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IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

ERNEST FALLS,	)	
	)	
Applicant-Plaintiff,	)	
	)	
	)	
v.	)	**No. M2020-01510-SC-R11-CV**
	)	
MARK GOINS, in his official	)	
capacity as Coordinator of	)	**On Application to Appeal**
Elections for the State of	)	**from the Judgment of the**
Tennessee, TRE HARGETT, in	)	**Court of Appeals**
his official capacity as	)	
Secretary of State of the State of	)	
Tennessee, and HERBERT	)	
SLATERY, III, in his official	)	
capacity as the Attorney	)	
General for the State of	)	
Tennessee,	)	
	)	
Respondents/Defendants.		

AMICUS BRIEF OF TENNESSEE LAW PROFESSORS IN SUPPORT OF ERNEST FALLS' APPLICATION FOR PERMISSION TO APPEAL

STEVEN J. MULROY
TN BAR No. 28831
Bredesen Professor of Law
Humphreys School of Law
University of Memphis
1 N. Front St.
Memphis, TN 38103
901-603-8779
smulroy@memphis.edu

JOSHUA STANTON
TN BAR No. 34593
Vanderbilt Legal Clinic
Vanderbilt University Law School
131 21st Avenue, South
Nashville, TN 37203
615-322-4964
joshua.stanton@vanderbilt.edu

(List of *Amici Curiae* continues on inside cover)

Arlene Amarante
Assistant Professor of Law
Lincoln Memorial University
Duncan School of Law
601 West Summit Hill Drive,
Knoxville, TN 37902

Maha Ayesh
Director of Experiential Learning
Assistant Professor of Law
Lincoln Memorial University
Duncan School of Law
601 West Summit Hill Drive,
Knoxville, TN 37902

Mohamed Fazier
Professor of Law
Lincoln Memorial University
Duncan School of Law
601 West Summit Hill Drive,
Knoxville, TN 37902

Demetria Frank
Associate Professor of Law
Associate Dean for Diversity & Inclusion
University of Memphis
Cecil C. Humphreys School of Law
1 North Front Street
Memphis, TN 38103

Donna Harkness
Professor of Clinical Law
Director Elder Law Clinic
University of Memphis
Cecil C. Humphreys School of Law
1 North Front Street
Memphis, TN 38103

David Hudson
Assistant Professor of Law
Belmont College of Law
1900 Belmont Boulevard
Nashville, TN 37212

Susan L. Kay
Associate Dean for Experiential Education
Clinical Professor of Law
Vanderbilt University Law School
131 21st Avenue, South
Nashville, TN 37203

Daniel Kiel
FedEx Professor of Law
University of Memphis
Cecil C. Humphreys School of Law
1 North Front Street
Memphis, TN 38103

Katy Ramsey Mason
Assistant Professor of Law
Director, Medical-Legal Partnership Clinic
University of Memphis
Cecil C. Humphreys School of Law
1 North Front Street
Memphis, TN 38103

Steven Mulroy
Bredesen Professor of Law
University of Memphis
Cecil C. Humphreys School of Law
1 North Front Street
Memphis, TN 38103

David Romantz
Olin Atkins University Professor
Associate Professor of Law
University of Memphis
Cecil C. Humphreys School of Law
1 North Front Street
Memphis, TN 38103

Willie Santana
Visiting Assistant Professor of Law
Lincoln Memorial University
Duncan School of Law
601 West Summit Hill Drive,
Knoxville, TN 37902

Daniel M. Schaffzin
Associate Professor of Law
Director of Experiential Learning
University of Memphis
Cecil C. Humphreys School of Law
1 North Front Street
Memphis, TN 38103

Kevin M. Stack
Lee S. and Charles A. Speir Professor of Law
Vanderbilt University Law School
131 21st Avenue, South
Nashville, TN 37203

Joshua Stanton
Clinical Fellow
Vanderbilt University Law School
131 21st Avenue, South
Nashville, TN 37203

Cara Suvall
Associate Clinical Professor of Law
Vanderbilt University Law School
131 21st Avenue, South
Nashville, TN 37203

Stevie Swanson
Associate Professor of Law
Lincoln Memorial University
Duncan School of Law
601 West Summit Hill Drive,
Knoxville, TN 37902

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INTRODUCTION

Amici adopt the Question Presented, Statement of Facts, and Standard Of Review set out in the Application For Permission To Appeal presented by Petitioner Ernest Falls.

INTEREST OF AMICI

Amici are law professors in Tennessee who specialize in, among other things, constitutional law, civil rights, voting rights, statutory interpretation, or clinical services relating to those topics. They have an interest in the correct interpretation of Tennessee law, particularly on a question of great public importance such as this. Amici respectfully submit that their brief can assist the Court in making a proper determination consistent with the interests of justice.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THIS CASE PRESENTS AN IMPORTANT LEGAL QUESTION

Tennessee Rule of Appellate Procedure 11 provides that parties may seek discretionary review by this Court by showing, *inter alia*, a need to (1) secure uniformity of decision; (2) settlement of important questions of law; (3) settlement of questions of public interest; and (4) exercise of this Court's supervisory authority. Tenn. R. App. P. 11(a). In this case, factors (2) and (3) are present and counsel toward acceptance of this case. Amici believe that the question of when Tennessee residents with out-of-state felony convictions can exercise the fundamental right to vote is obviously one of public interest. Their understanding is that point

will be made amply by other parties or amici. Given Amici's status as Tennessee, law professors with a special interest in the proper development of the law in Tennessee, Amici will focus on factor (2) above.

This case presents a pure question of law, and an issue of first impression. The question is whether persons with out-of-state convictions may vote in Tennessee by virtue of their citizenship rights being restored in the other state, or whether they will have to demonstrate that they have no outstanding restitution, court costs, or child support obligations. To Amici*'s* knowledge, no Tennessee court has decided this question.

As a general matter, questions of first impression are particularly appropriate for review by this Court. *State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014) (granting review of case raising admissibility into evidence of video recording of alleged child rape victim conversation with forensic interviewer because, *inter alia*, it was a question of first impression); *Griffin v. State*, 182 S.W.3d 795, 797 (Tenn. 2006) ("We accepted review …under Rule 11, in order to address a question of first impression" regarding whether a statutory right to DNA analysis could be waived by implication). This is so even when the number of cases potentially affected by the new rule is likely fairly small. *See, e.g., Searle v. Juvenile Court for Williamson County*, 188 S.W.3d 547 ,547 (Tenn. 2006) (granting discretionary review of question of first impression in child custody case of whether mother's status as a fugitive warranted dismissal of her habeas corpus petition).

And this case of first impression presents a particularly important legal question, raising as it does access to the right to vote, which this

Court has recently acknowledged to be the most fundamental of all rights. *Fisher v. Hargett*, 604 S.W.3d 381, 400 (Tenn. 2020). Given the large number of people with felony convictions in Tennessee, *Locked Out*, The Sentencing Project at 16–18 (2020), *available at* https://www.sentencingproject.org/wp-content/uploads/2020/10/Locked-Out-2020.pdf (last visited Feb. 18, 2022), this is an important question indeed.

This Court has granted discretionary appeal to resolve similar legal questions regarding the civil rights of convicted felons. *See, e.g.*, *Cole v. Campbell*, 968 S.W.2d 274, 274 (Tenn. 1998) (granting appeal to determine whether a convicted felon has standing to seek records under the Public Records Act); *State v. Johnson*, 79 S.W.3d 522, 524 (Tenn. 2002) (granting review to decide if a convicted felon whose citizenship rights had been restored had the right to possess a handgun); *May v. Carlton*, 245 S.W.3d 340, 342 (Tenn. 2008) (granting review to determine whether judgment disenfranchising convicted felon could be corrected through habeas corpus). Again, such review of voting rights issues is particularly appropriate where, as here, the legal issue is one of first impression. *See Johnson*, 79 S.W.3d at 524 (granting application for appeal "to address this issue of first impression").

For these reasons, this case presents an important legal question warranting discretionary review by this Court.

II. THE STATE'S POSITION, ADOPTED BY THE COURT OF APPEALS, LACKS MERIT

Tennessee Law Presumes Against Disenfranchisement

The Tennessee Constitution provides that all adult U.S. citizen residents of Tennessee "shall be entitled to vote in all federal, state, and local elections" held in the county or district where they have resided for sufficient period of time. Tenn. Const. Art. 4, §1. Further, the right to vote "shall never be denied" to any qualified person "except upon conviction by a jury of some infamous crime." Tenn. Const. Art. 1, §5.

This Court has said it "is beyond question" that the right to vote is a "precious" and "fundamental" right, foundational for all other rights. *Fisher v. Hargett*, 604 S.W.3d 381, 400 (Tenn. 2020). Because of this, the State must have explicit legislative authority to disenfranchise. *Crutchfield v. Collins,* 607 S.W.2d 478, 481-482 (Tenn. Ct. App. 1980). Without such explicit statutory disenfranchisement, Tennessee residents otherwise qualified to vote under Article 4, Section 1 are by default entitled to vote. *See id.*

Stated differently, there is a presumption in favor of enfranchisement for persons meeting the basic requirements of Article 4, Section 1, a presumption which can only be overcome by explicit statutory provisions. Indeed, this Court has long held that statutes stripping one of voting rights must "be strictly construed" in favor of enfranchisement. *Burdine v. Kennon*, 209 S.W.2d 9, 10-11 (Tenn. 1948); *cf. May v. Carlton*,

245 S.W.3d 340, 342 (Tenn. 2008); *Gaskin v. Collins,* 661 S.W.2d 865 866 (Tenn. 1983).[1]

Section 2-19-143's Plain Language Means That a Person With an Out-of-State Felony Conviction Whose Rights are Restored in That State Is Able to Vote in Tennessee

This principle—that no disenfranchisement can occur absent explicit statutory authority for it—informs the pure question of statutory interpretation that is the sole issue in this case. The only applicable statute which provides for that disenfranchisement[2] states in pertinent part:

> No person who has been convicted in another state of a crime … which would constitute an infamous crime under the laws of this state … shall be allowed to register … 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

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[1] This is an example of the enfranchisement-favoring rule of interpretation employed widely across the states for over a century, referred to by some election law scholars as the "democracy canon" of statutory construction. *See, e.g.,* Richard Hasen, *The Democracy Canon*, 62 Stanford Law Review 69 (2009) (listing scores of examples from state court decisions).

[2] One other statute providing for disenfranchisement, Tenn. Code Ann. § 40-20-112, does not provide disenfranchisement for out-of-state convictions. It commands the convicting court to issue immediately a judgment of "infamy," and the Tennessee Legislature has power to issue such a command only to Tennessee courts. *Burdine v. Kennon,* 209 S.W.2d 9, 10-11 (Tenn. 1948); *Vines v. State*, 231 S.W.d 332, 334 (Tenn. 1950; *see also Krause v. Taylor,* 583 S.W.2d 603, 604 (Tenn. 1979) (noting that one member of the Court of Appeals relied on this holding of *Burdine* in his opinion). That statute does clarify that for purposes of disenfranchisement, "infamous crime" means any felony.

> 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.

Tenn. Code Ann. § 2-19-143(3) (emphasis added).

The key word in this passage is "unless." In Tennessee as elsewhere, "the plain and ordinary meaning of the statute must be given effect." *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808 (Tenn. 2007). There is no indication from the statute or related statutes that "unless" is to be given any special meaning. Absent such indication, courts use the regularly accepted meaning of a word in a statute. *State v. Clark*, 355 S.W.3d 590, 593 (Tenn. 2011). "Unless" is synonymous with "except." It means "except on the condition that; under any other circumstance than"; or "without the accompanying circumstance or condition that." Merriam-Webster's Dictionary, *available at* https://www.merriam-webster.com/dictionary/unless (last visited Feb. 5, 2022).

Thus, the plain meaning of § 2-19-143(3) is that all Tennessee residents with out-of-state felony convictions are disenfranchised, except that such persons who have had their citizenship rights lawfully restored under the law of the other state[3] shall *not* be disenfranchised. Stated conversely and positively, where the other state has restored citizenship

[3] Subsection (3)'s plain language makes clear that restoration of rights can take place pursuant to the laws of Tennessee, ***or*** pursuant to the laws of the other state; either will suffice. *See id.* (disenfranchisement inapplicable where person has either been pardoned or had citizenship rights restored "in accordance with the laws of such other state, *or the law of this state,"* by…authority of such other state," "*or the law of this* state") (emphasis added).

rights, such persons are entitled to vote in Tennessee. Notably, this provision of § 2-19-143(3) is unqualified. It admits of no exceptions for persons who have unpaid fines or fees.

Section 40-29-202 Does Not Compel A Different Result

Tennessee Code Annotated Section 2-19-143 provides an overview of how those convicted of an "infamous" crime have their eligibility to vote in Tennessee restored by operation of law. There are three alternative paths, any one of which can suffice. First, section 2-19-143 restores the right to vote upon a pardon. Second, for those convicted of an "infamous" crime in a federal court or the court of another state, the right to vote is restored when the "person's full rights of citizenship have otherwise been restored in accordance with" federal law or the law of the state of conviction. § 2-19-143(2), (3). Third, the right to vote is restored when "the person's full rights of citizenship have otherwise been restored" by the laws of Tennessee. § 2-19-143.

Such a mechanism for restoration of the right to vote to be "otherwise . . . restored" by the laws of Tennessee exists in § 40-29-202. That section allows those convicted of "infamous" crimes to have their right to vote restored upon completion of the sentence of conviction: specifically, the "discharge from custody by reason of service or expiration of the maximum sentence imposed by the court for the infamous crime" or "[b]eing granted a certificate of final discharge from" parole. *Id.* But Section 40-29-202(b) & (c) only allows restoration of voting rights upon completion of the sentence of conviction when such a person also meets the additional requirements of paying restitution and court costs, and being "current in all child support obligations."

This reading of the statutes accommodates comity for the laws of sister states. Section 2-19-143(3) recognizes that a governor in a sister state may not be the only officer who can restore the franchise. It also recognizes that another state may reenfranchise felons through some other avenue (judicial, administrative, legislative, etc.) than that provided under Tennessee law. It allows for restoration of voting rights in such circumstances out of respect for those states. But it also allows the voter to choose to restore using Tennessee procedures: "in accordance with … the law of this state."

The Coordinator of Elections has put forward a different interpretation, one which strains against this plain reading of the statutes at issue. Such an agency interpretation of a statute is entitled to no deference from this Court. A Tennessee court will give the agency's interpretation no presumption of correctness. *H & R Block E. Tax Servs., Inc. v. Tenn. Dep't of Commerce & Ins., Div. of Ins.*, 267 S.W.3d 848, 854-855 (Tenn. Ct. App. 2008) (citing *Nashville Mobilphone Co. v. Adkins* , 526 S.W.2d 335, 340 (Tenn. 1976)); *Kidd v. Jarvis Drilling, Inc.*, No. M2004-00973-COA-R3-CV, 2006 WL 344755, at *4 (Tenn. Ct. App. Feb. 14, 2006).

The Coordinator relies solely on Tennessee Code Annotated Section 40-29-202. That section does indeed apply to a person whose felony conviction has disenfranchised them "by the judgment of any state or federal court," § 40-29-202(a), including convictions outside of Tennessee. As previously noted, if such a person needs to restore their right to vote, and wishes to choose to do so "otherwise" according to "the law of this

state," § 40-29-202 requires that they pay off restitution, court costs, and child support obligations.[4]

But unlike Section 143, which by its terms "shall govern the exercise of the right of suffrage" for all persons convicted of a felony, and thus actually *effectuates* disenfranchisement, § 40-29-202 does not itself provide for disenfranchisement. Instead, it only outlines the *procedure for restoration* of voting rights which have been previously removed.

The Sixth Circuit made this clear in *Johnson v. Bredesen,* 624 F.3d 742 (6th Cir. 2010), when it upheld the very provisions of § 40-29-202 (i.e., payment of court costs, restitution, and child support) at issue in this case. The court upheld those provisions *precisely because they did not themselves remove voting rights*, but rather merely governed the process for re-securing voting rights which had previously been lost. *Id.* at 750-751. Referring to § 40-29-202, the Sixth Circuit said "most fundamentally, the re-enfranchisement law at issue does not deny or abridge any rights; it only restores them." *Id.* Further, the law "does not condition the right to vote on payment of restitution or child support, but instead conditions the restoration of a felon's right to vote on such payment." *Id.* *See also id.* at 650 (again distinguishing between "the

[4] It is worth noting that Tennessee is in the small minority of states conditioning restoration on satisfaction of financial obligations. It is one of only nine states which do that. See Ala. Code § 15-22-36.1 (2021); Ariz. Rev. Stat. Ann. § 13-907 (2021); Ark. Const. Amend. 51, §11(d)(2)(A) (2021); Fla. Stat. § 98.0751(2)(a)(5) (2020); Ga. Op. Att'y Gen. No. 84-44, 1984 WL 59904 (May 24, 1984); Iowa Code § 48A.6 (2021); Ky. Rev. Stat. Ann §§ 196.045(a), (2)(c) (2021); S.D. Codified Laws § 12-4-18 (2021). And it is the only state at all which prevents restoration for persons who owe child support.

state's authority to disenfranchise" and the separate issue of "franchise return" and "statutory *re-enfranchisement*") (emphasis added).[5]

A Tennessee court has also acknowledged this distinction. *See State v. Dixon*, 2018 WL 11893, *5 (Tenn. Ct. App. 2018) (citing *Bredesen* and contrasting § 40-29-403, which makes disenfranchisement permanent for certain offenses, as a statute governing enfranchisement, as opposed to § 40-29-202, which merely "regulat[es] the restoration of voting rights").[6]

And another Tennessee court has made the exact same distinction regarding the analogous provision of § 40-29-105, which governs the restoration of *citizenship* rights generally (as opposed to *voting* rights) after loss through felony conviction. *Moffit v. State*, __ S.W.3d. __, 2018 WL 6333620, *6 (Tenn. Ct. App. Dec. 4, 2018). That court rejected an *ex post facto* challenge to § 40-29-105 on that ground. Referring to § 40-20-112, the other provision (besides Section -143) which affirmatively provides for disenfranchisement, the Court of Appeals wrote:

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[5] Indeed, the State of Tennessee insisted on this very distinction in its briefing in this case. *See* Brief In Opposition By State of Tennessee, *Johnson v. Bredesen*, No. 10-1149, at 16 (U.S. Apr. 20, 2011) ("…the reenfranchisement law at issue does not deny or abridge any rights, much less the right to vote," for the "statutes at issue concern *only the restoration* of the right to vote") (emphasis added).

[6] *Cf. State v. Baltimore,* 2014 WL 1921320, *2 (Tenn. Ct. Crim. App. Apr. 1, 2014) (referring to § 40-29-202 as "*establishing a procedure to restore* a convicted felon's right to vote") (emphasis added); *In re Cox*, 389 S.W.3d 794, 800 (Tenn. Ct. App. 2012) (referring to § 40-29-202 as a statute which "*restored* …disabilities by separate statute").

> Unlike Tennessee Code Annotated section 40-20-112, which *removes the right of suffrage*, [Section 40-29-105] *does not impose* any punishment. Rather, [it] *merely sets out the various procedures for pursuing restoration* of one's citizenship rights after he or she has been punished (under section 40-20-112) by removal of same.

Moffitt, 2018 WL 6333620 at *6 (emphasis added). Notably, the statute the *Moffitt* court characterized as merely procedural, one which does not itself strip anyone of their rights, contains language (112 words, including one subsection and three sub-subsections) *identical* to that of the pertinent part of § 40-29-202. *Compare* Tenn. Code Ann. § 40-29-202(a)[7] *with* Tenn. Code Ann. § 40-29-105(b)(1).[8]

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[7] 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:

> (1) Receiving a pardon, except where the pardon contains special conditions pertaining to the right of suffrage;
> (2) The discharge from custody by reason of service or expiration of the maximum sentence imposed by the court for the infamous crime; or
> (3) Being granted a certificate of final discharge from supervision by the board of parole pursuant to § 40-28-105, or any equivalent discharge by another state, the federal government, or county correction authority.

Tenn. Code Ann. § 40-29-202(a) (emphasis added).

[8] A person rendered infamous or deprived of the rights of *citizenship* by the judgment of any state or federal court may have full rights of citizenship restored upon:

> (A) Receiving a pardon, except where the pardon contains special conditions pertaining to the right to suffrage;
> (B) Service or expiration of the maximum sentence imposed for the infamous crime; or

It thus could not be clearer that Section 202, upon which the Coordinator relies, does not itself effectuate any disenfranchisement.

This distinction is crucial here. Since the Tennessee Constitution does not allow disenfranchisement except by express statutory authorization, and § 40-29-202 does not itself accomplish disenfranchisement, then its procedural conditions cannot cause disenfranchisement in situations not otherwise statutorily provided for. In the case of persons with out-state convictions, the only statute affirmatively providing for disenfranchisement is § 2-19-143. Thus, if § 2-19-143 by its plain terms contemplates enfranchisement for a class of persons whose rights have been restored by another state, § 40-29-202 cannot undo that.

Canons Of Statutory Construction Support A Narrow Reading Of Section 202

But that is precisely what the Coordinator suggests Section 202 is doing. Such an interpretation would run afoul of several different canons of statutory construction.

Avoiding Conflict Between Statutes. Noting that the Legislature passed Section 202 in 2006 and Section 143 in 1981, the Coordinator has invoked the statutory canon that the more recent statute controls over an older statute. *See* Brief Of Defendants-Appellees, *Falls v. Goins*, No. M2020-01510-COA-R3-CV, at 17 (Tenn. Ct. App. May 26,

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(C) Being granted final release from incarceration or supervision by the board of parole, or county correction authority.

Tenn. Code Ann. § 40-29-105(b)(1) (emphasis added).

2021). But that canon applies only when there is a true conflict. An interpretation "which places one statute in conflict with another must be avoided; therefore, we must resolve any possible conflict between statutes in favor of each other, so as to provide a harmonious operation of the laws." *Graham v. Caples*, 325 S.W.3d 578, 581-582 (Tenn. 2010) (citing *Cronin v. Howe*, 906 S.W.3d 910, 912 (Tenn. 1995). Interpreting Section 202 as applying where the other state *has not* removed the voting disability, and Section 143 as applying where the foreign state *has* removed the disability, avoids the conflict.

Avoiding Implied Repeal. Indeed, given the plain language of Section 143 suggesting that where the other state has restored citizenship, there is no disenfranchisement, the Coordinator's interpretation would suggest that the Legislature intended to repeal that part of Section 143. But constructions of implied repeal of statutes are disfavored. *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013); *Hayes v. Gibson County*, 288 S.W.3d 334, 337-338 (Tenn. 2009). A court will hold a later statute to have repealed an earlier statute by implication "only when the conflict between the statutes is irreconcilable." *Hayes*, 288 S.W.3d at 338. The general rule is that "new statutes change pre-existing law only to the extent expressly declared." *Hopkins*, 432 S.W.3d at 848.

The Specific Controls The General. Harmonizing the two statutes so as to bar disenfranchisement when the other state has restored citizenship rights is also consistent with another statutory construction canon. Generally, the rule is that "the specific controls the

general." In other words, "where a conflict is presented between two statutes, a more specific statutory provision takes precedence over a more general provision." *Graham v. Caples*, 325 S.W.3d 578, 581-582 (Tenn. 2010) (citing *Arnwine v. Union County Board of Education*, 120 S.W.3d 804, 809 (Tenn. 2003). Tennessee courts have applied this principle specifically in construing statutes regarding restoration of voting rights, including § 40-29-202. *See* *O'Neal v. Goins*, 2016 WL 4083466, *6 (Tenn. Ct. App. July 29, 2016) (using this principle to resolve a tension between § 40-29-101, governing the general restoration of citizenship rights, and § 40-29-202, which more specifically governs restoration of *voting* rights).

Here, Section 202 governs the procedure for restoring voting rights for many different classes of persons: those with Tennessee felony convictions (who have not previously received pardons or restoration of citizenship rights); those with federal felony convictions (who have not previously received pardons or restoration of citizenship rights); and those with felony convictions from other states (who have not previously received pardons or restoration of citizenship rights). Section 143 governs the far narrower class of persons who have already had their citizenship rights restored.

The Avoidance Canon. Considerations of Tennessee constitutional law also support this construction. The Coordinator's interpretation would run contrary to the general constitutional principle requiring explicit affirmative disenfranchisement, *Crutchfield v. Collins,* 607 S.W.2d 478, 481-482 (Tenn. Ct. App. 1980), and strictly construing

disenfranchising statutes, *Burdine v. Kennon*, 209 S.W.2d 9, 10-11 (Tenn. 1948).

As noted above, absent express statutory authority for disenfranchisement, a Tennessee resident has the right to vote. *May v. Carlton*, 245 S.W.3d 340, 342 (Tenn. 2008) (reversing trial court declaration of 'infamy' despite a homicide conviction because, at the time of the offense, homicide was not listed as an infamous crime under the relevant statute). This Court has interpreted this requirement strictly. Even where a disenfranchisement statute listed burglary, arson, forgery, and even bigamy, it has prevented disenfranchisement of convicted killers where homicide was not expressly listed. *May*, 245 S.W.3d at 340. And even when the Legislature corrected that oversight by providing that all felonies would trigger disenfranchisement, this Court invalidated an attempt to apply that disability retroactively. *Gaskin v. Collins*, 661 S.W.2d 865, 866 (Tenn. 1983).

As a general matter, courts should endeavor to construe statutes to avoid serious constitutional issues. Courts have a "duty to adopt a construction which will … avoid constitutional conflict if any reasonable construction exists" which may do so. *State v. Sliger*, 846 S.W.2d 262, 264 (1993) (citing *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990)); *Marion County Board of Commissioners v. Marion County Election Commission*, 594 S.W.2d 681, 684-685 (Tenn. 1980).

Here, construing Section 202 to disenfranchise in circumstances not contemplated by Section 143, despite the understanding that Section 202 merely provides restoration procedures, would cause unnecessary

tension with these constitutional principles. This construction should thus be avoided.[9]

CONCLUSION

For the reasons stated above, Amici respectfully ask that this Court accept this case for appeal; reverse the judgment of the Court of Appeals; and clarify that persons with out-of-state convictions whose rights have been restored are eligible to vote in Tennessee.

Respectfully submitted,

s/ STEVEN J. MULROY
STEVEN J. MULROY (BPR #28831)
Bredesen Professor of Law
Humphreys School of Law
University of Memphis
1 N. Front St.
Memphis, TN 38103
901-603-8779
smulroy@memphis.edu

s/ JOSHUA STANTON
JOSHUA STANTON (BPR #34593)
Vanderbilt Legal Clinic
Vanderbilt University Law School
131 21st Avenue, South
Nashville, TN 37203
615-322-4964
joshua.stanton@vanderbilt.edu

Attorneys for *Amici Curiae*

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9 The State's interpretation would also cause tension with the constitutional doctrine of giving full faith and credit to the judgments of other states. *See Blackwell v. Haslam*, 2013 WL 3379364, at *6 (Tenn. Ct. App. June 28, 2013) (explaining, in a case involving another state's restoration of firearm ownership rights, that except in "extremely rare occasions," Tennessee should give effect to judgments from other states).

CERTIFICATE OF SERVICE

I hereby certify that the forgoing document was served by U.S. mail on Alexander S. Rieger and Janet Kleinfelter for the Respondent, the State of Tennessee; and electronically on Christopher Sabis, Danielle Lang, and Blair Bowie, for Petitioner Ernest Falls, this 28th day of February, 2022.

s/ JOSHUA STANTON

CERTIFICATE OF COMPLIANCE

I certify that this 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 brief contains 4008 words.

s/ JOSHUA STANTON