NO. 23-_____

In the Supreme Court of the United States

MELANIE JERUSALEM,

Petitioner,

v.

DEPARTMENT OF STATE, LOUISIANA; AND
R. KYLE ARDOIN, LOUISIANA SECRETARY OF STATE,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Warner Mendenhall
Counsel of Record
THE LAW OFFICES OF WARNER MENDENHALL
190 North Union Street, Suite 201
Akron, OH 44304
(330) 535-9160
warner@warnermendenhall.com

March 8, 2024 *Counsel for Petitioner*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of Petitioner Melanie Jerusalem's complaint against Louisiana's Department of State and Secretary of State on standing grounds based on Petitioner's alleged failure to sustain an injury in fact caused by the State of Louisiana's past and continued use of vulnerable electronic voting machines in Federal elections.

THE QUESTION PRESENTED IS:

Did the Fifth Circuit err in ruling a registered Louisiana voter for a federal election sustained insufficient injury in fact under Article III of the United States Constitution to grant standing despite well-documented vulnerabilities found in the Louisiana electronic voting machines previously used by her and slated for use in upcoming federal elections in which she intends to vote?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Melanie Jerusalem

Respondents and Respondents-Appellees below

- R. Kyle Ardoin, Louisiana Secretary of State
- Department of State, Louisiana

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit

No. 23-30521

Melanie Jerusalem, Appellant v.
Department of State Louisiana, et al., Appellees.

Date of Final Opinion: January 18, 2024

U.S. District Court, Middle District of Louisiana

No. 22-516-SDD-EWD

Melanie Jerusalem, Plaintiff v.
Department of State Louisiana, et al., Defendants.

Date of Final Order: July 13, 2023

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

CASE DOCUMENTS

TABLE OF CONTENTS – Continued

Page

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

JUDICIAL RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

The underlying ruling affirmed by the Fifth Circuit frames the issue now before this Court: "It is difficult to discern from Plaintiff's Complaint and Opposition whether she claims to have suffered any other injuries aside from the possibility that her right to vote was undermined." *Jerusalem v. Department of State Louisiana, et al.*, 3:22-516-SDD-EWD (ECF 40, Magistrate Judge's Report, Recommendation, and Order, p. 9) (M.D. La. June 26, 2023) (emphasis added). App. A10.

Respectfully, this Court must now decide whether adjudicating the possibility that Petitioner's actual vote was undermined by state actors provides the predicate for a Constitutional claim our Federal courts should address—or is the Fifth Circuit correct in considering Petitioner's claim merely a "generalized" complaint more proper for a judicial wastebin.

Petitioner believes Louisiana's decision to disregard credible evidence of vulnerabilities in its voting machines is the exact sort of "stealthy encroachment" of voters' rights that have long concerned this Court —and now justify review of the Fifth Circuit's decision. *See c.f., Boyd v. United States*, 116 U.S. 616, 635 (1886) ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.").

Petitioner's cause of action states with particularity exactly how the "'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to

govern them'" is directly impacted by Louisiana's actions. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (*quoting Powell v. McCormack*, 395 U.S. 486, 547 (1969)). *See also Republican Party of Pa. v. Degraffenreid*, 141 S.Ct. 732, 738 (2021) (Thomas, J., dissenting) ("[E]lections enable self-governance only when they include processes that "giv[e] citizens (including the losing candidates and their supporters) confidence in the fairness of the election.") (citations omitted).

The Presidential primary election in Louisiana is scheduled for March 23, 2024. As recognized by Justice Thomas: "One wonders what this Court waits for. . . . The decision to leave election law hidden beneath a shroud of doubt is baffling. By doing nothing, we invite further confusion and erosion of voter confidence. Our fellow citizens deserve better and expect more of us." *Degraffenreid*, 141 S.Ct. at 738 (Thomas, J., dissenting). As done many times since it was first formed 235 years ago, this matter gives the Court an opportunity to erase confusion and give the American people certainty where none exists.

The Fifth Circuit should be reversed because it has undermined Petitioner's unenumerated right to have her vote counted by ruling she cannot ask a Court to address the use of vulnerable electronic voting machines in her home state. Unless this Court sets forth exactly why voters cannot access the Federal courthouse to address known improprieties in the election process, including by way of a state's continued use of vulnerable electronic voting machines, the American people will always wonder why they should trust the fairness of the election process and whether their vote even matters.

OPINIONS BELOW

The Fifth Circuit per curiam opinion is at 2024 WL 194174, and is included at App.1a. The district court's orders adopting the magistrate report (App.9a) dismissing the case are included at App.5a, 7a.

JURISDICTION

The Fifth Circuit entered judgment on January 18, 2024. App.1a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, sec. 2, cl.1 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. IX provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. XV, § 1 provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

52 U.S.C. § 20971 provides:

(a) Certification and testing

(1) In general

The Commission shall provide for the testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories.

(2) Optional use by States

At the option of a State, the State may provide for the testing, certification, decertification, or recertification of its voting system hardware and software by the laboratories accredited by the Commission under this section.

(b) Laboratory accreditation

(1) Recommendations by National Institute of Standards and Technology

Not later than 6 months after the Commission first adopts voluntary voting system guidelines under subpart 3 of part A of this subchapter, the Director of the National Institute

of Standards and Technology shall conduct an evaluation of independent, non-Federal laboratories and shall submit to the Commission a list of those laboratories the Director proposes to be accredited to carry out the testing, certification, decertification, and recertification provided for under this section.

(2) Approval by Commission

(A) In general

The Commission shall vote on the accreditation of any laboratory under this section, taking into consideration the list submitted under paragraph (1), and no laboratory may be accredited for purposes of this section unless its accreditation is approved by a vote of the Commission.

(B) Accreditation of laboratories not on Director list

The Commission shall publish an explanation for the accreditation of any laboratory not included on the list submitted by the Director of the National Institute of Standards and Technology under paragraph (1).

(c) Continuing review by National Institute of Standards and Technology

(1) In general

In cooperation with the Commission and in consultation with the Standards Board and the Board of Advisors, the Director of the

National Institute of Standards and Technology shall monitor and review, on an ongoing basis, the performance of the laboratories accredited by the Commission under this section, and shall make such recommendations to the Commission as it considers appropriate with respect to the continuing accreditation of such laboratories, including recommendations to revoke the accreditation of any such laboratory.

(2) Approval by Commission required for revocation

The accreditation of a laboratory for purposes of this section may not be revoked unless the revocation is approved by a vote of the Commission.

La. Rev. Stat. § 18:1361(A) provides:

(A) In addition to meeting any applicable certification standards, any voting system or system component procured or used in the state must have been certified according to the voluntary voting system guidelines developed and maintained by the United States Election Assistance Commission by a voting system test laboratory accredited by the United States Election Assistance Commission. This certificate, together with any relevant reports, drawings, and photographs, shall be a public record.

STATEMENT OF THE CASE

The First Amendment to the United States Constitution guarantees the right of the people to petition the government for redress of their grievances, and through application of the Fourteenth Amendment, such enumerated right extends to the states. The Ninth Amendment may only be a rule of construction, but it protects the unenumerated rights belonging to the American people, such as the unenumerated right to have one's vote accurately counted. The Fifth Circuit's application of the "generalized grievance doctrine"[1] diminishes Petitioner's unenumerated constitutional rights while also eroding public trust in the judiciary and our election process.

Given this is a presidential election year with an upcoming primary that will soon receive Petitioner's vote using the same vulnerable electronic voting machines referenced in her underlying Complaint, Petitioner respectfully submits that our Federal judiciary must address her well pled grievances derivatively based on Petitioner's unenumerated right to have her vote accurately counted.

Like many other states, Louisiana's election integrity process relies on Federal guidance. To that end,

---

[1] The generalized grievance doctrine requires federal courts refuse hearing "generalized grievances" because they pose "abstract questions of wide public significance . . . pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982) (citation and internal quotation marks omitted).

the Help America Vote Act of 2002 ("HAVA") provides that the U.S. Election Assistance Commission ("EAC") facilitates the certification process of electronic voting machines by way of voluntary voting system guidelines and the use of accredited voting system testing laboratories ("VSTLs"). *See generally* 52 U.S.C. § 20971. While HAVA does not require states to use EAC-certified voting systems, Louisiana and other states bound themselves to this Federal scheme via state statutes. In Louisiana, voting machines used within the state must be certified according to Federal guidelines. *See* La. Rev. Stat. § 18:1361(A) (requiring that "any electronic voting machine acquired or used in the state must have been certified by NASED Independent Testing Authorities according to the voting systems standards adopted by the Federal Election Commission. This certificate, together with any relevant reports, drawings, and photographs, shall be a public record.").[2]

Petitioner filed a complaint with the United States District Court for the Middle District of Louisiana against the Department of State of Louisiana and the Louisiana Secretary of State ("State of Louisiana") seeking relief for the lack of statutorily required electronic voting machines certifications since the

---

[2] NASED qualified voting systems were tested against the 1990 and 2002 voting system standards developed by the Federal Election Commission ("FEC"). HAVA transferred the responsibility for developing voting system standards from the FEC to the EAC. 52 U.S.C. § 20971(d). *See also* EAC Testing and Certification Program, dated August 11, 2021, found at: https://www.eac.gov/sites/default/files/TestingCertification/EAC_Testing_and_Certification_Program.pdf (last visited February 29, 2023).

fall of 2019. *Jerusalem*, 2023 WL 4537724, 3:22-cv-516, (Doc 1) (Pg 9) (M.D. LA.).

Petitioner also reached out to then Louisiana Secretary of State, Robert Kyle Ardoin, with information regarding other proceedings adjudicating issues with the same electronic voting machines used in Louisiana. The Louisiana Secretary of State took notice. Secretary Ardoin filed a motion on December 21, 2021, in the Northern District of Georgia seeking Alex J. Halderman's expert cybersecurity report ("Halderman Report")—a report that addressed the same vulnerable voting machines used in Louisiana. App.80a. Secretary Ardoin recognized:

> It is absolutely necessary to address any and all potential flaws with the machines prior to the spring of 2022 elections. The potential injury to over 3,000,000 voters in the state of Louisiana and the protection of their right to vote outweighs the fact that this information is currently only available to the parties in this litigation.

Curling v. Raffensperger, No. 1:17-cv-02989-AT, at 10 (Doc 1243-1) (emphasis added). *See* App.61a.

As stated in the subsequently unsealed Halderman Report, Louisiana's vulnerable voting machines can easily compromise the counting of votes. *See generally* App.70a. To remedy these alleged violations, Petitioner sought judicial relief asking the court to prevent the state from using these vulnerable electronic voting machines until the machines no longer were subject to the vulnerabilities referenced in the Halderman Report. *See* App.71a-78a.

I. The District Court Proceedings

Appearing *pro se*, Petitioner Melanie Jerusalem filed her complaint and application for emergency relief on July 28, 2022. App.24a. Nearly one year later, on June 26, 2023 the Magistrate Judge *sua sponte* filed a report and recommendation for dismissal on the grounds Petitioner lacked standing to bring her claims, thus depriving the district court of jurisdiction. App.9a. The Magistrate Judge opined:

> Like the many other plaintiffs who claimed their votes were unconstitutionally diluted because of alleged issues with the integrity of the 2020 election, Plaintiff's alleged injury is neither concrete nor particularized; rather, it amounts to a "generalized grievance about the conduct of [the] government." *Soudelier v. Department of State Louisiana, et al.*, No. 22-2436, 2022 WL 17283008 at *4, (E.D. La. Nov. 29, 2022), citing *Lance v. Coffman*, 549 U.S. 437, 442 (2007). It is well-settled that such generalized complaints about the operation of the government do not present the kind of controversy that is justiciable in federal court. The relief plaintiff seeks would "no more directly and tangibly benefit[] [her] than it [would] the public at large." *Soudelier*, 2022 WL 17283008, at *4, *citing Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485 (1982).

App.19a. The Chief Judge adopted the Magistrate Judge's recommendation on July 13, 2023. App.7a.

Plaintiff filed a notice of appeal on July 27, 2023. App.68a.

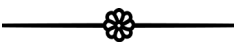
II. The Court of Appeals Proceedings

On October 2, 2023, Petitioner filed her merit brief with the Fifth Circuit. Appellees filed their opposition on November 01, 2023. The Fifth Circuit filed their opinion and judgment on January 18, 2024. App.1a. The Fifth Circuit ruled as follows:

> Appellant argues that she was injured because the voting machines in Louisiana are not certified, and the machines will diminish her voice and cause her irreparable harm. A "plaintiff seeking relief in federal court must [] demonstrate that he has 'a personal stake in the outcome, . . . distinct from a generally available grievance about government[.]'" *Gill v. Whitford*, 138 S.Ct. 1916, 1923 (2018) (quoting *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (internal citations and quotations omitted)). Further, Appellant has failed to allege actual and concrete harm that has or is certain to come to her because of Louisiana's use of these voting machines. "Unless a party seeking a remedy can show direct injury, this court will deny standing." *Hotze v. Hudspeth*, 16 F.4th 1121, 1124 (5th Cir. 2021) (finding that the four plaintiffs' claim "that drive-thru voting hurt the 'integrity' of the election process . . . was far too generalized to warrant standing.") (quoting *Friends of St. Frances Xavier Cabrini Church v. FEMA*, 658 F.3d 460, 466 (5th Cir. 2011)). Accordingly, the district court did not err in dismissing

Appellant's claim for lack of subject matter jurisdiction.

While Petitioner appeared *pro se* in the Fifth Circuit she retained counsel to file this Petition for Writ of Certiorari with this Court.



REASONS FOR GRANTING THE PETITION

Respectfully, this Court should grant certiorari and determine whether Petitioner's claims were properly dismissed for lack of standing under the generalized grievance doctrine. The Fifth Circuit erred by finding Petitioner's personal stake in the outcome of the 2020 Federal election and her allegations of sustained concrete harm that will recur should Louisiana persist in using vulnerable electronic voting machines do not create standing simply because others have similar grievances.

I. Under Sup. Ct. Rule 10(a), The Petition Should Be Granted Because the Fifth Circuit in *Jerusalem v. Department of State Louisiana, Et Al.,* No. 23-30521 (5th Cir. Jan. 18, 2024) Decided an Important Federal Question, Namely Whether Individuals Have Standing to Assert Claims Based on the Failure to Count Their Votes in a Federal Election, in a Way That Conflicts with Two State Courts of Last Resort.

There is a conflict here requiring resolution by the Court, namely between the Fifth Circuit's ruling and that of the Supreme Court of Georgia in *Jeffords v. Fulton Cnty.*, S22C1299 (Ga. Dec 20, 2022) and

the Pennsylvania Supreme Court in *Banfield v. Cortes*, 110 A. 3d 155 (Pa. Sup. Ct. 2015). *See* Sup. Ct. Rule 10(a).

In *Jeffords v. Fulton Cnty.*, S22C1299 (Ga. Dec 20, 2022), Georgia's court of last resort vacated a dismissal for lack of standing. App.69a. The original Complaint was filed by individuals who alleged that during the 2020 general election their votes were diluted by the inclusion of unlawful ballots from another county. *Id.* The Georgia Supreme Court remanded the matter to the Court of Appeals of Georgia, Fifth Division, to reconsider its decision based on the Georgia Supreme Court's ruling in *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs*, 315 Ga. 39, 880 S.E.2d 168 (Ga. 2022), in which that court determined "members of a community, whether as citizens, residents, taxpayers, or voters, may be injured when their local government fails to follow the law." *Id.* at *3.

While the court in *Sons of Confederate Veterans* distinguished between the requirements of standing under federal law as opposed to Georgia state law, the implications of the *Jeffords* decision remain relevant. In effect, it gives the Georgia electorate greater rights than citizens of other states when bringing claims involving elections. As noted by the Court of Appeals on remand, while the underlying litigation arose "out of the 2020 presidential election," the court was admonished by the Georgia Supreme Court that, "in the future, Georgia courts should apply principles of federal standing only to the extent they are (1) following binding precedents of this Court or (2) considering other federal precedent as persuasive authority only to the extent that those federal decisions

actually were guided by the same language, history, and context as that of the relevant state provision." *Favorito v. Wan*, 367 Ga. App. 642, 887 S.E.2d 810 (Ga. App. 2023) (*citing Sons of Confederate Veterans*, 880 S.E.2d at 175, n. 4).

Again, one result of *Jeffords* is that the citizens of one state can address the vulnerability of electronic voting machines of a federal election that impacts the entire nation while voters in other states and U.S. territories have no recourse.

Similarly, in a mandamus action that began nearly a decade earlier, the Pennsylvania Supreme Court decided against individual voters attacking their Secretary of State's use of electronic voting machines.[3] Specifically, Pennsylvania's highest court determined that there was "no merit in Appellants' claim that the Secretary's certification of the DREs [direct-recording electronic voting systems] violated the fundamental right to vote[.]" *Banfield v. Cortes*, 110 A.3d 155, 178 (Pa. Sup. Ct. 2015).

Despite the ultimate loss sustained by registered voters in Pennsylvania, there was at least discovery regarding this important Constitutional issue and the individual Plaintiffs were never shut out from the Courthouse. *See Id.* at 161 ("In the discovery phase of trial, the parties obtained reports and deposition

---

[3] No different than with any other action, the issue of standing must be addressed in a mandamus action. *See Funk v. Wolf*, 144 A.3d 228, 243 (Pa. Cmwlth. 2016) ("We next address Respondents' challenge to Petitioners' standing, where Respondents contend that the Petition merely asserts generalized injuries and claims based upon remote and speculative allegations of harm.").

testimony from expert witnesses who reviewed the Secretary's examination reports. Appellants retained two experts, Dr. Douglas Jones, Ph.D., and Dr. Daniel Lopresti, Ph.D., who contended that the certified DREs do not meet several requirements of the Election Code and the Secretary's certification process is inadequate to determine whether electronic voting systems meet accuracy, security and reliability requirements.").[4]

In the matter of *Trump v. Anderson*, this Court ruled on March 4, 2024 that one state cannot unilaterally remove a candidate in the upcoming presidential election. *See Trump v. Anderson*, 601 U.S. ___ (2024). During oral arguments, Justice Brett Kavanaugh commented, "what about the idea that we should think about democracy, think about the right of the people to elect candidates of their choice, of letting the people decide? Because your position has the effect of disenfranchising voters to a significant degree."[5] And, in their concurring opinion, Justices Sotomayor, Kagan, Jackson wrote: "The American people have the power to vote for and elect candidates for national

---

[4] Indeed, the Pennsylvania opinion appears to cut against several of Petitioner's positions given the Court there found that "the mere possibility of error cannot bar the use of a voting system" and that "all voting systems are imperfect and not immune from tampering". *Id.* at 174. Nevertheless, Petitioner should at least be afforded the opportunity to present her case given her standing to do so—as was done for other voters in Pennsylvania. It is worth noting, while the Courthouse door must be open for her, like all other plaintiffs wanting to enter a Federal courthouse, the availability of a seat at the table remains subject to Fed. R. Civ. P. 11.

[5] No. 23-719 (filed January 4, 2024; oral argument heard February 8, 2024), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-719_5he6.pdf, *114,115.

office, and that is a great and glorious thing." *Trump*, 601 U.S. ___ at *6 (Sotomayor, Kagan, Jackson, JJ., concurring in judgment) (emphasis added).

As in *Trump v. Anderson*, the Court here must also decide an issue of monumental importance to the American people, namely whether the highest court of one state can recognize a voter's standing to challenge a state's electronic voting infrastructure used in a federal election while citizens of other states and territories lack such rights. *See c.f.*, *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983) (internal citations omitted).

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States.

Because the Fifth Circuit has decided the issue of Petitioner's standing to challenge the propriety of using vulnerable electronic voting machines in a way that conflicts with the decision of the highest courts in the State of Georgia and the Commonwealth of Pennsylvania, Petitioner respectfully requests this Court grant certiorari to examine the standing doctrine as applied to federal elections. Voters should be allowed to petition their government for redress of voting grievances even when such redress applies to other voters. This, however, can best be done using a roadmap written by this Court.

II. Under Sup. Ct. Rule 10(b), The Petition Should Be Granted Because Two State Courts of Last Resort Decided an Important Federal Question—Whether Individuals Have Standing to Assert Claims Based on the Procedures Implemented in an Election in a Way That Conflicts with the Fifth Circuit's Decision in *Jerusalem v. Department of State Louisiana, Et Al.,* No. 23-30521 (5th Cir. Jan. 18, 2024).

The highest Courts of Georgia and Pennsylvania decided individual voters have standing to challenge election processes. These rulings conflict with the Fifth Circuit's wholesale application of the generalized grievance doctrine in Petitioner's instant lawsuit. The Georgia and Pennsylvania decisions conflict with the rulings of many other courts, which have routinely denied citizens the ability to challenge election matters using the generalized grievance doctrine. If state courts of last resort may give their citizens certain rights to challenge how a nationwide federal election is conducted—while citizens of other state or U.S. territories may not-those citizens have greater rights in federal elections to the detriment of the millions of other American voters who may not enforce similar rights. Petitioner respectfully believes she has standing to enforce her fundamental right to have her vote accurately counted no matter in what state she resides.

III. Under Sup. Ct. Rule 10(c), The Petition Should Be Granted Because the Fifth Circuit's Ruling in *Jerusalem v. Department of State Louisiana, Et Al.,* No. 23-30521 (5th Cir. Jan. 18, 2024) Results in a Decision on an Important Question of Federal Law—Whether a Registered Voter Has Article III Standing to Bring a Claim Regarding the Vulnerability of Electronic Voting Machines—That Has Not Been, but Should Be, Settled by This Court.

The Fifth Circuit's ruling results in a decision on an important question of federal law, namely whether a registered voter has Article III standing when claiming vulnerable electronic voting machines can and will cause her injury because the machines in question may not count her vote. *See* Sup. Ct. Rule 10(c).

In this Court's many rulings regarding the boundaries of Article III standing, the essential talisman warding off its curtailment of the generalized grievance doctrine has always been the view federal courts are ill-suited to resolve abstract questions best left to other branches of government. The nature of governmental "grievances," however, requires the judiciary to more readily address election cases—especially election cases involving the means by which the other two Federal branches gain power.

A. Granting the Petition Will Enforce the Fundamental Right to Have One's Vote Accurately Counted.

The Fifth Circuit's ruling disregards binding guidance in *Gill v. Whitford*, 138 S.Ct. 1916 (2018).

As a basic proposition, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. *Gill*, 138 S.Ct. at 1929 (*citing Baker v. Carr*, 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). When the Court in *Gill* addressed similar standing issues raised by this case, namely determining when a voter can properly seek judicial redress for allegations of individual harm, it opened the door for lower court judicial review even when standing is not readily determined from the initial pleadings.

Specifically, the Court ruled in *Gill* that a lack of standing typically demands dismissal of the action but

> [h]ere, however, where the case concerns an unsettled kind of claim that the Court has not agreed upon, the contours and justiciability of which are unresolved, the case is remanded to the District Court to give the plaintiffs an opportunity to prove concrete and particularized injuries using evidence that would tend to demonstrate a burden on their individual votes.

Id. at 1922 (emphasis added).

Petitioner never had the opportunity to demonstrate how her vote was burdened by Louisiana's vulnerable electronic voting machines. If these vulnerable voting machines are truly non-compliant with state law requiring certifications for the machines —which is not even really in dispute, and if they also have demonstrable flaws in counting votes, such facts concretely show Petitioner's individual harm if not addressed by a court, namely the potential that

her vote could not or would not be counted. More to the point, so long as the government officials who address such matters possibly retain office because of these infirmities, the only way to obtain relief is by way of the judiciary branch.

When evaluating Article III standing, injury-in-fact "is one of degree, not discernible by any precise test." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979). As explained by this Court, "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint." *Metropolitan Washington Airports Authority v. Citizens For the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991) (*citing Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975)).

B. The Fundamental Right to Have One's Vote Counted Is Protected Under the Ninth Amendment.

Under the Fifteenth Amendment, sec. 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const., amend. XV, § 1 (emphasis added). Even though "the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote," this Court has acknowledged the Fifteenth Amendment "is cast in fundamental terms, terms transcending the particular controversy," and "grants protection to all persons, not just members of a particular race." *Rice v. Cayetano*, 528 U.S. 495, 512 (2000).

In her action, Petitioner seeks to protect her highly individualized and valuable actual vote and not merely her right to vote—the exact same right had by every American of age. That many more people have their own similar valuable rights worth protecting does not mean she should forfeit her own individualized vote. Indeed, Article III standing requirements were drafted long before the advent of electricity—let alone software-driven electronic voting machines that counted votes. That is exactly why the Ninth Amendment comes to Petitioner's rescue.

The Framers of the Constitution, through their inclusion of the Ninth Amendment, gave us a deft mechanism to address non-protective governmental action. Under the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. Amend. IX (emphasis added). "[T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965).

Here, the Ninth Amendment protects the fundamental right to have one's actual vote counted and that right cannot be usurped based on governmental inaction any more than it can by governmental action. In *Griswold v. State of Connecticut*, the liberty of married couples to buy and use contraceptives without government restrictions was found in the Ninth Amendment. Justice Goldberg explained:

> The fact that no particular provision of the Constitution explicitly forbids the State from

> disrupting the traditional relation of the family—relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

Id. at 495-96.

In his concurrence, Justice Goldberg recognized that the Court "has had little occasion to interpret the Ninth Amendment." *Id.* at 490. Yet, he explained, "since 1791 it has been a basic part of the Constitution which we are sworn to uphold." *Id.* at 491. Justice Goldberg added that "[t]he language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Id.* at 488.

Noting the relationship between the Ninth Amendment and other constitutional provisions, Justice Goldberg further explained:

> While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not

> all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

Id. at 493 (*citing United Public Workers v. Mitchell*, 330 U.S. 75, 94-95 (1947)).

As this Court is aware, the seldom-litigated Ninth Amendment has largely been relegated to the status of a "saving clause" or rule of construction. *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 579, n.15 (1980) ("Madison's comments in Congress also reveal the perceived need for some sort of constitutional "saving clause," which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined. Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.") (internal citations omitted). *See also Charles v. Brown*, 495 F. Supp. 862, 863-64 (N.D.Ala.1980) (The Ninth Amendment "was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because

they were not specifically enumerated in the Constitution.").

The case below presents one of the most important personal interests one could contemplate in our American system—Petitioner's right to have her vote accurately counted. *See Stewart v. Blackwell*, 444 F.3d 843, 855 (6th Cir. 2006) (The Sixth Circuit found standing for plaintiffs challenge to election machines because "the increased probability that [plaintiffs'] votes will be improperly counted based on punch-card and central-count optical scan technology is neither speculative nor remote"), *vacated by* 473 F.3d 692 (6th Cir. 2007) (subsequently vacating appeal as moot after state's abandonment of election machines).

Like many courts across the country, the Fifth Circuit characterized Petitioner's complaint challenging the use of vulnerable electronic voting machines as merely a generalized grievance. These courts failed to recognize that the "right to vote" is a step removed from the "right to have one's own vote counted"—a particularized harm like the one recognized by this Court two decades ago. *See Bush v. Gore*, 531 U.S. 98, 105 (2000) ("The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."). *See also Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qual-

ified voters have a constitutionally protected right to vote, and to have their votes counted." (emphasis added) (citations omitted); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("Every voter's vote is entitled to be counted once. It must be correctly counted and reported.") (emphasis added); *United States v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections.") (emphasis added).

When the Supreme Court's extensive standing jurisprudence is appropriately reconciled and read in context, the generalized grievance doctrine becomes inapplicable to Petitioner's claims. Indeed, the misapplication of this doctrine by Federal courts to election complaints such as Petitioner's warrants this Court's intervention.

It is taken as an axiom that when the political branches of government act contrary to the will of the constituents, the people only have recourse through the ballot box. When the ballot box itself becomes the source of injury and the political branches fail to resolve the conflict, the judicial branch must step in to address those grievances as guaranteed by the First Amendment—especially when the other branches have shown such scorn for the First Amendment when it comes to election matters. *See e.g.*, *Missouri v. Biden*, 83 F.4th 350, 365 (5th Cir. 2023) ("CISA's role went beyond mere information sharing. Like the CDC for COVID-related claims, CISA told the platforms whether certain election-related claims were true or false. CISA's actions apparently led to moderation

policies being altered and content being removed or demoted by the recipient platforms.").

Federal courts often allow standing for special interest groups in election matters but registered voters are afforded no such courtesy. *See, e.g.*, *Vote.Org v. Callanen*, No. 22-50536, 2023 WL 8664636, (5th Cir. Dec. 15, 2023) (granting Vote.org, a non-voter, organizational standing to lodge a Voting Rights Act materiality provision challenge to Texas election law because the law allegedly frustrated use of Vote.org's smartphone app); *Curling v. Raffensperger*, 50 F.4th 1114, 1121 (11th Cir. 2022) (holding that the Coalition for Good Governance, a purported voter advocacy organization, had standing to challenge election machines under a diversion theory because the state's use of Dominion ImageCast X ballot-marking devices constituted "a policy [that would] force the [Coalition] to divert personnel and time to educating volunteers and voters and to resolving problems that the policy presents on election day); *Public Interest Legal Foundation v. Benson*, 1:2021-cv-00929-JMB (ECF 35) (W.D. Mich. Aug. 25, 2022) (granting organizational standing to litigate alleged violations of the National Voter Registration Act by the state of Michigan because the plaintiff organization alleged that the state's conduct impaired its purported "essential and core mission of fostering compliance with federal election laws and promoting election integrity" as well as the allegation that it "has suffered and continues to suffer pecuniary injury because PILF diverted resources that could have been expended in other states to address Michigan's alleged voter roll deficiencies"); *Judicial Watch, Inc. v. Griswold*, 554 F.Supp.3d 1091, 1104-1105 (D. Colo. Aug. 16, 2021)

(granting Judicial Watch associational standing to litigate alleged violations of the National Voter Registration Act by Colorado without needing to establish specific injuries by actual people reasoning that its members would benefit from resolution of the claims because the organization's purported mission includes the abstract principle of ensuring "fidelity to the rule of law"); *Democratic Party of Ga., Inc. v. Raffensperger*, 1:19-cv-05028-WMR (ECF 56) (N.D. Ga. Mar. 6, 2020) (approving a settlement agreement that changed Georgia's absentee voting procedures because the Democratic Party alleged that the state's laws and procedures generally violated voters' constitutional rights).

In other words, powerful corporations and entities with massive political influence can magically manifest injuries-in-fact so that federal courts can enact plaintiffs preferred voting policies, using "voter rights" pretexts that "seem[] to have been contrived," *Dept. of Commerce v. New York*, 139 S.Ct. 2551, 2575 (2019), while actual voters are left outside the courthouse steps wondering why they cannot enforce their actual voting rights.

Petitioner here has alleged specific facts establishing her claim that Louisiana's Dominion ImageCast X ballot-marking devices, which have been used for early voting in state elections since the fall of 2019, are not properly certified. More specifically, Petitioner alleged that the third-party laboratory used to certify the voting system, Pro V&V, was improperly accredited in violation of 52 U.S.C. § 20971(b). *Jerusalem*, 2023 WL 4537724, 3:22-cv-516, (Doc 1) (Pg 9-11) (M.D. LA.).

Petitioner also cited the most recent EAC certificate of accreditation for Louisiana's lease of the Dominion ImageCast X machines, noting that the

certificate specifies that Pro V&V's accreditation expired February 24, 2017. In addition, Petitioner referred to a memorandum by the EAC blaming "the outstanding circumstances posed by COVID-19" for the agency's failure to properly administer the certification program required by law, but Petitioner alleged that the EAC's actions are "erroneous reasoning at best [and] fraud at worst." In support, Petitioner argued that if Pro V&V met all requirements for continued accreditation as the EAC memo states, it would have submitted its renewal application by January 2017—long before COVID-19. *Jerusalem*, 2023 WL 4537724, 3:22-cv-516 (Doc 1) (Pg 10) (M.D. LA.).

Furthermore, Petitioner alleged that the EAC lacked a quorum for over a year before 2020, and because a quorum of the Commission is required to vote including any votes to renew accreditation of VSTLs, the lack of quorum shows EAC failed to accredit Pro V&V according to law. *Jerusalem*, 2023 WL 4537724, 3:22-cv-516, (Doc 1) (Pg 11) (M.D. LA.). Additionally, Petitioner notes the updated certificate of accreditation for Pro V&V issued February 1, 2021, was invalid because it did not contain an expiration date within two years of issuance and was not signed by the chair of the EAC when issued as required by its own manual. *Jerusalem*, 2023 WL 4537724, 3:22-cv-516, (Doc 1) (Pg 10) (M.D. LA.).

In support of her claims, Petitioner also references cybersecurity expert, Dr. Alex Halderman, who testified before the Louisiana Voting Commission in December 2021 that the Louisiana machines are vulnerable to hacking and could be "programmed to misprint voters' ballots, alter votes by printing different choices than the voters elected, and/or alter barcodes." *Jerusalem*,

2023 WL 4537724, 3:22-cv-516, (Doc 1) (Pg 13) (M.D. LA.). In the Halderman Report, Dr. Halderman offers a detailed expert report on the Dominion ImageCast X ballot-marking devices on behalf of the plaintiffs in the case *Curling v. Raffensperger*, Civil Action No. 1:17-CV-2989-AT. The Halderman Report, originally sealed due to its sensitive nature, explains why these machines and others with similar vulnerabilities must be replaced. *See* App.70a-78a.

Petitioner alleges Louisiana elections are "riddled with inconsistencies, lack of forthcoming information from parish and state officials, discrepancies between parish and state versions, uncertified software versions, unaccredited (VSTL)s, as well as Louisiana and HAVA 2002 violations." *Jerusalem*, 2023 WL 4537724, 3:22-cv-516, (Doc 1) (Pg 11) (M.D. LA.)**.** Accordingly, Petitioner asserted "a plain, direct and adequate interest in maintaining the effectiveness of [her] vote[]" sufficient for standing, *Coleman v. Miller*, 307 U.S. 433, 438 (1939), not merely "the right, possessed by every citizen, to require that the Government be administered according to law." *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922).

As in this case, lower courts in election cases often create the impression it is well-settled voters lack standing to challenge the constitutionality of voting procedures and voting machines. Because of potential ambiguities in this Court's standing precedents, courts across the country are bringing about political results by hearing political action groups while silencing voters under the generalized grievance doctrine. *See e.g.*, Transcript of Oral Argument, *TransUnion, LLC v. Ramirez* (20-297), ___ (Alito, J.) ("You know, *Spokeo*'s discussion of harm is quite

clipped and it's potentially subject to different interpretations."). Petitioner seeks to vindicate her individual rights and the fact that the outcome of this matter could incidentally affect the rights of many others does not *ipse dixit* render her complaint a mere "generalized grievance" unworthy of judicial review.

Courts routinely confuse subject matter jurisdiction with merits determinations, improperly conflating them at the motion to dismiss stage. *See generally*, Steven J. Mulroy, *Baby & Bathwater: Standing in Election Cases After 2020*, 126 DICK. L. REV. 9 (2021). Here the lower court held that the alleged future harm was too speculative to constitute threatened injury. To be sure, "pleadings must be something more than an ingenious academic exercise in the conceivable." *United States v. SCRAP*, 412 U.S. 669, 688 (1973). Nevertheless, just because a legal theory follows an "attenuated line of causation" does not render the resulting injury any less concrete. When faced with novel Constitutional issues, the merits of the matter must be further examined with discovery taking place rather than being dismissed outright. *Gill*, 138 S.Ct. at 1922.

Petitioner merely wants the same opportunity to present her case as is afforded to well-funded special interest groups who do not vote. There should not be an artificial additional barrier preventing resolution of Petitioner's injuries in fact caused by governmental officials who use vulnerable voting machines. Given divergent high court opinions addressing issues similar to the one here, namely whether an individual voter such as Petitioner has standing to pursue claims based on how uncertified and vulnerable electronic

voting machines might impact her own vote, this unsettled Constitutional question of law should respectfully be settled by the Court.

CONCLUSION

Article III requires courts exercise jurisdiction in all cases and controversies. The resilience and integrity of our court system hinges on resolving every difficult case put before it—including election cases. When applying the "generalized grievance" doctrine in this case, the Fifth Circuit unintentionally devalued important individual rights belonging to Petitioner. For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be granted and the decision of the U.S. Fifth Circuit Court of Appeals summarily reversed.

Respectfully submitted,

Warner Mendenhall
Counsel of Record
THE LAW OFFICES OF
WARNER MENDENHALL
190 North Union Street, Suite 201
Akron, OH 44304
(330) 535-9160
warner@warnermendenhall.com

Counsel for Petitioner,
Melanie Jerusalem

March 8, 2024