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

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

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Before the Court is the Motion of Defendants Mark Goins, Tre Hargett, and Jonathan Skrmetti, in their official capacities, to Dismiss the Second Amended Complaint of Plaintiff Pamela Moses. In that Complaint, Ms. Moses raises a number of state constitutional challenges to Tennessee's felon disenfranchisement scheme, specifically the practice of permanent felon disenfranchisement provided for in Tenn. Code Ann. § 40-29-204. In doing so, she brings claims under the Tennessee Constitution's Equal Protection guarantee, Due Process guarantee, Cruel and Unusual Punishment Clause, and Free and Equal Elections Clause. Mr. Robert W. Wilson, Senior Assistant Attorney General, and Mr. John E. Haubenreich, respectively for Defendants and Ms. Moses, appeared before the Court[1] in Jackson, Tennessee, on Thursday, March 16, 2023, to argue the present motion. Having reviewed the briefs and the caselaw and considered the arguments of counsel, the Court is now ready to issue its decision. For the reasons that follow, Defendants' Motion to Dismiss is **GRANTED IN PART AND DENIED IN PART**.

[1] Presiding over this matter is a three-judge panel appointed by the Tennessee Supreme Court pursuant to Tenn. Code Ann. §§ 20-18-101 *et seq.* and Supreme Court Rule 54.

Background[2]

In 2015, Plaintiff pleaded guilty to—among other, lesser offenses—tampering with evidence, a Class C felony. Ms. Moses had "fabricated a judicial complaint form to the Tennessee Board of Judicial Conduct against the general sessions judge who previously held Moses in criminal contempt." *State v. Moses*, No. W2015-01240-CCA-R3-CD, 2016 WL 4706707, at *2 (Tenn. Crim. App. Sep. 6, 2016). She received an effective seven-year sentence, but the sentence was suspended, and Plaintiff was placed on probation for that period of time. *Id.* at *2–3.

In 2019, Ms. Moses initially filed a petition for restoration of her rights of citizenship. The State[3] noted in its Response, however, that her sentence would not expire until August 13, 2020, and that Ms. Moses would not be eligible for restoration until that time. In October of the same year, the State filed an Amended Response, stating that Plaintiff would never be eligible for restoration of her voting rights because her conviction of tampering with evidence was among the convictions included within the scope of Tenn. Code Ann. § 40-29-204(3)(B) and thus mandated her permanent disenfranchisement.

In June 2022, Ms. Moses filed an amended petition that challenged the constitutionality of her permanent disenfranchisement and further argued that the State violated her due process rights. Ms. Moses, still appearing pro se, later amended her petition "to cure any irregularities of previous pleadings." The State filed a response. Plaintiff subsequently acquired counsel, who entered his appearance in July 2022. Counsel for Ms. Moses indicated she would be filing a new amended petition; the motion seeking leave to do so was filed in September. The State initially opposed the

[2] The following discussion is compiled from previous filings before the Court since this case's initial filing in 2019 as well as the appellate decision rendered in Ms. Moses's criminal case. The statements constitute neither findings of this Court nor allegations made by Plaintiff. They are provided merely for procedural context.

[3] Prior to the Second Amended Complaint, Ms. Moses's petition had been filed against the State of Tennessee.

motion, but by agreement of the parties, Plaintiff filed her Second Amended Complaint in October. Defendants then filed the instant motion.

Allegations of the Second Amended Complaint[4]

Tennessee has a vibrant history of independence and democracy that has unfortunately been polluted by pernicious discrimination against black Tennesseans. This discrimination has transformed over time from an explicit embrace of racism and white supremacy to a more malignant strain of statutory and structural discrimination, but it has always been there. The history of felon disenfranchisement is Tennessee is rooted in such a tradition of discrimination and racism. Tennessee's constitutional provisions authorizing such disenfranchisement were adopted during the apex of slavery in Tennessee, and those provisions were used for decades after the Civil War to discriminate and wrongly prevent black Tennesseans from voting. They still do so today: state law permanently denies the right to vote to Ms. Moses and thousands of other people living Tennessee communities because of a prior felony conviction. What is more, in the vast majority of—if not all—cases where voting rights are stripped from Tennesseans as a result of plea bargains, these voters—like Plaintiff—are not even informed of the consequences of pleading guilty because Tennessee has failed to require disclosure of this fact. Many Tennesseans—like Plaintiff—would never have pleaded guilty if they had known their voting rights would be permanently revoked. These Tennesseans are family members, friends, neighbors, co-workers, and taxpayers. Just like their fellow Tennesseans, their lives are governed by the laws voted on and enforced by our elected officials. But unlike their neighbors, these Tennesseans are denied the fundamental right to

[4] The allegations of Ms. Moses's Second Amended Complaint are set forth in this section, and, for the purposes of this motion, are presumed true. *See infra* "Legal Standard." Legal conclusions, however, are not factual allegations and therefore are not afforded this presumption. *See infra* note 5. Nothing in this section should be considered a finding of the Court. Also, because the statements are considered mere allegations for the purposes of this motion, Ms. Moses's citations—including those quoted directly—have been omitted.

participate in choosing their representatives. Tennessee's permanent disenfranchisement of citizens living in our community based solely on a prior felony conviction serves no legitimate government purpose. It is unfair, discriminatory, fundamentally wrong, and violates the Tennessee Constitution. Pl.'s 2d Am. Compl., ¶¶ 3, 5–6, 22, Oct. 13, 2022.

The impact of this scheme is staggering. The State of Tennessee denies the right to vote to approximately 451,000 of its citizens because of felony convictions, accounting for more than 9% of the total voting age population of Tennessee. Tennessee has the second highest rate of disenfranchisement in the United States, behind only Mississippi. Approximately 174,997 of disenfranchised Tennesseans are black, accounting for more than 21% of the black voting age population, the second highest rate of black disenfranchisement in the United States, behind only Wyoming. Of the hundreds of thousands of Tennesseans who have been disenfranchised, only approximately 3,415 have had their rights restored since 2016. Pl.'s 2d Am. Compl., ¶¶ 7–9 & n.2.

Remarkably, racial restrictions—at least as a constitutional matter—were not present in the original Tennessee constitution. This was reflected in other state constitutions of the time, though law and practice acted to disenfranchise black persons despite the lack an explicit constitutional command to do so. The development of the Tennessee Constitution began with the adoption of the North Carolina Constitution in 1776, of which Tennessee was then still a part. Article I, Section 10 of the North Carolina Constitution provides that "All elections shall be free." North Carolina's Free Elections Clause traced its roots to the 1689 English Bill of Rights, which declared that "Elections of members of Parliament ought to be free." This provision of the English Bill of Rights was a response to efforts by the king to manipulate parliamentary elections by manipulating the composition of the electorate. The king could modify voter eligibility rules by issuing municipal

charters, and in some areas, he would issue new charters to shrink the electorate to help his allies. While in other areas, he expanded the electorate to ensure his opponents would lose. The king thus manipulated the electorate "based on the detailed suggestions of the [king's] agents as to what specific local rights could, with electoral advantage, be confirmed or extended." The king's efforts to manipulate elections led to a revolution. After dethroning the king, the revolutionaries called for a "free and lawful parliament" as a critical reform, and they enacted the free elections clause. Pl.'s 2d Am. Compl., ¶¶ 23–26.

North Carolina's original free elections clause, adopted in 1776, provided that "elections of members, to serve as Representatives in the General Assembly, ought to be free." Its 1776 Constitution contained no restrictions on voting due to race, and no restrictions due to conviction of crime. Approximately 20 years later, Tennessee held its Constitutional Convention, adopting its own constitution and becoming a state. Tennessee's 1796 Constitution enshrined the right to vote for all male persons without regard to race or ethnicity. As compared to the North Carolina Constitution of 1776, the Tennessee Constitution's "suffrage provisions were greatly simplified and democratized. Adult free men—nothing was said about color—who were inhabitants of the state could vote in a county where they resided and were possessed of a freehold; if inhabitants of the county for six months they could vote without further qualification." Pl.'s 2d Am. Compl., ¶¶ 27–28.

It was not until 1834, along with the sharp increase of slavery in Tennessee and the concurrent rise in political power of slaveholders, that Tennessee's Constitution was amended to specify that only white males would be permitted to vote. According to United State Censuses, Tennessee contained 3,417 slaves in 1790, but that number increased to 141,603 by 1830 just before the Tennessee Constitution was amended to make clear that black persons could not vote.

"Increased democracy—but democracy limited to the white race—was they keynote of the [1834] convention's work. Property qualifications both for voting and holding office were swept utterly away, so far as officials named in the constitution were concerned." "Article IV, Section 1 delineates voting rights basically as they had existed in the 1796 Constitution, with the notable exception that the word 'white' was added to free men, thus taking away from free blacks their formerly held right to vote. Equally disappointing, Article II, Section 31 prohibited the legislature from passing any laws emancipating slaves." Two clauses were added to the Tennessee Constitution, both of which represented a substantial departure from the Constitution of 1796. Whereas the Constitution of 1796 contained neither a racial prohibition on voting nor a provision for disenfranchisement because of conviction of a crime, the new 1834 Constitution contained both. A new Article IV, Section 1 was added, specifying that "Every free white man of the age of twenty-one years, being a citizen of the United States, and a citizen of the county wherein he may offer his vote, six months next preceding the day of election, shall be entitled to vote for Members of the general Assembly, and other civil officers, for the county or district in which he resides . . . ." Second, Article IV added a new Section 2: "Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes." This clause has remained unchanged and undisturbed in the Tennessee Constitution since 1834. While the 1834 Constitution did specify that only white men could vote, it also left the door open for some free men of color to vote by noting that "no person shall be disqualified from voting in any election on account of color, who is now by the laws of this State, a competent witness in a court of Justice against a white man." Because some black men could still vote under the 1834 Constitution, the Infamous Crimes Clause was adopted as a backstop permitting the disenfranchisement of these black voters. Thus, the disenfranchisement of black Tennesseans by virtue of criminal conviction began in Tennessee as

far as back as 1834, though its use substantially increased after 1867, as explained below. The disenfranchisement of infamous persons is rooted in English common law. Infamy "could result either from the commission of an infamous crime," such as treason, "or from the receipt of an infamous punishment such as whipping," which could be inflicted for certain other crimes. Pl.'s 2d Am. Compl., ¶¶ 29–39.

At the end of the Civil War, Tennessee—in context of readmission to the Union in an attempt to avoid reconstruction—convulsed around the issue of giving black men the right to vote. On June 5, 1865, a mere two months after the end of the Civil War, the Tennessee legislature passed and approved "An Act to limit the elective franchise," which, although largely concerned with the voting rights of Confederate sympathizers, continued to explicitly limit voting rights to free white persons. This refusal to grant voting rights to freed slaves and other black men was explicit and intentional. In considering further revisions to the right to vote in Tennessee, the *Knoxville Whig*, on September 27, 1865, announced common sentiment at the time:

> I think it would be bad policy, as well as wrong in principle, to open the ballot to the uninformed and exceedingly stupid slaves of the Southern cotton, rice, and sugar fields . . . . When the people of Tennessee become satisfied that the Negro is worthy of suffrage, they will extend it, and not before.

Pl.'s 2d Am. Compl., ¶¶ 40–41.

In 1867, a law extending the right to vote to black men was finally forced through the Tennessee legislature. As many have observed, however, "black suffrage in the 'volunteer' state stemmed primarily from political expediency—an attempt by the Negrophobic, 'Radical' minority to maintain power." As others have put it, "Negro suffrage was a weapon, not a cause." "Though in power since 1865, Tennessee's Governor William Brownlow and Radical cohorts had avoided the question of Negro suffrage. When it became apparent that in early January 1867, that without Negro support Radical control would be upset, Brownlow urged the Tennessee legislature to

enfranchise freedmen immediately. The legislature granted the Negro the vote, but denied him the basic rights to hold office or serve on a jury. Obviously, newly enfranchised voters would support Radicalism, and it was equally clear that the Radicals widened the suffrage, not from ideological commitment but simply to stay in office." Pl.'s 2d Am. Compl., ¶¶ 42–43.

Concurrent with black men in Tennessee gaining the franchise, the existing government and society began to do everything possible to prevent them from voting. This included not only state-sponsored and extrajudicial executions, lynching, and terrorism, but also deliberate and orchestrated exploitation of criminal statutes. In short order, the criminal code became one of the main weapons to disenfranchise black people. In 1866, Colonel J. R. Lewis, Assistant Commissioner of the Freedman's Bureau in Tennessee, reported that in "criminal cases, the freedmen are often convicted on the slightest testimony and for the want of proper deference, and whenever convicted may, in many districts, surely expect the heaviest penalty. . . . And in criminal cases the punishment often follows too closely on conviction to admit of appeal or remedy, though the punishment be ever so unjust." Governor Brownlow agreed, stating on November 22, 1866, in a message to the Tennessee General Assembly:

> The conditions and workings of our penitentiary system will command your attention. . . . I apprehend that these penalties have not been impartially administered. The violent prejudices and high passions engendered by the war, have not so far subsided as to secure from juries, in many cases, that most sacred right—an impartial verdict. . . . [People of color] are convicted with alacrity, and generally sentenced to the maximum punishment allowed by law. I feel that I am warranted in the estimate, that twenty-five per cent of the convicts now in the State prison, are there on account of the color of their skin, or their antecedents as soldiers or active Unionists, or at least who would not have been there if they had different antecedents or a different color . . . .

Just three short years after black men in Tennessee were finally given the right to vote, the conservative Democrats, many of whom were ex-Confederates, took back power in Tennessee,

and the slim gains made for black Tennesseans began to be rolled back. As recognized by the Tennessee Virtual Archive, these former Confederates and their allies

> dominated the constitutional convention, and they were determined to prevent any future heavy-handed governorship such as Brownlow's Radical regime. . . . There was a good deal of argument over black men voting. With the passage of the 15th Amendment to the US Constitution—even though Tennessee voted not to ratify, convention delegates knew they could not repeal suffrage for African Americans. A Radical US Congress was watching for just a misstep by former Confederate states. Instead, the convention authorized a poll tax in the Constitution as a tool for controlling who voted.

Just as critically, these former Confederates and their allies also reinforced the felon disenfranchisement provisions—and clearly signaled both their importance and malicious intent—by mutilating Article I, Section 5 of the 1796 and 1834 constitutions. The section formerly read: "That elections shall be free and equal." It now read: "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 a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by a court of competent jurisdiction." This version of the Free and Equal Elections Clause has remained virtually unchanged and undisturbed in the Tennessee Constitution since 1870. Thus, both the poll tax and felon disenfranchisement were key innovations of the 1870 Constitutional Convention. But whereas the poll tax was eventually struck down by the courts and repealed, felon disenfranchisement remains to this day. Pl.'s 2d Am. Compl., ¶¶ 44–51 & n.6.

Eight years after male Tennesseans of color gained the right to vote, very little had changed. Criminal statutes were still being disproportionately used to punish and disenfranchise black Tennesseans. Samuel Lowry, a black attorney and member of the Nashville bar writing in April of 1875, noted that the white "radical" Republicans—who had pushed through limited gains for former slaves while they still held power—were now re-trenching with racist Democrats, many of

whom were ex-Confederates. Left with no political party representing the interests of black Tennesseans, Lowry explained:

> [T]heir Republican friends were proposing to shake hands with the Democratic party across the bloody chasm. The Negroes resented this treatment, as they felt that they were thereby betrayed and deserted. They disliked having to take back seats on the Federal decoration day. They regarded the Vagrant Act, recently passed by the general assembly, as an engine of discriminating oppression aimed especially toward them. They were excluded from jury service in both the Federal and State courts. As a result, they received scant justice before these tribunals. A white man might steal vast sums of money with impunity, but a Negro was sent to the penitentiary for committing a trifling offence. Under this system, the penitentiaries, jails and workhouses were easily filled with Negroes.

All of this of course was in context of the horrific violence being perpetrated against former slaves and other people of color across the South, including in Tennessee. The Ku Klux Klan was formed in 1866 in Pulaski, Tennessee, and shortly thereafter began a campaign of murder and terrorism designed explicitly to keep people of color from exercising their civil rights, particularly their voting rights. "The organization quickly took on the character of a body of desperate and lawless men determined to wrest control of the State government from the Radical party by terrorizing and killing Union men and Negroes and preventing the latter especially from exercising the right to vote." Pl.'s 2d Am. Compl., ¶¶ 52–53.

In 1871, the Tennessee Tribune reported that mass migration of black Tennesseans was occurring "to seek shelter elsewhere, from the violence, oppression and tyranny which they could not resist, and against which no protection was furnished." On May 19, 1875, a convention on emigration was convened in Nashville owing in large part to the massive migration of black Tennesseans out of the state due to violence and political oppression. The convention adopted a preamble and resolutions which have been summarized as follows:

> This document stated that grievous dispensations of such grave nature had been visited upon the Negroes in Tennessee as to make them fearful for the safety of their life and liberty; that present conditions among them were less favorable

than those existing during the first years of Negro citizenship. . . . that the considered judgment of the delegates was that the white people of Tennessee were solely responsible for the ills borne by the blacks. In the judgment of these delegates, the whites disregarded laws enacted by the General Government for the protection of Negroes and for their enjoyment of certain rights of citizenship, prevented Negroes from performing jury service even in cases where blacks only were concerned, and discriminated against them in cases brought before the law courts. The respectable elements among the whites, while disposed person ally to accord the Negroes justice, made no effort to prevent the frequent outbreaks of violence against them. Moreover, the highest officials in the State had been powerless to prevent the perpetration of outrages upon the blacks, or to bring the offenders to justice.

The preamble then recited a number of unredressed wrongs which had served to emphasize among the Negroes the insecurity of their life and liberty. It made reference to the lynching of David Jones, at Nashville, in front of the police station, scarcely fifty yards from the court-house; to the murder, in her Trousdale County home, of Julia Hayden, talented school-teacher; to the massacre, by armed outlaws, of sixteen men near Trenton; and to the lynching of Joseph Reed at Nashville, before four thousand people, after he had at first been placed in jail.

The convention document also focused on recent laws, and their application to black Tennesseans. It noted the recent vagrancy law passed by the legislature, pursuant to which any person of color who could not prove that he or she employed, was to be incarcerated.

To secure the utter subordination of the freedmen, whites in the postwar era resorted to every weapon and artifice at their command; and they did so with a single-minded determination that rivaled or surpassed their aggressive efforts to restrain their slaves . . . . Native whites generally maintained a firm grip on the county courthouses during Reconstruction, and they used those institutions as instruments of racial oppression. . . .

[M]any jduges and justices of the peace subverted the spirit of the law by willfully resolving every interracial case to the black' disadvantage. "The idea of negroes getting justice before the magistrates of this county is perfectly absurd," an indignant Freedman's Bureau agent wrote from Giles in 1866. . . . Traditional administrative and judicial powers of the courts were dusted off and polished up in the postwar years and then brought to bear against the freedmen. . . .

A second traditional legal instrument that assumed a new role after the war was imprisonment. . . . [J]ails became more than just a place of legal custody for black felons; they became also an agent for the social control of the black race. Authorities invoked vagrancy laws, for example, against urban blacks reluctant to sign work contracts with white employers, and they frequently imprisoned blacks for other "crimes" for which no white man ever served time. A Davidson County Freedman's Bureau agent complained in 1867 that "freedmen are committed to jail on the most frivolous grounds . . . ."

> "Uppitiness" towards whites was a common excuse for incarceration. The *Herald* reported with some satisfaction in 1870, for example, that a certain Miles Stokes "whose skin is the color of the Fifteenth Amendment," had received a sentence of six months in prison for the high crime of insulting some white women.

Pl.'s 2d Am. Compl., ¶¶ 53–56.

What was happening in Tennessee mirrored what was happening all across the South. In 1866, an inspector with the Freedman's Bureau in North Carolina notified a federal military commander that white former rebels in that state "had found new use for longstanding state laws" that imposed infamy, and thus effectively disenfranchisement, for crimes like petty larceny that were punishable by whipping. Across the state, these rebels "conspired to seize negroes, procure convictions for petty offenses punishable at the whipping post, and thus disqualify them forever from voting in North Carolina." Contemporary reports described the whippings in North Carolina as meticulous and widespread. Between 1874 and 1882, Mississippi, Alabama, Arkansas, Georgia, South Carolina, Virginia, and Louisiana all adopted laws that were designed and used to disenfranchise black voters. Mississippi adopted the so-called "Pig Law," which made theft of anything over $10 a felony, and the law was used viciously to disenfranchise black voters. Opposition to the Mississippi law was explicitly founded on its racist intent and effect. The Republican governor of the state initially vetoed the law, explaining: "Should this bill become a law, persons convicted of stealing any animal therein mentioned, of not more than one or two dollars in value, may be sent to the Penitentiary, perhaps for a term of years. Even if sent for a short time, the person so sentenced is dis[en]franchised." About three weeks after that governor left office, however, the bill was again passed by the Mississippi legislature, and the new governor signed it. Republicans in Alabama also recognized the threat, petitioning Congress and arguing they had "discovered the 'ulterior purposes' of the increased penalties for petty theft" and declaring that the new laws offered white Democrats a "means to 'persecute and oppress' African Americans

by making small crimes punishable by incarceration and dis[en]franchisement." Alabama, Arkansas, and Georgia all adopted their own pig laws in 1875. Tennessee followed suit in 1877. In 1858, Tennessee had defined grand larceny—i.e., a felony rendering the person convicted "infamous" and thus depriving them of the right to vote—as the "felonious taking and carrying away personal goods over the value of ten dollars," a crime punishable by "not less than three nor more than ten years." In 1875, Tennessee amended that statute to specify that grand larceny consisted of the "felonious taking and carrying away personal goods over the value of thirty dollars . . . ." This much higher threshold for grand larceny would make it more difficult to charge, and much more difficult to use as a means of conviction and disenfranchisement. But in 1877, Tennessee reinstated the prior version of the law so that, just like Mississippi's pig law, black citizens could be charged with a felony for allegedly taking any property worth over ten dollars. Pl.'s 2d Am. Compl., ¶¶ 57–59, 61–65 & nn.8–9.

In "1889 the Tennessee General Assembly passed four acts of self-described electoral reform that resulted in the disenfranchisement of a significant portion of African American voters as well as many poor white voters. The timing of the legislation resulted from a unique opportunity seized by the Democratic Party to bring an end to what one historian described as the most 'consistently competitive political system in the South.'" " . . . Democrats in the state legislature had acted, in 1889 and 1890, to restrict the voting of blacks—and illiterate whites—by enacting a harsh registration law, a poll tax requirement for voting, and a secret ballot law." Pl.'s 2d Am. Compl., ¶¶ 67–68.

Thus, Tennessee's policy of disenfranchising persons convicted of certain crimes became a tool of race-based political suppression immediately after the Civil War. The Tennessee General Assembly enforced felony disenfranchisement for specific crimes via statute for the first time in

1858. At that time, however, there was no permanent disenfranchisement. Tennesseans who had lost their rights of citizenship could regain said rights by petitioning the Circuit Court. In addition to adopting a poll tax in 1870, Tennessee began to greatly expand its felon disenfranchisement laws after the Civil War. In the 1869 Act calling for a constitutional convention, only "male person[s] not convicted and rendered infamous for crime" were permitted to vote for or against a convention to amend the Tennessee Constitution. Tennessee's expansion of its felony disenfranchisement laws following the Civil War was not unique. Many former Confederate states expanded the scope of criminal history-based disenfranchisement after 1865 to cover most or all felony convictions in an effort to suppress the political power of newly freed slaves. Indeed, "felon voting restrictions were the first widespread set of legal disenfranchisement measures imposed on African Americans; the literacy tests and other mechanisms for political exclusion followed at a later date." These disenfranchisement laws proliferated as the imprisonment of African Americans increased. By the 1870s, nearly 95% of persons with felony convictions in southern states were African American. "Disenfranchisement policies have served various political purposes, most notably racial exclusion. In the post-Reconstruction period, coincident with the advent of poll taxes and literacy requirements, legislators in a number of southern states tailored their disenfranchisement statutes with the specific intent of excluding the newly freed black voters. They accomplished this by tying the loss of voting rights to crimes alleged to be committed primarily by blacks while excluding offenses held to be committed by whites." Pl.'s 2d Am. Compl., ¶¶ 69–76.

Tennessee adopted permanent felon disenfranchisement for certain crimes in 1986 and expanded the list in 2006. Pl.'s 2d Am. Compl., ¶ 77. Ms. Moses was convicted of tampering with evidence in violation of Tenn. Code Ann. § 39-16-503, one of the offenses automatically

resulting in permanent disenfranchisement under Tenn. Code Ann. § 40-29-204. Pl.'s 2d Am. Compl., ¶ 81. This charge was unsupported by the evidence because the tampered with document was evidence for the same criminal proceedings that included the tampering charge; i.e., the tampered with document was not evidence for a different case or proceeding—it was cumulative with the forgery charge that gave rise to the criminal prosecution. Pl.'s 2d Am. Compl., ¶¶ 82–83. Thus, Ms. Moses's conviction was the result of a guilty plea that was not a voluntary and intelligent choice. Pl.'s 2d Am. Compl., ¶¶ 80, 83, 86. Plaintiff was sentenced to three years for the tampering with evidence charge and was not, even then, notified of her permanent disenfranchisement; it was not until years later, when attempting to regain her voting rights, that she realized the impact of the guilty plea. Pl.'s Second Am. Compl., ¶ 85.

Legal Standard

Defendants move under Rule 12.02(6), which provides for dismissal in the event of a "failure to state a claim upon which relief may be granted." A motion made under Rule 12.02(6) "tests 'only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence.'" *Elvis Presley Enterprises, Inc. v. City of Memphis*, 620 S.W.3d 318, 323 (Tenn. 2021) (quoting *Webb v. Nashville Area Habitat for Human., Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011)); *Dobbs v. Guenther*, 846 S.W.2d 270, 273–74 (Tenn. Ct. App. 1992) (citing *Sanders v. Vinson*, 558 S.W.2d 838, 840 (Tenn. 1977). As such, a plaintiff's allegations[5] are taken as true. *Id.* (citing *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002)). And all inferences that the Court might reasonably draw from those allegations are drawn in the plaintiff's favor. *Webb*, 346 S.W.3d at 426 (quoting *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31–32 (Tenn. 2007)).

[5] "Legal arguments or legal conclusions couched as facts" are not factual allegations and therefore are not taken as true. *Estate of Haire v. Webster*, 570 S.W.3d 683, 690 (Tenn. 2019) (quoting *Moore-Pennoyer v. State*, 515 S.W.3d 271, 276 (Tenn. 2017)) (alterations and internal quotation marks omitted).

Indeed, by the very act of filing a motion to dismiss, a defendant—*only* for the purposes of that motion—"admit[s] the truth of all of the relevant and material allegations contained in the complaint, but . . . assert[s] that the allegations fail to establish a cause of action." *Elvis Presley Enterprises, Inc.*, 620 S.W.3d at 323 (quoting *Leach v. Taylor*, 124 S.W.3d 87, 90 (Tenn. 2004)). Accordingly, we are compelled to "grant a motion to dismiss only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Id.* (quoting *Crews*, 78 S.W.3d at 857).

Analysis

As mentioned above, Ms. Moses brings several state constitutional challenges to Tennessee's permanent felon disenfranchisement statutes. The courts of this state are "charge[d] . . . to uphold the constitutionality of a statute wherever possible." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009). When presented with a question of the constitutionality of a statute, the Court must "begin with the presumption that an act of the General Assembly is constitutional" and "indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007) (quoting *Gallaher v. Elam*, 104 S.W.3d 455, 569 (Tenn. 2003)); *see also Waters*, 291 S.W.3d at 917 (Koch, J., concurring in part and dissenting in part) (citing *Gallaher*, 104 S.W.3d at 459–60; *In re Adoption of E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001); *State ex rel. Maner v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979)) ("This presumption places a heavy burden on the person challenging the statute."); *Perry v. Lawrence Cnty. Election Comm'n*, 411 S.W.2d 538, 539 (Tenn. 1967) (quoting *Frazer v. Carr*, 360 S.W.2d 449 (Tenn. 1962)); *Bell v. Bank of Nashville*, 7 Tenn. 269 (1823) ("'[T]he Legislature of Tennessee, like the legislature of all other sovereign states, can do all things not prohibited by the Constitution of this State or of the United States.' . . . 'To be invalid a statute must be plainly obnoxious to some

constitutional provision.'"). The Court also "must construe our Constitution as a whole to harmonize and give effect to each of its provisions." *Mayhew v. Wilder*, 46 S.W.3d 760, 772 (Tenn. Ct. App. 2001) (citing *Wolf v. Sundquist*, 955 S.W.2d 626, 630 (Tenn. Ct. App. 1997)).

Now, the Court addresses each of Ms. Moses's claims in turn.[6]

I. Challenge to the Tennessee Constitution

We begin with a statement made by Ms. Moses in her Response to Defendants' Motion: "Ms. Moses is challenging provisions of the Tennessee Constitution, not *just* statutes." Pl.'s Resp., at 15 (emphasis in original). In a footnote to that sentence, she adds:

> 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.

Pl.'s Resp., at 15 n.6 (emphasis in original). At the hearing on the instant motion, counsel for Ms. Moses clarified that Ms. Moses is not presently seeking to amend her Second Amended Complaint.

The Tennessee Constitution expressly sanctions felon disenfranchisement in Article I, Section 5 ("[T]he 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."), and Article IV, Section 2 ("Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes."). The problem with Ms. Moses's challenge to those constitutional

[6] We would further note that a constitutional challenge to a statutory provision may be either facial or as-applied, and Ms. Moses brings both types. *See Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020). A facial challenge asserts "there are no circumstances under which the statute, as written, may be found valid," while an as-applied challenge argues "the statute is unconstitutional as construed and applied in actual practice against the plaintiff under the facts and circumstances of the particular case, not under some set of hypothetical circumstances." *Id.* (citing *Hughes v. Tenn. Bd. of Prob. & Parole*, 514 S.W.3d 707, 712 (Tenn. 2017); *City of Memphis v. Hargett*, 414 S.W.3d 88, 103, 107 (Tenn. 2013)). In their arguments, however, the parties did little to distinguish between Ms. Moses's facial and as-applied challenges. While it will eventually be necessary to do so, for the purposes of today's motion, the Court sees little reason to do what the parties themselves did not.

provisions is that she relies exclusively on the authority of the same Constitution to do so. "The Constitution of Tennessee is the product of the sovereign will of Tennessee's citizens," and the courts "must construe each provision in a way that gives the fullest possible effect to the intent of the Tennesseans who adopted it." *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010) (citations omitted). Thus, one provision of the Tennessee Constitution cannot be used to "impair or destroy another provision." *Id.* (citing *Vollmer v. City of Memphis*, 792 S.W.2d 446, 448 (Tenn. 1990); *Patterson v. Washington Cnty.*, 188 S.W. 613, 614 (Tenn. 1916)); *see also Leandro v. State*, 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."). Such authority lies elsewhere. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

Ms. Moses relies heavily upon on *Hunter v. Underwood*, 471 U.S. 222 (1985), with respect to an equal protection challenge to the state Constitution. In that case the Supreme Court of the United States struck down a comparable disenfranchisement provision from the Alabama Constitution, reasoning that clear evidence demonstrated its racist origins in the Alabama Constitutional Convention of 1901. *Id.* at 228–29, 233 ("[The] Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks. . . . The delegates to the all-white convention were not secretive about their purpose. . . . Indeed, neither the District Court nor appellants seriously dispute the claim that this zeal for white supremacy ran rampant at the convention."). The *state* constitutional provision thus ran afoul of the *federal* Constitution.

See id. at 233. Here, despite similar allegations, Plaintiff challenges a *state* constitutional provision with other provisions from that *state* Constitution. This she cannot do.

Accordingly, to the extent Ms. Moses's Second Amended Complaint brings claims against the Tennessee Constitution, she has failed to state such claims, and Defendants' Motion is **GRANTED**. To the extent any of Ms. Moses's ten counts are brought in challenge to the Tennessee Constitution itself, those challenges are **DISMISSED**.

II. Equal Protection Claims

Equal protection of the laws of Tennessee is guaranteed by Article I, Section 8 and Article XI, Section 8 of our state Constitution. *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 695 (Tenn. 2020). In short, this means that in our laws "all persons similarly circumstanced shall be treated alike." *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988) (quoting F.*S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)) (citing *Plyler v. Doe*, 457 U.S. 202 (1982); *State ex rel. Dep't of Social Servs. v. Wright*, 736 S.W.2d 84 (Tenn. 1987)). Tennessee courts have "followed the framework developed by the United States Supreme Court for analyzing equal protection claims." *Newton v. Cox*, 878 S.W.2d 105, 109 (Tenn. 1994) (citing *Tenn. Small School Sys. v. McWherter*, 851 S.W.2d 139, 152–54 (Tenn. 1993)). That framework involves three standards of scrutiny: strict scrutiny, heightened scrutiny, and reduced scrutiny. *Hughes v. Tenn. Bd. of Probation & Parole*, 514 S.W.3d 707, 715 (Tenn. 2017) (citing *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994)).

> "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." Heightened scrutiny applies to cases of state sponsored gender discrimination. Reduced scrutiny . . . applies to all other equal protection inquiries and examines "whether the classifications have a reasonable relationship to a legitimate state interest."

Id. at 715–16 (citations omitted). "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), (quoting *Hawk v. Hawk*, 855 S.W.2d 573, 579 nn.8, 9 (Tenn. 1993)). When applying reduced scrutiny,[7] however,

> state legislatures have the initial discretion to determine what is "different" and what is "the same" and that they are given considerable latitude in making those determinations. Our inquiry into legislative choice usually is limited to whether the challenged classifications have a reasonable relationship to a legitimate state interest.

Gallaher v. Elam, 104 S.W.3d 455, 461 (Tenn. 2003) (citations omitted).

Thus, to state an equal protection claim, a plaintiff must first allege that the government has treated the plaintiff differently as compared to similarly situated persons. *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)). In criminal contexts, for example, this often involves demonstrating "(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 (Tenn. 2008) (citations omitted).

> A discriminatory purpose "implies more than intent as volition or intent as awareness of consequences. It implies 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." Thus, the defendant must prove that a discriminatory purpose was one of the factors that motivated the decision-maker."

Id. at 155–56 (citations omitted). "Statistical 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

[7] Neither Ms. Moses nor Defendants suggest heightened scrutiny would apply in this case. *Cf. Hughes*, 514 S.W.3d at 715–16; *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003).

discriminatory purpose, but to do so, it must depict a stark pattern of discrimination that is unexplainable on other grounds." *Id.* at 156. (citations omitted). "[O]nce disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Greenwood*, 547 S.W.3d at 218.

Ms. Moses makes two types of equal protection challenges: (1) discrimination against permanently disenfranchised felons (as compared to those who are able to eventually regain the franchise); and (2) discrimination against black Tennesseans. *Compare* Pl.'s 2d Am. Compl., ¶¶ 95–100, 136–39 *with* Pl.'s 2d Am. Compl., ¶¶ 101–104, 140–43. The Court examines both types of claims.

A. Equal Protection for Permanently Disenfranchised Felons

Defendants argue it is inconsequential that the challenged statutes treat those convicted of certain felonies different from those convicted of other felonies because the General Assembly's disparate treatment of these individuals satisfies rational basis review. A convicted and disenfranchised felon lacks a fundamental right to vote and does not otherwise implicate a suspect class. *See Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (examining Tennessee's re-enfranchisement law and applying rational basis review); *see also Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (holding that states may permissibly strip convicted felons of the fundamental right to vote); *Richardson*, 418 U.S. at 56 (Marshall, J., dissenting) (stating the Court held as such); *Cook v. Galaviz*, 616 F. App'x 747, 751 (5th Cir. 2015) (noting that felons are neither a suspect nor quasi-suspect class). Thus, rational basis review is applicable. *See Hughes*, 514 S.W.3d at 715–16.

Under rational basis review, the question is whether the General Assembly's classification of some felonies as meriting permanent disenfranchisement and others as not "has a reasonable

relationship to a legitimate state interest." *Gallaher*, 104 S.W.3d at 461. Our Supreme Court has held that under this test "a statute may discriminate in favor of a certain class, as long as the discrimination is founded upon a reasonable distinction or difference in state policy." *Id.* Defendants assert the General Assembly could rationally conclude that permanent disenfranchisement is appropriate for certain offenses "[a]gainst [a]dministration of [g]overnment," like the one Ms. Moses was convicted of, as 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, according to Defendants, that persons convicted of certain offenses are unfit to "take part in electing 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." *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967). Such conclusions are especially applicable here, Defendants insist, because Ms. Moses was convicted of tampering with or fabricating evidence. We agree. While Ms. Moses is entitled to have her allegations accepted as true, those allegations must be factual in nature rather than legal conclusions. *See supra* note 5. Ms. Moses must "plausibly allege facts showing that no reasonably conceivable state of facts could provide a rational basis for the challenged [statutes]." *Sanchez v. Office of State Superintendent of Educ.*, 45 F.4th 388, 396 (D.C. Cir. 2022) (citation omitted); *see also Bailey v. Kauffman*, No. 21-3357, 2022 WL 1115136, at *1, 3 (3d Cir. Apr. 14, 2022) (affirming trial court's dismissal of an equal protection claim when there was rational basis for the disparate treatment). Her description of the differential treatment alongside her mere insistence that such disparate treatment cannot withstand any level constitutional scrutiny are plainly insufficient.

Accordingly, Defendants' Motion to Dismiss is **GRANTED** with respect to Counts II and IX, and those claims are hereby **DISMISSED**.

B. Equal Protection for Black Tennesseans

Ms. Moses's race-based equal protection claims, however, are another matter. Defendants argue such claims must fail because she has failed to allege sufficient, *contemporaneous* discriminatory intent. Asserting that the statute is facially neutral, Defendants point to a significant gap in between the enactment of Tenn. Code Ann. § 40-29-204 and the end of Ms. Moses's extensive review of Tennessee's prior discriminatory intent. *See Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980), *superseded by statute*, *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986)) ("[S]uch evidence of past discrimination 'cannot, in the manner of original sin, condemn action that is not in itself unlawful.'"). The United States Court of Appeals for the Sixth Circuit affirmed the dismissal of a constitutional challenge in *Wesley* when the plaintiffs "were unable to present evidence that proved or inferred a discriminatory intent on the part of the Tennessee legislature."). *Id.* at 1262; *see also McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987) ("Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent."). Referring to allegations of statistical data demonstrating a disparate impact in Tennessee's disenfranchisement scheme, Defendants argue that the Tennessee Constitution does not support a disparate impact claim. *See McClay v. Airport Mngmt. Servs., LLC*, 596 S.W.3d 686, 695–696 (Tenn. 2020) (collecting cases that stand for the proposition that disparate impact is not alone sufficient to support an equal protection claim).

Ms. Moses responds that the felony disenfranchisement scheme was used for decades after the Civil War to discriminate and wrongfully prevent black Tennesseans from voting and that it still does so today. She also refers to her statistical data not to support the equal protection claim on its own but to demonstrate the discriminatory purpose for which its use is permissible.

Defendants reply that the cases that rely on such data for demonstration of discriminatory purpose use data that shows an overwhelming disparity for which there can be no other explanation, and that is not the case with Ms. Moses's statistics. Historical discrimination is not evidence of current discrimination, but her present data might be. *See* Pl.'s 2d Am. Compl., ¶¶ 7–9. And at this stage of the litigation, the Court does not evaluate the evidence supporting the allegations of the complaint. Accordingly, with respect to Ms. Moses's Counts III and X, Defendants' motion is **DENIED** as Plaintiff has stated a claim on which relief may be granted.

III. Due Process Claims

Tennessee's Law of the Land Clause, Tenn. Const., art. I, § 8, is synonymous with the protections of the federal Due Process Clauses. *Keller v. Casteel*, 602 S.W.3d 351, 357 (Tenn. 2020) (citing *Bailey v. Blount Cnty. Bd. of Educ.*, 303 S.W.3d 216, 230 (Tenn. 2010)). It is "intended to secure the individual from the arbitrary exercise of the powers of government." *Mortg. Elec. Registration Sys., Inc. v. Ditto*, 488 S.W.3d 265, 280 (Tenn. 2015) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). Due process claims take two general forms: procedural and substantive. *Lynch v. City of Jellico*, 205 S.W.3d 384, 391 (Tenn. 2006). And as before, we address both types of claims.

A. *Procedural Due Process Claims*

Procedural due process typically ensures a person is given both "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) (citing *State v. AAA Bail Bonds*, 993 S.W.2d 81 (Tenn. Crim.App. 1998)). That person must be provided with "fundamentally fair" procedures before being deprived of life, liberty, or property. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 309 (Tenn. 2005) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)). This involves "two-part inquiry:

(1) whether the interest involved can be defined as 'life,' 'liberty' or 'property' within the meaning of the [Law of the Land] 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); *Rowe v. Bd. of Educ.*, 938 S.W.2d 351, 354 (Tenn. 1996)). "The relative weight of [the] interest is relevant to the extent of due process to which one is entitled." *Id.* at 712. When determining what process is due to the individual, a court considers

> (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.

Id. at 711–12 (quoting *State v. Culbreath*, 30 S.W.3d 309, 317–18 (Tenn. 2000)).

Defendants rightly point out that the General Assembly's purpose in codifying criminal offenses and their corresponding penalties provides the fair notice required by due process. *State v. Smith*, 48 S.W.3d 159, 164 (Tenn. Crim. App. 2000) (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *Rose v. Locke*, 423 U.S. 48, 49 (1975); *State v. Boyd*, 925 S.W.2d 237, 242 (Tenn. Crim. App. 1995)). Moreover, Ms. Moses, like all Tennesseans, is presumed to know the law. *Id.* at 164–65; *State v. Anderson*, 894 S.W.2d 320, 322 (Tenn. Crim. App. 1994) (citing *Hunter v. State*, 12 S.W.2d 361, 363 (Tenn. 1928); *State ex rel. Davis v. Thomas*, 12 S.W. 1034 (Tenn. 1890); *McGuire v. State*, 26 Tenn. (7 Hum.) 39, 40 (1846)). It is along these lines that Defendants argue permanent disenfranchisement comports with procedural due process. Tennessee law provides meaningful notice that a charged felon will be permanently disenfranchised upon conviction of certain crimes. *See* Tenn. Code Ann. §§ 39-16-503, 40-29-204(3). Further, upon conviction, the court must declare the felon "infamous" and "immediately disqualif[y her] from exercising the right of suffrage." Tenn. Code Ann. § 40-20-112. And since

2006, felons convicted of offenses against administration of government, like Ms. Moses—who was convicted in 2016, have not been eligible to their right to vote restored. Tenn. Code Ann. § 40-29-204(3)(B).

Ms. Moses responds that Defendants miss the point of her claim—that her guilty plea was not knowingly, intelligently, and voluntarily made because she was not informed of the consequences of that plea with respect to voting before she made it. *See Frazier v. State*, 495 S.W.3d 246, 253 (Tenn. 2016) (citing *Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010)). But, as Defendants point out in their reply, disenfranchisement upon felony conviction is considered a regulatory, nonpenal measure. *Johnson*, 624 F.3d at 753. A nonpunitive measure is in turn considered a collateral consequence of a guilty plea. *Ward*, 315 S.W.3d at 472. Failure by the court to advise a criminal defendant of the collateral consequences of her plea does not render the plea invalid. *Id.* Therefore, the Court must agree with Defendants that Ms. Moses's procedural due process claims lack merit.

Accordingly, on this issue Defendants' motion to dismiss is **GRANTED**, and to the extent that Counts V and VII raise *procedural* due process claims, those claims are hereby **DISMISSED**.

B. *Substantive Due Process Claims*

Substantive due process, on the other hand, "limits oppressive government action" whatever the procedures used. *Lynch*, 205 S.W.3d at 391–392; *Mansell v. Bridgestone Firestone N. Am. Tire*, 417 S.W.3d 393, 409 (Tenn. 2013). It protects those rights "fundamental to our system of ordered liberty." *Brooks v. Bd. of Prof'l Resp.*, 578 S.W.3d 421, 427 (Tenn. 2019)). Claims invoking substantive due process involve either the deprivation of a particular constitutional guarantee or state action so arbitrary as to be "conscience shocking in a constitutional sense." *In re Walwyn*, 531 S.W.3d 131, 139 (Tenn. 2017) (quoting *Lynch*, 205

S.W.3d at 392) (alteration omitted). If the statute does not implicate a fundamental right, it must merely satisfy the rational-basis test. *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997) (citing *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994)). And for state action to be sufficiently "conscience-shocking," the conduct must be "intended to injure in some way unjustifiable by any government interest." *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)).

Defendants first argue, as already discussed in the equal protection context, that because convicted felons do not have a fundamental right to vote, the only test is whether the General Assembly had a rational basis to conclude that permanent disenfranchisement is appropriate for persons convicted of an offense against administration of government. *See Johnson*, 624 F.3d at 746; *Riggs*, 941 S.W.2d at 51. Second, Defendants assert that permanent disenfranchisement does not rise to the level of shocking the conscience because the Tennessee Constitution affirmatively sanctions the practice. Ms. Moses, however, maintains that permanent felon disenfranchisement constitutes oppressive government action inconsistent with our system of ordered liberty because of its racist and oppressive origins, administration, and impact as detailed in her allegations.

Having already addressed the rational basis test above, the remaining question here is whether the practice is nevertheless constitutionally conscience-shocking. Defendants are correct that a practice affirmed by a Constitution cannot somehow be conscience-shocking in terms of that same Constitution. Ms. Moses, however, challenges not felon disenfranchisement but *permanent* felon disenfranchisement. She has pleaded in detail regarding the impact of that practice. We are satisfied the allegations are sufficient to survive Defendants' motion.

Accordingly, to the extent that Counts V and VII raise *substantive* due process claims, Defendants' motion to dismiss those counts is **DENIED**.

IV. Cruel and Unusual Punishment Claims

The Tennessee Constitution prohibits the State from imposing "cruel and unusual" punishments. Tenn. Const. art. I, § 16. The federal Constitution does likewise. *See* U.S. Const. amend. VIII. Although the Tennessee Supreme Court may extend the protections of Article I, Section 16 further than the protections of the Eighth Amendment, the Court applies the same test and regularly refers to federal analyses. *Van Tran v. State*, 66 S.W.3d 790, 800–01 (Tenn. 2001) (citing *State v. Black*, 815 S.W.2d 166, 189 (Tenn. 1991)). And the Eighth Amendment "bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." *State v. Booker*, 656 S.W.3d 49, 70 (Tenn. 2022) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)) (Kirby, J., concurring in the judgment). Courts must "consider whether a particular punishment is 'disproportionate in relation to the crime for which it is imposed.'" *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)). The three-pronged test for whether a punishment is cruel and unusual is therefore as follows:

> First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?

Van Tran, 66 S.W.3d at 800 (quoting *State v. Ramseur*, 524 A.2d 188, 210 (N.J. 1987)).

A threshold question arises, however whether the state action is in fact a punishment because Tennessee, like the federal courts and other states, differentiates between a "punishment" and a "civil disability." *See Cole v. Campbell*, 968 S.WS.2d 274, 275–76 (Tenn. 1998) ("Virtually every jurisdiction subjects a convicted defendant not only to criminal punishment but also sanctions that restrict civil and proprietary rights."). "A civil disability . . . may include the loss of the right to vote, hold office, serve as a juror, possess firearms, and the denial of professional or occupational licensing." *Id.* at 276 (citing Special Project, *The Collateral Consequences of a*

Criminal Conviction, 23 Vand. L. Rev. 929 (1970)). Civil disabilities are considered collateral consequences of a punishment rather than a punishment in and of themselves. *See May v. Carlton*, 245 S.W.3d 340, 354 (Koch, J., dissenting) (citing Tenn. Code Ann. § 40–20–112) ("In Tennessee, a declaration of infamy is currently incidental to a felony conviction.");[8] *Cambria Coal Co. v. Tester*, 167 S.W.2d 343, 344 (Tenn. 1943) (holding that a pronouncement of infamy is mandatory upon a trial court). The disenfranchisement of convicted felons is considered such a civil disability. *See State v. Johnson*, 79 S.W.3d 522, 527 (Tenn. 2002); *Cole*, 968 S.W.2d at 275–76; *May*, 245 S.W.3d at 354 (Koch, J., dissenting); *Cambria Coal Co.*, 167 S.W.2d 344; *cf. Trop v. Dulles*, 356 U.S. 86, 95–97 (1958) (footnote omitted) ("The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.").

Ms. Moses relies upon language by the Tennessee Supreme Court stating that "[l]aws disenfranchising convicted felons are penal in nature" that disenfranchisement is not a civil disability but in fact a punishment. *See May*, 245 S.W.3d at 342. But the Supreme Court's

[8] The *May* Court observed in an Ex Post Facto Clause case that "[l]aws disenfranchising convicted felons are penal in nature." 245 S.W.3d at 349. But that statement has been labeled dicta and confined to the specific circumstances of that case. *See Johnson*, 624 F.3d at 754 (emphasis in original) ("Neither is the 'penal in nature' statement supported by other law or logic in the opinion. The 'penal in nature' statement is pure dicta, insufficient to compel the conclusion that *either* laws retroactively disenfranchising felons *or* laws regulating re-enfranchisement violate the Ex Post Facto Clause of the Tennessee Constitution.").

statement appears limited to the specific context of that case. *Johnson*, 624 F.3d at 754; *see also Johnson*, 79 S.W.3d at 527; *Cole*, 968 S.W.2d at 275–76; *May*, 245 S.W.3d at 354 (Koch, J., dissenting); *Cambria Coal Co.*, 167 S.W.2d 344; *In re Cox*, 389 S.W.3d 794, 798 (Tenn. Crim. App. 2012). This Court is cognizant of the notion that permanent felon disenfranchisement is so severe that it perhaps ought to be considered punitive,[9] but we are nevertheless bound by the decisions of the higher courts. *See Johnson*, 79 S.W.3d at 527; *Cole*, 968 S.W.2d at 275–76; *Cambria Coal Co.*, 167 S.W.2d 344. Thus, we must conclude that Ms. Moses has failed to state a claim that permanent felon disenfranchisement constitutes an impermissible cruel and unusual punishment.

Accordingly, Defendants' motion to dismiss is **GRANTED** on this issue, and Counts IV and VIII are hereby **DISMISSED**.

V. Free and Equal Elections Claims

The Tennessee Constitution provides "[t]hat elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto." Tenn.

[9] In the ex post facto context, the federal courts located in Tennessee have been less inclined to accept lifetime registration on the state's sex offender registry as a nonpunitive, regulatory measure. *See Does #1-9 v. Lee*, No. 3:21-cv-00590, 2023 WL 2335639, at *16 (M.D. Tenn. Mar. 2, 2023) ("In order for the Act to qualify as a prophylactic, civil safety regime, there needs to be at least some tailoring of its restrictions to actual, demonstrable risks. Instead, the Act simply imposes its restrictions automatically on every person convicted by a jury of committing a certain type of criminal offense—in other words, like a punishment."); *Million v. Rausch*, No. 3:22-CV-453, 2023 WL 2558138, at *2, *5 (E.D. Tenn. Feb. 10, 2023); *Doe v. Lee*, No. 3:21-CV-00028, 2022 WL 17650484, at *18 (M.D. Tenn. Dec. 13, 2022) ("Very little about the registry regime that actually exists in Tennessee in 2022 resembles the non-punitive, public safety-minded civil mechanism that it purports to be."); *Jordan v. Lee*, No. 3:19-CV-00907, 2022 WL 1196980, at *19 (M.D. Tenn. Apr. 21, 2022) ("*Snyder* overwhelmingly supports a holding that the Act is punitive for Ex Post Facto Clause purposes . . . ."); *Reid v. Lee*, No. 3:20-CV-0050, 2022 WL 1050645, at *19 (M.D. Tenn. Apr. 7, 2022) (stating the same); *Doe #1 v. Lee*, 518 F. Supp. 3d 1157, 1204 (M.D. Tenn. 2021) (finding the scheme punitive); *Doe v. Rausch*, 461 F. Supp. 3d 747, 768 (E.D. Tenn. 2020) ("Here, the Court concludes that the effect of lifetime compliance with SORVTA is punitive as it relates to Plaintiff."); *see also Foley v. State*, No. M2018-01963-CCA-R3-PC, 2020 WL 957660, at *8 (Tenn. Crim. App. Feb. 27, 2020) (Holloway, Jr., concurring) (calling upon the Tennessee Supreme Court to revisit Ward); *cf. Jackson v. Rausch*, 3:19-CV-377, 2021 WL 4302769, at *10 (E.D. Tenn. Sep. 21, 2021) (distinguishing five-year registration from those plaintiffs subject to lifetime registration). The Court wonders whether permanent felon disenfranchisement might be similarly punitive in nature. *Cf.* Mark E. Thompson, *Don't Do the Crime If You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 Seton Hall L. Rev. 167, 186–89 (2002) ("The history of disenfranchisement shows that it was a decidedly punitive measure in the civilizations from which America inherited the practice.").

Const. art. I, § 5. "The use of 'free and equal' in Art. I, § 5 of the Tennessee Constitution refers to the rights of suffrage and not to the logistics of how the votes are cast." *Mills v. Shelby Cnty. Election Comm'n*, 218 S.W.3d 33, 40–41 (Tenn. Ct. App. 2006) (quoting *State ex rel. Hooker v. Thompson*, 249 S.W.3d 331, 338 (Tenn. 1996)). Article I, Section 5 continues, of course, and provides an exception to its guarantee of the right to vote: "except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction." *Id.* That exception is reaffirmed in Article IV, Section 2: "Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes." Taken together, these provisions "expressly leave to the Legislature the designation in advance of the offenses for which a citizen may be disfranchised." *Crutchfield v. Collins*, 607 S.W.2d 478, 482 (Tenn. Ct. App. 1980).

As recounted in the Court's discussion of her allegations, Ms. Moses's Second Amended Complaint sets forth a theory based on the original meaning of the first portion of this provision, tracing its lineage to the English Bill of Rights in the aftermath of the Glorious Revolution of 1688. She alleges that the General Assembly is using permanent felon disenfranchisement to manipulate Tennessee's electorate. Defendants focus on the affirmative sanction of felon disenfranchisement in this constitutional provision in arguing that her claims cannot survive. But it requires a mangling of the provision's syntax to read the exception for convicted felons as applicable to the constitutional command that all elections are to be free and equal. Separate from the exception's direct modification of the prohibition on denying any person suffrage, "except upon conviction . . . ." makes no sense at all when read with "[t]he elections shall be free and equal." *See* Tenn. Const. art. I, § 5. In any event, the litigants devoted little if any argument to Ms. Moses's originalist

theory during the litigation of this motion. The Court requests further development from the parties on this provision.

With respect to Defendants' argument that Plaintiff has failed to adequately allege intentional, contemporary discrimination with respect to the felony disenfranchisement statutes, the Court relies upon its reasoning in our discussion of the equal protection claims.

To the extent it seeks dismissal of Ms. Moses's Free and Equal Elections claims, Defendants' motion is **DENIED**.

Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss the Second Amended Complaint is **GRANTED IN PART AND DENIED IN PART**. The motion is **GRANTED** with respect to Counts II (facial convicted-felon equal protection challenge), IV (facial cruel and unusual challenge), VIII (as-applied cruel and unusual challenge), and IX (as-applied convicted-felon equal protection challenge), and those claims are hereby **DISMISSED**. Ms. Moses's due process claims (Counts V and VII) are limited to substantive due process challenges because the motion is also **GRANTED** with respect to procedural due process aspects of those claims. Finally, the motion is likewise **GRANTED** with respect to any challenge to the provisions of the Tennessee Constitution itself based in Plaintiff's remaining counts.

It is so ORDERED.

JUDGE FELICIA CORBIN-JOHNSON, CHIEF JUDGE

L. Marie Williams with permission FCJ

JUDGE L. MARIE WILLIAMS

Barry Tidwell with permission

JUDGE BARRY TIDWELL