

# Civil and Voting Rights in Tennessee



A Report of the  
Tennessee Advisory Committee to the  
U.S. Commission on Civil Rights

July 2024

## **Advisory Committees to the U.S. Commission on Civil Rights**

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states, the District of Columbia, and the U.S. Territories. The committees are composed of state and territory citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states and territories that are within the Commission's jurisdiction. They are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

## **Acknowledgments**

The Tennessee Advisory Committee (Committee) would like to acknowledge all the panelists and members of the public who participated in this study.

**Tennessee Advisory Committee to the  
U.S. Commission on Civil Rights**

The Tennessee Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding Voting Rights in Tennessee, with a focus on: 1) the effects of the passage of S.B. 8005 on voting rights and 2) access to voting during the pandemic. S.B. 8005 was a bill that imposed a series of criminal penalties and mandatory minimum sentences on those engaged in certain demonstrations and protest activity. Under the law, Tennessee protesters face felony conviction and harsher penalties, including loss of the right to vote, for engaging in certain protest activity.

The Committee submits this report as part of its responsibility to study and report on civil-rights issues in Tennessee. The contents of this report are primarily based on testimony the Committee heard during public web briefings held on April 13, 2022, April 27, 2022, May 11, 2022, May 25, 2022, June 15, 2022, June 22, 2022, and February 8, 2023. The Committee also includes related testimony submitted in writing during the relevant period of public comment.

This report is split into two main parts, each presenting a brief background on each focus area to be considered by the Committee, primary findings as they emerged from the testimony, as well as recommendations for addressing areas of civil-rights concerns of each focus area. This report is intended to focus on civil-rights concerns regarding voting rights in Tennessee. Specifically, the Committee sought to examine the civil rights impacts upon the passage of S.B. 8005 in 2020 and civil rights concerns regarding access to voting during the Covid-19 pandemic. While additional important topics may have surfaced throughout the Committee’s inquiry, those matters that are outside the scope of this specific civil-rights mandate are left for another discussion.

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## Table of Contents

Overview.....	3
Methodology.....	4
<b>Part I: The Civil Rights Effects of S.B. 8005 .....</b>	<b>6</b>
Background.....	7
Findings .....	11
Finding I: S.B. 8005 enhanced criminal penalties for activities related to protesting, including camping on state property.....	12
Finding II: The Committee found that certain aspects of criminal law related to protesting within S.B. 8005 were already covered by existing laws. ....	14
Finding III: The Committee found that the legislative process behind S.B. 8005 included a shorter-than-usual timeline in which the legislation was passed. Testimony also indicated there was a lack of effort to directly communicate with protesters regarding their concerns.....	16
Finding IV: S.B. 8005 can result in the disenfranchisement of Tennesseans if they are convicted of a felony under this law.....	21
Finding V: Through the testimony received, the Committee learned that S.B. 8005 caused a chilling effect that was observed immediately after the passage of the law. ....	23
Finding VI: The Committee heard testimony regarding an alleged disparate treatment of protesters at racial justice-related protests, including those focused on S.B. 8005, as compared to other types of protests. ....	25
Finding VII: The Committee found that it is unclear how discretion may be used when S.B. 8005 is being enforced.....	28
Recommendations.....	29
<b>Part II: Access to Voting During the Pandemic .....</b>	<b>31</b>
Background.....	32
Findings .....	36
Finding I: Tennessee is an “excuse” state with a restrictive approach to absentee voting that persisted during the COVID-19 pandemic.....	36
Finding II: In addition to concerns regarding absentee voting, the Committee heard testimony regarding several ways in which Tennessee is one of the most restrictive states in access to voting nationwide. .	42
Finding III: The Committee heard testimony on how Davidson County and Shelby County faced challenges presented by the Covid-19 pandemic and found a significant variation in each county’s approach.....	45
Finding IV: Tennessee places additional obstacles on other voting-aged residents that impact registration and turnout, especially individuals convicted of felonies.....	48
Recommendations.....	49
Appendix.....	52

## Overview

On January 26, 2022, the Tennessee Advisory Committee (Committee) to the U.S. Commission on Civil Rights (Commission) adopted a proposal to undertake a study of Voting Rights. The focus of the Committee’s inquiry was to examine if certain voting laws, policies, or practices in Tennessee restrict the exercise of voting or create unjustifiable barriers to voting, causing a disparate impact on people within one or more protected classes. To do so, the Committee focused its study on two measures. First, the Committee studied Senate Bill 8005, signed into law in August 2020, that imposes criminal penalties on certain acts of protesting. With these criminal penalties resulting in those convicted under this law losing their right to vote, the Committee sought to understand whether this measure has the effect of unjustifiably disenfranchising one or more protected classes of people. Secondly, the Committee examined the impact of voting restrictions (both recent and long-established) on citizens during the COVID-19 pandemic. The Committee considered whether voting restrictions applied during the COVID-19 pandemic had a disparate impact on voters on the basis of race, color, disability status, national origin, age, religion, and/or sex. The two inquiries are linked by their real and perceived impact on the legitimacy of the political process within the state of Tennessee. Confidence in- and the integrity of our state’s processes is, in large part, based on non-discriminatory access to formal political engagement and less formal political discourse.

As part of this inquiry the Committee heard testimony via videoconferences held on April 13, 2022, April 27, 2022, May 11, 2022, May 25, 2022, June 15, 2022, June 22, 2022, and February 8, 2023.<sup>1</sup> The following report results from a review of testimony provided at these meetings, combined with written testimony submitted during this timeframe. The two focus areas begin with their own brief background of the issues to be considered by the Committee, followed by their own sets of primary findings as they emerged from this testimony. Finally, the Committee makes recommendations for addressing related civil rights concerns for each of the focus areas. This report focuses on Voting Rights in Tennessee, with a focus on the effects of the passage of S.B. 8005 on voting rights and access to voting during the pandemic. While other important topics may have surfaced throughout the Committee’s inquiry, matters that are outside the scope

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<sup>1</sup> Meeting records and transcripts are available in Appendix A.

Briefing before the Tennessee Advisory Committee to the U.S. Commission on Civil Rights, April 13, 2022, web-based, Transcript (hereinafter cited as “Transcript I”).

Briefing before the Tennessee Advisory Committee to the U.S. Commission on Civil Rights, April 27, 2022, web-based, Transcript (hereinafter cited as “Transcript II”).

Briefing before the Tennessee Advisory Committee to the U.S. Commission on Civil Rights, May 11, 2022, web-based, Transcript (hereinafter cited as “Transcript III”).

Briefing before the Tennessee Advisory Committee to the U.S. Commission on Civil Rights, May 25, 2022, web-based, Transcript (hereinafter cited as “Transcript IV”).

Briefing before the Tennessee Advisory Committee to the U.S. Commission on Civil Rights, June 15, 2022, web-based, Transcript (hereinafter cited as “Transcript V”).

Briefing before the Tennessee Advisory Committee to the U.S. Commission on Civil Rights, June 22, 2022, web-based, Transcript (hereinafter cited as “Transcript VI”).

Briefing before the Tennessee Advisory Committee to the U.S. Commission on Civil Rights, February 8, 2023, web-based, Transcript (hereinafter cited as “Transcript VII”).

of this specific civil rights mandate are left for another discussion. This report and the recommendations included within it were adopted unanimously by a roll call of members present at a Committee business meeting on May 9, 2024.<sup>2</sup>

## **Methodology**

As a matter of historical precedent, and in order to achieve transparency, Committee studies involve a collection of public, testimonial evidence and written comments from individuals directly impacted by the civil rights topic at hand; researchers and experts that have rigorously studied and reported on the topic; community organizations and advocates representing a broad range of backgrounds and perspectives related to the topic; and government officials tasked with related policy decisions and the administration of those policies.

Committee studies require Committee members to utilize their expertise in selecting a sample of panelists that is the most useful to the purposes of the study and will result in a broad and diverse understanding of the issue. This method of (non-probability) judgment sampling requires Committee members to draw from their own experiences, knowledge, opinions, and views to gain understanding of the issue and possible policy solutions. Committees are composed of volunteer professionals that are familiar with civil rights issues in their state or territory. Members represent a variety of political viewpoints, occupations, races, ages, and gender identities, as well as a variety of backgrounds, skills, and experiences. The intentional diversity of each Committee promotes vigorous debate and full exploration of the issues. It also serves to assist in offsetting biases that can result in oversight of nuances in the testimony.

In fulfillment of Committees' responsibility to advise the Commission of civil rights matters in their locales, Committees conduct an in-depth review and thematic analysis of the testimony received and other data gathered throughout the course of their inquiry. Committee members use this publicly collected information, often from those directly impacted by the civil rights topic of study, or others with direct expert knowledge of such matters, to identify findings and recommendations to report to the Commission. Drafts of the Committee's report are publicly available and shared with panelists and other contributors to ensure that their testimony was accurately captured. Reports are also shared with affected agencies to request for clarification regarding allegations noted in testimony.

For the purposes of this study, **Findings** are defined as what the testimony and other data *suggested, revealed, or indicated* based upon the data collected by the Committee. Findings refer to a synthesis of observations confirmed by majority vote of members, rather than conclusions drawn by any one member. **Recommendations** are specific actions or proposed policy interventions intended to address or alleviate the civil rights concerns raised in the related finding(s). Where findings indicate a lack of sufficient knowledge or available data to fully understand the civil rights issues at hand, recommendations may also target specific directed areas in need of further, more rigorous study. Recommendations are directed to the Commission;

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<sup>2</sup> See Appendix E for Committee Member Statements.

they request that the Commission itself take a specific action, or that the Commission forward recommendations to other federal or state agencies, policy makers, or stakeholders.

## **Part I:**

# **The Civil Rights Effects of S.B. 8005**



## Background

### *Protests After the Death of George Floyd*

In late May 2020, protests erupted across the country in reaction to the death of George Floyd, a Black man who was killed by a White police officer, as well as the violent deaths of other Black individuals.<sup>3</sup> The unrest spread quickly and the National Guard was activated in at least 21 states and has been called the “Summer of Racial Reckoning.”<sup>4</sup> An analysis of the protests that took place that Summer indicate that 96.3 percent of events involved no property damage or police injuries, and in 97.7 percent of events, no injuries were reported among participants, bystanders or police.<sup>5</sup> National tensions were further heightened due to fact that the protests occurred amidst the early months of the COVID-19 pandemic, prompting fear of an uptick of infections.<sup>6</sup> Furthermore, state lawmakers across the country introduced more than 100 bills that in some way restricted the right to peaceful assembly.<sup>7</sup>

In Tennessee, a range of protests took place, including acts of arson to the Metro Courthouse in Nashville and physical confrontations between law enforcement and protesters reported on May 30, 2020.<sup>8</sup> These acts prompted concern among some legislators that this was the beginning of an autonomous zone similar to the occurrences in Seattle, Washington.<sup>9</sup> One of the organizers of the Legislative Plaza protests that were formed shortly after these incidents publicly denounced the property damage and vandalism that occurred on May 30, 2020. By May 31, 2020, those individuals who had participated were arrested or cited on various charges under existing laws.<sup>10</sup>

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<sup>3</sup> Bryson Taylor, Derrick. “George Floyd Protests: A Timeline.” The New York Times. November 5, 2021. <https://www.nytimes.com/article/george-floyd-protests-timeline.html> (accessed November 5, 2021.)

<sup>4</sup> Ibid; *See also*: Ailsa Chang, Rachel Martin, and Eric Marrapodi. “Summer Of Racial Reckoning.” National Public Radio. August 16, 2020. <https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit> (accessed October 29, 2021).

<sup>5</sup> Chenoweth, Erica and Pressman, Jeremy. “This summer’s Black Lives Matter protesters were overwhelmingly peaceful, our research finds.” The Washington Post. October 16, 2020. <https://www.washingtonpost.com/politics/2020/10/16/this-summers-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds/> (accessed December 19, 2023); *See also*: Plazas Testimony, Transcript 2, p. 7-11.

<sup>6</sup> Hawkins, Derek, Taylor, Adam, Booth, William, Schemm, Paul, Copeland, Kareem, Goff, Steven, & Armus, Teo. “Officials warn mass protests could cause spikes in infections.” The Washington Post. May 31, 2020. <https://www.washingtonpost.com/nation/2020/05/31/coronavirus-live-updates-us/> (accessed November 4, 2021).

<sup>7</sup> Page, Written Testimony, p. 1.

<sup>8</sup> Stevens Testimony, Transcript 7, p. 3; *See also*: “Fire seen at Nashville courthouse and City Hall building as protests turn violent.” The Tennessean. May 30, 2020. <https://www.tennessean.com/story/news/crime/2020/05/30/nashville-city-hall-and-courthouse-fire-george-floyd-protest/5295953002/> (accessed November 4, 2021).

<sup>9</sup> Stevens Testimony, Transcript 7, p. 3. For more information on the 2020 autonomous zone protests in Seattle, see: <https://www.nytimes.com/2020/07/01/us/seattle-protest-zone-CHOP-CHAZ-unrest.html>.

<sup>10</sup> Sutton, Caroline. “28 people arrested in Nashville during violent, destructive night.” News Channel 5 Nashville. May 31, 2020. <https://www.newschannel5.com/news/28-people-arrested-in-nashville-during-violent-destructive-night> (accessed October 16, 2023).

## *Formation of the “People’s Plaza” and the Passage of Senate Bill 8005*

On June 1, 2020, a peaceful vigil was organized outside of the State Capitol to coincide with the first day of session for the 111<sup>th</sup> Tennessee General Assembly.<sup>11</sup> By June 12, 2020, hundreds of people had gathered at the Tennessee State Capitol in what would become a months-long demonstration.<sup>12</sup> The protesters’ main demand was to meet with Governor Bill Lee to discuss police brutality and racial justice.<sup>13</sup> Their other demands included the removal of the Confederate General Nathan Bedford Forrest bust, which at the time was still at the state capital, the firing Chief Anderson, who was the chief police of Nashville at that time, and an overall demand that the priority of policymakers be placed on police reform.<sup>14</sup> The protesters remained at the plaza for over 60 days – 24 hours a day - in what became known as the “People’s Plaza.” Over time, tensions between protesters, lawmakers and local law enforcement arose.<sup>15</sup> Although, ultimately, the protesters did not meet with the Governor, several of the demands were eventually met, such as the removal of the Nathan Bedford Forrest bust and the early retirement of Chief Anderson of the Metro Nashville Police Department.<sup>16</sup>

On June 12, 2020, in the earlier days of the protests, Governor Lee issued a statement that read:

“We encourage Tennesseans to exercise their First Amendment rights and have seen many examples of peaceful protests across our state in recent weeks. As demonstrations continue, we will continue to protect Tennesseans' right to peaceful assembly, while also reassuring citizens that lawlessness, autonomous zones, and violence will not be tolerated. Further, Tennessee law expressly prohibits camping on state property not expressly designated as a campground area, and that law will be enforced.”<sup>17</sup>

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<sup>11</sup> “Tennessee George Floyd protests: What we know Monday.” *The Tennessean*. June 1, 2020.

<https://www.tennessean.com/story/news/local/2020/06/01/george-floyd-protests-tennessee-nashville-what-we-know-monday/5303630002/> (accessed November 4, 2021).

<sup>12</sup> Gilmore Testimony, Transcript 6, p. 19.

<sup>13</sup> Elfrink, Tim. “Protesters camped at Tennessee’s Capitol. Lawmakers made it a felony.” *The Washington Post*. August 13, 2020. <https://www.washingtonpost.com/nation/2020/08/13/tennessee-camping-felony-capitol/> (accessed November 4, 2021).

<sup>14</sup> Plazas, Testimony, Transcript 2, p. 5; *See also*: Yarbro Testimony, Transcript 6, p. 21.

<sup>15</sup> Elfrink, Tim. “Protesters camped at Tennessee’s Capitol. Lawmakers made it a felony.” *The Washington Post*. August 13, 2020. <https://www.washingtonpost.com/nation/2020/08/13/tennessee-camping-felony-capitol/> (accessed November 4, 2021).

<sup>16</sup> Yarbro Testimony, Transcript 6, p. 22; *See also*: Allison, Natalie. “The bust of Nathan Bedford Forrest is out of the Tennessee Capitol. Here’s how it happened.” *The Tennessean*. July 23, 2021. <https://www.tennessean.com/story/news/politics/2021/07/23/tennessees-nathan-bedford-forrest-bust-has-been-moved-museum/8064468002/> (accessed December 18, 2023); *See also*: Gonzalez, Tony, Mitchell, Damon, and Samantha Max. “Nashville Police Chief Leaving Post, Abruptly Accelerating His Planned Retirement.” 90.3 WPLN News. August 6, 2020. <https://wpln.org/post/nashville-police-chief-steve-anderson-is-removed-abruptly-accelerating-planned-retirement/> (accessed December 18, 2023).

<sup>17</sup> “Statement from Gov. Lee on Protests.” Tennessee Office of The Governor. June 12, 2020. <https://www.tn.gov/governor/news/2020/6/12/statement-from-gov--lee-on-protests.html> (accessed November 4, 2021).

Despite the “Equal Access to Public Property Act of 2012<sup>18</sup> - which was referred to in the statement - already being in existence, the ongoing protests near the Capitol prompted the state legislature to pass Senate Bill 8005, making the act of camping on state property a Class E felony, which can result in up to six years in prison and a loss of voting rights.<sup>19</sup> Although the bill ultimately passed in the Senate with a 26-5 vote, lawmakers on both sides of the aisle debated its severity. Concerns were raised about consequences for people on state property who are not protesting but picnicking, for example.<sup>20</sup> The law also requires 12-hour holds without bond for other offenses like vandalizing state property and disrupting a meeting, although such holds are not required for the majority of other criminal offenses, including those that may be more serious.<sup>21</sup> The bill was signed into law by Governor Lee on August 20, 2020.<sup>22</sup>

Civil rights advocacy groups such as the American Civil Liberties Union of Tennessee and the Lawyers Committee for Civil Rights Under Law denounced the measure and described its effect on voting rights as a violation of the principles and rights guaranteed under the Constitution.<sup>23</sup> In the years leading up to the protests of 2020, at least 18 other states have introduced legislation meant to quell certain acts of protesting, but Senate Bill 8005 was the first piece of legislation enacted after the protests that emerged after the death of George Floyd.<sup>24</sup>

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<sup>18</sup> Tennessee Code Title 39. Criminal Offenses § 39-14-414.

<sup>19</sup> Tennessee Code Annotated. Title 39 Criminal Offenses(as amended), §39-14-414(f); Tennessee Code Annotated. Title 40, §40-35-112(c)(5); *See also*: Savage Testimony, Transcript 3, p. 8; *See also*: Elfrink, Tim. “Protesters have camped for months at Tennessee’s Capitol. So lawmakers made it a felony.” The Washington Post. August 13, 2020. <https://www.washingtonpost.com/nation/2020/08/13/tennessee-camping-felony-capitol/> (accessed October 29, 2021).

<sup>20</sup> Allison, Natalie. “Tennessee legislature cracks down on protesters, making it a felony to camp overnight outside Capitol.” The Tennessean. August 12, 2020. <https://www.tennessean.com/story/news/politics/2020/08/12/tennessee-passes-law-targeting-protesters-makes-capitol-camping-felony/3354879001/> (accessed October 25, 2021).

<sup>21</sup> Tennessee Code Annotated. Title 40 (as amended), §40-11-153(a); *See also*: Allison, Natalie. “Tennessee legislature cracks down on protesters, making it a felony to camp overnight outside Capitol.” The Tennessean. August 12, 2020. <https://www.tennessean.com/story/news/politics/2020/08/12/tennessee-passes-law-targeting-protesters-makes-capitol-camping-felony/3354879001/> (accessed October 25, 2021).

<sup>22</sup> Tennessee General Assembly. “Bill History, SB 8005 Actions.”

<https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB8005&ga=111> (accessed November 4, 2021).

<sup>23</sup> Itkowitz, Colby and Gardner, Amy. “Tennessee adopts new law that could strip some protesters of voting rights.” The Washington Post. August 22, 2020. [https://www.washingtonpost.com/politics/tennessee-adopts-new-law-that-could-strip-some-protesters-of-voting-rights/2020/08/22/293d7d28-e4aa-11ea-8dd2-d07812bf00f7\\_story.html](https://www.washingtonpost.com/politics/tennessee-adopts-new-law-that-could-strip-some-protesters-of-voting-rights/2020/08/22/293d7d28-e4aa-11ea-8dd2-d07812bf00f7_story.html). (accessed November 4, 2021).

<sup>24</sup> Ingraham, Christopher. “Republican lawmakers introduce bills to curb protesting in at least 18 states.” The Washington Post. February 24, 2017. <https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/> (accessed October 25, 2021); *See also*: Itkowitz, Colby and Gardner, Amy. “Tennessee adopts new law that could strip some protesters of voting rights.” The Washington Post. August 22, 2020. [https://www.washingtonpost.com/politics/tennessee-adopts-new-law-that-could-strip-some-protesters-of-voting-rights/2020/08/22/293d7d28-e4aa-11ea-8dd2-d07812bf00f7\\_story.html](https://www.washingtonpost.com/politics/tennessee-adopts-new-law-that-could-strip-some-protesters-of-voting-rights/2020/08/22/293d7d28-e4aa-11ea-8dd2-d07812bf00f7_story.html) (accessed November 4, 2021).

## *2020 Protests in the Context of other Notable Protests in Tennessee*

The Committee heard testimony that placed the passage of Senate Bill 8005 within a larger historical context and that pointed to a history of anti-protest, anti-trespassing laws largely in response to protests, particularly civil rights and racial justice protests.<sup>25</sup> Panelist Sekou Franklin, Political Science Professor at Middle Tennessee State University, noted that laws similar to Senate Bill 8005 (which he considers to be an anti-protest law) were passed by several states, particularly in the South, during the Jim Crow period in response to the sit-in protest movement of the 1960s, largely by young people.<sup>26</sup> He compared passage of Senate Bill 8005 during the largely peaceful racial justice protest at Legislative Plaza to earlier anti-protest laws.<sup>27</sup> He notes that, in stark contrast, no similar law was passed by the Tennessee legislature during a violent anti-tax protest in 2001.<sup>28</sup> The tax protest centered around alleged discussions among lawmakers regarding the possibility of increasing the flat income tax rate.<sup>29</sup> When word spread about the potential tax increase, hundreds of Tennesseans demonstrated outside the State Capitol and engaged in actions such as breaking office windows and accosting lawmakers.<sup>30</sup> No arrests were made during this protest, while nearly 200 people were arrested during the People's Plaza protest in 2020.<sup>31</sup>

Another example of a notable protest on state property in which no arrests were made and no laws were passed in response to it was a 2005 protest against cuts to the Medicaid program, also known as TennCare, by then-Tennessee Governor Phil Bredesen.<sup>32</sup> The protest took place outside the Governor's office and lasted for 77 days, and was considered to be one of the longest-running protests on state property at that time.<sup>33</sup> Governor Bredesen faced a budget

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<sup>25</sup> Franklin Testimony, Transcript 1, p. 4.

<sup>26</sup> Franklin Testimony, Transcript 1, p. 4-5; *See also*: Kristian, Bonnie. "Ahmaud Arbery and the racist history of loitering laws." *The Week*. May 7, 2020. <https://theweek.com/articles/912977/ahmaud-arbery-racist-history-loitering-laws> (accessed December 18, 2023).

<sup>27</sup> According to Panelist Sekou Franklin, Harvard University researcher Erica Chenoweth found that anti-protest bills were proposed in numerous states in May 2020 to April 2021 after the George Floyd protests notwithstanding the fact that 96% had no property damage and 97% no physical injury. Franklin Testimony, Transcript 1, at 4-5.

<sup>28</sup> Franklin Testimony, Transcript 1, p. 4-5.

<sup>29</sup> Associated Press. "Tennessee Officials Drop Tax Plan After Protest." *The New York Times*. July 13, 2001. <https://www.nytimes.com/2001/07/13/us/tennessee-officials-drop-tax-plan-after-protest.html> (accessed December 15, 2023).

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*; *See also*: Timms, Mariah. "Hundreds were arrested in last summer's 'People's Plaza' demonstration. How the cases are playing out in court." *The Tennessean*. May 20, 2021. <https://www.tennessean.com/story/news/crime/2021/05/20/nashville-peoples-plaza-protest-charges-largely-dropped-activists-face-fallout/5155638001/> (accessed December 15, 2023).

<sup>32</sup> Franklin Testimony, Transcript 1, p. 4-5; *See also*: Timms, Mariah. "Hundreds were arrested in last summer's 'People's Plaza' demonstration. How the cases are playing out in court." *The Tennessean*. May 20, 2021. <https://www.tennessean.com/story/news/crime/2021/05/20/nashville-peoples-plaza-protest-charges-largely-dropped-activists-face-fallout/5155638001/> (accessed January 3, 2024).

<sup>33</sup> Franklin Testimony, Transcript 1, p. 4-5; *See also*: Timms, Mariah. "Hundreds were arrested in last summer's 'People's Plaza' demonstration. How the cases are playing out in court." *The Tennessean*. May 20, 2021. <https://www.tennessean.com/story/news/crime/2021/05/20/nashville-peoples-plaza-protest-charges-largely-dropped-activists-face-fallout/5155638001/> (accessed January 3, 2024).

shortfall of \$300 million and described the cuts to the health program as difficult but necessary.<sup>34</sup> Over a two-year span, approximately 350,000 individuals were disenrolled from TennCare, including adults who were terminally ill or receiving life-saving treatment.<sup>35</sup>

During the Fall of 2011, the Occupy Wall Street protest movement, which focused on economic inequality, spread across the country, including at the Legislative Plaza in Nashville, Tennessee.<sup>36</sup> In past protests, groups had been allowed to gather at Legislative Plaza without permits; however in this instance with the Occupy Nashville protest, the General Assembly unexpectedly set new requirements for protests and undertook arrests, all of which were later contested in court.<sup>37</sup> In March 2012, as a response to the Occupy Nashville protest, then-Governor Bill Haslam signed a new law into effect that would prohibit knowingly camping on state property that is not designated for such use and would result in misdemeanors if violated.<sup>38</sup> This same law was later amended as part of the passage of Senate Bill 8005 during the Summer 2020 protests.<sup>39</sup>

The following Findings outlined by the Committee further explore the development and passage of Senate Bill 8005 and its effects on civil rights in Tennessee.

## Findings

In keeping with their duty to inform the Commission of (1) matters related to discrimination or a denial of equal protection of the laws; and (2) matters of mutual concern in the preparation of reports of the Commission to the President and the Congress,<sup>40</sup> the Tennessee Advisory Committee submits the following findings to the Commission regarding the civil rights effects of S.B. 8005. This report seeks to highlight the most salient civil-rights themes as they emerged

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<sup>34</sup> Timms, Mariah. “Hundreds were arrested in last summer's 'People's Plaza' demonstration. How the cases are playing out in court.” *The Tennessean*. May 20, 2021. <https://www.tennessean.com/story/news/crime/2021/05/20/nashville-peoples-plaza-protest-charges-largely-dropped-activists-face-fallout/5155638001/> (accessed January 3, 2024).

<sup>35</sup> *Ibid.*

<sup>36</sup> Franklin Testimony, Transcript 1., p. 5; *See also*: Anderson, James A. “Some Say Occupy Wall Street Did Nothing. It Changed Us More Than We Think.” *Time*. November 15, 2021. <https://time.com/6117696/occupy-wall-street-10-years-later/> (accessed January 3, 2024); *See also*: Morgan, David. “Occupy in red states/blue states.” *CBS News*. November 6, 2011. <https://www.cbsnews.com/pictures/occupy-in-red-states-blue-states/> (accessed January 3, 2024).

<sup>37</sup> Janquart, Phillip A. “Occupy Nashville Broken Up; Lawsuits Filed.” *Courthouse News Service*. November 3, 2011. <https://www.courthousenews.com/occupy-nashville-broken-up-lawsuits-filed/> (accessed January 3, 2024); *See also*: ACLU Tennessee. “Occupy Nashville, et al v. Haslam, et al.” <https://www.aclu-tn.org/en/cases/occupy-nashville-et-al-v-haslam-et-al> (accessed January 3, 2024).

<sup>38</sup> Tennessee Code Title 39. Criminal Offenses § 39-14-414 “Equal Access to Public Property Act of 2012.”

<sup>39</sup> Tennessee Code Annotated. Title 8; Title 38; Title 39 and Title 40 (as amended); *See*: <https://publications.tnsosfiles.com/acts/111/2nd%20Extraordinary%20Session/pc0003EOS.pdf> for the specific sections that were amended.

<sup>40</sup> 45 C.F.R. § 703.2 (2018).

from the Committee’s inquiry. The complete written testimony received and transcripts are included in Appendices B and C for further reference.

### **Finding I: S.B. 8005 enhanced criminal penalties for activities related to protesting, including camping on state property.**

The Committee heard from various panelists regarding the ways in which the passage of S.B. 8005 increased criminal penalties for several forms of conduct in the public space related to protesting.<sup>41</sup> While the law acknowledges the peaceful right to assemble and protest under the First Amendment,<sup>42</sup> it establishes the basis for amendments to the criminal code by stating:

“WHEREAS, this legislation is needed to safeguard the right of all Tennesseans to peacefully demonstrate by protecting the safety of state employees and the public and preventing damage or destruction to public and private property, including the prosecution of offenses committed against law enforcement, first responders, state employees and contractors, public officials, and public and private property; and

WHEREAS, this legislation is needed to establish a uniform framework of laws that will protect the rights of all Tennesseans to peacefully demonstrate...”<sup>43</sup>

Among the amendments that were approved by the General Assembly in 2020, one of the most notable includes increased criminalization for camping on state property.<sup>44</sup> According to Title 39 of the Tennessee Code, “It is an offense for a person to engage in camping on public property knowing that the area on which the camping occurs is not specifically designated for use as a camping area by the department or agency responsible for the land.”<sup>45</sup> The Act defines camping broadly.<sup>46</sup>

The amended language enhanced this violation to a Class E felony,<sup>47</sup> whereas it was previously a Class A misdemeanor.<sup>48</sup> In Tennessee, a Class E felony conviction can result in up to six years in prison.<sup>49</sup> Furthermore, felony convictions in Tennessee result in disenfranchisement.<sup>50</sup> According to Panelist Steven Mulroy, who, at the time of the briefing was the Bredesen Professor of Law at

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<sup>41</sup> Tennessee Code Annotated. Title 8; Title 38; Title 39 and Title 40 (as amended) *See*: <https://publications.tnsosfiles.com/acts/111/2nd%20Extraordinary%20Session/pc0003EOS.pdf> for the specific sections that were amended.

<sup>42</sup> *Id.*, recitals; U.S. Const, Amend. 1.

<sup>43</sup> Tennessee Code Annotated. Title 8; Title 38; Title 39 and Title 40 (as amended), recitals.

<sup>44</sup> Tennessee Code Annotated. Title 39 (as amended) §39-14-414(d), §39-14-414(f).

<sup>45</sup> Tennessee Code Annotated. Title 39 (as amended). §39-14-414(d)(1)

<sup>46</sup> The felonious conduct of camping is broadly defined by the Act to include conduct such as placing personal belongings for future use including food for consumption or sitting on a laid blanket between the hours of 10 pm and 7 am. *See*: Tennessee Code Annotated. Title 39 (as amended), §39-14-414(b)(1).

<sup>47</sup> Tennessee Code Annotated. Title 39 (as amended), §39-14-414(f).

<sup>48</sup> In addition to this enhancement, the amendment requires the court to include an order of restitution for any property damage or loss incurred as a result of the offense in any sentencing related to this violation.

<sup>49</sup> Tennessee Code Annotated. Title 40, §40-35-112(c)(5).

<sup>50</sup> Tennessee Constitution, Art. 4, § 2; *See also*: Savage Testimony, Transcript 3, p. 8.

the Humphreys School of Law at the University of Memphis, this law “has a number of significant effects that we should be concerned about. Depending on one's criminal history, this means that one could serve anywhere between one to six years for that act of protest.”<sup>51</sup>

In addition to the enhanced penalties for camping on state property, the amendments included enhancements to several other activities related to protesting. For example, certain forms of conduct were upgraded to a Class A misdemeanor, which involves nearly a year in prison and higher fines than other misdemeanor classes.<sup>52</sup> These forms of conduct include intentionally preventing or disrupting a lawful meeting,<sup>53</sup> marring, marking, or defacing state property,<sup>54</sup> and obstructing a highway or other passageway.<sup>55</sup> These activities, along with unauthorized camping on state property and others, require a 12-hour hold upon arrest.<sup>56</sup> Panelist Steven Mulroy described the hold without opportunity for bail as very unusual. and shared that, “There are many more serious types of offenses that don't have that minimum 12-hour hold.”<sup>57</sup> He also noted that judges may make exceptions in certain cases; the burden is placed on the defendant.<sup>58</sup>

Another important component to the law includes an addition to Title 39 of the State Code regarding criminal trespass.<sup>59</sup> One of the panelists and sponsors of the bill, Tennessee State Senator John Stevens, who represents the state’s 24<sup>th</sup> District, testified to the Committee that there were reports of state troopers who had been assigned to protect legislators and due to their name being on their badge, individuals showed up at their personal residence and tried to intimidate and harass them.<sup>60</sup> The amended language classifies aggravated criminal trespass as a Class E felony when committed “on residential property belonging to or occupied by a law enforcement officer,” among other officials.<sup>61</sup> Regarding this type of behavior, Senator Stevens stated: “if you view that as a legitimate form of protest, I believed you should forfeit your ability to participate in our system of government for a time.”<sup>62</sup>

As a matter of reporting, the law included a section requiring the District Attorneys General Conference to file a report with the leadership of the General Assembly by January 1, 2022, that detailed:

“(1) The aggregate number of reports of potential violations of criminal offenses

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<sup>51</sup> Mulroy Testimony, Transcript 1, p. 9. Steven Mulroy was the Bredesen Professor of Law at the Humphreys School of Law at the University of Memphis at the time of this briefing.

<sup>52</sup> Tennessee Code Annotated. Title 40, §40-35-111(e)(1).

<sup>53</sup> Tennessee Code Annotated. Title 39 (as amended), §39-17-306; *See also*: Gilmore Testimony, Transcript 6, p. 20.

<sup>54</sup> Tennessee Code Annotated. Title 39 (as amended), §39-14-408(c).

<sup>55</sup> Tennessee Code Annotated. Title 39 (as amended), §39-17-307(a)(1); *See also*: Page Written Testimony, p. 2; *See also*: Weinberg Testimony, Transcript 3, p. 4.

<sup>56</sup> Tennessee Code Annotated. Title 40 (as amended), §40-11-153(a); *See also*: Page, Written Testimony, p. 2; *See also*: Franklin Testimony, Transcript 1, p. 3; *See also*: Mulroy Testimony, Transcript 1, p. 9; *See also*: Weinberg, Testimony, Transcript 3, p. 4; *See also*: Gilmore Testimony, Transcript 6, p. 20.

<sup>57</sup> Mulroy Testimony, Transcript 1, p. 9.

<sup>58</sup> *Ibid*.

<sup>59</sup> Tennessee Code Annotated. Title 39 (as amended), §39-14-406(c).

<sup>60</sup> Stevens Testimony, Transcript 7, p. 6.

<sup>61</sup> Tennessee Code Annotated. Title 39 (as amended), §39-14-406(c).

<sup>62</sup> Stevens Testimony, Transcript 7, p. 6.

described in subdivision (F) in Section 22 of this act;

(2) The action taken by the appropriate district attorney for each report; and

(3) The legal disposition of any case resulting from each report.”<sup>63</sup>

The Committee heard from panelists on the negative impact these enhanced criminal consequences have on Tennesseans, particularly on their right to free speech. Elly Page, a Senior Legal Advisor at the International Center for Not-for-Profit Law who submitted written testimony to the Committee, stated “The law provides no exceptions for First Amendment activity, even though streets and sidewalks are public fora where protests and other expressive acts traditionally take place.”<sup>64</sup> Thomas Savage, State Vice President of the Tennessee Conference of the NAACP, testified that the enactment of this law “represents a blow to the free speech and assembly rights of all Tennesseans” and that it “hampers the ability of people to be free.”<sup>65</sup> Since the various offenses referenced throughout the amendments may carry a mandatory minimum sentence between thirty and ninety days of incarceration, Panelist Lindsey Smith, a Policy Analyst for State Senator Raumes Akbari of the 29<sup>th</sup> District at the time of the briefing, stated that this “just guarantees that we’re going to continue putting more people into correctional facilities without actually coming up with a solution.”<sup>66</sup>

## **Finding II: The Committee found that certain aspects of criminal law related to protesting within S.B. 8005 were already covered by existing laws.**

### *Laws Related to Property Destruction and Disorderly Conduct*

The Committee received information through oral and written testimony pointing out that Tennessee already had existing laws in place that addressed conduct highlighted in S.B. 8005. Elly Page of the International Center for Not-for-Profit Law noted that “states including Tennessee already have numerous laws prohibiting property destruction and violent conduct, undermining arguments that new legislation is needed to protect public safety.”<sup>67</sup> Tennessee’s vandalism law, for example, already addressed actions such as damage or destruction to personal or public property, including state property, as a criminal offense.<sup>68</sup> The state also already had laws in place regarding disorderly conduct.<sup>69</sup>

Panelist David Plazas, Opinion and Engagement Director at USA Today Network Tennessee, referenced an editorial piece he had published on this topic and stated that “Yes, there were

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<sup>63</sup> Tennessee Code Annotated. Title 8; Title 38; Title 39 and Title 40 (as amended), Section 23 <https://publications.tnsosfiles.com/acts/111/2nd%20Extraordinary%20Session/pc0003EOS.pdf>; *See also*: Stevens, Testimony, Transcript 7, p. 6-7.

<sup>64</sup> Page, Written Testimony, p. 2.

<sup>65</sup> Savage Testimony, Transcript 3, p. 8.

<sup>66</sup> Smith Testimony, Transcript 2, p. 17.

<sup>67</sup> Page, Written Testimony, p. 1-2.

<sup>68</sup> Tennessee Code Annotated. Title 39, §39-14-408(b)(1).

<sup>69</sup> Tennessee Code Annotated. Title 39, §39-17-305.



incidents of protestors blocking legislators' cars and handcuffing themselves to a capital railing,<sup>70</sup> but there are already laws to address these acts of civil disobedience.”<sup>71</sup> Plazas was referring to an instance during the protests outside the State Capitol in which about 20 people handcuffed themselves to a nearby balcony, resulting in 14 people being charged with criminal trespassing.<sup>72</sup> Similarly, Panelist Steven Mulroy stated:

“there already were laws on the books that criminalized trespass, criminalized vandalism, criminalized violence, so it wasn't clear to me that there was a compelling need for extra special legislation that would be...responding to this particular protest...my thinking is it already was criminalized and the particular way that this goes about singling out this kind of behavior for extra special, worse treatment seems to me somewhat concerning.”<sup>73</sup>

### *Laws Related to Camping on State Property*

In 2012, the State of Tennessee passed a law known as the “Equal Access to Public Property Act of 2012,” which originally established knowingly camping on state property unauthorized for this activity as a Class A misdemeanor. This was the same law that was amended by S.B. 8005 to enhance violations to a Class E felony.<sup>74</sup> According to James Tager, Research Director at PEN America, who submitted written testimony to the Committee,

“there was no legal penalty for camping out on state grounds prior to 2012, when state legislators made it a misdemeanor to camp on state property in response to Occupy Wall Street Protests. Notably, the 2012 law may indicate a pattern of practice among Tennessee lawmakers to respond to protests seen as left-wing through laws criminalizing protest-related behavior.”<sup>75</sup>

Tager was referring to the encampments near the State Capitol as part of the Occupy Wall Street protest in Nashville, which, according to news stories, the law reportedly aimed to shut down,

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<sup>70</sup> Hineman, Brinley. “Protesters handcuff themselves to railing outside Capitol.” *The Tennessean*. August 12, 2020. <https://www.tennessean.com/story/news/local/2020/08/12/protesters-handcuff-themselves-railing-outside-tennessee-capitol/3359740001/> (accessed August 11, 2023).

<sup>71</sup> Plazas Testimony, Transcript 2, p. 8; *See also*: Tennessee Code Annotated. Title 39, §39-17-307; *See also*: Tennessee Code Annotated. Title 39, §39-17-305; *See also*: USA Today Network Tennessee Editors. “Stripping a citizen's voting rights for peacefully protesting is abhorrent | Editorial.” *The Tennessean*. August 10, 2023. <https://www.tennessean.com/story/opinion/2020/08/17/tennessee-first-amendment-anti-protest-bill/5600429002/> (accessed August 10, 2023).

<sup>72</sup> Hineman, Brinley. “Protesters handcuff themselves to railing outside Capitol.” *The Tennessean*. August 12, 2020. <https://www.tennessean.com/story/news/local/2020/08/12/protesters-handcuff-themselves-railing-outside-tennessee-capitol/3359740001/> (accessed August 11, 2023).

<sup>73</sup> Mulroy Testimony, Transcript 1, p. 17.

<sup>74</sup> Tennessee Code Annotated. Title 39 (as amended), §39-14-414.

<sup>75</sup> Tager, Written Testimony, p. 6.

but also inadvertently used language that was broad enough to potentially harm the homeless population.<sup>76</sup>

Panelist Hedy Weinberg, who at the time of the briefing was the Director at the ACLU of Tennessee, shared about more recent, similar legislation and she described it as an extension of S.B. 8005.<sup>77</sup> S.B. 1610, which was signed into law by Governor Lee in 2022, is a set of amendments to the criminal code specific to camping.<sup>78</sup> It modifies existing language from the “Equal Access to Public Property Act of 2012” as well as S.B. 8005 and expands limitations to camping on state property to all public property.<sup>79</sup> Weinberg noted,

“This new law criminalizes unhoused people for sleeping on public property. Individuals can be charged with a felony offense under this law. The law is an extension of S.B. 8005, which made sleeping on state property a felony, and now S.B. 1610 extends that to all local property. Consider this, S.B. 8005 targeted the actions of a diverse group of folks peacefully protesting, and calling for racial justice, [and] S.B. 1610, which just became law, now extends that law and targets our most vulnerable, the unhoused community. In both cases, legislators and the governor used felony punishment as their weapon to chill speech and expression, harm demonstrators, and unhouse people, and disenfranchise Tennesseans.”<sup>80</sup>

Panelist Gautam Hans, who at the time of the briefing was Associate Clinical Professor of Law & Director of Stanton Foundation First Amendment Clinic at Vanderbilt University, also spoke on the consideration of existing laws in understanding S.B. 8005 and posed the following questions to the Committee: “What existing laws are on the books and what are the enforcement patterns, and can enforcement be a mechanism to sort of make those laws more effective, or try to prevent the behaviors that we find objectionable socially?”<sup>81</sup>

**Finding III: The Committee found that the legislative process behind S.B. 8005 included a shorter-than-usual timeline in which the legislation was passed. Testimony also indicated there was a lack of effort to directly communicate with protesters regarding their concerns.**

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<sup>76</sup> Leitsinger, Miranda. “Criminalizing homelessness? Fallout feared from anti-Occupy bill.” NBC News. February 29, 2012. <https://www.nbcnews.com/news/world/criminalizing-homelessness-fallout-feared-anti-occupy-bill-flna260954> (accessed August 11, 2023).

<sup>77</sup> Weinberg Testimony, Transcript 3, p. 6.

<sup>78</sup> Tennessee Code Annotated. Title 39, Chapter 14; Title 39, Chapter 17, Part 3 and Title 55, Chapter 8 (as amended). See: <https://publications.tnsosfiles.com/acts/112/pub/pc0986.pdf> for sections that were amended.

<sup>79</sup> Tennessee Code Annotated. Title 39, Chapter 14; Title 39, Chapter 17, Part 3 and Title 55, Chapter 8 (as amended). See: <https://publications.tnsosfiles.com/acts/112/pub/pc0986.pdf> for sections that were amended. This law includes additional information on camping and further amends various sections of §39-14-414 that had already been amended by the passage of S.B. 8005, specifically sections d and e.

<sup>80</sup> Weinberg Testimony, Transcript 3, p. 6.

<sup>81</sup> Hans Testimony, Transcript 1, p. 18.

### *S.B. 8005 was Passed Within an Unusually Swift Timeline*

Panelist and Tennessee State Senator Jeff Yarbrow, who represents the state's 21<sup>st</sup> District, shared with the Committee that a Special Session of the General Assembly was called by the Governor in August 2020.<sup>82</sup> “The items to be discussed included Covid-19 liability protections, telehealth services, and lastly, laws governing the Capitol grounds, which became S.B. 8005.”<sup>83</sup> Regarding this particular item, Senator Yarbrow shared “my understanding of that is that the legislative leadership demanded, when the governor was going to do the call, that that be included as one of the topics of the special session.”<sup>84</sup> Senator Yarbrow further shared that this Special Session lasted precisely three days, from August 10 to August 12, 2020, and that debates on the topic were among the most heated throughout his tenure at the legislature.<sup>85</sup> According to Senator Yarbrow, “significant portions of the legislation were unquestionably targeted at the precise protests that we were dealing with at the time.”<sup>86</sup>

The addition of the item regarding the Capitol grounds was also of concern to James Tager, who highlights in his written testimony that “S.B. 8005 was passed in a needlessly rushed process... While the first two measures are undeniably germane to the emergency of the pandemic, the inclusion of the last item on the agenda is given little justification.”<sup>87</sup> Tager further noted that the three days during which S.B. was deliberated is the bare minimum under the State Constitution<sup>88</sup> and stated that the fast pace at which deliberations were held was “procedurally irregular.”<sup>89</sup> Hans spoke to the short amount of time the General Assembly had to analyze and understand the potential effects of the law; he shared that he was not aware of any studies that were considered regarding the potential chilling effects on free speech or whether or how existing laws could mitigate the protests at the time.<sup>90</sup> Hans stated:

“I think that the Special Session and the timetable that was very aggressive and very unusual was not really designed to have that kind of analysis, which I think is unfortunate. I think that would've really potentially ameliorated some of the concerns that I and others had about the effects of what the law could do to chill protected speech and protected conduct.”<sup>91</sup>

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<sup>82</sup> Yarbrow Testimony, Transcript 6, p. 22.

<sup>83</sup> Office of the Governor. “Gov. Lee Calls Special Session for the Tennessee General Assembly on August 10, 2020.” Tennessee State Government. August 3, 2020. <https://www.tn.gov/governor/news/2020/8/3/gov--lee-calls-special-session-for-the-tennessee-general-assembly-on-august-10--2020.html> (accessed August 11, 2023); *See also*: Yarbrow Testimony, Transcript 6, p. 22.

<sup>84</sup> *Ibid*.

<sup>85</sup> Office of the Governor. “Gov. Lee Calls Special Session for the Tennessee General Assembly on August 10, 2020.” Tennessee State Government. August 3, 2020. <https://www.tn.gov/governor/news/2020/8/3/gov--lee-calls-special-session-for-the-tennessee-general-assembly-on-august-10--2020.html> (accessed August 11, 2023); *See also*: Yarbrow Testimony, Transcript 6, p. 22.

<sup>86</sup> *Ibid*.

<sup>87</sup> Tager, Written Testimony, p. 5.

<sup>88</sup> TN Const. art. 2 § 18; *See also*: Tager, Written Testimony, p. 5.

<sup>89</sup> Tager, Written Testimony, p. 5.

<sup>90</sup> Hans Testimony, Transcript 1, p. 19.

<sup>91</sup> *Ibid*; *See also*: Hans Testimony, Transcript 1, p. 18.

### *Impetus for Supporting S.B. 8005*

According to testimony received by the Committee, members of the Tennessee General Assembly who supported S.B. 8005 were influenced not only by the protests outside the Capitol, but by protest activity taking place nationwide at the time, particularly the autonomous zones in Seattle, Washington and Portland, Oregon.<sup>92</sup> Testimony received points to growing concerns legislators had at the time that the protests in Tennessee could escalate to the level of violence in the Pacific Northwest.<sup>93</sup> Senator Yarbrow told the Committee it was an emotional time and that, “it was a really interesting moment to see how much the national narrative really overwhelmed what people were actually experiencing on the ground and seeing with their own eyes.”<sup>94</sup>

In his testimony, Senator Stevens referenced protests that took place in Nashville on May 30, 2020, in which the Metro Courthouse was firebombed as “the beginnings of what was happening in Seattle,” and described this as “the impetus and the motivation for the legislation itself.”<sup>95</sup> Senator Stevens further stated that the events in Tennessee were “acts of subversion to lawful government” that went “beyond acceptable protest.”<sup>96</sup> He further stated “In my opinion, there is never an acceptable right to violently riot, that is never acceptable for protesting. Our form of government is based upon the right to protest, to address your elected officials, but once it moves into violence, it's no longer protesting.”<sup>97</sup>

In addition to the concerns about violence, Senator Stevens observed how public property is the property of every citizen of Tennessee.<sup>98</sup> He referenced past protests in which individuals remained outside the State Capitol for long periods of time, such as the Occupy Wall Street protests in 2012.<sup>99</sup> He recalled how the state allowed those protests to continue long-term but believes that was a misguided policy because it allowed only one viewpoint to be heard and that it is more appropriate for every viewpoint to be heard on public property.<sup>100</sup> Senator Stevens stated that in order to accomplish this, people should be incentivized so that

“if they recognize that the forfeiture of their right to participate in our system of government is part of the bargain they're into for this protest, if they're

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<sup>92</sup> Tager, Written Testimony, p. 5; *See also*: Yarbrow Testimony, Transcript 6, p. 23; *See also*: Stevens Testimony, Transcript 7, p. 3; For more information on the 2020 autonomous zone protests in Seattle, see: <https://www.nytimes.com/2020/07/01/us/seattle-protest-zone-CHOP-CHAZ-unrest.html>.

<sup>93</sup> Yarbrow Testimony, Transcript 6, p. 23.

<sup>94</sup> Yarbrow Testimony, Transcript 6, p. 38; *See also*: Yarbrow Testimony, Transcript 6, p. 23.

<sup>95</sup> Stevens Testimony, Transcript 7, p. 3; *See also*: Rau, Nate. “Nashville courthouse burns as peaceful protest turns into violent riot.” Tennessee Lookout. May 30, 2020. <https://tennesseelookout.com/2020/05/30/nashville-courthouse-burns-as-peaceful-protest-turns-into-violent-riot/> (accessed August 11, 2023).

<sup>96</sup> Stevens Testimony, Transcript 7, p. 3.

<sup>97</sup> *Ibid*.

<sup>98</sup> Stevens, Testimony, Transcript 7, p. 5-6.

<sup>99</sup> Stevens Testimony, Transcript 7, p. 8.

<sup>100</sup> *Ibid*.

legitimately trying to protest, then they will leave because they recognize that setting up an autonomous zone is not a legitimate form of protest.”<sup>101</sup>

Senator Stevens also provided the example of how visitors to the War Memorial Plaza could be excluded from that public space if the state allowed it to only be occupied by protesters.<sup>102</sup> He noted “we [the legislators] would've been choosing which side of that debate we preferred because we were disallowing others who didn't have the same viewpoint to come onto that public space.”<sup>103</sup>

Other panelists shared very different perspectives on how the public space outside the Capitol was managed during the protests. Amber Sherman, an organizer of the protests at Legislative Plaza who presented both public comment and written testimony to the Committee shared:

“Tennessee officials definitely expected us to give up after they constantly surveilled, and harassed people. Once it was clear that not only we were not leaving, but that our movement was growing in size, and in attention from the news, the state legislature strategically authored legislation to criminalize our protests, and take away our voting rights.”<sup>104</sup>

Former Tennessee State Senator Brenda Gilmore, who represented the State’s 19<sup>th</sup> District at the time of the briefing, said “their intentions were clear; instead of dealing with the issue of police brutality, the Governor and the super majority wanted the protestors gone.”<sup>105</sup>

### *Internal Concerns Regarding the Severity of the Bill’s Punitive Consequences*

In his testimony, Panelist David Plazas referenced reporting from Natalie Allison at USA TODAY Network Tennessee which highlighted internal concerns held by the Governor’s office and the legislature in regard to the severity of punishments that would be imposed by S.B. 8005.<sup>106</sup> Allison reported that “[Governor] Lee’s office, which stayed out of public discussion surrounding the bill, internally raised concerns about the extent of some of the punishments in light of the governor’s desire to implement various criminal justice reform measures.”<sup>107</sup>

Plazas noted that because the Governor “had been elected on a criminal justice reform platform, and continued to advocate for criminal justice reform throughout these years that he's been governor, he was concerned about it being too harsh and being antithetical to that.”<sup>108</sup> Further,

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<sup>101</sup> Stevens Testimony, Transcript 7, p. 8.

<sup>102</sup> Stevens Testimony, Transcript 7, p. 5.

<sup>103</sup> Ibid.

<sup>104</sup> Sherman, Public Comment, Transcript 3, p. 17.

<sup>105</sup> Gilmore Testimony, Transcript 6, p. 20.

<sup>106</sup> Plazas Testimony, Transcript 2, p. 5, 15.

<sup>107</sup> Allison, Natalie. “Tennessee legislature cracks down on protesters, making it a felony to camp overnight outside Capitol.” The Tennessean. August 12, 2020. <https://www.tennessean.com/story/news/politics/2020/08/12/tennessee-passes-law-targeting-protesters-makes-capitol-camping-felony/3354879001/> (accessed October 25, 2021); *See also:* Plazas Testimony, Transcript 2, p. 5.

<sup>108</sup> Plazas Testimony, Transcript 2, p. 15.

Plazas stated that “the bill and the rhetoric surrounding it contradict this focus on criminal justice reform... they [elected leadership] have an obligation to uphold and sustain democracy, even when exercising those rights is messy.”<sup>109</sup>

In her testimony, Senator Gilmore also expressed concern about the increased severity of charges in S.B. 8005 and efforts she undertook to dissuade this.<sup>110</sup> She and others met with District Attorney Funk several times to try to reduce the charges from felonies to misdemeanors. “There was a young protestor, as I recall, who was arrested for writing chalk on the sidewalk, which we all felt like that that was just a frivolous charge,” Senator Gilmore shared.<sup>111</sup>

Additional concerns included the potential costs associated with the bill upon its passage. Natalie Allison’s article also mentioned that another source of contention among the legislature and the Governor’s office was the cost of the bill, per year, which was estimated at \$1.3 million.<sup>112</sup> According to the Fiscal Memorandum for the bill with proposed amendments, the estimated state expenditures were \$504,20000 for incarceration and \$894,300 in local expenditures for fiscal years 2021-2022 and later.<sup>113</sup>

#### *A Lack of Communication Between the General Assembly and Protesters*

Certain panelists believed that an important issue arose prior to the passage of S.B. 8005 -- that there was a lack of effort from the government to directly address protesters’ concerns.<sup>114</sup> Panelist David Plazas stated that across his staff’s reporting, a common theme that emerged was that protesters felt unheard.<sup>115</sup> Due to not being successful in reaching elected officials during regular hours, “there was a perception that there was no other choice, but to express speech in a way that was perhaps uncomfortable and sometimes hyperbolic to the interpretation of the lawmakers.”<sup>116</sup>

Plazas noted that despite the overall peaceful nature of the protests at Legislative Plaza in which there was no evidence of direct harm to legislators, the passage of S.B. 8005 was a “slap in the face” to many protesters because it was as if the legislature was telling them “We’re not going to listen to you and we’re going to punish you for having camped out and for having after hours speech, essentially.”<sup>117</sup> Panelist Thomas Savage stated that “The governor refused to even meet with these activists... It is a job of the General Assembly to safeguard constitutional rights, and

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<sup>109</sup> Plazas Testimony, Transcript 2, p. 8.

<sup>110</sup> Gilmore Testimony, Transcript 6, p. 34.

<sup>111</sup> Ibid.

<sup>112</sup> Allison, Natalie. “Tennessee legislature cracks down on protesters, making it a felony to camp overnight outside Capitol.” The Tennessean. August 12, 2020. <https://www.tennessean.com/story/news/politics/2020/08/12/tennessee-passes-law-targeting-protesters-makes-capitol-camping-felony/3354879001/> (accessed October 25, 2021); *See also:* Plazas Testimony, Transcript 2, p. 5.

<sup>113</sup> Tennessee General Assembly Fiscal Review Committee. “Fiscal Note, HB 8005, August 8, 2020.” Tennessee General Assembly <http://www.capitol.tn.gov/Bills/111/Fiscal/HB8005.pdf> (accessed August 11, 2023).

<sup>114</sup> Plazas Testimony, Transcript 2, p. 12, 19; *See also:* Savage, Testimony, Transcript 3, p. 9.

<sup>115</sup> David Plazas, Testimony, Transcript 2, April 27, 2022, p. 19.

<sup>116</sup> Ibid.

<sup>117</sup> Plazas Testimony, Transcript 2, p. 19.

not tread on them.”<sup>118</sup> Plazas mentioned that upon a review of archives at his newsroom, the public opinion had an overall negative sentiment towards the passage of S.B. 8005, due to the swift time frame and lack of elected officials attempting to address protesters’ concerns.<sup>119</sup>

Regarding the lack of a meeting between the Governor and the protesters, Senator Stevens mentioned that it is generally challenging to meet with the Governor due to his many responsibilities. In addition, he noted the contradiction of the Governor meeting and listening to a group that is also, in the Senator’s view, establishing a subversive autonomous zone.<sup>120</sup> Further, he noted the difficulty in knowing who the leader of the group is, since protesters likely had different reasons for being there.<sup>121</sup> “I don’t know who you would’ve met with. I mean, you’re not negotiating certainly with them, so I don’t understand what there would be to meet with them. I don’t understand that. I don’t know what you would’ve benefited from that or what they would’ve even gotten out of it,” Senator Stevens said.<sup>122</sup>

#### *Efforts to Mitigate Concerns Surrounding S.B. 8005*

As an effort to address some of the concerns surrounding S.B. 8005, Senator Gilmore was the main sponsor of two bills filed in 2020 that ultimately failed in the Senate Judiciary Committee.<sup>123</sup> One of the bills, S.B. 8008, prohibited “local governments from infringing on the constitutional rights for people to protest peacefully,” according to Senator Gilmore.<sup>124</sup> Senator Gilmore further explained that her other proposed bill, S.B. 8012, “would have required officers and agents to clearly identify themselves as officer or agent when arresting a person during a protest or a demonstration.”<sup>125</sup>

#### **Finding IV: S.B. 8005 can result in the disenfranchisement of Tennesseans if they are convicted of a felony under this law.**

According to the Tennessee Constitution, “Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes.”<sup>126</sup> Several panelists highlighted the fact that individuals with felonies can lose their right to vote, with James Tager’s written testimony to the Committee claiming “Thus, S.B. 8005’s provision making it a felony for camping on state property must also be understood as a provision which strips people’s right to

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<sup>118</sup> Savage Testimony, Transcript 3, p. 9.

<sup>119</sup> Plazas Testimony, Transcript 2, p. 12.

<sup>120</sup> Stevens Testimony, Transcript 7, p. 9.

<sup>121</sup> Ibid.

<sup>122</sup> Stevens Testimony, Transcript 7, p. 9.

<sup>123</sup> Gilmore Testimony, Transcript 6, p. 34.

<sup>124</sup> S.B. 8008 (2020); *See also*: Gilmore Testimony, Transcript 6, p. 34.

<sup>125</sup> S.B. 8012 (2020); *See also*: Gilmore, Testimony, Transcript 6, p. 34.

<sup>126</sup> Tennessee Constitution, Art. 4, § 2.

vote if they are convicted of camping on state property.”<sup>127</sup> In Tennessee, there are approximately 472,000 residents who are disenfranchised due to past felony convictions, placing it only behind the state of Florida.<sup>128</sup> Furthermore, panelists noted the challenges that disenfranchised Tennesseans face in regaining the right to vote.<sup>129</sup> While the process of restoring voting rights can vary based on the nature of the offense and the date of conviction, requirements include the payment of all court fees and child support.<sup>130</sup> The Committee also received testimony regarding concerns about the impact of S.B. 8005 on people of color. Elly Page, who submitted written testimony to the Committee, shared that:

“The enactment of S.B. 8005 threatens to worsen the disparate impact of Tennessee’s felon disenfranchisement law, which disproportionately affects people of color. While 9 percent of Tennessee’s voting population cannot vote due to a felony conviction, the rate is 20 percent among black adults.”<sup>131</sup>

There were panelists who claimed that S.B. 8005 was targeting protesters specifically in order to take away their voting rights. James Tager’s testimony stated that the legislation was a response to the Black Lives Matter protests taking place at the time and noted

“this context makes it immediately apparent how the foreseeable effect of this bill is to penalize or retaliate against protesters seeking to engage in the same behavior. To put it most simply, this bill attempts to penalize Black Lives Matter protesters for exercising their First Amendment-guaranteed rights to assemble and to petition by camping out on state property and demanding to meet with their elected officials, punishing them for participating too directly in the democratic process by stripping away their right to vote.”<sup>132</sup>

Panelists Thomas Savage shared a similar notion when he stated that the law “reduces the legal space for protestors and make their voices heard. Matter of fact, they run out of space. The fact that this law could be used to effectively strip the right to vote from protestors, the very people assembling to assert their rights and to demand action from their elected officials demonstrates the anti-democratic nature of this bill.”<sup>133</sup> Senator Stevens’ testimony differed greatly from the concept of protestors being stripped of their right to vote and instead stated that “If you think

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<sup>127</sup> Tager, Written Testimony, p. 5; *See also*: Page, Written Testimony, p. 2-3; *See also*: Hans Testimony, Transcript 1, p. 21; *See also*: Weinberg, Testimony, Transcript 3, p. 4; *See also*: Savage Testimony, Transcript 3, p. 8; *See also*: Gilmore Testimony, Transcript 6, p. 20.

<sup>128</sup> Uggem, Christopher, Ryan Larson, Sarah Shannon, and Robert Stewart. “Locked Out 2022: Estimates of People Denied Voting Rights.” Sentencing Project. October 25, 2022. <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/> (accessed August 16, 2023); *Note*: Hedy Weinberg’s testimony cited a 2020 report from the Sentencing Project which estimated Tennessee’s disenfranchised population at 360,000 (*See*: Weinberg Testimony, Transcript 3, p. 4). This footnote provides an updated statistic.

<sup>129</sup> Weinberg Testimony, Transcript 3, p. 4.

<sup>130</sup> Hans Testimony, Transcript 1, p. 21; *See also*: Page, Written Testimony, p. 2-3; *See also*: Tennessee Secretary of State Tre Hargett. “Restoration of Voting Rights.” <https://sos.tn.gov/elections/guides/restoration-of-voting-rights> (accessed August 16, 2023).

<sup>131</sup> Page, Written Testimony, p. 3

<sup>132</sup> Tager, Written Testimony, p. 5.

<sup>133</sup> Savage Testimony, Transcript 3, p. 8-9.



violence is an appropriate form of protest, then you shouldn't be allowed to participate in the voting process because you obviously do not believe in our form of government.”<sup>134</sup> However, the Senator stated that such individuals can expunge those convictions and restore their voting rights, “once they decided they wanted to become active participants in our form of government again.”<sup>135</sup>

In addition to the possibility of losing the right to vote, the Committee also received testimony on other collateral consequences that could result from criminal charges. Amber Sherman highlighted in her written testimony that protesters facing misdemeanor or felony charges could face extreme stress and financial hardships.<sup>136</sup> Sherman also mentioned that many of the protesters of color were struggling with their cases even a year after the protests and had to attend several court dates, resulting in the loss of their jobs for having charges on their record, even if they were not convicted.<sup>137</sup> Panelist Lindsey Smith shared with the Committee that, in her view, the legislature sought to “penalize protests” by aiming to end the protests with the risk of disenfranchisement through the enhanced criminal penalties included in the law.<sup>138</sup>

### **Finding V: Through the testimony received, the Committee learned that S.B. 8005 caused a chilling effect that was observed immediately after the passage of the law.**

#### *Immediate Chilling Effects Caused by S.B. 8005*

The Committee heard testimony stating that the protests outside Legislative Plaza, which had continued throughout the Summer of 2020, were dispersed shortly after S.B. 8005 was signed into law. Senator Stevens, who supported the bill, shared that as soon as the legislature was done voting, “every protestor left that afternoon of their own accord.”<sup>139</sup> While he acknowledged that protests regularly take place at the Capitol and that they are allowed and encouraged, he stated that they should not be used to exclude viewpoints from public spaces.<sup>140</sup>

Other panelists testified that the dispersement occurred due in large part to the fear of the criminal penalties the law could impose.<sup>141</sup> Amber Sherman, an organizer who was present at the protests, stated via written testimony that “After the bill was passed and Governor Lee stated he would sign it, large groups of people left the plaza because they were afraid of more harassment and arrests.”<sup>142</sup> Panelist Hedy Weinberg described the law as “having the guise of protecting first

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<sup>134</sup> Stevens Testimony, Transcript 7, p. 4.

<sup>135</sup> Ibid.

<sup>136</sup> Sherman, Written Testimony, p. 1.

<sup>137</sup> Ibid.

<sup>138</sup> Smith Testimony, Transcript 2, p. 4.

<sup>139</sup> Stevens Testimony, Transcript 7, p. 5.

<sup>140</sup> Ibid.

<sup>141</sup> Page, Written Testimony, p. 1-2; *See also*: Sherman, Written Testimony, p. 1; *See also*: Weinberg Testimony, Transcript 3, p. 4.

<sup>142</sup> Sherman, Written Testimony, p. 1.

responders” through which “the state had used the threat of criminal penalties to attack free speech, and chill protest.”<sup>143</sup> Senator Yarbrow shared that according to protest flyers, the intention of protesters was to stay until their concerns were addressed.<sup>144</sup> He interprets the passage of the law as a strong statement that the protests in their current form could no longer continue.<sup>145</sup> Elly Page’s written testimony highlighted that according to organizers and activists in Tennessee, there was a general decline in the willingness to attend protests and demonstrations after S.B. 8005’s passage.<sup>146</sup> “According to one leading protest organizer,” Page wrote, “SB 8005 ‘had the effect of intimidating a lot of people from coming out,’ and ‘made a lot of people a little bit more fearful to participate.’”<sup>147</sup>

### *Impact of S.B. 8005 on Young People*

The testimony indicated that there were protesters, many of whom were young people, who did not have a thorough understanding of the legislation that had been passed, but they had heard about the risk of felonies and assumed it would apply to them.<sup>148</sup> “The average person doesn’t understand the law, they just understand the consequences associated and the majority crowd of young people didn’t want to endure trying to get a felony dismissed and the possibility of losing their voting rights,” stated Amber Sherman in her written testimony.<sup>149</sup> Panelist Sekou Franklin, Political Science Professor at Middle Tennessee State University, highlighted similar points in that S.B. 8005 was communicated broadly and young people are likely to think it will apply to them simply for participating in a protest.<sup>150</sup> Franklin believes that S.B. 8005 had a chilling effect on young people in particular because it can skew their understanding of their ability to vote.<sup>151</sup> “S.B. 8005 can potentially have a larger adverse impact on the youth vote, not just in terms of real voters, but also in terms of miscommunicating information or miscommunicating the process for voting to them,” said Franklin.<sup>152</sup>

According to Senator Gilmore, some of the protesters were middle schoolers as young as 14 who understood the main message of the law to be that it was illegal to camp out, regardless of whether, in reality, there were certain times and places where this would be allowed.<sup>153</sup> This misunderstanding and fear of risking arrest extended to a diverse group of individuals who participated in the protests. Devin Majors, a law student who provided public comment to the Committee, had attended the protests at Legislative Plaza and shared that he left in order to not be arrested and not hinder his opportunity to become licensed.<sup>154</sup> “It has discouraged me from

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<sup>143</sup> Weinberg Testimony, Transcript 3, p. 4.

<sup>144</sup> Yarbrow Testimony, Transcript 6, p. 37-38.

<sup>145</sup> Ibid.

<sup>146</sup> Page, Written Testimony, p. 2.

<sup>147</sup> Ibid.

<sup>148</sup> Sherman, Written Testimony, p. 1.

<sup>149</sup> Ibid.

<sup>150</sup> Franklin Testimony, Transcript 1, p. 15.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Gilmore Testimony, Transcript 6, p. 37.

<sup>154</sup> Majors, Public Comment, Transcript 3, p. 16.

protesting because I can't get arrested, trying to graduate and be a lawyer to represent clients. And I can't do so if you get charged with a felony for doing common types of protesting," said Majors.<sup>155</sup> Amber Sherman, who also provided public comment to the Committee, shared that the passage of this law "has drastically modified the behavior of young people in Tennessee" and that as an organizer, she had to write safety plans for others who were fearful of being convicted with felonies and losing their right to vote.<sup>156</sup>

### *S.B. 8005 and Free Speech*

Panelist Gautam Hans shared an analysis of First Amendment claims in relation to alleged chilling effects in which individuals may fear liability or consequences for activities that may constitute protected speech. and shared that it can be very difficult to measure chilling effects on speech that may result from a law or policy.<sup>157</sup> In the case of S.B. 8005, however, he stated that "it seems possible, even likely, that some individuals fear liability under the law for engaging and protecting expression, particularly because liability could also lead to disfranchisement."<sup>158</sup> In his 2020 editorial piece titled "Tennessee anti-camping bill was rushed and sends chilling message," Panelist David Plazas took the stance that the passage of the law sent a chilling message

"to people who already feel ignored, unheard and marginalized, that they must be content with socially acceptable means of protesting. Whatever that actually is, as protests are never meant to comfort the powerful... Protesting against injustice is not an attack on law enforcement. Empowering law enforcement to be heavy handed only undermines any efforts to build greater trust between the community and the authorities."<sup>159</sup>

## **Finding VI: The Committee heard testimony regarding an alleged disparate treatment of protesters at racial justice-related protests, including those focused on S.B. 8005, as compared to other types of protests.**

### *Increased Police Surveillance on S.B. 8005 Protests*

Written testimony submitted by Elly Page highlights that police have historically been more likely to be present and make arrests at protests with predominantly Black participants, with S.B.

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<sup>155</sup> Majors, Public Comment, Transcript 3, p. 17.

<sup>156</sup> Sherman, Public Comment, Transcript 3, p. 18.

<sup>157</sup> Hans Testimony, Transcript 1, p. 6-7.

<sup>158</sup> Ibid.

<sup>159</sup> Plazas Testimony, Transcript 2, p. 7; *See also*: Plazas, David. "Tennessee anti-camping bill was rushed and sends chilling message." The Tennessean. August 14, 2020. <https://www.tennessean.com/story/opinion/columnists/david-plazas/2020/08/14/tennessee-anti-camping-bill-protests-first-amendment/3371044001/> (accessed August 11, 2023).

8005-related protests not being an exception.<sup>160</sup> Panelists shared that there have been protests in the past that have been violent and disruptive and did not trigger this type of legislation.<sup>161</sup> Panelist Steven Mulroy highlighted this point in his testimony and said “I think both as a matter of legal challenge, but also probably more importantly as a matter of values, I think it's suspect that we single this out for that kind of special treatment.”<sup>162</sup> Regarding the 2020 protests generally, Page mentioned that “police were more than twice as likely to disperse and use force against protests focused on racial justice issues, as compared to right-wing demonstrations.”<sup>163</sup> James Tager, who also submitted written testimony to the Committee, shared similar points and noted that protesters involved in the S.B. 8005-related protests alleged that state troopers used unnecessary force in carrying out arrests.<sup>164</sup>

In his first-hand account of the protests, Devin Majors shared an instance of disparate treatment on behalf of law enforcement in his public comment to the Committee that occurred on June 13, 2020:

“Tennessee state troopers were surrounding protestors on the Legislative Plaza claiming they have closed the state grounds so they can pressure wash the Capital. I've then seen a white family on the Capital lawn, just walking around and they had no police officers surrounding them whatsoever. And when protestors went to the same area, the state troopers changed their line, so it appeared to me they were trying to prevent protestors.”<sup>165</sup>

Panelist Gautam Hans' testimony spoke to how the law does not discriminate based on the speakers' message but that the courts look to legislatures to enact time, place, and manner restrictions to regulate speech and expressive conduct.<sup>166</sup> However, Hans noted, the courts also look skeptically when legislation grants unbridled discretion to law enforcement.<sup>167</sup>

### *Legislators' Discomfort with Protesters as an Influence to Move Forward with S.B. 8005*

An issue that was raised by several panelists was that a motivation legislators had to vote for and apply the amendments brought forth by S.B. 8005 was their own discomfort with the behavior of protesters and who they were – a group comprised largely of young Black individuals. In her written testimony to the Committee, Amber Sherman mentioned a variety of protests previously held in Tennessee, and how none of them raised the need for legislation such as S.B. 8005:

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<sup>160</sup> Page, Written Testimony, p. 3.

<sup>161</sup> Mulroy, Testimony, Transcript 1, p. 17.

<sup>162</sup> Mulroy, Testimony, Transcript 1, p. 13.

<sup>163</sup> Page, Written Testimony, p. 3.

<sup>164</sup> Tager, Written Testimony, p. 3.

<sup>165</sup> Majors, Public Comment, Transcript 3, p. 16.

<sup>166</sup> Hans, Testimony, Transcript 1, p. 7.

<sup>167</sup> Ibid.

“There is a clear history of protest by various groups in Tennessee, whether that be white supremacists, first responders, or young folks. Look at the Occupy Wall Street movement or even the protest against Taxes which current sitting Tennessee Senators participated in” ... “It wasn’t until large groups of young folks of various races, mostly Black and White protested outside of the state Capitol for 60 plus days that the state legislature took action that clearly disenfranchises one of the largest voting blocks in the state which is millennials and newly eligible voters.”<sup>168</sup>

James Tager’s written testimony notes that there are reports about comments made by Senator Kerry Roberts, who supported the bill, and had expressed feeling “extremely uncomfortable” by protesters.<sup>169</sup> Senator Roberts had said he wished he “could convey to people is that it’s really hard to be sympathetic to what someone is saying when they are yelling at you, when they’re trying to shame you, when they’re calling you names and so forth.”<sup>170</sup> Tager’s written testimony further states that an opponent of the bill, Representative Jason Hodges, pointed out discrepancies in how the legislature treats different types of protests. Referencing a protest that took place earlier in 2020, Representative Hodges had said, “We seem not to worry about protesting when white people show up with AR-15s, but when Black people show up with signs, we try to pass legislation ... maybe that’s why they’re out there in the first place.”<sup>171</sup> Panelist Gautam Hans’ testimony referenced the dangers of using law offensively when he stated

“lawyers often observe that the law cannot remedy all social problems. Using the law to intimidate citizens because legislators dislike their messages, shows the dangers of using law offensively to target disfavored groups. Whether S.B. 8005 violates the first amendment is a question I can’t definitely answer, but I can confidently say that it offends first amendment values.”<sup>172</sup>

In his testimony, Panelist Sekou Franklin provided another example of disparate treatment of protest-related activity when he referenced school board meeting in Rutherford County where a young man had been heckled by other attendees for his views and his experience with the passing of his grandmother due to Covid-19.<sup>173</sup> Panelist Sekou Franklin stated “that protest in

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<sup>168</sup> Sherman, Written Testimony, p. 1.

<sup>169</sup> Tager, Written Testimony, p. 3-4; *See also*: Allison, Natalie. “Tennessee legislature cracks down on protesters, making it a felony to camp overnight outside Capitol.” The Tennessean. August 12, 2020.

<https://www.tennessean.com/story/news/politics/2020/08/12/tennessee-passes-law-targeting-protesters-makes-capitol-camping-felony/3354879001/> (accessed October 25, 2021)

<sup>170</sup> Tager, Written Testimony, p. 3-4; *See also*: Allison, Natalie. “Tennessee legislature cracks down on protesters, making it a felony to camp overnight outside Capitol.” The Tennessean. August 12, 2020.

<https://www.tennessean.com/story/news/politics/2020/08/12/tennessee-passes-law-targeting-protesters-makes-capitol-camping-felony/3354879001/> (accessed October 25, 2021)

<sup>171</sup> Tager, Written Testimony, p. 4; *See also*: Allison, Natalie. “Tennessee legislature cracks down on protesters, making it a felony to camp overnight outside Capitol.” The Tennessean. August 12, 2020.

<https://www.tennessean.com/story/news/politics/2020/08/12/tennessee-passes-law-targeting-protesters-makes-capitol-camping-felony/3354879001/> (accessed October 25, 2021)

<sup>172</sup> Hans Testimony, Transcript 1, p. 8.

<sup>173</sup> Franklin Testimony, Transcript 1, p. 5; *See also*: Hineman, Brinley. “Franklin alderman 'appalled' by national attention after viral Tennessee school board meetings.” The Tennessean. September 15, 2021.

Franklin, Tennessee could literally be classified as a violation of S.B. 8005, but the application of that law is disproportionate. The application of that law was not applied to those parents who were protesting.”<sup>174</sup> In a similar vein, James Tager wrote to the Committee that “Only in response to the Black Lives Matter protests, however, have Tennessee lawmakers responded through criminal provisions that would strip the right to vote from those found guilty of camping on state property.”<sup>175</sup> Reflecting on the general reactions to the protests, Panelist David Plazas stated that “there is not one correct way to protest,” as protests will always occur with someone in opposition and he encouraged that reactions be more solutions-focused in terms of attempting to understand the reasons for the protest and addressing it, rather than exacerbating the issue.<sup>176</sup>

### **Finding VII: The Committee found that it is unclear how discretion may be used when S.B. 8005 is being enforced.**

Throughout the testimony received on S.B. 8005, several panelists raised points regarding *how* discretion will be used to enforce the new law. Referencing the amendment to the criminal code that criminalizes knowingly camping on state property that is not authorized for this activity,<sup>177</sup> Panelist Sekou Franklin mentioned that there is state property across the state that one may not realize falls under this category and questions how the law is applied in these situations given how broad the language of the bill was.<sup>178</sup> In Senator Yarbrow’s view, “these statutes were passed in response to a very particular piece of state property [in reference to the State Capitol], one that is traditionally used for petition and for protest.”<sup>179</sup>

Senator Yarbrow also testified about the breadth of the camping limitations set forth in S.B. 8005 and gave the example of how someone who might visit a state park and fall asleep on the grounds may be in violation of the law and commit a felony.<sup>180</sup> Although he believes that there is a general understanding that such instances are not the target of the law, the lack of specificity creates what he calls “a realm of very broad and arbitrary enforcement in this time, place, and manner context.”<sup>181</sup> Furthermore, Yarbrow stated that the statute was “passed for what are perceived, I think, as people who are camping on state property and are not desired to be there. And I think that that creates a significant issue.”<sup>182</sup> Yarbrow also highlighted the fact that this

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<https://www.tennessean.com/story/news/local/williamson/franklin/2021/09/15/franklin-alderman-slams-tennessee-viral-anti-mask-meetings/8342469002/> (accessed August 18, 2023).

<sup>174</sup> Franklin Testimony, Transcript 1, p. 5.

<sup>175</sup> Tager, Written Testimony, p. 6.

<sup>176</sup> Plazas Testimony, Transcript 2, p. 19.

<sup>177</sup> Tennessee Code Annotated, Title 39 (as amended), §39-14-414(d)(1).

<sup>178</sup> Franklin Testimony, Transcript 1, p. 16; *See also*: “Real Estate for Sale.” TN Department of General Services. <https://www.tn.gov/generalservices/real-estate/-redirect-stream/surplus-real-estate/real-estate-for-sale.html> (accessed August 21, 2023); *See also*: “State-Owned Land Dashboard.” TN Department of General Services. <https://tnmap.tn.gov/tnstateownedlanddashboard/> (accessed August 21, 2023).

<sup>179</sup> Yarbrow Testimony, Transcript 6, p. 29.

<sup>180</sup> Yarbrow Testimony, Transcript 6, p. 28.

<sup>181</sup> *Ibid*.

<sup>182</sup> Yarbrow Testimony, Transcript 6, p. 32.

legislation was presented in a special session during a particular protest, which, in his view, puts the neutrality of the law into question.<sup>183</sup> In regard to the vagueness of the statute, Panelist David Plazas stated that “it can be dangerous to decide who gets to speak and who doesn't.”<sup>184</sup>

As to the actual application of the camping statute in S.B. 8005, Senator Stevens stated in his testimony that such activities would only become felonious when individuals are notified that what they are doing is illegal.<sup>185</sup> He specified in his testimony that if law enforcement informs someone that they must leave, and they refuse to, that is when the activity would become an offense.<sup>186</sup> When asked by the Committee if the same activity would not be a felony without a warning, Senator Stevens concurred and stated that there is a *mens rea* element to the law in which the person carrying out the activity must have an intention to violate the law.<sup>187</sup> The Senator described the various uses of War Memorial Plaza as an example. It is a regular site for protests *and* there are also numerous homeless individuals at that area who may receive charitable assistance there. “I think law enforcement can recognize the difference between individuals who are accessing services provided through the charitable goodness of people's hearts versus individuals who are intent on violating the law,” said the Senator.<sup>188</sup>

## Recommendations

Among their duties, advisory committees of the Commission are authorized to advise the Agency concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws, and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.<sup>189</sup> In keeping with these responsibilities, and given the testimony heard on this topic, the Committee submits the following recommendations to the Commission:

1. The U.S. Commission on Civil Rights should:
  - a. *Condemn legislation that may be enforced selectively and/or applied based on underlying speech's content.*
  - b. *Encourage the legislature to collect information about arrests and prosecutions under S.B. 8005, with particular attention to disparate impact on the federally protected classes of race, color, national origin, sex, disability, and religion.*

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<sup>183</sup> Yarbro Testimony, Transcript 6, p. 32.

<sup>184</sup> Plazas Testimony, Transcript 2, p. 20.

<sup>185</sup> Stevens Testimony, Transcript 7, p. 10.

<sup>186</sup> Ibid.

<sup>187</sup> Stevens Testimony, Transcript 7, p. 11; For more information on the legal term “mens rea,” please see: [https://www.law.cornell.edu/wex/mens\\_rea](https://www.law.cornell.edu/wex/mens_rea).

<sup>188</sup> Stevens Testimony, Transcript 7, p. 11.

<sup>189</sup> 45 C.F.R. § 703.2 (2018).

2. The U.S. Commission on Civil Rights should send this report and issue a formal request to the Tennessee General Assembly to:

- a. *Avoid passing legislation whose targeted activity is already subject to penalty by existing statute without sufficient public input, research, hearings and deliberation on an evidentiary basis for such legislative change.*
- b. *Review and consider repealing or modifying the legislative changes that were imposed under the exigencies of the summer of 2020 by enactment of S.B. 8005.*
- c. *Repeal the provision of S.B. 8005 that enhanced the criminal liability for a violation from a misdemeanor to a Class E felony violation.*
- d. *Repeal the 12-hour hold requirement for persons arrested under the Act.*
- e. *Consider enacting clarifying legislation to address the Act's vague, ambiguous, and over broad language regarding the prohibited conduct in general, and specifically by:*
  - i. *amending the Act's language to address the concern that the term "camping" risks treating peaceful protests and/or sleeping on public property as a felony subject to imprisonment and disenfranchisement,*
  - ii. *amending the Act's language regarding "marking" of state property in order to ensure that inconsequential conduct, such as a youth's use of chalk on a sidewalk, does not trigger a felonious arrest, as has been reported.*
- f. *Consider, to the extent not already required by law, requiring local and state law enforcement to clearly identify themselves as officers when arresting a person during a peaceful protest or demonstration to decrease the risk to public safety and of infringing on the constitutional rights of citizens.*
- g. *In order to best advance possible legislative reform in this area going forward, establish a panel of state / local policymakers to hear from Tennesseans who were impacted by the passage of S.B. 8005, including those who were arrested and those who believe that their constitutional rights of free speech and assembly were unreasonably burdened by its passage.*

3. The U.S. Commission on Civil Rights should send this report and issue a formal request to the Tennessee Governor to:

- a. *Veto legislation that limits voting access when the legislation passes during a special legislative session.*



## **Part II:**

### **Access to Voting During the Pandemic**

## Background

2020 saw the first general election amidst the Covid-19 pandemic and spurred a variety of approaches in how states eased or expanded voting options. Knowing that the pandemic was exacerbating pre-existing inequalities and in response to public health concerns nationally, federal, state, and local governments throughout the country modified the existing infrastructure of absentee voting and voting by mail to increase voter accessibility.<sup>190</sup> Changes to voting practices varied significantly by state, but the recurring changes included expanding voter eligibility for absentee ballots, developing online absentee ballot request sites, mailing absentee ballots to the addresses of registered voters, providing prepaid postage for mailing ballots, and installing secure ballot drop boxes in local districts.<sup>191</sup>

Due to the unprecedented circumstances, the Tennessee Secretary of State's Division of Elections published a "Tennessee Election Covid-19 Contingency Plan" to provide guidance to local election commissions on managing election operations.<sup>192</sup> In a survey conducted by the nonprofit ThinkTennessee of Tennessee election administrators on the outcomes of the November 2020 general election, respondents reported that their pandemic response measures worked well and noted that their biggest challenge was the increase in demand for absentee voting, more than preparing polling places for socially-distanced voting.<sup>193</sup>

Testimony received by the Committee indicated that making voting more accessible resulted in an overall increase in voter turnout nationally, and even though there was partisan rhetoric about the effects of making voting easier, suggesting it might have increased democratic turnout, research shows there was not a partisan effect and the increase in voter turnout was across the board.<sup>194</sup>

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<sup>190</sup> Weiser, Wendy R, Sweren-Becker, Eliza, Erney, Dominique, & Glatz, Anne. "Mail voting: What has changed in 2020," Brennan Center. <https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020> (accessed October 23, 2021); *See also*: Mattise, Johnathan. "Judge in mail voting ruling won't seek reelection." AP News. June 10, 2021. <https://apnews.com/article/government-and-politics-donald-trump-health-tn-state-wire-election-2020-5fbb153aee368fb2ac7d9123b7aaa14b> (accessed November 2, 2021).

<sup>191</sup> Weiser, Wendy R, Sweren-Becker, Eliza, Erney, Dominique, & Glatz, Anne. "Mail voting: What has changed in 2020," Brennan Center. <https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020> (accessed October 23, 2021)

<sup>192</sup> Tennessee Secretary of State Division of Elections. "Tennessee Election Covid-19 Contingency Plan," April 23, 2020. <https://www.courthousenews.com/wp-content/uploads/2020/05/COVID-19-Plan.pdf> (accessed November 18, 2023).

<sup>193</sup> Think Tennessee, "Election 2020 After Action Report: Four Opportunities to Further Strengthen Tennessee's Election System", May 2021. <https://www.thinktennessee.org/wp-content/uploads/2021/05/November-2020-After-Action-Report.pdf> (accessed December 4, 2023).

<sup>194</sup> Coll Testimony. Transcript 4, p. 8.

## *Voter Turnout*

Tennessee trails most other states on two key indicators of civic engagement, voter registration and voter turnout.<sup>195</sup> The U.S. Census Bureau released data from 2020 indicating that less than 75% of the total population in over half of U.S. states, including Tennessee, are registered to vote.<sup>196</sup> Despite the various challenges facing Tennessee voters in the first year of the pandemic, the Secretary of State reported record-breaking voter turnout for the 2020 general election, with over 3 million Tennesseans casting their ballots either via early voting, voting on Election Day, or submitting absentee ballots.<sup>197</sup> This was equivalent to a 59.6% voter turnout throughout the state, about seven percentage points below the national average of 66.2% and a 20 percentage point difference between Tennessee and the highest turnout state (Minnesota at 79.6%).<sup>198</sup> Since then, however, voter turnout in Tennessee remains one of the lowest in the country.<sup>199</sup> The U.S. Census Bureau estimates that 44.5% of Tennessee's estimated eligible voting population voted in November 2022.<sup>200</sup> That is nearly eight points behind the national average (52.2%).<sup>201</sup>

Although Tennessee offers online voter registration and a two-week early voting period, there are factors that may affect voter turnout, including the fact that it is one of a few states with a 30-day voter registration deadline, the longest period permissible under federal law.<sup>202</sup> Other states offer shorter windows of time to register before Election Day, or no deadline at all and instead offer Same Day Registration.<sup>203</sup> In an analysis of Tennessee calls to the Lawyers Committee for Civil Rights Under Law voter hotline during the 2020 General Election, most calls concerned

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<sup>195</sup> Schluckebier Testimony, Transcript 4, p. 3.

<sup>196</sup> Kaiser Family Foundation. "Voting and Voter Registration as a Share of the Voter Population, by Race/Ethnicity." State Health Facts. <https://www.kff.org/other/state-indicator/voting-and-voter-registration-as-a-share-of-the-voter-population-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (accessed October 23, 2021).

<sup>197</sup> Tennessee Secretary of State Tre Hargett. "Tennessee Breaks Voter Turnout and Participation Records." Tennessee Secretary of State. <https://sos.tn.gov/news/tennessee-breaks-voter-turnout-and-participation-records>. (accessed November 2, 2021).

<sup>198</sup> Coll, Testimony, Transcript 4, p. 8.

<sup>199</sup> Think Tennessee, "Election 2022 After Action Report", 2020, <https://www.thinktennessee.org/wp-content/uploads/2023/08/2022-election-after-action-report.pdf> (accessed December 4, 2023).

<sup>200</sup> Think Tennessee, "Election 2022 After Action Report", 2020, <https://www.thinktennessee.org/wp-content/uploads/2023/08/2022-election-after-action-report.pdf> (accessed December 4, 2023).

<sup>201</sup> Think Tennessee, "Election 2022 After Action Report", 2020, <https://www.thinktennessee.org/wp-content/uploads/2023/08/2022-election-after-action-report.pdf> (accessed December 4, 2023).

<sup>202</sup> 52 USC Ch. 205 § 20507; *See also*: Tennessee Secretary of State Tre Hargett. "How to Register to Vote." <https://sos.tn.gov/elections/guides/how-to-register-to-vote> (accessed December 19, 2023); *See also*: Schluckebier, Testimony. Transcript 4, p. 3.

<sup>203</sup> Schluckebier, Testimony, Transcript 4, p. 3; *See also*: National Council of State Legislatures. "Voter Registration Deadlines." Updated December 11, 2023. <https://www.ncsl.org/elections-and-campaigns/voter-registration-deadlines> (accessed December 19, 2023).

questions about the voter registration process and where to find a polling place, signaling confusion among voters regarding basic information.<sup>204</sup>

Furthermore, Tennessee has strict requirements for individuals with felony convictions to be able to restore their right to vote. Returning citizens with convictions that qualify for restoration who have completed their sentences, including parole and probation, must be able to demonstrate that they have paid all outstanding legal financial obligations, including court fees and restitution, to have their voting rights restored.<sup>205</sup> Tennessee is the only state that also requires them to demonstrate that they are current on all child support obligations.<sup>206</sup> Data from the Lawyers Committee for Civil Rights Under Law voter hotline during the 2020 General Election indicated that 25 calls concerned voter registration for Tennesseans with prior felony convictions, including more than half of callers who wanted to vote in the 2020 election but had not completed Tennessee's complex restoration process.<sup>207</sup>

### *Absentee Voting*

The state of Tennessee is one of five states where strict absentee ballot rules generally remained unchanged.<sup>208</sup> It is one of a few states that requires that potential absentee voters meet certain eligibility criteria to validate why they must cast their ballot by absentee vote.<sup>209</sup> This requirement ensued a series of legal actions on pushing for an expansion of absentee voting which was ultimately successful but limited to individuals with heightened Covid-19 risk and their caretakers.<sup>210</sup> Unlike other states, Tennessee did not afford every voter with the option to vote absentee during the pandemic.<sup>211</sup> There was an exception for first-time voters, who

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<sup>204</sup> Think Tennessee, "Election 2020 After Action Report: Four Opportunities to Further Strengthen Tennessee's Election System", May 2021. <https://www.thinktennessee.org/wp-content/uploads/2021/05/November-2020-After-Action-Report.pdf> (accessed December 4, 2023).

<sup>205</sup> Tennessee Code Title 40. Criminal Procedure § 40-29-202 (b)(2); Schluckebier Testimony, Transcript 4, p. 4; Weinberg Testimony, Transcript 3, p. 4; Mulroy Testimony, Transcript 1, p. 9; See also Tennessee Advisory Committee to the U.S. Commission on Civil Rights, Legal Financial Obligations in the Tennessee Criminal Justice System, 2019, p. 25 (hereinafter Tennessee Advisory Committee, Legal Financial Obligations) <https://www.usccr.gov/files/pubs/2020/01-15-TN-LFO-Report.pdf>. (accessed October 13, 2022).

<sup>206</sup> Tennessee Code Title 40. Criminal Procedure § 40-29-202 (c); Weinberg Testimony, Transcript 3, p. 7; Tennessee Advisory Committee, Legal Financial Obligations, p. 16; Mulroy Testimony. Transcript 1, p. 9.

<sup>207</sup> Think Tennessee, "Election 2020 After Action Report: Four Opportunities to Further Strengthen Tennessee's Election System", May 2021, <https://www.thinktennessee.org/wp-content/uploads/2021/05/November-2020-After-Action-Report.pdf> (accessed December 4, 2023).

<sup>208</sup> Scanland, Quinn. "States rules around voting amid the pandemic." ABC News. September 22, 2020. <https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089> (accessed October 23, 2021).

<sup>209</sup> Tennessee Code Annotated. Title 2, Chapter 6, §2-6-201. Tennessee Secretary of State Tre Hargett. "Guide to Absentee Voting." <https://sos.tn.gov/elections/guides/guide-to-absentee-voting> (accessed September 27, 2022).

<sup>210</sup> Ibid; See also: Finding I, p. 36.

<sup>211</sup> Think Tennessee, "Voting During the Pandemic: How Tennessee Elections are Adapting to Covid-19", October 2020, <https://www.thinktennessee.org/wp-content/uploads/2020/11/final-voting-in-a-pandemic-nov-2020-update.pdf> (accessed December 5, 2023); See also: California, Colorado and Hawaii were among the states that

registered via a method other than in person, online or by mail, and were otherwise eligible could also newly vote absentee in the November 2020 election.<sup>212</sup> Previously, the state required these voters to cast their ballots in person for their first election.<sup>213</sup> The matter of access to absentee ballots is further explored by the Committee in this report.<sup>214</sup>

According to a 2020 report from the nonprofit Think Tennessee, at the national level, 67% of voters favored temporarily changing election laws to allow everyone to vote absentee that November. In Tennessee, even if an at-risk voter was able to vote absentee, a member of their household may not be.<sup>215</sup> Demand for alternative ways to vote was high, as it was reported that absentee ballots typically make up 2% of votes cast in Tennessee, but in August 2020, they made up 12% of all votes cast.<sup>216</sup> Despite this increase and concerns around security measures and verification processes for the absentee ballots, there were no major issues or delays reported by counties as they tallied initial votes.<sup>217</sup> Since this spike in absentee voting during the 2020 elections, rates have returned to their previous trends, with 2.6% of ballots cast using absentee voting for the 2022 midterm election.<sup>218</sup>

### *Distribution of Absentee Ballot Applications*

Another area highlighted in the testimony includes information regarding a state law that prohibits the distribution of absentee ballot applications and classifies this action as a Class E felony.<sup>219</sup> Tennessee is the only state to impose this restriction.<sup>220</sup> This law was challenged by voting rights advocates in 2020 who claimed that the criminal consequences infringed on First

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automatically sent voters an absentee ballot during the pandemic, *See*: Kamarck, Elaine, et al. "Voting by mail in a pandemic: A state-by-state scorecard." Brookings. October 2020. <https://www.brookings.edu/articles/voting-by-mail-in-a-pandemic-a-state-by-state-scorecard/> (accessed December 19, 2023).

<sup>212</sup> Think Tennessee, "Election 2020 After Action Report: Four Opportunities to Further Strengthen Tennessee's Election System", May 2021, <https://www.thinktennessee.org/wp-content/uploads/2021/05/November-2020-After-Action-Report.pdf> (accessed December 4, 2023).

<sup>213</sup> Think Tennessee, "Election 2020 After Action Report: Four Opportunities to Further Strengthen Tennessee's Election System", May 2021, <https://www.thinktennessee.org/wp-content/uploads/2021/05/November-2020-After-Action-Report.pdf> (accessed December 4, 2023).

<sup>214</sup> *See*: Finding I, p. 36.

<sup>215</sup> Think Tennessee, "Voting During the Pandemic: Temporarily Expanding Absentee Voting Will Protect Tennessee Voters", May 2020, [https://www.thinktennessee.org/wp-content/uploads/2020/11/200612-thinktn\\_expanding-absentee-two-pager-1.pdf](https://www.thinktennessee.org/wp-content/uploads/2020/11/200612-thinktn_expanding-absentee-two-pager-1.pdf) (accessed December 5, 2023).

<sup>216</sup> Think Tennessee, "Voting During the Pandemic: How Tennessee Elections are Adapting to Covid-19", October 2020, <https://www.thinktennessee.org/wp-content/uploads/2020/11/final-voting-in-a-pandemic-nov-2020-update.pdf> (December 5, 2023).

<sup>217</sup> *Ibid*.

<sup>218</sup> Think Tennessee, "Election 2022 After Action Report", 2020, <https://www.thinktennessee.org/wp-content/uploads/2023/08/2022-election-after-action-report.pdf> (accessed December 4, 2023).

<sup>219</sup> Tennessee Code Annotated. Title 2 (as amended), §2-6-202(c)(3).

<sup>220</sup> Timms, Mariah. "Judge won't block Tennessee law with heavy penalties for sharing absentee ballot request forms." *The Tennessean*. September 24, 2020. <https://www.tennessean.com/story/news/politics/2020/09/24/tennessee-ballot-sharing-punishments-not-blocked-federal-judge/3512816001/> (accessed November 2, 2021).

Amendment rights, but it was ultimately determined in October 2023 by the 6<sup>th</sup> Circuit Court of Appeals that the law is not in such violation.<sup>221</sup> On Tuesday, January 23, 2024, *Hopkins v. Hosemann*, the 5th Circuit panel decision striking down on 8th Amendment grounds Mississippi’s lifetime felon disenfranchisement statute, was reargued before the 5th Circuit Court of Appeals En Banc.<sup>222</sup> While a ruling has not yet been issued, the Committee notes that this case is relevant to felon disenfranchisement. In November 2020, 31.8% of the 1.4 million registered voters in Tennessee were aged 60 or older, and at the county level, 86% of counties throughout the state had a higher number of registered voters aged 60 or older, some comprising up to 55% of the registered voter population in their county.<sup>223</sup> This is significant in considering that this is one of several voting groups who may need help in deciding whether or not to vote absentee, and restrictions on receiving absentee ballot applications may pose barriers in their understanding of the process.<sup>224</sup>

These are among the aspects of access to voting that are considered by the Committee in further detail in the following Findings section.

## **Findings**

In keeping with their duty to inform the Commission of (1) matters related to discrimination or a denial of equal protection of the laws; and (2) matters of mutual concern in the preparation of reports of the Commission to the President and the Congress,<sup>225</sup> the Tennessee Advisory Committee submits the following findings to the Commission regarding the civil rights effects of access to voting during the pandemic. This report seeks to highlight the most salient civil-rights themes as they emerged from the Committee’s inquiry. The complete meeting transcripts and written testimony received are included in [Appendix \_\_\_] for further reference.

### **Finding I: Tennessee is an “excuse” state with a restrictive approach to absentee voting that persisted during the COVID-19 pandemic.**

#### *“Excuse” Requirement for Absentee Voting*

The Committee heard testimony to the effect that Tennessee has a restrictive approach on absentee voting, requiring that potential absentee voters provide an “excuse” as to why they must cast their ballot by absentee vote.<sup>226</sup> It is one of only 16 states that requires an affirmative excuse

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<sup>221</sup> *Lichtenstein v. Hargett*, 83 F.4th 575 (C.A.6 (Tenn.), 2023).

<sup>222</sup> *Hopkins v. Hosemann*, 83 F.4th 312 (5th Cir. 2023).

<sup>223</sup> Schluckebier Testimony, Transcript 4, p. 6.

<sup>224</sup> *Ibid.*

<sup>225</sup> 45 C.F.R. § 703.2 (2018).

<sup>226</sup> Mulroy Testimony, Transcript 1, p. 10; Weinberg Testimony, Transcript 3, p. 5; Schluckebier Testimony, Transcript 4, p. 4; Coll Testimony, Transcript 4, p. 7; Kelly Testimony, Transcript 4, p. 12. Tennessee Secretary of

in order to vote absentee, as opposed to doing it entirely by mail or having a no excuse absentee voting regime.”<sup>227</sup> Most states allow a more permissive absentee voting process, not requiring voters provide a state-approved reason for the absentee ballot.<sup>228</sup>

One excuse under Tennessee law for absentee voting is “illness.”<sup>229</sup> In 2020, there was uncertainty surrounding how this medical or health exception was interpreted—whether fear of COVID-19 was a valid excuse for an absentee vote under the illness exception.<sup>230</sup> In the Tennessee Chancery Court, a temporary injunction was approved in which it was acknowledged that fear of COVID-19 was a valid excuse for an absentee vote.<sup>231</sup> The state had initially acknowledged that anyone with COVID-19 or who was quarantining due to potential COVID-19 exposure was eligible under state law to vote absentee. After months of litigation, the State ultimately further conceded, at oral argument before the Tennessee Supreme Court, that state law also authorized absentee voting for any person with an underlying medical or health condition that either made them more susceptible to catching COVID or placed them at greater risk if they contracted it, as well as their caretakers.<sup>232</sup> The associated lawsuit had originally been filed by a group of Memphis voters led by witness Rev. Earle Fisher who argued that Tennesseans should not have to choose between their health and their vote, and was later joined by ACLU Tennessee and several partners.<sup>233</sup> This injunction was later vacated in September of 2020 by the Tennessee Supreme Court and there were no additional exceptions or concessions to the requirement that “reasons” be given by those seeking to vote by absentee ballot.<sup>234</sup> According to panelist Michael T. Morley, Law Professor at Florida State University, this was the most significant judicial ruling concerning Tennessee election law during the 2020 election cycle.<sup>235</sup> The Supreme Court’s decision returned the state to its previous eligibility standards, and the exceptions were no longer in effect for the November election that year.<sup>236</sup>

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State Tre Hargett. “Guide to Absentee Voting.” <https://sos.tn.gov/elections/guides/guide-to-absentee-voting> (accessed September 27, 2022).

<sup>227</sup> Mulroy Testimony, Transcript 1, p. 10; National Conference of State Legislatures. “Table 2: Excuses to Vote Absentee.” July 12, 2022. <https://www.ncsl.org/elections-and-campaigns/table-2-excuses-to-vote-absentee> (accessed September 25, 2022); Examples of other states with “excuse” requirements include South Carolina, West Virginia, and Louisiana.

<sup>228</sup> “Table 1: States with No-Excuse Absentee Voting,” National Conference of State Legislatures, <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx>; (accessed October 13, 2022); Weinberg Testimony, Transcript 3, p. 5.

<sup>229</sup> Tennessee Code Annotated. Title 2. Elections § 2-6-201(5); Morley Testimony. Transcript 6, p. 24.

<sup>230</sup> *Fisher v. Hargett*, 604 S.W.3d 381, 385 (Tenn. 2020).

<sup>231</sup> *Lay v. Goins*, Tenn. Ch. Ct., No. 20-454-IV(III), (Tenn. 2020); Morley Testimony, Transcript 6, p. 24. *Note*: Panelist Steven Mulroy clarified to USCCR that the Chancery Court issued identical injunction orders separately and on the same day in the parallel *Lay v. Goins* and *Fisher v. Hargett* litigation and provided the following citation for the *Fisher v. Hargett* litigation Memorandum & Order Granting Temporary Injunction, *Fisher v. Hargett*, No. 20-453-IV(III) (Tenn. Chanc. Ct. Jun. 4, 2020).

<sup>232</sup> *Fisher v. Hargett*, 604 S.W.3d 381, 385, 406 n.1 (Lee, J., dissenting.) *Note*: Panelist Steven Mulroy provided clarification to USCCR regarding the timeline of the litigation.

<sup>233</sup> 230 *Id.* at 388-390. *Note*: Panelist Steven Mulroy provided clarification to USCCR on the order in which the lawsuits were filed and the entities that filed them.

<sup>234</sup> *Fisher v. Hargett*, 604 S.W.3d 381, 385-86 (Tenn. 2020); Morley Testimony, Transcript 6, p. 24.

<sup>235</sup> Morley Testimony, Transcript 6, p. 24.

<sup>236</sup> Gould Testimony. Transcript 6, p. 7; Timms, Mariah. “Fear of COVID-19 will not be reason to vote absentee in November, Tennessee Supreme Court rules.” August 6, 2020.

Tennessee also continues to require that absentee ballots be returned by mail and received by the close of polls on Election Day.<sup>237</sup> In some other states, voters may hand-deliver ballots to election offices and polling places that provide secure ballot boxes.<sup>238</sup> The Committee heard testimony that during the 2020 election, there was a nationwide concern about the United States Postal Service’s capacity.<sup>239</sup> The United States Postal Service admitted problems with postal delivery at the time, announcing that it “considered seven days to be an on-time delivery.”<sup>240</sup> Tennessee did not adjust its absentee ballot policy for the 2020 election, such as with allowing for drop boxes, for in-person receipt by the county Election Commission, or for drop off of ballots at polling locations, with only one exception.<sup>241</sup> Just before Election Day, Tennessee announced that voters could return an absentee ballot to a designated post office in each county if they were still in possession of them.<sup>242</sup> Despite this effort, panelist Debby Gould, President of the League of Women Voters of Tennessee, noted that “there was general confusion about the rules for how to mail the ballot, including how much postage was necessary. Was it one stamp or two? ...And, surprisingly, this was not included in the directions that the Secretary of State used for the standards for sending out absentee ballot.”<sup>243</sup> It should be noted that the Tennessee Secretary of State’s Division of Elections published a “Tennessee Election Covid-19 Contingency Plan” in April 2020 that stated:

“It is presumed that Tennessee will see a significant increase in absentee by-mail ballots. This increase will complicate election preparation and is not simple to plan for. Less than 2.5% of Tennessee voters historically voted absentee by-mail. In conversations with Washington (a vote-by-mail state) they have shared that unless you are currently voting 60% absentee, a conversion for all voters to vote-by-mail period needs to be about five years.”<sup>244</sup>

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<https://www.tennessean.com/story/news/politics/2020/08/05/fear-covid-19-not-reason-vote-absentee-november/5555059002/> (accessed September 25, 2022); Panelist Debby Gould also noted in her testimony that “A standard which was used only for the November [2020] election was that Judge Richardson ruled again in September 2020, that first time voters who were otherwise eligible to receive an absentee ballot, such as a voter over age 60, or a long distance truck driver and a spouse of that truck driver, could do so in November 2020 without appearing in person in front of the Election Commission. This has since been rescinded. This was only in effect for that one Election,” *See*: Gould Testimony. Transcript 6, p. 7.

<sup>237</sup> Tennessee Code Title 2. Elections § 2-6-202(E); *See also* “Guide to Absentee Voting,” Tennessee Secretary of State Tre Hargett, accessed October 13, 2022, <https://sos.tn.gov/elections/guides/guide-to-absentee-voting> (accessed September 27, 2022); Schluckebier Testimony, Transcript 4, p. 4.

<sup>238</sup> “Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options,” National Conference of State Legislatures, accessed October 13, 2022, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#return-voting-location> (accessed October 21, 2022); Schluckebier Testimony, Transcript 4, p. 4.

<sup>239</sup> Schluckebier Testimony, Transcript 4, p. 5.

<sup>240</sup> Gould Testimony, Transcript 6, 7-8.

<sup>241</sup> *Ibid*.

<sup>242</sup> Gould Testimony, Transcript 6, p. 8.

<sup>243</sup> *Ibid*; Timms, Mariah. “Still have an absentee ballot you want to submit in Tennessee? Visit these post offices in each county.” October 28, 2020. <https://www.tennessean.com/story/news/politics/2020/10/28/where-to-drop-off-tennessee-absentee-ballots/6056474002/> (accessed November 14, 2023).

<sup>244</sup> Tennessee Secretary of State Division of Elections. “Tennessee Election Covid-19 Contingency Plan,” April 23, 2020. <https://www.courthousenews.com/wp-content/uploads/2020/05/COVID-19-Plan.pdf> (accessed November 18, 2023).



Relative to other states that adjusted voting to accommodate voters during the coronavirus pandemic, the burdens of voting in Tennessee were high.<sup>245</sup> According to panelists, this type of burden has potential consequences broadly for the functioning of elections.<sup>246</sup> Panelist Dawn Schluckebier, Advocacy and Government Relations Director at Think Tennessee, highlighted “there are a lot of Tennessee voters who might need assistance maneuvering this absentee ballot process,” and while absentee voting in Tennessee has historically been low, there is a higher number of voters who are eligible.<sup>247</sup> The November 2020 election, however, saw record voter turnout in Tennessee, including for early and absentee voting.<sup>248</sup>

### *Distribution of absentee ballot applications*

Another aspect of absentee voting the Committee heard about in the testimony was regarding the illegality of anyone who is not an election commission employee distributing the absentee ballot application. According to Tennessee Election Law, “A person who is not an employee of an election commission commits a Class E felony if such person gives an application for an absentee ballot to any person.”<sup>249</sup> This law was challenged in 2020 when voting rights advocates filed a lawsuit against the state to remove this ban.<sup>250</sup> The 6<sup>th</sup> U.S. Circuit Court of Appeals rejected the complaint in October 2023.<sup>251</sup> Advocates argued that the “threat of heavy criminal charges infringes their right to constitutionally protected free speech by creating a system where fear of punishment overburdens those seeking to speak,” but it was found that the law does not violate First Amendment free speech rights.<sup>252</sup> Tennessee is the only state to impose this restriction.<sup>253</sup>

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<sup>245</sup> Kelly Testimony, Transcript 4, p. 12.

<sup>246</sup> Ibid.

<sup>247</sup> Schluckebier Testimony. Transcript 4, p. 6.

<sup>248</sup> Tennessee Secretary of State Tre Hargett. “Tennessee Breaks Voter Turnout and Participation Records.” <https://sos.tn.gov/press-releases/tennessee-breaks-voter-turnout-and-participation-records> (accessed September 27, 2022); Tennessee Secretary of State Tre Hargett. “Statistical Analysis of Voter Turnout for the November 3, 2020 Election as Submitted by the Counties.” <https://sos-tn-gov-files.tnsosfiles.com/2020November.pdf> (accessed September 27, 2022); Schluckebier Testimony, Transcript 4 p. 5.

<sup>249</sup> Tennessee Code Annotated. Title 2 (as amended), §2-6-202(c)(3).

<sup>250</sup> *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742 (Tenn. 2020); Timms, Mariah. “Judge won't block Tennessee law with heavy penalties for sharing absentee ballot request forms.” *The Tennessean*. September 24, 2020. <https://www.tennessean.com/story/news/politics/2020/09/24/tennessee-ballot-sharing-punishments-not-blocked-federal-judge/3512816001/> (accessed November 2, 2021); *See also*: Timms, Mariah. “Lawsuit challenges Tennessee law making it a felony to share absentee voter application form.” *The Tennessean*. August 31, 2020. <https://www.tennessean.com/story/news/politics/2020/08/31/tennessee-voting-rights-new-suit-looks-felony-sharing-application/3450928001/> (accessed November 2, 2021).

<sup>251</sup> *Lichtenstein v. Hargett*, 83 F.4th 575 (C.A.6 (Tenn.), 2023).

<sup>252</sup> *Id.*

<sup>253</sup> Timms, Mariah. “Judge won't block Tennessee law with heavy penalties for sharing absentee ballot request forms.” *The Tennessean*. September 24, 2020. <https://www.tennessean.com/story/news/politics/2020/09/24/tennessee-ballot-sharing-punishments-not-blocked-federal-judge/3512816001/> (accessed November 2, 2021).

Opponents of the law had taken issue because, in their view, the severity of the consequences outweighed the action in question. Panelist Steven Mulroy explained:

“I want to emphasize here, we're not talking about the criminalization of the distribution of actual absentee ballots that have been cast and are awaiting delivery to the Election Commission. These are just the forms in which one applies to get an absentee ballot to begin with. Tennessee's the only state that criminalizes that. The rationale is voting fraud, and it is certainly the case that absentee voting fraud does exist... And it is criminalized as a felony, even if it's in response to a specific request from a valid voter to get the form, and even though the form is available on the internet. So, if your grandmother doesn't have internet access and she says, "Can you print out the absentee application form and send it to me?" You're not allowed to do that, even though there are other laws on the books that already make illegal providing misleading information on an absentee ballot application... I think it has a racially disproportionate effect here, because it is the case that racial and ethnic minorities use third-party registration services more than do non-minorities.”<sup>254</sup>

Panelist Nathan Kelly, Professor of Political Science at the University of Tennessee, commented that this law also places disparate burdens on populations like the elderly and people of color, who can benefit from organizational support in overcoming administrative barriers such as accessing absentee ballot applications.<sup>255</sup> Once the voter has the application, they can receive assistance in filling it out; they simply cannot receive the actual application via anyone who is not an election commission employee.<sup>256</sup> In reference to the law, Debby Gould of the League of Women Voters stated:

“This severely limits us when we are speaking with voters who either lack technological skills, or don't have a printer, or for any other reason feel like this is an obstacle that they can't get around. We have also heard volunteers say to us, "Does this mean I can't even mention absentee voting as an option?" It's a very chilling effect on what we can offer in terms of voting services.”<sup>257</sup>

Gould continued to highlight that organizations conducting voter outreach can share any other information regarding voting, except for this specific form.<sup>258</sup> She explained that organizations also face confusion on what the limits are to this law and how much information can be shared, such as whether providing a link to the application would constitute as a violation or not.<sup>259</sup> In her experience, being able to share the form would be helpful for voters, especially first-time voters who would like to see it in advance to know how difficult or easy it is to complete before they decide moving forward with it.<sup>260</sup>

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<sup>254</sup> Mulroy Testimony, Transcript 1, p. 10.

<sup>255</sup> Kelly Testimony, Transcript 4, p. 12.

<sup>256</sup> Schluckebier Testimony, Transcript 4, p. 6.

<sup>257</sup> Gould Testimony, Transcript 6, p. 7.

<sup>258</sup> Gould Testimony, Transcript 6, p. 12.

<sup>259</sup> Ibid.

<sup>260</sup> Gould Testimony, Transcript 6, p. 12-13.

In his testimony, panelist Rev. Earle Fisher, Reverend and Founder of the voter advocacy organization Up the Vote 901, shared that while there has been a positive increase in voter turnout in recent Tennessee elections, advocates face challenges with laws that demonize or criminalize those participating in voter registration, education, and empowerment efforts.<sup>261</sup>

### *League of Women Voters' Recommendations on Absentee Voting*

In her testimony, panelist Debby Gould explained that the League of Women Voters sent a letter to the Secretary of State and Administrator of Elections with a series of recommendations on improving the absenting voting process without requiring legislative action. The League of Women Voters felt that there was a lot within the purview that could be done administratively to simplify the process.<sup>262</sup> Although the Secretary of State and Administrator of Elections did not implement these recommendations, the list included:

- Provide an online template for a ballot request form. Gould mentioned that the Davidson County Election Commission had already done this and it helped to eliminate some elements regarding the timely return of the ballot request form.<sup>263</sup>
- Carry out a proactive mailing to all registered voters 60 and over with a ballot request form. This was the eligibility group that was most likely to use absentee ballots, and most people in Tennessee had no idea that this was even a possibility for this age group.<sup>264</sup>
- Include postage paid envelopes with the request form and the ballot, particularly during the pandemic, in addition to an expansion of the capabilities for high volume processing of returned ballots by each Election Commission so that they would not be overwhelmed if the public responded with absentee ballots.<sup>265</sup>
- Educate voters to avoid common missteps when voting absentee, such as making sure that they really did include their entire social security number, and that they did use the correct number of stamps.<sup>266</sup>

This testimony reflected a larger concern around general access to information that was highlighted by panelist Rev. Earle Fisher, who stated:

“...When people have access to adequate information, they are more inclined to participate in the political process. But in Memphis and Shelby County, not only is it difficult, and I think the same is true across the state, it's difficult to get access to the information in so far as what elections is coming up, when the elections are coming up, what seats are on the ballot, who's running and all of those things,

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<sup>261</sup> Fisher Testimony, Transcript 6, p. 5.

<sup>262</sup> Gould Testimony, Transcript 6, p. 10.

<sup>263</sup> Gould Testimony, Transcript 6, p. 8.

<sup>264</sup> Gould Testimony, Transcript 6, p. 8-9.

<sup>265</sup> Gould Testimony, Transcript 6, p. 9.

<sup>266</sup> Ibid.

which is why you have the presidential elections yielding much more turnout than some of the local elections, because the presidential elections get much more press.”<sup>267</sup>

**FINDING II: In addition to concerns regarding absentee voting, the Committee heard testimony regarding several ways in which Tennessee is one of the most restrictive states in access to voting nationwide.**

Due to several issues such as low registration and turnout rates, long wait times, and low disability access, Tennessee ranked as the 37<sup>th</sup> best administered election in the United States based on state-level data collected by the Elections Performance Index at MIT and it ranked as the fourth most restrictive state according to the Cost of Voting Index.<sup>268</sup> Unlike other states, panelist Nathan Kelly noted, “Tennessee was not aggressive in easing voting during the pandemic.”<sup>269</sup> He added:

“We very minimally increased access to no-excuse absentee voting because of court order. We did not substantially expand access to vote by mail or drop box voting. We did not shift towards same-day registration... We maintain a restrictive photo ID law with a minimalist list of acceptable ID. We did not appreciably expand early voting to minimize crowds during the pandemic. This means that relative to other states that have taken such actions, the burdens of voting in Tennessee are relatively high.”<sup>270</sup>

*Panelists Discussed the Limited Availability of Polling Places*

Panelist Joseph Coll, who at the time of the briefing was a doctoral candidate in Political Science at the University of Iowa, highlighted that among the challenges Tennessee voters faced in being able to vote during the 2020 elections were more limited polling place hours in comparison to other states.<sup>271</sup> Furthermore, there were fewer polling places throughout the state in 2020 when compared to 2016 and he shared that there is suggestive evidence that there were greater closures in counties with more Black Tennesseans than there were in counties more White Tennesseans, which is important to note when considering the difficulty this community may have had in

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<sup>267</sup> Fisher Testimony, Transcript 6, p. 11.

<sup>268</sup> Coll Testimony, Transcript 4, p. 7; *See*:

[https://www.liebertpub.com/doi/suppl/10.1089/elj.2017.0478/suppl\\_file/supp\\_appendix.pdf](https://www.liebertpub.com/doi/suppl/10.1089/elj.2017.0478/suppl_file/supp_appendix.pdf) for information on the Cost of Voting Methodology.

<sup>269</sup> Kelly Testimony, Transcript 4, p. 12; Kaufman, Ellie. “As states make voting easier during the pandemic, Tennessee is moving in the other direction.” CNN Politics. August 31, 2020.

<https://www.cnn.com/2020/08/30/politics/tennessee-voting-coronavirus-pandemic/index.html> (accessed December 5, 2023).

<sup>270</sup> Kelly Testimony, Transcript 4, p. 12.

<sup>271</sup> Coll Testimony, Transcript 4, p. 7; *See also*: The Council of State Governments. “The Book of States, Volume 53.” 2021. p. 229, Table 6.5 “Polling Place Hours: General Elections.”

[https://issuu.com/csg\\_publications/docs/bos\\_2021\\_issuu](https://issuu.com/csg_publications/docs/bos_2021_issuu) (accessed December 5, 2023).

accessing voting as well as the potential increase in travel time involved in order to arrive at a polling place.<sup>272</sup> Although Coll pointed out that Tennessee had more poll workers in 2020 than in 2016, there is also, again, some suggestive evidence that areas of larger Latino populations in Tennessee were more likely to have fewer poll workers than areas of more White individuals.<sup>273</sup> These varying challenges can ultimately have an effect on how individuals interact with elections and whether their ballot is counted.<sup>274</sup>

Panelist Tami Sawyer, who was a Commissioner with the Shelby County Board of Commissioners at the time of her testimony, spoke about barriers in accessing polling places in that jurisdiction. She described Shelby County as one of the most under-resourced non-rural counties in the state with many transportation issues such as a high rate of uninsured drivers and people without more than one car per person in a home.<sup>275</sup> She shared that despite this, officials had planned to place only one polling place in the eastern suburbs of the county, which would have presented an access issue for the majority of Memphis residents.<sup>276</sup>

Sawyer also shared that at the time of her testimony she was on the board of the Memphis chapter of the NAACP, which, along with other voter advocacy organizations, had filed a complaint against the Shelby County Election Commission in Spring 2022 due to continually reducing access to early voting locations for several years in a row, primarily in minority communities.<sup>277</sup> Although Sawyer notes that the Commission's stance on reducing the number of early voting locations was due to voter turnout, she stated that the NAACP's argument is that when there are less locations, there will be lower turnout, and early voting locations are critical to turnout because people need more time and flexibility to cast their vote.<sup>278</sup> Shelby County stated that the NAACP and the other advocates lacked sufficient evidence.<sup>279</sup> Sawyer shared that the goal of the complaint was to make voting as accessible as possible for everyday residents.<sup>280</sup>

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<sup>272</sup> Coll Testimony, Transcript 4, p. 9; *See also*: U.S. Election Assistance Commission to the 117<sup>th</sup> Congress. "Election Administration and Voting Survey 2020, Comprehensive Report." 2020. [https://www.eac.gov/sites/default/files/document\\_library/files/2020\\_EAVS\\_Report\\_Final\\_508c.pdf](https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf) (accessed December 14, 2023); *See also*: U.S. Election Assistance Commission to the 115<sup>th</sup> Congress. "Election Administration and Voting Survey 2016, Comprehensive Report." 2016. [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2016\\_EAVS\\_Comprehensive\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf) (accessed December 14, 2023). *Note from the Committee*: The panelist noted that he coupled data from these reports with data from the American Community Survey (<https://www.census.gov/programs-surveys/acs>) and measured the change in poll workers as a function of the size of local racial and ethnic populations. For findings related to changes in poll workers and polling places, the panelist specified that these results are correlational, not causal, which is why he calls the evidence 'suggestive'.

<sup>273</sup> *Ibid*.

<sup>274</sup> Coll Testimony, Transcript 4, p. 9.

<sup>275</sup> Sawyer Testimony, Transcript 5, p. 4.

<sup>276</sup> *Ibid*.

<sup>277</sup> *NAACP v. Shelby County Election Commission, et al.* (2022) was dismissed before it formally became a case; *See also*: <https://interactive.localmemphis.com/pdfs/Shelby-County-Early-Voting-lawsuit1.pdf>; Sawyer Testimony, Transcript 5, p. 8-9; Fisher Testimony, Transcript 6, p. 5.

<sup>278</sup> Sawyer Testimony, Transcript 5, p. 8-9.

<sup>279</sup> King, Parker. "Judge halts lawsuit against Shelby County Election Commission." *Action News 5*. April 11, 2022. <https://www.actionnews5.com/2022/04/11/judge-halts-lawsuit-against-shelby-county-election-commission/> (accessed December 14, 2023).

<sup>280</sup> Sawyer Testimony, Transcript 5, p. 8-9.

In light of the legal issues between voter advocacy organizations and the local election commission, Panelist Sawyer also commented on what she believed to be an important issue for the Committee’s consideration – the fact that the local election commissions are not directly elected by constituents. In her view, this is a barrier for voters’ concerns being heard, especially since there are constant issues with locations being available within low-income neighborhoods.<sup>281</sup>

Sawyer shared another example of restrictions to voting access from the May 2022 elections in which she described that the Shelby County Board of Commissioners funded mailers meant to provide notice to voters about changes in their precincts, but that a large majority of voters did not receive them until the day of the election or after, even though the funding had been approved weeks before.<sup>282</sup> In her perspective, this is a challenge the Board of Commissioners faces when providing funding for initiatives but not being able to actively participate in planning them or carrying them out.<sup>283</sup>

### *Tennessee’s Strict Voter Identification Requirement*

The Committee also heard from several panelists that Tennessee has one of the most strict voting requirements nationwide.<sup>284</sup> Out of all 50 states, there are only three states that are more restrictive in 2020 than Tennessee.<sup>285</sup> This means that if a voter does not have their identification at the polling place, they have to take additional steps to have their ballot counted, such as presenting identification to election offices within two days for the vote to be counted.<sup>286</sup>

While the lack of identification can present a significant barrier to voting, actually acquiring identification can be a challenge for a growing number of Tennesseans. Panelist Debby Gould explained on behalf of the League of Women Voters:

“One of the issues that we consider to be ongoing is that we know that non-drivers are making up a larger and larger percentage of the American public as we move forward into this decade. And the most recent information I had was from 2018 from the Federal Highway Administration, which estimated at that point that only 80% of 18-year-olds had a driver's license. We are particularly concerned in Tennessee because photo IDs for people who do not drive are available only

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<sup>281</sup> Sawyer Testimony, Transcript 5, p. 4-5; *See also*: Shelby County Election Commission.

<https://shelbycountyttn.gov/127/Election-Commission> The Shelby County Election Commission is appointed by the Tennessee State Election Commission, which is an elected body.

<sup>282</sup> Sawyer Testimony, Transcript 5, p. 4.

<sup>283</sup> *Ibid*.

<sup>284</sup> Mulroy Testimony, Transcript 1, p. 11; *See also*: Weinberg Testimony, Transcript 3, p. 5; *See also*: Kelly Testimony, Transcript 4, p. 7; *See also*: Schluckebier Testimony, Transcript 4, p. 4; *See also*: Gould Testimony, Transcript 6, p. 9.

<sup>285</sup> Coll Testimony, Transcript 4, p. 7.

<sup>286</sup> Schluckebier Testimony. Transcript 4, p. 4; *See also*: Tennessee Secretary of State Tre Hargett. “Guide on ID Requirements when voting.” <https://sos.tn.gov/elections/voter-id-requirements> (accessed November 8, 2022).

through a DMV center, but those DMV centers are not in every county. 31 of Tennessee's 95 counties do not have a facility to process a photo ID.”<sup>287</sup>

The Committee also heard that this lack of access to identification may be correlated with existing racial disparities. Hedy Weinberg, Director of the ACLU in Tennessee at the time of the briefing, stated that the use of voter identification in Tennessee has a disproportionate impact on Tennessee’s Black residents. She stated that “up to 25% of Black Americans lack a government issued identification compared to only 8% of White Americans.”<sup>288</sup> The Committee notes that voter access advocates oppose these voter identification requirements, while others support them on grounds of voter security and lack of evidence concerning adverse impact.

### **FINDING III: The Committee heard testimony on how Davidson County and Shelby County faced challenges presented by the Covid-19 pandemic and found a significant variation in each county’s approach.**

Given the unprecedented challenges presented by the Covid-19 pandemic, the Tennessee Secretary of State’s Division of Elections published a “Tennessee Election Covid-19 Contingency Plan” to provide guidance to local election commissions on everything from poll worker recruitment, absentee ballot management, and logistical instructions on public health measures such as cleaning equipment and assessing locations for their capacity to handle social distancing.<sup>289</sup> Panelist Joseph Coll shared that in an analysis of the 2020 Survey of the Performance of American Elections, Tennessee ranked slightly higher than the national average in terms of voters seeing at least five different forms of personal protective equipment (PPE) at polling places.<sup>290</sup> According to Coll, when voters see adherence to PPE such as face masks, cleaning of voting booths, etc., they feel safer voting.<sup>291</sup>

#### *Davidson County*

Jeff Roberts, the Elections Administrator of Davidson County, provided testimony to the Committee about how his office carried out elections in light of the various concerns and challenges with the Covid-19 pandemic. The Davidson County Election Commission Office provided a way for voters who tested positive for Covid-19 to vote safely in-person at the polling

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<sup>287</sup> Gould Testimony, Transcript 6, p. 9; “TN Department of Safety & Homeland Security. “Locations by County.” <https://www.tn.gov/safety/driver-services/locations/dllocationcnty.html> (accessed November 8, 2022).

<sup>288</sup> Weinberg Testimony, Transcript 3, p. 5.

<sup>289</sup> Tennessee Secretary of State Division of Elections. “Tennessee Election Covid-19 Contingency Plan,” April 23, 2020. <https://www.courthousenews.com/wp-content/uploads/2020/05/COVID-19-Plan.pdf> (accessed November 18, 2023).

<sup>290</sup> Coll Testimony, Transcript 4, p. 9; *See also*: Stewart, Charles, 2021, "2020 Survey of the Performance of American Elections - Harvard Dataverse, V1; Appendix 4 - Top-line statistics from the nationwide study, by state, weighted data." 2021. <https://dataverse.harvard.edu/file.xhtml?fileId=4488075&version=1.0> (accessed December 14, 2023).

<sup>291</sup> Coll Testimony, Transcript 4, p. 9.

place.<sup>292</sup> Panelist Roberts stated: “We tried to utilize all the resources we had in Davidson County, including our local health department to help approve our plan the way we were setting up the precincts, the staff, the protective equipment they were going to use, essentially the entire nine yards as far as COVID goes.”<sup>293</sup> His office also hired additional poll workers to screen individuals for Covid-19 and direct them on how to vote away from others as safely as possible.<sup>294</sup> Panelist Roberts further described how his office prepared to handle voters who had tested positive for the virus after the deadline to apply for absentee ballots:

“To do that, we set up a mechanism where they would contact the Davidson County COVID hotline, and they would then be put in touch with us where we would give them a reserved time that they could drive to our office and we would vote them in the parking lot. We were lucky in that we had a poll official that was a physician, that actually did that voting for us, and he was assisted by other individuals that had either medical or laboratory backgrounds. So, we felt like we had provided a good opportunity for the voters to make sure they could vote if they tested positive in that short window, and we were protecting our staff that were making this possible for the voter.”<sup>295</sup>

Roberts described the August primary as a major challenge for his office, due to the unprecedented situation. He shared that his office received 28,000 absentee ballots, which the members of his Absentee Counting Board opened manually.<sup>296</sup> This experience led his office to purchase two envelope openers using funds provided by the state in order to ease the work for the November election.<sup>297</sup> According to Mr. Roberts, the Davidson County Election Commission had engaged in publicly advertising the option to vote absentee and the qualifications to do so.<sup>298</sup> He stated that the majority of absentee ballot requests his office received were from individuals over the age of 60.<sup>299</sup>

Roberts shared that for the August 2020 primary, 22% of the public voted by an absentee ballot but by the November general election, that percentage dropped to 11%, and he believes it did so because the public was able to see the precautionary measures the election commission had taken.<sup>300</sup> “That gave the voters a comfort that they could vote in person and didn't have to get an absentee ballot,” he said.<sup>301</sup> Roberts explained that despite the decrease in absentee ballots in the November 2020 election to 11%, this was still higher than what his office had usually seen in

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<sup>292</sup> Reese, Brooke. “Davidson County makes special accommodations for COVID-19 voters.” WKRN.com. November 3, 2020. <https://www.wkrn.com/election/davidson-county-makes-special-accommodations-for-covid-19-voters/> (accessed December 14, 2023).

<sup>293</sup> Roberts Testimony, Transcript 5, p. 5-6.

<sup>294</sup> Ibid.

<sup>295</sup> Roberts Testimony, Transcript 5, p. 6.

<sup>296</sup> Roberts Testimony, Transcript 5, p. 11.

<sup>297</sup> Ibid.

<sup>298</sup> Roberts Testimony, Transcript 5, p. 11-12.

<sup>299</sup> Ibid.

<sup>300</sup> Roberts Testimony, Transcript 5, p. 6.

<sup>301</sup> Ibid.



past elections, when the amount of absentee ballots is closer to 5%.<sup>302</sup> He said that this option, along with early voting (which in Davidson County lasts a period 14 days and includes two weekdays with longer hours as well as Saturdays), allows for more flexibility in voters' busy schedules.<sup>303</sup>

### *Shelby County*

Panelist Tami Sawyer shared testimony on the issues her county was facing with the type of voting machines being used along with other concerns on voter information and access, and how these heightened the challenges that were already being faced with the pandemic. Sawyer stated that shortly after she began her tenure as Commissioner in 2018, there were conversations about the efficacy of existing voting machines, which were outdated and not fully functional.<sup>304</sup> At the time, Sawyer states voters were increasingly requesting a hand-marked paper ballot voting process instead of the machines with touch screens due to reports of inconsistencies, and the Board of Commissioners passed a resolution directing the Tennessee State Election Commission to purchase the hand-marked paper ballot machines and provided funding for them, but the Election Commission had selected touch screen machines.<sup>305</sup>

According to Sawyer, the Election Commission listed several concerns regarding the hand-marked paper ballot machines, including cost associated with an increases use of paper, questions around this being technologically outdated, the need for additional staff training, and the fact that the touch screen machines provided a paper receipt before a ballots was cast, which should have dissuaded voters' concerns.<sup>306</sup> This situation resulted in a lawsuit and in the Board of Commissioners withholding funds from the Election Commission's purchase of the touch screen machines for a time.<sup>307</sup> Sawyer believes that having had the hand-marked paper ballot machines in polling locations throughout the county by pandemic-era elections would have been more accessible and easier to use for the majority of voters.<sup>308</sup> The Election Commission instead aimed to have only one voting location in the Eastern suburbs of the county specifically due to Covid-19 concerns.<sup>309</sup>

Commissioner Sawyer shared that in addition to this legal challenge, an important deterrent for voters is the frequency with which elections take place in Shelby County, which can be several times a year on a nearly annual basis.<sup>310</sup> She mentioned that it is difficult to expect a high voter turnout each election due to the lack of voter education and the fact that for many working

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<sup>302</sup> Roberts Testimony, Transcript 5, p. 12.

<sup>303</sup> Roberts Testimony, Transcript 5, p. 5.

<sup>304</sup> Sawyer Testimony, Transcript 5, p. 4.

<sup>305</sup> *Shelby Advocates for Valid Elections et al v. Hargett et al*, No. 2:2018cv02706 - Document 43 (W.D. Tenn. 2018); *See also*: Sawyer Testimony, Transcript 5, p. 4; *See also*: Sawyer Testimony, Transcript 5, p. 10; *See also*: Sawyer Testimony, Transcript 5, p. 10.

<sup>306</sup> Sawyer Testimony, Transcript 5, p. 11.

<sup>307</sup> Sawyer Testimony, Transcript 5, p. 10.

<sup>308</sup> Sawyer Testimony, Transcript 5, p. 4.

<sup>309</sup> *Ibid*.

<sup>310</sup> Sawyer Testimony, Transcript 5, p. 14.

people, this simply is not a priority when compared to having to meet everyday basic needs.<sup>311</sup> Commissioner Sawyer stated:

“I also look very closely at the fact that poverty is high in our community and all of those other things that I talked about, transportation, access, educational opportunity. You go into hierarchy of need situation here and voting is, we're nowhere near where voting falls on the pyramid, right? People are trying to get to work, people are trying to pay for \$5 gas, people are trying to get through high crime and low wages right now, and we vote three times a year, almost every year.”<sup>312</sup>

#### **FINDING IV: Tennessee places additional obstacles on other voting-aged residents that impact registration and turnout, especially individuals convicted of felonies.**

The Committee also heard testimony from various panelists on the challenges individuals with felony convictions face in attempting to regain their right to vote. While some states restore voting rights to formerly incarcerated people immediately upon their release from prison, Tennessee does not automatically restore voting rights after a sentence is served.<sup>313</sup>

Tennessee is one of eleven states that require affirmative action in order to restore voting rights.<sup>314</sup> This includes being among only a handful of states that require individuals with felony convictions to fully complete their parole and probationary periods and repay all legal financial obligations before voting, despite the likelihood of facing financial hardship as a result of being previously incarcerated.<sup>315</sup> These individuals are also required to obtain a certificate of restoration form, and obtain signatures from multiple officials from court clerks to probation officers, and sometimes others, to verify that their sentence is in fact completed, and that their financial obligations are paid off.<sup>316</sup> Tennessee is the only state that requires individuals with felony convictions to pay any outstanding child support payments.<sup>317</sup> The Committee heard

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<sup>311</sup> Sawyer Testimony, Transcript 5, p. 14.

<sup>312</sup> Ibid.

<sup>313</sup> Tennessee Secretary of State Tre Hargett. “Restoration of Voting Rights.” <https://sos.tn.gov/elections/guides/restoration-of-voting-rights> (accessed November 8, 2022); *See also*: Weinberg Testimony, Transcript 3, p. 5; *See also*: National Conference of State Legislatures. “Felon Voting Rights.” <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (accessed October 13, 2022).

<sup>314</sup> Mulroy Testimony, Transcript 1, p. 9; *See*: Tennessee Advisory Committee to the U.S. Commission on Civil Rights, “The Right to Vote and Ex-Felon Disfranchisement in Tennessee,” 2014, [https://www.usccr.gov/files/pubs/docs/TN\\_SAC\\_Ex-Felon-Report.pdf](https://www.usccr.gov/files/pubs/docs/TN_SAC_Ex-Felon-Report.pdf).

<sup>315</sup> Tennessee Code Title 40. Criminal Procedure § 40-29-202 (b)(2); *See also*: Schluckebier Testimony, Transcript 4, p. 4; Weinberg Testimony, Transcript 3, p. 4; Mulroy Testimony, Transcript 1, p. 9; *See also*: Tennessee Advisory Committee, *Legal Financial Obligations*, p. 25.

<sup>316</sup> Weinberg Testimony, Transcript 3, p. 4.

<sup>317</sup> Tennessee Code Title 40. Criminal Procedure § 40-29-202 (c); *See also*: Weinberg Testimony, Transcript 3, p. 7; *See also*: Tennessee Advisory Committee, *Legal Financial Obligations*, p. 16; *See also*: Mulroy Testimony Transcript 1, p. 9.

testimony that the process for seeking restoration of voting rights is complicated and confusing.<sup>318</sup>

According to testimony presented to the Committee, this has a disproportionate impact on Tennessee's Black residents, whose voter turnout rates significantly behind those of White residents.<sup>319</sup> Panelist Hedy Weinberg shared that "Black Tennesseans make up about 17% of the state's population but are 40% of the state's prisoners."<sup>320</sup> In Weinberg's view, Tennessee's voting polices have made it more and more difficult for people to vote, specifically voters of color, voters with disabilities, and voters on low-incomes.<sup>321</sup> Moreover, after deliberation, the Committee notes that individuals convicted of felonies are an already marginalized population with limited opportunities to participate in the political process.

## Recommendations

Among their duties, advisory committees of the Commission are authorized to advise the Agency (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws, and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.<sup>322</sup> In keeping with these responsibilities, and given the testimony heard on this topic, the Committee submits the following recommendations to the Commission:

1. The U.S. Commission on Civil Rights should:
  - a. *Consider these areas of concern and corresponding recommendations as part of its attention to voting rights nationally.*
2. The U.S. Commission on Civil Rights should send this report and issue a formal request to the Tennessee General Assembly to consider the following:
  - a. *Implement automatic voter registration.*
  - b. *Implement same-day registration or decrease the deadline for registration from 30 days before an election.*
  - c. *Decriminalize the sharing of absentee ballot applications.*

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<sup>318</sup> Mulroy Testimony, Transcript 1, p. 9; *See also*: Weinberg Testimony, Transcript 3, p. 4; *See also*: Schluckebier Testimony, Transcript 4, p. 4.

<sup>319</sup> Schluckebier Testimony, Transcript 4, p. 4.

<sup>320</sup> Weinberg Testimony, Transcript 3, p. 5.

<sup>321</sup> *Ibid.*

<sup>322</sup> 45 C.F.R. § 703.2 (2018).

- d. Implement no-excuse absentee voting.*
  - e. Increase the period for early voting.*
  - f. Pass legislation that standardizes (across the state) how instructions for ballot access are provided to potential voters.*
3. The U.S. Commission on Civil Rights should send this report and issue a formal request to the Tennessee Secretary of State to consider the following:
- a. Create drop boxes for returning absentee ballots OR at least allow hand delivery to elections offices.*
  - b. Eliminate in-person voting requirement for voters who register by mail or online.*
  - c. Accept a wider variety of government issued photo IDs as proof of identity when voting in person.*
  - d. Increase number of precincts and poll workers in an adequate and equitable manner, particularly in counties or areas with higher percentages of Latino and Black voters.*
  - e. Standardize the modes by which information about ballot access is provided to voters throughout the state.*
  - f. Issue clear guidelines and instructions to local election officials so that voters are informed about accessing ballots.*
  - g. Audit and publicly report local election agency efficacy according to data provided by voters served by those agencies.*
  - h. Keep polling locations open as long as possible on Election Day to equalize access to the polls for all citizens regardless of location.*
  - i. Consider reopening locations that were closed during the 2020 election to ensure equitable access to the polls and, where feasible, expand the number of polling locations to reflect the needs of areas experiencing rapid population growth.*
  - j. Make adjustments to the voting process to accommodate the needs of those with or vulnerable to COVID-19 and to ensure the safe access to the polls under future public health emergencies that may be declared from time to time.*
  - k. Evaluate existing or proposed voting procedures to identify and eliminate any disparate impact on protected groups, including minorities, to assure that all Tennesseans enjoy equal access and opportunity to exercise their right to vote*

*and participate in the political process, including during public health emergencies.*

## **Appendix**

All documents listed in the appendix can be accessed at the following link:

<https://usccr.app.box.com/folder/261634460832?s=xld21f4looaaj572s21fsh9qhaiv6d56>.

- A. Hearing materials
  - a. Agenda
  - b. Minutes
  - c. Panelist Presentations (PPT)
  - d. Other records
- B. Written Testimony
- C. Transcripts
- D. Outreach for Public Briefings
- E. Committee Member Statements
  - a. Statement from Member James Blumstein<sup>323</sup>

### **Tennessee State Advisory Committee (TSAC)**

#### **Separate Statement of James F. Blumstein**

I write this Separate Statement because I am unable to join the report and recommendations of the TSAC regarding the two issues it studied: (i) Legislation enacted by Tennessee to restrict after-hours camping on public property not designated for camping; and (ii) voting access during the pandemic and afterwards. The TSAC heard much testimony on these two issues; much of the testimony was quite one-sided. I quickly add that this was not the result of lack of effort to secure more balance by staff; nevertheless, the staff was not successful in securing balanced points of view, despite its good faith efforts to do so. Only state Senator Stevens appeared to support the state's initiatives with respect to the camping issue; in my view his testimony was quite persuasive,

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<sup>323</sup> *Note:* Committee Members J. Gregory Grisham and Ammon Smartt joined with this statement.

even if, from a quantitative perspective, his voice was that of a minority. To my recollection, no advocate (*e.g.*, from the state's Office of the Attorney General) presented the state's case regarding voting access during the pandemic. There may have been constraints on that office because of pending litigation at the outset, but the fact remains that the witnesses before the TSAC largely were advocates critical of the state's position. TSAC did not hear from advocates for the state's position, nor did they carefully assess considerations such as ballot security..

I will not address each TSAC recommendation, but will focus on selected matters and general principles in this Separate Statement.

### **I. After-hours Camping**

Much of TSAC's time was spent on the Tennessee legislation that restricted after-hours camping on public property not designated for camping. From what the TSAC was told, the protests that triggered the legislation engaged in overnight camping in order to protest. From what we were able to ascertain, the after-hours camping was in violation of pre-existing state law, and knowingly so. In a special session, the legislature observed the lack of compliance with the pre-existing law and concluded that that disregard of the law demonstrated ineffective deterrence of the camping activity. The penalty for illegal camping was escalated from a misdemeanor to a felony. In practical terms, that increased penalty achieved the legislature's goal; the unlawful camping activity ceased when the putative violators confronted the stiffer penalty of a felony.

The critics of the new Tennessee legislation informed the TSAC that the increased penalty was too severe; we did not hear testimony that the stiffer penalties were ineffective. So, the question becomes what conclusions the TSAC should reach about Tennessee's stiffening of penalties for unlawful camping. One of the themes we heard was that committing a felony could result in the

loss of voting rights; that potential penalty apparently had a significant effect on the unlawful campers, who discontinued the unlawful camping in the face of the stiffer consequences.

TSAC, appropriately, heard a lot about the need to protect free expression under the First Amendment. The issue, then, is how the First Amendment applies to unlawful after-hours camping on public property.

We did not hear much about the suppression of expression; the main grievance, as I recall, was that the protesters were denied their demand to meet with the governor. I did not draw any inference that the government barred expression of grievances or the rights of protesters to petition government for the redress of grievances. The rights to speech and petition were not threatened, as I recall things. One form of petition, a meeting with the governor, was denied; but critics of the Tennessee action cannot point to any special First Amendment guarantee of having a face to face meeting with the governor. That may be a demand, or a perceived grievance, but whether or not the governor has a face to face meeting with protestors is lodged with his discretion. This is particularly true when other means of communication are widely available. Realistically, no absence of expression or communication or inability to petition was established. And the legislation under review, which focused on after-hours camping, did not impair other available methods of communication.

For me, then, the critical question is how the law deals with a claim of unauthorized and unlawful after-hours camping on public property not designated for camping.

I am skeptical that such camping activity is even protected by the First Amendment; but, even if it is, there can be no serious dispute that government can regulate such activity under its authority to control speech as to time, place, and manner. There are limits to government's powers to



regulate First Amendment protected speech as to time, place, or manner; but those limits were not transgressed. One such potential constraint on government power in this context is nondiscrimination in terms of viewpoint. At least facially, there was no viewpoint-based limitation on after-hours camping. There were fears presented concerning lack of evenhandedness in terms of enforcement going forward, but the evidence of abuses was slim. Indeed, the response to such abuses, if they arise, is to stop the abuses, not to force on the state unauthorized after-hours camping in areas not designated for camping. I can foresee circumstances where evidence of persistent bias would warrant special attention, but the evidence we were presented did not remotely rise to that level, as I recall.

The First Amendment, in my view, allows for the type of regulation adopted by Tennessee regarding unlawful, after-hours camping. But should the state, nevertheless, refrain from outlawing such conduct and imposing stiffer penalties than provided for under pre-existing law? My conclusion is that the state acted prudently and within its authority.

After-hours camping on public property, where such camping is not permitted, raises a number of reasonable concerns, some of which were described by Senator Stevens. There is an issue of fairness in access to public property. When one protest group encamps itself on public property for an extended period of time, it precludes competitive groups from access to that community resource. There is a considerable risk that such unlawful encampments exclude persons who have a different viewpoint from using public property to express that counter viewpoint. Unlawful camping also can polarize rather than foster dialogue, partly because of the reality of exclusion, rather than inclusion.

But perhaps most troubling is the risk that unlawful after-hours encampments degenerate into vehicles for coercion and even intimidation, not communication as the First Amendment

contemplates. Evidence of the coercion or intimidation dimension of unlawful camping in the circumstances of the legislation under review stems from the disappearance of the protests once the camping activity was penalized more severely. Protests were (and are) still permitted, but unlawful after-hours camping is not allowed. That the protesters would fold their tents and leave the scene – not to remain to protest in permissible ways and times – suggests that the goals were more than communication but coercion or even intimidation. The same inference, for me, comes from the insistence on a face to face meeting with the governor; dialogue was not necessarily the goal, as that could be achieved in other ways, but face to face confrontation was sought. And government can defend against such types of conduct within the framework of its traditional authority to regulate the time, place, or manner of protected speech.

As to the stiffer penalties, the legislation under review was enacted in the face of the disregard of the prohibition of after-hours camping under pre-existing law. The stiffening of penalties, when demonstrable evidence exists that weaker penalties were ineffective (and even flouted), is rational and reasonable. Start with a slap on the wrist, but move to more serious penalties – including penalties that violators really care about, such as the loss or suspension of voting rights – in the face of non-compliance. It would be reasonable to ask to revisit the penalty once some time elapsed, and some intermediate penalty might suffice; but it is premature to go there until some time has lapsed, especially with current evidence of the adverse effects of unlawful camping activity.

Finally, I want to address two process-oriented points. Some critics expressed concern that the unlawful camping legislation was enacted in a special session of the legislature. The implication is that the legislature should wait to stiffen penalties until time passes and cooler heads prevail. But I find the argument unpersuasive. The legislation in question can be revisited during a regular

legislative session; the question boils down to where the political burden of legislating should lie. I see no persuasive reason to treat a special legislative session as empowered only to enact provisional legislation. If legislation enacted in a special session, in response to events of the moment, is to be reviewed or revisited, then the political burden of going forward properly rests with those advocating ameliorating or modifying legislation. Evidence of overreach should be mounted and presented, as in the case of any modification of legislation, and used to justify a revision. I just do not accept the view that legislation enacted in a special session deserves second class status; it is legislation and should be modified if warranted in the normal manner in which legislation is revised.

The second process point involves the concern about selective enforcement. The contention is that enforcement authorities can abuse their power by relying on viewpoint-biased decisionmaking as to how to enforce the non-camping law. I take this concern seriously, and it is a traditional problem in the context of law enforcement against First Amendment protected speech.

The issue arises here in the context of a requirement that persons against whom the camping law is to be enforced be given notice of enforcement. That allows for compliance without arrest and prosecution. Actually, this provision is a warning for potential law violators that enforcement is forthcoming, that law enforcement personnel view the activity as in violation of the law. This a due process type of fair notice or warning and is an attempted ameliorative provision – blocking enforcement against inadvertent law violations.

The risk is that these warnings could be selectively applied, to the disadvantage of some groups and the protection of others. This is a reasonable concern, but it arises whenever an ameliorative due process provision is enacted. I think that some monitoring to guard against viewpoint discrimination is appropriate; this is suggested by the TSAC recommendation for monitoring how

this type of provision is applied in practice. But, in my judgment, this concern does not warrant the undoing of the due process/fair warning structure of the legislation.

## II. Access to Voting

The TSAC undertook to review how Tennessee responded to the pandemic in terms of voter access to the ballot. In my view, the TSAC strayed from the narrow focus on the special circumstances of the pandemic; instead, its recommendations are generic and far reaching. I cannot join the report or recommendations on this phase of the TSAC work.

During the pandemic, Tennessee was not as clear as it should have been early on that legitimate health fears should allow for absentee voting. The state clarified its position in litigation before the Tennessee Supreme Court, acknowledging that the pandemic satisfied the health-related criteria for voting absentee, The Tennessee Supreme Court then upheld Tennessee's voting access laws, as clarified. The TSAC recommendations extend far beyond determining what conditions satisfy the requirements for absentee voting. Instead, the TSAC adopted a recommendation for "no-excuse" absentee voting. Other recommendations go far beyond the context of access to the ballot during a pandemic. Many of these recommendations short-change serious considerations about ballot security, in my judgment.

For example, in constitutional litigation, the United States Supreme Court has treated absentee voting quite differently from voter qualifications. The same level of judicial scrutiny does not apply to absentee voting as to voter qualifications; the Court has been more deferential to government in the context of absentee voting than in the case of voter qualifications, wherein restrictions on access must be justified by government under the rigorous "strict scrutiny" standard.

Absentee voting is deemed ameliorative, aimed to facilitate voting access. From a constitutional perspective, limitations on absentee balloting are seen as less ameliorative, not a barrier to voting access. The constitutional baseline expectation is that one starts with no duty to provide for absentee voting; that baseline has been modified, federally and at the state level, by ameliorative provisions for absentee voting. But, there are valid reasons to be concerned about such things as no-excuse absentee voting or ballot harvesting.

When I successfully litigated *Dunn v. Blumstein*, 405 U.S. 330 (1972), which held invalid Tennessee's one-year statewide and 90-day in-county durational residency requirement for voter registration, I was able to persuade the Supreme Court that lengthy durational residency requirements for voter registration were unnecessary and disenfranchised too many potential voters. One of the pillars of the argument was that ballot security was afforded by robust voter registration provisions, which made the durational residency requirements an unnecessary relic. Yet, the Supreme Court recognized that the state's interests in having knowledgeable voters and in assuring the "purity" of the ballot were not only legitimate but "compelling." But robust voter registration and modern communications sufficed to advance those interests.

What I found lacking in the advocates' presentations was serious consideration of these issues related to ballot security and ensuring informed voters. Yet, without assurances that these compelling interests are attended to, expanded voting access promises to raise concerns about the integrity of the ballot and the legitimacy of elections. I think it unwise to ignore these concerns, which can call into question the integrity of the election process. From a policy perspective, we should be identifying ways that address those concerns about election integrity or "purity" and still allow for more facilitated access to the ballot. Eliminating requirements that a person who registers remotely cast an initial ballot in person is an example of a proposal that can cause

questions about ballot integrity; I cannot join in that type of recommendation, without more evidence on the issue. And we did not have the ballot security position represented in testimony, so as to allow for a careful consideration of the risks involved.

Overall, this issue of voting access was not developed in the record developed by the TSAC in a comprehensive or balanced manner. The initial focus was on access to voting in the context of a pandemic; some of the recommendations go well beyond the pandemic context. As much as I would like to sign on to proposals for improved ballot access, I cannot join this component of the TSAC's report and recommendations.

**Tennessee Advisory Committee to the  
United States Commission on Civil Rights**



**U. S. Commission on Civil Rights Contact**

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