

year of the filing of this suit. Instead, in an effort to sidestep the one-year Tennessee statute of limitations, Plaintiffs argue for application of the “continuing violation” doctrine in such a way as to toll the limitations period, rendering their § 1983 claims timely. However, “a continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation.” *Tolbert, v. State of Ohio Dep’t of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999) (quoting *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir.1991)). Passive inaction does not support a continuing violation theory. *Id.* Thus, the Sixth Circuit has summarized the test for determining whether a continuing violation exists as follows:

“First, the defendant's wrongful conduct must continue after the precipitating event that began the pattern.... Second, injury to the plaintiff must continue to accrue after that event. Finally, further injury to the plaintiff[] must have been avoidable if the defendants had at any time ceased their wrongful conduct.”

Edison v. State of Tenn. Dep’t of Children’s Servs., 510 F.3d 631 635 (6th Cir. 2007) (quoting *Tolbert.*, 172 F.3d at 940); *see also, Paschal v. Flagstar Bank*, 295 F.3d 565, 572 (6th Cir.2002). Furthermore, the Sixth Circuit employs the continuing violations doctrine “most commonly in Title VII cases, and rarely extends it to § 1983 actions.” *Katz v. Vill. of Beverly Hills*, 677 Fed. Appx. 232, 236 (6th Cir. 2017) (quoting *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003)).

Plaintiffs cite to the case of *League of Women Voters v. Blackwell*, 432 F.Supp.2d 734, 7410-41 (N.D. Ohio 2006) in support of their argument that this Court should apply the continuing violation doctrine to toll the one-year statute of limitations. Plaintiffs’ reliance on this case is misplaced. The complaint in *League of Women Voters* was filed in July 2005, and while the plaintiffs alleged that there were “pervasive, severe, chronic and persistent” problems with Ohio’s voting system dating back at least to 1971, they also alleged “continual unlawful acts”, i.e., specific instances where the individual plaintiffs were disenfranchised or severely burdened in exercising

the right to vote in the November 2004 elections. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 466-67 (6th Cir. 2008).

Here, Plaintiffs have made no such allegations of “continual unlawful acts” but rather challenge the *effects* from the continued use of the current voting machines in Shelby County “In essence, [they have] presented no continued wrongful conduct, only the continued risk of future harm.” *Broom v. Stickland*, 579 F.3d 553, 555-56 (6th Cir. 2009). As such, the continuing violation doctrine is not applicable and Plaintiffs’ § 1983 claims are barred by the one-year statute of limitations.

II. Plaintiff Thornton Should Be Estopped From Challenging the Effectiveness of the Current Voting System in Shelby County.

Plaintiff Thornton has asserted that, as a future candidate for public office, absent relief from this Court she will be “disenfranchised or severely burdened in exercising [her] 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.” (D.E. 128 at PageID # 1650.) At the same time Plaintiff Thornton has made these assertions, she has sought to intervene in an ongoing administrative proceeding seeking a ruling that would permit and require the SCEC to implement instant run-off voting (IRV) in the October 2019 municipal elections. In her motion and supporting affidavit, Plaintiff Thornton avers that the SCEC Administrator of Elections “has determined that Shelby County’s current voting machines are technically capable of implementing IRV” and that she will be burdened if the SCEC does not implement IRV. *See* Motion to Intervene

by Britney Thornton and Ranked Choice Tennessee and Affidavit of Britney Thornton attached hereto as Exhibit 1 and incorporated herein by this reference.¹

Thus, Plaintiff Thornton's position is that the use of "outdated and technologically deficient digital electronic voting machines" in Shelby County violates her constitutional rights unless IRV is implemented on those same machines. Then the use of such machines would longer burden Plaintiff Thornton but would now benefit her candidacy. *Id.* These contradictory positions of Plaintiff Thornton only serve to highlight the conclusory nature of Plaintiffs' allegations of harm and not the sort of concrete and specific factual allegations that constitute "injury-in-fact" for purposes of standing. *Spokeo*, 136 S.Ct. at 1548-49.

CONCLUSION

For these reasons and the reasons set forth in the State Defendants' memorandum of law in support of their motion to dismiss (D.E. 115-1), the State Defendants respectfully request that this Court dismiss Plaintiffs' Second Amended Complaint in its entirety and with prejudice 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,

HERBERT H. SLATERY III
Attorney General and Reporter

/s/ Janet M. Kleinfelter
JANET M. KLEINFELTER (BPR 13889)
Deputy Attorney General
Janet.kleinfelter@ag.tn.gov
(615) 741-7403

¹ Generally, the Court is limited to facts contained in the pleadings when deciding a motion to dismiss. Fed. R. Civ. P. 12(d). However, a court may consider public records and matters of which the court may take judicial notice without converting a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment. *Armengau v. Cline*, 7 Fed. Appx. 336, 343-44 (6th Cir. 2001); *Jones v. City of Cincinnati*, 521 F.3d 555, 562 (6th Cir. 2008).

/s/ Matt Jones
MATT JONES
Assistant Attorney General
Public Interest Division
Office of Attorney General
P.O. Box 20207
Nashville, TN 37202
Matt. jones@ag.tn.gov
(615) 253-9987

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of June a copy of the above document has been served upon the following persons by:

X Electronic Case Filing (ECF) System to:

Carol Chumney
5050 Poplar, Suite 2436
Memphis TN38157
carol@carolchumney.law

John L. Ryder
Pablo A. Varela
Harris Shelton Hanover Walsh, PLLC
40 S. Main Street, Suite 2210
Memphis, TN 38103
jryder@harrishelton.com
pvarela@harrishelton.com

/s/ Janet M. Kleinfelter
JANET M. KLEINFELTER (BPR 13889)