

**IN THE CIRCUIT COURT OF TENNESSEE  
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS**

<b>PAMELA MOSES,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>No. CT-1579-19</b>
	)	<b>Division I</b>
	)	
	)	<b>Felicia Corbin-Johnson</b>
<b>MARK GOINS, TRE HARGETT, and</b>	)	<b>Chief Judge</b>
<b>JONATHAN SKRMETTI, in their official</b>	)	<b>Judge L. Marie Williams</b>
<b>capacities,</b>	)	<b>Judge Barry Tidwell</b>
	)	
<b>Defendants.</b>	)	

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**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS**

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Defendants, Mark Goins, Tennessee Coordinator of Elections; Tre Hargett, Tennessee Secretary of State; and Jonathan Skrmetti, Tennessee Attorney General and Reporter, submit this Memorandum of Law in support of their Motion to Dismiss the Second Amended Complaint of Plaintiff, Pamela Moses. While Plaintiff challenges the constitutionality of Tennessee's disenfranchisement statutes, permanent disenfranchisement on conviction of a felony is affirmatively sanctioned in the Tennessee Constitution and violates no other constitutional provision. Plaintiff therefore fails to state a claim upon which relief can be granted. The Court should grant Defendants' motion to dismiss.

## **BACKGROUND**

### **Tennessee Law Regarding Felon Disenfranchisement and Restoration**

The Tennessee Constitution provides that “[l]aws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes.” Tenn. Const. art. IV, § 2. It further provides that “elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.” Tenn. Const. art. I, § 5. In exercising its explicit grant of authority, the General Assembly mandates by statute that “[u]pon conviction for any felony, it shall be the judgment of the court that the defendant be infamous and be immediately disqualified from exercising the right of suffrage.” Tenn. Code Ann. § 40-20-112. Further, “[n]o person who has been convicted of an infamous crime, as defined by [Section] 40-20-112, in this state shall be permitted to register to vote or vote at any election unless . . . the person’s full rights of citizenship have otherwise been restored as prescribed by law.” Tenn. Code Ann. § 2-19-143(1).

In 2006, the General Assembly enacted new “provisions and procedures” to “govern restoration of the right of suffrage in this state to any person who has been disqualified from exercising that right by reason of a conviction in any state or federal court of an infamous crime.” Tenn. Code Ann. § 40-29-201(a). By law, a person previously “rendered infamous and deprived of the right of suffrage by the judgment of any state . . . court” may “apply for a voter registration card and have the right of suffrage restored” after meeting certain statutory requirements, Tenn. Code Ann. § 40-29-202(a)-(c), and may request “a certificate of voting rights restoration” as “sufficient proof that the person . . . is no longer disqualified from voting by reason of having been convicted of an infamous crime,” Tenn. Code Ann. § 40-29-203(a), (c).

The statutes also set eligibility requirements as to who may apply for a voter registration card and certificate of voting rights restoration. Persons convicted of certain enumerated felony offenses—including persons convicted of “Offenses Against Administration of Government” in “violation of title 39, chapter 16, parts 1, 4 or 5” of the Tennessee Code and “designated as a felony”—“shall never be eligible to register and vote.” Tenn. Code Ann. § 40-29-204(3)(B); *see, e.g.*, Tenn. Code Ann. § 39-16-503 (listing tampering with or fabricating evidence with intent to affect an investigation or official proceeding as an “Offense[] Against Administration of Government”).

### **Plaintiff’s Disqualifying Conviction**

In 2014, the Shelby County Grand Jury indicted Plaintiff on one count of tampering with or fabricating evidence with intent to affect the course of an investigation or official proceeding in violation of Tenn. Code Ann. § 39-16-503, which is a Class C felony. *See State v. Moses*, No. W2015-01240-CCA-R3-CD, 2016 WL 4706707, at \*1-2 (Tenn. Crim. App. Sept. 6, 2016), *perm. app. denied* (Tenn. Jan. 23, 2017); Tenn. Code Ann. § 39-16-503(a)-(b). Plaintiff pled guilty to this offense, among others,<sup>1</sup> and during the plea-submission hearing, the State informed the Shelby County Criminal Court that, had the matter gone to trial, the evidence for this offense would show that Plaintiff “fabricated a judicial complaint form to the Tennessee Board of Judicial Conduct

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<sup>1</sup> The Grand Jury also indicted Plaintiff on one count of forgery, one count of perjury, one count of stalking, one count of retaliation for past action, two counts of impersonating a licensed professional, two counts of harassment, and one count of aggravated perjury. *See Moses*, 2016 WL 4706707, at \*1. Additionally, in separate indictments, the Grand Jury charged Petitioner on one count of theft of merchandise worth \$500, one count of theft of property worth \$500 or less, one count of evading arrest, and one count of escape from misdemeanor incarceration. *See id.* At the plea submission hearing, in addition to pleading guilty of tampering with or fabricating evidence, Plaintiff also pled guilty to theft of merchandise worth \$500, forgery, perjury, stalking, and escape from misdemeanor incarceration, “in exchange for an effective seven-year sentence and the dismissal of the remaining charges.” *Id.* at \*2.

against the general sessions judge who previously held [her] in criminal contempt.” *Moses*, 2016 WL 4706707, at \*2.

After “an extensive plea colloquy,” the Criminal Court concluded that Plaintiff entered her guilty plea “freely, voluntarily, and intelligently”; that the facts were sufficient to support her plea; and that Plaintiff understood the “direct and indirect consequences” of, and the sentence she would receive in exchange for, pleading guilty. *See id.* at \*2-3. On that basis, the Criminal Court accepted Plaintiff’s guilty plea and imposed an effective seven-year sentence on April 29, 2015. *See id.* at \*2-4. Since then, Plaintiff has challenged the validity of her plea without success. *See id.* at \*1 (affirming the trial court’s denial of Plaintiff’s motion to withdraw her guilty plea); *see also State v. Moses*, No. W2019-01219-CCA-R3-CD, 2020 WL 4187317, at \*1 (Tenn. Crim. App. July 20, 2020) (affirming the trial court’s denial of Plaintiff’s motion for writ of habeas corpus), *perm. app. denied* (Tenn. Dec. 4, 2020).

### **Plaintiff’s Attempt to Restore Her Voting Rights**

In 2019, Plaintiff, acting *pro se*, filed a petition for the restoration of her citizenship in this Court. (Pet., pp. 1-2.) Plaintiff stated under oath that she was convicted of a felony on April 29, 2015, and that her “Supervised Probation or Parole [had] expired for this sentence.” (*Id.*, pp. 1, 3.) The State of Tennessee, through the District Attorney General’s Office for the 30th Judicial District, argued that Plaintiff was not entitled have her rights restored because her sentence had not yet expired, and because her conviction for tampering with or fabricating evidence permanently denied her the right to vote. (Resp., pp. 1-3; Am. Resp., pp. 1-3.)

Plaintiff filed an amended petition in June 2022. (Am. Pet., p. 1.) Plaintiff claimed that she was “wrongfully convicted” and that the loss of her voting rights violated various provisions of the Tennessee Constitution. (*Id.* pp. 3, 10-23.) In response, the State argued that the Tennessee

Constitution expressly sanctioned the exclusion of felons from voting and that Plaintiff failed to state a claim entitling her to relief. (Resp. to Am. Pet., pp. 1-6.) The State further explained that Plaintiff could not litigate whether her guilty plea “was knowingly, intelligently, and voluntarily entered” in an action to restore her citizenship. Rather, Plaintiff was required to “ventilate such a claim . . . in a post-conviction proceeding pursuant to Tenn. Code Ann. § 40-30-101 *et seq.*” (*Id.*, p. 7.)

Plaintiff, now with counsel, subsequently sought leave to further amend her petition by filing a Second Amended Complaint (“SAC”). (Mot. for Leave, p. 1; Joint Notice of Filing, pp. 1-3, Ex. A.) In the SAC, Plaintiff added the Secretary of State and Coordinator of Elections, as well as the Attorney General, as defendants in their official capacities, and removed the “State of Tennessee” as a defendant. (Mot. for Leave, p. 1; SAC, pp. 1, 5.) On October 28, 2022, the Court entered an agreed order granting Plaintiff’s request for leave to file the SAC and ordering that the SAC “shall be the operative Complaint once filed of record in this cause.” (Order, pp. 1-2.)<sup>2</sup>

### **Plaintiff’s SAC**

In the SAC, Plaintiff requests the Court to declare that “Tennessee’s permanent felony disenfranchisement laws [Tenn. Code Ann. §§ 40-29-105(c)(2)(B) and 40-29-204] violate the Tennessee Constitution” and to “enjoin Defendants from denying the fundamental right to vote” to convicted felons. (SAC, p. 5, ¶ 15; pp. 25-26, ¶ 78.) Plaintiff presents a total of ten claims— five asserting facial challenges to the statutes and five asserting similar as-applied challenges.

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<sup>2</sup> The Court entered a scheduling order on September 20, 2022, directing the State to respond to Plaintiff’s Amended Petition no later than December 7, 2022. While Plaintiff has not “filed [the SAC] of record” in this cause, Defendants file the instant motion in response to the SAC attached to Plaintiff’s Joint Notice of Filing in accordance with the scheduling order out of an abundance of caution.

Counts One and Six allege violations of the Constitution’s “free and equal” elections clause, Tenn. Const. art. I, § 5. (SAC, pp. 29-30, ¶¶ 87-94; pp. 35-36, ¶¶ 120-23.) Counts Two and Nine assert equal-protection challenges under Tenn. Const. art. I, § 8 and art. XI, § 8, alleging that the statutes disenfranchise felons “on a disparate basis.” (SAC, pp. 30-31, ¶¶ 95-100; p. 38, ¶¶ 136-39.) Counts Three and Ten also assert equal-protection challenges, but alleging that the statutes were enacted with “the intent and effect of discriminating against Black Tennesseans.” (SAC, pp. 31-32, ¶¶ 101-04; p. 39, ¶¶ 140-43.) Counts Four and Eight allege that the statutes violate the prohibition against “cruel and unusual punishments,” Tenn. Const. art. I, § 16. (SAC, pp. 32-33, ¶¶ 105-14; pp. 37-38, ¶¶ 131-35.) And Counts Five and Seven allege violations of both substantive and procedural due process. (SAC, pp. 34-35, ¶¶ 115-19; pp. 36-37, ¶¶ 124-30.)

## ARGUMENT

### **Plaintiff Fails to State Claims for Relief Because Permanent Disenfranchisement Does Not Violate the Tennessee Constitution.**

Plaintiff’s SAC should be dismissed because it fails to state claims on which relief can be granted. All of Plaintiff’s claims allege that Tenn. Code Ann. § 40-29-204 violates certain provisions of the Tennessee Constitution.<sup>3</sup> But in two separate provisions, the Tennessee Constitution provides an affirmative sanction for the disenfranchisement of persons convicted of an infamous crime, i.e., any felony conviction. In other words, the General Assembly has exercised its constitutional authority to remove voting rights from convicted felons, and by virtue

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<sup>3</sup> Plaintiff also purports to challenge Tenn. Code Ann. § 40-29-105(c)(2)(B). (SAC, p. 25, ¶ 78.) But Plaintiff is clearly not injured by this statute, so she lacks standing to challenge it. *See Am. Civil Liberties Union v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006). Section 40-29-105(c)(2)(B) provides that persons convicted of “murder, rape, treason or voter fraud shall never be eligible to register and vote.” Plaintiff, however, was not convicted of any of these offenses—her claims are based on her conviction for tampering with or fabricating evidence under Tenn. Code Ann. § 39-16-503. (SAC, p. 27, ¶ 81.)

of Plaintiff's Class C felony conviction for violating Tenn. Code Ann. § 39-16-503, the removal of her voting rights is constitutional.

**A. Legal standards**

**1. Rule 12.02(6) motions to dismiss**

A defendant may move to a dismiss a complaint when a plaintiff “fail[s] to state a claim upon which relief can be granted.” Tenn. R. Civ. P. 12.02(6). Such a motion “tests only the legal sufficiency of the complaint.” *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009). In reviewing the motion, a trial court “construe[s] the complaint in favor of the plaintiff, accept[s] the allegations of fact as true,” and will dismiss the claims when the “plaintiff can establish no facts supporting the claim that would warrant relief.” *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999). While a complaint need not contain detailed allegations of all the facts necessary to give rise to a claim, the facts pleaded, and the inferences drawn therein, “must raise the pleader’s right to relief beyond the speculative level.” *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011) (internal quotation marks omitted). Legal arguments and legal conclusions couched as facts, however, “are not taken as true.” *Estate of Haire v. Webster*, 570 S.W.3d 683, 690 (Tenn. 2019).

**2. Principles of Constitutional Interpretation and Review**

In reviewing provisions of the Tennessee Constitution, a court must “give effect to the intent of the people” who adopted its provisions. *Cleveland Surgery Ctr., L.P. v. Bradley Cnty. Mem’l Hosp.*, 30 S.W.3d 278, 281 (Tenn. 2000) (internal quotation marks omitted). A court should interpret the words and terms used in the Tennessee Constitution in accordance with their “plain, ordinary and inherent meaning” and “without reading any ambiguities into them.” *Hooker v. Haslam*, 437 S.W.3d 409, 426 (Tenn. 2014). When a “provision clearly means one thing, the

judiciary should not give it another meaning.” *State ex rel. Sonnenburg v. Gaia*, 717 S.W.2d 883, 885 (Tenn. 1986).

Further, a court must interpret the Tennessee Constitution “as a whole” by “harmoniz[ing] and giv[ing] effect to each of its provisions.” *Mayhew v. Wilder*, 46 S.W.3d 760, 772 (Tenn. Ct. App. 2001). While the judiciary has the responsibility for determining the meaning of a constitutional provision, “courts must give careful consideration to the interpretation placed upon the constitution by the legislature.” *Metro. Gov’t of Nashville & Davidson Cnty. v. Tenn. State Bd. of Equalization*, 817 S.W.2d 953, 955 (Tenn. 1991). When the General Assembly’s construction of a constitutional provision is “long accepted and acquiesced in by the people,” that construction “is entitled to great weight, and in the absence of some showing of palpable error, is to be accepted as a correct interpretation.” *LaFever v. Ware*, 365 S.W.2d 44, 47 (Tenn. 1963).

When evaluating the constitutionality of a statute, a court “begin[s] with the presumption that an act of the General Assembly is constitutional.” *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). The court “must be controlled by the fact that” the General Assembly “may enact any law” that the Tennessee Constitution “does not prohibit.” *Willeford v. Klepper*, 597 S.W.3d 454, 465 (Tenn. 2020) (internal quotation marks omitted). In its review, a court must “indulge every presumption and resolve every doubt in favor of the constitutionality of the statute.” *In re Burson*, 909 S.W.2d 768, 775 (Tenn. 1995). Only when a statute “clearly appears” to “contravene some provision of the [Tennessee] Constitution” may a court strike it down as unconstitutional. *Willeford*, 597 S.W.3d at 465 (internal quotation marks omitted). In other words, a “[c]ourt must uphold the constitutionality of a statute wherever possible.” *State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014).



A constitutional challenge to a statute may be facial or as applied. In a facial challenge, a plaintiff “undertake[s] an especially heavy legal burden” because she must establish that “there are no circumstances under which the statute, as written, may be found valid.” *Fisher v. Hargett*, 604 S.W.3d 381, 396-98 (Tenn. 2020). When a plaintiff asserts an as-applied challenge, she claims that “the statute is unconstitutional as construed and applied in actual practice against [her] under the facts and circumstances of [her] particular case.” *Id.* at 397.

**B. Plaintiff fails to show that the General Assembly enacted Section 40-29-204 with discriminatory intent. (Plaintiff’s Counts One, Three, Six, and Ten.)**

Plaintiff makes only conclusory allegations that the legislature acted with discriminatory intent in enacting Section 40-29-204, which are insufficient to state a claim on which relief can be granted. Plaintiff’s factual allegations comprise little more than historical data. Plaintiff reviews laws dating from 1796 to the late 19th century that discriminated against Black Tennesseans’ right to vote. (SAC, pp. 6-25, ¶¶ 22-76.) And with that background, Plaintiff alleges—in Counts One, Three, Six, and Ten—that, over a century later, the General Assembly enacted Section 40-29-204 with the same discriminatory “intent,” in violation of the Tennessee Constitution—even though the statute itself is neutral on its face. (SAC, pp. 1-2, ¶ 3; p. 6, ¶ 22; p. 25, ¶ 77; pp. 29-30, ¶¶ 91-94; p. 32, ¶ 102; p. 36, ¶ 123; p. 39, ¶ 141.)

Plaintiff’s factual allegations of historical racial motivation are inadequate to state even a colorable claim that Section 40-29-204 was enacted with discriminatory intent. Although Plaintiff’s implicit assertion is that an inference of discriminatory intent can be drawn from historical antecedents alone, her reliance on alleged “evidence of past discrimination cannot, in the manner of original sin, condemn action that is not in itself unlawful.” *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) (internal quotation marks omitted); *see id.* at 1261-63 (affirming the

dismissal of a challenge to the constitutional validity of Tenn. Code Ann. § 2-19-143 where plaintiffs “were unable to present evidence that proved or inferred a discriminatory intent on the part of the Tennessee legislature”). Historical evidence of purposeful discrimination “has little probative value” when such evidence is not “reasonably contemporaneous with the challenged” law. *See McCleskey v. Kemp*, 481 U.S. 279, 297-99 & n.20 (1987) (rejecting the plaintiff’s invitation to “infer a discriminatory purpose” where a state legislature had “legitimate reasons . . . to adopt and maintain capital punishment”).

The United States Supreme Court’s decision in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), is instructive.<sup>4</sup> *Abbott* reversed a three-judge district court’s determination that Texas’s 2013 redistricting plans were invalid because they did not “cure[] any taint from the 2011 plans” that “allegedly harbored” discriminatory intent—finding that the lower court had “committed a fundamental legal error” in so holding. 138 S. Ct. 2305, 2313, 2315-18 (2018) (internal quotation marks omitted). The Court noted that Texas’ 2013 plans were not enacted with an “avowedly dedicated” intent to discriminate, nor did the 2013 legislature reenact “a law originally enacted with discriminatory intent” or adopt “criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 legislature.” *Id.* at 2325. Under those circumstances, the relevant inquiry was “the intent of the 2013 [Texas] Legislature,” not the 2011 legislature. *Id.* And the 2013 Texas Legislature was to be afforded “the presumption of legislative good faith” and not condemned based on a previous legislature’s prior bad acts. *Id.* at 2324-25. After setting the

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<sup>4</sup> The Tennessee Supreme Court has relied on United States Supreme Court decisions in analyzing a claim that a state law was passed with a “discriminatory purpose.” *See State v. Banks*, 271 S.W.3d 90, 155-56 (Tenn. 2008).

proper focus on the intent of the 2013 Texas Legislature, *Abbott* concluded that the adoption of the 2013 plans was “entirely reasonable and certainly legitimate.” *Id.* at 2327-30.<sup>5</sup>

Here, Plaintiff likewise fails to allege facts that would show that the General Assembly enacted Section 40-29-204 with discriminatory intent. The thrust of Plaintiff’s claim is that the alleged discriminatory intent behind a prior enactment of the General Assembly necessarily taints its more recent decision to “adopt[] permanent felon disenfranchisement for certain crimes.” (SAC, p. 25, ¶ 77.) That contention, though, is indistinct from the one asserted and rejected in *Abbott*—and only two years separated the legislative actions in *Abbott*, where 150 years separate the legislative enactments on which Plaintiff bases her claims.

As in *Abbott*, the proper subject of inquiry here is the intent of the 2006 General Assembly in enacting Section 40-29-204—not the intent of previous legislatures. *See Abbott*, 138 S. Ct. at

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<sup>5</sup> Although the Supreme Court decided *Abbott* after the district court conducted a bench trial, its reasoning is also pertinent in the context of a motion to dismiss. As the person claiming “that a state law was enacted with discriminatory intent,” a plaintiff has “the burden of proof” to demonstrate such intent. *Abbott*, 138 S. Ct. at 2324-25. A plaintiff cannot “flip[]” that burden by merely alleging “past discrimination”; both the “allocation of the burden of proof and the presumption of legislative good faith *are not changed*” by such claims. *See id.* at 2324 (emphasis added). Further, district courts have relied on *Abbott* in resolving a motion to dismiss equal protection claims. *See, e.g., Assoc. for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-cv-02540-PX, 2022 WL 3019762, at \*9-10 (D. Md. July 29, 2022); *Higginson v. Becerra*, 363 F. Supp. 3d 1118, 1123-28 (S.D. Cal. 2019). And pre-*Abbott*, federal courts applied similar principals to conclude that a plaintiff failed to state a claim upon which relief could be granted by relying on past discriminatory intent to allege that a new law passed by a different legislature contained similar animus. *See, e.g., Hayden v. Patterson*, 594 F.3d 150, 169 (2d Cir. 2010) (finding that the plaintiff’s allegations that prior laws were enacted with discriminatory intent “faile[d] to allege any facts to support a claim” that a later law was passed with such intent); *Wesley*, 791 F.2d at 1261-63 & n.10 (affirming district court’s grant of a motion to dismiss where the plaintiffs were “unable to present evidence that proved or inferred a discriminatory intent on the part of the Tennessee legislature”).

2325. Examined under this proper focus, Plaintiff's claims fail to rise "beyond the speculative level"; they allege no facts sufficient to draw an inference that the General Assembly harbored a discriminatory purpose in passing Section 40-29-204. *See Webb*, 346 S.W.3d at 427 (internal quotation marks omitted). Plaintiff does not even allege that any member of the 2006 General Assembly made any comment on that Section, let alone a comment supporting an inference of discriminatory intent. *See Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1325 (11th Cir. 2021) (finding no discriminatory intent in Alabama's voter identification law when the plaintiffs could not demonstrate that a single "sitting Alabama legislator" made "a single comment" about their intent in enacting the law); *see also Wesley*, 791 F.2d at 1262-63 & n.10 (affirming grant of motion to dismiss where the "plaintiffs were unable to present evidence that proved or inferred a discriminatory intent on the part of the Tennessee legislature" in disenfranchising convicted felons).

Nor could the 2006 General Assembly possibly have "reenacted" a discriminatory 19th century permanent disenfranchisement law, since Plaintiff alleges that "there was no permanent disenfranchisement" in Tennessee in the 19th century. (SAC, p. 23, ¶ 71 (emphasis removed)); *see Abbott*, 138 S. Ct. at 2325. Finally, and similarly, Plaintiff makes no claim that Section 40-29-204 "carried forward" any discriminatory criteria from a previous law. *See Abbott*, 138 S. Ct. at 2325. Because Plaintiff fails to allege any contemporaneous facts showing that the General Assembly intended to discriminate against Black Tennesseans in enacting Section 40-29-204, the Court should dismiss Plaintiff's discriminatory-intent claims in Counts One, Three, Six, and Ten. *See Doe*, 2 S.W.3d at 922.

**C. Plaintiff has no claim that permanent disenfranchisement violates the “Free Elections Clause.” (Plaintiff’s Counts One and Six.)**

Beyond the insufficiency of Plaintiff’s discriminatory-intent allegations, as discussed above, Plaintiff cannot otherwise state a claim for relief in Counts One and Six. Although the General Assembly has permanently disenfranchised persons convicted of the crimes listed in Section 40-29-204, including Plaintiff, that legislative action is expressly sanctioned in the “free and equal” elections clause in art. I, § 5, of the Tennessee Constitution. Plaintiff’s disenfranchisement, therefore, cannot violate rights under that constitutional provision.

Article I, § 5, and article IV, § 2 “expressly leave to the Legislature the designation in advance of the offenses for which a citizen may be disenfranchised.” *Crutchfield v. Collins*, 607 S.W.2d 478, 482 (Tenn. Ct. App. 1980). That is, the Tennessee Constitution empowers the General Assembly to “deprive convicted criminals of the right to vote under the limitations set out in” those provisions. *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983) (quoting *Crutchfield*, 607 S.W.2d at 481). Consequently, Tennessee “may constitutionally disenfranchise convicted felons,” and “the right of felons to vote is not fundamental.” *See Wesley*, 791 F.2d at 1261 (stating that the Fourteenth Amendment to the United States Constitution allows states to disenfranchise convicted felons).

The General Assembly has disenfranchised convicted felons under its constitutional grant of authority. After a person is convicted of “any felony,” a court must declare her “infamous” and “immediately disqualif[y her] from exercising the right of suffrage.” *See* Tenn. Code Ann. § 40-20-112. And that person has no right to vote unless and until she has her “full rights of citizenship . . . restored as *prescribed by law*.” Tenn. Code Ann. § 2-19-143(1) (emphasis added).

A convicted felon “does not have an absolute right to the restoration of the full rights of citizenship.” *State v. Johnson*, 79 S.W.3d 522, 527 (Tenn. 2002). “Instead, the restoration of citizenship process is subject to the requirements and restrictions imposed by the legislature.” *Id.* For a person convicted of a felony offense in violation of “title 39, chapter 16, part[] . . . 5” of the Tennessee Code, she “shall never be eligible to register and vote in this state.” Tenn. Code Ann. § 40-29-204(3)(B).

Accordingly, Plaintiff’s “free and equal” elections challenge in Counts One and Six fails to state a claim for this reason as well. Plaintiff’s conviction for tampering with or fabricating evidence is a Class C felony offense, *see* Tenn. Code Ann. § 39-16-503(a)-(b), that rendered her “infamous” and “disqualified from exercising the right of suffrage.” Tenn. Code Ann. § 40-20-112. Following that conviction, Plaintiff is only “permitted to vote” if her “voting rights are restored.” *See State v. Dixon*, No. W2017-01051-COA-R3-CV, 2018 WL 1168693, at \*2 (Tenn. Ct. App. Mar. 6, 2018) (no perm. app. filed); *see also Wesley*, 791 F.2d at 1258 (noting that, under Tenn. Code Ann. § 40-20-112, “all convicted felons are disenfranchised in Tennessee until the franchise is restored”). But by operation of law, Plaintiff’s conviction for an offense against the administration of government renders her ineligible to restore her right to vote. *See* Tenn. Code Ann. § 40-29-204(3)(B). And as a convicted felon, Plaintiff has no fundamental right to vote in Tennessee. *See Wesley*, 791 F.2d at 1261.

The restoration of Plaintiff’s right to vote is “subject to the requirements and restrictions imposed by” the General Assembly. *See State v. Johnson*, 79 S.W.3d at 527 & n.3 (noting that the General Assembly restricted persons convicted of murder, rape, treason, or voter fraud from becoming eligible to vote). And current law provides that she is ineligible to have that right restored. *See* Tenn. Code Ann. § 40-29-204(3)(B). Nothing in the Tennessee Constitution’s “free

and equal” elections provision requires the General Assembly to provide Plaintiff or any other felon with a path to restore the right to vote. *See* Tenn. Const. art. I, § 5.

**D. Section 40-29-204 comports with the equal-protection provisions of the Tennessee Constitution. (Plaintiff’s Counts Two, Three, Nine, and Ten.)**

Plaintiff also fails to state a claim on which relief may be granted in Counts Two, Three, Nine, and Ten. In Counts Two and Nine, Plaintiff alleges that Section 40-29-204 violates equal protection because it disenfranchises felons “on a disparate basis.” (SAC, pp. 30-31, ¶¶ 95-100; p. 38, ¶¶ 136-39.) But rational-basis review—not strict scrutiny—applies to these claims, and Section 40-29-204 passes the rational-basis test. In Counts Three and Ten, Plaintiff alleges that Section 40-29-204 violates equal protection because it was enacted with “the intent and effect of discriminating against Black Tennesseans.” (SAC, pp. 31-32, ¶¶ 101-04; p. 39, ¶¶ 140-43.) But as discussed above, Plaintiff’s allegations of discriminatory intent are insufficient, and alleged disparate impact does not state a claim for relief.

Together, art. I, § 8, and art. XI, § 8, of the Tennessee Constitution encompass the “equal protection of the laws.” *Hughes v. Tenn. Bd. of Prob. & Parole*, 514 S.W.3d 707, 715 (Tenn. 2017). These provisions provide “essentially the same protection” as the Equal Protection Clause of the Fourteenth Amendment in the United States Constitution. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). Because of their similarity, the Tennessee Supreme Court “has adopted an analytical framework similar to that used by the United States Supreme Court in analyzing equal protection challenges.” *Gallaher*, 104 S.W.3d at 460.

Strict scrutiny applies if the “legislative classification . . . interferes with the exercise of a fundamental right” or “operates to the peculiar disadvantage of a suspect class.” *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (internal quotation marks omitted). Such review requires the

State to demonstrate that any burden on the fundamental right or suspect class is justified by a compelling state interest that is narrowly tailored to achieve that interest. *Fisher*, 604 S.W.3d at 399. In the absence of a fundamental right or a suspect class, reduced scrutiny, or “rational basis” review, applies, and under this test, “a statute will survive a constitutional challenge if any reasonably conceivable state of facts could provide a rational basis for its application of the statute.” *Id.*

Although the right to vote is a fundamental right and “expressly guaranteed under the Tennessee Constitution,” *id.* at 400, once a convicted felon loses her voting rights, she “lack[s] any fundamental interest to assert.” *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (affirming the grant of a motion for judgment on the pleadings regarding a constitutional challenge to Section 40-29-202); *see also Wesley*, 791 F.2d at 1261 (“[T]he right of felons to vote is not fundamental.”). Since the exclusion of felons from voting has “affirmative sanction” in the constitution, a state may permanently disenfranchise a felon “consistent with the Equal Protection Clause of the Fourteenth Amendment.” *See Richardson v. Ramirez*, 418 U.S. 24, 54-56 (1974) (reversing the Supreme Court of California’s conclusion that the Equal Protection Clause prevented the exclusion of “felons who have completed their sentences and paroles” from voting); *see also Jones v. Governor of Fla.*, 950 F.3d 795, 801 (11th Cir. 2020) (“Regardless of the political trend towards re-enfranchisement, there is nothing unconstitutional about disenfranchising felons—even all felons, even for life.”).

Plaintiff’s equal-protection claims fail under these standards. In Counts Two and Nine, Plaintiff alleges that strict scrutiny applies because Section 40-29-204 burdens the “fundamental” right to vote by treating her differently from other felons who may have their voting rights restored. (SAC, pp. 30-31; ¶¶ 95-100; p. 38, ¶¶ 136-39.) But the rational-basis test applies because Plaintiff,



as a convicted felon, “lack[s] any fundamental interest” to vote. *See Johnson v. Bredesen*, 624 F.3d at 746. Furthermore, disenfranchisement for conviction of an infamous crime is “consistent with” the equal-protection provisions of the Tennessee Constitution. *See Richardson*, 418 U.S. at 54-56; *Gaskin*, 661 S.W.2d at 867.

Permanent disenfranchisement passes rational-basis review. The General Assembly could rationally conclude that permanently depriving persons of their right to vote based on their conviction for certain offenses, including a felony conviction for an “Offense[] Against Administration of Government,” is necessary to protect the integrity of Tennessee’s elections. *See Tenn. Code Ann. §§ 39-16-503; 40-29-204(3)*. The General Assembly could also rationally conclude that persons convicted of certain offenses are unfit to “elect[] the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.” *See Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) (rejecting a felon’s equal-protection challenge to his disenfranchisement). These rational conclusions certainly apply here, where Plaintiff was convicted of tampering with or fabricating evidence, specifically, “fabricat[ing] a judicial complaint form to the Tennessee Board of Judicial Conduct against the general sessions judge who previously held [her] in criminal contempt” in violation of Section 39-16-503. *See Moses*, 2016 WL 4706707, at \*2. Because the General Assembly had a rational basis for enacting Section 40-29-204, the Court should dismiss Plaintiff’s equal-protection claims in Counts Two and Nine.

Plaintiff’s equal-protection claims in Counts Three and Ten are also subject to dismissal. Plaintiff alleges in these counts that permanent disenfranchisement violates equal protection because Section 40-29-204 was enacted with “the intent and effect of discriminating against Black Tennesseans.” (SAC, pp. 31-32, ¶¶ 101-104; p. 39, ¶¶ 140-43.) But the Tennessee Constitution’s

equal-protection provisions “do[] not provide for disparate impact claims.” *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 695-96 (Tenn. 2020); *see id.* at 696 (stating that “without evidence of discriminatory purpose, disparate impact alone does not violate the equal protection provisions”). As explained above, in Part B pp. 9-12, Plaintiff fails to sufficiently allege discriminatory purpose, i.e., that the General Assembly acted with discriminatory intent relative to the enactment of Section 40-29-204.

**E. Permanent disenfranchisement does not constitute cruel and unusual punishment. (Plaintiff’s Counts Four and Eight.)**

Plaintiff alleges in Counts Four and Eight that permanent disenfranchisement violates the Tennessee Constitution’s prohibition against cruel and unusual punishment, specifically, that permanent disenfranchisement is “penal in nature,” “grossly disproportionate,” and does not “comport with contemporary standards of decency.” (SAC, pp. 32-34, ¶¶ 106-14; pp. 37-38 ¶¶ 132-35.) But permanent disenfranchisement for a felony offense is not punishment, and even if it were, it cannot violate the Tennessee Constitution—since it is expressly sanctioned by the Tennessee Constitution. Counts Four and Eight should also be dismissed for failure to state a claim.

First, permanent disenfranchisement is a civil disability—it is not a punishment subject to the Tennessee Constitution’s prohibition on “cruel and unusual punishments.” *See* Tenn. Const., art. I, § 16. Civil-disability statutes “designate a particular civil disability that occurs upon the conviction and remains in effect throughout the defendant’s life unless restored by a specific statutory procedure.” *Cole v. Campbell*, 968 S.W.2d 274, 276 (Tenn. 1998). The loss of the right to vote is one such civil disability. *State v. Johnson*, 79 S.W.3d at 527. And since the purpose of that civil disability “is to designate a reasonable ground of eligibility for voting,” it serves “as a

nonpenal exercise of the power to regulate the franchise.” *See Trop v. Dulles*, 356 U.S. 86, 96-97 (1954) (Warren, C.J., plurality opinion). Because permanent disenfranchisement is an expression of the General Assembly’s “power to regulate the franchise” as a civil disability, rather than a punishment, *see id.*, it follows that such disenfranchisement cannot constitute “cruel and unusual punishment[.]” *See* Tenn. Const. art. I, § 16.

Second, even if permanent disenfranchisement were a “punishment,”<sup>6</sup> it would not be “cruel and unusual” under the Tennessee Constitution. The Tennessee Constitution affirmatively sanctions the disenfranchisement of a person found guilty of an infamous crime. *See Richardson*, 418 U.S. at 54-56; *Gaskin*, 661 S.W.2d at 867. Since the Tennessee Constitution must be interpreted “as a whole,” *see Mayhew*, 46 S.W.3d at 772, Plaintiff’s claim—which depends on there being internal inconsistency in the Constitution—cannot succeed. Indeed, other courts have rejected Plaintiff’s “internally inconsistent” interpretation and found that disenfranchisement does not violate the constitutional prohibition on cruel and unusual punishment. *See, e.g., Thompson v. Merrill*, 505 F. Supp. 3d 1239, 1266-67 (M.D. Ala. 2020); *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997).

**F. Permanent disenfranchisement does not violate due process.  
(Plaintiff’s Counts Five and Seven.)**

Finally, Plaintiff fails to state a claim upon which relief can be granted in Counts Five and Seven. In those counts, Plaintiff asserts that allowing persons to plead guilty to felonies “without notice” of their disenfranchisement violates both substantive and procedural due process. (SAC,

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<sup>6</sup> Defendants acknowledge that in *May v. Carlton*, 245 S.W.3d 340 (Tenn. 2008), the Supreme Court stated, for purposes of applying Tennessee’s habeas corpus statute, that “[l]aws disenfranchising convicted felons are penal in nature.” 245 S.W.3d at 349. In *Johnson v. Bredesen*, however, the Sixth Circuit observed that this statement in *May* lacked support in “law or logic.” 624 F.3d at 753-54.

pp. 34-35, ¶¶ 115-19; pp. 36-37, ¶¶ 124-130.) She also asserts that her permanent disenfranchisement “shocks the conscience.” (*Id.*, p. 28, ¶ 84.) But Tennessee law expressly provides for permanent disenfranchisement, and the General Assembly had a rational basis for permanently excluding some felons, including Plaintiff, from having their voting rights restored.

The Tennessee Constitution provides “[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.” Tenn. Const. art. I, § 8. The “law of the land” provision “is synonymous with the due process provisions of the federal constitution” contained in the Fourteenth Amendment. *Willis v. Tenn. Dep’t of Corr.*, 113 S.W.3d 706, 711 n.4 (Tenn. 2003) (internal quotation marks omitted).

Due process “encompasses both procedural and substantive protections.” *Lynch v. City of Jellico*, 205 S.W.3d 384, 391 (Tenn. 2006). Procedural due process requires a person to have “notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *Manning v. City of Lebanon*, 124 S.W.3d 562, 566 (Tenn. Ct. App. 2003). That is, a person must be provided with “fundamentally fair” procedures before being deprived of a right to or interest in life, liberty, or property. *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292, 309 (Tenn. 2005) (internal quotation marks omitted).

Substantive due process, by contrast, “limits oppressive government action.” *Lynch*, 205 S.W.3d at 391-92. Such claims are divided into two categories: (1) deprivations of a particular constitutional guarantee; and (2) actions by the government which are “arbitrary or conscience shocking in a constitutional sense.” *In re Walwyn*, 531 S.W.3d 131, 139 (Tenn. 2017) (internal quotation marks omitted). A statute that does not implicate a fundamental right must pass only rational basis review. *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997). For conduct to rise to a

“conscience-shocking level,” the conduct must be “intended to injure in some way unjustifiable by any government interest.” *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (internal quotation marks omitted). A legislative act, such as a statute that “appl[ies] to large segments of society,” “will withstand a substantive due process challenge if the government identifies a legitimate governmental interest that the legislative body could rationally conclude was served by the legislative act.” *Parks Props. v. Maury Cnty.*, 70 S.W.3d 735, 744 (Tenn. Ct. App. 2001).

In the context of criminal proceedings, “[d]ue process requires the State to provide fair notice to its citizens of prohibited conduct and potential consequences flowing from such conduct.” *State v. Smith*, 48 S.W.3d 159, 164 (Tenn. Crim. App. 2000). The General Assembly’s purpose in codifying criminal offenses and their corresponding penalties “precisely . . . provide[s]” such notice. *Id.* Further, “every citizen is presumed to know the law.” *Davis v. Metro. Gov’t of Nashville & Davidson Cnty.*, 620 S.W.2d 532, 535 (Tenn. Ct. App. 1981); *see also State v. Anderson*, 894 S.W.2d 320, 322 (Tenn. Crim. App. 1994) (stating that courts “presume that a person knows the law”). Accordingly, a person’s ignorance of the law provides “no basis for declaring [a] statute unconstitutional.” *Smith*, 48 S.W.3d at 164.

Permanent disenfranchisement comports with due process. As to procedural due process, Tennessee law provides meaningful notice to a person that she will be permanently disenfranchised upon conviction. *See Manning*, 124 S.W.3d at 566. The Tennessee Constitution empowers the General Assembly to remove the right to vote for those convicted of an infamous crime. *See Gaskin*, 661 S.W.2d at 867. After a person’s conviction for “any felony,” a court must declare her “infamous” and “immediately disqualif[y her] from exercising the right of suffrage.” *See Tenn. Code Ann. § 40-20-112*. As of 2006, felons convicted of “Offenses Against Administration of Government” are not eligible to have their right to vote restored. *See Tenn. Code Ann. § 40-29-*

204(3)(B). A person is “presumed to know th[ese provisions of] law” at the time of her criminal proceedings. *See Davis*, 620 S.W.2d at 535. By any measure, Tennessee law provides persons with notice of the “potential consequences”—including permanent disenfranchisement—flowing from their criminal conduct. *See Smith*, 48 S.W.3d at 164. That includes Plaintiff, who pled guilty to an offense that permanently disenfranchised her in 2016, long after the statute’s enactment in 2006. *See* Tenn. Code Ann. §§ 39-16-503; 40-29-204; *Moses*, 2016 WL 4706707, at \*2. *See also In re Walwyn*, 531 S.W.3d at 138 (finding that a person received “adequate notice of his range of possible punishment” based on the text of a Tennessee Supreme Court Rule).

Plaintiff’s substantive due process challenge is also meritless. First, convicted felons, including Plaintiff, do not have a fundamental right to vote. *See Johnson v. Bredesen*, 624 F.3d at 746. Because permanent disenfranchisement is accomplished by legislative act and does not implicate a fundamental right, the rational basis test applies. *Riggs*, 941 S.W.2d at 51; *Parks Props*, 70 S.W.3d at 744. As previously explained previously, in Part D at pp. 16-17, the General Assembly had a rational basis to conclude that permanent disenfranchisement is appropriate for persons convicted of an offense against administration of government.

Second, and similarly, permanent disenfranchisement does not rise to the level of shocking the conscience. *See Chavez*, 538 U.S. at 775. The Tennessee Constitution explicitly grants the General Assembly a legitimate and justified power to exclude felons from voting. At the time Plaintiff pled guilty to tampering with or fabricating evidence, Tennessee law provided that persons guilty of such offenses “shall never be eligible to register and vote.” Tenn. Code Ann. § 40-29-204(3)(B); *see Moses*, 2016 WL 4706707, at \*2. Plaintiff and other felons are presumed to know the law. *See Smith*, 48 S.W.3d at 164; *Davis*, 620 S.W.2d at 535. Indeed, the Criminal Court specifically found that Plaintiff “understood the direct and indirect consequences of” her

guilty plea. *Moses*, 2016 WL 4706707, at \*3. Nothing in the General Assembly’s exercise of its legitimate constitutional interest to disenfranchise felons permanently rises to the level of conscience-shocking conduct.

Finally, to the extent Plaintiff challenges the validity of her criminal conviction, this Court lacks jurisdiction to entertain it. “In Shelby County, . . . the criminal courts are separate from the circuit courts, and the circuit courts do not hear criminal matters.” *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 753 (Tenn. 2006). Plaintiff must initiate that challenge by filing a petition “with the clerk of the court in which the conviction occurred,” that is, the Shelby County Criminal Court, in accordance with the Post-Conviction Procedure Act. *See* Tenn. Code Ann. § 40-30-104(a).

**CONCLUSION**

For the reasons stated, the Court should grant Defendants’ motion to dismiss.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 7th day of December, 2022, a true and exact copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court’s electronic filing system to all parties indicated on the electronic filing report. Parties may access this filing through the Court’s electronic filing system. Additionally, a copy of the foregoing has been electronically mailed to the following:

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