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 STATE DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED COMPLAINT

COME NOW the Plaintiffs and submit this Memorandum in Opposition to the Motion to Dismiss their Second Amended Complaint of the Defendants Tre Hargett, in his Official Capacity as Tennessee Secretary of State; Mark Goins, State Coordinator of Elections; the Tennessee State Election Commission; Kent D. Younce, Judy Blackburn, Donna Barrett, Greg Duckett, James H. Wallace, Jr., Tom Wheeler and Mike McDonald, members of the Tennessee State Election Commission (the "State Defendants"), and would state to the Court as follows:

The State Defendants filed a Motion to Dismiss the Second Amended Complaint for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Dk. 115. The Defendants Linda Phillips, Shelby County Election Commission, Robert Meyers, Norma Lester, Dee Nollner, Steve Stamson, and Anthony Tate (collectively "County Defendants") filed a Motion to Dismiss the Second Amended Complaint pursuant to Rules 41, 12(b)(1) and 12

(b)(6), and also join into the State Defendant's Motion to Dismiss[1]. Dk. 116. For the reasons set forth below and in the Plaintiffs previously filed Memorandums in Opposition to Motions to Dismiss Dk. 64, 89, which they incorporate by reference, the Motion to Dismiss should be denied in its entirety.

While the Defendants contend that the Court should not exercise its authority to hear and provide redress as to the Plaintiffs' Second Amended Complaint, there is abundant evidence regarding the vulnerabilities of the current Shelby County election systems. As recently set forth in the *Curling, etal v. Raffensperger, etal*, No. 1:17-cv-2989-AT , pg. 23 (N.D. Ga. Atlanta Division), *Order* of May 21, 2019 case, the serious security vulnerabilities have recently been 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"

[1] The Plaintiffs also are filing simultaneously a separate Memorandum in Opposition to the Local Defendants' Motion to Dismiss the Plaintiffs' Second Amended Complaint. That Motion to Dismiss of the Local Defendants incorporated the State Defendant's Memorandum in Opposition by reference, and added three other defenses to the Plaintiffs' Second Amended Complaint. The Plaintiffs are likewise incorporating this Memorandum of Law in Opposition to the State's Motion to Dismiss Second Amended Complaint by reference in their response to the Local Defendants' Motion to Dismiss Second Amended Complaint.

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 (and the Court may take judicial notice of the reports cited above); *see also* Dk. 104, , Nos. 109, 112, 113, 275.

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.) Intrusions Targeting the Administration of U.S. Elections at 50-51. [2]

---

[2] *Curling, supra, 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 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

The State of Georgia uses the same Diebold AccuVote DREs as in Shelby County, Tennessee. Dk. 104, No. 181. And the U.S. District Court, N.D. Ga. has held that the same model DRE voting systems used in Shelby County, was hacked multiple times by cybersecurity experts who reported the system's vulnerabilities to the authorities. Dk. 104, No. 181.

In addition, hacking activity meant to discredit Tennessee elections has already occurred in 2018 when Knox County experienced a distributed denial of service attack, distracting from the fact that hackers were infiltrating the election system and injecting malicious code into the system. Dk. 104, 262 & Exb. X. On May 1, 2018, computers from about 65 countries accessed the Knox County website in a three-hour period, and an active attack was made on the server, with the election commission website crashing. Dk. 104, 262.

STANDARD OF REVIEW FOR 12(B) MOTION TO DISMISS

I. Dismissal for Lack of Subject Matter Jurisdiction

The Defendants previously indicated that they were seeking to launch a factual attack on the Plaintiffs' complaint as to subject matter jurisdiction, as opposed to a fatal attack. Dk. 87. They asked the Court to weigh the facts to decide whether or not the Court has subject matter jurisdiction. Dk. 87. However, in the latest brief, they do not specify whether they are seeking a facial or factual attack. Dk. 115-1, pg. 3.

---

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.

Even if this is a factual attack, "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim". *Lujan v. Nat'l Wildlife Fed'n,* 504 U.S. 555 (1992). Also, when a defendant raises standing as a basis for a Motion to Dismiss for lack of subject matter jurisdiction, the "district court 'may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *White Tail Park, Inc. v. Stroube,* 413 F. 3d 451, 459 (4th Cir. 2005).

II. 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 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (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. *Ibid.*

ARGUMENT

I. THE COURT HAS SUBJECT MATTER JURISDICTION OF PLAINTIFFS' COMPLAINT

A. General Law

"The states are authorized to regulate elections, but that authorization does not allow states to violate the Constitutional rights of citizens." *Mich. State A. Philip Randolph Inst. v. Johnson,* 209 F. Supp. 3d 935, **9 (E.D. Mich. 2016).

For standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly trace able to the challenged conduct of a defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins,* 136 S.Ct. 1540, 1547 (2016). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly…allege facts demonstrating' each element." *Spokeo,* 136 S. Ct. at 1547. The court must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Parsons v. U.S. Dep't of Justice,* 801 F. 3d 701, 710 (6th Cir. 2015)(quoting *Worth v. Seldin,* 422 U.S. 490, 501 (1975)).

To establish an injury in fact, the Plaintiff must show that he or she suffered "an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo,* 136 S.Ct. at 1548 (quoting *Lujan,* 504 U.S. at 560). Where the plaintiffs seek to establish standing based upon an imminent injury, the Court has held "that 'threatened injury must be *certainly impending* to constitute injury in fact"'. *Clapper v. Amnesty Int'l USA,* 133 S.Ct. 1138, 1147 (2013). "However, the Supreme Court has also 'found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm," even where it is not "literally certain the harms they

identify will come about." *Mohammad S. Galaria, etal v. Nationwide Mutual Insurance Co.*, 664 Fed. Appx. 384 (6th Cir. 2016 Not for Publication)(citing *Spokeo*, 133 S.Ct. at 1150, n. 5).

As set forth by the Sixth Circuit in *Stewart v. Blackwell,* "after *Lujan*, courts have continued to recognize that the increased risk of harm constitutes an injury to support standing". *Stewart*, 444 F. 3d 843, 853 (6th Cir. 2006). The *Stewart* Court referred to various U.S. Supreme Court decisions wherein standing had been conferred based upon an increased likelihood of a future injury. *Stewart,* 444 U.S. 843, 852-53, *citing Bryant v. Yellen*, 447 U.S. 352 (1980)(farm workers had standing where it was unlikely any land would be available for sale if a federal act applied); *Metro-North Commuter R. Co., v. Buckley,* 521 U.S. 424, (1997)(merits of claim considered where plaintiff had been exposed to asbestos-related disease, but had not yet experienced symptoms); *see also, Sutton v. St. Jude S.C., Inc.*, 419 F. 3d 568, 573-74 (6th Cir. 2005)(standing found based upon an increased risk of harm that required medical monitoring).

The *Stewart* Court relied upon the prior Sixth Circuit decision of *Sandusky County Democratic Party v. Blackwell*, 387 F. 3d 565, 574 (6th Cir. 2004) to find standing for the plaintiffs:

> In the voting context, this Court and others have recognized that voters can have standing based on an increased risk that their votes will be improperly discounted. In *Sandusky County Democratic Party v. Blackwell*, 387 F. 3d 565, 574 (6th Cir. 2004)(per curiam), this Court held that the plaintiffs had standing to bring a claim on behalf of voters alleging that the Secretary of State's issuance of provisional ballots in Ohio elections violated the Help America Vote Act. The Act allowed voters to cast provisional ballots in those instances where their names could not be located on the list of qualified voters. *Id. at 569.* The Secretary of State issued a directive that would prohibit voters from casting provisional votes unless the poll worker was able to confirm that the voters was eligible to vote in that specific precinct. *Id. at 571.* On behalf of their members, *i.e.* voters, plaintiffs alleged that the directive violated the Act because the directive would allow "poll workers to withhold a provisional ballot from anyone who is not—according to the poll worker's on-the-spot determination at the polling place—a resident of the precinct in which the would-be voter desires to cast a provisional ballot". *Id.*

> This Court held that the plaintiffs had standing, even though they were unable to name specific voters who would seek to vote at polling places that would be deemed to be wrong by voters:
>
> > Appellees have not identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable; by their nature, mistakes cannot be specifically identified in advance. Thus, a voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place. It is inevitable, however that there will be such mistakes. The issues Appellees raise are not speculative or remote; they are real and imminent.
>
> *Id. at 574**. So too here, the plaintiffs are unable to articulate which voter will be harmed in the future by deficient equipment.
>
> It is inevitable, however, that errors have been made and will be made in the future. As the district court found, "[a] flaw in the punch card ballot is its fragile nature and the fact that running the punch card ballots repeated times through the counting machinery will result in different results." The claims of the plaintiffs here are not speculative or remote, but real and imminent.
>
> *Stewart*, 444 F. 3d at 854.

While the Defendants previously relied upon *Lance v. Coffman*, 549 U.S. 437, 441 (2007), that case was deemed different as to the plaintiffs in *Johnson*, 209 F. Supp. 3d, *at* **11, who alleged that a state law would disproportionately impact African Americans in urban areas in the form of longer wait times. The African American plaintiffs were held to have a stake in the litigation as the alleged harm would disproportionately impact them. *Id.* Relying upon *Stewart v. Blackwell*, *supra*, and *Sandusky*, *supra*, the *Johnson* Court also held "the fact that the alleged harm has yet to materialize is not dispositive in this case", as courts have continued to recognize that the increased risk of harm constitutes an injury sufficient to find standing. *Johnson*, 209 F. Supp. 3d at **11.

B. Injury in Fact of the Plaintiffs

1. Plaintiffs Thornton and Towns, Jr.

In this case, the Plaintiffs have set forth statistics showing that Shelby County, Tennessee has a large and the greatest African American population in any county. Dk. 104, 193-200. . They have further set forth facts that other counties, including Hamilton County, have greater safeguards by state law and regulation to protect their votes with paper trail ballots and optical scan machines not connected to the internet. Dk. 104, Nos. 216-220. Two of the Plaintiffs are African American- Rep. Joe Towns and Brittaney Thornton. Dk. 104, Nos. 24, 26. They aver discrimination such that there is a substantial likelihood that their votes, and those of African Americans in the county, will be improperly discounted and vote dilution due to the voting systems in use in Shelby County, Tennessee. Dk. 104, 24, 26, 243-244. They also both are future candidates for public office, and allege that absent relief from this Court, they will be disenfranchised or severely burdened in exercising their fundamental right to vote in future elections, that there is an overwhelming probability that votes will be miscounted in future elections, and also severely burdened as to whether the votes cast for them in the upcoming elections will be properly cast and counted by the Defendants. They further aver that will have to expend additional resources on poll workers and a cybersecurity expert to monitor the election process in 2020. Dk. 104, No. 245. They further allege that they have been personally injured by the actions and inactions of the Defendants with their money and time expended in past elections due to the same. Dk. 104, No. 245. Thus, facts are alleged of personal injury to these Plaintiffs who are African American, and not that of just the general population.

These allegations are not conclusory, nor are these self-inflicted harms. These are harms due to the Defendants' actions and inactions has abundantly documented in the Second Amended Complaint, exhibits, and the *Voting on Thin Ice Report.* The Second Amended Complaint sets

out that 6000 voters were not found in the epoll books in November 2018, thus creating barriers to those who were registered, sought to vote, but whose names were not located. Dk. 104, No. 8. Some of these voters might have wanted to vote for Plaintiff Joe Towns, Jr. Some might want to vote for Plaintiff Thornton and/or Towns, Jr. in their upcoming elections, but may be lost in the system again. They will need extra poll watchers to aid their supporters who encounter this and other documented voting barriers.

The disenfranchisement was so great in Shelby County, in November 2018, that it was documented in the *Stateline* article. Dk.104, No. 11. The Tennessee Black Voter Project sued in October 2018, when half of 36,000 voter registration forms were rejected by the Defendant Shelby County Election Commission. Dk. 104, No. 206. And, in July 2018, a Chancellor issued an order for the Shelby County Election Commission to open more early voting sites and days earlier as a result of a lawsuit filed by the NAACP, after arguments that the plan to open only three sites in Germantown, East Memphis, and Whitehaven would have suppressed vote in predominately black neighborhoods. Dk. 104, No. 205.

Mathew Bernhard, the Plaintiffs' expert, states that due to architectural flaws of the system, and failures to provide operational security at many levels, it is not possible for any person to faithfully attest that any voting machine in the county is free from malware that can affect election results. Dk. 104, No. 223. He adds that use of this election system subjects votes to a substantial risk of election outcomes which do not fairly represent the political opinions of voters in Shelby County. Dk..104, No. 224. He also states that the transmission of election results over a network by the Defendants exposes the system to an even greater risk of compromise. Dk, 104,No. 225. He finds that there is circumstantial evidence, based upon the Plaintiffs' complaint and the *Voting on Thin Ice Report,* that election tampering has occurred. Dk. 104, No. 231 & Exb. X. Under the circumstances, the Plaintiffs Thornton and Towns, Jr.

have no choice but to expend additional resources to monitor the polls, along with a cyber security expert. These harms are not speculative, but certainly impending with the substantial risk of harm as documented from the past elections.

2. SAVE

The Plaintiffs have addressed injury as to Plaintiff SAVE in their prior briefs. In *Sandusky County Democratic Party v. Blackwell, 387 F. 3d 565, *20 (*6th Cir. 2004), the Court held that the political party and labor organization plaintiffs had standing to assert the rights of their members would vote in the election. The Court noted that the individual participation of an organization's members is not normally necessary when an association seeks prospective or injunctive relief for its members. *Id.* And, more recently in *Common Cause Georgia v. Kemp,* 2018 U.S. Dist. LEXIS 195340 (N.D. Ga. Nov. 12, 2018), the Court held that the Plaintiff organization had standing to ensure that provisional ballots casts by registered voters in the 2018 general election were properly counted. The Court stated that "it is well-established that an organization can establish standing to sue on its own behalf where it can show the defendant's acts resulted in an impediment to the organization's mission or diversion of its resources". *It. at *37* (*citing Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982)(holding that an organization has standing to sue on its own behalf it the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts). *See also, Common Cause/Georgia v. Billups,* 554 F. 3d 1340, 1350 (11th Cir. 2009); *Fla. State Conf. of NAACP v. Browning,* 522 F. 3d 1153, 1158 (11th Cir. 2008). An organization also has standing "to assert claims based on injuries to itself or its members if that organization or its members are affected in a tangible way. *Common Cause, supra, at *38.*

In this case, SAVE has alleged that the Defendants' actions have impeded its mission, including voter registration, research, advocacy and education to ensure the fundamental right to

vote in elections. Dk. 104, No. 15, 19, 236. SAVE's purpose includes submitting open records requests to governmental bodies about elections; to report to the public and governmental bodies on vulnerabilities related to public elections; to monitor nationwide developments in election law and technology; to provide speakers for programs to inform and educate the public about voting vulnerabilities; to provide commentary from its leadership to the public through the media, press, and social media platforms; to collaborate with election computer scientists, academics, non-profits, and organizations to advocate for reforms in the public election voting processes; to facilitate through its members, volunteers, and others the monitoring of elections by poll watching, auditing of election results, observation, and education of the public at large, among other things. Dk. 104, No. 18. The lawsuit clearly diverts resources from those purposes.

The same was sufficient to constitute standing in *League of Women Voters v.* , 548 F. 3d 463, 466-67 (6th Cir. 2008)(League of Women voters of Ohio and of Toledo-Lucas County had standing where they alleged that the officials actions and inactions caused injury by impeding their voter registration and education efforts). The organization also has Plaintiff Kernell as a member, who has standing in his individual capacity. Dk. 104, No. 15, 237. And, it is clear that individual members to SAVE do not have to participate in the lawsuit, in that Dr. Joseph Weinberg is listed as in incorporator, but is not a Plaintiff. Dk. 104, No. 15, 21.

It is obvious that Plaintiff SAVE did not manufacture injury by incurring litigation costs, or choosing to spend money to fix a problem that would not affect the organization at all. If SAVE did not incur the litigation costs, then voter registration forms it gathers and submits may not be processed as occurred in November 2018; additional SAVE poll workers and resources will be required to monitor the serious election vulnerabilities; it can not ensure that SAVE poll workers are allowed to watch all aspects of the voting process; and its primary mission to ensure the fundamental right to vote through education efforts will be impeded. *See* Dk. 104, No. 23

(irregularities in uploading votes from satellite zone); No. 206 (voter registrations not processed); No. 192 (Defendant Goins refusal to allow tabulator inspection); Dk.104, Prayer for relief, No. 16. SAVE has standing.

3. Plaintiff Kernell

The Defendants argue that Plaintiff Kernell does not have standing because even though hundreds of voters in his district were given the wrong ballot, and others a ballot when they did not reside in his legislative district, he has not alleged that the problem was due to machine malfunction or hacking. The Defendants ignore that Plaintiff Kernell also alleged injury from the failure of the Defendant Shelby County Election Commission to provide poll tapes, as required under state law, prior to certification of the vote despite his requests. Dk. 104, No. 19. Also, that the election improprieties he observed as a poll watcher in November 2018 will dilute, disenfranchise, miscount, or severely burden his right to vote in future elections. Dk. 104, No. 19.

And, the Defendants argument that he can not prove that voters were provided the wrong ballot as a result of machine malfunction or hacking is disingenuous. The Plaintiffs' Second Amended Complaint states that the Tennessee Secretary of State asked the State Comptroller to conduct an audit of the election irregularities. Dk. 104, No. 145. While the Tennessee Comptroller did conduct an audit, it only "focused on the period January 1, 2012, through July 31, 2012.." except as otherwise warranted, and was "limited to a review of the redistricting activities leading up to and during the 2012 elections." From the report, there was no review or investigation or forensic audit of the voting machines, tabulators, or regarding other complaints raised. [3] Dk. 104, No. 145.

[3] Tennessee Comptroller Audit Report Oct. 2, 2012.

When Plaintiff Mike Kernell wrote a letter to the Comptroller asking questions about the limited scope of the audit, he received a cursory response the next day that "we limited the scope of the review based on the time and resources we had available." Dk. 104,No. 146. In March 2013, Dr. Weinberg also wrote Tennessee Secretary of State Hargett about the November 2012 problems of voters receiving the wrong ballot, and the Comptroller's lack of serious and thoughtful response to Kernell's letter (or recommendations). Dr. Weinberg asked Hargett to request the Comptroller or other consultant with the necessary computer expertise to perform a thorough evaluation. [4] Dk. 104, No. 146.. Defendant Goins has denied the request again in his response to the SAVE demand letter. Dk. 104, Exb. W. Thus, the ability to undertake the forensic audit was in the sole control of the Defendants, which they repeatedly denied. The Plaintiff Kernell has met his burden of proof as to standing, and even more so where the burden should shift to the Defendants failed to conduct the forensic audit, and have denied the Plaintiffs the opportunity to do so as well.

The Plaintiffs address the issue of the statute of limitations later in this brief. As to Plaintiff Kernell's fear of reduced participation being speculative, this is a well-founded fear based upon the documented pattern and practice of the Defendants in disenfranchising voters over and over again. And, also as evident from the expert statements of Bernhard set forth above.

4. All Plaintiffs

As to all of the Plaintiffs, "the fact that a harm is widely shared does not necessarily render it a generalized grievance." *Jewel v. National Sec. Agency*, 673 F.3d 902, 909 (9th Cir. 2011); *see also Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("[I]t does not matter how many persons have been injured by the challenged action" so long as "the party bringing suit

[4] Dr. Weinberg email to Tennessee Secretary of State Hargett in November 2012.

shows that the action injures him in a concrete and personal way."; *Federal Election Comm. v. Akins*, 524 U.S. 11, 24 (1998) ("[A]n injury .... widely shared ... does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an 'injury in fact."); *Covington v. Jefferson Cnty.*, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, J., concurring) ("[T]he most recent Supreme Court precedent appears to have rejected the notion that injury to all is injury to none for standing purposes."); *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001) ("So long as the plaintiff . . . has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). Indeed, even if the experience was shared by virtually every Tennessean, "the inquiry remains whether that shared experience caused an injury that is concrete and particular to the plaintiff. *Jewel*, 673 F.3d at 910. Denying "standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973). Thus, even if every voter in Shelby County, Tennessee has the same injury, it does not abrogate standing where the Plaintiffs have suffered the injury in a concrete and particularized way by having their own votes improperly discounted[5].

In this case, the plaintiffs have shown that the Shelby County voting systems have been connected to the internet on more than one occasion and each voting machine has a modem. Dk. 104, 86, 162, 219. Also, that the votes are transmitted remotely on election night from satellite

turn-in sites to the GEMS server at the Shelby County Election Commission. Dk. 104, No. 219. As averred by Matthew Bernhard, this exposes the system to an even greater risk of compromise. Dk. 104, 226. He further avers that there is a substantial risk undetectable error and manipulation will continue to increase as voting equipment ages and foreign actors become more sophisticated and brazen in their attempts to impact elections in the U.S. Dk.104, No. 227. On May 1, 2018 computers from 65 countries accessed the website in a three hour period and an active attack was made on the server with the website crashing on election night[6]. Dk. 104, 262. The Knox County uses DRE voting machines with no VVPAT. As stated in the recent TACIR Report, the risk to election security has changed since 2007. The court must accept the plaintiffs' allegations as true.

The hackers are within the radius of the Shelby County voting systems as evident by the attack on the Knox County voting systems in 2018. The Plaintiffs have alleged injury in fact based upon where they live due to the increased risk of successful infiltration by hackers due to the voting systems and processes in place in Shelby County. The intense hacking efforts are well-documented by the U.S. Department of Homeland Security, and the U.S. Congress, as well as the Plaintiffs' expert. Dk. 104, 275. In August 2018, DHS Secretary Kirstjen Neilsen called on all state and local election officials to make certain that by the 2020 presidential election, every American votes on a verifiable and auditable ballot[7]. Thus, the threat is not speculative or remote, but real and imminent. Sufficient injury-in-fact has been demonstrated due to the

[6] TACIR Election Security: Staff Update Dec. 2018, pg. 4.
[7] *The Hill*, August 22. https://thehill.com/policy/cybersecurity/403148-dhs-chief-calls-onelection-officials-in-all-50-states-to-have.

increased risk that the hacking efforts will succeed due to the inactions of the Defendants and effect the plaintiffs' votes and/or candidacies[8].

Georgia uses the same Accuvote TSx voting machines as Shelby County, Tennessee. In *Curling v. Kemp,*334 F. Supp. 3d 1303, 1314 (N.D. Ga. 2018) the defendants argued that the plaintiffs allegations that the DRE voting machines are vulnerable to hacking and are presumed to be compromised was only a speculative, generalized fear, falling short of a concrete injury. But, the Court found that the plaintiffs had established that the DRE voting system was actually hacked multiple times by cybersecurity experts who reported the system's vulnerabilities to state authorities. *Id.* It follows that if the same voting machines in Georgia were hacked as established in *Curling, supra,* they can be hacked in Shelby County, Tennessee[9].

Further, the Plaintiffs have been personally injured because their private data was exposed and sold on Ebay, as demonstrated at the DEF CON 2017 Hacking conference. Exb. "A", No. 3; Exb. "B", No. 9. The Defendants' claims that there was no personal injury from the exposure of the data on the electronic poll book is false. Under Tenn. Code Ann. 2-2-116, the permanent registration record contains the social security numbers of the registrants. Under Tenn. Code Ann. 2-2-127,

> the permanent records are made available for public inspection, but the "registrar shall make a reasonable effort to redact a person's social security number from a record before such record is made available to any person other than the holder of the number if such record is stored in a computer readable format on April 12, 1999 When such records are first stored in computer readable format or when

[8] *See Monsonto v. Geertson Seed Farms,* 561 U.S. 139 (2010)(U.S Supreme Court found standing where the government deregulation would result in bees feeding off of genetically modified alfalfa, and likely migrating to and contaminating the plaintiff farmers' crops within a certain radius. In this case, the affected area for hacking is Tennessee, and migration is likely to occur).

[9] Thus, this case is distinguishable from cases involving other voting machines, such as iVotronic which may not have an express federal district court evidentiary finding that vulnerability to hacking is not speculative as to those types of voting machines, but not the TSx Accuvote.

> changes are made to any computer program that stores or accesses records, a registrar shall redact a person's social security number from a record before such record is made available to any person other than the holder of the number. The coordinator of elections shall also redact the social security number before making any voter registration records available to the public.

The Defendants arguments to the court that the exposure of the Plaintiffs' social security numbers was a public record when the exact opposite is true, demonstrates the fundamentally maladministration and lawed voting systems and processes in existence in Shelby County, Tennessee. The fact that the Defendants would make such assertions, instead of investigating and holding those accountable who violated the law is systemic. Neither have the Defendants conducted a forensic audit, or addressed the many documented facts set forth in the Plaintiffs' complaints and *Voting on Thin Ice Report.* The State Plaintiffs are represented by the Tennessee Attorney General's office. They admit in their Motion to Dismiss the Second Amended Complaint that the Plaintiffs have made specific allegations of wrongdoing. Dk. 115, pg. 15. Thus, the Tennessee Attorney General Slatery is presumed to have knowledge of the allegations of wrongdoing, and is defending without an investigation or forensic audit.

The Plaintiffs are registered voters, and their data is stored in the Defendants' electronic poll books. Dk. 104, No. 15, 24, 25, 26. The misuse of their data by the Defendants, and failure to secure it, places the Plaintiffs at a continuing, increased risk of voter fraud and identify theft beyond the speculative allegations of "possible future injury" or "objectively reasonable likelihood" of injury. Exb. "B", No. 11. *See Galaria,* 663 Fed. Appx. At 384 (plaintiffs had standing where data was stolen from insurer). As a result the Plaintiffs have been forced to expend resources to bring this action in order to prevent future breaches. These costs are a concrete injury suffered to mitigate an imminent harm, and satisfy the injury requirement of Article III standing. *See also, Remijas v. Neimus Marcus Group, LLC,* 794 F. 3d 688 (7th Cir.

2015); *Lewart v. P.F. Chang's China Bistro, Inc.,* 819 F. 3d 963 (7th Cir. 2016); *Krottner v. Starbucks Corp.,* 628 F. 3d 1139 (9th Cir. 2010).

3. Fairly Traceable to the Conduct of the Defendants

Next, the Plaintiffs' injury must also be "fairly traceable' to the conduct being challenged." *Wittman v. Personhuballah,* 136 S. Ct. 1732, 1736 (2016)(quoting *Lujan,* 504 U.S at 560-61). This element of standing "is not focused on whether the defendant 'caused' the plaintiff's injury in the liability sense," *Wuliger v. Mfrs., Life Ins. Co.,* 5667 F. 3d 787, 796 (6th Cir. 2009), because "causation to support standing is not synonymous with causation sufficient to support a claim." *Parsons,* 801 F. 3d at 715. "Proximate causation is not a requirement of Article III standing". *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377, 1391 n. 6 (2014). "To that end, the fact that an injury is indirect does not destroy standing as a matter of course." *Parsons,* 701 F. 3d at 713; *see also Warth,* 422 U.S. at 504. "Rather the traceability requirement mainly serves "to eliminate those cases in which a third party and not a party before the court causes the injury." *Galeria,* 663 Fed. Appx at 384 (citing *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n,* 389 F. 3d 536, 542 (6th Cir. 2004)).

Plaintiffs contend that the Defendants have waived any argument that this prong is not met, in that they have only cursorally mentioned it in passing. In any event, the Plaintiffs injuries are fairly traceable to the Defendants' conduct. The Defendants have allowed the continued use of the Shelby County voting systems and processes, despite the State Comptroller's own finding that "[t]he primary responsibility of the SCEC is to conduct elections in Shelby County, yet SCEC has demonstrated an inability to conduct elections without significant inaccuracies, including those identified in the 2012 elections"[10]. Dk. 104, Nos. 139-140. The Defendant

[10] Letter of Justin Wilson, Tennessee Comptroller of the Treasury, Oct. 2, 2012.

Secretary of State admitted in his letter to the Comptroller that nearly every election cycle in the county in recent memory has been plagued by a myriad of errors and complaints of wrongdoing, with errors stretching back a decade. Dk. 104, No. 139. The Comptroller's failure to conduct a forensic audit thereafter increased the risk that the constitutional violations would continue as there was no true investigation as to what was wrong. Dk. 104, Nos 145-146. And, the barriers to voting and voter disenfranchisement have continued, as documented in the *Voting on Thin Ice* Report Dk. 104, Exb. H, the Second Amended Complaint, and the Center for American Progress 2018 Report which gave the State an "F" expressly referencing the failure to set out regulations for chain of custody of memory cards. Dk. 104, No. 212.

In addition, as set forth in the Second Amended Complaint, the voting system is not on 2013 list as having been certified, or the 2015 recertification list of the Tennessee Secretary of State. Dk. 104, No. 82, 185, 194, 195. It is obvious that each Shelby County voting machine, the tabulator(s), *and* the internal software have not been inspected for recertification in that they are not on the list. This lack of inspection by the Defendants also increases the risk of votes being improperly counted, in that older voting systems are more likely to malfunction and drop votes, and vote-changing malware may be present since the system has been connected to the internet on more than one occasion. Dk. 104, No. 186. Also, the machines can not be recertified as explained by Bernhard because the platform is obsolete rendering the voting systems vulnerable due to the inability to install needed security patches. Dk.104, No. 186, & Exb. "U". If they had been tested as required under state law, then they would have been decertified. Thus, the Defendants failure has caused the injuries to the Plaintiffs with an increased risk of lost or improperly discounted votes, vulnerability to hacking by local election official(s), staff, paid volunteer(s), or continued efforts by nefarious third parties to infiltrate the State's voting systems as documented by the 2018 Knox County infiltration.

Moreover, the Defendant SCEC has advised that it has no documents responsive to a request as to any action taken with regard to the unauthorized editing software found on the system in 2007. Dk. 104, No. 256. Thus, it may still be there today leaving the system vulnerable to the whim of any internal county election official or staff member to alter votes at will. And, the mishandling of passwords further compromised the Shelby County voting systems, with the report that persons no longer on the election staff still had passwords. Dk. 104, No. 166. The actions of the Defendants in allowing voting processes and systems that disenfranchised thousands of voters over the years which impacted on Plaintiff Kernell's election and others, improper handling of memory cards containing thousands of votes, unexplained uploading of memory cards containing thousands of votes, certification of elections without the results verified in the database, insecure method of transferring the election results databased out of county, state and even the country, acceptance of vote totals by the Defendant Coordinator of Elections that do not match the computer printouts, and manipulation of early vote totals as admitted by Defendant SCEC Lester, and the failure of the Defendants to take action to investigate, develop rules and regulations to address the problems, and decertify the system are all fairly traceable to the Defendants.

In addition, the County Defendants misrepresented to the Court that the votes are not remotely transmitted[11], when in fact the regular practice on election night (as observed by Plaintiff Kernell in November 2018), is to transmit them remotely from satellite zone turn-in sites. Dk. 104, No. 19, 101. Once again, this process opens the system up for hacking and unauthorized access, and closes the door to the Plaintiffs who are not permitted to even inspect the software for the voting systems. Certainly the threat is real and imminent in that safeguards

[11] October 17, 2018 Hearing Transcript, ECF 44, pgs 57-58.

have been put in place for Hamilton County, and those other counties in the State that use paper trail optical scan systems, to prevent wireless capability. If there were no threat, why those safeguards? Yet, the Shelby County voting systems have no such safeguards with every single voting machine sporting its own modem, and the remote transmission of votes on election eve. Not to mention, the Defendants' failure to document access to the tabulator, the more than one documented times that the ES & S vendor was left alone with the tabulator during vote-counting , along with the blatant failure to conduct state-required audits of every poll tape[12].

Yes, there is causation due to the either willful blindness of the election officials, or malfeasance in failing to do their jobs to properly administer the election, investigate and correct thereafter. The Defendants' failures interfered with the Plaintiff Kernell's election wherein funds and time were spent on voters who were not even given a ballot with his race on it although residing in his district. Dk.104, No. 23. It will also impact on Plaintiffs Towns and Thornton's future candidacies for public office, forcing them to expend additional dollars on poll

[12] At this point, the Court must ask why would the Defendants: (1) upload 20 extra unexplained memory cards potentially carrying thousands of votes; (2) not upload 9 other memory cards in a different election until notified by a citizen and under duress with an election lawsuit by a candidate; (3) not investigate unauthorized editing software found by an independent state agency on the tabulator vote-counting system; (4) not conduct a forensic audit when thousands of citizens are given the wrong ballot in more than one election; (5) disregard the state law requiring every poll tape be checked against the reported vote totals; (6) lose early vote poll tapes for the elections where the extra cards were uploaded; (7) cognizant of the Knox County hacking in 2018, still advise the court that assistance by U.S. Homeland Security was not needed to ensure a secure voting system; (8) hook the system up to the internet *after* an independent agency reported that exposing the voting systems to the internet rendered it vulnerable; (9) certify an election when the vendor is unable to pull up the votes in the database; (10) submit election results to the State that do not match the machine print-outs, and have them accepted *without any investigation.* How convenient that in the August 2012 election where thousands were given the incorrect ballot, and 20 extra unexplained memory cards possibly containing thousands of votes were uploaded, only a sampling audit of poll tapes was done (contrary to state law), and early vote poll tapes are now mysteriously missing so as to prevent a comparison of the vote totals to the poll tapes which should have been done.

watchers to monitor satellite zones, hire cyber security experts to monitor the election process, and spend campaign funds and time on seeking public office with the increased risk that those who vote for them may not have their votes counted, or attributed on a vote-flip to an opposing candidate.

And, even more significant, the Plaintiffs' injury is fairly traceable to the Defendants' conduct where they failed to secure the electronic poll book, which resulted in the Plaintiffs' data being sold on Ebay as exposed at the 2017 DEF CON Hackers conference. The Defendants' failure to secure the sensitive personal information entrusted to its custody and insufficient security, allowed the data breach. These allegations more than meet the threshold for Article III traceability, which only requires "more than speculative but less than but-for" causation. *Gloveria,* 664 Fed. Appx. At 384, pg. 10 (citing *Parsons,* 801 F. 3d at 714). *Gloveria* is persuasive authority where it found causation where the plaintiffs' data was hacked from an insurance company. *See also, Lambert v. Harman,* 517 F. 3d 433, 438 (6th Cir. 2008); *Resnick v. AvMed, Inc.*, 693 F. 3d 1317, 1324 (11th Cir. 2012); *Lewert,* 819 F. 3d at 969; *Remijas,* 794 F. 3d at 696; *Krottner,* 628 F. 3d at 1141.

4. Redressability

The Plaintiffs must also show that their injury will likely be redressed by a favorable decision. *Wittman,* 136 S.Ct. at 1736 (quoting *Lujan,* 504 U.S. at 560-61). Plaintiffs contend that the Defendants have waived any argument that this prong is not met, in that they have only cursorily mentioned it in passing in their Memorandum to Dismiss the Second Amended Complaint. Moreover, the Defendants argument that the relief requested by the Plaintiffs would not create a perfect voting system is a red herring. For the redressability inquiry, it is sufficient to show that the requested remedy would "slow or reduce" the harm, or make it better. ***Mass. v. EPA***, 549 U.S. at 525 (citing *Larson v. Valente,* 456 U.S. 228, 243, n. 15 (1982)).

Redressability does not require certainty. It only requires a substantial likelihood that the Court could provide meaningful relief. It is clearly within a district court's authority to declare a violation of plaintiffs' constitutional rights. *See, e.g. Obergefell v. Hodges,* 135 S. Ct. 2584 (2015); *Brown v. Bd. of Educ.,* 347 U.S. 483 (1954); *Lawrence v. Texas,* 539 U.S. 558 (2003). "Once a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15 (1970).

The Plaintiffs claims are clearly redressable where they contend their constitutional rights have been violated in that there is an increased probability that their votes will be improperly discounted based upon the deficient voting systems and processes used in Shelby County, Tennessee. The Sixth Circuit, in *Stewart,* 444 F. 3d, at *30, found redressability sufficient to confer standing and order that judgment be entered for the plaintiffs who alleged that the use of deficient equipment, including punch-card ballot, in some counties and not others violated equal protection and due process. It is significant that the Court in *League of Women Voters v. Brunner,* 548 F. 3d 463, 476 (6th Cir. 2006) relied in part upon the allegations of one plaintiff that her vote jumped to another candidate when she tried to vote, similar to allegations in this case by the Stockings and Veronique Black, and verified by the Defendant Norma Lester, as well as the testimony of City Councilwoman Patrice Robinson before the Defendant SCEC. Dk. 104, No. 173, 176, 174. And Bernard states that newer paper based systems provide substantial mitigation to the risks facing voters in Shelby County. Dk. 104, No. 229, Exb. "U", No. 7. The TACIR has recommended voter verified paper audit trails that can be counted by hand, as well as

by machine since 2007[13]. Dk. 104, No. 286. The U.S. Senate Select Committee on Intelligence Committee has also strongly recommended voter verified paper trails.

Just as the Plaintiffs' claims were redressable in *Stewart, supra,* and *Johnson, supra,* the Plaintiffs claims, taken true at this stage of the proceedings, are sufficient to constitute standing.

Further, none of Plaintiff SAVE's members, or the Individual Plaintiffs, can be adequately compensated for these harms in an action at law for money damages brought after the fact because the violation of constitutional rights is an irreparable injury.

As in *League of Women Voters of Ohio, etal v. Blackwell, etal,* U.S. District Court (N.D. Ohio), No. 3:05-cv-07309-JGC, Dk. 104, No. 202, the Plaintiffs in this case have standing. In that case, the Court held that the injuries of the organizational and individual plaintiffs were traceable to defendants' alleged equal protection and due process violations. *Id.,* Dk. 104, No. 202, pg. 15. Also, as to the Individual Plaintiffs they have alleged injury that affects them in a particularized way in that they have alleged facts showing disadvantage to themselves as individuals. *Baker v. Carr,* 369 U.S. 186, 206 (1962). "A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when, such impairment resulted from dilution by a false tally, cf. *United States v. Classic,* 313 U.S. 299 (1941); or by a refusal to count votes from arbitrarily selected precincts, cf. *United States v. Mosely,* 238 U.S. 383 (11915), or by a stuffing of the ballot box, cf. *Ex parte Siebold,* 100 U.S. 371 (1879); *United States v. Saylor,* 322 U.S. 385(1944)". Just as in *Baker, supra,* the Individual Plaintiffs are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes. *Id. at ****37.* Just as in *Baker,* the injury that the Individual Plaintiffs assert is that they have been placed in a position of unconstitutional unjustifiable

[13] *Trust but Verify Increasing Voter Confidence in Election Results, 2007 Report.*

inequality compared to voters in irrationally favored counties. Also, as in *League of Women Voters v. Fields*, 352 F. Supp. 1053 (E.D. Ill. 1972), the Plaintiff organization, and registered voters are entitled to proceed on with evidence on their claims that the officials were infringing upon rights guaranteed to them by the *U.S. Const. amend. XIV* under 1983 as to an uneven administration of state officials of their duties when such administration infringed upon a federal right.

5. Continuing Violation

The Defendants contend that the Plaintiffs' case is barred by the one year statute of limitations, Tenn. Code Ann. 28-3-104 . While the one-year statute may apply as to the Plaintiffs' federal civil rights claims, the Plaintiffs contend that there are numerous acts within the past one-year before it filed suit, and that there has been a continuing violation by the Defendants. Dk. 104, Nos. 8, 11, 13, 23, 174, 176, 177, 178, 206, 206, 207, 253, 262, 264, 265, 266, 290.

If a violation is continuing, then the statute of limitations proposes no bar. *League of Women Voters v. Blackwell, 432 F. Supp. 2d 734, 740-41 (N.D. Ohio 2006).* "A violation is continuing if: 1) the defendants' wrongful conduct continues; 2) the injuries to the plaintiffs continue to accrue; and 3) further injuries to the plaintiffs were avoidable if the defendants had at any time ceased their wrongful conduct. *Tolbert v. State of Ohio Dept. of Transp., 172 F. 3d 934, 940 (6th Cir. 1999)(citing Kuhnle Brothers, Inc. v. County of Geauga, 103 F. 3d 516, 522 (6th Cir.1997)." Id. at 740-41*. In *Blackwell, supra*, the Court found that there was a continuing violation with the statute of limitations posing no bar as to the federal civil rights claims of the Plaintiffs challenging the long-standing aspects of Ohio's election, with injuries in the past, present, and future alleged to be the direct result of defendants' conduct not occurring absent that conduct. *Id. at 741*. The same is true in this case.

Therefore, the Plaintiffs have standing to bring this action and this Court has subject matter jurisdiction.

II. PLAINTIFFS' COMPLAINT STATES A CLAIM FOR VIOLATION OF DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

The facts set forth above and in the Second Amended Complaint, the Exhibits, citations, and Declarations all show that this is an extraordinary case that requires the federal court to intervene and merits strict scrutiny. The Plaintiffs have set forth arguments in their prior briefs, and will supplement here.

Under Fed. R. Civ. P. 8, the plaintiffs' allegations in their Complaint must be taken as true with regard to the Defendants' Motions to Dismiss for failure to state a claim under 12(b)(6). The Complaint, and exhibits, including the 49 page *Voting on Thin Ice Report,* more than satisfy the notice pleading requirements and plainly allege cognizable claims for violation of federal constitutional and statutory voting rights. The continued pattern and scope of the reported problems in the Shelby County voting systems, as admitted by the Defendant Secretary of State, and State Comptroller show a systematic breakdown and failure of the voting systems so egregious as to unconstitutionally deny and burden the fundamental right to vote. Further, the Defendant TEC's own minutes do not reflect that the Shelby County voting machines and software was ever recertified by the Defendant TEC. Dk. 104, No. 82, Exbs. "F" and "G".

1. The Current Voting System in Shelby County is Fundamentally Unfair

Due process is violated where the voting process is permeated by broad-gauged, patent, and fundamental unfairness or severely burdens the fundamental right to vote. *Griffin v. Burns,* 570 F. 2d 1065, 1076 (1st Cir. 1978)(unfair application of absentee ballot requirements violated due process); *Roe v. Alabama,* 43 F. 3d 574 (11th Cir. 1995)(arbitrary application of voting

procedures violates due process); *Ury, supra,* 303 F. Supp. at 126 (inadequate voting facilities hindered, delayed and effectively deprived plaintiffs of right to vote); *Black,* 209 F. Supp. 2d at 889 (allegations of fundamentally unfair vote counting procedures stated due process claim).

Also, the severity of the burdens imposed by the current system is plain where thousands of Shelby County citizens have been disenfranchised over the years, and thousands of others unreasonably burdened in exercising their right to vote. Dk. 104, Nos. 8, 23, 134, 135, 137, 140, 205, 206. Incredibly, the Defendants argue that the Plaintiffs have failed to present any credible evidence that the current voting system has disenfranchised any voter in Shelby County, and that there is no evidence particularly of disenfranchisement in the August and November 2018 elections. Dk. 115-1, pgs. 21-22. These stick your head in the sand denials of the Defendants, are the very reason the Plaintiffs have brought this lawsuit.

The State Comptroller and Defendant Secretary of State Hargett confirmed that thousands did not receive the correct ballot in 2012. Dk.,104, No. 139, 140. A Chancellor ordered additional early voting sites to be opened in African American parts of the city in August 2018. Dk. 104, No. 205. The Tennessee Black Voter Project brought a lawsuit when the Defendants would not process thousands of voter registration applications in November 2018. Dk. 104, No.206.

The Second Amended Complaint does not allege "garden variety" or isolated errors as verified by Bernard. Dk. 104, No. 225, Exb. "U". Instead, there is a chronically and systematically unfair voting system lacking even the minimally adequate standards, processes, supervision, and funding necessary to protect the fundamental right to vote. There is no rational basis for the continued disorder, confusion, and inequitable elections.

The chronic failure to state and local officials to remedy well-known and longstanding violations of fundamental constitutional rights gives rise to a claim for prospective injunctive and

declaratory relief against those officials under 1983. *See Penick v. Columbus Bd. of Ed.*, 519 F. Supp. 925, 928, 941-42 (S.D. Ohio 1981)("studied indifference" and willful blindness of state education officials to continuing equal protection violations supported 1983 injunctive relief); *Penick v. Columbus Bd. of Ed.*, 663 F. 2d 24, 27 (6th Cir. 1981)("hands off" policy of state officials and failure to remedy known constitutional violations contrary to their legal duties subject to 1983 injunctive relief). *See, League of Women Voters, supra,* district court held that "[t]here is no question that LWV has alleged actionable constitutional violations." Dk. 104,No. 202, pg. 7.

The Defendants rely upon the 2003 decision of *Weber v. Shelley*, 347 F.3d 1001 (9th Cir.), arguing that using the current system in Shelby County is a reasonable and neutral choice of election officials. They rely upon the 2006 decision of *Mills v. Shelby Cty. Election Comm'n,* 218 S. W. 3d 33 (Tenn. App.) to contend that the current voting system does not "severely" restrict the right to vote. More appropo is the recent ruling in *Curling, supra,* where the district court noted the "sea of change" and the numerous federal authorities that have warned of the certainly impending national threat of its continued use.

Taking the Plaintiffs' claims as true, the Defendants' *Rule 12 (b)(6)* motion must fail.

2. The Complaint States a Claim that the Shelby County Current Voting System Violates the Equal Protection Clause

Our democracy is based upon "one man, one vote", and the "equal weight accorded to each vote and the equal dignity owed to each such voter.". *Bush v. Gore,* 531 U.S. 98, 104 (2000); *Baker v. Carr*, 369 U.S. 186 (1962). The constitutional right to equal protection of the fundamental right to vote is violated not only by intentional discrimination, but also by the "arbitrary and disparate treatment" of voters in different counties within a state. *Bush,* 531 U.S. at 105-06. The fair and equal protection of the right to vote "is protected more than the initial

allocation of the franchise." *Id.* It also applies to "the manner of its exercise". *Id.* Once the state grants the right to vote on equal terms, it may not later by "arbitrary and disparate treatment, value one person's vote over that of another". *Id.* Uniform rules, including specific standards to ensure the equal application of the law, are required in order to equal protection of the fundamental right to vote. *Id.* at 106; *see also Sandusky*, 340 F. Supp. 2d at 817-22.

The Defendants argue that because the local election commissions have the duty to purchase the voting systems in the 95 counties and there are statewide rules for the same, then here is no preferential treatment. They contend that there are no facts alleged that show an interference with the right to vote, lost or miscounted votes, tampering with election results, or malfunction preventing voters from casting their votes. They further contend that no facts have been alleged demonstrating dilution of the votes of minority voters in Shelby County. They contend that the Plaintiffs must show minimization of the racial minorities' votes, or cancelling out of their political strength. They assert that the Plaintiffs must show that the voting system was acquired and implemented with the intent to discriminate against minority voters and that the current voting system in Shelby County is wholly unrelated to the achievement of any combination of legitimate purposes.

Contrary to the assertions of the Defendants, the Plaintiff have alleged overwhelming facts demonstrating that the use of the current voting system in Shelby County has directly interfered with the right to vote. The Complaint, and its exhibits document the voting system experiencing lost or miscounted votes, tampering of election results, malfunction preventing voters from casting their votes,. They have documented facts showing that Shelby County voters are less likely to have their votes counted accurately than voters in other counties by the very admission of Defendant Secretary of State Hargett.

No other county in Tennessee utilizes the antiquated voting system used in Shelby County. . But Hamilton County residents have special protections under the law requiring their voting apparatus to have no wireless connectivity capability. This also violates the Plaintiffs equal protection.

The Supreme Court found equal protection violations in arbitrary and irrational legislative apportionment schemes. *Baker,* 369 U.S. 186; *Reynolds v. Sims,* 377 U.S. 533 (1964). In *Ury v. Santee,* 303 F. Supp. 119, 126 (N.D. Ill. 1969), the court held that inadequate, unequal allocation of voting facilities, long lines, and failure to provide sufficient numbers of trained workers violated the equal protection rights of voters. Also, in *League of Women Voters v. Fields,* 352 F. Supp. 1053 (E.D. Ill. 1972), the court denied a motion to dismiss where the plaintiffs sought injunctive relief based upon the inconsistent "uneven" administration of elections, with allegations of "serious and widespread" inconsistencies. The Court held that "[t]he administration of valid state election laws in an uneven or unlawful manner could amount to such arbitrary administration that citizens would be denied federal rights to vote, to have their vote counted equally, and to have substantially fair elections". *Id.*

Likewise, in *Common Cause v. Jones,* 213 F. Supp. 2d 1106, 1107-10 (C.D. Cal. 2001), the Court held that an equal protection claims was stated under 1983 based upon the use of different voting technologies in different California counties because certain technologies were less reliable than others. And, in *Black v. McGuffage,* 209 F. Supp. 2d 889 (N.D. Ill 2002), the court found that alleged county to county variations in the reliability and accuracy of the voting systems being used was sufficient to state an equal protection claim. .

In *League of Women Voters, supra,* the district court stated:

> Put simply, LWV contends that defendants' election system provides different voting rights to different citizens based solely on where those citizens happen to

> reside and vote. Some citizens get short lines, properly functioning voting machines, well trained and informed poll workers, accurate registration information, and the opportunity to cast unencumbered absentee or proper provisional ballots. Other citizens, due to the vagaries of residence and registration encounter long lines, defective voting machines, ill-trained and uninformed poll workers, inaccurate registration information, and absentee or provisional ballots that are ultimately deemed invalid.
>
> If LWV's allegations are well founded, defendants may be depriving citizens of the franchise depending on where they live in violation of the equal protection clause, *see U.S. v. Mosley,* 238 U.S. 383, 386 (1915)(holding a state may not deprive citizens of their vote based on where they live).
>
> Just as a state may not directly condition the franchise on one's place of residence, one's place of residence cannot cause his or her vote to be cheapened or devalued. *See Reynolds v. Sims,* 377 U.S. 533, 555 (1964)(holding that Alabama violated citizens' due process rights by apportioning legislative districts to minimize the electoral strength of a class of voters).
>
> Equal protection is likewise violated where the state dilutes the votes of some voters by imposing barriers to the ability or opportunity to vote. *Ury v. Santee,* 303 F. Supp. 119 (N.D. Ill. 1969)(defendants' failure to provide adequate voting facilities that resulted in long lines and failure to provide sufficient number of trained poll workers impaired citizens' rights to vote and violated equal protection clause).
>
> In action that diminishes the right to vote equally may be as actionable as direct and overt acts treating the franchise unequally. A state having power to ensure uniform treatment of voters cannot adopt policies leading to disparate treatment of those voters and thereafter plead "no control" as a defense. *Bush v. Gore,* 531 U.S. 98, 109 (2004)(holding that Florida Supreme Court's statewide recount order violated equal protection clause because the Court had the power to assure uniformity and did not exercise that power to guarantee equal protection and fundamental fairness). A state's failure to exercise such power, where such inaction foreseeably impairs the fair and equal exercise of the franchise, gives rise to an equal protection claim. *Id.*

Dk. 104, No. 202, pgs. 4-5. The Defendants' Motion to Dismiss should be denied.

III. PLAINTIFFS' COMPLAINT STATES A CLAIM FOR RELIEF UNDER THE TENNESSEE CONSTITUTION

The Plaintiffs' Complaint sets out Tenn. Const. Art. IV, Sec. 1, that the General Assembly shall have the power to enact laws "to ensure the freedom of elections and the purity of the ballot

box". (ECF), pg. 9, No. 26; Tenn. Const. Art. 1, Sec. 5, provides that "the elections shall be free and equal..". (ECF), pg. 8, No. 23; and that the Tennessee Constitution further contains a clause that the legislature may not pass "any law granting to any individual or individuals, rights, privileges, immunity[s] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law." Tenn. Const. Art. IX, Sec. 8, (ECF), pg. 9, No. 27. The Plaintiffs have set out the multitude of violations of these provisions in their Complaint and exhibits, and have stated a claim for relief. And, there is a state constitutional equal protection violation due to the safeguards provided to the Hamilton County citizens, and not those of Shelby County as set out above[14]. The claims are not barred by sovereign immunity in that the Defendants are sued in their official capacity for injunctive relief.

Further, this Court should exercise supplemental jurisdiction in that the Plaintiffs do have standing and stated federal claims upon which relief can be granted. The claims are not the same as in *Mills, supra.,* especially in light of the sea of change, the *Voting on Thin Ice Report,* and other facts set forth in the Plaintiffs Second Amended Complaint—all which occurred *after* that decision. The claims are abundantly set forth in detail in the Plaintiffs nearly 100 page Second Amended Complaint (with exhibits).

CONCLUSION

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

Respectfully submitted,

CAROL CHUMNEY LAW PLLC

By: /s/Carol J. Chumney
Carol J. Chumney, Esq. (#012021)
5050 Poplar, Suite 2436
Memphis, TN 38157
carol@carolchumneylaw.com
(901) 844-7141

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon:
Janet M. Kleinfelter
Matt Jones
Public Interest Division
Office of Attorney General
P.O. Box 20207
Nashville, TN 37202
Janet.kleinfelter@ag.tn.gov
Matt.jones@ag.tn.gov

John L. Ryder
Pablo A. Varela
HARRIS SHELTON HANOVER WALSH, PLLC
40 S. Main Street, Suite 2210
Memphis, TN 38103
jryder@harrisshelton.com
pvarela@harrisshelton.com

via U.S. Mail and ECF email on this 29 day of May 2019.

/s/Carol Chumney
Carol Chumney