

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

CAROL J. CHUMNEY

Counsel of Record

CAROL CHUMNEY LAW PLLC

5050 Poplar, Suite 2436

Memphis, TN 38157

(901) 844-7141

carol@carolchumneylaw.com

Counsel for Petitioners

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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, unauditale 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 unauditale 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 SSEC 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. Summum*, 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 Envtl. 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 SCEC 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,

CAROL J. CHUMNEY

Counsel of Record

CAROL CHUMNEY LAW PLLC

5050 Poplar, Suite 2436

Memphis, TN 38157

(901) 844-7141

carol@carolchumneylaw.com

Counsel for Petitioners