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

PAMELA MOSES,	)	
	)	
Plaintiff,	)	**Case No. CT-1579-19**
	)	**Division I**
v.	)	
	)	**Felicia Corbin-Johnson**
STATE OF TENNESSEE, and	)	**Chief Judge**
HERBERT H. SLATERY III, Attorney General	)	**Judge L. Marie Williams**
and Reporter for the State of Tennessee,	)	**Judge Barry Tidwell**
	)	
Defendants.	)	

RESPONSE TO MOTION TO DISMISS

"*Resolved, That free persons of color, including Mulattoes, Mustees and Indians, were not parties to our political compact, nor were they represented in the Convention which framed the evidence of the compact, under which the free people of the State, and of the United States, are associated for civil government; nor are they recognized by our political fabrics as subjects of our naturalization laws; but on the contrary, are, by the Constitution and laws of the United States, prohibited from being brought to the United States, either as property, or as being within the scope or meaning of our provisions relating to naturalization and citizenship; and hence their supposed claim to the exercise of the great right of free suffrage, is, and shall be, not only not recognized, but prohibited.*

Resolved, That all free white men of the age of twenty-one years and upwards, who are natural born citizens of this State . . . shall be entitled to vote for members of either house o the General Assembly . . . ."

> Resolutions of Delegate G.W.L Marr, Tennessee Constitutional Convention of 1834, Monday, June 30, 1834.[1]

"The right to vote, so precious to Tennesseans during the Reconstruction Era, qualifies today as a fundamental liberty in a representative government and, when illegally abridged, should be restored . . . ."

> *May v. Carlton*, 245 S.W.3d 340, 347 (Tenn. 2008).

[1] Journal of the Convention of the State of Tennessee Convened for the Purpose of Revising and Amending the Constitution Thereof, 1834 at 107. Available at: https://www.google.com/books/edition/Journal_of_the_Convention_of_the_State_o/KBBmAAAAcAAJ

INTRODUCTION

There is no debate: Tennessee's felon disenfranchisement regime was born and raised during a series of explicitly racist and discriminatory constitutional conventions. Yet despite this, the State condemns the vast majority of Plaintiff's Second Amended Complaint as "little more than historical data." (Mem. in Supp. at 9.) Far from it – this "historical data" is both context and preliminary evidence of a system of constitutional provisions and statutes that have wide-ranging, life-altering effects on hundreds of thousands of Tennesseans, including Ms. Moses.

In essence, the State argues that because the challenged constitutional provisions and statutes are written down, then felon disenfranchisement must be constitutional. (*See, e.g.,* Mem. in Supp. at 1 ("While Plaintiff challenges the constitutionality of Tennessee's disenfranchisement statutes, permanent disenfranchisement on conviction of a felony is affirmatively sanctioned in the Tennessee Constitution . . . ."). This tautology (something has been adopted, therefore it is constitutional) ignores the entire substance of Ms. Moses' claims, i.e., that these provisions and statutes are unconstitutional *because* they have discriminatory impact and were passed with discriminatory intent; *because* they violate substantive due process; *because* they are unconstitutionally applied in the plea bargain setting; *because* they constitute cruel and unusual punishment; and *because* they infringe on the right to vote under the Free and Fair Elections clause.

Ms. Moses, on behalf of herself and seeking relief for the thousands of other similarly-situated Tennesseans, has brought a number of constitutional claims, some premised directly on the discriminatory intent and impact of this disenfranchisement regime; others premised on violations of due process, the Free and Fair Elections clause, and our constitution's ban on cruel and unusual punishment. The State ignores the standards of a Motion to Dismiss, hoping to prevent Ms. Moses from conducting discovery to support her claims and in an attempt to short-circuit this

entire matter. Ms. Moses, however, has more than adequately pled her claims as a matter of law, which is all that is required in the context of a Motion to Dismiss. What is more, cases evaluating constitutional challenges of all types routinely hold that, in Tennessee, plaintiffs are entitled to develop the record supporting their claims before judgment on the merits is rendered. For these reasons and the others contained herein, Ms. Moses respectfully requests that this Panel DENY the State's Motion to Dismiss.

LAW AND ARGUMENT

I. Legal Standard

A. Motion to Dismiss

"Tenn. R. Civ. P. 12.02(6) motions are rarely appropriate in declaratory judgment actions" such as this one. *Cannon Cnty. Bd. of Educ. v. Wade*, 178 S.W.3d 725, 726 (Tenn. Ct. App. 2005). Rather, the "prevailing rule is that when a party seeking a declaratory judgment alleges facts demonstrating the existence of an actual controversy concerning a matter covered by the declaratory judgment statute, the court should not grant a [Rule] 12.02(6) motion to dismiss but, instead, proceed to render a declaratory judgment as the facts and law require." *Parsley v. City of Manchester*, 2021 WL 6139210, at *4 (Tenn. Ct. App. Dec. 29, 2021) (emphasis added).[2]

More generally, the "sole purpose" of a 12.02(6) motion is "to test the legal sufficiency of the complaint." *Dobbs v. Guenther*, 846 S.W.2d 270, 273–74 (Tenn. Ct. App. 1992) (emphasis added). Such "motions are not favored, and are now rarely granted in light of the liberal pleading standards in the Tennessee Rules of Civil Procedure." *Id.* (emphasis added). Thus, "a complaint should not be dismissed, no matter how poorly drafted, if it states a cause of action." *Id.* (emphasis added). Therefore, "when a complaint is tested by a Tenn. R. Civ. P. 12.02(6) motion to dismiss,

[2] All unreported cases cited herein are attached as **Exhibit 1**.

[the court] must take all the well-pleaded, material factual allegations as true, and [it] must construe the complaint liberally in the plaintiff's favor." *Id.* (citations omitted). As such, "dismissal under Rule 12.02(6) has nothing to do with how many claims the non-moving party has stated in his complaint, or how good a job he did in explaining his contentions. Even a poorly drafted complaint . . . can result in the denial of a Rule 12.02(6) motion, if it states a claim that is cognizable under the law." *Norton v. Campbell*, 1998 WL 744230, at *4 (Tenn. Ct. App. Oct. 27, 1998) (emphasis added).

B. Level of Scrutiny

The development of the record in this case will be guided by the Court's application of strict scrutiny: "To withstand strict scrutiny, the legislation must be justified by a 'compelling state interest' and must be narrowly drawn to advance that interest." *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996), *abrogated on other grounds* by *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008)[3] (quoting *Hawk v. Hawk*, 855 S.W.2d 573, 579, 579 nn. 8, 9 (Tenn. 1993)); *see also*, *e.g., Johnston v. Davidson Cnty. Election Comm'n,* 2014 WL 1266343, at *3 (Tenn. Ct. App. Mar. 26, 2014) *perm. app. denied* ("In light of the express language guaranteeing the right to vote in Article I, § 57 and Article IV, § 18, and consistent with our holding in *Hargett*, we have determined that the right to vote is fundamental under the Tennessee Constitution and that, accordingly, a strict scrutiny analysis is the appropriate standard to be applied to our consideration of Mr. Johnston's challenge to Tenn. Code Ann. § 2–7–112(a)(1)(B). Under this standard, the legislation must be justified by a compelling state interest and must be narrowly drawn to advance that interest. *Hawk v. Hawk*, 855 S.W.2d 573, 579, and nn. 8, 9 (Tenn. 1993).").

[3] Overruling only the holding that the Declaratory Judgment Act contains an explicit waiver of sovereign immunity. As repeatedly recognized by Tennessee courts, the constitutional analysis in *Campbell* is still good law, and is cited often.

In *Campbell*, for example, the Plaintiff challenged the Homosexual Practices Act under the Equal Protection provisions of the Tennessee Constitution, as well as its Right to Privacy provisions. *Campbell,* 926 S.W.2d at 253. Much like this case, the State moved to dismiss, arguing that the Complaint presented only questions of law, not fact. *Id.* The trial court denied the motion and the case proceeded to discovery, eventually resulting in substantial discovery and affidavits of at least ten expert witnesses. *Id.* at 254. The trial court eventually granted summary judgment to the plaintiffs finding, based on the extensive record, that the State "had failed to show a compelling state interest sufficient to prohibit private sexual activity between consenting adults of the same sex." *Id.*

Strict scrutiny applies to the equal protection claims as pled by Plaintiff, because she is a member of a protected class and she has pled that the statutes and constitutional provisions at issue have an intentional and disparate impact[4] on that protected class. *Hughes v. Tennessee Bd. of Prob. & Parole*, 514 S.W.3d 707, 715 (Tenn. 2017) ("When analyzing the merit of an equal protection challenge, this Court has utilized the three levels of scrutiny—strict scrutiny, heightened scrutiny, and reduced scrutiny, which applies a rational basis test—that are employed by the United States Supreme Court depending on the right that is asserted. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (citations omitted). 'Strict scrutiny applies when the classification at issue: (1) operates to the peculiar disadvantage of a suspect class; or (2) interferes with the exercise of a fundamental right.'") (emphasis added); *State v. Whitehead*, 43 S.W.3d 921, 925 (Tenn. Crim. App. 2000) ("Suspect classifications include race, alienage, national origin, and gender.")

[4] *See, e.g., McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 696 (Tenn. 2020) ("Accordingly, without evidence of discriminatory purpose, disparate impact alone does not violate the equal protection provisions of the Tennessee Constitution.") (emphasis added).

The other causes of action apply to the right to vote, which the Tennessee Supreme Court has repeated categorized as a "fundamental" right also requiring the application of strict scrutiny when challenged.[5] *See, e.g., Fisher v. Hargett*, 604 S.W.3d 381, 400–03 (Tenn. 2020) ("It is beyond question that the right to vote is a 'precious' and 'fundamental' right. Even the most basic of other rights are 'illusory if the right to vote is undermined.' This fundamental right is expressly guaranteed under the Tennessee Constitution. *See* Tenn. Const. art. I, § 5; art. IV, § 1.") (internal citations omitted); *State v. Whitehead*, 43 S.W.3d 921, 925 (Tenn. Crim. App. 2000) ("Fundamental rights include voting, privacy, travel, and the freedoms of speech and association.")

Even if a lower level of scrutiny did apply, however, this does not dispense with the need for the development of a factual record. *See, e.g., State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (applying rational basis test, but noting that the plaintiff bringing the equal protection challenge must show that the "legislative classification is unreasonable," that "there is no bright-line rule by which to distinguish a reasonable from an unreasonable classification," that "'Reasonableness' varies with the facts in each case," and therefore examining the record to determine that the statute in question was unconstitutional even under the rational basis test); *see also, e.g., Fisher*, 604 S.W.3d at 403 (applying intermediate scrutiny under the *Anderson-Burdick* framework and examining the factual assertions and record evidence proffered by both sides in detail).

[5] The State has made a reference to a lower level of scrutiny being applied because Ms. Moses is a convicted felon, but (1) this is not the law in the State of Tennessee, and (2) the State conflates restoration statutes (i.e., statutes governing how a person *regains* his or her right to vote) with deprivation statutes (i.e., statutes that take away the fundamental right to vote in the first place). In other cases, the State may argue (wrongly, in Plaintiff's opinion) that a lower level of scrutiny applies to restoration statutes, but this reasoning does not apply to deprivation statues. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of 'a fundamental political right . . . preservative of all rights.'") (applying strict scrutiny).

C. Facial and As-Applied Challenges

The State repeatedly attempts to argue that because some of the claims in the Second Amended Complaint are labeled "facial" challenges, this makes them more susceptible to a Motion to Dismiss. As an initial matter, the difference between facial and as-applied challenges is not nearly as clear as the State makes it out to be; nor is such a label nearly as important. As the United States Supreme Court recently held:

> A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications. So classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding "breadth of the remedy," but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). Surely it would be strange for the same words of the Constitution to bear entirely different meanings depending only on how broad a remedy the plaintiff chooses to seek. *See Gross v. United States*, 771 F.3d 10, 14–15 (CADC 2014) ("'[T]he substantive rule of law is the same for both [facial and as-applied] challenges'").

Bucklew v. Precythe, __ U.S. __, 203 L. Ed. 2d 521 (Apr. 1, 2019) (emphasis added).

Tennessee follows the same rule. For example, in the recent *Fisher v. Hargett* case the Tennessee Supreme Court noted:

> Initially, it appeared that the parties disputed whether the plaintiffs' challenge to the constitutionality of Tennessee Code Annotated section 2-6-201(5)(C) and (D) was facial or as-applied. In truth, the dispute now appears more about the available scope of any injunctive remedy; that is, whether the trial court erred in issuing an injunction that applied to persons beyond the named plaintiffs. All parties now appear to recognize that the plaintiffs' constitutional claim is a hybrid; it has characteristics of both an as-applied challenge and a facial challenge. *See Green Party of Tenn. v. Hargett*, 791 F.3d 684, 691-92 (6th Cir. 2015) (" '[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.' In fact, a claim can have characteristics of as-applied and facial challenges: it can challenge more than just the plaintiff's particular case without seeking to strike the law in all its applications."

Fisher v. Hargett, 604 S.W.3d 381, 397 (Tenn. 2020) (emphasis added). Previously, the United States Supreme Court noted that "the distinction between facial and as-applied challenges is not

so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (emphasis added) (cited by the Sixth Circuit in *Green Party of Tenn. v. Hargett*, itself cited and quoted by the Tennessee Supreme Court in *Fisher v. Hargett*); *Doe #1 v. Lee*, 518 F. Supp. 3d 1157, 1180 (M.D. Tenn. 2021) ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases."); *see also, e.g., McCullen v. Coakley, 573 U.S. 464* (2014) (holding a portion of Massachusetts statute making it a crime to stand within 35 feet of entrance to a place where abortions are performed facially unconstitutional although the statute was proper in other respects); *City of Chicago v. Morales,* 527 US. 41, 51 & nn. 14-15, 55 (1999) (loitering ordinance facially invalid even though some applications were plainly constitutional).

II. All of The Claims Have Been Adequately Pled as a Matter of Law

Ms. Moses brings 10 claims in her Amended Complaint, all of which have been properly pled as a matter of law. They fall into four categories: (1) Equal Protection claims under Art. I, § 8 and Art. XI, § 8 of the Tennessee Constitution; (2) Cruel and Unusual Punishment Claims under Art. I, § 16 of the Tennessee Constitution; (3) Due Process claims under Art. I, § 8 of the Tennessee Constitution; and (4) Free and Fair Elections claims under Art. I, § 5 of the Tennessee Constitution.

A. Equal Protection Claims

To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff differently as compared to similarly situated persons and that such disparate treatment burdens a fundamental right or targets a suspect class. *Greenwood v. Tenn. Bd. of Parole*,

547 S.W.3d 207, 218 (Tenn. Ct. App. 2017) (citing *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011)) (internal citations and quotations omitted). Equal protection requires strict scrutiny of a legislative classification "when the classification interferes with the exercise of a 'fundamental right' (e.g., right to vote, right of privacy), or operates to the peculiar disadvantage of a 'suspect class' (e.g., age or race)." *Nat'l Gas Distribs. v. Sevier Cty. Util. Dist.*, 7 S.W.3d 41, 45 (Tenn. Ct. App. 1999) (emphasis added). Both are applicable and have been alleged here.

Ms. Moses has brought claims that the felon disenfranchisement structure in Tennessee (constitutional provisions *and* statutes) was "used for decades after the Civil War to discriminate and wrongfully prevent Black Tennesseans from voting" and that such a system "still do[es] so today." (Second Am. Compl. at ¶ 3.) The Second Amended Complaint goes on to describe both the discriminatory intent (*see, e.g., id.* at ¶¶ 3, 22, 29-38, 40-41, 44-51, 65, 70-76, 92, 123) and impact (*see, e.g., id.* at ¶¶ 5-9, 52-56, 63-68, 75, 92, 94, 102-104, 141-143) of the felony disenfranchisement regime. Of course, this regime impacts both a fundamental right (the right to vote) *and* a suspect class (race). *Nat'l Gas Distribs. v. Sevier Cty. Util. Dist.*, 7 S.W.3d 41, 46 (Tenn. Ct. App. 1999) ("While violations of equal protection have been found in cases where a statute is neutral on its face, but has a disparate impact on particular classes, those cases involve discrimination against suspect or quasi-suspect classes, like race, age, or gender.") (emphasis added) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); and *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979)). Ms. Moses has also brought equal protection claims on behalf of a class of *permanently* disenfranchised felons as compared to only temporarily disenfranchised felons, a class to which she also belongs. (Second Am. Compl. at ¶¶ 95-100, 136-139.) These claims implicate a

fundamental right (the right to vote) and, as Ms. Moses believes discovery will bear out, a suspect class (race).

The State cites *Crutchfield v. Collins*, 607 S.W.2d 478, 482 (Tenn. Ct. App. 1980), *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983), and *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) for the proposition that felon disenfranchisement *in general* is permissible. These cases, however, are in no way dispositive of the claims Ms. Moses brings. *Crutchfield* reviewed a Free and Fair Elections Clause (i.e., Art. I, § 5) claim (just like Ms. Moses) but simply ruled that the provisions of the Tennessee Constitution authorizing felon disenfranchisement (which the *Crutchfield* plaintiffs did not challenge) were not self-executing and that the convictions of the plaintiffs did not contain a "declaration of infamy or disfranchisement as required by the statutes." *Crutchfield*, 607 S.W.2d at 481-82. There was no discussion of a challenge to the constitutional provisions themselves (as Ms. Moses brings under *Hunter v. Underwood*) or the disenfranchising statutes themselves (as Ms. Moses also brings). *Crutchfield* was simply determining whether the plaintiffs' specific convictions warranted disenfranchisement based on what the actual judgments of conviction said.

Gaskin was about the retroactive application of felon disenfranchisement, which the Court held was unconstitutional. *Gaskin*, 661 S.W.2d at 868. Interestingly enough, however, the *Gaskin* Court also evaluated a Free and Fair Elections Clause (i.e., Art. I, § 5) claim, and used historical evidence developed at the trial court level in its decision, just as Ms. Moses asks this Panel to do. *Id.* at 867-68. *Wesley* was a challenge to disenfranchisement under federal law (specifically the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment). *Wesley*, 791 F.2d at 1257. While the Sixth Circuit recognized that under federal law felon disenfranchisement is permissible under the Fourteenth Amendment, this does not implicate Ms. Moses' claims at all. *Id.* at 1261.

More specifically, the State argues that Ms. Moses fails to allege discriminatory intent on the part of the Tennessee Legislature in enacting the felon disenfranchisement statutes at issue, but

there are two problems with this argument: (1) Ms. Moses does plead the elements of a "traditional" equal protection/discrimination claim and (2) the State ignores the direct application of *Hunter v. Underwood*, 471 U.S. 222 (1985), in which the United States Supreme Court expressly held that a constitutional disenfranchisement provision can be struck down based on proof of it being adopted with discriminatory intent, a claim which Ms. Moses has more than adequately pled.

1. "Traditional" Equal Protection Claims

Ms. Moses has challenged the disenfranchisement statutes directly in the Second Amended Complaint. (*See, e.g.,* Second Am. Compl. at ¶ 102 ("Tennessee's Permanent Disenfranchisement Statutes also violate the Equal Protection Guarantee because the statutes have the intent and effect of discriminating against Black Tennesseans. The continued permanent disenfranchisement of thousands of people disproportionately impacts Black Tennesseans and deprives Black communities of substantially equal voting power. This differential treatment and cannot withstand any level of constitutional scrutiny.") (emphasis added); ¶ 123 (". . . the fact that the Permanent Disenfranchisement Statutes and their predecessors were enacted with the intent, and effect of, discrimination against Black persons—a class to which Plaintiff belongs—her constitutional right to a free and fair election means that the Permanent Disenfranchisement Statutes are unconstitutional as applied to her.") (emphasis added).

As explained by the Tennessee Supreme Court in the context of a constitutional challenge to the death penalty, a defendant "who asserts an equal protection violation must prove (1) the existence of purposeful discrimination and (2) that this purposeful discrimination had a discriminatory effect on him or her." *State v. Banks*, 271 S.W.3d 90, 155–56 (Tenn. 2008) (citing *McCleskey v. Kemp,* 481 U.S. 279 (1987) and *State v. Irick,* 762 S.W.2d 121, 129 (Tenn. 1988)).

As to purposeful discrimination, the plaintiff "must prove that a discriminatory purpose was one of the factors that motivated the decision-maker." *Id.* (citing *Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 265–66 (1977)). And while, "without evidence of discriminatory purpose, disparate impact alone does not violate the equal protection provisions of the Tennessee Constitution," "[s]tatistical proof may be used to prove the existence of a discriminatory purpose in limited circumstances. In rare cases, it can provide the sole evidence of discriminatory purpose, but to do so, it must depict a stark pattern of discrimination that is unexplainable on other grounds. *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 696 (Tenn. 2020) (citing *McCleskey*, 481 U.S. at 293–94 and *Arlington Heights*, 429 U.S. at 266) (emphasis added); *Banks*, 271 S.W.3d at 156 (emphasis added). Again, Ms. Moses has alleged both discriminatory purpose (*see supra*) and discriminatory impact (*see supra*). And, in keeping with *McClay*, Ms. Moses has even cited statistics in support of her equal protection claims (*id.* at ¶¶ 7-9), and anticipates that forthcoming discovery will prove the statistical claims she has made.

2. *Hunter v. Underwood* Equal Protection Claims

Much of Ms. Moses' Second Amended Complaint goes to a very different type of equal protection challenge under the United States Supreme Court case *Hunter v. Underwood*. In that case, the United States Supreme Court struck down a disenfranchisement provision of the Alabama Constitution, finding that it violated principles of equal protection. *Hunter v. Underwood*, 471 U.S. 222 (1985). In particular, the Court concurred in the overruling of the district court, which had found that, though the "disenfranchisement of blacks was a major purpose for the convention at which the Alabama Constitution of 1901 was adopted . . . there had not been a showing that 'the provisions disenfranchising those convicted of crimes [were] based upon the racism present at the constitutional convention'" and that "proof of an impermissible motive for the provision would

not warrant its invalidation in face of the permissible motive of 'governing exercise of the franchise by those convicted of crimes.'" *Id.* at 224–25 (emphasis added). As a side note, this is exactly the argument the State makes in its Motion to Dismiss. (*See, e.g.,* Mem. in Supp. at 16 ("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.'").)

The Supreme Court upheld the reversal of the District Court's decision by the Eleventh Circuit:

> [T]he court [of appeals] first determined that the District Court's finding of a lack of discriminatory intent in the adoption of § 182 was clearly erroneous. After thoroughly reviewing the evidence, the court found that discriminatory intent was a motivating factor. It next determined from the evidence that there could be no finding that there was a competing permissible intent for the enactment of § 182. Accordingly, it concluded that § 182 would not have been enacted in absence of the racially discriminatory motivation, and it held that the section as applied to misdemeanants violated the Fourteenth Amendment. It directed the District Court to issue an injunction ordering appellants to register on the voter rolls members of the plaintiff class who so request and who otherwise qualify. We noted probable jurisdiction, 469 U.S. 878, 105 S.Ct. 241, 83 L.Ed.2d 180 (1984), and we affirm.

Hunter, 471 U.S. at 225 (emphasis added). The Court went on to find that, though the constitutional provision was facially neutral, the discriminatory impact was irrefutable, and the evidence of a discriminatory purpose was likewise compelling:

> Section 182 on its face is racially neutral, applying equally to anyone convicted of one of the enumerated crimes or a crime falling within one of the catchall provisions. Appellee Edwards nonetheless claims that the provision has had a racially discriminatory impact. The District Court made no finding on this claim, but the Court of Appeals implicitly found the evidence of discriminatory impact indisputable:
>
> > "The registrars' expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as

> whites to suffer disfranchisement under section 182 for the commission of nonprison offenses." 730 F.2d, at 620.
>
> So far as we can tell the impact of the provision has not been contested, and we can find no evidence in the record below or in the briefs and oral argument in this Court that would undermine this finding by the Court of Appeals.

Id. at 227 (emphasis added). The Court went on to apply the *Arlington Heights* factors for equal protection claims and concluded that while "understandably no 'eyewitnesses'" to the 1901 proceedings testified, "testimony and opinions of historians were offered and received without objection. These showed that the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 228–29 (emphasis added). This was in spite of the fact that the State contended that it had "a legitimate interest in denying the franchise to those convicted of crimes involving moral turpitude, and that § 182 should be sustained on that ground." *Id.* at 232. The Court concluded that, without revisiting prior precedent on felon disenfranchisement, it was "confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment." *Id.* at 233.

These are, of course, exactly the claims that Ms. Moses has brought in the Second Amended Complaint, and the purpose of the "historical data" (Mem. in Supp. at 9) the State so casually dismisses. Ms. Moses has pled in great detail how the constitutional provisions at issue were adopted with discriminatory intent and impact, and that the purpose of these provisions was to disenfranchise Black Tennesseans. (*See, e.g.,* Second Am. Compl. at ¶¶ 3, 5-9, 22, 29-38, 40-41, 44-56, 63-68, and 70-76.) Just like in *Hunter v. Underwood*, Ms. Moses anticipates disclosing additional historical proof as well as expert testimony on the impact of the felon disenfranchisement regime on Black Tennesseans. These claims also directly impact the statutes being challenged. The essential core of Ms. Moses' Second Amended Complaint is that the two

clauses in the Tennessee Constitution permitting felon disenfranchisement (without which the challenged statutes could not have been passed) were adopted with explicit discriminatory intent and effect and that, if those two constitutional provisions fall—as the constitutional provision did in *Hunter v. Underwood*—then the two statutes must fall as well. The State tacitly acknowledges this argument, noting (incorrectly) that Ms. Moses "makes no claim that Section 40-29-204 'carried forward' any discriminatory criteria from a previous law." (Mem. in Supp. at 12.)

Missing the *Hunter v. Underwood* challenge entirely, the State relies on *Abbot v. Perez* and similar cases to argue that Ms. Moses has not pled that the Tennessee legislature, in enacting the challenged statutes, acted with discriminatory intent. As discussed above, Ms. Moses has indeed adequately pled such claims sufficient to withstand a motion to dismiss, but this argument misses the broader point: Unlike in *Abbot* (or the other cases cited, e.g., *Kemp*, *Webb*, *Greater Birmingham*, and *Wesley*), Ms. Moses is challenging provisions of the Tennessee Constitution, not *just* statutes.[6] In addition to adequately pleading the "traditional" equal protection claims, Ms. Moses has also adequately pled her *Hunter v. Underwood* equal protection claims.

B. Cruel and Unusual Punishment Claims

Article I, Section 16 of the Tennessee Constitution requires that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Tenn. Const. Art. I, § 16. To state a claim for cruel and unusual punishment, a plaintiff must address the three-prong analysis adopted by the Tennessee Supreme Court in order to determine whether a punishment constitutes cruel and unusual punishment under Art. 1 § 16: "First, does the punishment for the crime conform with contemporary standards of decency? Second, is the

[6] To the extent this is unclear *and* the Panel believes that dismissal is warranted on this basis, Ms. Moses would seek leave to amend to clarify that her challenge is both to the constitutional provisions permitting felony disenfranchisement and to the companion statutes that rely on those constitutional provisions.

punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?" *Van Tran v. State*, 66 S.W.3d 790, 800 (Tenn. 2001).

Ms. Moses has adequately pled such claims as well. The Tennessee Supreme Court has unequivocally held that "[l]aws disenfranchising convicted felons are penal in nature." *May v. Carlton*, 245 S.W.3d 340, 349 (Tenn. 2008) (emphasis added). Thus, the State's entire argument, i.e., that "permanent disenfranchisement is a civil disability—it is not a punishment subject to the Tennessee Constitution's prohibition on 'cruel and unusual punishments'" (Mem. in Supp. at 18 (emphasis added)) fails out of the gate.[7] Ms. Moses has pled that permanent disenfranchisement violates all three prongs of the *Van Tran* test (Second Am. Compl. at ¶¶ 110-114, 133-135) and has raised additional allegations about the effect of such punishments (i.e., going to the "grossly disproportionate" and "necessary to accomplish" prongs). (Second Am. Compl. at ¶¶ 5-9, 133-135.) Whether, of course, disenfranchisement—as a punishment—is *cruel and unusual* requires development of the record (as discussed below), contrary to the State's perfunctory claim that since felon disenfranchisement is permitted by the Tennessee Constitution (under the provisions challenged by Ms. Moses in her *Hunter v. Underwood* challenge), it cannot possibly be cruel and unusual. (Mem. in Supp. at 19.) This puts the cart before the horse and ignores the *Van Tran* factors in any case, factors which require development of proof in the record.[8]

[7] The State purports to "acknowledge" this holding of the Tennessee Supreme Court, and cites a Sixth Circuit case for the proposition that this holding "lacked support in 'law or logic'" (Mem. in Supp. at 19, n.6). This—of course—is wholly insufficient to overrule the Tennessee Supreme Court's holding, by which this Panel is bound.

[8] The cases cited by the State are not to the contrary. *Thompson v. Merrill* was decided on summary judgment after extensive record and evidentiary development. *See* 505 F. Supp. 3d 1239, 1248 (M.D. Ala. 2020) ("The factual context of each is important to the claims raised. Therefore, in addition to the facts underlying the Plaintiffs' claims as construed in a light most favorable to the non-movants, the Court also sets out the historical setting of the statutes."). *Farrakhan* involved a tacked-on Eighth Amendment claim to federal constitutional claims. In light of the Supreme Court's decision permitting felon disenfranchisement in some instances under the 14th Amendment, the Court declined to consider this tacked-on claim and focused instead on equal protection claims. There appear to have been

C. Due Process Claims

According to the Tennessee Supreme Court, "persons invested with the right to vote can be deprived only 'by due process of law.'" *May v. Carlton*, 245 S.W.3d 340, 346 (Tenn. 2008). A claim of denial of due process "must be analyzed with a two-part inquiry: (1) whether the interest involved can be defined as 'life,' 'liberty' or 'property' within the meaning of the Due Process Clause; and if so (2) what process is due in the circumstances." *Willis v. Tenn. Dep't of Corr*., 113 S.W.3d 706, 711 (Tenn. 2003) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972) and *Rowe v. Bd. of Educ*., 938 S.W.2d 351, 354 (Tenn. 1996)). The relative weight of an individual's interest is "relevant to the extent of due process to which one is entitled." *Id.*

Due process under the Tennessee Constitution encompasses both procedural and substantive protections. A court considers three factors in determining the procedural due process protections required by a particular situation:

> (1) the private interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Willis, 113 S.W.3d at 711-12 (citing *State v. Culbreath*, 30 S.W.3d 309, 317-18 (Tenn. 2000)).

Substantive due process "bars oppressive government action regardless of the fairness of the procedures used to implement the action," *Mansell v. Bridgestone Firestone N. Am. Tire*, 417 S.W.3d 393, 409 (Tenn. 2013), and it protects rights "that are fundamental to our system of ordered liberty." *Brooks v. Bd. of Prof'l Responsibility*, 578 S.W.3d 421, 427 (Tenn. 2019). "In evaluating a claim for the violation of an individual's substantive due process rights, a plaintiff must establish

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no serious factual allegations or arguments around the Eighth Amendment claim in that case, and the Court there dispensed with the Eighth Amendment claims, the Fifth Amendment claims, and the First Amendment claims in less than ten sentences. *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997).

two elements: (1) That he has a constitutionally protected property or liberty interest and (2) that defendants arbitrarily and capriciously deprived him of that interest." 6A Tenn. Juris. § 74 (2022)

The State simply makes a conclusory argument that because felon disenfranchisement is constitutional (a premise challenged throughout the Second Amended Complaint) and that because persons are "presumed" to know the law, then "Tennessee law provides meaningful notice to a person that she will be permanently disenfranchised." (Mem. in Supp. at 21-22.) This cursory analysis of Ms. Moses' procedural due process claims ignores the entire body of law regarding direct and collateral consequences, and what a defendant must be apprised of before a plea is knowingly, intelligently, and voluntarily made. *See Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010) ("To pass constitutional muster under the Due Process Clause of the United States Constitution, a guilty plea must be entered knowingly, voluntarily, and intelligently. *North Carolina v. Alford,* 400 U.S. 25, 31 (1970); *Brady v. United States,* 397 U.S. 742, 747 (1970); *Boykin v. Alabama,* 395 U.S. 238, 242–44 (1969); *State v. Mackey,* 553 S.W.2d 337, 340 (Tenn. 1977)." [*superseded on other grounds by* Tenn. R. Crim. P. 37(b) and Tenn. R. App. P. 3(b)]).

The State's argument also ignores Ms. Moses' substantive due process challenge that the felon disenfranchisement regime in Tennessee constitutes "oppressive government action," *Mansell*, 417 S.W.3d at 409, and interferes with rights "that are fundamental to our system of ordered liberty" because of its racist and oppressive origins, administration, and impact. *Brooks*, 578 S.W.3d at 427. If Ms. Moses is correct that the felon disenfranchisement structure is rife with discriminatory intent, administration, and impact, then the structure will indeed be deemed "oppressive government action" and the loss of the franchise will be deemed an "arbitrary and capricious deprivation" of that fundamental right.

As to the direct consequences of conviction (i.e., procedural due process) claim, Plaintiff has adequately pled that she and other Defendants are not advised as to the fact that pleading guilty to a felony will lead to an automatic loss of voting rights, sometimes permanently. (*See, e.g.,* Second Am. Compl. at ¶¶ 80-81, 85-86, 119, 123, and 125-130.) Under applicable law, this automatic imposition of a penal consequence (*see May v. Carlton*, discussed *supra*) is a direct consequence of conviction and, as such, defendants must be so advised, otherwise violations of both substantive and procedural due process occur. *C.f., e.g., Ward v. State*, 315 S.W.3d 461, 476 (Tenn. 2010) ("In summary, we hold that the mandatory sentence of lifetime supervision imposed in addition to other statutorily authorized punishment is a direct and punitive consequence of a plea of guilty to the crimes enumerated in Tennessee Code Annotated section 39–13–524(a). Consequently, trial courts have an affirmative duty to ensure that a defendant is informed and aware of the lifetime supervision requirement prior to accepting a guilty plea."). In any case, Ms. Moses has more than adequately pled these claims to withstand a motion to dismiss and proceed to discovery, as is necessary to prove such claims. *See infra*.

So too with Ms. Moses' "oppressive government action" due process claims. As explained herein, Ms. Moses has pled in significant detail the racist and discriminatory origins, intent, administration, and impact of the felon disenfranchisement regime. (*See, e.g.,* Second Am. Compl. at ¶¶ 3, 5-9, 22, 29-38, 40-41, 44-56, 63-68, and 70-76.) These allegations are more than sufficient to make out substantive due process claims and, as such, are sufficient to withstand the State's Motion to Dismiss.

D. Free and Fair Elections Claims

Multiple Free and Fair Elections claims have been litigated in Tennessee courts, and it is clear that Art. I § 5 of the Tennessee Constitution is a sufficient basis on which to bring those

claims. For example, in *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 899 (Tenn. 1987), the Tennessee Supreme Court—though eventually finding the statute at issue constitutional—considered a Free and Fair Elections challenge and applied strict scrutiny to the extensive record developed below. *See id.* at 899-900; *see id.* at 901 ("Article I, § 5, of our Constitution further provides that the elections in this State 'shall be free and equal,' and Article XI, § 10, encourages internal improvements in the State. Moreover, the effective exercise of the right to vote is essential to the continued existence of democratic institutions. That the right to vote is individual and fundamental is not only recognized in the Tennessee Constitution, but the Constitution of the United States contains not less than four amendments preserving and protecting this right."); *see also, e.g., State ex rel. Hooker v. Thompson*, 249 S.W.3d 331, 338 (Tenn. 1996) ("[A]lso it has previously been held that the "free and equal" requirement relates only to the rights of suffrage and not the nature of elections.") (emphasis added); *City of Memphis v. Hargett*, 414 S.W.3d 88, 101 (Tenn. 2013) ("The Plaintiffs argue that the Act creates an undue burden on their right to vote in violation of article I, section 5 of the Tennessee Constitution.").

A claim for violation of the Free and Fair Elections Clause requires the plaintiff to allege that the individual "has been denied the free exercise of suffrage." *Mills v. Shelby Cty. Election Comm'n*, 218 S.W.3d 33, 41 (Tenn. Ct. App. 2006) (affirming the dismissal of an Art. I § 5 claim because the plaintiff "[made] no allegation that he, or any other voter, has been denied the free exercise of suffrage as a result of the use of electronic voting machines"). Under these cases, Ms. Moses has adequately pled her Free and Fair Elections claims. She has pled that the statutes and constitutional provisions at issue illegally and discriminatorily affect her right of suffrage under Art. I § 5 and has explained how that right is being illegally restrained. (*See supra*.) This is all that

is required at this stage of the litigation and, as such, the State's Motion to Dismiss these claims should be denied.

III. All of the Claims Require Discovery and Development of the Record

Even if there were some doubt as to whether Ms. Moses had adequately pled her claims, however, it is clear that these types of claims require the development of a factual record before the Panel can rule on the merits. On a Motion to Dismiss, the State can only prevail if Plaintiff can show no set of facts that would entitle her to relief on any claim. *See, e.g., Fuerst v. Methodist Hosp. S.*, 566 S.W.2d 847, 848 (Tenn. 1978) ("It is well established that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.'"); *see also, e.g., Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436 (Tenn. 2012) (reversing 12.02 dismissal of claims based on statute of limitations to give the plaintiff a chance to discover facts supporting his discovery rule, fraudulent concealment, and equitable estoppel claims); *id.* at 467 ("Ultimately, the decisions regarding the Diocese's alleged fraudulent concealment of its knowledge of and responsibility for Fr. Guthrie's conduct and Mr. Redwing's diligence in pursuing his claim against the Diocese will require further development of the facts through discovery." (emphasis added)).

As explained by the Tennessee Supreme Court in a constitutional challenge to the death penalty, a defendant "who asserts an equal protection violation must prove (1) the existence of purposeful discrimination and (2) that this purposeful discrimination had a discriminatory effect on him or her." *State v. Banks*, 271 S.W.3d 90, 155–56 (Tenn. 2008) (citing *McCleskey v. Kemp,* 481 U.S. 279 (1987) and *State v. Irick,* 762 S.W.2d 121, 129 (Tenn. 1988)) (emphasis added). Thus, the defendant must prove that a discriminatory purpose was one of the factors that motivated the decision-maker. *Id.* (citing *Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 265–

66 (1977)). Moreover, "[s]tatistical proof may be used to prove the existence of a discriminatory purpose in limited circumstances" and in "rare cases, it can provide the sole evidence of discriminatory purpose . . . ." *Id.* (citing *McCleskey*, 481 U.S. at 293–94 and *Arlington Heights*, 429 U.S. at 266.).

The same is true of cruel and unusual punishment claims (which require development of the record as to the *Van Tran* factors) and due process claims (which require development of the record as to what process is afforded and how, and whether the government's action can be considered "oppressive"). *See, e.g., Abdur'Rahman v. Bredesen*, 2004 WL 2246227, at *3 (Tenn. Ct. App. Oct. 6, 2004), *aff'd*, 181 S.W.3d 292 (Tenn. 2005) (applying extensive factual record developed at the trial court record to the *Van Tran* factors); *In re Walwyn*, 531 S.W.3d 131, 138 (Tenn. 2017) (applying extensive factual record to determination of both substantive and procedural due process claims).

Finally, the free and fair elections claims hinge on the exact facts underlying the equal protection and due process claims, i.e., whether the governmental action in taking away Ms. Moses' (and other felons') right to vote was and is being done in a manner that is oppressive, violates equal protection, and/or which violates the fundamental premise of our Tennessee Constitution. This, of course, requires the development of a factual record to determine whether the fundamental right to vote guaranteed by Art. I, § 5 has been infringed. *See, e.g., Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 899 (Tenn. 1987) (reviewing extensive factual record developed at trial to determine whether a violation of Art. I, § 5 of the Tennessee Constitution (i.e., the Free and Fair Elections Clause) had occurred).

Constitutional cases in Tennessee—whether labeled "facial" or "as-applied," or whether being tested under strict scrutiny, intermediate scrutiny, or rational basis review—uniformly

require development of the factual record before being decided on the merits. *See, e.g., West v. Schofield*, 519 S.W.3d 550, 556 (Tenn. 2017) (extensive factual record developed in course of facial challenge to lethal injection protocol); *Abdur'Rahman*, 2004 WL at *3 (same) ("On May 6, 2003, the chancery court granted the State's motion to dismiss all the counts of Mr. Abdur'Rahman's Tenn. Code Ann. § 4-5-225 petition except for his constitutional claims. Following a bench trial on May 29, 2003, the chancery court filed a memorandum and order . . . ."); *State v. Booker*, 656 S.W.3d 49, 64 (Tenn. 2022) (Tennessee Supreme Court, in striking down Tennessee's mandatory life sentence for juvenile homicide offenders as cruel and unusual, examining, among other extensive facts, the "evidence presented at [the appellant's] juvenile transfer hearing, proof at trial, and evidence proffered at the hearing on the motion for new trial" as well as expert testimony in context of the second "cruel and unusual" inquiry prong); *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 526 (Tenn. 1993) (facial challenge to obscenity statute requiring substantial record proof and testimony (both lay and expert)); *City of Memphis v. Hargett*, 414 S.W.3d 88, 107 (Tenn. 2013) (evaluating proof with respect to as-applied challenge to Voter ID law); *Fisher v. Hargett*, 604 S.W.3d 381, 391 (Tenn. 2020) (evaluating competing evidence developed at the trial court level in context of constitutional challenge to voting procedures in light of the COVID-19 epidemic); *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (applying rational basis test but noting that "reasonableness" "varies with the facts in each case" and therefore examining the record to determine that the statute in question was unconstitutional even under the rational basis standard).

In similar contexts in other states, the need for discovery is also clear. For example, in a recent comparable case out of North Carolina, the North Carolina Supreme Court considered the issue of evidentiary support of allegations of discriminatory intent (in the voter ID context), and

found that—despite *Abbott v. Perez*, 138 S. Ct. 2305, 201 L. Ed. 2d 714 (June 25, 2018), cited repeatedly by the State in its Motion—the "extensive" discovery and testimony in that case established discriminatory intent, despite a facially neutral law. *See Holmes v. Moore*, 881 S.E.2d 486, 493 (N.C. 2022) ("In reaching its final decision in this case, the three-judge panel held a three week trial, and created a lengthy six volume record, of over one thousand pages, which included extensive discovery from both parties."); *id.* at 498 ("The trial court concluded that the historical context in which the General Assembly enacted S.B. 824 supported the inference that the measure had been passed with the intent to discriminate against African-American voters. The trial court based this conclusion on extensive testimony by expert historians . . . ."); *see also, e.g., Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 725 (S.D. Tex. 2017) (finding discriminatory intent on the part of local legislators and mayor in adopting dilutive city council map based largely on emails exchanged between the defendants, testimony of multiple witnesses, and extensive discovery materials); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 201 (2008) (evaluating extensive record developed below in a facial voter ID constitutional challenge).

Ms. Moses has diligently and more than adequately pled her claims and should be permitted to proceed with discovery and expert proof so that she can bring forth the facts to prove them. In the alternative, however, if the Court believes that any of claims are insufficiently pled, the remedy is to allow (1) amendment and (2) discovery, if necessary, to support that amendment. The legislative history for the enactment of these statutes is largely unavailable to the public (i.e., any analyses, memoranda, communications, and other documents surrounding the drafting and adoption of the statutes); without such information, Ms. Moses cannot adequately flesh out her equal protection, free and fair elections, and other claims.

CONCLUSION

The State's Motion to Dismiss can be summed up as follows: The Tennessee Constitution says that felons can be disenfranchised; the statutes say that felons can be disenfranchised; Ms. Moses is a felon; therefore, the State wins on all of her claims. This formulaic recitation, however, completely ignores *Hunter v. Underwood* and the myriad of other challenges that Ms. Moses has brought against the very foundation of those constitutional provisions and statutes. Ms. Moses has brought well-established legal claims (equal protection, due process, etc.) and has more than adequately pled them. The State has alleged no absolute bar to her claims (e.g., sovereign immunity, statute of limitations, etc.) that would justify dismissal. As such, the State's Motion should be denied and this case should proceed to discovery and trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served via email and the Court's electronic filing system on February 14, 2023, as follows:

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