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

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

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO REVISE AND PERMIT INTERLOCUTORY APPEAL

Defendants' Motion rests entirely on a mischaracterization of the narrow *Falls v. Goins* decision, which Defendants deploy as a fig leaf to re-assert arguments that this Court has already considered and correctly rejected at the motion to dismiss stage. The *Falls* decision was limited to the interpretation of statutes that are not at issue in this case.[1] Thus, the decision neither controls the disposition of Plaintiff's constitutional claims nor warrants Defendants' requested relief. Defendants' Motion should be denied in full.

First, Defendants' Motion does not support revising this Court's Order on Defendants' Motion to Dismiss (the "Order"). Stripped away of its incorrect interpretation of *Falls*, a decision that has nothing to do with this litigation, Defendants' Motion simply amounts to a sur-Reply rehashing arguments that the Court considered before issuing its Order. As explained below, while

[1] As explained below, although *Falls v. Goins* is related to voting, it is a narrow, fact-specific case about how a person who has an out-of-state felony conviction and receives an out-of-state pardon goes about restoring his or her voting rights in Tennessee. 673 S.W.3d 173, 179 (Tenn. 2023). The decision deals with **no** constitutional claims, and certainly not the Equal Protection, Substantive Due Process, and Free and Equal Elections claims that Ms. Moses has brought in this case.

the Panel does have the discretion to revise its orders, it must have a good reason to do so. No such reason exists here.

Second, the Court should not exercise its discretion to permit Defendants to seek an interlocutory appeal because none of the typical circumstances warranting such an appeal are present in this case. Defendants do not allege any irreparable harm, fail to identify how this case will be inordinately expensive or protracted, overstate their likelihood of success on appeal, and misapply the uniformity criterion. Instead, Defendants should reserve their arguments for later stages of this litigation.

I. ***Falls*** **is not a proper basis for the Panel to revise its Order.**

This Court correctly denied Defendants' Motion to Dismiss with respect to Claims One and Six, and the *Falls* decision does not provide any grounds for the Court to revise its Order.

A trial court has the discretion to revisit interlocutory orders under Tenn. R. Civ. P. 54.02 in limited circumstances, such as when it recognizes that a prior order contains a clear legal error. *See, e.g., Waddell v. Waddell*, 2023 WL 2485667, at *7-9 (Tenn. Ct. App. Mar. 14, 2023) (upholding trial court's conclusion to revisit prior ruling because of possible legal error and because review of the prior order "would not prejudice either party").[2] Although such a decision is discretionary,[3] a motion to revise is generally only appropriate when (1) controlling law changes, (2) previously unavailable evidence becomes available, or (3) it is required to correct a clear error of law or prevent injustice to the moving party. *Shannon v. Shannon*, 2021 WL 1590234, at *4

[2] Copies of all unpublished cases cited herein are attached as **Collective Exhibit 1**.

[3] *Harris v. Chen*, 33 S.W.3d 741, 744 (Tenn. 2000); Tenn. R. Civ. P. 54.02(1). While not identical, courts interpret Tenn. R. Civ. P. 54.02 under a similar standard to Tenn. R. Civ. P. 59.04. *See Kenyon v. Handal*, 122 S.W.3d 743, 763 (Tenn. Ct. App. 2003); *Harris*, 33 S.W.3d at 744; *cf. Waddell*, 2023 WL 2485667 at *8-9.

(Tenn. Ct. App. 2021) (upholding the trial court's decision to alter or amend under Rule 59 because there was a clear and obvious error of law resulting in injustice).

Importantly, the decision to revise should not serve as a chance to "relitigate old matters." *Williams v. Shelby Cnty. Bd. of Educ*., 2021 WL 698861, at *2 (W.D. Tenn. 2021) (interpreting similar federal law and local rules) (quoting *In re Regions Morgan Keegan Secs., Derivative*, 2010 WL 5464792, at *1 (W.D. Tenn. Dec. 30, 2010)). A Rule 54.02 motion, like a Rule 59.04 motion, also "should not be used to raise or present new, previously untried or unasserted theories or legal arguments," *Rehrer v. Rehrer*, 2011 WL 13165343, at *5–6 (Tenn. Ct. App. 2011) (quoting *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005)). While the decision to revise is discretionary, courts should only revise with good reason. *See Waddell*, 2023 WL 2485667 at *8–9.

Here, controlling law has not changed, there is no new evidence, and there is no clear error of law or injustice to the Defendants. The legal standards at the motion to dismiss stage are clearly established; Plaintiff's surviving claims should proceed forward to discovery. To revise the Order would be to allow the Defendants to use an unrelated case to relitigate issues that the Panel has already considered. *Falls* provides no basis to revisit the Order, and the Court correctly denied Defendants' Motion to Dismiss.

A. There has been no change in controlling law.

Defendants claim that "*Falls* settles the question [as to] whether Tenn. Const. art. I, § 5, allows for permanent disenfranchisement" (Mem. at 3), but this argument not only (1) ignores Plaintiff's actual claims but (2) is wrong in any case. On the first point, to be clear: Plaintiff understands that Article I § 5 of the Tennessee Constitution contains a disenfranchisement provision for those convicted by a jury of some infamous crime. That is not being challenged in this case. Plaintiff <u>is</u>, however, challenging the <u>manner</u> in which felon disenfranchisement is

implemented in Tennessee, contending that this implementation fails to comply with other constitutional provisions (namely the Equal Protection, Free and Equal Elections, and Due Process provisions of the Tennessee Constitution). As Plaintiff has pointed out before (*see, e.g.,* Resp. to Mot. to Dismiss at 2), simply because disenfranchisement for those convicted of infamous crimes is written into Article I § 5 does not mean that its *implementation* (given that such provision is not self-executing[4]) automatically complies with the other provisions of the Tennessee Constitution. *Falls* has nothing to say on these issues.

Rather, *Falls* was simply a statutory interpretation case, which even a cursory read of the opinion reveals. It was not a change in controlling law:

> Perhaps the most proper issue statement was set forth by the Court of Appeals, which stated simply that "[t]he central question in this appeal is whether, pursuant to Tenn. Code Ann. [section] 2-19-143(3), Mr. Falls was immediately re-enfranchised in Tennessee when the Governor of Virginia restored his Virginia citizenship rights in 2020, or whether he is subject to the additional preconditions to re-enfranchisement established by Tenn. Code Ann. [section] 40-29-202(b) and (c)."

Falls, 673 S.W.3d at 178 (quoting *Falls v. Goins*, 2021 WL 6052583, at *3 (Tenn. Ct. App. 2021)). Indeed, the entire case is about rights restoration, not deprivation: "It is clear that, under some circumstances, our legislature has sought to provide recourse for those deprived of the right to vote based on conviction of an infamous crime. It is less clear what those precise circumstances are, and we seek to answer that question **by interpreting the statutes at issue** in this case." *Id.* at 180 (emphasis added).

The Tennessee Supreme Court's express efforts to narrowly cabin its holding in *Falls* further underscore the inaccuracy of Defendants' characterization of the decision. As an initial matter, the Court noted that the legislature "provided a list of enumerated crimes that bar persons

[4] *See Gaskin v. Collins*, 661 S.W. 2d 865, 867 (Tenn. 1983) ("We agree that these provisions are not self-executing.")

from voting altogether" in Tenn. Code. Ann. § 40-29-204, *id.* at 182 n.7, and explained that those provisions were "irrelevant to the facts before [the Court]" and outside of the scope of the Court's analysis. *Id.* at 179 n.6. Those statements alone put to rest the question of whether *Falls* addressed the constitutionality of the permanent disenfranchisement statutes at issue in this case. Moreover, the Court expressly disclaimed offering an "opinion as to the outcome of a hypothetical case in which a person convicted of an infamous crime in another state regains citizenship and voting rights in that person's state of prosecution before establishing residency and attempting to register to vote in Tennessee." *Id.* at 178. Put differently, *Falls* does not address all applications of the statute that was at issue, let alone the broad constitutional issue that Defendants claim it addresses.

It is telling that Defendants can only cite two portions (and a footnote) of the *Falls* opinion for their argument.[5] This is because *Falls* is not about constitutional interpretation or claims; rather, the opinion simply mentions Article I § 5 in a preamble to its actual holding regarding statutory interpretation. It is also noteworthy that the one sentence quoted by Defendants in their memorandum actually supports *Plaintiff's* claims: "Indeed, to the contrary, our Constitution affords the legislature broad discretion in limiting voting rights for those convicted of infamous crimes." *Id.* at 182. This preamble notes that the legislature has broad discretion to limit voting rights, not unlimited discretion. The legislature's discretion, of course, is limited by the other parts of the Tennessee Constitution, which is precisely what Plaintiff is arguing in this case.

As this Court acknowledged in denying the Motion to Dismiss, the relevant inquiry is whether the statutes at issue are incompatible with the Tennessee Constitution's (1) Equal Protection provisions; (2) Due Process provisions; and (3) Free and Equal Elections Clause. (Order on Motion to Dismiss at 31-32.) *Falls* does not engage in that inquiry. Rather, *Falls* contemplates

[5] One citation, to Note 7, is simply a recitation of T.C.A. § 40-29-204. Just like the other cited portions of the opinion, it contains no analysis or holding of any kind.

whether "persons convicted of infamous crimes in other states must comply with the re-enfranchisement provisions listed in section 2-19-143(3) and section 40-29-202 when they seek to obtain re-enfranchisement." *Falls*, 673 S.W.3d at 184.

In other words, while *Falls* is about voting broadly speaking, it is not relevant to Plaintiff's claims because: (1) it did not deal with constitutional claims at all (and therefore made no new law regarding the constitutionality of voting rights); (2) it did not rule on Equal Protection, Due Process, or Free and Equal Elections claims (and therefore made no new law about such claims); and (3) it was decided strictly on the basis of an attempt to harmonize two allegedly conflicting statutes (and therefore made no new law outside of those two statutes). As such, this Panel has no reason, let alone good reason, to revise its Order.

B. Defendants are seeking to "relitigate old matters."

Rather than raising new law that bears on the issues in this case, Defendants are simply attempting to invoke *Falls* as a stalking horse to relitigate their Motion to Dismiss arguments. Defendants assert the exact same argument under the incorrect premise that *Falls* should change the outcome. (Mem. at 4.) This Panel already rejected Defendants' argument that the "affirmative sanction" of felon disenfranchisement in article I, § 5 decides Plaintiff's claims. The Panel should similarly reject Defendants' claim that "*Falls* specifically holds that article I, § 5 allows for permanent disenfranchisement." (Mem. at 3-4.) Compare the two arguments:

Motion to Dismiss:

- "[P]ermanent disenfranchisement on conviction of a felony is affirmatively sanctioned in the Tennessee Constitution and violates no other[6] constitutional provision." (Mem. in Support of Motion to Dismiss at 1.)

[6] This is one of the few places that Defendants acknowledge Plaintiff's actual claims, i.e., that permanent disenfranchisement violates "other constitutional provision[s]."

- "Since the exclusion of felons from voting has 'affirmative sanction' in the constitution, a state may permanently disenfranchise a felon 'consistent with the Equal Protection Clause of the Fourteenth Amendment.'" (Mem. in Support of Motion to Dismiss at 16.)

- "The Tennessee Constitution affirmatively sanctions the disenfranchisement of a person found guilty of an infamous crime." (Mem. in Support of Motion to Dismiss at 19)

Motion to Revise and Permit Interlocutory Appeal:

- "*Falls* settles the question, in the affirmative, whether Tenn. Const. art. I, § 5, allows for permanent disenfranchisement." (Mem. at 3.)

- "*Falls* specifically holds that article I, § 5 allows for permanent disenfranchisement; so this Claim cannot proceed to trial and must be dismissed." (Mem. at 3-4.)

Defendants are simply attempting to relitigate the same argument. To be clear, the Panel has already fully considered this argument and, among other things, (1) held that Plaintiff has stated an Equal Protection claim notwithstanding the language of Article I § 5; (2) held that Plaintiff has stated a Substantive Due Process claim notwithstanding the language of Article I § 5; and (3) held that Plaintiff has stated a Free and Equal Elections claim notwithstanding the language of Article I § 5, asking the parties to "further develop[]"the argument that § 40-29-204 disenfranchises a swath of Tennesseans in a way that manipulates the electorate and makes impossible the constitutional mandate of "free and equal" elections. (Order on Motion to Dismiss at 32.)

To revise the Order that resulted from such substantial briefing and argument—and thereby deny Plaintiff the ability to even *attempt* to prove her claims—would work a substantial injustice upon Plaintiff.

II. Defendants cannot meet the standard for an interlocutory appeal and are simply trying to deny Plaintiff a reasonable opportunity to prove her case.

By seeking interlocutory appeal, Defendants offer nothing more than the unsupported belief that the Panel got it wrong when ruling on the Motion to Dismiss. This, however, is far too little to justify halting this case in its tracks and accelerating an appeal that Defendants will have

an opportunity to file later in this case. None of the typical justifications for an interlocutory appeal are present here: (1) Defendants can articulate no potential irreparable injury; (2) Defendants cannot articulate any way in which this case will be more expensive or protracted than normal litigation; (3) Defendants cannot articulate a high probability of reversal because *Falls* is irrelevant and they otherwise simply repeat their Motion to Dismiss arguments; (4) there is no body of law that needs to be uniformly developed; and (5) Defendants can absolutely pursue their arguments in the course of a normal appeal.

"Interlocutory appeals to review pretrial orders or rulings are generally 'disfavored.'" *Reid v. State,* 197 S.W.3d 694, 699 (Tenn. 2006) (quoting *State v. Gilley,* 173 S.W.3d 1, 5 (Tenn. 2005)); *see also Pickard v. CNR Foods, LLC*, 2017 WL 5571245, at *2 (Tenn. Cir. Ct. Sep. 11, 2017) ("An interlocutory appeal is an exception to the general rule which requires a final judgment before a party may appeal as of right.") (denying motion); *Romine v. Morris*, 2000 WL 35539756 (Tenn. Cir. Ct. June 16, 2000) (denying motion for interlocutory appeal after motion to dismiss was denied).[7]

Though the Panel has discretion as to whether to permit an interlocutory appeal, there is a high bar for Defendants to clear in order to justify such an action. Tennessee Rule of Appellate Procedure 9 states: "In determining whether to grant permission to appeal, the following, while

[7] *See also, e.g., Kasemeyer v. Chase Home Finance, LLC*, 2008 WL 6016244 (Tenn. Cir. Ct. July 21, 2008) ("The Defendant has failed to meet its burden and show that allowing an interlocutory appeal at this time would prevent protracted litigation and expense. The Court believes the causes of action the Plaintiff has raised should allow the Plaintiff to move forward in presenting his case, having previously ruled on the Defendant's Motion for Summary Judgment."); *Gilbert, Jr. v. Wessels, MD*, 2013 WL 12396980, at *2 (Tenn. Cir. Ct. Jan. 08, 2013) (denying motion for interlocutory appeal after defendant's expert was excluded); *c.f. Jones v. Yancy*, 420 F. App'x 554, 557 (6th Cir. 2011) ("Although we have interpreted *Scott* to permit us to exercise jurisdiction over interlocutory appeals from denials of summary judgment in those 'rare' cases where the district court makes a 'blatan[t] and demonstrabl[e] error' in finding an issue of material fact . . . the present case falls well short of satisfying this narrow exception." (quoting *Wysong v. City of Heath*, 260 Fed.Appx. 848, 853–54 (6th Cir. 2008)).

neither controlling nor fully measuring the courts' discretion, indicate the character of the reasons that will be considered:

> (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 (emphasis added).

Here, Defendants seek permission to appeal the Panel's Order on Defendants' Motion to Dismiss. As the Panel was aware during its deliberations on Defendants' Motion, "Tenn. R. Civ. P. 12.02(6) motions are rarely appropriate in declaratory judgment actions" such as this one. *Cannon Cnty. Bd. of Educ. v. Wade*, 178 S.W.3d 725, 726 (Tenn. Ct. App. 2005). Rather, the "prevailing rule is that when a party seeking a declaratory judgment alleges facts demonstrating the existence of an actual controversy concerning a matter covered by the declaratory judgment statute, the court should not grant a [Rule] 12.02(6) motion to dismiss but, instead, proceed to render a declaratory judgment as the facts and law require." *Parsley v. City of Manchester*, 2021 WL 6139210, at *4 (Tenn. Ct. App. Dec. 29, 2021) (internal citations omitted).

Indeed, the "sole purpose" of a 12.02(6) motion is merely "to test the legal sufficiency of the complaint." *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992). After extensive briefing, argument, and deliberation, this Panel concluded that some of Plaintiff's claims were not legally sufficient, but that some of her claims were, and such claims warranted discovery and

further development. (*See, e.g.,* Order on Motion to Dismiss at 24 ("[A]t 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.").)

In *Vaughn*, the Supreme Court of Tennessee found that Tenn. Code. Ann. § 27-305 (which mirrors and is superseded by Rule 9(a)) should not be construed in such a way "as to defeat substantial justice, result in a duplication of appeals, nor to evade a response to an issue of critical public importance which continues to recur but evades review." *Tennessee Dept. of Human Services v. Vaughn*, 595 S.W.2d 62, 63 (Tenn. 1980) (emphasis added). Given the substantial delays that Plaintiff has already suffered in this case (and the number of elections she has already missed), granting an interlocutory appeal would not only work a substantial injustice on her personally, but also on the other thousands of Tennesseans unjustly permanently disenfranchised.

A. Defendants do not (and cannot) assert any potential irreparable injury.

The most typical situations in which interlocutory appeals are granted are where there is a threatened irreparable injury.[8] Often such injury is loss of parental rights, given that time with children—like the ability to vote in elections—is something that, once lost, can never be regained. *See, e.g., In re K.A.S.*, 2005 WL 195110, at *1 (Tenn. Ct. App. Jan. 27, 2005) (upholding grant of interlocutory appeal and reversing trial court's order). Frankly, if any party is in danger of irreparable injury, it is the Plaintiff, who loses her right to vote in increasing numbers of elections the longer this case takes to resolve. No such injury to Defendants exists here, and Defendants have not alleged one.

[8] Such injuries must be substantial and truly irreparable; even injuries that might be considered at first to be irreparable do not always qualify under the law. *See, e.g., State v. Gilley*, 173 S.W.3d 1, 6 (Tenn. 2005) (no irreparable injury and grant of interlocutory appeal was in error even though criminal defendant argued that evidence of other crimes could result in wrongful conviction).

B. This case does not present issues of needless, expensive, or protracted litigation.

By default, Plaintiffs are entitled to 'have their day in court,' which includes conducting discovery and developing their claims. *See, e.g., Land v. Dixon*, 2005 WL 1618743, at *6 (Tenn. Ct. App. July 12, 2005) ("Plaintiffs should be allowed the opportunity to prove that Defendants' conduct fell below the applicable standard of care . . . ."); *Miller v. Vanderbilt Univ.*, 2017 WL 4467445, at *7 (Tenn. Ct. App. Sept. 29, 2017) (concluding that the plaintiff had a "reasonable opportunity to prove his case" because ample discovery and a trial was conducted); *see also e.g., Ohio Envtl. Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977) (courts "must tread carefully in granting a stay of proceedings since a party has a right to a determination of its rights and liabilities without undue delay." (emphasis added)).[9]

Allowing this case to continue to the discovery phase will provide the Plaintiff with the "reasonable opportunity" to prove her case. While Defendants argue that the movement of certain deadlines demonstrate the propriety of an interlocutory appeal, the retention of experts, further discovery, and trial preparation are simply the normal procedures of a lawsuit. There is no indication (or allegation) that this case will be inordinately expensive or protracted. It is not, for example, a multi-district litigation (MDL) case; nor will it require highly technical proof (such as medical or engineering testimony). An interlocutory appeal is not meant to circumvent normal litigation procedure. Indeed, Defendants' expansive arguments about the burdens posed by proceeding with this litigation are so generalized that they could be used to describe the practices associated with each and every lawsuit. (*See* Mem. At 10-11) Defendants do not present any

[9] Because Federal Rules of Civil Procedure 26(b) and (c) generally mirror Tennessee Rules of Civil Procedure 26.02 and 26.03, federal precedent is persuasive. *See Harris v. Chern*, 33 S.W.3d 741, 745 n.2 (Tenn. 2000) ("Federal case law interpreting rules similar to our own are persuasive authority for purposes of construing the Tennessee rule").

evidence that this case creates an unusual, unnecessary expense for both parties by moving on to discovery. The possibility of this case going to trial is not compelling enough to warrant interlocutory review.

C. Defendants substantially overstate the probability of reversal.

Defendants' articulation of the likelihood of their success on an interlocutory appeal is substantially overstated, because (1) motions to dismiss are rarely granted in similar cases, (2) *Falls* is irrelevant to this case, and (3) Defendants merely parrot the arguments that this Court previously rejected.

As discussed above, at the Motion to Dismiss stage, the Court only tests the legal sufficiency of the complaint; it does not inquire into factual development or otherwise resolve disputed issues. *See supra.* There is no reason to think (and Defendants offer no reason why) the Court of Appeals would disturb the Panel's lengthy and detailed decision on the Motion to Dismiss, particularly given the highly deferential legal standards that apply. Thus, instead of offering any reason why Plaintiff's claims should be dismissed now (as opposed to a few months ago) and why the Court of Appeals is likely to agree, Defendants simply refer to *Falls* (which is inapposite, *see supra*) and repeat their Motion to Dismiss arguments.

As to the Motion to Dismiss arguments that have already been rejected, Defendants again misstate both the Second Amended Complaint and the Court's Order when they assert that the only allegations of discrimination made by Plaintiff are historical context and statistical proof. As repeatedly briefed and argued, the Second Amended Complaint alleges (1) a historical pattern of discrimination that persists to this day, up to and including the passage of the challenged statutes; (2) specific discriminatory intent in the passage of the challenged statutes (*see, e.g.*, Second Amended Complaint at ¶ 123); and (3) statistical evidence that supports and supplements these

intent allegations and which—after discovery—may prove to be sufficient evidence of discrimination in its own right, as permitted by *State v. Banks*, 271 S.W.3d 90 (Tenn. 2008). Thus, setting aside *Falls* and the arguments that have already been rejected by the Panel, Defendants are left simply with the unsubstantiated hope that the Court of Appeals will see things differently. As discussed below, Defendants will have an opportunity to brief this issue after Plaintiff has had a chance to prove her case, and Defendants fail to offer a persuasive justification as to why the appeal needs to happen now.

D. An interlocutory appeal is not needed to develop a uniform body of law.

Defendants also misapprehend the uniformity criterion, which does not apply here. The need to develop a uniform body of law is a unique element that applies to legal questions that come up repeatedly across the State and/or for issues of first impression. Neither circumstance applies. In *State v. McKim*, the Supreme Court approved interlocutory appeal regarding which factors prosecutors can consider in deciding whether to grant pretrial diversion, a circumstance that occurs tens or hundreds of thousands of times a year. 215 S.W.3d 781, 790 (Tenn. 2007).[10] Separately, in *State v. Hurley*, the Tennessee Court of Appeals noted that "Tennessee courts often grant Rule 9 applications on issues of first impression." 2021 WL 2545256, at *4 (Tenn. Ct. App. June 22, 2021).

Here, there is no need to develop a uniform body of law because (1) there are few—if any—other cases currently pending (or on appeal) that deal with the intersection of statistical proof and Equal Protection claims and (2) the use of statistical proof to establish Equal Protection claims

[10] Highlighting how difficult it is to meet the uniformity criterion is *State v. Sparks*, 1988 WL 1708, at *4 (Tenn. Crim. App. Jan. 14, 1988). There, even though the trial court granted a motion for interlocutory appeal to seek guidance as to proper statutory interpretation of a DUI blood test statute (which would conceivably be relevant to thousands of cases a year), the Tennessee Court of Appeals overruled the trial court's grant, finding that interlocutory appeal was not necessary.

is not an issue of first impression, given the Tennessee Supreme Court's ruling in *State v. Banks* and the substantial United States Supreme Court law on this issue (some of which is cited in the *Banks* opinion). 271 S.W.3d at 156. Moreover, even if such a need to develop a uniform body of law *did* exist, Defendants' Motion would be premature for the simple reason that no statistical proof has been adduced yet. Given that the "statistical proof as evidence of discrimination" question is highly factual, any interlocutory appeal would be the equivalent of an advisory opinion only, which the Court of Appeals and the Supreme Court have held is inappropriate. *See, e.g., State v. Gilley*, 173 S.W.3d 1, 6 (Tenn. 2005) ("An appellate court decision at this stage would be tantamount to an advisory ruling and would not be necessary to achieve uniformity in the law.").

Defendants claim that their "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," (Mem. at 11), but Defendants again fail to recognize that in both *Banks* and *McClesky*, actual statistical evidence was being analyzed; the courts were not simply theorizing in a vacuum. In *Banks*, no "statistical information specifically regarding racial discrimination in connection with the imposition of the death penalty in Tennessee" was provided. 271 S.W.3d at 157. In *McClesky*, the Court examined an extensive statistical study in context of the death penalty claims at issue. *McCleskey v. Kemp*, 481 U.S. 279, 296 (1987).[11]

E. Defendants can raise their arguments following the entry of final judgment.

As to the final factor, there is no question that Defendants will be able to raise these arguments on appeal after the case concludes at the trial court level and, indeed, likely before that. It is highly likely that Defendants will raise such arguments again at the Motion for Summary

[11] The Court also held that it had "permitted a finding of constitutional violation even when the statistical pattern does not approach" the "stark pattern" level of proof. *McCleskey*, 481 U.S. at 294 (internal citation ommitted).

Judgment stage and—if unsuccessful there—at trial. If Plaintiff's claims succeed at either stage, Defendants can certainly raise the arguments again on appeal.

There is no "extraordinary" reason to pursue the appeal now beyond Defendants' desire to further delay the resolution of this case. Defendants assert that the issue "may potentially impact thousands of Tennesseans of all races" and that "[i]t is crucial to get a swift answer to whether Plaintiff's claims are viable when national elections are scheduled for next year." (Mem. at 12.) But their argument about the time sensitivity of the interlocutory appeal rings hollow, considering the status quo—the permanent disenfranchisement of the Plaintiff and similarly situated individuals—would remain in place irrespective of the outcome of a potential interlocutory appeal. Only the advancement of this lawsuit can alter the status quo for thousands of Tennesseans.

CONCLUSION

Given that Plaintiff has multiple claims that survived Defendants' Motion to Dismiss, this case should proceed just like any other lawsuit. Defendants have articulated no basis for the Panel to revise its Order and no basis for an interlocutory appeal. Rather, they have simply grasped at a few lines from a recent case as an excuse to re-assert arguments (1) already rejected by this Panel and (2) that can be raised during the ordinary course of appeal at the end of this stage of litigation. Plaintiff respectfully requests that this Panel DENY Defendants' Motion in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served via email and the Court's electronic filing system on October 18, 2023, as follows:

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