IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

RULE 11 APPLICATION OF TENNESSEANS FOR SENSIBLE ELECTION LAWS

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III. INTRODUCTION

This case presents a constitutional challenge to Tennessee Code Annotated § 2-19-142—a presumptively unconstitutional political speech restriction that criminalizes political speech based on the viewpoint that a speaker expresses ("opposition") and the medium of expression used to speak ("campaign literature"). Of note, there is little doubt that the trial court correctly determined that § 2-19-142 is unconstitutional, because even if § 2-19-142 were limited to libelous statements—and it is not—a politician-specific speech restriction cannot withstand constitutional scrutiny. *See R.A.V. v. 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."). The additional fact that § 2-19-142 is a *criminal* political speech restriction only exacerbates its unconstitutionality. *See Citizens United v. FEC*, 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.").

Significantly, as the Defendant Attorney General has advised in formal and still-pending guidance, § 2-19-142 ensures that newspapers and other news media cannot safely carry the Plaintiff's campaign literature. *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"). That limitation alone is a First Amendment injury that confers standing. *See, e.g.*, *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) (holding that limiting the number of people who will convey a speaker's message and limiting the audience that a speaker can reach are constitutional injuries))). Even so, that case-dispositive issue—and many others brought to the Panel's attention—went unaddressed by the Panel in any respect.

Instead, the Panel applied the wrong standard of review to the jurisdictional facts found by the trial court, and it replaced them with factual findings that were clearly erroneous in order to hold that the Plaintiff lacked standing. *See, e.g.*, *Tennesseans for Sensible Election Laws v. Slatery*, No. M2020-01292-COA-R3-CV, 2021 WL 4621249, at *5 (Tenn. Ct. App. Oct. 7, 2021) (finding that a criminal threat letter transmitted by the Shelby County District Attorney was one of several examples of § 2-19-142 being enforced in "civil cases"); *id.* (finding that "the cases cited by Plaintiff represent wrongful attempts to use Tenn. Code Ann. § 2-19-142 to establish civil liability[,]" even though *the Tennessee Court of Appeals itself* was one of the entities that had enforced § 2-19-142 civilly, *see Jackson v. Shelby Cty. Civ. Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518 (Tenn. Ct. App. Jan. 10, 2007)), *no app. filed*. Based on the Panel's erroneous fact-finding—including its finding that a separate Court of Appeals Panel "wrongful[ly]" enforced § 2-19-142 in a civil context, *id.*—the Panel held that the Plaintiff lacked standing to maintain its claims. As a result, the Panel vacated the trial court's merits ruling, thereby reinstating a political speech restriction that allows any law enforcement official in

Tennessee to jail citizens for mocking candidates for public office. This timely Application followed.

IV. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(1) FILING STATEMENT

Pursuant to Tennessee Rule of Appellate Procedure 11(b), the Plaintiff states that the judgment of the Tennessee Court of Appeals regarding which this Application is filed—attached hereto as **Exhibit #1**—was entered on October 7, 2021. *See id.* The Plaintiff's petition to rehear was filed on October 7, 2021 and denied on October 20, 2021. *See* **Exhibit #2**. Thus, this Application having been filed within 60 days of the Tennessee Court of Appeals' order denying the Plaintiff's petition to rehear, the Plaintiff's Rule 11 Application has been timely filed.

V. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(2) STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

The Plaintiff presents the following questions for review:

1. Is Tennessee Code Annotated § 2-19-142 enforceable in civil contexts—as a unanimous panel of the Court of Appeals held in *Jackson v. Shelby County Civil Service Merit Board*, 2007 WL 60518, and as other courts and tribunals have similarly held—or is enforcing § 2-19-142 in civil contexts categorically "wrongful[,]" as the Panel held below?

2. When a trial court adjudicates jurisdictional facts and exercises its discretion to issue a declaratory judgment based on its factual findings, is the appellate standard of review "de novo with no presumption of correctness[,]" as the Panel held, or, as other courts have held, are jurisdictional facts reviewed for clear error, while the trial court's decision to issue a declaratory judgment is reviewed for abuse of

discretion?

3. Does a district attorney transmitting a criminal threat letter constitute a matter of illusory "civil" enforcement for purposes of evaluating a litigant's pre-enforcement standing, as the Panel held, or is a district attorney transmitting a criminal threat letter an example of criminal enforcement that makes fear of prosecution credible?

4. Is the threat of § 2-19-142's civil enforcement illusory under circumstances when multiple courts have enforced § 2-19-142 civilly—including another Panel of the same court characterizing § 2-19-142's civil enforcement as illusory?

5. Does subjecting news media and other third parties to the threat of liability if they publish the Plaintiff's campaign literature constitute a First Amendment injury sufficient to establish the Plaintiff's standing to challenge § 2-19-142?

6. In cases filed in Tennessee courts, does Tennessee Code Annotated § 1-3-121—which provides 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"—enable an affected person to seek declaratory or injunctive relief in an action brought regarding the constitutionality of a governmental action without regard to constraints imposed by Article III?

7. Does Tennessee's Declaratory Judgment Act still serve as "a proactive means of preventing injury to the legal interests and rights of a litigant" that enables litigants "to settle important questions of law

before the controversy has reached a more critical stage"[1] in constitutional cases?

8. Should "[t]he long-standing rule in Tennessee . . . that state courts of equity lack jurisdiction to enjoin the enforcement of a criminal statute"[2] be overturned?

9. Should the trial court's judgment be reinstated, and should the Plaintiff be awarded its attorney's fees on appeal?

VI. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(3) STATEMENT OF THE FACTS RELEVANT TO THE QUESTIONS PRESENTED FOR REVIEW

Plaintiff Tennesseans for Sensible Election Laws is a registered Tennessee multicandidate political campaign committee.[3] To further its mission, the Plaintiff engages in direct advocacy for and against candidates for public office.[4]

For dramatic, humorous, or memorable effect, the Plaintiff's campaign literature often includes knowingly false statements. During the 2018 election cycle, for example, the Plaintiff published campaign literature alleging that two candidates had "cauliflower for brains."[5] The following cycle, in 2020, the Plaintiff developed campaign literature

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[1] *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008).

[2] *See Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 752 (Tenn. 2006).

[3] R. at 696 n.1; R. at 1, ¶ 1.

[4] R. at 697; R. at 1–2, ¶ 2.

[5] R. at 2, ¶ 4; R. at 15.

opposing State Representatives Bruce Griffey[6] and Rick Staples.[7] The Plaintiff's Griffey opposition literature included a print mailer that—among other things—asserted that Representative Griffey was "literally Hitler."[8] Separately, the Plaintiff's Staples opposition literature included Facebook advertisements mocking then-Representative Staples's misuse of campaign funds.[9] Some of those advertisements, too, contained knowingly false statements, alleging, for example, that Staples had "illegally blow[n] thousands of 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)."[10] This action followed because the Plaintiff "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."[11]

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[6] R. at 16–17.

[7] R. at 18–21.

[8] R. at 16–17.

[9] R. at 18–21; R. at 3–4, ¶ 8.

[10] R. at 18–19.

[11] R. at 2, ¶ 5.

The trial court determined that it had subject-matter jurisdiction to adjudicate the Plaintiff's claims for declaratory relief. Thereafter, the trial court held that Tennessee Code Annotated § 2-19-142 could not withstand strict constitutional scrutiny, and it declared § 2-19-142 unconstitutional on several grounds. On the way to reaching that determination, the trial court also adjudicated jurisdictional facts pertaining to the Plaintiff's contested standing, finding that material facts in the record—none of which the Defendants thereafter contested on appeal—evidenced a history of § 2-19-142's enforcement sufficient to make the Plaintiff's fear of enforcement credible.[12]

The evidentiary record of this case made plain that § 2-19-142 has, in fact, been enforced in both criminal and civil settings, too—including recently. For instance,

> In a letter dated July 31, 2002, William L. Gibbons, [the Shelby County] District Attorney General, (Mr. Gibbons) informed [a distributor of campaign literature] that
>
> [u]nder Tennessee law, it is a crime for a person to publish or distribute, or cause to be published or distributed, any campaign materials in opposition to any candidate if that persons [sic] knows that any statement or other matter contained on the materials [sic] is false.
>
> Mr. Gibbons further advised:
>
> [u]nless you have reason to believe that Mr. Key is a member of the KKK, the publication and distribution of such

[12] R. at 706 (ruling 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.").

> materials appear to violate our state criminal law, and any such publication or distribution should cease immediately.[13]

Of significance, the Shelby County District Attorney's Office also indicated to the Plaintiff *during this litigation* that it does not maintain a policy of non-enforcement where § 2-19-142 is concerned.[14]

Section 2-19-142 has also been enforced civilly on several occasions. As one example, in 2014, the campaign of a sitting U.S. Congressman utilized § 2-19-142 to secure a temporary restraining order.[15] As a second, in 2010, a city council candidate utilized § 2-19-142 to maintain a multi-year, $1,000,000.00 lawsuit against twelve citizens[16]—*including one of the Plaintiff's own attorneys and agents*.[17] As a third, the Tennessee Court of Appeals itself enforced § 2-19-142 in a civil setting, affirming the termination of public employee for violating § 2-19-142 and ruling that "Section 2-19-142 is not blatantly unconstitutionally overbroad." *See Jackson*, 2007 WL 60518, at *3.

Notwithstanding this proven history of both criminal and civil enforcement, though, the Panel vacated the trial court's declaratory judgment with instructions to dismiss the Plaintiff's claims for lack of standing—a procedurally unavailable remedy that the Defendants had

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[13] R. at 222 (quoting *Jackson v. Shelby Cty. Civ. Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518, at *1 (Tenn. Ct. App. Jan. 10, 2007)), *no app. filed.*

[14] R. at 678 ("I am not aware of any such policy.").

[15] R. at 537–49.

[16] R. at 229–41.

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

never even sought. As grounds, the Panel determined *de novo*—as a matter of (demonstrably inaccurate) fact—that "the cases cited by Plaintiff represent wrongful attempts to use Tenn. Code Ann. § 2-19-142 to establish civil liability[,]" which the Panel determined precluded any credible fear of enforcement. *See Tennesseans for Sensible Election Laws*, 2021 WL 4621249, at *5.

Even on its own terms, though, the Panel's ruling presents serious problems—both for this case and future cases—on several grounds. To begin, a district attorney sending a criminal threat letter cannot reasonably be characterized as an attempt "to use Tenn. Code Ann. § 2-19-142 to establish civil liability[.]" *Compare id., with Jackson*, 2007 WL 60518, at *1 (referencing district attorney's warning 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"). It isn't. Determining that criminal threat letters from district attorneys are *really* matters of civil enforcement that can safely be ignored because they are not credible is also self-evidently problematic.

Additionally, as noted above, *the Tennessee Court of Appeals itself*—in a unanimous Panel ruling joined by a now-Justice of this Court—is one of the entities that enforced § 2-19-142 in a civil context, *see Jackson*, 2007 WL 60518—apparently (as the Panel below determined) "wrongful[ly.]" *Tennesseans for Sensible Election Laws*, 2021 WL 4621249, at *5. The Court of Appeals also is not the only court to have done so. *See, e.g.*, R. at 537–49 (issuing restraining order in civil case for,

inter alia, violating § 2-19-142); *Jackson*, 2007 WL 60518, at *1 (noting that the "Chancery Court for Shelby County" had upheld an employee's termination for violating § 2-19-142).

Under such circumstances, no citizen can reasonably be expected to treat the threat that § 2-19-142 will be enforced in a civil setting as an illusory concern that lacks credibility. Put another way: Because Tennessee's judiciary—including a separate Court of Appeals panel that contained a now-Justice of this Court, *see Jackson*, 2007 WL 60518, at *3—has enforced § 2-19-142 in civil settings *repeatedly*, the threat of civil enforcement is not illusory at all, notwithstanding the Panel's determination to the contrary.

In addition to resolving the split of authority within the Court of Appeals regarding whether § 2-19-142's enforcement in civil settings is necessarily "wrongful"—and over and above the questions of public importance that arise from the Panel reinstating a viewpoint-based, political speech-restricting *criminal* statute that the trial court correctly determined was unconstitutional—review is also warranted to address four broader non-merits issues pertaining to justiciability.

First, the Panel's opinion has the effect of nullifying a powerfully important new statute—one that has never been interpreted by this Court—that the General Assembly enacted into law in 2018. To facilitate resolution of constitutional claims on their merits, Tennessee Code Annotated § 1-3-121 provides that:

> Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental

> action. A cause of action shall not exist under this chapter to seek damages.

The instant case presented such an action. The Plaintiff—in consecutive election cycles—has developed and distributed campaign literature that contravened § 2-19-142. One of the Plaintiff's own attorneys has also been sued for an asserted violation of the statute. Accordingly, there is little doubt that the Plaintiff is an "affected person" within the meaning of § 1-3-121. Even so, the Panel ruled that the Plaintiff may not maintain its claims in this action, effectively rendering § 1-3-121 a nullity.

Second, the Panel's opinion contravenes this Court's holding that declaratory review serves as "a ***proactive*** means of ***preventing*** injury to the legal interests and rights of a litigant[,]" *see Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008) (emphases added), thereby enabling litigants "to settle important questions of law ***before*** the controversy has reached a more critical stage[,]" *id.* at 837 (citing 26 C.J.S. DECLARATORY JUDGMENTS § 3 (2001)) (emphasis added). By imposing (misapplied) Article III limitations onto review of pre-enforcement declaratory judgment actions, though, the Panel's opinion not only prevents Tennessee's Declaratory Judgment Act from providing a "real service to the people and to the profession[,]" *Hodges v. Hamblen Cty.*, 277 S.W. 901, 902 (Tenn. 1925); *see also id.* ("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.")—it renders the Declaratory Judgment Act *valueless* in cases involving federal constitutional rights. Specifically, if Article III limitations apply to state

court actions brought under the Declaratory Judgment Act, then the Act is—at most—duplicative of 42 U.S.C. § 1983, with the principal difference being that § 1983 also allows litigants to obtain damages, injunctions, and an award of attorney's fees.

Third, this case affords this Court an opportunity to revisit a longstanding but outmoded doctrine that prevents lower courts from enjoining district attorneys from enforcing criminal statutes even after they have been declared unconstitutional. *See generally Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *25–26 (Tenn. Ct. App. Dec. 12, 2019) (noting that "'[t]he long-standing rule in Tennessee is that state courts of equity lack jurisdiction to enjoin the enforcement of a criminal statute that is alleged to be unconstitutional[,]'" and, thus, holding that "we will not extend the trial court's injunction to the District Attorney General on appeal" even after affirming a challenged statute's unconstitutionality (quoting *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 752 (Tenn. 2006))), *no app. filed*. Because this jurisdictional limitation is one that federal courts do not recognize, the principal function of the doctrine is to outsource constitutional litigation involving state laws and state officers to federal courts.

Fourth, this case enables this Court to determine the standard of review that applies when a trial court resolves jurisdictional facts to determine a plaintiff's standing, and then exercises its wide discretion to issue a declaratory judgment thereafter. The Panel incorrectly held that the standard of review that applies to both determinations is "de novo with no presumption of correctness." *Tennesseans for Sensible Election*

Laws, 2021 WL 4621249, at *2. Other courts, however, have correctly held that jurisdictional factual determinations are reviewed for clear error. *See, e.g., Thomas v. City of Memphis,* 996 F.3d 318, 323 (6th Cir. 2021) ("We generally review de novo a district court's decision to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). If the lower court, however, 'does not merely analyze the complaint on its face, but instead inquires into the factual predicates for jurisdiction, the decision on the Rule 12(b)(1) motion resolves a 'factual' challenge rather than a 'facial' challenge, and we review the district court's factual findings for clear error.'") (cleaned up); *Pederson v. La. State Univ.,* 213 F.3d 858, 869 (5th Cir. 2000) ("If the district court resolves any factual disputes in making its jurisdictional findings, the facts expressly or impliedly found by the district court are accepted on appeal unless the findings are clearly erroneous.") (cleaned up). Additionally, other panels of the Court of Appeals have held that whether to issue a declaratory judgment under Tennessee law is a matter entrusted to the trial court's "wide" discretion. *State ex rel. Moncier v. Jones*, No. M2012-01429-COA-R3-CV, 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 Found.*, 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).

For these reasons, and for the additional reasons detailed below, review is warranted to secure uniformity of decision, because this case presents unusually important questions of law and public interest, and

because the need to exercise this Court's supervisory authority compels review. As such, the Plaintiff's Application should be granted.

VII. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(4) STATEMENT OF THE REASONS SUPPORTING REVIEW

This Court should grant review pursuant to Tennessee Rule of Appellate Procedure 11(a). In this extraordinary case, all four Rule 11 factors are present. Specifically, review is warranted given:

1. The need to secure uniformity of decision;

2. The need to secure settlement of important questions of law;

3. The need to secure settlement of questions of public interest; and

4. The need for the exercise of the Supreme Court's supervisory authority.

1. THE NEED TO SECURE UNIFORMITY OF DECISION

a. Panels of the Court of Appeals and other courts and tribunals are split as to whether Tennessee Code Annotated § 2-19-142 is enforceable in civil settings.

In *Jackson*, 2007 WL 60518, a separate panel of the Tennessee Court of Appeals enforced Tennessee Code Annotated § 2-19-142 in a civil setting. In that case, the Court of Appeals explained that:

> Following a Loudermill hearing on August 21, 2002, Mr. Jackson was determined to have engaged in "acts of misconduct, which are job related," where he violated Tennessee Code Annotated § 2-19-142, the statutory provision prohibiting publication and distribution of campaign literature against a candidate in an election containing statements which the distributor/publisher knows to be false.

Id. at *2.

The "Chancery Court for Shelby County" upheld the "decision of the Shelby County Civil Service Merit Board to terminate his employment with the Criminal Court Clerk's Office" thereafter. *Id.* at *1. Upon review, a unanimous Court of Appeals panel—one that included a Justice of this Court—also "affirm[ed] the judgment of the trial court." *Id.* at *5.

The Shelby County Civil Service Merit Board, the Chancery Court for Shelby County, and a unanimous panel of the Court of Appeals are not the only entities or courts to enforce § 2-19-142 in civil contexts, either. In 2014, multiple political organizations and an individual citizen were sued under § 2-19-142 by the campaign committee for U.S. Congressman Steve Cohen,[18] resulting in a restraining order being entered against all defendants.[19] In 2010, a city council candidate utilized § 2-19-142 to maintain a multi-year, $1,000,000.00 lawsuit against twelve citizens[20]—including one of TSEL's attorneys and agents.[21] 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.[22]

Notwithstanding all of the foregoing, though, the Panel below ruled that "the cases cited by Plaintiff"—*including a case issued by a separate Court of Appeals panel*—"represent wrongful attempts to use Tenn. Code

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[18] R. at 537–49.

[19] R. at 544.

[20] R. at 229–41.

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

[22] R. at 520–26.

Ann. § 2-19-142 to establish civil liability[,]" rendering the threat of civil liability illusory. *Tennesseans for Sensible Election Laws*, 2021 WL 4621249, at *5. Thus, review is warranted to secure uniformity of decision regarding the following question: Is § 2-19-142 enforceable in civil contexts—as the Court of Appeals held in *Jackson*, 2007 WL 60518, and as other courts and tribunals have also held—or is enforcing § 2-19-142 in civil contexts necessarily "wrongful[,]" as the Panel held below?

b. <u>Lower (and other) courts are split as to the proper standard of review to apply to standing determinations premised upon findings of jurisdictional facts.</u>

The trial court determined that the Plaintiff had standing after finding and adjudicating multiple jurisdictional facts that supported standing. *See* R. at 706 (finding that "the <u>totality</u> 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."). Of significance, one of those jurisdictional facts was that: "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." R. at 221; R. at 706 (finding Plaintiff's Material Fact #3 undisputed).

On appeal, the Panel held as follows with respect to the standard of review that applied to this case: "Whether a party has standing is a question of law. . . . We review questions of law de novo with no presumption of correctness." *See Tennesseans for Sensible Election Laws*,

2021 WL 4621249, at *2 (citing *In re Est. of Brock*, 536 S.W.3d 409, 413 (Tenn. 2017)). After applying *de novo* review, the Panel also inexplicably determined—as a matter of fact—that a district attorney sending a criminal threat letter was a civil matter. *See id.* at *5 (finding that "[t]he cases relied upon as evidence of 'past enforcement' are civil cases"). *See also id.* ("The civil cases identified above fail to establish a history of past enforcement of the criminal sanctions set forth in § 2-19-142.").

Because the Defendants did not even contest the trial court's jurisdictional fact-finding on appeal, the Court of Appeals had no business reviewing—let alone overturning—the trial court's findings. *See* Tenn. R. App. P. 13(b) ("Review generally will extend only to those issues presented for review."). As another panel of the Court of Appeals has correctly observed, issues of subject-matter jurisdiction are also reviewable *de novo* only "[i]n the absence of a dispute regarding jurisdictional facts . . . ." *See Cavnar v. State*, No. M2002-00609-COA-R3-CV, 2003 WL 535915, at *2 (Tenn. Ct. App. Feb. 26, 2003), *no app. filed*. Federal courts are similarly in accord that jurisdictional facts found by a trial court are not subject to *de novo* review on appeal. *See Thomas,* 996 F.3d at 323 ("We generally review de novo a district court's decision to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). . . . If the lower court, however, 'does not merely analyze the complaint on its face, but instead inquires into the factual predicates for jurisdiction, the decision on the Rule 12(b)(1) motion resolves a 'factual' challenge rather than a 'facial' challenge, and we review the district court's factual findings for clear error.'") (citation omitted); *Pederson,* 213 F.3d at 869 ("If the district court resolves any factual disputes in making

its jurisdictional findings, the facts expressly or impliedly found by the district court are accepted on appeal unless the findings are clearly erroneous.") (citation omitted). As a result, review is warranted to secure uniformity of decision regarding the following question: When a trial court adjudicates jurisdictional facts, is the appellate standard of review "de novo with no presumption of correctness[,]" as the Panel held, or are jurisdictional facts reviewed for clear error, as other courts have held?

c. Lower courts are split as to the proper standard of review to apply to a trial court's decision to issue declaratory relief.

As noted above, the Panel held that: "Whether a party has standing is a question of law. *See In re Est. of Brock*, 536 S.W.3d at 413. We review questions of law de novo with no presumption of correctness." *Tennesseans for Sensible Election Laws*, 2021 WL 4621249, at *2. *De novo* review does not apply under circumstances when a trial court exercises its discretion to issue a declaration after adjudicating jurisdictional facts, though. Instead, as noted above, standing is reviewable *de novo* as a question of law only in the absence of a dispute regarding jurisdictional facts. *See Cavnar*, 2003 WL 535915, at *2 ("In the absence of a dispute regarding jurisdictional facts, issues of subject matter jurisdiction present questions of law that appellate courts review de novo." (citing *Sw. Williamson Cty. Cmty. Ass'n v. Saltsman*, 66 S.W.3d 872, 876 (Tenn. Ct. App. 2001))).

Thus, when jurisdictional facts adjudicated by the trial court support standing, a trial court's decision to issue a declaration is an issue subject to the trial court's "wide" discretion. *State ex rel. 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 . . . ."); *Oldham*, 910 S.W.2d at 435 ("[T]he making or refusing of a declaratory judgment is discretionary with the trial court.") (collecting cases). Accordingly, "[a]bsent an abuse of discretion, a trial court's decision to grant or deny declaratory judgment should not be disturbed on appeal." *Moncier*, 2013 WL 2492648, at *3; *see also 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 v. Lindsey*, 310 S.W.3d 834, 839 (Tenn. Ct. App. 2009))). The Panel's ruling does not recognize this standard of review, however. As a result, review is warranted to secure uniformity of decision regarding the following question: When jurisdictional fact-finding supports a plaintiff's standing, is a trial court's decision to issue a declaratory judgment subject to review "de novo with no presumption of correctness[,]" as the Panel held, or, as other courts have held, is the trial court's decision to issue a declaratory judgment reviewed for abuse of a trial court's wide discretion?

2–3. THE NEED TO SECURE SETTLEMENT OF IMPORTANT QUESTIONS OF LAW AND QUESTIONS OF PUBLIC INTEREST

Review is additionally warranted to secure settlement of several important questions of law and public interest on a wide variety of issues. As detailed below, those issues concern important questions of constitutional law and justiciability and a question of first impression regarding Tennessee Code Annotated § 1-3-121—a new state statute enacted by the General Assembly in 2018 to facilitate merits review of constitutional claims.

a. Review is warranted to secure settlement of important constitutional questions of law and public interest.

"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." *See Citizens United*, 558 U.S. at 349. Upon review of the merits of this action, the trial court determined that Tennessee Code Annotated § 2-19-142 is an unconstitutional speech restriction that enables the government to fine and jail citizens of this state for engaging in constitutionally protected political speech.

Significantly, nobody—not even the Panel that ruled adversely below—is actually unclear about § 2-19-142's unconstitutionality. "Ironically, the statute does not criminalize a favorable but knowingly false statement a candidate makes about himself/herself[,]" the Panel quipped. *See Tennesseans for Sensible Election Laws*, 2021 WL 4621249, at *1 n.2. "Ironic[]" is the wrong word. What the Panel was describing is called "viewpoint discrimination"—an "egregious form of content discrimination" that should *offend* the judiciary, rather than amuse it. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The fact that § 2-19-142's "ironic[]" viewpoint-based political speech restriction can land a speaker in jail for up to 30 days also renders the issue markedly less humorous than the Panel imagined.

With that context in mind, review is warranted to settle the following important questions of law and public interest: Whether the State of Tennessee may maintain a viewpoint-based, politician-specific, *criminal* speech restriction that makes mocking candidates in this state a crime, and whether "the First Amendment has any force" in the State

of Tennessee. *See Citizens United*, 558 U.S. at 349. Put another way, review is warranted to determine whether the trial court's correct merits judgment should be reinstated.

b. Review is warranted to secure settlement of important questions of law and public interest regarding justiciability.

Review is also warranted to address critical issues that determine citizens' ability to vindicate constitutional claims in pre-enforcement cases. The United States Supreme Court has long made clear that "[w]hen contesting the constitutionality of a criminal statute, 'it is not necessary that the 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.'" *See Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979) (cleaned up). The Panel below, however, determined that criminal threat letters from district attorneys can effectively be ignored as mere "civil" matters, and that civil enforcement of Tennessee Code Annotated § 2-19-142 is an illusory concern even though multiple courts have enforced § 2-19-142 civilly—including another panel of the Court of Appeals. The ultimate effect of these rulings, if permitted to stand, is that litigants may not obtain pre-enforcement review of clearly unconstitutional statutes even in the face of a demonstrated history of both criminal and civil enforcement.

Put another way: Barring an actual arrest or prosecution, the Panel has held—*contra* the United States Supreme Court's instructions—that pre-enforcement review of a constitutional claim is effectively impossible.

Public policy strongly favors proactive judicial review over deliberate lawbreaking, though. As the Fourth Circuit recently observed:

> As we have previously explained, "[p]ublic policy should encourage a person aggrieved by laws he [or she] considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his [or her] chances in the ensuing suit or prosecution." *Mobil Oil Corp. v. Att'y Gen. of Commonwealth of Va.*, 940 F.2d 73, 75 (4th Cir. 1991); *see also* 13B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3532.5 (3d ed. 1998) ("[C]itizens should be allowed to prefer official adjudication to private disobedience."). Establishing standing does not require that a litigant fly as a canary into a coal mine before she may enforce her rights.

Bryant v. Woodall, 1 F.4th 280, 286 (4th Cir. 2021), *as amended* (June 23, 2021).

Accordingly, review is warranted to determine whether litigants must expose themselves to the risk of arrest and prosecution in order to determine their constitutional rights, or whether they may seek a declaratory judgment to determine their constitutional rights instead.

Separately, as the Defendant Attorney General has warned, § 2-19-142 exposes newspapers and other news media to the threat of prosecution if they publish the Plaintiff's campaign literature. *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"). Accordingly, as the Plaintiff contended both to the trial court and in its briefing below,

> § 2-19-142 "'also prohibits all recipients of TSEL's proposed campaign literature from republishing it or distributing it to others,'"[23] which necessarily limited the reach of the Plaintiff's message and constituted a First Amendment injury sufficient to confer standing by itself. *Cf. Nickolas*, 2007 WL 2316752, at *2 ("[A] decrease in readership constitutes a First Amendment injury sufficient to confer standing." (citing *Meyer*, 486 U.S. at 422–23 ("The refusal to permit appellees to pay petition circulators restricts political expression" by "limiting the number of voices who will convey appellees' message and the hours they can speak and, therefore, *limits the size of the audience they can reach*." (cleaned up)))).

See Brief of Appellee at 58*, Tennesseans for Sensible Election Laws v. Slatery*, No. M2020-01292-COA-R3-CV, 2021 WL 1726078 (Tenn. Ct. App. Oct. 7, 2021). Despite the Plaintiff's briefing on the matter, however, the Panel's opinion makes no mention of this injury, even though it suffices to confer standing by itself. The issue is utterly absent from the Panel's opinion, and despite serving as one of the bases for the trial court's ruling on standing, *see* R. at 702 ("the Court adopts and incorporates herein by reference the July 15, 2020 *Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Summary Judgment* at 5-20, 24-29") (incorporating, *inter alia*, Plaintiff's argument set forth at R. at 645, ¶ 4), the Panel made no attempt to engage with it.

The Panel's decision to ignore this case-dispositive issue aside, however, the issue is important, and it merits review. Where criminal statutes are concerned, the U.S. Supreme Court has long recognized concerns that "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably

[23] R. at 645, ¶ 4.

unlawful words, ideas, and images." *See Reno v. ACLU*, 521 U.S. 844, 872 (1997). *See also 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."). The Plaintiff was accordingly entitled to maintain its claims based on the restrictions that § 2-19-142 imposes on the reach of the Plaintiff's message alone. *See Nickolas*, 2007 WL 2316752, at *2. That injury also does not just violate the Plaintiff's own First Amendment rights; it violates the First Amendment rights of the public to hear, too. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas. This freedom (of speech and press) * * * necessarily protects the right to receive * * *.") (collecting cases); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees."); *Banks v. Wolfe Cty. Bd. of Educ.*, 330 F.3d 888, 896 (6th Cir. 2003) (noting the First Amendment's focus on "not only . . . a speaker's interest in speaking, but also with the public's interest in receiving information" (quoting *Chappel v. Montgomery Cty. Fire Prot. Dist. No. 1*, 131 F.3d 564, 574 (6th Cir. 1997))).

This Court's review of these important issues of law and public interest concerning justiciability—one of which the Panel adjudicated

wrongly, the other of which the Panel neglected to adjudicate at all—is warranted accordingly.

c. <u>Review is warranted to secure settlement of important questions of law and public interest regarding a matter of first impression: the effect, if any, of Tennessee Code Annotated § 1-3-121.</u>

Review is also warranted to determine an important question of first impression: Whether Tennessee Code Annotated § 1-3-121—a relatively new statute enacted into law in 2018 that has never been interpreted by this Court—carries any force. To facilitate merits review of constitutional claims, § 1-3-121 provides that:

> Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages.

The Plaintiff fully briefed its claims under § 1-3-121 during the proceedings below. Once more, though, the Panel neglected even to *mention* § 1-3-121 in its ruling, let alone analyze it. Instead, the Panel simply indicated—in cursory fashion and by footnote—that Article III standing considerations must be met before an affected litigant may maintain a claim under § 1-3-121. *See Tennesseans for Sensible Election Laws*, 2021 WL 4621249, at *3 n.5.

There are serious problems with the Panel's approach to this issue, however. For one, the text of § 1-3-121 unambiguously reflects the General Assembly's intention to ease justiciability constraints and facilitate merits determinations in non-damages constitutional cases.

See id. ("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."). The General Assembly was also within its authority to enact such a statute, given that Tennessee's Constitution does not contain any case or controversy limitation. *State ex rel. Cunningham v. Farr*, No. M2006-00676-COA-R3-CV, 2007 WL 1515144, at *2 (Tenn. Ct. App. May 23, 2007) ("Tennessee's courts do not have a constitutional limitation on their jurisdiction similar to the 'case or controversy' requirement in Article III, Section 2 of the United States Constitution."). The General Assembly was similarly empowered to enact § 1-3-121 to enable merits determinations of federal constitutional claims—even in cases that do not satisfy the constraints of Article III. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.").

Without undertaking any meaningful analysis, though, the Panel all but rendered § 1-3-121 meaningless in cases involving federal constitutional claims. Put simply: If Article III constraints must be met even in cases brought in state court under § 1-3-121, then § 1-3-121 does nothing that 42 U.S.C. § 1983 does not. This Court should accordingly grant review to resolve an important question of first impression: In cases filed in Tennessee courts, does § 1-3-121 enable an affected person

to seek declaratory or injunctive relief in an action brought regarding the constitutionality of a governmental action without regard to constraints imposed by Article III?

d. <u>Review is warranted to secure settlement of important questions of law and public interest regarding whether the Tennessee Declaratory Judgment Act continues to facilitate proactive, pre-enforcement review in constitutional cases.</u>

"[T]o afford relief from uncertainty[,]" *see* Tenn. Code Ann. § 29-14-113, Tennessee's Declaratory Judgment Act facilitates 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 (Tenn. 1938).

As this 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 (citing 26 C.J.S. DECLARATORY JUDGMENTS § 3 (2001)) (emphasis added). This expressly includes settling questions of law involving a "statute." *See* Tenn. Code Ann. § 29-14-103; *see also Sanders v. Lincoln Cty.*, No. 01 A. 01-9902-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), *no app. filed*.

The Declaratory Judgment Act is "construed broadly" to accomplish its purpose. *See Colonial Pipeline Co.*, 263 S.W.3d at 837. *See also Hodges*, 277 S.W. at 902 ("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 this 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.") (citation omitted). Thus, where, as here, the constitutionality of a criminal statute is contested, a separate panel of the Court of Appeals 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 v. Sundquist*, 926 S.W.2d 250, 255–56 (Tenn. Ct. App. 1996) ("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."), *abrogated on other grounds by Colonial*

Pipeline Co. v. Morgan, 263 S.W.3d 827. *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.'").

Accordingly, this Court has held that "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 v. Anderson*, No. M2016-01867-COA-R3-CV, 2018 WL 2324359, at *5 (Tenn. Ct. App. May 22, 2018) (citing *Burkett v. Ashley*, 535 S.W.2d 332, 333 (Tenn. 1976)), *perm. to app. denied* (Tenn. Oct. 10, 2018). Notably, the Defendants have never disputed that the Plaintiff "allege[d]" such facts, either. *See id.* To the contrary, in their Answer, the Defendants admitted that the Plaintiff 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 did the Defendants contest the trial court's finding that one of the Plaintiff's own attorneys and agents

was among the many individuals who has been targeted by § 2-19-142.[24] Significantly, if the Plaintiff's interpretation of § 2-19-142 was correct—and the trial court agreed that it was—then the Plaintiff 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*, 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, this Court's precedent compelled a finding that the Plaintiff—an affected person—had standing to seek a declaration under Tennessee's broad, remedial declaratory judgment statute. Nonetheless, the Panel held otherwise—even though the Defendants failed to address the issue on appeal in any respect. *See Tennesseans for Sensible Election Laws*, 2021 WL 4621249, at *4 ("Defendants' failure to address this issue on appeal is not dispositive."). Under these circumstances, review is warranted to secure settlement of important questions of law and public interest regarding whether Tennessee's Declaratory Judgment Act continues to facilitate proactive, pre-enforcement review in constitutional cases.

[24] 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.").

e. <u>Review is warranted to secure settlement of important questions of law and public interest regarding whether the "[t]he long-standing rule in Tennessee . . . that state courts of equity lack jurisdiction to enjoin the enforcement of a criminal statute" should be overturned.</u>

"The long-standing rule in Tennessee is that state courts of equity lack jurisdiction to enjoin the enforcement of a criminal statute that is alleged to be unconstitutional." *Clinton Books, Inc.*, 197 S.W.3d at 752 (citing *Alexander v. Elkins*, 179 S.W. 310, 311 (Tenn. 1915); *J.W. Kelly & Co. v. Conner*, 123 S.W. 622, 637 (Tenn. 1909)). Based on this rule, even after Tennessee's courts have determined that a criminal statute is unconstitutional following appellate review, courts still will not issue injunctive relief against district attorneys. *See Tennesseans for Sensible Election Laws*, 2019 WL 6770481, at *26 ("[W]e agree with the chancery court's implicit conclusion that it lacked jurisdiction to enjoin the District Attorney General, and we will not extend the trial court's injunction to the District Attorney General on appeal.").

To be sure, as the Court of Appeals noted in a recent opinion, there is unresolved uncertainty regarding the Court of Appeals' equitable authority in this realm. *See id.* at *25 (noting that "*Clinton Books* does not clearly answer whether this Court can require the chancery court to enjoin a District Attorney General from pursuing a criminal prosecution, upon finding a statute unconstitutional on appeal, when the chancery court lacked jurisdiction to do so in the first instance."). That uncertainty merits review in its own right. Beyond resolving that uncertainty, though, there is also a broader question worthy of this Court's review,

which is whether Tennessee's "long-standing rule" on the matter should be overturned entirely given that federal courts do not respect it.

For their part, federal courts recognize no limitation on their jurisdiction that precludes them from enjoining Tennessee's district attorneys. As a result, federal courts both can and do enjoin Tennessee's district attorneys from enforcing Tennessee's criminal laws. *See, e.g.*, *Bongo Prods., L.L.C. v. Lawrence*, No. 3:21-CV-00490, 2021 WL 2897301, at *1 (M.D. Tenn. July 9, 2021) ("Plaintiffs . . . have filed a Motion for Preliminary Injunction (Doc. No. 6), to which . . . District Attorney General ("DAG") Glenn R. Funk, and DAG Neal Pinkston have filed a Response (Doc. No. 21). For the reasons set out herein, the motion will be granted."). Thus, as long as Tennessee's "long-standing rule" on the matter remains effective, the practical result is that constitutional litigation involving Tennessee's criminal laws will nearly always take place in a federal forum—thereby depriving Tennessee's judiciary of a role in interpreting Tennessee's own state statutes and enforcing its own citizens' constitutional rights in cases involving state officers.

Put another way: To obtain complete relief, litigants must 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.[25] The former is a suggestion that the Attorney General has decried as "radical" in other circumstances,[26] and the latter is one that the United States

[25] R. at 162.

Supreme Court long ago repudiated. *See Babbitt*, 442 U.S. at 298 ("When contesting the constitutionality of a criminal statute, 'it is not necessary that [the 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.'") (cleaned up). Thus, by depriving Tennessee's own courts of authority to grant litigants complete relief regarding unconstitutional criminal laws, Tennessee's "long-standing rule" that district attorneys may not be enjoined, *see Clinton Books, Inc.*, 197 S.W.3d at 752, principally functions to outsource constitutional litigation involving state laws and state officers to federal courts. With this context in mind, review is warranted to secure settlement of important questions of law and public interest regarding whether the "[t]he long-standing rule in Tennessee . . . that state courts of equity lack jurisdiction to enjoin the enforcement of a criminal statute" should be overturned. *See id.*

4. THE NEED FOR THE EXERCISE OF THE SUPREME COURT'S SUPERVISORY AUTHORITY

Finally, review is warranted due to the need for the exercise of this Court's supervisory authority. In several respects, the Panel's opinion contravened the principle of party presentation, which facilitates the process of judicial review in the first place. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("In our adversarial system of

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

adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 554 U.S. 237 (2008), 'in both civil and criminal cases, in the first instance and on appeal ..., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'") (citation omitted); *Wood v. Milyard*, 566 U.S. 463, 472 (2012) ("[A] federal court does not have carte blanche to depart from the principle of party presentation basic to our adversary system." (citing *Greenlaw*, 554 U.S. 237).

In particular, the Panel's Opinion:

1. Modified the trial court's factual findings regarding jurisdictional facts that the Defendants did not even contest on appeal;

2. Failed to adjudicate case-dispositive issues raised by the Plaintiff while simultaneously finding that "Defendants' failure to address [a case-dispositive] issue on appeal is not dispositive," *Tennesseans for Sensible Election Laws*, 2021 WL 4621249, at *4; and, most concerningly,

3. Issued a *sua sponte* remedy—dismissal for lack of standing—that the Defendants had never even sought and which was procedurally unavailable.

With respect to this third issue: At no point in this case did the Defendants move to dismiss the Plaintiff's claims for lack of standing. *See* R. at 26–27 (moving to dismiss on non-standing grounds); R. at 141 ("Plaintiff's standing, however, has not been challenged by the Defendants."). Instead, the Defendants raised standing *as a defense in their Answer* and argued to the trial court that more discovery was

needed regarding that defense before *the Plaintiff's* motion for summary judgment regarding that defense could be adjudicated. *See* R. at 428–31.

Thus, the trial court's order resolving the Plaintiff's standing was an order granting the Plaintiff's *offensive* motion for summary judgment regarding the Defendants' standing *defense* based on undisputed, pre-discovery facts that the Plaintiff had asserted established the Plaintiff's standing to maintain its claims by themselves. *See* R. at 700–703. At most, then, the Court of Appeals was empowered to vacate and remand with instructions to deny the Plaintiff's motion for summary judgment as to the Defendants' standing defense. Thereafter, the Parties would presumably engage in standing-related discovery regarding matters like the Shelby County District Attorney's indication—also unmentioned in the Panel's opinion—that it does not have a non-enforcement policy where § 2-19-142 is concerned. *See* R. at 678 ("I am not aware of any such policy."). Thereafter, if the issue remained contested and unresolved after discovery, a trial would be warranted.

What the Panel was *not* empowered to do, however, was:

1. grant the Defendants relief that the Defendants never sought,

2. based on a claim that the Defendants raised only as a defense in their Answer,

3. without either notice or affording the Plaintiffs an opportunity to develop evidence in response.

Doing so contravened fundamental party presentation principles that are essential to the process of judicial review itself. The Panel's *sua sponte* ruling—effectively a determination that *at the complaint stage*, the allegations in the Plaintiff's Complaint failed to satisfy minimum

standing requirements—also had the effect of botching clearly established law. As the United States Supreme Court itself reiterated on December 10, 2021, for example:

> The petitioners have plausibly alleged that [a challenged law] has already had a direct effect on their day-to-day operations. See Complaint ¶¶103, 106–109. And they have identified provisions of state law that appear to impose a duty on the licensing-official defendants to bring disciplinary actions against them if they violate S. B. 8. In our judgment, this is enough at the motion to dismiss stage to suggest the petitioners will be the target of an enforcement action and thus allow this suit to proceed.

Whole Woman's Health v. Jackson, No. 21-463, 2021 WL 5855551 (U.S. Dec. 10, 2021) (slip opinion); *cf.* R. at 4, ¶ 10 (noting "the extraordinarily serious criminal sanctions that Tennesseans for Sensible Election Laws faces both for publishing its prior campaign literature and if it continues to publish its desired campaign literature"); R. at 9, ¶ 29 (alleging that the Plaintiff "risks prosecution by District Attorneys across the State of Tennessee wherever its campaign literature is distributed"); R. at 6–7, ¶ 18; R. at 211, ¶ 18; Tenn. R. Civ. P. 8.04 (conclusively admitting Plaintiff's allegation that "the Davidson County District Attorney General's responsibilities include prosecuting violations of Tenn. Code Ann. § 2-19-142"); R. at 9, ¶ 31 (alleging that "Tenn. Code Ann. § 2-19-142 has both been actively enforced [by the Tennessee Court of Appeals itself in civil proceedings], and used as a basis for civil liability").

Accordingly, this Court's established adversarial processes were undermined by the Panel's *sua sponte* issuance of a remedy that the Defendants never even sought and which was not available at the stage

of proceedings that the Court of Appeals was called upon to review. Consequently, supervisory review is warranted to reestablish the principle that parties—not the Court of Appeals—are responsible for framing the issues presented in litigation. This principle also holds true even when—perhaps especially when—a panel of the Court of Appeals may prefer a different outcome based on its apparent disagreement with a unanimous and never-reversed opinion by another Court of Appeals panel that was joined by a member of this Court. *Compare Jackson*, 2007 WL 60518 (unanimously affirming ruling that Tenn. Code Ann. § 2-19-142 was properly enforced in a civil context), *with Tennesseans for Sensible Election Laws*, 2021 WL 4621249, at *5 *id.* (holding that "the cases cited by Plaintiff represent wrongful attempts to use Tenn. Code Ann. § 2-19-142 to establish civil liability").

VIII. CONCLUSION

For the foregoing reasons, the Plaintiff's Rule 11 Application for permission to appeal should be **GRANTED**.

Respectfully submitted,

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IX. CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02 and Tennessee Rule of Appellate Procedure 11(a), this brief contains 9,643 words pursuant to § 3.02(a)(1)(a) excluding excepted sections, as calculated by Microsoft Word; it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3); and the argument in this Application does not exceed 50 pages.

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X. CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2021, a copy of the foregoing was served via the Court's electronic filing system upon:

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APPENDIX OF EXHIBITS

Exhibit # 1: *Tennesseans for Sensible Election Laws v. Slatery*, No. M2020-01292-COA-R3-CV, 2021 WL 4621249 (Tenn. Ct. App. Oct. 7, 2021).

Exhibit #2: October 20, 2021 Panel Order Denying Petition to Rehear