UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
MEMPHIS DIVISION

SHELBY ADVOCATES FOR VALID ELECTIONS, MICHAEL KERNELL, JOE TOWNS, JR., ANN SCOTT, and BRITTANY THORTON,	)	
Plaintiffs,	)	
v.	)	Case No. 18-2706 TLP dkv
TRE HARGETT, in his official capacity as TENNESSEE SECRETARY OF STATE, et al.	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Defendants, Tre Hargett, in his official capacity as Tennessee Secretary of State; Mark Goins, in his official capacity as State Coordinator of Elections; the Tennessee State Election Commission; and Kent D. Younce, Judy Blackburn, Donna Barrett, Greg Duckett, James H. Wallace, Jr., Tom Wheeler and Mike McDonald, in their official capacities as members of the Tennessee State Election Commission (the "State Defendants") submit this memorandum of law in support of their motion to dismiss Plaintiffs' Second Amended Complaint (D.E. 104) for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

INTRODUCTION

Plaintiffs are four individuals, who allege that they are residents of Shelby County, Tennessee and who have voted or will vote in federal, state and local elections in Shelby County,

and a nonprofit corporation, Shelby Advocates for Valid Elections ("SAVE"), whose purpose is "for research, advocacy, and education to ensure the fundamental right to vote in public elections." (D.E. 104 at ¶¶ 17, 22-26.) Plaintiffs have sued the Tennessee Secretary of State and the State Coordinator of Elections, both in their official capacities, as well as the members of the Tennessee State Election Commission, in their official capacities, along with the Shelby County Election Commission ("SCEC") members in their official capacities. (*Id*. at ¶¶ 27-31.)

While the second amended complaint (hereinafter referred to as "complaint") raises a challenge to the SCEC's continued use of the AccuVote DRE voting system as being in violation of Plaintiffs' due process and equal protection rights, the primary thrust of Plaintiffs' complaint is their dissatisfaction with the way that elections are conducted in Shelby County and with the failure of any state and federal executive or legislative officials to take action in response to their complaints. *See* D.E. 104 PageID # 1273 at ¶ 266 ("The Plaintiffs have demanded action from federal and state officials and law enforcement repeatedly . . . [t]he entire election process, including the state's administrative and judicial corrective process has failed on its face to afford fundamental fairness, as well as the U.S. Congress and federal law enforcement authorities.") Faced with this perceived inaction by "Defendants, the state courts, the State Comptroller, the Governor, the FBI, the U.S. Department of Justice, the U.S. Congress, and others" (D.E. 104 PageID# 1274 at ¶ 268), Plaintiffs now seek to have this Court exercise its broad injunctive powers not only to enjoin further use of the current voting machines/system in Shelby County, but to mandate virtually every aspect of how elections are to be conducted in Shelby County.[1]

[1] Plaintiffs "request the Court to Order that the Defendants implement constitutional election systems, processes, tabulators, and voting machines, adequate funding be allocated, training to be conducted and sufficient workers to be hired"; "to order the Defendants to establish uniform testing criteria for the certification, recertification and examination of the voting systems"; and to order "public observation, post-election audits, pre-election testing, cybersecurity protections, standards for the chain of custody of memory cards and vote tally, prevention of wireless transmission and remote transmission, and the appointment of an Independent Master." (D.E. 89 PageID # 863.)

Plaintiffs ask this Court to grant such extensive relief in the absence of *any* allegations that the current voting system in Shelby County has ever been hacked or that any attempts to have ever been made to hack it, as well as in the absence of any concrete or specific factual allegations from which the Court could infer that their votes have not been counted or that they have been denied access to vote.

Accordingly, the State Defendants move to dismiss Plaintiffs' Second Amended Complaint in its entirety and with prejudice as Plaintiffs lack the requisite standing to confer Article III jurisdiction on this Court. Furthermore, even if Plaintiffs could demonstrate the requisite standing, their second amended complaint fails to state a claim upon which relief can be granted. Indeed, nothing alleged in Plaintiffs' second amended complaint justifies the extraordinary relief they seek.

STANDARD OF REVIEW FOR 12(B) MOTION TO DISMISS

I. Dismissal for Lack of Subject Matter Jurisdiction

A challenge to the court's subject-matter jurisdiction under Rule 12(b)(1) may be either a facial attack or a factual attack. *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). A facial attack "questions merely the sufficiency of the pleadings." *Id.* When reviewing a facial attack, this Court must take the allegations in the complaint to be true. *Id.*

But when there is a factual attack, the Court must weigh conflicting evidence provided by the plaintiff and the defendant to determine whether subject-matter jurisdiction exists. *Id.* Thus, in reviewing a factual attack, the Court may consider evidence outside the pleadings and both parties are free to supplement the record by affidavits. *Id. See Rogers v. Stratton Industries*, 798 F.2d 913, 916 (6th Cir. 1986).

II. Dismissal for Failure to State a Claim

To state a claim upon which relief can be granted, a complaint must contain either direct or inferred allegations respecting all material elements to sustain a recovery under some viable legal theory. *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005); *Wittstock v. Mark A Van Sile, Inc*., 330 F.3d 889, 902 (6th Cir. 2003). While the factual allegations in a complaint need not be detailed, they "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-95 (2007)).

The United States Supreme Court has encapsulated the appropriate standard to be applied in considering a motion to dismiss for failure to state a claim:

> Two working principles underlie our decision in [*Bell Atlantic v.*] *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "show[n]" – "that the pleader is entitled to relief."

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-1950 (2009) (citations omitted).

ARGUMENT

Plaintiffs' Second Amended Complaint asserts four counts, and while each count contains multiple and repetitive claims, they can generally be summarized as follows. In Count One, brought pursuant to 42 U.S.C. § 1983, Plaintiffs assert that "[t]he voting systems in Memphis and Shelby County, Tennessee elections suffer from non-uniform standards, processes, and rules, and employs trained or improperly training personnel, and that has wholly inadequate systems and process," and that Defendants "are administering an election process in Shelby County that deprives Shelby County citizens, including individual plaintiffs here, of their liberty interest in voting and does so without adequate pre-or post-deprivation process." Plaintiffs further assert that requiring voters to suffer these severe burdens and infringements violates the Due Process Clause of the Fourteenth Amendment. (D.E. 104 PageID # 1275-77.)

In Count Two, also brought pursuant to 42 U.S.C. § 1983, Plaintiffs assert that by requiring the citizens of Shelby County to vote using the current voting system, "the Defendants will knowingly treat the Plaintiffs differently than other similarly situated voters in the same election who reside in Tennessee counties that do not use the Shelby voting systems" and further, because Shelby County has the largest percentage of residents whose race is Black, the continued use of the current voting system will have a disproportionate impact on Black voters in Shelby County. (D.E. 104 PageID # 1281-83.)

In their third count, Plaintiffs seek a declaration that the current voting system in Shelby County is fundamentally unfair and, therefore, unconstitutional under the Fourteenth Amendment, as well as the Tennessee Constitution. Plaintiffs further seek an injunction prohibiting the use of the current Shelby County voting systems "for all public elections from December 2018 forward." (*Id*. at PageID # 1285.) Plaintiffs' fourth count, repeating their request for injunctive relief, seeks

an order of mandamus requiring the Defendants to decertify and discontinue the use of the current Shelby County voting system. (*Id*. at PageID # 1286-87.)

I. PLAINTIFFS' SECOND AMENDED COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION.

Plaintiffs lack the standing necessary to vest jurisdiction in this Court. Nothing in the Second Amended Complaint alters this inescapable conclusion.

"The first and fundamental question presented by every case brought to the federal courts is whether it has jurisdiction to hear a case." *Evans v. Allen*, No. 3:13-CV-480-TAV-CCS, 2014 WL 585392, at *1 (E.D. Tenn. Feb. 14, 2014) (quoting *Douglas v. E.G. Baldwin & Assocs.*, 150 F.3d 604, 607 (6th Cir.1998), *abrogation on other grounds recognized by Heartwood, Inc. v. Agpaoa*, 628 F.3d 261, 266 (6th Cir.2010)). "Standing goes to a court's subject matter jurisdiction." *Kepley v. Lanz,* 715 F.3d 969, 972 (6th Cir.2013) (internal quotation and brackets omitted). Thus, a complaint must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) if the plaintiff lacks standing to bring suit. *See, e.g., Taylor v. KeyCorp,* 680 F.3d 609 (6th Cir.2012) (affirming district court's grant of Rule 12(b)(1) motion to dismiss for lack of standing); *Allstate Ins. Co. Global Med. Billing, Inc.,* 520 F. App'x 409, 410–11 (6th Cir.2013) (stating that lack of standing is treated as an attack on the court's subject matter jurisdiction and is therefore considered under Rule 12(b)(1)).

The requirement of standing is "rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). Plaintiffs have the burden "clearly to allege facts demonstrating that [they are] proper part[ies] to invoke judicial resolution of the dispute." *Warth v. Seldin*, 422 U.S. 490, 518 (1975). Furthermore, standing "must affirmatively appear in the record"; it cannot be "inferred argumentatively from averments in the pleadings." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). And the inquiry into

whether plaintiffs have standing should be "especially rigorous" where, as here, Plaintiffs seek to have the actions of a sovereign state declared unconstitutional. *Crawford v. U.S. Dept. of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017) (citing *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013)).

The "irreducible constitutional minimum" of standing is that each plaintiff must allege an actual or imminent injury that is traceable to the defendant and redressable by the court for each claim asserted. *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560-62 (1992). An injury must be an "injury in fact," i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan*, 504 U.S. at 560 (citations omitted). In *Spokeo*, the Court held that an injury must be both "concrete *and* particularized," and for an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." 136 S.Ct. at 1548-49 (emphasis in original) (citations omitted). For an injury to be "concrete," it must be " 'de facto'; that is, it must actually exist." *Id*.

In the context of a declaratory judgment action, the Sixth Circuit has stated that allegations of past injury alone are not sufficient to confer standing; rather, the plaintiff must allege and/or "demonstrate actual present harm or a significant possibility of future harm." *Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006) (citations omitted). And the Supreme Court has "repeatedly reiterated that threatened injury must be *clearly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper*, 133 S.Ct. at 1147 (internal quotation marks and citations omitted; emphasis in original). Finally, that Court has recognized that lawsuits that do not challenge "specifically identifiable Government violations of law," but instead challenge "particular programs agencies establish to carry out their legal obligations are .

. . rarely if ever appropriate for federal-court adjudication." *Crawford*, 868 F.3d 438, 455 (6th Cir. 2017) (quoting *Lujan*, 504 U.S. at 568).

Even if a plaintiff alleges an actual or imminent injury that is concrete and particularized, the plaintiff must also show that the injury is "fairly traceable to the defendant's allegedly unlawful conduct." *Id*. (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). An injury is not fairly traceable to the defendant's conduct if the plaintiffs have "inflict[ed] the harm on themselves based on their fears of hypothetical future harm." *Clapper*, 133 S.Ct. at 1151. Finally, a plaintiff must also plead facts sufficient to establish that the court is capable of providing relief that would redress the alleged injury. *Lujan*, 504 U.S. at 561-62.

None of these harms alleged in the second amended complaint are sufficient to demonstrate that Plaintiffs have the standing necessary to invoke the jurisdiction of this Court.

A. Standing of Plaintiff SAVE

In order to pursue the claims set forth in the Second Amended Complaint, Plaintiff SAVE as an organization, must allege facts sufficient to establish that it has either organizational standing or associational standing.

Organizational standing is the right of an organization to sue on its own behalf rather than through its members. "An organization has standing to sue on its own behalf if it meets the same standing test that applies to individuals." *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990). Thus, in order to have organizational standing, Plaintiff must show (1) injury in fact, (2) a causal connection between the injury and conduct complained of, and (3) the likelihood that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61.

Here, the only harm Plaintiff SAVE has alleged is that it "will be directly harmed by the diversion of resources from its purposes of research and education in order to bring, fund, and

participate in this litigation." (D.E. 104 PageID # 1265 at ¶ 236.) The Supreme Court has recognized that an organization has standing to sue under a "diversion-of-resources" theory. Under this theory, an organization has standing to sue on its own behalf when the defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) ("[C]oncrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests."); *see also NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (finding that plaintiffs had made sufficient showing of concrete injury because they "averred" that they would be required to divert personnel and time educating volunteers and voters on compliance with statute and resolving problems of voters left off the registration rolls on election day); *Memphis Center for Independent Living v. Woodglen Village Apartments*, No. 08-2121-STA-cgc, 2010 WL 145351, at *4 (W.D. Tenn. Jan. 8, 2010) (noting that the "Sixth Circuit requires that an organization must show some diversion of resources that is independent of the costs of litigation" to demonstrate standing).

Thus, an organization may satisfy the Article III requirement of injury in fact if it can demonstrate: "(1) frustration of its organizational mission; and (2) diversion of its resources to combat the [effects of the particular law] in question." *Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). An organization cannot, however, "'manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that would otherwise not affect the organization at all. It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem.'" *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (quoting *La Asociacion de Trabajadores de Lake*

Forest v. Lake Forest, 624 F.3d 1083, 1088 (9th Cir. 2010) (citations omitted)); *see also Am. Soc. For Prevention of Cruelty to Animals v. Feld Entm't, Inc*., 659 F.3d 13, 25 (D.C.Cir. 2011) ("an organization's diversion of resources to litigation or to investigation in anticipation of litigation is considered a 'self-inflicted' budgetary choice that cannot qualify as an injury in fact for purposes of standing").

Other than the allegation that it is has diverted resources in order to fund this litigation, Plaintiff SAVE has not alleged any other facts demonstrating either the frustration of its organizational mission or diversion of its resources. And, because Plaintiff SAVE itself does not have the right to vote, it has no standing to assert the loss of a right to vote. *See Johnson v. Bredesen*, No. 3:07-0372, 2007 WL 1387330 at * 1 (M.D. Tenn. May 8, 2007) (finding that since non-profit organization may not exercise a right to vote in any election, organization has no standing to assert the loss of a right to vote if injunction is not granted). As Plaintiff SAVE has not alleged a sufficient injury in fact, it cannot demonstrate that it has organizational standing.

Plaintiff SAVE also cannot demonstrate that it has associational standing. In order to have associational standing, an organizational plaintiff must show that:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 342-43 (1977); *see also Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 294-95 (6th Cir. 1997). Organizational plaintiffs are "obligated to allege facts sufficient to establish that one or more of [their] members has suffered, or is threatened with, any injury." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 n.23 (1982). Such obligation includes

identifying the member or members of plaintiff organizations that have suffered, or will suffer, harm. *See Barry v. Corrigan*, 79 F.Supp.3d 712, 724 (E.D. Mich. 2015) (finding that because one of the plaintiffs, who was a member of the organization, had standing, the organization had association standing on behalf of its members). A "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself." *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

Plaintiff SAVE cannot meet the third element for association standing, as both the claims asserted in Plaintiffs' second amended complaint and the relief requested would require the participation of individual members. As previously discussed, SAVE does not independently have the right to vote. Thus, in order to prove the essential claims in Plaintiffs' second amended complaint that the voting systems and process in Shelby County unduly burdens the rights of voters in Shelby County, it would be necessary for individual members of SAVE to show that they are registered voters and to demonstrate that they have suffered an injury in fact as a result of the continued use of the voting systems in Shelby County. Because it cannot establish this element necessary for associational standing, Plaintiff SAVE lacks standing to bring this action on behalf of its members.

B. Standing of Plaintiff Kernell

Plaintiff Kernell alleges in paragraphs 246-247 that he was harmed as a result of the "Defendants' actions in providing incorrect ballots to voters" in the August 2012 Democratic Primary election. (D.E. 104 PageID# 1268-69). Significantly, Plaintiff Kernell does *not* allege that voters were provided the wrong ballot as a result of the voting machine malfunction or hacking of the voting machines. *Id*. at ¶246. Thus, the harm of which Plaintiff Kernell complains was not even caused by the SCEC's continued use of the voting system in Shelby County.

Moreover, any claim based on this alleged harm is clearly time-barred. Plaintiffs have brought this cause of action pursuant to 42 U.S.C. § 1983. Because Congress did not enact a statute of limitations for actions brought under 42 U.S.C. § 1983, federal courts look to state statutes of limitations to determine the appropriate limitations period. *Wilson v. Garcia*, 471 U.S. 261, 268-69 (1985); *Johnson v. Railway Express Agency, Inc*., 489 F.2d 525, 529 (6th Cir. 1973). The one-year statute of limitations in Tenn. Code Ann. § 28-3-104(a)(3) applies to civil rights claims arising in Tennessee. *Jackson v. Richards Med. Co.*, 961 F.2d 575, 578 (6th Cir. 1992). Although the limitations period for §1983 actions is borrowed from state law, federal law governs when the limitations period begins to run. *Wallace v. Kato*, 549 U.S. 384, 388 (2007). Section 1983 claims accrue and the statute of limitations begins to run when the plaintiff knows or has reason "to know of the injury which is the basis of his action." *Roberson v. Tenn*. 399 F.3d 792, 794 (6th Cir. 2005). This inquiry is objective and courts look "to what event should have alerted the typical layperson to protect his or her rights." *Hughes v. Vanderbilt Univ*., 215 F.3d 543, 548 (6th Cir. 2000).

Plaintiff Kernell's cause of action, if any, against Defendants accrued on August 2, 2012, the date of the August primary election and thus, under the applicable 1-year statute of limitations, Plaintiff had until August 2, 2013 to bring his Section 1983 claim based on this alleged harm. This lawsuit was not filed until October 2018. Accordingly, to the extent Plaintiff Kernell seeks to rely on this alleged "injury" from the August 2012 primary election, it is time-barred.

Plaintiff Kernell also alleges that he has been harmed as a result of the SCEC's continued use of the voting system in Shelby County because of his "fear that as more and more citizens realize the vulnerabilities of the Shelby County, Tennessee voting systems, processes and machines, they will refrain from offering themselves for public service and thereby skew the

democracy." (D.E. 104 at ¶ 252.) But this subjective fear does not constitute a concrete and particularized injury to Plaintiff Kernell and "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). Plaintiff Kernell's fear of reduced participation in the democratic process is simply too speculative and abstract to be considered judicially cognizable. *See Kardules v. City of Columbus*, 95 F.3d 1335, 1348-49 (6th Cir. 1996).

C. Standing of Plaintiffs Towns, Jr. and Thornton

Plaintiffs Towns, Jr. and Thornton allege that their "votes have been improperly discounted and diluted by the continued use of voting systems, processes and machines that have not been recertified, [and] the continued and pervasive willful or maladministration of the voting process." (D.E. 104 PageID # 1267 at ¶ 243.) These Plaintiffs further allege that the "continued use of the antiquated hackable DRE without a paper trail, continual failure to timely process voter registration forms of Black citizens, efforts to reduce early voting sites in areas of the county where Black voters reside, failure to investigate and properly audit the votes, failure to properly handle memory cards . . and other documented errors" disenfranchise these Plaintiffs and other Black voters and dilute their votes in statewide and local elections. (*Id*. at ¶ 244.)

In *Gill v. Whitford*, 138 S.Ct. 1916, 1929 (2018), the Supreme Court articulated the standing requirements for a claim asserting vote dilution in violation of the Fourteenth Amendment's Equal Protection Clause. *See Gill*, 138 S.Ct. at 1929–31. The Supreme Court reaffirmed the well-established principle that "a person's right to vote is 'individual and personal in nature.' " *Id.* at 1929 (quoting *Reynolds*, 377 U.S. at 561, 84 S.Ct. 1362). Therefore, only " 'voters who allege facts showing disadvantage to *themselves as individuals* have standing to sue' " under the Fourteenth Amendment. *League of Women Voters of Michigan v. Benson*, No. 2:17-

CV-14148, 2019 WL 1856625, at *29 (E.D. Mich Apr. 25, 2019) (emphasis added) (quoting *Gill*, 138 S.Ct. at 1929) (citations omitted)).

However, Plaintiffs Towns, Jr. and Thornton have only asserted conclusory allegations and not the sort of concrete and specific factual allegations from which this Court could infer that their votes have not been counted or have been diluted as a result of the "continued use of voting systems, processes and machines" in Shelby County. Consequently, these allegations do not constitute "injury-in-fact" for purposes of standing. *See, e.g. Stein v. Cortes*, 223 F.Supp.3d 423, 432-33 (E.D.Pa. 2016) ("Plaintiffs' allegation that voting machines may be 'hackable', and the seemingly rhetorical question they pose resecting the accuracy of the vote count, simply do not constitute injury-in-fact."); *Schulz v. Kellner*, No. 1:07-CV-0943 (LEK/DRH), 2011 WL 2669546, at *7 (N.D.N.Y July 7, 2011) ("[E]ven construing their Amended Complaint to mean that the machine error and human fraud resulting from Defendants' voting procedures will also harm Plaintiffs—whose votes will allegedly not be counted accurately—the Court finds these allegations are merely conjectural and hypothetical and do not demonstrate a concrete or particularized injury to Plaintiffs.").

Plaintiffs Towns, Jr. and Thornton also allege that they "will have to expend additional resources on poll workers and a cyber security expert to monitor the election process in 2020" and that they "will be forced to expend additional sums and time to reach out to voters in different districts than the ones they are seeking office in." (D.E. 104 at ¶¶ 245, 254.) Yet Plaintiff Towns, Jr. does not allege that he had to expend additional resources on poll workers or a cyber security expert during his candidacy[2] in the August and November 2018 election, despite the use of the same "antiquated hackable DRE without a paper trail" and election processes in those elections.

[2] Plaintiff Towns, Jr. was a candidate for re-election to the office of State Representative in the August and November 2018 state elections. See D.E. 104 at ¶ 24.

Moreover, the Supreme Court has held that an injury is not fairly traceable to the defendant's conduct if the plaintiffs have "inflict[ed] the harm on themselves based on their fears of hypothetical future harm." *Clapper v. Amnesty Int'l USA*, 133 S.Ct. at 1151.

D. Standing of Individual Plaintiffs Generally

In addition to the individual allegations of harm discussed above, Plaintiffs' Second Amended Complaint contains numerous allegations of harm which they claim have been suffered by all the individual Plaintiffs[3]. In some instances, these allegations are nothing more than general conclusory statements, *e.g.*,

> [b]ecause Shelby County's 13 plus year old DrE touchscreen voting machines and voting systems are insecure and fail to meet reasonable security standards, lack a voter-verified paper audit capacity, and fail to meet minimum statutory requirements and/or reasonable standards for recertification and use, requiring the Plaintiff voters to use those machines and voting systems violates their constitutional rights to have their votes recorded in a fair, precise, verifiable, and anonymous manner, and to have their votes counted and reported in an accurate, auditable, legal, and transparent process. (D.E. 104, PageID #1198 at ¶ 4.)

In other instances, the Plaintiffs' Second Amended Complaint contains specific allegations of alleged wrongdoing:

> The records . . . showed that some 21 memory cartridges were uploaded for the precinct COR 09 before the polls closed on August 2012 election day, and 9 thereafter, even though only 9 voting machines had been assigned to that precinct (one memory cartridge is assigned for each voting machine); that a datebase was sent from the election software vendor and no results were found; it was then reported [to] being sent to Canada for research; the election was certified prior to the solution being identified; and ES&S technician had access to the tabulation server without any supervising Shelby Board official . . .. (*Id.* at PageID # 1238 at ¶ 149.)

[3] Plaintiffs' Second Amended Complaint does not contain any individual allegations of harm suffered by Plaintiff Scott.

However, these allegations all share several things in common. First, they are all documented in Plaintiff SAVE's report, *Voting on Thin Ice*, which was published in August 2017. (D.E. 104-14, Exh. H.) Despite publishing this report in August 2017, and specifically relying on the "facts" contained therein in their Second Amended Complaint ("[t]he facts stated in this section of this Complaint are set forth more fully in the Report. Exb. 'H'" (D.E. 104 PageID# 1233 at ¶ 132), Plaintiffs did not file this lawsuit until October 2018—more than one year after they knew or had reason "to know of the injury which is the basis of [this] action." *Roberson v. Tenn*. 399 F.3d at 794. Moreover, Plaintiffs characterize their "*Voting on Thin Ice*" report as being the "results of open records requests and investigation over five years." (D.E. 104 PageID # 1232 at ¶ 131.) Thus, in many instances Plaintiffs were aware of these "results" long before the publication of the report or the filing of their original complaint. Consequently, Plaintiffs' cause of action, if any, at the latest accrued in August 2017 and Plaintiffs had until August 2018 to bring a Section 1983 claim based on the harms alleged in their report. As previously noted, Plaintiffs did not file the suit until October 2018 after the 1-year statute of limitations and, therefore, the harms alleged in the *Voting on Thin Ice* report are time-barred.

And even if Plaintiffs' Section 1983 claims based on these harms were not barred by the one-year statute of limitations, these harms are not sufficient to establish Plaintiffs' standing for the simple reasons that these harms are not particularized to the individual Plaintiffs; rather, these harms were allegedly suffered by all voters in Shelby County. The Supreme Court has consistently held that a plaintiff raising only such a generally available grievance about government—claiming only harm to his and other citizens' interest in the proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. *See Lujan*, 504 U.S. at 555; *Allen v. Wright*, 468

U.S. 757 (1984); *Valley Forge*, 454 U.S. at 483. " 'A federal court is not a forum for generalized grievances, and the requirement of such a personal stake ensures that courts exercise power that is judicial in nature.'" *Williams v. Thomas*, No. 2019 WL 1905166, at *3 (W.D. Tenn. Apr. 29, 2019) (quoting *Gill*, 138 S.Ct. 1916, 2018).

The injuries Plaintiffs have alleged from the continued use of the current voting system in Shelby County are "plainly undifferentiated" and "shared in substantially equal measure" by all voters in Shelby County. *Warth v. Seldin*, 422 U.S. at 499. Accordingly, the bar on generalized grievances as a basis for Article III standing applies in the instant case for a simple reason: Plaintiffs are not affected by the continued use of the current voting system in Shelby County in any "personal and individual way." *Davis v. Detroit Pub. Sch. Cmty. Dist*., 889 F.3d 437, 444 (6th Cir. 2018)(qoting *Spokeo*, 136 S.Ct. at 1548) (quotation marks and citation omitted)). On the contrary, the SCEC's continued used of the voting system in Shelby County affects all Shelby County voters equally.

Finally, Plaintiffs assert new allegations concerning a "data breach" as a result of an electronic poll book exhibited at the 2017 Voting Village DEF CON Hacking Conference as evidence of their "concrete and particularized" harm. (D.E. 104 at ¶¶ 9, 241-248, 252-255). Once again, however, this alleged "data breach" has nothing to do with the use of the current voting system in Shelby County, and even if it did, it is still not sufficient to demonstrate standing for the Plaintiffs for multiple reasons. First, by Plaintiffs' own admissions, the exposure of this data occurred in 2017 and was publicly reported on August 1, 2017. (D.E. 104-7, Exh. B.) Consequently, Plaintiffs knew or should have known of this alleged injury when it was publicly reported. Plaintiffs waited to file suit, however, until October 2018—after the one-year statute of limitations and, therefore, such claim is time-barred.

Second, even if this claim were not time-barred, the Supreme Court has held that allegations of possible future injury—without more—are not sufficient to establish standing. *Clapper v. Amnesty*, 133 S.Ct. at 1147; *see also Galaria v. Nationwide Mut. Ins. Co.*, 663 Fed.Appx. 384, 388 (6th Cir. 2016) (finding that plaintiffs' allegations of a substantial risk of harm resulting from theft of their personal data, *coupled with reasonably incurred mitigation costs*, were sufficient to establish a cognizable Article III injury at the pleading state of litigation). Unlike the plaintiffs in *Galaria*, who alleged that they had incurred costs in purchasing credit reporting and monitoring services, Plaintiffs have done nothing more than allege that their personal data may have been disclosed thereby exposing them to the "likelihood of voter fraud and identity theft."[4] (D.E. 104 at ¶ 242.) Such bare assertion is not sufficient to establish standing. *See Khan v. Children's Nat'l Health Sys.*, 188 F.Supp.3d 524, 531 (D. Md. 2016) (district courts have generally found that the increased risk of identity theft does not confer standing). Moreover, although Plaintiffs' personal data was allegedly disclosed over a year and half ago, Plaintiffs have not alleged or otherwise identified a single instance of identity theft resulting from this disclosure. Consequently, Plaintiffs' cannot demonstrate that their claim of injury from this disclosure is imminent or impending. *See Doe v. Obama*, 631 F.3d 157, 163 (4th Cir 2011) ("The imminence requirement is 'stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time.'") (citations omitted)).

Third, the personal data that was allegedly exposed on the electronic pollbook is all a matter of public record under Tennessee state law. Tenn. Code Ann. § 2-2-116 lists the information that a voter must provide on his or her permanent voter registration record, including name, address

[4] Plaintiffs do not actually cite to any proof that their personal data was disclosed on the electronic pollbook; instead, they seek to have this Court infer that such information was disclosed.

and date of birth, and Tenn. Code Ann. § 2-2-117 requires that a voter's ten-year voting record be included on the back of that registration record. Tenn. Code Ann. § 2-2-127 provides that permanent registrations records are public records and "shall be available for public inspection."[5] Thus, the personal information "exposed" on the electronic poll book was just as readily accessible by public inspection of the permanent voter registration records on file with the Shelby County Election Commission. Consequently, the disclosure of this information could not, as a matter of law, constitute an injury or harm to the Plaintiffs.

There is no guarantee of a perfect voting system and states are entitled to broad leeway in administering elections to ensure that they are carried out in a fair and orderly manner. *Wexler v. Lepore*, 878 So.2d 1276, 1282 (Fla. Ct. App. 2004) (citing *Weber v. Shelley*, 347 F.3d at 1105). "The law of Article III standing, which is built on separation-of-powers principles serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U.S. ay 408. Plaintiffs' allegations are simply insufficient to confer standing and accordingly, Plaintiffs' complaint should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

II. PLAINTIFFS' SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR VIOLATION OF DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Since all of Plaintiffs' claims are precluded by fatal threshold problems, the Court need not even consider the merits of those claims. Were the Court to reach the merits, though, it should conclude that Plaintiffs have failed to establish that use of the current voting system in Shelby County violates the U.S. and Tennessee Constitutions.

[5] The statute does require the redaction of social security numbers before making permanent registration records available for inspection and Plaintiffs have presented no evidence that their social security numbers were disclosed.

A. Legal Standard for Claims Challenging State Election Practices

The Sixth Circuit has held that the level of scrutiny to be applied in evaluating a state election law or practice depends on the degree of burden imposed on the fundamental right to vote. *See Ohio Council 8 Am. Fed'n of State v. Husted*, No. 14-3678, 2016 WL 537398, at *3 (6th Cir. Feb. 11, 2016); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 545-46 (6th Cir. 2014); *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012). An election regulation that imposes no burden on the fundamental right to vote and does not discriminate on the basis of a protected class is subject only to rational basis review. *Obama for Am.*, 697 F.3d at 429. Regulations that impose at least *some* burden are subject to the "flexible standard" established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (19982). *See Obama for Am.*, 697 F.3d at 429. Under that standard, a court "must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," while taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted).

In practice, regulations that are only minimally burdensome and non-discriminatory are subject essentially to rational basis review and "will usually pass constitutional muster if the state can identify important regulatory interests that they further." *Green Party of Tenn.*, 767 F.3d at 546 (internal quotation marks omitted). Regulations that impose a severe burden are subject to strict scrutiny and "will fail unless they are narrowly tailored and advance a compelling state interest." *Id.* For regulations falling between these two extremes, the court must "weigh[] the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Id.*

The flexible standard that applies to state election practices reflects the "considerable leeway" that States possess to manage election processes. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999); *see also Weber v. Shelley*, 347 F.3d 1101, 1105 (9th Cir. 2003). That leeway is especially great with respect to a State's management of its own state elections. *See Warf v. Bd. of Elections of Green Cnty., Ky.*, 619 F.3d 553, 559 (6th Cir. 2010). "[P]rinciples of federalism . . . limit the power of federal courts to intervene in state elections," and only "in extraordinary circumstances will a challenge to a state . . . election rise to the level of a constitutional deprivation." *Id.* (internal quotation marks omitted); *see also, e.g., Gonzalez-Cancel v. Partido Nuevo Progresista*, 696 F.3d 115, 119 (1st Cir. 2012); *Burton v. State of Ga.*, 953 F.2d 1266, 1268 (11th Cir. 1992). For the reasons explained below, this case—involving a challenge to the voting system in one Tennessee county—does not present such extraordinary circumstances.

B. The Use of the Current Voting System in Shelby County Does Not Create a Fundamentally Unfair Voting System in Violation of the Due Process Clause.

The Sixth Circuit has held that the "'Due Process Clause is implicated . . . in the exceptional case where a state's voting system is fundamentally unfair.'" *Warf v. Bd. of Elections of Green Cnty., Ky.*, 619 F.3d 553, 559 (6th Cir. 2010) (quoting *League of Women Voters v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008)). As relevant here, a State's election practices may violate a voter's substantive due process rights if it employs "non-uniform rules, standards and procedures that result in significant disenfranchisement and vote dilution or significantly departs from previous state election practice." *Id.* (internal quotation marks and citation omitted). None of these irregularities is present in this case. While Plaintiffs have asserted various hypotheticals concerning the current Shelby County voting system and outlined instances of human error in prior elections, they have failed to present any credible evidence that the current voting system has

disenfranchised any voter in Shelby County. And given that this same voting system was used in two elections in 2018[6], Plaintiffs' lack of evidence of any disenfranchisement is fatal to their claims that the use of the current voting system is fundamentally unfair in violation of the Due Process Clause.

The Sixth Circuit has held that a due process claim may also be implicated where a state's election process impairs citizens' ability to participate in state elections on an equal basis with other qualified voters." *George v. Hargett*, 879 F.3d 711, 727 (6th Cir. 2018) (citing *Phillips v. Snyder*, 836 F.3d 707, 716 (6th Cir. 2016)). Again, Plaintiffs have failed to allege any credible evidence demonstrating that the use of the current voting system impairs the freedom and ability of any voter in Shelby County to participate equally in elections. And, while Plaintiffs speculate that, because the voting system does not provide a paper audit, votes may not be accurately recorded or cast at all, such speculation is insufficient to establish that Plaintiffs are not able to vote and have their votes counted on the same basis as other voters in Shelby County and the other 94 counties in Tennessee.

In *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003), the Ninth Circuit considered a voter's challenge to the use of electronic voting machines without a paper trail very similar to the present case. In *Weber*, the Court of Appeals held that the system did not violate due process or equal protection because the plaintiff's concerns were mostly "hypothetical." *Id.* at 1102-03. In refusing to find a constitutional violation, the court noted "no balloting system is perfect" and that states must be free to choose balloting systems as "long as their choice is reasonable and neutral." *Id.* at 1106-07. And in *Mills v. Shelby Cty. Election Comm'n*, 218 S.W.3d 33 (Tenn. Ct. App. 2006),

[6] As of the filing of Plaintiffs' complaint, the voting system had been used in two election cycles in Shelby County. Since that time, the voting system was again used in the November 6, 2018 general election and no credible allegations that any voter was disenfranchised by the voting system during that election has surfaced.

the Tennessee Court of Appeals affirmed the point of the Ninth Circuit because it held that using electronic voting machines without a paper trail (i.e., DRE), as a matter of State constitutional law, is a reasonable choice of election officials because " 'We cannot say that use of paperless, touchscreen voting systems severely restricts the right to vote'." *Id*. at 42 (quoting *Weber*, 347 F.3d at 1106).

In light of these authorities, Plaintiffs' complaint fails to state a claim upon which relief can be granted for violation of the Due Process Clause of the Fourteenth Amendment and such claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

C. The Use of the Current Voting System in Shelby County Does Not Violate the Equal Protection Clause.

Plaintiffs' claim for relief under the Equal Protection Clause of the Fourteenth Amendment also fails to state a claim upon which relief can be granted. A plaintiff may state an equal-protection claim by alleging that lack of statewide standards results in a system that deprives citizens of the right to vote based on where they live. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008). Plaintiffs' complaint asserts that because the voting system in Shelby County is different than the voting systems used in other counties in Tennessee, the use of such voting system violates the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs' complaint further alleges that, because Shelby County has a disproportionately large number of African-Americans, the current voting system unconstitutionally disenfranchises minority voters and/or dilutes their vote in Shelby County in violation of the Equal Protection Clause.

But Plaintiffs' claims do not address the central question in a lack-of-uniform standards claim: whether Tennessee lacks "adequate statewide standards" for voting systems. *Bush v. Gore*, 531 U.S. at 110. Here, while the duty to purchase a voting system is placed on the 95 county

election commissions, *see* Tenn. Code Ann. §§ 2-9-111 – 113, the machines used in any such system must meet clearly defined statutory standards. Specifically, Tenn. Code Ann. § 2-91-101(a) outlines the specifications that "[a] voting machine to be used in Tennessee must provide." Tenn. Code Ann. § 2-9-110(b) provides that before a non-standard voting machine can be used, both the State Election Coordinator and the State Election Commission must approve and the machine "shall provide as much protection for the purity of the ballot and against election fraud as do the voting machines which otherwise meet the requirements of this title." Finally, Tenn. Code Ann. § 2-9-117 requires the State Election Coordinator and the State Election Commission to certify all voting machines before they may be purchase by a county and to recertify any such machines on a regular basis.[7]

Arguable differences in how county election commissions apply these uniform statewide standards in choosing the voting system to be used for elections in each county are to be expected. In fact, that flexibility is part and parcel of the right of "local entities, in the exercise of their expertise, [to] develop different systems for implementing elections." *Bush v. Gore*, U.S., 531 U.S. at 109. But despite differences in the local application of provisions concerning voting systems, the county election commissions are guided by clear prescriptive statewide rules that apply equally to all voting systems used in the 95 counties. Consequently, there simply is no indication that voters in one county have received preferential treatment due to the type of voting system used in that county. *See Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 598 (6th Cir. 2012); *see also Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 236 (6th Cir. 2011).

[7] This statute further provides that if a particular machine is not recertified by the coordinator of elections and the state election commission, the affected county election commission shall have two (2) years to purchase and implement machines that are properly certified. *See* Tenn. Code Ann. § 2-9-117.

And, while Plaintiffs may desire that the Shelby County Election Commission purchase newer or different voting machines, that decision is for the elected representatives to make, after balancing the pros and cons of different systems against their expense. Indeed, as the Ninth Circuit emphasized in *Weber*, it is **"**the job of democratically-elected representatives to weigh the pros and cons of various balloting systems**"** and "[s]o long as their choice is reasonable and neutral, it is free from judicial second-guessing.**"** 347 F.3d at 1107; *see also Schulz v. Kellner*, 2011 WL 2669546, at *6 ("[W]hile plaintiffs in the case may be correct that it would be 'desirable for New York to purchase more or newer voting machines, or to adopt some more modern technology for conducting elections . . . that debate is for the elected representatives of the people to decide . . ."); *Cf. Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir.1975) (providing that "[v]oting device malfunction [and] the failure of election officials to take statutorily prescribed steps to diminish what was at most a theoretical possibility that the devices might be tampered with ... fall far short of constitutional infractions").

Plaintiffs have failed to allege any facts demonstrating the use of the current voting system in Shelby County has directly interfered with the right to vote as there is no evidence of the voting system experiencing lost or miscounted votes, tampering of their election results, or malfunction preventing voters from casting their vote. Nor have Plaintiffs alleged any facts demonstrating that voters in Shelby County are less likely to have their votes counted accurately than those voters in other counties, particularly, as this Court recognized, Shelby County is in the majority of Tennessee counties using voting systems *without* a voter verified paper audit trail. (D.E. 43 PageIde # 292.). While there is a fundamental right to vote, there is no constitutional right to a perfect voting system or to any particular method of registering and counting votes. *See, e.g., Weber v. Shelley*, 347 F.3d 1101, 1105 (9th Cir.2003); *Green Party of State of New York v. Weiner*,

216 F.Supp.2d 176, 190-91 (S.D.N.Y. 2002); *Hendon v. N. Carolina State Bd. of Elections*, 710 F.2d 177, 181 (4th Cir. 1983) (citing *Carrington v. Rash*, 380 U.S. 89, 91 (1965)); *Wexler v. Lepore*, 878 So. 2d 1276, 1282 (Fla. Dist. Ct. App. 2004); *Banfield v. Cortes*, 631 Pa. 229, 264–67, 110 A.3d 155, 176–78 (2015).

Finally, Plaintiffs have failed to allege any facts demonstrating that the use of the current voting system in Shelby County has diluted the votes of minority voters in Shelby County in violation of the Equal Protection Clause.

The essence of a vote dilution claim under the Fourteenth Amendment is "that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities.' " *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 66, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion)). To obtain relief on a constitutional vote dilution claim, a plaintiff must "prove that the purpose and operative effect" of the challenged election scheme "is to dilute the voting strength of [minority] citizens." *Voter Info. Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 212 (5th Cir.1980). While a plaintiff need not prove that a discriminatory purpose was the sole reason for the action, the challenged voting scheme must have been adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable [racial group]." *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986 (quoting *Personal Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). To prove discriminatory effect, a plaintiff must show that the scheme impermissibly dilutes the voting rights of the racial minority. Generally, this requires proof that the racial minority's voting potential has been minimized or cancelled out or the political strength of such a group has been adversely affected. *See Mobile*, 446 U.S. at 66, 84, 100 S.Ct. 1490 (internal quotation marks omitted).

Thus, in order for Plaintiffs to prove that the voting system in Shelby County violates the Equal Protection Clause by diluting the vote of minority voters in Shelby County, 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." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Other than alleging that Shelby County has the largest population of Black voters in the State and that Plaintiffs Thorton and Towns, Jr., Plaintiffs' second amended complaint contains no allegations, factual or otherwise, demonstrating that the current voting system in Shelby County was adopted or implemented with the intent to discriminate against minority voters.

Accordingly, there simply is no merit in Plaintiffs' claims that the current voting system in Shelby County violates the fundamental right to vote or has resulted in disparate treatment of any group of voters and therefore, Plaintiffs' complaint fails to state a claim upon which relief can be granted for violation of the Equal Protection Clause of the Fourteenth Amendment and such claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

III. PLAINTIFFS' SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF UNDER THE TENNESSEE CONSTITUTION.

To the extent Plaintiff seek declaratory or injunctive relief against the State Defendants in their official capacity for violations of the Tennessee Constitution, such claims are barred by Eleventh Amendment sovereign immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); s*ee also In re Ohio Execution Protocol Litigation*, 709 Fed. Appx. 779, 782-83 (6th Cir. 2017); *Ernst v. Rising*, 427 F.3d 351, 368 (6th Cir. 2005); *Sherman v. State of Tennessee, et al*., No. 16-02625, 2017 WL 2589410, at *7 (W.D. Tenn. June 14, 2017).

Additionally, Plaintiffs' complaint fails to state a claim for relief pursuant to 42 U.S.C. § 1983 for violations of the Tennessee Constitution as claims under § 1983 can only be brought for

"deprivation of rights secured by the constitution and laws of the United States." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). Section 1983 does not provide redress for a violation of a state law. *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995); *Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994).

Finally, to the extent that Plaintiff seeks to invoke this Court's supplemental jurisdiction over a state-law claim, this Court declines to exercise jurisdiction, given that Plaintiffs' federal law claims should be dismissed for lack of standing and/or for failure to state a claim for violations of due process and equal protection. Supplemental jurisdiction is codified at 28 U.S.C. § 1367, which states, in pertinent part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.
> …
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
>
> (1) The claim raises a novel or complex issue of State law,
> …
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

In determining whether to retain supplemental jurisdiction, "[a] district court should consider the interests of judicial economy and the avoidance of multiplicity of litigation and balance those interests against needlessly deciding state law issues." *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993). When all federal claims are dismissed before

trial, the balance of considerations usually will point to dismissing the state law claims. *Musson Theatrical, Inc. v. Fed. Exp. Corp.*, 89 F.3d 1244, 1254-1255 (6th Cir. 1996).

In the present case, Plaintiffs have made a general demand for relief that the Court declare the actions/omissions of the Defendants unconstitutional under the Tennessee State Constitution, but Plaintiffs have not alleged how it has been violated. Under a plain reading of Fed. R. Civ. P. 8, Plaintiffs have failed to plead a claim for relief, and applying the plausibility standard for pleading certainly causes this claim to fail. Nonetheless, even if a claim for relief were stated, the Court should decline supplemental jurisdiction because (1) the issue of constitutionality has already been decided in a Tennessee state court, *Mills*, (2) all the federal claims should be dismissed for the reasons stated above, and (3) the deference federal courts usually pay to state election processes is even more warranted when a plaintiff asks the federal court to interpret and apply state law to a state election process. Therefore, the amorphous claim for relief under the Tennessee State Constitution should be dismissed along with Plaintiffs' claims under the federal Constitution.

CONCLUSION

For these reasons, the State Defendants respectfully request that this Court dismiss Plaintiffs' Second Amended Complaint in its entirety for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of May a copy of the above document has been served upon the following persons by:

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