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

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

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

As Defendants have previously discussed, the Tennessee Constitution permits the General Assembly to enact laws to regulate the franchise for those convicted of an infamous crime, i.e., any felony. (Mem. in Support Defs.' Mot. to Dismiss ("Mem. Defs."), 2-3.) In 2006, the General Assembly enacted a race-neutral statute providing procedures for restoration of the right of suffrage but also providing that felons convicted of specified offenses "shall never be eligible to register and vote in this state." 2006 Tenn. Pub. Acts, ch. 860, § 1, codified at Tenn. Code Ann. § 40-29-204 (as amended). As with any act passed by the General Assembly, that statute enjoys a strong presumption of validity. (Mem. Defs., 8.)

Plaintiff opposes Defendants' motion to dismiss, but her response is flawed. Plaintiff relies on claims that are simply not raised in her Second Amended Complaint ("SAC") and misconstrues the analytical framework for adjudication of constitutional challenges to Tennessee statutes.

Defendants maintain that the Court should dismiss Plaintiff's SAC for failure to state a claim upon which relief may be granted. *See* Tenn. R. Civ. P. 12.02(6).

ARGUMENT

A. Plaintiff has asserted no claim challenging a provision of the Tennessee Constitution.

Plaintiff says that she is "challenging provisions of the Tennessee Constitution, not *just* statutes"—that "[t]he essential core of [her SAC] is that the two clauses in the Tennessee Constitution permitting felon disenfranchisement . . . were adopted with explicit discriminatory intent and effect and that, if those two constitutional provisions fall[,] . . . then the two statutes [Tenn. Code Ann. §§ 40-29-105(c)(2)(B) and 40-29-204] must fall as well." (Pl.'s Resp. to Mot. to Dismiss ("Pl.'s Resp."), 14-15 (emphasis in original).) Accordingly, Plaintiff seems to insist, the historical data that dominates her complaint is probative and supportive of her claims. (Pl.'s Resp., 2, 9.) But the fundamental flaw in this assertion is that Plaintiff's complaint includes *no claim* challenging a provision of the Tennessee Constitution. (SAC, 29-41.)

Plaintiff repeatedly likens her claims to the claim at issue in *Hunter v. Underwood*, 471 U.S. 222 (1985). (Pl.'s Resp., 2, 10, 11, 12, 14, 15.) But *Hunter* involved a claim that a provision of the Alabama Constitution was unconstitutional *under the Fourteenth Amendment* to the United States Constitution. 471 U.S. at 233. Plaintiff herself acknowledges that none of her claims are brought under the Fourteenth Amendment, or any other provision of the Federal Constitution. (Pl.'s Resp., 8.)

Insofar as Plaintiff is suggesting that her claims allege that the disenfranchisement provisions of the Tennessee Constitution violate *other* provisions of the Tennessee Constitution, the SAC belies such a suggestion. Plaintiff asserts in her SAC that "the claims in this suit . . .

challenge an official interpretation of Tennessee *statutes*" (SAC, 6 at ¶ 20 (emphasis added)). Indeed, each one of Plaintiff's 10 claims unambiguously challenges the constitutionality of "Tennessee's Permanent Disenfranchisement *Statutes*" or "the General Assembly's *statutes*." (SAC, 30 at ¶ 94; 31 at ¶ 98; 32 at ¶ 102; 32 at ¶ 107; 35 at ¶ 119; 36 at ¶ 123; 37 at ¶ 130; 37 at ¶ 132; 38 at ¶ 137; 39 at ¶ 141.) And Plaintiff's requests for relief ask the Court to declare that "TCA § 40-29-105 and § 40-29-204 are unconstitutional." (SAC, 39-40.)[1]

Nor would this Court have subject-matter jurisdiction to entertain a Tennessee-Constitution-based challenge to the disenfranchisement provisions of the Tennessee Constitution anyway. First, one provision of the Tennessee Constitution cannot be interpreted so as "to impair or destroy another provision." *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010); *see also Leandro v. North Carolina*, 488 S.E.2d 249, 258 (N.C. 1997) ("It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself."). Second, the Tennessee Declaratory Judgment Act, under which Plaintiff brings this action, provides only that "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise[] may have determined any question of construction or validity arising under the . . . statute, ordinance, contract, or franchise." Tenn. Code Ann. § 29-14-103. The Act does not grant a person the right to determine the "construction or validity" of a provision of the Tennessee Constitution.

[1] As Defendants noted in their original memorandum, Plaintiff has standing to challenge only § 40-29-204 (Mem. Defs., 6 n.3), and Plaintiff has not argued otherwise.

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

As Defendants have explained, Plaintiff's equal-protection claims fail to state a claim for relief because Tenn. Code Ann. § 40-29-204 complies with the equal-protection guarantee of the Tennessee Constitution; regardless of race, the statute permanently bars all offenders convicted of specified offenses from eligibility to vote. (Mem. Defs. 15-18.) *See* Tenn. Code Ann. § 40-29-204(1)-(3). On its face, the statute neither burdens a fundamental right for felony offenders nor operates to the peculiar disadvantage of a suspect class. And the statute has a rational basis to bar those convicted of "Offenses Against Administration of Government" from regaining their right to vote. *See* Tenn. Code Ann. § 40-29-204(3)(B); *Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997) (applying rational-basis review).

Plaintiff's contentions to the contrary are unpersuasive. She first asserts that § 40-29-204 violates her fundamental right to vote and therefore triggers strict scrutiny. (Pl.'s Resp., 4-6.) Plaintiff claims that § 40-29-204 is a "deprivation statute[]" that "take[s] away the fundamental right to vote in the first place," as opposed to a "restoration statute[]" that "govern[s] how a person regains his or her right to vote." (Pl.'s Resp., 6 n. 5 (emphasis removed).) But nothing in § 40-29-204 "take[s] away" the right to vote. Section 40-29-204 instead precludes persons convicted of specified felonies from regaining the right to vote as part of the "provisions and procedures" that "apply to and *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 . . . of an infamous crime." Tenn. Code Ann. § 40-29-201(a) (emphasis added).[2]

[2] Plaintiff relies on *Dunn v. Blumstein*, 405 U.S. 330 (1972), to claim that strict scrutiny applies to laws removing the right to vote from felons. (Pl.'s Resp., 6 n.5.) *Dunn* held that durational residence voting laws were subject to strict scrutiny. 405 U.S. at 336. But Plaintiff's reliance on

Plaintiff also says that strict scrutiny applies because "she is a member of a protected class and she has pled that the statutes . . . at issue have an intentional and disparate impact on that protected class." (Pl.'s Resp., 5 (footnote omitted); *see id.* at 11-12.) But as Defendants have stated, strict scrutiny applies only when a legislative classification "operates to the peculiar disadvantage of a suspect class." (Mem. Defs., 15 (quoting *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994)).) Section 40-29-204 is facially neutral and thus does not "operate[] to the peculiar disadvantage of a suspect class." Nor has Plaintiff sufficiently pleaded that § 40-29-204 treats Black felons differently. (Pl.'s Resp., 11.)

As Defendants have discussed, to state a valid equal-protection claim on this basis, Plaintiff must allege facts showing both a discriminatory impact *and* that the law was passed with a discriminatory purpose—and Plaintiff has failed to show that the legislature acted with discriminatory intent in enacting § 40-29-204. (Mem. Defs., 9-12.) *See McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 695-96 (Tenn. 2020). The discriminatory purpose prong requires a plaintiff to show that the decisionmaker "'selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'" *State v. Banks*, 271 S.W.3d 90, 155 (Tenn. 2008) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987)). Plaintiff insists that she *has* alleged discriminatory purpose, but all the allegations to which she refers are merely conclusory. (Pl.'s Resp., 11; *see, e.g., id.* (reciting allegation that

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Dunn is misplaced. The Supreme Court in *Richardson v. Ramirez*, 418 U.S. 24 (1974), explicitly rejected the application of *Dunn* to felon disenfranchisement laws. *Richardson*, 418 U.S. at 54. The Court concluded that rational basis review applies because, unlike other "state limitations on the franchise," "the exclusion of felons from the vote has affirmative sanction" in the Federal Constitution. *Id.* at 54-56.

"Tennessee's Permanent Disenfranchisement Statutes . . . have the intent and effect of discriminating against Black Tennesseans").)

Plaintiff also says that "she has even cited statistics in support of her equal protection claims." (Pl.'s Resp., 12.) But while statistical proof can show the existence of a discriminatory purpose "in limited circumstances," only "[i]n rare circumstances" can it serve as the "sole evidence." *Banks*, 271 S.W.3d at 156. That is, unless a "clear pattern, unexplainable on grounds other than race emerges," "impact alone is not determinative, and the [c]ourt must look to other evidence." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (footnote omitted).

Plaintiff has not asserted that her alleged statistics show a "clear pattern" of racial discrimination. Nor could she, as the rare cases in which statistical evidence alone was deemed sufficient all involved total or near-total exclusion of an identifiable group. For example, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the complaint alleged that a redistricting law "alter[ed] the shape [of the city] from a square to an uncouth twenty-eight sided figure" and excluded at least 395 of 400 Black voters and no white voters. 364 U.S. at 340-41. Similarly, the pleadings in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), alleged that a city had denied to all 200 Chinese applicants an exemption to an ordinance prohibiting laundries from operating in wooden houses, but had granted exemptions to all but one of the 80 similarly situated non-Chinese operators. 118 U.S. at 374. By contrast, Plaintiff alleges that less than 40% of persons disenfranchised are Black. (SAC 3, at ¶¶ 7-8.) This allegation falls well short of the complete exclusions at issue in *Gomillion* and *Yick Wo*. *Cf. Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010) (affirming dismissal of a constitutional challenge to New York's disenfranchisement law

where the plaintiffs alleged that "[n]early 52%" of those disenfranchised were Black and that "nearly 87% of those currently denied the right to vote" were Black or Latino).[3]

Plaintiff also argues that "[m]uch of [her SAC] goes to a very different type of equal protection challenge under the United States Supreme Court case *Hunter v. Underwood*[, 471 U.S. 222 (1985)]." (Pl.'s Resp., 12.) But as noted above, Plaintiff's reliance on *Hunter* is misplaced. There the Supreme Court held that an article of the Alabama Constitution was unconstitutional under the Fourteenth Amendment to the United States Constitution. *Hunter*, 471 U.S. at 233. Plaintiff presents no claim challenging the constitutionality of any provision of the Tennessee Constitution. Indeed, Plaintiff herself says that any precedent involving a challenge to disenfranchisement under *federal law* "does not implicate [her] claims." (Pl.'s Resp., 10.) Furthermore, and unlike the challenged article in *Hunter*—which enumerated the offenses that subjected offenders to disenfranchisement—the Tennessee Constitution's disenfranchisement provisions do not affect Plaintiff's rights on their own. Rather, they simply empower the General Assembly to pass laws that "'deprive convicted criminals of the right to vote.'" *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983) (quoting *Crutchfield v. Collins*, 607 S.W.2d 478, 481-82 (Tenn. Ct. App. 1980)).[4]

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[3] Plaintiff's SAC also alleges much historical data, but as noted above and as Defendants have previously explained, this historical data is not probative and provides no support for Plaintiff's claims. (Mem. Defs., 9-12.) Plaintiff fails to allege any fact more recent than 1900 to demonstrate that the General Assembly acted with discriminatory intent in passing any disenfranchisement law, or specifically in enacting § 40-29-204 in 2006. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324-26 (2018) (concluding that the proper inquiry is the intent of the legislature that enacted the challenged law, not that of previous legislatures).

[4] Plaintiff claims that *Gaskin* and *Crutchfield* are distinguishable because the plaintiffs there did not raise the same claims that she does here. (Pl.'s Resp., 10.) But nothing in *Gaskin* or *Crutchfield* suggests that their interpretation of the Tennessee Constitution turned on the specific claims at issue. And contrary to Plaintiff's contention that *Gaskin* relied on "historical evidence developed at the trial court level," the evidence the Court considered was "set forth in [the] Appellee's brief,"

C. Permanent disenfranchisement does not constitute cruel and unusual punishment. (Plaintiff's Counts Four and Eight.)

Plaintiff's cruel-and-unusual-punishment claims fail because, *inter alia*, a restriction on a felon's right to vote is a "civil disability"—not a criminal "punishment." (Mem. Defs., 18-19 (citing *State v. Johnson*, 79 S.W.3d 522, 527 (Tenn. 2002)).) *See Cole v. Campbell*, 968 S.W.2d 274, 275-77 (Tenn. 1998). Defendants have acknowledged (Mem. Defs., 19 n.6), and Plaintiff seizes on (Pl.'s Resp., 15-16), the statement in *May v. Carlton*, 245 S.W.3d 340 (Tenn. 2008), that "[l]aws disenfranchising convicted felons are penal in nature." 245 S.W.3d at 349. But contrary to Plaintiff's assertion, *May* did not "unequivocally h[o]ld" that laws disenfranchising felons are penal. (Pl.'s Resp., 16.) The Court's remark in *May* is limited to the habeas corpus context, and it otherwise lacks support in Tennessee law.

At issue in *May* was whether an illegal designation of infamy "could be corrected through the writ of habeas corpus." 245 S.W.3d at 342. Such relief could be granted only if the petitioner's criminal judgment "directly contravene[d] a statute" and he was "restrained of liberty" by the judgment. *Id.* at 344 (internal quotation omitted). *May* determined that an infamous designation qualifies as a restraint on liberty and held that "an erroneous label of infamy in a judgment of conviction warrants remedy and should be declared null and void." *Id.* at 347-49. But *May* made a point to note that "not every collateral consequence qualifies as a restraint on liberty." Rather, only those collateral consequences that affect an "illegally abridged" fundamental right "should be restored through" habeas corpus relief. *Id.* at 347-48.

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and nothing in *Gaskin* otherwise indicates that the parties presented any evidence before the chancery court. *See* 661 S.W.2d at 867.

May's statement that "[l]aws disenfranchising convicted felons are penal in nature" was made against this habeas corpus backdrop, and it should therefore be confined to that context. *Id.* at 349. Nothing in *May* suggests that the Court considered disenfranchisement to be a "punishment" under Tenn. Const. art. I, § 16—the decision never referenced that provision at all. *May* considered the loss of the right to vote to be a "collateral consequence," similar to *Cole* and *State v. Johnson*, but determined that an "erroneous label of infamy" warranted habeas relief.

Indeed, applying *May*'s statement outside the habeas corpus context would lack support in "law or logic." *Johnson v. Bredesen*, 624 F.3d 742, 754 (6th Cir. 2010); *see also id.* (concluding that the "penal in nature" statement was "pure dicta"). Felon disenfranchisement laws "serve a regulatory, non-penal purpose," *id.* at 753 (citing *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958) (plurality opinion)), and the text of the Tennessee Constitution is consistent with that view. *See also Simmons v. Galvin*, 575 F.3d 24, 44 (1st Cir. 2009) (noting that "felon disenfranchisement has historically not been regarded as punitive in the United States").

No Tennessee appellate opinion considers the remark at issue in *May* to constitute the "holding" in that case. Indeed, Tennessee decisions after *May* have continued to refer to laws disenfranchising felons as a civil disability, not punishment. *See, e.g.*, *State v. DeDreux*, No. E2021-00786-COA-R3-CV, 2022 WL 1115017, at *2 (Tenn. Ct. App. Apr. 14, 2022) (no perm. app. filed); *Fisher v. State*, No. W2016-01409-COA-R3-CV, 2017 WL 2839742, at *1-2 (Tenn. Ct. App. July 3, 2017), *perm. app. denied* (Tenn. Nov. 17, 2017); *In re Cox*, 389 S.W.3d 794, 798 (Tenn. Crim. App. 2012). Because disenfranchisement is not a "punishment," Petitioner's permanent disenfranchisement under § 40-29-204 cannot be said to violate Tennessee's prohibition on cruel and unusual punishments.

D. Permanent disenfranchisement does not violate due process. (Plaintiff's Counts Five and Seven.)

Plaintiff argues that she has sufficiently stated a procedural-due-process claim on the theory that *Ward v. State*, 315 S.W.3d 461 (Tenn. 2010), supports the proposition that because disenfranchisement was a "direct consequence[]" of her guilty plea, the trial court's failure to notify her that she would lose the right to vote violated her procedural-due-process rights. (Pl.'s Resp., 17-18.) But *Ward* supports the opposite proposition.

Disenfranchisement upon conviction of a felony serves as a regulatory, nonpenal measure, *Johnson v. Bredesen*, 624 F.3d at 753, and nonpenal "remedial and regulatory measure[s]" are collateral consequences to a guilty plea; a trial court's failure to advise a defendant about such consequences does not render the "guilty plea constitutionally invalid." *Ward*, 315 S.W.3d at 472; *see id.* at 469-72 (holding that sex-offender registration is a collateral, non-penal consequence of a guilty plea that does not require a trial court to provide notice of the requirement); *cf. id.* at 473-76 (concluding that mandatory lifetime supervision is a punitive, direct consequence of a guilty plea based in part on the General Assembly's use of "punishment" and "sentence" throughout the statute). In any event, and as Defendants have stated, not only may Plaintiff not challenge the validity of her guilty plea in this declaratory-judgment action, *see Carter v. Slatery*, No. M2015-00554-COA-R3-CV, 2016 WL 1268110, at *7 (Tenn. Ct. App. Feb. 19, 2016), *perm. app. denied* (Tenn. Aug. 18, 2016), but the Shelby County Criminal Court explicitly found that Plaintiff understood both the direct and indirect consequences of her plea. (Mem. Defs., 22-23.)

Plaintiff also argues that she has sufficiently stated a substantive-due-process claim since Tennessee's disenfranchisement "structure" and "regime" constitute "oppressive government action" "because of its racist and discriminatory origins, intent, administration, and impact." (Pl.'s

Resp., 18-19.) The crux of this claim is that the Court should not give effect to the disenfranchisement provisions of the Tennessee Constitution, which Plaintiff obviously considers to be part of that "structure" and "regime." *See* Pl.'s Resp. at 2 (asserting that "Tennessee's felon disenfranchisement regime was born and raised" during the constitutional conventions). But as explained above, Plaintiff's claims challenge only—and *can* challenge only—Section 40-29-204, not the Tennessee Constitution itself. As Defendants have discussed, the enactment of § 40-29-204 does not violate substantive due process because permanent disenfranchisement for certain felony convictions does not rise to the level of conscience-shocking conduct. (Mem. Defs., 22-23.)

E. Plaintiff has no claim that permanent disenfranchisement violates the "Free and Fair Elections Clause." (Plaintiff's Counts One and Six.)

Plaintiff says that she has "adequately pled her Free and Fair Elections claims," because she has "pled that the statutes and constitutional provisions at issue illegally and discriminatorily affect her right of suffrage." (Pl.'s Resp., 20.) But Plaintiff again overlooks that she has presented—and can present—no claim against the Tennessee Constitution.

Moreover, Plaintiff ignores the fact that Tenn. Const. art. I, § 5, 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*" (emphasis added). In giving the Free and Fair Elections Clause its "plain, ordinary and inherent meaning," *Hooker v. Haslam*, 437 S.W.3d 409, 426 (Tenn. 2014), disenfranchisement upon conviction of an infamous crime is an explicit exception to the otherwise "free and equal" elections guarantee.

F. Plaintiff's claims do not "require discovery and development of the record."

Plaintiff's final argument in opposition to Defendants' motion to dismiss is that "[e]ven if there were some doubt as to whether [she] had adequately pled her claims, . . . these types of claims require the development of a factual record" before the Court can rule on the merits. (Pl.'s Resp., 21.) But Plaintiff misses the point: claims that are legally inadequate do *not* "require discovery." Defendants' motion to dismiss tests only the legal sufficiency of the SAC, and Defendants have shown that Plaintiff has failed to state a claim to relief. *See Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009) ("[A motion under Rule 12.02(6)] tests only the legal sufficiency of the complaint, not the strength of the proof. . . . [T]he motion contemplates that all relevant and material allegations in the complaint, even if true and correct, do not constitute a cause of action."). Further, issues of constitutional interpretation "are questions of law"; courts must presume that a challenged statute is facially valid, *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009); and a declaratory-judgment suit does not regularly "invoke disputed issues of fact," *Goodwin v. Metro. Bd. of Health*, 656 S.W.2d 383, 387 (Tenn. Ct. App. 1983). So if Plaintiff has failed to sufficiently state a claim—and she has—Plaintiff's asserted need for discovery "to bring forth the facts" (Pl.'s Resp., 24) will not save her complaint from dismissal.

CONCLUSION

For the reasons stated here and in Defendants' original memorandum, Defendants' motion to dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of March, 2023, 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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