IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE AT MEMPHIS

SHELBY ADVOCATES FOR VALID ELECTIONS; ET. AL,

Plaintiffs,

JURY TRIAL DEMAND

vs.

No. 2:18-cv-02706

TRE HARGETT in his Official capacity as TENNESSEE SECRETARY OF STATE; ET. AL,

Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO LOCAL DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED COMPLAINT

COME NOW the Plaintiffs and submit this Memorandum in Opposition to the Defendants' Linda Phillips, Shelby County Election Commission, Robert Meyers, Norma Lester, Dee Nollner, Steve Stamson, and Anthony Tate's ("Local Defendants") Motions to Dismiss the Plaintiffs' Second Amended Complaint, and would state to the Court as follows:

I. PRELIMINARY STATEMENT

The Plaintiffs hereby incorporate by reference their Memorandum in Opposition to the State Defendants' Motion to Dismiss the Second Amended Complaint, as if restated in full herein.

II. STANDARD

Dismissal for Failure to State a Claim

To state a claim upon which relief may be granted, a complaint must contain " a short and plain statement of the claim showing that the pleader is entitled to relief". Fed. R. Civ. P. 8(a)(2). A complaint must plead enough facts to state a claim to relief that is plausible on its face. *Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). " a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Igbal*, 556 U.S. 662, 678 (2009). The court must determine only whether "the claimant is entitled to offer evidence to support the claims," not whether the plaintiff can ultimately prove the facts alleged. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully

III. FACTS AND ARGUMENT

1. The Correct Defendants are Before the Court

The Local Defendants misstate the facts in their Memorandum, claiming that Shelby County Government is the proper party to sue for the relief requested by the Plaintiffs. The Defendant Tennessee Coordinator of Elections Mark Goins admits in his letter to the Plaintiffs' counsel dated October 4, 2018 [Dk. 104, Exb. W] that **"[f]inally, regarding the replacement of the voting system, the decision to purchase new voting equipment rests with the Shelby County Election Commission"** (emphasis added)[1]. In fact the Shelby County Election Commission must approve any voting equipment. Tenn. Code Ann. 2-12-116(3). And the State Defendants state in their Memorandum in Support of the Motion to Dismiss the Plaintiffs' Second Amended Complaint that "the duty to purchase a voting system is placed on the 95

[1] And, the Tennessee Secretary of State's Rules and Regulations expressly reference the purchase of electronic voting devices by a county election commission, as well as by the county governing body. Dk. 104, No. 73, 74.

county election commissions, *see* Tenn. Code Ann. 2-9-111-113, the machines used in any such system must meet clearly defined statutory standards". Dk. 115-1, pg. 23-24.

The Resolution Approving the Shelby County Capital Improvement Budget for the Fiscal Year 2019 and the Corresponding Five Year Capital Improvement Plan for Fiscal Years 2019-2023 adopted on June 25, 2018, includes an allocation of Two Million Dollars for Voting Machines for FY 2019. Exb. "A". The Resolution further includes additional funding of Five Million Dollars for FY2020, and Five Million for FY 2021. Exb. "A". The funds are stated to be for "replacement of voting machines, tabulation software, servers and electronic pollbooks." Exb. "A".

The Project Request Form for FY2019-2023 submitted by Defendant Robert Meyers, as Chairman of the Defendant Shelby County Election Commission states that "The RFP will be developed in accordance with ITS project development guidelines and then submitted to the state. ". Exb. "B", pg. 18. The Project Request Form submitted by the Local Defendants further states in bold letters **"If this project is not funded by the state, the project must be funded through the county**". Exb. "B", pg. 18. Thus, the Local Defendants own admissions in the Project Request Form show that the State Defendants can fund the new equipment.

The Local Defendants further state in the Project Request Form that the "current voting machines are at end of life". However, they indicate that the request is only for equipment purchases in FY21 and FY22 for "staff education and voter education". The Request states that "All equipment would be in place for the May 2022 primary elections". As testified to by Defendant Administrator Phillips at the May 22, 2019 Shelby County Commission budget hearing, the Local Defendants have not even issued a request for proposal for new voting machines.

On May 22, 2019, Administrator Phillips testified before the Shelby County Commission budget committee that only 2.5 million is needed for 2019 to purchase a new system with a two year payment plan. She testified that the vendors have plenty of inventory and can ship once the contract is signed. At the same meeting Defendant Norma Lester testified that the current voting machines are on a respirator due to age.

Despite the prior Project Request Form by the Local Defendants asking for funding for the new machines and equipment to first be used in FY22, Administrator Phillips backtracked at the May 22, 2019 budget hearing. She now asked that the monies be placed in the CIP to purchase in time for the March 2020 Presidential election. The discrepancies in the positions taken by the Local Defendants as to when they propose voting machines to be purchased undermines their credibility as to their actual intentions.

It is clear that the Local Defendants have played a large part in the unreasonable delay in purchasing new voting machines and equipment, despite acknowledging in 2013 that it was needed. To date despite the Two Million Dollars referenced in the FY19 CIP budget and admission that the State can provide funding, the Local Defendants have never issued a Request for Proposal for new voting machines. Now, they attempt to blame the Shelby County Commission, which had included funds in the FY19 CIP budget, and the five year plan.

In addition, pursuant to Tenn. Code Ann. 2-11-201(d), the Tennessee Coordinator of Elections, "may …enter into such contracts for equipment as may be appropriate for the efficient discharge of the duties of the office". Thus, the Defendant Tennessee Coordinator of Elections clearly has the authority to purchase new voting machines for Shelby County. The plain facts are that the Local Defendants have never submitted a request for proposal. The State and Local Defendants are the proper parties before this Court.

2. **The Plaintiffs' Case is Not Moot**

Without citing any legal authority, the Local Defendants argue that the Plaintiffs' case is moot because the County Mayor has submitted a proposed County Budget for fiscal year 2020, that "removed the CIP funds for the purchase of new voting equipment for fiscal year 2020 and moved it to fiscal year 2021". They contend that under the County Mayor's proposed budget, the first funding available to purchase new voting equipment is July 2020. They contend that because the process to purchase voting machines and equipment has been initiated in the budget proposal, that this case is moot. However, in the same breath they admit that they presented a five year plan and estimated budget for the replacement of the "aging voting equipment" to the CIP Committee as far back as 2016.

The Plaintiffs are seeking injunctive relief for future elections. As set forth in *League of Women Voters v. Brunner,* 548 F. 3d 463, 473-74 (6th Cir. 2008):

> At the threshold, the Secretary and Governor argue that this court lacks jurisdiction because the claims presented are moot. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *L.A. County v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed. 2d 642 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 491 (1969).*
> …
>
> A defendant's "voluntary cessation of a challenged practice" does not moot a case. *Ammex, Inc. v. Cox, 351 F. 3d 697, 704 (6th Cir. 2003)(*quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); Northland Family Planning Clinic, Inc. v. Cox, 487 F. 3d 323, 342-43 (6th Cir. 2007).* Rather, voluntary conduct moots a case only in the rare instance where "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonable be expected to recur." *Akers v. McGinnis, 352 F. 3d 1030, 1035 (6th Cir. 2003)(*citation omitted). What is more, the party asserting mootness bears the "heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again". *Id. (quoting Jones v. City of Lakeland, 224 F. 3d 518, 529 (6th Cir. 2000)); Adarand Constructors, Inv. v. Slater, 528 U.S. 216, 222, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000). …*

The Local Defendants, who admitted to the Shelby County Commission budget committee this past week that the vendor will no longer service the voting machines after 2020, are asking the Plaintiffs to merely hope that they will be replaced in the near future. However, the Local Defendants have delayed and delayed, and have not even issued a Request for Proposal some three years after admittedly approaching the County Mayor in 2016. With that track record, there are no assurances that action will be taken to replace the voting machines and equipment for the 2019 and 2020 elections. Moreover, there are no assurances that any of the Defendants, based upon their past track record of allowing insufficient cybersecurity and other protections, will select equipment, and implement safeguards, to protect the Plaintiffs' fundamental right to vote and have their votes properly counted. The Administrator Phillips has even told the other Local Defendants that she does not recommend the paper ballot optical scan voting system preferred under the Tennessee Voter Confidence Act. Dk. 104, No. 65. Thus, the request for an Independent Master is even greater with the new facts presented by the Local Defendants so as to give oversight to the process.

Further, the Local Defendants fail to mention, that the Plaintiffs' Second Amended Complaint describes a fundamentally flawed process overall, including the antiquated voting machines and equipment. Even the Defendant Secretary of State acknowledged the myriad of problems, but there still has been no forensic audit, or implementation of adequate rules and regulations to avoid continued problems even with new voting equipment. As in *Brunner, supra*, the Plaintiffs seek to prevent and correct the constitutional violations that have occurred, and these claims are not moot. *Id. at 474-75.* And, "even if defendants had corrected all the alleged problems and sought thereby to avoid any risk of future harm, in cases of alleged continuing violations there remains a presumption that future injury injury will occur" which refutes claims

of mootness like the ones defendants raise here. *League of Women Voters v. Blackwell, 432 F. Supp. 2d 734, 741, fn. 3.* Thus, the case is not moot.

3. **The Plaintiffs' Case is Not Barred by Res Judicata**

The Local Defendants' attempt to assert *res judicata* as an affirmative defense also fails[2]. First as to identity of parties, none of the Plaintiffs in the Second Amended Complaint were parties to the two suits referenced by the Local Defendants. Thus, there is not a complete identity of parties. *South Central Bell Tele. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999)(*res judicata* does not apply against strangers to earlier identity of interests without more insufficient to establish identity of parties).

The general rule is that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Curling, etal v. Raffensperger, etal,* No. 1:17-cv-2989-AT , pg. 23 (N.D. Ga. Atlanta Division), *Order* of May 21, 2019, *citing Taylor v. Strugell,* 553 U.S. 880, 884, 891 (*quoting Hansberry v. Lee,* 311 U.S. 32, 40 (1940). "A person who is not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." *Taylor,* 553 U.S. at 892-93. The application of *res judicata* to nonparties "thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court." *Id. (quoting Richards v. Jefferson County,* 517 U.S. 793, 798 (1996). Thus, on this basis alone, the Local Defendants fail to meet the criteria for *res judicata* to apply. *See also, Curling, supra, Order* of May 21, 2019, pgs. 24-25.

[2] The State Defendants have not raised *res judicata* as a bar to the Plaintiffs' claims, and therefore have waived the affirmative defense.

And, even where identity of parties is shown, *res judicata* only precludes further claims by parties or their privies based on the same cause of action[3]. *Frank's Nursery & Crafts,* 177 F. 3d at 462. For *res judicata* purposes, a cause of action is defined by the factual, not the legal basis for the claim. A cause of action includes all facts which together constitute the plaintiff's right to maintain the action. *Mattix v. Swettson, 127 Tenn. 697 (1913).* Cases involve the same cause of action only when they arise from the same nucleus of operative facts. *See League of Women Voters, supra, Dk. 202, pg. 16; Forry, Inc. v. Neudorfer, Inc.,* 837 F. 2d 259, 2654 (6th Cir. 1988); *accord Maharaj v. Bankamerica Corp.,* 128 F. 3d 94, 97 (2d Cir. 1997). Where the facts necessary to the subsequent action differ from those in the prior action, there is no identity of the cause of action. *Forry,* 837 F. 2d at 265; *Duncan v. Peck,* 752 F. 2d 1135, 1140 (6th Cir. 1985).

For example, in the *League of Women Voters, supra,* the Court found that the prior 2004 case by the *League of Women Voters,* dealt with specific actions of the Ohio Secretary of State leading up to and during the 2004 election, and "did not arise of the alleged systemic problems with Ohio's election process. Thus, the earlier action does not prevent plaintiffs from bringing this case". Dk. 202, pg. 16. And, claims that mature after prior actions even between the same parties are not barred by *res judicata. Young v. Barrow, 130 S.W. 3d 159, *9 (Tenn. App. 2003)("*A prior judgment or decree does not prohibit the later consideration of rights that had not accrued at the time of the earlier proceeding or the reexamination of the same question between the same parties when the facts have changed or new facts have occurred that have altered the

[3] For this prong, as well as the others, it is important to note that the Local Defendants bear the burden of proof. *Meng v. City of Memphis, 2018 Tenn. App. LEXIS 559, *13 (*the party relying on the defense of *res judicata* has the burden to prove it and must generally put in the evidence a record of the former case). In this case, not only have the Local Defendants failed to meet their burden as set forth herein, but they have not put into evidence the entire record, or even any final judgment or decree showing an adjudication on the merits.

legal rights or relations of the parties" (*citing White v. White, 876 S.W. 2d 837, 839-40 (Tenn. 1994)); see also, Estate of Ralston, 2013 Tenn. App. LEXIS 308, *12; Meng v. City of Memphis, 2018 Tenn. App. LEXIS 559, *16.*

In this case, the facts of Plaintiffs' broad constitutional challenge to Defendants' administration of the Shelby County voting system are different than those in the other actions. None of the other actions challenged Defendants' fundamental failure to properly supervise and direct the proper conduct of elections as a whole.

The *Yahweh, etal v. SCEC, etal,* U.S. Dist. Court, (W.D. TN No. 10-2608-JDT-dkv) was dismissed as to one plaintiff without prejudice for failure to pay a filing fee. The request for class certification was denied as *pro se* plaintiff can not represent a class. The case was dismissed as to Plaintiffs Yahweh and Withers due to lack of standing for failing to allege they are registered voters, that they voted in the August 2010 election or intend to vote in any future election, or that their vote in the August 2010 election was not properly counted. That lawsuit was limited to a past election, and did not involve forward looking challenges to procedures used in future elections as in *Stewart v. Blackwell,* 444 F. 3d 843 (6th Cir. 2006-later vacated when rendered moot before *en banc* review). The 2010 *Yahweh* Court relied upon the prior 2006 *Yahweh* lawsuit to deny the equal protection claim noting that it was only filed against the Shelby County Election Commission and not the Tennessee Election Commission, and there were no allegations that the machines were selected to intentionally discriminate against Shelby County residents or African Americans.

In both the other 2006 and 2010 *Yahwah* suits, there was no due process claim. The 2006 *Yahweh* equal protection claim was dismissed by Judge McCalla because the state election commission and officials were not parties, and the Amended Complaint did not allege that the Diebold machines were purchased.

The facts underlying the Plaintiffs' claims in this case are far broader with respect to the subject matters, time periods, and relevant actors at issue, as well as the scope and nature of the injury. In sum, there is no bar to the Plaintiffs' claims in this case by the prior cases.

And, the current claims are not such that should have been raised in the prior actions. Parties are barred from raising issues that could have been asserted in an earlier action only if those issues concern the same cause of action at issue in the earlier action. This applies even where two lawsuits arguably involve related matters. *Northeast Ohio Regional Sewer Dist. V. U.S. E. P.A.*, 411 F. 3d 726, 732-33 (6th Cir. 2005); *accord Apparel Art Int'l, Inc. v. Amertex Enter. Ltd.*, 48 F. 3d 576, 583-84 (1st Cir. 1995). Here there is no same cause of action. By contrast to the *Yahwehs* dismissals, the Plaintiffs' case goes far beyond any voting issues in 2006, and 2010, and will require proof of current historical facts concerning the misadministration of elections in Shelby County.

As in the *Curling, supra,* case, the Plaintiffs' claims here seek relief to require at a minimum paper ballots with optical scans with no internet capability in all future elections held in Shelby County. Dk.. No. *Curling, Order* of May 21, 2019, pg. 30. The causes of action are not identical based upon the wealth of new facts alleged by the Plaintiffs that have occurred since the *Yahweh* cases were dismissed, in addition to the only recently revealed serious security vulnerabilities set forth in the: (a) Congressional Task Force on Election Security's January 2018 Final Report; (b) Secretary of the U.S. Department of Homeland Security's March 2018 declaration that DRE voting systems are a 'national security concern'; (c) The May 2018 conclusion of the United States Senate Select Committee on Intelligence that DREs are 'at highest risk of security flaws" and that states "should rapidly replace outdated and vulnerable voting systems" with systems that have a verified paper trail; (c) the September 6, 2018 consensus report of the National Academies of Sciences, Engineering, and Medicine and

associated National Research Council ("NAS"), titled "Securing the Vote: Protecting American Democracy," addressing the need to improve voting machine security, and recommending that voting machines that do not produce paper audit trails for each person's vote "should be removed from service as soon as possible" and that "[e]very effort should be made to use human-readable paper ballots in the 2018 federal election;" and (e) the 2018 resolution by the Board of Advisors of the U.S. Elections Assistance Commission (EAC) recommending that the EAC "not certify any system that does not use voter-verifiable paper as the official record of voter intent". *See Curling, supra, Order* of May 21, 2019, pg. 30.

As set forth in *Curling, supra, Order* of May 21, 2019:

> The sea change between the issues raised in *Curling I* in 2017 and by September 2018 are highlighted most recently by the March 2019 Report on the Investigation Into Russian Interference in the 2016 Presidential Election by Special Counsel Robert S. Mueller. That Report, of which the Court takes judicial notice, documents successful efforts of Russian agents' cyber intrusions targeting the individuals and entities involved in the administration of U.S. elections. *See* Mueller Report: Section C(2.) Instrusions Targeting the Administration of U.S. Elections at 50-51. [4]

[4] *curling, Order of May 21, 2019, fn. 26, pg. 31* adds:
The Report found:

Victim included U.S. state and local entities, such as state boards of elections (SBOEs), secretaries of state, and county governments, as well as individuals who worked for those entities. The GRU also targeted private technology firms responsible for manufacturing and administering election-related software and hardware, such as voter registration software and electronic polling stations. The GRU continued to target these victims through the elections in November 2016 [Redacted]…

By at least the summer of 2016, GRU officers sought access to state and local computer networks by exploiting known software vulnerabilities on websites of state and local governmental entities. GRU officers, for example, targeted state and local databases of registered voters using a technique known as "SQL injection," by which malicious code was sent to the state or local website in order to run commands (such as exfiltrating the database contents). In one instance in approximately June 2016, the GRU compromised the computer network of the Illinois State Board of Elections by exploiting a vulnerability in the SBOE's website. The GRU then gained access to a database containing information on millions of registered Illinois voters, and extracted data related to thousands of U.S. voters before the malicious activity was identified.

GRU officers [Redacted]…scanned state and local websites for vulnerabilities. For example, over a two-day period in July 2016, GRU officers [searched] for vulnerabilities on websites of

And, new events occurred as recent as 2018, when Knox County, Tennessee Election Commission experiencing the cyber-attacks.

CONCLUSION

For all of the reasons above, the Motions of the Local Defendants to the Dismiss Second Amended Complaint should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon:
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more than two dozen states [Redacted]..Similar [searches] for vulnerabilities continued through the election.

Unit 74455 also sent spearplishing emails to public officials involved in election administration and personnel at companies involved in voting technology. In August 2016, GRU officers targeted employees of [Redacted] a voting technology company that developed software used by numerous U.S. counties to manage voter rolls, and installed malware on the company network. Similarly, in November 2016, the GRU sent spearplishing emails to over 120 email accounts used by Florida county officials responsible for administering the 2016 U.S. election. The spearplishing emails contained an attached Word document coded with malicious software (commonly referred to as a Trojan) that permitted the GRU to access the infected computer. The FBI was separately responsible for this investigation. We understand the FBI believes that this operation enabled the GRU to gain access to the network of at least one Florida county government.

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via U.S. Mail and ECF email on this 29 day of May2019.

/s/Carol Chumney
Carol Chumney