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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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SHELBY COUNTY ADVOCATES FOR  
VALID ELECTIONS; MICHAEL KERNELL;  
JOE TOWNS, JR.; ANN SCOTT,  
and SUHKARA A. YAHWEH,  
Plaintiffs,

v.

JURY DEMANDED  
No. 2:18-cv-02706-TLP-dkv

TRE HARGETT, in his official  
capacity as TENNESSEE SECRETARY  
OF STATE, et al.,  
Defendants.

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**MOTION FOR TEMPORARY RESTRAINING ORDER AND MANDAMUS  
BEFORE THE HONORABLE THOMAS L. PARKER**

**OCTOBER 16, 2018**

CATHY BEST, RPR  
Official Court Reporter  
167 North Main Street, Suite 242  
Memphis, Tennessee 38103

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**APPEARANCES**

For the Plaintiffs:

CAROL J. CHUMNEY, ESQ.  
Carol Chumney Law, PLLC  
5050 Poplar Avenue, Suite 2436  
Memphis, Tennessee 38157

For the Defendants:

JANET M. KLEINFELTER, ESQ. (Via Telephone)  
MATTHEW F. JONES, ESQ.  
Office of Attorney General  
425 5th Avenue, North  
Nashville, Tennessee 37243

JOHN L. RYDER, ESQ.  
PABLO ADRIAN VARELA, ESQ.  
Harris Shelton Hanover Walsh, PLLC  
One Commerce Square, Suite 2210  
Memphis, Tennessee 38103

1 BE IT REMEMBERED that the above-captioned  
2 cause came on for hearing this, the 16th day of October,  
3 2018, in the above court, before the Honorable Thomas L.  
4 Parker, presiding, when and where the following  
5 proceedings were had, to wit:

6 (11:15 a.m. telephonic status conference  
7 conducted but not requested transcribed.)

8 **THE COURT:** Good afternoon.

9 **MS. CHUMNEY:** Good afternoon, Your Honor.

10 **MR. RYDER:** Good afternoon.

11 **THE COURT:** Before we begin, I did bring up  
12 something earlier today with the parties.

13 Ms. Chumney, have you had a chance to speak  
14 with your clients?

15 **MS. CHUMNEY:** Your Honor, I've spoken with all  
16 but one. And all the ones I spoke to, we feel that we  
17 can proceed without a recusal. I anticipate the other  
18 plaintiff will feel the same way, Your Honor. Plus,  
19 he'll be outvoted. So I feel we should move forward  
20 today.

21 **THE COURT:** All right. Mr. Ryder or Mr. --

22 **MR. VARELA:** -- Varela.

23 **THE COURT:** Thank you.

24 **MR. RYDER:** Your Honor, we have no objection.

25 We're prepared to proceed.

1           **THE COURT:** All right. And, then, do we have  
2 Ms. Kleinfelter on the phone?

3           **MS. KLEINFELTER:** Yes, Your Honor,  
4 Ms. Kleinfelter and Mr. Jones. We also have no  
5 objection.

6           **THE COURT:** Great. All right.  
7 Well, Ms. Chumney --

8           **MS. CHUMNEY:** Yes, Your Honor.

9           **THE COURT:** -- you called this party.

10          **MS. CHUMNEY:** Yes, I did, Your Honor.

11          **THE COURT:** So, I guess, I'll hear from you as  
12 to why we need a TRO in this case. Now, I have some  
13 questions for you --

14          **MS. CHUMNEY:** Yes, Your Honor.

15          **THE COURT:** -- that I can ask when the  
16 opportunity arises. But I'll give you a minute if you  
17 want to go ahead and just sort of tell the story.

18          **MS. CHUMNEY:** Right, Your Honor. We filed a  
19 civil rights complaint, the SAVE Complaint, and other  
20 plaintiffs -- Shelby Advocates for Valid Elections --  
21 versus Tennessee Election Commission, Shelby County  
22 Election Commission, and various state and local election  
23 officials.

24                   And, Your Honor, we document in it with our  
25 attachment, primarily Exhibit D, work from five years of

1 open records of irregularities and problems with the  
2 Shelby County elections, in particular.

3 So we -- the November election is here for  
4 this year. Early voting starts tomorrow, October 17th.  
5 And so we asked for the emergency temporary restraining  
6 order and mandamus in order to make sure that the voters'  
7 rights are protected when they vote in this election.

8 We asked in the Complaint for other relief  
9 moving forward after this election. But cognizant of the  
10 fact that the election is just about to begin, we felt  
11 that it would be -- probably the Court would not be  
12 interested in ordering new voting machines for this  
13 election or paper ballots.

14 So what we've asked instead for this election  
15 in the Complaint is some safeguards to be put in to  
16 better protect the voters' rights, fundamental right to  
17 vote, under the U.S. Constitution, the Tennessee  
18 Constitution, and under the Civil Rights Act in this  
19 case.

20 So what we've asked the Court to do, based on  
21 documents that we've attached and the allegations in our  
22 Complaint -- and it is a verified complaint. We've  
23 actually attached even emails from one Shelby County  
24 Election Commissioner who talked about how the voting  
25 machines had -- their lifespan has been -- had been

1 expended. That was two years ago, and here we are still  
2 using them.

3 We also documented how she -- an email she  
4 had, Norma Lester, Shelby County Election Commissioner,  
5 an email where she talks about how she thinks early  
6 voting, the votes aren't matching, the counter and the  
7 votes on the machines aren't matching with the number of  
8 people who voted, and even her concerns that they may be  
9 backing out votes to make them match.

10 We put in our Complaint how a certificate sent  
11 to the State of Tennessee in one election, the numbers  
12 did not match with what the voting machine tape said.  
13 And the state official emailed back and said, well, the  
14 numbers are supposed to match. You know, don't do this  
15 again. We're not going to accept it this way again.

16 Clearly, there's a problem with our voting  
17 machines' server and equipment. Of course, there's a  
18 problem. It was purchased in 2005. We're in 2018.  
19 Everybody knows if you have a laptop or a computer, you  
20 have to upgrade. And the upgrades have not been done on  
21 this very ancient software.

22 So here the voters of Tennessee, Shelby  
23 County, are having to go in and vote on this equipment  
24 which is outdated. We believe it's probably been  
25 improperly modified. So we're trying to get some

1 safeguards to protect the vote.

2 We know there was hacking reports. Department  
3 of Homeland Security and officials on the national level  
4 have reported that. And --

5 **THE COURT:** Is that hacking in Shelby County?

6 **MS. CHUMNEY:** They have not -- they have not  
7 reported where. But they did report, I believe, that the  
8 Tennessee Secretary of State's website may have had  
9 hacking efforts there.

10 So a lot of that information we don't have  
11 privy to maybe through this lawsuit. If the Court  
12 requires a protective order, I understand. Maybe that  
13 might have to happen or maybe not. We might argue  
14 against it.

15 The Department of Homeland Security has  
16 offered to the states, because of this, free cyberscans,  
17 free services. They could go in and scan our equipment,  
18 take a look at it, and let us know of any problems.

19 What I understand -- and even though I know  
20 that -- I want to get on the record that we do have an  
21 expert who could testify, but I know the defendants have  
22 objected to that. So we'll probably just travel on our  
23 Complaint today.

24 But I have been told that the cyberscans can  
25 be done very quickly, and that the sooner that you do

1       them before voting starts, the better because then you  
2       can pick up on any problems and fix them before people  
3       vote. So that's not saying that it happens in the middle  
4       of the election. That might have value too. And we may  
5       be back arguing that, depending on what the Court rules  
6       today. But we would just submit that costs nothing.  
7       It's available through an independent Department of  
8       Homeland Security. We feel that should be taken  
9       advantage of.

10               Now, we asked for other relief in here. And I  
11       could go through that, Your Honor, but I know your time  
12       is valuable. And I wanted to hit the high point for you  
13       first, which is the DHS scan.

14               **THE COURT:** One of the issues that I have,  
15       Ms. Chumney, is that right out of the gate we're talking  
16       about extraordinary relief.

17               **MS. CHUMNEY:** Right.

18               **THE COURT:** Extraordinary relief. The very  
19       first factor that the Court has to consider is likelihood  
20       of success on the merits. And what I'm hearing -- you  
21       know, the first thought that I had when I read the  
22       Complaint last night was, you know, a lot of the  
23       attachments that you included with the Complaint date  
24       back to 2007, 2010. There's a report from September of  
25       this year, but then there's some emails that go back to

1 2012. I couldn't help but wonder -- well, I wondered a  
2 lot of things, but one of them was, what took so long?

3 **MS. CHUMNEY:** Well, we've been trying to get  
4 relief, Your Honor. We didn't do it in the courts. We  
5 submitted our report to the U.S. Select Senate  
6 Intelligence Committee. We submitted our report. We  
7 submitted documents to the Department of Justice --

8 **THE COURT:** And real quick, when you say "our  
9 report," are you talking about the report entitled  
10 "Voting on Thin Ice"?

11 **MS. CHUMNEY:** Yes, we did submit that to the  
12 U.S. Senate -- Select Senate Intelligence Committee. And  
13 we also have submitted our concerns, more than once, to  
14 the Department of Justice, U.S. Department of Justice,  
15 both -- two offices and the local office, U.S. Attorney's  
16 Office here. We submitted it to the FBI.

17 We went even to the Tennessee Election  
18 Commission as recently as July, submitted a report, asked  
19 them to take action, asked them to refer it to the  
20 Tennessee Attorney's General Office and also to the  
21 comptroller at TBI. That failed on a divided vote.

22 So this appears to be a court of last resort,  
23 because nobody will take responsibility for it. And  
24 that's a concern for our democracy.

25 **THE COURT:** Well, you say it's a court of last

1 resort. I question that because a suit very similar to  
2 this was brought in the Tennessee courts back in the  
3 middle part of the last decade. The Tennessee court  
4 ruled, as I understand it, that the voting machines, the  
5 DRE voting machines that you're complaining about,  
6 actually passed muster under the Tennessee Constitution.  
7 So why federal court?

8 **MS. CHUMNEY:** Okay. Because of the Civil  
9 Rights Act. And I'm not sure exactly which case the  
10 Court is talking about. But our case is unique because  
11 of the fact, number one, we're not just talking about  
12 these voting machines, these type of voting machines.  
13 We're talking about the age of these voting machines.  
14 We're talking about the fact that they were not  
15 recertified apparently by the State of Tennessee in  
16 accordance with state law, because they're not on the  
17 recertification list. So these are machines that may not  
18 even be properly used in the state of Tennessee.

19 **THE COURT:** But real quick, didn't you talk to  
20 the State Administrator of Elections, Mr. Goins --

21 **MS. CHUMNEY:** Yes, I did.

22 **THE COURT:** -- about that very issue?

23 **MS. CHUMNEY:** He said they had been certified,  
24 but he could not explain why they were not on the  
25 recertification list. That's my recollection from the

1 hearing. And I took notes. So...

2 Your Honor --

3 **THE COURT:** Ms. Chumney, the case that I'm  
4 talking about is *Mills v. Shelby County Election*  
5 *Commission*, 218 S.W.3d 33.

6 **MS. CHUMNEY:** Okay. Thank you, Your Honor.  
7 But once again, our case is talking about equal  
8 protection as well, Your Honor, in the fact that I'm  
9 sure since that case was decided, Hamilton County  
10 has -- 14 counties in the state have voting machines with  
11 a paper trail. So it puts us in a different position in  
12 terms of equal protection, our county versus some other  
13 counties in the state of Tennessee.

14 **THE COURT:** "Some" other counties,  
15 Ms. Chumney.

16 **MS. CHUMNEY:** That's right, Your Honor.

17 **THE COURT:** I was reading, with interest, the  
18 report. And I'm sorry, but I'll forget the name of the  
19 group. It's the Tennessee Advisory Commission on  
20 Intergovernmental Relations. It was a very interesting  
21 report. I noticed that they referenced the fact that  
22 14 counties have a system that you're advocating.

23 **MS. CHUMNEY:** That's right.

24 **THE COURT:** Which means that -- you correct me  
25 if I'm wrong, but that means 81 counties don't have it.

1           **MS. CHUMNEY:** That's correct, Your Honor. But  
2 we have the largest African American population in the  
3 state of Tennessee. And so that falls into the Civil  
4 Rights Act, purposefully discrimination, in the fact that  
5 our voters are using the voting machines that are  
6 outdated, that are not certified/recertified in the state  
7 of Tennessee, and also do not have the paper trail. So  
8 our county is unique and different in the fact that we  
9 have the vast majority of African American voters in our  
10 county and statewide.

11           **THE COURT:** Well, you know, when you look at  
12 voting rights cases, or at least the ones that we think  
13 about, it's a situation where there's been a rule that  
14 prevents someone, a certain class of individual, from  
15 voting. Are you alleging that African Americans are not  
16 entitled to vote based on the use of these machines?

17           **MS. CHUMNEY:** Oh, you mean that the machines  
18 disenfranchise them?

19           **THE COURT:** Yes.

20           **MS. CHUMNEY:** Yes, we are. Because, I mean,  
21 we have emails where they're saying votes are backed out,  
22 may be backed out, that votes don't match, tallies don't  
23 match with votes, votes aren't counted.

24           **THE COURT:** And when were those emails?

25           **MS. CHUMNEY:** One was as recently as 2016.

1           **THE COURT:** But what you're asking for here is  
2 an injunction with very short notice --

3           **MS. CHUMNEY:** Yes, Your Honor.

4           **THE COURT:** -- for everyone --

5           **MS. CHUMNEY:** I know that, Your Honor.

6           **THE COURT:** -- to address an issue that may or  
7 may not happen, and the evidence that you have that it  
8 did dates back to 2016. Let me ask you this: From the  
9 August election to now, what evidence do you have of  
10 voting irregularities with the DRE machines?

11           **MS. CHUMNEY:** Well, we filed an exhibit, Your  
12 Honor, which is Document, I think, 1-9. It's a letter  
13 from the Shelby County Election Commission dated  
14 August 21, 2018. This was a response to an open records  
15 request that we did about the August elections.

16           And we document in our Complaint and in the  
17 response to this, Your Honor, that they don't have  
18 documents on things. It's just inconceivable that there  
19 would not be documents or a log of who has access in and  
20 out of the tabulator room, that there would not be  
21 documents documenting when these cards that carry all  
22 these votes are put into or taken into the Zone Turn-In  
23 sites or down into the annex. Hold on, I'll tell you the  
24 rest, Your Honor, because we set it out in our Complaint  
25 here. It's really mind-boggling that there would not be

1 any record, which makes us concerned. Here they are. No  
2 documents regarding pre-election and post-election  
3 testing of the election computer at the GEM server, which  
4 received the tabulated votes --

5 **THE COURT:** What are you reading from?

6 **MS. CHUMNEY:** Page 43 of the Complaint,  
7 paragraph No. 166.

8 **THE COURT:** Okay. Page 43?

9 **MS. CHUMNEY:** Yes.

10 **THE COURT:** All right. And which paragraph?

11 **MS. CHUMNEY:** Paragraph No. 166, Your Honor.

12 **THE COURT:** I read the response that they sent  
13 you. At least in some of the paragraphs -- and I wasn't  
14 able to necessarily follow which questions they were  
15 answering, but they said, you know, under the Tennessee  
16 Open Records Act, they're not required to essentially  
17 create a report.

18 **MS. CHUMNEY:** I didn't reference those at all  
19 in the Complaint, Your Honor. I only referenced the ones  
20 that said they did not have documents, I believe. Yeah,  
21 like 19, 20, 21, 22. Those are the ones that --  
22 certainly, if they have some other argument -- but they  
23 didn't put it in the answer to this.

24 **THE COURT:** This particular case is very  
25 different, it seems to me, from a lot of the cases that,

1 you know, we remember back in the Warren Court, if you  
2 will, where groups of people were prevented from walking  
3 in and casting ballots, for whatever reason.

4 But what you're talking about here has to do  
5 with the mechanics of voting, the actual system that  
6 we're utilizing here in Shelby County to vote.

7 One of the questions that I'm struggling with,  
8 Judge Gilman in a case -- he was dissenting from an  
9 opinion, and he wrestled with the same questions. He  
10 didn't have an answer, which means that maybe you will.  
11 And here's the question.

12 **MS. CHUMNEY:** I hope so.

13 **THE COURT:** The question is -- well, first of  
14 all, are you aware or do you have proof of how much more  
15 accurate the system you want to use is from the system  
16 we're now using?

17 **MS. CHUMNEY:** We do have an expert, Your  
18 Honor, that we've consulted with, yes.

19 **THE COURT:** Well, that isn't evidence.

20 **MS. CHUMNEY:** Right, Your Honor. If we want  
21 to get them on the phone, you know, I'm happy to do that  
22 today. I know Mr. Ryder objected. He is available.

23 **THE COURT:** No, what I'm -- I mean, if you  
24 want to submit an affidavit or something, that might be  
25 interesting. But here's my question to you.

1           **MS. CHUMNEY:** Yes, sir.

2           **THE COURT:** All right. So let's just say you  
3 do have evidence that the system you want to employ,  
4 which is this optical scanner system, is more reliable,  
5 let's say, than the DRE system.

6           **MS. CHUMNEY:** Right.

7           **THE COURT:** How much more reliable?

8           **MS. CHUMNEY:** Well, how do you determine that,  
9 Your Honor?

10          **THE COURT:** That's a great question.

11          **MS. CHUMNEY:** How do you determine it if you  
12 don't get to look at the machines? How do you determine  
13 it if machines aren't scanned? How do you determine  
14 that? If people can hack into a machine and it not be  
15 detected, how do you determine that?

16          **THE COURT:** Well, I think one way to determine  
17 it is to conduct studies.

18          **MS. CHUMNEY:** And they have.

19          **THE COURT:** Okay. And so what is the answer?

20          **MS. CHUMNEY:** Well, I've gone through in the  
21 report and talked about the Secretary of State in  
22 California who threw out their machines, and in Ohio.  
23 They did these studies on these same type of machines.

24          **THE COURT:** Well, it might surprise you to  
25 know that there are actually lawsuits on both sides of

1 this equation that have gone one step from the United  
2 States Supreme Court.

3 **MS. CHUMNEY:** Right.

4 **THE COURT:** There are cases where people are  
5 leaving the paper system behind and going to a DRE  
6 system, and they've alleged exactly what you have: Wait  
7 a minute. I want a paper trail. And there are other  
8 people who are saying we need to abandon this old,  
9 antiquated paper system and go where the computers are.  
10 And they're both alleging equal protection violations,  
11 constitutional issues, on both sides of this equation.  
12 Were you aware of that?

13 **MS. CHUMNEY:** I haven't seen any cases  
14 recently like the Court is talking about where they want  
15 to leave the paper and go to DRE, no, I haven't seen  
16 those. I know --

17 **THE COURT:** Well, there's one in the Sixth  
18 Circuit.

19 **MS. CHUMNEY:** Okay. Well, I know there are  
20 cases that are in Georgia, for example, that's the  
21 opposite. We did rely on that in our brief.

22 **THE COURT:** Right, and I looked into that  
23 case.

24 **MS. CHUMNEY:** Right.

25 **THE COURT:** And the difference between that

1 case and this one is -- we pulled the docket sheet. This  
2 is the docket sheet (indicating).

3 **MS. CHUMNEY:** Yes, Your Honor, it's been there  
4 for a while.

5 **THE COURT:** That case has been there for over  
6 a year.

7 **MS. CHUMNEY:** Right.

8 **THE COURT:** In August they moved for an  
9 injunction, and Judge Totenberg denied it.

10 **MS. CHUMNEY:** Yes, Your Honor.

11 **THE COURT:** I was envious of Judge Totenberg  
12 for at least having a record to go on.

13 **MS. CHUMNEY:** Yes, Your Honor.

14 **THE COURT:** So the question that Judge Gilman  
15 posed is one that I'm still struggling with, and that is,  
16 as far as -- and maybe your expert might say otherwise --  
17 so far there's no such thing as a foolproof system. So  
18 if there's not a foolproof system, then what level of  
19 inaccuracy can we live with?

20 **MS. CHUMNEY:** Well, we certainly --

21 **THE COURT:** And put another way is, what level  
22 of inaccuracy creates a constitutional emergency?

23 **MS. CHUMNEY:** And I would submit I understand  
24 the Court's struggle, and I have not read what the Court  
25 is referring to. I would like to know what case that is

1 exactly so I can read it, Your Honor, and then I would  
2 like to respond.

3 **THE COURT:** Sure. Give me a minute, and I'll  
4 tell you.

5 **MS. CHUMNEY:** Right, and I don't anticipate  
6 reading it right this second. I just want to make sure I  
7 get the cite.

8 **THE COURT:** The one I think is interesting  
9 that is right on point with us is *Weber v. Shelley*. It's  
10 out of the Ninth Circuit. It's 347 F.3d 1101. That's  
11 2003.

12 The case that I was referring to where  
13 Judge Gilman wrote his dissent is *Stewart v. Blackwell*.  
14 It's a long opinion. It's got an interesting history, I  
15 guess, you could say. This went up from Ohio to the  
16 Sixth Circuit. Judge Merritt, I believe, wrote the  
17 majority opinion -- no, Judge Martin wrote the majority  
18 opinion. And Judge Gilman dissented. And it was set for  
19 en banc argument, and the parties resolved their dispute.  
20 So the Sixth Circuit didn't get to rule. So they vacated  
21 this opinion. It doesn't stand for much, except it does  
22 raise interesting questions.

23 **MS. CHUMNEY:** Yes, Your Honor.

24 **THE COURT:** And you also asked -- so that's  
25 the case where Judge Gilman...

1           So in that case, they compared a number of  
2 different systems, voting systems: punch cards, the  
3 DRE-type machines, the optical scanning machines. And  
4 they all had some percentage of inaccuracy. And he  
5 raised this question: Which of these error rates is  
6 constitutionally significant?

7           What's clear to me, if nothing else from  
8 reading these cases, is that the beauty of a voting  
9 machine is in the eye of the beholder.

10           **MS. CHUMNEY:** Or the vendor, I guess,  
11 manufacturer/vendor.

12           **THE COURT:** May be. May be.

13           **MS. CHUMNEY:** Yeah.

14           **THE COURT:** But it's a difficult issue,  
15 Ms. Chumney, to wrap your arms around because whatever  
16 system we come up with, if I were to adopt your argument,  
17 would be flawed in some way. And so, then, it's going to  
18 matter a lot to that one voter, if you will, whose vote  
19 didn't count. But system-wide, what is acceptable? What  
20 is not?

21           **MS. CHUMNEY:** And I think there's a difference  
22 there. One of the differences some of these cases have  
23 talked about is the difference between human error and  
24 mechanical error, and there is a big difference there.

25           So I would suspect one of the things the Court

1 is thinking is that human error is different and -- you  
2 know, that goes more into negligence or maybe  
3 intentional.

4 But under the Civil Rights Act, I believe the  
5 mechanical, the way -- the fact that, you know, we don't  
6 know if China or Russia is getting into our machines, and  
7 we're about to start voting tomorrow, this clearly  
8 undermines the very pinnings of our democracy.

9 So I would submit there's no foolproof system.  
10 That may be correct. But there certainly are systems  
11 that are much more accurate with a paper trail so the  
12 voter themselves at least can check their vote.

13 And with our outdated systems that have not  
14 been patched and modified up to the standards of 2018,  
15 there's even much more likely of those types of problems  
16 to have occurred, and here the voter is unable to  
17 double-check.

18 So I would submit that a system that allows a  
19 voter to at least double-check their vote with a paper  
20 trail or even hand-mark their ballot and turn it in for  
21 the optical scan, then they've done their ballot. And if  
22 there is a problem, the ballots can go back and be  
23 reviewed.

24 But if you don't have that voter marking the  
25 ballot actually, then you have a machine that is

1 controlling everything, and maybe somebody somewhere else  
2 controlling our machine. So I would submit that that is  
3 a serious problem.

4 But in our case, I think it's even a step  
5 higher because of the age of the machines. You know, the  
6 fact we're -- apparently, if they were recertified,  
7 they're not on the list, the state list. We don't know  
8 what kind of examination they did. Did they look inside?  
9 Did they have a forensic examination? There could be  
10 malware in our machines as we sit here today.

11 We even pointed out the comptroller saying he  
12 didn't have the resources to go in and look at the  
13 machines. Well, if he and the state officials don't have  
14 the resources, how could they have reexamined them and  
15 recertified them?

16 So we would just submit that with all the  
17 serious questions now about foreign interference in our  
18 elections, this is raised to a higher level. It's gone  
19 to a higher level now.

20 **THE COURT:** Well, one of the things I was  
21 struck by when I read the attachments to your Complaint  
22 is I believe it was Ms. Lester whose email -- it's  
23 1-10 -- it talked about some glitches when voters were  
24 pushing the button for "Hillary Clinton," the vote would  
25 flip to "Trump," according to the email.

1           **MS. CHUMNEY:** That's right.

2           **THE COURT:** But she also said this -- and this  
3 is in your attachment -- "Thankfully, with attention  
4 given, all errors thus far have been corrected prior to  
5 casting" -- I think she would have said the ballot or a  
6 ballot. "Please know that" -- again, I think there's a  
7 typo -- "that a ballot cast is a ballot recorded."  
8 That's the way I'm reading it.

9           **MS. CHUMNEY:** Uh-huh.

10          **THE COURT:** Now, she goes on to say, "I'll be  
11 advocating for the purchase of new machines" --

12          **MS. CHUMNEY:** Right.

13          **THE COURT:** -- and goes on to say that. But  
14 one of the errors with the machines is, apparently it's  
15 obvious to the voter when they are in there, "Wait a  
16 minute. This thing is glitching."

17          **MS. CHUMNEY:** Uh-huh.

18          **THE COURT:** And they're able to call that to  
19 the attention of the election officials and get it  
20 resolved. Because as she points out, once the vote is  
21 cast, it's -- and we've caught it so far.

22                 The other item that I was struck by was a  
23 defendant in this case, Tre Hargett, wrote a letter --  
24 I'm not sure which one it is. Hang on. He wrote a  
25 letter to Justin Wilson, Comptroller of the Treasury, in

1 July of 2012, six years ago, and requested an audit of  
2 the Shelby County Election Commission Administration.  
3 You attached that to your Complaint to demonstrate how  
4 long the problems had been going on.

5 **MS. CHUMNEY:** That's right.

6 **THE COURT:** And it definitely supports the  
7 notion that there have been problems and that they have  
8 been ongoing. It says something else, though. When you  
9 read the cases that address the requests for federal  
10 intervention in elections, one of the things that jumps  
11 out -- and it doesn't take long to find it. The Sixth  
12 Circuit has bunches of cases that say essentially  
13 this: The mechanics of elections is inherently a state  
14 and local function, and federal courts should be  
15 cautious, careful -- you come up with the synonym -- but  
16 federal courts should be loathe to jump in and interfere  
17 with the mechanics of how votes are cast and counted in  
18 state and local races. And so what struck me about that  
19 letter and why it jumped out at me is because, to me,  
20 that is a very good example of how the system is supposed  
21 to work.

22 The state and local officials had a history of  
23 problems, and the state Secretary of State called upon  
24 the comptroller of the currency -- of the treasury,  
25 excuse me, to investigate. And it was -- there's nothing

1 in here about the results of that audit.

2 But the fact that he called upon the state  
3 official, who's responsible to look into these things and  
4 to conduct these audits, says to a federal official that  
5 the state apparatus is functioning. Why don't you speak  
6 to that?

7 **MS. CHUMNEY:** Sure. Because after that  
8 letter, the problems continued. We documented problems  
9 in 2014. We documented problems in 2016. We even  
10 mentioned a problem in the last August election with a  
11 voter. And we went to the State of Tennessee Election  
12 Commission and asked them to refer this to the  
13 comptroller, and they did not. They voted not to do  
14 that.

15 So this is a different situation in the fact  
16 that the state apparatus has clearly not worked. And  
17 nobody is taking responsibility, it appears, for this.  
18 And so the voters are left with this court as their  
19 recourse.

20 **THE COURT:** Have you considered what problems  
21 may arise from the optical scanning system that you're  
22 advocating?

23 **MS. CHUMNEY:** Well, Your Honor, we believe, in  
24 consulting with our expert, that they will work fine.

25 **THE COURT:** I bet you could find someone that

1 says the DRE system is working fine.

2 **MS. CHUMNEY:** The vendor certainly or the  
3 manufacturer, yes, and maybe people in China and Russia,  
4 maybe Putin.

5 **THE COURT:** Ms. Chumney, what does Tennessee  
6 law require when it comes to the voting machines?

7 **MS. CHUMNEY:** It requires them to be  
8 certified, and they -- I believe they say, up to federal  
9 standards. But I could not find our system on the  
10 Election Assistance Commission list -- I looked just  
11 before I filed this Complaint -- of an approved voting  
12 machine.

13 Before the Election Assistance Commission  
14 approved machines, there was another entity that did some  
15 of that. It's called NASED. That is the one that got  
16 thrown out even though -- the NASED-certified machines,  
17 some of the machines during that time period, voting  
18 machines. California and Ohio still found that the  
19 testing was insufficient and that -- I believe, there's  
20 even a report that said they didn't even perform the  
21 testing. So that would be something we would have to  
22 have, you know, obviously our expert proof on, Your  
23 Honor. But that's my understanding of how that works.

24 **THE COURT:** But the Tennessee law does not  
25 require a county to have a paper trail, does it?

1           **MS. CHUMNEY:** No, not under Tennessee law.  
2 They did pass a law -- we document that in our  
3 Complaint -- in 2008.

4           **THE COURT:** Right.

5           **MS. CHUMNEY:** I know it was long Complaint,  
6 Your Honor. I really do.

7           **THE COURT:** No, I -- and as I understand it,  
8 the law evolved in Tennessee. At first, it was a  
9 requirement.

10          **MS. CHUMNEY:** Right.

11          **THE COURT:** Then it was "we hope you do." And  
12 now --

13          **MS. CHUMNEY:** Give us a preference.

14          **THE COURT:** -- it's gone from basically --  
15 from requiring it to authorizing it and encouraging it.

16          **MS. CHUMNEY:** Right, giving a preference, you  
17 know, make every effort to buy this kind.

18          **THE COURT:** Well, and then there's also  
19 Congress --

20          **MS. CHUMNEY:** Right.

21          **THE COURT:** -- federal law -- I believe, it's  
22 the Help Americans Vote Act --

23          **MS. CHUMNEY:** Right.

24          **THE COURT:** -- that, as I read it, does not  
25 require states to adopt a specific voting mechanism. It

1 allows states to do so, and it encourages the states to  
2 improve their systems and provides some money apparently,  
3 but it doesn't require states to go -- I mean, some  
4 states have the old paper ballot. Some states have DRE,  
5 like Shelby County.

6 **MS. CHUMNEY:** Michigan and Wisconsin and, I  
7 think, Pennsylvania.

8 **THE COURT:** But my point is both Tennessee law  
9 allows for flexibility and federal law allows for  
10 flexibility in terms of how the state and local officials  
11 are going to get the job done. It seems to me, at least  
12 in reading about it, it suggests one reality that you and  
13 I haven't talked about, and that is budgets and  
14 priorities, and the learning curve that comes every time  
15 you change a system, and the ability to train your  
16 volunteers and whatnot.

17 Sometimes, sometimes not being first pays  
18 dividends because you can see what works. I mean, that's  
19 why you have beta programs and the like. I was asking  
20 you about what problems the optical scanner might have or  
21 present.

22 Well, one of the issues that comes up when you  
23 do include handwritten ballots is this notion of residual  
24 votes. And what happens is people invariably mess up  
25 when they're using their hands to write, and so you may

1 turn in a card that votes for two people for the same  
2 office.

3 Well, if you do that using the DRE system, as  
4 I understand it, it will stop you or something will  
5 happen. It won't accept your vote. It will say, wait a  
6 minute. You made a mistake over here.

7 If you just hand your card in, nobody stops  
8 you. You go on about your business, and what do you  
9 know? Your vote didn't count for that office. And so  
10 there are lawsuits out there alleging that that is  
11 inefficient, constitutionally flawed.

12 So all of this discussion is around your very  
13 first hurdle it seems to me, Ms. Chumney, and that is,  
14 the likelihood of success on the merits. And so I'm  
15 struggling with that.

16 **MS. CHUMNEY:** Yes, Your Honor. I would just  
17 say as far as the budget issue, we did document that with  
18 the TACIR report. That was attached. We mentioned the  
19 fact the money is there, and it's been there for quite  
20 some time, several years. The State did get "Help  
21 America Vote Act" money and did spend about \$28 million  
22 of it. And, also, more monies have been allocated this  
23 year by Congress. And even the administrator admitted  
24 that the county has agreed to the funding, as well, at  
25 the Election Commission meeting.

1           **THE COURT:** But what would it cost Shelby  
2 County to change these voting machines?

3           **MS. CHUMNEY:** I don't have a number off the  
4 top of my head. I just know that she said the money was  
5 there.

6           **THE COURT:** Well, but, I mean, we're one of  
7 81 counties that apparently are due to change their  
8 system, according to you. And so is that money going to  
9 get spread out among 81 counties?

10          **MS. CHUMNEY:** I don't know.

11          **THE COURT:** If not, I suspect the members of  
12 those counties might want to hire you.

13          **MS. CHUMNEY:** Well, I believe, she said our  
14 county said they had the money to do it as well, that our  
15 county will put money in too. I believe, that's what she  
16 said at the Election Commission meeting. It's not just  
17 the state money or the federal money. I believe, she  
18 said the local money is there too. She said even the  
19 finance officer is willing to incur debt, if necessary.  
20 So I don't think the money -- respectfully, Your Honor, I  
21 don't think the money in this instance is an issue.

22                 I would just raise, again, the issue that we  
23 do have a large African American population in this  
24 county in the state of Tennessee. So there are higher --  
25 higher -- I can't think of the right word here. You

1 know, that raises it to a different level under the Civil  
2 Rights Act, in terms of allocations of money, I would  
3 submit as well.

4 And as far as the handwritten-ballot issue and  
5 the Court talking about lawsuits, I would just go back  
6 again and say if a voter makes a mistake on their ballot,  
7 that handwritten ballot, that's a lot different than a  
8 machine making a mistake on your vote and you not being  
9 able to even know that it happens. So that's a  
10 difference.

11 **THE COURT:** Well, I want you to help me  
12 understand the equal protection argument again. I know  
13 that Shelby County has a majority African American  
14 population. But when everybody is using the same  
15 machines, and everyone is allowed to come and vote, if  
16 you wish, an African American voter and a Caucasian voter  
17 or, you know, any other voter has the same risk of the  
18 vote not being recorded properly, if I'm following your  
19 argument. Right?

20 **MS. CHUMNEY:** Conceivably. But we did  
21 document in the Complaint that there is even a method  
22 within the machines and the system to not program cards  
23 to be uploaded. That could actually impact on certain  
24 precincts that are majority African American more than  
25 Caucasian. So it's a way that the system can be

1 manipulated to not count as many votes or any votes in  
2 certain areas where it's mostly a majority of African  
3 American voters.

4 So I would submit that you say everybody is  
5 voting on the same machine in Shelby County, but we might  
6 not be. And we've even found -- you know, we document,  
7 through different elections, people being given different  
8 ballots. There have been lawsuits over that. Just  
9 recently in Georgia there was a state lawsuit using the  
10 same machines, different ballots. The Court threw it  
11 out.

12 So, I think, even within the county there's an  
13 issue. But beyond that, beyond that, outside, there  
14 certainly is because the African American votes get  
15 diluted. If our votes aren't counted properly in this  
16 county, it has a greater impact, disparate impact, on the  
17 African American voters and impacts statewide.

18 **THE COURT:** But if I understand your argument,  
19 the voters in Shelby County are voting in exactly the  
20 same way as 80 other counties in this state.

21 **MS. CHUMNEY:** But they're not voting the same  
22 way as Hamilton County and 13 other counties in addition  
23 to Hamilton County. And also, Your Honor, we did point  
24 out that no other county in the state of Tennessee is  
25 using our voting machines, none. So to say that they're

1 the same is really not accurate. Maybe I should have  
2 pointed that out earlier. There are no other counties in  
3 the state of Tennessee that use the AccuVote TSX.

4 Now, if you're talking about the paper trail,  
5 then according to the TACIR report, 14 counties have  
6 that. But our particular voting machines, nobody uses  
7 them in the state except Shelby County.

8 **THE COURT:** But the issues with our voting  
9 machines, are they unique to the voting machines that  
10 Shelby County uses? Or is it a vulnerability of all  
11 DREs?

12 **MS. CHUMNEY:** Both.

13 **THE COURT:** Well, but, I guess, my point is if  
14 we used a different DRE, you could say the same thing,  
15 couldn't you?

16 **MS. CHUMNEY:** But we don't use --

17 **THE COURT:** Each one of them is going to have  
18 their own unique software and their own unique issue.

19 **MS. CHUMNEY:** Right, but that's not what is in  
20 this lawsuit right now. We're talking about the Shelby  
21 County voting machines. And --

22 **THE COURT:** But you're also saying that it's  
23 an equal protection issue --

24 **MS. CHUMNEY:** Yes, we are. Yes, we are.

25 **THE COURT:** -- and that it distinguishes

1 Shelby County voters from other voters in the state of  
2 Tennessee, and I'm trying to follow you.

3 **MS. CHUMNEY:** Well, our machines were modified  
4 by Accenture, which is -- so our machines are unique in  
5 the fact that the software has been modified as well.  
6 But yes, it's equal protection because, once again, we  
7 have the majority of African American voters. Their  
8 votes get diluted. If we're voting on the bad voting  
9 machines, and people in other parts of the state get to  
10 vote on the good ones, then that's a problem.

11 Also, another equal protection argument we  
12 made that relates to this case is that we've heard  
13 they're planning on buying, maybe piecemeal, voting  
14 machines and having voters vote on different types of  
15 machines even possibly next year in Shelby County. So  
16 that's a whole other equal protection argument in terms  
17 of, you know, if I go to vote and get the good machine  
18 and somebody else gets the bad one. I know that's maybe  
19 not part of the TRO today, but we do allege that as well.

20 We also allege due process, fundamental right  
21 to vote. It's not just an equal protection allegation.

22 **THE COURT:** I know. And the law on that is --  
23 Ms. Chumney, I know that I've been asking you a lot of  
24 questions. Part of the reason for that is because when  
25 you start getting into these cases, the burden is a high

1 one. Number one, it's high anyway --

2 **MS. CHUMNEY:** Right.

3 **THE COURT:** -- because you're asking for an  
4 injunction.

5 **MS. CHUMNEY:** Yes, Your Honor.

6 **THE COURT:** It's also high because you're  
7 asking the federal judiciary to intervene in what is  
8 historically, constitutionally and legislatively, a state  
9 and local function. It is what Judge Gibbons referred  
10 to as: It has to be an exceptional case where the  
11 state's voting system is fundamentally unfair. It would  
12 arise, for example, if the state employs nonuniform  
13 rules, standards and procedures, that result in  
14 significant disenfranchisement and vote dilution.  
15 Significant disenfranchisement.

16 So far, Ms. Chumney, what you've been talking  
17 about is possibilities. If this assembly right here were  
18 the Shelby County Election Commission, the conversation  
19 would probably be very different. But you're in a  
20 federal court, asking for extraordinary relief. So the  
21 Court has to pose hard questions because the relief is so  
22 extraordinary.

23 As I understand your argument, it boils down  
24 to the election -- the voting machines are not as  
25 reliable as they should be, there are other mechanisms

1 that are more reliable, Shelby County has known about  
2 this for a long time, they've continued to do nothing  
3 about it, and for that reason you want the federal court  
4 to impose an injunction to require them to do something  
5 about it. Is that fair?

6 **MS. CHUMNEY:** Not just that they're not  
7 reliable, Your Honor, I think that they don't meet --  
8 they're fundamentally -- a fundamentally unfair voting  
9 system, as the Court just said. They're not just  
10 unreliable is our position. They're fundamentally  
11 unfair. And they disenfranchise and dilute the African  
12 American vote in this county significantly, we believe.  
13 And we believe it's documented with their own records,  
14 emails, through the "Voting on Thin Ice" report. And  
15 they haven't been apparently recertified, at least  
16 they're not on the list in 2015, re-examined. So they  
17 are not authorized under state law if they were not  
18 properly recertified. We would submit they're so  
19 outdated at this point that they're not -- more than not  
20 reliable. Higher standard than that even, Your Honor.  
21 So we would submit that that merits the extraordinary  
22 relief in this case, especially since we've been so many  
23 places, asking people to do things.

24 **THE COURT:** Except state court.

25 **MS. CHUMNEY:** Well, no, we did not go to state

1 court, Your Honor. But if we had gone to state court,  
2 they would probably just have removed us to you anyway.

3 **THE COURT:** And I'd be talking about the  
4 abstention doctrine.

5 **MS. CHUMNEY:** And I would just say, Your  
6 Honor, under -- you know, the U.S. Constitution has, you  
7 know, due process and the fundamental right to vote. So  
8 there is a place. And there are federal elections on the  
9 ballot in November, Your Honor.

10 So we would submit that that -- if the U.S.  
11 Constitution is going to mean anything, that requirement  
12 and equal protection under the U.S. Constitution, then  
13 the federal court has a role.

14 **THE COURT:** Well, courts have said that it is  
15 a fundamental right, being able to vote. But what they  
16 haven't said, as far as I know, is that you're entitled  
17 to a foolproof system.

18 You have a right to cast your ballot. And I  
19 haven't heard you say that no one -- that the Shelby  
20 County Election Commission is preventing people from  
21 casting their ballot.

22 What I've heard you say is they've got  
23 unreliable machines that, in your words, are  
24 "fundamentally unfair." But I have yet to hear anything  
25 about people being turned away at the door.

1           **MS. CHUMNEY:** Well --

2           **THE COURT:** And I know that's not the only  
3 way. But it's a different issue. What I'm saying there  
4 is it brings us back to the questions that I was talking  
5 to you about of what is an acceptable error rate, if you  
6 will, versus what is a constitutionally flawed system,  
7 and nobody has put the number on it.

8           **MS. CHUMNEY:** Probably --

9           **THE COURT:** And the reason why is because you  
10 want to encourage innovation, right?

11           **MS. CHUMNEY:** Right.

12           **THE COURT:** You want systems to get better.  
13 You want the county government, the state government, you  
14 want people to go out and try to find a better way to do  
15 it. You don't want people to sit still. But you also  
16 don't want to waste money. And you don't want to run out  
17 there and try to be first all the time because you'll  
18 make a lot of mistakes that way. I mean, you can  
19 understand the decision-makers saying you know what,  
20 let's see what system works better before we jump at the  
21 next one.

22           **MS. CHUMNEY:** Well, we're definitely not  
23 first, Your Honor. We're nowhere near first. And I  
24 would just submit, Your Honor, the Georgia -- I know it's  
25 a different judge and different state, the same machines.

1 They found a likelihood of success on the merits in that  
2 case, *Curling v. Kemp*, Civil Action No. 1:17-cv-2989-AT.

3 And I would just submit it's also not -- okay.  
4 How do you say, turned away? Does that mean if I go in  
5 and I say I want to vote today, and they say no, you  
6 can't, that's turning me away? Or if I go into the  
7 machine to vote, and the vote doesn't cast the vote I put  
8 there, that's turning a person away as well?

9 **THE COURT:** Well --

10 **MS. CHUMNEY:** And I would submit it's not just  
11 about an error rate -- oh, go ahead, Your Honor.

12 **THE COURT:** Well, I think what you're saying  
13 sounds definite. Everything I've read talks about  
14 vulnerability. I have yet to see a situation where  
15 there's evidence that someone cast a ballot here, and it  
16 was recorded incorrectly.

17 **MS. CHUMNEY:** Well, we do put the lady in here  
18 that tried to vote four times for a Democratic candidate  
19 for governor, and it kept giving her the Republican.

20 **THE COURT:** I think that was the Trump --

21 **MS. CHUMNEY:** No, this was in the last  
22 election, in the August election, yeah.

23 **THE COURT:** Well, even taking that example,  
24 the email that you attached spoke in terms of every  
25 problem so far has been resolved.

1           **MS. CHUMNEY:** I don't think that's what  
2 Ms. Lester said in that email. I think she meant every  
3 time somebody told her that a "Trump" came up when they  
4 voted for "Hillary," the ones she knew about -- I don't  
5 think she's saying every problem with the election over  
6 these times have been resolved. No, I do not believe  
7 that's what she was saying, Your Honor, at all.

8           **THE COURT:** Well, let me just tell you what  
9 she said. I don't know what she meant, but what she said  
10 is, "Thankfully, with the attention given, all errors  
11 thus far have been corrected prior to casting ballot.  
12 Please know that ballot cast is ballot recorded." That's  
13 what her email that you attached said.

14           **MS. CHUMNEY:** She was talking specifically  
15 about calibration, and we're not talking only about  
16 calibration, Your Honor, in the "Voting on Thin Ice"  
17 report nor in the Complaint. We're talking about many  
18 other things in addition to that. So her comments were  
19 addressed specifically to calibration in that election.

20           But I would also submit it's not really even  
21 so much an error rate, what error rate is acceptable.  
22 It's an issue of what security measures are put in for  
23 these machines for this election so that we can be sure  
24 that our votes are actually being counted in Shelby  
25 County and that somebody else somewhere else in another

1 country is not voting for us instead. And that's what  
2 that part of it is about, Your Honor.

3 **THE COURT:** Well, you know, that brings me  
4 back to the very first question I asked you, which is  
5 what took you so long.

6 **MS. CHUMNEY:** We're here, Your Honor.

7 **THE COURT:** Well, I know.

8 **MS. CHUMNEY:** We're here.

9 **THE COURT:** Respectfully, though, I mean, a  
10 lot of what you're saying is hypothetical. It is  
11 potential. It is vulnerability. And so that's part of  
12 this that we have to acknowledge, that coming in right  
13 now you do not have multiple examples where these  
14 machines have proven that the vote cast was not counted  
15 correctly.

16 **MS. CHUMNEY:** Your Honor, how would one do  
17 that?

18 **THE COURT:** Well, one way --

19 **MS. CHUMNEY:** If the machine records a  
20 different vote, and you don't get a paper trail --

21 **THE COURT:** Well, one of the first things that  
22 I thought about in reading all the papers here is that  
23 this case is not *Bush v. Gore*. Okay? This is not a  
24 recount case. This is not a case where we're in an  
25 emergency situation where the electoral college is about

1 to meet and we got to figure this out. We are ahead of  
2 the vote. And what you're asking for is a TRO at this  
3 point.

4 This case may play out like the one you cited  
5 a minute ago, the *Curling v. Kemp* case from Georgia,  
6 where Judge Totenberg had over a year to have these sorts  
7 of conversations before she was faced with an injunction.  
8 And she denied it, by the way. And so that's what I'm  
9 saying.

10 **MS. CHUMNEY:** What happened in that case, Your  
11 Honor, I believe is they changed legal counsel, some of  
12 the plaintiffs changed legal counsel in the middle of the  
13 case. And so it was dormant, actually, for a while. It  
14 wasn't proceeding. And then they secured new legal  
15 counsel. It may have been a funding issue, Your Honor.  
16 But that is one reason why that case, I believe, has been  
17 there over a year. In fact, I talked to one of the  
18 plaintiffs' representatives, and that's what she told me.  
19 That's not in our Complaint but...

20 **THE COURT:** Well, they figured out a way to  
21 file a few things.

22 **MS. CHUMNEY:** Right, Your Honor. That's  
23 right, Your Honor. But anyway, the Court in *Curling*,  
24 yes, they denied the preliminary injunction because  
25 they -- we were trying to throw out all the voting

1 machines and get paper ballots. They found a likelihood  
2 of success on the merits. They found the injury, in  
3 fact. They found those things. But they said, we can't  
4 give this broad relief on this short notice.

5 But what we were trying to do with this TRO is  
6 just saying there are some things that could be done that  
7 would not -- that cost nothing, that would not interfere  
8 with the elections proceeding.

9 We want everybody to vote. We're not trying  
10 to do anything to interfere with that or discourage  
11 people from voting. We just thought, safeguards. And  
12 it's my understanding that the sooner you do a  
13 cybersecurity scan, the better protection there is.

14 There are things called Albert sensors that  
15 could be put on the databases that the vendor makes that,  
16 apparently, give some protection there so you know, are  
17 alerted, if something happens unusual in the election.

18 Those are the kind of things that we were  
19 hoping. We know it's extraordinary relief. I appreciate  
20 the Court telling me -- asking me all these questions so  
21 that we can evaluate them and --

22 **THE COURT:** Your points, again, in a different  
23 forum, a lot of your ideas could carry the day, for  
24 example if we were sitting with the Shelby County  
25 Election Commission and we happened to have their lawyers

1 here. So I'll ask the question in a minute, which is,  
2 why haven't you called DHS? Why haven't you looked into  
3 some of these things? But you're asking a federal court  
4 to tell them to go do these things.

5 **MS. CHUMNEY:** That's right, Your Honor.

6 **THE COURT:** That's an extraordinary thing to  
7 ask. So I think that -- I mean, we've talked about a  
8 good bit.

9 **MS. CHUMNEY:** Yes, Your Honor.

10 **THE COURT:** I'll give you the last word.

11 **MS. CHUMNEY:** I was going to say one more  
12 thing. We did get a letter back from Coordinator Goins.  
13 And, basically, we -- I don't want to misquote him. He  
14 kind of punted to the Shelby County Election Commission.  
15 He kind of punted to them.

16 But we never got a letter of response from the  
17 Shelby County Election Commission. If we had gotten  
18 something and maybe it had said we are doing this or  
19 that, you know, we might have not gone for the TRO. But  
20 we never got a response, so we had no choice but to come  
21 forward. Now, they may say they're doing some things. I  
22 don't know. I guess we'll find out.

23 I hope they've done the DHS security scan. I  
24 hope they've accessed all those free resources with the  
25 Department of Homeland Security, with the top experts.

1 Because that, to me, would make the absolute most sense  
2 to make sure, absolutely sure, that our voting systems  
3 are as secure as they can be with the flawed machinery  
4 that we have. I hope they ask ES&S to put the Albert  
5 sensors on there. I hope they've had maybe some outside  
6 forensic review of the voting systems recently. I hope  
7 that they'll let us know if we have been hacked in the  
8 past year or so and that actions have been taken. I hope  
9 they can explain why there are no documents that show  
10 anybody documenting who has been in and out of the  
11 tabulator. I hope they'll be able to show and explain  
12 that to us. I hope -- we had other things in here about  
13 wanting candidates to be notified of problems and many  
14 other items we asked for in here. We also asked they  
15 preserve the digital ballot images.

16 But in any event, Your Honor, maybe we'll find  
17 out something, we hope. But thank you for considering  
18 our motion.

19 **THE COURT:** Yes, ma'am. Yes, ma'am.

20 Well, let's see. Who do we have? I know  
21 we've got Mr. Ryder sitting here.

22 Do you want -- Ms. Kleinfelter, you're with  
23 the State. I think you're first on the docket. Do you  
24 want to be heard first?

25 **MS. KLEINFELTER:** Well, Your Honor, I think a

1 lot of what -- I mean, I'm glad to address some of the  
2 issues that Ms. Chumney has raised. I think a lot of the  
3 specific relief that she is requesting in her application  
4 primarily deal with actions that she wants this Court to  
5 order the Shelby County Election Commission to take, many  
6 of which we believe would be very disruptive to the  
7 election process. But Mr. Ryder is probably in a better  
8 position to describe that in more detail.

9 I am glad, however, to go ahead and address  
10 some of the legal arguments that Ms. Chumney has made or  
11 if you would prefer to go ahead and hear from Mr. Ryder  
12 first, whichever the Court prefers.

13 **THE COURT:** Well, I have a question for you  
14 real quick, and that is, is the Shelby County Election  
15 Commission using machines that have not been certified  
16 under Tennessee law?

17 **MS. KLEINFELTER:** No, Your Honor, they were  
18 certified. As Mr. Goins explained, it was a typo, human  
19 error as Ms. Chumney referred to, simply human error that  
20 ended up leaving that equipment off of the  
21 recertification list as a result from the State Election  
22 Commission meeting when they met to recertify -- to  
23 certify and recertify voting systems.

24 **THE COURT:** And the reference is to, I think,  
25 the name of the software. That's how you know the

1 different systems; is that right?

2 **MS. KLEINFELTER:** I believe that's correct,  
3 Your Honor.

4 **THE COURT:** And they, basically, come up with  
5 a chart of some sort that lists all the different types  
6 of voting machines that are certified. Is that how it  
7 works?

8 **MS. KLEINFELTER:** It's actually a voting  
9 system because there's oftentimes multiple pieces, and so  
10 that's sort of the correct lingo is to refer to it as the  
11 "voting system." But yes, there's a list of voting  
12 systems that have been examined and reviewed.

13 These systems also have to have been certified  
14 by the Election Assistance Commission, which is the  
15 federal entity, because we can't spend HAVA funds on  
16 acquiring voting systems unless they have been certified  
17 by the Election Assistance Commission. And, then, they  
18 also have to be certified by the Tennessee State Election  
19 Commission.

20 And so yes, what you have is a list of  
21 machines that meet both the federal qualifications and  
22 the state qualifications and have been certified.

23 **THE COURT:** And who certifies the machines  
24 from the federal side?

25 **MS. KLEINFELTER:** The Election Assistance

1 Commission. The Election Assistance Commission was  
2 created by the Help America Vote Act when Congress passed  
3 that in 2004. They are also the entity that is -- that  
4 disburses funds under the Help America Vote Act.

5 **THE COURT:** The Election Assistance Commission  
6 is?

7 **MS. KLEINFELTER:** Yes.

8 **THE COURT:** All right. Well, counsel for  
9 Shelby County, Ms. Chumney used the term "punt." Maybe  
10 Ms. Kleinfelter is also a punter.

11 **MR. RYDER:** I get the impression that it's my  
12 turn to talk now.

13 **THE COURT:** That's right.

14 **MR. RYDER:** Thank you, Your Honor. I  
15 appreciate you hearing us at this time.

16 This is a Complaint that was filed Friday. It  
17 was served on my client Monday. The motion for  
18 injunctive relief was filed yesterday. And here we are.  
19 As Your Honor points out, plaintiffs are seeking  
20 extraordinary relief. Injunction in any case is  
21 extraordinary relief. A mandatory injunction rises to  
22 even a higher level.

23 In this case, I think that the plaintiffs are,  
24 in essence, asking this Court to usurp the duties of the  
25 state process, the elected officials who constitute that

1 process.

2 Article 1, Section 4, of the Constitution says  
3 that the time, place and manner of holding elections  
4 shall be determined by the legislature of the state. And  
5 the legislature has determined that the State Election  
6 Commission and the State Coordinator of Elections, who is  
7 an officer in the Office of the Secretary of State, who  
8 is elected by the General Assembly, has supervision over  
9 the election process. The State Election Commission in  
10 turn appoints the County Election Commission. The County  
11 Election Commission is appointed on the recommendation of  
12 the legislatures from Shelby County.

13 So the elected representatives of the people,  
14 directly or indirectly, determine the officials who are  
15 responsible for the administration of elections.

16 What this lawsuit seeks to do is to replace  
17 the judgment of the people and their elected  
18 representatives with the judgment of this Court. Now, I  
19 have great respect for the judgment of this Court, and  
20 I'm not disparaging Your Honor's judgment. But I am  
21 suggesting that's not the proper place for the Court.

22 We raised initially a question about  
23 jurisdiction. A great many of the items for which relief  
24 is sought in this motion are sought under 28 U.S.C.  
25 Section 1361, the federal mandamus statute. The federal

1 mandamus statute only applies to federal officers or  
2 employees. It does not apply to state officers or  
3 employees, and therefore is inapplicable to the Shelby  
4 County Election Commission or the Tennessee Election  
5 Commission. Therefore, the relief sought cannot be  
6 granted under the statute cited.

7           The second thing I really want to call to the  
8 Court's attention is, the issue of the DRE machines used  
9 in Shelby County has been litigated for many, many years.  
10 There are a number of cases, *Mills v. Shelby County*,  
11 which, I believe, the Court referenced. There was an  
12 earlier case, *Willingham v. Shelby County Election*  
13 *Commission*, which is at 2004 Tennessee Appeals Lexis 825.  
14 There is another case out of this court, *Yahweh v. County*  
15 *of Shelby*, which, I think, involves the plaintiff, one  
16 of the named individual plaintiffs in this case,  
17 Suhkara Yahweh, who filed suit in 2006. This district  
18 court, Judge McCalla presiding, heard the case.

19           I want to read from one of the opinions that  
20 Judge McCalla rendered in that case because I think it's  
21 relevant to the civil rights and equal protection  
22 arguments that have been raised by the plaintiff. The  
23 case number is 06-2492. This particular document is  
24 "Order Granting in Part, Denying as Moot in Part, and  
25 Reserving in Part County Defendants' Motion to Dismiss."

1 It's Document No. 45 in that case.

2 In that portion of the opinion, Judge McCalla  
3 said the following: "The claim must likewise fail if it  
4 asserts that the County discriminated against blacks  
5 within its own county simply by virtue of the County  
6 being comprised largely of African American residents and  
7 knowingly using defective machines. Plaintiffs do not  
8 allege that the County used the machines for some  
9 residents but not for others, in certain neighborhoods  
10 but not in others, or for African American voters but not  
11 for white voters. Indeed, plaintiffs allege that the  
12 County used only the Diebold machines throughout the  
13 County, such that all County residents were affected the  
14 same, regardless of race or residency."

15 Judge McCalla, in that case, denied the civil  
16 rights and equal protection claims that Minister Yahweh  
17 brought in that case 12 years ago. I think there may be  
18 an issue of res judicata certainly as to Plaintiff Yahweh  
19 in this case. He's raised this issue before, and the  
20 Court ruled against him before.

21 In addition, I would point out that for  
22 any kind of Section 2 action under the Voting Rights  
23 Act, plaintiffs would have to establish what are  
24 called the *Gingles* preconditions, arising out of  
25 *Gingles v. Thornburg*, showing that there's racial

1 bloc voting and that the minority is not able to elect  
2 its preferred candidate of choice, so on and so forth.

3 I don't think you can look at the recent  
4 voting history of this county and reach that conclusion.  
5 We have had a county in which majority white precincts  
6 have voted for African American candidates such as  
7 A.C. Wharton and Barack Obama, where majority black  
8 precincts have voted for candidates such as Steve Cohen  
9 and Jim Strickland.

10 You have an election last August in which a  
11 mixed slate of Democrats swept the county elections,  
12 including both African American and white candidates, and  
13 received substantial majorities across the board.

14 So I think it's pretty hard -- it would be  
15 pretty hard if we get to a full hearing on the issue for  
16 the plaintiffs to establish likelihood of success on the  
17 merits in that I don't think they can establish the  
18 *Gingles* preconditions.

19 The other issue I wanted to raise -- and this  
20 arises and goes again to one of the injunction factors --  
21 is the public interest factor. The courts travel under a  
22 lot of different names for this, principally under the  
23 *Purcell* principle, which refers to a case in the Supreme  
24 Court out of Arizona, *Purcell v. Gonzalez*, which dealt  
25 with voter implementation of a voter ID law, and actually

1 whether the stay issued by a lower court would be  
2 permitted to stand, a stay issued on the eve of the  
3 election.

4           The Supreme Court essentially in *Purcell*  
5 said the closer you get to the election, the less --  
6 the higher justification you need to invoke federal  
7 intervention because the risk of creating voter confusion  
8 by creating new systems or changing the system that is in  
9 place, even if it's not entirely -- even if there are  
10 some defects in the system, is too great.

11           The Supreme Court reaffirmed its allegiance to  
12 the *Purcell* principle as late as this May in *Benisek v.*  
13 *Lamone*, which was the redistricting case out of Maryland  
14 this past year, in which it said that the lower court did  
15 not err in denying the application for stay on the eve of  
16 the election.

17           The Sixth Circuit has followed that same  
18 principle in *Crookston v. Johnson*. In that case, the  
19 Sixth Circuit said you can call it the *Purcell* principle,  
20 or you can call it common sense. And it just makes  
21 common sense to restrain -- for the Court to exercise  
22 restraint under these circumstances.

23           We sit here today, 2:00 -- well, now it's  
24 3:30 in the afternoon. Early voting starts at 11 a.m.  
25 tomorrow. There are over a thousand UOCAVA absentee and

1 overseas ballots out. Nursing home voting has started.  
2 All of the machines, all of the machines, over 200  
3 machines, necessary for early voting have been deployed  
4 to their early voting sites. We have a thousand and nine  
5 machines prepared to be deployed for Election Day voting  
6 on November 6th. They have all been programmed and are  
7 in the process of being tested and audited.

8           So this process is well underway, and  
9 virtually any disruption to that process increases  
10 significantly the possibility of error anytime you're  
11 dealing with 266 precincts and a couple thousand  
12 employees, most of whom are temporary employees, as we  
13 all know, who work the precincts more as volunteers,  
14 rather than employees, out of a sense of civic duty. And  
15 they show up a couple times every couple of years. They  
16 receive their training. They go out there. They do  
17 their civic duty.

18           But if you have that many employees in that  
19 many locations doing that many functions, the possibility  
20 of human error exists. If you have that many machines,  
21 the possibility -- in a thousand machines, I promise you  
22 on Election Day there will be at least one machine that  
23 will malfunction. It's just going to happen. It's the  
24 nature of machinery. If you have a thousand brand new  
25 Ford automobiles drive off the lot tomorrow, one is not

1 going to function properly. It's the nature of things  
2 that are created by human hands in this imperfect world.

3 So you're faced with that level of uncertainty  
4 and imperfection. But every change you make in that  
5 process, that calibrated process -- training, testing,  
6 deployment -- any change you make increases the  
7 likelihood of error, of confusion, and of difficulty.

8 And that's why, that's why I think  
9 Judge Totenberg got it right in the *Curling* case out of  
10 Georgia, which counsel for the plaintiffs has alluded to,  
11 when she said at the end of her opinion denying the  
12 request for injunctive relief: The state and the  
13 county's arguments about the time and resource  
14 constraints at issue, in the event the Court granted the  
15 requested injunctive relief, are "compelling right now,  
16 with the November election just weeks away..." Well,  
17 that was last month. And the election was weeks away.

18 **THE COURT:** Believe me, I noticed.

19 **MR. RYDER:** We're hours away, Your Honor.  
20 We're hours away. So for all those reasons we think the  
21 request for injunctive relief is too late. We could  
22 argue standing. We could argue laches. We could argue  
23 all of these things.

24 The three points I really want to make is,  
25 number one, the plaintiffs have the burden -- a very,

1 very, very substantial burden -- to meet in seeking this  
2 very extraordinary relief, very late in the day, on the  
3 eve of the election, which has the potential to create  
4 problems. All of which are situations in which the  
5 precedence from the Supreme Court and the Sixth Circuit  
6 urge this Court to exercise restraint and not jump into  
7 this fray at this point in time.

8 **THE COURT:** Mr. Ryder, can I ask you -- I'd  
9 like to ask you a couple of fact questions. Ms. Chumney  
10 essentially said, look, we recognize that we're up  
11 against the clock here. So we're not asking you to throw  
12 out the old machines and have paper ballots. We just  
13 want better oversight. We want a mechanism to audit  
14 these machines. We want to utilize the resources that  
15 are available, such as the Department of Homeland  
16 Security who will essentially assist Shelby County in  
17 doing this correctly.

18 Has Shelby County taken any steps in that  
19 regard?

20 **MR. RYDER:** Yes, Your Honor, it has. And let  
21 me point out two things. I think Your Honor picked up on  
22 this in reviewing the Complaint, which is, a lot of the  
23 data on which the Complaint is based relates to earlier  
24 elections.

25 And I have to tell Your Honor I was a party to

1 a number of election contests arising out of those  
2 earlier elections. I'm familiar with some of the  
3 problems that existed then.

4 In May of 2016 the Election Commission named a  
5 brand new administrator of elections, Linda Phillips.  
6 And I have to say that since she's come on board, the  
7 procedures, protocols, and processes of the Shelby County  
8 Election Commission have become much more rigorous.

9 The second major change since, I think, the  
10 last -- well, over the last four years has been a shift  
11 from the Shelby County Election Commission having its own  
12 in-house IT system to transferring the responsibilities  
13 for IT to Shelby County IT. And that has given us access  
14 to more people with a higher level of skill and  
15 experience in dealing with systems.

16 The third thing I want to point out -- and  
17 this is, I think, one of the great myths of the debate  
18 over election hacking or whatever -- is the election  
19 system itself is not what Ms. Phillips likes to describe  
20 as forward-facing. It does not have any  
21 interconnectivity with the Internet or the outside world.  
22 That is, the recording of the votes on the DREs, the  
23 PCMCIA cards and MCIA cards that record the votes in the  
24 machines, they're transported manually, physically, not  
25 over the Internet. You know, some human being picks them

1 up and carries them to the Election Commission in a  
2 secure bag, and they're unloaded ultimately at the  
3 Election Commission. And then the votes are tabulated at  
4 the Election Commission.

5 Both the recording at the precinct and the  
6 tabulation at the operation center are not connected  
7 to the Internet. So the idea that they can be hacked  
8 from the outside world -- as Ms. Chumney suggested,  
9 Vladimir Putin is out there trying to interface with our  
10 tabulator -- it simply cannot happen.

11 The electronic poll books, the registration  
12 system, is one that is connected to the Internet because  
13 you can now register to vote online. County IT does do  
14 the security assessment and security sweep of that  
15 system.

16 And it was very much the feeling of the  
17 administrator and the staff that Homeland Security  
18 would've been duplicative of the security measures taken  
19 by the county on that point.

20 **THE COURT:** Okay. What about auditing  
21 capabilities? If one were concerned about the accuracy  
22 of these machines to tabulate the vote that Voter X made,  
23 if they went in and chose candidate No. 1 for the  
24 statewide office, how do we know that that vote counted  
25 for candidate No. 1?

1           **MR. RYDER:** The first issue that that raises  
2 is the ability and the duty of the voter to verify his or  
3 her own vote in the polling place. I feel relatively  
4 confident that Your Honor has voted on these machines and  
5 is familiar --

6           **THE COURT:** I have. The issue that I'm asking  
7 about is, at the end of the process it says, you know,  
8 before you hit the "Cast Vote" or "Cast Ballot" button,  
9 this is who we think you voted for. And, you know, you  
10 look through it and make sure everything is right, and  
11 then you hit "Cast Ballot." And then I think it asks  
12 maybe a second time. Okay. "Cast Ballot."

13           **MR. RYDER:** Right.

14           **THE COURT:** My question to you and, I think,  
15 the question that's raised by this Complaint is the thing  
16 that actually carries my vote is not a screenshot of what  
17 I'm confirming, but it's a little card with, you know,  
18 computer magic that carries my vote to the tabulator.

19           **MR. RYDER:** Well, what the Complaint complains  
20 about is there's not a paper -- a voter-verifying paper  
21 trail.

22           **THE COURT:** That's right.

23           **MR. RYDER:** I mean, the screenshot is  
24 generated by software and would be carried on the card.  
25 But the card is an electronic impulse recordation of the

1 vote that is cast. The results, the final results in  
2 Shelby County are audited by two firms, Watkins Uiberall  
3 and Finley, Banks & White. They audit the results and  
4 issue a report to the Shelby County Election Commission,  
5 upon which it bases its final certification.

6 **THE COURT:** Mr. Ryder, I don't know if you  
7 know the answer to this question or not, but it occurred  
8 to me in reading all these documents, and that is, how  
9 hard would it be for the Shelby County Election  
10 Commission to convert our current system, the DRE system,  
11 to one that includes a voter-verified paper audit trail?

12 **MR. RYDER:** It would be impossible for this  
13 election.

14 **THE COURT:** Well, I understand that.

15 **MR. RYDER:** I think plaintiffs concede that.

16 **THE COURT:** Sure.

17 **MR. RYDER:** That's why their request in that  
18 regard is for prospective relief. That actually goes  
19 back to the initial point that we discussed, which is  
20 there's a process: legislature, state board, county  
21 board. The County Commission has a role to play in all  
22 of this. And that process is actually underway.

23 The administrator has recommended, the Shelby  
24 County Election Commission has recommended that Shelby  
25 County acquire new machines. And that process is

1 underway. Within the last month the Shelby County  
2 Election Commission held a demonstration of three voting  
3 systems and made those available to the public.  
4 Interestingly enough, plaintiffs did not show up for that  
5 demonstration notwithstanding the fact that they've been  
6 investigating this for a significant period of time.

7 But it is my understanding that one or more of  
8 those systems does include -- Mr. Varela is tugging at me  
9 and saying all three systems include voter-verified paper  
10 trails. The cost of that system -- of the system,  
11 depending on the configuration and which system, is  
12 between 12 and \$20 million. So it's not an insignificant  
13 cost.

14 And while there may be some state or federal  
15 money, we do not believe that the -- we believe that the  
16 county is going to have to absorb a major portion of that  
17 cost. That's why the County Commission gets involved in  
18 this decision.

19 But again, this is a decision for the elected  
20 representatives of the people to decide which equipment.  
21 And there is a process. Plaintiffs, particularly able  
22 counsel for the plaintiffs who's here today, Dr. Joe  
23 Weinstein, have been very active in appearing before the  
24 County Election Commission, asking questions, raising  
25 issues. They've been to the State Election Commission.

1 They have asked questions. They have raised issues.  
2 They have made their concerns known to all levels of  
3 government. And the government is -- I believe, that the  
4 government is responding in accordance with its  
5 processes. And, I think, we should let those processes  
6 play out as they will.

7 If the County Commission denies funding, if  
8 the Shelby County Election Commission refuses to accept  
9 the machines, if the coordinator won't certify any of the  
10 new systems, then maybe there's a cause of action.  
11 Probably not. But I'm not going to concede that point  
12 today. But that would be the appropriate time. The time  
13 to address that issue is at decision time. The time is  
14 not to address it 16 hours before voting starts.

15 **THE COURT:** Before you sit down, let me look  
16 at one more list of questions here. I want to make sure  
17 that I...

18 All right. I don't have any other questions.

19 **MR. RYDER:** Thank you, Your Honor.

20 **THE COURT:** Ms. Chumney --

21 **MS. CHUMNEY:** May I just quickly respond to --

22 **THE COURT:** Of course. You get the last word.

23 **MS. CHUMNEY:** Oh, good. Thank you. Your  
24 Honor, with regard to the question of jurisdiction, we  
25 also cited Rule 65, which we would submit gives the Court

1 the power to issue mandamus.

2 With regard to the *Yahweh* case that Mr. Ryder  
3 mentioned, that was not a case that had a defendant in  
4 the state of Tennessee. And, I believe, in that case  
5 Judge McCalla also said that the plaintiffs might have a  
6 claim if they had alleged Shelby County was being treated  
7 differently than other counties in the state, which is  
8 what we have alleged in our Complaint. So that case  
9 involved not the state of Tennessee. And, also, he  
10 specifically said, yes, you might have a case if you had  
11 alleged that. And we have alleged that, Your Honor.

12 **THE COURT:** You've alleged it. But,  
13 Ms. Chumney, the standard is likelihood of success. I'm  
14 struck by the fact that only 14 of the 95 counties that  
15 you reference, that those are the counties that create  
16 the problem out of 95. So Shelby County's in the  
17 majority --

18 **MS. CHUMNEY:** Right.

19 **THE COURT:** -- of the other counties.

20 **MS. CHUMNEY:** If you're a voter in Hamilton  
21 County, you get your paper trail -- or one of those  
22 13 counties -- and if you're in Shelby County, you don't.  
23 So we would submit that that's enough. You don't have to  
24 say every other county in the state gets one and we don't  
25 or a majority of the counties.

1           We would submit that, let's face it, these  
2 elections can be decided by one county in a county as big  
3 as Shelby County in these statewide elections because  
4 there's so many voters here. And African American voters  
5 could make a big difference in who wins those elections,  
6 those statewide elections. But I just did want to point  
7 that out to the Court the distinction there in that one  
8 case.

9           Also, Your Honor -- do you want me to move to  
10 the next point?

11           **THE COURT:** Sure.

12           **MS. CHUMNEY:** Okay. The Court asked them what  
13 they had done. I just want to point out to the Court  
14 that in our lawsuit -- he's saying that they've known  
15 about these problems -- Mr. Ryder is saying they've known  
16 about these problems for a while, the Shelby County  
17 Election Commission, and now they have a new  
18 administrator, so therefore, you know, she's put in new  
19 protections or new processes. But we're using the same  
20 machines and the same server still that have these  
21 problems. It doesn't matter how great a job Ms. Phillips  
22 does, we're using the same equipment.

23           I would say, number two, that when he talks  
24 about how the cards are taken from the polls, the memory  
25 cards are taken to the Election Commission, they are

1 taken and the practice has been to take them to what is  
2 called Zone Turn-In sites. And we mentioned that and  
3 explained that in our Complaint. And, then, it's our  
4 understanding -- and I did ask the chair of the Election  
5 Commission -- when I went and watched early voting myself  
6 on November 16th -- November 2016, that evening, I asked  
7 the chair of the Election Commission, "How are the  
8 results brought in from the Zone Turn-In sites?" And  
9 they are remotely brought into the server. So they don't  
10 just take them all to the annex where the tabulator is.  
11 They go to -- most of them go to one of five or six  
12 different zones and then are transmitted to the Election  
13 Commission. I did ask him that.

14 Your Honor, one of the grounds of relief we  
15 asked for in this TRO was to not do that, to have them  
16 all required to go straight to the Election Commission  
17 after the precincts. Now, that may involve a lot more  
18 people driving. Or at least don't transmit the results  
19 from the Zone Turn-In sites. Make them take those cards  
20 down. It may delay voting election results. Everybody  
21 gets all excited about "we want the results now." Well,  
22 I just want them to be right. I don't know about anybody  
23 else in this county. So, to me, that's a glitch in the  
24 system there that, you know, could -- that could be a  
25 problem.

1           And, then, also he says that -- Mr. Ryder says  
2 for the Shelby County Election Commission that the  
3 machines are not connected to the Internet. We've  
4 alleged and there's a state report that they were  
5 connected. Our machines were connected in 2007 and in  
6 2013. Once again, the ES&S vendor actually pointed it  
7 out.

8           Now, are they connected today? Will they be  
9 connected in this election? If we don't admit that they  
10 can be, then -- it's been acknowledged twice already by  
11 two different entities. So I think -- you know, we were  
12 asking for safeguards for that.

13           **THE COURT:** And, you know, the fact that we  
14 just voted in August --

15           **MS. CHUMNEY:** Right.

16           **THE COURT:** -- and if you had evidence that  
17 they were doing that in August, that may be a little  
18 different. But everything you're saying makes sense.

19           **MS. CHUMNEY:** Right.

20           **THE COURT:** And it, again, goes to the  
21 vulnerabilities of the system.

22           **MS. CHUMNEY:** Right.

23           **THE COURT:** And it goes to the potential  
24 problems with the system. All of which it sounds as  
25 though the state-elected officials are not only cognizant

1 of those problems, mindful of those problems, but they're  
2 looking toward the next generation of voting systems in  
3 Shelby County. So in some ways they're addressing the  
4 issues, not at your pace apparently. But I -- anyway, I  
5 cut you off. Keep going.

6 **MS. CHUMNEY:** No, that's what I was just  
7 saying. They have been twice. So I'm not sure if when  
8 they say they're not connected to the Internet that means  
9 that we're not going to connect them to the Internet, or  
10 if it means that they don't have the capability of being  
11 connected. Because they clearly do have the capability  
12 of being connected. They were twice already in two  
13 different years, documented by the vendor and also by the  
14 Tennessee TACIR group.

15 **THE COURT:** Is that at the point in time where  
16 they're at the Turn-In sites, and from the Turn-In sites  
17 they're --

18 **MS. CHUMNEY:** No, that was a tabulator,  
19 apparently.

20 **THE COURT:** Okay. But when you say "twice,"  
21 what exactly -- what part of the system was exposed to  
22 the Internet?

23 **MS. CHUMNEY:** I believe that when they were  
24 talking about the tabulator, because they found editing  
25 software on our tabulator in 2007. And they said it

1 needed to get off there and that they needed to check the  
2 software to make sure that that's not on there.

3 And then in 2013 that was ES&S vendor that did  
4 a report. And they said, you know, don't connect to the  
5 Internet. And so -- I don't have the reports in front of  
6 me right now, Your Honor. But, I believe, they were  
7 referring more to the tabulator and the server.

8 **THE COURT:** And at what point does the  
9 tabulator -- I mean, is that housed at the Election  
10 Commission, or is that at one of these Turn-In sites or  
11 at all of the Turn-In sites?

12 **MS. CHUMNEY:** Okay. Well, Mr. Ryder can  
13 probably better address that. But what I believe, I  
14 think there may be more than one tabulator. I know  
15 there's at least one at the annex. And there may be one  
16 at the downtown office.

17 Because I know they had a problem in one  
18 election where there were some emails that we got through  
19 open records where one of the deputy administrators says,  
20 "I'm going downtown to the server because they couldn't  
21 get the server to work at the annex." So, I think, they  
22 may have two. There may be one at the annex and one  
23 downtown.

24 But the remote transmission of votes from the  
25 Zone Turn-In sites, they may say that's done through a

1 VPN line. I don't know. But even that we would argue is  
2 not secure and that they should just bring all the cards  
3 down -- you know, into wherever they're going to be  
4 counted and definitely not, you know -- and if they had  
5 produced documents that said, okay, Susie Q went into the  
6 tabulator at 8 a.m., and she was there until 12 p.m.,  
7 yeah, I would say, okay, we know there's not just a  
8 vendor there by themselves in our tabulator, counting her  
9 votes. There's an election person there too. And, you  
10 know, hopefully they're videoing that. But there's no --  
11 they've produced no documents saying who was in there  
12 when. And so how can we evaluate it? So I have a real  
13 concern about that, Your Honor.

14 Moving on to the auditing, I thought the  
15 Court -- I agree, how can you -- I don't think there was  
16 ever really an answer of how a voter could verify their  
17 own vote. Once you punch that button, it's gone. It's  
18 just gobbledygook in the system.

19 And as far as the viewing machines, I just  
20 wanted the Court to know these plaintiffs are very  
21 serious about this case. One is bedridden right now. He  
22 couldn't go. I was in court. And the other one had just  
23 recovered -- was covering from -- he had a serious  
24 illness too. He's okay now. But they wanted to go --

25 **THE COURT:** Go --

1                   **MS. CHUMNEY:** -- and look at the machines.  
2 They wanted to go, but nobody could go. It's just the  
3 way it was. So I don't want the Court to think that we  
4 didn't care.

5                   That's pretty much it, Your Honor. Any relief  
6 you can grant us, we appreciate. Thank you.

7                   **THE COURT:** Mr. Ryder.

8                   **MR. RYDER:** Nothing further.

9                   **THE COURT:** I said she would have the last  
10 word, but she mentioned that you might know more about  
11 one of those issues.

12                   **MR. RYDER:** Well, I mean, with respect to the  
13 tabulator, it's in a room that's behind a locked door,  
14 and the only people who are admitted into the room are  
15 the administrator, the deputy administrator, and one  
16 senior Election Commission official who stays in there  
17 pretty much all night until the results are tabulated.  
18 Members of the Election Commission are permitted in  
19 there, but do not generally go in there.

20                   **THE COURT:** Do the candidates have any ability  
21 to observe all that?

22                   **MR. RYDER:** They have the ability to -- well,  
23 not that.

24                   **THE COURT:** Not the tabulator.

25                   **MR. RYDER:** They do have the ability to

1 observe. And, in fact, they -- both the candidates and  
2 the political parties and other organizations that are  
3 committed to the purity of the ballot, as it says under  
4 the Tennessee Poll Watchers statute, have the ability to  
5 appoint poll watchers to observe the process, the intake  
6 process, the tabulation at the precincts, and intake at  
7 the Election Commission.

8 **THE COURT:** Okay.

9 **MR. RYDER:** That was one of the things that  
10 really struck me about this is the plaintiffs seem to be  
11 seeking -- there's a lot of talk about more public  
12 participation in this. We have a vehicle. There's a  
13 statutory mechanism chosen by the legislature, in  
14 accordance with its role under Article 1, Section 4, of  
15 the Constitution, to provide for public participation and  
16 supervision of the process.

17 First of all, both the State Election  
18 Commission and the County Election Commission are  
19 bipartisan, the Republican and Democrat, so that they're  
20 looking over each other's shoulder.

21 Second, the County Election Commission has to,  
22 by law, apportion its employees as equally as possible  
23 between the parties so that they're looking over each  
24 other's shoulder.

25 Third, the third level you have is the ability

1 of the candidates, committees, and parties to appoint  
2 poll watchers who can be observers and report any  
3 infractions they see. So there is a mechanism for public  
4 participation, public supervision and observation of the  
5 process.

6 **THE COURT:** Thank you.

7 **MS. CHUMNEY:** I was saying but not at the  
8 tabulator, Your Honor. They're not allowed there. We  
9 would submit that they should be, and that's part of what  
10 we ask for.

11 **MR. RYDER:** Well, I'm sorry, Your Honor, but  
12 that's where you have -- and I've been in the room  
13 outside the room where the tabulator is. That is  
14 generally where the members of the Election Commission of  
15 both parties sit and observe the process. They're not  
16 inside the room with the tabulator, but they are where  
17 they can observe the process and make sure nobody  
18 untoward is going into the tabulator room.

19 **THE COURT:** Well, Ms. Kleinfelter?

20 **MS. KLEINFELTER:** Yes, Your Honor?

21 **THE COURT:** Are you awake?

22 **MS. KLEINFELTER:** Yes, Your Honor.

23 **THE COURT:** Is there anything you need to add  
24 for the State?

25 **MS. KLEINFELTER:** No, other than, Your Honor,

1 on this last question about the tabulator, I would refer  
2 you to an exhibit actually that plaintiffs attached to  
3 their Complaint. It's Document 1-12, which is a letter  
4 from my client, the state election coordinator.

5 **THE COURT:** Yes.

6 **MS. KLEINFELTER:** And in the second page of  
7 that letter, he explains the process of how once the  
8 election is over that the poll officials are required to  
9 print and post a tape from each voting machine used in  
10 each polling place. And they post those tapes. And  
11 everyone is able, including the plaintiffs and poll  
12 officials and candidates and members of the press, anyone  
13 and everyone is able to take pictures of those tapes.  
14 And those tapes that they've printed out are used to then  
15 audit what goes on with the tabulators. So we do have a  
16 system, a system of checks and balance.

17 And, then, the other point that I think is  
18 also very significant that's set out in this letter is  
19 the testing of the machines. Your Honor, how do I know  
20 that the vote that I cast was cast for the right person?  
21 Well, that's the whole purpose behind the testing of the  
22 machines.

23 Each machine is tested whereby the  
24 technicians -- and the technicians have to be from both  
25 parties. So, again, it's a bipartisan effort. And they

1 go through, and they test every candidate, every button  
2 on the machine, and see how that is reflected, how is  
3 that recorded, to make sure that if I vote for John Doe  
4 for this office, that is then reflected as a vote for  
5 John Doe in the tape that is printed out.

6 So the testing is -- that's the whole purpose  
7 of the testing of the machines prior to putting them out  
8 for early voting and then on Election Day.

9 **THE COURT:** Okay. How many of the machines do  
10 they test? I think Mr. --

11 **MS. KLEINFELTER:** They test all of them. I  
12 believe, there are 200-and-some machines that are being  
13 used for early voting, and then there's over a thousand  
14 machines that are being used on Election Day in Shelby  
15 County.

16 Now, obviously, it's going to be different.  
17 Shelby County probably has the most. Davidson County has  
18 the next highest number of machines. Knox County is  
19 probably next after that.

20 **THE COURT:** Okay.

21 **MS. KLEINFELTER:** I guess, one other point I  
22 would make with respect to implementation of a new voting  
23 system, in our experience, Your Honor, it takes about two  
24 years. If you're talking about replacing 1200 machines,  
25 approximately 1200 machines, it's not like the vendor --

1 whoever is chosen, it's not like they just have 1200  
2 machines sitting in a warehouse that they can immediately  
3 ship down to Shelby County.

4 Those machines have to be manufactured. They  
5 have to be tested. You have to do that quality control.  
6 They have to be then transported to Shelby County, have  
7 to be set up, tested here again. And then you have all  
8 of the training that has to take place with respect to,  
9 as Mr. Ryder pointed out, thousands of individuals who  
10 are going to be operating these machines. And then we  
11 have requirements under state law that we have to make  
12 those machines available for the public to come and view  
13 prior to an election so that they can come and get  
14 familiar with those machines. So it's a process that  
15 usually takes two years when you take into account that  
16 elections are virtually going on nonstop.

17 **THE COURT:** Right. Okay. Well, thank you for  
18 that clarification.

19 Ms. Chumney, has her hand raised, and I'm  
20 going to give her the last word. Then I'm going to let  
21 y'all breathe for a second.

22 **MS. CHUMNEY:** Your Honor, just with regard to  
23 what she said about the testing, that is -- that may be  
24 of the machines, but there's no candidate ability or  
25 citizen ability to review the internal part of the

1 machines and the software and the server. So as you  
2 know --

3 **THE COURT:** So you want them to pop the hood  
4 and let you look underneath?

5 **MS. CHUMNEY:** Right. That's right, Your  
6 Honor.

7 **THE COURT:** What would you see?

8 **MS. CHUMNEY:** Well, you have to have an  
9 expert, you know, but they can see a lot of things. The  
10 other thing would be, talking about the implementation  
11 taking two years, which really concerns me greatly to  
12 hear that said, in that, these machines now are so old  
13 and everybody -- one of the election commissioners even  
14 said two years ago that we needed new machines. Now  
15 they're just getting started, and apparently you're going  
16 to try to drag this out to 2020.

17 So I would just say, Your Honor, that in  
18 Virginia it's my understanding that they threw out all  
19 their DRE voting machines only weeks before the elections  
20 there and were able to get a different method of voting  
21 only weeks before the election. It didn't take them two  
22 years there. I know there are processes and things that  
23 have to be done. But I would certainly hope that the  
24 people of Shelby County do not have to wait two years for  
25 a secure method of voting that has a voter-verified paper

1 trail.

2 **THE COURT:** I don't believe it was a federal  
3 court that threw out those machines in Virginia, was it?

4 **MS. CHUMNEY:** No, it wasn't. But they got  
5 them. They threw them out. They decided to get new  
6 machines, and it was done.

7 **THE COURT:** Well, Virginia may have more money  
8 than we have.

9 All right. If y'all will give me a few  
10 minutes, I can come out and at least tell you the result.  
11 I won't have a written opinion this afternoon, but I can  
12 tell you what the result is. And, I think, that noise is  
13 air flow.

14 **MS. CHUMNEY:** Okay. Thank you, Your Honor.

15 **MS. KLEINFELTER:** Thank you, Your Honor.

16 **THE COURT:** I may be wrong, but I think that's  
17 what it is. All right. Well, anyway, thanks everybody.  
18 I'll be back in a few minutes.

19 **THE CLERK:** All rise. This Honorable Court  
20 stands in recess.

21 (Recess was taken at 4:11 p.m.)

22 **THE CLERK:** All rise. This Honorable Court is  
23 back in session. You may be seated.

24 **THE COURT:** Thank you for working with me  
25 today with short notice. You guys did a very nice job.

1           In a case entitled *Ohio Democratic Party v.*  
2 *Husted*, which is from Ohio, one of our Sixth Circuit  
3 judges, Judge McKeague, began this way: This case  
4 presents another opportunity for the federal courts to  
5 become entangled, as overseers and micromanagers, in the  
6 minutiae of state election processes. No one denies that  
7 our Constitution, in defining the relationship between  
8 the people and the government, establishes certain  
9 fundamental rights, including the right to vote, that  
10 warrant vigilant enforcement. But our Constitution also  
11 defines the relationship between the spheres of  
12 government, state and federal, and their responsibilities  
13 for protecting the rights of people. The genius of this  
14 balance is no less deserving of vigilant respect.

15           Judge Gilman, in the case that I alluded to  
16 earlier, *Stewart v. Blackwell*, said -- and I'm  
17 paraphrasing this. He said, I would take a more cautious  
18 approach than the majority, an approach that recognizes  
19 the primacy of the executive and legislative branches in  
20 the electoral process and the significant costs that the  
21 plaintiffs' -- in this case, the plaintiffs' TRO -- will  
22 place on state and local governments, and the intrusion  
23 of federal court for that matter. And those state and  
24 local governments are the entities that are charged with  
25 most aspects of election administration.

1           In this case, the plaintiffs are asking this  
2 federal court to substitute its judgment for that of the  
3 elected officials and the election officials for the  
4 state of Tennessee and Shelby County. And they all have  
5 exactly the same information as this Court. And one can  
6 certainly question some of the decisions -- and,  
7 apparently, Ms. Chumney has questioned those decisions --  
8 of whether they are taking an unwarranted risk or not.  
9 But they have taken the steps that they're taking based  
10 on the considerations that they have in front of them.  
11 And they are the ones properly entrusted to take those  
12 risks and to make those hard judgment calls.

13           In this particular case, the plaintiffs are  
14 asking for a temporary restraining order. Rule of Civil  
15 Procedure 65 lists four factors for the Court to  
16 consider: substantial likelihood of success, the  
17 irreparable harm that might come to the plaintiffs if the  
18 Court does not provide the relief, the injury to others  
19 if the Court does provide the relief, and the public  
20 interest that is served by granting the relief sought.

21           But in this case, unlike many temporary  
22 restraining orders, the plaintiff is not just asking for  
23 the status quo to be maintained. The plaintiff is asking  
24 for this Court to order that the Shelby County Election  
25 Commission take affirmative steps, and that actually

1 increases the burden that the law requires in order to  
2 grant the relief.

3 In this case, the Court is not convinced that  
4 the plaintiff has established and has overcome its  
5 burden. I am not convinced that there is a substantial  
6 likelihood, not just a likelihood but a substantial  
7 likelihood, of success on the merits in this case.

8 I think that, in fact, everything that I've  
9 heard about the vulnerability of the machinery used in  
10 the voting system in Shelby County is potential, it is a  
11 prediction, but it is not evidence.

12 The Court is not convinced -- the very first  
13 factor is one that I've continued to struggle with, not  
14 just today but in reading the Complaint and reviewing all  
15 the material that the plaintiff provided.

16 I will issue a written order, and I'll address  
17 these other factors because there are problems with  
18 those, too, but the biggest one I would say here today is  
19 the substantial likelihood of success.

20 So for that reason and the reasons that will  
21 be forthcoming in a written order, the Court is going to  
22 deny the application for a TRO.

23 **MS. CHUMNEY:** All right. Thank you, Your  
24 Honor.

25 **THE COURT:** Thank you.

