IN THE SUPREME COURT OF TENNESSEE

ERNEST FALLS,	)
Appellant	)
v.	)
MARK GOINS, in his official capacity as Director of the Elections Division, TRE HARGETT, in his official capacity as Secretary of State, and HERBERT SLATERY, III, in his official capacity as Attorney General,	) M2020-01510-SC-R11-CV
Appellees.	)

Appeal from the Final Judgment of the Tennessee Court of Appeals at Nashville Case No. M2020-01510-COA-R3-CV

SUPPLEMENTAL BRIEF OF APPELLANT

ERNEST FALLS

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ARGUMENT

Appellant Ernest Falls respectfully submits this brief to supplement his merits briefs of February 23, 2022.

Appellant Falls' case rests on a straightforward premise: a Tennessee resident who is not disqualified from voting does not need to seek restoration of his voting rights to register and cast a ballot. This precept stems from the Tennessee Constitution's guarantee of universal suffrage and this court's interpretation of its allowance to the legislature to pass laws revoking or suspending the right to vote for individuals convicted of infamous crimes. *Crutchfield v. Collins*, 607 S.W.2d 478, 481 (Tenn. Ct. App. 1980) (holding that the Tennessee Constitution's grant of universal suffrage is self-executing and can be relied upon "independently of any legislative enactment," including by people who have been convicted of felonies). No one can place special voting qualifications on the right to vote of people who were convicted of felonies if they are not already deprived of the right to vote by some prior statement of law. Tenn. Const. Art. I § 5, Art. IV § 2; *Gaskin v. Collins*, 661 S.W.2d 865, 868 (Tenn. 1983) ("[T]he exception to universal suffrage [for infamous crimes] is expressly dependent upon legislative action."). If and when a legislative deprivation of the right to vote no longer applies to an individual, he or she once again has a default presumption of the right to vote under the Tennessee Constitution.

Tennessee Code Section 2-19-143(3) governs loss of the right to vote for individuals convicted of felonies in other states and it limits that deprivation to those whose civil rights have not been restored by the

governor of that state, the law of that state, *or* through the processes for restoration provided by Tennessee law. Appellant Ernest Falls was convicted of a single felony in Virginia over 35 years ago and his full civil rights have been restored by the governor of Virginia. Therefore, he is not deprived of the right to vote by Section 2-19-143(3) or any other statement of Tennessee law. He need not restore his right to vote using Tennessee's administrative procedures. This case is that simple.

Yet Defendants have complicated Appellant Falls' situation by muddying the order of operations. Despite their previous agreement with Appellant Falls' straightforward reading of the law, they now insist that he is deprived of the right to vote because he has not restored that right yet through Tennessee's administrative procedures, which allow "a person who has been deprived of the right of suffrage" to restore that right upon payment of court costs and restitution, among other requirements. But their application of Tennessee's rights *restoration* process to an individual *who is not deprived* of the right to vote is has no basis in law. They put the cart before the horse in defiance of the order established by the Tennessee Constitution. Defendant's interpretation elides the plain language and structure of the statutes separately governing both the loss of the right to vote and the restoration of such, transplanting the requirements of one onto the other in a way that disrupts the logic of both and sets them in needless conflict. Defendant's position also thwarts the legislature's clear and longstanding policy choice to give faith and credit to civil rights restorations in other states in this context.

Appellant Falls respectfully asks the Court to reverse the Court of Appeals, recognize that he is not deprived of the right to vote by any Tennessee law, and therefore hold that he does not need to restore that right to register and cast a ballot.

I. A Person Only Needs to Restore a Constitutionally Guaranteed Right if He or She is Deprived of that Right

Imagine that the Tennessee Constitution includes the following two provisions:[1]

> The right to play baseball, as hereinafter declared, shall never be denied to any person entitled thereto, except during a pandemic, as declared by law. (*cf.* Tenn. Const. Art I, § 5)
>
> Laws may be passed excluding persons from the right to play baseball during a pandemic. (*cf.* Tenn. Const. Art. IV, § 2).

Years later, the legislature declares a pandemic and passes the following law:

> The following provisions shall govern the exercise of the right to play baseball during a pandemic:
>
> No person shall be allowed to play baseball during a pandemic unless such person has been fully vaccinated, or recovered from the illness in the last three months, or been restored to the right to play baseball under the law of this state. (*cf.* Tenn. Code Ann. § 2-19-143(3)).

[1] Because this case is at its core a straightforward question of statutory and constitutional interpretation, Appellant Falls humbly (and with a commensurate sense of humor) asks the court to indulge this hypothetical to provide some intellectual distance from the politically-charged topic of voting rights for people with past felony convictions.

At the same time, it creates a pathway to seeking an exception through the courts that restores the right to play baseball:

> Persons deprived of the right to play baseball may have that right restored by the circuit court. (*cf.* Tenn. Code. Ann § 40-29-101(a)).

A few years later, wanting to increase participation in baseball leagues, the legislature creates an easier, administrative pathway to seeking a restoration under the laws of the state, but leaves the other previously mentioned sections untouched.

> The provisions and procedures of this part shall apply to and govern restoration of the right to play baseball in this state to any person who has been disqualified from exercising that right by reason of pandemic. (*cf.* Tenn. Code Ann. § 40-29-201).

The next section lays out the procedure through which individuals who have been disqualified from exercising the right to play baseball can seek an exception:

(a) A person deprived of the right to play baseball by pandemic is eligible to apply for an exception and have that right restored upon:
   i. Receiving a doctor's note recommending against vaccination
   ii. Presenting a valid certificate of religious objection to vaccination

(b) Notwithstanding subsection (a), a person shall not be eligible to apply for an exception and have the right to play baseball restored, unless the person has paid $200 to the baseball players' wellness fund.

(c) Notwithstanding subsection (a), a person shall not be eligible to apply for an exception and have the right to play baseball restored, unless the person is currently covered by health insurance. (*cf.* Tenn. Code Ann. § 40-29-202(a)-(c)).

In this scenario, Appellant Falls is fully vaccinated. As a result, under the law "govern[ing] the exercise of the right to play baseball during a pandemic," he is no longer disqualified from exercising his right to play baseball by the pandemic and his right to play baseball is therefore fully guaranteed by the Tennessee Constitution. *Cf.* Tenn. Code Ann. § 2-19-143(3). Nonetheless, Appellees will not let him play until he presents a doctor's note or religious objection, pays $200 to the baseball players' wellness fund, and shows that he is current on his health insurance. This runs contrary to the plain language of *all* of the relevant statutes, deprivation and restoration alike, and to the state's clear and longstanding policy choice to allow vaccinated individuals to play baseball.

II. No Legislative Statement Deprives Appellant Falls of the Right to Vote, Therefore that Right is Guaranteed by the Tennessee Constitution.

The Tennessee Constitution provides a default right to vote, including for people with felonies, unless the legislature passes a law depriving those individuals of the right to vote. Section 2-19-143(3) governs deprivation of that right for Tennesseans with out-of-state convictions and it plainly exempts from its scope individuals who have had their civil rights restored in the state of conviction.

The Tennessee Constitution Article I, Section 5 makes clear that an inquiry into an individual's voting rights always begins with the premise of universal suffrage. *Crutchfield*, 607 S.W.2d at 481 (holding that the Tennessee Constitution's grant of universal suffrage is self-executing and can be relied upon "independently of any legislative enactment,"

including by people who have been convicted of felonies). That right to vote may only be revoked following a conviction for an infamous crime by explicitly disenfranchising legislation. Tenn. Const. Art. I § 5, Art. IV § 2; *Gaskin*, 661 S.W.2d at 867 ("[T]he exception to universal suffrage [for infamous crimes] is expressly dependent upon legislative action."). In *Crutchfield v. Collins*, the Tennessee Court of Appeals held that in the absence of legislation revoking the right to vote, a Tennessean who has been convicted of an infamous felony has the right to vote protected by the full weight of the Tennessee Constitution. 607 S.W.2d at 481. In *Gaskin v. Collins*, this Court affirmed that holding and went further to say that even if it plainly intends to, the legislature cannot place qualifications on the right to vote of people who were convicted of felonies if they have not been disenfranchised by some prior statement of law. 661 S.W.2d at 868.

The legislative deprivation of the right to vote for Tennesseans with felony convictions from other states is governed by Section 2-19-143(3).[2]

> No person who has been convicted in another state of a crime or offense which would constitute an infamous crime under the laws of this state, regardless of the sentence imposed, shall be allowed to register to vote or vote at any election in

[2] At various times in this case, Appellees have attempted to rely on Section 40-20-112 as a separate source of deprivation of Appellant Falls' right to vote. That position is foreclosed by this Court's rulings in *Burdine v. Kennon*, 209 S.W.2d 9, 10 (Tenn. 1948) and *Vines v. State,* 231 S.W.2d 332, 334 (Tenn. 1950). (See Appellant-Petitioner's Merits Brief at (D)(1)). Accordingly, though it was erroneously adopted and relied upon by the Chancery Court, this argument was not explicitly adopted by the Court of Appeals.

> this state unless such person has been pardoned or restored to the rights of citizenship by the governor or other appropriate authority of such other state, or the person's full rights of citizenship have otherwise been restored in accordance with the laws of such other state, or the law of this state.

A rule cannot be divorced from its exceptions, particularly where the exceptions are in the same sentence as the rule. *Coffman v. Armstrong Int'l, Inc.*, 615 S.W.3d 888, 903 (Tenn. 2021) (stating that courts must "construe a statute so that no part will be inoperative, superfluous, void, or insignificant, giving full effect to legislative intent"). Moreover, case law shows that disenfranchisement is construed narrowly under the Tennessee Constitution. *See* Amicus Br. of Tennessee Law Professors in Supp. of Ernest Falls' Application for Permission to Appeal at 20-24. Therefore, the law that disenfranchises people with out-of-state convictions cannot be divorced from its exceptions: a person with an out-of-state conviction is deprived of the right to vote unless and until that individual's civil rights are restored by the state of conviction *or* using some procedure available under Tennessee law. Deprivation of Appellant Falls' right to vote does not fall within the reach of Section 2-19-143(3). Were his civil rights not restored by the authority or law of Virginia, he could avail himself of the Certificate of Restoration process under Tennessee law. However, because his civil rights were restored in Virginia, he is not deprived of the right to vote by any Tennessee law. Therefore, the default Constitutional right to vote applies. *Gaskin*, 661 S.W.2d at 867 ("It is true that the declaration of the right of universal

suffrage is self-executing in that any citizen may rely upon it independently of any legislative enactment.")

III. Section 40-29-202 States that it Applies Only to Individuals who Have Been Deprived of the Right to Vote by some Other Statute; it Does Not Work to Deprive an Individual of that Right.

As only an individual deprived of a guaranteed right needs to proactively restore it, the voting rights restoration provision of Section 40-29-202 itself states that it only applies to individuals who are already disenfranchised by some other section of the code. Indeed, this principle is reflected in the wording found throughout, including in the names of the statutes themselves: Title 40, Chapter 20 ("*Restoration* of Citizenship"), Part 2 ("Voting Rights"). For example, the statement of purpose for the law in Section 40-29-201 states that it "shall apply to and govern *restoration* of the right of suffrage in this state *to any person who has been disqualified from exercising that right* by reason of a conviction in any state or federal court of an infamous crime." (emphasis added).

Section 40-29-202, which lays out the criteria for administrative restoration through a Certificate of Restoration, similarly states that "*[a] person rendered infamous and deprived of the right of suffrage* by the judgment of any state or federal court is eligible to apply for a voter registration card and have the right of suffrage restored upon . . . [meeting certain criteria]" (emphasis added). Importantly, this states that a person who is deprived of the right to vote – not just any person convicted of a felony – can use this mechanism to restore that right. This

makes clear that it presumes an independent source of deprivation of the right to vote elsewhere in the code.

Moreover, the requirements to prove payment of court costs and restitution at issue in this case are cabined to their application to the section on Certificates of Restoration. Tenn. Code Ann. § 40-29-202(b) ("*[N]otwithstanding subsection (a)*, a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person . . . [pays court costs and restitution]") (emphasis added). The legislature could, of course, have said "notwithstanding § 2-19-143," or "notwithstanding any other statement of law," or not said "notwithstanding" at all. Instead, it used the word "notwithstanding" to clearly place the court costs and restitution requirements within their context as part of the Certificate of Restoration process. *Locust v. State*, 912 S.W.2d 716, 718 (Tenn. Ct. App. 1995) (holding that courts must presume that "the Legislature used each word in the statute purposely and that the use of these words conveys some intent and had a meaning and purpose").

Only a person who does not have the right to vote needs to restore their right of suffrage. What Tennessee's administrative rights restoration mechanism does or does not require is of no concern to a person who is not disenfranchised. The plain language of Section 40-29-202 reflects that precept as a mechanism to restore the right to vote if already lost, but which has no power by itself to deprive a Tennessean of that right. *Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010) ("[M]ost fundamentally, the re-enfranchisement law at issue [([Section

40-29-202)] does not deny or abridge any rights; it only restores them . . . . [it does] not disenfranchise [plaintiffs] or anyone else, . . . Tennessee's . . . disenfranchisement statute accomplished that.")

IV. Appellant Falls' Position Respects the Policy Choice of the Tennessee Legislature to Incorporate Civil Rights Restorations in Other States.

Over the lifespan of this case, Defendants have attempted to mischaracterize Appellant Falls' position as forcing Tennessee to adopt the rights restoration standards of other states. Not so. Appellant Falls does not argue that Tennessee *must* recognize civil rights restorations in other states; he simply acknowledges that the Tennessee legislature *has chosen* to incorporate the rights restoration standard of other states as it relates to suffrage.

As described above, the plain language of Section 2-19-143(3) makes the legislature's choice clear: restoration of citizenship by the law or authority of the state of conviction exempts an individual from deprivation of the right to vote. This interpretation is also supported by the enactments that created the laws in question and the way in which they structured the code. To aid their analysis, courts often look to the context of legislative enactments and what they changed or did not change about prior law. *See In re Kaliyah S.*, 455 S.W.3d 533, 541 (Tenn. 2015) (analyzing the "evolution of Tennessee statutes" on the issue in the case); *see also State v. Mixon*, 983 S.W.2d 661, 669 (Tenn. 1999) (reviewing the history of enactments and court cases to discern the meaning of the legislature's choice to replace the phrase "from rendition of judgment," with "after the judgment becomes final"). Tennessee courts

recognize that the legislature does not write its laws on a blank slate. As a result, understanding the statutory language before enactment and any revisions interpretation is part of interpreting the plain meaning of that law. See *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 682-83 (Tenn. 2005) (contextualizing the narrow scope of non-compete legislation by pointing to a prior Supreme Court case establishing a general presumption against non-competes).

The 1981 and 1983 acts creating Tenn. Code Ann. § 40-29-101 et seq. and § 2-19-143 present a roadmap for understanding the statutes together. In 1980, the Court of Appeals held that the code at the time did not contain any provision disqualifying individuals with felony convictions from voting. *Crutchfield,* 607 S.W.2d at 481. Shortly thereafter, the legislature set about writing statutes that would revoke the right to vote after a felony conviction and updating the mechanism to reinstate those rights if lost. 1981 Pub. Acts 342, §§ 1-3; 1981 Pub. Acts 345 § 2.

In so doing, the legislature decided to give full faith and credit to judgments of both felony convictions and civil rights restorations in other states. The 1981 version of Tenn. Code Ann. § 2-19-143(3) governing deprivation of the right to vote for a felony in another state included exceptions to disenfranchisement if civil rights were restored in that state but did not include the current exception via restoration of citizenship "in accordance with . . . the law of this state."

> No person who has been convicted in another state of a crime or offense which would constitute an infamous crime under

> the laws of this state, regardless of the sentence imposed, shall be allowed to register to vote or vote at any election in this state unless such person has been pardoned or restored to the rights of citizenship by the governor or other appropriate authority of such other state, or the person's full rights of citizenship have otherwise been restored in accordance with the laws of such other state.

1981 Pub. Acts 345 (codified as amended at Tenn. Code Ann. § 2-19-143(3)).

In other words, a person with an out-of-state conviction was disenfranchised *unless* their civil rights were restored in the state of their conviction. *Id.* In parallel, the section of the Criminal Procedure Code that provided for rights restoration (at that time, via court petition) to those convicted of Tennessee state convictions included no mention of out-of-state courts or convictions and thus was not available as a route to voting rights restoration. *Id.* (codified as amended at Tenn. Code Ann. § 40-29-101 et seq.).

Because full civil rights restorations in other states are rare, even today, *see* Appellant's Br. 33 n.6, Tenn. Ct. of App. No. M-2020-01510-COA-R3-CV (Apr. 26, 2021), this meant that most Tennesseans with out-of-state convictions would have been permanently disenfranchised. In 1983, the legislature remedied this by opening up the *possibility* for individuals with out-of-state convictions whose rights of citizenship had not been restored in the state of conviction to make use of the same rights restoration pathway available to those with in-state convictions. 1983 Pub. Acts 207. To do this, the legislature created the third exception to disenfranchisement now found in Section 2-19-143(3) by adding the

phrase "or the law of this state." *Id.* at § 2 (codified as amended at Tenn. Code Ann. § 2-19-143(3)).

The legislature's addition was deliberately disjunctive. It did not abrogate or strike the other exceptions to disenfranchisement for restoration of citizenship under the laws of the state of conviction. At the same time, to further clarify that the opportunity to petition Tennessee circuit courts was available to those with out-of-state convictions, the legislature added language about out-of-state courts and out-of-state convictions to the restoration provision in the Code of Criminal Procedure: "Persons rendered infamous or deprived of the rights of citizenship by the judgment *of any state or federal court*, may have their full rights of citizenship restored by the circuit court." *Id.* at § 3 (codified as amended at Tenn. Code Ann. § 40-29-101 et seq.) (1983 amendments emphasized). The same language about any state or federal court which made Tennessee's rights restoration process available to, but not mandatory for, people with out-of-state convictions is found today in § 40-29-202.

The 1983 legislature deliberately left intact the original two exceptions to disenfranchisement, incorporating the standard of civil rights restorations in other states. That basic structure has not been changed or abrogated by the legislature since. *See* Appellant's Br. 35 n.7, Tenn. Ct. of App. No. M-2020-01510-COA-R3-CV (Apr. 26, 2021). Modifications to the voting rights restoration process of "the law of *this* state," do not automatically or silently carry over to civil rights restorations under the law of other states. Appellees do not offer any

alternative understanding of the 1983 Act. Instead, Appellees' interpretation illogically assumes that a later modification to the *rights restoration* mechanism "under the law of this state" silently expands the scope of the original deprivation of that right, working against the very people that the 1983 Act intended to help.

This defies logic and well-established precepts of statutory interpretation. When analyzing laws enacted by the legislature, courts have recognized that "[u]nless the newer statute expressly repeals or amends the old one, the new provision is presumed to be in accord with the same policy embodied in the prior statutes . . . ." *Shorts v. Bartholomew*, 278 S.W.3d 268, 277 (Tenn. 2009). If the 2006 legislature had intended to end Tennessee's 25-year incorporation of the rights restoration mechanisms of other states, as Defendants suggest, it easily would and could have done so by striking the first two exceptions in Section 2-19-143(3):

> "No person who has been convicted in another state of a crime or offense which would constitute an infamous crime under the laws of this state, regardless of the sentence imposed, shall be allowed to register to vote or vote at any election in this state unless such person has been ~~pardoned or~~ restored to the rights of citizenship ~~by the governor or other appropriate authority of such other state, or the person's full rights of citizenship have otherwise been restored~~ in accordance with ~~the laws of such other state, or~~ the law of this state."

See In re Estate of Tanner, 295 S.W.3d 610, 614 (Tenn. 2009) (quoting *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)) ("We also must presume that the General Assembly was aware of any prior

enactments at the time the legislation passed"). Repeals by implication are disfavored – and here such an interpretation is not necessary because Section 2-19-143(3) is unambiguous in its setting of the scope of disenfranchisement and Section 40-29-202(b) and (c)'s meaning as eligibility criteria for rights restoration applying to those who are otherwise disenfranchised is plain. *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013).

The criteria for administrative restoration of the right to vote do not overlay and extend the scope of the original deprivation of that right. The legislature could, perhaps, through new legislation, choose to stop recognizing civil rights restorations from other states. But it has not. The legislature has chosen to incorporate the standard of rights restorations in other states, a policy choice akin to giving full faith and credit to their courts' judgments of felony convictions in the first place. The power to make that policy decision rests with the legislature alone, not with the Director of Elections, Secretary of State, or Attorney General.

CONCLUSION

Tennessee law follows a simple structure: a person who is not deprived of the right to vote by Tennessee law does not need to restore his right to vote. Once deprived of the right to vote, a person may need to take affirmative action to restore the right to vote, but the State may not erect obstacles in the path of a person who is not disenfranchised. Moreover, this Court has made clear that having been convicted of a felony does not necessarily mean that a person is deprived of the right to vote under the Tennessee Constitution. Defendants have violated the well-established precepts of statutory interpretation and created

unnecessary conflicts and constitutional problems by blending the circumstances under which a person is disenfranchised and the criteria for restoration. Appellant Falls asks the Tennessee Supreme Court to untangle this mess and clarify the order of operations governing first the loss of and then the restoration of the right to vote.

Tennesseans convicted of felonies in other states who have had their civil rights restored in those states have not been disqualified from voting since 1981. Changes to the restoration procedures that may be utilized by those who are already deprived of that right do not implicitly expand the scope of the original deprivation. Nor may the Director of Elections and Secretary of State expand the scope of deprivation of the constitutional right to vote absent clear legislative action requiring and authorizing it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the forgoing Supplemental Brief has been served on counsel for the parties by hard copy, via U.S. mail, and electronic mail on the **11th day of July, 2022** to:

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CERTIFICATE OF COMPLIANCE

I certify that this Principal Brief complies with the text, font, and other formatting requirements set forth in Supreme Court Rule 46, § 3.02. Based upon the word count of a word processing system and excluding the sections set forth in § 3.02(a)(1), this Supplemental Brief contains 4,355 words.

/s/ William L. Harbison

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