

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

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

**MEMORANDUM IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT BY PLAINTIFF PAMELA MOSES**

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## INTRODUCTION

The fundamental premise of both the United States and the State of Tennessee is that constitutions limit the power of government. As stated by the Tennessee Supreme Court:

Constitutions are expressions of the sovereign will of the people, the fountain of all power and authority. The several departments of the government are created and vested with their authority by them, and they must exercise it within the limits and in the manner which they direct. The provisions of these solemn instruments are not advisory, or mere suggestions of what would be fit and proper, but commands which must be obeyed. Presumably they are all mandatory. Certainly no provision will be construed otherwise, unless the intention that it shall be unmistakably and conclusively appears upon its face. The supremacy and permanency of republics depend upon the maintenance of the fundamental law, in its integrity, as written in Constitutions adopted by the people; and it is the solemn duty of all those temporarily vested with power, in all departments of the state, to do this.

*State v. Burrow*, 104 S.W. 526, 527 (Tenn. 1907) (emphasis added).

This case involves a key limit on government power enshrined in the Tennessee Constitution's Declaration of Rights: that "the right of suffrage . . . shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction." Tenn. Const. art. I, § 5 (emphasis added) (the "Free and Equal Elections Clause").

This limit is clear, unequivocal, and mandatory. The State, however, has defied this constitutional limit in both statute and practice by permanently depriving Plaintiff Pamela Moses of her right of suffrage *without* a conviction by a jury. The statute authorizing such deprivation, and the actions of the Defendants in interpreting, enforcing, and defending this statute, are unconstitutional and must be enjoined.

The sole question for this Court is whether "except upon conviction by a jury" means what it says? That is, does the Free and Equal Elections Clause prohibit the State from permanently denying Ms. Moses the right to vote on the basis of a conviction secured by a guilty plea? The

clear answer is yes. *First*, the plain language of the Free and Equal Elections Clause is unambiguous, and its ordinary meaning indicates that conviction **by a jury** is a mandatory prerequisite to permanently depriving a citizen of the right to vote. Such an interpretation (i) accords the plain meaning to the words in the Constitution; (ii) harmonizes the Constitution’s two criminal disenfranchisement provisions; and (iii) avoids treating the Free and Equal Elections Clause’s “by a jury” language as surplusage. *Second*, the undisputed historical context overwhelmingly demonstrates that the mandatory jury conviction prerequisite to disenfranchisement was carefully considered and intentionally adopted by the drafters of the Constitution of 1870, who were motivated to strengthen suffrage protections following targeted attacks on voting rights in the decade prior.

Defendants have argued throughout this case, and will likely argue once again, that when Ms. Moses pled guilty in 2015, the procedural waiver of her right to a jury trial also waived the constitutional limitation on government power contained in the Free and Equal Elections Clause without her even being told about it. This waiver argument fails for three independent reasons. First, the undisputed evidence establishes that Ms. Moses was only informed that she was waiving her right to a jury trial; there was no mention in her plea colloquy or plea documents of her right to vote or the Free and Equal Election Clause’s limits on the State’s disenfranchisement authority. For that reason alone, Ms. Moses did not waive her constitutional protection against permanent disenfranchisement absent a jury conviction.

Second, Ms. Moses could not have waived the constitutional limitation on the State’s permanent disenfranchisement authority even if she had wanted and attempted to do so. “[S]hall never” is an explicit limitation on the State. And it means precisely what it says: “shall *never*.” As far as Plaintiff is aware, no Tennessee court has ever held that an individual can enlarge the power

of a branch of government beyond the limits that the framers of a constitution saw fit to impose. While an individual may waive a constitutional provision enacted for her personal benefit (such as a right to a jury trial) if an appropriate statutory framework is in place allowing such waivers, it is well settled that an individual cannot waive a constitutional limitation on the authority of a branch of government (such as a limit on the State's permanent disenfranchisement authority meant to protect free and equal elections). Accordingly, Ms. Moses' waiver of her procedural right to a jury trial has no impact on the State's permanent disenfranchisement authority, which remains limited by the jury conviction requirement that Defendants impermissibly ignored in permanently denying Ms. Moses the right to vote.

Third, Defendants' waiver theory also fails because conditioning the benefits of a plea agreement on Ms. Moses surrendering her constitutional rights is an unconstitutional condition.

In sum, Ms. Moses has been permanently deprived of her fundamental right to vote by the State in direct contravention of the express limitation on legislative and executive power in the Free and Equal Elections Clause. Ms. Moses is entitled to summary judgment.

## **BACKGROUND**

### **I. CONSTITUTIONAL BACKGROUND**

The first constitution of the state of Tennessee was adopted in 1796, as a “preliminary step to the admission of Tennessee as the 16th state of the United States later that year.” *State v. Marshall*, 859 S.W.2d 289, 292 (Tenn. 1993). “Article XI of the Constitution of 1796 was the only Article of that Constitution that had a title; its title was ‘Declaration of Rights.’” *Id.* Among other things, the Declaration of Rights declared “[t]hat Elections shall be free and equal.” Tenn. Const. of 1796, art. XI, § 5. As an indication of the fundamental importance of the Declaration of Rights, the Constitution of 1796 expressly provided that: (i) the “Declaration of Rights . . . is declared to

be a part of the Constitution of this State and Shall never be violated on any pretence whatever”; and (ii) “everything in the Bill of Rights contained and every other right not hereby delegated is excepted out of the General Powers of Government and shall for ever remain inviolate.” Tenn. Const. of 1796, art. X, § 4.

When the constitution was amended in 1834, the Declaration of Rights was moved to Article I, though it still provided “[t]hat Elections shall be free and equal.” Tenn. Const. of 1834, art. I, § 5. Like the Constitution of 1796, the Constitution of 1834 also contained an express provision emphasizing the importance of the Declaration of Rights. *See* Tenn. Const. of 1834, art. XI, § 12 (“Declaration of Rights hereto prefixed, is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever.”); *id.* (“every thing in the Bill of Rights contained, is excepted out of the general powers of government, and shall forever remain inviolate”). In addition, some new provisions were added to the Constitution of 1834, including one that provided: “Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes.” Tenn. Const. of 1834, art. IV, § 2.

The constitution of the state of Tennessee was amended once again in 1870. This time, the delegates to the convention substantively amended the Free and Equal Elections Clause, as opposed to merely moving it from one part of the constitution to another. While the Constitution of 1834 merely stipulated that “elections shall be free and equal,” the delegates of the 1870 constitutional convention modified that clause to read:

That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, ***except upon a conviction by a jury*** of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

Tenn. Const. art. I, § 5 (emphasis added). This version of the Free and Equal Elections Clause has since remained unchanged as one of the provisions of the Declaration of Rights.

“[F]earful that the Declaration of Rights,” including Article I, Section 5, “might be relegated to some subordinate status,” the delegates of the 1870 constitutional convention also “adopted Article XI, Section 16 of the Constitution, which provides: ‘The declaration of rights hereto prefixed, is declared to be a part of the Constitution of this State, and shall never be violated on any pretence [sic] whatever.’” *Marshall*, 859 S.W.2d at 304 (Reid, C.J., concurring and dissenting) (quoting Tenn. Const. art. XI, § 16). The framers “foresaw times in which legislators and judges would undertake to subvert the plain meaning of their words in order to suppress unpopular ideas and unorthodox expression, to barter liberty for conformity.” *Id.* As further noted by Justice Reid, “[t]he framers have proved to be prophetic.” *Id.*

## II. STATUTORY BACKGROUND

The General Assembly of Tennessee enacted the State’s first criminal disenfranchisement law as part of the 1858 Tennessee Code. At several points in time, the General Assembly has revised Tennessee’s criminal disenfranchisement regime. Since 1981, the Tennessee Code has defined “any felony” as an infamous crime and mandated the disenfranchisement of any person convicted of a felony, whether convicted by a jury or not. Specifically, Tennessee Code Annotated section 40-20-112 reads: “Upon conviction for any felony, it shall be the judgment of the court that the defendant be infamous and be immediately disqualified from exercising the right of suffrage.”

A different Tennessee statute imposes permanent disenfranchisement when individuals are convicted of certain felonies. Tenn. Code Ann. § 40-29-102 provides that anyone “convicted on or after July 1, 2006” of “[a]ny violation of title 39, chapter 16, parts 1, 4, or 5 designated as a felony” “shall never be eligible to have the right of suffrage restored and vote in this state.” (This provision was originally enacted in 2006 as Tenn. Code Ann. § 40-29-204, but was moved to § 40-29-102 in 2025.) Tampering with or fabricating evidence as defined by Tenn. Code Ann.

§ 39-16-503 is one of Tennessee's permanently disqualifying offenses that renders a Tennessean permanently disenfranchised upon conviction and forever ineligible to pursue the restoration of voting rights.

The Defendants have interpreted these statutes to automatically impose disenfranchisement or permanent disenfranchisement for the enumerated offenses, regardless of whether the person was convicted of a felony by a guilty plea or by a jury verdict. (See Plaintiff's Statement of Undisputed Material Facts at ¶¶ 1-3, 8-14 (hereinafter "SUMF").)

### III. PAMELA MOSES

On April 29, 2015, Ms. Moses pled guilty to tampering with evidence and forgery as defined by Tenn. Code Ann. § 39-16-503. (SUMF ¶ 8.) According to the office of the Coordinator of Elections, when that guilty plea was entered, Ms. Moses was automatically, immediately, and permanently deprived of her right to vote. (SUMF ¶¶ 1-3, 8-9, 12.) Defendants have prohibited Ms. Moses from restoring her voting rights and registering to vote as a consequence of her guilty plea. (SUMF ¶¶ 10-14.) When Ms. Moses applied to restore her voting rights and register to vote in September 2019, Defendant Goins, on behalf of Defendant Hargett, instructed the Shelby County Election Commission that, as a result of Tenn. Code Ann. § 40-29-204 (now § 40-29-102), Ms. Moses was permanently ineligible to restore her voting rights and to vote due to the aforementioned felony conviction; this instruction served as the basis for the denial of her restoration application and registration application. (*Id.*) Specifically, the Shelby County Election Commission informed Ms. Moses that: (i) a consequence of her guilty plea "to the crime of Tampering with/Fabricating Evidence as described in Tenn. Code Ann. § 39-16-503" was that she was rendered "permanently ineligible to register to vote in Tennessee"; and (ii) her voter registration application therefore was denied. (SUMF ¶ 13)

## **PROCEDURAL HISTORY**

Plaintiff filed this lawsuit in 2019 challenging Tennessee's laws that bar her from voting based on a felony conviction by plea bargain. In October 2022, she filed the operative Second Amended Complaint ("SAC"). (See Exhibit A to Joint Notice of Filing of Agreed Order Granting Leave to Amend, October 13, 2022). Since 2022, the operative complaint has named three defendants: Secretary of State Tre Hargett, Coordinator of Elections Mark Goins, and Attorney General and Reporter Jonathan Skrmetti (together, the "Defendants").

In December 2022, the Defendants moved to dismiss the SAC on various grounds. (Defs.' Mot. to Dismiss, December 7, 2022). In July 2023, the Court granted the motion in part and denied it in part, allowing six of Plaintiff's constitutional claims to proceed. (Order on Defs.' Motion to Dismiss, July 19, 2023). Plaintiff's procedural due process claims, which focused on the substance of what Plaintiff was told when entering into a guilty plea prior to being permanently disenfranchised, were dismissed. Plaintiff's claims under the Free and Equal Elections Clause, which do not turn on anything Plaintiff discussed as part of the process of entering into a guilty plea, survived the motion.

On August 1, 2025, Plaintiff filed a motion to make limited amendments to the Second Amended Complaint. (Plf.'s Mot. for Leave to Make Amendments to the SAC, August, 1, 2025). Among other things, Plaintiff sought to amend the statutory references to Tennessee's permanent disenfranchisement law after the General Assembly amended the Tennessee Code in the spring of 2025 and moved the list of permanently disqualifying offenses from one provision of the code to another without changing the list of permanently disqualifying offenses.

On September 16, 2025, the Court granted in part and denied in part Plaintiff's motion to make limited amendments to the complaint. The Court concluded that Plaintiff's proposed

amendments that were “in response to the statutory changes . . . [we]re GRANTED as fairly sought in light of such changes.” (Order on Plf.’s Mot. for Leave to Make Amendments to the SAC, September 16, 2025).

On October 7, 2025, the Court granted the parties leave to file “supplemental briefing or a new motion” with respect to “Plaintiff’s as-applied jury-conviction requirement claim.” (Order Continuing Trial, Reopening Discovery, and Permitting Re-briefing, October 7, 2025).

### **STANDARD OF REVIEW**

A court may grant summary judgment where “(1) there is no genuine issue with regard to the material facts relevant to the claim . . . ; and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts.” *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995) (internal citations omitted); Tenn. R. Civ. P. 56.04. “Summary judgments are not disfavored procedural devices.” *Green v. Green*, 293 S.W.3d 493, 513 (Tenn. 2009). “A summary judgment is appropriate in virtually every civil case that can be resolved on the basis of legal issues alone.” *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 471 (Tenn. 2012); *see also Green*, 293 S.W.3d at 513; *Eskin v. Bartee*, 262 S.W.3d 727, 732 (Tenn. 2008). “Issues relating to the interpretation of written instruments involve legal rather than factual issues. These essentially legal questions can be resolved using summary judgment when relevant facts are not in dispute.” *The Pointe, LLC v. Lake Mgmt. Ass’n*, 50 S.W.3d 471, 474 (Tenn. Ct. App. 2000) (citations omitted).

### **ARGUMENT**

This Court should enter summary judgment in favor of Plaintiff on her as-applied Free and Equal Elections claim because the State is only authorized to permanently deprive Tennesseans of the right to vote upon a “conviction by a jury of some infamous crime,” but the State—through the actions of the Defendants (*i.e.*, those responsible for interpreting and enforcing Tennessee’s voting

laws)—has impermissibly permanently deprived Plaintiff of the right to vote on the basis of a conviction that was not secured by a jury.

**I. THE STATE MAY ONLY PERMANENTLY DEPRIVE A CITIZEN OF THE RIGHT TO VOTE BASED UPON A CRIMINAL CONVICTION WHEN THAT CONVICTION WAS BY A JURY**

This Court should hold that the State is only authorized to permanently disenfranchise Ms. Moses on the basis of a criminal conviction when said conviction was secured by a jury. *First*, the plain language of the Free and Equal Elections Clause is unambiguous, and its ordinary meaning makes clear that Ms. Moses may only be deprived of her fundamental right to vote upon a conviction by a jury of her peers. *Second*, concluding that the State’s ability to permanently deprive Ms. Moses of the right to vote is limited by a jury conviction prerequisite is the only way to give effect to the jury language in the Free and Equal Elections Clause and harmonize the criminal disenfranchisement provisions in the Constitution. *Finally*, a jury conviction prerequisite is consistent with the intent of the members of the 1870 constitutional convention to strengthen suffrage protections following targeted attacks by the government on voting rights during and after the Civil War.

**A. The Constitution Plainly States that a Jury Conviction Is a Mandatory Prerequisite Before Ms. Moses Could be Permanently Deprived of Her Right to Vote**

The plain language of the Free and Equal Elections Clause confirms that the State can only permanently deprive a citizen of the right to vote when a conviction was “by a jury”—not a guilty plea. Tenn. Const. art. I, § 5. As established 45 years ago in *Crutchfield*, the legislature is only “empowered to deprive convicted criminals of the right to vote under the limitations set out in Article I, Section 5 and Article IV, Section 2.” *Crutchfield v. Collins*, 607 S.W.2d 478, 481 (Tenn. Ct. App. 1980) (emphasis added).

“When interpreting the Tennessee Constitution, [Tennessee courts] aim to enforce ‘what the people who voted for this constitutional [provision] would think that the language meant.’” *McNabb v. Harrison*, 710 S.W.3d 653, 658 (Tenn. 2025) (quoting *State ex rel. Doyle v. Torrence*, 310 S.W.2d 425, 427-28 (Tenn. 1958)). This approach to constitutional construction is “more commonly known today as determining the ‘original public meaning,’” and “it requires courts to determine, using the evidence available, ‘how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.’” *Id.* (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012)). As a part of this process, courts “begin by reading the plain language and giving terms ‘their ordinary and inherent meaning.’” *Id.* (quoting *State v. Phillips*, 21 S.W.2d 4, 5 (Tenn. 1929)). To that end, Tennessee courts “consider contemporaneous dictionary definitions [and] usages and historical practices at the time of the adoption of the text.” *Id.*

Additionally, it is well-settled that Tennessee courts must “construe constitutional provisions as written without reading ambiguities into the provisions.” *Barrett v. Tennessee Occupational Safety & Health Rev. Comm'n*, 284 S.W.3d 784, 787 (Tenn. 2009) (citing *State ex rel. Sonnenburg v. Gaia*, 717 S.W.2d 883, 885 (Tenn. 1986)); *see also McNabb*, 710 S.W.3d at 659 (“It is not this Court’s role to create ambiguity.”). “When a provision clearly means one thing, courts should not give it another meaning.” *Hooker v. Haslam*, 437 S.W.3d 409, 426 (Tenn. 2014). As such, “[w]hen the words are free from ambiguity and doubt and express plainly and clearly the sense of the framers of the Constitution there is no need to resort to other means of interpretation.” *Id.* Under those circumstances, a court is to simply “give the terms contained in constitutional provisions their ordinary and inherent meaning.” *Barrett*, 284 S.W.3d at 787 (citing *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983)).

Relevant here, the language of the Free and Equal Elections clause is unambiguous, and its ordinary meaning indicates that the State may only deprive a citizen of their right to vote on the basis of a criminal conviction when the conviction was secured by a jury composed of the criminal defendant's peers. Specifically, the Free and Equal Elections Clause 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 a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

Tenn. Const. art. I, § 5 (emphasis added). The tools used by courts to “determine the original public meaning” make clear that the term “jury,” as used in the Free and Equal Elections Clause, can only be understood as referring to a jury composed of a criminal defendant’s peers, not a court of law.

*First*, contemporaneous dictionary definitions establish that the word “jury,” as used around the time of the drafting of the Constitution of 1870, referred to a body of multiple people.<sup>1</sup> *See, e.g.*, Jury, *Bouvier’s Law Dictionary*, (11th ed. 1862) (“A body of men selected according to law, for the purpose of deciding some controversy.”); Jury, *Webster’s Dictionary of the English Language*, (Academic ed. 1867) (“A body of men, selected and sworn to inquire into any matter of fact, and to declare the truth of it on the evidence given to them.”); Jury, *A Law Dictionary and Glossary*, (2nd ed. 1871) (“A certain number of men, selected according to law, and sworn (*jurati*) to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them.”); Jury, *Chamber’s English Dictionary*, (1872) (“A body of not less than twelve men, selected and sworn, as prescribed by law, to declare the truth on evidence before them.”); Jury, *A Law Dictionary for the Use of Students and the Legal Profession*, (1875) (“A certain number of men (usually twelve) to whose decision the matter in dispute between a plaintiff and defendant is

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<sup>1</sup> “To determine the original public meaning, we first turn to dictionary definitions published around the time the constitutional language was approved.” *McNabb*, 710 S.W.3d at 660.

submitted, and who are bound upon their oaths to decide (or give their verdict) according to the evidence which is laid before them on the trial of the cause.”); *see also* Jury, 2 Noah Webster, *An American Dictionary of the English Language* (1828) (“A number of freeholders, selected in the manner prescribed by law, empaneled and sworn to inquire into and try any matter of fact, and to declare the truth on the evidence given in the case.”).<sup>2</sup> In other words, the framers of the Constitution of 1870 could not have intended the word “jury” to encompass “the court” in the absence of a jury. *See McNabb*, 710 S.W.3d at 660 (“It is not this Court’s role to create ambiguity. When a constitutional provision has a clear meaning, this Court cannot apply another.”).

*Second*, contemporaneous uses of the word “jury” also demonstrate that Tennesseans used the word to refer to a body of multiple people and differentiated between the jury and the court. *See id.* at 658 (“Not only do we consider contemporaneous dictionary definitions, but also usages and historical practices at the time of the adoption of the text.”). For instance, Tennessee courts routinely spoke of the jury as a separate part of legal proceedings and a body composed of multiple persons chosen from the community. *See, e.g., Garner v. State*, 13 Tenn. 160, 172 (1833) (“One part of this scheme is that a jury empaneled, sworn and charged with the prisoner, is an entire thing; though composed of twelve persons, in judicial proceedings it is an unit.”); *Webbs v. State*, 44 Tenn. 199, 201 (1867) (discussing court instructions to the jury and differentiating between “the verdict of a jury[] and judgment of the Court”); *Eason v. State*, 65 Tenn. 466, 467 (1873) (discussing the swearing in of “jurors” and examining whether the defendant was tried by an “impartial jury”); *Neely v. State*, 63 Tenn. 174, 180 (1874) (describing a “trial by jury” as a trial where “the facts involved in a[] litigation [are] determined by twelve good and lawful men”).

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<sup>2</sup> The definition of jury in the first edition of Black’s Law Dictionary in 1891 is identical to the definition in the 1891 edition of *A Law Dictionary and Glossary*. *See Jury*, *Black’s Law Dictionary* (1st ed. 1891).

Moreover, the contemporaneous usages of the word “jury” in the Constitution of 1870, both broadly and within the Free and Equal Elections Clause, confirm that the framers intended for a jury to play a role in the conviction process as a prerequisite to the possibility of criminal disenfranchisement. The Free and Equal Elections Clause refers to both a jury *and* a court, establishing that *two separate actors* are to play a role prior to potential criminal disenfranchisement. *See* Tenn. Const. art. I, § 5 (referring to a “conviction by a jury” and a “judgment thereon by a court”). If the framers of the 1870 Constitution had not contemplated multiple actors, including a jury, playing a role in criminal proceedings as a prerequisite to disenfranchisement, they could have simply referred to a conviction and judgment entered thereon by a court, but they did not do so.

The usages of the word “jury” elsewhere in the Constitution of 1870 further illuminate that the word refers to a body of people distinct from the court.<sup>3</sup> All the references to the word “jury” in the document distinguish between the jury and the court, emphasizing when a jury can or may be required to play a role in a legal proceeding. Because as a general matter “the same meaning attaches to a given word or phrase repeated in a constitution where it occurs within the document,” 16 C.J.S. Constitutional Law § 90, the uses of the word “jury” elsewhere in the Constitution of 1870 show that the word “jury” as used within the Free and Equal Elections Clause refers to a jury of a criminal defendant’s peers.

*Finally*, the historical practices at the time of the adoption of the strengthened Free and Equal Elections Clause lend further support for the notion that the framers intended to impose a

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<sup>3</sup> *See* art. I, § 6 (establishing “the right of trial by jury”); art. I, § 9 (establishing a criminal defendant’s right to a “speedy public trial, by an impartial jury”); art. I, § 19 (discussing that “the jury shall have a right to determine the law and the facts, under the direction of the court” in connection with indictments for libel); art. VI, § 14 (noting a Tennessean cannot be fined more than fifty dollars unless such a fine is “assessed by a jury of his peers”).

“jury conviction” requirement for criminal disenfranchisement. Convictions by way of guilty pleas were in existence at the time the Free and Equal Elections Clause was amended, yet the framers were intentional in their usage of the phrase “conviction by a jury.”<sup>4</sup> In particular:

- Guilty pleas, without the involvement of the jury in determining guilt and rendering a conviction, were authorized by statute in the 1830s in Tennessee. *See Act of 1831, Chapter 83, Section 1, R.L. Caruthers and A.O.P Nicholson, A Compilation of the Statutes of Tennessee of a General and Permanent Nature from the Commencement of the Government to the Present Time* (Nashville, Tenn.: The Steam Press of James Smith, 1836), 241 (“When any person or persons, shall stand charged upon indictment or presentment for any offence punishable by confinement in the public jail and penitentiary house of this state, upon his her or their arraignment shall plead ‘guilty’ to the charge so made by presentment or indictment, the court, before whom such plea shall be entered, shall direct a jury of twelve good and lawful men to be empanneled, to fix and determine the length of time for which such person or persons shall be confined in the penitentiary, who shall fix upon the time in the same manner as if such person or persons had pleaded ‘not guilty.’”).
- Guilty pleas, without the involvement of the jury in determining guilt or rendering a conviction, were permitted by statute in the 1858 code. *See The Code of Tennessee* (1858), Title 4, ch. 13, § 5210 (“Upon the plea of guilty, when the punishment is confinement in the penitentiary, a jury shall be empanelled to hear the evidence and fix the time of confinement, unless otherwise expressly provided by this Code.”).
- Guilty pleas to misdemeanors were authorized by statute prior to 1870. *See The Code of Tennessee* (1858), Title 4, ch. 3, § 4994 (“Any person brought before a Justice of the Peace for a misdemeanor, may plead guilty ....”); *see State v. Atkinson*, 28 Tenn. 677, 678 (1849) (explaining the law was passed in 1848 and the purpose for it); *see, e.g., State v. Lowry*, 31 Tenn. 34, 35 (1851) (“[T]he defendant, being brought before the justice, pleaded guilty, and the evidence being heard, was fined \$2 by the judgment of said justice.”).
- In 1865, the Tennessee Supreme Court ordered a new trial upon reviewing the “highly improper” behavior of the state attorney general, who had coerced the defendant into pleading guilty to two gambling offenses, despite his protestations of innocence. *See Swang v. State*, 2 Cold. 212, 214–15 (Tenn. 1865).
- In 1868, the Tennessee Supreme Court considered a case where the defendant had pled guilty, and thereafter a a jury had been empaneled to determine the sentence. *See Nolin v. State*, 46 Tenn. 12, 12-13 (Tenn. 1868). The Court dismissed the appeal

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<sup>4</sup> Plea bargaining emerged in the United States in the middle of the nineteenth century, and the practice became more common during the second half of that century. *See Albert W. Alschuler, Plea Bargaining and Its History*, 79 Colum. L. Rev. 1, 5 (1979).

because, although the jury had determined a sentence, the court had not rendered a judgment so an appeal was improper without a final judgment. *Id.*

- There are cases and numerous newspapers articles that reflect that guilty pleas occurred prior to 1870 throughout Tennessee. *See* Supplement of Dr. Phillipa Holloway (“Holloway Supp.”), attached as **Ex. W** to SUMF, at 2-4; *Rogers v. State*, 13 Tenn. 368, 368 (1833) (explaining that the defendant “pleaded guilty to the indictment, [and] was fined ten dollars by the court”); *Hill v. State*, 10 Tenn. 247, 247 (1829) (explaining that the defendant “appeared and pleaded guilty” and that “[t]he court fined him twenty dollars”); *Beasley v. State*, 10 Tenn. 481, 481 (1831) (“Defendant was indicted in the Davidson county court for a riot, was taken, pleaded guilty and was fined five dollars and the costs.”); *Anonymous*, 1 Tenn. 437, 438 (Tenn. Super. L. & Eq. 1809) (relied upon in *Swang* and permitting a defendant to change his plea from guilty to not guilty if the case is retried).

Thus, at the time of the 1870 convention, convictions not secured by a jury (and with no finding of guilt by a jury) had been a practice in Tennessee for decades, so it was a practice that the framers would have been well-aware of. As a result, it is readily apparent that the framers knew of the difference between a “conviction by a jury” and just “a conviction” and were intentional in the language they chose to use to restrict the State’s criminal disenfranchisement authority: “except upon *conviction by a jury*. (*See also* SUMF ¶¶ 17-18.). *See McNabb*, 710 S.W.3d at 661 (“Courts should presume that every word the drafters used has a specific meaning and purpose.”).

Further, the plea bargaining movement had already begun to take off nationwide prior to the 1870 convention. *See* William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. Rev. 1435, 1441 (2020) (surveying the history of plea bargaining and concluding that plea bargaining became “pervasive” and “institutionalized” between 1850 and 1865); George Fisher, *Plea Bargaining’s Triumph*, 109 Yale L.J. 857, 865 (2000) (noting that, in the late nineteenth century, prosecutors began to use plea bargaining in order to avoid the risk that juries would find the defendant not guilty).

In sum, the Free and Equal Elections Clause unambiguously establishes that a Tennessean otherwise entitled to vote may only be permanently denied their right of suffrage based upon a

criminal conviction when said conviction was secured by a jury of their peers. To read any other meaning into Article I, Section 5 would introduce ambiguity into a clause where no such ambiguity exists.

**B. Permitting Permanent Disenfranchisement Absent a Jury Conviction Would Render the Mandatory Language in Article I, Section 5 Meaningless**

Defendants have previously argued that the State's authority to disenfranchise convicted criminals is not limited by a jury conviction requirement because Article IV, Section 2 of Tennessee's Constitution authorizes the General Assembly to enact laws "excluding from the right of suffrage persons who may be convicted of infamous crimes" without specific mention of a jury.<sup>5</sup> This is wrong. Such a theory overlooks black-letter principles of constitutional construction and binding precedent and would render language that was deliberately added to the 1870 Constitution meaningless.

In fact, the Tennessee Supreme Court has conclusively held that Article IV, Section 2 is constrained by the later-adopted Article I, Section 5. *See Gaskin*, 661 S.W.2d at 868 (holding the General Assembly's criminal disenfranchisement authority given under Article IV, Section 2 was limited by Article I, Section 5); *see also Crutchfield v. Collins*, 607 S.W.2d 478, 481 (Tenn. App. 1980) ("That is, the legislature is empowered to deprive convicted criminals of the right to vote under the limitations set out in Article 1, Section 5 and Article IV, Section 2 . . . . . .") (emphasis added) (cited by *Gaskin* at 661 S.W.2d at 867).

Moreover, under well-settled Tennessee law, "[a]ll constitutional provisions are entitled to equal respect. Thus, when called upon to construe a particular provision, the Court must consider the entire instrument and must harmonize its various provisions in order to give effect to them all."

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<sup>5</sup> Reply ISO Mot. Of Def. Jonathan Skrmetti for Judgment on the Pleadings (July 10, 2024), at 8.

*Est. of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010) (citations omitted). Critically, this means that “[n]o constitutional provision should be construed to impair or destroy another provision.” *Id.* (citing *Vollmer v. City of Memphis*, 792 S.W.2d 446, 448 (Tenn. 1990); *Patterson v. Washington County*, 188 S.W. 613, 614 (Tenn. 1916)). This is because it is the duty of the court to “favor the construction which will render every word operative rather than one which will make some words idle and meaningless.” *Shelby County v. Hale*, 292 S.W.2d 745, 748-49 (Tenn. 1956); *see also Jenkins v. Ewin*, 55 Tenn. 456, 464 (1872) (“It is not to be presumed that idle words are used in so solemn an instrument as a Constitution.”); *McNabb*, 710 S.W.3d at 661 (“Courts should presume that every word the drafters used has a specific meaning and purpose.”). With respect to “[l]egislative powers enumerated in one clause,” they “must be defined and exercised with reference to limitations and requirements made in other clauses.” *State v. Memphis City Bank*, 19 S.W. 1045, 1048 (Tenn. 1892), *aff’d sub nom. Memphis City Bank v. State of Tennessee*, 161 U.S. 186 (1896).

The Declaration of Rights are among those limitations on legislative power that must be enforced when defining the contours of legislative powers enumerated elsewhere in the constitution. This is because the “General Assembly has no constitutional power to enact rules that infringe upon the protection of the Declaration of Rights.” *State v. Mallard*, 40 S.W.3d 473, 483 (Tenn. 2001). As noted above, the Declaration of Rights are so fundamental to Tennessee’s constitutional structure that the constitution expressly declares that they “shall never be violated on any pretense whatever” and that “every thing in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.” Tenn. Const. art. XI, § 16; *see also Mayhew v. Wilder*, 46 S.W.3d 760, 771 (Tenn. Ct. App. 2001) (emphasizing the significance of the Declaration of Rights). The protections contained in the Declaration of Rights,

including those enshrined in the Free and Equal Elections Clause, “were written with the intent to reserve to the people various liberties and to protect the free exercise of those liberties from governmental intrusion.” *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 12 (Tenn. 2000).

Relevant to this case, Article IV, Section 2 enumerates a legislative power—the authority to pass laws disenfranchising (on a non-permanent or permanent basis) Tennesseans convicted of infamous crimes—and Article I, Section 5 operates as one of the Declaration of Right’s limitations on that legislative power. The only way to harmonize the two criminal disenfranchisement provisions in the constitution and give meaning and purpose to every word in the Free and Equal Elections Clause is to conclude that the General Assembly’s authority to legislate with respect to permanent criminal disenfranchisement is limited to the circumstance expressly enumerated in Article I, Section 5: when there has been a “conviction by a jury for an infamous crime.”<sup>6</sup> See *Gaskin*, 661 S.W.2d at 868 (holding the General Assembly’s criminal disenfranchisement authority under Article IV, Section 2 is constrained by Article I, Section 5).

It would contravene black-letter principles of constitutional interpretation to interpret Article IV, Section 2 as an isolated provision that is wholly unconstrained by the rest of the constitution. See *Vollmer*, 792 S.W.2d at 448 (“In construing the Constitution, the whole instrument must be taken into consideration, and no part so construed as to impair or destroy any other part.”); *McNabb*, 710 S.W.3d at 659 (“In [determining original public meaning], we construe the

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<sup>6</sup> Interpreting the more specific 1870 addition to the Free and Equal Election Clause to constrain the general provision conferring legislative authority from 1834 is also consistent with the well-accepted principle that, “when there is a conflict between statutes which were enacted at different times, ‘the more specific and more recently enacted statutory provision’ generally controls.” *Chartis Cas. Co. v. State*, 475 S.W.3d 240, 246 (Tenn. 2015) (quoting *Lovlace v. Copley*, 418 S.W.3d 1, 20 (Tenn. 2013)).

Tennessee Constitution as a single, unified document.”). If Article IV, Section 2 is not constrained by the Declaration of Rights, for example, that would mean that the General Assembly’s permanent criminal disenfranchisement authority is unlimited by the Tennessee Constitution’s equal protection guarantee. *See State v. Tester*, 879 S.W.2d 823, 827 (Tenn. 1994) (explaining how Article I, Section 8 and Article XI, Section 8 guarantee equal protection under the Tennessee Constitution). If that were true, the General Assembly could pass a law that provides that only Black Tennesseans or female Tennesseans convicted of a felony shall be permanently deprived of the right to vote. Just as the General Assembly cannot permanently disenfranchise Tennesseans with felony convictions in violation of the limitations imposed by Tennessee’s equal protection provisions when exercising its authority under Article IV, Section 2, it also cannot permanently disenfranchise Tennesseans in violation of the limitations imposed by the Free and Equal Elections Clause. *Gaskin*, 661 S.W.2d at 868.

The only way to harmonize the criminal disenfranchisement provisions of the Tennessee Constitution is to conclude that the General Assembly’s authority to pass permanent criminal disenfranchisement laws is restrained by the express limitation on legislative power within the Free and Equal Elections Clause. That means that the General Assembly can only pass laws permanently denying the right to vote to those convicted of infamous crimes *by a jury*. Looking at the document as a whole, it is clear that any other interpretation would render the words that the framers of the Constitution of 1870 conscientiously choose to add to the Free and Equal Elections Clause “idle and meaningless.” *Hale*, 292 S.W.2d at 749.

**C. Requiring a Conviction by a Jury as a Prerequisite for Permanent Disenfranchisement Is Consistent with the Historical Context of the 1870 Constitutional Convention Strengthening Suffrage Protections**

As explained above, the words of the Free and Equal Elections Clause are “free from ambiguity and doubt and express plainly and clearly” that Tennesseans shall not be denied suffrage on the basis of a criminal conviction unless said conviction was secured by a jury; thus, “there is no need to resort to other means of interpretation.” *Hooker*, 437 S.W.3d at 426. Indeed, the Tennessee Supreme Court recently reiterated that, in determining original public meaning, “we do not speculate on the subjective intentions or motives of the drafters.” *McNabb*, 710 S.W.3d at 653. However, if the Court concludes it must resort to other means of interpretation—though it need not—the undisputed historical evidence strongly supports the conclusion that the original public meaning of the Free and Equal Elections Clause in the Constitution of 1870 created a conviction-by-jury requirement as a safeguard against disenfranchisement (on both a temporary and permanent basis) following a decade of targeted attacks on voting rights within the State.<sup>7</sup>

“[T]he 1870 constitutional convention was comprised of men who had known the injustice of retroactive disenfranchisement and were determined to safeguard themselves and future generations from similar acts of repression.” *Gaskin v. Collins*, 661 S.W.2d 865, 868 (Tenn. 1983). The framers of the constitution had witnessed electoral participation in Tennessee “c[o]me under attack in the 1860’s by targeted efforts to limit the voting rights of supporters of the Confederacy during and after the Civil War through the imposition of loyalty oaths.” (SUMF ¶ 16; *see also* Expert Report of P. Holloway (“Holloway Rep.”), **Ex. U** to SUMF, at 9.) The increasingly stringent

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<sup>7</sup> Evidence regarding historical context may have some permissible role in the analysis in discerning the original public meaning of the text insofar as it is evidence going toward the “usages and historical practices at the time of the adoption of the text.” *McNabb*, 710 S.W. 3d at 658-59; *see also Peay v. Nolan*, 7 S.W.2d 815, 817 (Tenn. 1928) (“When construing constitutional provisions the state of things when the provision originated is to be considered.”); *Richardson v. Young*, 125 S.W. 664, 674 (Tenn. 1910) (consideration of what the framers knew at the time of the convention is relevant in interpreting a provision of the Constitution); *Grainger Cnty. v. State*, 80 S.W. 750, 751 (Tenn. 1904) (“[I]n construing the Constitution, the state of the community at the time it was created must be considered.”).

loyalty oaths enacted in 1863 and 1866 generated substantial resentment among Tennesseans. (See SUMF ¶ 16; *see also* Ex. U to SUMF (Holloway Rep.), at 9) (referencing Clifton R. Hall, *Andrew Johnson: Military Governor of Tennessee* (Princeton: Princeton University Press, 1916), 111-130.) In fact, twenty legislators across the state published a letter protesting loyalty oaths for “punish[ing] and derpriv[ing] the citizens of his rights and liberties . . . without his right of trial by jury.” (See SUMF ¶ 16; *see also* Ex. U to SUMF at 11 (Holloway Rep.) (citing *The Nashville Daily Union*, February 28, 1866, at 1.)) Other newspapers printed protests of the loyalty oaths that accused the oaths of “‘inflicting’ the punishment of disenfranchisement on men for ‘crimes of which they are declared to be guilty, without trial by a jury of their peers.’” (See SUMF ¶¶15-16 *see also* Ex. U to SUMF at 11 (Holloway Rep.) (quoting *The Nashville Daily Union*, April 28, 1866, at 2; *Memphis Daily Appeal*, May 3, 1866, at 1.)) Due to the resentment that was fostered by several years of targeted disenfranchisement efforts, “a desire to eliminate [] restrictions on suffrage was a key motivation for the Constitutional Convention of 1870.” (SUMF ¶ 16; *see also* Ex. U to SUMF at 12 (Holloway Rep.) (referencing Sam Elliott, “The Two ‘Great Issues’ of the Constitutional Convention of 1870,” *Tennessee Bar Journal*, 51:5 (2015).)) Indeed, several delegates to the convention stated as much. (SUMF ¶ 16; *see also* Ex. U to SUMF at 14 (Holloway Rep.) (collecting quotes from delegates).)

The delegates’ decision to strengthen the Free and Equal Elections Clause by imposing a “conviction by jury” requirement as a reaction to the hated loyalty oaths is traceable to two commonly held views at that time. (SUMF ¶¶ 15-16.) First, juries were viewed as protectors of due process. (*Id.*) Second, public judgment had long been understood to play a role in the determination of one’s citizenship rights. (*Id.*) Taken together, it is clear that the amendment to the Free and Equal Elections Clause was the delegates’ attempt to reduce the State’s ability to

wrongfully manipulate the electorate by requiring members of a criminal defendant's community to play a role in the criminal proceedings before the right to vote could potentially be stripped forever.

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For the reasons described above, this Court should hold that the State is only authorized to permanently deprive Tennesseans of the right to vote on the basis of a criminal conviction when said conviction was secured by a jury.

II. PLAINTIFF HAS BEEN IMPERMISSIBLY PERMANENTLY DEPRIVED OF THE RIGHT TO VOTE ON THE BASIS OF A CONVICTION SECURED WITHOUT A JURY IN CONTRAVENTION OF THE FREE AND EQUAL ELECTIONS CLAUSE

Because the State is only authorized to permanently disenfranchise its citizens on the basis of a criminal conviction when said conviction was secured by a jury, Plaintiff has been impermissibly permanently deprived of the right to vote in violation of the Free and Equal Elections Clause and is entitled to summary judgment.

As noted above, Plaintiff's application to restore her voting rights and register to vote following her conviction by guilty plea for tampering with or fabricating evidence as defined by Tenn. Code Ann. § 39-16-503 was denied on the basis that this conviction rendered her permanently ineligible to seek to restore her voting rights or vote. (SUMF ¶¶ 10-14.) This felony conviction was not secured by a jury. (SUMF ¶ 8.) Nevertheless, the Defendants have taken the position that Ms. Moses has permanently lost her right to vote by virtue of this felony conviction. (SUMF ¶¶ 1-3, 9-14.) In turn, the Coordinator of Elections, on behalf of the Secretary of State, instructed the Shelby County Election Commission that Ms. Moses was ineligible to restore her voting rights and register to vote based on a felony conviction that was not by a jury. (SUMF ¶¶ 11-12.) The State has accordingly exceeded its constitutional authority when it permanently took

away Ms. Moses' right to vote because her conviction for violating Tenn. Code Ann. § 39-16-503 was secured by a guilty plea in the absence of a jury. (SUMF ¶¶ 8-14.)

### III. PLAINTIFF CANNOT AND DID NOT WAIVE THE FREE AND EQUAL ELECTION CLAUSE'S LIMIT ON GOVERNMENT POWER

Throughout this case, Defendants have argued that by pleading guilty, Ms. Moses waived the Free and Equal Elections Clause's protection against permanent disenfranchisement absent a jury conviction. That argument fails for three independent reasons. First, there is no evidence that Ms. Moses waived this constitutional protection, as neither the plea colloquy nor the written plea agreement mentions it—or any voting-related consequences. Second, even if she had been informed of the Free and Equal Election's Clause's jury-conviction requirement and agreed to waive it, the jury-conviction requirement is a structural limitation on the State's power, not a personal right, and as such cannot be waived by an individual. Third, even if such a waiver were possible, Defendants' theory would still fail under the unconstitutional conditions doctrine, which prohibits the government from conditioning access to a benefit—such as a plea bargain—on the surrender of unrelated constitutional protections.

#### **A. Ms. Moses Did Not Waive Her Constitutional Protection Against Permanent Disenfranchisement Absent a Jury Conviction**

Defendants bear the burden to establish that Ms. Moses knowingly and voluntarily waived the specific constitutional protection she now invokes, and Defendants cannot meet that burden with respect to waiver of the Free and Equal Elections Clause's jury-conviction requirement. Neither the plea colloquy nor the written plea agreement for Ms. Moses' sole permanently disqualifying offense states—or even suggests—that her plea bargain would subject her to permanent disenfranchisement in violation of that clause's jury-conviction requirement.

Under Tennessee law, in order for a waiver of constitutional rights to be effective, the individual must be aware of the specific right at issue and the consequences of relinquishing it. In

addition, the waiver must be “done in accordance with safeguards provided by both the constitution and implementing statutes or rules of criminal procedure.” *State v. Durso*, 645 S.W.2d 753, 759 (Tenn. 1983). “Due to our long-standing presumption against waiver of fundamental constitutional rights, these rights must be personally waived by a defendant.” *State v. Blackmon*, 984 S.W.2d 589, 591 (Tenn. 1998). “The record of a waiver of a defendant’s right must affirmatively demonstrate that his decision was both voluntary and knowledgeable, i.e., that he has been made aware of the significant consequences of such a waiver; otherwise it will not amount to an intentional abandonment of a known right.” *Id.* (cleaned up). Tennessee courts “will not presume a waiver of important constitutional rights from a silent record.” *Id.*; *see also State v. Mellon*, 118 S.W.3d 340, 345 (Tenn. 2003) (applying these principles to plea bargaining).

No evidence exists—let alone enough evidence to meet Defendants’ high burden to establish waiver—that Ms. Moses waived her right not to be permanently disenfranchised without a jury conviction. The plea colloquy confirms that she was advised of, and waived, her right to a jury trial, but there is no mention of the Free and Equal Elections Clause, its jury-conviction requirement, or any voting-related consequences, particularly permanent disenfranchisement. *See* Ex. 2 to Second Am. Compl. The written plea form and judgment likewise say nothing about voting rights or permanent disenfranchisement. *See* Exs. M–N to Plf.’s SUMF. Notably, the court’s order on her guilty plea (Ex. N) enumerates the constitutional rights Ms. Moses expressly waived, consistent with Tenn. R. Crim. P. 11—including the right to a jury trial (Article I, § 6) and the right to have a jury fix any fine over \$50 (Article VI, § 14)—but makes no mention of the Free and Equal Elections Clause in Article I, Section 5. Ms. Moses’ waiver of those criminal procedure rights does not constitute a waiver of an unrelated voting right that was never mentioned. Under

settled Tennessee law, a waiver of constitutional rights must be knowing, voluntary, and intelligent, and cannot be presumed from a silent record. Defendants cannot make such showing here.

If anything, her decision to accept a guilty plea instead of going to trial is consistent with the view that she intended to *preserve* her right to vote, in reliance on the express constitutional provision confirming that defendants who are convicted by guilty plea may not be permanently disenfranchised.

#### **B. The Jury-Conviction Requirement in the Free and Equal Elections Clause Is a Structural Limit on Government Power That Cannot Be Waived**

Even if Ms. Moses had been informed, and had agreed, that pleading guilty would subject her to non-jury permanent disenfranchisement, any waiver would still be invalid. That is because the Free and Equal Elections Clause’s jury-conviction requirement is not a waivable personal right—it is a structural limitation on the State’s power to disenfranchise.

Tennessee courts have recognized that, while individuals may waive constitutional rights conferred for their personal benefit, they cannot waive structural constitutional provisions that limit government power. While an individual “may waive … a constitutional provision *made for his benefit*,” *Wallace v. State*, 245 S.W.2d 192, 194 (Tenn. 1952) (emphasis added) (cleaned up), “[a]n individual cannot waive a constitutional [provision] designed to protect both the individual and the public,” 16A Am. Jur. 2d Constitutional Law § 401 (citing *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007)). Consistent with those principles, it is well settled that “structural protections provided by the separation of powers doctrine” “cannot be waived.” *Comm’n on Ethics v. Hardy*, 212 P.3d 1098, 1109 (Nev. 2009). To that end, the Tennessee Supreme Court has recognized that an individual cannot confer power upon a branch of government that is expressly withheld from it by the Constitution. *See, e.g., Barthell v. Zachman*, 36 S.W.2d 886, 888 (Tenn. 1931) (“jurisdiction of the subject-matter, which refers to the power of the court to adjudicate the question presented,

cannot be waived”). Considering the State “derive[s] [its] powers … from the law,” not a particular person, “[i]t necessarily follows therefore that [constitutional authority] cannot be conferred or enlarged by waiver, consent, or estoppel.” *Brown v. Brown*, 281 S.W.2d 492, 501 (Tenn. 1955). For example, Tennessee cannot pass a law providing that anyone who pleads guilty to a crime forever loses the right to “freely speak,” and then argue that no one can challenge that law because anyone who has pled guilty has knowingly waived their right to challenge the loss of their free speech rights, which are protected by limits on State power enumerated in Article I, Section 19.

The Free and Equal Elections Clause embodies such a constraint. It does not merely protect an individual’s right to vote; it limits when and how the State may deprive someone of that right to protect free and equal elections for all. *See Crutchfield*, 607 S.W.2d at 481 (discussing how the State’s criminal disenfranchisement power is subject to “limitations set out in Article I, Section 5”). By its express terms, the clause declares that the right of suffrage “shall never be denied … except upon conviction by a jury.” Tenn. Const. art. I, § 5. That language does not confer a right that individuals may barter away—it imposes a boundary on the State’s power to act. It is, in every sense, a structural provision of the Constitution. Binding Supreme Court precedent confirms as much. *See Gaskin*, 661 S.W.2d at 868 (discussing how “Article I, Section 5 of the Tennessee Constitution prohibits the General Assembly” from taking certain actions).

No Tennessee decision that has permitted a structural limit on government power to be waived by an individual citizen. And for good reason: permitting such waivers would enable the State to expand its power in individual cases in ways the Constitution forbids.

### **C. Conditioning a Plea Bargain on the Surrender of Constitutional Voting Protections Violates the Unconstitutional Conditions Doctrine**

Even if Ms. Moses could waive the jury-conviction requirement and did so knowingly, Defendants’ waiver theory would still fail under Tennessee’s unconstitutional conditions doctrine.

That doctrine prohibits the government from requiring an individual to give up a constitutional right in exchange for an unrelated government benefit. It ensures that the State cannot accomplish indirectly—by imposing conditions on benefits—what it is forbidden to do directly.

Tennessee courts have previously applied the unconstitutional conditions doctrine in the plea bargaining context. In *State v. Henry*, 539 S.W.3d 223 (Tenn. Crim. App. 2017), the court explained “that a State may not impose a condition on a privilege that would require the relinquishment of a constitutional right.” *Id.* at 251. “If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all.” *Id.* (quoting *Frost v. R.R. Comm'n*, 271 U.S. 583, 593-94 (1926)). “It is inconceivable that guaranties embedded in the Constitution … may thus be manipulated out of existence.” *Id.* (quoting same). In short, “a State may not impose unconstitutional conditions on the grant of a privilege.” *Id.* (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657 (1981)). Even more recently, the Tennessee Court of Appeals applied this doctrine to prevent the State from conditioning occupancy in public housing on a waiver of Second Amendment rights. *See Columbia Hous. & Redevelopment Corp. v. Braden*, 663 S.W.3d 561 (Tenn. Ct. App. 2023). As the court recognized, even when a person enters into a voluntary agreement, the government may not “coerc[e] people into giving up constitutional rights” by tying them to benefits such as public housing. *Id.* (citation and internal quotation marks omitted). In other words, “the government may not require a person to give up a constitutional right … in exchange for a discretionary benefit.” *Id.* (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)); *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[E]ven though a person has no ‘right’ to a valuable governmental benefit … [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”).

Defendants' theory runs directly afoul of these principles. Under their view, an individual who pleads guilty automatically loses the protection of the Free and Equal Elections Clause. But while certain constitutional rights are waived by necessity in the plea process, others are not. As the Tennessee Supreme Court has recognized, “[i]n the process of entering a guilty plea in a criminal trial, the defendant necessarily waives several constitutional rights, including the privilege against self-incrimination, the right to a trial by jury, and the right to confront his accusers.” *Mellon*, 118 S.W.3d at 345. These rights are inherent to the criminal trial itself, and their waiver is what makes the plea functionally possible. But the Free and Equal Elections Clause's jury-conviction requirement governs an entirely different domain—it limits the State's power to disenfranchise, not its ability to prosecute. Conditioning a plea bargain on the surrender of that protection is no more permissible than conditioning public housing on the surrender of Second Amendment rights, as the Court of Appeals rejected in *Braden*. The distinction is one of constitutional fit: the rights waived must be germane to the benefit conferred. *See Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 214-15 (2013) (holding that the unconstitutional conditions doctrine forbids government from imposing “conditions that seek to leverage funding to regulate speech outside the contours of the program itself”). Just as the government may not use spending conditions to leverage unrelated ideological commitments, it may not use the plea-bargain process to extract waivers of structural constitutional limits unrelated to guilt or adjudication. The unconstitutional conditions doctrine forbids that result.

Defendants' theory would also eliminate the constitutional protection entirely. The jury-conviction requirement in the Free and Equal Elections Clause means that a person cannot be disenfranchised based on a conviction unless it was secured by a jury. That excludes convictions obtained through plea bargains. But under Defendants' view, pleading guilty waives that

protection. If that were true, the protection would never apply—because anyone with a plea conviction would be deemed to have waived it, and anyone with a jury conviction could be disenfranchised anyway. That would reduce the jury-conviction requirement to an empty promise. That is precisely the result the Court of Appeals forbade in *Henry* when it said that “guaranties embedded in the Constitution” may not be “manipulated out of existence.” 539 S.W.3d at 251. The legislature cannot manipulate the Free and Equal Elections Clause’s jury-conviction requirement out of existence by passing statutes flouting that requirement and disenfranchising people convicted by plea bargain, and then contending that the mere existence of those statutes establishes that anyone convicted by plea bargain has waived the right to challenge the statutes.

Just as troubling, Defendants’ theory would permit prosecutors to demand the waiver of *any* constitutional protection as a precondition to accepting a plea. That would give local officials the power to unilaterally rewrite constitutional constraints, one plea agreement at a time. Tennessee law does not permit such a result, and the unconstitutional conditions doctrine forbids it.

### **CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests the Court grant her motion and enter summary judgment in favor of her. The Court should declare that Tenn. Code Ann. § 40-29-102 is unconstitutional as applied to Plaintiff. Further, the Court should declare Plaintiff immediately eligible to vote and order Defendants to cease all activity seeking to deny Plaintiff her right to vote.

Date: December 12, 2025

Respectfully submitted,

/s/ John E. Haubenreich

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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 December 12, 2025, as follows:

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