

RECORD NO. 19-6142

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

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

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

**BRIEF FOR PLAINTIFFS-APPELLANTS
ORAL ARGUMENT REQUESTED**

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CORPORATE DISCLOSURE

The Appellants have already filed their Corporate Disclosure Statements. None of the Appellants are a subsidiary or affiliate of a publically owned corporation. There is no publically owned corporation not a party to the appeal that has a financial interest in the outcome.

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III. STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Appellants request oral argument as this case concerns the fundamental right to vote. The constitutional issues involved are significant not only for this jurisdiction, but for others across the nation.

IV. STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. 1331 (federal question jurisdiction); 1343 (jurisdiction over civil rights actions), 1367 (supplemental jurisdiction), 2201 (jurisdiction to grant declaratory relief), and 2202 (jurisdiction to grant relief ancillary to declaratory judgment), and 42 U.S.C. 1983.

This Court has appellate jurisdiction under 28 U.S.C. 1291.

The District Court entered an *Order Granting Motion to Dismiss Without Prejudice* on the basis of subject matter jurisdiction, and a *Judgment* on September 13, 2019. RE 140, 141. The Appellants filed their Notice of Appeal from that *Order and Judgment* on October 8, 2019. RE 142.

Venue lies in the Western District of Tennessee pursuant to 28 U.S.C. 1391(b) because multiple defendants reside in the judicial district and all defendants are residents of Tennessee and a substantial part of the events or omissions giving rise to the Appellants' claims occurred in this judicial district.

The Appellants contend that there is subject matter jurisdiction as to all of the Appellants as set forth herein.

V. STATEMENT OF ISSUES

- 1. At the Motion to Dismiss stage of these proceedings, do the Appellants' have Standing?**

VI. STATEMENT OF THE CASE

The Appellant Shelby Advocates for Valid Elections is a Tennessee nonprofit corporation. [hereinafter “SAVE”]. *Second Amended Complaint* RE 104, Page ID# 1203, No. 15 [hereinafter the *Second Amended Complaint* will be referred to as *Complaint*]. 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. *Complaint*, RE 104, Page ID ## 1203-1204, Nos. 18, 19.

The Appellant 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. *Complaint*, RE 104, Page ID # 1205, No. 23. Appellant Joe Towns, Jr. is a current Tennessee state representative, a Shelby County voter, and is of the African American race. *Complaint*, RE 104, Page ID #1207, No. 24. Appellant Britney Thornton was a candidate for Memphis city council in the October 3, 2019 Memphis municipal elections, is a Shelby County voter, and is of

the African American race. *Complaint*, RE 104, Page ID # 1208, No. 26. Appellant Ann Scott is a voter in Shelby County, Tennessee. *Complaint*, RE 104, Page ID # 1207, No. 25.

Thousands of voters were given the wrong ballot in the August 2012 state and local elections in Shelby County, Tennessee. *Complaint*, RE 104, Page ID ## 1232-1233, No. 131, Page ID # 1235-1236, No. 139. Kernell, ran for reelection to the State House, and was not renominated. *Complaint*, RE 104, Page ID # 1268, No. 246. He expended monies on voters that resided in his district, but were not allowed to vote for him due to the Appellees' misassignment of voters. *Complaint*, RE 104, Page ID # 1268, 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. *Complaint*, RE 104, Page ID #1268, No. 246.

The misassignment of voters was identified by Dr. Joseph Weinberg, and another citizen, and promptly reported to the Shelby County Election Commission. *Complaint*, RE 104, Page ID # 1233, Nos. 132,133. Yet, the problems continued, with official vote records even being altered during the correction process so as to appear that the misassigned voters voted in the correct district. *Complaint*, RE 104, Page ID #1233, No. 133. One voter reported voting in two school board races, although only one should have been on her ballot. *Complaint*, RE 104, Page ID ##

1233-1234, No. 134. And, the problems continued in the November 2012 elections. *Complaint*, RE 104, Page ID# 1235, No. 137.

The 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”. *Complaint*, RE 104, Page ID ## 1236, No. 140, *Complaint, Exb. A*, RE 104-6. 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”. *Complaint*, RE 104, Page ID # 1236, No. 142. However, the Comptroller did not perform a forensic audit of the software and voting machines, instead only reviewing redistricting activities, *Complaint*, RE 104, Page ID # 1237-1238, Nos. 145-146.

Thereafter, the SAVE founders began open records requests to the Shelby County Election Commission [hereinafter the “Shelby Board”]. *Complaint*, RE 104, Page ID # 1238, No. 148. The work continued over five years, resulting in a 49 page published report, *Voting on Thin Ice Report*, [hereinafter the “*VOTI Report*” referencing over 128 exhibits] *Complaint*, RE 104, Page ID # 1232, No. 131, *VOTI Report*, RE 104-14.

The Appellants document in the *VOTI 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. *Complaint*, RE 104, Page ID ## 1242-1243, Nos. 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”. *Complaint*, RE 104, Page ID ## 1242-1243, 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”. *Complaint*, RE 104, Page ID # 1242-243, 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”, *Complaint*, RE 104, Page ID ## 1242-1243, No. 162. The *TACIR Report* concluded that “the real threat for wholesale election fraud lies with the Diebold central tabulator.” *Complaint*, RE 104, Page ID #

1243, 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.” *Complaint*, RE 104, Page ID# 1243, No. 163. The SAVE open records request to the Shelby Board for any documents regarding any investigation relating to the *TACIR Report* or action take thereafter, incredibly resulted in a response that it had no documents responsive. *Complaint*, RE 104, 1243, No. 163, *Complaint, Exb. M*, RE104-19, *Complaint, Exb. N*, RE 104-20.

- (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. *Complaint*, RE 104, Page ID # 1242, 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”. *Complaint*, RE 104, Page ID # 1242, 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). *Complaint*, RE 104, Page ID# 1238, No. 149, *VOTI Report*, RE 104-14, Page ID # 1353. And although the August 2012 Election Day poll tapes of votes cast are available, the Appellees claim that they do not have the 2012 early vote poll tapes for confirming those votes cast or determining the reason for 21 extra cards being uploaded. *Complaint*, RE 104, Page ID ## 1239-1240, No. 153.
- (4) that election databases (including those containing votes cast) are regularly sent via insecure methods to the vendor (even to Canada); *Complaint*, RE 104, Page ID # 1238, No. 149.
- (5) that the August 2012 Shelby County election results were certified before the vote totals were verified; *Complaint*, RE 104, Page ID # 1238, 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; *Complaint*, RE 104, Page ID # 1240, 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. *Complaint*, RE 104, Page ID #1239, No. 152, Page ID ## 1240-1241, No. 155.

- (8) User names and passwords for voter files were insecurely emailed to state officials, *Complaint*, RE 104, Page ID ## 1243-1244, 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). ¹ *Complaint*, RE 104, Page ID # 1246, No. 171.
- (10) an email from 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 with “rumors that ballots have been backed out”. *Complaint*, RE 104, Page ID # 1235, No. 138, *Complaint, Exb. L*, RE 104-18.

¹ It is important to note that the GEMS Reference manual produced by the 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. *Complaint*, RE 104, Page ID # 1241, No. 156.

(11) that the ES & S vendor has been given access to the tabulation server without any supervising Shelby Board official; *Complaint*, RE 104, Page ID # 1238, No. 149, Page ID ## 1241-1242, No. 159;

(12) that for several years, the Shelby County Election Commission 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. *Complaint*, RE 104, Page ID # 1216, No. 58, Page ID #, No.1241, No. 157, Page ID # 1253, No. 187.

(13) the unsealing of early vote machines before the polls close contrary to state regulations. *Complaint*, RE 104, Page ID # 1220, 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. *Complaint*, RE 104, Page ID # 1242, No. 160, Page ID # 1243-1244, No. 164, Page ID # 1251, No. 183, Page ID # 1273, No. 266. The State Board was provided the *VOTI Report*, and asked to take action to address the constitutional violations, and also to refer the matter to the Tennessee Attorney General and State Comptroller for review. *Complaint*, RE 104, Page ID # 1251, No. 184, Page ID # 1253, No. 188. However, the same Shelby County voting systems are still in use,

and the maladministration continues. *Complaint*, RE 104, Page ID # 1227-1228, No. 108.

As recently as 2017, over 650,000 Shelby County voters' personal information was discovered on an electronic poll book sold on Ebay. *Complaint, Exb. B*, RE 104-7. The voters' records were exhibited along with the poll book at the 2017 Voting Village DEF CON Hacking Conference. *Complaint*, RE 104, Page ID # 1200, No. 9, Page ID #1262, No. 225, Page ID # 1264, No. 233. The information can be used to disenfranchise hundreds of thousands of voters on voting day, such as marking some voters as having already voted absentee when in fact they didn't. *Complaint*, RE 104, Page ID# 1200, 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. *Complaint*, RE 104, Page ID # 1262, No. 225, RE 104-26.

In November 2018, some six thousand Shelby County voters were not located in the Shelby County Election Commission electronic poll books. *Complaint*, RE 104, Page ID # 1199-1200, 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. *Complaint*, RE 104, Page ID# 1199-1200, 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. RE 104, Page ID# 1256-1257, Nos. 205-207.

While the Shelby Board Administrator Phillips 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. *Complaint*, RE 104, Page ID # 1202, 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. *Complaint*, RE 104, Page ID # 1201, No. 11. And, the Shelby County Election Commission website still states that new voting machines will not be used until 2021. *Complaint, Exb. D*, RE 104-9.

As recent as the November 2018 state and local elections, Myra Stiles, a former Shelby County election commissioner received the wrong ballot. *Complaint*, RE 104, Page ID # 1249, No. 177. Another citizen tried to vote for a

candidate of one political party for Governor more than four times, but the voting machines showed that her vote was cast for a candidate of the other political party. *Complaint*, RE 104, Page ID #1248-1249, No. 176.

On September 30, 2018, the SAVE faxed a demand letter to the Appellees asking, among other things, that the voting machines, software, and tabulators be inspected. *Complaint*, RE 104, Page ID # 1253, No. 189. They further asked that the Appellees authorize the U.S. Dept. of Homeland Security to provide a full cyber scan. *Complaint*, RE 104, Page ID # 1253, No. 189, *Complaint, Exb. V*, RE 104-27.

The only response was a letter dated October 4, 2018 from Tennessee Election 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”. *Complaint*, RE 104, Page ID # 1253-1254, Nos. 190-191, *Complaint, Exb. W*, RE 104-28. Goins denied the request for SAVE’s expert to examine the Shelby voting systems, software, and tabulators. *Complaint, Exb. W*, RE 104-28. When action was not forthcoming, the Appellants moved forward with the lawsuit.

The original Complaint in this action was filed on October 12, 2018, *Original Complaint*, RE 1, along with a Motion for a Temporary Restraining Order a few days later. *Motion for TRO*, RE 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). *Order Denying TRO*, RE 43.

An Amended Complaint was filed on January 11, 2019. *Amended Complaint*, RE 62, 63. Various briefs and motions were filed related thereto.

On Friday, April 16, 2019, the Plaintiffs filed a Second Amended Complaint for Deprivation of Constitutional Rights, Injunctive Relief and Declaratory Relief, against the Defendants state and local elections entities and officials. *Complaint*, RE 104. This 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.

Also pending on that date was the Plaintiffs' request for a forensic examination of a Shelby County Election Commission voting machines and tabulator. *Rule 26(f) Report*, RE 98. The Court never ruled on the request for a forensic examination. *Minute Entries*, RE 101, 137.

In their Motion for Preliminary Injunction filed before the hearing 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. *Motion for Preliminary Injunction*, RE 136. The Appellees 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). *Complaint*, RE 104, Page ID # 1289, No. 7. They also seek risk limiting audits of the paper ballots. And, they request the appointment of an Independent Master to oversee this process. *Complaint*, RE 104, Page ID #1203, No. 14.

Joe Towns, Jr., is a Tennessee state representative, and intends to run for reelection in 2020. *Complaint*, RE 104, Page ID #1207, No. 24. Further, all Appellees 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 and voters encumbered who seek to vote in future elections, and also be severely burdened as to whether the votes cast in the upcoming elections will be properly counted. *Complaint*, RE 104, Page ID ## 1207-1207, Nos. 24, 26. The Tennessee U.S. Presidential primaries are scheduled for March 3, 2020, with the general election in November 2020.

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. *Complaint*, RE 104, Page ID # 1228, No. 109. But, the Appellees 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. *Complaint*, RE 104, Page ID # 1229, No. 112. 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. *Complaint*, RE 104, Page ID ## 1229-1230, Nos. 114, 117, 119. .

The Shelby County Election Commission uses 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. *Complaint*, RE 104, Page ID #1221, No. 79. The use of this system makes Shelby County’s elections unverifiable, unauditible, and vulnerable to undetectable manipulation. *Complaint*, RE 104, Page ID ## 1227-1232, Nos. 108-129.

AccuVote DREs create no verifiable record of voter intent, paper ballot or paper verification of the votes cast, unlike some optical scanner components that rely on a voter hand-marked paper ballot as a verifiable official record. *Complaint*, RE 104, Page ID # 1224, No. 87, Page ID # 1225, No. 98. The Shelby County AccuVote DREs were purchased in 2005, and were never recertified by the Appellees as required by Tenn. Code Ann. 2-9-117. *Complaint*, RE 104, Page ID #1221, No. 79, Page ID # 1222, No. 82, Page ID ## 1251-1253, Nos. 184-186, Paged ID ## 1254-1255, Nos. 194-195, *Complaint, Exb. F*, RE 104-12, *Complaint, Exb. G*, RE 104-13. Microsoft is no longer issuing updates or security patches for the machines operating system. *Complaint*, RE 104, Page ID# 1224, 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. *Complaint*, RE 104, Page ID ## 1223-1224, No. 86. The practice of the Appellees has been for the AccuVote DRE units to be used also 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 Kernell on November 8, 2018. *Complaint*, RE 104, Page ID ## 1206-1207, No.23, Page ID # 1223-1224, No. 86, Page ID # 1226, No. 101.

The Appellants' expert, Matthew Bernard, states that the remote transmission "is a practice that exposes the system to even greater risk of compromise". *Complaint*, RE 104, Page ID # 1262-1263, No. 226, *Complaint Exb. U*, RE 104-26, no. 5.² He adds that many voters in Tennessee do not face this risk, as they vote on paper-based systems which produce verifiable election results. *Complaint*, RE 104, Page ID # 1263, No. 227, *Complaint Exb. U*, RE 104-26, 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". *Complaint*, RE 104, Page ID #1263, No. 228, *Complaint, Exb. U*, RE 104-26, no. 7.

Bernard further is of the opinion that the errors reported in the Plaintiffs' Second Amended Complaint, and the *VOTI 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

² Moreover, the Appellees 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. *Complaint*, RE 104, Page ID # 12066-1207, No. 23, Page ID # 1220, No. 77.

circumstantial evidence that election tampering may have occurred.” *Complaint*, RE 104, Page ID # 1264, No. 231, *Complaint Exb. X*, RE 104-29, Page ID # 1420, 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. *Complaint*, RE No 104, Page ID # 1271-1272, Nos. 260-261, *Complaint Exb. X*, RE 104-29, Page ID # 1422, Nos. 2-5.

The Second Amended Complaint is rife with facts about the maladministration of the Appellees. *Complaint*, RE 104, Page ID # 1242-1243, Nos. 161-163. The Appellees 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. *Complaint*, RE 104, Page ID # 1202, No. 12, Page ID # 1241, No. 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. *Complaint*, RE 104, Page ID # 1228, No. 110, Page ID # 1271, No. 259.

The entire State of Georgia uses the same type Diebold AccuVote DREs as in Shelby County, Tennessee. RE *Complaint*, 104, Page ID #1250, No. 181. The U.S District Court, Northern District of Georgia upheld 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. *Complaint*, RE 104, Page ID # 1250, No. 181, *Curling v. Brian Kemp, et al* 334 F. Supp. 3d 1303, 1314 (N.D. Ga. 2018). The Court 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, DRE 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. *Complaint*, RE 104, Page ID # 1272, No. 262, *Complaint Exb. X*, RE 104-29, Page ID # 1423, no. 6. 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. *Complaint*, RE 104, Page ID # 1272, No. 262.

The Appellees contend, among other things, that the custom and policy of the Appellees 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. *Complaint*, RE 104, Page ID # 1232, No. 129, Page ID # 1249, No. 180. Shelby County is the second largest county in the State, and has the largest African American population. *Complaint*, RE 104, Page ID # 1255, 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]. *Order*, RE 140. The District Court granted Appellees' motion to dismiss for lack of standing.

VII. SUMMARY OF THE ARGUMENT

This Court has subject matter jurisdiction because SAVE has injury in fact from the diversion of resources due to the Appellees actions and inactions. Also, the SAVE has associational standing from the injury in fact to its members, including Kernell. Further, the Individual Plaintiffs have standing due to their injury in fact in response to the Appellees' maladministration and the use of the AccuVote DREs that has severely and unconstitutionally burdened each of their fundamental right to vote.

VIII. ARGUMENT

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 Appellants contend that the Appellees have violated their constitutional right to vote, and that that they have standing to bring this action.

A. STANDARD OF REVIEW

A District Court's dismissal of a case for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) is reviewed de novo. *Donaldson v. Lyon*, 2019 U.S. App. Lexis 31066, *2 (6th. 2019). As further set forth below, the Appellants meet the standing requirements of Article III of the United States Constitution. U.S. Const. art. III, sec. 2. For standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly trace able to the challenged conduct of a defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). "Where, as here, a case is at the pleading

stage, the plaintiff must ‘clearly...allege facts demonstrating each element.’” *Spokeo*, 136 S. Ct. at 1547. The court must “accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Parsons v. U.S. Dep’t of Justice*, 801 F. 3d 701, 710 (6th Cir. 2015)(quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim’.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Parsons*, 801 F.3d at 710. Also, when a defendant raises standing as a basis for a Motion to Dismiss for lack of subject matter jurisdiction, the “district court ‘may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.’” *White Tail Park, Inc. v. Stroube*, 413 F. 3d 451, 459 (4th Cir. 2005).

A district court's dismissal of a claim under Fed. R. Civ. P. 12(b)(6) is reviewed de novo. *Morgan v. St. Francis Hosp.*, 2019 U.S. App. LEXIS 29887 (6th Cir. 2019). To state a claim upon which relief may be granted, a complaint must contain “ a short and plain statement of the claim showing that the pleader is entitled to relief”. Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), the Court accepts

the factual allegations in the complaint as true and construes them in a light most favorable to the nonmoving party. *Mixon v. Ohio*, 193 F. 3d 389, 400 (6th Cir. 1999). The court must determine only whether "the claimant is entitled to offer evidence to support the claims," not whether the plaintiff can ultimately prove the facts alleged. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

B. THE COURT HAS SUBJECT MATTER JURISDICTION

1. General Law

The District Court dismissed the case for lack of subject matter jurisdiction, in particular finding that the Appellants' did not have injury in fact sufficient to constitute standing. To establish an injury in fact, at least one plaintiff must show that he or she suffered "an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed 2d 351 (1992)). An intangible injury can be concrete, such as free speech. *Spokeo*, at 1549 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009)).

The Appellants' Second Amended Complaint (and exhibits including expert Declarations) set forth facts that they have suffered an invasion of their

fundamental right to vote and SAVE’s mission has been thwarted due to the actions and inactions of the Appellees that is concrete and particularized, and both actual and imminent. For example, attached to the Second Amended Complaint is the 49 page *VOTI Report*, that documents the fundamentally flawed voting system in Shelby County, Tennessee. *Complaint Exb. H*, RE 104-14.

The *risk* of real harm can also satisfy the requirement of concreteness³. *Spokeo*, 136 S. Ct at 1549 (citing *Clapper v. Amnesty Int’l USA*, 568 U. S. 398, 133 S. Ct. 1138, 185 L. Ed. 2d 264).⁴ The Supreme Court has upheld standing where the plaintiffs have shown a ‘substantial risk’ that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm,” even where it is not “literally certain the harms they identify will come about.” *Galaria, et al v. Nationwide Mut. Ins. Co.*, 663 Fed. Appx. 384, 388 (6th Cir. 2016 Not for publication)(citing *Clapper, supra*, at 414, n. 5).

As set forth by the Sixth Circuit in *Stewart v. Blackwell*, “after *Lujan*, courts have continued to recognize that the increased risk of harm constitutes an injury to

³ “For example, the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure. See, e.g., Restatement (First) of Torts (libel), (slander *per se*) (1938)”, *Spokeo* 136 S. Ct. at 1549.

⁴ While the *Clapper* Court dismissed the case, it was *after* discovery and at the summary judgment stage, while noting that the Court often did not find standing when reviewing cases in the fields of intelligence gathering, and foreign affairs. *Clapper*, 568 U.S. at 407-409.

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

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

In the voting context, this Court and others have recognized that voters can have standing based on an increased risk that their votes will be improperly discounted. In *Sandusky County Democratic Party v. Blackwell*, 387 F. 3d 565, 574 (6th Cir. 2004)(per curiam), this Court held that the plaintiffs had standing to bring a claim on behalf of voters alleging that the Secretary of State’s issuance of provisional ballots in Ohio elections violated the Help America Vote Act. ...The Secretary of State issued a directive that would prohibit voters from casting provisional votes unless the poll worker was able to confirm that the voter was eligible to vote in that specific precinct..

This Court held that the plaintiffs had standing, even though they were unable to name specific voters who would seek to vote at polling places that would be deemed to be wrong by voters: ...

So too here, the plaintiffs are unable to articulate which voter will be harmed in the future by deficient equipment.

It is inevitable, however, that errors have been made and will be made in the future. As the district court found, “[a] flaw in the punch card ballot is its fragile nature and the fact that running the punch card ballots repeated times through the counting machinery will result in different results.” The claims of the plaintiffs here are not speculative or remote, but real and imminent.

Stewart, 444 F. 3d at 854.

Further, as set forth in *Lujan*, 504 U.S. at 565, n. 2, 112 S. Ct. 2130, 119 L. Ed. 351, the term “‘imminence’ is concededly a somewhat elastic concept.” The Supreme Court has used other phrases, sometimes in conjunction with “‘certainly impending’”. See e.g., *Babbitt v. UFW Nat’l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1997) (plaintiff “‘must demonstrate a realistic danger of sustaining a direct injury’”); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)(the plaintiff must demonstrate that “‘the defendant’s allegedly wrongful behavior will likely occur or continue’”); *Davis v. F.E.C.*, 554 U.S. 724, 734, 128 S. Ct. 2759, 171 L. Ed. 737(2008); *Pennell v. San Jose*, 485 U.S. 1, 8, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988)(“realistic danger”).

2. Injury in Fact of the Appellants

A. SAVE

i. Organizational Standing

SAVE has alleged that the Appellees' actions have impeded its mission, including voter registration, research, advocacy and education to ensure the fundamental right to vote in elections. *Complaint*, RE 104, Page ID ## 1204, No. 19; Page ID # 1265, No. 236.

SAVE alleges there is a systematic breakdown in the voting processes. *Complaint*, RE 104, Page ID # 1249, No. 179. SAVE further alleges that the foreseeable result of the Appellees actions and inactions is a massive disenfranchisement and unreasonable dilution of the vote, as well as a loss of confidence in the voting system, which in turn, further disenfranchises by discouraging Shelby County residents from registering or voting. *Complaint*, RE 104, Page ID ## 1198-1199, No. 5. The actions of the Appellees substantially impede SAVE's ability to further its goals and institutional purpose of advancing voters' full and meaningful participation in the electoral process by registering to vote, voting, and having their votes counted on a fair and equal basis, and SAVE's resources are being diverted and drained by the need to address the voting inequities and irregularities that continue to occur throughout Shelby County,

Tennessee. *Complaint*, RE 104, Page ID # 1204, No. 19. The SAVE's purpose is further frustrated due to the use of noncertified machines, and miscounted votes.

SAVE has organizational standing, on its own behalf, to bring each of the claims for prospective relief because 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. *Complaint*, RE 104, Page ID #1265, no. 236. The lack of an adequate notification and problem resolution by the Appellees also frustrates the purposes of SAVE to ensure that voters are able to register to vote, cast a ballot, and have their vote counted. *Complaint*, RE, 104, Page ID ## 1276-1277, No. 277.

In *Sandusky County Democratic Party v. Blackwell*, 387 F. 3d 565 (6th Cir. 2004), the Court held that the political party and labor organization plaintiffs had standing to assert the rights of their members who would vote in the election. The Court noted that the individual participation of an organization's members is not normally necessary when an association seeks prospective or injunctive relief for its members. *Id* at 574. And, more recently in *Common Cause Georgia v. Kemp*, 347 F. Supp. 3d 1270 (N.D. Ga., Atlanta Div., 2018), the Court held that the plaintiff organization had standing to ensure that provisional ballots casts by registered voters in the 2018 general election were properly counted. The Court stated that “[i]t is well-established that an organization can establish standing

to sue on its own behalf where it can show the defendant's acts resulted in an impediment to the organization's mission or diversion of its resources". *Id.* at 1288-1289 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Standing has been upheld where an organization had to divert its resources and staff time and energy in response to defendants' unlawful actions. *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F. 3d 571, 576 (6th Cir. 2013). An organization also has standing "to assert claims based on injuries to itself or its members if that organization or its members are affected in a tangible way. *Common Cause*, 347 F. Supp. at 1289.

The same interference with a nonprofit's voter registration and education efforts was sufficient to constitute standing in *League of Women Voters v. Brunner*, 548 F. 3d 463, 466-67 (6th Cir. 2008). The *Brunner* Court held that the League of Women voters of Ohio and of Toledo-Lucas County had standing where they alleged that the officials actions and inactions caused injury by impeding their voter registration and education efforts, and the individual plaintiffs were denied the right to vote or severely burdened in exercising the right to vote in the November 2004 elections. *Id.* at 466-67.

The District Court in denying SAVE standing relied upon *Fair Elections Ohio v. Husted*, 770 F. 3d 456 (6th Cir. 2014). On appeal from the ruling in favor of the plaintiffs on a motion for summary judgement, the Sixth Circuit reversed on

the basis of standing and held that the organization conducting voter outreach programs had only an abstract social interest in maximizing voter turnout instead of a concrete stake in voter registration. *Id.* at 459-61. However, the appellate court also based its decision on the fact that none of the plaintiff nonprofit members would be personally harmed by the law and were instead asserting the rights of third parties. *Id.* at 461. In this case the SAVE incorporators are all registered voters in Shelby County and are directly affected by the fundamentally flawed voting system in place. *Complaint*, RE 104, Page ID #1205, No. 23; Page ID # 1207-1208, Nos. 24-26.

And, unlike the plaintiff nonprofit in *Husted, supra*, in addition to voter outreach SAVE has spent time and resources on five years of open records requests, and published its findings in the *VOTI Report*. *Complaint Exb. H*, RE 104-14. Thus, SAVE has a concrete interest in ensuring that the evidence and findings in the *VOTI Report* are reviewed, and acted upon based upon its mission to ensure the fundamental right to vote. The failure of the Appellees to do so impacts upon SAVE's efficacy, and depletes SAVE's resources which have to instead be directed to negate the impact of the Appellees failure to act.

SAVE's increased risk of harm by the Appellees' actions and inactions is similar to that in *Stewart v. Blackwell*, 444 F. 3d 843, 849 (6th Cir. 2006), *vacated as moot*, 473 F. 3d 692 (6th Cir. 2007). SAVE's *VOTI Report*, Second Amended

Complaint, and expert declarations all show that there is a realistic possibility and danger that upcoming elections will be compromised by the use of the AccuVote DRE voting system, as well as due to the fundamentally flawed operations of the Appellees. Expert Bernhard unequivocally states that the AccuVote DRE machines in use in Shelby County are not sufficiently secure to guarantee that any election held adequately expresses the will of the people. *Complaint Exb. X*, RE 104-29, Page ID #1419, No. 21, and even avers that there is circumstantial evidence of tampering. *Complaint Exb. X*, RE 104-29, Page ID #1420, no. 22. And, the U.S. Homeland Security has warned of the realistic danger of foreign interference with the non VVPAT voting machines. *Memo for Preliminary Inj.*, RE 136-1, Page ID # 1780.

Moreover, there is proof that the issues arising in the 2012 election that impacted SAVE member Kernell will reoccur, contrary to the Court's opinion. *Order*, 140, Page ID # 1845. Voters were given the wrong ballot again in November 2012, *Complaint*, RE 104, Page ID# 1235, No. 137. Voters were given the wrong ballot in a City Council race in 2015. *Complaint*, RE 104 Page ID # 1239, No. 152. And, in 2015 the Shelby County Election Commission also failed to upload seven memory cartridges prompting a lawsuit, *Complaint*, RE 104, Page ID 1239, No. 152. The Stockings were given the wrong ballot as well. *Complaint*, RE 104, Page ID # 1246, No. 173, *Complaint Exb O*, RE 104-21, *Complaint Exb.*

P, RE 104-22. A former Shelby county election commissioner was given the wrong ballot in August 2018, *Complaint*, RE 104, Page ID ## 1247-1248, No. 174. A city councilwoman testified before the Appellee Shelby County Election Commission about a voter being given the wrong ballot in August 2018. *Complaint*, RE 104, Page ID ## 1247-1248, No. 174. The disenfranchisement was so bad that one election commissioner voted against certification. *Complaint*, RE 104, Page ID # 1248, No. 174.

Further SAVE has been harmed in that the Appellees have failed to explain if any actions were taken as a result of the irregularities found. *Complaint Exhs. M & N*, RE 104-19, 104-20. The failure of the Appellees to answer and explain what happened, and why the irregularities have not been properly addressed, frustrates SAVE's purpose to educate the public at large.

SAVE's time and resources have also been diverted from advocating for reform nationally as a direct result of the stonewalling of the Appellees and their failure to promptly address the issues already raised at the local level. Litigation costs have been incurred, attorney time expended, and countless meetings of SAVE's members developing strategies on how to move forward with SAVE's core mission, while fighting in court for the fundamental right to vote. SAVE's efforts are hampered by the constraints of litigation necessitated by the fact that the Appellees turn a blind eye and fail to perform due diligence to address and correct

the serious problems brought to their attention from the open records requests, and the *VOTI Report. Complaint, Exb. H*, RE 104-14.

In addition, 36,000 voter registration applications were rejected in November 2018, *Complaint*, RE 104, Page ID # 1256, No. 206. And thousands of voters were not located in the epoll books in the same election. *Complaint*, RE 104, Page ID # 1256, No. 206. The Appellees actions in rejecting voter registration applications discourages voters and forces SAVE to reduce or eliminate work in certain areas—voter education and new registrations—to address the Appellees failure to process registrations and properly input voter information in the epoll books. This strikes directly at SAVE’s mission to register and educate voters. *Common Cause v. Lawson*, 937 F. 3d 944, 954 (7th Cir. 2019). *See also, Crawford v. Marion County Election Board*, 472 F. 3d 949, 951 (7th Cir. 2007).

Moreover, SAVE’s injury is not abstract or manufactured. The District Court acknowledges that funding this lawsuit may divert funds from SAVE’s other goals. *Order*, RE 140, Page ID # 1841. But, this lawsuit is not an armchair observation by SAVE, as evident from the substantial *VOTI Report* that was delivered to the U.S. Select Senate Intelligence Committee after its members reviewed thousands of pages of documents, data, and observed elections over a period of five years. *Complaint Exb. H*, RE 104-14, Page ID # 1330. SAVE members testified before the Tennessee Election Commission, *Complaint* RE 104,

Page ID ## 1251-1252, Nos. 183-184, reached out to the Tennessee Election Coordinator, *Complaint Exb V*, RE 104-27, and asked federal, state and local officials to take action. *Complaint*, RE 104, Page ID # 1253, No. 188, Page ID # 1242, Nos. 160-161, Page ID # 1243, No. 164, Page ID ## 1237-1238, Nos. 146-148, Page ID # 1239, No. 150, Page ID # 1273, No. 266. Yet, nothing was done.

The issues raised in this lawsuit are an interest that goes to the heart of SAVE's mission and purpose. And, they are of *national* interest. When the American voting system is compromised, those who are elected illegally may have loyalties that impact adversely on U.S. military policy, foreign affairs, as well as domestic policy. The danger reaches to all branches of government.

If SAVE does not incur these litigation costs, then voter registration forms it gathers and submits may not be processed; additional SAVE poll workers and resources will be required to monitor the serious election vulnerabilities; it can not ensure that SAVE poll workers will be allowed to watch all aspects of the voting process; and its primary mission to ensure the fundamental right to vote through education efforts will be impeded. *See Complaint*, RE 104, Page ID # 1206, No. 23 (irregularities in uploading votes from satellite zone); Page ID # 1256, no. 206 (voter registrations not processed); Page ID # 1256, no. 192 (Goins refusal to allow tabulator inspection); Page ID # 1291, no. 16.

For these reasons, SAVE has personal injury in fact to constitute standing.

ii. Associational Standing

“An association has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization’s purpose, and [3] neither the claim requested nor the relief requested requires the participation of individual members in the lawsuit.” *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F. 3d 250, 254-55 (6th Cir. 2018)(quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000)). As the District Court held, “[t]he individual participation of an organization’s members is ‘not normally necessary when an association seeks prospective or injunctive relief for its members.’” *Sandusky Cty. Democratic Party v. Blackwell*, 387 F. 3d 565, 574 (6th Cir. 2004)(quoting *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996)). However, the District Court found that the SAVE did not meet the first prong to show that one of its members has injury in fact. *Order*, RE 140.

Yet, SAVE does have standing because one of its named members, Mike Kernell, suffered an injury in fact, that is fairly traceable to the challenged conduct of the Appellees, and that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Thousands of voters were given the wrong ballot in the August 2012 Shelby County, Tennessee state and county elections, including over 720 voters in Kernell's district. *Complaint*, RE 104, Page ID ## 1205-1206, No. 23. Plaintiff Kernell also alleged injury from the failure of the Shelby County Election Commission to provide poll tapes upon his repeated request, as required under state law, prior to certification of the vote. *Complaint*, RE 104, Page ID # 1206, No. 23. Also, he observed election improprieties as a poll watcher in November 2018 when a worker was permitted to upload votes in a room by herself at a Zone Turn-in site after the polls closed which failed to adhere to state election rules. *Complaint*, RE 104, Page ID ## 1206-1207, No. 23. He alleges that the actions of the Appellees dilute, disenfranchise, miscount, and severely burden his fundamental right to vote in future elections. *Complaint*, RE 104, Page ID ## 1206-1207, No. 23.

The District Court, however, held that SAVE's allegations are only generalized grievances and do not constitute concrete and particularized harm. *Order*, RE 140. The District Court errs in stating that SAVE is seeking the "illusive perfect voting system" and is only seeking "to vindicate its own value preferences" due to a "general dissatisfaction." *Order*, RE 140, Page ID # 1844.

"[T]he fact that a harm is widely shared does not necessarily render it a generalized grievance." *Jewel v. National Sec. Agency*, 673 F.3d 902, 909 (9th Cir.

2011); *see also Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("[I]t does not matter how many persons have been injured by the challenged action" so long as "the party bringing suit shows that the action injures him in a concrete and personal way."); *Federal Election Comm. v. Akins*, 524 U.S. 11, 24 (1998) ("[A]n injury widely shared ... does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an 'injury in fact.'). Indeed, even if the experience was shared by virtually every Tennessean, "the inquiry remains whether that shared experience caused an injury that is concrete and particular to the plaintiff. *Jewel*, 673 F.3d at 910. Denying "standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973). Thus, even if every voter in Shelby County, Tennessee has the same injury, it does not abrogate standing where the Appellants have suffered the injury in a concrete and particularized way by having their own votes improperly discounted.⁵

Kernell and the other individual appellants each have a concrete and particularized injury that is actual and imminent in that they each intend to vote in the 2020 elections. *Complaint*, RE 104, Page ID # 1205, No. 23, Page ID # 1207-1208, Nos. 24-26. In this case, it is documented that the Shelby County voting systems have been connected to the internet on more than one occasion and each voting machine has a modem. *Complaint*, RE 104, Page ID ## 1223-1224, No. 86, Page ID ##1242-43, No. 162, Page ID ## 1260-1261, No. 219. Also, the votes are transmitted remotely on election night from Zone Turn-in sites to the GEMS server at the Shelby County Election Commission. *Complaint*, RE 104, Page ID ## 1260-1261, No. 219. As averred by Matthew Bernhard, this exposes the system to an even greater risk of compromise. *Complaint*, RE 104, Page ID ## 1262-1263, No. 226. He further avers that there is a substantial risk undetectable errors and manipulation will continue to increase as voting equipment ages and foreign actors become more sophisticated and brazen in their attempts to impact elections in the U.S. *Complaint*, RE 104, Page ID # 1263, No. 227.

As set forth in the recent *TACIR Report*, the risk to election security has changed since 2007. *Complaint Exb. E*, RE 104-11. And, the hackers are within the radius of the Shelby County voting systems as evident by the attack on the Knox County voting systems in 2018. The Plaintiffs have alleged injury in fact due to the increased risk of successful infiltration by hackers because of the voting systems

and processes in place in Shelby County. The intense hacking efforts are well-documented by the U.S. Department of Homeland Security, and the U.S. Congress, as well as the Plaintiffs' expert. *Complaint*, RE 104, Page ID # 1276, No. 275, *Complaint Exb. U*, RE 104-26, *Complaint Exb. X*, RE 104-29. In August 2018, DHS Secretary Kirstjen Nielsen called on all state and local election officials to make certain that by the 2020 presidential election, every American votes on a verifiable and auditable ballot. RE 136-1, Page ID # 1780, n. 5. Thus, the threat is not speculative or remote, but real and imminent⁶.

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

⁶ See *Monson v. Geertson Seed Farms*, 561 U.S. 139 (2010) (U.S. Supreme Court found standing where the government deregulation would result in bees feeding off of genetically modified alfalfa, and likely migrating to and contaminating the plaintiff farmers' crops within a certain radius. In this case, the affected area for hacking is Tennessee, and migration is likely to occur).

County, Tennessee. To deny standing because the plaintiffs did not definitively show hacking would mean that only by hacking to find malware, can one gain standing to protect against malware. This would be an absurd criteria to gain access to the courts where another jurisdiction, after a preliminary injunction hearing on the same AccuVote TSx voting machines, has outlawed them due to their hack ability.

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Further, Kernell, like the other Individual Appellants has been personally injured because his private data was exposed and sold on Ebay, as demonstrated at the DEF CON 2017 Hacking conference. RE 104, Page ID # 1200, No. 9. The Appellees' claims that there was no personal injury from the exposure of the data on the electronic poll book is false. Under Tenn. Code Ann. 2-2-116, the permanent registration record contains the social security numbers of the registrants. And Tenn. Code Ann. 2-2-127 requires redaction of the social security numbers before such records are made public.

The Plaintiff Kernell is a registered voter, and his data is stored in the Appellees' electronic poll books. The misuse of his data by the Appellees, and failure to secure it, places Kernell at a continuing, increased risk of voter fraud and

⁷ The Appellants' expert is also an expert witness in the *Curling, supra*, case. *Complaint Exb. X*, RE 104-29, Page ID # 1424. And he opines that a paper ballot system with risk limiting audits is more secure. *Complaint Exb. U*, RE 104-29, no. 7.

identify theft beyond the speculative allegations of “possible future injury” or “objectively reasonable likelihood” of injury. *See Galaria*, 663 Fed. Appx. At 384 (plaintiffs had standing where data was stolen from insurer). As a result the Appellants have been forced to expend resources to bring this action in order to prevent future breaches. These costs are a concrete injury suffered to mitigate an imminent harm, and satisfy the injury requirement of Article III standing. *See also, Remijas v. Neimus Marcus Group, LLC*, 794 F. 3d 688 (7th Cir. 2015); *Lewart v. P.F. Chang’s China Bistro, Inc.*, 819 F. 3d 963 (7th Cir. 2016); *Krottner v. Starbucks Corp.*, 628 F. 3d 1139 (9th Cir. 2010).

The District Court stated that “[t] closest SAVE comes to a specific allegation of harm against one its [sic] members is the allegation that Defendants gave voters the wrong ballot when Michael Kernell was running for office in 2012.” *Order*, RE 140, Page ID # 1845. The District Court erred in holding that that there is no proof that the distribution of wrong ballots would happen again as set forth above. The Appellants have already shown that there is a realistic likelihood of the conduct reoccurring in that it has occurred over and over again year after year since then.

The SAVE allegations must be construed as true at this stage of the litigation. SAVE has associational standing to bring its claim for declaratory relief and injunctive relief.

B. Individual Appellants

In this case, the Plaintiffs have set forth statistics showing that Shelby County, Tennessee has a large and the greatest African American population in any county. *Complaint*, RE 104, Page ID ## 1255-1256, Nos. 193-200. They have further set forth facts that other counties, including Hamilton County, have greater safeguards by state law and regulation to protect their votes with paper trail ballots and optical scan machines not connected to the internet. *Complaint*, RE 104, Page ID ## 1259-1261, Nos. 216-220. Two of the Plaintiffs are African American- Rep. Joe Towns and Brittaney Thornton. They aver discrimination such that there is a substantial likelihood that their votes, and those of African Americans in the county, will be improperly discounted and their votes diluted due to the voting systems in use in Shelby County, Tennessee. *Complaint*, RE 104, Page ID # 1207, No. 24, Page ID # 1208, no. 26, Page ID ## 1267-1268, Nos. 243-244. They also allege that absent relief from this Court, they will be disenfranchised or severely burdened in exercising their fundamental right to vote in future elections, that there is an overwhelming probability that votes will be miscounted in future elections, and also severely burdened as to whether the votes cast for them in the upcoming elections will be properly cast and counted by the Appellees. *Complaint*, RE 104, Page ID ## 1269-1270, no. 251. They also aver that will have to expend additional resources on poll workers and a cybersecurity expert to monitor the election

process in 2020. *Complaint*, RE 104, Page ID ##s 1267-1268, No. 245. And, they further allege that they have been personally injured by the actions and inactions of the Appellees with their money and time expended in past elections due to the same. *Complaint*, RE 104, Page ID # 1268, No. 245.

These allegations are not conclusory, nor are these self-inflicted harms. These are harms due to the Appellees' actions and inactions as abundantly documented in the Second Amended Complaint, exhibits, and the *VOTI Report*. The Second Amended Complaint sets out that 6000 voters were not found in the epoll books in November 2018, thus creating barriers to those who were registered, sought to vote, but whose names were not located. *Complaint*, RE 104, Page ID ## 1199-1200, No. 8. Some of these voters might have wanted to vote for Joe Towns, Jr.

The disenfranchisement was so great in Shelby County, in November 2018, that it was documented in the *Stateline* article. *Complaint*, RE 104, Page ID # 1201, No. 11. The Tennessee Black Voter Project sued in October 2018, when half of 36,000 voter registration forms were rejected by the Shelby County Election Commission. *Complaint*, RE 104, Page ID # 1256, No. 206. And, in July 2018, a Chancellor issued an order for the Shelby County Election Commission to open more early voting sites and days earlier as a result of a lawsuit filed by the NAACP, after arguments that the plan to open only three sites in Germantown,

East Memphis, and Whitehaven would have suppressed vote in predominately black neighborhoods. *Complaint*, RE 104, Page ID # 1256, No. 205.

Mathew Bernhard, the Plaintiffs' expert, states that due to architectural flaws of the system, and failures to provide operational security at many levels, it is not possible for any person to faithfully attest that any voting machine in the county is free from malware that can affect election results. *Complaint*, RE 104, Page ID # 1262, No. 223. He adds that use of this election system subjects voters to a substantial risk of election outcomes which do not fairly represent the political opinions of voters in Shelby County. *Complaint*, RE 104, Page ID # 1262, No. 224.

As in *Stewart, supra*, the Appellants have shown that the voting system is fundamentally flawed. And even if the Court were not to find definitive proof of the same, the Appellants' injury is self-evident. *Tenn. Republican Party v. Sec. and Exch. Comm'n*, 863 F. 3d 507, 517 (6th Cir. 2017). The Sixth Circuit has excused definitive proof where the injury was impossible to prove with absolute certainty, or where the injury could not be specifically identified in advance. *Tenn. Republican Party*, 863 F. 3d at 518, (citing *Sierra Club v. United States, EPA*, 793 F.3d 636, 664 (6th Cir. 2015) and *Sandusky Cty Democratic Party v. Blackwell*, 387 F. 3d 565, 574 (6th Cir. 2004)). In this case, the voting machines are in the control and possession of the Appellees who have refused to release any proof of a

forensic audit, permit an independent inspection, or allow the Appellants' expert to inspect. *Complaint*, RE 104, Page ID # 1254, No. 19, *Complaint Exb. W*, RE 104-28. Thus, injury in fact can be inferred.

At this stage these general allegations of injury from each of the Appellants suffice, and the Court must presume that the general allegations embrace those specific facts that are necessary to support the Appellants' claims. *Sierra Club v. United States, EPA*, 793 F. 3d 656, 662 (6th Cir. 2015).

3. Fairly Traceable to the Conduct of the Defendants

The Appellants' injury is also "fairly traceable" to the conduct being challenged." *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016)(quoting *Lujan*, 504 U.S at 560-61). This element of standing "is not focused on whether the defendant 'caused' the plaintiff's injury in the liability sense," *Wuliger v. Mfrs., Life Ins. Co.*, 5667 F. 3d 787, 796 (6th Cir. 2009), because "causation to support standing is not synonymous with causation sufficient to support a claim." *Parsons*, 801 F. 3d at 715. "Proximate causation is not a requirement of Article III standing". *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n. 6 (2014). "To that end, the fact that an injury is indirect does not destroy standing as a matter of course." *Parsons*, 701 F. 3d at 713; *see also Warth v. Seldin*, 422 U.S. 490, 504 (1975). "Rather the traceability requirement mainly serves "to eliminate those cases in which a third party and not a party before the

court causes the injury.” *Galeria*, 663 Fed. Appx at 384 (citing *Am. Canoe Ass’n v. City of Louisa Water & Sewer Comm’n*, 389 F. 3d 536, 542 (6th Cir. 2004)).

The District Court did not address this prong and the Appellees have waived any argument that this prong is not met, in that they have only cursorily mentioned it in passing. In any event, the Appellants’ injuries are fairly traceable to the Appellees’ conduct. The Appellants have allowed the continued use of the Shelby County voting systems and processes, despite the State Comptroller’s own finding that “[t]he primary responsibility of the SCEC is to conduct elections in Shelby County, yet SCEC has demonstrated an inability to conduct elections without significant inaccuracies, including those identified in the 2012 elections.”⁸

Complaint, RE 104, Page ID ## 1235-1236, Nos. 139-142, *Complaint Exb. A*, RE 104-6. And, the barriers to voting and voter disenfranchisement have continued, as documented in the *VOTI Report*, the Second Amended Complaint, and the Center for American Progress 2018 Report which gave the State an “F”. *Complaint*, RE 104, Page ID # 1259, No. 213.

In addition, as set forth in the Second Amended Complaint, the voting system is not on the 2013 list as having been certified, or the 2015 recertification list of the Tennessee Secretary of State. *Complaint*, RE 104, Page ID # 1222, No. 82, Page

⁸ Letter of Justin Wilson, Tennessee Comptroller of the Treasury, Oct. 2, 2012. RE 104, Page ID ## 1237-1238, no. 146.

ID ## 1251-1252, No. 185, Page ID ## 1254-1255, No. 194, Page ID # 1258, No. 195, *Complaint Exbs. F & G*, RE 104-12, RE 104-13. It is obvious that each Shelby County voting machine, the tabulator(s), *and* the internal software have not been inspected for recertification in that they are not on the list. This lack of inspection by the Defendants also increases the risk of votes being improperly counted, in that older voting systems are more likely to malfunction and drop votes, and vote-changing malware may be present since the system has been connected to the internet on more than one occasion. *Complaint*, RE 104, Page ID ## 1252-1253, No. 186 Also, the machines can not be recertified as explained by Bernhard because the platform is obsolete rendering the voting systems vulnerable due to the inability to install needed security patches. *Complaint*, RE 104, Page ID ## 1252-1253, No. 186. If they had been tested as required under state law, then they would have been decertified. Thus, the Appellees failure has caused the injuries to the Appellants with an increased risk of lost or improperly discounted votes, vulnerability to hacking by local election official(s), staff, paid volunteer(s), or continued efforts by nefarious third parties to infiltrate the State's voting systems as documented by the 2018 Knox County infiltration.

Moreover, the Shelby County Election Commission has advised that it has no documents responsive to a request as to any action taken with regard to the unauthorized editing software found on the system in 2007. *Complaint*, RE 104,

Page ID ## 1270-1271, No. 256, *Complaint Exb. O*, RE 104-20. Thus, it may still be there today leaving the system vulnerable to the whim of any internal county election official or staff member to alter votes at will. And, the mishandling of passwords further compromised the Shelby County voting systems, with the report that persons no longer on the election staff still had passwords. *Complaint*, RE 104, Page ID # 1244, No. 166. The actions of the Defendants in allowing voting processes and systems that disenfranchised thousands of voters over the years which impacted on Kernell's election and others, improper handling of memory cards containing thousands of votes, unexplained uploading of memory cards containing thousands of votes, certification of elections without the results verified in the database, insecure method of transferring the election results databases out of county, state and even the country, acceptance of vote totals by the Coordinator of Elections that do not match the computer printouts, and manipulation of early vote totals as admitted by election commissioner Lester, and the failure of the Appellees to take action to investigate, develop rules and regulations to address the problems, and decertify the system are all fairly traceable to the Appellees.

In addition, the Local Appellees misrepresented to the Court that the votes are not remotely transmitted, when in fact the regular practice on election night (as observed by Appellant Kernell in November 2018), is to transmit them remotely from satellite zone turn-in sites. *Complaint*, RE 104, Page ID # 1226, No. 101,

Transcript, RE 44, Page ID # 352-353. Once again, this process opens the system up for hacking and unauthorized access, and closes the door to the Appellants who are not permitted to even inspect the software for the voting systems.

Certainly the threat is real and imminent in that safeguards have been put in place for Hamilton County that under state law is banned from using optical scanners with any wireless capability. If there were no threat from internet connectivity, then why those safeguards? Yet, the Shelby County voting systems have no such safeguards with every single voting machine sporting its own modem, and the remote transmission of votes on election eve. Not to mention, the Appellees' failure to document access to the tabulator, the more than one documented times that the ES & S vendor was left alone with the tabulator during vote-counting, along with the blatant failure to conduct state-required audits of every poll tape.

Yes, there is causation due to the either willful blindness of the election officials, or malfeasance in failing to do their jobs to properly administer the election, investigate and correct thereafter. The Appellees' failures interfered with Kernell's election wherein funds and time were spent on voters who were not even given a ballot with his race on it although residing in his district. *Complaint*, RE 104, Page ID ## 12-5-1206, No. 23. It will also impact on Towns Jr.'s certain future candidacy, and the possible future candidacies of Thornton and Kernell,

forcing them to expend additional dollars on poll watchers to monitor satellite zones, hire cyber security experts to monitor the election process, with the increased risk that those who vote for them may not have their votes counted, or attributed on a vote-flip to an opposing candidate.

And, even more significant, the Appellants' injury is fairly traceable to the Appellees' conduct where they failed to secure the electronic poll book, which resulted in the Appellants' data being sold on Ebay as exposed at the 2017 DEF CON Hackers conference. *Complaint*, RE 104, Page ID # 1264, No. 233. The Appellees' failure to secure the sensitive personal information entrusted to its custody and insufficient security, allowed the data breach. These allegations more than meet the threshold for Article III traceability, which only requires "more than speculative but less than but-for" causation. *Galaria*, 663 Fed. Appx. at 384, pg. 10 (citing *Parsons*, 801 F. 3d at 714). *See also*, *Lambert v. Harman*, 517 F. 3d 433, 438 (6th Cir. 2008); *Resnick v. AvMed, Inc.*, 693 F. 3d 1317, 1324 (11th Cir. 2012); *Lewert v. P.F. Chang's China Bistro*, 819 F. 3d 963, 969 (7th Cir. 2016); *Remijas v. Neiman Marcus Group, LLC*, 794 F. 3d 688, 696 (7th Cir. 2015); *Krottner v. Starbucks Corp*, 628 F. 3d 1139, 1141 (9th Cir. 2010).

4. Redressability

The Appellants' injury will likely be redressed by a favorable decision. *Wittman v. Personhuballah*, 136 S.Ct. 1732, 1736 (2016) (quoting *Lujan*, 504 U.S.

at 560-61). Appellants contend that the Appellees have waived any argument that this prong is not met, in that they have only cursorily mentioned it in passing.

Moreover, the District Court's suggestion and the Appellee's argument that the relief requested by the Appellants would not create a perfect voting system is a red herring. For the redressability inquiry, it is sufficient to show that the requested remedy would "slow or reduce" the harm, or make it better. *Mass. v. EPA*, 549 U.S. 497, 525 (2007) (citing *Larson v. Valente*, 456 U.S. 228, 243, n. 15 (1982)).

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

The Appellants claims are clearly redressable where they contend their constitutional rights have been violated in that there is an increased probability that their votes will be improperly discounted based upon the deficient voting systems and processes used in Shelby County, Tennessee. The Sixth Circuit, in *Stewart*,

444 F. 3d, at 855, found redressability sufficient to confer standing and order that judgment be entered for the plaintiffs who alleged that the use of deficient equipment, including punch-card ballot, in some counties and not others violated equal protection and due process. And Bernard states that newer paper based systems provide substantial mitigation to the risks facing voters in Shelby County. *Complaint Exb. U*, RE 104-26, No. 7. The *TACIR* has recommended voter verified paper audit trails that can be counted by hand, as well as by machine since 2007. *Complaint*, RE 104, Page ID # 1279, No. 286. The U.S. Senate Select Committee on Intelligence Committee has also strongly recommended voter verified paper trails. *Memo for Preliminary Inj.*, RE 136-1, Page ID # 1780.

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

IX. CONCLUSION

As in *League of Women Voters of Ohio, etal v. Blackwell, etal*, 432 F. Supp. 723 (N.D. Ohio 2005), the Appellants in this case have standing. In that case, the Court held that the injuries of the organizational and individual plaintiffs were traceable to defendants' alleged equal protection and due process violations. *Id.* at 733.

Also, the Individual Appellants have alleged injury that affects them in a particularized way in that they have alleged facts showing disadvantage to themselves as individuals. *Baker v. Carr*, 369 U.S. 186, 206 (1962). As in *Baker, supra*, the Individual Appellants are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes. *Id.* at 208. As in *Baker*, the injury that the Individual Appellants assert is that they have been placed in a position of unconstitutional unjustifiable inequality compared to voters in irrationally favored counties.

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

Therefore, the Appellants have standing to bring this action and this Court has should reverse and remand.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 31, 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