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

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

RESPONSE IN OPPOSITION TO
PLAINTIFF PAMELA MOSES' MOTION TO COMPEL

The Court should deny Plaintiff Pamela Moses' motion to compel. Plaintiff has delayed in moving to compel; she requests discovery from a party she has no standing to seek affirmative relief against; and she accuses Defendants of engaging in delay tactics in not responding to her requests—despite those Defendants properly objecting because Plaintiff neither filed nor served her complaint for over a year. And when it comes to the substance of Plaintiff's claims, the discovery she seeks to compel has no relevance to either her facial or as-applied constitutional challenges to her inability to seek the restoration of her voting rights as an infamous criminal. As explained below, Plaintiff is entitled to no relief.

RELEVANT PROCEDURAL HISTORY

In this action, Plaintiff challenges the constitutionality of two Tennessee statutes that bar infamous criminals convicted of listed crimes from seeking the restoration of their voting rights. (Feb. 2, 2024 Second Amended Complaint ("SAC"), at 25-26, ¶ 78, at 29-39); *see also* Tenn. Code

Ann. §§ 40-29-105(c)(2)(B), -204.[1] Plaintiff alleges that these statutes facially, and as applied to her, violate various provisions of the Tennessee Constitution. (SAC, at 29-30, 31-32, 34-37, 39.) Plaintiff asserts that the General Assembly enacted the statutes with a discriminatory purpose against Black Tennesseans, with an intent to "restrict" Tennessee's electorate, and that applying the statutes to her is unfair because she too is a Black Tennessean and because of the circumstances of her guilty plea. (*Id.*)

Plaintiff sought leave to file her SAC on October 13, 2022. (Joint Notice of Filing, at 1.) In the proposed SAC, Plaintiff named as defendants, the Tennessee Attorney General and Reporter, the Tennessee Secretary of State, and the Tennessee Coordinator of Elections, all in their official capacities. (Joint Notice of Filing, Ex. A, at 5; *see also* SAC, at 5, ¶¶ 17-19.) According to Plaintiff, the Attorney General has the "authority to issue opinions interpreting, but not changing the meaning of, Tennessee law." (SAC, at 5, ¶ 19.) Through the Tennessee Declaratory Judgment Act, Plaintiff seeks both declaratory and injunctive relief against the defendants. (*Id.* at 6, ¶ 20, at 39-41.)

On September 20, 2022, this Court entered a scheduling order establishing the deadline for the "State" to respond to Plaintiff's amended pleading by December 7, 2022, if her "Motion for Leave to Amend is granted." (Sept. 20, 2022 Scheduling Order, at 2.)[2] The order further required

[1] As Defendants have previously argued, Plaintiff lacks standing to challenge Tenn. Code Ann. § 40-29-105(c)(2)(B) because she has no injury from that statute. The statute bars infamous criminals convicted of murder, rape, treason, and voter fraud from seeking restoration of their voting rights. Plaintiff was not convicted of any of these offenses and thus cannot claim any injury. (Defs.' Mem. in Support of Mot. to Dismiss, at 6, n.3.) Plaintiff has never argued otherwise.

[2] Neither the Secretary of State nor the Coordinator of Elections were parties at the time the Court entered the scheduling order.

the parties to propound discovery by January 6, 2023, complete "[a]ll written discovery and disclosures" by March 7, 2023, and to complete all depositions by May 6, 2023. (*Id.*)

The Court granted Plaintiff leave to file an amended pleading on October 28, 2022; it also ordered that Plaintiff's amended pleading "shall be the operative Complaint once filed of record in this cause." (October 28, 2022 Order, at 1.) Plaintiff did not file the SAC until 16-months later, on February 2, 2024. (SAC, at 1; Pl.'s Feb. 2, 2024 Notice of Filing SAC, at 1 (stating that Plaintiff "did not file the [SAC] as of record" after receiving leave).)

After the Court granted Plaintiff leave to file an amended pleading, Defendants moved to dismiss on December 7, 2022, noting Plaintiff's failure to file the complaint as of record and that they filed their motion "in accordance with the scheduling order out of an abundance of caution." (Defs.' Mot. to Dismiss, at 1; Defs.' Mem. in Support of Mot. to Dismiss, at 5 n.2.) Defendants also moved to stay discovery on January 6, 2023, again stating that Plaintiff had not filed the SAC as of record and had not "properly served either" the Secretary of State or the Coordinator of Elections. (Defs.' Mot. to Stay Discovery, at 1; Defs.' Mem. in Support of Mot. to Stay Discovery, at 3 n.2.) Plaintiff opposed the motion to stay, contending that staying discovery was "inappropriate" and requested the Court to "order Defendants to respond to discovery promptly." (Pl.'s Resp. to Mot. to Stay Discovery, at 1.) The Court denied Defendants' motion to stay discovery on February 6, 2023. (Feb. 6, 2023 Order, at 1.)

Following the Court's denial of the motion to stay, Defendants responded to Plaintiff's first set of discovery requests on February 21, 2023, and had a meet-and-confer the next month. (Pl.'s Mem. in Support of Mot. to Compel ("Pl.'s Mem."), at 4-5, Exs. C-D.) Later, Plaintiff filed an unopposed motion to amend the scheduling order or for a case management conference, stating that the parties were "in the midst of resolving issues with respect to written discovery, some of

which may require motions briefing and an order," and that Plaintiff "believe[d] that she may need to issue one or more third-party subpoenas." (Pl.'s Apr. 3, 2023 Mot., at 1-2.) Following the Court's entry of a protective order as to the disclosure of confidential information of non-party criminal offenders (May 24, 2023 Agreed Protective Order, at 1-4), Defendants supplemented their responses on June 23, 2023. (Pl.'s Mem., at 4-5, Ex. E.)

On July 19, 2023, the Court entered an order granting in part and denying in part Defendants' motion to dismiss. (July 19, 2023 Order, at 1, 32.) Defendants then answered, again noting that Plaintiff had not complied with the Court's requirement for the SAC to be filed as of record. (Aug. 29, 2023 Answer, at 1 n.1.) Defendants also raised as a defense that Plaintiff lacked standing to assert her claims against the Attorney General. (*Id.* at 26.)

At a case management conference on October 5, 2023, Plaintiff made an oral motion to propound additional discovery. (Oct. 11, 2023 Order, at 1.) The court granted the request, limiting Plaintiff to seek discovery as to: "[r]ace/ethnicity in conviction data; [v]oting pattern data; and [l]egislative history of the 1986 and 2006 versions of the challenged felon disenfranchisement statute(s)." (*Id.*) The Court ordered Plaintiff to serve her discovery requests within 30 days of the entry of the order, and 30 more days for Defendants to respond. (*Id.*) Defendants timely responded to Plaintiff's second set of discovery requests on December 8, 2023. (Pl.'s Mem. at Exs. K-L.) And following the entry of a protective order on February 22, 2024, Defendants supplemented their responses on March 15, 2024, to produce the Statewide Voter Registry Database. (Pl.'s Mem., at Ex. N.) The parties held a meet-and-confer as to Defendants' second set of responses on April 9, 2024. (Pl.'s Mem. at 6.) Plaintiff then moved the Court for an order compelling Defendants to respond to both her first and second sets of discovery requests on April 29, 2024. (Pl.'s Mot. to Compel, at 1.)

ARGUMENT

The Court Should Deny Plaintiff's Motion to Compel.

I. Plaintiff's Motion to Compel is Untimely.

Plaintiff is entitled to no relief because her motion to compel is untimely. Plaintiff filed her motion many months after receiving Defendants' responses and objections to her discovery requests. And Plaintiff has moved to compel beyond the discovery deadlines without demonstrating good cause to modify them. For these reasons alone, Plaintiff's motion should be denied.

A trial court may "enter a scheduling order that limits the time" to, among other things, "complete discovery." Tenn. R. Civ. P. 16.01(1)(C). The entry of a scheduling order is within the trial court's discretion. Tenn. R. Civ. P. 16.01 Adv. Comm'n Cmt. But "once ordered," the schedule "shall not be modified except by leave of the judge upon a showing of good cause." Tenn. R. Civ. P. 16.01(3).

A litigant may move a trial court "for an order compelling discovery." Tenn. R. Civ. P. 37.01. Like its federal counterpart, the Tennessee rule does not specify a time for moving to compel. *Compare* Tenn. R. Civ. P. 37.01, *with* Fed. R. Civ. P. 37(a). That said, Tennessee courts construe State discovery rules "consistently with [their] federal counterpart[s]." *Thomas v. Oldfield*, 279 S.W.3d 259, 261-62 (Tenn. 2009); *see also Turner v. Turner*, 473 S.W.3d 257, 268-69 (Tenn. 2015) ("[O]ur Rules having been taken from the Federal Rules of Civil Procedure, and the object of our virtual adoption of the federal rules being to have similar rules of procedure in state trial courts and federal district courts, it is proper that we look to the interpretation of the comparable Federal Rule." (quoting *Williamson Cnty. v. Twin Lawn Dev. Co.*, 498 S.W.2d 317, 320 (Tenn. 1973))). And in applying Tenn. R. Civ. P. 37.01's federal equivalent, "courts have

made it clear that a party seeking to compel discovery must do so in timely fashion." *Cont'l Indus., Inc. v. Integrated Logistics Solutions, LLC*, 211 F.R.D. 442, 444 (N.D. Okla. 2002) (Clearly, M.J.) Once served with objections and responses, "the initiative rests with the party seeking" discovery to promptly "move for an order compelling it." *Clinchfield R. Co. v. Lynch*, 700 F.2d 126, 132 n.10 (4th Cir. 1983). Further, courts have routinely denied motions to compel discovery as untimely when filed after the discovery deadline. *Pittman v. Experian Info. Solutions, Inc.*, 901 F.3d 619, 642-43 (6th Cir. 2018) (collecting cases); *see also Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 542 (7th Cir. 2000) (holding that the plaintiffs' request for discovery filed two months after the discovery deadline had "no possible merit").

Here, Plaintiff's motion to compel is untimely. Plaintiff did not promptly move the Court to compel discovery responses to either her first or second set of discovery requests. *See Clinchfield R. Co.*, 700 F.2d at 132 n.10. Defendants provided responses and objections to Plaintiff's first set of discovery requests in February 2023 and supplemental responses in June 2023. (Pl.'s Mem. at 4-5, Exs. C-E.) But Plaintiff did not move to compel until over a year after receiving Defendants' initial responses and more than ten months after receiving the supplemental production. Even when parties more punctual than Plaintiff moved to compel, courts denied them as untimely. *See, e.g.*, *Avanos Med. Sales, LLC v. Medtronic Sofamor Danek USA, Inc.*, No. 19-cv-02754-JPM-tmp, 2021 WL 848177, at *4-5 (W.D. Tenn. Mar. 5, 2021) (eight-month delay between receiving discovery responses and moving to compel); *Aardwolf Indus., LLC v. Abaco Machines USA, Inc.*, No. 16-cv-01968-GW-JEMx, 2017 WL 4769431, at *102 (C.D. Cal. July 10, 2017) (seven-month delay); *Hyland v. Homeservices of Am., Inc.*, No. 3:05-cv-612, 2012 WL 1680109, at *5 (W.D. Ky. May 14, 2012) (six-month delay). And while Plaintiff was more expeditious in seeking to compel discovery responses to her second set of requests, she moved to

compel more than four months after Defendants provided responses and objections in December 2023. (Pl.'s Mem. at 5-6, Exs. K-L.)[3] But even here, courts have denied motions to compel filed by parties as tardy as Plaintiff or even swifter. *E.g.*, *Sanders v. Robert Half, Int'l, Inc.*, No. 2:22-cv-12532-GAD-drg, 2023 WL 3901486, at *2-3 (E.D. Mich. June 8, 2023) (over four-month delay between receiving discovery responses and moving to compel); *Cottrell v. Wright*, No. 2:09-cv-0824-JAM-ckd, 2012 WL 3535838, at *2 (C.D. Cal. Aug. 15, 2012) (less than four-month delay) (Delaney, M.J.); *see James v. Benjamin*, No. 3:17-cv-491-MBS-pjg, 2019 WL 2612706, at *5 (D.S.C. June 26, 2019) (denying motion to compel as untimely for failure to file the motion within the local rule's 21-day deadline) (Gossett, M.J.).

Not only did Plaintiff delay in moving to compel, but she filed it after any relevant discovery deadline expired. "If there is a bright line when it comes to when a motion to compel may be brought it is the discovery deadline." *Henneman v. Fed. Check Recovery*, No. 2:10-cv-00746-aeg, 2011 WL 1900183, at *3 (E.D. Wis. May 19, 2011) (collecting cases). The Court's September 20, 2022 Scheduling Order required all written discovery to be completed by March 7, 2023, and all remaining discovery by May 6, 2023. And the Court's October 11, 2023 Order granted Plaintiff additional time to propound limited discovery that ended, at the latest, on December 11, 2023. Plaintiff's April 29, 2024 motion to compel is well beyond both deadlines. Plaintiff provides no reason for her delay, much less demonstrates that "good cause" exists to modify the deadlines. *See* Tenn. R. Civ. P. 16.01(3); *Pittman*, 901 F.3d at 642-43.

How were we supposed to move to compel when we hadn't even gotten documents AND hadn't gotten responses to our deficiency letters?

[3] Defendants did supplement their responses and objections to Plaintiff's second set of discovery requests on March 15, 2024, following the Court's entry of protective order to allow Defendants to disclose the Statewide Voter Registration List. (Pl.'s Mem. at 6, Ex. N.) Plaintiff raises no issue with these supplemental responses and objections.

The Court should not permit Plaintiff to complain about denying her motion as untimely. In this very matter, Plaintiff has asserted that any delays in discovery would cause her "substantial and irreparable harm" to her inability to seek the restoration of her voting rights; "the more delay that is introduced to this case," "the worse those harms become." (Pl.'s Resp. to Mot. to Stay Discovery, at 1.) Yet Plaintiff waited over a year after receiving responses to her first set of requests, and several months after receiving responses to her second, to move for an order compelling responses. And that is on top of Plaintiff delaying more than a year to file her SAC as of record and to properly serve it. *See infra*, Argument, Part III. While Plaintiff accuses Defendants of engaging in "delay tactics" in responding to her discovery requests (Pl.'s Mem., at 1), Plaintiff only made that assertion once she filed the SAC and after properly serving the Secretary of State and Coordinator of Elections. Plaintiff offers no reason for delaying in moving to compel. Her failure to promptly move for an order compelling responses or a modification of the discovery deadline impedes the timely resolution of this matter. In sum, the Court should deny Plaintiff's motion as untimely.

The idea is that Defendants can hide the ball for 18 months and then when Plaintiff finally figures out what's going on, claim the Plaintiff has waited too long

II. Plaintiff Lacks Standing to Seek Affirmative Relief Against the Attorney General in this Declaratory Judgment Action.

To seek affirmative relief against a defendant under the Tennessee Declaratory Judgment Act, a plaintiff must have standing to obtain relief against that defendant independent of the Act. Here, Plaintiff lacks standing to seek affirmative relief against the Attorney General. Therefore, the Court should deny Plaintiff's motion to compel seeking such relief. (Pl.'s Mem. at 8-9, 12.)

Tennessee courts are limited to deciding "legal controversies" between parties. *Norma Faye Pyles Lynch Fam. Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 203 (Tenn. 2009) (quotation omitted). A "legal controversy" requires a "real and existing" dispute "between parties

with real and adverse interests"; a "theoretical or abstract" dispute will not do. *West v. Schofield*, 468 S.W.3d 482, 490 (Tenn. 2015) ("*West I*") (quotation omitted). To determine whether a legal controversy exists, "Tennessee courts use justiciability doctrines that mirror the justiciability doctrines employed by the United States Supreme Court and the federal courts." *Id.* (quotation omitted). A court "must first consider questions pertaining to justiciability before proceeding to the merits." *City of Memphis v. Hargett*, 414 S.W.3d 88, 96 (Tenn. 2013); *see also UT Med. Grp., Inc. v. Vogt*, 235 S.W.3d 110, 119 (Tenn. 2006) (noting that justiciability is a "threshold question").

Standing is one such doctrine. That doctrine determines whether a plaintiff is "entitled to pursue judicial relief as to a particular issue or cause of action." *City of Memphis*, 414 S.W.3d at 97. While standing focuses on the plaintiff's right to bring a cause of action, "standing may turn on the nature of the claim and requires a determination of whether a plaintiff is entitled to an adjudication of the particular claim." *Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020). A plaintiff "bears the burden of establishing" standing "by the same degree of evidence as other matters on which [she] bears the burden of proof." *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 149 (Tenn. 2022) (quotation omitted).

Constitutional standing "is one of the 'irreducible . . . minimum' requirements that a party must meet" to establish a legal controversy. *City of Memphis*, 414 S.W.3d at 98 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To have standing, a plaintiff must demonstrate: (1) a distinct and palpable injury; (2) a causal connection between the alleged injury and the challenged conduct; and (3) that the injury is capable of being redressed by a favorable decision. *Fisher*, 604 S.W.3d at 396. "And standing is not dispensed in gross;" a plaintiff must "demonstrate standing for each claim" that she presses and "for each form of relief" that she seeks. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). That also requires a plaintiff to show "how the

requested relief against *each* of the defendants could redress [her] alleged injuries-in-fact." *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1031 (6th Cir. 2022); *see also Disability Rights S.C. v. McMaster*, 24 F.4th 893, 900 (4th Cir. 2022) (collecting cases holding that "the standing inquiry must be evaluated separately as to each defendant").

The "primary purpose" of the Tennessee Declaratory Judgment Act is "'to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations . . . .'" *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 193 (Tenn. 2000) (quoting Tenn. Code Ann. § 29-14-113). Under the Act, when a litigant challenges a "statute, ordinance, or franchise [that] is of statewide effect" as "unconstitutional," "the attorney general and reporter shall . . . be served with a copy of the proceeding and be entitled to be heard." Tenn. Code Ann. § 29-14-107(b). A plaintiff complies with this requirement by serving the Attorney General with notice of the constitutional challenge; the Attorney General may determine whether to intervene. *See In re Bently D.*, 537 S.W.3d 907, 909 (Tenn. 2017) (stating that the Attorney General filed a "notice of intent" to defend the constitutionality of the statute after receiving notice); *In re Adoption of E.N.R.*, 42 S.W.3d 26, 33 (Tenn. 2001) (requiring a party to notify the Attorney General "of any effort to challenge the constitutionality of Tennessee statutes"); *Tennison Bros., v. Thomas*, 556 S.W.3d 697, 731 (Tenn. Ct. App. 2017) (concluding that Tenn. Code Ann. § 29-14-107(b) required "notice [to] be provided to the Attorney General" to "attack . . . the constitutionality of a statute"); *State v. Simmons*, No. M2018-00937-COA-R3-CV, 2018 WL 6721801, at *6 (Tenn. Ct. App. Dec. 21, 2018) (rejecting argument that the Attorney General needed to intervene in an action involving a constitutional challenge) (no perm. app. filed).[4]

[4] Defendants are aware that one line of authority holds that the Attorney General must be a "party defendant" in a constitutional challenge to a statute. *See Cummings v. Beeler*, 223 S.W.2d 913,

Seeking relief under the Tennessee Declaratory Judgment Act "is not a ticket to bypass standing." *Massengale v. City of E. Ridge*, 399 S.W.3d 118, 127 (Tenn. Ct. App. 2012). The Act "is a mere procedural device by which various types of substantive claims may be asserted," *Brackin v. Sumner Cnty.* 814 S.W.2d 57, 60-61 (Tenn. 1991), and "does not create a cause of action to enforce rights," *Ritchie v. Haslam*, No. M2010-01068-COAR3-CV, 2011 WL 2520207, at *3 (Tenn. Ct. App. June 23, 2011) (no perm. app. filed). That is, standing is a "viable defense[]" in an action brought under the Act. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 838 (Tenn. 2008).

To obtain affirmative relief against the Attorney General in a declaratory judgment proceeding challenging the constitutionality of a statute, then, a litigant must establish "an independent source of subject matter jurisdiction" separate from the Act. *Carter v. Slatery*, No. M2015-00554-COA-R3-CV, 2016 WL 1268110, at *6 (Tenn. Ct. App. Feb. 19, 2016) (quotation omitted), *perm. app. denied* (Tenn. Aug. 19, 2016). If that independent source does not provide the trial court with authority to grant relief—for example, authority to enjoin a defendant—the court "cannot take jurisdiction to enter a declaratory judgment." *Zirkle v. City of Kingston*, 396 S.W.2d 356, 363 (Tenn. 1965).

Here, Plaintiff lacks standing to seek affirmative relief against the Attorney General. To satisfy the "causal connection" prong, a plaintiff must establish "the existence of a 'fairly traceable' connection between the alleged injury and the defendant's challenged conduct."

---

916 (Tenn. 1949); *Oldham v. ACLU*, 910 S.W.2d 431, 434-35 (Tenn. Ct. App. 1995). But as shown above, more modern authority has not interpreted Tenn. Code Ann. § 29-14-107(b) this way. *E.g.*, *In re Adoption of E.N.R.*, 42 S.W.3d at 33. Even if *Cummings* applies here, it does not stand for the proposition that a plaintiff can avoid establishing standing by merely naming the Attorney General as a party.

Darnell, 195 S.W.3d at 620 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). That is, the relevant inquiry "is whether the plaintiffs' injury can be traced to [the] allegedly unlawful conduct of the defendant, not to the provision of law that is challenged." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (quotation omitted).

Plaintiff's asserted injury (her inability to restore her right to vote) is not fairly traceable to any conduct by the Attorney General. The Attorney General has no enforcement authority over the statutes Plaintiff challenges. *See* Tenn. Code Ann. §§ 40-29-105, -204. Nor does the Attorney General have any enforcement authority over restoration of rights statutes generally. Indeed, the Attorney General's authority "is limited to handling appeals, reporting court decisions, offering advisory opinions, suing to recover public funds, and defending the constitutionality of state statutes." *Universal Life Church*, 35 F.4th at 1032 (citing Tenn. Code Ann. § 8-6-109). In her only factual allegation referencing the Attorney General, Plaintiff alleges that he "has authority to issue opinions interpreting, but not changing the meaning of, Tennessee law." (SAC, at 5, ¶ 19.) But, Plaintiff does not allege that even that general authority has harmed her in any way.

Plaintiff's suggestions to the contrary are meritless. She accuses the Attorney General of "sandbag[ging]" her by representing that discovery responses were served by all Defendants. (Pl.'s Mem. at 9.) But if Plaintiff wanted to seek affirmative relief against the Attorney General, she must have done far more than just allege that he has authority to issue opinions.[5] (SAC, at 5, ¶ 19); *see Universal Life Church*, 35 F.4th at 1032. More to the point, Plaintiff never explains how

[5] And Plaintiff engages in the same shorthand she accuses Defendants of "sandbagging" her with. She asserts that "Defendants" produced more documents in a "similar case" that is pending in federal court. (Pl.'s Mem., at 15.) The Attorney General, however, is not a party to that case. *See* First Am. Compl., D.E. 102, *Tenn. Conf. of the NAACP v. Lee, et al.*, No. 3:20-cv-01039 (M.D. Tenn. Oct. 20, 2022).

the Attorney General—who has no connection to the statutes she challenges—would have any relevant discovery as to her claims that the General Assembly enacted the law preventing her from restoring her voting rights with a discriminatory purpose. *See Universal Life Church*, 35 F.4th at 1031-32; *Darnell*, 195 S.W.3d at 620.

Plaintiff also asserts that the Attorney General "may have waived" his standing defense by failing to assert it in the motion to dismiss. (Pl.'s Mem. at 9.) Standing, however, is not a waivable defense under Tenn. R. Civ. P. 12.08. And Rule 12 expressly exempts defenses based on the failure to state a claim upon which relief can be granted from the waiver rule. Tenn. R. Civ. P. 12.08; *see also Dubis v. Loyd*, 540 S.W.3d 4, 8 (Tenn. Ct. App. 2016) (ruling that standing may be raised in a motion for failure to state a claim).

Finally, Plaintiff contends that her motion to compel is "not the appropriate time" to litigate the Attorney General's standing defense. (Pl.'s Mem. at 9.) But Plaintiff cannot "bypass standing" in this declaratory judgment proceeding to request a court-order compelling discovery responses on a party she has no legal controversy with. *See West I*, 468 S.W.3d at 490; *Massengale*, 399 S.W.3d at 127.

In all, Plaintiff's complaint does not allege "what the [Attorney General] has done, is doing, or might do to injure" her. *Universal Life Church*, 35 F.4th at 1031-32. Since the Attorney General "has no role in enforcing the law at issue, it follows that . . . [P]laintiff's injury allegedly caused by that law is not traceable" to him. *McMaster*, 24 F.4th at 902.[6] With no standing to seek affirmative relief against the Attorney General, Plaintiff cannot seek an order affirmatively

[6] Because Plaintiff has no traceable injury to the Attorney General, a court order granting Plaintiff relief would have "no effect on his conduct," and Plaintiff fails the redressability prong as well. *McMaster*, 24 F.4th at 903.

compelling him to respond to discovery responses in this declaratory judgment action. *See Zirkle*, 396 S.W.2d at 363; *Carter*, 2016 WL 1268110, at *6.

III. The Secretary of State and Coordinator of Elections Have Participated in Discovery Despite Plaintiff's Past Failure to File and Serve the SAC.

Plaintiff claims that the Secretary of State's and Coordinator of Elections' objections to responding to her discovery requests for her failure to properly file and serve the SAC are "meritless" and that they have "not complied with their discovery obligations." (Pl.'s Mem. at 3-4, 9-11.) The record belies Plaintiff's claim.

To reiterate, the Court granted Plaintiff leave to file the SAC on October 28, 2022, and that the SAC would become the operative complaint "once filed of record." (October 28, 2022 Order, at 1.) Despite being granted leave to file the SAC in October 2022, Plaintiff failed to do so for 16 months. Plaintiff's claim that she "mistakenly did not file the [SAC] as of record" has no support in the record. (Pl.'s Notice of Filing SAC, at 1.) Defendants repeatedly noted Plaintiff's deficiency in multiple court filings. (Defs.' Mem. in Support of Mot. to Dismiss, at 5 n.1; Defs.' Mem. in Support of Mot. to Stay Discovery, at 3 n.2; Defs.' Aug. 29, 2023 Answer, at 1 n.1.) And Defendants made those objections within the applicable deadlines in the Court's September 20, 2022 Scheduling Order. The Secretary of State and Coordinator of Elections also objected to answering Plaintiff's discovery responses because of her failure to properly serve them with the SAC. (Pl.'s Mem., Exs. C, at 3; D, at 2; E, at 1 K, at 3; L, at 2; N, at 1.)[7] Subject to those objections, Defendants answered Plaintiff's discovery requests and provided her with many documents. Once

[7] The Attorney General also objected to providing responses to Plaintiff's first set of interrogatories for failure to file and serve an operative complaint. (Pl.'s Mem., Ex. D, at 2.) Plaintiff raises no issue as to this objection.

Plaintiff did file the SAC, the Secretary of State and Coordinator of Elections timely raised as a defense that Plaintiff failed to properly serve them with the SAC. (Defs.' Feb. 20, 2024 Answer, at 26.) Plaintiff finally served those Defendants with the SAC on April 19, 2024, and quickly moved to compel discovery responses to assert that Defendants' service objections were "meritless." (Pl.'s Mem., at 3 n.2.)

Against this backdrop, Plaintiff has no grounds to seek an order compelling any Defendant to keep answering her discovery requests. Throughout her memorandum, Plaintiff repeatedly asserts that the Secretary of State and Coordinator of Elections are required to "*fully*" participate in discovery. (Pl.'s Mem., at 9-11.) But to do so, Plaintiff was required to "*fully*" participate in this litigation by, at the very least, filing her SAC and serving it. Plaintiff withheld filing the SAC for over a year after the Court granted her permission. Once filed, she delayed serving the SAC on the Secretary of State and Coordinator of Elections for another two months. Even with these deficiencies, Defendants continued to litigate this matter in accordance with the Court's deadlines and respond to Plaintiff's discovery requests.

And Defendants productions are responsive to Plaintiff's requests—even though much, if not all, of Plaintiff's requests are not relevant to her constitutional claims. Plaintiff's remaining facial and as-applied challenges assert that the General Assembly enacted the challenged statutes with a discriminatory purpose, and that applying the statutes to her because she is Black and under the circumstances of her plea is improper. (SAC, at 29-30, 31-32, 34-37, 39.) Defendants produced multiple tables and databases in June 2023 detailing all "persons who are ineligible to register and/or vote in the State of Tennessee by virtue of conviction of a felony," tables listing "Tennessee residents convicted of felony convictions in state court," "in federal court," and for "out-of-state convictions." (Pl.'s Ex. E, at 1-2.) Those tables identify the offender by name, date

of birth, and social security number, and provide the convicting offense and sentence information. Defendants also produced tables listing Tennessee residents "whose application for the restoration of voting rights was denied . . . on the ground that the applicant was permanently ineligible to register and/or vote under Tenn. Code Ann. § 40-29-204," those individuals who previously participated in an election, and other election statistics. (Pl.'s Exs. K, at 4-7; L, at 4-12.) Defendants produced the Statewide Voter Registry Database to Plaintiff in response to her requests for documents showing "voter registration, turnout, and participation" of persons generally and those "Permanently Disenfranchised" before their conviction. (Pl.'s Ex. N, at 2.) While Plaintiff contends that Defendants "have produced few documents" (Pl.'s Mem., at 12,) she disregards these table and database productions.

Plaintiff's contrary contentions are baseless. She says that the Secretary of State and Coordinator of Elections waived their insufficient service defense by failing to raise it in the motion to dismiss and by otherwise participating in this case. (Pl.'s Mem., at 9-10.) Plaintiff overlooks that Defendants did raise her failure to properly file the SAC as of record. (Defs.' Mem. in Support of Mot. to Dismiss, at 5 n.1.) And Rule 4 of the Tennessee Rules of Civil Procedure, which governs service of process, contemplates that Plaintiff's service obligations start "[u]pon the filing of the complaint." *See* Tenn. R. Civ. P. 4.01(1); Tenn. R. Civ. P. 4.04 (requiring a plaintiff to furnish the person making service "with such copies of the . . . complaint as are necessary"). Defendants could not have raised an insufficient service of process defense to a complaint that Plaintiff refused to file for 16 months after being granted leave to do so. And by "[h]aving adequately raised" their objections to Plaintiff's failure to timely file the SAC and, once filed, raising insufficient service of process as a defense in their answer, "Defendants did not waive

the defense by their continued participation in the lawsuit." *Hall v.* Haynes, 319 S.W.3d 564, 584-85 (Tenn. 2010).

Plaintiff also suggests that she properly served the Secretary of State and Coordinator of Elections with the SAC in accordance with Rule 5 of the Tennessee Rules of Civil Procedure. (Pl.'s Mem., at 3, n.2.) But to properly serve a defendant, Plaintiff's "[s]ervice of process must [have] strictly compl[ied] to Rule 4 of the Tennessee Rules of Civil Procedure." *Watson v. Garza*, 316 S.W.3d 589, 593 (Tenn. Ct. App. 2008) (quotation omitted). Plaintiff makes no claim that she did so before April 19, 2024.

Plaintiff has unduly delayed in litigating this matter. Over the course of this case, she has failed to properly file the SAC; failed to properly serve the Secretary of State and Coordinator of Elections; and has not moved to compel discovery responses promptly. Despite this, Defendants have produced sufficient responses and documents to Plaintiff's discovery requests. The Court should not reward Plaintiff's dilatory efforts in litigating this matter with an order compelling Defendants to provide additional responses.

IV. Plaintiff Seeks to Compel Discovery Irrelevant to Her Claims.

Plaintiff's motion to compel raises a host of other contentions regarding Defendants' discovery responses. But the Court should disregard those contentions because none would lead to the discovery of material relevant to Plaintiff's constitutional challenges.

Trial courts can control pretrial matters, including the resolution of discovery disputes. *Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 604-05 (Tenn. 2004). That discretion, however, is not unlimited. *Id.* A party may only obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Tenn. R. Civ. P. 26.02(1). Before a trial court can compel discovery responses, Rule 26.02(1) requires the court to make a

"threshold determination" that the matters sought are not privileged and are relevant to the suit. *West v. Schofield*, 460 S.W.3d 113, 121 (Tenn. 2015) ("*West II*").

Discovery is "relevant to the subject matter" if it is "germane" or bears on the subject matter. *Id.* at 125 (quotation omitted). In Tennessee, evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. In other words, the "crucial issue in determining" whether information is discoverable is whether "it has (or will lead to information which has) some probative value *as to the subject matter involved in the pending action*." *West II*, 460 S.W.3d at 125. In actions challenging the constitutionality of a statute, the discoverability of information "must be analyzed in th[e] specific context" of the plaintiff's challenge. *Id.* at 126.

Here, none of Plaintiff's contentions are relevant to her constitutional claims. She claims that the General Assembly enacted Tenn. Code Ann. § 40-29-204 with a discriminatory purpose by restricting the eligible electorate and to discriminate against Black Tennesseans; as applied to her, Plaintiff says that the statute has a discriminatory purpose because she is Black and because of her guilty plea. (SAC, at 29-30, 31-32, 34-37, 39.) Plaintiff's discovery requests must be analyzed within "th[is] specific context." *West II*, 460 S.W.3d at 126.

Neither of Plaintiff's challenges support her requests for discovery from Defendants. As to her facial challenges (SAC, at 29-30, 31-32), Plaintiff's allegations relate to Tenn. Code Ann. § 40-29-204 "*as written*"; the Court need only analyze whether the statute "*on its face*" violates the Tennessee Constitution. *See West II*, 460 S.W.3d at 126; *see also Gen. Elec. Co. v. Johnson*, 362 F. Supp. 2d 327, 337-38 (D.D.C. 2005) ("[A] facial challenge to the text of a statute does not typically require discovery for resolution because the challenge focuses on the language of the

statute itself."). As to her as-applied challenges (SAC, at 34-37, 39), Plaintiff alleges that Tenn. Code Ann. § 40-29-204 has the effect of discriminating against her because she is Black and because of the circumstances of her guilty plea. Notably, her complaint does not allege that Defendants have applied the law in a discriminatory manner as to her. So Plaintiff's discovery requests seeking information as to how Defendants "may facilitate or carry out" Tenn. Code Ann. § 40-29-204 "are not relevant to a determination of whether the [General Assembly's enactment] passes constitutional muster." *West II*, 460 S.W.3d at 126.

Plaintiff's contentions miss this "threshold" mark to obtain discovery in accordance with Tenn. R. Civ. P. 26.02(1). *See id.* at 121. She first claims that Defendants both improperly produced denial letters of persons who attempted to seek the restoration of their voting rights for reasons "other than the permanent disenfranchisement statutes at issue in this case" and improperly withheld documents supporting those denials. (Pl.'s Mem. at 12-13.) But this claim goes to how Defendants carry out their duties, not to whether the General Assembly enacted the law with a discriminatory purpose or if the statute has the effect of discriminating against Plaintiff because she is Black and because of her guilty plea. Plaintiff also does not assert constitutional challenges on behalf of any other infamous criminals, so how Defendants apply Tenn. Code Ann. § 40-29-204 to other offenders is unrelated to her claims. *See West II*, 460 S.W.3d at 125.

The record also undermines Plaintiff's contention that a privilege log should be produced due to "the scope of [her] requests," "who the Defendants are," and because the Secretary of State and Coordinator of Elections produced a privilege log in the pending *NAACP v. Lee*, Case No. 3:20-cv-01038 (M.D. Tenn.) federal proceeding. (Pl.'s Mem., 13, 15.) Again, though, Plaintiff does not claim that Defendants have applied Tenn. Code Ann. § 40-29-204 in a discriminatory manner; her requests for discovery on that issue is not "relevant to the subject matter involved"

here. Tenn. R. Civ. P. 26.02(1). Defendants' privileged communications about the eligibility of infamous criminals are not relevant to Plaintiff's claims in the SAC, and thus no privilege log is required. *See* Tenn. R. Civ. P. 26.02(5) (requiring a privilege log only when a party "withholds information otherwise discoverable").

Plaintiff has relied on an expert report generated in the *NAACP v. Lee* matter, which states that only 7,728 infamous criminals are prohibited from restoring their voting rights under Tenn. Code Ann. § 40-29-204. (Pl.'s Feb. 21, 2024 Resp. to Defs.' Mot. to Quash, Ex. B, at 11.) That report adds that many of those offenders are convicted of "very serious crimes" and "are serving active sentences or died in prison." (*Id.* at 11, n.5.) Even if Defendants' privileged discussions about those infamous criminals were relevant, there is no reason to accept Plaintiff's speculation as to the number of documents a privilege log would reveal. Finally, despite Plaintiff's attempt to link this case to the *NAACP v. Lee*, matter, the proceedings are very different. That proceeding involves federal claims related to allowing *eligible* infamous criminals to seek restoration of their voting rights (along with including other defendants not named here, such as the Governor of Tennessee and the Commissioner for the Tennessee Department of Correction). Plaintiff's claims here only focus on the facial validity of Tenn. Code Ann. § 40-29-204 and her own *ineligibility* to restore her voting rights.

Similarly, Plaintiff says that her requests should have required Defendants to produce more documents. (Pl.'s Mem., at 13-15.) Defendants note that all the requests Plaintiff references here are to Defendants' first set of responses produced in February 2023; her moving to compel additional responses over a year later is untimely. Plaintiff also fails to explain how the process Defendants employ to determine whether an infamous criminal is eligible to seek voting restoration is relevant to her claims, nor does she even suggest that Defendants are, or have, applied

any restoration statutes in a discriminatory manner. *See West II*, 460 S.W.3d 131 ("[P]ublic officials in Tennessee are presumed to discharge their duties in good faith and in accordance with the law.").

Plaintiff's claim that Defendants' document searches, in responding to her first set of requests, should have revealed a document created after they provided responses is frivolous. (Pl.'s Mem., at 15.) Plaintiff points to the Coordinator of Election's July 21, 2023 memorandum about the process for eligible infamous criminals to seek restoration of their voting rights following the Tennessee Supreme Court's decision in *Falls v. Goins*, 673 S.W.3d 173 (Tenn. 2003), a date well after Defendants responded to her discovery requests in February and June 2023. Even so, Plaintiff previously argued that *Falls* was "limited to the interpretation of statutes that are not at issue in this case." (Pl.'s Resp. in Opposition to Defs.' Mot. to Revise, at 1.) Plaintiff cannot seriously claim that documents regarding *Falls* must be produced. it is DIRECTLY responsive to a discovery request

Next, Plaintiff asserts that Defendants have "stonewall[ed]" her by not revealing information about their searches for documents. (Pl.'s Mem., at 16-17.) Plaintiff, however, does not point to any of her discovery requests seeking such information. Nor does she explain how the information on the searches would lead to information that has "some probative value *as to the subject matter involved in the pending action*." *West II*, 460 S.W.3d at 125. Like her other contentions and requests, Plaintiff's request for information on Defendants' searches is simply an attempt to seek discovery on how Defendants carry out their duties, a claim Plaintiff does not raise here.[8]

[8] Plaintiff says that the Court should overrule Defendants' "boilerplate" objections. (Pl.'s Mem., at 18-20.) But Plaintiff does not identify what objection she takes issue with. To the extent she claims that the Secretary of State and Coordinator of Elections could not object to providing discovery because she did not timely file or serve the SAC, those objections were certainly proper.

Plaintiff also claims that Defendants needed to produce the "metadata" of the documents produced. (Pl.'s Mem., at 23.) But as with her attempt to obtain discovery on Defendants' document searches, Plaintiff does not point to where she requested such information. Although Plaintiff cites her instructions in her requests for production of documents, Plaintiff does not argue that Defendants did not substantially comply with her request by producing documents with "appropriate markings" that identified the "entity keeping custody" of the documents, and the "specific request(s)" Defendants produced documents as "responsive." (*See id.*) In any event, under *West II*, Plaintiff never explains how any metadata would be relevant to her claims that the General Assembly enacted Tenn. Code Ann. § 40-29-204 with a discriminatory purpose.

As to her contention that she did not exceed the limits on interrogatories under the Local Rules of Practice for the Circuit Court of the Thirtieth Judicial District at Memphis, Plaintiff misstates the rule. (Pl.'s Mem. at 23-24.) As Plaintiff notes, under Rule 12(D), "[n]o party shall serve on any other party more than thirty (30) interrogatories without leave of court." But Plaintiff omits the next sentence: "For purposes of this Rule, a sub-part of an interrogatory shall count as an additional interrogatory." In other words, Rule 12(D) only permits a litigant to serve 30 interrogatories, and that limit includes all sub-parts of an interrogatory. And by the time Plaintiff served "Interrogatory 14" in her second set of discovery requests, she exceeded the number of permissible interrogatories.

Plaintiff also rejects Defendants' objections that her second set of requests exceed the scope of the Court's October 11, 2023 Order. (Pl.'s Mem., at 21-22.) She says that Request 23 for

---

To the extent Plaintiff claims that Defendants' relevance objections are boilerplate, this Court has an independent duty to determine whether Plaintiff's requests are discoverable in accordance with Tenn. R. Civ. P. 26.02(1). *West II,* 460 S.W.3d at 121.

production of documents, which asked for all documents "related to any and all denials" of infamous criminals who were permanently ineligible to vote and sought to restore their rights, complied with the Court's limited grant of permitting discovery on "voting pattern data" and "race/ethnicity in conviction data." (*Id.* at 21-22, Ex. K, at 6-7 (alteration omitted).) But Plaintiff's request could not have sought "voting pattern" data; any individuals denied restoration are ineligible to vote. Nor could it have reasonably sought "race/ethnicity in conviction data"; by its terms, Tenn. Code Ann. § 40-29-204 applies to all infamous criminals convicted of listed offenses, and Plaintiff has not alleged or suggested that Defendants have applied the statute in any discriminatory way.[9]

Those same objections apply to Plaintiff's "Interrogatory 17," which requested Defendants to "state the number of Tennessee residents" that were "ineligible to vote by virtue of a conviction of a felony, broken down by offense type, manner of conviction (i.e. guilty plea or trial), race/ethnicity, county of residence, and zip code." (Pl.'s Mem., Ex. L, at 7-8.)[10] Plaintiff again seeks "voting" data on persons ineligible to vote; she also requested information beyond "race/ethnicity in conviction data." As to Plaintiff's request for information on offenders other than her, such information is not relevant to her facial or as-applied challenges.[11]

---

[9] Plaintiff's facial and as-applied constitutional challenges all relate to the enactment of Tenn. Code Ann. § 40-29-204. (SAC, at 29-30, 31-32, 34-37, 39.)

[10] Plaintiff's memorandum leaves out that the interrogatory sought information on the "offense type" and "manner of conviction (i.e. guilty plea or trial)." (Pl.'s Mem., at 22.)

[11] Plaintiff also says that the objections as to her request 24, which sought documents "you" "contend support the State's interest in permanently disenfranchising Plaintiff and other Permanently Disenfranchised Persons," and her "Interrogatory 19," requesting Defendants to identify the "100 elections" "with the narrowest margins of victory," are invalid. (Pl.'s Mem., at 22.) But even if Plaintiff was correct, she takes no issue with Defendants' other objections, such

Finally, Plaintiff says that Defendants should be required to answer her "contention interrogatory" in "Interrogatory 22," which requests Defendants to state all "governmental interest(s) in permanently denying Tennessee residents the right to vote under Tenn. Code Ann. § 40-29-204." (Pl.'s Mem., at 24-25.) But again, Defendants need not respond because it exceeds the number of interrogatories permissible under Rule 12(D). Not only that, but in "th[e] specific context" of Plaintiff's claims, *see West II*, 460 S.W.3d at 126, it would require Defendants to speculate on the General Assembly's intentions in enacting Tenn. Code Ann. § 40-29-204 and otherwise seeks Defendants' attorneys' work product in defending this action. That said, to the extent Plaintiff is seeking Defendants' position as what the General Assembly *may* have intended, Defendants have already provided those arguments in their motion to dismiss. (Defs.' Mem. in Support of Mot. to Dismiss, at 16-17.) And this Court agreed that the General Assembly could "rationally conclude" that persons convicted of certain offenses "are unfit" to participate in Tennessee's elections. (July 19, 2023 Order, at 22.) If Plaintiff merely wants Defendants to supplement their responses to include this argument, judicial intervention is inappropriate.

---

as her use of the phrase "narrowest margins of victory" being vague and ambiguous and that her request for the State's "interest" in not providing a pathway for infamous criminal to seek the restoration of their voting rights would require Defendants to speculate as to the General Assembly's intentions and otherwise sought privileged work product and attorney-client information. (Pl.'s Mem., Exs. K, at 7-8; L, at 8-9.)

CONCLUSION

For all these reasons, the Court should deny Plaintiff's motion to compel.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter

/s/ Robert W. Wilson
Robert W. Wilson, BPR #34492
Senior Assistant Attorney General

Dawn Jordan, BPR 20383
Special Counsel

Zachary L. Barker, BPR #035933
Assistant Attorney General

Office of the Attorney General and Reporter
40 South Main Street, Suite 1014
Memphis, TN 38103-1877
(901) 543-9031
Robert.Wilson@ag.tn.gov

CERTIFICATE OF SERVICE

I hereby certify that on this the 21st day of May, 2024, 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:

John E. Haubenreich
Protect Democracy
John.Haubenreich@protectdemocracy.org

Elisabeth S. Theodore
Robert Stanton Jones
Seth Engel
Catherine E. McCarthy
Matthew Peterson
Michael Mazzullo
Arnold & Porter Kaye Scholer LLP
elisabeth.theodore@arnoldporter.com
stanton.jones@arnoldporter.com
seth.engel@arnoldporter.com
catherine.mccarthy@arnoldporter.com
matthew.peterson@arnoldporter.com
michael.mazzullo@arnoldporter.com

Counsel for Plaintiff

/s/ Robert W. Wilson
Robert W. Wilson
Senior Assistant Attorney General