

No. _____

In the **Supreme Court of the United States**

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

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 ELECTION 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 ELECTION
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,
Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. Do the plaintiffs, who have shown an actual breach and maladministration, have standing to challenge their county's fundamentally unfair voting system?
- II. Did the Sixth Circuit err in applying the Rule 12(b)(6) *Twombly/Iqbal* Standard on a Rule 12(b)(1) motion to dismiss?
- III. Did the Sixth Circuit err in requiring proof of "Inevitable Harm" for standing in this election security case?

PARTIES TO THE PROCEEDINGS

Petitioners are the Shelby Advocates for Valid Elections, Michael Kernell, Joe Towns, Jr., Britney Thornton, and Ann Scott.

Respondents are 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 Election Commission, Kent Young, 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 Election 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.

The plaintiffs filed Disclosure of Corporate Affiliations and Financial Interest statements in the Sixth Circuit, Dk. 8.

DIRECTLY RELATED PROCEEDINGS

This case arises out of *Shelby Advocates for Valid Elections, et. al v. Hargett, et al*, No. 2:18-cv-02706-TLP-dkv (W.D. Tenn. 2019). The district court entered an *Order Granting Motions to Dismiss without Prejudice* and a *Judgment* on September 13, 2019. App. 13-41.

The case was certified for direct appeal to the United States Court of Appeals for the Sixth Circuit. ECF 142, 143. The Sixth Circuit entered an *Opinion* and *Judgment* on January 24, 2020, App. 1-12. The Sixth Circuit denied the petition for rehearing, en banc, on March 10, 2020. App. 42-43.

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The Petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

INTRODUCTION

More than one kind of virus is threatening this country. The continued use of paperless, unauditible electronic voting machines in many jurisdictions jeopardizes our democracy by opening the door for sophisticated hackers to insert viruses, or internal operators to manipulate votes without detection.

The plaintiffs seek to enjoin the use of the deficient breached paperless unauditible election technology used in Shelby County, Tennessee, to implement cybersecurity safeguards, and to adopt a hand-marked paper ballot system with risk limiting audits. This case is of exceptional importance to preserve the fundamental right for citizens to protect their vote.

The plaintiffs have fully set out the facts supporting the basis for organizational, associational, and individual standing in their Second Amended Complaint (“SAC”) (ECF 104). They uncovered serious election irregularities, actual breach of the system, repeated machine malfunction, malfeasance, and continued inaction to acknowledge or remedy by election and law enforcement officials.¹

¹ Since the Sixth Circuit *Opinion* was issued, there also have been reports in the press about possible conflicts of interest of those with election oversight. The attorneys representing the Defendant SCEC lease office space from the ES & S election system vendor’s Tennessee lobbying firm. Attorney John Ryder’s name was listed on the office building directory as a member of the lobbying firm.

The Sixth Circuit *Opinion* requiring definitive proof of the hack of a voting system to merit standing is based upon a false technological premise. Hackers can cover their tracks. And, there is an even greater risk of undetected tampering by election workers where there is no hand-marked paper trail to audit. To require the plaintiffs to prove an undetectable hack of the voting system, or to hack the system themselves, sets the bar too high for Article III standing.

The standing standard for election security cases is an important question of federal law that has not been directly decided by this Court. Sup. Ct. R. 10(c). Also, there is a split in the Circuits as to the proper 12(b)(1) standard. And, the panel decision is inconsistent with relevant decisions of this Honorable Court.

OPINIONS BELOW

The court of appeals decision (App. 1-12) is reported at *Shelby Advocates for Valid Elections, etal v. Hargett, etal*, 947 F.3d 977 (6th Cir. 2020). The opinion of the district court dismissing the case without prejudice as to standing (App. 13-39) is reported at No. 2:18-cv-02706-TLP-dkv (W.D Tenn. 2019).

JURISDICTION

The district court entered an *Order Granting Motions to Dismiss Without Prejudice* as to subject

Baker, "Election Commission Attorney Shares Office with Voting-Machine Lobbyist," *Memphis Flyer*, (April 22, 2020). Also, Phillips admits prior employment with, and employment of her sons, by a vendor that received a SCEC voter registration contact. Baker, "Further Questions About Linda Phillips," *Memphis Flyer*, May 11, 2020.

matter jurisdiction, and a *Judgment* on September 13, 2019. App. 40. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 1367, 2201, and 2202, and 42 U.S.C. § 1983. The plaintiffs filed their Notice of Appeal on October 8, 2019. ECF 142.

The *Opinion* and *Judgment* of the Court of Appeals affirming the dismissal without prejudice was entered on January 24, 2020. App. 1-12. A timely petition for rehearing was denied on March 10, 2020. App. 42-43. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISION INVOLVED

U. S. Const., amend. XIV, Sec. 1., App. 44.

STATEMENT OF THE CASE

The Shelby County Election Commission voting system and processes (“SCEC system”) have been compromised. In 2007, the Tennessee Advisory Commission on Intergovernmental Relations reports in² “Trust But Verify, Increasing Voter Confidence in Election Results” [*TACIR Report*], that the SCEC system was connected to the internet. ECF 104, 1242-43, No. 162. In fact, unauthorized editing software was found on the system that could allow manual editing of the Global Election Management System (“GEMS”) software database file, audit log, and election results. *Id.* This is deemed a critical security breach which would allow “unfettered access to the central tabulator

² The TACIR is a permanent intergovernmental research body created by the Tennessee state legislature.

to anyone connected to the county government network or the Internet.” *Id.*

The *TACIR Report* warns 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.” *Id.* It further ominously finds that “someone was attempting to edit saved election summary reports, perhaps to agree with altered vote totals in the Diebold Microsoft Access database file.” *Id.*

The *TACIR Report* adds that “the real threat for wholesale election fraud lies with the Diebold central tabulator.” ECF 104, 1243, No. 163. It states “unless Shelby County 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.” *Id.* There is no record of an investigation or that the unauthorized software was ever removed.³ ECF 104, pg. 1243, No. 163, 1387, No. 28, 1392, No. 28, 1251, No. 182.

Despite the TACIR admonishment not to connect the SCEC system to the internet, the current election vendor, Election Systems & Software (“ES &S”), reported in 2013 that the SCEC server was plugged

³ Under the Tenn. Sec. of State Rules, the county election commission must institute safeguards to secure the operating system and the application program, lock out unwarranted actions on the computer and log all actions. ECF 104, 1219, No. 76. There is no record that this was ever done.

into the county network exposing it to hacking, viruses and malware (and which can contaminate any new system). ECF 104, 1242, No. 161. The report further finds that the tabulation server room can be accessed by many people “which makes it difficult to defend against allegations of tampering.” *Id.*

The SCEC system uses the 14 year old electronic touchscreen Premier Election Solutions (formerly Diebold Election Systems) AccuVote TSx DRE voting machines (“AccuVoteTSx”) with no paper trail. ECF 104, 1198, No. 4, 1223, No. 85. The AccuVoteTSx records votes electronically on a removable memory card, which is later uploaded into the GEMS server to tabulate the votes. ECF 104, 1223, Nos. 85-86, 1226, Nos. 100-103. A paper tape is also printed after the polls close on Election Day for each voting machine that tallies the votes for that machine. ECF 104, 1225, No. 99. Each voting machine has a “modem” which can be used to connect the telephone jack within the Ethernet slot to a wall phone jack or cell phone. ECF 104, 1224, No. 86. On every election night, the SCEC opens the system up to hacking by using some of the AccuVoteTSxs at designated satellite zones to transmit votes from the collected precinct memory cards to the servers. *Id.* The documented internet exposure and critical security breach, regular remote transfer of votes cast, and lack of an auditable paper trail renders it impossible to verify accurate election results. ECF 104, 1224, No. 87.

Serious security vulnerabilities of the AccuVoteTSxs were reported in research studies commissioned by the California and Ohio Secretaries of State. ECF 104,

1229-30, Nos. 114-122. The studies found that the design of the AccuVoteTSx permits unauthorized, undetectable, surreptitious manipulation of software installed on individual machines that causes them to record and report false votes. *Id.* Likewise, in 2017 after the hacking demonstration at an international hackers' convention, the State of Virginia decertified all DRE touchscreen voting machines. ECF 104, 1228, No. 110. Just recently an HBO special, "Killchain: The Cyber War on America's Elections," featured the ease in buying and hacking a discarded AccuVoteTSx.

Live demonstrations have been given in open federal court by highly qualified election security experts of the ease in which the AccuvoteTSx can be infected by a malware virus on a memory card, such as to alter the votes cast without detection. See *Curling, et al v. Kemp, et al*, 334 F. Supp. 3d 1303, 1308, 1323 (N.D. Ga. 2018). The malware can also spread like a virus to the other voting machines, the tabulator, and ultimately the county system. *Id.* at 1309; ECF 104, 1246, No.172.

The Shelby Advocates for Valid Elections ("SAVE") plaintiffs' five-year open records findings are published as the "Voting on Thin Ice" Report ("*VTI Report*") and were submitted to the U.S. Senate Select Committee on Intelligence in 2017. ECF 104, 1330-78. The findings are recounted at some length to illustrate that the consistent pattern of security breaches is so extensive as to eliminate any concern that the plaintiffs' asserted harm is speculative.

The *VTI Report* found that:

- (1) system passwords were insecurely emailed to state officials and databases remotely transferred to the out-of-state election vendor “to fix.” ECF 104, 1243-44, No. 165.
- (2) a county audit reported 29 unauthorized users had SCEC system access, enabling them to change the system security and coding. ECF 104, 1244, No. 166.
- (3) the SCEC does not document the chain of custody of memory cards from the precincts carrying thousands of votes. ECF 104, 1246, No. 171, 1250, No. 182, 1261, No. 222.
- (4) ES & S technicians and others have unsupervised access to the tabulation server. ECF 104, 1238, No. 149, 1242, No. 160-61.

2010 Elections

- (5) upon review of the audit logs, a cybersecurity expert reported that thousands of “phantom” votes were uploaded the day prior to Election Day for five precincts in the 2010 county-wide elections. ECF 104, 1363-64, 1245, No. 169, 1363-64. Also, the wrong database was uploaded to the system which impacted over five thousand voters. ECF 104, 1245, No. 169.
- (6) early vote poll tapes which would shed light on the phantom vote uploads, are mysteriously missing from the state and local archives, although election day poll tapes were retained. ECF 104, 1239-1240, No. 153.

2012 Elections

(7) in August 2012 county wide elections, twenty-one memory cards (perhaps thousands of votes) were illegally uploaded to the tabulator before the polls closed for one of the same precincts that was reported to have phantom votes in 2010.⁴ ECF 104, 1353-56, 1238, No. 149. The precinct had only 9 voting machines on election day, but memory cards for 30 machines were uploaded for that precinct. *Id.*

(8) vote flips for candidates selected in contested races were reported by voters in August 2012, which was the same election where Plaintiff Kernell was on the ballot for reelection to the State House. ECF 104, 1375.

(9) the SCEC was unable to get voting machine totals to balance for the August 2012 elections. ECF 104, 1235, No. 138; 1358. The total results sent by the SCEC to the state officials did not match the computer print-out. ECF 104, 1240, No. 154.

(10) a second database was opened on election night in August 2012 by the ES & S⁵ vendor with no results,

⁴ Under the Tenn. Sec. of State Rules, the seals on early voting machines may not be removed until “after the close of polls on election day.” ECF 104, 1220, No. 78. Yet, the SCEC begins processing the early votes before the polls close. ECF 104, 1248, No. 175.

⁵ ES & S is a limited liability company, whose owner is a privately owned investment firm managing over \$500 million in assets. The lack of a hand-marked paper trail with appropriate audits abdicates the public duty to protect the right to vote to this private entity with possible links to foreign investors. ECF 104, 1244-1245, No. 167.

then sent to Canada for a “fix,” and the election contests certified by the SCEC without those results. ECF 104, 1238, No.149.

(11) early vote poll tapes for the August 2012 elections, which would shed light on the phantom vote uploads, are mysteriously missing from the state and local archives, although election day poll tapes were retained. ECF 104, 1239-40, No. 153.

(12) the state election law requiring that all poll tapes be compared with tabulator results was not adhered to by SCEC officials in 2012 and thereafter, instead using an agreed upon procedures in lieu of an audit. ECF 104, 1241, No. 157, 1253, No. 187, 1357. Compliance with the audit law by the defendants might have uncovered the origin of the phantom votes and memory card upload discrepancies.⁶

(13) 132 poll workers took SCEC microchips home on August 2012 election eve, to be inserted into electronic poll books the next morning, thus constituting a total failure of any election chain of custody security. ECF 104, 1234, No. 135.

(14) a candidate for school board was granted a new election after the August 2012 election due to the machines rendering the wrong electronic ballots. ECF 104, 1236-37, No. 144 (although later overturned on appeal). *Id.*

⁶ The vendor manual explains how the GEMS software can be programmed to alter the number of memory cards which can result in lost votes. ECF 104, 1241, No. 156, 1359.

(15) a voter cast votes in two school board races in August 2012, although only one race should have been on her electronic ballot. ECF 104, 1233, No. 134.

(16) another chancellor overturned a suburban sales tax hike referendum in August 2012 due to the machines rendering the wrong electronic ballots. ECF 104, 1237, No. 144.

(17) The Tennessee Secretary of State Hargett admits that thousands of voters were rendered the wrong electronic ballot in the August 2012 Shelby County elections. ECF 104, 1299. At least 720 were voters that impacted on Plaintiff Kernell's state legislative reelection effort. ECF 104, 1205-1206, No. 23. One was SAVE member David Holt when attempting to early vote for Kernell.⁷ ECF 104, 1233-34, No. 134, 1379-80. SAVE member Dr. Joseph Weinberg reported the problem, and office voter records were altered by the SCEC administrator to instead show that they voted in the correct district, evidencing an insidious or fraudulent intent. ECF 104, 1233, No. 133.

(18) in November 2012, the machines again rendered many voters the wrong electronic ballots. ECF 104, 1235, No. 137.

(19) the sign-in log showed 801 had voted at one precinct but the voting machine accumulator only showed 293 votes cast. ECF 104, 1235, No. 137.

⁷ Kernell was not re-nominated. ECF 104, 1268, No. 246.

2014 Elections

(20) some memory cards carrying precinct votes were not uploaded in a 2014 close county commission election. ECF 104, 1373.

(21) some voters received the wrong electronic ballot in the August 2014 elections. ECF 104, 1239, No. 151.

2015 Elections

(22) at least seven memory cards carrying hundreds of votes were not uploaded in a close city-wide election. ECF 104, 1240, No. 155, 1358.

(23) the system indicated precinct cards carrying votes were uploaded when they were not. ECF 104, 1360.

(24) 100 vote variances from results were found on machines at precinct polls. ECF 104, 1242, No. 160, 1352, fn. 23.

(25) Defendant SCEC Commissioner Lester expressed concerns about the “discrepancies in the election night totals and those presented for certification” and recommended a forensic audit in 2015, which was never done. ECF 104, 1241-42, No. 159.

(26) a communication breakdown between the GEMS database, server and memory cards was reported. ECF 1, 1245, No. 170, 1364.

(27) there were numerous reports of machine malfunction, ECF 104, 1374.⁸

(28) SAVE members, the Stockings, experienced voting problems in 2015. ECF 104, 1247, No. 173, 1393-97.

2016 Elections

(29) the machines rendered voters the wrong electronic ballots in a city council race. ECF 104, 1246-47, No. 173.

(30) the former Tennessee Attorney General's vote flipped when he tried to vote in a 2016 congressional election. ECF 104, 1247, No. 173.

(31) Lester exclaimed that on numerous occasions the voter's choice for Hillary Clinton flipped to Donald Trump, or when voting for Trump was totally removed from the ballot. ECF 104, 1247, No. 173, 1398.

(32) Dr. Weinberg observed at the SCEC annex multiple opportunities for poll workers to insert an unauthorized memory card due to lax oversight. ECF 104, 1246, No. 172.

2018 Elections

(33) Lester voted against certification due to voters rendered wrong electronic ballots in 2018 and called for an investigation, ECF 104, 1247-1248, No. 174-176.

⁸ An 10/5/18 Help Desk Log reports "machine '0' operating erratically," "voting totals machine #2 50329 (showing 5329)." ECF 104, 1374.

(34) even former SCEC election commissioner Myra Stiles was sent an incorrect absentee ballot. ECF 104, 1249, No. 177.

(35) Memphis City Councilwoman Robinson called for an investigation due to the machines rendering voters the wrong electronic ballots. ECF 104, 1247-48, No. 174.

Despite the repeated exposure of the voting system to the internet, disenfranchisement of thousands of voters, vote flipping, and admission by the SCEC in a Request for Proposal that the lack of vendor support for the “critical and obsolete software presents an unacceptable risk to the election delivery capability and operation of the election commission,” ECF 104, 1223, No. 84, the machines have not been decertified. In fact, there is no record that the state defendants ever even recertified the voting machines bought in 2006. State law requires recertification every eight years after an examination of the machines. ECF 104, 1214-15, No. 52, 1251-52, Nos. 184-186. The machines cannot be recertified according to the plaintiffs’ expert because the platform is obsolete (rendering the voting systems vulnerable due to the inability to install needed security patches). ECF 104, 1252, No. 186.

As set forth in the Center for American Progress Report, the machines are “easily hacked, can be reprogrammed to ‘predetermine electoral outcomes,’” are “susceptible to malicious vote-stealing software,” and more likely to vote-flip due to age. ECF 104, 1258, No. 212. The defendants’ failure to decertify the machines causes a substantial increased risk of lost or

miscounted votes, and vulnerability to hacking. ECF 104, 1252-53, No. 186.

In November 2017, unencrypted data of 650,000 Shelby County voters was exposed at an international hackers' convention from an electronic poll book sold on E-bay. ECF 104, 1200, No. 9, 1264, No. 233. The information can be used to disenfranchise thousands of voters on voting day by incorrectly marking some voters as having already voted. ECF 104, 1200, 1303.

According to the plaintiffs' expert, the Express Poll Books ["poll books"] used in Shelby County have architectural flaws to their security model and lack sufficient cryptography to protect voter data or to prevent malicious tampering. ECF 104, 1264, No. 232, 1420-21. The voter data in the poll books can be "changed at will, either maliciously or by accident, with no record of having occurred." *Id.*

The poll books malfunctioned resulting in long voting lines in October 2018. *Id.*, ECF 104, 1264, No. 232. Voters were denied provisional ballots when machine malfunction occurred. ECF 104, 1201, No. 11. Over six thousand voters were not found in the poll books, ECF 104, 1199-1200, No. 8. And, those who needed larger type on the voting machine were provided an electronic ballot that bumped one major party's gubernatorial nominee onto the second page. ECF 104, 1201, No. 11. The plaintiffs' expert declares that these are not garden-variety election irregularities, with the sheer number of incidents negatively impacting on voters in Shelby County far greater than other jurisdictions. ECF 104, 1262, No. 225.

The *Stateline* publication documents two decades of continuing barriers to the right to vote in Shelby County, with voters rendered the wrong electronic ballots, people falsely told they had already voted, and improper registration purges. ECF 104, No. 11, 1304-12. Even, Hargett admits that “[n]early every election cycle in the county in recent memory has been plagued by a myriad of errors and complaints of wrongdoing” that has “eroded public confidence.” ECF 104, 1236, No. 140, 1299. And, Lester stated that she believes “manipulation” occurs inside the SCEC “either at satellite zones during the course of reconciliation and possibly during tabulation.” ECF 104, 1235, No. 138, 1384. She reports that the daily early vote totals do not balance, and “rumors that ballots have been backed out.” *Id.*

The Tennessee State Comptroller found 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.” ECF 104, 1238, No.146. Despite requests to the Comptroller, Hargett, Coordinator of Elections Goins (faxed), Phillips, the DOJ, Asst. U.S. Attorney, FBI, and testimony by SAVE to the Defendant Tennessee Election Commission, a forensic audit of the SCEC system has never been done. ECF 104, 1227-28, No. 108, 1237, Nos. 145-146, 1239, No. 150, 1242, Nos. 160-161, 1243, No. 164, 1251-53, Nos. 183-184, 186, 189-190. Even the calls by Lester for a forensic audit because election night vote tallies do not match those presented for certification, is disregarded. ECF 104, 1241-42, No. 159, 1360-61. Nor, have the defendants implemented any uniform

cybersecurity standards. ECF 104, 1254, No. 190, 1258, No. 213.

The SCEC refuses to produce the audit logs for the voting machines claiming they are proprietary to the vendor. ECF 104, 1241, No. 158. And, the plaintiffs were denied the request for their expert to examine the voting machines, software and tabulators. ECF 104, 1254, No. 191. Thus, the plaintiffs are unable to further prove the malfeasance, malware, and malfunction without a court order.

The multitude of lawsuits due to the unconstitutional voting system and practices has continued with a chancellor ordering the SCEC to open more early vote sites after the NAACP alleged voter suppression in predominately black neighborhoods. ECF 104, 1256, No. 205. In October 2018, the Tennessee Black Voter Project filed a lawsuit when the SCEC rejected approximately half of the 36,000 voter registration applications received. ECF 104, 1256, No. 206.⁹

⁹ Amicus Briefs from current and former election officials (bipartisan) of 13 states and cybersecurity experts were submitted on behalf of these plaintiffs to the Sixth Circuit Court of Appeals, succinctly setting forth the realistic danger that the nation's voting systems have become prey to nefarious interests. Dk. 27, 31. The Knox County, Tennessee Election Commission server was infiltrated by hackers who were injecting malicious code into the system in 2018. ECF 104, 1272, No. 262, 1423, No. 6. The United States Intelligence community has stated that foreign actors are already targeting the 2020 election cycle for interference. ECF 104, 1262, No. 224.

This lawsuit was prompted when nothing was done by the defendants, the district attorneys¹⁰ or other law enforcement to address the vulnerabilities in the SCEC system. The plaintiffs include the SAVE nonprofit, Tennessee State Rep. Joe Towns, Jr., Michael Kernell (a former Tennessee state legislator and county school board member), Ann Scott, and Britney Thornton (a candidate in the 2019 Memphis city council elections). The defendants are the local and state election commissions and commissioners, the local election administrator, the state coordinator of elections and the Tennessee secretary of state. ECF 104, 1208-10, Nos. 27-31.

The plaintiffs' claims in their Second Amended Complaint are:

(1) a *42 U.S.C. 1983* claim for violation of the *Fourteenth Amendment's* guarantee of due process due to the substantial burden on their right to vote from the fundamentally unfair voting system and processes; ECF 104, 1275-76, Nos. 270-279.

(2) a *42 U.S.C. 1983* claim for violation of the *Fourteenth Amendment's* guarantee of equal protection due to the more severe burdens placed on the plaintiffs' right to vote and right to freedom of speech and association relative to voting systems used in other counties; ECF 104, 1232, No. 129, 1249, No. 180, 1281, Nos. 297-314.

¹⁰ Bill Gibbons served as Shelby County District Attorney from 1998-2011 and Tennessee Commissioner of Homeland Security from 2011-2016. He is the husband of Sixth Circuit Judge Julia Gibbons.

(3) Declaratory and injunctive relief, and mandamus against the defendants pursuant to *28 U.S.C. § 2201(a)* and the *Tennessee Constitution*. ECF 104, 1284-87, Nos. 315-332.

The plaintiffs asked the district court to enjoin and require decertification of the SCEC system, and to implement hand-marked paper ballots that can be optically scanned. They seek cybersecurity protections, a ban on remote transmission, and use of voting machines and systems with no wireless communication capability. They ask to observe all stages of election processing; to be notified of any irregularities; for accurate audits; and appointment of an Independent Master. They request a forensic audit of the software, voting machines, and tabulators, along with production of the audit logs. They demand criminal background checks of workers, vendors and volunteers; preservation of all digital ballot images; and the retention of the current voting systems until the expert examination. ECF 104, 1287-93.

On September 13, 2019, the district court dismissed the case, opining that the plaintiffs did not have standing. App. 13-39.

On appeal, the Sixth Circuit affirmed the dismissal on January 24, 2020. App. 1-12. The petition for rehearing en banc was denied on March 10, 2020. App. 42-43.

REASONS FOR GRANTING THE PETITION

I. This is a Case of Exceptional Importance to Preserve the Fundamental Right to Vote

“[T]he right to vote freely for the candidate of one’s choice is the essence of a democratic society, and any restrictions on that right strike at the very heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Equal protection applies to the manner of the exercise of the right to vote. 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).

This case is of exceptional importance in that the plaintiffs are challenging their fundamentally unfair voting system.

A. Standard for Standing

The U.S. Supreme Court standard to determine standing has been stated as follows:

It is by now well settled that ‘the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’ ---an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of...Third, it must be likely, as opposed to merely speculative, that

the injury will be redressed by a favorable decision.’

United States v. Hays, 515 U.S. 737, 742-43 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).¹¹

B. The Individual Plaintiffs Have Shown a Concrete Injury and Actual Harm

1. The Plaintiffs Allege that the SCEC was Actually Breached

On August 15, 2019, the entire State of Georgia was enjoined from using the AccuVoteTSx/GEMS system due to its proven vulnerabilities. *Curling*, No. 17-cv-02989-AT, ECF 579, *Order*, pg. 152. The *Curling* Court heard expert testimony on the plaintiffs’ motions for preliminary injunction and the jurisdictional issue of standing raised in the defendants’ motions to dismiss. *Id.*; *Curling*, 334 F. Supp. at 1307. The *Curling* court found standing.

In this case, the Sixth Circuit held that the same exact voting system hacked anywhere in the United States, did not suffice to show the imminence of injury in fact for standing by these plaintiffs.¹² (App. 12.) Yet,

¹¹ Because the opinions below did not hold against the plaintiffs as to the fairly traceable, and redressability elements, they are not discussed herein. The plaintiffs rely upon and incorporate by reference their arguments in their brief to the Sixth Circuit, Dk. 22, pgs. 57-64.

¹² The district court did not hear proof on these plaintiffs’ motions for temporary restraining order, preliminary injunction, or on the defendants’ motion to dismiss for lack of jurisdiction. App. 13-39; *Shelby Advocates for Valid Elections v. Hargett*, 348 F. Supp. 3d 764 (W.D. Tenn. 2018); ECF 138.

the facts in this case as to breach of the system are more egregious.

First, both cases allege that the voting system was breached. In *Curling*, two cybersecurity experts hacked the system. *Curling*, 334 F. Supp. 3d at 1310, ECF 104, pg. 1250, No. 181. In this case, the *TACIR Report* documents a critical security breach where the voting system was found to be exposed to the internet and to have *unauthorized editing software*. The TACIR further found that *someone was attempting to edit saved election summary reports, perhaps to agree with altered vote totals* in the database file.

Second, in *Curling* the hackers found voter data exposed online. *Curling*, 334 F. Supp. at 1310. In this case the individual plaintiffs' voter data *was exhibited at an international hacker's convention* when an unwiped poll book was sold on E-Bay.

Third, in *Curling*, the hackers accessed system passwords. *Curling*, 334 F. Supp. at 1310. In this case, passwords were insecurely emailed, *and 29 unauthorized users given access*.

Fourth, in *Curling*, a plaintiff alleged he was not able to vote when his name did not appear in the roles for the district where he resided. *Curling*, 334 F. Supp. at 1316. In this case, SAVE member McClure alleges that she was not permitted to vote when the roles

incorrectly showed she had already voted.¹³ ECF 104, 1604-06.

Fifth, in *Curling*, the plaintiffs alleged that their votes can be manipulated by remote transmission from satellite zones on election night. *Curling*, 334 F. Supp. at 1316. In this case, the plaintiffs allege the same. ECF 104, 1260-61.

The *Curling* hack was from cybersecurity experts who promptly reported it to state and federal authorities. Yet, the *TACIR Report* warned of *fraud*, and urged good faith investigation by the SCEC as to who had access to the central tabulator, the unauthorized software, and *who did the illegal install*. Thus, the harm alleged by these plaintiffs has occurred. A forensic audit has never been done to remove the unauthorized editing software, malware from the internet exposure, or any coding changes from unauthorized users. There is a real and immediate threat of repeated injuries to the plaintiffs due to the “continuing present adverse effects” from the corrupted server, tabulator and system that burdens their future right to vote in the 2020 elections. *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

¹³ The Court can consider that Affiants McClure, Black, Holt and the Stockings are SAVE members, although not so expressly identified in the *SAC*. See *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1147 (7th Cir. 2010).

2. The Plaintiffs' Allege Concrete and Particularized Individual Past and Future Harm

a. Violation of Due Process

An intangible injury can be concrete, such as free speech. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (citing *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009)). This Court has reiterated that the right to vote is individual in nature and voters who allege facts showing disadvantage to themselves as individuals have standing to sue. *Gill v. Whitford*, 377 U.S. 138 S. Ct.1916, 1929 (2018)(citing *Reynolds*, 377 U.S. at 561); *Baker v. Carr*, 369 U.S. 186, 206 (1962).

The individual plaintiffs are Shelby County residents who are severely burdened in attempting to exercise their right to vote, and/or efforts to win election to public office. ECF 104, 1205, No. 22. The plaintiffs allege both past and future harm: (seven hundred twenty district ballot voters given the wrong ballot in incumbent Kernell's state legislative district race causing him to misallocate campaign time and thousands of dollars on the wrong voters and fail to connect with the right ones), ECF 104, 1205-06, No. 23, 1268, No. 246; (candidate Kernell was never provided certified copies of poll tapes requested in August 2018 before certification as required per state law), ECF 104, 1206, No. 23; (Kernell observed a lone SCEC poll worker uploading memory cards for remote transmission at a satellite zone creating a threat of the illegal substitution of cards that would void and/or dilute his vote), ECF 104, 1206, No. 23, (as a result of the defendants' actions, Towns and Thornton will

expend additional resources on poll workers and a cybersecurity expert to monitor the election process in 2020, and were personally injured with their money and time expended in past elections),¹⁴ ECF 104, 1267-68, No. 245; (Kernell would have never run if he had known that there would be hundreds of random floating votes, regrets that his decision was made under false circumstances due to the actions of the defendants, and was personally injured with his money and time expended), ECF 104, 1268-69, No. 247; (plaintiffs have expended additional personal funds, and time, to bring this lawsuit to address the constitutional violations), ECF 104, 1269, No. 248; (plaintiffs will be required to cast their votes using the insecure, antiquated voting systems causing irreparable injury and severely burdening their constitutional rights), ECF 104, 1269, No. 251; (imminent injury to the plaintiffs of future data breaches due to the defendants' failure to address the prior breach and cybersecurity), ECF 104, 1270, No. 253; (Kernell, Towns, and Thornton will be forced to expend additional sums and time to reach voters in different districts), ECF 104, 1270, No. 254; (defendants have covered up and shrouded in secrecy the cause of and results of breaches in security and malfeasance), ECF 104, 1271, No. 256; (violation of the plaintiffs' constitutional rights is an irreparable injury), ECF 104, 1271, No. 257.

¹⁴ The panel *Opinion* incorrectly states that they only allege future harm. App.10-12. Towns also suffered harm when he lost a congressional bid in 2008.

Further, the plaintiffs not only allege injury due to the insecure AccuVoteTSxs.¹⁵ They allege facts of a SCEC system with non-uniform standards and rules; that employs untrained or improperly trained personnel; and with wholly inadequate systems, processes, and funding. *League of Women Voters v. Brunner*, 548 F.3d 463, 466 (2008); ECF 104, 1198, No. 5. They allege that the problems are pervasive, severe, chronic, and persistent. *Id.*; ECF 104, 1200-01, No. 10. They have concrete plans to vote in the fall. ECF 104, 1205-08, Nos. 23-26. The continued use of the breached SCEC system, along with the failure to address the maladministration, presents a case and controversy.

¹⁵ Just this year, the SCEC has issued a Request for Proposal ["RFP"] for new voting equipment. As this Petition is submitted, the funding has not been approved, a contract has not been executed, and new voting machines are not in service. One SCEC commissioner has stated publicly that new machines will not be in service in 2020. The SCEC recommended system includes computers that have the capacity to be maliciously exploited, and undetectably change votes. ECF 104, 1418, Nos. 11-12. The RFP also shows that the tabulator has two mirror images at other sites, providing other entry points for hacking. Any new system connected to the county internet will still be compromised by the breach reported by TACIR. The RFP does not include replacement of the deficient poll books. And, the defendants' policy of failing to forensically audit, or allow inspection of the audit logs enhances the ability of hackers to gain access of any new equipment. ECF 104, 1227-28, No. 108, 1254, No. 192. There is a documented history of voter suppression, maladministration, malfeasance, and deliberate indifference or willful blindness by the SCEC. ECF 104, 1270-71, No. 256; 1275, No. 273. The plaintiffs allege that systematic relief is needed. ECF 104, 1205, No. 22; 1257, No. 209. Thus, without redress, the defendants' wrongful behavior can reasonably be expected to recur. *Stewart v. Blackwell*, 444 F.3d 843, 856 (6th Cir. 2006)(rehearing, en banc, granted)(vacated by 473 F.3d 692 (6th Cir. 2007).

Lujan, 504 U.S. at 366 (past exposure to illegal conduct along with continuing, present adverse effects can present a case or controversy for injunctive relief); *League of Women Voters v. Fields*, 352 F. Supp. 1053 (E.D. Ill. 1972) (motion to dismiss denied where plaintiffs allege an uneven administration by state officials of their duties).

Moreover, the plaintiffs allege injury from their data exposed at the hackers' convention. ECF 104, 1270, No. 253. The circuit courts have failed to reach consensus as to when the prospects of future injury resulting from a data breach presents a 'substantial risk' of actual harm. *See, e.g., Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017); *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384 (6th Cir. 2016); *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015). The Sixth Circuit panel did not address the issue. The district court held the likelihood of a significant risk of harm too speculative as to hacking or manipulation of the SCEC system, but ignored the facts related to the poll book data exposure. App. 13-39. The exposure suffices for allegations of injury-in-fact at the pleading stage due to a substantial risk of actual harm from identity theft.

b. Denial of Equal Protection

Shelby County has the largest number of number of black (African American) registered voters in Tennessee. ECF 104, 1256, No. 203. No other county in the state uses the AccuVoteTSx. ECF 104, 1256, No. 204. Plaintiffs Towns and Thornton are African-American.

Hamilton County is the fourth largest county in the state and uses optical scan voting machines. ECF 104, 1256, No. 201. Counties with optical scan machines have greater state mandated safeguards, such as automatic mandatory audits of the paper ballots cast, independent expert review of the system, and a ban on the machines having “any capacity, enabled or disabled, for wireless communication of any sort.” ECF 104, 1217, No. 65, 1259-1261, Nos. 216-220,¹⁶ *Tenn. Code Ann. 2-20-101, et. seq.*

To the contrary, the AccuVoteTSxs have modems, and are used at satellite zones to remotely transfer votes to the tabulator. ECF 104, 1260-61, No. 219.¹⁷ The plaintiffs’ expert states that the transmission of election results over a network “exposes the system to even greater risk of compromise” than other counties such as Hamilton that ban wireless transmission. ECF 104, 1262-63, No. 226.

The plaintiffs, including Towns and Thornton, allege a dilution of their votes due to the vulnerabilities of the AccuVoteTSx making it less likely that their votes will be counted than those voters in counties using hand-marked paper ballots. ECF 104, 1207, Nos. 23-26; 1273, Nos. 264-65. Moreover, they are further prejudiced due to the risk of coronavirus exposure from the SCEC use of touchscreen machines. “If such

¹⁶ The recommendation of the SCEC is for a product that has wireless capability. The plaintiffs’ prayer for relief includes a request to enjoin the use of such equipment.

¹⁷ The local defendants misrepresented to the Court that the votes are not remotely transmitted. ECF 104, 1226, No. 101, ECF 44, pgs. 57-58.

impairment does produce a legally cognizable injury, the plaintiffs are among those who have sustained it.” *Baker*, 369 U.S. at 208.

The plaintiffs have standing because they assert a “plain, direct and adequate interest in maintaining the effectiveness of their votes’...” *Id.* (citing *Coleman v. Miller*, 307 U.S. 433, 438 (1939); *see also Gill*, 136 S. Ct. at 1930 (vote dilution is a distinct specific injury); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)(a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction); *Reynolds*, 377 U.S. at 563 (“[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable”); *Stewart*, 444 F.3d at 847-48 (held standing for voters residing in four Ohio counties to challenge the use of punch card ballots where other counties utilized more reliable voting methods).

C. SAVE Has Standing

1. Organizational Standing

Preserving the fundamental right to vote is not an abstract social interest. *Common Cause Indiana, v. Lawson*, 937 F.3d 944, 956 (7th Cir. 2019); *Curling*, 334 F. Supp. 3d. at 1319. SAVE’s purposes of research, auditing of election results, observation, education, voter registration, and poll watching have been frustrated by the defendants’ actions. ECF 104, 1203-04, No. 17-19 (the actions of the defendants substantially impede SAVE’s ability to further its purpose of voter registration); ECF 104, 1277, No. 277

(the lack of an adequate process of notification and problem resolution has frustrated SAVE's voter registration purpose); ECF 104, 1254, No.191 (SAVE denied request for its expert to examine the SCEC system). The Sixth Circuit erred in holding that injuries to an organization that are part of its core mission cannot be considered for standing. App. 9-10; *Crawford v. Marion Cty Election Board*, 553 U.S. 181, 189 n. 7 (2008)(political party had standing to challenge a voter law due to added GOTV costs); *Common Cause Indiana*, 937 F.3d at 954 (voter organization injury due to added work within its core mission are concrete injuries).

SAVE has a personal stake in the outcome of this action due to the past and future drain and diversion of its resources from its missions. ECF 104, 1204, No. 19 (SAVE's resources are being diverted and drained by the need to address the continuing voting inequities and irregularities in the county). The time and expense SAVE has expended is evident for the open records pre-litigation investigation; preparation and copyright of the *VTI Report*; the faxed demand letters; and travel to testify before the state election commission. ECF 104, 1204, No. 19, 1265, No. 236. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Brunner*, 548 F.3d. at 466 (voter nonprofits allowed to proceed where they alleged harm from the interference with their voter registration efforts). Even, the district court acknowledged that funding this lawsuit may divert funds from SAVE's other goals. App. 30-31.¹⁸

¹⁸ If further facts supporting standing are needed, including the diversion of SAVE's resources, then the plaintiffs ask that the Court remand and allow them to amend their SAC.

Thus, SAVE has shown more than an identifiable trifle of injury to confer standing. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n. 14 (1973)(noting standing previously found related to a fraction of a vote, a \$5 fine, or \$1.50 poll tax); *Fair Housing Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 445-46 (3d Cir. 1998); *League of Women Voters of Mich. v. Johnson*, 352 F. Supp. 3d 777 (E.D. Mich. 2018)(upheld standing where nonprofit's mission of education and voter engagement more difficult by the gerrymandering).

2. Associational Standing

SAVE's members have been specifically aggrieved by defendants' actions which have infringed on their fundamental right to vote and to equal protection. *Sandusky*, 387 F.3d at 573-74 (quoting *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996)). Thus, SAVE has standing. ECF 104, 1204, No. 19, *Curling*, 334 F. Supp. 3d at 1319 (citing *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008)).

SAVE member Kernell's individual standing is set out above. He alleges absent injunctive relief, it is certainly impending that serious and widespread election improprieties will disenfranchise or severely burden and dilute his fundamental right to vote in the 2020 elections. ECF 104, 1205-07, No. 23. *Lujan*, 504 U.S. at 595, n.2.

Further, SAVE member affiants Black, the Stockings, Holt and McClure each were burdened in

attempting to exercise their fundamental right to vote, and have standing to sue the defendants in their own right. ECF 104, 1233-34, No. 134; 1247, No. 173; 1248-49, Nos. 176, 178; 1265, No. 237. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 181 (2000).

II. There is a Split in the Circuits as to the Correct Standard for a 12(b)(1) Motion to Dismiss

The panel noted a split in the circuits on the standard to apply for a 12(b)(1) motion to dismiss in the aftermath of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). App. 9-10. While the *Opinion* stated that the plaintiffs would fail under either standard, the panel only applied the “plausibility” standard applicable to a 12(b)(6) motion.

Twombly and *Iqbal* are “ill-suited to application in the constitutional standing context” because the 12(b)(6) analysis assesses the merits of a claim. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). “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.’” *Id.*; (quoting *Lujan*, 504 U.S. at 561); *Ross v. Bank of America*, 524 F.3d 217, 225 (2d Cir. 2008). Compare, *Muscogee (Creek) Nation v. Oklahoma Tax Commission*, 611 F.3d 1222, 1227, n.1, (10th Cir. 2010)(applying same standards under Rule 12(b)(1) applicable to Rule 12(b)(6) motion to dismiss). The *Opinion* failed to

“accept as true all material allegations of the complaint” as to the plaintiffs’ injuries, or to “construe the complaint in the favor” of the plaintiffs. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

For example, the Sixth Circuit erred in attributing all the allegations of voter disenfranchisement as past “human error.” App. 7. After the August 2012 election fiasco, the SSEC Administrator Holden was placed on probation which creates an inference of wrongdoing or that he “ordered” the “mistakes.” ECF 104, 1346. The panel improperly judged at the pleading stage that the cause of thousands of voters rendered wrong electronic ballots in numerous elections was not machine malfunction, malfeasance, or even foreign interference designed to wreak havoc.¹⁹ ECF 104, 1250, No. 181. And, it can be presumed that the defendants will always make these “mistakes” from Hargett’s own admission of a repeated pattern. ECF 104, 1299.

It further ignored the plaintiffs’ expert declaration finding “circumstantial evidence” of election tampering, “malware,” and “computer system malfunction.” ECF 104, 1264, No. 231. At this stage, the plaintiffs do not have to prove standing. *Lujan*, 504 U.S. at 561; *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65-66 (1987). Construing these facts and the prior *TACIR Report* of an illegal system install in the plaintiffs’ favor, and inferring these facts embrace the necessary facts to support the plaintiffs’

¹⁹ While the defendants claim that erroneous redistricting was the cause of the voters receiving wrong electronic ballots in August 2012, there has been no proffered explanation of the cause in nonredistricting years such as 2015.

claims of injury to their fundamental right to vote, suffices for injury to constitute standing at the pleading stage.²⁰

Because there is a split in the circuits as to the proper standard, the Court should grant the petition and resolve this conflict.

III. The Sixth Circuit’s “Inevitable Harm” Standard is Inconsistent with This Court’s Standard for Imminence

Standing may exist where the plaintiffs have shown a ‘risk’ that the harm will occur even where it is not literally certain the harm they identify will come about. *Spokeo*, 136 S. Ct. at 1549;²¹ (citing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414, n.5 (2013));²² *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, but had not yet experienced disease

²⁰ The plaintiffs would also meet a *Twombly Iqbal* “plausibility” test because there are enough facts to raise reasonable expectation that discovery will reveal evidence of the wrongdoing where the *TACIR Report* has already documented illegal access to the SCEC system and warns that without action there is no confidence in the integrity of the vote. *Twombly*, 550 U.S. at 556.

²¹ “[T]he law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure,” *Spokeo*, 136 S. Ct. at 1549.

²² The *Clapper* Court dismissed the case after discovery, while noting that the Court often did not find standing for cases in the fields of intelligence gathering and foreign affairs. *Clapper*, 568 U.S. at 407-409.

symptoms); *Monson v. Geertson Seed Farms*, 561 U.S. 139 (2010) (standing found for farmers where government deregulation would result in bees likely migrating and contaminating their crops); *Sutton v. St. Jude Medical S.C., Inc.*, 419 F.3d 568 (6th Cir. 2005) (standing found based upon increased risk of future harm due to possible medical device malfunction); *Banfield v. Cortes*, 922 A.2d 36, 44 (Pa. Commw. Ct. 2007) (standing where electors have no way to verify that the votes cast on a DRE have been recorded and will be counted).

In *Stewart*, the Sixth Court at the summary judgment stage held that the punch card voting machines violated equal protection where there was only an increased risk that the individual plaintiffs' votes would be improperly discounted.²³ *Stewart*, 444 F.3d at 876-77. The Court relied upon *Sandusky*, which found standing for plaintiffs who brought claims on behalf of voters who might be denied a provisional ballot at a precinct if a poll worker could not confirm eligibility. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004). And, in *Brunner*, (authored by Judge Julia Gibbons after *Sandusky*), the Sixth Circuit affirmed the denial of a motion to dismiss where the plaintiff nonprofit and individual voters alleged violation of equal protection and substantive due process because Ohio's voting

²³ While the panel gave *Stewart* short shrift, that decision was held not moot despite the defendants' claim that punch card technology would be discontinued by the 2006 federal election. *Stewart*, 444 F.3d at 855-56. It was only vacated because the parties subsequently agreed. *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007); see also, *Brunner*, 548 F.3d at 473.

system was so deficient as to deny or severely burden their right to vote. *Brunner*, 548 F.3d at 463.²⁴ There was no requirement in *Brunner*, that the future alleged injuries be proven “inevitable” at the pleading stage.

Yet, in this case, the panel relying on the false premise that all allegations, except for vote-flipping, were past “human error,” held that the imminence found to exist in *Sandusky* only applies where it is “inevitable” that the voting rights of individuals will be denied. The panel held that standing to seek injunctive relief is only found if it is alleged that the election “mistakes” always happen or that election officials ordered the “mistakes.” App. 7.

The panel was further misguided in relying on prior discrimination and police misconduct decisions based upon individual subjective facts, where this case concerns antiquated election machinery more likely to fail with every next election and malfunction capable of repetition yet evading review. *Kingdomware Technologies, Inc. v. U.S.*, 136 S. Ct. 1969 (2016). In *Brunner*, the Sixth Circuit expressly held that one intervening plaintiff had stated a due process claim where she alleged that the touchscreen voting machine “jumped” from her preferred candidate to another candidate, possibly causing her vote to be counted for the wrong candidate. *Brunner*, 548 F.3d at 470, 478. Lester called for forensic audits in two different election years and voted against certification due to vote-flip malfunction. The SAC alleges numerous allegations of vote flipping over many elections,

²⁴ It is impossible to square the differing results in *Brunner*, *supra*, and the decision of this panel chaired by Judge Gibbons.

including to SAVE member Black. ECF 104, 1399. Contrary to the panel *Opinion*, this did happen in Kernell's election. App. 7-8; ECF 104, 1375. Yet, the panel has inexplicably departed from the Sixth Circuit's own precedents.

More applicable is this Honorable Court's holding that the term "imminence" is concededly a somewhat elastic concept." *Lujan*, 504 U.S. at 565, n. 2. It can include a "realistic danger" and risk of sustaining a direct injury. *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979); *Pennell v. San Jose*, 485 U.S. 1, 8 (1988). The plaintiffs who intend to vote in 2020 have pled that there is a substantial risk that their votes will not be accurately counted. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)(standing found for plaintiffs due to risk of prosecution from future political statements)(citing *Clapper*, 568 U.S. at 402); *see also Galaria*, 663 F. Appx. at 384.

The heightened "inevitable" injury standard for imminence now set by the Sixth Circuit disregards the realistic danger of undetectable hacking or internal manipulation. It also departs from prior precedent that excuses definitive proof where the injury is impossible to show with absolute certainty or cannot be specifically identified in advance. *Tenn. Rep. Party v. SEC*, 863 F.3d 507, 517 (6th Cir. 2017). Because the defendants control the SCEC system and refuse inspection, definitive proof of a piracy of the plaintiffs' votes should be excused at this stage.

Where a voting system has been shown by a state agency and the election vendor to have been compromised on more than one occasion; national

cybersecurity experts have warned that the system is highly vulnerable to hacking; another federal court has enjoined the DREs due to proven vulnerabilities; there is evidence of malware; voter data has been exposed; and there has been a repeated pattern of maladministration; common sense dictates that without redress there is a realistic danger and risk that the plaintiffs will be harmed again.

CONCLUSION

The plaintiffs allege facts that if accepted as true, with all inferences drawn in their favor, show a substantial risk that their future votes will not be properly counted. They have alleged an actual breach, maladministration, malfeasance, and circumstantial evidence of malware. The standards applied by the Sixth Circuit allow a dangerous cybernetic conundrum. Voting is private, but counting should be public. The Court should grant the petition.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0028p.06

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

No. 19-6142

[Filed January 24, 2020]

SHELBY ADVOCATES FOR VALID)
ELECTIONS; MICHAEL KERNELL;)
JOE TOWNS, JR.; ANN SCOTT;)
BRITNEY THORNTON,)
<i>Plaintiffs-Appellants,</i>)
)
<i>v.</i>)
)
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)
ELECTION COMMISSION; KENT)
YOUNCE, JUDY BLACKBURN,)
GREGORY DUCKETT, DONNA)
BARRETT, JAMES H. WALLACE, JR.,)
TOM WHEELER, AND MIKE)

App. 2

MCDONALD, in their official)
capacities as members of the)
Tennessee Election Commission;)
LINDA PHILLIPS, in her official)
capacity as Administrator of the)
Shelby County Election)
Commission; SHELBY COUNTY)
ELECTION COMMISSION; ROBERT)
MEYERS, NORMA LESTER, DEE)
NOLLNER, STEVE STAMSON, and)
ANTHONY TATE, in their official)
capacities as Board)
Commissioners of the Shelby)
County Election Commission,)
Defendants-Appellees.)
_____)

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 2:18-cv-02706—Thomas L. Parker,
District Judge.

Argued: December 3, 2019

Decided and Filed: January 24, 2020

Before: GIBBONS, SUTTON, and MURPHY,
Circuit Judges.

_____)
COUNSEL

ARGUED: Carolyn J. Chumney, CAROL CHUMNEY
LAW PLLC, Memphis, Tennessee, for Appellants.
Janet M. Kleinfelter, OFFICE OF THE TENNESSEE

ATTORNEY GENERAL, Nashville, Tennessee, for State of Tennessee Appellees. Pablo A. Varela, HARRIS SHELTON HANOVER WALSH, PLLC, Memphis, Tennessee, for Shelby County Appellees. **ON BRIEF:** Carolyn J. Chumney, CAROL CHUMNEY LAW PLLC, Memphis, Tennessee, for Appellants. Janet M. Kleinfelter, Matt F. Jones, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for State of Tennessee Appellees. Pablo A. Varela, John L. Ryder, HARRIS SHELTON HANOVER WALSH, PLLC, Memphis, Tennessee, for Shelby County Appellees. Megan C. Keenan, COVINGTON & BURLING LLP, Washington, D.C., Andrew Grosso, ANDREW GROSSO & ASSOCIATES, Washington, D.C., for Amici Curiae.

OPINION

PER CURIAM. Shelby Advocates for Valid Elections (SAVE) and four individual plaintiffs sued an assortment of state and local election officials and entities: Tennessee’s secretary of state, coordinator of elections, and election commission and its members, along with the Shelby County Election Commission and its members. The claimants allege that, in future elections, the defendants will burden their right to vote, dilute their votes, and disenfranchise them in violation of the Fourteenth Amendment’s Equal Protection and Due Process clauses. The district court granted the government’s motion to dismiss the case for lack of standing. We affirm.

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Based in Shelby County, Tennessee, SAVE focuses on “research, advocacy, and education to ensure the fundamental right to vote in public elections.” R. 104 at 8. It pursues these goals by submitting open records requests about elections, reporting on election security, monitoring national developments in election law, organizing public events, and advocating for election reform.

Plaintiffs Michael Kernell, Ann Scott, Britney Thornton, and Joe Towns, Jr. allege that they plan to vote in future Shelby County elections. And they fear, the complaint says, that those votes will be denied or substantially burdened. Towns alleges that he plans to run for office in the future, and Thornton alleges that she intended to be a city council candidate in 2019. Due to election administration problems in Shelby County, they claim that they will have to spend extra money campaigning and monitoring the election.

The plaintiffs also allege a variety of election administration problems. They say election workers are poorly trained, sometimes distributing the wrong ballots (say by giving a voter who lives in District 1 the ballot for District 2), sometimes recording the wrong address when registering a voter, and once distributing a poll book without redacting voters’ personal information. Election workers, the plaintiffs allege, also have failed to recertify the voting machines as Tennessee requires. The plaintiffs also claim election personnel have not followed fair protocols for uploading votes from each polling place and that they have adjusted vote totals after uploads.

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Plaintiffs also complain about Shelby County's use of digital voting machines. Because the machines connect to the Internet, the plaintiffs allege, that makes them vulnerable to hacking and cyberattacks. The machines may also be hacked, plaintiffs allege, by insertion of a memory card containing malware. And the machines do not produce a paper record of each voter's choices, which allegedly makes them difficult to audit for voter-protection purposes, whether to confirm that the machines recorded the votes accurately at the outset or to confirm that hackers did not modify the votes afterwards. The plaintiffs allege that the machines sometimes "flip" votes, recording a vote cast for A as a vote cast for B due to programming or maintenance problems.

Each of these problems, the plaintiffs say, is partly the responsibility of the State as well. They claim that it has failed to enact standards that sufficiently protect elections from hacking and voting-machine malfunctions because it does not require all counties to use paper ballots with optical scanning, and it does not prohibit Internet-capable voting machines or prescribe rules for handling voting-machine memory cards.

To remedy these problems, the plaintiffs request a variety of forms of relief. They ask for an injunction requiring Shelby County to buy secure election equipment and allocate adequate funding to protect its elections. They ask for a permanent injunction preventing the commission from using the current machines in future elections. And they ask for a mandamus order compelling decertification of the existing voting machines, implementation of uniform

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testing for voting machines, and reexamination of the voting system, along with appointment of a supervisor to review current voting procedures and oversee the requested changes.

To remedy the election administration problems, the plaintiffs seek an injunction requiring, among other things, system password protection, public observation of vote processing, pre-election voting machine testing, post-election audit procedures, voter data protection, background checks for poll workers and equipment vendors, preservation of all digital ballot images, and immediate disclosure of election irregularities before the close of polls on each election day. They also seek a judgment declaring that Shelby County's system violates numerous provisions of the federal constitution.

The district court granted the defendants' motion to dismiss the lawsuit because the plaintiffs lack standing—in particular a concrete injury—to bring the lawsuit. This appeal followed.

A plaintiff has Article III standing if he suffered an injury in fact that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged conduct; and likely to be redressed by a favorable judgment. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016). To obtain declaratory or injunctive relief, a claimant must show a present ongoing harm or imminent future harm. *Grendell v. Ohio Supreme Court*, 252 F.3d 828, 832 (6th Cir. 2001). At the pleading stage, plaintiffs bear the burden of alleging facts establishing each element of standing. *Spokeo*, 136 S. Ct. at 1547.

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The plaintiffs stake their standing to bring this lawsuit on three theories of injury. The individual plaintiffs point to their alleged future risk of vote dilution or vote denial stemming from maladministration and technology problems. SAVE says it has associational standing to litigate on behalf of its members. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). And SAVE says it separately has organizational standing to litigate in its own right because the election problems caused it to divert resources from its other activities. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982).

All three theories share, at a minimum, an imminence problem. The complaint's allegations with respect to injury all boil down to prior system vulnerabilities, previous equipment malfunctions, and past election mistakes. Past may be precedent. But the Supreme Court has not been sympathetic to claims that past occurrences of unlawful conduct create standing to obtain an injunction against the risk of future unlawful conduct. *See O'Shea v. Littleton*, 414 U.S. 488, 495–98 (1974) (allegation, based on past examples, of discriminatory prosecution); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983) (allegation, based on plaintiff's past experience, that policy of using constitutionally excessive chokeholds increased risk of experiencing another).

The crux of the problem is that nearly all of the plaintiffs' allegations of past harm stem from human error rather than errors caused by the voting machines or hacking. Fear that individual mistakes will recur,

generally speaking, does not create a cognizable imminent risk of harm. Think about how the Court addressed this point in *Lyons*, a case in which the plaintiffs sought to enjoin members of a police department, who had violated the constitutional rights of arrestees in the past, from engaging in similar misconduct in the future. The Court concluded that the plaintiff could establish standing only if he pleaded “(1) that *all* police officers in Los Angeles *always*” take the challenged action, using unnecessary chokeholds, when interacting with “any citizen with whom they happen to have an encounter,” or (2) “that the City ordered or authorized police officers to act in such manner.” *Lyons*, 461 U.S. at 105–06. Today’s plaintiffs face a similar plight. They do not allege—they cannot plausibly allege—that Shelby County election officials *always* make these mistakes, and they do not allege that the government entities ordered the election workers to make any such mistakes.

The plaintiffs have tied only one of their allegations of past harm, the “flipped” votes they allege happened in 2016 and in 2018, to machine malfunctions rather than human error. But they do not allege that this vote-flipping ever happened to any of them or in any election in which they were candidates, and the evidence they produced indicates that “all errors” were “corrected prior to casting [the] ballot[s].” R. 104-23; R. 104-24. Even if this were not the case, even in other words if the plaintiffs had adequately alleged past harm, they have not plausibly alleged, much less shown, that future vote-flipping is “certainly impending.” *Clapper v. Amnesty Int’l*, 568 U.S. 398, 402 (2013). Nor, to the extent the Supreme Court has

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suggested the possibility that a “substantial risk” plus mitigation costs can satisfy the imminence requirement, would that make a difference. The plaintiffs have not plausibly shown that there is a substantial risk of vote flipping. *See id.* at 414 n.5; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). In the absence of imminent harm, the individual plaintiffs have no standing to sue and thus no basis for moving forward with their claims.

That same problem dooms SAVE’s claim of associational standing. One precondition of this type of standing is that the association’s “members would otherwise have standing to sue in their own right.” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977). In the absence of cognizable Article III injuries affecting its members, SAVE has no basis for asserting such claims for them.

SAVE’s organizational standing claim faces two distinct problems. One is that it pleads only backward-looking costs, not the imminent future injury needed to establish standing for declaratory and injunctive relief claims like this one. *Grendell*, 252 F.3d at 832. The other is that an organization can no more spend its way into standing based on speculative fears of future harm than an individual can. *Clapper*, 568 U.S. at 416. Plus, SAVE did not divert resources from its mission to prepare for litigation in this case. The alleged diversionary actions—spending money to “bring, fund, and participate in this litigation,” R.104 at 70, and spending its resources “to address the voting inequities and irregularities” throughout the county, *id.* at 9—do

not divert resources from its mission. That is its mission.

In reaching this conclusion, we need not resolve how the pleading standards implicated by motions to dismiss under Civil Rule 12(b)(6) relate to the pleading standards implicated by motions to dismiss for lack of standing in Civil Rule 12(b)(1) motions like this one. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). True, standing-related cases before *Twombly* and *Iqbal* “presum[ed] that general allegations embrace those specific facts that are necessary to support the claim.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); see *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889 (1990) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)). But *Twombly* and *Iqbal* replaced *Conley*’s permissive pleading standard, calling into question the use of the *Conley* rule in the Rule 12(b)(1) context. Our sister circuits have split on the issue. Compare *Muscogee (Creek) Nation v. Okla. Tax Comm’n*, 611 F.3d 1222, 1227 & n.1 (10th Cir. 2010), with *James v. J2 Cloud Servs. LLC.*, 887 F.3d 1368, 1372 (Fed. Cir. 2018). Because today’s plaintiffs would fail under either standard, we see no need to resolve the question today.

Sandusky Cty. Democratic Party v. Blackwell, 387 F.3d 565 (6th Cir. 2004) (per curiam), does not lead to a different conclusion. It concluded that plaintiffs’ feared injury was sufficiently imminent because some voters would likely be denied the chance to vote based on the challenged voting policy. *Id.* at 574. While the plaintiff organizations could not “identif[y] specific voters” who would mistakenly be denied the chance to

vote and thus could not allege with certainty that their members would be harmed, we concluded that they nevertheless possessed standing because “[i]t is inevitable . . . that there will be such mistakes.” *Id.* That reasoning does not apply here. In *Sandusky*, the challenged policy—which violated a federal statute—made it “inevitable” that the defendants would deny individuals their voting rights. Here, by contrast, plaintiffs allege only policies that add risk to the ever present possibility that an election worker will make a mistake. No injury may occur at all. Any analogy to *Sandusky* falls short.

Also falling short are the claims of the individual plaintiffs who plan to run for office in the future. Thornton and Towns say the challenged actions mean they will have to spend more money campaigning outside their districts and hiring poll watchers and a cybersecurity expert. R. 104 at 73–75. But plaintiffs may not bootstrap their way into standing by “inflicting harm on themselves based on their fears of a hypothetical future harm.” *Clapper*, 568 U.S. at 416. Any such approach would eviscerate the Article III standing imperative, as it would permit the plaintiff who is willing to pay for unreasonable mitigation measures to prevent an unlikely future harm to manufacture standing.

The plaintiffs claim that the reasoning of our decision in *Stewart v. Blackwell* establishes standing in this case. 444 F.3d 843 (6th Cir. 2006). True or not, the case makes no difference here. The dispositive point is that the en banc court vacated the decision. *Stewart v.*

Blackwell, No. 05-3044, 2006 U.S. App. LEXIS 32545 (6th Cir. July 21, 2006) (en banc).

The plaintiffs rely on a Georgia district court case that required a county to replace its identical voting machines after they were hacked twice. *Curling v. Raffensperger*, 403 F. Supp. 3d 1311 (N.D. Ga. 2019). But even if we agreed with the court that examples of hackers disrupting those particular voting machines showed an imminent harm somewhere in Georgia—or for that matter anywhere in the United States—that does not translate into an imminent risk that individuals will hack the voting machines in Shelby County, Tennessee. The long and short of it is that the plaintiffs failed to demonstrate the imminence of any injury in fact, depriving them of Article III standing to bring this claim.

We affirm.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

No. 2:18-cv-02706-TLP-dkv

JURY DEMAND

[Filed September 13, 2019]

SHELBY COUNTY ADVOCATES)
FOR VALID ELECTIONS,)
MICHAEL KERNELL, JOE)
TOWNS, JR., ANN SCOTT,)
and BRITNEY THORNTON,)
)
Plaintiffs,)
)
v.)
)
TRE HARGETT, in his official)
capacity as TENNESSEE)
SECRETARY OF STATE, et al.,)
)
Defendants.)
)

**ORDER GRANTING MOTIONS TO DISMISS
WITHOUT PREJUDICE**

Plaintiffs seek an order requiring Defendants to implement procedures Plaintiffs believe will make elections more secure and trustworthy. (ECF No. 104.) Now Defendants move to dismiss the complaint. (ECF Nos. 115 & 116.) The Court held a hearing on the Motions and heard arguments from the parties. (*See* Minute Entry, ECF No. 137.) The Motions are now ripe. For the reasons below, the Motions to Dismiss are GRANTED.

BACKGROUND

I. Prior Proceedings

Plaintiffs sued here on Friday, October 12, 2018, five days before early voting began in Shelby County, Tennessee for the November 2018 elections. (ECF No. 1.) The Complaint brings “a civil rights action for declaratory and injunctive relief” against the State of Tennessee, Shelby County, and various individuals responsible for conducting elections. (ECF No. 104.) Shortly after suing, Plaintiffs moved for a temporary restraining order (“TRO”) and mandamus order requesting an order requiring the election officials take various affirmative measures related to the voting system before early voting began. (ECF No. 23.) The Court held a hearing on that request and heard from representatives for all parties. The Court determined that Plaintiffs failed to meet their burden of proof and issued both an oral order denying the request for a TRO and entered a written oral elaborating on its reasons for denying the Motion. (ECF No. 43.)

The case then continued. Plaintiffs filed two amended complaints. (ECF Nos. 63 & 104.) The Second

Amended Complaint is now the operative filing. The Court will refer to the Second Amended Complaint simply as the Complaint.

II. General Allegations

The Complaint names various state and county officials charged with implementing election processes, as well as the Tennessee Election Commission (“Tennessee”) and the Shelby County Election Commission (“Shelby County”).¹ (*See* ECF No. 104.) Plaintiffs allege that both the State and County Defendants have created and maintained a non-functioning voting system that deprives Individual Plaintiffs and members of Shelby Advocates for Valid Elections (“SAVE”) the fundamental right to vote and the equal protection of that right. (ECF No. 104 at PageID 1197.) Plaintiffs allege many deficiencies within the Shelby County election process that interfere with their right to vote. But their main issue is that Shelby County’s use of AccuVote-TSx R7 direct-recording electronic voting machines (“AccuVote DRE”) and Diebold GEMS version 1.18.24.101 voting software allegedly does not meet Tennessee statutory requirements and thus creates an inherently insecure and inaccurate voting system. (*See id.* at PageID 1198.)

¹ The Court refers to Defendants at times as the State Defendants and the County Defendants. The State Defendants include Tre Hargett, Mark Goins, Kent D. Younce, Judy Blackburn, Greg Duckett, Donna Barrett, James H. Wallace, Jr., Tom Wheeler, Mike McDonald, and the Tennessee Election Commission. And the County Defendants include Linda Phillips, Robert Meyers, Norma Lester, Dee Nollner, Steve Stamson, Anthony Tate, and the Shelby County Election Commission.

In effect, Plaintiffs allege that Shelby County's voting system is not secure because it does not create a voter verified paper audit trail ("VVPAT"). (ECF No. 104 at PageID 1198.) The AccuVote DRE does not record each voter's selection on a paper ballot. Instead, each voter verifies their choices on the screen (much like using a banking ATM machine) before submitting their ballot electronically. And the machine stores their votes on removable memory cards and on the voting machine's internal flash memory. (*Id.* at PageID 1223–25.)

After the polls close on election day, poll workers insert the memory cards from each DRE machine into one machine to tabulate the votes from that precinct. (ECF No. 104 at PageID 1223.) Shelby County's practice is to bring these memory cards to centralized Zone Turn-in Sites or directly to the election headquarters for tabulation. (*Id.* at PageID 1224 & 1226.) Election workers then upload these results to the Diebold GEMS server where the software combines election-day data with mail-in absentee ballots to tabulate the election results. (*Id.* at PageID 1226.) Another concern Plaintiffs have about the AccuVote DRE is that it can connect to the internet and Shelby County election officials sometimes use this capability to transfer election results from satellite turn-in locations to the election headquarters. (*Id.* at PageID 1260–61.)

Plaintiffs claim these alleged deficiencies in the voting process purportedly uniquely affect Shelby County voters because of the County's size and racial makeup. (ECF No. 104 at PageID 1198–99.) Plaintiffs

allege that out of the 95 counties in Tennessee, Shelby County has the largest African American population. (*Id.* at PageID 1255.) And no other county in Tennessee uses the same DRE voting machine that Shelby County uses. (*Id.* at PageID 1256.) That said, Plaintiffs acknowledge that only 14 of the 95 counties in Tennessee use a VVPAT capable voting system. (*Id.* at PageID 1258.) Chattanooga is the only major city in Tennessee that is in a county that uses a VVPAT system. (*Id.* at PageID 1258–59.)

But counties using VVPAT voting systems must perform audits of the ballots cast in presidential and gubernatorial elections. (*Id.* at PageID 1260); *see also* Tenn. Code Ann. § 2-20-103. Plaintiffs argue that Shelby County’s voting system is not subject to a meaningful recount or audit because the only record of the votes kept is on the AccuVote DRE’s internal memory cards. These cards, they assert, can be hacked or manipulated. (*Id.* at PageID 1231.) Plaintiffs point to systems elsewhere that include a VVPAT so the election officials verify the results. These supposed weaknesses undergird Plaintiffs’ theory that Shelby County’s election procedures were “designed and implemented with the intent of disenfranchising Shelby County voters, the majority of whom are African American, including Plaintiffs Joe Town, Jr. and Britney Thornton.” (*Id.* at PageID 1232.)

Adding to their claims, Plaintiffs allege that Defendants do not properly train many of the election officials and poll workers to use the voting machines and software. This, they claim, raises the likelihood of misconduct. (ECF No. 104 at PageID 1227.) The lack of

training and oversight has reportedly led to the cavalier handling of memory cards from the AccuVote DRE machines. (*Id.* at PageID 1238& 1240.) And the GEMS software has at times exhibited defective connections with the DRE memory cards. (*Id.* at PageID 1245.) Still another problem with the equipment is that sometimes a voter's selection of one candidate registers on the screen as a vote for that candidate's opponent. (*Id.* at PageID 1247–48.) Plaintiffs thus allege that Shelby County's antiquated voting equipment paired with the ill-prepared election workers leaves Shelby County's election system vulnerable to undetectable hacking and malicious manipulation. (*Id.* at PageID 1228.)

All in all, Plaintiff's claim that Shelby County's current voting system creates a fundamentally unfair voting system in violation of the Due Process Clause of the Fourteenth Amendment, and that it has impaired Shelby County voters' ability to participate in state elections on an equal basis with other qualified voters in Tennessee. (ECF No. 104 at PageID 1264–65.) This has caused vote dilution which violates the Equal Protection Clause of the Fourteenth Amendment. (*Id.*)

III. Specific Allegations

A. Due process claim

Plaintiffs' due process claim hinges on their argument that the right to participate in a "trustworthy and verifiable election process that safely, accurately, and reliably records and counts all votes cast" is part in parcel with the fundamental right to vote. (ECF No. 104 at PageID 1275.) The voting

systems used by Shelby County allegedly suffers from nonuniform standards and improperly trained personnel causing an unfair system and the denial of the right to vote. (*Id.*) Plaintiffs argue that such an unsecure voting system creates an unreasonable risk of votes being miscounted or that registered voters will be erroneously denied the right to vote. (*Id.* at PageID 1277.) Besides these risks, and to shoehorn its claim into a category recognized by Courts as a valid one, SAVE asserts that it must divert its resources, time, and personnel from other projects to monitor Shelby County's continued use of the AccuVote DRE voting machines. (*Id.*) Above all, SAVE argues it must keep taking legal action until the County uses hand-marked paper ballots. (*Id.*)

Plaintiff Kernell also claims that when he ran for State Representative for District 93 in Shelby County in August 2012, election workers distributed around 720 incorrect ballots to voters. (ECF No. 104 at PageID 1268.) Poll workers gave ballots to some voters residing outside District 93 which allowed them to vote for or against Kernell. (*Id.*) He claims that he had to waste time and money campaigning for a race when Defendants did not adhere to district lines. (*Id.* at PageID 1268–69.) Kernell argues that he will have to expend additional sums of money and spend extra time reaching voters outside his district if he runs for office again. (*Id.* at PageID 1270.) And Plaintiff Kernell predicts that such issues with Shelby County's voting system will lead potential candidates to decline running for office. (*Id.*) Plaintiffs Towns, Jr. and Thornton also believe that they will have to spend additional sums of money and time to reach voters

outside of their districts to prevent the same issues from arising that burdened Kernell's candidacy seven years ago. (*Id.*)

B. Equal protection claim

Plaintiffs also allege that the continued use of the DRE voting machines creates an unequal voting system within Tennessee in violation of the Equal Protection Clause of the Fourteenth Amendment. (ECF No. 104 at PageID 1281.) This voting system allegedly dilutes the voting power within Shelby County and violates the right to have one's vote counted equally. (*Id.*) And Plaintiffs claim this treatment has a disproportionate impact on Tennessee's African American population because Shelby County has the largest population of African American voters in the State. (*Id.* at PageID 1282.) As a result, the voting system implemented by Defendants brings about different treatment for Shelby County citizens because of where they reside.

IV. Requested Relief

To remedy these issues, Plaintiffs seek an order declaring that Shelby County's voting system violates Plaintiffs' right to equal protection under the Fourteenth Amendment and their fundamental right to vote under the Due Process Clause of the Fourteenth Amendment. (ECF No. 104 at PageID 1287.) Plaintiffs demand that this Court order Defendants to replace the Shelby County voting systems with paper ballots and an optical scan system. (*Id.* at PageID 1251.) They also request that the Court order an examination and an internal audit of current software, vote tabulator, and voting machines. (*Id.*) They also seek an order

enjoining Defendants from holding future elections without adopting and enforcing rules and regulations that ensure the safety and accuracy of the voting process. (*Id.* at PageID 1288.) That said, both the State Defendants and the County Defendants moved to dismiss the complaint arguing, among other things, that Plaintiffs lack standing to bring this complaint. (ECF Nos. 115 & 116.) The County Defendants have joined in the State Defendants' Motion and have also made arguments of their own. (*See* ECF NO. 116.) The Court addresses these Motions together where the arguments are the same.

LEGAL STANDARD

A defendant may move to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. To analyze a motion to dismiss under this Rule, the Court begins with the pleading requirements in Rule 8 of the Federal Rules of Civil Procedure. Under Rule 8, a complaint must contain “a short and plain statement showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). In practice, Rule 8 requires that a “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see Engler v. Arnold*, 862 F.3d 571, 575 (6th Cir. 2017).

Though a court will grant a motion to dismiss if a plaintiff has no plausible claim for relief, a court must “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *DirecTV*

v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007). “A complaint should only be dismissed if it is clear to the court that ‘no relief could be granted under any set of facts that could be proved consistent with the allegations.’” *Herhold v. Green Tree Serv., LLC*, 608 F. App’x 328, 331 (6th Cir. 2015) (quoting *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 855 (6th Cir. 2003)). “Dismissal of the action is proper if there is an absence of law to support the type of claim made, if the facts alleged are insufficient to state a valid claim, or if, on the face of the complaint, there is an insurmountable bar to relief.” *Doe v. Ohio*, No. 2:91-CV-464, 2012 WL 12985973, at *5 (S.D. Ohio Feb. 16, 2012) (citations omitted).

Additionally, a party may move to dismiss the claims for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). A motion made under this Rule involves a different analysis. This is so because a Rule 12(b)(1) motion challenges a federal courts authority to decide a case, while a Rule 12(b)(6) motion tests whether the plaintiff has pleaded a cognizable claim. *Primax Recovers, Inc. v. Gunter*, 433 F.3d 515, 517 (6th Cir. 2006) (quoting 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed. 2004)). One instance in which subject-matter jurisdiction is absent is when a plaintiff cannot meet the standing requirements of Article III of the United States Constitution. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). The case or controversy mandate of Article III endows the standing doctrine. See U.S. Const. art. III, § 2.

The standing doctrine includes three elements and the plaintiff bears the burden of establishing each element. *Spokeo*, 136 S. Ct. at 1547. The plaintiff must show: (1) that she suffered an injury in fact; (2) that the injury is fairly traceable to the conduct of the defendant; and (3) that the injury is likely to be redressed by a favorable decision by the court. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Put another way, an injury in fact is one that is both “concrete and particularized.” *Spokeo*, 136 S. Ct. at 1548-49. A concrete injury must truly exist. (*Id.*) And a particularized injury “must affect the plaintiff in a personal way.” (*Id.*) “Where, as here, a case is at the pleading stage, the plaintiff must ‘clearly . . . allege facts demonstrating’ each element.” *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Each claim is subject to dismissal if a plaintiff lacks standing to assert it.

ANALYSIS

Defendants’ main argument for dismissal is that Plaintiffs lack standing to sue here. (ECF No. 115-1 at PageID 1551.) To that end, Defendants argue that Plaintiffs have failed to plead an injury in fact. (*Id.* at PageID 1553.)

“Article III standing is ‘the threshold question in every federal case[.]’ *Davis v. Detroit Public Sch. Cmty. Dist.*, 899 F.3d 437, 443 (6th Cir. 2018) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)) (alteration in original).

Because Plaintiffs ground their claims for injunctive relief on the same arguments they have for declaratory

relief—that the current voting system is unlawfully deficient—the Court may dismiss claims of any Plaintiff who lacks standing for declaratory relief here. *See Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 652 (6th Cir. 2007). For a court to grant declaratory relief, the plaintiff must allege or “demonstrate actual present harm or a significant possibility of future harm.” *Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006). In *Clapper v. Amnesty Int'l USA*, the Supreme Court noted its longstanding requirement “that threatened injury must be *clearly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.” 13 S. Ct. 1138, 1147.

Taking each Plaintiff one at a time, the Court will determine whether they have standing to bring the claim for declaratory relief.

I. Plaintiff SAVE

SAVE is a nonprofit corporation based in Memphis and whose membership includes individuals residing in Tennessee. (ECF No. 104 at PageID 1203.) SAVE’s purpose is to monitor public elections and report those findings to the public. (*Id.*) And SAVE advocates for more secure and reliable election processes by submitting their reports to governmental bodies. (*Id.*)

An organization such as SAVE can establish standing two ways. First, the organization may assert standing “on its own behalf because it has suffered a palpable injury as a result of the defendants’ actions” through so-called organizational standing. *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 332–33 (6th Cir.

2002) (citing *Warth*, 422 U.S. at 511). Second, an organization may claim standing as a representative of its members who would have standing to sue individually through associational standing. *Id.*

A. Organizational Standing

To establish organizational standing, a plaintiff organization must establish the three traditional elements of standing. *See Fair Elections Ohio v. Husted*, 770 F.3d 456, 459 (6th Cir. 2014). That is, the organization must establish that it suffered an injury in fact, that the injury is fairly traceable to the conduct of the defendant and that the injury can be remedied by a favorable decision. *Id.* But plaintiffs seeking injunctive or declaratory relief face a higher burden. *Id.* at 460 (“[Plaintiffs who have standing to bring a damages claim do not necessarily have standing to bring a claim for” injunctive or declaratory relief.) On top of the *Lujan* elements, “plaintiffs seeking injunctive or declaratory relief must show ‘actual present harm or a significant possibility of future harm.’” *Vaduva v. City of Xenia*, 2019 WL 3714790, at *6 (6th Cir. Aug. 7, 2019) (quoting *Grendell v. Ohio Supreme Ct.*, 252 F.3d 828, 833 (6th Cir. 2001)).

SAVE argues that it has organizational standing because its mission has been frustrated by the lack of secure voting systems and it will continue to be, “harmed by the diversion of resources from its purposes of research and education in order to bring, fund, and participate in this litigation.” (ECF No. 104 at PageID 1265.) Defendants argue that Plaintiff’s diversion of resources theory of harm is not enough to establish an injury in fact here. (ECF No. 115-1 at PageID 1553.)

Going on, Defendants point out that an organization lacks standing if it “manufacture(s) the injury by incurring litigation costs or simply choos[es] to spend money fixing a problem that would otherwise not affect the organization at all. It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem.” Citing *Valle del Sol, Inc. v. Whiting*, 703 F.3d 1006, 1018 (9th Cir. 2013.) So the diversion of resources theory is at issue.

Addressing this theory in *Sierra Club v. Morton*, the Supreme Court noted that an organization’s abstract interest in a problem cannot establish standing, “no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem.” 405 U.S. 727, 739, 92 S. Ct. 1361 (1972). Looking at standing, “an organization’s abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III.” *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40, 96 S. Ct. 1917 (1976). By extension, if an organization “seek(s) to do no more than vindicate their own value preferences through the judicial process” that organization generally cannot establish standing. *Sierra Club*, 405 U.S. at 740, 92 S. Ct. 1361; *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114(1982).

The Sixth Circuit has addressed the diversion of resources theory of injury in fact several times. In *Fair Elections Ohio v. Husted*, the court held that an organization conducting voter outreach programs lacked standing to sue to overturn an Ohio

incarceration practice that prevented individuals jailed at certain times from voting, because the organization had only “abstract social interest in maximizing voter turnout” instead of a concrete stake in voter registration. 770 F.3d at 461. The Sixth Circuit found that the organization had not suffered an injury in fact just because it expended resources advising others how to comply with a law or attempting to change the law. *Id.* at 460. The court summed up its opinion by stating “the law purportedly injures [the organization] by hampering [its] abstract social interest in maximizing voter turnout. Harm to abstract social interests cannot confer Article III standing.” *Id.* at 460.

On the other hand, in *Northeast Ohio Coalition for the Homeless v. Husted*, the Sixth Circuit held that the plaintiff organization established standing. 837 F.3d 612, 624 (6th Cir. 2016). The plaintiff had standing there because it had immediate plans to revise its voter education program to change from assisting the homeless with mail-in voting to focus on helping the homeless participate in early, in-person voting in response to changed election laws. *Id.* The court found that this change in the organization’s conduct was a complete “overhaul” of the organization’s strategy—more than just effort and expense associated with advising voters how to follow the law as in *Fair Elections Ohio v. Husted*. *Id.* The Sixth Circuit held that the organization’s “allegations indicate that the burden would cause them to change significantly their expenditures and operation and a favorable decision would redress that injury” *Id.*

SAVE relies on *Galaria v. Nationwide Mutual Insurance Company*, 663 F. App'x 384 (6th Cir. 2016), to support its argument that costs incurred to mitigate the perceived threats posed by the AccuVote DREs satisfies the standing requirements. (See ECF No. 128 at PageID 1647–48.) In that case, the plaintiffs brought a class action against the defendant after computer hackers breached the defendant's network and stole the plaintiffs' personal information. *Galaria*, 663 F. App'x at 385. The Sixth Circuit held that the plaintiffs established a cognizable Article III injury because they had alleged a substantial risk of harm and had shown that they reasonably incurred mitigation costs. *Id.* at 388. In fact, the plaintiffs alleged that an unknown party had stolen their private information and that they had a continuing, increasing risk of fraud and identity theft. *Id.*

Here, SAVE has established no significant risk of harm like the plaintiffs in *Galaria*. SAVE, and the other Plaintiffs, allege that the AccuVote DRE machines are subject to hacking or manipulation, but they have no citations in the record showing that anyone has hacked or manipulated Shelby County's voting machines². This is different than *Galaria* where the plaintiffs established that someone had stolen their information and that the risk of future harm had substantially increased, causing them to incur mitigation expenses. Plaintiffs' allegations here are based only on speculation, conjecture and their

² To be sure, in this digital age, hacking is a possibility. But courts require more than a possibility to maintain an action for injunctive relief.

seemingly sincere desire for their “own value preferences” in having voting machines with a paper trail. As a result, Plaintiffs fail to establish substantial risk of harm.

This also differs from the increased risk of harm in *Stewart v. Blackwell*, 444 F.3d 843, 849 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007), where statistical evidence showed that the error rate was 50 percent higher in voting machines using punch cards versus other voting technologies. In that case, the Sixth Circuit held that the plaintiffs had established, beyond speculation, the increased probability that the punch-card system was more likely to count votes improperly. *Id.* at 855. In contrast, as noted above, SAVE’s alleged risk of harm is based on fear and speculation that AccuVote DRE is likely to count votes improperly in upcoming elections. Although Plaintiffs raise several possible flaws with AccuVote DRE, they have provided no evidence that there is a realistic possibility that upcoming elections will be compromised. And merely alleging that issues arising during the 2012 election will recur with no real proof of that likelihood is the sort of hypothetical harm on which this Court cannot grant relief. Plaintiffs allege no facts showing that AccuVote DRE systems miscount votes or are more likely to miscount votes when compared to other voting systems. SAVE therefore has not established a substantial risk of harm to its members.

And SAVE has not established that its diversion of resources to fund this litigation establishes a cognizable Article III injury. SAVE’s purpose is to monitor elections, report its findings, and advocate for

more secure election processes. (ECF No. 104 at PageID 1203.) “Harm to abstract social interests cannot confer Article III standing.” *Fair Elections Ohio*, 770 F.3d at 460. That SAVE is having to spend more to advocate their position does not satisfy the injury in fact standard. SAVE’s “diversion of resources” is unlike those in *Northeast Ohio Coalition for the Homeless v. Husted*. The plaintiff in that case had to change their organizational tactics to keep helping the homeless community vote. By contrast SAVE has decided to institute this lawsuit to advocate proactively for a change in Shelby County’s voting process to what it perceives to be safer elections.

It is true that funding this lawsuit may divert funds from SAVE’s other goals. But that is a cost that SAVE has chosen to incur to further its abstract social interest of having more secure elections. SAVE has therefore not established that it suffered an injury in fact and lacks organizational standing to sue here. The Court will now determine whether SAVE has associational standing.

B. Associational Standing

SAVE’s remaining option to establish standing is to sue as a representative of its members who would have standing to sue individually through associational standing. *MX Group, Inc.*, 293 F.3d at 332–33. “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)).

Defendants argue that SAVE cannot meet the third element for associational standing—that the participation of the individual members in the lawsuit is not required. (ECF No. 115-1 at PageID 1556.) Defendants argue that the individual members’ participation is required because SAVE does not have the right to vote and it must therefore establish that one of its members is a registered voter and has suffered an injury in fact as a result of the current voting system used in Shelby County. (*Id.*) To be sure, SAVE must show that one of its members has the right to vote and would be harmed by using the current voting system, this does not necessarily require a member’s participation. Defendant’s argument does not hold water because “[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)).

That said, SAVE still must establish that “at least one of [its] members would have standing to sue on his own.” *Waskul*, 900 F.3d at 255 (citation omitted) (alteration in original). This means that the organization “must show that one of its named members ‘(1) suffered an injury in fact, (2) that is fairly

traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). This requires a specific allegation of the name of the member harmed unless all members of the organization have been harmed by the defendant’s conduct. *Tennessee Republican Party v. Sec. and Exch. Comm’n*, 863 F.3d 507, 520 (6th Cir. 2017) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)). The Court focuses on whether any of SAVE’s members have suffered an injury in fact.

An injury in fact is a “concrete and particularized” and “actual or imminent, not conjectural or hypothetical” harm caused by the invasion of a legally protected interest. *Tennessee Republican Party*, 863 F.3d at 517 (quoting *Spokeo, Inc.*, 136 S. Ct. at 1548). A harm is a particularized one if it affects a plaintiff in a “personal and individual way” *Davis*, 899 F.3d at 444. And it is concrete if it “actually exist[s].” *Duncan v. Muzyn*, 885 F.3d 422, 427 (6th Cir. 2018) (quoting *Spokeo, Inc.*, 136 S. Ct. at 1548).

i. SAVE alleges that at least one of its members has suffered an Article III injury.

The Complaint identifies only Carol Chumney, Michael Kernell, and Dr. Joseph Weinberg as members of SAVE. (ECF No. 104 at PageID 1203.) Of that group, Michael Kernell is the lone member to allege that he suffered a constitutional injury. (*Id.* at PageID 1205.) Kernell alleges harm when he ran in the 2012 August county and state primaries. During that 2012 primary election, Shelby County election officials allegedly issued the wrong ballot to thousands of voters which

caused about 720 voters to cast ballots in the wrong precinct. (*Id.* at PageID 1205–06.)

Kernell also alleges that, in August 2018, he ran as a candidate for the Shelby County School Board of Commissioners and that “before certification, he repeatedly called the Defendant Shelby County Election Commission to obtain certified copies of the poll tapes for his district as allowed by state law, and was never timely afforded an opportunity to do so.” (*Id.* at PageID 1206.) And Kernell states that he observed Shelby County election workers in November 2018 failing to adhere to state election rules regulating uploading votes after polls are closed on election day. (*Id.*) Kernell claims that these “improprieties” provide “a reasonable basis that, absent injunctive relief, he will be disenfranchised or severely burdened in exercising his fundamental right to vote in future elections” (*Id.* at PageID 1206–07.)

SAVE also claims that all its members are “threatened with imminent injury-in-fact” (ECF No. 104 at PageID 1204.) SAVE alleges that Defendants’ actions “have infringed on their fundamental right to vote and to equal protection” due to the unsecure voting system used by Shelby County. (*Id.* at PageID 1204, 1266.) Thus SAVE argues that at least one of its members has suffered an Article III injury.

ii. SAVE’s allegations are only generalized grievances.

SAVE’s allegations amount to a general dissatisfaction with the voting system and processes

used in Shelby County. SAVE wants a more secure voting system with a paper trail and it is suing to get it. While SAVE's aspiration makes sense, its absence—that is, the current voting system—has not caused “concrete and particularized harm.” Wanting a better, more secure voting system, will likely always be SAVE's desire. That is, until someone devises the illusive perfect voting system. SAVE is out to vindicate its own value preferences and it boils down to general dissatisfaction.

“[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Davis*, 899 F.3d at 444 (quoting *Lujan*, 504 U.S. at 573–74.) So-called general grievances do not meet the Article III standing requirements because such “harms” fail to affect the plaintiff in a “personal and individual way.” *Id.* (quoting *Spokeo, Inc.*, 136 S. Ct. at 1548.)

Alleging that the AccuVote DRE used by all voters in Shelby County violates legally protectable interests, SAVE has identified an issue that affects all voters in Shelby County equally. This type of generalized grievance is simply not enough to meet the Article III standing requirements. *See, e.g., Davis*, 899 F.3d at 444 (holding that Plaintiffs did not state any more than a generalized grievance where they could not prove they were affected in a “personal and individual way” and where the challenged ballot question “affect[ed] all

Detroit voters equally”); *Lujan*, 504 U.S. at 555 (“[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy”). SAVE, then, has failed to provide the Court with any evidence that any of its members would suffer from a special harm that makes the injury particularized to SAVE members. And suing the Shelby County Election Commission to force it to abide by the rules and regulations that govern the election process in Tennessee and Shelby County suffers from the same defect.

The closest SAVE comes to a specific allegation of harm against one its members is the allegation that Defendants gave voters the wrong ballot when Michael Kernell was running for office in 2012. But this too fails to meet the Article III injury standard. “Past injury is also inadequate to constitute an injury in fact when the plaintiff seeks injunctive relief but [does not] suffer ‘any continuing present adverse effects.’” *Crawford v. United States Dep’t. of Treasury*, 868 F.3d 438, 455 (6th Cir. 2017) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). So while Kernell may have been harmed in 2012 when the election officials distributed the wrong ballots to voters, there is no proof that this will happen again. SAVE and Kernel only hypothesize that it will. Because SAVE seeks declaratory and injunctive relief, it would have to show that there is a realistic likelihood of the conduct reoccurring. *See Lyons*, 461 U.S. at 105–06 (holding that the plaintiff

failed to allege that a realistic possibility existed that he would face an illegal chokehold again in the future). Kernell thus does not allege a cognizable injury because he has not shown that there is a real and immediate threat that Defendants will distribute wrong ballots in the future.

And so SAVE has failed to allege that at least one of its members has suffered an injury in fact. SAVE thus lacks associational standing to bring a claim for declaratory relief here. In the end, SAVE's claims for injunctive relief depend on its claims for declaratory relief. These claims are consequently dismissed because of SAVE's lack of standing. *See American Civil Liberties Union*, 493 F.3d at 652 (“The injunction in this case is predicated on the declaratory judgment . . . so it follows that if the plaintiffs lack standing to litigate their declaratory judgment claim, they must also lack standing to pursue an injunction.”)

The Court now determines whether any of the remaining named Plaintiffs have standing to pursue these claims.

II. Joe Towns, Jr. and Britney Thornton

Neither Joe Towns, Jr. nor Britney Thornton allege that they have suffered an injury or are subject to an imminent injury. Instead, both Plaintiffs allege that 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” because of the “overwhelming probability” that Defendants will miscount votes in the future. (ECF No. 104 at PageID 1207–08.) Both Plaintiffs state

their intention to run as candidates in future elections. (*Id.*) These beliefs stem from Defendants' use of the allegedly antiquated AccuVote DRE voting machines and allegedly ill-trained poll workers.

Despite Plaintiffs' fears, these allegations fall far short of being concrete injuries. As noted above, a concrete injury is one that is real and actually exists. *Spokeo, Inc.*, 136 S. Ct. at 1548. Future harm must be imminent, meaning "certainly impending," rather than a simple "allegation[] of possible future injury." *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015). The harm alleged here by Towns and Thornton is merely hypothetical.

Even construing the allegations in the light most favorable to them, Plaintiffs offer no proof showing that Shelby County's voting system is any more likely to miscount votes than any other system used in Tennessee. At the same time, they have no proof that the AccuVote DRE voting machines are more likely to be hacked or manipulated than other Tennessee voting machines. In sum, these allegations fall far short of the evidence provided in *Stewart* where statistical evidence showed that voting systems using punch-card ballot had a 50 percent higher likelihood of being miscounted than other voting technologies. *See* 444 F.3d at 849. Such a conjectural and hypothetical injury cannot survive as the foundation for Plaintiffs' claims. *Tennessee Republican Party*, 863 F.3d at 517 (citing *Spokeo, Inc.*, 136 S. Ct. at 1548).

And so Towns and Thornton have failed to allege a concrete injury necessary to support standing on their declaratory judgment claim. The Court finds that

Towns and Thornton lack standing to bring these declaratory judgment claims and so the claims are dismissed. These Plaintiffs' injunctive relief claims are also dismissed for the reasons stated above.

III. Ann Scott

The Complaint fails to allege that Ann Scott suffered a particularized harm. Her claims arise solely out of her membership in SAVE. In fact, beyond the general allegation that the AccuVote DRE machines may miscount her vote in future elections, the Complaint wholly fails to make any specific claims of harm as to Scott. (*See* ECF No. 104 at PageID 1207–08.) Scott's claims therefore amount to only generalized grievances that affect her no more than any other registered voter in the community at large. Generalized grievances do not support Article III standing. *See Davis*, 899 F.3d at 444. Scott's claims are therefore dismissed for lack of standing.

IV. Michael Kernell

Michael Kernell's allegations of harm were discussed before. *See supra* Section I.B.i. And as stated above, Kernell's *allegation* that Defendants may distribute the wrong ballots in future elections fails to state a realistic likelihood that this harm is likely to repeat itself. *See supra* Section I.B.ii. This is necessary for cases seeking injunctive relief. *See Lyons*, 461 U.S. at 105–06. And the remaining claims are no more than generalized grievances that do not state a particularized harm. So Kernell's claims are also dismissed.

CONCLUSION

In the end, “[t]he law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches” *Spokeo, Inc.*, 136 S. Ct. at 1547 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 393, 408 (2013)). Although initiatives designed to make election processes more secure are beneficial to the democratic process, this Court must limit its adjudicative power to “cases” and “controversies” as outlined in Article III. No Plaintiff here has standing to bring the claims alleged, and so the Court is without the authority to hear this case.³ The Court, therefore, GRANTS the Motions to Dismiss without prejudice.

SO ORDERED, this 13th day of September, 2019.

s/Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE

³ Defendants made several other arguments attacking the Second Amended Complaint here beyond their contention that Plaintiffs lack standing. Yet given the Court’s holding that Plaintiffs lack standing to bring the claims alleged, it is unnecessary to address the other arguments raised by Defendants.

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

No. 2:18-cv-02706-TLP-dkv

JURY DEMAND

[Filed September 13, 2019]

SHELBY COUNTY ADVOCATES)
FOR VALID ELECTIONS,)
MICHAEL KERNELL, JOE)
TOWNS, JR., ANN SCOTT,)
and BRITNEY THORNTON,)
)
Plaintiffs,)
)
v.)
)
TRE HARGETT, in his official)
capacity as TENNESSEE)
SECRETARY OF STATE, et al.,)
)
Defendants.)
)

JUDGMENT

JUDGMENT BY COURT. This action came before the Court on Plaintiff's Complaint, filed on October 12, 2018. (ECF No. 1.) In accordance with the Order Granting Motions to Dismiss, (ECF No. 140), entered by the Court,

IT IS ORDERED, ADJUDGED AND DECREED that this action is **DISMISSED WITHOUT PREJUDICE.**

APPROVED:

s/ Thomas L. Parker

THOMAS L. PARKER

UNITED STATES DISTRICT JUDGE

September 13, 2019

Date

APPENDIX D

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

No. 19-6142

[Filed March 10, 2020]

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, ET AL.,)
)
Defendants-Appellees.)

O R D E R

BEFORE: GIBBONS, SUTTON, and MURPHY,
Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the

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petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

U.S. Const. amend. XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.