

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

<b>TENNESSEANS FOR SENSIBLE</b>	)	
<b>ELECTION LAWS,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>No. 20-312-III</b>
	)	
<b>HERBERT H. SLATERY III, in his</b>	)	
<b>official capacity as TENNESSEE</b>	)	
<b>ATTORNEY GENERAL and GLENN</b>	)	
<b>FUNK, in his official capacity as</b>	)	
<b>DISTRICT ATTORNEY GENERAL</b>	)	
<b>FOR THE 20th JUDICIAL DISTRICT</b>	)	
<b>OF TENNESSEE,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM AND ORDER GRANTING PLAINTIFF’S MOTION  
FOR SUMMARY JUDGMENT DECLARING TENNESSEE CODE  
ANNOTATED SECTION 2-19-142 UNCONSTITUTIONAL**

This lawsuit was filed by a political campaign committee<sup>1</sup> challenging the constitutionality of Tennessee Code Annotated section 2-19-142 (the “Statute”). It provides,

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

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

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

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

The Plaintiff asserts four causes of action of constitutional violations on the face of the Statute and as applied to the Plaintiff. The four violations alleged under the First and Fourteenth Amendments to the United States Constitution are viewpoint discrimination, content-based and identity-based discrimination, freedom of speech, and overbreadth. In

addition, the Plaintiff asserts section 2-19-142 violates Article I, section 9 of the Tennessee Constitution both facially and upon application of the Statute to the Plaintiff.

The *Complaint* is filed against the Tennessee Attorney General in his official capacity as defender of the constitutionality and validity of all legislation of statewide application and as a required party under Tennessee Code Annotated section 29-14-107(b). *Complaint* at ¶ 17, p. 6.<sup>2</sup>

The Plaintiff's *Prayer for Relief* seeks

- a declaratory judgment that section 2-19-142 violates the U.S. and Tennessee Constitutions (¶ 2);
- that upon the rendering of an unappealable final judgment, this Court enjoin the continued enforcement of Section 2-19-142 (¶ 3); and
- that pursuant to 42 U.S.C. § 1988(b) the Plaintiff be awarded its reasonable costs and attorneys fees associated with prosecuting this lawsuit (¶ 4).

The case is presently before the Court on the Plaintiff's motion for summary judgment. After taking the matter under advisement following oral argument, the Court

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<sup>2</sup> The Plaintiff has also filed its claims against the Davidson County District Attorney as the official who is responsible for prosecution of violations of state criminal laws which occur in Davidson County where the Plaintiff is registered and conducts its operations. *Complaint* at ¶ 18, p. 7. On May 14, 2020, the Court dismissed paragraph 3 of the *Prayer for Relief* of the *Complaint*, seeking ultimately for this Court to enjoin criminal enforcement of Tennessee Code Annotated section 2-19-142, because chancery courts in Tennessee do not have subject matter jurisdiction to enjoin criminal proceedings. In addition, the Court dismissed the Defendant Davidson County District Attorney General. Both of these dismissals were without prejudice because the Plaintiff was not presently seeking an injunction by this Court against criminal prosecution but only prospectively after there has been entered an "unappealable final judgment." *Complaint*, p. 12, ¶ 3 of the *Prayer For Relief* (Mar. 18, 2020); see also *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 753 (Tenn. 2006) ("[O]nce this [Supreme] Court has concluded that a criminal statute is unconstitutional, no controversies are required to be settled by a criminal court, and the equity court is not invading the criminal court's jurisdiction by issuing an injunction.") (citation omitted).

concludes that summary judgment is appropriate, quoting and adopting in its entirety the following from the Plaintiff's papers.

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

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

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

*Third*, Tennessee Code Annotated § 2-19-142's criminalization of "false" speech cannot be reconciled with the U.S. Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709 (2012), which held that a statement's falsity alone is insufficient to remove it from the ambit of protection guaranteed by the First Amendment.

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

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

For all of these reasons, Tennessee Code Annotated § 2-19-142 cannot withstand constitutional scrutiny.

*Plaintiff's Memorandum in Support of Its Motion for Summary Judgment*, June 12, 2020, at 1-2.

For its analysis and authorities the Court cannot improve upon the Plaintiff's memoranda. The Court therefore adopts in its entirety and incorporates herein by reference as its reasoning and authorities for holding the Statute unconstitutional pages 1-29 of the June 10, 2020 *Plaintiff's Memorandum in Support of Its Motion for Summary Judgment*, and pages 30-37 of the July 15, 2020 *Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment*.

In addition, the Court dismisses with prejudice the Defendants' defenses of lack of standing, ripeness and justiciability asserted and argued at pages 3-9 of the July 13, 2020 *Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment*. The issue in this case as to these defenses is that they function in the law as a filter of court and attorney resources, and priority legal issues. The law does not have courts decide hypothetical cases and does not have courts issue advisory decisions. There must be a real, imminent threat and harm before a court rules on the constitutionality of a statute. In this case the Court concludes that the Plaintiff has demonstrated facts to proceed through this filter. The Court concludes that the summary judgment record establishes a credible threat to the Plaintiff's exercise of the speech in issue.

In so concluding, the Court's analysis applies the factors of *McKay v. Federspiel*, 823 F.2d 862, 868-69 (6th Cir. 2016). *McKay* holds that 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).

This Court finds, adopting the Defendants’ following reasoning excerpted from pages 5, 7-9 of its *Response*, that *McKay* factors 2 and 3 are not present in this case:

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) Plaintiff’s Facebook page to the effect that “[s]traight up lying should get you thrown in jail.” 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.

\* \* \*

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 alleged harm that is only “conjectural” or “hypothetical”—if not completely unreasonable. *Lujan*, 504 U.S. at 560.

As to the first *McKay* factor, the Plaintiff does not allege or demonstrate in the record by any evidentiary showing that it has been subjected to past enforcement of Tennessee Code Annotated section 2-19-142. Nevertheless, the Court finds that *McKay* factor 1 is present because there are undisputed material facts proven in the record which the Court concludes establish a history of past enforcement, not against the Plaintiff, but others.

In so finding, the Court adopts and incorporates herein by reference the July 15, 2020 *Plaintiff’s Reply to Defendants’ Response to Plaintiff’s Motion for Summary Judgment* at 5-20, 24-29 (excepted and not adopted by this Court is the Plaintiff’s analysis “Plaintiff’s Standing to Maintain Claims for Constitutional Injuries to Third Parties at pages 21-23). The incidents the Plaintiff characterizes as “enforcement” in its papers just cited, the Court concludes, do constitute a credible threat to the Plaintiff’s exercise of the speech in issue. The Court does not adopt the Defendant’s challenge that there is not a sufficient track record of enforcement of the Statute because some of these incidents are too remote in time and/or others are civil not criminal matters. The Court finds that the

totality of the undisputed incidents the Plaintiff cites do satisfy its burden to demonstrate sufficient enforcement of the Statute to pose a credible threat to the Plaintiff's exercise of the speech in issue.

It is therefore ORDERED that the Plaintiff's motion for summary judgment is granted, and Tennessee Code Annotated section 2-19-142 is declared unconstitutional both facially and as applied to the Plaintiff as violative of the First and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Tennessee Constitution. This is not a final order as the Plaintiff's claim to recover reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1988(b) has not been decided.

It is ORDERED that by August 14, 2020, the Plaintiff shall file its application for attorney's fees in accordance with Local Rule 5.05. Opposition is due by August 28, 2020, with a Reply due September 4, 2020.

s/ Ellen Hobbs Lyle  
ELLEN HOBBS LYLE  
CHANCELLOR

cc: Due to the pandemic, and as authorized by the *Twentieth Judicial District of the State of Tennessee In Re: COVID-19 Pandemic Revised Comprehensive Plan* as approved on May 22, 2020 by the Tennessee Supreme Court, this Court shall send copies solely by means of email to those whose email addresses are on file with the Court. If you fit into this category but nevertheless require a mailed copy, call 615-862-5719 to request a copy by mail.

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

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