No. 18-____

IN THE

Supreme Court of the United States

TRACEY E. GEORGE, *et al.*,

Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether state actor defendants may defend and foreclose a federal action brought under 42 U.S.C. § 1983 by suing civil rights plaintiffs in a subsequently-filed state court declaratory judgment lawsuit seeking to declare the state actors' actions lawful.

(2) Whether state actors' administering an election in a manner that is not neutral to that election's outcome violates the Fourteenth Amendment's equal protection and due process clauses.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioners Tracey E. George, Ellen Wright Clayton, Deborah Webster-Clair, Kenneth T. Whalum, Jr., Meryl Rice, Jan Liff, Teresa M. Halloran, and Mary Howard Hayes, all of whom are individual, private citizens, were the appellees in the court of appeals.

Respondents William Edward "Bill" Haslam, in his official capacity as the Governor of Tennessee, Tre Hargett, in his official capacity as Secretary of State of Tennessee, Mark Goins, in his official capacity as the Coordinator of Elections of Tennessee, Herbert H. Slatery III, in his official capacity as the Attorney General of Tennessee, the State Election Commission of Tennessee, and Judy Blackburn, Donna Barrett, Gregg Duckett, Tommy Head, Jimmy Wallace, Tom Wheeler, and Kent Younce, in their official capacities as the then-members of the State Election Commission of Tennessee were the appellants in the court of appeals.

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STATUTES

PETITION FOR WRIT OF CERTIORARI

Petitioners Tracey E. George, Ellen Wright Clayton, Deborah Webster Clair, Kenneth T. Whalum, Jr., Meryl Rice, Jan Liff, Teresa M. Halloran, and Mary Howard Hayes respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a – 37a) is reported at 879 F.3d 711. The opinion of the district court (App. 38a – 104a) is reported at 112 F. Supp. 3d 700.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. The court of appeals had jurisdiction under 28 U.S.C. § 1292(a), filed its judgment on January 9, 2018, and denied both panel rehearing and rehearing en banc on February 28, 2018. On May 21, 2018, Justice Kagan granted Petitioners' Application to extend time to file a petition for a writ of certiorari from May 29, 2018 to July 13, 2018. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution is reproduced at App. 105a. Article XI, Section 3 of the Tennessee Constitution is reproduced at App. 106a.

STATEMENT OF THE CASE

A. The Vote on the Proposed Constitutional Amendment

Petitioners are eight private citizens of Tennessee who filed a 42 U.S.C. § 1983 action in federal district court against Respondents—Governor of Tennessee William Edward "Bill" Haslam, Secretary of State Tre Hargett, Coordinator of Elections Mark Goins, Attorney General Herbert H. Slatery III, and the State Election Commission of Tennessee, and its then-members Judy Blackburn, Donna Barrett, Gregg Duckett, Tommy Head, Jimmy Wallace, Tom Wheeler, and Kent Younce, all in their official capacities (collectively "State Actors")—on November 7, 2014. Respondent State Actors are officials of the State of Tennessee who determined the manner in which votes would be counted in the November 4, 2014 state and federal general election in Tennessee and who certified the results based on their determination. This included the vote for governor and the vote on Constitutional Amendment Number 1 to the Tennessee Constitution ("the proposed constitutional amendment").

Petitioners asserted the method by which State Actors conducted the election for both governor and the proposed constitutional amendment violated their federal constitutional rights in several ways:

1. violating due process rights by compelling them to vote for governor in order for their vote on the proposed constitutional amendment to have any weight, while commensurately incentivizing voters desiring the opposite result not to vote for governor in order to give their votes greater weight to pass the proposed constitutional amendment;

2. violating their equal protection rights by weighing their "no" votes less than certain "yes" votes on the proposed constitutional amendment based on whether the voter cast a ballot in the governor's race;

3. violating due process by subjecting them to a fundamentally unfair voting system; and

4. violating their Fourteenth Amendment rights by tabulating votes on the proposed constitutional amendment contrary to the plain language requirement of the state constitution.[1]

Petitioners sued days after the release of preliminary election results (but before certification), seeking, among other relief, a judgment declaring State Actors' counting scheme unconstitutional on its face or as-applied and either voiding the November 4, 2014 election results on the proposed constitutional amendment or requiring a different counting method pursuant to Article XI, Section 3 of the Tennessee Constitution.

Along with the proposed constitutional amendment at issue, the November 4, 2014 general election ballot featured a number of other races, including an opportunity to vote for governor. Before the election, Tennessee's Division of Elections received inquiries regarding how the votes on proposed constitutional amendments would be counted, particularly whether voters must first vote for governor in order to have their votes on a proposed constitutional amendment counted. While declining to issue an official statement,

[1] Article XI, Section 3 of the Tennessee Constitution requires that that a proposed constitutional amendment must pass by "a majority of all citizens of the state voting for governor, voting in [its] favor . . . ."

State Actors publicly declared to media outlets that "yes" voters could effectively increase the weight of their vote by not voting for governor and that "no" voters had to vote for governor for their votes to matter at all for ratification purposes.

Based on this voting scheme articulated by State Actors, opponents of the proposed constitutional amendment were compelled to vote for governor. Conversely, supporters of the proposed constitutional amendment propagated a multichannel scheme to have voters favoring the proposed constitutional amendment not to vote in the governor's race and thereby increase or, in their words, "double," the weight of their votes on the proposed constitutional amendment. *See, e.g.*, App. 52a – 55a. As indicated by the election results,[2] this scheme worked. For the first time in Tennessee's history, the number of votes on a constitutional amendment exceeded the number of votes cast for governor. *See* App. 57a.

Petitioners, however, asserted that State Actors' determination of the threshold for the passage of the proposed constitutional amendment—regardless of whether it was consistent with or, as Petitioners asserted, contrary to the plain meaning of Article XI, Section 3 of the Tennessee Constitution—was constitutionally flawed because it:

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[2] The vote totals for the November 4, 2014 general election were as follows: (i) 1,430,117 ballots were cast in the November 4, 2014 election; (ii) 1,353,728 votes were cast in the Governor's race; (iii) 729,163 votes were cast in favor of the proposed constitutional amendment; and (iv) 657,192 votes were cast against the proposed constitutional amendment. Based on these totals, there were 32,627 more votes on the proposed constitutional amendment (1,386,355) than in the gubernatorial race (1,353,728). *See* App. 7a.

i. compelled Petitioners and other opponents of the proposed constitutional amendment to vote in the governor's race for their vote to count at all for purposes of ratification,

ii. induced proponents of the proposed constitutional amendment to choose between increasing the likelihood of the passage of the proposed constitutional amendment and exercising their constitutional right to vote in the governor's race,

iii. subjected to dilution, and actually diluted, Petitioners' votes by basing the proposed constitutional amendment's passage/ratification on the number of "yes" votes on the amendment as compared to total votes cast in the governor's race, and

iv. created a fundamentally unfair voting system by disenfranchising Petitioners and other opponents of the proposed constitutional amendment and commensurately rewarding proponents of the amendment who refrained from voting for governor.

B. Respondent State Actors' Retaliatory State-Court Lawsuit

In response to Petitioners' lawsuit filed in the U.S. District Court for the Middle District of Tennessee, State Actors filed multiple motions to dismiss in the district court. The district court denied these motions. Rather than seek interlocutory appeal to the federal court of appeals and with trial set only a few months away, two of the State Actors—Secretary of State Tre Hargett and Coordinator of Elections Mark Goins, acting in their official capacities and represented by Tennessee's Attorney General (another Respondent)—filed a new declaratory judgment lawsuit, *Hargett et*

al. v. George et al. (the "State's Declaratory Judgment Action"), against Petitioners. The State Actors chose to file suit in Williamson County, Tennessee Chancery Court—a venue unavailable to Appellee-Voters[3] and one of the counties where the contested vote on the proposed constitutional amendment enjoyed its highest support—"even though the Davidson County Chancery Court [where the state capital is located and State Actors are based] would seem to have been the most logical venue." App. 66a.

The State's Declaratory Judgment Action functionally sought a declaration that the State Actors did nothing wrong in response to claims in Petitioners' federal civil rights lawsuit. Because the eight Petitioners were sued only in their individual capacities, the state-court judgment in the State's Declaratory Judgment Action would neither be binding on Tennessee voters generally nor provide any future certainty to the State Actors. Instead, its only value was as a countermeasure to Petitioners' federal civil rights action.

Although Petitioners moved to dismiss the State's Declaratory Judgment Action on a host of jurisdictional and justiciability grounds, the state court summarily denied this motion. As State Actors sought to prolong the federal court proceeding, they simultaneously moved as quickly as possible to judgment in the State's Declaratory Judgment Action, serving their motion for summary judgment a mere two days after Petitioners filed their answer in state court. The state court fast-tracked the summary judgment

[3] Because Davidson County, Tennessee is the official residence of both the Secretary of State and the Coordinator of Election, Petitioners would have had to file their lawsuit in Davidson County had they attempted to sue these parties in state court. *See* Tenn. Code Ann. § 4-4-104.

process, denied Petitioners any discovery, and even initially set a response deadline for Petitioners shorter than the minimum time required under Tennessee law.

C. District Court and State Court Decisions

After a bench trial in the federal action, the district court ruled that State Actors had acted unlawfully in their application of the law toward Petitioners and other Tennessee voters and further concluded that State Actors' operation and tabulation of the vote on the proposed constitutional amendment violated Petitioners' constitutional rights.

The district court found that "an opponent of Amendment 1 [the proposed constitutional amendment] . . . was compelled to vote in the Governor's race in order for his or her vote to have an impact on the denominator used in determining whether a constitutional amendment had obtained the threshold for passage." App. 91a. And the district court found that the State Actors' "tabulation method affected two separate races—the vote for governor and the vote on Amendment 1 [because] Amendment 1 supporters who subscribed to the 'double your vote' theory likely abstained from the governor's race, so as to make their votes on Amendment 1—a wholly separate race—count more [and] [t]hose who opposed Amendment 1 likely felt compelled to vote for governor." App. 95a.

The district court held that State Actors' counting scheme resulted in vote dilution, fundamental unfairness, disenfranchisement, and compelled voting while also disregarding the plain language meaning of Article XI, Section 3 of the Tennessee Constitution. The district court specifically found that Petitioners' votes "were not given the same weight as those who

voted for Amendment 1 but did not vote in the governor's race . . . because the way the votes were counted, voters who did not vote in the Governor's race but who voted on Amendment 1 effectively lowered the requisite threshold passage of Amendment 1." App. 91a. Based on these findings, the district court concluded that Petitioners' Fourteenth Amendment due process and equal protection rights had been violated.

Meanwhile, in the state court proceeding and after the bench trial in the district court, the State Actors, represented by the State Attorney General, pushed the state court to issue an order before the federal district court could issue its 50-plus page findings of fact and conclusions of law after the bench trial. On the eve of the district court releasing its decision, the state court purported to declare that State Actors acted lawfully in their treatment of the Petitioners and thereby effectively declared that Petitioners' due process rights had not been violated. This rush to judgment in the state court was in stark contrast to the record developed and bench trial conducted before the district court.

D. Appellate Proceedings

State Actors timely appealed the district court's ruling and raised, for the first time, that the state court's decision in the State's Declaratory Judgment Action—rendered after the bench trial concluded but one day before the publication of the district court's findings of fact and conclusions of law—was binding on the district court. After initial briefing was complete, the court of appeals ordered supplemental briefing regarding the state court's jurisdiction to issue its declaratory judgment in the State's Declaratory Judgment Action.

The court of appeals ultimately concluded that the state "declaratory judgment" should be given preclusive effect in the federal proceeding. The court of appeals explained that the state court ruling "undermine[d] the district court's analysis of plaintiffs' civil rights claims." App. 22a. The court of appeals concluded that State Actors' voting scheme did not violate federal law. App. 23a – 36a. The appellate court therefore reversed the district court's decision.

REASONS FOR GRANTING THE PETITION

I. THE APPELLATE COURT'S RULING RAISES AN IMPORTANT ISSUE OF FEDERAL LAW BY VALIDATING A NEW PROCEDURE FOR STATE ACTORS TO CIRCUMVENT FEDERAL COURT JURISDICTION BY SUING THE FEDERAL COURT PLAINTIFFS IN A FAVORABLE STATE COURT FORUM.

The court of appeals's decision shifts the landscape of federal civil rights litigation and creates a new roadmap for state actors to circumvent the rights of plaintiffs to federal court in 42 U.S.C. § 1983 cases. According to the decision below, any state actor defending against a § 1983 lawsuit (or conceivably any other federal statutory cause of action) can now turn around to sue the federal court plaintiffs in state court to declare that their conduct was lawful on the basis that there is a justiciable controversy created by the federal court lawsuit. Citizens whose only distinguishing characteristic is that they filed a federal lawsuit could routinely be named as defendants in state-court actions, thereby depriving plaintiffs of their protected access to federal court to redress constitutional wrongs. For example, citizens challenging redistricting as being improperly gerrymandered could be sued

in state court by the very officials who drew the district lines for a declaration that the redistricting was lawful. Or a plaintiff bringing a Fourth Amendment malicious prosecution claim in federal court could once again face a state-court lawsuit brought by the same entities who previously prosecuted them.[4]

Any citizen asserting that a state actor's implementation or application of a law violates federal constitutional rights is now open to being the defendant in a state court declaratory judgment action seeking to pre-clear the state actor's action before (or even after) the federal court has reached its decision. Further, unlike a federal lawsuit under § 1983 (or other statutes such as Title VII) where a successful plaintiff is entitled to fee shifting, citizens facing a retaliatory state court lawsuit must defend themselves at their own cost without any possibility of fee shifting when they prevail. Whereas this lack of fee-shifting imposes a substantial additional financial burden on the private citizens trying to advance their federal court claims, state actors incur no additional costs themselves in both defending the federal lawsuit and prosecuting the state-court case because they are or would be represented by the state attorney general in both actions—precisely what occurred in this case and the State's Declaratory Judgment Action.

In short, as the decision below now stands, state actors are now emboldened to answer federal com-

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[4] *See also* App. 117a (acknowledging this same risk and providing examples of a city defending against a federal pattern-and-practice discrimination lawsuit suing the victims of that discrimination in state court or police officers facing a federal-court excessive force lawsuit bringing a state-court action against the victim of that force seeking a declaration that the force was not excessive).

plaints with state-court lawsuits. As even the court of appeals appears to acknowledge, Secretary Hargett and Coordinator Goins could not have brought their state-court lawsuit in the absence of this preexisting federal court litigation—at least not against Petitioners, who are merely private citizens subject to the same voting laws as all other Tennesseans. The Sixth Circuit's endorsing State Actors' claim that a pending lawsuit against them creates a justiciable case or controversy opens the door to the very issues described above.

A. The Sixth Circuit's opinion is inconsistent with other appellate courts' rulings and provides opportunity for this Court to clarify its precedent regarding access to courts.

Both this Court and lower appellate courts have held that access to the courts is a fundamental right and that this right includes a meaningful opportunity to be heard "through the remov[al] [of] obstacles to [] full participation in judicial proceedings." *Tenn. v. Lane*, 541 U.S. 509, 522-23 (2004); *see also, e.g.*, *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971); *In re Primus*, 436 U.S. 412, 426 (1978); *Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004). The question presented to this Court is whether the Sixth Circuit now deviates from this principle by permitting the State Actors here—and endorsing this maneuver for other state actors in the future—to encumber federal civil rights plaintiffs with having to defend themselves and their federal-court claims in a parallel state court lawsuit.

This Court has yet to address the issue. The Sixth Circuit's ruling, however, cannot be reconciled with the numerous other circuits that have long held that

state action taken in retaliation for the exercise of the right to sue, or that chills the exercise of that right, violates the fundamental right of access to the courts. As the Eighth Circuit has held, access to the court "cannot be impaired, either directly . . . or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits" and further explains that it "is not necessary that the [individual] succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the [individual's] right of access." *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1427-28 (8th Cir. 1986) (citations omitted) (alterations in original). This ruling aligns with similar decisions from other circuits, including the Third, Fifth, Seventh, Tenth, and Eleventh. *See, e.g.*, *Hall v. Sutton*, 755 F.2d 786, 787 (11th Cir. 1985); *Matzker v. Herr*, 748 F.2d 1142, 1150-51 (7th Cir. 1984), *partially overruled in other part* as recognized in *Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 992 (7th Cir. 1998); *Lamar v. Steele*, 693 F.2d 559, 562 (5th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983); *Milhouse v. Carlson*, 652 F.2d 371, 374 (3d Cir. 1981); *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976).

These lower court cases previously held that state officials may not take retaliatory action against individuals designed either to punish them for having exercised their constitutional right to seek judicial relief or to intimidate or chill their exercise of that right in the future. The opinion below conflicts with these decisions by endorsing just such an action, in the form of state actors suing in state court the parties who have previously sued them in federal court, as "unorthodox [but] efficient and fruitful," App. 22a, and provides a roadmap for this retaliatory litigation tactic.

The facts of this case presents a new twist to the precedent of this Court and other circuit courts of appeals that state actors' conduct should not interfere directly or indirectly with plaintiffs' access to the courts because here State Actors retaliated by filing a state-court lawsuit,[5] and the Sixth Circuit approved—if not endorsed—just such a method of interference. This split within the circuits and lack of guidance from this Court as to the scope of what states may do to limit access to federal courts constitute an important issue that merits this Court's review.

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[5] In the court of appeals, both Petitioners and the federal courts professors who filed an amici curiae brief represented that they could not find another case in which state actors resorted to this tactic of suing federal civil rights plaintiffs in state court. *See* App. 140a.

While preparing this petition, Petitioners learned of a recent instance: *Frank v. Walker* (E.D. Wis., No. 11-cv-01128), an ongoing federal voting-rights class action lawsuit, and *Wisconsin Dep't of Transp. v. Am. Civil Liberties Union of Wis. Foundation, Inc.* (Dane Cnty., Wis. Cir. Ct., Branch 16, Case No. 17-CV-2639), a responsive state court declaratory judgment action that a state actor filed against the named plaintiffs in *Frank v. Walker*. To date, however, the state court lawsuit in response to *Frank v. Walker* has been unsuccessful because both the state trial court and the state appellate judge who heard the Wisconsin Department of Transportation's ex parte petition for an injunction pending appeal analyzed standing under Wisconsin state law—which is comparable to both Tennessee's and federal standing standards—and held that the state actor there lacked standing to pursue its declaratory judgment action against the *Frank* plaintiffs. This outcome contrasts with the outcome here but suggests that, absent intervention from this Court, other state actor defendants in federal civil rights lawsuits are prepared to follow the path endorsed by the appellate court below.

B. The appellate court's giving preclusive effect to the State's Declaratory Judgment Action seeks to redefine the appellate courts' prior understanding of this Court's precedent regarding preclusion and constitutionally infirm judgments.

This Court has long held that "federal courts are not required to accord full faith and credit" to a "constitutionally infirm judgment." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982); *see also, e.g.*, *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1309 (2015). Following this edict, lower courts have refused to give preclusive effect to state-court judgments that contravene public policy or result in manifest injustice. *See, e.g.*, *Title v. Immigration and Naturalization Service*, 322 F.2d 21 (9th Cir. 1953); *Spilker v. Hankin*, 188 F.2d 35 (D.C. Cir. 1951).

The Sixth Circuit now breaks with those other lower appellate courts and raises the question of whether this Court's precedent applies to a purported declaratory judgment action brought by state actor defendants premised upon the very federal civil rights lawsuit in which they have been sued. And this question implicates two fundamental principles of the American judicial system: (1) whether plaintiffs remain the masters of their complaints, entitled to select a forum from among those with jurisdiction and (2) that, so long as subject matter jurisdiction exists, whether a suit will be heard in federal court if either party prefers federal court.

Plaintiffs' status as the masters of their complaints should extend to selecting the jurisdiction, *e.g. Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915), and forum to which they appeal, *e.g.*, *Atl. Marine Constr.*

Co. v. U.S. Dist. Court for the W. Dist. of Tex., 571 U.S. 49, 62 (2013). Here, Petitioners chose to seek relief in federal court, and there is no serious dispute that the federal court had subject matter jurisdiction. This Court has recognized various abstention doctrines and certification procedures to address state law questions posed by a case filed in federal court. The court of appeals's ruling, however, creates a new mechanism that has not been recognized by this Court—a state retaliatory declaratory judgment that is then given preclusive effect on appeal. This new procedure allows state actors to engage in self-help whenever they believe a district court has erroneously denied certification or failed to abstain. Instead of appealing such rulings, state actors can now file their own declaratory judgment actions and force civil rights plaintiffs and others such as Petitioners to litigate, perhaps even to the point of exhaustion, their claims as defendants in state court instead.

Similarly, although removal provides a counterpoint to a plaintiff's forum selection, it limits a plaintiff's ability to choose an appropriate forum only to level the playing field and protect defendants' access to federal court. *See, e.g.*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816); *see generally* 28 U.S.C. § 1441. In this case, however, the decision below permits state actors defendants to thwart a plaintiff's choice of a federal forum by filing their independent action in state court and do so not only in retaliation, but also to circumvent federal appellate review.[6] This new

[6] In essence, rather than seeking an interlocutory appeal to a federal appellate court after the district court denied their motion to abstain and/or to certify the question to the Tennessee Supreme Court, State Actors created their own self-help version of parallel review by filing a state-court lawsuit and then

methodology appears incongruent with this Court's precedent and presents an important issue of law that merits this Court's review.

II. THE CONFLICT BETWEEN SIXTH CIRCUIT'S RULING HERE AND OTHER COURTS' RULINGS REGARDING COMPELLED VOTING PROVIDES AN OPPORTUNITY FOR THIS COURT TO CLARIFY ITS COMPELLED-VOTING JURISPRUDENCE.

This case raises the important question of whether and to what extent a state's administration of an election survives Fourteenth Amendment scrutiny when it tilts the field by both compelling voters on one side of an issue to vote in another, separate race and by strongly incentivizing voters on the other side of the same issue to avoid voting in that separate race.

To determine whether the proposed constitutional amendment had been ratified, State Actors compared the number of votes cast in favor of the amendment with the number of votes cast in the governor's race to ascertain whether the number of votes for the amendment would constitute a majority of the votes cast for governor. In other words, State Actors tabulated the outcome of the amendment vote by using a fraction in which the number of votes in favor of the amendment composed the numerator and the number of votes cast in the governor's race was the denominator.[7]

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attempting to use the ruling therein to preclude the federal courts from meaningfully reviewing the issues.

[7] *I.e.* [729,163 votes in favor of the proposed constitutional amendment] / [1,353,728 votes in the Governor's race]; because

State Actors' ratification method linking these two votes on the amendment and in the gubernatorial race created yielded four possible voting permutations:

> (1) not voting for governor and voting against the proposed constitutional amendment;
>
> (2) voting for governor and voting against the proposed constitutional amendment;
>
> (3) voting for governor and voting in favor of the proposed constitutional amendment; or
>
> (4) not voting for governor and voting in favor of the proposed constitutional amendment.

But, under State Actors' tabulation method, the power and influence of a vote for/against the amendment depended on whether the voter also voted for governor. Option 1 (not voting for governor and voting against the proposed constitutional amendment) was a valueless vote as to the amendment because it neither added to the numerator nor the denominator of the ratification equation; Options 2 and 3 (voting for governor and voting for/against the proposed constitutional amendment) had the same value regarding the ratification threshold because both added to the denominator (as well as the numerator for those who favored the proposed constitutional amendment); and Option 4 (voting for the proposed constitutional amendment but not for governor) had the greatest influence on whether the proposed constitutional amendment was ratified under State Actors' counting scheme by adding to the numerator without affecting the denominator.

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this fraction is greater than 1/2, State Actors determined that the proposed constitutional amendment passed.

The current concept of compelled voting derives from this Court's decision in *Wooley v. Maynard*, 430 U.S. 705 (1977), explaining that that the First Amendment, as incorporated through the Fourteenth, protects not only the right to free speech, but also the right to "refrain from speaking at all." *Id.* at 714.

Following this ruling, some lower courts and state courts of last resort have held that voting systems inducing citizens to vote in a particular race are constitutionally suspect. *See, e.g.*, *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 727-31 (1st Cir. 1994) (holding that a state may not "condition the right to vote in one election on whether that right was exercised in a preceding election"); *Partnoy v. Shelley,* 277 F. Supp. 2d 1064, 1078-79 (S.D. Ca. 2003) *as modified on reconsideration* (Aug. 21, 2003) (invalidating California's law requiring having voted on whether to recall an official in order to vote in the subsequent election for the recalled official's successor); *In re Hickenlooper*, 312 P.3d 153, 155-60 (Colo. 2013) (invalidating a state constitutional provision comparable to the statute at issue in *Partnoy*). In the more than 40 years since *Wooley*, this Court, however, has never squarely addressed the issue.

Moreover, this Court has never addressed compelled voting that is viewpoint-specific. The State Actors' voting scheme only compelled certain voters to cast a ballot for governor (while simultaneously incentivizing other voters not to cast a ballot for governor). As explained above, a voter opposing the proposed constitutional amendment was compelled to vote for governor to have his or her vote count toward ratification; a vote from someone who does not vote in the gubernatorial race and who votes against an amendment is permissible but meaningless: it would not factor into either the

numerator (votes in favor of the amendment) or the denominator (votes cast in the gubernatorial race) of State Actors' ratification fraction and thus has no meaning.[8] On the other hand, a voter supporting the proposed constitutional amendment was incentivized not to vote for governor, so as to add to the numerator of the vote total but not the denominator used for ratification.

The appellate court's opinion both gives rise to state viewpoint-specific compelled voting and represents a break with the holdings in *Ayers-Schaffner*, *Partnoy*, and *Hickenlooper*. Each of these other cases agree that preconditioning the ability to vote in one election on having voted in a prior election is constitutionally impermissible. This case presents heightened constitutional concerns in the context of only certain voters being compelled to vote in one race on the ballot in order for their vote to have mathematical value in another race on the same ballot. The district court's unchallenged factual finding was that opponents of "[the proposed constitutional amendment] likely felt compelled to vote for governor." App. 95a. And State Actors through Tennessee's Secretary of State conceded that their ratification method—the one affirmed by the Sixth Circuit—compelled opponents of a proposed constitutional amendment to cast a vote for a governor if they want to affect the threshold for ratification of that amendment. Nonetheless, the appellate court affirmed this state action.

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[8] Someone favoring an amendment under this scheme faced no such compulsion and could have voted for governor and for the amendment (so that it equaled that of a voter who voted for governor and voted against the amendment) or just voted for the amendment (and thereby increased the relative weight of the vote for the amendment).

At base, this case raises the substantial question of whether—and, if so, to what extent—a state can condition having a vote count in one election on having voted in another race on the same ballot, and whether such condition can only apply to some voters but not all. Petitioners contend and the district court found that State Actors' ratification method placed a compelled voting burden on the fundamental right to vote, triggering and failing heightened scrutiny. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807-09 (1969). In light of the subsequent lower court developments in the decades since *Wooley* and the Sixth Circuit's break with other courts' precedent regarding compelled voting, this Court should grant certiorari to decide this issue.

III. THE CONFLICT BETWEEN THE SIXTH CIRCUIT'S HOLDING THAT DILUTION OF PETITIONERS' VOTES ON THE PROPOSED CONSTITUTIONAL AMENDMENT DID NOT VIOLATE THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE AND THIS COURT'S PRECEDENT RAISES THE IMPORTANT ISSUE OF DEFINING THE LIMIT OF NON-RACIAL VOTE DILUTION IN AN ELECTION.

Although this Court has explained that the archetypal one-person-one-vote principle exists most rigidly when addressing equality of representation, *see generally, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1131 (2016); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), and that this standard is more supple in other, direct-vote contexts, this case tests the extent to which this standard can flex before violating the Equal Protection Clause's requirement that citizens within a

jurisdiction be afforded a right to vote on an equal basis. *See, e.g. Town of Lockport, N.Y. v. Citizens for Community Action at Local Level, Inc*., 430 U.S 259, 265 (1977); *see generally Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). This Court has not yet had the opportunity to consider the circumstances of this case—where the equally situated voters desiring different election results had their votes weighted differently—and how it fits in Court's precedent regarding instances where votes can permissibly have differential weight.

For example, this Court has (and subsequently lower courts have) addressed and affirmed differential voting weights in situations where different stakeholder groups in referenda votes were classified differently based on the way in which a referendum would affect them. *Lockport* permitted a state law requiring separate majorities of those voters who lived in the cities within the county and those voters who lived outside of the cities to approve a new county charter. *Lockport*, 430 U.S. at 260; *see also Tigrett v. Cooper*, 7 F. Supp. 3d 792, 798-801 (W.D. Tenn. 2014) (permitting a requirement for separate majority votes of affected city voters and county voters on a consolidation referendum), *appeal dismissed as moot*, 595 F. App'x 554 (6th Cir. 2014). And this Court reached a similar decision in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, where a California law limited voting for the board of a water storage district to the affected stakeholders, not the populace as such. 410 U.S. 719 (1973).

These precedents preserved—rather than undercut—equal protection by acknowledging differing interest of differing stakeholders and permitting them to vote accordingly. *See also Kramer v. Union Free Sch. Dist.*

No. 15, 395 U.S. 621, 632 (1969) (requiring "exacting precision" for the identification of such differential interest groups). This case, however, diverges from these precedents and presents a different issue because there are no differing stakeholders; there are simply differing views on the desired election result among the electorate as a whole. This case allows the Court to define the limits of permissible divisions for differentially weighing votes. While such differential weight may be given to distinct categories of stakeholders, state voting schemes should not be permitted to differentially weigh votes based merely on the election outcome desired by voters.

In this case, there were not differing stakeholders—only differing viewpoints on the proposed constitutional amendment. And as discussed above, under State Actors' ratification method, the option to vote for or against the proposed amendment couples with the option to vote or not to vote in gubernatorial race to yield four possible combinations of votes with three different relative weights—notably a combination that had no impact on the passage of the amendment (i.e. voting against the proposed amendment and not voting in the gubernatorial race) and one that had disproportionate effect in favor of the amendment's passage (i.e. voting in favor of the proposed constitutional amendment and not voting for governor).[9]

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[9] Two social scientists who study voting rules and election design and their strategic implications on voting practice—Steven Brahms (Professor of Politics at New York University) and Paul H. Edelman (Professor of Mathematics and Professor of Law at Vanderbilt University)—filed an amicus brief in support of neither party in the Sixth Circuit that analyzed the mathematical consequences of this multi-permutation voting system in detail and that concluded that the State Actors' system allowed

This voting scheme presents a different issue from *Gordon v. Lance*, 403 U.S. 1 (1971), and its progeny, where the threshold required for a resolution or amendment is a fixed value greater than a simple majority—*e.g.*, West Virginia's 60% majority requirement for political subdivisions to levy higher taxes or incur bond debt in *Gordon*. *Id.* at 2-3. As this Court explained, departing from a strict majority rule may empower a minority (i.e. the >50% of voters opposing the measures), but this supermajority threshold does not violate equal protection because it applies equally to all voters. *Id*. at 5-6. The value of votes remained the same relative to all voters in the state because every vote cast had the same potential impact on achieving/preventing the 60% threshold. The situation here presents a question not yet addressed by this Court: where the voting-value difference hinges on viewpoint, rather than a fixed threshold because Petitioners' "no" votes did not have the same potential weight compared to other voters who favored the proposed constitutional amendment and did not vote for governor.

The appellate court analogized the State Actors' voting scheme to previously upheld "strategic" voting. This analogy is misplaced. In permissible bullet voting,[10] the choice to/not to vote for more than one candidate is limited to a single race where a voter opts to self-limit. And all voters have the same choice to

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strategic voting advantages for some voters that were unavailable to others. App. 150a – 158a.

[10] Bullet voting is a tactic by which voters who have the option to cast a vote for more than one candidate in a single race opt instead to vote for only one candidate. *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 184 n.19 (1980) *abrogated by Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

"enhance" the power of their ballot. State Actors' counting scheme, however, departed in both respects.

First, the scheme created a choice not to vote that reached across the ballot to two separate races—the vote for governor and the vote on the proposed constitutional amendment. Instead of choosing not to vote more than once in a single race to maximize the one vote they cast as occurs in bullet voting, pro-amendment "double-your-vote" voters wholly abstained from the governor's race to advantage their vote on the proposed constitutional amendment. This Court has yet to consider whether voters should be able to empower their votes in one race by abstaining to vote in a wholly separate race on the same ballot.

Second, the voting scheme here only gave certain voters an opportunity to vote strategically. State Actors' ratification method permitted only pro-amendment voters the option of foregoing voting for governor to bolster their vote for the proposed constitutional amendment; conversely, Petitioners and others who opposed the amendment were left with decidedly lesser options: vote for governor and against the proposed constitutional amendment to cast a diluted vote or vote against the proposed constitutional amendment without voting for governor and cast a vote with no bearing on ratification.[11]

This Court should articulate the equal protection limits of permissible strategic voting. Strategic voting systems previously condoned by this Court have provided all voters, regardless of viewpoint, the same option to bullet vote. This case allows the Court to

[11] In this respect, the one-way avenue for manipulation allows for further exploitation in the wording of proposed constitutional amendments.

decide whether to now endorse the one-way influence present in this case that invites viewpoint-limited strategic voting. *Cf., e.g.*, *Thornburg v. Gingles*, 748 U.S. 30, 38-39 (1986); *City of Rome*, 446 U.S. at 184. The appellate court's endorsement of this unequal ability for voters on only one side of an issue to shift the threshold for ratification differentiates this case from instances of fixed majority or bullet voting systems and places it in tension with this Court's precedent. Whether the Equal Protection Clause permits such a system presents a substantial question meriting review by this Court.

IV. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY ITS PRECEDENT IN LIGHT OF THE APPELLATE COURT'S RULING PERMITTING A FUNDAMENTALLY UNFAIR VOTING SYSTEM.

Where a state's voting system is fundamentally unfair, due process is implicated, and § 1983 relief is appropriate. *See Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring); *United States v. Saylor*, 322 U.S. 385, 388-39 (1944); *see also Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978). This Court has previously found instances of fundamental unfairness in the context of non-race-based vote tabulation, but it has been many decades since the Court last addressed the issue head-on.

For example, *United States v. Saylor* explained that a state election violated federal due process when election officials' conduct resulted in fraudulent or fundamentally unfair voting results—in that case, stuffing the ballot box. 322 U.S. at 388-39. Here, although State Actors themselves did not cast more than one vote for the proposed constitutional

amendment, their tabulation method yielded a comparable result by according certain votes greater weight. Like the officials in *Saylor*, State Actors' conduct valued certain votes over other votes, thereby tipping the scale in favor of the amendment.

Since *Saylor*, lower appellate courts have found non-race-based due process violations based on fundamental unfairness. In *Roe v. State of Alabama*, the Eleventh Circuit explained that Alabama's counting of contested absentee ballots (which, until the election in question, had not been counted) implicated fundamental fairness because, among other reasons, counting those contested ballots "effectively 'stuff[ed] the ballot box.'" 43 F.3d 574, 581 (11th Cir.) (*certified question answered sub nom. Roe v. Mobile Cnty. Appointment Bd.*, 676 So. 2d 1206 (Ala. 1995); *see also Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970) (holding that changing voting rules and then refusing to count votes from voters who were not informed of the change created a fundamentally unfair system).

Under the voting scheme advanced by State Actors and endorsed by the appellate court, a vote on the proposed constitutional amendment from anyone who voted for governor—regardless of whether the vote was for or against the amendment—has less value than a vote for the proposed constitutional amendment from someone who did not vote for governor. The Sixth Circuit's opinion stands in contrast to the other lower courts' holdings.

Under State Actors' counting scheme, Petitioners and other voters like them who relied on the election procedures seemingly established by Tennessee's Constitution—*i.e.*, that passage of a proposed constitutional amendment depended on those voting for governor—had their votes against the proposed

constitutional amendment diluted vis-à-vis proponents of the amendment who did not vote for governor. Conversely, opponents of the proposed constitutional amendment who relied on State Actors' public but not officially released pre-election statements that "there was no requirement to vote in any race" to understand that they did not need to vote for governor to have their vote against the proposed constitutional amendment count,[12] saw their votes wholly deprived of value because they neither contributed to the numerator (votes for the proposed constitutional amendment) or denominator (total votes cast for governor) of the ratification calculation. *See Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998) *as amended on denial of reh'g and en banc reh'g* (June 23, 1998).

And State Actors' ratification method was unequal to proponents of the proposed amendment as well: a vote on the proposed constitutional amendment from anyone who voted for governor, regardless of whether the vote was for or against the amendment, had less value than a vote for the proposed constitutional amendment from someone who did not vote for governor.[13] Pro-amendment voters thus had to decide whether they most valued voting in the governor's race (thereby diminishing the value of their amendment vote) or maximizing their vote for the proposed constitutional amendment (at the cost of not being able to vote for governor).

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[12] Notably, although State Actors made statements like "[w]hether people vote in the governor's race doesn't affect their eligibility to vote on the amendments" to the media, they did not—and, discovery in this case revealed, they explicitly decided not to—issue any sort of formal release about tabulating votes on the proposed constitutional amendment. *See, e.g.*, App. 51a – 56a.

[13] *See generally* App. 146a – 152a.

The question of whether such a voting system is fundamentally unfair, and the apparent conflict between the Sixth Circuit's ruling and precedent from other circuits creates a substantial question appropriate for this Court's review, particularly because it has been nearly 70 years since this Court as spoken on the question of what constitutes fundamental unfairness in these circumstances.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 13, 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

———

No. 16-5563

———

TRACEY E. GEORGE, *et al.*,

Plaintiffs-Appellees,

v.

TRE HARGETT, *et al.*,

Defendants-Appellants.

———

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:14-cv-02182—Kevin H. Sharp, District Judge.

———

Argued: August 2, 2017
Decided and Filed: January 9, 2018

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Before: SUHRHEINRICH, GILMAN, and
McKEAGUE, Circuit Judges.

———

COUNSEL

ARGUED: Sarah K. Campbell, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellants. William L. Harbison, SHERRARD ROE VOIGT & HARBISON, PLC, Nashville, Tennessee, for Appellees. ON BRIEF: Sarah

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OPINION

McKEAGUE, Circuit Judge. In November 2014, Tennessee voters approved an amendment to the Tennessee Constitution making clear that the Constitution is not to be construed as securing or protecting a right to abortion or requiring funding of an abortion. Understandably, the amendment was a matter of no small controversy. In fact, more votes were cast in favor of and opposition to the amendment than were cast in the governor's race during the same election. In this litigation, the controversy is still kept alive. That is, since federal court jurisdiction was invoked three years ago, it remains to be determined whether the Tennessee electorate did in fact amend their constitution. This litigation, however, is only marginally related to the public policy controversy, focusing on what might be viewed as much more pedestrian questions, such as whether the votes were counted incorrectly, and whether the vote-counting method impermissibly infringed some voters' rights. We answer "no" to both questions and thus give effect to the express will of the people.

Plaintiffs in this case, Tracey E. George, Ellen Wright Clayton, Deborah Webster-Clair, Kenneth T. Whalum, Jr., Meryl Rice, Jan Liff, Teresa M. Halloran, and Mary Howard Hayes, are eight individual Tennessee voters. In the November 2014 election, plaintiffs voted against Amendment 1, an abortion-related proposed amendment to the Tennessee Constitution. After the election, Tennessee government officials determined that Amendment 1 had passed. Plaintiffs brought suit in the Middle District of Tennessee, asserting claims under 42 U.S.C. § 1983 against the Governor of Tennessee, the Secretary of State, the Coordinator of Elections, the Attorney General, and the State Election Commission and its members ("the State officials") in their official capacities. Underlying plaintiffs' claims is the theory that, in counting the votes on Amendment 1, the State officials incorrectly interpreted the requirements of Article XI, Section 3 of the Tennessee Constitution, which prescribes Tennessee's constitutional-amendment process. After a bench trial, the district court entered judgment in favor of plaintiffs and issued an injunction requiring the State officials to recount the votes on Amendment 1 in accordance with plaintiffs' proposed interpretation of Article XI, Section 3. This appeal followed. The district court stayed the injunction pending appeal. For the reasons that follow, we reverse the district court's judgment.

I. BACKGROUND[1]

A. Factual Background

On the ballot in the Tennessee general election in November 2014 were the governor's race and four proposed amendments to the Tennessee Constitution. Only Amendment 1 is at issue here. It provides:

> Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother.

R. 119, Findings and Conclusions at 5, Page ID 3016.

Amendment 1 was proposed by the Tennessee legislature pursuant to Article XI, Section 3 of the Tennessee Constitution, which prescribes two methods of effectuating an amendment: the legislative, or "referendum," method and the convention method. Article XI, Section 3 provides that, for amendments going through the legislative method,

> if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the State voting for Governor, voting in their favor, such amendment or amendments shall become a part of this Constitution.

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[1] This background summary is drawn principally from the district court's opinion, which, in this respect, is not objected to by the parties.

Tenn. Const. Art. XI, § 3. This provision, though succinct, is not eloquent and may be understood in more ways than one. Prior to the November 2014 election, State officials had consistently interpreted Article XI, Section 3 as follows:

> Counting the Votes
>
> In order for the amendment to pass and become part of the Constitution, two things must happen:
>
> 1. The amendment must get more "yes" votes than "no" votes; and
>
> 2. The number of "yes" votes must be a majority of the votes cast in the gubernatorial election.
>
> To determine the votes needed, all votes for all candidates for governor are added together. This number is divided by two or halved. The number of "yes" votes must exceed that number. If the number of "yes" votes exceeds the number, the Constitutional amendment passes and becomes part of the Constitution.
>
> Voting
>
> Despite the fact that the number of votes cast for governor is used to determine the outcome, it is not necessary to vote in the governor's race in order to vote on the Constitutional amendment. Likewise, it is not necessary to vote for an amendment in order to vote in the governor's race.

R. 119, Findings and Conclusions at 10–11, Page ID 3021–22 (quoting language previously posted on the Secretary of State website). In fact, no evidence was

presented to the district court suggesting that Article XI, Section 3 had ever been interpreted and applied differently by State officials. *Id.* at 9, n.4, Page ID 3020.

Prior to the November 2014 election, the State officials received inquiries from members of the public, as well as one from the Davidson County Election Commission, regarding how the votes on the proposed amendments would be counted. Specifically, the inquiries sought guidance as to whether Article XI, Section 3 required voters to vote for a gubernatorial candidate in order for their votes to count on the proposed amendments. In accordance with the above interpretation consistently applied by officials in the past, the State officials responded to the effect that voting in the governor's race was not a prerequisite to casting a valid vote on an amendment. R. 119, Findings and Conclusions at 9, Page ID 3020. A spokesperson for the Secretary of State's office also explained this response to the media, which was made known to the public through newspaper articles. *Id.* at 12, Page 3023.

Supporters and opponents of Amendment 1 then began using the published interpretation of Article XI, Section 3 to enhance or diminish the likelihood of the amendment's approval. Applying the published interpretation, both supporters and opponents surmised that the greater the number of votes cast for governor, the greater would be the ultimate number of votes for Amendment 1 needed for its approval and ratification. Hence, supporters encouraged voters to vote for the amendment *and* abstain from voting for governor, and opponents urged voters to vote against Amendment 1 *and* cast a vote for a candidate for governor. The largest campaigns, noted the district court, were

mounted by supporters of Amendment 1. *Id.* at 13, Page ID 3024.

The State officials tabulated the votes after the November 2014 election. A total of 1,430,117 individuals voted, of whom 1,353,728 voted for a gubernatorial candidate. Even more votes—1,386,355—were cast on Amendment 1. For the first time since Article XI, Section 3 was amended in 1953, more votes were cast on a proposed amendment than were cast for governor. *Id*. at 16, Page ID 3027. The voters favoring Amendment 1 numbered 729,163 and those opposed numbered 657,192. The State officials announced their preliminary determination that Amendment 1 had passed because a majority of the votes cast on the amendment were "yes" votes and because the number of "yes" votes was also greater than a majority of the votes cast for governor. On December 8, 2014, the State officials certified the election results, including the vote on Amendment 1. *Id.*

B. Procedural Background

Three days after the November 4, 2014 election, plaintiffs filed a complaint in the district court, which they later amended. The amended complaint alleged that the State officials, by their erroneous interpretation of Article XI, Section 3, employed a vote-counting method that (1) violated plaintiffs' due-process rights by creating a fundamentally unfair voting system, and (2) violated plaintiffs' equal-protection rights by diluting their votes. R. 51, Amended Complaint, Page ID 596–600.

Plaintiffs sought a judgment declaring that Article XI, Section 3 required the State officials to count only the votes of those who voted in the gubernatorial race, that the State officials' method of tabulating votes

violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and that the election results were void. Plaintiffs also sought an injunction requiring a recount of the vote on Amendment 1, as well as costs and attorneys' fees.

In response, the State officials moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted. They also asked the district court to either decline to decide the case under the *Pullman* abstention doctrine or certify the question of how to interpret Article XI, Section 3 to the Tennessee Supreme Court. In July 2015, the district court denied the motion to dismiss and refused to certify the question. The parties began preparing for a bench trial, which was conducted in April 2016.

Meanwhile, in September 2015, the State officials filed a complaint in state court, *Hargett v. George*, Williamson Cty. Chancery Ct. No. 44460, seeking a declaratory judgment that the vote-counting method they had used represented a proper interpretation of Article XI, Section 3. Named as defendants were the eight individual plaintiffs in the present suit, who moved to dismiss the state court action on various grounds, including that the State officials were seeking an impermissible advisory opinion. Their motion was denied in December 2015. Appellants' Suppl. Br. Ex. A, *Hargett v. George*, No. 44460, Slip Op. (Dec. 9, 2015).

On April 21, 2016, the state court granted the State officials' motion for summary judgment and issued a declaratory ruling, concluding that Article XI, Section 3 does not require an individual voter to vote for governor as a condition of casting a valid vote on a proposed

constitutional amendment. Appellants' Suppl. Br. Ex. B, *Hargett v. George*, No. 44460, Slip Op. (April 21, 2016). The court concluded its 22-page opinion as follows:

> The court hereby declares that Article XI, Section 3, requires that a proposed amendment be first approved by receiving votes constituting a majority of the votes cast on the amendment and then be ratified by receiving votes constituting a majority of the total votes cast in the gubernatorial election. Article XI, Section 3, does not restrict or precondition the right of a citizen to vote for or against a constitutional amendment upon that citizen also voting in the gubernatorial election.

Id. at 22.

The district court entered its judgment the very next day, reaching the opposite conclusion about the proper interpretation of Article XI, Section 3. R. 119, Findings and Conclusions, Page ID 3013. The district court essentially concluded that the plain language of Article XI, Section 3, given its ordinary meaning, requires that a voter who would cast a valid vote for a constitutional amendment must, as a precondition, also vote for governor. *Id.* at 29– 32, Page ID 3040–43. The court further concluded that the State officials' implementation of a contrary construction during the 2014 election resulted in violation of plaintiffs' due process and equal protection rights. *Id.* at 51, Page ID 3062.[2] Accordingly, the district court issued an

[2] The district court acknowledged the state court's contrary ruling on the meaning of Article XI, Section 3, but held that the declaratory relief awarded by the state court was prospective

injunction requiring the State officials to recount the votes on Amendment 1 to determine whether it "passed by a majority of those who voted in the governor's race." R. 118, Order at 2, Page ID 3011. The court deferred ruling on plaintiffs' request that the election results be voided, however, because of the possibility that the recount results would render further relief moot. This timely appeal followed, and the district court stayed its injunction pending appeal.

II. ANALYSIS

A. Preclusive Effect of State Court Ruling

Before addressing the merits of the district court's judgment, we consider a threshold issue raised by the State officials. They argue first that we should give preclusive effect to the declaratory judgment of the state court because the state court's interpretation of Article XI, Section 3, having not been appealed, has since become a final judgment entitled to preclusive effect between the parties.[3] Because the state-court judgment became final only after this appeal had been filed, we may consider its preclusive effect in the

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only, was not a final judgment, and did not address the claim that the November 2014 application of that interpretation had resulted in violation of some voters' due process and equal protection rights under the United States Constitution. *Id.* at 25–26, Page ID 3036–37.

[3] The impact of the state-court ruling was not addressed by the parties below because it issued after briefing and oral arguments had been completed in the district court proceedings and just one day prior to the district court's declaratory judgment ruling. Nonetheless, the district court was cognizant of the state-court ruling and did not disregard the state-court ruling in its opinion, as discussed *infra* at n.5.

first instance. *See Gooch v. Life Investors Ins. Co. of America*, 672 F.3d 402, 418–19 (6th Cir. 2012).[4]

The preclusive effect of the state court's decision in this federal litigation is governed by Tennessee law. *Anderson v. City of Blue Ash*, 798 F.3d 338, 350 (6th Cir. 2015). Issue preclusion, also referred to as collateral estoppel, is a judicially created doctrine that "promotes finality, conserves judicial resources, and prevents inconsistent decisions." *Mullins v. State*, 294 S.W.3d 529, 534 (Tenn. 2009). Collateral estoppel not only reduces unnecessary litigation and fosters reliance on adjudication, but also promotes comity between state and federal courts. *Allen v. McCurry*, 449 U.S. 90, 95–96 (1980). The doctrine generally bars parties from relitigating issues that have been decided in prior litigation between the same parties or their privies. *Mullins*, 294 S.W.3d at 534–35.

> To prevail with a collateral estoppel claim, the party asserting it must demonstrate

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[4] In *Gooch*, the court went so far as to consider *sua sponte* the preclusive effect of a state-court judgment that had not become final until after district court proceedings had been completed. Because the judgment had since become final, it was deemed entitled to respect, and because its preclusive effect posed a purely legal issue that was presented with sufficient clarity and completeness in the parties' briefs, the court held that *sua sponte* consideration was appropriate. *Gooch*, 672 F.3d at 419. *See also MSI Regency, Ltd. v. Jackson*, 433 F. App'x 420, 430 (6th Cir. 2011) (same).

Here, in comparison, consideration of the preclusive effect of the state-court judgment is even more appropriate: the state-court judgment became final only after this appeal commenced; the preclusive effect is a purely legal issue; the issue is not addressed *sua sponte*, but has been raised and fully briefed by the parties; and, moreover, the court has requested and received supplemental briefing.

> (1) that the issue to be precluded is identical to an issue decided in an earlier proceeding, (2) that the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding, (3) that the judgment in the earlier proceeding has become final, (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded.

Id. at 535. The State officials contend that all five of these requirements are met by the state court declaratory judgment ruling. Plaintiffs disagree. We consider the five elements in order.

First, the issue decided in the state court, concerning the meaning of Article XI, Section 3 of Tennessee's Constitution, is an integral component of the district court's ruling that the State officials' implementation of Article XI, Section 3 violated plaintiffs' due process and equal protection rights. The district court arrived at its interpretation of Article XI, Section 3 before the state court's one-day-earlier contrary interpretation became final, but *our* ruling comes after the state court's interpretation became "final" and, to date, the best state-law authority on the meaning of Article XI, Section 3. This particular issue is common to, and identical in, both the state and federal court proceedings.[5]

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[5] The district court recognized the commonality of this issue in both cases. R. 119, Findings and Conclusions at 24–26, Page ID 3035–37. In declining to abstain from exercising jurisdiction, the

Second, although plaintiffs argue the point, there is no serious contention that the meaning of Article XI, Section 3 was not actually raised, litigated, and decided on the merits in the state-court proceeding.

Third, plaintiffs concede that the state-court ruling became final no later than August 2016, over a year prior to our addressing the issue.

Fourth, plaintiffs do not deny that the same parties are involved in both actions.

Fifth, plaintiffs maintain that preclusive effect should be denied the state-court judgment because they were not granted a full and fair opportunity to contest it. Their argument is premised on the state court's denial of their motion to conduct discovery before "rushing" to judgment as a matter of law on the meaning of Article XI, Section 3. Yet, the state court's declaratory judgment ruling clearly represents a judgment as a matter of law based on the language of Article XI, Section 3 and its legislative history. Plaintiffs have not explained how any expected fruits of discovery would have been material to the court's ruling. Nor, tellingly, did they appeal the state court's ruling.

"The courts have not devised a precise definition of what constitutes the sort of 'full and fair opportunity

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district court gave three reasons for not abiding by the state court's interpretation: (1) the state court's ruling purported to grant only prospective relief and did not address the propriety of the State officials' implementation of Article XI, Section 3 in the 2014 election; (2) the state court's ruling did not address the propriety of the State officials' actions in the 2014 election under the United States Constitution; and (3) the state court's ruling was appealable and therefore not a final judgment at the time of the district court's ruling. *Id*.

to litigate' that will support the invocation of the doctrine of collateral estoppel." *Mullins*, 294 S.W.3d at 538. The question is one of fundamental fairness. *Id.* Generally, a defendant in the matter "must have had notice of the claim and an opportunity to be heard." *Id.* Plaintiffs herein, who were defendants in the state court action, certainly had notice and opportunity to be heard. They challenged the state court's jurisdiction to proceed and vigorously opposed the declaratory relief sought by the State officials. Plaintiffs fall far short of demonstrating how the denial of discovery could be deemed to have resulted in fundamental unfairness. If it had, their recourse lay in appellate review. Plaintiffs have not argued that their right to appellate redress was somehow hindered. If any unfairness resulted, it was not for lack of a full and fair opportunity to litigate.

Accordingly, all five factors of the *Mullins* standard are satisfied and the state court ruling on the meaning of Article XI, Section 3 should be deemed entitled to preclusive effect in our analysis of the constitutional issues presented in this appeal.

Still, plaintiffs object. They contend that the *Mullins* factors presume a final judgment by a court of "competent jurisdiction." *See Gibson v. Trant*, 58 S.W.3d 103, 113 (Tenn. 2001). Although they acknowledge that the Tennessee Declaratory Judgments Act is "to be liberally construed and administered," they contend that a Tennessee court does not have competent jurisdiction to issue a declaratory judgment unless presented with a justiciable controversy. *See West v. Schofield*, 460 S.W.3d 113, 129–30 (Tenn. 2015). To be justiciable, a controversy must present a real question regarding a legally protectable interest, not one that is dependent on a future or contingent event and not one that is

theoretical or hypothetical. *Id*. Because the state-court declaratory relief sought by the State officials regarding their interpretation of Article XI, Section 3 would have prospective effect only, affecting only future contingent elections, plaintiffs contend that the controversy before the state court was not justiciable.

The primary purpose of the Tennessee Declaratory Judgments Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Id.* at 129 (quoting Tenn. Code. Ann. § 29-14-113). The Act "should be liberally construed in favor of the person seeking relief in a proper case to the end that rights and interests be *expeditiously* determined." *Tennessee Farmers Mut. Ins. Co. v. Hammond*, 290 S.W.2d 860, 862 (Tenn. 1956) (emphasis added). To this end, Tennessee courts have "very wide" discretion in deciding whether to exercise jurisdiction over a complaint for declaratory judgment. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 193 (Tenn. 2000). An appellate court will disturb the trial court's decision whether to exercise jurisdiction only if arbitrary. *Id.* at 193–94 (affirming refusal to issue declaratory judgment as not arbitrary); *State ex. rel. Earhart v. City of Bristol*, 970 S.W.2d 948, 954 (Tenn. 1998) (reversing refusal to grant declaratory judgment as an abuse of discretion).

The State officials respond that the pendency of this federal litigation, which precipitated their state-court action, demonstrates that their declaratory-judgment action presented a real, contemporaneously existing controversy. Indeed, the individual voters' federal claims that the State officials' manner of interpreting and applying Article XI, Section 3 resulted in violation of their federal constitutional rights necessarily presented a real controversy arising under Tennessee

law. At the heart of the voters' federal claims is the theory that the State officials misinterpreted Article XI, Section 3. The answer to the question whether the State officials' interpretation was proper under state law would not, as the district court noted, necessarily dictate the outcome of the voters' federal constitutional claims, but the voters' claims were undeniably premised on the charge that the State officials had misinterpreted state law. *See* R. 62, Memorandum at 18–21, Page ID 781–84. Because this question of state law was integral to the federal litigation, the State officials proceeded with their state-court action for declaratory relief only after the district court had denied their request to abstain or certify the question to the Tennessee Supreme Court. *See id*.

Moreover, the State officials named the same individual voters who brought the federal action as defendants in the state-court action so that they would have the opportunity to contest it. There was no mystery about the factual background or concreteness of the dispute between the parties. Whatever other significance might be found in the intertwined relationship between the two actions, it can hardly be denied that there was a real live controversy, not simply a hypothetical one, regarding the meaning of Article XI, Section 3. Yes, the controversy stems from the 2014 election, but the meaning of Article XI, Section 3 remained in question, and authoritative resolution of this state-law question would invariably impact the State officials' continuing and future discharge of their duties.

Nor did the justiciability question elude the state court's attention. The defendant voters expressly challenged the state court's jurisdiction to proceed under the Tennessee Declaratory Judgments Act. Rejecting

the notion that the court was being asked to issue an advisory opinion, the court observed:

> Providing the state officials responsible for the conduct of elections with authoritative interpretation of their legal duties under State law is not, *in this context*, a hollow exercise.

Appellants' Suppl. Br. Ex. A, *Hargett v. George*, No. 44460, Slip Op. at 23 (Dec. 9, 2015) (emphasis added). The "context" referred to by the state court was the defendant voters' pending federal civil rights challenge to the manner in which the State officials had interpreted and applied Article XI, Section 3 in the November 2014 election, which had called the State officials' reading into uncertainty, despite its consistency with longstanding practice. With reference to *Buntin v. Crowder*, 118 S.W.2d 221 (Tenn. 1938), where, under analogous circumstances, a justiciable declaratory judgment action was held to exist, the state court further observed:

> The Plaintiffs [State officials] are interested in construing Article XI, Section 3 in the manner they have customarily applied it, the Defendants are interested in making the Plaintiffs apply Article XI, Section 3 in the manner they prefer.

Appellants' Suppl. Br. Ex. A, *Hargett v. George*, Slip. Op. at 24. The state court thus determined that it had jurisdiction to proceed under the Declaratory Judgments Act.

The defendant voters (i.e., plaintiffs herein) did not appeal the state court's jurisdictional determination or its final decision and we are not in a position, of course, to review either of the state court's rulings. Yet,

cursory examination of the state court's 26-page opinion denying the defendant voters' motion to dismiss reveals that the court did not exercise jurisdiction lightly or carelessly. The state court has not been shown to have so manifestly abused its discretion as to persuade us to hold that it acted without competent jurisdiction.

Plaintiffs argue that the justiciability of the state-court action should be evaluated without regard to their federal action. If we indulge the fiction that the controversy surrounding the 2014 election does not exist, as they propose, then it becomes clear that the State officials' complaint for declaratory relief pertains only to future contingent events. The argument is based on the notion that the declaratory judgment could not include relief affecting the outcome of the 2014 election; therefore, the declaratory relief afforded could be prospective only, affecting only future applications of Article XI, Section 3. Although plaintiffs' position grows stronger if the inquiry whether there is a real controversy between the parties ignores the real controversy between the parties, we find no merit in such an artificial approach to justiciability.[6]

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[6] Moreover, we note that the State officials' resort to state-court declaratory relief represented a response to the district court's denial of *Pullman* abstention. Notwithstanding the district court's refusal to hold proceedings on the § 1983 civil rights claims in abeyance pending clarification of the unsettled question of state law, per *Railroad Comm'n of Texas v. Pullman Co*., 312 U.S. 496 (1941), the State officials pursued state-court clarification *concurrently* with the ongoing federal-court proceedings. If abstention had been granted, then, to properly reserve disposition of the federal claims in federal court, per *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 421 (1975), it would have been obligatory to "inform" the state court of the outstanding federal claims, per *Gov't and Civic Employees*

Further, recognizing that declaratory relief afforded by the state court would not affect the outcome of the 2014 election does not dictate the conclusion that the controversy spawned by that election is not real. Until plaintiffs filed their federal civil rights action, State officials had consistently interpreted and applied Article XI, Section 3 in what appeared to be a reasonable manner without controversy. Only after that filing did the controversy emerge. Nor does the necessarily prospective nature of declaratory relief mean that the controversy at stake is too contingent and hypothetical. Article XI, Section 3 is part of the Tennessee Constitution which the State officials are charged with administering when a proposed constitutional amendment makes its way onto the ballot. The controversy surrounding the 2014 election is the real event regarding a legally cognizable question that affords the occasion for judicial clarification of the state law that the State officials are charged with administering.

But if their federal civil rights action is to be recognized as creating the controversy, *then*, plaintiffs contend, it should also be deemed to render declaratory relief in a different forum inappropriate. They point to two cases where the Tennessee Supreme Court upheld lower court refusals to entertain actions of declaratory judgment. In *Nicholson v. Cummings*, 217 S.W.2d 942 (Tenn. 1949), the court held that refusal of declaration was proper where the facts were disputed, the declaration would not have terminated the controversy, and the declaration "could have been

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Organizing Committee, C.I.O. v. Windsor, 353 U.S. 364 (1957). It was thus appropriate, analogously, for the State officials to so inform the state court in the concurrently proceeding declaratory judgment action, and for the state court to consider the information in assessing the justiciability of the claim before it.

no more than a stepping-stone to further litigation." *Id.* at 943. In *Burkett v. Ashley*, 535 S.W.2d 332 (Tenn. 1976), the court affirmed the denial of declaratory relief where the plaintiff failed to allege sufficient facts to establish a real controversy and where the declaration had been sought to circumvent an alimony obligation imposed in another court. The court observed that "a declaration will not be given in aid of another proceeding then pending." *Id.* at 333.

Both opinions are short and both upheld the lower court's exercise of discretion in sensible, straightforward rulings. Each case involved the pendency or prospect of other related litigation, as here. Yet, the "other related litigation" in this case presented federal constitutional claims creating a real controversy of state law ripe for declaratory relief, distinguishing our case from *Burkett*. And the State officials' request for declaratory relief to resolve this unsettled question of state law was based on undisputed facts, distinguishing our case from *Nicholson*.

Moreover, the question addressed to the state court, integral to the pending federal civil rights claims, is a question the district court had declined to certify to the Tennessee Supreme Court for an authoritative state-court interpretation of the Tennessee Constitution. Under these circumstances, we find it highly doubtful that the Tennessee Supreme Court—if it had been asked to review the state court's decision to adjudicate the state law question, which it was not—would have held the decision arbitrary and vacated it for lack of jurisdiction. Rather, it is far more likely that the Tennessee high court, consistent with its own precedents, would have upheld the trial court's decision to exercise jurisdiction as being within the trial court's "very wide discretion." *Cf. State ex. rel. Earhart*, 970

S.W.2d at 955 ("Where there is presented a significant issue that needs resolving, as in this case, refusing to issue a declaratory judgment cannot be excused on the basis of discretion.").

Accordingly, we cannot conclude that the state court was without competent jurisdiction to address the State officials' complaint for declaratory relief. No party having appealed the state court's ruling, it has become final and binding between the parties to that action, who are also the parties to the instant appeal. *Mullins*, 294 S.W.3d at 535. It follows that the state-court declaratory judgment on the meaning of Article XI, Section 3 is now entitled to conclusive effect, and the parties are barred from relitigating its meaning. *Id.* at 534. This result is entirely consonant with the purposes of collateral estoppel: promoting efficiency, judicial economy and comity, and preventing inconsistent decisions. *Allen*, 449 U.S. at 95–96; *Mullins*, 294 S.W.3d at 534.

In other words, that portion of the district court opinion devoted to discerning the meaning of Article XI, Section 3 is, for purposes of the instant dispute between these parties, effectively supplanted by the state court's contrary interpretation, which is binding on the parties. The district court's determination that Article XI, Section 3 means that "voters must vote for governor in addition to voting on a proposed amendment" (i.e., to cast a valid vote for the amendment), R. 119, Findings and Conclusions at 29, Page ID 3040, is supplanted by the state court's declaration "that Article XI, Section 3, requires that a proposed amendment be first approved by receiving votes constituting a majority of the votes cast on the amendment and then be ratified by receiving votes constitut-

ing a majority of the total votes cast in the gubernatorial election." Appellants' Suppl. Br. Ex. B, *Hargett v. George*, Slip Op. at 22.

This means that the method of counting votes employed by the State officials in the 2014 election was faithful to the actual meaning of Article XI, Section 3. Although this undermines the district court's analysis of plaintiffs' civil rights claims, it does not necessarily dictate a different outcome. We next consider the impact of this clarification of state law on the merits of plaintiffs' due process and equal protection claims.[7]

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[7] The State officials have also challenged the district court's refusals to abstain and to certify the question of state law to the Tennessee Supreme Court. Our ruling on the preclusive effect of the state-court declaratory judgment effectively renders both challenges moot. Because the state court acted so promptly and its ruling became final so quickly, the resulting state-court confirmation of the meaning of Article XI, Section 3 produced the very benefits (i.e., comity and avoidance of inconsistent rulings), by way of issue preclusion, that the State officials had endeavored to achieve though *Pullman* abstention or certification of the question.

If the district court had abstained, the parties would have pursued clarification of the unsettled issue of state law in state court, while reserving adjudication of residual questions of federal constitutional law in federal court, per *England*, 375 U.S. at 421. Similarly, if the unsettled question of state law had been certified to the Tennessee Supreme Court (an option potentially even more efficient than, and therefore preferred over, *Pullman* abstention), the federal court would have postponed further proceedings on the federal claims pending state-court clarification. *See Jones v. Coleman*, 848 F.3d 744, 749–50 (6th Cir. 2017). When the district court declined to employ either option (on which we express no opinion), the State officials pursued a third course, which, albeit unorthodox, turned out to be an efficient and fruitful substitute.

B. Due Process

1. *Standard of Review*

On appeal from a judgment following a bench trial, we review de novo the district court's conclusions of law. *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 547 (6th Cir. 2010). The district court's findings of fact are reviewed for clear error. *Id.* The scope of the injunctive relief ordered by the district court is reviewed under the abuse-of-discretion standard. *Lee v. City of Columbus*, 636 F.3d 245, 249 (6th Cir. 2011).

Plaintiffs here allege that the State officials' manner of counting the votes in the 2014 election impermissibly infringed or burdened their right to vote. Indeed, the right to vote, being fundamental, is afforded special protection by the courts. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 626 (6th Cir. 2016). Yet, common sense dictates that substantial regulation of elections is required if they are to be fair and honest. *Id.* "Federal law thus generally defers to the states' authority to regulate the right to vote." *Id.* When these interests come into tension and ripen into a constitutional challenge, we evaluate the State's actions under the so-called *Anderson-Burdick* framework, derived from the Supreme Court's rulings in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). In *Ohio Democratic Party*, we described the framework as follows:

> Though the touchstone of *Anderson-Burdick* is its flexibility in weighing competing interests, the "rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S.

> at 434. This flexible balancing approach is not totally devoid of guidelines. If a state imposes "severe restrictions" on a plaintiff's constitutional rights (here, the right to vote), its regulations survive only if "narrowly drawn to advance a state interest of compelling importance." *Id*. On the other hand, "minimally burdensome and nondiscriminatory" regulations are subject to a "less-searching examination closer to rational basis" and "'the State's important regulatory interests are generally sufficient to justify the restrictions.'" *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) (citing *Green Party of Tennessee v. Hargett*, 767 F.3d 533, 546 (6th Cir. 2014), and quoting *Burdick*, 504 U.S. at 434). Regulations falling somewhere in between—i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a "flexible" analysis, "weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Hargett*, 767 F.3d at 546.

834 F.3d at 627. The district court recognized and purported to apply the *Anderson-Burdick* approach. It concluded that the vote-counting method employed by the State officials imposed a more-than-minimal burden on voting rights and therefore warranted a flexible weighing of the state's asserted interest against the burden on plaintiffs' rights. We consider each of plaintiffs' three theories of relief in order.

2. *Plain Language Theory*

Plaintiffs' due process claim is two-pronged. First, they contend the State officials' vote-counting method was fundamentally unfair because it was not in

conformity with the plain language of Article XI, Section 3. The district court agreed with plaintiffs and found in their favor on this theory.

> The relevant language of Article XI, Section 3 bears repeating:
>
> [I]f the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the State voting for Governor, voting in their favor, such amendment or amendments shall become a part of this Constitution.

Tenn. Const. Art. XI, § 3. The district court adopted plaintiffs' literal reading of this language as meaning that only the votes of those *persons* who cast votes for a gubernatorial candidate can count toward the approval and ratification of an amendment. The court rejected the State officials' position that this provision requires only that an amendment be approved by a *number* of "yes" votes exceeding the number of "no" votes, and be ratified by a *number* of "yes" votes at least equal to a majority of the number of citizens who cast votes in the governor's race, without reference to *who*, personally, cast the votes.

The state court reached a contrary conclusion, holding that, although the proposed literal reading of Article XI, Section 3 was plausible, it was not reasonable because it would have the effect of disenfranchising—by placing extra qualifications on—voters who wished to vote for an amendment but who did not wish to vote for a gubernatorial candidate. The state court thus held that the State officials' interpretation is the only *reasonable* interpretation. Appellants' Suppl. Br. Ex. B, Slip Op. at 21. As explained above, this interpretation of Article XI, Section 3, has become final and

binding on the parties and is preclusive of any inconsistent interpretation in this litigation.[8]

Accordingly, insofar as the district court's analysis was premised on its determination that the State officials' vote-counting method was fundamentally unfair because inconsistent with Article XI, Section 3, it must be vacated. To its credit, however, the district court recognized that plaintiffs' claims were viable irrespective of the interpretation that ultimately prevailed. The court's opinion thus includes assessment of

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[8] If the state-court ruling were not binding, and we were called upon to review the district court's interpretation of Article XI, Section 3, we would hold, consistent with the state court's ruling, that the State officials' actions interpreting and implementing the provision, viewed through the lens of plaintiffs`' due process and equal protection claims, were not unreasonable.

In addition to the reasons cited in the state court's opinion, we note that plaintiffs' preferred reading of the text of Article XI, Section 3, while not implausible on its face, would be patently unreasonable in effect. Not only would their proposed construction—requiring a voter to vote for governor as a prerequisite to casting a valid vote on Amendment 1—contravene longstanding practice and pre-election instructions published to the public, and effectively nullify the votes of thousands of citizens; it would also conflict with another provision of the Tennessee Constitution. Article IV, Section 1 prohibits the imposition of any additional qualification to vote, beyond age, U.S. citizenship, state residency, and registration. To adopt plaintiffs' proposed interpretation would be to run afoul of our obligation, in construing state law, "to avoid constitutional difficulty" when fairly possible. *Green Party of Tenn. v. Hargett*, 700 F.3d 816, 825 (6th Cir. 2012); *Davet v. City of Cleveland*, 456 F.3d 549, 554 (6th Cir. 2006). *See also Estate of Bell v. Shelby Cty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010) ("No constitutional provision should be construed to impair or destroy another provision."). Because the State officials' interpretation of Article XI, Section 3 was and is reasonable, this potential "constitutional difficulty" is easily avoided.

plaintiffs' due process and equal protection claims as though the State officials' interpretation was correct.

3. *Vote-Dilution Theory*

In their second due-process theory of relief, plaintiffs contend that even if the State officials' vote-counting method is accepted as a reasonable implementation of the language of Article XI, Section 3, it still results in a fundamentally unfair infringement of their rights. The district court determined that this burden on plaintiffs' rights warranted "mid-level scrutiny." R. 119, Findings and Conclusions at 38, Page ID 3049. The court did not, however, identify what the burden is. Even though the "rigorousness of our inquiry" under *Anderson-Burdick* depends on the extent to which the challenged vote-counting method burdened plaintiffs' rights, the district court did not identify the burden. The court characterized the burden as falling squarely between the extremes of a severe burden and a minimal burden, but did not say *how* plaintiffs' voting rights were so burdened as to deny them due process.

Plaintiffs contend that the State officials' vote-counting method had the effect of according greater value to the votes of those persons who voted in support of the amendment but did not vote for governor than the votes of those persons who opposed the amendment but who voted for governor. This effect is said to have been fundamentally unfair in that it diluted the value of some voters' votes in relation to others' votes. Concomitantly, plaintiffs argue, to avoid this vote-dilution effect, they felt compelled to vote for governor. Plaintiffs' argument fails to identify how any voter's right to vote was burdened by governmental action, apart from the alleged disparate treatment, a

concern more properly addressed under their equal protection theory, discussed *infra*.

The district court seemed to accept at face value plaintiffs' argument that "different voters were treated differently" as substantiating the existence of a more-than-minimal burden. Yet, as the district court itself recognized, quoting *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012), "[i]f a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used," *id.* at 429, not intermediate, or "mid-level," scrutiny. There is no basis in the district court record for finding that any particular plaintiff's, or any particular voter's, right to vote for or against Amendment 1, or right to vote for governor or not, was hindered or burdened (or even treated differently, for that matter) by any actions of the State officials. It appears that every Tennessee voter was free to vote his or her conscience on the amendment and for governor. Plaintiffs have thus failed to identify a more-than-minimal burden on their right to vote that would warrant more rigorous examination than rational-basis scrutiny.

A state's election process may be found fundamentally unfair only in the "exceptional case," such as where "a state employs 'non-uniform rules, standards and procedures' that result in significant disenfranchisement and vote dilution . . . or significantly departs from previous state election practice." *Warf v. Bd. of Elections of Green Cty.*, 619 F.3d 553, 559 (6th Cir. 2010) (quoting *League of Women Voters v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008)). None of these irregularities is presented in this case. State

officials did not apply the process required by Article XI, Section 3 non-uniformly or in a manner at odds with previous practice. Rather, it is undisputed that the State officials' interpretation of Article XI, Section 3 was consistent with established practice and consistent with the interpretation that had been published to the citizenry through the media prior to the election.[9]

An actionable due process claim may also be implicated where a state's election process impaired citizens' ability to participate in state elections on an equal basis with other qualified voters. *See Phillips v. Snyder*, 836 F.3d 707, 716 (6th Cir. 2016). Here, the State officials' vote-counting method did not impair any voter's freedom and ability to participate equally in the election. Still, plaintiffs maintain that the State officials' vote-counting method was susceptible to manipulation by campaigns for and against Amendment 1. Because adoption of the amendment required both approval by majority vote *and* ratification by votes equal in number to a majority of the votes cast for governor, campaigns for and against the amendment encouraged their supporters to either vote for governor, or refrain from voting for governor, in order to influence the likelihood of ratification and adoption. These efforts, plaintiffs speculate, may have affected the outcome.

Yet, as the district court observed, such strategic choices by interested groups of private citizens "were entirely within their prerogative and not this Court's concern." R. 119, Findings and Conclusions at 45–46,

[9] If, instead, the State officials had altered or departed from the established practice prior to the 2014 election without giving adequate notice of the change to the citizenry, *then* a stronger due process claim would be made out.

Page ID 3056–57. The due process analysis is concerned rather with whether plaintiffs were subject to fundamentally unfair treatment as a result of governmental action. The record discloses no grounds for holding that the State officials' management of the 2014 election, in accordance with the Tennessee Constitution, deprived plaintiffs of equal freedom and ability to participate or otherwise burdened their right to vote.

Any "burden" imposed on plaintiffs' rights as a result of Tennessee's approval-and-ratification process was no more than "minimal." The record shows that the purpose of the ratification threshold in Article XI, Section 3 is to ensure that proposed amendments to the constitution enjoy considerable statewide support. This objective of preventing a too-easy amendment of the Tennessee Constitution by small well-organized interest groups is undeniably a legitimate governmental purpose.[10] *See Gordon v. Lance*, 403 U.S. 1, 5–8 (1971) (recognizing that state-law departures from strict majority rule, making certain kinds of governmental action more difficult, are legitimate as long as they do not discriminate against any identifiable class based on extraneous conditions like race, wealth, tax status or military status). And Article XI, Section 3, albeit inartfully drawn, as implemented by the State officials, is nondiscriminatory and rationally related to the purpose. This is sufficient to satisfy rational-basis

[10] It is, in fact, precisely the sort of safeguard that plaintiffs and other opponents of Amendment 1 would ordinarily be expected to wholeheartedly endorse. Their grievance in this case thus appears to be driven by regrets, not so much that the State officials' actions infringed their rights, but that their "adversaries," supporters of Amendment 1, may have campaigned more effectively than did opponents of Amendment 1.

scrutiny; it is irrelevant that the state might have chosen a better method of furthering its purpose. *See Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 298–99 (6th Cir. 1993). Accordingly, we find no cognizable infringement of plaintiffs' due process rights. This is not the "exceptional case" that warrants federal intervention in a lawful state election process. *See Warf*, 619 F.3d at 559. The district court's judgment on this count must be reversed.

C. Equal Protection

The State officials also challenge the district court's ruling on plaintiffs' equal protection claim. The district court identified plaintiffs as members of a class consisting of voters who both cast a vote on Amendment 1 and cast a vote in the gubernatorial race. The court held that, under the State officials' vote-counting method, members of the plaintiffs' "class" were subject to unequal treatment in comparison with voters who voted on Amendment 1 but not for governor. As a result of the Article XI, Section 3 ratification requirement, the value of plaintiffs' votes against Amendment 1 was held to be diluted by their votes for governor in comparison with the value of votes against Amendment 1 by voters who refrained from voting for governor. Consequently, the court concluded, voters who opposed Amendment 1 were unfairly compelled to vote for governor (to maximize the value of their vote against Amendment 1) whereas voters who supported Amendment 1 were not subject to the same compulsion. R. 119, Findings and Conclusions at 43–46, Page ID 3054–57.

"Equal protection of the laws" means that "[h]aving 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, 104–05 (2000). Voting rights can be impermissibly burdened "by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right [to vote]." *Reynolds*, 377 U.S. at 559 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964)). "[A]ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be." *Reynolds*, 377 U.S. 557–58 (quoting *Gray v. Sanders*, 372 U.S. 368, 379 (1963)). Thus, "a law that would expressly give certain citizens a half-vote and others a full vote" would be violative of the Equal Protection Clause. *Wesberry*, 376 U.S. at 19 (quoting *Colgrove v. Green*, 328 U.S. 549, 569 (1946)).

On the other hand, broadly applicable and nondiscriminatory laws are generally presumed to pass muster under equal protection scrutiny. *Ohio Democratic Party*, 834 F.3d at 631. Any minimal restriction of some identifiable class of voters' right to vote is ordinarily deemed justified by the state's "important regulatory interests." *Id.* (citing *Obama for America*, 697 F.3d at 433–34); *see also Northeast Ohio Coalition*, 837 F.3d at 631.

The State officials contend that the district court erred in concluding that plaintiffs are members of a class of voters who were subject to disparate treatment during the 2014 election. They maintain that their implementation of Article XI, Section 3 was nondiscriminatory and that all citizens' votes, whether on Amendment 1 or for governor, were weighted equally.

They acknowledge that a two-step process determined the ultimate outcome on the adoption of Amendment 1. That process involved both an approval step and a ratification step. According to the State officials, "approval" of the amendment required more "yes" votes than "no" votes; i.e., at least a majority of the vote. "Ratification" required that the number of votes for the amendment be at least equal to a majority of the number of votes cast in the governor's race. As the State officials explained, the outcome of each step was a function of the *number* of votes cast, not a function of *who* had cast them. Every vote cast—on the amendment and in the governor's race—was accorded the same weight.

The district court's analysis was driven by concerns stemming from the interplay of the two steps in the process. And these concerns were derived from plaintiffs' emphasis on *who* voted *how* in both steps. From the beginning, plaintiffs' civil rights claims have been premised on a rigid, literal reading of Article XI, Section 3 that would have allowed the counting of votes for and against Amendment 1 only of those *voters who* had voted for governor. This interpretation has now been conclusively rejected by the state court declaratory judgment ruling. Yet, the notion that the State officials' method of counting the votes on Amendment 1 should have been linked to those *voters who* voted for governor has continued to pervade plaintiffs' arguments. That is, despite the state-court declaration that the State officials' method—of simply counting the numbers of votes, irrespective of *who* cast them—was reasonable and faithful to the meaning of Article XI, Section 3, plaintiffs have maintained, and the district court agreed, that this method effectively treated a class of voters disparately and unfairly, depending on *how* they voted.

Again, any "disparity" was the result, not of Article XI, Section 3, or of the State officials' vote-counting method, or of any other actions by the State officials, but of strategic choices made by members of the voting public to maximize the impact of their votes. Plaintiffs' suspicion that their opposition to Amendment 1 *might* have been disadvantaged by the choices of voters who supported Amendment 1 simply does not make out a cognizable claim for denial of equal protection. Neither the language of Article XI, Section 3, nor the State officials' implementation thereof resulted in "classifications" of voters. The record does not support a finding that plaintiffs or their votes were treated unequally because of their race or sex or occupation or income or place of residence or any other characteristic. Their votes were counted in the same manner as all other voters'. The record is devoid of evidence that the State officials treated plaintiffs' votes in opposition to Amendment 1 any differently than they treated others' votes in support of Amendment 1. Nor is there evidence that the State officials treated plaintiffs' votes in the governor's race any differently than Amendment 1 supporters' votes in the governor's race.

Plaintiffs' arguments amount to little more than a complaint that the campaigns in support of Amendment 1, operating within the framework established by state law, turned out to be more successful than the campaigns against Amendment 1. That private-citizen supporters of Amendment 1 may have endeavored to lower the ratification threshold by refraining from voting for governor does not support a finding that State officials' actions had the effect of "diluting" the value of plaintiffs' votes in opposition to Amendment 1. Nor does it support a finding that State officials' actions "compelled" plaintiffs to vote for governor in order to raise the ratification threshold. Quite to the

contrary, as the district court noted, plaintiffs enjoyed the same "freedom" as their adversaries to operate within the established framework to promote their opposition to Amendment 1. They were equally free to campaign for greater voter turnout in the governor's race in order to increase the chances that Amendment 1 would fail. The Equal Protection Clause simply does not authorize federal courts to correct a perceived unfairness in state election processes that results from voters' choices rather than from governmental action. If a generally applicable nondiscriminatory law turned out to be susceptible to unfair manipulation by members of the voting public, this would be a matter for state authorities to remedy, not for federal intervention.

Again, plaintiffs have failed to identify how their right to vote was burdened by disparate treatment as a result of the State officials' actions implementing Article XI, Section 3. To the extent that the vote-counting implementation of the ratification requirement is alleged to have disadvantaged plaintiffs in their opposition to Amendment 1, any such "burden" was reasonably justified by the State's interest in ensuring that a proposed constitutional amendment enjoy widespread support as a prerequisite to adoption. We therefore conclude that the district court's judgment in favor of plaintiffs on their equal protection claim must also be reversed.

III. CONCLUSION

The subject matter of Amendment 1, touching on abortion rights, is politically sensitive and controversial. The amendment's adoption was closely contested in the 2014 election and, though it appeared to have been approved by the electorate (approximately 53% of the votes cast), its status has remained unresolved

pending this appeal. In this litigation, treating matters of process, the issues raised have been fully aired and vigorously disputed. Although the subject of abortion rights will continue to be controversial in Tennessee and across our nation, it is time for uncertainty surrounding the people's 2014 approval and ratification of Amendment 1 to be put to rest.

For the reasons set forth above, we conclude that the vote-counting method employed by defendant State officials in the 2014 election was reasonable and true to the meaning of Article XI, Section 3 of the Tennessee Constitution, as confirmed by the state-court's declaratory judgment ruling. Further, we hold that the State officials' actions did not result in any infringement of plaintiffs' voting rights. The district court's judgment in favor of plaintiffs on their due process and equal protection claims must therefore be REVERSED. The case is REMANDED for entry of an order VACATING the district court's injunctive order and entry of JUDGMENT in favor of defendant State officials.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-5563

TRACEY E. GEORGE, *et al.*,
Plaintiffs-Appellees,

v.

TRE HARGETT, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville

Before: SUHRHEINRICH, GILMAN, and McKEAGUE, Circuit Judges.

JUDGMENT

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, and for the reasons set forth more fully in the court's opinion of even date, it is ORDERED that the district court's judgment in favor of the plaintiffs on their due process and equal protection claims is REVERSED, and the case is REMANDED to the district court for entry of an order vacating the injunction and for entry of judgment in favor of the Tennessee State officials.

ENTERED BY ORDER OF THE COURT

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

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Feb. 28, 2018]

No. 16-5563

TRACEY E. GEORGE, *et al.*,

Plaintiffs-Appellees,

v.

TRE HARGETT, *et al.*,

Defendants-Appellants.

ORDER

BEFORE: SUHRHEINRICH, GILMAN, and McKEAGUE, 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 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 C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:14-02182

TRACEY E. GEORGE, ELLEN WRIGHT CLAYTON, DEBORAH WEBSTER-CLAIR, KENNETH T. WHALUM JR., MERYL RICE, JAN LIFF, TERESA M. HALLORAN, AND MARY HOWARD HAYES,

Plaintiffs,

v.

WILLIAM EDWARD "BILL" HASLAM, as Governor of the State of Tennessee, in his official capacity, TRE HARGETT, as Secretary of State, in his official capacity, MARK GOINS, as Coordinator of Elections, in his official capacity; HERBERT H. SLATERY III, as Attorney General & Reporter of the State of Tennessee, in his official capacity; STATE ELECTION COMMITTEE OF TENNESSEE; JUDY BLACKBURN, as a member of the State Election Commission, in her official capacity; DONNA BARRETT, as a member of the State Election Commission, in her official capacity; GREG DUCKETT, as a member of the State Election Commission, in his official capacity; TOMMY HEAD, as a member of the State Election Commission, in his official capacity; JIMMY WALLACE, as a member of the State Election Commission, in his official capacity; TOM WHEELER, as a member of the State Election Commission, in his official capacity; and KENT YOUNCE, as a member of the State Election Commission, in his official capacity;

Defendants.

Judge Sharp

FINDINGS OF FACT AND CONCLUSIONS OF LAW

"*And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the state voting for Governor, voting in their favor, such amendment or amendments shall become a part of this Constitution.*" Article XI, Section 3 of the Tennessee Constitution

This seemingly simple 172 year old sentence – unchanged save for a single word substitution more than six decades ago – is at the center of a Fourteenth Amendment challenge to the way votes were tabulated and certified on proposed constitutional Amendment 1 to the Tennessee Constitution in the November 4, 2014 state and federal general election ("the 2014 Election"). The matter was tried to the Court on the papers, and oral arguments were heard on April 5, 2016.

Having reviewed the parties' proposed findings and conclusions (Docket Nos. 110 & 112), their trial briefs and replies (Docket Nos. 111, 115 & 116), the oral arguments at the hearing, the record, and the exhibits received in evidence, the Court hereby enters the following Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Except where the Court discusses different evidence on a specific issue, any contrary evidence on that matter has been rejected in favor of the specific fact found. Further, the Court omits from its recitation facts it deems to be immaterial to the issues presented. Finally, to the extent that a finding of fact constitutes a conclusion of law, the Court so

concludes; to the extent that a conclusion of law constitutes a finding of fact, the Court so finds.[1]

I. Findings of Fact

1. Plaintiffs are eight registered voters who voted in the 2014 Election. More specifically, Tracey E. George and Ellen Wright Clayton are professors at Vanderbilt University and reside in Nashville, Tennessee; Deborah Webster-Clair is an Obstetrician and Gynecologist who resides in Brentwood, Tennessee; Kenneth T. Whalum Jr. is the pastor of New Olivet Baptist Church in Memphis, Tennessee ,where he also resides; Meryl Rice is a social worker and small business owner who resides in Whiteville, Tennessee; Jan Liff is a registered nurse who resides Nashville; Teresa M. Halloran is the volunteer coordinator for Meals on Wheels in Franklin, Tennessee where she also resides; and Mary Howard Hayes, a Gallatin, Tennessee resident, is the former Director of the Public Health Department of Sumner County, Tennessee.

2. Defendants include the State Election Committee of Tennessee and eleven state officials who are sued in their official capacities. Those state officials are Governor William Haslam; Tre Hargett, the Secretary of State; Mark Goins, the Coordinator of

[1] In this regard, the Court notes that the following Findings of Fact include both legislative and adjudicative fact, the former of which are "facts that bear on the justification for legislation, as distinct from facts concerning the conduct of parties in a particular case ('adjudicative facts')." *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012); *see* Fed. R. Evid. 201(a) advisory committee's note. Because "[o]nly adjudicative facts are determined in trials," *id*., the Court does not technically make findings on the legislative facts, but only presents them in the factual findings to place the parties' legal arguments in context.

Elections; Herbert Slatery III, the Attorney General and Reporter; and members (or former members) of the State Election Commission Judy Blackburn, Donna Barrett, Greg Duckett, Tommy Head, Jimmy Wallace, Tom Wheeler, and Kent Younce.

3. The 2014 Election was for state and federal offices, and included the race for Governor in which Defendant Haslam (the incumbent Republican Governor) was running for reelection against Democrat Charlie Brown and several third-party and independent candidates,including John Jay Hooker.

4. Also on the ballot were referendums on four proposed amendments to the Tennessee Constitution: Amendment 1 related to abortion; Amendment 2 related to the selection of appellate judges; Amendment 3 related to the prohibition of a state income tax; and Amendment 4 related to charitable gaming events held by veterans' groups. The four proposed amendments were printed on the ballot directly after the list of candidates for governor as required by Tenn. Code Ann. § 2-5-208.[2]

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[2] So far as relevant, the statute provides:

> [W]henever the question of a state constitutional amendment is submitted to the vote of the people pursuant to article XI, § 3, paragraph 1 of the Tennessee Constitution, it shall be printed upon the ballot directly after the list of candidates for governor followed by the words "Yes" and "No", so that the voter can vote a preference by making a cross mark (X) opposite the proper word. Any question submitted to the people shall be worded in such manner that a "yes" vote would indicate support for the measure and a "no" vote would indicate opposition.

Tenn. Code Ann. § 2-5-208(f)(1).

5. Proposed Amendment 1, the passage of which led to the filing of this lawsuit, read:

> Shall Article I of the Constitution of Tennessee be amended by adding the following language as a new, appropriately designated section:
>
> > Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother.

(Parties Stipulation ¶ 1).

6. All four proposed Amendments were placed on the ballot in accordance with Article XI Section 3 of the Tennessee Constitution. Article XI contains two methods for amending the Tennessee Constitution, the "legislative" (or sometimes called the "referendum") method and the "convention" method. At issue in this case is the legislative method for constitutional amendment.

7. The current language governing the legislative method was adopted during the Constitutional Convention of 1953 and provides as follows:

> > Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals with the

> yeas and nays thereon, and referred to the general assembly then next to be chosen; and shall be published six months previous to the time of making such choice; and if in the general assembly then next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people at the next general election in which a Governor is to be chosen. And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the state voting for Governor, voting in their favor, such amendment or amendments shall become a part of this Constitution. When any amendment or amendments to the Constitution shall be proposed in pursuance of the foregoing provisions the same shall at each of said sessions be read three times on three several days in each house.

Tenn. Const. Art. XI, § 3.

8. The legislative method was first adopted during the Constitutional Convention of 1834. This method was seen as providing a more convenient and less expensive way to amend the Constitution than calling a constitutional convention, while at the same time insuring that amending the constitution did not become too easy of a process.

9. The language found in the present version of Article XI, Section 3 is substantially the same as that

found in its original iteration,[3] with two exceptions. First, the language "voting for representatives" in the 1834 Constitution was replaced with "voting for Governor," at least in part due "the difficulty [in] the requirement that a majority of all those voting for representatives, not just a majority of those voting on the amendment, must approve any amendment proposed by the legislature." (Docket No. 110-09 at 198). Second, the 1834 requirement that the General Assembly submit a proposed amendment to the people "at such time as the General Assembly shall prescribe" was replaced with "at the next general election in which a Governor is to be chosen."

10. A good portion of the 1953 Constitutional Convention was devoted to determining whether the legislative method of Article XI, Section 3 should be amended. A majority proposal from the Committee on the Amendment Process, and the one that ultimately prevailed, was to leave the ratification requirement unchanged (save for the two differences noted above). The minority proposal was to require ratification by only a majority of those voting on the amendment. A substitute minority report proposed requiring

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[3] In relevant part, Article XI, Section 3 of the 1834 Constitution provided that, after a proposed amendment was passed by two successive legislature, then

> it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner, and at such time as the General Assembly shall prescribe. And if the people shall approve and ratify such amendment or amendments, by a majority of all the citizens of the State, voting for representatives, voting in their favor, such amendment or amendments shall become part of this constitution.

ratification by a two-thirds majority of those voting on the amendments.

11. Defendants submit as proposed findings that "[d]elegates to the Constitutional Convention of 1953 understood the ratification requirements of article XI, section 3, to require a comparison of the number of votes casts in favor of the amendment to the total number of votes for representatives or governors," and that "[t]here is no evidence that either the delegates to the Constitutional Convention 1953 or the public understood article XI, section 3, to make voting for representatives a precondition for having one's vote on a proposed constitutional amendment counted." (Docket No. 110, at 10, ¶¶ 37 & 39). The Court does not make that finding because the evidence presented on the issue is conflicting at best.

12. Even though support for Defendants' proposed findings can be found in the 1953 Journal and Proceeding of the Limited Constitutional Convention, State of Tennessee ("1953 Journal"), as well as contemporaneous reporting of the proceedings published in *The Tennessean* and the *Kingsport News* newspapers, that evidence is far from conclusive.

For example, in responding to a request to supply statistical data about the passage of prior amendments, Delegate Gilreath simply reported the total number of votes for and against each amendment and the total number of votes for representatives, without in any way suggesting that only voters who voted for representatives could vote on the amendments. However, immediately before reciting those statistics, Delegate Gilreath said, "I have often marveled at the simplicity of the amending process under Section 3; all on the earth it requires is that a majority voting for representatives shall vote for a constitutional

amendment and it is amended; it is simle [sic] and it is certain," (Docket No. 110-9 at 177). This statement at least plausibly suggests the requirement that those voting on an amendment also vote for representative. (*Id*. at 198).

Further, while Defendants rely on Delegate Sims' advice to his "friends not to vote in uncontested legislative races because it would give the amendment a better chance," (*id*. at 254) and assert this "would have made little sense if a voter could not vote on an amendment without first voting for representatives," (Docket No. 115 at 21-22), Delegate Sims labeled this process "crazy" (Docket No. 110-9 at 254). In fact, he earlier stated "that the present requirement of 'those voting for members of the House of Representatives'" was "ambiguous." He urged his fellow delegates to "clear up this confusion" by altering that requirement to a simple "two-thirds" vote for an amendment. But in making this suggestion, Sims stated that § 3 would require "a majority of those voting for members of the House of Representatives." Sims's phrasing arguably suggests that he thought that, under § 3, a voter must first vote for a representative in order for his or her vote on a proposed amendment to count.

Additionally, several delegates stated that under the preconvention version of Article XI, Section 3, it was difficult to count votes. This included Delegate Sims, who, in commenting on the ambiguity of the phrase "those voting for member of the House of Representatives" lamented "that the number can never be mathematically ascertained." (*Id.*). Since counting the number of votes for and against an amendment and counting the number of votes for a representative would both appear to be a straightforward processes, it could be that the difficulty stemmed

from trying to ascertain who of those voting for and against an amendment also voted for representatives. (*Id*. at 201).

In short, the record, assuming it is complete, is far from definitive regarding what the Delegates at the 1953 convention were thinking. The record is even less clear as to what the public may have understood. And, tellingly, neither the 1953 Journal excerpts, nor the contemporary newspaper articles explicitly mention the two-step reading of Article XI, Section 3 that Defendants now advance.

13. Regardless of the intent of the drafters at the 1953 convention, at least since 1995, and likely for long before then, whether a proposed constitutional amendment passed was based on counting the number of "yes" and "no" votes, counting the total number of votes casts in the governor's race and comparing the two.[4] That is, there was no effort to correlate the votes to count only votes on an amendment that were cast by voters who voted for governor.

14. Brook Thompson, the Coordinator of Elections for the State of Tennessee from 1995 to 2009, has filed a declaration in which he claims that he interpreted article XI, section 3, to require an amendment to be (a) approved, by receiving "yes" votes equal to more than half of the votes cast on the amendment, and (b) ratified by receiving "yes" votes equal to more than half of the total votes cast for governor. Thus, he did

[4] In addition to the 2014 Election, Defendants have submitted certified results for 1970, 1982, 1998, 2002, 2006, and 2010 elections which seems to show that this was the method used. There is no evidence before the Court that any other method was used to calculate whether an amendment passed since Article XI, Section 3 was amended in 1953.

not interpret Article XI, Section 3, to mean that a voter must first vote for governor in order to have his or her vote on a proposed amendment counted. This interpretation was followed by Mr. Thompson when determining whether proposed amendments that appeared on the ballot in the general elections of 1998, 2002 and 2006 had been passed.

15. Two amendments appeared on the ballot in each of the 1998, 2002 and 2006 ballots. On the 2002 ballot was a proposed amendment to establish a state lottery and to abolish the $50 limit on fines without a jury trial. Under Mr. Thompson's direction, his office prepared what he characterizes as a Frequently Asked Question sheet ("FAQ sheet") that was titled "Constitutional Amendment Issues." That document, placed on the Secretary of State's Website and otherwise made available to the public, stated in pertinent part:

> Counting the Votes
>
> In order for the amendment to pass and become part of the Constitution, two things must happen:
>
> 1. The amendment must get more "yes" votes than "no" votes; and
>
> 2. The number of "yes" votes must be a majority of the votes cast in the gubernatorial election.
>
> To determine the votes needed, all votes for all candidates for governor are added together. This number is divided by two or halved. The number of "yes" votes must exceed that number. If the number of "yes" votes exceeds the number, the Constitutional

> amendment passes and becomes part of the Constitution.
>
> Voting
>
> Despite the fact that the number of votes cast for governor is used to determine the outcome, it is not necessary to vote in the governor's race in order to vote on the Constitutional amendment. Likewise, it is not necessary to vote for an amendment in order to vote in the governor's race.

(Docket No. 110-11 at 14). A similar information sheet appeared on the Secretary of State's website before the 2006 election in which voters considered an amendment relating to the definition of marriage as being between one man and one woman, and an amendment that would allow the legislature to implement a grant of property tax relief to citizens sixty-five years of age and older.

16. In February 2009, Defendant Goins was appointed Coordinator of Elections by the Secretary of State. During his tenure, four proposed amendments appeared on the ballot, one during the 2010 general election, and four during the 2014 election, including the amendment at issue in this case.

17. Defendant Goins has filed a declaration in which he states that when the proposed amendment appeared on the ballot in the 2010 general election, he interpreted Article XI, Section 3 to mean that, in order to pass, an amendment must be (a) approved, by receiving "yes" votes equal to more than half of the total votes cast on the amendment; and (b) ratified, by receiving "yes" votes equal to more than half of the total votes cast for governor. Like Mr. Thompson, he did not interpret Article XI, Section 3, to mean that a

voter must first vote for governor in order to have his or her vote on a proposed amendment counted.

18. Mr. Goins claims that he reached this interpretation based on his reading of the text of Article XI, Section 3, and from conversations with his staff about how the provision had been interpreted and applied in previous elections. Those conversations included discussions with Beth Henry-Robinson, the Assistant Coordinator of Elections, who had been with the Division of Elections since 1995, and had been involved in the counting of votes on the proposed amendments in the 1998, 2002 and 2006 elections. Ms. Henry-Robinson also showed Mr. Goins the FAQ sheets utilized during the earlier elections involving proposed constitutional amendments. Mr. Goins staff prepared a similar information sheet for the 2010 election that included a proposed amendment giving citizens the personal right to hunt and fish. That information sheet contained the identical language used by Mr. Goins' predecessor relating to "Counting the Votes" and "Voting."

19. Before the 2014 election, the Division of Elections received inquiries regarding how the votes on the proposed constitutional amendments would be counted. One such inquiry came from the Davidson County Election Commission and asked whether Article XI, Section 3, required a voter to first vote for governor in order to have his or her vote on a proposed constitutional amendment counted. Defendants Hargett and Goins claim that they further researched the issue and talked to prior election officials in an effort to confirm their belief that the answer to the question was "no."

20. Blake Fontenay, a spokesman for the Secretary of State, explained to members of the media that there

was no requirement that voters first vote for governor in order to have their votes on the proposed amendments counted. This position was made known to the public through newspaper articles. For example, the Nashville Scene reported Mr. Fonteney as indicating that "you [a voter] do not actually have to vote for a gubernatorial candidate in order for your vote for or against an amendment to count (or vice versa)," and quoted him as saying "'[t]here's no requirement to vote in any race." Cari Wade Gervin, Your Guide to the four propositions of Tuesday's ballot, THE NASHVILLE SCENE, October 30, 2014, http://www.nashvillescene.com/nashville/your-guide-to-the-four-propositions-on-tuesdays-ballot/Content?oid=4759989 (all Websites last visited April 21, 2016).

21. Apparently because of the way that votes were to be counted, assorted groups, organizations, and individuals encouraged voters either to vote or not vote for governor in order to affect the denominator that would be utilized to determine whether Amendment 1 passed. That is, those in favor of Amendment 1 were urged to vote only for Amendment 1 and not for governor; those opposed were urged to vote against Amendment 1 and also for governor.

22. Far and away, the largest campaigns were by those who favored passage of Amendment 1. They spread their message – encouraging voters not to vote in the Governor's race so as to increase the likelihood that Amendment 1 would pass – by phone calls, yard signs, mailers, leaflets, newspapers, the Internet, and church bulletins. A few examples give the flavor of the messages and their wide-spread scope:

A. A video titled "Double Your Vote on Amendment 1" explained:

You may know that if you vote yes on Amendment 1, you will be protecting women and children in Tennessee. The truth is you can double your vote by doing one simple thing don't vote in the governor's race.

Did you hear that? If you want to double your vote, don't vote in the governor's race. Okay. Let me explain. The reason behind it is a little-known statement in the Tennessee Constitution that says for a constitutional amendment to pass, it must receive one more vote than half the number of total votes cast in the governor's race.

For example, if a million people vote in the governor's race, it doesn't matter which candidate they vote for. Then Amendment 1 needs 500,001 votes to pass. It doesn't matter if 500,000 people vote yes for Amendment 1 and only 3 vote against it. It will still fail since it doesn't have one more than half the total in the governor's race.

I know you may think this is crazy. It doesn't matter. It's the law. What does it mean for us? Vote yes for Amendment 1 but don't vote in the governor's race. The less people who vote in the governor's race means it takes less votes to pass the amendment. In other words, if you vote yes on 1 but don't vote in the governor's race, you'll double your vote.

Here's the deal, please tell your friends. Forward this video to them. Use social media and get out there and vote yes on Amendment 1, but don't vote in the governor's race.

"Double Your Vote on Amendment 1," www.youtube.com/watch?v=7mnIgn-WXls

B. The October 12, 2014 Cathedral of the Incarnation Church's bulletin in Nashville contained a half-page devoted to "Yes on 1" that contained the following statement:

Bottom Line: you MUST VOTE and tell others. Amendment 1 must be approved by 50% + 1 of those casting a vote in the Governor's race. You do not need to vote for a governor, if you do not want too [sic]. In fact, not voting in the uncontested governor's race counts as a vote and a half for Amendment 1.

(Docket No. 5 at 4).

C. A Website titled "truthon1.org" with accompanying Facebook page was developed which contained videos and written material favoring voting in favor of Amendment 1, but not for governor. Typical are banners that stated:

"IF YOU WANT TO DOUBLE YOUR VOTE, DON'T VOTE IN THE GOVERNOR'S RACE";

"DON'T VOTE? WHAT?

You read that right

> If you vote Yes on Amendment but don't vote for in the governor's race, then you actually double the impact of your vote. Don't vote for governor this election cycle";

and

ONE MORE THAN HALF

To pass amendment 1

> The reason behind this is a little known law in the Tennessee Constitution that says for a Constitutional Amendment to pass, it must receive 1 more vote than half the number of votes cast in the governor's race.

(Docket No. 109 at 1, 5 & 6).

23. The campaign to vote in favor of Amendment 1, but not for governor was covered by news and media outlets in the state. This included an October 16, 2014 editorial in the *Memphis Flyer*, an article in *The Tennesseean* on October 27, 2014, and a November 4, 2014 article on the website of Knoxville television station WBIR.

24. At least some of the Defendants, including Secretary of State Hargett and Coordinator of Elections Goins, were aware of the "double your vote" campaign before the November 4, 2014 election. This is hardly surprising given the publicity the campaign received.[5] However, there is no evidence that any of

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[5] Additionally, on October 28, 2014, Mr. Hooker wrote Governor Haslam an open letter in which he asked that the Governor either join him in a declaratory judgment action or advise the people of the state that to vote for an amendment a voter must also vote in the governor's race. From the terms of the letter, however, Mr. Hooker's concern was with Amendment 2 relating the selection of judges, a matter that was unquestionably dear to Mr. Hooker's heart, given the number of lawsuits he filed over the years on the issue. *See*, *e.g.*, *Hooker v. Haslam*, 437 S.W.3d 409 (Tenn. 2014); *Hooker v. Haslam*, 393 S.W.3d 156 (Tenn. 2012); *Johnson v. Bredesen*, 356 Fed. App'x 781 (6th Cir. 2009); *Hooker v. Anderson*, 12 Fed. App'x 323 (6th Cir. 2001).

the Defendants participated in the campaigns or that any of them acted in anything less than good faith in conducting the election and tabulating the results.

25. When voters went to the polls on November 4, 2014, all registered and qualified voters were eligible to vote on any or all of the four proposed constitutional amendments, regardless of whether they voted for governor.

26. The certified election results from the 95 county election commissions showed the Governor Haslam was reelected and that all four Amendments passed. A total of 1,430,117 voters voted in the 2014 election. A breakdown of those votes as it pertains to this case is as follows:

- 1,353,728 votes were cast for governor, meaning that approximately 95% of the voters voted for governor.[6]
- 1,386,355 votes were cast on Amendment 1. Of those, 729,163 votes were cast in favor of Amendment 1, and 657,192 votes were cast against Amendment 1.

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[6] According to Defendants, this percentage is not substantially different from the percentage in recent elections: in 2010, approximately 99% of voters who voted in the election voted for governor; in 2006 that figure was 97%; in 2002 the figure was 98%; in 1998 the figure was 95%; and, in 1994, 97% of voters who voted in the election voted for governor. Not a lot can be drawn from this, however, because the percentage (96.94%) of voters who cast ballots in the 2014 election voted on Amendment 1 at a higher rate than the equivalent percentage on past constitutional amendments: 88.68% for the single amendment in 2010; 93.5% and 87.77% for the two amendments in 2006; 92.1% and 78.57% for the two amendments in 2002; and 74.79% and 74.68% for the two amendments in 1998.

27. Defendant Goins determined Amendment 1 passed because (a) the number of "yes" votes (729,163) exceeded a majority (693,178) of the total votes cast on the amendment (1,365,355), and (b) the number of "yes" votes on the amendment (729,163) exceeded a majority (676,865) of the total votes cast for governor (1,353,728).

28. On December 8, 2014, and in accordance with their statutory duties, Governor Haslam, Attorney General Slatery, and Secretary Hargett certified the results of the 2014 Election, including the results for the election on Amendment 1.

29. Each of the Plaintiffs voted in the 2014 Election, voted in the gubernatorial race, and voted against ratifying Amendment 1.

30. The 2014 Election was the first time since Article XI, Section 3 of the Tennessee Constitution was amended in 1953 that more votes were cast on a proposed constitutional amendment than in the Governor's race.

31. Three days after the 2014 Election, Plaintiff filed suit in this Court. The First Amended Complaint is in two counts. Count I alleges the denial of due process due to a fundamentally unfair voting scheme; Count II alleges the denial of equal protection of the law due to disenfranchisement through vote dilution. Plaintiffs seek the following forms of relief: (i) a declaration that Article XI, Section 3, of the Tennessee Constitution requires that Defendants tabulate the votes on Amendment 1 based only on the number of only voters who both voted for governor and voted on Amendment 1; (ii) a declaration that Defendants' vote tabulation method violates the Due Process Clause and Equal Protection Clause of the Fourteenth

Amendment; (iii) a declaration that the election results for Amendment 1, as currently certified, are void; (iv) an injunction requiring Defendants to recount the vote on Amendment 1 to correlate votes in the governor's race with votes on Amendment 1; (v) if Defendants are unable to correlate the votes or if Plaintiffs' interpretation of Article XI, Section 3 is unconstitutional, a declaration that the 2014 Election vote on Amendment 1 is void; and (vi) costs, expenses, and reasonable attorney's fees.

32. Election data for each county in Tennessee is kept and secured at the county level. Since this suit was filed, Defendants have not attempted to recount the ballots to determine whether Amendment 1 would have passed had it been based on the number of voters who vote on Amendment 1 and also voted for governor. Nevertheless, such a recount is possible for each of the 95 counties, save one. On January 7, 2015, a fire destroyed the county administration building in Van Buren County, along with the election machines stored therein. However, Van Buren county is a relatively small county with a small voter population.

II. Conclusions of Law

From the parties' perspectives, what this Court characterized at the outset as a seemingly simple sentence is subject to two different readings, one of which potentially places the passage of Amendment 1 into doubt. The difference in the readings, in its simplest form, is whether voting for governor is a precondition to having a vote on an amendment count. Prior to reaching the substantive arguments on the proper interpretation and its application, however, the Court must address several preliminary matters concerning Plaintiffs' claims.

A. Standing, Abstention, Abandonment and Waiver

Defendants first argue that Plaintiffs lack standing. They lack standing to assert a vote dilution or a fundamental unfairness claim, the argument goes, because they suffered no injury in fact inasmuch as the "no" votes cast by voters like Plaintiff were weighed the same as those who voted in favor of Amendment 1 but abstained from voting for governor. And, they lack standing to assert a compelled voting (or compelled abstention) claim because they have not proven they were personally compelled to vote for governor or abstain. The Court is unpersuaded by either argument.

Standing was discussed in some detail in this Court's prior ruling. *George v. Haslam*, 112 F. Supp. 3d 700, 707-09 (M.D. Tenn. 2015). That is typical, as "[m]ost standing cases consider whether a plaintiff has satisfied the requirement when filing suit[.]" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). Nevertheless, because "Article III demands that an 'actual controversy' persist throughout all stages of litigation," *id*., and "standing is '[o]ne element' of the Constitution's case-or-controversy limitation on federal judicial authority, expressed in Article III," *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2663 (2015) (citation omitted), "[a] plaintiff must maintain standing throughout all stages of [the] litigation." *City Commc'ns, Inc. v. City of Detroit*, 888 F.2d 1081, 1086 (6th Cir. 1989)

As this Court pointed out in its prior ruling:

> The constitutional requirements for standing were explained by the Supreme Court in

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992):

> 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 – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

(internal quotation marks, citations, and footnote omitted).

George, 112 F. Supp. 3d at 706-07. This Court went on to conclude:

> Read fairly, and stripped to its essence, Plaintiffs' claimed injury is that their individual votes on Amendment 1 were not counted and valued the same way as other votes, making their injury distinct. Their alleged injuries are specific to them, and those like them, who (1) were registered to vote; (2) voted in the November 4, 2014 election; (3) voted in the gubernatorial race in that election; (4) voted against Amendment 1, and (5) (allegedly) had the relative values of their particular votes devalued. As such, theirs is

> not a generalized grievance about a law not being followed that is applicable to all, a point best exemplified by the fact that those voters who cast ballots only in favor of Amendment 1 were allegedly not injured. In short, Plaintiffs claim "a plain, direct and adequate interest in maintaining the effectiveness of their votes." . . .
>
> "Where a plaintiff's voting rights are curtailed, the injury is sufficiently concrete to count as an injury in fact" because, in such cases, "the plaintiffs 'are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes," . . . not merely a claim of "the right possessed by every citizen to require that the government be administered according to law." . . .

George, 112 F. Supp. 3d at 709.

Nothing has changed since the foregoing observations were made. This Court's conclusion remains the same notwithstanding Defendants argument that "[t]he evidence presented in this case" reveals Plaintiffs' "premise to be completely flawed[,] . . . because the decisive calculation for determining whether Amendment 1 passed was a simple comparison of 'yes' and 'no' votes on the amendment, with each vote having exactly the same power to affect the outcome of the vote[.]" (Docket No. 36 at 26 & 27). Such an argument, the Court believes, conflates standing with the merits of the case, yet "one must not 'confus[e] weakness on the merits with absence of Article III standing.'" *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (quoting *Davis v. United States*, 131 S.Ct. 2419, 2434, n. 10 (2011); *see also*, *Warth v. Seldin*, 422 U.S. 490,

500, 95 S. Ct. 2197, 2206 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"); *Arreola v. Godinez*, 546 F.3d 788, 794-95 (7th Cir. 2008) ("Although the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing. Standing is a prerequisite to filing suit, while the underlying merits of a claim . . . determine whether the plaintiff is entitled to relief.").

Defendants next argue that "Plaintiffs plainly lack standing to assert any compelled voting claim because they have not alleged or adduced any evidence that they personally were compelled to vote for governor." (Docket No. 37 at 28). As support, Defendants cite the following exchange from the deposition testimony of Plaintiff Clayton:

> Q. . . . So is it your position that your civil rights are violated when a voter chooses not to vote for governor but votes for a referendum?
>
> A. Yes.
>
> Q. What would you do if you wanted to vote for – or in, I will rephrase, if you wanted to vote in a referendum in an election but did not want to vote for governor?
>
> A. I actually always vote for governor when I vote on an amendment.
>
> Q. So that hypothetical would not take place?
>
> A. It would not take place.

(Docket 89-8, Clayton Depo. at 56).

No doubt, to establish constitutional standing a plaintiff must show that he or she was injured by a

defendant's actions; generalized grievances usually do not suffice. *See Lance v. Coffman*, 549 U.S. 437, 439-441 (2007); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 543 (6th Cir. 2014) *Smith v. Jefferson Cty. Bd. of Sch. Commis*., 641 F.3d 197, 207 (6th Cir. 2011). The Supreme Court essentially said as much in *Lujan*: "In requiring a particular injury, the Court meant that 'the injury must affect the plaintiff in a personal and individual way.'" *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 131 S.Ct. 1436, 1442, 179 L.Ed.2d 523 (2011) (quoting *Lujan*, 504 U.S. at 560 n. 11).

Nevertheless, Defendants' single citation to Plaintiff Clayton's testimony is an insufficient basis on which to dismiss Plaintiffs' compelled voting claim because "only one plaintiff needs to have standing in order for the suit to move forward." *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 711 (6th Cir. 2015) (citing *Horne v. Flores*, 557 U.S. 433, 446–47 (2009)). Plaintiff Rice appears to have said the exact opposite of Plaintiff Clayton, to wit, that she would vote for governor (even when she did not want to) in order to vote on a referendum, (Docket No. 89-6 Rice Depo. at 130-131), and Plaintiff Webster-Clair voiced the opinion that in order to vote on a constitutional amendment, a voter was required to vote for governor (Docket No. 89-9, Webster-Clair Depo. at 56).

Nor will the Court ignore the compelled voting claim on the grounds that a separate cause of action was not pled for that claim. Count I of the Amended Complaint alleges "a fundamentally unfair system of vote tabulation that severely burdens Plaintiffs' right to vote," and that "[b]y devaluing Amendment 1 votes from voters who voted for governor, Defendants have violated fundamental fairness" in violation of the Due Process Clause of the Fourteenth Amendment.

(Docket No. 51, Amended Complaint ¶¶ 53-54). While the term "compelled voting" never appears in the Amended Complaint as such, all the rules require is sufficient notice of the claim. Indeed, "the 'simplified notice pleading standard' of the Federal Rules 'relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 585 (2007) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)).

The potential that compelled voting was an issue has been in play since at least the filing of the Motion to Dismiss and the Court's ruling thereon. Further, and while it is true that once a case gets beyond the motion to dismiss stage "the liberal pleading standards under *Swierkiewicz* and [the Federal Rules] are inapplicable'" *Tucker v. Union of Needletrades, Industrial & Textile Employees*, 407 F.3d 784, 788 (6th Cir. 2005) (citation omitted, bracket in original), as the above-mentioned citations to deposition testimony make clear, at least some of the Plaintiffs were specifically asked about whether they felt compelled to vote in a particular way and said that they did. Additionally, and while Defendants' lodged an objection "[t]o the extent that Plaintiffs seek to amend their pleadings to raise new constitutional claims," Plaintiffs' theory of the case, as set forth in the Joint Proposed Pretrial Order, included the claims that the tabulation method employed "forc[ed] proponents of Amendment 1 to choose between increasing the likelihood of the passage of Amendment 1 and exercising their constitutional right to vote in the governor's race, and . . . compell[ed] Plaintiffs and other voters against Amendment 1 to vote in the governor's race in order for their vote to count at all for purposes of

ratification." (Docket No. 95 at 1-2). Defendants simply cannot claim unfair surprise. *Cf. Goodson v. Bank of Am.*, N.A., 600 F. App'x 422, 427 (6th Cir. 2015) (citation omitted) ("A plaintiff may not raise a new theory for the first time in opposition to summary judgment because '[t]o permit a plaintiff to do otherwise would subject defendants to unfair surprise.'").

Similarly, the Court will not dismiss Plaintiffs' fundamental unfairness claim, although it presents somewhat the procedural converse of the compelled voting claim. Defendants object to inclusion of the fundamental unfairness claim because it was allegedly abandoned and not specifically mentioned in the Joint Pretrial Order. This is a somewhat curious position to take because, as just noted, in that same document Defendant also objected to trying anything that was not specifically pled in the Amended Complaint and they concede that "Plaintiffs' First Amended Complaint includes a claim under the Due Process Clause that Plaintiffs were subjected to a fundamentally unfair voting scheme." (Docket No. 111 at 29). Regardless, and while the precise phrase "fundamentally unfair" does not appear in the Pretrial Order, the substance of the claim certainly does. Besides, Rule 16(e) of the Federal Rules of Civil Procedure allows the Court to amend the pretrial order "to prevent manifest injustice," Fed. R. Civ. P. 16(e), and it would be manifestly unjust and an abuse of discretion not to consider a claim which was specifically pled, has been a part of this case since the inception, has been fully litigated, and has caused no prejudice to Defendants. *See, Jones v. Potter*, 488 F.3d 397, 411 (6th Cir. 2007) (citation omitted) ("district courts have broad discretion to modify or enforce pretrial orders"); *Hunt v. Cty. of Orange*, 672 F.3d 606, 616 (9th Cir. 2012) (factors to consider under Rule

16(e) include "(1) the degree of prejudice or surprise to the defendants if the order is modified; (2) the ability of the defendants to cure any prejudice; (3) the impact of the modification on the orderly and efficient conduct of the case; and (4) any degree of willfulness or bad faith on the part of the party seeking the modification"); *Manley v. AmBase Corp*., 337 F.3d 237, 249 (2nd Cir. 2003) (a pretrial order is not "a legal 'strait-jacket' binding the parties and court to an unwavering course at trial").

Defendants also argue that this Court should abstain from ruling on Plaintiffs' claims pursuant to the abstention doctrine announced in *Railroad Commission of Texas v. Pullman Co*., 312 U.S. 496 (1941) until the Tennessee courts have authoritatively construed Article XI, Section 3. As an alternative, Defendants request that the Court certify the question to the Tennessee Supreme Court. These arguments, too, were considered in some detail, but rejected in this Court's ruling on Defendants' Motion to Dismiss. George, 112 F. Supp.3d 713-15. Nevertheless, and unlike the issue of standing, there is a changed circumstance that requires mention.

Some nine months after this case was filed, and after the Court had issued its adverse ruling on Defendants' Motion to Dismiss, Defendants filed a parallel action in state court. For unexplained reasons, that case, styled *Hargett v. George*, Civil No. 44460 (2015), was filed in the Williamson County Chancery Court, even though the Davidson County Chancery Court would seem to have been the most logical venue. Regardless, the fact that Defendants chose to file the parallel suit does not warrant abstention because "principles of comity and federalism do not require a federal court to abandon jurisdiction it has properly

acquired simply because a similar suit is later filed in state court." *Town of Lockport v. Citizens for Cmty. Action at Local Level, Inc.*, 430 U.S. 259, 264 n.8 (1977).

Moreover, the relief sought between the two cases is different. Here, and particularly as it relates to Plaintiffs' as-applied claims, the issue is retrospective: did the tabulation method utilized to count the votes on Amendment 1 violate either Article XI, Section 3 or the federal constitution? In contrast, the issue in the Williamson County declaratory judgment action is prospective: how should that provision of the Tennessee Constitution be applied in future elections?

Just yesterday, Judge Michael Binkley issued a ruling in the state case and found that Defendants' interpretation and application of Article XI, Section 3 was correct. As expected, Judge Binkley did not base his ruling on the federal constitution,[7] and the difference between the two cases segues back into the primary reasons that this Court declined to abstain previously: (1) federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), and (2) *Pullman* abstention "is appropriate only where state law is unclear and a clarification of that law would preclude the need to adjudicate the federal

[7] Even so, and "[a]lthough not being disposed to instruct the United States District Court for the Middle District of Tennessee how to apply the federal constitution," Judge Binkley went on to "point out . . . that the Supreme Court of the United States has ruled that otherwise plain and unambiguous statutory provisions should be construed so as to effectuate the underlying fundamental purpose of the statute." *Hargett v. George*, Case No. 44460, Slip. Op. at 15 n.1 (April 21, 2016).

question," *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 233 (6th Cir.2011). "[T]he purpose of *Pullman* abstention is not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question," but rather, "to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy." *San Remo Hotel, L.P. v. City and Cty. of San Francisco*, 545 U.S. 323, 339, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005).

Judge Binkley's recent determination as to how Article XI, Section 3 should be applied going forward does not address the question of whether its application in the 2014 Election violated the United States Constitution. Moreover, [i]n considering abstention, [a court] must take into account the nature of the controversy and the importance of the right allegedly impaired," and it has been held that "voting rights cases are particularly inappropriate for abstention." *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000); *see also, C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 381 (9th Cir. 1983) (while "there is no *per se* civil rights exception to the abstention doctrine . . . the Supreme Court has demonstrated a reluctance to order abstention in cases involving certain civil rights claims, such as voting rights").

This Court's decision not to abstain is not undertaken lightly. Even though Judge Binkley has given his interpretation of the pertinent sentence in Article XI, Section 3, that ruling is subject to review,[8] and "[a] State's highest court is unquestionably 'the

[8] It may be, however, that the state court Defendants (Plaintiffs here) choose not to file an appeal, leaving the prospect that the only other decision on the issue is a Chancery Court case.

ultimate exposito[r] of state law.'" *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

The "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *Id.* While "the state courts share equivalently with the federal courts the responsibility of protecting constitutional guarantees," *The News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1508 (11th Cir. 1991), and a "state court is "duty bound to enforce the provisions of the United States Constitution," *Adrian Energy Associates v. Michigan Public Service Commission*, 481 F.3d 414, 422 (6th Cir. 2007), the Williamson County Chancery Court was simply not called upon to decide the issues presented to this Court.

B. Interpretation of Article XI, Section 3

As noted at the outset, the specific language at the center of this case states that "if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the state voting for governor, voting in their favor, such amendment or amendments shall become a part of this Constitution." Tenn. Const. Art. XI, Sec. 3. Plaintiffs read this language to mean that "in order for a proposed constitutional amendment to be ratified, it must receive a majority of the votes cast in its favor from those voters who voted for Governor." (Docket No. 116 at 28). In other words, an "amendment must pass not merely by a majority of all citizens of the state voting in its favor or by a majority of the number of citizens voting for governor; rather, to pass, an amendment must be ratified by a majority comprised of 'all the citizens of

the state voting for governor,' i.e., voting for governor is critical to voting for an amendment." (*Id*.).

Defendants' interpretation is a bit more complicated and involves a two-step process. They read the language to mean that, "in order to pass, an amendment must be both: (i) approved, by receiving 'yes' votes equal to more than half of the total votes cast on amendment; and (ii) ratified, by receiving 'yes' votes equal to more than half of the total votes cast for governor." (Docket No. 111 at 4-5). As further amplification, Defendants write:

> Put another way, [an] amendment must at least get a majority of the votes cast on the amendment. If more people vote for governor than for the amendment, however, the threshold for passage increases to a majority of the total votes cast for governor. In practice, when the number of votes cast on an amendment exceeds the number of votes cast for governor, all that matters is whether the amendment was approved, because the threshold for approval will always be higher than for ratification in that scenario.
>
> For example, if 200 people vote on an amendment, with 90 people voting in favor of the amendment and 110 against, and only 100 people vote for governor, the amendment would not pass. It would not be approved, because the 90 "yes" votes cast on the amendment would not be more than half of the 200 total votes cast on the amendment. While it would meet the ratification threshold, because the 90 "yes" votes are more than half of the 100 total votes cast for governor, it

> still would not pass because it did not meet the higher threshold necessary for approval.
>
> Under Defendants' interpretation of Article XI, Section 3, voting for governor is not a precondition for voting on an amendment or for having one's vote on an amendment counted. To the contrary, under Defendants' interpretation, any registered and qualified voter may cast a vote on a proposed amendment, and all votes cast on an amendment are counted in determining whether the amendment has passed.

(*Id.* at 5).[9]

"Issues of constitutional interpretation are questions of law." *Waters v. Farr*, 291 S.W.3d 873, 882

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[9] This two-step process was not explained until Defendants made their trial filings. Prior to then, the Court understood that, for an amendment to pass, the total number of "yes" votes on the amendment had to be one voter more than 50% of the number of voters who voted for governor, effectively making the negative votes meaningless. As the Court explained:

> Thus, for example, if 2,000,000 persons participated in an election, but only 1,000,000 people voted in the gubernatorial race, an Amendment will be deemed approved so long as it received 500,001 "yes" votes, even if 1,499,999 votes were cast against the amendment. As a consequence, those who favor a proposed Amendment may feel compelled to forego voting for governor so as to decrease the votes required to pass the amendment, while those who have a particular interest in seeing a proposed Amendment fail may feel compelled to vote for governor so as to increase the number which serves as the benchmark for tabulating whether an amendment passes.

George, 112 F. Supp.3d at 713.

(Tenn. 2009) (citation omitted). "The courts are to construe constitutional provisions as written without reading any ambiguities into them." *State ex rel. Sonnenberg v. Gaia*, 717 S.W.2d 883, 885 (1986) (citing *Chattanooga-Hamilton Co. Hosp. Auth. v. Chattanooga*, 580 S.W.2d 322, 327 (Tenn.1979). As the Tennessee Supreme Court has stated:

> When a provision clearly means one thing, courts should not give it another meaning. The intent of the people adopting the Constitution should be given effect as that meaning is found in the instrument itself, and courts must presume that the language in the Constitution has been used with sufficient precision to convey that intent. . . Constitutional provisions will be taken literally unless the language is ambiguous.
>
> When the words are free from ambiguity and doubt and express plainly and clearly the sense of the framers of the Constitution there is no need to resort to other means of interpretation. Shelby County v. Hale, 200 Tenn. 503, 292 S.W.2d 745, 748 (1956). . . .

Hooker v. Haslam, 437 S.W.3d 409, 426 (Tenn. 2014); *see also*, *Mills v. Fulmarque, Inc*., 360 S.W.3d 362, 368 (Tenn. 2012) ("The text of the statute is of primary importance, and the words must be given their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose.").

In the prior ruling on Defendants' Motion to Dismiss, the Court observed that "Plaintiffs' reading of the constitutional requirement for the passage of an amendment in Tennessee seems perfectly natural." *George*, 112 F. Supp. 3d at 711. Having had the

opportunity to consider the complete record, and "[e]xercising caution appropriate to a federal court called upon to interpret a state constitution," *Phan v. Commonwealth of Virigina*, 806 F.2d 516, 524 (4th Cir. 1986), the Court now finds that Plaintiffs' reading is not only perfectly natural, but also correct.

Defendants fault Plaintiffs for "spend[ing] over half of their proposed legal conclusions attempting to discredit the Defendants' interpretation of Article XI, Section 3," (Docket No. 115 at 24), an argument that might have had some purchase if Plaintiffs were making straw man arguments, which they do not. Besides Plaintiffs' approach is hardly startling. In the Court's opinion and with all due deference to Judge Binkely, the phrase "approve and ratify such amendment or amendments by a majority of all the citizens of the state voting for governor" suggest only one interpretation – voters must vote for governor in addition to voting on a proposed amendment – making it difficult to say much more. *See, Norfolk S. Ry. Co. v. Perez*, 778 F.3d 507, 512 (6th Cir. 2015) ("We must presume that Congress says what it means and means what it says . . . and therefore must apply a statute as it is written, giving its terms the ordinary meaning that they carried when the statute was enacted"); *Bandy v. Duncan*, 665 S.W.2d 387, 391 (Tenn. Ct. App. 1983) ("In the instant case the language is explicit and we find little room for interpretation. In short, the statute means what it says").

Unlike Plaintiff's interpretation, Defendants' interpretation of the language involves a two-step process, something they say is necessary to give effect to the terms "approve" and "ratify." That is, the requirement that the people "approve" a constitutional amendment means that the amendment must receive more "yes"

than "no" votes; the requirement that the people ratify an amendment "by a majority of all the citizens of the State voting for Governor, voting in their favor" means that the "yes" votes cast on the amendment must be greater than half the total number of votes cast for governor. This reading does not make voting for governor a precondition for voting on a proposed amendment because the phrase "the people" "is most naturally read to refer to the general electorate rather than a subset of voters who voted for governor." (Docket No. 110 at 26).

This Court agrees with Defendants that "approve" and "ratify," while functionally synonymous, can have different meanings since the latter often connotes the final step in a process. The Court also agrees with Defendants that "approve" means that there are more votes in favor of the amendment than against it because Article XI, Section 3 requires "voting in their favor," meaning the one or more amendments. However, the Court disagrees with Defendants' contention that "[t]he most natural reading of the requirement that the people ratify an amendment 'by a majority of all the citizens of the State voting for Governor, voting in their favor" is that the number of 'yes' votes cast on the amendment must be greater than half of the total number of votes cast for governor." (Docket No. 110 at 25). Such an interpretation adds words not found in the language of Article XI, Section 3; specifically, it adds the words "the total number of votes cast for governor," when, in fact, it says "citizens of the state voting for Governor."

The Court also does not agree with Defendants' assertion that Plaintiffs' interpretation of Article XI, Section 3, "would undoubtedly impose an additional qualification on the right to vote for constitutional

amendments" in violation of Article IV, Section 1 of the Tennessee Constitution. (Docket No. 115 at 24). That latter constitutional provision provides:

> Every person, being eighteen years of age, being a citizen of the United States, being a resident of the State for a period of time as prescribed by the General Assembly, and being duly registered in the county of residence for a period of time prior to the day of any election as prescribed by the General Assembly, shall be entitled to vote in all federal, state, and local elections held in the county or district in which such person resides. All such requirements shall be equal and uniform across the state, and there shall be no other qualification attached to the right of suffrage.

Tenn. Const. Art. IV, § 1. While the Tennessee Supreme Court in *City of Memphis v. Hargett*, 414 S.W.3d 88, 101 (Tenn. 2013), a voter identification case, held that the enumerated qualifications – age, citizenship, and residency – "constitute the exclusive criteria for the right to vote," *id*. at 108, the plain reading of Article XI, Section 3 does not impose an additional requirement on a citizen's right to vote. As Plaintiffs' point out, "[r]egardless of whether or how a voter were to choose to vote on an amendment or vote for governor, every eligible citizen has their right of suffrage preserved." (Docket No. 116 at 8).

Apart from a potential violation of Article IV, Section 1 of the Tennessee Constitution, Defendants argue that the requirement that an amendment voter also vote for governor violates the First Amendment to the United States Constitution because it imposes "a condition precedent on voting . . . without furthering

any compelling state interest." (Docket No. 115 at 25). This argument, of course, presupposes that having each voter's vote count equally on an issue is not a compelling interest. And, if having a broad-based, state-wide support is truly the compelling reason, it would seem to make more sense to require that those voting for governor also vote for a proposed amendment as opposed to counting voters who may have voted only because they had a vested interest in the outcome of the local candidate races.

Regardless, and whatever validity this argument may have, it applies to Defendants' tabulation procedure as well, because both proposed interpretations peg the votes in one election to the votes in another election, although Plaintiffs' version does so in a more palatable way. Certainly Defendants do not seek a ruling that finds Article XI, Section 3 constitutionally infirm, particularly when it may be that, no matter which interpretation is used, the results are the same, *viz*, Amendment 1 passed.

Because Article XI, Section 3's meaning is clear, the Court need not go any further in trying to discern the intent of the drafters. *Hooker*, 437 S.W.3d at 42; *see also*, *Mayhew v. Wilder*, 46 S.W.3d 760, 784-85 (Tenn. Ct. App. 2001) (while the "construction of constitutional provisions must respect the intentions of the persons who adopted the constitutional provision at issue," a court "must be guided chiefly by the text of the Constitution itself," as "[t]hese intentions are reflected in the text of the Constitution itself"). Yet even were it proper to go beyond the clear language of Article XI, Section 3, the information Defendants supply about the 1953 Constitutional Convention is conflicting at best, as noted in this Court's findings,

and may be read as supporting this Court's interpretation. Moreover, Article XI, Section 3 has a lengthy history and discussion about other proceedings and that constitutional provision lend support to the conclusion that the link required is majority of those who voted for governor, not a majority of those who voted in a gubernatorial election.

In *Snow v. City of Memphis*, 527 S.W.2d 55 (Tenn. 1975), the Tennessee Supreme Courtconsidered a challenge to the Constitutional Convention of 1971 relating to the classification of property. In discussing the issue, the court provided "[a] brief review of the background and events leading directly to the amendment of Article XI, Section 3 of our Constitution, dealing with the Convention method of amendment," and, in doing so, reviewed 1945 legislation that authorized the appointment of a Constitution Revision Committee that "was to make a study of the needs for revision of the Constitution of Tennessee and present its recommendations to the 1947 Session of the General Assembly." *Id.* at 61. Commenting on the results of that study, the Tennessee Supreme Court observed:

> Said commission recommended that nine sections of the Constitution be changed and devoted much of its report to the procedure best calculated to bring about the suggested changes. Eleven efforts to amend the 1870 Constitution by the legislative method had failed because of the obstacle of obtaining voter ratification of a majority of those voting for representatives. We judicially note that in said efforts to amend by that process, only a small percentage of the voters who voted for representatives cast ballots either for or

> against constitutional amendments, leaving the required majority of those voting for representative unattainable.

Id.[10]

The statement that "only a small percentage of the voters who voted for representatives cast ballots either for or against constitutional amendments" certainly suggests that votes on amendments were to be based only on those who also voted for representatives. Moreover, the statement about "obtaining voter ratification of a majority of those voting for representatives" is in keeping with this Court's interpretation of what is contemplated by the word "ratify," and not, as Defendants would have it, that "yes" votes must be more than half of the total votes cast for governor in order for an amendment to pass.

To be sure, and as this Court pointed out in its prior ruling, the quoted language from *Snow* is dicta because the issue there was the second paragraph of Article XI, Section 3. But dicta need not be ignored; it can be persuasive. *In re Estate of Davis*, 308 S.W.3d 832, 841 (Tenn. 2010); *see*, *Galli v. New Jersey Meadowlands Comm'n*, 490 F.3d 265, 274 (3d Cir. 2007) (dicta from the United States Supreme Court, while not binding, "are highly persuasive" and should not be "view[ed] lightly"). And dicta can support the plain reading of a statute. *See*, *Morey v. Milano*, 151 F. Supp. 2d 1051, 1064 (D.N.M. 2001) (stating that "dicta in two New Mexico Supreme Court cases support the plain reading of the statute").

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[10] In an accompanying footnote, the court set forth the relevant language of Article XI, Section 3 which is identical to the present language, except that, as previously noted, "voting for Governor" read "voting for representative" in the 1870 version.

Finally on the issue of interpretation, Defendants string-cite several Tennessee Supreme Court cases in their proposed conclusions of law for the proposition that a court "construing a constitutional provision must also consider how the provision has been interpreted by the legislative and executive branches of the State," and that "an interpretation not emanating from a judicial decision, but adopted by the legislative or executive branches and long accepted by the public, will usually be accepted as correct by the Tennessee courts." (Docket No. 110 at 24).[11] In their reply brief, Defendants state that in two of those cases "the Tennessee Supreme Court has applied this well-established principle when interpreting article XI, section 3 – the very constitutional provision at issue here." (Docket No. 115 at 20).[12] Lastly, they suggest that the United States Supreme Court decision in *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362 (1940) provides general support for their position.

The cases on which Defendants rely are entirely inapposite and none can be read as remotely suggesting that the way something has always been

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[11] Those case are: *Am. Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 626 n.12 (Tenn. 2006); *Southern Ry. Co. v. Dunn*, 483 S.W.2d 101 (Tenn. 1972); *Williams v. Carr*, 404 S.W.2d 522, 529 (Tenn. 1966); *LaFever v. Ware*, 365 S.W.2d 44, 47 (Tenn. 1963); *New England Mut. Life Ins. Co. v. Reese*, 83 S.W.2d 238, 241 (Tenn. 1935); *Derryberry v. State Bd. of Election Comm'rs*, 266 S.W. 102, 105 (Tenn. 1924); and *State v. Nashville Baseball Club*, 154 S.W. 1151 (Tenn. 1913).

[12] Actually, *Darnell* also involved an interpretation of Article XI, Section 3, but was resolved on the basis of lack of standing. The Tennessee Supreme Court "expressed no opinion on whether the Chancellor properly interpreted Article XI, Section 3[.]" 195 S.W.3d at 626.

done makes it constitutionally correct. For example, Nashville Baseball Club, the lead case on which many of the others cases and Judge Binkley relied, involved a determination that a statute banning the playing of baseball on Sunday was illegally enacted because the final bill had not been passed in three readings before the Senate. The real issue, however, was the effect of *stare decisis* because, in a case decided years earlier, the Tennessee Supreme Court had affirmed the conviction of a man for violating the statute. Tellingly, the Tennessee Supreme Court observed that there has "[n]ever been any difficulty about the construction of this act, nor is there any controversy here about the meaning of the constitutional provision." 154 S.W. at 1154. It went on to make several observations worthy of note here: (1) "[w]here there is no particular reason for applying the rule of *stare decisis*, this court has not hesitated to hold an act unconstitutional, even though it had been in force many years, and had been recognized in numerous reported decisions; (2) "'[i]t is not the province or practice of this court to seek out constitutional defects in the acts of the General Assembly" and "'[t]he fact . . . that an act has been construed and enforced and passed upon by this court is not conclusive of its validity and constitutionality, and this question may be raised at any time when the facts and pleadings justify its consideration'"; and (3) "'if an error [in construction] has been committed, and becomes plain and palpable, the court will not decline to correct it, even though it may have been reasserted and acquiesced in for a long number of years." *Id.* at 1155 (citations omitted).

Derryberry and *Dunn*, which Defendants characterize as involving "the very constitutional provision at issue here," had to do with the calling (*Derryberry*) and timing (*Dunn*) of a constitutional convention. Even

though the court in *Derryberry* observed that the "practical construction of the Legislature, extending over a period of so many years, is entitled to great weight," 266 S.W. at 105, (language quoted in *Dunn*), it actually construed the convention provision of Article XI, Section 3. That court also observed that "'the will of the people, as declared in the Constitution, is the final law; and the will of the Legislature is only law when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen.'" *Id*. at 105-06.

Browning was a challenge to an assessment under Tennessee's ad valorem tax laws in which the Supreme Court stated that "[d]eeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text." 310 U.S. at 369. The Court also wrote, however, that "[s]ettled state practice" may establish what state law is, but it "cannot supplant constitutional guarantees." *Id. See Nw. Airlines v. State of Minnesota*, 322 U.S. 292, 298, 64 S. Ct. 950, 953, 88 L. Ed. 1283 (1944) (stating the *Browning* "merely sustained . . . a familiar and frequently sanctioned formula" for the apportionment of taxes based on mileage and that the "essence of the *Browning* holding" is that "[m]athematical exactitude in making the apportionment has never been a constitutional requirement").

The Court finds it unnecessary to go any farther on this issue, other than to observe two things. First, none of the cases cited by Defendants involved a direct voter challenge, yet "[a] voting rights claim strikes at the heart of the political process." *Judge v. Quinn*, 612 F.3d 537, 545 (7th Cir. 2010). Second, even if

Defendants' decision to tabulate the 2014 Election votes was based upon how votes had previously been counted and therefore subject to some deference, "the responsibility for determining the meaning of the Constitution of this State rests in the last analysis with the judiciary." *LaFever*, 366 S.W.2d at 400.

C. Constitutional Implications of the Method Used to Count Votes on Amendment 1

Defendants argue that the method they utilized in counting the votes on Amendment 1 is subject to rationale basis review. This is understandable given the extremely deferential nature of such review:

> . . . Even foolish and misdirected provisions are generally valid if subject only to rational basis review. As we have said, a statute is subject to a "strong presumption of validity' under rational basis review, and we will uphold it "if there is any reasonably conceivable state of facts that could provide a rational basis." *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001). *See also*, *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Those seeking to invalidate a statute using rational basis review must "negative every conceivable basis that might support it." *Lehnhausen v. Lake Shore Auto Parts Co*., 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973). Our standards for accepting a justification for the regulatory scheme are far from daunting. A profferred explanation for the statute need not be supported by an exquisite evidentiary record; rather we will be satisfied with the government's "rational speculation" linking the regulation to a legitimate purpose, even

> "unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc*., 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Under rational basis review, it is "'constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.'" *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980) (quoting, *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)).

Craigmiles v. Giles, 312 F.3d 220, 223-24 (6th Cir. 2002).

In *Craigmiles*, the Sixth Circuit went on to state that, "[t]he Supreme Court has established a tripartite rubric for analyzing challenges under the Equal Protection and Due Process clauses" and that, "[w]hen a statute regulates certain 'fundamental rights' (e.g. voting or abortion) or distinguishes between people on the basis of certain 'suspect characteristics' (e.g. race or national origin), the statute is subject to 'strict scrutiny.'" *Id*. at 223. However, in a more recent case, the Sixth Circuit indicated that, at least with respect to voting rights, the determination of the proper rubric to be utilized is more nuanced:

> If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used. . . . On the other extreme, when a state's classification "severely" burdens the fundamental right to vote, as with poll taxes, strict scrutiny is the appropriate standard. . . .

> Most cases fall in between these two extremes. When a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, we review the claim using the "flexible standard" outlined in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). . . . Although *Anderson* and *Burdick* were both ballot-access cases, the Supreme Court has confirmed their vitality in a much broader range of voting rights contexts. . . .

Obama for Am. v. Husted, 697 F.3d 423, 429 (6th Cir. 2012); *see also Green Party*, 791 F.3d at 684 (citations omitted) (stating that "[i]f the burden on the right to vote is 'severe,' the statute will be subject to strict scrutiny"; "[i]f the burden is 'reasonable' and 'nondiscriminatory,' the statute will be subject to rational basis"; and "[i]f the burden lies somewhere in between, courts will weigh" the state's interest against the burden on plaintiff).

This case falls squarely between the two extremes because Plaintiffs claim that different voters were treated differently as a result of Defendants' chosen tabulation method, and "when a state regulation is found to treat voters differently in a way that burdens the fundamental right to vote, the *Anderson–Burdick* standard applies." *Id*. This mid-level standard of review is as follows:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to

> vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights."

Burdick, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

Turning to the stated justification, Defendants assert that the tabulation method they utilize is meant to "ensure that constitutional amendments are broadly supported and to prevent small interest groups from exercising undue influence on the State's fundamental law." (Docket No. 111 at 38). These are indeed laudatory goals and undeniably legitimate. *See Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993) (state "has a strong interest in ensuring that proposals are not submitted for enactment into law unless they have sufficient support"); *see also Tex. Indep. Party v. Kirk*, 84 F.3d 178, 186 (5th Cir. 1996) ("state has a legitimate goal of requiring a demonstration of sufficient public support to gain access to the ballot*"); Libertarian Party of Me. v. Diamond*, 992 F.2d 365, 371 (1st Cir. 1993) (collecting numerous cases for the proposition that states have a legitimate interest in protecting the electoral process by ensuring that all candidates for nomination have strong public support).

If the real goal is in fact to prevent certain interests groups from exerting undue influence, then it may have failed in the 2014 Election on Amendment 1. In any event, when the stated interest is weighed against the burden placed on Plaintiffs' right to vote in a meaningful manner, the Court finds that the selected method utilized by Defendants violated Plaintiffs'

Fourteenth Amendment rights. That conclusion remains whether Plaintiffs' or Defendants' understanding of the meaning of Article XI, Section 3 is correct.

"The right to vote is a 'precious' and 'fundamental' right," and "'[o]ther rights, even the most basic, are illusory if the right to vote is undermined.'" *Obama for Am.*, 697 F.3d at 428 (quoting, *Westbury v. Sanders*, 376 U.S. 1, 17 (1964)). Indeed, the right to vote is so fundamental that it is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), and, therefore, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562 (1964).

Nevertheless, the conduct of state elections are generally state affairs and "[c]ourts 'have long recognized that not every state election dispute implicates federal constitutional rights.'" *Warf v. Bd. of Elections of Green Cty.*, 619 F.3d 553, 559 (6th Cir. 2010) (*Burton v. Georgia*, 953 F.2d 1266, 1268 (11th Cir.1992)). As a consequence, the Sixth Circuit has

> held that "[t]he Due Process clause is implicated, and § 1983 relief is appropriate, in the exceptional case where a state's voting system is fundamentally unfair." . . . . "[D]ue process is implicated where the entire election process including as part thereof the state's administrative and judicial corrective process fails on its face to afford fundamental fairness." . . . . Such an exceptional case may arise, for example, if a state employs "non-uniform rules, standards and procedures," that result in significant disenfranchisement and vote dilution, . . . or significantly departs from previous state election practice . . .[.]

> Federal courts, however, "have uniformly declined to endorse action[s] under [§] 1983 with respect to garden variety election irregularities." . . .

Id. (internal citations omitted).

If this Court is correct that "a majority of all the citizens of the state voting for Governor" means that voting for governor is a precondition to having a vote on an amendment count, then Defendants' decision to utilize their now-articulated two-step process was fundamentally unfair because it was "an officially-sponsored election procedure which, it its basic respects, was flawed[.]'" *Id.* (citation omitted). The process was flawed because it did not follow the clear language of the Tennessee Constitution. In arguing otherwise, Defendants quote the Ninth Circuit's decision in *Bennett v. Yoshina*, 140 F.3d 1218, 1226-27 (9th Cir. 1998), for the proposition that "two elements must be present" for there to be an fundamental unfairness claim: "'(1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures." (Docket No. 111 at 42). They assert those elements cannot be met here because

> Defendants' interpretation and application of Article XI, Section 3, in the referendum on Amendment 1 was entirely consistent with the interpretation and practice of previous state officials, . . . as well as with contemporaneous official pronouncements by the Secretary of State's spokesperson about how the votes would be counted[.] It is therefore inconceivable that voters were relying on or

> expecting the State to interpret or apply Article XI, Section 3, in any other manner—and certainly not in the absurd manner pressed by Plaintiffs. Indeed, if anything would be fundamentally unfair, it would be for this Court to void the election on Amendment 1 or force Defendants to recount the votes on Amendment 1 pursuant to Plaintiffs' proposed method when no voters were ever informed before the election that they must vote for governor in order to have their votes on the amendments counted.

(*Id.*).

Contrary to Defendants' position, this Court does not believe it to be inconceivable that voters would expect the votes to be counted in accordance with the language of the state constitution, or that counting them that way would be absurd. Moreover, the court in *Bennett* stated that it was not setting forth "an exhaustive description of the electoral problems that might be fundamentally unfair." *Id.* at 1227 n.3. In fact, it made clear that courts "have drawn a distinction between 'garden variety' election irregularities and a pervasive error that undermines the integrity of the vote," the former of which "do not violate the Due Process Clause, even if they control the outcome of the vote or election," while the latter renders the election "invalid." *Id*. at 1226.

"Like beauty, fundamental fairness frequently lies in the eye of the beholder," and the court "do[es] not pretend that it is a simple matter to segregate run-of-the-mill electoral disputes from those that can appropriately be characterized as harbingers of patent and fundamental unfairness." *Bonas v. Town of N.*

Smithfield, 265 F.3d 69, 75 (1st Cir. 2001). Nevertheless, this is not, as Defendants would have it, a "'garden variety election dispute." (Docket No. 115 at 32, citation omitted).

The Ninth Circuit in "*Bennett* cited several cases that illustrate garden variety irregularities, and "include[d] human error in miscounting votes, delays in the arrival of voting machines, technical deficiencies in printing ballots, and malfunctioning voting machines." *Krieger v. City of Peoria*, 2014 WL 4187500, at *3 (D. Ariz. Aug. 22, 2014). "The cited cases hold that such common irregularities should be resolved through state-law remedies and do not amount to a violation of constitutionally protected rights." *Id.* Those types of situations are markedly different, however, from "cases where a federal role is appropriate," such as when "broad-gauge unfairness permeates an election, even if derived from apparently neutral action." *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *see*, *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. 1981) ("the constitution offers no guarantee against insubstantial election irregularities," but "[i]t is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law").

Even if this Court's reading of Article XI, Section 3, is incorrect, Defendants' two-step counting method violated not only Plaintiffs' right to due process right, but also equal protection of the law.

The right to vote, being both "'precious' and 'fundamental,'" is protected by the equal protection clause of the Fourteenth Amendment. *Obama for Am.*, 697 F.3d at 428. That protection applies beyond the initial grant of the right. As the Supreme Court has explained:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. 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 . . . . It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Bush v. Gore, 531 U.S. 98, 104-05, 121 S. Ct. 525, 530, 148 L. Ed. 2d 388 (2000)

The language in Bush is hardly surprising since, "[i]n decision after decision, [the Supreme] Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (collecting cases). "The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement." *Id.* Indeed, the Supreme Court "has consistently held in a long series of case, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it as practicable, as any other person's." *Hadley v. Junior Coll. Dist. of Metro. Kansas City Mo.*, 397 U.S. 50, 54 (1970). These principles apply to all sorts of elections for, "[w]hen a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the

purpose of the election." *Id*. "If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator." *Id*. At 55.

In this case, Plaintiffs voted for governor and against Amendment 1. Their votes, however, were not given the same weight as those who voted for Amendment 1 but did not vote in the governor's race. This is because the way the votes were counted, voters who did not vote in the Governor's race but who voted on Amendment 1 effectively lowered the requisite threshold passage of Amendment 1. Conversely, an opponent of Amendment 1 (or any of the other three Amendments under consideration in the 2014 Election) was compelled to vote in the Governor's race in order for his or her vote to have an impact on the denominator used in determining whether a constitutional amendment had obtained the threshold for passage.

In other words, a vote on Amendment 1 from anyone who voted for governor, regardless of whether the vote was for or against Amendment 1, had less value than a vote for Amendment 1 from someone who did not vote for governor. As Plaintiffs explain, there were actually four possible permutations of votes on Amendment 1 during the ratification step with three different vote values:

> (1) not voting for governor and voting against Amendment 1, (2) voting for governor and voting against Amendment 1, (3) voting for governor and voting in favor of Amendment 1, and (4) not voting for governor and voting in favor of Amendment 1. But these different permutations count for three different

> amounts for Defendants tabulation of ratification. Option 1 (not voting for either) creates a valueless vote because it neither adds to the numerator (voting for Amendment 1) nor the denominator (total number of votes cast for governor); Options 2 and 3 (voting for governor and voting for/against the amendment) have the same weight regarding the ratification threshold because both added to the denominator (as well as the numerator for those who favored Amendment 1); and Option 4 (voting for Amendment 1 but not for governor) has the greatest influence on ratification using Plaintiffs' interpretation because it adds to the numerator without adding to the denominator.

(Docket No. 116 at 29 n.18).

Each citizen's vote should count the same; some should not count double, or one and one-half times, or any other increment more than another citizen's vote. On this the parties seemingly agree. Plaintiffs' votes, however, were devalued and their voting rights debased. *See*, *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise") ; *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("Every voter's vote is entitled to be counted once).

Moreover, the method utilized by Defendants violated the Equal Protection Clause by collectively counting the votes of two classes of people: (1) Plaintiffs, along with those voters like them, who voted in the gubernatorial race as well as on Amendment 1; and (2) those who did not vote for governor and merely

voted on Amendment 1. By counting votes for Amendment 1 from voters who did not vote for governor while basing its passage threshold on the number of votes in the gubernatorial race without a corresponding increase in the number of votes needed for ratification, Defendants knowingly condoned, if not encouraged, voters to give their votes more value on Amendment 1 by not voting for governor. This comes at the expense of those voters, like Plaintiffs who chose to exercise their fundamental right to vote both on the governor's race and on the amendments. However, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Moore v. Ogilvie*, 394 U.S. 814, 819, 89 S. Ct. 1493, 1496, 23 L. Ed. 2d 1 (1969).

The Court fully recognizes that the principle of "one person, one vote" as confirmed most recently by the Supreme Court in *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016) relates to the election of representatives, specifically, "in voting for their legislators, all citizens have an equal interest in representative democracy, and that the concept of equal protection therefore requires that their votes be given equal weight." *Town of Lockport*, 430 U.S. at 265. The court also recognizes this principle does not fully transfer to other circumstances, such as where a "referendum puts one discrete issue to the voters," *id.* or where legislation apportions a special purpose unit (such as a water district) in favor of those most affected by unit's functions, *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719, 794 (1973). Still, the Court does not read cases like *Town of Lockport* and *Salyer* as eliminating the general requirement that citizens be afforded the right to participate in elections on an equal basis, or approving a system that allows certain voters to have

their votes diminished while other have their voting power increased based solely on viewpoint.

Voters are often faced with strategic choices. But it is one thing to have real choices; quite another to be forced to vote in a particular fashion so as to have your vote count the most, or at least the same as everyone else's. The latter lends itself to manipulation. That clearly was the intent of certain groups in favor of Amendment 1, who essentially told voters to get more bang for their buck by voting for Amendment 1 and abstaining from voting for governor. This was entirely within theirprerogative and not this Court's concern. What is of concern is whether Plaintiffs, and others who did not favor Amendment 1, were treated unequally in a constitutional sense.

Defendants insist that the method they utilized was constitutional because it is akin to bullet voting. Bullet voting or single-shot voting "is a strategy that 'enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.'" *United States v. Charleston Cty., S.C.*, 365 F.3d 341, 351 (4th Cir. 2004) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 38-29 n.4 (1986)). Bullet voting is generally unobjectionable because the practice provides a way for minorities to aggregate and exercise their political power. *See*, *Westwego Citizens for a Better Gov't v. City of Westwego*, 946 F.2d 1109, (noting that an "anti-single shot provision . . . forces minority voters to cast votes for white candidates whom the minority voters may not favor thereby increasing the vote totals of those white candidates"). What occurred here, however, is objectionable.

Leaving aside that the results from bullet voting for particular candidates is transitory and does not have the permanency of the enactment of a constitutional amendment, when a voter engages in bullet voting, the choice not to vote for more than one candidate is limited to the single race, whereas Defendants' tabulation method affected two separate races – the vote for governor and the vote on Amendment 1. Unlike in bullet voting, Amendment 1 supporters who subscribed to the "double your vote" theory likely abstained from the governor's race, so as to make their votes on Amendment 1 – a wholly separate race – count more. Those who opposed Amendment 1 likely felt compelled to vote for governor. *See*, *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 727 (1st Cir. 1994) (stating that a state may not condition the right to vote in one election on whether that right was exercised in a previous election and holding that "depriving a qualified voter of the right to cast aballot because of failure to vote in an earlier election is almost inconceivable"); *Partnoy v. Shelley*, 277 F. Supp.2d 1064, 1065 (S.D. Cal. 2003) (holding state election code provision that required voters in a recall election to vote on the recall issue or have their votes concerning potential successors forfeited violated due process and equal protection); *In re Hickenlooper*, 312 P.3d 153 (Colo. 2013) (holding that state constitutional provision virtually identical to the code provision in *Partnoy* violated First and Fourteenth Amendment).

Additionally, the decision to bullet vote (when possible) is available to any and all voters. Here, in contrast, only those voters who favored Amendment 1 had the option to forego voting for governor and thereby increase the weight of their vote on Amendment 1, while Plaintiffs and others who opposed Amendment 1, were left with two lesser options: vote for governor

and against Amendment 1 and cast a diluted vote, or vote against Amendment 1 without voting for governor and cast a vote that really did not count at all.

The Court likewise finds Defendants' reliance on case such as *Gordon v. Lance*, 403 U.S. 1 (1971) inapt. There, the Supreme Court held that a West Virginia law prohibiting political subdivisions from incurring bond indebtedness or increasing tax rates without the approval of 60% of voters in a referendum election did not violate the Equal Protection clause. Although acknowledging that "any departure from strict majority rule gives disproportionate power to the minority," the Court held that the requirement at issue did not violate the Equal Protection Clause because it did not "discriminate against or authorize discrimination against any identifiable class." *Id.* at 6. The Court saw "no constitutional distinction between the 60% requirement in the present case and a state requirement that a given issue be approved by the majority of voters." *Id*. at 7.

Based on the above language and the "[l]ower courts [that] have followed *Gordon* in upholding similar state and local requirements under rational basis review," Defendants argue:

> Plaintiffs cannot establish that the ratification requirement of Article XI, Section 3, discriminates against any identifiable group, much less that it was intended to do so. The ratification requirement applies to all proposed constitutional amendments, regardless of subject matter or which group is supporting or opposing the amendment. Plaintiffs' circular logic suggesting that Article XI, Section 3, intentionally discriminates against voters who, like them, voted "no" on Amendment 1

> and voted for governor, is obviously flawed; under that logic, the supermajority requirement at issue in *Gordon* also would have discriminated against an identifiable class—those favoring passage of the bond issuance.

(Docket No. 111 at 37). The Court disagrees.

Requiring more than a majority only empowers the minority because those favoring a proposal must marshal more votes to get something passed. This is not problematic where, as in *Gordon*, the value of votes both favoring and disfavoring passages have the same weight in either reaching or preventing the 60% threshold. Here, and has previously been explained, however, the votes on Amendment 1 were not all allotted equal relative weight during what Defendants describe as the ratification process –Plaintiffs' votes were afforded less weight than those cast by those in favor of Amendment 1 who did not vote for governor.

Moreover, the Supreme Court in Gordon distinguished the facts before it and cases like *Gray v. Sanders*, 372 U.S. 368 (1963) and *Cipriano v. City of Houma*, 395 U.S. 701(1969), where a "sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." Id. at 5. "The defect [the Supreme] Court found in those cases lay in the denial or dilution of voting power because of group characteristics 'geographic location and property ownership' that bore no valid relation to the interest of those groups in the subject matter of the election; moreover, the dilution or denial was imposed irrespective of how members of those groups actually voted." *Id*. at 4.

While Plaintiffs in this case were not "fenced off" from voting, their votes counted less. This Court

agrees with Plaintiffs' position that "[t]his unequal ability for voters on only one side of an issue (here the voters who favored Amendment 1) to shift the threshold for ratification is an element unique to this case and one that differentiates this case from instances of simple strategic voting or a requirement over and beyond a simple majority." (Docket No. 116 at 39). Also unique to this case is that, for the first time since Article XI, Section 3 was enacted, there were more votes for a proposed constitutional amendment than there were for governor, suggesting the inference – if not leading to the conclusion – that the "double your vote" scheme worked. Proponents of Amendment 1 were certainly free to run that campaign, but opponents of that campaign were just as equally entitled to expect that their votes would be counted not only in accordance with the state constitution, but also in a way that would not violate their rights to due process and equal protection.[13]

C. Remedy

As noted in this Court's findings, Plaintiffs' Amended Complaint sought (1) a declaration that their rights to due process and equal protection were violated by the manner in which the votes were tabulated on Amendment 1; (2) a declaration that the election results as certified are void; and (3) an injunction requiring Defendants to correlate the votes

[13] Defendants' counting method may be objectionable for another reason as well. In Plaintiffs' proposed findings, however, they state that "write-in [votes] were disregarded by Defendants[.]" (Docket No. 112 at 33). If true, this means that Defendants did not, in fact, compare the "yes' votes to the total of votes for Governor as they have claimed. The Court makes no findings or conclusions on this issue, however, because Plaintiffs' citation to the record does not support the assertion they make.

in the governor's race with those votes on Amendment 1. In the Pretrial Order and Plaintiffs' Proposed Findings and Conclusions, Plaintiffs both expand and contract those requests – they now seek to have the first paragraph of Article XI, Section 3 declared unconstitutional on its face, but forgo the request for a recount.

Plaintiffs' request that Article XI, Section 3 be declared unconstitutional on its face will be denied. Whereas an as-applied challenge "argues that a law is unconstitutional as enforced against the plaintiffs before the court," a "facial challenge to a law's constitutionality is an effort 'to invalidate the law in each of its applications, to take the law off the books completely.'" *Speet v. Schuette*, 726 F.3d 867, 872 (6th Cir. 2013) (citation omitted). A "facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). It is incumbent upon the challenger to "shoulder the[] heavy burden to demonstrate that the [Amendment] is facially unconstitutional" in all of its applications, *id*., something Plaintiffs in this case do not attempt to show, or even argue in a compelling way. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (citation omitted) (stating that "[f]acial challenges are disfavored for several reasons" and that "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid'"); *Speet*, 726 F.3d 867, 872 (6th Cir. 2013) (citation omitted) (observing that "[s]ustaining a facial attack to the constitutionality of a state law . . is momentous and consequential").

As for equitable remedies, the Supreme Court has noted that "[i]n shaping equity decrees, the trial court is vested with broad discretionary power;" and, "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). Having considered the record and the parties' arguments, the Court finds that what is necessary, fair, and workable is a recount of the 2014 Election as it relates to Amendment 1. Defendants cannot be heard to complain about having to count the votes on Amendment 1 in accordance with the plain language of the Tennessee Constitution, and the citizens of this state, no less than Plaintiffs, are entitled to know whether its passage was "by a majority of all the citizens of the state voting for Governor."

The Court will defer ruling at this time on Plaintiffs' request that the election be voided or declared invalid because the recount may make this issue moot.

III. Conclusion

For the foregoing reasons, the Court finds that the method used to tabulate the votes on proposed Amendment 1 in the 2014 Election was fundamentally unfair and violated Plaintiffs' due process rights because it was not done in accordance with the plain language of Article XI, Section 3 of the Tennessee Constitution, as well as their due process and equal protection rights under the Fourteenth Amendment because their votes were not accorded the same weight as those cast against proposed Amendment 1. The Court, however, will deny Plaintiffs' request that Article XI, Section 3 be declared unconstitutional on its face.

As a remedy, the Court will order a recount of the 2014 Election solely in relation to Amendment 1, but defer ruling on the question of whether the election on Amendment 1 should be voided.

Finally, as the prevailing party under Section 1983, Plaintiffs are also entitled to reasonable attorney's fees and costs in accordance with 42 U.S.C. § 1988. Given the likelihood of an appeal, however, the Court will defer awarding fees or costs until such time as any appeal has been completed, or the time for filing an appeal has run.

An appropriate Order will be entered.

/s/ Kevin H. Sharp
KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:14-02182

TRACEY E. GEORGE, ELLEN WRIGHT CLAYTON, DEBORAH WEBSTER-CLAIR, KENNETH T. WHALUM JR., MERYL RICE, JAN LIFF, TERESA M. HALLORAN, AND MARY HOWARD HAYES,

Plaintiffs,

v.

WILLIAM EDWARD "BILL" HASLAM, as Governor of the State of Tennessee, in his official capacity, TRE HARGETT, as Secretary of State, in his official capacity, MARK GOINS, as Coordinator of Elections, in his official capacity; HERBERT H. SLATERY III, as Attorney General & Reporter of the State of Tennessee, in his official capacity; STATE ELECTION COMMITTEE OF TENNESSEE; JUDY BLACKBURN, as a member of the State Election Commission, in her official capacity; DONNA BARRETT, as a member of the State Election Commission, in her official capacity; GREG DUCKETT, as a member of the State Election Commission, in his official capacity; TOMMY HEAD, as a member of the State Election Commission, in his official capacity; JIMMY WALLACE, as a member of the State Election Commission, in his official capacity; TOM WHEELER, as a member of the State Election Commission, in his official capacity; and KENT YOUNCE, as a member of the State Election Commission, in his official capacity;

Defendants.

Judge Sharp

ORDER

In accordance with the Findings of Fact and Conclusions of Law entered contemporaneously herewith, the Court FINDS that the method used to tabulate the votes on proposed Amendment 1 in the November 4, 2014 state and federal general elections was fundamentally unfair and violated (1) Plaintiffs' due process rights under the Fourteenth Amendment to the United States Constitution because it was not done in accordance with the plain language of Article XI, Section 3 of the Tennessee Constitution; and (2) Plaintiffs' due process and equal protection rights under the Fourteenth Amendment because Plaintiffs' votes were not accorded the same weight as those who casts against proposed Amendment 1.

The Court further rules as follows:

(1) Plaintiffs' request that Article XI, Section 3 be declared unconstitutional on its face is DENIED;

(2) The Court DEFERS ruling on Plaintiffs' request that the vote on Amendment 1 in the 2014 election be declared void;

(3) Plaintiffs' original request that Defendants be required to correlate the votes in the governor's race with those votes on Amendment 1 is GRANTED, and Defendants are hereby ORDERED to conduct a recount of the votes to determine whether Amendment 1 passed by a majority of those who voted in the governor's race. Within twenty (20) days from the date of entry of this Order, Defendants shall file a proposed time line for the recount for the Court's approval; and

(4) A ruling on Plaintiffs' request for attorney's fees is hereby DEFERRED pending the conclusion of any appeal, or the expiration time within which to take an appeal, at which point Plaintiffs' request will be referred to a Magistrate Judge for a Report and Recommendation.

It is SO ORDERED.

/s/ Kevin H. Sharp
KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE

APPENDIX E

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

U.S. Const. Amend. XIV, § 1

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.

APPENDIX F

Tenn. Const. art. XI, § 3

Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals with the yeas and nays thereon, and referred to the General Assembly then next to be chosen; and shall be published six months previous to the time of making such choice; and if in the General Assembly then next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people at the next general election in which a governor is to be chosen. And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the state voting for governor, voting in their favor, such amendment or amendments shall become a part of this Constitution. When any amendment or amendments to the Constitution shall be proposed in pursuance of the foregoing provisions the same shall at each of said sessions be read three times on three several days in each house.

The Legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform or abolish any specified part or parts of it; and when, upon such submission, a majority of all the voters voting upon the proposal sub mitted shall approve the proposal to call a convention, the delegates to such convention shall be

chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and manner as shall be prescribed. No change in, or amendment to, this Constitution proposed by such convention shall become effective, unless within the limitations of the call of the convention, and unless approved and ratified by a majority of the qualified voters voting separately on such change or amendment at an election to be held in such manner and on such date as may be fixed by the convention. No such convention shall be held oftener than once in six years.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 16-5563

TRACEY E. GEORGE, *et al.*,
Plaintiffs-Appellees,

v.

TRE HARGETT, *et al.*,
Defendants-Appellants.

On appeal from the United States District Court for the Middle District of Tennessee Case No. 3:14-cv-2182 *The Honorable Kevin H. Sharp, United States District Judge*

BRIEF FOR *AMICI CURIAE* PROFESSORS OF THE LAW OF FEDERAL COURTS ERWIN CHEMERINSKY, BARRY FRIEDMAN, SUZANNA SHERRY[*], AND ADAM STEINMAN IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF *AMICI CURIAE*

Amici are scholars and teachers of the law of federal courts. *Amici* have studied, taught, and written scholarly commentary on the requisites of federal-court jurisdiction and the relationship between state and federal courts. They have a common professional interest in one of the questions presented in this case: Whether a federal court should give preclusive effect to a state-court judgment that is the result of a sham lawsuit instituted solely for the purpose of violating citizens' constitutional rights.

Amici are the following scholars:[1]

- Erwin Chemerinsky, Dean and Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law;
- Barry Friedman, Jacob D. Fuchsberg Professor of Law, Affiliated Professor of Politics, and Director, Policing Project, New York University School of Law;
- Suzanna Sherry, Herman O. Loewenstein Professor of Law, Vanderbilt University Law School;
- Adam Steinman, Professor of Law, University of Alabama School of Law.

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[1] *Amici* appear in their individual capacities; institutional affiliations are listed here for identification purposes only. No counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, nor has any other person or persons made a monetary contribution intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Giving preclusive effect to the state-court judgment in this case would violate Appellees' constitutional rights and undermine federal court authority. The state-court suit is unlike ordinary parallel litigation, in which two parties each seek a forum advantage. The state officials who brought the state-court suit did so not because they hoped to prevail, but as an illegitimate and unconstitutional attempt to intimidate the Appellees in this case, to retaliate against them for bringing their federal suit, and to deter future plaintiffs from bringing suit. Therefore, contrary to Appellants' contention (Brief of Appellants, at 27-29, ECF 35-37), the state court's judgment is not binding on the Appellees.

If this Court holds the state-court judgment binding, it will encourage every state actor to answer a federal complaint with a state lawsuit. Police officers sued in federal court for using excessive force will bring a state-court action against the victim of that force seeking a declaratory judgment that the force was not excessive. Municipalities sued in federal court for pattern-and-practice discrimination will sue the victims of that discrimination in state court seeking a declaratory judgment that they did not engage in discrimination. Citizens whose only allegedly wrongful act was filing a federal lawsuit will routinely be named as defendants in state-court actions, and federal courts will be deprived of their role in enforcing constitutional rights.

This case involves a simple and common scenario. Eight private citizens believed that the state electoral process violated their federal constitutional rights. They filed a § 1983 suit in federal court against several state officials, seeking declaratory and injunctive

relief. When the controversial lawsuit became known to the public, plaintiffs received hate mail and threats, but persevered. The officials defended vigorously, including filing a motion to dismiss on numerous grounds. The motion was denied, and the case proceeded to the discovery phase. All of this is typical in constitutional litigation.

But then two of the state officials did something unprecedented and unconstitutional. They filed suit in state court *against the eight named plaintiffs*, seeking a declaratory judgment that their actions were lawful. The complaint was signed by the State Attorney General and lawyers in his office as the two officials' counsel.

Most of the federal-court plaintiffs had not been involved in a lawsuit before, they had been threatened for their participation in the original suit, and now they were named as defendants in another suit. They were, understandably, concerned and intimidated. Would they have to retain and pay attorneys? Would the state-court suit harm their credit ratings?[2]

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[2] It did not help that the summons and complaint were served on them personally (although they were represented by counsel in the federal suit) and that the summons included the following language:

> Tennessee law provides a ten thousand dollar ($10,000.00) personal property exemption from execution or seizure to satisfy a judgment. If a judgment should be entered against you in this action and you wish to claim property as exempt, you must file a written list, under oath, of the terms [sic] you wish to claim as exempt with the clerk of the court. . . . Certain items are automatically exempt by law and do not need to be listed; these include items of necessary wearing apparel (clothing) for yourself and your family and trunks or other receptacles necessary to contain such

The plaintiffs' concerns were heightened when they received notices of depositions in the federal suit and were then subjected to hours-long depositions peppering them with questions about the legal theories underlying their claims. They were also asked whether they could afford to pay legal costs should the officials prevail.

To highlight the egregiousness of the state officials' conduct in bringing the state lawsuit, imagine that the original plaintiffs had never brought the federal suit. But the two state officials, concerned about public controversy, wanted judicial confirmation of the lawfulness of their actions. Would they—*could* they—have brought suit (in either state or federal court) against private citizens who were known to believe that the officials' actions were unlawful? Of course not.

This case, therefore, is not like ordinary parallel litigation in state and federal courts. In this case, the state-court plaintiffs *could not have filed this suit* prior to being sued in federal court. They could not have chosen eight citizens and sought a declaratory judgment against them. In a typical "reactive" suit, the defendant in the first suit could have brought an anticipatory action before being sued; the order of the suits is the result of a race to the courthouse. Moreover, in ordinary cases the party bringing the second suit wants something tangible from his or her

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> apparel, family portraits, the family Bible, and school books. Should any of these items be seized, you would have the right to recover them.

(*See* Memorandum in Support of Plaintiffs' Motion for Initial Pre-Trial/Status Conference, RE 76, Page ID # 853-78, at 861; *see also* Williamson County, Tennessee Chancery Court Summons Form at http://www.williamsonchancery.org/_fileUploads/files/summons.pdf).

opponents, not simply a declaration that the opponents should lose the earlier-filed suit. We are aware of no cases in which state officials responded to a federal suit by bringing a state suit against the plaintiffs, alleging solely that the plaintiffs were wrong for challenging the officials' actions.

The state officials brought suit in state court against the named plaintiffs *only* because they had filed the federal suit. But just like any other private citizens, the federal-court plaintiffs are not proper defendants: they have no role in the state's electoral process, and a declaratory judgment against them affords the officials no relief. The state-court suit was an illegitimate attempt to intimidate the eight Plaintiff-Appellees, to retaliate against them for seeking redress in federal court, and to deter future plaintiffs from bringing federal lawsuits.

The state suit was therefore unconstitutional *ab initio* as a direct and intentional interference with the fundamental right of access to the courts. Because the state-court suit had no legal basis and was merely an unconstitutional attempt to interfere with the Appellees' fundamental constitutional rights, any judgment issued in that suit is not binding on the Appellees.

ARGUMENT

I. Access to the courts is a fundamental constitutional right, with which state actors may not interfere either directly or indirectly by taking actions that punish or chill the exercise of that right.

The Supreme Court has long held that all citizens have a fundamental right of access to the courts. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 522-23 (2004)

(Due Process Clause guarantees "the right of access to the courts" and "a meaningful opportunity to be heard" through the "remov[al] [of] obstacles to their full participation in judicial proceedings"); *Bounds v. Smith*, 430 U.S. 817, 821 (1977) ("It is now established beyond doubt that [even] prisoners have a constitutional right of access to the courts."); *see also United Transp. Union v. State Bar of Michigan.*, 401 U.S. 576, 585 (1971); *In re Primus*, 436 U.S 412, 426 (1978); *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts . . . is the right conservative of all other rights, and lies at the foundation of orderly government.").

This Court has similarly recognized that "the right of access to the courts is a fundamental right protected by the Constitution." *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997) (quoting *Graham v. NCAA*, 804 F.2d 953, 959 (6th Cir. 1986)). The Sixth Circuit has located the source of the right in various constitutional provisions, including the First Amendment's protection of the right to petition the government for redress of grievances. *See, e.g., EJS Properties LLC v. City of Toledo*, 698 F.3d 845, 863 (6th Cir. 2012) ("The right to meaningful access to the courts is also protected by the Petition Clause"); *John L. v. Adams*, 969 F.2d 228, 231-32 (6th Cir. 1992); *accord Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004) ("The right of individuals to pursue legal redress for claims . . . is protected by the First Amendment right to petition and the Fourteenth Amendment right to substantive due process.").

Other legal doctrines also reflect the centrality of meaningful access to judicial process for a regime based on the rule of law. For example, witnesses testifying in judicial proceedings are absolutely immune

from suits based on their testimony. *See Rehberg v. Paulk*, 132 S. Ct. 1497 (2012) (absolute immunity for grand jury witnesses); *Briscoe v. LaHue*, 460 U.S. 325 (1983) (absolute immunity for trial witnesses). Papers filed with a judicial body cannot be the basis for a defamation suit. *See, e.g.,* Restatement (Third) of Torts: Phys. & Emot. Harm § 46 cmt. f (Am. Law Inst. 2012) (referencing, inter alia, Restatement (Second) of Torts § 586 (Am. Law Inst. 1977), which states that "[a]n attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel"). Parties who are in the state in connection with legal proceedings cannot be served with process while in the forum for that purpose. *See, e.g.*, 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1076 (rev. 4th ed. Supp. 2016) ("[P]arties, witnesses, and attorneys entering the state from another jurisdiction in order to attend court or to represent a party in connection with the conduct of one lawsuit are immune from service of process in another."). Communications for the purpose of giving or receiving legal advice are protected by attorney-client privilege. *See generally Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *In re Grand Jury Subpoenas*, 454 F.3d 511, 519 (6th Cir. 2006).

Recognizing the importance of meaningful access to judicial process, courts—including this Court—have interpreted the right of access to the courts to be broader than merely the absence of physical or legal barriers to access. Of particular relevance to this case, courts have held that state action that is taken in retaliation for the exercise of the right to sue, or that chills the exercise of that right, itself violates the

fundamental right of access to the courts. As this Court noted in *EJS Properties*, "right-to-petition claims are viewed in kind with right-to-speech claims," and thus can rest on a showing that "government actions chilled [the plaintiff's] expression." 698 F.3d at 863. The Eighth Circuit—in a case drawing on cases from five other circuits, and cited positively by this Court in *Graham*, 804 F.2d at 959—has explained more fully:

> An individual's constitutional right of access to the courts "cannot be impaired, either directly . . . or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits. It is not necessary that the [individual] succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the [individual's] right of access." The cases from this Circuit, as well as from others, make it clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future.

Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422, 1427-28 (8th Cir. 1986) (citations omitted).

This Court has consistently implemented the constitutional protection against retaliatory or chilling state action. In *ACLU v. Livingston County*, 796 F.3d 636 (6th Cir. 2015), the Court affirmed the grant of a preliminary injunction against a prison policy that allowed prison officials to read prisoners' incoming "legal mail," because doing so "chills important First Amendment rights" including "the right of access

to the courts." *Id*. at 645. In *Carmen's East, Inc. v. Huggins*, 995 F.2d 1066, 1066 (6th Cir. 1993), the Court affirmed a denial of qualified immunity in a suit brought against public officials for allegedly "retaliat[ing] against plaintiffs for exercising their right to sue under the petition for redress of grievances clause." In *Biver v. Saginaw Township Community Schools*, 878 F.2d 1436 (6th Cir. 1989), the court held: "When actors, like the defendants here, take actions that have a chilling effect on an individual's ability to seek redress through the courts, those actors violate a constitutional right and 'interference with or deprivation of the right of access to the courts is actionable under § 1983'" *Id.* at 1436 n.4 (quoting *Graham*, 804 F.2d at 959).

This case is unusual because the retaliatory action is the filing of a state lawsuit, rather than some other form of official harassment, such as unjustified police attention or the denial of an otherwise routine permit. (Indeed, we were unable to find a single case in which state actors who were sued in federal court responded by suing the federal-court plaintiffs in state court, highlighting the illegitimacy of the tactic.) But the principle is the same: the state officials cannot engage in conduct that directly or indirectly interferes with plaintiffs' access to the courts.

II. The two state officials, Tre Hargett and Mark Goins, filed suit in state court with the sole purpose of intimidating Appellees, retaliating against them for exercising their right of access to courts, and chilling future potential plaintiffs.

The officials, Hargett and Goins, could have had no legitimate purpose in filing the state lawsuit. They, and the Attorney General's office as their counsel,

knew or should have known that the lawsuit itself could accomplish no legitimate goal. Note that it is irrelevant whether any of the arguments we make here were presented to the state court. Our contention that this Court should not give preclusive effect to the state-court judgment is not based on that court's lack of jurisdiction, a question that might (or might not) have been adequately addressed by the state court. Instead, we suggest that the various defects—some of which might be considered jurisdictional—were so glaring and obvious that Hargett and Goins could not reasonably have expected to prevail in state court, but instead filed the state-court action for the sole purpose of intimidating Appellees, retaliating against them for bringing suit, and deterring future civil-rights plaintiffs.

The procedural posture of this case thus distinguishes it from other, allowable, instances of parallel litigation in state and federal courts. Hargett and Goins could not have filed suit against the eight citizens prior to being sued in federal court; they could not have brought an anticipatory action in the forum of their choice. Moreover, in other cases in which a state actor brings a parallel suit, the state actor is seeking a judgment that will result in specific real-world consequences: taxes will have to be paid, water rights will be allocated, and so on. We are aware of no cases in which state officials responded to a federal lawsuit by bringing suit against the plaintiffs, alleging only that the plaintiffs' challenge to the officials' actions should fail.

The state-court suit was, in essence, a frivolous lawsuit designed solely for purposes of harassment. We know that it was brought for that purpose because it flagrantly violated at least four established

doctrines of Tennessee law, and thus could not have been brought with any hope of prevailing.[3]

A. Hargett and Goins did not have standing to sue the eight private citizens.

Established standing doctrines, under both federal and Tennessee law, set out three requirements for standing: "The plaintiff must have (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." *Spokeo v. Robbins*, 136 S. Ct. 1540, 1547 (2016); *accord ACLU v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006). Tennessee standing doctrines "are based on the judiciary's understanding of the intrinsic role of judicial power, as well as its respect for the separation of powers doctrine . . . of the Constitution of Tennessee." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cty.*, 301 S.W.3d 196, 202-03 (Tenn. 2009). The fact that Hargett and Goins were seeking declaratory relief does not alter standing requirements: "A declaratory judgment is not a ticket to bypass standing." *Massengale v. City of E. Ridge*, 399 S.W.3d 118, 127 (Tenn. Ct. App. 2012).

It is doubtful that Hargett and Goins suffered any injury at all from the ongoing federal-court lawsuit. They were neither ordered to act nor hampered in the performance of their official duties. Whatever the injury, however, it could not be traceable to the actions of eight private citizens. Those eight private citizens merely challenged actions that Hargett and Goins had previously taken. Any injury to Hargett and Goins

[3] None of these doctrines are unique to Tennessee. Indeed, most have counterparts in both federal law and the law of other states.

could only flow from an eventual ruling by the federal district court. But, of course, under long-established law, they could not ask a state court to enjoin the federal-court proceeding. *Donovan v. City of Dallas*, 377 U.S. 408 (1964); *Gen. Atomic Co. v. Felter*, 434 U.S. 12, 18-19 (1977). Pretending that their injury was caused by the plaintiffs in the federal-court suit rather than by any ultimate ruling by the court makes transparent their lack of a legitimate purpose for the state-court lawsuit.

The illegitimacy of blaming Appellees for the officials' injury is further illustrated by viewing the officials' complaint in larger contexts. First, we can compare it to an analogous situation. Just as parties in federal court may not evade the strictures of the Anti-Injunction Act, 28 U.S.C. § 2283, by seeking to enjoin the *parties* to a state-court suit, *see Cty. of Imperial v. Munoz*, 449 U.S. 54, 58-59 (1980); *Tropf v. Fidielity Nat'l Title Ins. Co.*, 289 F.3d 929, 941 (6th Cir. 2002), parties in state court may not blame the *parties* to a federal lawsuit for the legal outcome of that lawsuit. Second, by filing the state-court suit, the officials are essentially trying to blame Appellees for an injury that was the result of the officials' own action: the officials will only suffer the "injury" of having their conduct declared unlawful (and thus having the results of their conduct invalidated) if the federal court finds that they have violated Appellees' constitutional rights.

Nor would the requested relief—a declaratory judgment against eight private citizens—remedy whatever injury Hargett and Goins might suffer. As we explain more fully in discussing advisory opinions, *infra*, a declaratory judgment issued by the state court would not alter rights or obligations, or change the

behavior, of any of the parties to the state suit. A declaratory judgment is meant to be a substitute for, or a prelude to, an injunction: instead of ordering the parties to do (or refrain from doing) something, it tells them whether their behavior is lawful. Importantly, if a party fails to act consistently with a declaratory judgment, the court can follow up with an injunction. See 28 U.S.C. § 2202; *Samuels v. Mackell*, 401 U.S. 66, 72 (1971) (noting that "a declaratory judgment . . . might serve as the basis for a subsequent injunction"); *Steffel v. Thompson*, 415 U.S. 452, 461 n.11 (1974) (quoting *Samuels*); Tenn. Code Ann. § 29-14-110(a) ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper."). But what injunction could Hargett and Goins have requested? They do not want the Appellees to do, or refrain from doing, *anything*. The lack of any potential injunctive relief both starkly illustrates why Hargett and Goins fail the redressability prong of standing, and confirms the advisory nature of the state suit.

Filing suit knowing that standing is lacking is a strong indicator of an illegitimate purpose for the lawsuit. *See Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 579 (6th Cir. 1986) (citing with approval a case in which Ninth Circuit found illegitimate purpose where defendants "filed meritless appeals (all of which they lost) knowing they lacked standing to so appeal").

B. Hargett and Goins were seeking a purely advisory opinion, which is prohibited under Tennessee law.

Tennessee courts, like federal courts, are prohibited from issuing advisory opinions: "Although a plaintiff in a declaratory judgment action need not show a present injury, an actual 'case' or 'controversy' is still

required. . . . Courts still may not render advisory opinions . . . ." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837-38 (Tenn. 2008). In particular, the Tennessee declaratory judgment act does not permit courts to "render a declaratory opinion to assist [parties] in their other litigation or otherwise allay their fears as to what might occur in the future." *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000). Nor does it allow declaratory judgments that "arise out of a closed incident." *Hodges v. Hamblen Cty*, 277 S.W. 901, 902 (Tenn. 1925).

Hargett and Goins sought a declaratory judgment that was purely advisory, to confirm that they had acted lawfully *in the past*. Nothing turned on the resolution of that question in state court. Both Hargett and Goins themselves and the defendants in the state-court proceeding—eight private citizens of Tennessee—would remain unaffected whether the state court issued the declaratory judgment or refused to do so. The requested declaratory judgment would not, in other words, adjust the legal rights or obligations of any party. A judgment without any effect is a classic advisory opinion.

To the extent that Hargett and Goins sought the declaratory judgment for advice on how to count votes for future proposed amendments, that too would be an advisory opinion under Tennessee law. "If the controversy depends upon a future or contingent event, or involves a theoretical or hypothetical state of facts, the controversy is not justiciable." *Brown & Williamson*, 18 S.W.3d at 193. The possibility that Hargett and Goins would need to know which method to use for counting votes for an amendment was dependent on a distant and speculative contingency: that there would be an amendment on a future ballot *and* that the ratio

of gubernatorial votes to amendment votes made it mathematically possible for the counting method to make a difference to the outcome. Hargett and Goins filed the state suit in September 2015. No amendment could be placed on a ballot until 2018 at the earliest—the next gubernatorial race. Tenn. Const. art. XI, § 3. No amendments were in the legislative pipeline in September 2015. For no amendment prior to Amendment 1 had it been even a mathematical possibility that the counting method mattered to the outcome. Thus, in seeking a declaratory judgment that their preferred method of counting was lawful, the state officials were seeking an advisory opinion in a controversy that depended on a contingent (and highly unlikely) event. *See also West v. Schofield*, 460 S.W.3d 113, 130 (Tenn. 2015) (no declaratory judgment if plaintiff presents only "a theoretical question of what *may* happen in future elections") (quoting *Mills v. Shelby Cty. Election Comm'n*, 218 S.W.3d 33, 39-40 (Tenn. Ct. App. 2006)).

C. Hargett's and Goins's claim for a judgment declaring their actions to be lawful was a compulsory counterclaim to Appellees' federal claims, and therefore could not be brought in an independent action.

Both Federal Rule of Civil Procedure 13(a) and Tennessee Rule of Civil Procedure 13.01 require a party to state as a counterclaim any claim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." The claim raised in the federal-court suit was that the method Hargett and Goins (and the other officials) used to count votes for Amendment 1 was unlawful and unconstitutional. The claim raised in the state-court suit was that the method Hargett and Goins used to count votes for

Amendment 1 was lawful. It is obvious that both claims arose out of the same occurrence, that is, the counting of votes for Amendment 1.

Failure to raise a compulsory counterclaim is an absolute bar to asserting the same claim in an independent action. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974); *Sanders v. First Nat'l Bank & Tr. Co. in Great Bend*, 936 F.2d 273, 277 (6th Cir. 1991) ("It is well established that an opposing party's failure to plead a compulsory counterclaim forever bars that party from raising the claim in another action."). As this Court has noted, the rule "serves the desirable goal of bringing all claims arising out of the same transaction or occurrence before the court in a single action." *Bluegrass Hosiery, Inc. v. Speizman Indus., Inc.*, 214 F.3d 770, 772 (6th Cir. 2000). Had Hargett and Goins attempted to bring an independent federal action for a declaratory judgment, then, it would have been precluded under federal law. And Tennessee state courts are required to apply federal preclusion doctrine when determining the effect of a federal-court suit. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001) ("States cannot give [federal-court] judgments [in federal-question cases] merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes."); *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938) (state court treatment of prior federal ruling "raised a federal question"); *Deposit Bank of Frankfort v. Bd. of Councilmen of City of Frankfort*, 191 U.S. 499, 516-17 (1903) (judgments of a "court of the United States" are "conclusive in the courts of a state except for such cause as would be sufficient to set it aside in the [federal] courts").

Moreover, the failure to raise a compulsory counterclaim bars an independent action under Tennessee law as well. Tennessee Rule of Civil Procedure 13.01 is "closely akin" to the federal rule, and serves the same purpose. *Quelette v. Whittemore*, 627 S.W.2d 681, 682 (Tenn. Ct. App. 1981); *see also Carnation Co. v. T.U. Parks Constr. Co.*, 816 F.2d 1099, 1103-04 (6th Cir. 1987) (relying on *Quelette* to bar a claim in a diversity case that had not been raised as a compulsory counterclaim in a prior state case). Under Tennessee law, "not only issues which were actually determined, but all claims and issues which were relevant and which could reasonably have been litigated in a prior action, are foreclosed by the judgment therein." *Am. Nat'l Bank & Tr. Co. of Chattanooga v. Clark*, 586 S.W.2d 825, 826 (Tenn. 1979). This doctrine applies to transactionally related counterclaims as well as transactionally related claims. *Mackie v. First Tennessee Bank of Cookeville, N.A.*, 1986 WL 1653 at *2 (Tenn. Ct. App. Feb. 5, 1986).

Hargett and Goins did not file a counterclaim in federal court seeking a declaratory judgment that their actions were lawful. Under both Tennessee and federal law, their failure to do so prohibited them from filing a separate state-court action raising that claim.[4]

[4] In addition to providing evidence of the officials' illicit motives in filing suit, the compulsory counterclaim rule might offer an independent justification for ignoring the state-court judgment. As positive federal law that directly addresses the impermissibility of litigation elsewhere, Fed. R. Civ. P. 13(a) might be viewed as creating an exception to the dictates of 28 U.S.C. § 1738.

D. Hargett's and Goins's claim for a declaratory judgment could not be heard in state court because Tennessee law does not permit declaratory relief that is merely "in aid of another proceeding then pending."

The Tennessee Supreme Court has explained that a declaratory judgment action is improper if it is being brought merely to create or strengthen issues in another lawsuit. *Nicholson v. Cummings*, 217 S.W.2d 942, 943 (Tenn. 1949) (noting that where a declaratory judgment would be no more than a stepping stone to further litigation, the action was properly dismissed). A Tennessee court may not declare rights and obligations when such a declaration is merely being used in another pending proceeding. *Burkett v. Ashley*, 535 S.W.2d 332, 334 (Tenn. 1976) (a declaration of rights under the Declaratory Judgment Act "will not be given in aid of another proceeding then pending"); *cf.* Tenn. Code Ann. § 29-14-109 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings.").

The complaint filed by Hargett and Goins makes plain their intention to use the declaration sought in the state suit merely as fodder in the federal suit. The recitation of facts in the complaint includes a description of the pending federal lawsuit. (State Court Complaint, RE 76-1, Page ID #879-90, at 886-87 (¶¶ 27-30)). The complaint states that the pendency of the federal suit "demonstrates that a controversy exists" regarding the interpretation of the Tennessee Constitution, (State Court Complaint, RE 76-1, Page ID #879-90, at 887 (¶ 31)), and "has created uncertainty regarding the rights and duties [of Hargett and Goins]

. . . and regarding the status of Amendment 1." (State Court Complaint, RE 76-1, Page ID #879-90, at 887 (¶ 33)). But Hargett and Goins had, by the time the state lawsuit was filed, completed all duties assigned to them regarding Amendment 1; they had both counted the votes and Hargett had certified the results. (State Court Complaint, RE 76-1, Page ID #879-90, at 886 (¶¶ 25-26)). Thus the only open "controversy" or "uncertainty" about their rights and duties was whether the federal district court might invalidate the prior certification or require a recount. The only possible purpose for obtaining a declaratory judgment from the state court was to use it to influence the outcome of the federal proceeding. Because this is an impermissible purpose, the state suit for a declaratory judgment was improper under Tennessee law.

* * *

The purpose and intended effect of the state-court lawsuit, then, was to retaliate against the Appellees for bringing the federal suit, to intimidate them into dropping the suit, and to chill the exercise of fundamental constitutional rights by future plaintiffs.

In addition to the legal obstacles discussed above, which demonstrate that the state lawsuit could not have been brought for a legitimate purpose, the officials' conduct in both the state and federal lawsuits confirms that they sought to punish or intimidate Appellees. They did not bring the state lawsuit until after the federal court denied their motion to dismiss (*compare* Order Denying Motion to Dismiss on July 1, 2015, RE 63, Page ID #786 *with* State Court Complaint File-Stamped September 1, 2015, RE 76-1, Page ID #879-90), suggesting that the state suit was a

litigation tactic rather than a real attempt to adjudicate a dispute. They served the eight private citizens personally, without notice to the lawyers who were representing the private citizens in their federal-court suit and who were engaged in ongoing correspondence with opposing counsel. (*See* Brief of Appellees, at 43, ECF 51). Although not unlawful, this suggests that the officials (and their counsel) were deliberately attempting to intimidate the Appellees. Shortly after initiating the state-court lawsuit, the officials served the Appellees with deposition notices in the federal suit. Again, although doing so was lawful, the unlikelihood of obtaining much information about a purely legal dispute—the construction of a provision of the Tennessee Constitution—from the private-citizen parties suggests that the Appellants were "playing hardball" and trying to intimidate the Appellees. That conclusion is bolstered by the conduct of the depositions, which lasted up to eight hours each. (*See* Appellee Deposition Transcripts, RE 78-1 (Page ID #1019-50), 78-2 (Page ID #1051-83), 78-3 (Page ID #1084-1119), 78-4 (Page ID #1120-40), 87-1 (Page ID #1201-40), 89-10 (Page ID #1633-56), 89-12 (Page ID #1714-48)). Appellees, most of whom have no legal training, were asked repeatedly about the legal theories of the case. (*Id.*) They were also asked whether they could afford to pay Appellants' costs' if Appellants prevailed. (*Id.*) The only purpose for these questions was to intimidate the Appellees.

It is thus clear that the officials' only purpose in bringing the state lawsuit was to interfere with the Appellees' fundamental constitutional right of access to the courts. The suit was brought with the sole aim of intimidating Appellees, retaliating against them for exercising their right of access to courts, and chilling future potential plaintiffs. As this Court noted in a

slightly different context, the officials brought the state-court suit to harm the Appellees "not by the *result* of the litigation, but by the simple fact of the *institution* of the litigation." *Westmac, Inc. v. Smith*, 797 F.2d 313, 316 (6th Cir. 1986) (quoting *Winterland Concessions Co. v. Trela*, 735 F.2d 257, 264 (7th Cir. 1984)).

III. Because the sole purpose of the suit was to interfere with fundamental constitutional rights, any judgment issued by the state court is constitutionally infirm and therefore not binding on Appellees.

It is settled law that "federal courts are not required to accord full faith and credit" to a "constitutionally infirm judgment." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982); *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 420 (6th Cir. 2012) (quoting *Kremer*); *Hamilton v. Herr*, 540 F.3d 367, 374 (6th Cir. 2008) ("Infirm judgments are not entitled to full faith and credit in federal courts."); *see also Montana v. United States*, 440 U.S. 147, 164 n.11 (1979) ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation"); *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1309 (2015) (same); *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293, 299 (6th Cir. 2005) (no preclusive effect "for state-court rulings made in the absence of . . . due process"); *Rainey Bros. Constr. Co. v. Memphis & Shelby Cty. Bd. of Adjustment*, 178 F.3d 1295 (6th Cir. 1999) (no preclusive effect if state's procedures were not "constitutionally sufficient").

This Court has similarly refused to give preclusive effect to prior state judgments in cases in which doing so would "result in manifest injustice to a party or

violate an overriding public policy." *United States v. LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977). In particular, avoiding frustration of "[p]aramount congressional policy" is a sufficient reason to deny application of res judicata doctrines. *Westwood Chem. Co., Inc. v. Kulick*, 656 F.2d 1224, 1229 (6th Cir. 1981).

The state-court judgment in this case is "constitutionally infirm" and "made in the absence of due process" because, as we demonstrated in Part II, it is the product of a deliberate attempt to interfere with Appellees' fundamental constitutional rights. To give preclusive effect to the judgment would thus frustrate not merely congressional but constitutional policy. It would allow state officials to profit from their deliberate violation of Appellees' fundamental right of access to the courts.

Giving preclusive effect to the state-court judgment also flouts two of the most fundamental and long-standing principles of the American judicial system: that the plaintiff is the master of her complaint and thus entitled to choose the forum from among those with jurisdiction, and that if either party prefers federal court (and the federal courts have subject-matter jurisdiction), the suit will be heard in federal court.

The Supreme Court has long held that that the plaintiff is master of the complaint. *See, e.g.*, *Holmes Grp., Inc. v. Vornado Air Circulations Sys., Inc.*, 535 U.S. 826, 831 (2002); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986); *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). This means that "the plaintiff is absolute master of what jurisdiction he will appeal to." *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915). Thus, "plaintiffs are ordinarily allowed to select whatever forum

they consider most advantageous," *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 581 (2013), and "the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). These principles apply both to vertical choice of forum (*between* state and federal courts, as in *Healy*) and horizontal choice of forum (*among* different state or federal courts, as in *Atlantic Marine* and *Gulf Oil*). As one commentator points out, "courts have traditionally gone to great lengths to ensure the plaintiff's right to seek relief in the forum of his choice." Benjamin W. Larson, Comment, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach: *Respecting the Plaintiff's Choice of Forum*, 74 Notre Dame L. Rev. 1337, 1353 (1999).

Indeed, had the situation been reversed, with Appellees filing in state court and Appellants then filing a reactive declaratory-judgment suit in federal court, it would likely have been dismissed on that theory that "a suit for declaratory judgment aimed solely at wresting the choice of forum from the 'natural' plaintiff will normally be dismissed." *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993); *accord BASF Corp. v. Symington*, 50 F.3d 555, 558 (8th Cir. 1995).

In some tension with the principle that the plaintiff chooses the forum is the right of defendants to remove a case from state court to federal court under 28 U.S.C. § 1441. *See* 13F CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3641 (rev. 3d ed. Supp. 2016) ("[T]he . . . defendants may thwart the plaintiff's choice of a state forum by removing the suit to federal court."); Debra Lyn Bassett & Rex R. Perschbacher, *The Roots of Removal*, 77 Brook. L. Rev. 1, 1 (2011) ("Through removal . . .

a defendant is able to defeat the plaintiff's choice of forum.").

This limit on plaintiffs' ability to choose a forum is as old as our nation, and stems from the principle that either party is entitled to invoke federal-court jurisdiction where it exists:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their priviliges [sic], before the same forum.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816).

Removal jurisdiction is thus a one-way ratchet: It allows the defendant the same option to choose federal court as is accorded the plaintiff. But it is only the need to protect defendants' access to federal courts that allows a defendant to thwart the plaintiffs' choice of *state* forum. In this case, Defendants-Appellants attempted to thwart Plaintiff-Appellees' choice of a *federal* forum by filing their independent action in state court. There is no tension between the two principles here; both principles are violated by the Defendants-Appellants' actions.[5]

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[5] Appellants' filing of a "reactive" suit in state court is also "patently wasteful" and "smacks of indefensible gamesmanship, jeopardizing public faith in the judicial system." James C.

* * *

This case presents, as far as we are aware, a unique form of interference with federal constitutional rights. In no other case have state actors enlisted the state judicial system in their attempt to intimidate, retaliate against, or chill individuals who have exercised their constitutional right of access to federal courts. Previous cases involve interference such as a physical or legal barrier to access to the courts (*see, e.g.*, *Tennessee v. Lane*, 541 U.S. at 522-23 and *ACLU v. Livingston Cty.*, 796 F.3d at 645), police or other official harassment (*see, e.g.*, *Carmen's East*, 995 F.2d 1066), or the deprivation of a benefit to which the individual was entitled (*see, e.g.*, *Graham*, 804 F.2d at 959). In one case outside this Circuit, local officials who were sued in state court filed a frivolous counterclaim in an attempt to coerce settlement, but the counterclaim was dismissed. *Harrison*, 780 F.2d at 1427-28. In all of these cases, the affected individuals subsequently brought § 1983 suits against the state actors in federal court, seeking damages, injunctive relief, or both. That relief either restored their access to the courts, remedied whatever ongoing harm they were suffering at the hands of state actors, or compensated them for the violation of their rights.

In this case, however, the state officials seek to take advantage of their violation of Appellees' constitutional rights by using the outcome of the state case to bind Appellees. They are effectively asking this Court to compound the constitutional violation by accepting the state-court judgment.

Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan. L. Rev. 1049, 1064 (1994).

A holding that the state-court judgment binds Appellees in this case would thus reward Appellants for violating Appellees' constitutional rights. It would also threaten federal-court jurisdiction in future cases: any state official sued in federal court—from governors to police officers—could respond by filing a frivolous bad-faith action in state court, seeking a declaration that his or her conduct was lawful and hoping that the state court reaches judgment first.

CONCLUSION

For the foregoing reasons, this Court should decline to give the state-court judgment any preclusive effect, and should instead decide this appeal based on the substantive merits of Appellees' claims.

Respectfully submitted this 17th day of November, 2016,

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DESIGNATION OF RELEVANT
DISTRICT COURT DOCUMENTS

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APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-5563

TRACEY E. GEORGE, *et al.*,

Plaintiffs-Appellees,

v.

TRE HARGETT, in his official capacity as Secretary of State of the State of Tennessee, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

THE HONORABLE KEVIN H. SHARP, CHIEF DISTRICT JUDGE, CASE NO. 3:14-cv-2182

BRIEF OF *AMICI CURIAE* PROFESSORS STEVEN BRAMS AND PAUL EDELMAN IN SUPPORT OF NEITHER PARTY AND URGING AFFIRMANCE

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November 17, 2016

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae, listed below, are social scientists who study voting rules and election design. Their research is directed toward understanding the strategic implications of voting rules and their impact on voting practice. They file this brief to aid the Court in analyzing the strategic implications and anomalies of the competing interpretations of the voting rules in this case.

Steven Brams is Professor of Politics at New York University.

Paul H. Edelman is Professor of Mathematics and Professor of Law at Vanderbilt University.

ARGUMENT

The purpose of this brief is three-fold. First, we will give a game theoretic analysis of the voting procedure advocated by the defendants in this case.[2] We will show how theoretical considerations indicate how their preferred rules inevitably lead to a large number of voters not participating in the gubernatorial race for purely strategic reasons. This theoretical analysis is borne out in the second section where we analyze the actual results in the contest and support the claim of

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[1] Pursuant to Fed. R. App. P. 29(c)(5), counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] For consistency and ease of reference, we refer to the appellants throughout this brief as "defendants," based on their designation below and due to their defense of the counting method the State of Tennessee employed. Conversely, we refer to appellees throughout as "plaintiffs."

the plaintiffs that the voting rules materially affected the outcome of the contest. In the final section, we will distinguish the voting procedure advocated by the defendants from other currently accepted voting methods, show how it is uniquely harmful as an election procedure, and provide a more rational alternative that achieves the stated goal of the defendants without any of the negative side effects that their method has.

I. ANALYSIS OF THE RATIFICATION RULES

Under the defendants' interpretation of Article XI, Section 3 there are two requirements for the successful ratification of an amendment to the Tennessee constitution. *First*, the number of votes in favor of the amendment must exceed the number of votes against it (the Majority Requirement). *Second*, the number of votes for the amendment must exceed half the number of votes cast in the governor's race (the Participation Threshold).[3] These two requirements, while related, are independent. It is possible that an amendment might fail to satisfy either or both requirements.

To illustrate the possibilities, suppose that in the gubernatorial contest 100 votes were cast, and a possible amendment received 46 votes in favor and 44 against. In this scenario, the amendment would fail since, while it satisfied the Majority Requirement (46 is larger than 44), it failed to exceed the Participation Threshold (since 46 is less than half of 100 [*i.e.* 50].) On the other hand, suppose in the same election a different proposed amendment received 56 votes in

[3] The use of "exceed" in both requirements means that a tie in the number of votes for and against the amendment results in the failure of the amendment under the Majority Requirement, and if the number of total votes in the amendment contest is exactly half the number of the votes cast for governor the amendment fails to meet the Participation Threshold.

favor but 58 against. This amendment would also fail, since it failed to satisfy the Majority Requirement even though it satisfied the Participation Threshold.

Because the Participation Threshold depends on the voting in both the gubernatorial contest and the amendment contest certain unusual strategic opportunities are created. A vote in the gubernatorial contest (no matter for whom it might be cast) raises the Participation Threshold. Thus the choice to cast a ballot in the gubernatorial contest can materially affect the outcome of the amendment contest.

A small example of this effect will be helpful. Suppose that there have been 99 votes cast in the gubernatorial contest and the voting in the amendment contest currently stands tied at 49.[4] If the voting were to end at this point the amendment would fail since it fails the Majority Requirement (the tie of 49-49 results in a loss) as well as falling short of the Participation Threshold (the 49 votes cast in favor of the amendment are less than half of the votes cast for governor; half of 99 = 49.5).

Now suppose a new voter who favors the amendment enters the polling place. This voter will cast a vote in favor of the amendment, resulting in a 50-49 outcome in the amendment contest, but has the choice of whether or not to participate in the gubernatorial contest. If she casts a ballot in the gubernatorial contest then there have now been 100 votes cast. The result is that the amendment fails: While the amendment satisfies the Majority Requirement (50 is larger

[4] One person voted in the gubernatorial contest but not in the amendment contest. This happens frequently on down-ballot contests and is irrelevant to either the defendants' or the plaintiffs' method of counting.

than 49) it fails to cross the Participation Threshold (50 is exactly half of 100, but the requirement is that participation *exceed* half of those voting in the gubernatorial election).

On the other hand, if the voter chooses not to participate in the gubernatorial election then the amendment passes: The Majority Requirement is still satisfied (50 is larger than 49) but now the Participation Threshold has been crossed (half of 99 is still 49.5, and now there are 50 votes in favor of the amendment).

This effect is true in general. A pro-amendment voter will always increase the likelihood of the passage of an amendment by voting for the amendment (thus supporting the Majority Requirement) and by not participating in the gubernatorial contest (thus not raising the Participation Threshold). In game theoretic terms, this strategy is *dominant* for all voters in favor of the amendment—if their sole goal is to affect the outcome of the amendment contest, their optimal strategy is to vote in this way regardless of what their opponents do. *See* Martin J. Osborne & Ariel Rubinstein, A COURSE IN GAME THEORY, 181 (1994).

Perversely, then, the dominant strategy of the pro-amendment voter is to refrain from voting in the gubernatorial contest. That is, the tabulation rule proposed by the defendants gives a strong incentive for a certain class of voters to refrain from expressing their preferences as to who should be governor.

Contrast this situation with the one presented by the plaintiffs' interpretation of the method of deciding the amendment contest. Under their interpretation, in order to have one's vote counted in the amendment contest, a voter *must* have participated in the gubernatorial contest. That means that if a voter's sole

concern is to affect the amendment contest, then he or she must vote in the gubernatorial contest. So each voter has a similar dominant strategy: vote in the gubernatorial contest *and* vote in the amendment contest. Thus, under the plaintiffs' tabulation rule all voters would have a strategic incentive to participate in the gubernatorial contest.

II. THE MATHEMATICS OF THE ACTUAL VOTE ON AMENDMENT 1

Based on the preceding analysis, we would expect that, consistent with the plaintiffs' claims, a significant number of pro-Amendment I voters would cast a ballot in the amendment contest but would not participate in the gubernatorial contest. The numbers bear this out. According to the parties, *see* Stipulations, R. 96, PageID#1798-99, the relevant numbers from the November 4, 2014 election are as follows:

> Total Votes Cast in the Election = 1,430,117 (call this T, "total")
>
> Total Votes Cast for Governor = 1,353,728 (call this G, "governor") Votes in Favor of Amendment I = 729,163 (call this F, "for")
>
> Votes Opposed to Amendment I = 657,192 (call this O, "opposed)
>
> Total Votes Cast in the Amendment Contest = 1,386,355 (call this A, "amendment) (the total number of votes in favor plus the total number of votes against)

We know that 32,627 more people voted in the amendment contest than in the gubernatorial contest.[5] So *at least* those 32,627 people must have voted in the

[5] 1,386,355 [A] minus 1,353,728 [G].

amendment contest but not the gubernatorial contest. But that number is just a lower bound. It is possible that *all* of the voters who participated in the election without casting a gubernatorial ballot voted in the amendment contest. In other words, it is possible that as many as 76,389 voters cast a ballot in the Amendment I contest but not in the gubernatorial contest.[6]

We can therefore conclude that number of voters who participated in the Amendment I election but not in the gubernatorial election is between 32,627 and 76,389 (or between 2.3% and 5.5% of the ballots cast in the amendment contest).

Under the defendants' method of counting, Amendment I passed. It met the Majority Requirement (there were more votes in favor than opposed) and it crossed the Participation Threshold.[7] But what is the result under the plaintiffs' method of counting? Their method would have counted *only* the votes in the amendment contest that were cast by voters who also participated in the gubernatorial contest.

As we noted above, somewhere between 32,627 and 76,389 voters cast ballots in the amendment contest but not in the gubernatorial race. How many pro-Amendment voters would have had to use the strategy of voting yes on the Amendment without voting for governor to make the outcome different under plaintiffs' counting method? It turns out that if only 52,299 of votes cast in favor of Amendment I and are disallowed for failure to vote in the gubernatorial race (following the plaintiffs' counting method) Amendment I

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[6] 1,430,117 [T] minus 1,353,728 [G].

[7] The Participation Threshold is 1/2* G = 1/2* 1,353,728 = 676,864 < F.

would not have satisfied the Participation Threshold and thus would have failed.[8]

Is it plausible that in fact this happened? The number is roughly halfway between our upper and lower bounds on the possible number of voters casting votes only in the amendment contest,[9] so it is certainly in the ballpark. Moreover, the earlier analysis suggests that it is pro-Amendment I voters who would be most likely *not* to have voted in the gubernatorial contest. Thus, it is quite plausible that, had the plaintiffs' counting method been employed, Amendment I would have failed to satisfy at least one of the two requirements for passage.[10]

III. DISTINGUISHING THE DEFENDANTS' METHOD OF COUNTING FROM OTHER TYPE OF VOTING SCHEMES

No election system is immune to strategic voting.[11] And many widely accepted election systems (bullet

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[8] Per above, the Participation Threshold is a majority of those voting in the gubernatorial contest, that is, half of 1,353,728 (G) which is 676,864. The total number of people voting in favor of the Amendment was 729,163, so if 52,299 of those votes were disallowed it would leave only 729,163-52.299=676,864 votes in favor, which ties but does not exceed the Participation Threshold. In that instance, Amendment I would have failed.

[9] Our bounds are 32,627 and 76,389. Halfway between is 54,508.

[10] For example, if 71,971 people who voted yes on the Amendment failed to vote for governor, the Amendment would have failed *both* the Participation Threshold *and* the Majority Requirement.

[11] Research on this point is abundant. *See, e.g.*, Kenneth Arrow, SOCIAL CHOICE AND INDIVIDUAL VALUES (2nd ed.) (1963); A. Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 ECONOMETRICA 587 (1973); M. A. Satterthwaite, *Strategy-proofness and Arrow's Conditions: Existence and Correspondence*

voting, cumulative voting, instant-runoff voting) allow voters flexibility in the way that they cast their ballots. What distinguishes the defendants' rules for vote-counting from others? And why might it be more problematic than other methods?

What is unique to the amendment rules as interpreted by the defendants is that rules governing one contest (the amendment contest) are dependent on the outcome in a different contest on the same ballot (the gubernatorial contest.) This intertwining of the contests necessarily produces new strategic possibilities that will often be asymmetric in their result. Indeed, defendants' amendment rules produce just this type of asymmetry.

Even apart from asymmetry, there is another problem from a democratic perspective: the results in each contest cannot be viewed as representing the view of the voters in each contest separately, but rather their strategic weighing of the combined interests in the pair of contests.

The purpose of an election contest is to aggregate the views of the polity as best as one can. There is no perfect way to do this—there will always be ways to strategically manipulate the outcome. But, to the extent possible, one hopes to get an answer as to what the polity prefers the outcome to be in that contest.

If a method ties one contest to another in the way that the defendants' method does, it becomes impossible to interpret the results in each contest separately. For example, the results of the gubernatorial election do not reflect the views of those voters who wished to vote in the contest but decided that it was more

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Theorems for Voting Procedures and Social Welfare Functions, 10 J. ECON. TH. 187 (1973).

important to maximize the chance that Amendment I would pass by foregoing the opportunity. As we saw, that could have been a substantial number of voters.

Contrast this situation with another in which voters have the flexibility to act strategically by casting different kinds of ballots. In the contest for at-large representatives in the Nashville Metro Council, each voter was permitted to vote for up to five candidates for the five open seats. A candidate was a presumptive winner if she received more than twenty percent of the total number of votes cast. If not all of the seats were awarded presumptively, then some of the candidates moved on to a run-off.

Voters in this type of election are faced with the strategic issue of how many candidates to vote for. If the voter has a strong preference for one candidate he may cast only one vote and forego the opportunity to vote for anyone else. This helps the chosen candidate more than getting one of five separate votes, since her vote total goes up by one and the total number of votes goes up only by one as well, so her percentage increase is larger than if the voter cast ballots for four others.

For example, suppose that 98 votes have been cast and candidate A has 19 votes. That is still short of the twenty percent threshold.[12] A new voter wishes A to be elected. If he casts only one ballot, and that ballot is for A, then A now has 20 votes out of 99, which makes her a presumptive winner.[13] But if that voter had cast all five of his votes, including one for A, then A has 20 votes out of 103 and would not have crossed the 20%

[12] 19/98=0.1937, or 19.37%.

[13] 20/99=0.202, or 20.2%.

threshold.[14] So the strategic choice for the voter is to cast only one of his possible five ballots if his principal goal is to elect A.

We see that many of the same issues that arise in the Tennessee amendment process are present in the Metro council election. In both cases some voters are able to increase the influence of their ballot by making strategic choices.

But for all the similarities, there are two significant differences. *First*, all the strategic choices a voter has to make to influence the outcome in the Metro election affect only that particular contest. The strategies never bleed over into affecting different contests on the ballot. That is the complication that occurs in the amendment process.

Second, only in the amendment process is the opportunity for strategic voting asymmetric. In the Metro elections, voters in favor of candidates B, C, D, etc. have the same choices and opportunities as our hypothetical voter who favors candidate A. In the amendment process, however, it is only those in favor of the amendment who can increase the likelihood of their favored outcome (passage of the amendment) by not voting in the gubernatorial contest; those who oppose the amendment will only hurt their cause if they fail to vote in the gubernatorial contest.

One can make similar comparisons to cumulative voting. Most often used as a remedy for voting rights violations, *see, e.g.*, *Dillard v. Chilton County Board of Education and Chilton County Commission*, 699 F. Supp. 870 (M. D. Ala. 1988), in cumulative voting a voter casting a ballot in a multi-seat contest is allowed

[14] 20/103=0.194, or 19.4%.

to bundle his votes and cast them as a bloc. For example, if the five at-large seats in the Metro Council were elected using cumulative voting, a voter could assign all five of his votes to one candidate, or divide them (perhaps three to a single candidate and two to another), or distribute one vote each to all five candidates. Cumulative voting allows for the possibility of a certain level of proportional representation,[15] which is why it has been employed as a remedy for Section II Voting Rights Act claims.

It is evident from the mere definition that cumulative voting allows voters to enhance their influence over the outcome of a multi-seat contest by bundling their vote. Instead of being able to alter the threshold required to be awarded a win (as in bullet voting or in the amendment contest) with cumulative voting the voter can actually change the vote count itself. Strategic considerations abound.

But, again, the defendants' interpretation of the amendment process is distinguishable from cumulative voting for the same two reasons that it is distinguishable from bullet ballots. The strategies available to a voter using a cumulative ballot are limited in their effect to the outcome of the particular race in question. These strategies do not bleed into other contests the way the strategies for amendment voting bleed into the gubernatorial contest. And the strategies are symmetrically available to all voters, no matter which candidate(s) they favor.

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[15] This principle is well explained in the literature. *See* Edward Bolger, *Proportional Representation* in POLITICAL AND RELATED MODELS, Modules in Applied Mathematics Vol. 2 (Steven J. Brams, William F. Lucas and Philip D. Straffin, Jr. eds.) 19 (1978).

As we have just shown, many traditionally accepted voting methods allow for strategic voting. Different voters may cast ballots with different weights, and may use their voting strategy (as well as the votes themselves) to affect the outcome.

Two things set the defendants' proposed method apart from these traditionally accepted methods. The first distinction is that the strategies—indeed, the *dominant* strategy—necessitate specific behaviors in ballot contests unrelated to the one that is at issue. Voting is intended to aggregate the preferences of the voters on the issue being contested. The intertwining of the ballot contests undermines this fundamental goal of an election. The strategic behaviors may disincentivize voters from casting ballots in one contest in order to best influence the outcome in another and so their views will not be adequately represented in the aggregation.

The second distinction is that the opportunities for strategic voting differ depending on whether the voter is in favor of or opposed to the amendment. The defendants' counting method systematically grants a strategic advantage *only* to those in favor of the amendment, by allowing proponents but not opponents to increase the probability of their favored outcome by failing to vote in the gubernatorial race.

If the connection between the two contests were necessary then perhaps this would be a price worth paying. The claimed justification for defining the Participation Threshold in terms of the gubernatorial race is to ensure that a sufficient number of voters participate in the amendment election so that amendments do not pass without broad-based support. But that requirement could easily be met by requiring that the number of voters participating in

the amendment contest exceed some fixed percentage of *all* voters in the election. Such a requirement would limit the strategic possibilities and, in particular, would be neutral as to participation in any other contest and as between proponents and opponents of the amendment.

CONCLUSION

The method of counting ballots advocated by the defendants has two noteworthy failings. *First*, by intertwining ballot questions it undermines the goal of correctly aggregating the preferences of the voters as to each unique question. *Second*, it allows for strategic advantages for some voters (the pro-amendment voters) that are unavailable to others (the anti-amendment voters). Moreover, there is no rational reason to introduce these complications when the claimed justification—to ensure sufficient participation in the amendment process—can be achieved by a neutral rule as described in the preceding section. For these reasons, *amici* respectfully suggest that the judgment of the district court be affirmed.

Respectfully submitted,

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