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 Suzanne Cooke**
capacities,	)	**Judge Barry Tidwell**
	)	
Defendants.	)	

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

INTRODUCTION

As Defendants previously discussed, the Tennessee Supreme Court's decision in *Falls v. Goins*, 673 S.W.3d 173 (Tenn. 2023), holds that a person disenfranchised upon conviction of an infamous crime has no right to re-enfranchisement under article I, § 5, of the Tennessee Constitution. That holding applies to Plaintiff's Claims One and Six of her Second Amended Complaint ("SAC"), which assert that her ineligibility to restore her suffrage rights under Tenn. Code Ann. § 40-29-204—or her "permanent disenfranchisement"—violates article I, § 5. As a result, the Court should revise its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (the "Order") and dismiss Claims One and Six.

Interlocutory appellate review is also warranted. *Falls* casts doubt on the Order's determination that Plaintiff's substantive due process challenge to her inability to regain her right to vote is constitutionally conscience shocking. And Plaintiff only asserts a disparate-impact

theory to support her equal protection claims; her statistical disparity allegations fail to show the stark pattern the Tennessee Supreme Court requires to establish that the General Assembly enacted Tenn. Code Ann. § 40-29-204 with a discriminatory purpose. Since Defendants have a high likelihood of success on appeal, granting interlocutory review would prevent the parties and this Court from engaging in needless, expensive, and further protracted litigation and help develop a uniform body of law.

Plaintiff opposes Defendants' motion, but she offers no compelling reasons for this Court to deny it. Plaintiff relies on an incorrect statement of law regarding Defendants' request to revise the Order; fails to show that *Falls*' interpretation of Tenn. Const. art. I, § 5, does not apply to her claims; and merely speculates that proceeding to discovery "may" help her uncover evidence of a stark pattern of discrimination. Defendants maintain that the Court should revise the Order to dismiss Plaintiff's Claims One and Six and permit them to file an interlocutory appeal as to Plaintiff's Claims One, Three, Five, Six, Seven, and Ten.

ARGUMENT

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

A. Plaintiff provides the Court with an incorrect statement of the law as to the standards governing Defendants' request to revise.

In their Memorandum, Defendants requested this Court to exercise its discretion to revise its Order under Tenn. R. Civ. P. 54.02 to dismiss Plaintiff's Claims One and Six. (Defs.' Mem. in Support of Mot. to Revise and to Permit Interlocutory Appeal ("Defs.' Mem."), 3-5.) Plaintiff, relying on *Waddell v. Waddell*, No. W2020-00220-COA-R3-CV, 2023 WL 2485667, at *7-9 (Tenn. Ct. App. Mar. 14, 2023), *perm. app. denied* (Tenn. Sept. 12, 2023), argues that the Court cannot revise the Order unless the "limited circumstances" required to alter or amend a judgment

under Tenn. R. Civ. P. 59.04 are met.[1] (Pl.'s Resp. in Opp'n to Defs.' Mot. to Revise and Permit Interlocutory Appeal ("Pl.'s Resp."), 2-3.) But *Waddell* rejected that argument. *Waddell* determined that the appellant "relie[d] on an incorrect statement of the law" in arguing that a Rule 54.02 motion is "analyzed under the framework for a Rule 59.04 motion." 2023 WL 2485667, at *7-8. And *Waddell* affirmed the trial court's decision to revise the order denying the appellee's motion to dismiss in order "to 'get the issue right.'" *Id.* at *9 (alterations omitted).

Nor is *Waddell* the only case Plaintiff miscites. She asserts that both *Harris v. Chen*, 33 S.W.3d 741 (Tenn. 2000), and *Kenyon v. Handal*, 122 S.W.3d 743 (Tenn. Ct. App. 2003), require "courts [to] interpret Tenn. R. Civ. P. 54.02 under a similar standard to Tenn. R. Civ. P. 59.04." (Pl.'s Resp., 2 n.3.) But *Harris* made no such ruling. *See Waddell*, 2023 WL 2485667, at *8 (rejecting same argument). And *Kenyon* provides the opposite: in reviewing Rule 59.04 motions, courts instead "consistently use[] [Rule 54.02]'s standards." 122 S.W.3d at 763.[2]

Plaintiff's remaining claim, that a motion to revise "should not serve as a chance to relitigate old matters," also has no support under Tennessee law. (Pl.'s Resp. at 3 (quotations omitted).) Rule 54.02 allows litigants "a limited opportunity to readdress *previously determined issues*" and "afford[s] trial courts an opportunity to revisit and reverse their own decisions." *Harris*, 33 S.W.3d at 744 (emphasis added). Further, *Waddell* approved of the trial court's decision

[1] Those circumstances include "when the controlling law changes before the judgment becomes final; when previously unavailable evidence becomes available; or to correct a clear error of law or to prevent injustice." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005).

[2] Plaintiff's reliance on other cases applying Rule 59.04 are also inapplicable. (Pl.'s Resp. at 2-3 (citing *Shannon v. Shannon*, No. M2020-00055-COA-R3-CV, 2021 WL 1590234, at *3-4 (Tenn. Ct. App. Apr. 23, 2021) (no perm. app. filed); and *Rehrer v. Rehrer*, No. E2010-01907-COA-R3-CV, 2011 WL 13165343, at *5-6 (Tenn. Ct. App. Sept. 15, 2011) (no perm. app. filed)).)

to revise the order denying the appellee's motion to dismiss after the matter was transferred to it. *See Waddell*, 2023 WL 2485667, at *2-3, 7-9.[3] Additionally, *Falls* was decided well after the parties completed briefing and this Court conducted a hearing on Defendants' motion to dismiss, so Defendants satisfy Plaintiff's (incorrect) "old matters" standard in any case. In sum, the Court should apply the appropriate discretionary standard to resolve Defendants' request to revise the Order.

B. *Falls* requires dismissal of Plaintiff's Claims One and Six.

As Defendants previously explained, *Falls* holds that Tenn. Const. art. I, § 5,[4] "does not mandate that the legislature provide convicted infamous criminals with a pathway or pathways to regain the right to vote." (Defs.' Mem., 4 (quoting *Falls*, 673 S.W.3d at 182).) In other words, an infamous criminal has no right to restore her right to suffrage under article I, § 5. While Plaintiff insists that *Falls* does not apply to her claims attacking Tenn. Code Ann. § 40-29-204[5], her contentions are meritless.

[3] Plaintiff also contends that a motion to revise should not be granted without "good reason." (Pl.'s Resp., 3.) But if the transfer of a case serves as a "good reason" for the trial court to consider a motion to revise in order "to 'get the issue right,'" *see Waddell*, 2023 WL 2485667, at *7-9 (alterations omitted), applying recent Tennessee Supreme Court precedent interpreting the constitutional provision Plaintiff raises provides an even better reason for this Court to do so.

[4] Tenn. Const. art. I, § 5 provides that "elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction."

[5] Although Plaintiff's SAC purports to challenge the constitutionality of Tenn. Code Ann. § 40-29-105, Defendants have argued, and Plaintiff has never disputed, that she lacks standing to assert her challenge. (Defs.' Mem. in Support of Mot. to Dismiss, at 6 n.3; Defs.' Reply in Support of Mot. to Dismiss, at 2 n.1; Defs.' Mem. in Support of Mot. to Revise and to Permit Interloc. Appeal, at 2-3 n.2.) The Court should specifically revise its Order to state that Plaintiff lacks standing to challenge Tenn. Code Ann. § 40-29-105.

Plaintiff first asserts that *Falls* "is not relevant" to her claims because "it did not deal with constitutional claims." (Pl.'s Resp., 6.) *Falls* proves otherwise. The appellant there specifically requested "[the Tennessee Supreme] Court to address whether he ha[d] been unlawfully disenfranchised under article I, section 5 of the Tennessee Constitution" after he received a pardon. *Falls,* 673 S.W.3d at 178. He further argued that "because article I, section 5 of the Tennessee Constitution begins with a presumption of universal suffrage," the Tennessee Supreme Court should interpret a statute as "self-executing" and restoring his right to vote *Id.* at 181. And the dissent concluded that the majority's rejection of that argument denied the appellant "his constitutional right to vote" granted by Tenn. Const. art. I, § 5. *Id.* at 184-85, 188 (Lee, J., dissenting). The interpretation and application of Tenn. Const. art. I, § 5 was properly before the Tennessee Supreme Court.

Plaintiff says that *Falls* is inapplicable because it did not consider her specific claims. Accordingly, Plaintiff insists, *Falls* "made no new law" about her claims. (Pl.'s Resp., 4, 6.)[6] Plaintiff, though, overlooks that *Falls* interpreted Tenn. Const. art. I, § 5. In doing so, *Falls* held that the provision "affords the legislature broad discretion in limiting voting rights for" infamous criminals and does not grant them the right to "regain the right to vote." 673 S.W.3d at 182. And it cited to Tenn. Code Ann. § 40-29-204—the statute Plaintiff attacks here—with approval for its interpretation. *Id.* at 182 n.7; *see also ACLU v. Darnell,* 195 S.W.3d 612, 626 n.12 (Tenn. 2006) ("When interpreting constitutional provisions, courts carefully consider any interpretation the General Assembly has given the provision."). These holdings apply to Plaintiff's Claims One and

[6] Contrary to Plaintiff's assertion, this Court need not conclude that *Falls* constitutes "new law" before resolving Defendants' request to revise the Order. *Supra,* 2-4.

Six, which allege that her ineligibility to regain the right to vote under Tenn. Code Ann. § 40-29-204 violates Tenn. Const. art. I, § 5. (SAC, 29-30, 35-36.)

Plaintiff also contends that she attacks a "deprivation" statute while the *Falls* appellant challenged a "restoration" one. (Pl.'s Resp., 4.) The flaw here, though, is that Tenn. Code Ann. § 40-29-204 did not, and does not, deprive Plaintiff of any suffrage rights. That Section only provides that persons convicted of an enumerated offense "shall never be *eligible* to register and vote," meaning that those persons cannot regain their suffrage rights. *See* Tenn. Code Ann. § 40-29-204 (emphasis added). By comparison, following her 2015 felony conviction for "fabricat[ing] a judicial complaint form . . . against [a] general sessions judge" in violation of Tenn. Code Ann. § 39-16-503, *see State v. Moses*, No. W2015-01240-CCA-R3-CD, 2016 WL 4706707, at *2 (Tenn. Crim. App. Sept. 6, 2016), *perm. app. denied* (Tenn. Jan. 23, 2016), the disenfranchisement statute, Tenn. Code Ann. § 40-20-112, rendered Plaintiff "infamous" and "immediately disqualified from exercising the right of suffrage." Plaintiff points to no language in Tenn. Code Ann. § 40-29-204 that similarly disqualifies her from exercising her voting rights or rendering her infamous, so "if Plaintiff[] suffer[s] from an affirmative disability, the disenfranchisement statute must take the blame." *See Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010).

Further, the statute Plaintiff attacks here, and the ones that the *Falls* appellant challenged (Tenn. Code Ann. §§ 40-29-201 and -202, *see Falls*, 673 S.W.3d at 179 n.6), were enacted as part of the "provisions and procedures" that "apply to and govern restoration of the right of suffrage . . . to any person who has been disqualified from exercising that right by reason of a conviction . . . of an infamous crime." 2006 Tenn. Pub. Acts, ch. 860, § 1, *codified at* Tenn. Code Ann. § 40-29-201(a). Plaintiff offers no explanation as to why *Falls*' interpretation of Tenn. Const. art. I, § 5, should only apply to certain statutes that govern the restoration of voting rights. *See Estate of*

Bell v. Shelby Cnty. Health Care Corp., 318 S.W.3d 823, 835 (Tenn. 2010) (stating that courts should interpret the Tennessee Constitution "in a principled way that attributes plain and ordinary meaning" to its provisions); *Holder v. Tenn. Judicial Selection Comm'n*, 937 S.W.2d 877, 882 (Tenn. 1996) (noting that trial courts are "not free to disregard . . . the pronouncement of a superior court when it speaks directly on the matter before it").

As to Plaintiff's assertion that *Falls* "narrowly cabin[ed] its holding" to the statutory claims and facts at issue and did not address a "broad constitutional issue" (Pl.'s Resp., 4-5), Plaintiff misreads Defendants' motion. Defendants only request this Court to revise its Order as to Claims One and Six after applying *Falls*' interpretation of Tenn. Const. art. I, § 5, which, as explained above, is appropriate here. (Defs.' Mem., 3-5.) And to the extent Plaintiff insists that Tenn. Const. art. I, § 5, incorporates the Tennessee Constitution's due process or equal protection provisions (Pl.'s Resp., 7), Plaintiff points to no language in art. I, § 5, or case law concluding that such incorporation exists.[7]

Alternatively, Plaintiff says that *Falls'* holding that Tenn. Const. art. I, § 5, "affords the legislature broad discretion in limiting voting rights for those convicted of infamous crimes" supports her theory that Tenn. Code Ann. § 40-29-204 violates multiple constitutional provisions. (Pl.'s Resp., 5 (citing *Falls*, 673 S.W.3d at 182).) Again, though, Defendants only seek this Court to revise its decision as to Plaintiff's Claims One and Six, which attack Tenn. Code Ann. § 40-29-204 as a violation of article I, § 5, only. (SAC, 29-30, 35-36.) Whether Tenn. Code Ann. § 40-

[7] Plaintiff also insists that this Court can ignore *Falls*' holdings regarding Tenn. Const. art. I, § 5, because they were made in a "preamble" to the opinion. (Pl.'s Resp., 5.) Defendants are not aware of any case law allowing this Court to ignore the Tennessee Supreme Court's interpretation of constitutional provisions that are in a "preamble," and Plaintiff cites to none. In any event, as discussed above, the scope of article I, § 5, in *Falls* was properly before the Tennessee Supreme Court to interpret and review its provisions. *Supra*, 5.

29-204 violates *other* provisions of the Tennessee Constitution (and it does not) has no bearing as to whether this Court should dismiss Claims One and Six after *Falls*.[8]

On a final note, Plaintiff appears to focus her response solely as to her facial challenge in Claim One. In Claim Six, Plaintiff asserts an as-applied challenge based on the "facts and circumstances of her guilty plea." (SAC, 35-36.) But as Defendants have argued, and Plaintiff does not dispute, this Court lacks jurisdiction to consider the validity of Plaintiff's guilty plea and lacks the authority to overturn other courts' determinations that her guilty plea was "knowing, voluntary, and intelligent." (Defs.' Mem., 4-5 (quotations omitted).) For all of these reasons, the Court should revise its Order to dismiss Claims One and Six.

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

Plaintiff also opposes Defendants' request for immediate interlocutory review of the Order. But Plaintiff's contentions are again meritless.

Plaintiff cites *Reid v. State*, 197 S.W.3d 694 (Tenn. 2006), to say that interlocutory appeals are "generally disfavored." (Pl.'s Resp., 8 (quotations omitted).) *Reid*, though, was a criminal case, and the Tennessee Supreme Court granted the appellant's request for an interlocutory appeal despite such grants being "disfavored, *especially in criminal cases*." *Reid*, 197 S.W.3d at 699 (emphasis added and quotations omitted). And *Reid* granted interlocutory review after finding a need to "develop a uniform body of law" and to "prevent needless, expensive, and protracted

[8] Plaintiff construes the Order as approving her contention that Tenn. Code Ann. § 40-29-204 "disenfranchises a swath of Tennesseans in a way that manipulates the electorate" in violation of Tenn. Const. art. I, § 5. (Pl.'s Resp., 7.) If that interpretation is correct, the Court should also revise the Order to dismiss Claims One and Six because nothing in Tenn. Code Ann. § 40-29-204 disenfranchises Plaintiff or any other convicted infamous criminal. *Supra*, 6-7; *see also In re Cox*, 389 S.W.3d 794, 799 (Tenn. Crim. App. 2012) (noting that rights restoration is subject to the "requirements and limitations imposed by the General Assembly").

litigation," the same factors that support granting Defendants' request here. *Id.*; (Defs.' Mem., 6-12).

Plaintiff also reasserts her prior argument that a motion to dismiss is "rarely appropriate in declaratory judgment actions." (Pl.'s Resp., 9 (quotation omitted).) But Tennessee's appellate courts have routinely affirmed the grant of a motion to dismiss a declaratory judgment action that asserts a constitutional claim. *See Highwood Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 697, 712 (Tenn. 2009); *Mills v. Shelby Cnty. Election Comm'n*, 218 S.W.3d 33, 34-35 (Tenn. Ct. App. 2006).

Next, Plaintiff relies on *Tenn. Dep't of Human Servs. v. Vaughn*, 595 S.W.2d 62 (Tenn. 1980), but, like *Reid*, that case supports granting Defendants' request for interlocutory review. (Pl.'s Resp., 10.) There, the Tennessee Supreme Court granted the Tennessee Department of Human Services' request for an interlocutory appeal as to the constitutionality of a statute that provided that an "alleged father shall not be compelled to give evidence" in a paternity dispute. 595 S.W.3d at 62-63. And it did so without concluding that any of the Tenn. R. App. P. 9(a) factors were present. *See id.*[9] Defendants similarly seek interlocutory review to determine whether Plaintiff's constitutional attack on Tenn. Code Ann. § 40-29-204 is proper. (Defs.' Mem., 6-12.)

Plaintiff also claims that granting interlocutory review is not warranted because she has already "suffered" delay and the loss of a "number of elections." (Pl.'s Resp., 10, 15.) But any

[9] Plaintiff broadly asserts that *Vaughn* concluded that Tenn. R. App. P. 9(a) should not be construed to "defeat substantial justice" or "result in a duplication of appeals." (Pl.'s Resp., 10 (emphasis removed and quoting *Vaughn*, 595 S.W.2d at 63).) But the *Vaughn* majority made that statement in response to the dissent's argument that the certified question did not present the constitutional issue ultimately decided. *Vaughn*, 595 S.W.2d at 63 (arguing that the certified question, "[w]hile not stated with admirable articulation," included the constitutional issue); *id.* at 68 (Harbison, J., dissenting) (arguing that the constitutional issue was not "properly before the Court").

delay cannot be attributed to Defendants. Plaintiff initially filed a petition for restoration of her citizenship in April 2019, and by October of that year, the case became dormant, leading the Court to enter an order setting the matter on its dismissal calendar and for a status conference in January 2021. (Nov. 30, 2020 Order, 1); *see also* Local Rules of Practice, Circuit Court for the Thirtieth Judicial District at Memphis, Rule 4(D) (noting that cases "that have had no activity for at least six (6) months" are placed on the dismissal docket). Following that status conference, the Court entered an order setting the matter for a status hearing 13 months later, in February 2022. (Jan. 15, 2021 Order, 1.) And before that date, the Court entered an order commanding the Shelby County Sheriff's Office "to bring [Plaintiff]" to the conference while she was in custody. (Feb. 2, 2022 Order, 1.)

Nor has Plaintiff identified any year that she could have voted but for her ineligibility under Tenn. Code Ann. § 40-29-204. Plaintiff could not have restored her right to vote until she received a pardon, was discharged from custody "by reason of service or expiration of the maximum sentence imposed by the court for the infamous crime," or upon the grant of a "certificate of final discharge from supervision by the board of parole" or similar "correction authority." Tenn. Code Ann. § 40-29-202(a)(1)-(3). Nothing in the SAC indicates that Plaintiff received pardon. Further, since Plaintiff received an effective seven-year sentence following her 2015 guilty pleas, the earliest she could have registered to vote was in 2022. *See State v. Moses*, No. W2019-01219-CCA-R3-CD, 2020 WL 4187317, at *2-4 (Tenn. Crim. App. July 20, 2020) (noting that Plaintiff was "simply misreading her judgments" in arguing that she only received a three-year sentence), *perm. app. denied* (Tenn. Dec. 4, 2020).[10]

[10] Plaintiff also argues that Defendants cannot show irreparable injury under Tenn. R. App. P. 9(a). (Pl.'s Resp., 10.) Defendants motion, though, does not seek interlocutory review on this factor

A. Interlocutory Review will avoid needless, expensive, and protracted litigation.

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.

Plaintiff asserts that *Falls* "is irrelevant" to her claims. (Pl.'s Resp., 12.) But as shown above, *Falls*' holding as to whether Tenn. Const. art. I, § 5, requires the General Assembly to provide infamous criminals with a pathway to regain their suffrage rights is directly applicable to Plaintiff's Claims One and Six. *Supra*, 4-8. The Court of Appeals is likely to hold that Plaintiff's Claims One and Six are legally insufficient under *Falls*. (Defs.' Mem., 3-5, 7.)

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

As this Court recognized, "a practiced affirmed by a Constitution cannot somehow be conscience-shocking in terms of that same Constitution." (Order, 27.) *Falls* holds that Tenn. Const. art. I, § 5, permits the General Assembly to disenfranchise infamous criminals without providing them with a process to regain their voting rights. *See* 673 S.W.3d at 182. Taken together, since Plaintiff's permanent disenfranchisement is "affirmed by [the Tennessee] Constitution," it cannot be "conscience-shocking" under the same Constitution. Plaintiff appears to only contend that *Falls* is also inapplicable to her substantive due-process claims (*see* Pl.'s

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(Defs.' Mem., 6-12), nor is irreparable injury a prerequisite to do so. *See State v. Scarborough*, 201 S.W.3d 607, 612 n.2 (Tenn. 2006) (granting interlocutory review to "prevent needless, expensive, and protracted litigation and a need to develop a uniform body of law"). Defendants note that the case Plaintiff relies on for her assertion that "[t]he most typical situations in which interlocutory appeals are granted are where there is a threatened irreparable injury," *In re K.A.S.*, No. M2004-02180-COA-R3-CV, 2005 WL 195110 (Tenn. Ct. App. Jan. 27, 2005) (no perm. app. filed), is a "Memorandum Opinion" under Tenn. Ct. App. R. 10 that "shall not be cited or relied on for any reason in any unrelated case." 2005 WL 195110, at *1 n.1. (Pl.'s Resp., 10.)

Resp., 12), but again, *Falls*' holding applies here. Defendants have a high likelihood of success on appeal as to Claims Five and Seven.

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

Plaintiff argues that she has stated an equal protection claim because the SAC alleges: (1) "a historical pattern of discrimination that persists to this day, up to and including the passage of the challenge statutes"; (2) "specific discriminatory intent in the passage of the challenged statutes" in Paragraph 123; and (3) statistical evidence "that supports and supplements these intent allegations." (Pl.'s Resp. 12-13.) But her argument is flawed. As to her "historical pattern" allegations, this Court observed that the SAC contains "a significant gap in between the enactment of Tenn. Code Ann. § 40-29-204 and the end of [Plaintiff's] extensive review of Tennessee's prior discriminatory intent." (Order, 23.) And, on that basis, this Court held that Plaintiff's claims of "[h]istorical discrimination[are] not evidence of current discrimination." (*Id.*, 24; *see also* Defs.' Mem., 8).) Defendants have shown that all of Plaintiff's referenced discriminatory purpose allegations "are merely conclusory." (Defs.' Reply in Support of Mot. to Dismiss, 5-6.) That includes Plaintiff's reference to Paragraph 123 in Claim Six of the SAC, which asserts that the "specific facts and circumstances of her guilty plea" violate Tenn. Const. art. I, § 5, not the equal protection provisions. (SAC, 36 at ¶ 123.) Not only is that allegation conclusory (*see id.* (alleging that "the Permanent Disenfranchisement Statutes and their predecessors were enacted with the intent, and effect of, discrimination against Black persons")), the Court lacks jurisdiction to consider Plaintiff's attack on the validity of her guilty plea. (Defs.' Mem., 4-5.)

That leaves Plaintiff with only a disparate-impact theory, which she claims exists through her allegations of statistical disparities as to persons disenfranchised in Tennessee because of a

conviction of an infamous crime. (Pl.'s Resp., 12-13; SAC, 3 at ¶¶ 7-9; 31-32, 39.) But stating a valid equal protection claim under the Tennessee Constitution requires allegations of both disparate impact and "discriminatory intent or purpose." *McClay v. Airport Mgmt. Servs. LLC*, 596 S.W.3d 686, 695-96 (Tenn. 2020). And her disparate-impact claims fail to "depict a stark pattern of discrimination that is unexplainable on other grounds" to "provide the sole evidence of discriminatory purpose." *State v. Banks*, 271 S.W.3d 90, 156 (Tenn. 2008).

Plaintiff suggests that *Banks* and *McCleskey v. Kemp*, 481 U.S. 279 (1987), allow her to proceed to discovery now and that she "may" later prove that her statistical allegations are "sufficient evidence of discrimination in [their] own right." (Pl.'s Resp. 12-14.) But to proceed to discovery, Plaintiff's allegations must rise "beyond the speculative level." *Webb. v. Nashville Area Habitat for Humanity, Incl*, 346 S.W.3d 422, 427 (Tenn. 2011) (quotations omitted). And Plaintiff's speculative claim that she "may prove" a discriminatory purpose after discovery is no more than a request to embark on "a fishing expedition for unspecified evidence." *Wesley v. Collins*, 791 F.2d 1255, 1262-63 (6th Cir. 1986); (*see also* Order, 23 (citing *Wesley*)).

Plaintiff also claims that *McCleskey* permits "'a finding of a constitutional violation even when the statistical pattern does not approach' the 'stark pattern' level of proof." (Pl.'s Resp. 14 n.11 (quoting *McCleskey*, 481 U.S. at 294).) But Plaintiff misquotes *McCleskey*. The Supreme Court has only "accepted statistics as proof of intent to discriminate in certain limited contexts," such as the "selection of the jury venire" and "to prove statutory violations under Title VII of the Civil Rights Act of 1964" *McCleskey*, 481 U.S. at 293. Outside of those contexts, "statistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent under the Constitution." *Id.*; *see also id.* at 293 n.12 (noting the "examples of those rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional

violation"); *cf. Spurlock v. Fox*, 716 F.3d 383, 401 (6th Cir. 2013) (noting that the court's task to resolve an equal protection claim was to determine whether the case "belongs . . . in that rare category where the clear pattern of disparate impact cannot be explained except by reference to discriminatory intent, or whether it fits the usual mold where disparate impact alone cannot justify an inference of intent").[11]

Plaintiff contends that interlocutory review would be inappropriate because both *Banks* and *McCleskey* "analyzed" "actual statistical evidence." (Pl.'s Resp., at 14.) As to *Banks*, Plaintiff asserts that no "statistical information specifically regarding racial discrimination in connection with the imposition of the death penalty in Tennessee was provided." (*Id.* (quotation omitted).) But that supports Defendants' request for interlocutory review. Like *Banks*, Plaintiff similarly fails to allege any statistics as to "permanent disenfranchisement" under Tenn. Code Ann. § 40-29-204; her allegations only relate only to disenfranchisement in Tennessee generally. (SAC, 3 at ¶ 7 (alleging Tennessee's total number of persons disenfranchised by infamous crime); at ¶ 8 (alleging total number of Black Tennesseans disenfranchised by infamous crime); 3 at ¶ 9 (alleging number of Tennesseans who have had their suffrage rights restored since 2016)); *see Banks*, 271 S.W.3d at 155 (concluding that general statistical studies "prove[d] too little" in an equal protection claim). Further, in *McCleskey*, the Supreme Court determined that the statistical evidence presented failed to provide the "exceptionally clear proof" necessary "to support an inference that any of the decisionmakers in [the defendant's] case acted with discriminatory purpose." 481 U.S. at 297. Here, Plaintiff's disparate-impact allegations do not meet either *Banks*'

[11] The Tennessee Constitution's equal protection provisions are co-extensive with its federal counterpart. (Defs.' Mem., 9 n.4 (citing *McClay*, 596 S.W.3d at 695).)

or *McCleskey*'s standard to rise "beyond the speculative level" necessary to proceed to discovery. *See Webb*, 346 S.W.3d at 427.

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

Plaintiff says that this matter will not be "inordinately expensive or protracted." (Pl.'s Resp. 11-12.) This matter is already protracted. Whether as a restoration of rights proceeding or as a request for declaratory judgment, Plaintiff's claims have been pending before this Court since 2019. (Pet. for Restoration of Citizenship, Apr. 10, 2019, 1.) And Plaintiff's proposed scheduling order, submitted to the Court on October 5, 2023, indicates that this trend will continue. Plaintiff requests the Court to revive nearly all of its deadlines originally imposed in its September 2022 Scheduling Order by setting dates to complete all discovery, provide expert witness disclosures, deadlines for dispositive motions, and a trial date, at the earliest, in September 2024. (Attach. A.) Further, Plaintiff's multiple petitions for restoration of citizenship and complaints for declaratory judgment in the last four years have implicated multiple State officials—including the Shelby County District Attorney, the Tennessee Secretary of State, the Tennessee Coordinator of Elections, the Tennessee Attorney General and Reporter—requiring them to expend time and resources on her claims. Because "this matter is likely to continue well into next year," permitting interlocutory review now would "avoid needless, expensive, and further protracted litigation." (Defs.' Mem., 10.)

Plaintiff also claims that Defendants' arguments regarding the burdens of reopening discovery are too "generalized" and are "the normal procedures of a lawsuit." (Pl.'s Resp., 11-12.) But Plaintiff overlooks her own statements that "the number and complexity of the issues raised" in this matter that have already required "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, 1.) It is within that context that interlocutory review is necessary to avoid the parties and this Court from engaging in "needless, expensive, and further protracted litigation" (Defs.' Mem., 10.) And as previously discussed, Defendants' likelihood of success on appeal is high in light of *Falls*, *Banks*, and *McCleskey*, further necessitating the need to avoid additional, needless litigation. (*Supra*, 11-15; Defs.' Mem. 6-9.)[12]

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

Plaintiff claims that Defendants "misapprehend the uniformity criterion," which, according to Plaintiff, requires a "legal question[] that come[s] up repeatedly across the State" or an "issue of first impression." (Pl.'s Resp., 13-14.) But Plaintiff points to no language in Tenn. R. App. P. 9(a)(3) requiring either circumstance before an interlocutory appeal can be granted. And courts have granted interlocutory appeals to develop a uniform body of law for a multitude of reasons, including whether "information used to obtain a search warrant has been provided by a citizen informant," *State v. Williams*, 193 S.W.3d 502, 506 (Tenn. 2006), whether the denial of a motion to dismiss for intentional delay of service of process was proper, *Jones v. Cox*, 316 S.W.3d 616, 620 & n.2 (Tenn. Ct. App. 2008), and the "perceive[d] . . . need for uniformity" in a workers' compensation suit, *McCall v. Nat'l Health Corp.*, 100 S.W.3d 209, 211 (Tenn. 2003). Plaintiff's rigid construction of Tenn. R. App. P. 9(a)(3) has no basis in its text or its application.

Nor do the cases Plaintiff cite support her reading of Rule 9(a). She claims that *State v. McKim*, 215 S.W.3d 781 (Tenn. 2007), granted interlocutory review regarding the consideration

[12] In responding to Defendants' motion, Plaintiff relies on *Miller v. Vanderbilt Univ.*, No. M2015-022230COA-R3-CV, 2017 WL 4467445 (Tenn. Ct. App. Sept. 29, 2017), *perm. app. denied* (Tenn. Feb. 14, 2018). (Pl.'s Resp., 11.) Defendants note that the Tennessee Supreme Court designated *Miller* as "not for citation" under Tenn. Sup. Ct. R. 4(E)(1).

of pretrial diversion, a "circumstances that occurs tens or hundreds of thousands of times a year." (Pl.'s Resp., 13.) But nothing in *McKim* or the record before this Court establishes that diversion decisions occur at any number, much less in the "tens or hundreds of thousands." *McKim* also supports Defendants' motion. There, the Tennessee Supreme Court determined that interlocutory review was appropriate because the assistant district attorney general specifically "consider[ed] . . . a clearly irrelevant factor" "[c]ontrary to established precedent. 215 S.W.3d at 788, 790-91. As there, Defendants here seek interlocutory review in part because the Order is inconsistent with established Tennessee Supreme Court precedent governing Plaintiff's equal protection, substantive due process, and Tenn. Const. art. I, § 5 claims. (Defs.' Mem., 6-9; *see also* Defs.' Mem. in Support of Mot. to Dismiss, 9-15, 17-18, 22-23; Defs.' Reply in Support of Mot. to Dismiss, 5-6, 10-11.)[13]

Plaintiff asserts that interlocutory review would be premature because "no statistical proof has been adduced yet" and would "be the equivalent of an advisory opinion." (Pl.'s Resp., 14 (quoting *State v. Gilley*, 173 S.W.3d 1, 6 (Tenn. 2005).) But Plaintiff misconstrues Defendants' motion, which seeks interlocutory review as to whether Plaintiff's disparate-impact allegations meet the "stark pattern" necessary to infer discriminatory intent. (Defs.' Mem., 8-9.) *Gilley* does

[13] Plaintiff's citations to *State v. Sparks*, No. 177, 1988 WL 1708 (Tenn. Ct. App. Jan. 14, 1988) (no perm. app. filed) and *State v. Hurley*, No. E2020-01674-COA-R10-CV, 2021 WL 254526 (Tenn. Ct. App. June 22, 2021) (no perm. app. filed), are also of no moment. *Sparks* concluded that a Tenn. R. App. P. 9(a) appeal was improvidently granted because the State had an appeal as of right, the trial court properly construed the statute, and the appeal turned on the trial court's factual conclusions. 1988 WL 1708, at *2-4. And *Hurley* was a request for an extraordinary appeal under Tenn. R. App. P. 10, which the court noted could only be granted in "circumstances . . .[that] are far more circumscribed" than those provided in Tenn. R. App. P. 9(a), including the grant of applications for an interlocutory appeal to resolve an issue of first impression. 2021 WL 2545256, at *3-5. Neither case "[h]ighlights" the "difficult[y] . . . to meet" Plaintiff's proposed "uniformity criterion." (Pl.'s Resp. 13 & n.10.)

not say otherwise. That case involved a request to grant interlocutory review following a trial court's evidentiary rulings as to whether "'other crimes, wrongs or acts'" of a criminal defendant would be admissible at trial. *Gilley*, 173 S.W.3d at 3-5 (quoting Tenn. R. Evid. 404(b)). The Tennessee Supreme Court concluded that interlocutory review was not appropriate in part because evidentiary rulings are "afforded great deference and may be reversed only if the appellate court concludes that the trial court abused its discretion" and because the defendant's trial had not started. *Id.* at 6. Here, by contrast, appellate review of Defendants' motion to dismiss is de novo, and the Court has already issued the Order. *See Burns v. State*, 601 S.W.3d 601, 605-07 (Tenn. Ct. App. 2019) (reviewing the denial of a motion to dismiss under Tenn. R. App. P. 9(a) de novo).

E. The issues to be decided are important.

Plaintiff says that immediate review is not necessary because "[o]nly the advancement" of her suit "can alter the status quo for thousands of Tennesseans." (Pl.'s Resp., 15.) But Plaintiff overlooks that, if she is granted summary judgment or wins at trial, potentially "thousands of [infamous] Tennesseans" would become eligible to vote—contrary to the will of the people as expressed in the Tennessee Constitution and the statutes the peoples' representatives enact. *See Bailey v. Cnty of Shelby*, 188 S.W.3d 539, 546 (Tenn. 2006) (noting that the Tennessee Constitution "is the truest expression of the will of the people"). Further, permitting immediate review now would prevent chaos in Tennessee's elections should this Court grant Plaintiff relief but is ultimately reversed on appeal. That circumstance is not hypothetical, as North Carolina recently discovered after the trial court ruled that a law prohibiting felons on probation and parole from voting unconstitutional and permitting more than 56,000 felons to vote before the decision was reversed by the North Carolina Supreme Court two years later. *Compare* NPR, *Roughly 56,0000 Felony Offenders Can Now Vote in North Carolina* (Aug. 23, 2021),

https://www.npr.org/2021/08/23/1030503248/felony-offenders-vote-north-carolina, *with Cmty. Success Initiative v. Moore*, 886 S.E.2d 16, 23-24 (N.C. 2023).

F. Defendants cannot challenge the legal sufficiency of Plaintiff's claims following entry of final judgment.

Finally, Plaintiff claims that Defendants can raise their arguments on appeal after summary judgment or final judgment. (Pl.'s Resp., 14-15.) Not so. Permitting Plaintiff to proceed to discovery will effectively negate Defendants' arguments that her claims are legally insufficient to require discovery. While Defendants maintain that Plaintiff cannot establish that she is entitled to relief even after discovery, this Court would avoid needless, expensive, and protracted litigation by permitting immediate review. *See* Tenn. R. App. P. 9(a)(2).

While Plaintiff contends that Defendants request for interlocutory review is based on an "unsupported belief" (Pl.'s Resp., 7), Defendants have shown herein and in their Memorandum that such review is necessary to prevent needless, expensive, protracted litigation, their likelihood of success on appeal is high, and to develop a uniform body of law.

CONCLUSION

For the reasons stated herein and in Defendants' Memorandum, the Court should grant their Motion to Revise and to Permit Interlocutory Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 25th day of October, 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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