's voluntary cessation of a challenged practice moots a case only in the 'rare instance' where 'subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'") (cleaned up).

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

See Pl.'s Mem. in Supp. of Mot. for Summ. J. at 28 (emphases added).

As such, the fact that the Defendant Davidson County District Attorney: (1) has not disavowed all enforcement of Tenn. Code Ann. § 2-19-142; (2) has continued to participate in this action for the purpose of defending Tenn. Code Ann. § 2-19-142's constitutionality; and (3) has reserved the right to prosecute violations of Tenn. Code Ann. § 2-19-142 under circumstances not involving political satire, does not even remotely render risk of criminal prosecution "imaginary." *Cf. Online Merchants Guild v. Cameron*, No. 3:20-CV-00029-GFVT, 2020 WL 3440933, at *6 (E.D. Ky. June 23, 2020) ("The Attorney General has also repeatedly **refused to disavow enforcement of the statutes**, as evidenced his public statements **and the ongoing nature of this litigation** and the Jones & Panda litigation. Further analysis on the credible threat factor is unnecessary—it is met. Therefore, Merchants Guild has established pre-enforcement injury to at least one of its members." (citing *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Court*, 769 F.3d 447, 452 (6th Cir. 2014) (emphases added)).

Neither does it address the Plaintiff's asserted concern and uncontested observation that it is subject to the risk of prosecution *in every other judicial district* in

Tennessee where it distributes its literature, given that:

1. The Defendant Attorney General has issued a formal opinion that Tenn. Code Ann. § 2-19-142 is enforceable across Tennessee, *see* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009)—a fact of considerable significance because "government officials rely upon them for guidance." *State v. Black*, 897 S.W.2d 680, 683 (Tenn. 1995); and
2. Tennessee has separate "district attorneys general from the state's 31 judicial districts." *See About TNDAGC*, TENN. DIST. ATTYS GEN. CONF., https://www.tndagc.org/about.html (last visited June 7, 2020). Each has the power to prosecute violations of Tennessee Code Annotated § 2-19-142. And based on the Attorney General's published guidance detailed above, the Defendant [Attorney General] has advocated the position that there is absolutely no constitutional bar to doing so.

See Pl.'s Mem. in Supp. of Mot. for Summ. J. at 36–37. *See also* Pl.'s Compl. ¶ 9 (expressing "concern that its members may or will be prosecuted in the event that a District Attorney in Tennessee deems any 'statement, charge, allegation, or other matter contained' in its campaign literature to be 'false.'").

General Moore's eleventh-hour declaration also does not address, in any regard, any of the many additional injuries wrought by Tenn. Code Ann. § 2-19-142, either. For example:

1. It does not prevent the Plaintiff or others from being subject to civil litigation for damages, the credible threat of which is easily demonstrated. *See supra,* pp.

7–8.[6] (Of special note, the fact the Davidson County District Attorney himself—an elected official and Defendant in this action—has maintained and continues to maintain a $200,000,000.00 lawsuit against a news organization and a journalist regarding allegedly false statements in opposition to him also brings the reality of this threat into sharp focus. *See Funk v. Scripps Media, Inc.*, No. 16C333 (Davidson Cty. Cir. Ct.), Docket Entry #1.)

2. It does not preclude any civil claims for injunctive relief regarding alleged violations of Tenn. Code Ann. § 2-19-142. *See, e.g.,* Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order at Bates Nos. 0067–68 (claim for, *inter alia*, injunctive relief filed by the campaign for Congressman Steve Cohen regarding alleged violation of Tenn. Code Ann. § 2-19-142); *id.* at Bates No. 0072 (granting Congressman Cohen's campaign's application for a restraining order, including "restraining the Defendants in this cause from: . . . (b) Distributing literature, disseminating information or in any way communication or implying any misleading information regarding the political party affiliation of a candidate or group" and further ordering that "Defendants shall take immediately action to remove from public view and/or access all items identified to be restrained in this pleading."). *Cf.* Tenn. Code Ann. § 16-11-101 ("The chancery court has all the powers, privileges and jurisdiction properly and rightfully incident to a court of equity."); *Anderson v. Clarksville Montgomery Cty. Sch. Sys.*, No. 3:06-0324, 2006 WL

[6] The Defendants have asserted that "Tenn. Code Ann. § 2-19-142 provides no private right-of-action" as an apparent basis for discounting the Plaintiff's demonstrated threat of civil liability. *See* Defs.' Resp. to Pl.'s SUMF at 7. But whether a "private right of action" exists is neither relevant to, nor the standard for, imposing liability under a negligence *per se* claim. *See, e.g.*, *Smith v. Owen*, 841 S.W.2d 828, 831 (Tenn. Ct. App. 1992) ("negligence per se liability turns on constructive notice of the *duty* imposed by the statute or ordinance . . . ."); *id.* at 832 (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). And as noted above, *see supra* at 7–9, beyond just being sought, civil relief has actually been granted to private litigants filing claims on the basis of Tenn. Code Ann. § 2-19-142. Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order Ex. C at Bates Nos. 0072 (granting U.S. Congressman Steve Cohen's campaign a restraining order).

1639438, at *2 (M.D. Tenn. June 13, 2006) (noting courts' "inherent power to enjoin unconstitutional conduct.").

3. It does not address the Plaintiff's concern that it "wishes to be able to publish and distribute campaign literature against candidates for state office . . . without its opponents being able to allege that circulating Tennesseans for Sensible Election Laws' campaign literature is criminal[,]" *see* Pl.'s Compl. ¶ 9, nor does it foreclose "the risk of an allegation that Tennessee Code Annotated § 2-19-142 has been violated or an investigation regarding the statute . . . ." Pl.'s Mem. in Supp. of Mot. for Summ. J. at 37 (citing *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474 (6th Cir. 2016) (referencing concerns about "profound political damage" even before a final adjudication) (cleaned up));

4. It does not address the Plaintiff's concerns that Tenn. Code Ann. § 2-19-142 "also prohibits all recipients of TSEL's proposed campaign literature from republishing it or distributing it to others," which "necessarily limits the reach of the Plaintiff's message and constitutes a First Amendment injury sufficient to confer standing by itself." *Id.* (citing *Nickolas v. Fletcher*, No. CIV.A.3:06CV00043 KK, 2007 WL 2316752, at *2 (E.D. Ky. Aug. 9, 2007) ("[A] decrease in readership constitutes a First Amendment injury sufficient to confer standing." (citing *Meyer*, 486 U.S. at 422–23 ("The refusal to permit appellees to pay petition circulators restricts political expression" by "limiting the number of voices who will convey appellees' message and the hours they can speak and, therefore, ***limits*** *the size of the audience they can reach*.") (cleaned up)))); and

5. It does not address the Plaintiff's concern that "Tenn. Code Ann. § 2-19-142 . . . unconstitutionally chills and penalizes core political speech," *see* Pl.'s Compl. ¶ 14, or "the chilling effect that arises where—as here—a speech restriction carries the potential

for criminal punishment."[7] *Id.* at p. 10 (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 872 (1997) ("[T]he CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. **The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.**" (emphasis added)); *Citizens United v. F.E.C.,* 558 U.S. 310, 349 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."); *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) ("**So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.**" (emphasis added)); *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 745 (9th Cir. 2012) ("The threat to infringement of such First Amendment rights is at its greatest when, as here, the state employs its criminalizing powers.")).

V. PLAINTIFF'S STANDING

A. PLAINTIFF'S STATUTORY STANDING UNDER THE DECLARATORY JUDGMENT ACT AND TENN. CODE ANN. § 1-3-121.

Standing to maintain a claim can be and commonly is conferred by statute. In a

[7] The Tennessee General Assembly has expressly recognized the gravity of such chilling effects on protected speech even in purely civil contexts. *See, e.g.*, Tenn. Code Ann. § 4-21-1002(b) ("The general assembly finds that the threat of a civil action for damages in the form of a 'strategic lawsuit against political participation' (SLAPP), and the possibility of considerable legal costs, can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. SLAPP suits can effectively punish concerned citizens for exercising the constitutional right to speak and petition the government for redress of grievances.").

recent opinion, the Court of Appeals helpfully explained the concept of "statutory standing" as follows:

> A standing analysis focuses on the party, rather than the merits of the claim. *Metro. Air Research Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 842 S.W.2d 611, 615 (Tenn.Ct.App. 1992). Even so, the standing inquiry "often turns on the nature and source of the claim asserted." *Id.* The claim can be, and often is, "created or defined by statute." *Wood v. Metro. Nashville & Davidson Cty. Gov't*, 196 S.W.3d 152, 158 (Tenn. Ct. App. 2005).
>
> The question of whether a particular plaintiff has a cause of action under a statute has been referred to as "statutory standing." *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92, 97 (1998). Statutory standing requires the plaintiff's injury to "arguably [fall] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Camp*, 397 U.S. at 153; *see also Steel Co.*, 523 U.S. at 97; *Wood*, 196 S.W.3d at 158. Statutory standing has been described as falling within the "rubric" of prudential standing. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1387 (2014). However, statutory standing has also been associated with the distinct and palpable injury element of constitutional standing. *See, e.g., State v. Harrison*, 270 S.W.3d 21, 28 (Tenn.2008).

Town of Collierville v. Town of Collierville Bd. of Zoning Appeals, No. W2013-02752-COA-R3-CV, 2015 WL 1606712, at *4 (Tenn. Ct. App. Apr. 7, 2015). Thus, "[w]hen a statute creates a cause of action and designates who may bring an action, the issue of standing is interwoven with that of subject matter jurisdiction . . . ." *Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004). *See also Sons of Confederate Veterans v. City of Memphis*, No. M2018-01096-COA-R3-CV, 2019 WL 2355332, at *5 (Tenn. Ct. App. June 4, 2019) ("The right to bring a cause of action in a Tennessee court exists for those who suffer a 'legal injury, that is, a violation of his legal rights in some way, or a violation of law that affects him adversely.' *Barnes v. Kyle*, 306 S.W.2d 1, 3 (Tenn. 1957). As a corollary, 'the legislature has the inherent authority to set the parameters under which a cause of action accrues and is abolished[.]'" *J.A.C. by & through Carter v. Methodist*

Healthcare Memphis Hosps., 542 S.W.3d 502, 521 (Tenn. Ct. App. 2016)), *app. denied* (Tenn. Oct. 14, 2019).

Here, the Plaintiff has statutory standing to maintain this action under two separate state statutes: Tennessee Code Annotated § 29-14-102 (the Declaratory Judgment Act) and § 1-3-121. Indeed, that conclusion has already been determined in this litigation. With respect to its claim under the Declaratory Judgment Act, for example, the Plaintiff cannot improve upon this Court's holding on May 14, 2020, that:

> [T]he 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.

Mem. and Order of May 14, 2020 at 15 (emphasis added). Put another way, as the Tennessee Supreme Court has succinctly stated under similar circumstances: "The question presented is the constitutionality of [a state statute]. The complainant is interested in having the Act stricken down, and defendants are interested in having it upheld. The parties are, therefore, entitled to a ruling under the declaratory judgments statute." *Buntin v. Crowder*, 118 S.W.2d 221, 221 (1938).

The Plaintiff's statutory standing to maintain its claims under Tenn. Code Ann. § 1-3-121 is easily established as well. For its part, 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. (emphasis added).

Although not unbounded, this liberal standard—allowing any "affected" person to maintain an action for declaratory or injunctive relief, whether or not the person is also "injured"—carries substantial meaning. *Cf. Town of Collierville*, 2015 WL 1606712, at *5 ("We have held that use of the term 'aggrieved' in the statute 'reflects an intention to ease the strict application of the customary standing principles.'" (quoting *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49, 57 (Tenn. Ct. App. 2004)). Put another way: If the legislature's use of the term "aggrieved" in other contexts reflects "an intention to ease the strict application of the customary standing principles," *id.*, then its use of the even broader term "affected" with respect to Tenn. Code Ann. § 1-3-121 reflects an

intention to foreclose almost entirely disputes over standing with respect to any litigant whose equitable claims fall within a broad zone of constitutional interests. *See City of Brentwood*, 149 S.W.3d at 56 ("[W]here a party is seeking to vindicate a statutory right of interest, the doctrine of standing requires the party to demonstrate that its claim falls within the zone of interests protected or regulated by the statute in question.").

Here, because the Plaintiff's claims for "declaratory or injunctive relief in [this] action brought regarding the legality or constitutionality of a governmental action" fall squarely within Tenn. Code Ann. § 1-3-121's "zone of interests," the Plaintiff's statutory standing under Tenn. Code Ann. § 1-3-121 is easily established. *Id*. *See also* Mem. and Order of May 14, 2020 at 20 ("The Court further concludes that it has subject matter jurisdiction of the Plaintiff's declaratory judgment claim pursuant to Tennessee Code Annotated section 1-3-121."). Accordingly, as an "affected" litigant bringing claims for declaratory and injunctive relief, the Plaintiff has statutory standing to maintain its claims under Tenn. Code Ann. § 1-3-121 as well.

B. PLAINTIFF'S STANDING TO MAINTAIN CLAIMS FOR CONSTITUTIONAL INJURIES TO THIRD PARTIES.

As this Court observed during earlier litigation in this case, "[t]he Plaintiff's standing . . . has not been challenged by the Defendants," *see id*., and a standing defense was not raised in Defendants' Motion to Dismiss. The Plaintiff initially believed that although a standing defense was not raised by the Defendants as an initial matter, it could not be waived because it was a component of the Court's subject matter jurisdiction. *See* Pl.'s Mem. in Supp. of Mot. for Summ. J. at 30. As the U.S. Supreme Court made clear thereafter, however, with respect to the Plaintiff's claims premised upon the rights or interests of third parties, the Plaintiff's assumption that a standing defense could not be

waived was in error.

Specifically, in *June Med. Servs. L. L. C. v. Russo*, No. 18-1323, 2020 WL 3492640, at *8 (U.S. June 29, 2020), the U.S. Supreme Court stated:

> The State's argument rests on the rule that a party cannot ordinarily "'rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). This rule is "prudential." 543 U.S. at 128–129, 125 S.Ct. 564. It does not involve the Constitution's "case-or-controversy requirement." *Id.* at 129, 125 S.Ct. 564; *see Craig v. Boren*, 429 U.S. 190, 193, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). And so, we have explained, it can be forfeited or waived. *See Craig*, 429 U.S. at 193–194, 97 S.Ct. 451.

Id.

This matters a great deal in the instant facial overbreadth challenge, because the Supreme Court has "fashioned [an] exception to the usual rules governing standing" in cases involving facial overbreadth challenges to statutes that restrict First Amendment freedoms. *Dombrowski*, 380 U.S. at 486 (citing *United States v. Raines*, 362 U.S. 17, 20 (1960)). "This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."). As the D.C. Circuit recently explained under similar circumstances:

> To succeed in a typical facial attack, Appellants must establish "that no set of circumstances exists under which [the challenged regulations] would be

> valid or that the statute lacks any plainly legitimate sweep." *United States v. Stevens,* 559 U.S. 460, 472, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). In the First Amendment context, the Supreme Court recognizes "a second type of facial challenge," under which a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449 n. 6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). **In neither case, however, must Appellants show injury to themselves.** *See Sec'y of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 958, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court."); *see also Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Edwards v. D.C., 755 F.3d 996, 1001 (D.C. Cir. 2014) (emphasis added).

Put another way:

> [I]n the First Amendment context, "'[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Sec'y of State of Md. v. J.H. Munson Co.*, 467 U.S. 947, 956–957, 104 S.Ct. 2839, 2846–2847, 81 L.Ed.2d 786 (1984) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973)). This exception applies here, as plaintiffs have alleged an infringement of the First Amendment rights of bookbuyers.

Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392–93 (1988).

In sum: The nature of this action enables the Plaintiff to lodge a facial constitutional challenge to Tenn. Code Ann. § 2-19-142 based on its injuries to third parties, and, by failing to contest their standing to do so as an initial matter, the Defendants have waived the defense with respect to third party interests.

C. PLAINTIFF'S INDIVIDUAL STANDING.

Notwithstanding the Defendants' claim to the contrary, the Plaintiff's individual standing is also easily established. Although other federal courts have applied even more

lenient standards, *see, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("An injury-in-fact may simply be the fear or anxiety of future harm."), *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) ("First Amendment cases raise 'unique standing considerations,' *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir.2003), that 'tilt[] dramatically toward a finding of standing,' *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir.2000)."); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) ("To establish the conflict needed to animate this principle, however, a party must show that her fear of prosecution is 'not imaginary or wholly speculative.' *Babbitt*, 442 U.S. at 302, 99 S.Ct. at 2310–11. This standard—encapsulated in the phrase 'credible threat of prosecution'—is quite forgiving. *Babbitt* illustrates how readily one can meet it."); *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) ("The leniency of First Amendment standing manifests itself most commonly in the doctrine's first element: injury-in-fact."); *Am. Booksellers Ass'n*, 484 U.S. at 393 ("the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."), the Defendants correctly observe that several (non-exhaustive) factors that the Sixth Circuit has relied upon to find standing to maintain a pre-enforcement claim are set forth in *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016). These standards include finding

> a credible threat of prosecution where plaintiffs allege a subjective chill *and* point to some combination of the following factors: (1) a history of past enforcement against the plaintiffs or others, *see, e.g., Russell v. Lundergan-Grimes,* 784 F.3d 1037, 1049 (6th Cir.2015); (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct, *see, e.g., Kiser v. Reitz,* 765 F.3d 601, 608–09 (6th Cir.2014); *Berry,* 688 F.3d at 297; 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, *see Platt v. Bd. of Comm'rs on Grievances & Discipline of the Ohio Sup. Ct.,* 769 F.3d 447, 452 (6th Cir.2014). *See also Susan B. Anthony List,* 134 S.Ct. at 2345 (finding

> "substantial" "threat of future enforcement" based on "history of past enforcement[,]" statutory provision "allow[ing] 'any person' with knowledge of the purported violation to file a complaint[,]" and evidence that enforcement proceedings were common). We have also taken into consideration a defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff. *See Kiser*, 765 F.3d at 609; *Platt*, 769 F.3d at 452.

Id.

After observing that a plaintiff may point to these factors to establish standing to maintain a pre-enforcement challenge, the Defendants declare that "Plaintiff fails to do so." *See* Defs.' Resp. at 5. In so doing, the Defendants also pay vanishingly little attention to the Attorney General's own published, still-effective guidance that even "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). Regardless, both *McKay* factors (1) and (3), at least, are easily met.

To begin, the record unmistakably demonstrates a history of past enforcement and past threatened enforcement of Tenn. Code Ann. § 2-19-142—both civil and criminal—against others, *see supra* at 7–9, including one of the Plaintiff's own lawyers.[8]

Private litigants' ability to prosecute civil claims under Tenn. Code Ann. § 2-19-142—a tool that has recently been utilized successfully by a sitting U.S. Congressman, *see* Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order Ex C. at Bates No. 0072 (issuing restraining order "restraining the Defendants in this cause from: . . . (b) Distributing literature, disseminating information or in any way communication or implying any misleading information regarding the political party affiliation of a

[8] Although Defendants admit that Jamie Hollin is one of the Plaintiff's attorneys, *see* Defs.' SUMF ¶ 7, they apparently dispute "that Jamie Hollin serves as one of Plaintiffs' [sic] agents." *Id.* As a matter of law, though, attorneys are agents of their clients. *Simmons v. O'Charley's, Inc.*, 914 S.W.2d 895, 902 (Tenn. Ct. App. 1995) ("Lawyers are agents . . . ."). The State has also "correctly noted" this fact before. *State v. Freeman*, No. 03C01-9712-CC-00523, 1999 WL 96272, at *4 (Tenn. Crim. App. Feb. 22, 1999).

candidate or group" and further ordering that "Defendants shall take immediately action to remove from public view and/or access all items identified to be restrained in this pleading.")—also constitutes 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." *McKay*, 823 F.3d at 869.

Further, given: (1) several legislators' current, demonstrated desire to increase dramatically the criminal sanction for violating Tenn. Code Ann. § 2-19-142,[9] *see* Defs.' SUMF ¶ 8 (admitting, for purposes of summary judgment, that: "In consecutive legislative sessions, Tennessee legislators of both political parties have introduced legislation to raise the criminal penalty for violating Tenn. Code Ann. § 2-19-142."); (2) the Defendants' decision to defend this action and their refusal to disavow enforcement of Tenn. Code Ann. § 2-19-142 wholesale, *see Cameron*, 2020 WL 3440933, at *6 ("The Attorney General has also repeatedly **refused to disavow enforcement of the statutes**, as evidenced his public statements **and the ongoing nature of this litigation** and the Jones & Panda litigation. Further analysis on the credible threat factor is unnecessary—it is met. *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447, 452 (6th Cir. 2014). Therefore, Merchants Guild has established pre-enforcement injury to at least one of its members." (emphases added)); and (3) the responses to previous advertising that the Plaintiff has received from members of the

[9] The Defendants emphasize that legislative efforts to enhance Tenn. Code Ann. § 2-19-142's penalty have not yet been successful. This is not the point. The point is that the beneficiaries of Tenn. Code Ann. § 2-19-142 are keenly aware of it and eager to see those who violate it in prison. Further, given how many such beneficiaries consider even accurate statements with which they disagree to be "fake news," Andrew Blake, *Tennessee Lawmakers Advance Measure to Designate CNN, Washington Post as "Fake News" Outlets*, WASH. TIMES (Feb. 27, 2020), https://www.washingtontimes.com/news/2020/feb/27/tennessee-lawmakers-advancemeasure-to-recognize-c/, the risk that such a censorship tool will be abused is a great deal less than "imaginary."

public,[10] *see, e.g.,* Ex. C to Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order Ex. C at Bates No. 0006 ("Straight up lying should get you thrown in jail."); *id.* at Bates No. 0007 ("You don't have my support, if you lie about your opposition, you should face stiff penalties"); *id.* at Bates No. 0008 ("Knowingly publishing any false information deserves punishment."); *id.* at Bates No. 0009 ("If a politician tells an outright lie about his opponent, I think they should face jail time. This is not a 1st amendment issue."), sufficient objective evidence exists to make clear that fear of enforcement is more than "imaginary or speculative," *see Babbitt*, 442 U.S. at 298 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1969); *Golden v. Zwickler*, 394 U.S. 103 (1969) (internal quotation marks omitted)). Tennessee law is in accord. *See Campbell v. Sundquist*, 926 S.W.2d 250, 256 (Tenn. Ct. App. 1996), *abrogated on other grounds by Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008) ("We think the plaintiffs' status as homosexuals confers upon them an interest distinct from that of the general public with respect to the HPA, and that they are therefore entitled to maintain an action under the Declaratory Judgment Act **even though none of them have been prosecuted under the HPA**." (emphasis added)). *See also Dombrowski*, 380 U.S. at 494 ("**So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one**. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." (emphasis added)); *Bullock*, 698 F.3d at 745 (9th Cir. 2012) ("The threat to infringement

[10] Defendants gripe, in a footnote, that these statements were provided "without explanation or context." *See* Defs.' Resp. at 7, n. 3. But the statements were provided specifically in response to Defendants' Interrogatory No. 2, and the additional context desired was provided in Plaintiff's response to the interrogatory, which states that: "the statements attached hereto as Attachment #1, **received by the Plaintiff in response to Plaintiff's publication of the campaign literature that is attached to the Plaintiff's Complaint as Exhibit A**, may be responsive to this Interrogatory." (emphasis added)). *See* Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order [Ex. C?] at Bates No. 0002.

of such First Amendment rights is at its greatest when, as here, the state employs its criminalizing powers."). *Cf.* 16 Am. Jur. 2d Constitutional Law § 138 (West 2020) ("A plaintiff need not await an arrest or prosecution to have constitutional standing to challenge the constitutionality of a criminal statute. Indeed, a plaintiff need not engage in the proscribed conduct and expose himself or herself to punishment or prosecution nor confess that he or she will violate the law before bringing constitutional claim.").

Nor does the Defendants' cursory analysis of a small minority of the Plaintiff's proposed campaign literature compel the opposite conclusion. To begin, the Defendants' declaration that unwritten and heretofore unknown portions of Tenn. Code Ann. § 2-19-142 governing "metaphor," the "absurd," or the "impossible" render compliant one of the Plaintiff's five proposed advertisements (the four advertisements included in Exhibit C to the Plaintiff's Complaint are unaddressed) is hardly conclusive, *see* Defs.' Resp. at 10–11, particularly given that the advertisements the Plaintiff has appended as exhibits to its Complaint do not purport to be exhaustive. *See* Pl.'s Compl. ¶ 5 ("Tennesseans for Sensible Election Laws wishes to continue publishing and distributing other literally false campaign literature in opposition to candidates campaigning for state office—including satirical, parodical, and hyperbolic campaign literature—despite knowing that certain charges and allegations contained in its campaign literature are false."). *See also* 16 Am. Jur. 2d Constitutional Law § 138 (West 2020) (noting that "a party satisfies the injury-in-fact requirement for federal standing and may bring a preenforcement challenge to a statute or regulation, if (1) the party alleges an intention to engage in a course of conduct **arguably** affected with constitutional interest" (emphasis added)).

Nor is the Defendants' observation that the statute of limitations forecloses prosecution arising from the advertisement that the Plaintiff published in 2018—which

overlooks Tenn. Code Ann. § 2-19-142's broad application to publication "or distribut[ion]"—helpful to its standing defense. *See* Defs.' Resp. at 4, n.1 ("[I]t also was published more than one year ago, and prosecution would be barred by the statute of limitations for misdemeanors."). To the contrary, if it were true that prosecution under Tenn. Code Ann. § 2-19-142 were merely "'imaginary or speculative,'" *see Babbitt*, 442 U.S. at 298, then a statute of limitations defense would not be necessary regardless of the date of publication. Moreover, given that any subsequent distribution of the Plaintiff's violative campaign advertising *by others*—including news media—similarly violates Tenn. Code Ann. § 2-19-142, *see* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009) ("[A] prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections."), Tenn. Code Ann. § 2-19-142 constantly functions to limit the reach of the Plaintiff's message—a First Amendment injury that is sufficient to confer standing by itself. *See, e.g.*, *Nickolas v. Fletcher*, No. 3:06-CV-00043 KK, 2007 WL 2316752, at *2 (E.D. Ky. Aug. 9, 2007) ("[A] decrease in readership constitutes a First Amendment injury sufficient to confer standing." (citing *Meyer*, 486 U.S. at 422–23 ("The refusal to permit appellees to pay petition circulators restricts political expression" by "limiting the number of voices who will convey appellees' message and the hours they can speak and, therefore, ***limits*** *the size of the audience they can reach*.") (cleaned up)) (emphasis added)), *no app. filed*.

For all of these reasons, and for the reasons previously detailed in the Plaintiffs' Motion for Summary Judgment and Response in Opposition to Defendants' Motion for Case Management Order, all of which are incorporated herein by reference, the Plaintiff has standing to maintain this action, and this Court may safely adjudicate its merits.

VI. TENN. CODE ANN. § 2-19-142 FAILS STRICT SCRUTINY

A. TENN. CODE ANN. § 2-19-142 DOES NOT FURTHER A COMPELLING GOVERNMENTAL INTEREST.

Because Tenn. Code Ann. § 2-19-142 regulates on the basis of both content and viewpoint, *see* Pl.'s Mem. in Supp. of Mot. for Summ. J. at 12–16, it is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (internal quotation marks omitted)). Here, however, in response to the Plaintiff's Motion for Summary Judgment, the Defendants have not even *asserted* that Tenn. Code Ann. § 2-19-142 advances a compelling interest, *see generally* Defs.' Resp., even though it is their burden to do so. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 210 (2014) ("'[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.'") (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)). Thus, the Defendants have failed to establish that Tenn. Code Ann. § 2-19-142 serves a compelling state interest. As such, Tenn. Code Ann. § 2-19-142 fails strict scrutiny, and the Plaintiff is entitled to summary judgment on the merits of its constitutional claims.

B. TENN. CODE ANN. § 2-19-142 IS NOT NARROWLY TAILORED.

The Defendants contend that "Tenn. Code Ann. § 2-19-142 is a codification of a criminal cause of action for defamation and should be construed as such." Defs.' Resp. at 9. As a consequence, the Plaintiff assumes—without knowing—that the Defendants are advancing the position that Tenn. Code Ann. § 2-19-142 advances the interest of preventing defamation. Even assuming, for the sake of argument, that such an interest

were compelling, however, Tenn. Code Ann. § 2-19-142 would not be narrowly tailored to achieve it, because it is simultaneously fatally overinclusive—prohibiting far more speech than necessary—and fatally underinclusive, providing insufficient protection to achieve the lone interest that the Government purports to be promoting. For both reasons, Tenn. Code Ann. § 2-19-142 fails to satisfy strict scrutiny.

1. Tenn. Code Ann. § 2-19-142 is fatally overinclusive and overbroad.

"A content-based law regulating speech is overinclusive if it implicates more speech than necessary to advance the government's interests." *Thomas v. Bright*, 937 F.3d 721, 735 (6th Cir. 2019), *cert. denied*, No. 19-1201, 2020 WL 3865256 (U.S. July 9, 2020). Here, the government's apparent interest is preventing defamation. *See* Defs.' Resp. at 9 ("Tenn. Code Ann. § 2-19-142 is a codification of a criminal cause of action for defamation and should be construed as such.").

As a threshold problem, though, the text of Tenn. Code Ann. § 2-19-142 is not actually limited to defamatory false statements, nor is its text ambiguous or reasonably susceptible to such a limitation. Instead, it expressly applies to "any [] statement, charge, allegation, or other matter contained" in campaign literature. *See* Tenn. Code Ann. § 2-19-142 (emphasis added). As such, it treats "lying about a political candidate's shoe size" the same way as it treats "lying about a candidate's party affiliation or vote on an important policy issue[.]" *Susan B. Anthony List*, 814 F.3d at 475.

Further, whatever Tenn. Code Ann. § 2-19-142 covers, and even adopting a limiting construction that perfectly aligns it with defamation law, Tenn. Code Ann. § 2-19-142 is—at the very least—duplicative when it comes to forbidding defamation. Tennessee already recognizes the tort of defamation, which the Defendants themselves observe. *See* Defs.'

Resp. at 7 ("Defamation is a common law tort."). As such, regardless of Tenn. Code Ann. § 2-19-142's ambit, any lawful interest it serves is already served elsewhere.

Further still, Tenn. Code Ann. § 2-19-142 targets not only the authors of offending literature, but also its messengers—including those who republish campaign literature for innocuous purposes. *But see Higgins v. Ky. Sports Radio, LLC*, 951 F.3d 728, 739 (6th Cir. 2020) ("Merely repeating potentially false reviews generated by other users may be in bad taste. But it cannot by itself constitute defamation. And good thing too. If it could, any news article discussing a tendentious Twitter exchange could land its author in front of a jury. That would make the authors of the First Amendment cringe.").

For all of these reasons, and for those previously details, Tenn. Code Ann. § 2-19-142 is fatally overinclusive and overbroad.

2. Tenn. Code Ann. § 2-19-142 is fatally underinclusive.

"Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011) (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989)). Here, Tenn. Code Ann. § 2-19-142's underinclusiveness with respect to punishing defamation is easily demonstrated.

To begin, even if its plain text were limited as the Defendants propose, Tenn. Code Ann. § 2-19-142 does not punish defamation. Instead, it punishes defamation with respect to "candidate[s] in any election." *Id.* The Defendants observe that Tennessee law prohibits false statements in other regards, *see* Defs.' Resp. at 12–13, but they offer no explanation for why "a criminal cause of action for defamation" applying to individuals

would be narrowly limited to politicians who are actively running for office.

Similarly, Tenn. Code Ann. § 2-19-142 does not even meaningfully punish defamation where candidates for election are concerned. Instead, it narrowly applies to "campaign literature," leaving slander and defamatory literature that is not campaign-related unaffected. Thus, as previously noted, the only actual interest that Tennessee Code Annotated § 2-19-142 seems tailored to promote is to increase liability for newspapers and undermine civil safe harbor provisions that would otherwise govern retractions. *See* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009) ("[A] prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections. . . . We are not aware of anything that would preclude prosecution under Tenn. Code Ann. § 2-19-142 of a party who had retracted a false statement . . . .").

For all of these reasons, Tenn. Code Ann. § 2-19-142 is not narrowly tailored to promote any compelling governmental interest, and it fails strict scrutiny as a consequence. Accordingly, the Plaintiff is entitled to summary judgment on the merits of the constitutional claims it has asserted.

VII. TENN. CODE ANN. § 2-19-142 IS NOT SUSCEPTIBLE TO A LIMITING CONSTRUCTION

In a final effort to salvage § 2-19-142's constitutionality, the Defendants assert that a "reasonable and constitutional" limiting construction of Tenn. Code Ann. § 2-19-142 is available. Specifically, they contend that Tenn. Code Ann. § 2-19-142 should be construed "according to relevant defamation case law." *See* Defs.' Resp. at 9. For several reasons, this argument, too, is meritless.

To begin, in advocating for a limiting construction, the Defendants have carefully

avoided any reference to the statute's central problems—specifically, its specific application to "candidate[s] in any election," "campaign literature" opposing such candidates, and its criminal penalty. Overlooking these defects, the Defendants have instead advocated for a limiting construction only with reference to Tenn. Code Ann. § 2-19-142's proscription of satire, parody, and metaphor. *See* Defs.' Resp. at 9–10.

By contrast, no limiting construction is proposed or offered to cure the statute's fatal content-based and viewpoint-based infirmities with respect to its criminalization of political campaign literature specifically. *Id.* And the Defendants themselves having failed to propose such a construction, this Court should not attempt to do so for them. *See, e.g.*, *City of Knoxville v. Entm't Res., LLC*, 166 S.W.3d 650, 658 (Tenn. 2005) ("[T]he City declined to give any limiting construction to the ordinance, and we are unable to impose a narrowing definition to salvage its constitutionality. . . . [N]o such instruction has been proffered, either to Entertainment Resources or to this Court.").

The Plaintiff is also constrained to note that the Attorney General has issued formal guidance regarding the statute and has never previously proposed any limiting construction at all. *See* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009). Nor have any of the courts, officials, or governmental bodies that have previously enforced Tenn. Code Ann. § 2-19-142 applied such a limiting construction. *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."), *no app. filed.*; *id.* ("In a letter dated July 31, 2002, William L. Gibbons, District Attorney General, (Mr. Gibbons)

informed Mr. Jackson that '[u]nder Tennessee law, it is a crime for a person to publish or distribute, or cause to be published or distributed, any campaign materials in opposition to any candidate if that persons [sic] knows that any statement or other matter contained on the materials [sic] is false.' Mr. Gibbons further advised: '[u]nless you have reason to believe that Mr. Key is a member of the KKK, the publication and distribution of such materials appear to violate our state criminal law, and any such publication or distribution should cease immediately.'"); Pl.'s Resp. in Opp. to Defs.' Mot. for Case Management Order Ex. C at Bates No. 0072 (issuing restraining order "restraining the Defendants in this cause from: . . . (b) Distributing literature, disseminating information or in any way communication or implying any misleading information regarding the political party affiliation of a candidate or group" and further ordering that "Defendants shall take immediately action to remove from public view and/or access all items identified to be restrained in this pleading.").

Further, and most significantly, applying a limiting instruction to cure Tenn. Code Ann. § 2-19-142's content-based infirmities is impossible. Defamation law applies to all persons—it does not exclusively protect "candidate[s] in an[] election." *Id.* Defamation law also applies regardless of the form or publication—it does not apply exclusively to "campaign literature." *Id.* It is also "the traditional rule that 'equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages,'" *In re Conservatorship of Turner*, No. M2013-01665-COA-R3CV, 2014 WL 1901115, at *9 (Tenn. Ct. App. May 9, 2014) (quoting *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206 (6th Cir.1990)), and although injunctive relief may also be permissible after a final judgment, *id.* at *20, incarceration is neither of these remedies. Further, although the State is the victim of criminal conduct and the only party that can maintain a criminal

prosecution, the State is legally incapable of bringing a defamation action. *See 281 Care Comm.*, 638 F.3d at 634 ("A government entity cannot bring a libel or defamation action." (citing *N.Y. Times*, 376 U.S. at 291 (1964))).

In order for a limiting construction to render Tenn. Code Ann. § 2-19-142 constitutional, all of the above defects must be cured. However, both the U.S. Supreme Court and the Tennessee Supreme Court have been resolute that fashioning an altogether different statute through judicial legislation is improper. In *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), for example, the U.S. Supreme Court stated:

> [W]e cannot accept the Government's proposal, because the statute says something markedly different. This Court, of course, may interpret "ambiguous statutory language" to "avoid serious constitutional doubts." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). But that canon of construction applies only when ambiguity exists. "We will not rewrite a law to conform it to constitutional requirements." *United States v. Stevens*, 559 U.S. 460, 481, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (internal quotation marks and alteration omitted). So even assuming the Government's reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language. And we cannot. The "immoral or scandalous" bar stretches far beyond the Government's proposed construction. The statute as written does not draw the line at lewd, sexually explicit, or profane marks. Nor does it refer only to marks whose "mode of expression," independent of viewpoint, is particularly offensive. Brief for Petitioner 28 (internal quotation marks omitted). It covers the universe of immoral or scandalous—or (to use some PTO synonyms) offensive or disreputable—material. Whether or not lewd or profane. Whether the scandal and immorality comes from mode or instead from viewpoint. To cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one.

Id. at 2301–02.

Similarly, *United States v. Stevens*, 559 U.S. 460 (2010), the U.S. Supreme Court emphasized:

> "[T]his Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). We "'will

> not rewrite a . . . law to conform it to constitutional requirements,'" *id.*, at 884–885, 117 S.Ct. 2329 (quoting *Virginia v. Am. Booksellers Ass'n., Inc.*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (omission in original), for doing so would constitute a "serious invasion of the legislative domain," *United States v. Treasury Employees*, 513 U.S. 454, 479, n. 26, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), and sharply diminish Congress's "incentive to draft a narrowly tailored law in the first place," *Osborne*, 495 U.S., at 121, 110 S.Ct. 1691. To read § 48 as the Government desires requires rewriting, not just reinterpretation.

Id. at 481.

Further, in *City of Knoxville*, the Tennessee Supreme Court made clear that Tennessee law is in accord, stating:

> the City declined to give any limiting construction to the ordinance, and we are unable to impose a narrowing definition to salvage its constitutionality. . . . [A] drastic revision by this Court would amount to impermissible judicial legislation. "[C]ourts may supply words when reasonably called for. Nevertheless, it is the prerogative of the legislature, and not the courts, to amend statutes." *In re Swanson*, 2 S.W.3d 180, 186–87 (Tenn.1999) (citations omitted).

166 S.W.3d at 658.

For all of these reasons, adopting a limiting construction that would cure all of Tenn. Code Ann. § 2-19-142's fatal defects is not possible. As such, the Defendants' invitation to adopt such a construction to salvage Tenn. Code Ann. § 2-19-142's constitutionality should be declined.

VIII. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 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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