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.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO REVISE AND TO PERMIT INTERLOCUTORY APPEAL

The Court should revise its July 19, 2023 Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (the "Order") pursuant to Tenn. R. Civ. P. 54.02 because the recent Tennessee Supreme Court decision *Falls v. Goins* leads to the inevitable conclusion that Plaintiff's Claims One and Six of her Second Amended Complaint ("SAC") fail as a matter of law. ---S.W.3d----, 2023 WL 4243961 (Tenn. June 29, 2023).[1] Additionally, the Court should grant Defendants permission to seek an interlocutory appeal because the Tenn. R. App. P. 9 factors weigh in favor of immediate review. Accordingly, the Court should revise its order to dismiss Claims One and Six and otherwise grant permission for interlocutory review.

[1] Claims One through Ten refer to the claims asserted in Counts One through Ten of the SAC.

BACKGROUND

In her SAC, Plaintiff alleged that her "permanent disenfranchisement" was unconstitutional under a variety of facial and as-applied challenges. (SAC at 29-39.) Defendants moved to dismiss the SAC on December 7, 2022, arguing that Plaintiff failed to state a claim. (Defs.' Mot. to Dismiss at 1.) This Court in part agreed and dismissed Claims Two, Four, Eight, and Nine, as well as parts of Claims Five and Seven. (Order at 21-22, 24-26, 28-30.) But the Court denied the motion as to Plaintiff's claims in Counts One, Three, Five, Six, Seven, and Ten:

> 1. The statute providing for permanent disenfranchisement (Tenn. Code Ann. § 40-29-204) (Statute) facially violates the "Free and Equal Elections Clause" of Tenn. Const. art. I, § 5 (SAC at 29-30);
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> 3. The Statute facially violates the right to equal protection under Tenn. Const. art. I, § 8 and art. XI, § 8, because it allegedly has the intent and effect of discriminating against Black Tennesseans (SAC at 31-32);
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> 5. The Statute facially violates the substantive due-process provision of Tenn. Const. art. I, § 8 (SAC at 34-35);
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> 6. The Statute is unconstitutional as applied to Plaintiff under Tenn. Const. art. I, § 5, because (a) she was allegedly provided inadequate information about the effects of her guilty plea before she pled; (b) the State lacked sufficient factual support for the charges against her; and (c) the Statute was enacted with the intent and effect of discriminating against Black Tennesseans (SAC at 35-36);
>
> 7. The Statute is unconstitutional as applied to Plaintiff under the same substantive due-process provision because Plaintiff allegedly was not informed that her conviction would permanently disqualify her from voting (SAC at 36-37);
>
> 10. The Statute violates the same equal-protection guarantees as applied to Plaintiff because the Statute allegedly has the intent and effect of discriminating against Black Tennesseans (SAC at 38-39).

(Order at 23-32.)[2]

[2] In the SAC, Plaintiff also challenged the constitutionality of Tenn. Code Ann. § 40-29-105, a statute prohibiting the restoration of the right to vote to felons convicted of murder, rape, treason,

ARGUMENT

I. *Falls* Requires the Court to Revise Its Decision as to Claims One and Six.

Falls settles the question, in the affirmative, whether Tenn. Const. art. I, § 5, allows for permanent disenfranchisement. Accordingly, Plaintiff's Claims One and Six, which allege that her permanent disenfranchisement is unconstitutional under article I, § 5, fail as a matter of law, and the Court should revise the Order pursuant to Tenn. R. Civ. P. 54.02 and dismiss those claims.

A trial court's non-final, interlocutory order "is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties." Tenn. R. Civ. P. 54.02(a). A motion to revise under Rule 54 "afford[s] litigants a limited opportunity to readdress previously determined issues and afford[s] trial courts an opportunity to revisit and reverse their own decisions." *Harris v. Chern*, 33 S.W.3d 741, 744 (Tenn. 2000). The grant of a motion to revise is within the trial court's discretion. *See id.* at 746. A trial court abuses its discretion if it applies an incorrect legal standard, reaches an illogical conclusion, or employs reasoning that causes an injustice to the movant. *Discover Bank v. Morgan*, 363 S.W.3d 479, 487 (Tenn. 2012).

In light of *Falls*, Plaintiff's Claims One and Six fail as a matter of law, and the Order should be revised to dismiss those claims. As noted, Claim One alleges that the permanent-disenfranchisement portions of the Statute facially violate the "free and equal" provision of Tenn. Const. art. I, § 5. (SAC at 29-30.) But *Falls* specifically holds that article I, § 5 allows for

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or voter fraud. (SAC, pp. 25-26, 29-34); *see* Tenn. Code Ann. § 40-29-105(c)(2)(B). Defendants argued in their motion to dismiss that Plaintiff lacks standing to challenge this statute because she was not convicted of the enumerated offenses. (Defs.' Mem. in Support of Mot. to Dismiss, p. 6 n.3.) Plaintiff did not argue otherwise. (Defs.' Reply in Support of Mot. to Dismiss, p. 3 n.1.) The Order does not address Plaintiff's challenge to Tenn. Code Ann. § 40-29-105.

permanent disenfranchisement; so this Claim cannot proceed to trial and must be dismissed. *Falls*, 2023 WL 4243961, at *4, 6 & n.7. Referencing article I, § 5, the Tennessee Supreme Court held: "[O]ur Constitution affords the legislature broad discretion in limiting voting rights for those convicted of infamous crimes." *Id*. at *6. The Court further held, "Article I, section 5 does not mandate that the legislature provide convicted infamous criminals with a pathway or pathways to regain the right to vote" and cited with approval the Statute, which contains the permanent-disenfranchisement provisions. *Id*. at *6 & n.7 The controlling law, therefore, is that the General Assembly has broad discretion to disenfranchise felons and that there is no constitutional right to re-enfranchise them.

i.e., that if the GA doesn't have to provide a pathway, then perm. disenfranch. is fine across the board

In light of these holdings in *Falls*, Claim One cannot stand as a matter of law. Disenfranchising someone with no right to re-enfranchisement and permanently disenfranchising someone are the same thing, just worded differently. Article I, § 5 cannot approve the one and, at the same time, disallow the other. In other words, nothing in the Free and Equal Election Clause's "plain, ordinary and inherent meaning," *see Hooker v. Haslam*, 437 S.W.3d 409, 426 (Tenn. 2014), requires the General Assembly to provide convicted felons "with a pathway . . . to regain the right to vote," *Falls*, 2023 WL 4243961, at *6. *Falls* dictates that Claim One must be dismissed as a matter of law.

Plaintiff's Claim Six fares no better. In Claim Six, Plaintiff contends that the Statute violates article I, § 5 on an as-applied basis because her guilty plea was allegedly unknowing and involuntary and because the disenfranchising statute was enacted with discriminatory intent. (SAC at 35-36.) As noted, though, Plaintiff's permanent disenfranchisement is expressly permitted by article I, § 5. *Falls*, 2023 WL 4243961, at *4, 6 & n.7. And "the evidence [from Plaintiff's criminal proceedings] shows that [her] guilty plea was knowing, voluntary, and intelligent." *State*

v. Moses, No. W2015-01240-CCA-R3-CD, 2016 WL 4706707, at *11 (Tenn. Crim. App. Sept. 6, 2016), *perm. app. denied* (Tenn. Jan. 23, 2017). Plaintiff cannot assert that she was provided inadequate information during the guilty-plea process, have multiple courts hold against her, and then ask this Court to revisit the other courts' final decisions. Indeed, this Court lacks jurisdiction "to enter a declaratory judgment regarding the legality or constitutionality" of Plaintiff's guilty plea. *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). Last, her claim about discriminatory intent, which more properly belongs in her equal-protection challenge, fails to state a claim that would entitle her to relief, as set forth in Part II of the Argument, *infra* at 8-9. Accordingly, the Order should be revised to dismiss Claims One and Six.

II. Defendants Should Be Permitted to Seek an Interlocutory Appeal.

Whether or not the Court revises its order as requested, *supra*, it should permit an interlocutory appeal in this instance because immediate review will avoid needless, expensive, and protracted litigation and will help develop uniformity of decision on an important area of law.

A. Tenn. R. App. P. 9's standards for granting interlocutory review

A party may take an appeal by permission from an interlocutory order upon application to, and in the discretion of, both the trial and appellate court. Tenn. R. App. P. 9(a). "[W]hile neither controlling nor fully measuring the court's discretion," the following factors indicate the character of a court's consideration in determining whether to grant permission to appeal:

> (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective;
>
> (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an

interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and

(3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment.

Tenn. R. App. P. 9(a). When a trial court is of the opinion that an interlocutory order is appealable, it must state in writing the specific issue or issues the court is certifying for appeal and the reasons for permitting an interlocutory appeal. Tenn. R. App. P. 9(b).

B. Proposed questions presented

Defendants submit the following issues for interlocutory appeal:

1. Whether Plaintiff states a claim to relief that Tenn. Code Ann. § 40-29-204 violates the equal protection provisions of the Tennessee Constitution.

2. Whether Plaintiff states a claim to relief that Tenn. Code Ann. § 40-29-204 violates the substantive due process provisions of the Tennessee Constitution.

3. Whether Plaintiff states a claim to relief that Tenn. Code Ann. § 40-29-204 violates Tenn. Const. art. I, § 5.[3]

C. Interlocutory review will avoid needless, expensive, and protracted litigation.

Interlocutory review of the Order is likely to resolve this matter, or significant portions thereof, and avoid expensive and protracted litigation. Defendants' likelihood to prevail on appeal is high, and interlocutory review would "result in a net reduction in the duration and expense of" this matter. *See* Tenn. R. App. 9(a).

[3] Defendants obviously would not raise this issue if the Court revises its Order as requested under Part I of Defendant's Argument, *supra*.

Further litigation before this Court is likely unnecessary because Defendants' probability of success on appeal is high. *See id.* The Tennessee Supreme Court's recent decision in *Falls* negates Plaintiff's free-and-equal elections and substantive due-process claims. And, standing on the allegations in the SAC alone, Plaintiff's alleged disparate impact does not show the stark pattern necessary to allow a court to infer that the General Assembly enacted the Statute with discriminatory intent in 2006—a threshold requirement to state a valid equal-protection claim.

1. Plaintiffs' claims based on article I, § 5 (Claims One and Six) will likely be found to fail as a matter of law on appeal.

As noted in Part I of Defendant's Argument, *supra* at 3-5, *Falls* holds that article I, § 5 permits permanent disenfranchisement. Plaintiff's contention (Claims One and Six) that permanent disenfranchisement is unconstitutional under article I, § 5 fails as a matter of law and will likely not survive on appeal.

2. Plaintiff's substantive due-process claims (Claims Five and Seven) will likely be found to fail as a matter of law on appeal.

Similarly, Plaintiff's substantive due-process challenge in Claims Five and Seven fails in light of *Falls*. Plaintiff asserts that Tenn. Code Ann. § 40-29-204 "shocks the conscience" by barring her from regaining the right to vote. (SAC at 34-37.) But as explained above, the Tennessee Supreme Court, by whose opinions this Court is bound, has ruled authoritatively in *June of this year* that the Tennessee Constitution authorizes the General Assembly to permanently prohibit a person convicted of a felony from regaining her voting rights. *See Falls*, 2023 WL 4243961, at *6 & n.7; *see supra*, Argument Section I, at 3-5. And "a practice affirmed by a Constitution cannot somehow be conscience-shocking in terms of that same Constitution." (Order at 27.) Accordingly, the Court of Appeals is likely to hold that Claims Five and Seven must be dismissed.

3. The Court of Appeals is likely to hold that Plaintiff's racial equal-protection claims (Claims 3 and 10) must be dismissed under Rule 12.02 because of inadequate factual proof in the SAC.

Finally, Plaintiff's surviving equal-protection claims in Claims 3 and 10 only validly rely on a disparate-impact theory—and "disparate impact alone does not violate the equal protection provisions of the Tennessee Constitution." *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 696 (Tenn. 2020). Plaintiff appears to rely on two sets of factual allegations to support her contention that Tenn. Code Ann. § 40-29-204 was passed with discriminatory intent against Black voters: (1) historical animus against Black Tennesseans through the Reconstruction after the Civil War in the nineteenth century; and (2) statistics allegedly showing a large impact of felon-disenfranchisement laws on Black Tennesseans. (SAC at 31-32, 39; *see* Order at 23-24.) But, as this Court correctly concluded, events of the Reconstruction era and earlier are too remote to be relevant to the General Assembly's intent in passing the Statute in 2006. (Order at 23 (citing *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986); and *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987)). Accordingly, the only allegations that could support her equal-protection claims in the SAC refer to the alleged disparate impact of the statute on Black voters. (SAC at 31-32, 38-39; *see* Order at 23-24.)

But the Tennessee Supreme Court expressly held that disparate impact alone is insufficient to support an equal protection claim under the Tennessee Constitution. *McClay*, 596 S.W.3d at 696. The Tennessee Supreme Court further acknowledged, "[t]he United States Supreme Court has held repeatedly that the Equal Protection Clause of the Federal Constitution does not provide for disparate impact claims." *Id*. at 695 (citing *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 42 (2012); *Lewis v. Casey*, 518 U.S. 343, 375 (1996) (Thomas, J., concurring); *Personnel Admin.*

of Mass. v. Feeney, 442 U.S. 256, 273 (1979); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976)).[4]

Plaintiff's allegations of disparate impact in the SAC cannot support her surviving equal-protection claims. To be sure, statistics can be probative to show discriminatory intent, but only "in rare instances" when the statistics "depict a stark pattern of discrimination that is unexplainable on other grounds." *State v. Banks*, 271 S.W.3d 90, 156 (Tenn. 2008) (citing *McCleskey*, 481 U.S. at 293-94). *Banks*' reliance on *McCleskey* signals that the "stark pattern" requires total or near-total exclusion of an entire group—a pattern Plaintiff does not allege here. *See McCleskey*, 481 U.S. at 293 n.12 (noting examples of the "rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation"). And here, as this Court noted, the General Assembly certainly had rational, non-discriminatory grounds to conclude that offenders convicted of the felonies enumerated in the Statute were "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." (Order at 22 (quotation omitted).) In sum, Defendants' likelihood to prevail on appeal is high and supports granting permission to file an interlocutory appeal.

[4] The Tennessee Supreme Court also held that the Tennessee Constitution's equal-protection provisions are co-extensive with the United States Constitution's Equal Protection Clause. *McClay*, 596 S.W.3d at 695.

4. Interlocutory review would obviate needless, expensive, protracted litigation.

The Court should grant permission for interlocutory appeal to avoid needless, expensive, and further protracted litigation. *See* Tenn. R. App. P. 9(a). Plaintiff agrees that "the number and complexity of the issues raised" in Defendants' motion to dismiss "has taken a considerable (and likely unanticipated) amount of time to brief, argue, and rule on, pushing back development of the merits of the case." (Pl.'s Apr. 3, 2023, Unopposed Mot. to Amend Scheduling Order ("Pl.'s Unopposed Mot.") at 1.)[5] That development is unabated. Neither party disclosed experts by the Court's original March 7, 2023, deadline. (Scheduling Order at 2.) Nor have the parties deposed fact witnesses or experts. While the parties have engaged in written discovery, Plaintiff asserts that "issues with respect to written discovery . . . may require motions briefing and an order from the" Court. (Pl.'s Unopposed Mot. at 1.) The parties are also likely to file competing motions for summary judgment, requiring even more time and resources for the Court and the parties.[6] Accordingly, the litigation in this matter is likely to continue well into next year as these deadlines are pushed back.

The retention of experts, potential further discovery, dispositive motion deadlines, and trial preparation would be extensive and expensive—and all could be obviated by the interlocutory

[5] The Court has not yet ruled on Plaintiff's unopposed motion to push back the remaining litigation dates, including the trial date.

[6] Plaintiff also previously requested a deadline for replies in support of motions for summary judgment to be filed by January 15, 2024. (Pl.'s Unopposed Mot. at 2.) Defendants note that one of this Court's panel members has announced plans to retire on January 3, 2024. Law Shawn Pagán, *Marie Williams to retire from Hamilton County Circuit Court*, Chattanooga Times Free Press (July 31, 2023, at 5:06 PM), https://www.timesfreepress.com/news/2023/jul/31/marie-williams-to-retire-from-hamilton-county/.

appeal. If the surviving equal-protection claims are undisturbed, the parties will need to employ experts to explain Plaintiff's allegations of disparate impact. The parties will also need time to conduct expert depositions. Other discovery may need to be conducted. The parties will likely then litigate motions for summary judgment, which are time consuming and expensive. And if those motions are denied in whole or in part, the parties must then engage in trial preparation, which is unto itself extensive and expensive. Because Defendants' likelihood of success on appeal is high, and interlocutory review would prevent "expensive[] and protracted litigation," this factor favors granting Defendants permission to file an interlocutory appeal. *See* Tenn. R. App. P. 9(a).

D. Interlocutory review would develop a uniform body of law.

Additionally, interlocutory review of the Order would allow Tennessee's appellate courts to develop a uniform body of law as to the constitutionality of the Statute. As to Plaintiff's surviving equal protection claim, this Court concluded that Plaintiff's alleged racial disparities "might be" evidence of a discriminatory purpose. (Order at 23-24 (citing SAC at p. 3, ¶¶ 7-9).) But *Banks* undermines that conclusion. Plaintiff's allegations do not demonstrate the "stark pattern" necessary to infer discriminatory intent based solely on those statistics. *Supra*, Argument Section II.C.3 at 8-9. Granting Defendants' motion would foster clarity as to when alleged statistical data, standing alone, would allow a Tennessee court to infer discriminatory intent for an equal protection claim.

Interlocutory review would also develop the law governing Plaintiff's substantive due-process claims. The Order determined that Plaintiff's allegations "regarding the impact of" "*permanent* felon disenfranchisement" properly stated a claim that the practice was "constitutionally conscience-shocking." (Order at 27.) This determination is also inconsistent with Tennessee Supreme Court authority. Generally, the Tennessee Constitution's due-process

provisions prohibit "certain government *action*," including "*actions* . . . which are arbitrary, or conscience shocking in a constitutional sense." *Lynch v. City of Jellico*, 205 S.W.3d 384, 392 (Tenn. 2006) (quotation omitted and emphasis added). The focus of Plaintiff's substantive due-process claim must be on the *action* of permanent felon disenfranchisement, not its *impact*. *See id.* And *Falls* concludes that the Tennessee Constitution permits permanent felon disenfranchisement. 2023 WL 4243961, at *6. This Court's conclusion as to Plaintiff's substantive due process claims is similarly inconsistent with the Tennessee Supreme Court's opinions and necessitates interlocutory review. Because "the need to develop a uniform body of law" with respect to Plaintiff's claims is high, this Court should grant Defendants' request to file an interlocutory appeal. *See* Tenn. R. App. P. 9(a).

E. The issues to be decided are important.

Last, the issue of whether the Statute is facially unconstitutional is important and may potentially impact thousands of Tennesseans of all races. It is crucial to get a swift answer to whether Plaintiff's claims are viable when national elections are scheduled for next year. For these reasons, the Court should grant Defendants leave to seek an interlocutory appeal in this instance.

CONCLUSION

For the reasons stated, the Court should grant Defendants' motion to revise and for permission to seek interlocutory review of this Court's Order to present to the Court of Appeals the following questions:

1. Whether Plaintiff states a claim to relief that Tenn. Code Ann. § 40-29-204 violates the equal protection provisions of the Tennessee Constitution.

2. Whether Plaintiff states a claim to relief that Tenn. Code Ann. § 40-29-204 violates the substantive due process provisions of the Tennessee Constitution.

3. Whether Plaintiff states a claim to relief that Tenn. Code Ann. § 40-29-204 violates Tenn. Const. art. I, § 5.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of August, 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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