

**RECORD NO. 19-6142**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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SHELBY ADVOCATES FOR VALID ELECTIONS, MICHAEL KERNELL;  
JOE TOWNS, JR; ANN SCOTT; BRITNEY THORNTON

*Plaintiffs-Appellants*

v.

TRE HARGETT, in his official capacity as Tennessee Secretary of State; MARK GOINS, in his official capacity as the Coordinator of Elections for the State of Tennessee; STATE OF TENNESSEE ELECTIONS COMMISSION; KENT YOUNCE; JUDY BLACKBURN; GREGORY DUCKETT; DONNA BARRETT; JAMES H. WALLACE, JR.; TOM WHEELER; MIKE MCDONALD, in each of their Official Capacity as a member of the Tennessee Election Commission; LINDA PHILLIPS, in her Official Capacity as Administrator of the Shelby County Election Commission; SHELBY COUNTY ELECTIONS COMMISSION; ROBERT MEYERS; NORMA LESTER; DEE NOLLNER; STEVE STAMSON; ANTHONY TATE, in each of their Official Capacity as a Board Commissioner of the Shelby County Election Commission

*Defendants-Appellees*

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ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE WESTERN  
DISTRICT OF TENNESSEE  
AT MEMPHIS

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**APPELLANTS' MOTION TO EXPEDITE**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....3

MOTION TO EXPEDITE.....5

MEMORANDUM IN SUPPORT OF MOTION TO EXPEDITE.....6

BACKGROUND.....6

PROCEDURAL HISTORY AND CLAIMS.....16

REASONS FOR EXPEDITED REVIEW.....18

STANDARD OF REVIEW.....24

ARGUMENT.....25

    I.    EXPEDITED REVIEW IS WARRANTED BECAUSE OF THE  
          CONSTITUTIONAL ISSUES AT STAKE AND UPCOMING  
          PRESIDENTIAL PRIMARY AND GENERAL ELECTIONS

CONCLUSION.....27

CERTIFICATE OF COMPLIANCE.....29

CERTIFCATE OF SERVICE.....30

## TABLE OF AUTHORITIES

### CASES

<i>Bush v. Gore</i> , 531 U.S. 98, 104 (2000).....	25
<i>Curling, et al v. Kemp</i> , 334 F. Supp. 3d 1303 (N.D. Ga. 2018).....	21
<i>Curling, et.al v. Raffensperger, et.al</i> , No. 1:17-cv-2989-AT, <i>Order, May 21, 2019</i> .....	21
<i>Curling, et.al v. Raffensperger, et. al</i> , No. 1:17-cv-2989-AT, <i>Order, Aug. 15, 2019</i> .....	22, 24
<i>Hunter v. Hamilton County Bd. of Elections</i> , 635 F. 3d 219, 231 (6 <sup>th</sup> Cir. 2011)..	27
<i>Jewel v. National Sec. Agency</i> , 673 F. 3d 902, 909 (9 <sup>th</sup> Cir. 2011).....	24
<i>Massachusetts v. E.P.A.</i> , 549 U.S. 497, 517 (2007).....	24
<i>Northwest Ohio Coalition v. Husted</i> , 696 F. 3d 580, 583 (6 <sup>th</sup> Cir. 2012)..	26
<i>Ohio Democratic Party v. Husted</i> , 834 F. 3d 620 (6 <sup>th</sup> Cir. 2016).....	26
<i>Ohio State Conf. of the NAACP v. Husted</i> , 769 F. 3d 385 (6 <sup>th</sup> Cir. 2014)..	26
<i>Reynolds v. Sims</i> , 377 U.S. 533, 555 (1964).....	25
<i>Russell v. Lundergen-Grimes</i> , 784 F. 3d 1037 (6 <sup>th</sup> Cir. 2015).....	26
<i>United States v. Students Challenging Regulatory Agency Procedures</i> , 412 U.S. 669, 687 (1973).....	24

### STATUTES & RULES

28 U.S.C. 1291.....	
28 U.S.C. 1657.....	5, 24, 25

28 U.S.C. 2201.....16

28 U.S.C. 2202.....16

42 U.S.C. 1983.....16

Fed. R. App. P. 2.....5, 24

Fed. R. App. P. 27.....5

Fed. R. Civ. P. 57.....16

Fed. R. Civ. P. 65.....16

6<sup>th</sup> Cir. R. 27(f).....5,24

6<sup>th</sup> Cir. R. 34(c).....5

**MOTION TO EXPEDITE**

Pursuant to Fed. R. App. P. 2 and 27, 6<sup>th</sup> Cir. R. 27(f) and 34 (c), and 28 U.S.C. 1657, Appellants, Shelby Advocates for Valid Elections, Michael Kernell, Joe Towns, Jr., Ann Scott and Brittney Thornton (“Appellants”), respectfully move this Court for an order entering the expedited briefing schedule and oral arguments to be as set forth below (or sooner) and to expedite its ruling in this appeal.

- Appellants’ Brief: Thursday, October 31, 2019
- Appellees’ Opposition Brief: Friday, November 15;
- Appellants’ Reply Brief: Friday, November 22.
- Oral Arguments: December 2019. The Appellants’ request oral arguments due to the significant constitutional issues regarding their fundamental right to vote.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXPEDITE**

**BACKGROUND**

The Plaintiff Shelby Advocates for Valid Elections is a Tennessee nonprofit corporation. [hereinafter “Plaintiff SAVE”]. ECF 104, No. 15. Its 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 development in election law and technology; to provide speakers for programs to inform and educate the public; to collaborate with experts to advocate for reforms in the public election voting processes; to monitor elections, etc. ECF 104, No. 18, 19.

The Plaintiff Michael Kernell is a former Tennessee State Representative and Shelby County School Board Commissioner, a Shelby County voter, as well as a founder of SAVE. ECF 104, No. 23. Plaintiff Joe Towns, Jr. is a current Tennessee State Representative, a Shelby County voter, and is the African American race. ECF 104, No. 24. Plaintiff Britney Thornton was a candidate for Memphis City Council in the October 3, 2019 Memphis municipal elections, is a Shelby County voter, and is the African American race. ECF 104, No. 26. Plaintiff Ann Scott is a voter in Shelby County, Tennessee. ECF 104, No. 25.

Thousands of voters were given the wrong ballot in the August 2012 state and local elections in Shelby County, Tennessee. ECF 104, No. 131, 139. Plaintiff

Kernell, ran for reelection to the State House, and was not renominated. ECF 104, No. 246. He expended monies on voters that resided in his district, but were not allowed to vote for him due to the Defendant Shelby County Election Commission's misassignment of voters. ECF 104, No. 246. He also did not expend campaign funds on voters who were allowed to vote in his legislative district, but did not reside in the district. ECF 246.

The misassignment of voters was identified by Dr. Joe Weinberg, and another citizen, and promptly reported to the Shelby County Election Commission. ECF 104, Nos. 132,133. Yet, the problems continued, with official vote records being altered during the correction process so as to appear that the misassigned voters voted in the correct district. ECF 104, No. 133. One voter reported voting in two school board races, although only one should have been on her ballot. ECF 104, No. 134. And, the problems continued in the November 2012 elections. ECF 104, No. 137.

The Defendant Tennessee Secretary of State Hargett confirmed in a letter to the State Comptroller that there have been a "series of errors in the Shelby County Election Commission stretching back at least a decade. Nearly every election cycle in the county in recent memory has been plagued by a myriad of errors and complaints of wrongdoing". ECF 104, No. 139-142, Exb. "A". He stated that the examples set forth in his letter "indicate a troubling pattern of errors that cannot go

unnoticed. These errors have eroded public confidence in the Shelby County Election Commission”. ECF 104, No. 142. However, the Comptroller did not perform a forensic audit of the software and voting machines, instead only reviewing redistricting activities, ECF, 104, No. 145-146.

Thereafter, the SAVE founders began open records requests to the Defendant Shelby County Election Commission [hereinafter the “Shelby Board”], and to the Defendant Tennessee Election Commission [hereinafter the “State Board”]. ECF 104, No. 148. The work continued over five years, resulting in a 49 page report, *Voting on Thin Ice Report*, [hereinafter the “*VTI Report*”] ECF 104, No. 131, Exb. “H”, published, with 128 exhibits.

The Plaintiffs document in the *VTI Report* irregularities found with the Shelby County elections, including:

- (1) findings and recommendations by the Tennessee Advisory Commission on Intergovernmental Relations in 2007, *Trust But Verify, Increasing Voter Confidence in Election Results*, [hereinafter the “*TACIR Report*”] warning of unauthorized software found on the Shelby County voting systems that could allow manual editing of the GEMS software database file, audit log, and election results. ECF 104, No. 162-163. And, further, that “someone was attempting to edit saved election summary reports, perhaps to agree with altered vote totals in the Diebold Microsoft Access



database file”. ECF 104, No. 162. In addition, the *TACIR Report* noted a critical security breach where unauthorized software had been installed which would allow “unfettered remote access to the central tabulator to anyone connected to the county government network or the Internet”. ECF 104, No. 162. The *TACIR Report*, states that “the GEMS central tabulator should absolutely NOT be connected to any network via Ethernet card wireless network card, infrared port, USB port or modem”, ECF 104, No. 162. The *TACIR Report* concluded that “the real threat for wholesale election fraud lies with the Diebold central tabulator”. ECF 104, No. 163. It added that “unless Shelby County election officials can be seen as conducting a good faith investigation as to who had access to this central tabulator PC and the above unauthorized software and who actually did the illegal install, voters in this county (and ultimately the state) can have no confidence in the integrity of the November 2006 election”. ECF 104, No. 163. The SAVE open records request to the Defendant Shelby Board for any documents from any investigation regarding the *TACIR Report* or action take thereafter, incredibly resulted in a response that it had no documents responsive. ECF 104, Exbs. “M”, “N”.

- (2) findings from the *Shelby County Election Process Final Report, Jan. 7, 2013* by the ES & S vendor to the Shelby Board [hereinafter the “*ES & S Report*”] that the tabulation server room was not secure, and the server had been plugged into the county network exposing it to hacking, virus and malware. ECF 104, No. 161. This was despite the express warning in the previous *TACIR Report*. The *ES & S Report* further found that the tabulation server room could be accessed by many people “which makes it difficult to defend against allegations of tampering”. ECF 104, No. 161.
- (3) proof that 21 memory cartridges [cards] were uploaded for one precinct on August 2012 Election Day *before* the polls closed, and 9 more thereafter, even though only 9 voting machines had been assigned to that precinct (one memory cartridge is assigned for each voting machine and can carry hundreds of votes). ECF No. 104, No. 149, Exb. “H”. And although the August 2012 Election Day poll tapes of votes cast are available, the Defendants claim that do not have the 2012 early vote poll tapes for confirming those votes cast or determining the reason for 21 extra cards being uploaded. ECF 104. No. 153.

- (4) that election databases (including those containing votes cast) are regularly sent via insecure methods to the vendor (even to Canada); ECF 104, No. 149.
- (5) that the August 2012 Shelby County election results were certified before the vote totals verified; ECF 104, No. 149
- (6) that a Certificate of Results submitted by the local election officials for the August 2012 election was accepted by the state election officials with numbers not matching the vote tally tape; ECF 104, No. 154;
- (7) in 2015, some voters were given the wrong ballot in a City Council district race, and all memory cartridges were not uploaded to the server in a clerk's race (from mostly African American voter precincts). A citizen took a photo of a poll tape at one poll and a clerk candidate reported it not matching the Unofficial Statement of Votes Cast which finally prompted late uploads of hundreds of votes. ECF 104, No. 152, 155.
- (8) user names and passwords for voter files were insecurely emailed to state officials, ECF 104, No. 165.

(9) the repeated inadequate chain of custody of memory cartridges from the precincts to the Zone Turn-In sites (which can allow for the insertion of malware to the system). <sup>1</sup>ECF 104, Nos. 165-166, 171.

(10) an email from Defendant Shelby County Election Commissioner Lester to SAVE member Dr. Joseph Weinberg stating that she thinks “manipulation occurs inside the Commission either at turn in zones during the course of reconciliation and possibly during tabulation”, and that every night during early vote they can not get the totals to balance from the voting machines, and mentioning “rumors that ballots have been backed out”. ECF 104, Nos 138, Exb. “L”.

(11) that the ES & S vendor has been given access to the tabulation server without any supervising Shelby Board official; ECF 104, No. 149, 159;

(12) that for several years, the Defendants did not even conduct a complete audit of the precinct tally poll tapes [vote totals] with the tabulated results.

Instead the auditor only compared a sample, contrary to Tenn. Code Ann. 2-8-104. ECF 104, No. 58, 157, 187.

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<sup>1</sup> It is important to note that the GEMS Reference manual produced by the Defendant Shelby Board states that the Vote Center Editor can be altered to cause programmed or uploaded memory cards [cartridges] to be lost, thus impacting on whether hundreds or thousands of votes are counted. SAC, ECF 104, No. 156.

(13) the unsealing of early vote machines before the polls close contrary to state regulations. ECF 104, No. 78.

The SAVE members wrote the U.S. Department of Justice, and FBI more than once about their findings; testified before the Tennessee Election Commission in July 2018; and submitted their findings to the U.S Select Senate Intelligence Committee. ECF 104, No. 160, 164, 183, 266. The Defendant State Board was provided the *VTI Report*, and asked to take action to address the constitutional violations, and also refer the matter to the Tennessee Attorney General and State Comptroller for review. ECF 104, No. 184, 188. However, the same Shelby County voting systems are still in use, and the maladministration continues. ECF 104, No. 108.

As recently as 2017, over 650,000 Shelby County voters' personal information was discovered on an electronic poll book sold on Ebay. ECF 104, Exb. "B". Some of the voters' records were exhibited along with the poll book at the 2017 Voting Village DEF CON Hacking Conference. ECF 104, No. 9, 225, 233. The information can be used to disenfranchise tens of hundreds of thousands of voters on voting day, such as marking some voters as having already voted absentee when in fact they didn't. ECF 104, No. 9. As the Plaintiffs' expert, Matthew Bernhard states, this is not a "garden-variety election" irregularity, and

the sheer number of incidents which have negatively impacted voters in Shelby County is far greater than other jurisdictions. ECF 104, No. 225, Exb. "U" no. 3.

In November 2018, some six thousand Shelby County voters were not located in the Shelby County Election Commission Electronic Poll Books. ECF 104, No. 8. As a result thousands of voters who attempted to cast their voting during that election suffered a severe burden in having to prove they were in fact a registered voter, with undoubtedly many giving up. ECF 104, No. 8. Other lawsuits were filed in 2018 related to the location of early vote sites in predominately white neighborhoods, the rejection of thousands of voter registration applications, and the alleged irregular counting of absentee and provisional ballots. ECF 104, Nos. 205-207.

While the Defendant Administrator averred in the *Stateline* magazine that the county would use new voting machines in 2019 with an auditable paper trail, she once again back-pedaled only a month later saying that it would be delayed until 2020. ECF 104, No. 12. The national article documents the two decades of continuing barriers to the right to vote in the county, with voters being given wrong ballots, people falsely told they had early or absentee voted and turned away, improper voter registration purges, electronic poll books at times losing connectivity, early voting poll workers incorrectly turning voters away without allowing a provisional ballot, and a ballot that bumped the Democratic

gubernatorial candidate to the second page when the voter used large type on the voting machine. ECF 104, No. 11. And, the Defendant SCEC website still states that new voting machines will not be used until 2021. ECF 104, No. 12, Exb. D.

As recent as the November 2018 state and local elections, Myra Stiles, a former Shelby County Election Commissioner received the wrong ballot (which was observed as well by Memphis City Councilwoman Patrice Robinson). ECF 104, No. 174, 177. Another citizen tried to vote for a candidate of one political party for Governor more than four times, but the AccuVote DRE showed that her vote was cast for a candidate of the other political party. ECF 104, No. 176.

On September 30, 2018, the Plaintiffs SAVE faxed a demand letter to the Defendants asking, among other things, that the voting machines, software, and tabulators be inspected. ECF No. 104, 189. They further asked that they authorize the U.S. Dept. of Homeland Security to provide a full cyber scan. ECF 104, No. 189, Exb. "V".

The only response was a letter dated October 4, 2018 from State Coordinator Mark Goins stating that the Shelby County Election Commission is responsible for "protecting the technology used to conduct elections from malicious actors who want to jeopardize the integrity of the election process". ECF 104, 190-191, Exb. "W". Goins denied the request for Plaintiff SAVE's expert to examine the Shelby

voting systems, software, and tabulators. ECF 104, No. 191, Exb. “W”. When action was not forthcoming, the Plaintiffs moved forward with the lawsuit.

### **PROCEDURAL HISTORY AND CLAIMS**

The original Complaint in this action was filed on October 12, 2018, ECF 1, along with a Motion for a Temporary Restraining Order a few days later. ECF 23. The Motion sought protections for the November 2018 elections, which was denied by the Court on October 24, 2018 (with only the briefs and arguments of counsel). ECF 43.

An Amended Complaint was filed on January 11, 2019. ECF 62, 63. Various briefs and motions were filed related thereto. ECF 87, 88, 89, 90, 92, 93, 94, 95.

On Friday, April 16, 2019, the Plaintiffs filed a Second Amended Complaint for Deprivation of Constitutional Rights, Injunctive Relief and Declaratory Relief, ECF 104, [hereinafter the “SAC”] against the Defendants state and local elections entities and officials. ECF 104. The SAC is a civil rights action for declaratory and injunctive relief pursuant to 42 U.S.C. 1983, Rules 57 and 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. 2201 and 2202. All of the Defendants responded with Motions to Dismiss and oral arguments were heard on June 27, 2019. ECF 115, 116, 135.



Also pending on that date was the Plaintiffs' request for a forensic examination of a Shelby County Election Commission voting machines and tabulator. ECF 98. The Court never ruled on the request for a forensic examination. ECF 101, 137.

In their Motion for Preliminary Injunction filed on June 27, 2019, the Plaintiffs sought needed safeguards to be implemented by state and local election officials to protect the integrity of the vote in the October 3, 2019 municipal elections, as well as for the federal, state, and local elections in 2020, and thereafter. ECF 136. The Plaintiffs seek preliminary and permanent injunctive relief for the Court to order constitutional secure elections systems, processes, tabulators, and voting machines, equipment to be implemented, adequate funding be allocated, training be conducted, and sufficient workers hired to do the same. They are seeking hand-marked paper ballots, such as used in Hamilton County, TN (with secure optical scanning devices that have no internet connectivity). ECF 104, No. 14, pg. 94, No.7. They also request the appointment of an Independent Master to oversee this process. ECF 104, No. 14.

Plaintiff, Joe Towns, Jr., is a Tennessee State Representative, and intends to run for reelection in 2020. ECF 104, No. 24. Further, all Plaintiffs aver they have a reasonable basis to believe that, absent injunctive relief, 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 in the upcoming elections will be properly counted. ECF 104, No. 24, 26. The Tennessee U.S. Presidential primaries are scheduled for March 3, 2020, with the general election in November 2020.

### **REASONS FOR EXPEDITED REVIEW**

In January 2017, the U.S. Department of Homeland Security (DHS) designated elections as “critical infrastructure” to more formally make election infrastructure “a priority for cybersecurity assistance and protections” and allow DHS to provide cybersecurity assistance to state and local election officials who request the same. ECF No. 104, No. 109. But, the Defendants have not replied as to whether they have even accessed these services.

In January 2018, the Congressional Task Force on Election Security issued a Final Report addressing the insecurity of the voting infrastructure in the United States. ECF 104, No 122. The Final Report stated:

Given the breadth of security risks facing voting machines it is especially problematic that approximately 20% of voters are casting their ballots on machines that do not have any paper backup. These voters are using paperless Direct Recording Electronic (DRE) machines that have been shown over and over again to be highly vulnerable to attack. Because these machines record votes on the internal memory of the machine, and do not leave any paper backup, it is near impossible to detect whether results have been tampered with.

These findings are in accordance with those of research studies commissioned

by the California Secretary of State and Ohio's Secretary of State regarding the Diebold AccuVote voting system. ECF 104, Nos. 114, 117, 119. .

The Defendants use GEMS software version 1.18.24.101 to tabulate the votes, and AccuVote TSx version 4.6.4.103 [hereinafter "AccuVote DREs"] produced by Diebold. ECF 104, No. 75. The use of this system makes Shelby County's elections unverifiable, unauditable, and vulnerable to undetectable manipulation. ECF 104, No. 108-129.

AccuVote DREs create no verifiable record of voter intent, paper ballot or paper verification of the votes cast, unlike optical scanner components that rely on a voter hand-marked paper ballot as a verifiable official record. ECF 104, No. 87, 98. The Shelby County AccuVote DREs were purchased in 2005, and were never recertified by the Defendants as required by Tenn. Code Ann. 2-9-117. ECF 104, No. 79, 82, 184-186, 194-195, Exbs. "F" & "G." Microsoft is no longer issuing updates or security patches for that software. SAC, ECF 104, No. 89.

Each Shelby County AccuVote DRE has a modem that allows it to be connected to a telephone jack for uploading results, and thus the capability to be connected to the internet and vulnerable to hacking. ECF 104, No. 86. The practice of the Defendants has been for the AccuVote DRE units to be used as an intermediate device for remote electronic transmission of votes cast on the voting

machines from designated Zone Turn-In sites to the Shelby County GEMS server, as observed by Plaintiff Kernell on November 8, 2018. ECF 104, No.23, 86, 101.

The Plaintiffs' expert, Matthew Bernard, states that this "is a practice that exposes the system to even greater risk of compromise". ECF 104, No. 226, "U", no. 5.<sup>2</sup> He adds that many voters in Tennessee do not face this risk, as they vote on paper-based systems which produce verifiable election results. ECF 104, No. 227, "U", no. 6. Bernhard further states that "[n]ewer paper-based systems, and in particular voting systems that include hand-marked paper ballots and post-election audits, provide substantial mitigation to the risks facing voters in Shelby County". ECF 104 No. 228, Exb. "U", no. 7.

Bernard further is of the opinion that the errors reported in the Plaintiffs' SAC, and the *VTI Report* are consistent with errors he would expect to see generated with "malware, programming errors, or other sources of computer system malfunction", and that "there seems to be circumstantial evidence that election tampering may have occurred" and. ECF 104, No. 231, Exb. "X", no. 25. He also warns of new Advanced Persistent Threats (APTs) that he believes may have gained access to the system to gather intelligence and garner the ability to cause damage at a later time. ECF No 104, No. 260-261, Exb. X, nos. 2-5.

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<sup>2</sup> Moreover, the Defendants do not adhere to state regulations that require members of both political parties to be present for the transport of election memory cartridges carrying the votes. ECF 104, No. 23, 77.

The Plaintiffs' SAC is rife with facts about the maladministration of the Defendants, such as the insecure transfer of votes with modems at satellite zones on election night. ECF 104, No. 161-163. The Defendants have failed to produce audit logs, refused to allow inspection of a voting machine, and have admitted that the system is outdated, insecure and vulnerable, yet failed to take prompt remedial action. ECF 104, No. 12, 158.

In the fall of 2017, the State of Virginia decertified all DRE touchscreen voting machines requiring 23 cities and counties to purchase new voting machines only weeks before the November 2017 election. ECF 104, No. 110, 259.

The State of Georgia uses the same Diebold AccuVote DREs as in Shelby County, Tennessee. ECF 104, No. 181. And, the U.S District Court, N.D. Ga. found standing where the same type of AccuVote DRE voting systems used in Shelby County, were hacked multiple times by cybersecurity experts who reported the system's vulnerabilities to the authorities. ECF 104, No. 181, *Curling v. Brian Kemp, et al* 334 F. Supp. 3d 1303, 1314 (N.D. Ga. 2018). The *Curling* district court has noted the "sea change" highlighted by the March 2019 Report on the Investigation into Russian Interference in the 2016 Presidential Election by Special Counsel Robert S. Mueller. *Curling, et al v. Raffensperger, et al*, No. 1:17-cv-2989-AT, *Order* of May 21, 2019, ECF 375, pgs. 30-31. On August 15, 2019, that Court

enjoined the State of Georgia from using the AccuVote DRE system after 2019. *Order, Id.*, ECF 579, pg. 152.

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. ECF 104, No. 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. ECF 104, No. 262.

The Plaintiffs contend, among other things, that the custom and policy of the Defendants to use the outdated GEMS 1.18.24 software and AccuVote DREs in Shelby County violates their fundamental right to vote, and was purposefully designed and implemented with the intent of disenfranchising the large number of African American voters in Shelby County. ECF 104, Nos. 129, 180. Shelby County is the second largest county in the State, and has the largest African American population. ECF 104, No. 199.

Although the hearing was held on June 27, 2019, the district court did not rule until September 13, 2019 [the first day of early vote for the October 2019 municipal elections]. ECF 140. The district court granted Appellees’ motion to dismiss without prejudice for lack of standing. In so doing, the district court

disregarded the specific harm set out by the Plaintiffs such as exposure of their data when the Defendants did not properly secure an electronic poll book which was sold on Ebay, ECF 104, No. 241, Exb. “B”; vote dilution for African American Plaintiffs Towns, Jr. and Thornton, ECF No. 104, No. 243, 244; expenditure of additional funds for poll watchers and cybersecurity protections by candidate Plaintiffs Towns, Jr. and Thornton, ECF No. 104, 245, 248, 254; money and time expended by Plaintiff Kernell when voters were given the wrong ballot in his reelection campaign and if he seeks public office again, ECF No. 246-247, 248, 254.

The ruling further erred in finding the diversion of the resources of the Plaintiff SAVE as merely a harm to an abstract social interest of securing the election process. ECF 140, pg. 14-15. Yet, the *VTI Report* documents the vast pattern of disenfranchisement that is real and concrete. The failure of the Defendants to act to secure the system has harmed SAVE, causing it to spend time and money litigating as opposed to educating and registering voters. Protecting democracy is not an abstract social interest; it is a *national security* interest that patriots have fought and died for over and over again.

Contrary to the Judge’s ruling, the Plaintiffs have shown with their own expert affidavits that the voting system causes a substantial risk of harm that their votes won’t be counted accurately as compared with other voting systems in the

State. In fact, the same voting system was just outlawed for further use in Georgia. *Curling, supra*, No. 1:17-cv-2989-AT, ECF 579, pg. 152. This is not general dissatisfaction as the Court opined; it is the individual Plaintiffs' rights as American citizens to have their votes accurately counted. Moreover, "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 (9<sup>th</sup> Cir. 2011); *see also*, *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973).

The District Court agreed that the Plaintiff Kernell did state a specific allegation of harm when voters were given the wrong ballots when he was running for office. ECF 140, pg. 19. But, in opining that it was not shown that there was a realistic likelihood that it would happen again, he disregarded the SAC allegations that it happened again to voters as recently as 2018. ECF 104, No. 174, 177. Thus, there is standing. The Appellants filed their Notice of Appeal on October 8, 2019 pursuant to U.S.C. 1291.

### **STANDARD OF REVIEW**

The Federal Rules of Appellate Procedure and this Court permit expediting consideration of appeals. Fed. R. App. P. 2; 6<sup>th</sup> Cir. R. 27(f). Under 28 U.S.C. 1657, the Court "shall expedite the consideration of any ..action for ..temporary or injunctive relief..if "good cause" is shown. Good cause is shown "if a right under



the Constitution of the United States or a Federal Statute...would be maintained in a factual context that indicates that a request for expedited consideration has merit.” 28 U.S.C. 1657.

## ARGUMENT

### I. EXPEDITED APPEAL IS WARRANTED BECAUSE OF THE CONSTITUTIONAL ISSUES AT STAKE AND UPCOMING PRESIDENTIAL PRIMARY AND GENERAL ELECTIONS

The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strikes at the very heart of representative government. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

The Defendants and their predecessors have, through a pattern of maladministration, wantonly disregarded their duties under Tennessee and federal law. The creation and maintenance of a non-functioning voting system deprived members of the Plaintiff SAVE, and the individual Plaintiffs of their fundamental Constitutional right to vote and to equal protection of that right.

This is not as to a singular or isolated failure of the Defendants, but is a widespread, serious, and deeply-rooted failing at the most basic levels in Shelby

County's voting system; non-uniform standards; inadequate funding, planning and training. ECF 104, No. 10, 179, 256. The pattern occurring over more than a decade discriminates as to the African American Plaintiff candidate and voters, as well as to all Plaintiffs based upon where they live in the State. ECF 104, No. 180, 265.

Voters in the State utilizing precinct based optical scanners, such as Hamilton County, have state law protections not afforded the Plaintiffs, such as automatic mandatory audits of the voter-verified paper ballots cast for the U.S. President in a presidential election; and review by an independent expert; as well as prohibition of the scanning devices to have "any capability, enabled or disabled, for wireless communication of any sort". ECF 104, Nos. 216-219.

The Sixth Circuit frequently grants motions to expedite in election law cases. *Ohio Democratic Party v. Husted*, 834 F. 3d 620, 624 (6<sup>th</sup> Cir. 2016); *Russell v. Lundergen-Grimes*, 784 F. 3d 1037, 1043 (6<sup>th</sup> Cir. 2015); *Ohio State Conf. of the NAACP v. Husted*, 769 F. 3d 385, 387 (6<sup>th</sup> Cir. 2014); *Northwest Ohio Coalition v. Husted*, 696 F. 3d 583 (6<sup>th</sup> Cir. 2012); *Hunter v. Hamilton County Bd. of Elections*, 635 F. 3d 219, 231 (6<sup>th</sup> Cir. 2011).

The same is necessary here given the well-documented maladministration and vulnerabilities of the Shelby County voting systems. The Appellant's counsel has conferred with defense counsel, and the Appellees oppose this Motion. But, the

timing of this Courts' decision impacts upon the Appellants constitutional fundamental right to vote in the upcoming March 3, 2019 Presidential Primaries in Tennessee, as well as the August and November 2020 state and federal elections.

There is still time for the matter to be heard and decided, and a Preliminary hearing held to enact paper ballots and other safeguards for the aforesaid elections.<sup>3</sup> In the absence of action by the Defendants, the State Comptroller, the Governor, the FBI, the U.S. Department of Justice, the U.S. Congress, the state officials and courts, the federal district court, and others, this Court may be the last resort for the Plaintiffs to ensure that the votes they seek to cast for President in 2020 are properly counted.

### **CONCLUSION**

The Court should grant the Appellants' Motion to Expedite.

Dated: October 10, 2019

Respectfully submitted,

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<sup>3</sup> The record consists solely of the parties' electronic filings, one transcript of the attorneys' arguments before the federal district judge on Jan. 14, 2019, ECF 44; and another transcript of the parties' oral arguments on the Defendants' motions to dismiss which was ordered several weeks ago and will be available by the court reporter on Monday, October 15, 2019.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

**Certificate of Compliance with Type-Volume Limitation  
Typeface Requirements, and Type-Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(c)(1) and 27(d)(2)(A) because the brief contains 5100 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a 14-point Times New Roman style.

By: /s/Carol Chumney  
Attorney for Appellants

**CERTIFICATE OF SERVICE**

On October 10, 2019, I certify that I filed the foregoing with the Clerk of the Court using the CM/ECF system, which then sent a notification of electronic filing to all counsel of record.

*/s/Carol Chumney*  
Carol Chumney