IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

TENNESSEANS FOR SENSIBLE ELECTION LAWS,	§	
Plaintiff-Appellee,	§	
v.	§	Case: M2020-01292-COA-R3-CV
HERBERT H. SLATERY III, et al.,	§	Davidson County Chancery Court Case No.: 20-312-III
Defendants-Appellants.	§	

PRINCIPAL BRIEF OF APPELLEE AND CROSS-APPELLANT TENNESSEANS FOR SENSIBLE ELECTION LAWS

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III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. PLAINTIFF'S ISSUES AS APPELLEE

Pursuant to Tennessee Rule of Appellate Procedure 27(b), the Plaintiff submits its own Statement of the Issues Presented for Review:

(1) Whether the trial court correctly determined that it had subject matter jurisdiction to adjudicate the Plaintiff's claims under Tennessee Code Annotated § 29-14-102, § 1-3-121, and/or 42 U.S.C. § 1983.

(2) Whether the trial court's unappealed ruling that the Plaintiff had subject matter jurisdiction to adjudicate the Plaintiff's claims under 42 U.S.C. § 1983 renders the Parties' dispute over the trial court's subject matter jurisdiction *res judicata*.

(3) Whether the trial court correctly determined that the Plaintiff had statutory standing to seek a declaration under Tennessee Code Annotated § 29-14-102 and § 1-3-121.

(4) Whether the Defendants' failure to contest the trial court's ruling that the Plaintiff had statutory standing to seek a declaration regarding Tennessee Code Annotated § 2-19-142's constitutionality forecloses the Defendants' claim regarding the Plaintiff's individualized standing.

(5) Whether the trial court correctly determined that the Plaintiff had individualized standing to challenge § 2-19-142's constitutionality.

(6) Whether § 2-19-142 satisfies strict constitutional scrutiny or, instead, violates the 1st and 14th Amendments and article I, § 19 of the Tennessee Constitution as an overbroad, content-based, and viewpoint-based speech restriction that cannot be cured with a limiting

construction.

(7) Whether the Defendants have waived the claim that § 2-19-142 advances a compelling governmental interest by proffering a new governmental interest for the first time on appeal.

B. PLAINTIFF'S ISSUES AS CROSS-APPELLANT

The Plaintiff also submits the following issues as Cross-Appellant pursuant to Tennessee Rules of Appellate Procedure 3(h) and 13(a):

(8) Whether the Plaintiff had standing to maintain this action based on § 2-19-142's injury to third parties.

(9) Whether the trial court had subject matter jurisdiction to adjudicate this action under the Tennessee Constitution.

(10) Whether the Plaintiff should recover its attorney's fees regarding this appeal.

IV. STATEMENT REGARDING CITATIONS

Plaintiff's Brief uses the following designations:

(1) Citations to the Technical Record are abbreviated as "R. at [page number]."

(2) Citations to the July 17, 2020 Transcript of Proceedings are abbreviated as "Transcript at [page number]."

(3) Defendants' Brief is cited as "Defendants' Brief at [page number]."

V. APPLICABLE STANDARDS OF REVIEW

(1) Whether the trial court had subject matter jurisdiction to adjudicate the Plaintiff's claims under Tennessee Code Annotated § 1-3-121, § 29-14-101, *et seq.*, and/or 42 U.S.C. § 1983 are questions of law that this Court reviews de novo.[1]

(2) Whether to issue a declaratory judgment under Tennessee law is a decision subject to the trial court's "wide" discretion.[2] Thus, "[a]bsent an abuse of discretion, a trial court's decision to grant or deny declaratory judgment should not be disturbed on appeal."[3]

(3) Whether to issue a declaratory judgment under 42 U.S.C. § 1983 "is reviewed deferentially, for abuse of discretion."[4]

(4) Whether Tennessee Code Annotated § 2-19-142 is unconstitutional is a question of law reviewed de novo.[5]

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[1] *Irvin v. Green Wise Homes, LLC*, No. M2019-02232-COA-R3-CV, 2021 WL 709782, at *3 (Tenn. Ct. App. Feb. 24, 2021), *no app. filed*.

[2] *State ex rel. Moncier v. Jones*, No. M2012-01429-COA-R3CV, 2013 WL 2492648, at *3 (Tenn. Ct. App. June 6, 2013) ("The decision of whether to entertain a declaratory judgment action is discretionary with the trial judge and this discretion is wide . . . ."), *perm. to app. denied* (Tenn. Nov. 13, 2013); *Oldham v. ACLU*, 910 S.W.2d 431, 435 (Tenn. Ct. App. 1995) ("[T]he making or refusing of a declaratory judgment is discretionary with the trial court.") (collecting cases).

[3] *Moncier*, 2013 WL 2492648, at *3 ("Absent an abuse of discretion, a trial court's decision to grant or deny declaratory judgment should not be disturbed on appeal." (citing *Timmins v. Lindsey*, 310 S.W.3d 834, 839 (Tenn. Ct. App. 2009))).

[4] *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003) ("The Supreme Court has also made it clear that this broad discretion is reviewed deferentially, for abuse of discretion.").

VI. INTRODUCTION

This case presents a constitutional challenge to Tennessee Code Annotated § 2-19-142, a presumptively unconstitutional statute that criminalizes speech about politicians based on the viewpoint that a speaker expresses ("opposition") and the medium of expression used to speak ("campaign literature"). The trial court correctly held that it had subject matter jurisdiction to issue declaratory relief. The trial court also correctly held that the Plaintiff had statutory and individualized standing to maintain its claims.

Upon review of the merits of this action, the trial court held that § 2-19-142 cannot withstand strict constitutional scrutiny, and it declared § 2-19-142 unconstitutional. It additionally held that § 2-19-142 is unconstitutionally overbroad, and that no limiting construction could save it. There is little doubt that these rulings were correct. As a matter of law, § 2-19-142—a politician-specific, content-based, and viewpoint-based *criminal* speech restriction—does not serve any compelling governmental interest. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) ("[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government."). Section 2-19-142 also goes far beyond proscribing defamation—it criminalizes campaign literature containing "any" knowingly false statement in opposition to a candidate—and it is facially overbroad as a consequence.

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[5] *TSEL v. Tenn. Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *13 (Tenn. Ct. App. Dec. 12, 2019), *no app. filed*.

Section 2-19-142 cannot withstand strict scrutiny, either. Specifically, even assuming that proscribing defamation were a compelling governmental interest, § 2-19-142 would at once be fatally *over*inclusive—prohibiting far more speech than is necessary to proscribe defamation—and fatally *under*inclusive, allowing myriad defamatory statements to evade liability.

Thus, the bulk of the Defendants' appeal is devoted to arguing that the trial court was not permitted to adjudicate the Plaintiff's claims at all. As grounds, the Defendants assert that chancery courts lack subject matter jurisdiction to issue declaratory judgments regarding criminal statutes, though this Court and the Tennessee Supreme Court have held otherwise. *See Grant v. Anderson*, No. M2016-01867-COA-R3-CV, 2018 WL 2324359, at *7 (Tenn. Ct. App. May 22, 2018) ("Declaratory relief may be granted with respect to a penal or criminal statute." (citing *Erwin Billiard Parlor v. Buckner*, 300 S.W. 565, 566 (Tenn. 1927))), *perm. to app. denied* (Tenn. Oct. 10, 2018). Alternatively, the Defendants contend that the Plaintiff lacked standing to maintain its claims. As the record makes clear, though, that claim lacks merit as well, on several grounds.

Thus, the trial court did not abuse its "wide" discretion to issue a judgment declaring § 2-19-142 unconstitutional. *Moncier*, 2013 WL 2492648, at *3. The trial court's ruling should accordingly be affirmed. The Plaintiff should additionally be awarded its reasonable attorney's fees regarding this appeal.

VII. STATEMENT OF FACTS

A. THE PLAINTIFF'S CAMPAIGN LITERATURE

Plaintiff Tennesseans for Sensible Election Laws ("TSEL") is a Tennessee multicandidate political campaign committee.[6] To further its mission, TSEL engages in direct advocacy for and against political candidates.[7]

For dramatic, humorous, or memorable effect, TSEL's campaign literature often includes knowingly false statements. During the 2018 election cycle, for example, TSEL published campaign literature alleging that two candidates had "cauliflower for brains."[8] The following cycle, in 2020, TSEL developed campaign literature opposing State Representatives Bruce Griffey[9] and Rick Staples.[10] TSEL's Griffey opposition literature included a print mailer that—among other things—stated that Representative Griffey was "literally Hitler."[11] Separately, TSEL's Staples opposition literature included Facebook advertisements mocking then-Representative Staples' misuse of campaign funds.[12] Some of those advertisements, too, contained knowingly false statements, alleging, for example, that Staples had "illegally blow[n] thousands of

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[6] R. at 696 n.1; R. at 1, ¶ 1.

[7] R. at 697; R. at 1–2, ¶ 2.

[8] R. at 2, ¶ 4; R. at 15.

[9] R. at 16–17.

[10] R. at 18–21.

[11] R. at 16–17.

[12] R. at 18–21; R. at 3–4, ¶ 8.

campaign dollars on avocado toast, expensive sunglasses, Hot Yoga classes, and extra fruit for his açaí bowls" and had spent campaign funds "playing roulette, Texas hold 'em, blackjack, stud, Caribbean stud, Spanish 21, rummy, and war during a recent Vegas vacation (probably)."[13] This action followed because TSEL "wishe[d] 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."[14]

B. TENNESSEE'S CRIMINALIZATION OF "[A]NY" FALSE CAMPAIGN LITERATURE OPPOSING CANDIDATES

Tennessee Code Annotated § 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.

Thus, § 2-19-142 makes publishing or distributing "any" knowingly false campaign literature in opposition to candidates a Class C misdemeanor. *Id.* Violating § 2-19-142 also risks exposing a publisher to civil liability for both damages and injunctive relief—a fate that

[13] R. at 18–19.

[14] R. at 2, ¶ 5.

several entities and individuals,[15] *including one of TSEL's own attorneys and agents*[16]—has suffered in recent years. The Defendant Attorney General has also warned newspapers that they cannot safely carry campaign literature like TSEL's, either. *See* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009) (asserting that "a prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections").

Significantly, any recipient of TSEL's campaign literature who republished it, on social media or elsewhere, similarly risked incurring liability—a concern that risks materially limiting the potential impact, reach, and readership of TSEL's literature. Thus, for example, public employees who republished TSEL's campaign literature would risk not only criminal prosecution—*see Jackson v. Shelby Cty. Civ. Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518, at *1 (Tenn. Ct. App. Jan. 10, 2007) ("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

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[15] R. at 706 (finding Plaintiff's SUMF Fact #6 undisputed); R. at 223 ("**Fact #6:** Tenn. Code Ann. § 2-19-142 has additionally been used as a predicate for asserting private claims of civil liability."). *See also* R. at 229–41; R. at 520–26; R. at 537–49.

[16] R. at 706 (finding Plaintiff's SUMF Fact #7 undisputed); R. at 223 ("**Fact #7:** One of the individuals who has been sued for allegedly violating Tenn. Code. Ann. § 2-19-142 is Jamie Hollin, who is one of the Plaintiff's attorneys and agents."). *See also* R. at 229–41.

statement or other matter contained on the materials [sic] is false.'"), *no app. filed*—they would risk civil consequences, including termination, as well. *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[.]").

C. TENNESSEE CODE ANNOTATED § 2-19-142'S HISTORY OF ENFORCEMENT

Before being declared unconstitutional, § 2-19-142 was an actively enforced statute. In both 2017 and 2019, members of leadership from both major political parties also sought to *increase* its criminal penalty.[17] The General Assembly's most recent legislative attempt to elevate § 2-19-142 to a Class B misdemeanor offense also reflected an assumption that there would be criminal prosecutions under the statute, though something less than a "significant number" of them.[18]

Undisputed facts also demonstrated that § 2-19-142 had been enforced in both civil and criminal settings. For example:

(1) In 2014, multiple political organizations and an individual citizen were sued under § 2-19-142 by the campaign committee for U.S.

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[17] R. at 227, 228.

[18] Fiscal note of S.B. 2255/HB 2343, 111th Gen. Assemb. Reg. Sess. (Tenn. 2020), https://www.capitol.tn.gov/Bills/111/Fiscal/SB2255.PDF. The Court may take judicial notice of this public record. *See Ind. State Dist. Council of Laborers v. Brukardt*, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at *8 (Tenn. Ct. App. 2009), *perm. to app. denied* (Tenn. Aug. 24, 2009).

Congressman Steve Cohen,[19] resulting in a restraining order being entered against all defendants.[20]

(2) In 2010, a city council candidate utilized § 2-19-142 to maintain a multi-year, $1,000,000.00 lawsuit against twelve citizens[21]—including one of TSEL's attorneys and agents.[22]

(3) Also in 2010, yet another such lawsuit was filed against an individual citizen for certain "statements [published] by hand-delivery door-to-door to registered voters . . . ." in asserted violation of § 2-19-142.[23]

(4) In 2002, a public employee'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 during the July 2002 election . . . ."[24]

(5) Also in 2002, the same individual was sent a criminal threat letter by a district attorney based on § 2-19-142 that this Court quoted as follows:

> 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

[19] R. at 537–49.

[20] R. at 544.

[21] R. at 229–41.

[22] R. at 706 (finding Plaintiff's SUMF Fact #7 undisputed); R. at 223.

[23] R. at 520–26.

[24] *Jackson*, 2007 WL 60518, at *2–3.

> 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.[25]

Significantly, the above examples of § 2-19-142's enforcement "d[id] not purport to be exhaustive."[26] They only reflected enforcement history that TSEL was aware of before filing suit. Identifying the full universe of § 2-19-142's enforcement would have required—at minimum—taking discovery from all district attorneys and court clerks across all of Tennessee's judicial districts. Because records of at least one instance of § 2-19-142's criminal enforcement also were not maintained[27]—and because charges filed under § 2-19-142 may be expunged whether they were dismissed or resulted in a conviction[28]—identifying all instances of § 2-19-142's enforcement is impossible.

Based on the above examples of § 2-19-142's enforcement in both criminal and civil contexts, TSEL asserted standing to maintain this action and contended, with supporting record references, that the following facts were material and undisputed:

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[25] *Id.* at *1.

[26] R. at 635 n.3.

[27] R. at 686.

[28] TENN. CODE ANN. §§ 40-32-101(a)(1)(A)(i), (g)(1)(B).

Fact #3: One or more Tennessee District Attorneys General has threatened to enforce Tennessee Code Annotated § 2-19-142's criminal penalty and demanded that publication or distribution of materials that violate Tennessee Code Annotated § 2-19-142 cease.

Fact #4: In a letter dated July 31, 2002, William L. Gibbons, [a] District Attorney General, (Mr. Gibbons) informed [a citizen] 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 [by operation of Tennessee Code Annotated § 2-19-142].

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.

Fact #5: Government officials have also enforced Tenn. Code Ann. § 2-19-142 in civil contexts.

Fact #6: Tenn. Code Ann. § 2-19-142 has additionally been used as a predicate for asserting private claims of civil liability.

Fact #7: One of the individuals who has been sued for allegedly violating Tenn. Code Ann. § 2-19-142 is Jamie Hollin, who is one of the Plaintiff's attorneys and agents.

Fact #8: 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.

Fact #9: The Defendant Tennessee Attorney General has

> formally opined that prosecutions may be brought under Tenn. Code Ann. § 2-19-142—including "against a newspaper or other news medium"—without "rais[ing] any constitutional objections."[29]

In its August 4, 2020 Memorandum and Order, the trial court agreed that the above facts were undisputed. R. at 706 ("The events and actions stated in [the above] paragraphs are undisputed."). The Defendants also do not argue on appeal that the trial court incorrectly found any of the above facts to be undisputed. The trial court additionally held that "the totality of the undisputed incidents stated in paragraphs 1–9 of the *Plaintiff's Statement of Undisputed Material Facts* satisfies its burden to demonstrate sufficient enforcement of the statute in issue to pose a credible threat to the Plaintiff's exercise of protected speech."[30]

D. THE DEFENDANTS' ADMISSIONS REGARDING TENNESSEE CODE ANNOTATED § 2-19-142'S ENFORCEMENT AND ONGOING ENFORCEMENT POSITIONS

In 2009, the Defendant Attorney General published guidance regarding § 2-19-142 that included a robust defense of its purported constitutionality. *See* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009). The Defendants admit that "the cited Attorney General Opinion"—which advises, among other extraordinary things, that "a prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections[,]" *id.*—"speaks for itself."[31]

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[29] R. at 221–24.

[30] R. at 706.

[31] R. at 212, ¶ 30.

The Attorney General's opinion does not assert that any limiting construction of § 2-19-142 is necessary. *Id.*

The Attorney General has never withdrawn this guidance. As relevant to TSEL's standing, the Attorney General has also maintained that § 2-19-142 is constitutional throughout this litigation. *Cf.* TENN. CODE ANN. § 8-6-109(b)(9) (affording the 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 District Attorney: TSEL alleged in its Complaint that "the Davidson County District Attorney General's responsibilities include prosecuting violations of Tenn. Code Ann. § 2-19-142."[32] Both Defendants conclusively admitted this allegation in their Answer,[33] and as such, no proof was necessary regarding it.[34] Precedent is in accord with this position.[35] It is also consistent with, for example, the policy of the Shelby County District Attorney—an office that has a demonstrated history of enforcing § 2-19-

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[32] R. at 6–7, ¶ 18.

[33] R. at 211, ¶ 18; 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[.]"); *Irvin v. City of Clarksville*, 767 S.W.2d 649, 653 (Tenn. Ct. App. 1988).

[34] *Irvin*, 767 S.W.2d at 653.

[35] *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'").

142, *see Jackson*, 2007 WL 60518, at *1—which indicated that it does not maintain a policy of non-enforcement where § 2-19-142 is concerned. R. at 678 ("I am not aware of any such policy."). The Governor of Tennessee—who appoints district attorneys to fill vacancies—has similarly repudiated the notion that the Defendant District Attorney may "disregard[] current, duly enacted laws by the legislature[.]"[36]

Despite admitting that its "responsibilities include prosecuting violations of Tenn. Code Ann. § 2-19-142,"[37] though, just five days before the Parties' hearing on TSEL's Motion for Summary Judgment, a representative of the Defendant District Attorney abruptly declared its "present," *partial* intention not to enforce § 2-19-142 with respect to "political satire" specifically.[38] Section 2-19-142's criminalization of "political satire" was not its only—or even its primary—constitutional infirmity, however, nor was it the only infirmity regarding which TSEL asserted that § 2-19-142 was injurious and overbroad.[39] Thus, the Defendant District Attorney: (1) did not disavow all enforcement of § 2-19-142; (2) has continued to defend § 2-19-142's constitutionality throughout this case; and (3) reserved the right to prosecute violations of § 2-19-142 under circumstances not involving political satire.

VIII. STATEMENT OF THE CASE

Leading up to Tennessee's 2020 elections—but to allow sufficient

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[36] *Plaintiff's Second Motion to Consider Post-Judgment Fact*, p. 1.

[37] R. at 211, ¶ 18.

[38] R. at 594–95.

[39] R. at 6, ¶ 15.

time to resolve this action before them—TSEL filed its Complaint.[40] Thereafter, the Defendants moved to dismiss TSEL's Complaint under Tenn. R. Civ. P. 12.02(1).[41]

The Defendants' motion asserted that because § 2-19-142 is a criminal statute, the trial court "lack[ed] subject matter jurisdiction to grant Plaintiff declaratory relief."[42] The Defendants' motion did not contest TSEL's standing. R. at 141 ("Plaintiff's standing, however, has not been challenged by the Defendants."); R. at 29–35.

Following a hearing, the trial court denied the Defendants' motion to dismiss TSEL's claims for declaratory relief, but it dismissed TSEL's claims for injunctive relief against the Defendant District Attorney.[43] As grounds, the trial court "adopte[d] and incorporate[d]" and "quote[d] extensively"[44] from this Court's decision in *TSEL v. Tennessee Bureau of Ethics & Campaign Finance*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *25–27 (Tenn. Ct. App. Dec. 12, 2019), *no app. filed*, which detailed chancery courts' subject matter jurisdiction to issue declarations—but not injunctions—regarding criminal statutes.[45]

The Defendants filed a joint Answer thereafter.[46] The Defendants'

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[40] R. at 1–21.

[41] R. at 26–28.

[42] R. at 33.

[43] R. at 122–142.

[44] R. at 129.

[45] R. at 129–134.

[46] R. at 209–17.

Answer raised several defenses,[47] though they only maintain two of them on appeal.[48] TSEL then filed a Motion for Summary Judgment and supporting Memorandum[49] accompanied by a Statement of Undisputed Material Facts.[50]

The Defendants filed untimely responses to TSEL's Motion for Summary Judgment,[51] to which TSEL replied.[52] Following a hearing, the trial court granted TSEL summary judgment[53] and entered a separate order explicating the undisputed material facts upon which its order granting summary judgment was based.[54] The trial court also granted TSEL attorney's fees and costs under 42 U.S.C. § 1988(b).[55] Thereafter, the Defendants appealed.

IX. ARGUMENT

A. THE TRIAL COURT CORRECTLY RULED THAT IT HAD SUBJECT MATTER JURISDICTION TO ISSUE A DECLARATORY JUDGMENT.

The trial court correctly ruled that Tennessee's Declaratory Judgment Act confers subject matter jurisdiction to issue declaratory

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[47] R. at 215.

[48] *See generally* Defendants' Brief.

[49] R. at 218–19; R. at 257–301.

[50] R. at 220–56.

[51] R. at 596; R. at 614.

[52] R. at 630–68.

[53] R. at 696–704.

[54] R. at 705–07.

[55] R. at 877–80.

judgments regarding the constitutionality of state statutes. Tennessee Code Annotated § 1-3-121 and 42 U.S.C. § 1983 similarly conferred subject matter jurisdiction over TSEL's claims. Accordingly, the trial court's Memorandum and Order denying the Defendants' Rule 12.02(1) Motion to Dismiss the Plaintiff's Complaint[56] should be affirmed.

1. Chancery courts have subject matter jurisdiction to issue declarations regarding the constitutionality of statutes under the Declaratory Judgment Act.

Litigants may challenge the constitutionality of a state statute under Tennessee's Declaratory Judgment Act. *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008) (holding that the Declaratory Judgment Act is "an enabling statute to allow a proper plaintiff to maintain a suit against the State challenging the constitutionality of a state statute") (citation omitted). The Declaratory Judgment Act "grants subject matter jurisdiction" to do so. *Id.* at 853 ("[T]he Declaratory Judgment Act grants subject matter jurisdiction to the Davidson County Chancery Court to address the constitutional issues."). The fact that a statute may be penal or criminal also does not alter that reality. Instead, as this Court and the Tennessee Supreme Court have made clear, "[d]eclaratory relief may be granted with respect to a penal or criminal statute" as well. *See Grant*, 2018 WL 2324359, at *7 (citing *Erwin Billiard Parlor*, 300 S.W. at 566); W. E. SHIPLEY, ANNOTATION, VALIDITY, CONSTRUCTION, AND APPLICATION OF CRIMINAL STATUTES OR ORDINANCES AS PROPER SUBJECT FOR DECLARATORY JUDGMENT, 10 A.L.R.3d 727, § 2

[56] R. at 122–42.

(1966) ("[I]t now seems reasonably well settled that in an otherwise proper case declaratory relief may be granted notwithstanding the fact that the declaration is as to the validity or construction of a statute having criminal or penal provisions . . . .")).

Because this has long been the law in Tennessee, § 2-19-142 is not the first state criminal statute to be declared unconstitutional by a chancery court. Far from it. *See, e.g.*, *TSEL*, 2019 WL 6770481, at *25 (noting that "[i]n *Campbell v. Sundquist* . . . this Court declared an act criminalizing homosexual conduct unconstitutional," and affirming a chancery court's declaration that a state criminal statute was unconstitutional); *Blackwell v. Haslam*, No. M2011-00588-COA-R3CV, 2012 WL 113655, at *3 (Tenn. Ct. App. Jan. 11, 2012) ("We have concluded that the chancery court has subject matter jurisdiction over the petition for declaratory relief on the constitutionality of Tennessee Code Annotated § 39-17-1307(b)(1)(B) as applied to the Petitioner."), *perm. to app. denied* (Tenn. Apr. 11, 2012). Even so, the Defendants maintain that "[t]he chancery court lacked jurisdiction under Tenn. Code Ann. § 29-14-102" anyway. *See* Defendants' Brief at 12. The claim is unsupported by precedent, though, as the Defendants are aware. Two observations confirm as much.

First, this Court recently detailed and affirmed the Davidson County Chancery Court's authority to issue such a declaration in a case involving the same Parties and attorneys. *See TSEL*, 2019 WL 6770481, at *25–27 (collecting cases; extensively detailing courts' subject matter jurisdiction to issue declarations—but not injunctions—regarding unconstitutional criminal statutes; and affirming "in all respects" the

Davidson County Chancery Court's declaration that a criminal election statute was unconstitutional). The Defendants have not overlooked this case or forgotten about it. Instead, during the proceedings below, the Defendants asked the trial court to disregard this Court's decision as "unpublished."[57] With reason, though, the trial court declined to do so,[58] and thus, rather than disregarding this Court's opinion in *TSEL*, 2019 WL 6770481, the trial court "adopt[ed] and incorporate[d]" into its *Memorandum and Order* "the reasoning and authorities of the *TSEL-2019 Decision*" and "quot[ed] extensively from [it]."[59]

Second, in another pending case, the Attorney General's Office has characterized *this very litigation* as a lawsuit that "fall[s] within the *Colonial Pipeline* exception" because it presents a "declaratory judgment action[] challenging the constitutionality of statutes against state officers."[60] That characterization is correct. This case falls squarely within *Colonial Pipeline*'s holding that Tennessee's Declaratory Judgment Act confers subject matter jurisdiction to seek a non-damages declaration that a state statute is unconstitutional. *See Colonial Pipeline*, 263 S.W.3d at 853 ("This grant of subject matter jurisdiction is found in Tennessee Code Annotated section 29-14-103[.]").

The Defendants' contrary claim is not persuasive, either. Specifically, eliding context, the Defendants argue that *Colonial*

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[57] R. at 118.

[58] R. at 129 n.3.

[59] R. at 129.

[60] Ex. #1 to *Appellee's First Motion to Consider Post-Judgment Facts* at 4.

Pipeline's statement that "the [Declaratory Judgment] Act . . . conveys 'the power to construe or determine the validity of any . . . statute, . . . *provided that the case is within the court's jurisdiction*[,]'" Defendants' Brief at 13, means that chancery courts lack jurisdiction to declare a criminal statute unconstitutional. This qualification, however, concerned actions for money damages that "would 'reach the state, its treasury, funds, or property'" regarding which sovereign immunity applies. *See Colonial Pipeline Co.*, 263 S.W.3d at 850 (citing TENN. CODE ANN. § 20-13-102); *id.* at 848–53. By contrast, sovereign immunity is not implicated by non-damages claims for declaratory relief. *Id.* at 850 ("[F]or this specific classification of suit[,] sovereign immunity simply does not attach.").

Though this Court has settled the matter and also is not in a position to overrule Tennessee Supreme Court precedent, *see Grant*, 2018 WL 2324359, at *7 ("Declaratory relief may be granted with respect to a penal or criminal statute." (citing *Erwin Billiard Parlor*, 300 S.W. at 566)), the Defendants' position would also carry awful consequences. Under it, Tennessee's citizens would be denied any opportunity to turn to Tennessee's courts for pre-enforcement relief from unconstitutional state criminal provisions. Instead, they would have to do what the Defendants proposed below: either go to "a federal district court" to redress grievances regarding a *state* statute, or else wait to be prosecuted, and only then seek redress in a state criminal court.[61]

Neither proposal is tenable. The Defendants' former suggestion—

[61] R. at 162.

one that the Attorney General has decried as "radical" in other cases[62]—would deprive Tennessee's courts of the opportunity to rule on Tennessee's own statutes and upend bedrock notions of federalism. By contrast, the Defendants' latter suggestion—requiring citizens to wait to be prosecuted before they can challenge an unconstitutional criminal statute in a state court—contravenes well-established law. *See, e.g.*, *ACLU of Tenn. v. State of Tenn.*, 496 F. Supp. 218, 221 (M.D. Tenn. 1980) (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *NAACP v. Button,* 371 U.S. 415, 428 (1963)). It also goes without saying that the Government should not be incentivized to criminalize an ever-expanding array of conduct in the hopes of insulating unconstitutional laws from judicial review.

For all of these reasons, the trial court's ruling that it had subject matter jurisdiction over this action under Tennessee's Declaratory Judgment Act should be affirmed.

2. The trial court had subject matter jurisdiction to adjudicate the Plaintiff's claims under Tennessee Code Annotated § 1-3-121.

TSEL independently invoked this Court's subject matter jurisdiction under Tennessee Code Annotated § 1-3-121[63]—a relatively

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[62] *See* Brief of the States of Tenn., at al. as Amici Curiae Supporting Respondents, at 8, Minn. Voters Alliance v. Mansky, 849 F.3d 749 (2017) (No. 16-1435), https://www.supremecourt.gov/DocketPDF/16/16-1435/35139/20180212140354363_16-1435%20Amici%20Brief%20States.pdf.

[63] R. at 7, ¶ 19.

new statute that resolved any lingering uncertainty in this context. In straightforward terms, § 1-3-121 provides:

> 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.

In TSEL's briefing on the issue, set forth on pages 47 through 50 of the record, TSEL detailed at length how § 1-3-121 was enacted to put an end to the Attorney General's steadfast mischaracterization of *Colonial Pipeline* and to "dispense with any conceivable ambiguity regarding whether litigants have a cause of action to seek declaratory relief regarding constitutional issues[.]"[64] Thus, because § 1-3-121 provides in the clearest possible terms that "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," *id.*, and because "Tennessee's courts derive subject matter jurisdiction . . . from legislative acts[,]" *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004) (citations omitted); *see also* TENN. CONST. art. I, § 17, one might reasonably expect that by enacting § 1-3-121, the General Assembly had settled any remaining dispute over trial courts' subject matter jurisdiction in this context. Because the Defendants remain unwilling to concede the matter, though, one would be wrong.

Upon review, the trial court adopted TSEL's argument and held that it "independent[ly]" had subject matter jurisdiction under § 1-3-

[64] R. at 49.

121.[65] The Defendants now contest that ruling on two grounds, neither of which is persuasive.

First, the Defendants argue, for all practical purposes, that § 1-3-121 does not actually do or mean anything. *See* Defendants' Brief at 15 (contending that "nothing in this statute alters existing law regarding chancery-court jurisdiction or explicitly confers jurisdiction on chancery courts"). One struggles to imagine, however, how any statute could more explicitly establish a court's authority to consider declaratory judgment actions on constitutional questions than § 1-3-121 does. Thus, the text of § 1-3-121 being "plain, clear, and unambiguous," this Court's duty is simply to "obey it." *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997) (quoting *Miller v. Childress*, 21 Tenn. 320, 321–22 (1841)).

Second, the Defendants mention—but hardly develop—a novel theory presented for the first time on appeal: that § 2-19-142 does not constitute "governmental action" within the meaning of § 1-3-121. Defendants' Brief at 16 n.5. Never having been presented to the trial court or decided below, though, the argument is waived. *See King v. Bank of Am.*, N.A., No. W2018-01177-COA-R3-CV, 2020 WL 7861368, at *9 (Tenn. Ct. App. Dec. 29, 2020) (citing *Dorrier v. Dark*, 537 S.W.2d 888, 890 (Tenn. 1976)), *no app. filed*. Having been presented to this Court only in "skeletal" form in a single-sentence footnote, the argument is separately waived for that reason, too. *See Sneed v. Bd. of Prof'l Responsibility of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010).

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[65] R. at 141.

Regardless of waiver, though, the Defendants' argument is also wrong. Enacting laws is *quintessential* governmental action, and TSEL may maintain its challenge to § 2-19-142 under § 1-3-121 as a result. *See, e.g.*, *Garden State Equal v. Dow*, 82 A.3d 336, 359 (N.J. Super. Ct. Law Div. 2013) ("[I]t defies common sense to suggest that the passage of a statute by the New Jersey Legislature is not state action." (citing *Parks v. Mr. Ford*, 556 F.2d 132 (3d Cir.1977) ("Certainly the creation of law is state action. . . . The enactment of a statute . . . must be recognized as state action in its purest form."))); *Am. Humanist Ass'n v. Baxter Cty.*, 143 F. Supp. 3d 816, 823 (W.D. Ark. 2015) ("There is no dispute that on December 10, 2014, Judge Pendergrass signed and approved a unanimous resolution . . . . Defendants' argument that there is no state action fails.").

The trial court's ruling that it had subject matter jurisdiction to adjudicate TSEL's claims under § 1-3-121 should accordingly be affirmed.

3. The trial court had subject matter jurisdiction to adjudicate the Plaintiff's claims under 42 U.S.C. § 1983.

TSEL additionally invoked this Court's subject matter jurisdiction under 42 U.S.C. § 1983.[66] "42 U.S.C. § 1983 provides a vehicle by which a court may be granted subject matter jurisdiction to address alleged constitutional violations." *Blue Sky Painting Co. v. Phillips*, No. M2015-01040-COA-R3CV, 2016 WL 3947744, at *4 (Tenn. Ct. App. July 15, 2016), *perm. to app. denied* (Tenn. Nov. 17, 2016). Thus, despite being a federal statute, "state courts of 'general jurisdiction' can adjudicate cases

[66] R. at 7, ¶ 19.

invoking federal statutes, such as § 1983, absent congressional specification to the contrary." *Nevada v. Hicks*, 533 U.S. 353, 366 (2001).

42 U.S.C. § 1983 authorizes claims for "declaratory" relief, among other relief. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). Additionally, as the Tennessee Supreme Court has held, despite similar remedies being available under state law, in certain instances, "§ 1983 provides a better and more efficient remedy than a declaratory judgment." *Davis v. McClaran*, 909 S.W.2d 412, 421 n.8 (Tenn. 1995).

Upon review, the trial court held that it had subject matter jurisdiction under § 1983, ruling:

> [S]ection 1983 "provides a remedy for violations of rights protected by the United States Constitution or by a federal statute." *King v. Betts*, 354 S.W.3d 691, 702 (Tenn. 2011). Toward that end, the Plaintiff has alleged—in four independent respects—that section 2-19-142 infringes upon Plaintiff's federally protected rights under the First and Fourteenth Amendments to the United States Constitution.[67]

This ruling was correct. As importantly, the Defendants do not advance any argument that it was not. *See generally* Defendants' Brief. Thus, any claim of error regarding the trial court's subject matter jurisdiction is *res judicata*. *See Goeke v. Woods*, 777 S.W.2d 347, 350 (Tenn. 1989) ("*Res judicata* applies to questions of jurisdiction, if jurisdiction is litigated or determined by the court." (citing *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932))). Of note, the Defendants also invoked the trial court's authority under 42 U.S.C. § 1988 *themselves*.[68]

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[67] R. at 141.

[68] R. at 215, ¶ 6.

4. The trial court had subject matter jurisdiction to adjudicate the Plaintiff's claims under the Tennessee Constitution.

Invoking yet another basis for the trial court's subject matter jurisdiction, TSEL detailed why "[t]he Tennessee Constitution itself provides subject matter jurisdiction to adjudicate the Plaintiff's claims."[69] The trial court ruled it was "not necessary for th[e] Court to reach th[e] issue" because its subject matter jurisdiction to adjudicate TSEL's claims was already secure.[70] Even so, for the reasons set forth at pages 57 through 62 of the record, TSEL's argument was correct. Thus, the trial court's ruling that it had subject matter jurisdiction may also be affirmed on the alternative ground that jurisdiction was conferred by the Tennessee Constitution itself. *See State v. Hester*, 324 S.W.3d 1, 21 n.9 (Tenn. 2010).

B. THE TRIAL COURT CORRECTLY RULED THAT TSEL HAD STANDING TO CHALLENGE TENNESSEE CODE ANNOTATED § 2-19-142'S CONSTITUTIONALITY.

The trial court's July 30, 2020 Memorandum and Order[71] correctly ruled that TSEL had standing to maintain this action. Four reasons compel this conclusion:

1. TSEL had statutory standing to seek declaratory relief.

"When a statute creates a cause of action and designates who may bring an action, the issue of standing is interwoven with that of subject

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[69] R. at 57–62.

[70] R. at 141.

[71] R. at 705–07.

matter jurisdiction . . . ." *Osborn*, 127 S.W.3d at 740. "The question of whether a particular plaintiff has a cause of action under a statute has been referred to as 'statutory standing.'" *Town of Collierville v. Town of Collierville Bd. of Zoning App.*, No. W2013-02752-COA-R3-CV, 2015 WL 1606712, at *4 (Tenn. Ct. App. Apr. 7, 2015), *perm. to app. denied* (Tenn. Nov. 24, 2015). Statutory standing falls within the "rubric" of prudential standing. *Id.* (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014)). To have statutory standing, a plaintiff's claim must "'arguably [fall] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

Upon review, the trial court held that TSEL had statutory standing to maintain its claims under both the Declaratory Judgment Act and § 1-3-121.[72] The Defendants have not contested either ruling on appeal. Regardless, both rulings were correct.

a. <u>The Defendants have waived any claim of error regarding the Plaintiff's statutory standing.</u>

The Defendants have not advanced any argument contesting the trial court's ruling regarding TSEL's statutory standing on appeal. *See generally* Defendants' Brief. Instead, their brief contests only TSEL's individualized standing. *Id.* at 16–21.

The Defendants' failure to contest the trial court's ruling regarding

[72] R. at 702 (adopting and incorporating, *inter alia*, TSEL's arguments set forth at R. at 646–50).

the Plaintiff's statutory standing is dispositive of the Parties' standing dispute. *Cf. Augustin v. Bradley Cty. Sheriff's Off.*, 598 S.W.3d 220, 226–27 (Tenn. Ct. App. 2019) ("Appellant's initial brief contains no properly supported argument responsive to the trial court's dispositive ruling in this case. This failure would generally result in a waiver on appeal.") (citation omitted). As this Court explained in *Lovelace v. Baptist Memorial Hosp.–Memphis*, No. W2019-00453-COA-R3-CV, 2020 WL 260295, at *3 (Tenn. Ct. App. Jan. 16, 2020), *no app. filed*:

> Generally, where a trial court provides more than one basis for its ruling, the appellant must appeal all the alternative grounds for the ruling. *See* 5 Am. Jur. 2d Appellate Review § 718 ("[W]here a separate and independent ground from the one appealed supports the judgment made below, and is not challenged on appeal, the appellate court must affirm."). Based on this doctrine, this Court has at least twice ruled a party waived its claim of error on appeal by appealing less than all of the grounds upon which the trial court issued its ruling.

Id. (collecting cases).

Put another way: Although TSEL has standing on multiple grounds, TSEL need not prevail on each theory of standing in order to obtain a merits ruling. Instead, any basis for standing suffices. *Cf. NORML v. U.S. Dep't of State*, 452 F. Supp. 1226, 1230 (D.D.C. 1978) ("[O]nce standing is established on at least one ground, plaintiff is entitled to 'public interest' standing on other grounds." (citing *Sierra Club v. Adams*, 578 F.2d 389, 392 (D.C. Cir. 1978))).

b. <u>TSEL has statutory standing to seek a declaration.</u>

Regardless of waiver, the trial court's ruling regarding TSEL's

statutory standing was correct. "[T]o afford relief from uncertainty," *see* TENN. CODE ANN. § 29-14-113, Tennessee's declaratory judgment statutes facilitate declaratory judgments precisely like the one the trial court issued below. Thus, like several cases before it, in the instant case:

> 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).

As the Tennessee Supreme Court explained in *Colonial Pipeline,* declaratory judgments "have gained popularity as a ***proactive*** means of ***preventing*** injury to the legal interests and rights of a litigant." *See Colonial Pipeline Co.*, 263 S.W.3d at 836 (emphases added). They accordingly permit parties "to settle important questions of law ***before*** the controversy has reached a more critical stage." *Id.* at 837 (emphasis added) (citing 26 C.J.S. DECLARATORY JUDGMENTS § 3 (2001)). This expressly includes settling questions of law involving a "statute." *See* TENN. CODE ANN. § 29-14-103; *see also Sanders v. Lincoln Cty.*, No. 01A01-9902-CH-00111, 1999 WL 684060, at *6 n.6 (Tenn. Ct. App. Sept. 3, 1999) ("[T]he Declaratory Judgment Act . . . specifically authorizes trial courts to hear declaratory judgment actions seeking the construction of a statute or challenging a statute's validity.") (cleaned up).

The Declaratory Judgment Act is "construed broadly" to accomplish its purpose. *See Colonial Pipeline Co.*, 263 S.W.3d at 837. *See also Hodges v. Hamblen Cty.*, 277 S.W. 901, 902 (Tenn. 1925) ("This court is committed to a liberal interpretation of the Declaratory Judgments Act

so as to make it of real service to the people and to the profession."). And as the Tennessee Supreme Court has made clear, facilitating the resolution of constitutional issues is a *feature* of the Declaratory Judgment Act, not a bug. *Colonial Pipeline Co.*, 263 S.W.3d at 844–45 ("The importance of correctly resolving constitutional issues suggests that constitutional issues should rarely be foreclosed by procedural technicalities.") (cleaned up). Thus, where, as here, the constitutionality of a criminal statute is contested, this Court has held that litigants who have an interest that is "distinct from that of the general public" may obtain a declaratory judgment even if they have never been prosecuted. *See Campbell*, 926 S.W.2d at 255–56 ("The appellants argue that the plaintiffs do not have standing to maintain this action, because none of the plaintiffs have been prosecuted under the HPA; therefore, none of them have suffered an injury as a result of the statute. . . . 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."). *Cf. Cummings v. Beeler*, 189 Tenn. 151, 156 (1949) ("It is not necessary that any breach should be first committed, any right invaded, or wrong done. The purpose of the act . . . is to 'settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.'").

Given this context, "a plaintiff in a declaratory judgment action need not show a present injury[.]" *Colonial Pipeline Co.*, 263 S.W.3d at 837. Instead, a plaintiff need only "allege facts which show he has a real,

as contrasted with a theoretical, interest in the question to be decided and that he is seeking to vindicate an existing right under presently existing facts." *Grant*, 2018 WL 2324359, at *5 (citing *Burkett v. Ashley*, 535 S.W.2d 332, 333 (Tenn. 1976)). Notably, the Defendants have never disputed that TSEL "allege[d]" such facts. *See id.* To the contrary, in their Answer, the Defendants admitted that TSEL did so repeatedly. *See, e.g.*, R. at 211, ¶ 22 ("Defendants admit the allegations of paragraph no. 22 to the extent that they assert Plaintiffs' [sic] stated purpose in bringing this action"); R. at 210, ¶ 10 ("Defendants admit the allegations of paragraph no. 10 to the extent that they assert Plaintiffs' [sic] stated purpose in bringing this action"). Neither do the Defendants contest the trial court's finding that one of TSEL's own attorneys and agents was among the many individuals who has been targeted by § 2-19-142.[73] Significantly, if TSEL's interpretation of § 2-19-142 was correct—and the trial court agreed that it was—then TSEL was also required to comply with the statute or risk criminal liability for distributing its desired campaign literature. *Cf. Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) ("That requirement is met here, as the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution.") (citations omitted).

Under these circumstances, TSEL—an affected person—had

[73] R. at 706 (finding Plaintiff's SUMF Fact #7 undisputed); R. at 223 ("**Fact #7:** One of the individuals who has been sued for allegedly violating Tenn. Code. Ann. § 2-19-142 is Jamie Hollin, who is one of the Plaintiff's attorneys and agents.").

statutory standing to seek a declaration under Tennessee's broad, remedial declaratory judgment statutes. Accordingly, the trial court did not abuse its "wide" discretion to issue one. *See Moncier*, 2013 WL 2492648, at *3 ("The decision of whether to entertain a declaratory judgment action is discretionary with the trial judge and this discretion is wide[.]") (citations omitted). As such, the trial court's decision to issue a declaratory judgment "should not be disturbed." *Id.* ("Absent an abuse of discretion, a trial court's decision to grant or deny declaratory judgment should not be disturbed on appeal." (citing *Timmins*, 310 at 839)).

2. TSEL had standing to maintain its claims under the "relaxed" standard that governs facial overbreadth challenges.

The United States Supreme Court has "fashioned [an] exception to the usual rules governing standing" in facial overbreadth challenges to statutes that restrict First Amendment freedoms. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (citing *United States v. Raines*, 362 U.S. 17, 20 (1960)). "The ordinary injury-in-fact requirement for standing is properly relaxed in the case of facial overbreadth challenges 'because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application."'" *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1034 n.18 (5th Cir. 1981) (quoting *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975) (in turn quoting *NAACP*, 371 U.S. at 433)). "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) (collecting cases).

Consequently, in First Amendment facial overbreadth cases—which this case is—litigants have "standing to challenge a statute on grounds that it is facially overbroad, regardless of whether [their] own conduct could be regulated by a more narrowly drawn statute[.]" *Bigelow*, 421 U.S. at 816 (citing *NAACP*, 371 U.S. at 433). As such, "[a]nticipatory constitutional challenges should not lightly be dismissed for lack of a justiciable controversy because . . . they 'play a most vital role in modern efforts to enforce constitutional rights.'" *Red Bluff Drive-In*, 648 F.2d at 1034 n.18 (quoting *Int'l Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 817 (5th Cir. 1979)). Sixth Circuit precedent is in accord. *See, e.g.*, *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 766–67 (6th Cir. 2019) ("The distinction between facial and as-applied challenges bears legal significance when assessing standing. In *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1182, 1192 (6th Cir. 1995), the court found that Central Michigan students had standing to challenge their university's discriminatory-harassment policy. The students hadn't been punished under the policy, nor had the university acted concretely so as to threaten them with punishment. *Id.* at 1182. Yet, because the students were bringing a facial overbreadth challenge, the court found that the students had standing, even if they had 'not yet [been] affected by [the policy.]' *Id.*"); *Glenn v. Holder*, 690 F.3d 417, 421 (6th Cir. 2012) ("[W]hen a statute is alleged to be overly broad in violation of the First Amendment, the standing rules are relaxed to allow plaintiffs '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.'") (citations omitted).

The trial court's order granting TSEL's Motion for Summary Judgment did not reach TSEL's claim of standing based on its facial overbreadth claim,[74] presumably because its holding that TSEL had standing individually—a more stringent standard—pretermitted the issue. But it should have, and this Court may affirm the trial court's order on that alternative basis. *Cf. Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (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."). Several reasons support this result.

First, because it is not necessary to find that a plaintiff suffered an individualized injury in a facial overbreadth case, *see, e.g.*, *Edwards v. D.C.*, 755 F.3d 996, 1001 (D.C. Cir. 2014) (holding that a party need not "show injury to themselves"), affirming TSEL's standing based on the relaxed standards that govern facial overbreadth challenges would be a narrower basis for exercising jurisdiction. *See, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person

[74] R. at 702.

making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" (quoting *Dombrowski*, 380 U.S. at 486)).

Second, given the undisputed history of § 2-19-142's historical and recent enforcement and threatened enforcement—both civil and criminal—against third parties,[75] TSEL's standing to prosecute its facial overbreadth claim is clear. *Id.* at 612 ("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."); *Schlissel*, 939 F.3d at 766 ("The University contends that Speech First lacks standing because there is no 'credible threat' that its members would be subject to discipline for protected speech. In support, the University argues that there is no evidence in the record that a student has faced discipline for having an 'intellectual debate.' This misses the point. The lack of discipline against students could just as well indicate that speech has already been chilled. . . . Students who violate the Statement are subject to a range of consequences, including expulsion. . . . Thus, Speech First has established a concrete and objective threat of harm and therefore has standing to challenge the definitions.").

Third, as the U.S. Supreme Court recently made clear in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2117 (2020), when a

[75] R. at 706 (finding Plaintiff's SUMF Facts ##3–7 undisputed (citing R. at 221–23)). *See also* R. at 537–49, 229–41, 520–26, 501–02.

plaintiff asserts standing based on the legal rights or interests of third parties, a defendant's standing defense "can be forfeited or waived." And here, the Defendants *repeatedly* waived such a defense, not only by failing to raise it in their Motion to Dismiss—in which the Defendants did not contest standing on any basis, *see* R. at 29–35; R. at 141 ("The Plaintiff's standing . . . has not been challenged by the Defendants.")—but also in their response to TSEL's motion for summary judgment, when they failed to advance an argument on the matter[76] despite the fact that TSEL had both moved for summary judgment on and briefed the claim.[77]

Given this context, the trial court's holding that TSEL had standing should be affirmed on the narrower basis that TSEL could maintain its claims under the "exception to the usual rules governing standing" that apply to facial overbreadth challenges, *Dombrowski*, 380 U.S. at 486. *Cf. Hester*, 324 S.W.3d at 21 n.9 ("This Court may affirm a judgment on different grounds than those relied upon by the lower courts when the lower courts have reached the correct result.").

3. TSEL had standing to maintain its claims under 42 U.S.C. § 1983 individually.

Over and above TSEL's statutory standing to maintain its claims under Tennessee's declaratory judgment statutes, and in addition to the relaxed standing requirements applicable to TSEL's facial overbreadth challenge, the trial court also correctly determined that TSEL had standing to maintain its claims individually. Thus, based on the

[76] R. at 614–28.

[77] R. at 286–88; R. at 650–52.

undisputed material facts demonstrating § 2-19-142's enforcement in both criminal and civil contexts[78]—none of which the Defendants contest on appeal—the trial court's ruling that TSEL had standing to maintain an individualized pre-enforcement claim should be affirmed.

With respect to TSEL's individual claim for standing: "[I]n a pre-enforcement review case under the First Amendment (like this one), courts do not closely scrutinize the plaintiff's complaint for standing when the plaintiff 'claims an interest in engaging in protected speech that implicates, if not violates,'" a challenged statute. *Platt v. Bd. of Comm'rs on Grievances & Discipline*, 769 F.3d 447, 451 (6th Cir. 2014) (citing *Carey v. Wolnitzek*, 614 F.3d 189, 196 (6th Cir. 2010)). Indeed, courts *assume* a credible threat of prosecution where non-moribund statutes are concerned. *See N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) ("When dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.").

Although other federal courts apply 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."); *Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020) ("[A] plaintiff may show a chilling effect on his speech that is objectively

[78] R. at 706 (finding Plaintiff's SUMF Facts ##3–7 undisputed (citing R. at 221–23)). *See also* R. at 537–49, 229–41, 520–26, 501–02.

reasonable, and that he self-censors as a result.") (citations omitted); *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)."); *Gardner*, 99 F.3d at 14 ("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.' . . . This standard—encapsulated in the phrase 'credible threat of prosecution'—is quite forgiving. *Babbitt* illustrates how readily one can meet it." (citing *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 300 (1979)); *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 ("[T]he 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 factors that the Sixth Circuit has relied upon to find standing to maintain a pre-enforcement First Amendment claim are set forth in *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016). This Court is not bound to apply the Sixth Circuit's standard for pre-enforcement challenges, but in the event that it does so, the Sixth Circuit has found pre-enforcement standing:

> [W]here 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.

Here, *McKay* factors (1) and (3), at least, were met, although the trial court only determined that factor (1) was established. Specifically, the record unmistakably demonstrated a history of past and threatened enforcement of § 2-19-142, both civil and criminal, against "others," *see id.*—including one of TSEL's own attorneys and agents.[79] The fact that private litigants could prosecute and had prosecuted civil claims for damages or injunctive relief under § 2-19-142[80]—a tactic that had

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[79] R. at 706 (finding Plaintiff's SUMF Fact #7 undisputed); R. at 223 ("**Fact #7:** One of the individuals who has been sued for allegedly violating Tenn. Code. Ann. § 2-19-142 is Jamie Hollin, who is one of the Plaintiff's attorneys and agents."). *See also* R. at 229–41.

[80] R. at 706 (finding Plaintiff's SUMF Fact #6 undisputed); R. at 223 ("**Fact #6:** Tenn. Code Ann. § 2-19-142 has additionally been used as a predicate for asserting private claims of civil liability."). *See also* R. at 229–41, 520–26, 537–49.

recently been utilized successfully by, among others, a U.S. Congressman[81]—was also properly characterized as 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.* (citations omitted).

Nor was the above analysis meaningfully affected by the Defendant District Attorney's eleventh-hour, satire-specific, "present," partial declaration of its strategically-announced office policy,[82] for several reasons. To begin, as a threshold matter, because the declaration at issue did not bind the office permanently, it is not even clear that it matters. *Cf. Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990) (holding that interpretation of statute offered by Attorney General was not binding because "he may change his mind about the meaning of the statute; and he may be replaced in office."); *Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987) (finding pre-enforcement standing where plaintiff's intended actions fit within the law, even though the defendant had disclaimed enforcement and represented that the plaintiff's actions would "not give rise to prosecution under the Ordinance."); *id.* at 1395 (emphasizing that the city's policy disclaiming enforcement had been drafted "only after Planned Parenthood initiated the instant suit, and it did not alter the actual terms of the Ordinance. . . . Since there is no requirement under the Ordinance that the City retain the current version of the permit application form,

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[81] R. at 537–49.

[82] R. at 594–95.

Planned Parenthood's fear of prosecution is reasonably founded in fact."). *See also Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1106 (6th Cir. 1995) ("[W]e know of nothing that *requires* us to accept representations from the City's counsel under the circumstances presented here. To begin with, it is not at all clear what representations we received, if any. Second, it is not clear that counsel can bind either the legislative body of the City or its police department.").

Neither did the District Attorney's eleventh-hour declaration address or attempt to address, in any respect, any of the many additional injuries wrought by § 2-19-142. For example:

(1) It did not prevent TSEL or others from being subject to civil litigation for damages, even though several recent examples of such litigation demonstrated that such a threat was credible.[83]

(2) It did not preclude civil claims for injunctive relief regarding alleged violations of § 2-19-142, which private litigants—including the campaign of a U.S. Congressman—had maintained.[84]

(3) It did not address TSEL'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

[83] R. at 229–41; R. at 520–26. *See also* R. at 702 ("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.").

[84] R. at 537–49.

criminal[,]"[85] nor did it foreclose "the risk of an allegation that Tennessee Code Annotated § 2-19-142 has been violated or an investigation regarding the statute . . . ."[86] *Cf. 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 did not address TSEL's concerns that § 2-19-142 "'also prohibits all recipients of TSEL's proposed campaign literature from republishing it or distributing it to others,'"[87] which necessarily limited the reach of the Plaintiff's message and constituted a First Amendment injury sufficient to confer standing by itself. *Cf. 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 v. Grant*, 486 U.S. 414, 422–23 (1988) ("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)))).

(5) It did not address TSEL's concern that "Tenn. Code Ann. § 2-19-142 . . . unconstitutionally chills and penalizes core political speech[,]"[88] nor did it address the chilling effect that arises where, as

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[85] R. at 4, ¶ 9.

[86] R. at 293 (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))).

[87] R. at 645, ¶ 4.

[88] R. at 5–6, ¶ 14.

here, a speech restriction carries the potential for criminal punishment[89]—a serious concern that the Tennessee General Assembly itself has recognized even in purely civil contexts.[90] *Cf. Reno v. ACLU*, 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.**" (citations omitted, 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."); *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.").

Neither did the Defendant District Attorney's eleventh-hour declaration address TSEL's asserted concern that it remained subject to

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[89] *Id.*; R. at 11, ¶ 44.

[90] 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.").

the risk of prosecution *in every other* judicial district in Tennessee where TSEL distributes its literature. This concern was not abstract. Tennessee has separate "district attorneys general from the state's 31 judicial districts[,]"[91] each of which has the power to prosecute violations of § 2-19-142 regardless of the Davidson County District Attorney's position on the statute.[92] The record also indicates that the Shelby County District Attorney's Office—which has a history of enforcing § 2-19-142—did not maintain such a policy, *see* R. at 678 ("I am not aware of any such policy."), and certainly, every district attorney in Tennessee has not disavowed enforcement. *Cf. Green Party v. Hargett*, 791 F.3d 684, 696 (6th Cir. 2015) ("While defendants have not enforced or threatened to enforce this statute against plaintiffs or any other political party, they also have not explicitly disavowed enforcing it in the future. In such situations, the Supreme Court has held that plaintiffs have standing to challenge statutes." (citing *Babbitt*, 442 U.S. at 302)). Further, the Defendant Attorney General had maintained formal—and still-effective—guidance that § 2-19-142 is enforceable across Tennessee,[93] a fact of surpassing significance because "government officials rely upon [such formal opinions] for guidance." *State v. Black*, 897 S.W.2d 680, 683 (Tenn. 1995). *Cf. Online Merchants Guild v. Cameron*, No. 3:20-cv-00029-GFVT, 2020 WL 3440933, at *6 (Ed. Ky. June 23, 2020) ("The Attorney General has also repeatedly refused to disavow enforcement of

[91] R. at 292.

[92] *Id.*

[93] R. at 508–18.

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."), *vacated and remanded on other grounds* No. 20-5723, 2021 WL 1680265 (6th Cir. Apr. 29, 2021). The record also reflects that members of the public have supported varying degrees of criminal enforcement against TSEL for its constitutionally protected speech activities.[94]

For all of these reasons, the undisputed material facts in the record support the trial court's ruling that TSEL had pre-enforcement standing to maintain its claims individually. The fact that § 2-19-142 is a criminal provision also heavily bolsters this conclusion. *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.") (collecting cases); *Babbitt*, 442 U.S. at 298 ("When contesting the constitutionality of a criminal statute, 'it is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974))).

C. TENNESSEE CODE ANNOTATED § 2-19-142 IS A PRESUMPTIVELY UNCONSTITUTIONAL CONTENT- AND VIEWPOINT-BASED SPEECH RESTRICTION THAT MUST SATISFY STRICT SCRUTINY.

Turning to the merits of this action, the trial court correctly held

[94] R. at 478–93.

that § 2-19-142 is a presumptively unconstitutional content- and viewpoint-based political speech restriction that must satisfy strict scrutiny to survive. "Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 155 (2015). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 156. *Cf. Citizens United*, 558 U.S. at 340 ("Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.") (quotations omitted).

The Defendants' Brief fails to identify the requisite level of constitutional scrutiny involved in this case, asserting only that "the statute survives the applicable constitutional tests" without saying what they are. *See* Defendants' Brief at 24. The answer, though, is that because § 2-19-142 discriminates based on viewpoint specifically and content generally, strict scrutiny applies.

Section 2-19-142 expressly punishes only false speech "*in opposition to*" candidates for elected office, while simultaneously permitting false speech *in support of* such candidates. *See id.* Thus, § 2-19-142 facially discriminates based on viewpoint. Viewpoint discrimination is presumptively forbidden by the First Amendment, *see Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor

some viewpoints or ideas at the expense of others.") (collecting cases), and it is regarded as "an egregious form of content discrimination[,]" *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Viewpoint discrimination thus triggers strict scrutiny, which requires the Government to demonstrate that § 2-19-142 is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 155.

Section 2-19-142 also discriminates more broadly based on content, which similarly triggers strict scrutiny. *See Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248 (6th Cir. 2015) ("Both content- and viewpoint-based discrimination are subject to strict scrutiny." (citing *McCullen v. Coakley*, 134 S. Ct. 2518, 2530, 2534 (2014))). For example, it selectively criminalizes false campaign literature "in opposition to any candidate in any election," while permitting, among other things, all other false campaign literature, all other false speech opposing politicians, and all speech regarding non-candidates. As a consequence, § 2-19-142 facially discriminates on the basis of speech's content; it is presumptively unconstitutional; and it may be justified only if the Government proves that it is the least restrictive means of serving a compelling state interest. *Reed*, 576 U.S. at 156; *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

D. TENNESSEE CODE ANNOTATED § 2-19-142 DOES NOT SERVE ANY COMPELLING GOVERNMENTAL INTEREST.

Section 2-19-142 cannot clear even the first hurdle of strict scrutiny, because it does not serve any compelling interest. Significantly, the Defendants also declined to argue that § 2-19-142 served any compelling interest in their response to TSEL's Motion for Summary

Judgment below. Thus, during oral argument on TSEL's Motion for Summary Judgment, defense counsel conceded in response to the trial court's questioning that the issue "is not in our brief." Transcript at 26, lines 7–8. Indeed, the Defendants admitted that they had never raised any claim that § 2-19-142 served a compelling interest at any point during the case. *Id.* at lines 11–15 (Trial court: "Is it anywhere in the record, or am I just getting this for the first time in oral argument today?" Defense Counsel: "It is not in the record, Your Honor.").

The Defendants did proffer a compelling interest for the first time during oral argument on TSEL's Motion for Summary Judgment, though. Specifically, the Defendants argued—at that time—that § 2-19-142 served a compelling interest in "[p]rotecting voters from . . . [c]onfusion and undue influence." Transcript at 25, lines 16–17. For the seven reasons set forth in TSEL's briefing at pages 272 through 282 of the record, however, § 2-19-142 does not actually promote that interest, and it is not narrowly tailored to achieve it.

On appeal, the Defendants appear to concede as much. Consequently, the Defendants' Brief abandons their "protecting voters" theory and never mentions it. In its place, the Defendants have also pivoted to a new interest entirely. Specifically, the Defendants now assert—for the first time on appeal—that "defamation is one of the areas where content-based restrictions are permitted," and thus, as "a codification of a criminal cause of action for defamation," § 2-19-142 withstands constitutional scrutiny because it supports the Government's anti-defamation interests. Defendants' Brief, at 24.

As a threshold matter, the Defendants' claim that the

Government's interest in proscribing defamation alone can sustain § 2-19-142 is waived because it is raised for the first time on appeal. *See City of Elizabethton v. Carter Cty.*, 321 S.W.2d 822, 827 (Tenn. 1958) ("We do not have any sympathy for the practice of raising constitutional questions for the first time on appeal . . . ."); *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 457 (Tenn. 1995) (noting that "issues of constitutionality should not first surface on appeal") (citation omitted). Before the trial court, the Defendants never made this claim, and as a result, there is nothing in the record that would allow the Defendants to meet their burden of proving that § 2-19-142 was designed to solve "an 'actual problem'" in this space. *But see Brown v. Ent'mt Merchants Ass'n*, 564 U.S. 786, 799 (2011) ("The State must specifically identify an 'actual problem' in need of solving, *Playboy*, 529 U.S., at 822–823, 120 S. Ct. 1878, and the curtailment of free speech must be actually necessary to the solution[.]") (citation omitted). Regardless of waiver, though, the claim lacks merit, for several reasons:

First, § 2-19-142 unmistakably is *not* just "a codification of a criminal cause of action for defamation." Defendants' Brief at 24. Instead, § 2-19-142 makes the further content discrimination of proscribing defamation *in opposition to candidates for public office* specifically. *But see R.A.V.*, 505 U.S. at 384 ("[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government."). Thus, characterized accurately, § 2-19-142 codifies a criminal cause of action only for candidate-specific defamation—and any other knowingly false statement opposing a candidate. The Defendants' Brief, however, offers no hint as

to why, if it all, the Government would have a compelling governmental interest in criminalizing such politician-specific defamation, and none is apparent.

Second, as a criminal cause of action, the Government is the party to criminal prosecutions under § 2-19-142; it appears as the prosecutor; and the entire purpose of a criminal prosecution is to enforce the purposes of the State. *See, e.g.*, *Dunham v. Frank's Nursery & Crafts*, Inc., 919 F.2d 1281, 1292 (7th Cir. 1990) ("In a criminal prosecution, the government is directly involved in the proceeding. The government appears in the person of the prosecutor. . . [M]ore fundamentally, the entire purpose of a criminal prosecution is to enforce the purposes of the state . . . .") (cleaned up). Where defamation is concerned, though, this purpose is not even legitimate—let alone compelling—because "[a] government entity cannot bring a libel or defamation action." *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 634 (8th Cir. 2011) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 291 (1964)). *See also N.Y. Times Co.*, 376 U.S. at 291–92 ("For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.'" (quoting *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601 (1923)); *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (referencing "the spectre of prosecutions for libel on government, which the Constitution does not tolerate in any form").

Third, the Defendants offer no explanation for why the Government has a compelling need to maintain a criminal, politician-specific defamation statute when civil common law already permits all defamed

persons—including politicians—to seek redress civilly. The answer is that there is none. The actual explanation for the statute—one supported by the record—is that while safeguarding everyone's right to make false *laudatory* statements about them, Tennessee's politicians want to be able to threaten and punish newspapers for false *opposing* statements about them, even in the event of a retraction. *See* R. at 516 ("[A] prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not be barred by the *New York Times* rule. Your next questions asks [sic] whether a party who 'takes steps to correct and to retract such false and defamatory campaign literature or political advertisement' could nevertheless be prosecuted under § 2-19-142. 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, whether the retraction was issued pursuant to Section 2(b)(4) of HB891 or for some other reason.").

Accordingly, the Defendants have waived the claim that § 2-19-142 serves a compelling interest in proscribing defamation; there is nothing in the record to suggest that § 2-19-142 addresses an actual problem in need of solving; and as a matter of law, the Government lacks any compelling interest in criminalizing politician-specific false statements. As such, the trial court's declaration that § 2-19-142 is unconstitutional should be affirmed.

E. TENNESSEE CODE ANNOTATED § 2-19-142 IS NOT NARROWLY TAILORED.

Despite materially modifying their position regarding § 2-19-142's purpose after taking an appeal, the Defendants also contend that the

trial court's strict scrutiny analysis was "incorrect." *See* Defendants' Brief at 24. As grounds, they assert that: "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." *Id.*

To be clear, this is not an accurate characterization of the trial court's ruling. In truth, the trial court declared § 2-19-142 unconstitutional on five independent grounds—its viewpoint discrimination, its insufficient tailoring, its criminalization of constitutionally protected false speech, its facial overbreadth, and under article I, section 19 of the Tennessee Constitution—all which are detailed on page 699 of the record. As support for its holdings, the trial court also adopted "in its entirety and incorporate[d] herein by reference as its reasoning . . . 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 Defendants' Response to Plaintiff's Motion for Summary Judgment*[,]"[95] which are set forth on pages 257–285 and pages 659–666 of the record, respectively. Those materials exhaustively detailed § 2-19-142's myriad constitutional defects, its lack of narrow tailoring despite its facial viewpoint- and content-discrimination, and the extensive precedent from other jurisdictions, both state and federal, invalidating similar and less odious laws, *see* R. at 257–285; R. at 659–666—virtually none of which the Defendants even attempt to address.

[95] R. at 700.

With this context in mind, the trial court's ruling—and the incorporated authority behind it—reflect the straightforward conclusion that, for several reasons, § 2-19-142 is not the least restrictive means of promoting any compelling governmental interest. And even overlooking the fact that the Defendants have proffered a new interest for the first time on appeal, if proscribing defamation were § 2-19-142's goal, then it still would not satisfy strict scrutiny as a matter of law. *See United States v. Doe*, 968 F.2d 86, 88 (D.C. Cir. 1992) ("Whether [a challenged] regulation meets the 'narrowly tailored' requirement is of course a question of law . . . ."). Specifically, § 2-19-142 would at once be fatally *over*inclusive—prohibiting far more speech than is necessary to proscribe defamation—and fatally *under*inclusive, allowing myriad defamatory statements to evade liability without justification. *But see First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793 (1978) ("This purpose is belied, however, by the provisions of the statute, which are both underinclusive and overinclusive."). Several reasons support this inevitable conclusion:

To begin, § 2-19-142 is not actually restricted to prohibiting defamation. Instead, it proscribes "*any*" knowingly false statement in opposition to a candidate—including trivial and immaterial false statements—without requiring any demonstration of injury. Thus, it criminalizes, for instance, "lying about a political candidate's shoe size," *Susan B. Anthony List*, 814 F.3d at 475. As such, § 2-19-142's criminalization of "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" proscribes far more than just defamatory speech, and

it fails narrow tailoring for that reason alone. Further, even taking the Government's claimed interest in proscribing defamation at face value, the Defendants have yet to explain why a criminal remedy supplementing existing civil liability is not overzealous and serves any compelling need.

At the same time, § 2-19-142 is also fatally *under*inclusive. *Cf. Brown*, 564 U.S. at 802 ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.") (citations omitted). For example, § 2-19-142 treats identical statements differently—either permitting them or criminalizing them—based solely on the medium of expression ("literature") used to publish them. It also treats identical statements in "literature" differently depending on whether their target is a "candidate" and whether an "election" is underway. *Id.* Indeed, even where literature about candidates during an election is concerned, speech is either permissible or criminal depending on whether the statement is made in "campaign" literature versus "non-campaign" literature. *Id.*

None of this, of course, advances any plausible interest in proscribing defamatory statements—nearly all of which escape liability under § 2-19-142. Instead, the only thing § 2-19-142 does in anything resembling a targeted way is promote liability for *newspapers*. *Cf.* Tenn. Op. Att'y Gen. No. 09-112 (June 10, 2009) (asserting that "a prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections"). Consequently, due to its failure to promote a compelling governmental interest, and due further to its lack of narrow tailoring, § 2-19-142 fails strict scrutiny.

Accordingly, the trial court's declaration that § 2-19-142 is unconstitutional should be affirmed.

F. TENNESSEE CODE ANNOTATED § 2-19-142 IS OVERBROAD, AND NO LIMITING CONSTRUCTION CAN SAVE IT.

Section 2-19-142 is also fatally overbroad, and no limiting construction can save it. As TSEL noted below—and as the trial court held:

> 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 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).[96]

The Defendants dismiss these defects as "hardly 'substantial[,]'" Defendants' Brief at 26, though they are not. They also do so only after integrating a substantial limiting construction that their own still-pending guidance does not reflect, *see* Tenn. Op. Att'y Gen. No. 09-112

[96] R. at 284.

(June 10, 2009), and which has never previously been applied by any of the courts, officials, or governmental bodies that have enforced § 2-19-142. *See, e.g.*, *Jackson*, 2007 WL 60518, at *2.

Most problematically, though, applying the Defendants' desired limiting instruction to cure § 2-19-142's content-based infirmities is *impossible*. Defamation law must apply to all persons—it cannot exclusively protect "candidate[s] in an[] election." *But see id.* This Court also lacks authority to *expand*—particularly through a "limiting" construction—a criminal statute to cure this content-based infirmity.[97] Defamation law also applies regardless of the form of a publication—it does not apply to "campaign literature" alone—which presents the same problem. Further, "the traditional rule [is] 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)), *no app. filed*, and although injunctive relief may be permissible after a final judgment, *id.* at *20, incarceration is neither of these remedies.

In order for a limiting construction to render § 2-19-142

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[97] Brief of Inst. for Justice as Amicus Curiae Supporting Respondents, at 7, Barr v. Am. Ass'n of Political Consultants, Inc., 591 U.S. ___ (2020) (No. 19-631), https://www.supremecourt.gov/DocketPDF/19/19-631/139596/20200401112650578_39697%20pdf%20Gammon.pdf ("[A] court should not—indeed, cannot—rectify an unconstitutional restriction on individual liberty by commanding the government to punish more people.").

constitutional, all of the above defects—which are insurmountable—must be cured. However, both the U.S. Supreme Court and the Tennessee Supreme Court have repeatedly emphasized that fashioning an altogether different statute through judicial legislation is improper. *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *United States v. Stevens*, 559 U.S. 460 (2010); *City of Knoxville v. Ent'mt Resources, LLC*, 166 S.W.3d 650 (Tenn. 2005). Thus, "it is the prerogative of the legislature, and not the courts, to amend" § 2-19-142, *see In re Swanson*, 2 S.W.3d 180, 186–87 (Tenn. 1999), and the Defendants' invitation to read in a limiting instruction *that cannot cure any of § 2-19-142's fatal content-based defects* should be rejected.

For all of these reasons, adopting a limiting construction that would cure all of § 2-19-142's fatal defects is neither possible nor appropriate. Further, even ignoring § 2-19-142's incurable defects—and even adopting a limiting construction that perfectly aligns it with civil defamation law—§ 2-19-142 would still, at best, be *duplicative* of civil law when it comes to regulating defamation. Thus, even then, § 2-19-142 could not plausibly be necessary to achieve any "compelling" governmental need.

For all of these reasons, § 2-19-142 is facially overbroad, and no limiting construction can save it. Further, because "Article I, Section 19 is 'a substantially stronger provision than that contained in the First Amendment to the Federal Constitution,'" *State v. Smoky Mountain Secrets, Inc.*, 937 S.W.2d 905, 910 n.4 (Tenn. 1996) (cleaned up), § 2-19-142 necessarily violates the more expansive provisions of article I, section 19 as well.

G. TSEL IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES REGARDING THIS APPEAL.

The Defendants do not dispute that TSEL was properly awarded attorney's fees. Nor do they contest any component of TSEL's fee award or the fact that "[s]ection 1988 authorizes such an award to prevailing parties in actions under 42 U.S.C. § 1983." *See* Defendants' Brief at 28. Instead, they argue only that TSEL's award should be reversed because "TSEL should not have prevailed[.]" *Id.*

For the reasons detailed above, TSEL prevailed because the First Amendment requires that outcome. And having properly prevailed, TSEL is entitled to an award of attorney's fees on appeal. *See, e.g.*, *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) ("[I]n absence of special circumstances a district court not merely 'may' but *must* award fees to the prevailing plaintiff[.]"); *Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52, 56 (Tenn. 1992) ("[T]he cases interpreting that statute state that the prevailing party should receive an award, unless there are 'special circumstances' that would render an award unjust.") (collecting cases); *Riley v. Kurtz*, 361 F.3d 906, 915 (6th Cir. 2004) (affirming award of appellate fees to prevailing party as part of the costs (citing *Hutto v. Finney*, 437 U.S. 678, 693–98 (1979))); *Weisenberger v. Huecker*, 593 F.2d 49, 54 (6th Cir. 1979) (finding abuse of discretion in failing to award appellate attorney's fees to prevailing party). "To paraphrase the acute observation of baseball great Yogi Berra, a case ain't over till it's over. This means that . . . counsel are entitled to compensation until all benefits obtained by the litigation are in hand." *Norman v. Hous. Auth.*, 836 F.2d 1292, 1305 (11th Cir. 1988).

Consequently, having raised its entitlement to an appellate fee award in its Statement of the Issues, *cf. Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 410 (Tenn. 2006), and having defended meritorious constitutional claims through this appeal, this Court should remand with instructions that TSEL be awarded its appellate attorney's fees and costs.

X. CONCLUSION

For the foregoing reasons, the trial court's judgment should be **AFFIRMED**, and TSEL should be awarded its reasonable attorney's fees regarding this appeal.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-X) contains 14,946 words pursuant to § 3.02(a)(1)(a), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2021, 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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