

TENNESSEANS FOR)
SENSIBLE ELECTION LAWS,)
Plaintiff-Appellee,)
))
v.) **M2020-01292-COA-R3-CV**
))
HERBERT H. SLATERY III,)
in his official capacity as)
TENNESSEE ATTORNEY) **Davidson Chancery No.**
GENERAL) **20-312-III**
))
and)
))
GLENN FUNK, in his official)
Capacity as DISTRICT)
ATTORNEY GENERAL FOR)
THE 20th JUDICIAL)
DISTRICT OF TENNESSEE,)
Defendants-Appellants.)

BRIEF OF DEFENDANTS-APPELLANTS

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ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED FOR REVIEW

1. Whether the chancery court erred in ruling that it had jurisdiction to rule on the constitutionality of a criminal statute, Tenn. Code Ann. § 2-19-142.
2. Whether the chancery court erred in ruling that Plaintiff had standing to challenge the constitutionality of Tenn. Code Ann. § 2-19-142.
3. In the alternative, whether the chancery court erred in declaring that Tenn. Code Ann. § 2-19-142 is unconstitutional.
4. Whether the chancery court erred in awarding attorney's fees to Plaintiff.

STATEMENT OF THE CASE AND THE FACTS

Plaintiff, Tennesseans for Sensible Election Laws (“TSEL”), filed a complaint in Davidson County Chancery Court on March 18, 2020, challenging the constitutionality of Tenn. Code Ann. § 2-19-142, both facially and as applied, and seeking to enjoin its enforcement. (I, 1-13.) Tennessee Code Annotated § 2-19-142 makes it a Class C misdemeanor “for any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election if such person knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is false.”

TSEL claimed that it wished to publish political advertisements that employed false speech to criticize certain political candidates, but that fear of prosecution under Tenn. Code Ann. § 2-19-142 prevented it from publishing these advertisements. (I, 7-9.) For example, TSEL

alleged that it wished to publish hyperbolic and satirical statements, such as declaring that Representative Griffey is “literally Hitler,” or asserting that Representative Camper and Senator Tate “have cauliflower for brains.” (I, 2-3.) TSEL alleged that the statute unconstitutionally prevented it from doing so, in violation of both the First and Fourteenth Amendments to the United States Constitution and art. I, § 19, of the Tennessee Constitution. (I, 10-12.)

Defendants moved to dismiss the complaint for lack of subject-matter jurisdiction. (I, 26-27.) Defendants argued that because the chancery court lacked jurisdiction to enjoin a criminal statute it also lacked jurisdiction to declare a criminal statute unconstitutional. (I, 26-27, 31-35.)

The chancery court partially denied the motion to dismiss. The court determined that it did not have the jurisdiction to enjoin the prosecution of a criminal statute and dismissed the complaint insofar as it sought injunctive relief.¹ (I, 142.) However, the chancery court also found that despite its lack of jurisdiction to enjoin the challenged statute, the court retained jurisdiction to declare the statute unconstitutional. (I, 142.)

Following the partial denial of the motion to dismiss, the Attorney General filed an Answer to the Complaint, in which he denied that § 2-19-142 is unconstitutional and raised, *inter alia*, an affirmative defense that TSEL lacked standing to challenge the statute. (II, 209-217.) TSEL

¹ The chancery court also dismissed, without prejudice, the Davidson County District Attorney General as a defendant. (I, 133.)

filed a motion for summary judgment five days later, on June 10, 2020. (II, 218-219.)²

The Attorney General opposed summary judgment based in part on TSEL's lack of standing to challenge Tenn. Code Ann. § 2-19-142, asserting that TSEL could not demonstrate a credible threat of prosecution. (V, 616-622.) TSEL failed to identify a single criminal prosecution in the 40-plus years since the statute was passed or otherwise demonstrate that TSEL had been threatened with prosecution. (IV, 473-498.) The Attorney General also submitted an affidavit from Roger Moore, Deputy District Attorney General for the 20th Judicial District, who stated that the District Attorney General for the 20th Judicial District "has no present intent for his Office to prosecute Tennesseans for Sensible Elections Laws, or any other person or organization, under Tenn. Code Ann. 2-19-142 for engaging in political satire." (IV, 594-595.)

The chancery court issued an order on July 30, 2020, rejecting the Attorney General's standing argument and declaring Tenn. Code Ann. 2-19-142 unconstitutional. (V, 696-703.) Adopting much of TSEL's argument, the chancery court ruled that despite TSEL's failure to point to any criminal prosecutions or threats of prosecution, the existence of

² The Attorney General had served his first set of discovery requests simultaneously with the filing of the Answer. (III, 434-435.) The Attorney General moved to continue Plaintiff's motion for summary judgment to give the Attorney General the opportunity to conduct discovery concerning standing. (III, 428-432.) The chancery court denied the Attorney General's motion on July 9, 2020, and the summary-judgment motion was set for hearing on July 17, 2020. (IV, 576-577).

civil suits relying on the statute were sufficient to establish a credible threat of prosecution against TSEL to afford it standing. (V, 700-703.)

On the merits, the chancery court declared that Tenn. Code Ann. 2-19-142 violated the First and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the Tennessee Constitution. Again, adopting much of TSEL's argument, the court determined that the statute was unconstitutional based on viewpoint discrimination, content-based restrictions, the Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709 (2012), and overbreadth. (V, 703.)

The chancery court issued a separate order on September 11, 2020, awarding Plaintiff the full amount of its request for attorney's fees and costs: \$69,882.37. (VI, 859-873.)

The Attorney General timely appealed to this Court on September 17, 2020. (VI, 881-883.)

STANDARD OF REVIEW

Questions concerning subject-matter jurisdiction, standing, and the constitutionality of a statute are all questions of law. *See Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000); *Gallagher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003). A chancery court's conclusions on questions of law are reviewed "de novo upon the record of the chancery court with no presumption of correctness." *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

ARGUMENT

I. The Chancery Court Lacked Subject-Matter Jurisdiction to Rule on the Constitutionality of Tenn. Code Ann. § 2-19-142.

The chancery court erred in ruling that it had subject-matter jurisdiction to rule on the constitutionality of Tenn. Code Ann. § 2-19-142, which is a criminal statute. Neither the Declaratory Judgments Act nor Tenn. Code Ann. § 1-3-121 confer independent jurisdiction on chancery courts to declare that criminal laws are constitutional.

A. The chancery court lacked jurisdiction under Tenn. Code Ann. § 29-14-102.

Tennessee Code Annotated § 2-19-142 is a statute with purely criminal ramifications. By its plain language, it creates a criminal misdemeanor but no civil cause of action; it can be enforced only by a district attorney general through a criminal prosecution.³

TSEL brought its challenge to this law in *chancery* court, seeking to enjoin use of the statute and have it declared unconstitutional. Chancery courts, however, are “courts of equity [that] have no jurisdiction to enjoin threatened criminal proceedings under a statute enacted by a state in the exercise of the police power in relation to which

³ As discussed below with respect to the standing issue, the Davidson County District Attorney General has no intention of enforcing § 2-19-142 against TSEL. While TSEL also brought this action against the Tennessee Attorney General, based on the Attorney General’s “general mandate ‘[t]o defend the constitutionality and validity of all legislation of statewide applicability’” (I, 6 (quoting Tenn. Code Ann. § 8-6-109(b)(9))), the Tennessee Attorney General does not have enforcement authority over Tenn. Code Ann. § 2-19-142 unless cross-designated by a district attorney general.

the Legislature has complete jurisdiction.” *J.W. Kelly & Co.*, 123 S.W. 622, 636 (Tenn. 1909); see *Clinton Books Inc. v. City of Memphis*, 197 S.W.3d 749, 754 (Tenn. 2006).

The chancery court recognized that it lacked authority to enjoin prosecutions under § 2-19-142, but it concluded nevertheless that it had authority to issue a declaration regarding the statute’s constitutionality under Tenn. Code Ann. § 29-14-102—the Declaratory Judgments Act. (I, 150-51.)⁴ But while chancery courts do have subject-matter jurisdiction to adjudicate declaratory-judgment actions, “the Declaratory Judgment Act does not confer an independent basis for jurisdiction.” *Hill v. Beeler*, 286 S.W.2d 868, 871 (Tenn. 1956).

A court’s authority under the Declaratory Judgments Act is limited; the Act 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.*” *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837 (Tenn. 2008) (citing Tenn. Code Ann. § 29-14-103) (emphasis added). “The Declaratory Judgment Act does not grant the power to courts to declare and enforce rights outside their scope of jurisdiction.” *Carter v. Slatery*, M2015-00554-COA-R3-CV, 2016 WL 1268110, at *6 (Tenn. Ct. App. Feb. 19, 2016) (citing *Morgan v. Norris*, No. 88-70-II, 1988 WL 133479, at *2 (Tenn. Ct App. Dec. 16, 1988)). Indeed, the Tennessee Supreme Court has held that “[a] declaratory judgment is proper in chancery, but only if chancery originally could have

⁴ The chancery court dismissed Plaintiff’s claim for injunctive relief *without prejudice*, concluding that it could enjoin prosecution under the statute after “the rendering of a ‘final unappealable judgment.’” (*Id.*)

entertained a *suit of the same subject matter*.” *Zirkle v. City of Kingston*, 396 S.W.2d 356, 363 (Tenn. 1976) (citing *Gibson, Suits in Chancery* § 36, n. 62 (5th ed. 1955) (emphasis added)).

The chancery court cannot entertain a criminal prosecution, i.e., a suit of the same subject matter as Tenn. Code Ann. § 2-19-142. Article VI, Section 8, of the Tennessee Constitution provides that “the jurisdiction of the circuit, chancery and other inferior courts, shall be as now established by law, until changed by the legislature.” And the General Assembly has vested exclusive and original jurisdiction of all criminal matters in the circuit and criminal courts of this State. *See* Tenn. Code Ann. §§ 16-10-102; 40-1-107 to -108; *see also Tennesseans for Sensible Elections Laws v. Tennessee Bureau of Ethics and Campaign Finance*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *25-26 (Tenn. Ct. App. Dec. 12, 2019) (discussing the “well established” proposition that the enforcement of criminal laws does not lie with a chancery court).

Since the chancery court here lacked jurisdiction to enforce Tenn. Code Ann. § 2-19-142, it likewise lacked jurisdiction to issue a declaration regarding its constitutionality. Just like an injunction, such a declaratory order would “interfere with the administration of this state's criminal laws” and “cause confusion in the preservation of peace and order and the enforcement of the State's general police power.” *Id.* 2019 WL 6770481, at *26. Unless a district attorney general is expected to ignore it, a chancery court’s declaration that a criminal statute is invalid would effectively “enjoin the officers of the state from prosecuting persons

who are [engaging in conduct] made unlawful by a criminal statute.” *Id.* (citing *J.W. Kelly & Co.*, 123 S.W. at 631); see *Carter*, 2016 WL 1268110, at *7. Cf. *Memphis Bonding Co., Inc. v. Criminal Court of Tennessee 30th Dist.*, 490 S.W.3d 458, 467 (Tenn. Ct. App. 2015) (“Because MBC’s underlying claim for injunctive relief regarding the local rules could not be brought in chancery court, the chancery court could not exercise subject matter jurisdiction over the declaratory judgment aspect of the case either.”).

B. The chancery court lacked jurisdiction under Tenn. Code Ann. § 1-3-121.

The chancery court also relied on Tenn. Code Ann. § 1-3-121 as a basis for its subject-matter jurisdiction. (I, 152.) Section 1-3-121 provides in pertinent part that “[n]otwithstanding 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.” But nothing in this statute alters existing law regarding chancery-court jurisdiction or explicitly confers jurisdiction on chancery courts. See, e.g., *In re Baby*, 447 S.W.3d 807, 837 (Tenn. 2014) (citing *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000)) (noting that a court has subject-matter jurisdiction when conferred by a statute or the state or federal constitutions). If a chancery court lacks jurisdiction to issue injunctive or declaratory relief with respect to a criminal statute under

Tenn. Code Ann. § 29-14-102 (and it does), then it likewise lacks such jurisdiction under Tenn. Code Ann. § 1-3-121.⁵

II. Plaintiff Lacked Standing to Challenge the Constitutionality of Tenn. Code Ann. § 2-19-142.

The chancery court also lacked jurisdiction in this case because TSEL failed to demonstrate that it had standing to challenge the constitutionality of Tenn. Code Ann. § 2-19-142. The concept of standing requires a plaintiff to demonstrate “three ‘indispensable’ elements.”

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

City of Memphis v. Hargett, 414 S.W.3d 88, 98 (Tenn. 2013) (citations omitted)

This standing requirement applies in the context of a free-speech claim. A plaintiff must satisfy the “injury-in-fact” requirement by alleging “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists *a credible threat* of prosecution.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)) (emphasis added).

⁵ Furthermore, as discussed below, no “governmental action” has been taken in this case.

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).

TSEL did not, and cannot, show any “imminent enforcement” of § 2-19-142. The chancery court agreed with Defendants that the second and third *McKay* factors were not present here. But it erred in concluding that the first factor was satisfied: “a history of past enforcement against the plaintiffs or others.” (V, 701-702.)

The chancery court acknowledged that “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.” (V, 702). The court determined, however, that “[t]he incidents the Plaintiff characterizes as ‘enforcement’ in its papers just cited [and incorporated by the chancery court] . . . do constitute a credible threat to the Plaintiff’s exercise of the speech in issue.” (V, 702.)

But the “incidents” TSEL cited do not constitute a credible threat of prosecution. First, the chancery court ignored the uncontroverted evidence from the Office of the Davidson County District Attorney General—the only office with statutory authority to enforce Tenn. Code Ann. § 2-19-142 against TSEL under these circumstances. Deputy District Attorney General Moore attested that the District Attorney General had never prosecuted an action under the statute, has never threatened to do so, and has no intent to do so for anyone, including TSEL, that engages in political satire. (IV, 594-595.) That alone should have been enough to negate TSEL’s standing.

The chancery court, however, gave weight to the following:

1. A lawsuit against political organizations filed by the campaign committee for Representative Steve Cohen. (V, 636.)
 2. A lawsuit against twelve citizens filed by a failed city council candidate. (V, 636.)
 3. A lawsuit against a citizen “for certain ‘statements [published] by hand-delivery door-to-door to registered voters.’” (V, 637.)
 4. A 2002 termination of employment based upon violation of Tenn. Code Ann. § 2-19-142. (V, 637.)
 5. A letter from the then-Shelby County District Attorney General relating to the same 2002 termination of employment. (V. 637-638.)
 6. An Attorney General Opinion. (V, 638.)
 7. Various social media threats. (V, 639.)
- (V, 702.)

But what is missing in each of these examples is any *actual enforcement of the statute*. Again, the statute does not provide a cause of action to anyone other than a district attorney general; it is a criminal statute setting forth a misdemeanor offense. While a private party may be free to cite the statute in civil pleadings, a private party has no enforcement power under the statute. So reliance on the statute by a private party in a civil suit is simply not enough to establish a credible threat of *prosecution*.

A termination of employment based on § 2-19-142 is also not a “criminal prosecution.” TSEL relied in the chancery court on this Court’s decision in *Jackson v. Shelby Cty. Civil Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518 (Tenn. Ct. App. Jan. 10, 2007), which involved the Civil Service Board’s termination of the plaintiff’s employment for distributing political signs reading: “Just Say ‘No’ to Bill KKK Key Criminal Court Clerk.” 2007 WL 60518, at *1. A civil service board has no more authority to enforce a criminal statute than a private party. And while the *Jackson* decision reflects that in July 2002, the then-Shelby County District Attorney General informed the plaintiff that “the publication and distribution of such materials appear to violate our state criminal law, and any such publication or distribution should cease immediately,” *id.*, there is no evidence that the plaintiff was ever *prosecuted* for anything. In other words, *Jackson* provides no evidence of

“a history of past enforcement against . . . others.” *McKay*, 823 F.3d at 869.⁶

“The potential for prosecution must be likely or must be objectively reasonable under circumstances.” 16 Am. Jur. 2d Constitutional Law § 138. Here, TSEL failed to show *any* likelihood of prosecution, and its alleged 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 TSEL will *not* be prosecuted for engaging in political satire. (IV, 594-595.) Having alleged a harm that is, at best, merely “conjectural” or “hypothetical,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), TSEL failed to establish its standing to challenge the constitutionality of Tenn. Code Ann. § 2-19-142.

Additionally, to establish standing, a litigant’s “injury must be capable of being redressed by a favorable decision of the court.” *City of Memphis*, 414 S.W.3d at 98. This requires an injury “apt to be redressed by a remedy that the court is prepared to give.” *City of Chattanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn. 2001). But here, the chancery court declared that it had no jurisdiction to give a remedy, i.e., to enjoin enforcement of the statute. For this reason, TSEL also could not establish its standing to challenge Tenn. Code Ann. § 2-19-142 and the chancery court’s declaration as to the constitutionality of the statute was

⁶ Even if the Shelby County District Attorney’s 18-year-old letter were construed as a “threat” of prosecution, it would obviously not be an “actual or imminent” threat against TSEL. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); see *McKay*, 823 F.3d at 869.

simply an impermissible advisory opinion.⁷ *State ex rel. Lewis v. State*, 347 S.W.2d 47, 48 (Tenn. 1961) (“The courts of this State have no right to render an advisory opinion.”)

III. Tennessee Code Annotated § 2-19-142 Is Constitutional.

Even if the chancery court were correct in ruling that it had subject-matter jurisdiction and that Plaintiff had standing, the court erred in declaring that Tenn. Code Ann. § 2-19-142 violates the First and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the Tennessee Constitution.

A. The statute does not prohibit TSEL’s desired speech.

Courts must “begin with the presumption . . . that the acts of the General Assembly are constitutional.” *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996). When a statute is challenged, therefore, courts have an affirmative duty to “adopt a construction which will sustain a statute and avoid constitutional conflict if *any* reasonable construction exists that satisfies the requirements of the Constitution.” *State v. Sliger*, 846 S.W.2d 262, 263 (Tenn. 1993) (emphasis added). “When faced with a choice between two constructions, one of which will sustain the validity of the statute and avoid a conflict with the

⁷ The chancery court tacitly acknowledged that TSEL sought an advisory opinion noting that “Plaintiff is not even presently seeking a preliminary injunction nor a permanent injunction of enforcement of a criminal statute from this Court at the conclusion of the trial court proceedings. Instead, the Plaintiff has sought prospectively to have this Court enjoin the Defendants’ enforcement of Tennessee Code Annotated section 2-19-142 only after ‘an unappealable final judgment’ has been rendered.” (I, 150.)

Constitution, and another which renders the statute unconstitutional, [courts] *must choose* the former.” *Davis-Kidd Book Sellers, Inc. v. McWherter*, 866 S.W.2d 520, 529-30 (Tenn. 1993) (emphasis added) (citations omitted). Furthermore, “[t]he most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute’s coverage *beyond its intended scope*.” *State v. Howard*, 504 S.W.3d 260, 269 (Tenn. 2016) (emphasis added). Courts should avoid “a construction that leads to absurd results.” *State v. Welch*, 595 S.W.3d 615, 621 (Tenn. 2020).

In declaring Tenn. Code Ann. § 2-19-142 unconstitutional, the chancery court ran afoul of these rules. A reasonable and constitutional construction of § 2-19-142 that “sustains” the statute, while also avoiding both absurdity and “coverage beyond its intended scope,” is plainly and readily available. And that construction does not prohibit TSEL’s desired speech.

Section § 2-19-142 is the codification of a criminal cause of action for defamation and should be construed as such. The statute prohibits the “public[cation] or distribut[ion]” of a “statement, charge, [or] allegation” that the publisher or distributor “know[s] . . . is false.” Tenn. Code Ann. § 2-19-142. Since “[c]ourts presume that every word in a statute has a meaning and a purpose,” *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013), the statute is properly construed to prohibit only the knowing expression of *factual* falsehoods.

Satire and parody—the form of expression in which TSEL wishes to engage—fall outside the boundaries of the statute because such

statements are not objectively factual. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (defining parody and satire as “speech [which] could not reasonably have been interpreted as stating actual facts about the public figure involved”). For example, for TSEL to say that Representative Griffey is “literally Hitler,” or assert that Representative Camper and Senator Tate “have cauliflower for brains” (I, 2-3), would be an exercise in metaphor. Metaphor is not fact; it is rhetoric intended to denote one kind of object or idea in the place of another to suggest a likeness or analogy between the two. *See New Oxford American Dictionary* 1100 (3d ed. 2010). TSEL wants to engage in “hyperbole and satire,” not literal statements of fact. (I, 1-9.) And “rhetorical hyperbole” is not subject to prosecution under Tenn. Code Ann. § 2-19-142. *See Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 284-286 (1974).

Support for construing Tenn. Code Ann. § 2-19-142 in accordance with defamation law lies in its plain language, which mirrors the “actual malice” standard discussed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *see id.* at 279-80 (observing that “constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”). Prosecutions under Tenn. Code Ann. § 2-19-142 are therefore already subject to the same constitutional guardrails established for civil lawsuits for defamation. Put another way, the

statute cannot be violated by statements of parody or satire alone; there must also be not only a “false statement of fact” but one “which was made with ‘actual malice.’” *See Hustler Magazine*, 485 U.S. at 56.

So the chancery court should not have ruled on the constitutionality of § 2-19-142 at all. The court should have “ascertain[ed] and give[n] effect to the legislative intent without unduly restricting or expanding a statute’s coverage beyond its intended scope.” *Howard*, 504 S.W.3d at 269. Under a proper construction of the statute, TSEL’s desired conduct fell outside its boundaries, obviating the constitutional challenge.

B. The statute is not an impermissible content-based restriction.

In any event, the chancery court’s constitutional ruling was wrong, because the statute survives the applicable constitutional tests. First, the court erred in determining that Tenn. Code Ann. § 2-19-142 constitutes an impermissible content-based restriction on speech. (V, 700, 659-660; II, 264-265, 270-272.) As explained above, § 2-19-142 is a codification of a criminal cause of action for defamation, and defamation is one of the areas where content-based restrictions are permitted. *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

The basis for the chancery court’s determination was that § 2-19-142 prohibits all false statements made against a candidate while permitting false statements in any other context. (V, 699.) That is incorrect. Again, the statute restricts *only* factually defamatory statements, and defamation is potentially actionable in *any* context because it is not constitutionally protected speech. Those who make defamatory statements are subject to civil liability, and Tenn. Code Ann.

§ 2-19-142 does not abrogate common-law defamation in all other contexts. *See State v. Welch*, 595 S.W.3d 615, 621 (Tenn. 2020). Furthermore, there are other statutes that create a criminal cause of action for making false statements. *See, e.g.*, Tenn. Code Ann. §§ 39-16-702, 39-14-120, 39-16-502. The notion that false statements in one particular context are being singled out while all other types of actionable false speech are permitted is demonstrably false. The State is not required to address all forms of constitutionally unprotected false statements in one statute.

C. The statute is not an impermissible viewpoint-based restriction.

The chancery court also determined that Tenn. Code Ann. § 2-19-142 constitutes impermissible viewpoint-based discrimination, because it prohibits only false speech made *in opposition* to a candidate but not in favor of a candidate. (V, 700; II, 263-264, 268-270.) This language does not render the statute unconstitutional, though; it provides additional support for the conclusion that the statute was meant to apply only to defamatory statements—a limitation that actually *preserves* the statute’s constitutionality.

Defamation is “malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person.” Black’s Law Dictionary (11th ed. 2019). Since the statute applies only to the publication or distribution of campaign literature “in opposition to any candidate,” it is logically limited to statements harmful to the reputation or good name of another. Indeed, if § 2-19-142 were to encompass *all* false statements, it would necessarily extend to non-

defamatory speech and thus potentially encroach on constitutionally protected statements. *See Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 475 (6th Cir. 2016) (holding Ohio’s false-statements law unconstitutional because it made non-defamatory statements actionable).⁸ And statutes must be construed so as to “avoid a conflict with the Constitution.” *Davis-Kidd Book Sellers*, 866 S.W.2d at 529-30.

D. The statute is not overbroad.

The chancery court also concluded that Tenn. Code Ann. 2-19-142 is unconstitutionally overbroad, “because it prohibits a substantial amount of constitutionally protected speech.” (V, 700; II, 267, 283-284.) It does not, as discussed above. Furthermore, the overbreadth doctrine is “strong medicine” that should be employed only as a “last resort”; any claim of overbreadth must “be ‘substantial’ before the statute involved will be invalidated on its face.” *New York v. Ferber*, 458 U.S. 747, 769 (1982).

TSEL’s overbreadth claim is hardly “substantial.”⁹ Section 2-19-142 makes it an offense for a person to publish or distribute “campaign literature *in opposition* to any candidate in any election if such person

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

⁹ In *Jackson*, this Court concluded that § 2-19-142 “is not blatantly unconstitutionally overbroad.” 2007 WL 60518, at *4-5.

knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is *false*” (emphasis added). As discussed, when properly construed the statute prohibits defamatory statements made with actual knowledge of their falsity. “Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (citations omitted). And neither the United States nor the Tennessee Constitution affords protection for defamatory speech, putting it within the State’s “power to proscribe.” *Id.*

E. The statute does not offend the Tennessee Constitution.

Finally, the chancery court also concluded that Tenn. Code Ann. § 2-19-142 violates the Tennessee Constitution, “by restricting speech based on its content, by proscribing protected speech, and by criminalizing political speech based on viewpoint.” (V, 699.) In so ruling, the court relied on “the more expansive protections of article I, section 19 of the Tennessee Constitution” (*id.*), but there is no reason to conclude that the Tennessee Constitution provides greater protection than the First Amendment in this particular context.

In *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978), the Supreme Court did state that article I, section 19, “is a substantially stronger provision than that contained in the First Amendment.” 569 S.W.2d at 442. But the Court went on to make clear that this provision “*does not constitutionalize false and malicious defamations*, and publishers are answerable for abuse.” *Id.* (emphasis added); *see also id.* (equating the phrase “abuse of that liberty” in Article I, Section 19, “with the phrase

‘actual malice’ as used in *New York Times*”). Since § 2-19-142 prohibits only false and malicious defamations, it fully comports with both the First Amendment *and* the Tennessee Constitution.

IV. TSEL Is Not Entitled to an Award of Attorneys’ Fees.

After granting TSEL’s motion for summary judgment, the chancery court awarded TSEL attorney’s fees and costs under 42 U.S.C. § 1988. (VI, 860-861.) Section 1988 authorizes such an award to prevailing parties in actions under 42 U.S.C. § 1983. 42 U.S.C. § 1988(b). For the reasons discussed above, TSEL should not have prevailed; its complaint should have been dismissed, or its motion for summary judgment should have been denied. In either instance, TSEL was not entitled to an award of fees and costs under § 1988.

CONCLUSION

For the reasons stated, the judgment of the chancery court should be reversed and its award of attorneys' fees and costs should be vacated.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief consists of 6,215 words in compliance with
Tenn. Sup. Ct. R. 46.

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