IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

BETTY JANE AYERS, DAVID RUSSELL AYERS, and SARAH WALKER BRUUN, as residents of and registered voters in Anderson and Bradley Counties, Tennessee, *Pro Se*, Plaintiffs, v. TRE HARGETT, Secretary of State for the State of Tennessee, MARK STEPHENS, Administrator, Anderson County Election Commission, JONATHAN SKRMETTI, Attorney General and Reporter for the State of Tennessee, JANET M. KLEINFELTER, Deputy Attorney General for the State of Tennessee, DAVID KUSTOFF, Congressman, JIM COOPER, Congressman, STEVE COHEN, Congressman, MARSHA BLACKBURN, Senator, and BILL HAGERTY, Senator, Defendants.	)	Civ.No.: 3:22-CV-370-TAV-JEM

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY UNITED STATES CONGRESSMEN DAVID KUSTOFF, JIM COOPER, AND STEVE COHEN AND UNITED STATES SENATORS MARSHA BLACKBURN AND BILL HAGERTY

Come now, United States Congressmen David Kustoff, Jim Cooper, and Steve Cohen and United States Senators Marsha Blackburn and Bill Hagerty ("Federal Officers"), by and through Francis M. Hamilton III, United States Attorney for the Eastern District of Tennessee, and pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, hereby submit the following Memorandum in Support of their Motion to Dismiss.[1]

[1] To the extent this Court issues its standard Order Governing Motions to Dismiss, this Motion asserts, primarily, a lack of subject matter jurisdiction. As a result, Plaintiffs cannot cure the lack of subject matter jurisdiction through an amended pleading and the meet and confer requirement is not applicable.

I. INTRODUCTION

On September 21, 2022, Plaintiffs filed suit in Anderson County Circuit Court against Tennessee Secretary of State Tre Hargett, Administrator of the Anderson County Election Commission Mark Stephens, Attorney General and Reporter for the State of Tennessee Jonathan Skirmetti and Deputy Attorney General and Reporter for the State of Tennessee Janet M. Kleinfelter (collectively referred to as the "State Officers").[2] (*See* Doc. 1, Ex. 1, Compl., PageID# 11-14.) In addition, Plaintiffs named Congressmen David Kustoff, Jim Cooper, and Steve Cohen and Senators Marsha Blackburn and Bill Hagerty, all in their official capacities. (*Id.*) Plaintiffs allege the State Officers failed to discontinue the use of electronic voting machines and have violated their Constitutional rights by allowing such use to continue, not only in the 2020 election, but also in the next election. (*Id.*) Plaintiffs further claim that, despite being aware of this alleged security risk, the State Officers failed to enact procedural safeguards as required by the U.S. Constitution. (*Id*., PageID# 31, ¶¶ 22-23.) They have also sued the State Attorney General and Deputy Attorney General for failing to investigate these claims, and in doing so, violating their oaths of office. (*Id*., PageID# 15-17.) As to the Federal Officers, Plaintiffs claim that despite being provided with information related to the electronic voting machines by "then-President Trump's attorney before the January 6, 2021 vote," they still voted to certify the 2020 election, which they allege amounts to an act of treason. (*Id*., PageID# 18-19,

[2] It is worth noting that this is not Plaintiffs' first lawsuit related to electronic voting systems. On March 1, 2021, Plaintiff Betty Jane Ayers filed a suit in the U.S. District Court for the District of Columbia against numerous federal government officials, including every Member of Congress, making the same demand for the cessation of the use of electronic voting machines and asking that those who failed to support sending the 2020 election vote back to the states for re-certification be arrested. *See Ayers v. Wilkinson*, No. 1: 21-0551-ABJ, Order (D.D.C. May 10, 2021). This case was dismissed for lack of Article III standing on May 10, 2021.

On August 25, 2022, Plaintiffs filed a case against Tre Hargett and Mark Stephens in this Court. *See Bruun, et al., v. Hargett*, No. 3:22-cv-00292-TAV-JEM. Following defendants' motions to dismiss for lack of subject matter jurisdiction, Plaintiffs voluntarily dismissed their case and filed the present case, adding additional state and federal officers, in the Circuit Court of Anderson County.

¶ 3.) They further allege that the Federal Officers "knowingly failed to protect [their] votes(s) from being subverted" and "passed no legislation to protect [them] from these known threats" in violation of their oaths of office. (*Id.*, PageID# 32-33, ¶¶ 25-27.) Finally, Plaintiffs allege a violation of the Elections Clause of the U.S. Constitution and also seek to enforce provisions of the Help America Vote Act, 52 U.S.C. § 20901, and the Federal Election Records statute, 52 U.S.C. § 20701. (*Id.*, PageID# 13-15, 17, 20, 24-25, 30-31, 34, 36-37.)

Based on these claims, Plaintiffs ask this Court to award extraordinary relief in the form of an injunction to forestall the use of electronic voting equipment in Tennessee and to require all future elections be conducted by paper ballot. Plaintiffs also request a "full forensic audit and investigation of Tennessee's November 2020 election results, data, and electronic machines." (*Id.*, PageID# 35, Demand for Judgment, ¶ B.) Finally, Plaintiffs demand that the Federal Officers "immediately resign and face prosecution" or come to a hearing in this Court to refute this evidence. (*Id.*, PageID# 18-19, ¶ 3.)

II. STANDARD OF REVIEW

A. Fed. R. Civ. P. 12(b)(1).

This Court set out an explanation of the dismissal standard under Rule 12(b)(1) of the Federal Rules of Civil Procedure in *Linboe v. City-County Federal Credit Union*, No. 3:06-cv-257, 2006 WL 2708323, at *2 (E.D. Tenn. Sept. 19, 2006):

> Fed. R. Civ. P. 12(b)(1) provides that a party may move to dismiss an action by motion based on lack of jurisdiction over the subject matter. In analyzing a motion under Fed. R. Civ. P. 12(b)(1), a court must make a distinction between Rule 12(b)(1) motions which attack the complaint on its face and those which attack the existence of subject matter jurisdiction in fact. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). As to "facial" attacks, the challenge is that the plaintiff has not faithfully recited all the jurisdictional predicates necessary for a court to exercise subject matter jurisdiction. *Id*. As to "factual" attacks, the challenge is the actual existence of a court's jurisdiction over the matter…. *Id*.

> A court is obligated to dismiss an action in the absence of subject matter jurisdiction, either on its own motion or by suggestion of a party. 2 Moore's Federal Practice § 12.30 (Matthew Bender 3rd Ed.) (citing *Avitts v. AMOCO Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995)).

When a "factual attack" is undertaken, this Court has further noted:

> When the motion to dismiss is based on a "factual attack," no presumptive truthfulness applies to the complaint's factual allegations and the Court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." [*RMI Titanium Co.,* 78 F.3d at 1134.] If the facts are in dispute, the Court can exercise wide discretion to consider affidavits, documents outside the complaint, and even conduct a limited evidentiary hearing. *Id*. Consideration of matters outside the pleadings, however, does not convert the Rule 12(b)(1) motion into a Rule 56 motion, as it would under a Rule 12(b)(6) motion. *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915-16 (6th Cir. 1986).

Graybeal v. Chesterfield Finance Company, No. 3:04-cv-274, 2006 WL 1288580, at *4 (E.D. Tenn. May 5, 2006).

B. Fed. R. Civ. P. 12(b)(6).

To survive a Rule 12(b)(6) motion, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id*. A plaintiff must plead facts sufficient to "state a claim to relief that is plausible on its face." *Id*. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. LAW AND ARGUMENT

A. Plaintiffs Failed to Properly Serve Federal Officers.

As an initial matter, the Federal Officers have not been properly served with the Complaint. Ordinarily, state court rules of procedure apply to a lawsuit and govern the sufficiency of service of process before the case is removed to federal court. See *Wilkey v. Golden Feathers*, No. 1:06-cv-72, 2006 WL 2478317, at *10 (E.D. Tenn. Aug. 25, 2006) (noting that it is "well-settled that state law governs the sufficiency and service of process before removal") (quoting *Eccles v. National Semiconductor Corp.*, 10 F. Supp. 2d 514, 519 (D. Md. 1998)). However, once a case is removed to federal court, from that point forward, federal law applies. Fed. R. Civ. P. 81(c); *see also id.*

In this case, Plaintiffs elected to attempt service on the Federal Officers by using Federal Express and/or United States Postal Service priority mail. Under the Tennessee Rules of Civil Procedure, service of process by mail is not accomplished by simply mailing the defendant a copy of the complaint. *Toler v. City of Cookeville,* 952 S.W.2d 831 (Tenn. Ct. App. 1997). "To serve a defendant by mail, the plaintiff, the plaintiff's attorney or other authorized person for service by mail, must send to the defendant, postage prepaid, a certified copy of the summons and a copy of the complaint by *registered return receipt or certified return receipt mail*." *Stitts v. McGown*, No. E2005-02496-COA-R3CV, 2006 WL 1152649, at *2 (Tenn. Ct. App. May 2, 2006) (emphasis added). Further, "[t]o be effective, service by mail requires filing with the court clerk the following three items: a) the original summons, endorsed as set forth in the rule; b) an affidavit of the person making service, setting forth the person's compliance with the requirement of Rule 4.03; and c) the return receipt." *Id.* (citing Tenn. R. Civ. P. 4.03, 4.04). Prior to removal, Plaintiffs had not served the Federal Officers in accordance with Tennessee law as Plaintiffs did

not utilize a method of mailing that included registered return receipt or certified return receipt mail. *See* Tenn. R. Civ. P. 4.04(10). Consequently, Plaintiffs have not complied with Tenn. R. Civ. P. 4.03(2)'s requirements.

Now that this case has been removed to Federal court, because Plaintiffs did not achieve proper service under Tennessee law prior to removal, Plaintiffs are required to serve the Federal Officers in the manner required under Fed. R. Civ. 4(i), which controls service upon the United States and its officers. *Wilkey*, 2006 WL 2478317, at *10. Having not been served, the Federal Officers are not obligated to respond to the Complaint. However, in the interest of advancing this action, the Federal Officers have filed their Motion to Dismiss. To the extent that Plaintiffs' time for service ends without effectuating proper service while the Motion to Dismiss is pending, the Court should dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(5).

B. This Court Lacks Subject Matter Jurisdiction.

i. Plaintiffs lack Article III standing to bring this suit.

Federal Courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Thus, in order to identify matters that are appropriately resolved through the judicial process, a plaintiff must have Article III standing to bring their case. *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560 (1991). Only those with "actual cases or controversaries" have standing to maintain suit in federal court. *Id.* The case-or-controversary requirement of Article III is the threshold question in every federal case. The Supreme Court has established that the "irreducible constitutional minimum of standing consists of three elements." *Id.* In order to maintain suit in federal court, plaintiffs must demonstrate: 1) that they have suffered an injury-in-fact, which is concrete and particularized and actual and imminent; 2) that

there is a causal connection between the injury and the conduct complained of; and 3) that the injury is likely to be redressed by a favorable decision. *Id.* at 560-561.

It is substantially more difficult to establish standing when, as is the case here, the plaintiff is not directly the subject of the government action or inaction. *Allen v. Wright*, 468 U.S. 737, 757 (1984). In the instant case, Plaintiffs are unable to prove any of the three elements of Article III standing and, therefore, this Court should dismiss the Complaint for lack of subject matter jurisdiction.

a. Plaintiffs have not suffered an injury-in-fact.

The first element of standing is the requirement that the plaintiff must have suffered an injury-in-fact. *Lujan*, 504 U.S. at 560. To establish an injury-in-fact, a plaintiff must show that he suffered "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (quoting *Lujan*, 504 U. S. at 560) (internal quotation marks omitted). This injury must affect the plaintiff in a "personal and individual way." *Lujan*, 504 U.S. at 560, n. 1. "A generalized grievance, no matter how sincere, is insufficient to confer standing." *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013). A "generalized grievance," one that is "plainly undifferentiated and common to all members of the public," is simply too abstract of an injury to satisfy the first element of standing. *Lance v. Coffman*, 549 U.S. 437, 441 (2007) (per curiam). A plaintiff must assert his or her own legal rights and interests, not those of third parties. *Id.* at 708 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

Applicable to this case, the requirement of an injury-in-fact has been specifically applied in the election context. In *Lance v. Coffman*, a group of voters from Colorado filed suit against the Colorado Secretary of State alleging that the Colorado Constitution, which only allowed for a

redistricting plan once per census, violated their rights under the U.S. Constitution. *Id.* at 437–38. The Supreme Court held that the only injury the plaintiffs alleged was that the law was not followed. *Id.* at 441. This, the Court noted, was "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Id.* at 441–42. Because the plaintiffs had no particularized stake in the litigation, the Court held that they lacked standing to bring their claim. *Id.* at 442; *see also, Ex Parte Levitt*, 302 U.S. 633 (1937) (per curiam) (finding that the plaintiff's challenge to Justice Black's appointment to the Supreme Court was merely a "general common interest" insufficient to confer standing); *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (finding that the plaintiff lacked standing to challenge procedures by which the Nineteenth Amendment was ratified and thus lacked Article III standing).

Plaintiffs bring their Complaint as "individual members of the public" and claim to have standing as "citizens and taxpayers under common law." (Compl., PageID# 12.) Their Complaint alleges that the electronic voting machines used in the Tennessee 2020 election have the ability to be easily accessed via the internet and the potential for their votes to be switched. However, Plaintiffs allege no evidence that their votes were actually switched, but simply that their vote "has the means to be disenfranchised and will continue to be in danger of such if continued use of the electronic machines is allowed." (*Id.*, Demand for Judgment, ¶ B PageID# 35.) These overarching, broad allegations about the administration of the Tennessee election process are precisely the type of "undifferentiated, generalized grievance[s] about the conduct of government" that courts have refused to permit. *Lance*, 549 U.S. at 442. Not only is this clearly an injury common to all citizens of the State of Tennessee, but Plaintiffs have consistently styled themselves as representative of the people, further supporting the conclusion that this alleged

"injury" is nothing more than an undifferentiated, general grievance. It is clear from the allegations in their Complaint that Plaintiffs themselves have not suffered a harm in any personal way and, as a result, lack standing.

Additionally, despite their proclamation, Plaintiffs do not in fact have taxpayer standing to bring their suit. Generally, the payment of taxes is not enough to establish standing to challenge an action taken by the federal government. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007). In *Hein*, the Supreme Court recognized a narrow exception to this general prohibition for those plaintiffs asserting a violation of the Establishment Clause. *Id.* Nowhere in Plaintiffs' Complaint do they allege a violation of the Establishment Clause. Thus, Plaintiffs have not established that their status as taxpayers creates a basis for standing.

b. There is no causal connection between Plaintiffs' alleged injury and the conduct complained of.

Even if the Plaintiffs had alleged a particularized injury, which Federal Officers submit they have not, the alleged injury must be "fairly traceable" to the conduct of the Federal Officers and not as a result of the independent actions of some third party. *Lujan*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976). At the pleading stage, traceability is a "relatively modest burden" for the plaintiff to carry. *Bucholz v. Tanick*, 946 F.3d 855, 866 (6th Cir. 2020) (quoting *Bennett v, Spear*, 520 U.S. 154, 171 (1997)). Therefore, harm that flows even indirectly from the defendant's conduct is fairly traceable for the purposes of standing. *Id.* However, courts have consistently declined to find causation where, as here, the plaintiff "failed to identify any role whatsoever" of the defendants "in promulgating or enforcing" the challenged rule. *Nat'l Ass'n for Advancement of Multijurisdiction Prac. v. Howell*, 851 F.3d 12, 17 (D.C. Cir. 2017); *see also e.g., Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) (dismissing several state officials on standing grounds

for lacking a connection to the enforcement of the challenged law); *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (*en banc*) ("The requirements of *Lujan* are entirely consistent with the long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute."); *Muskrat v. United States*, 219 U.S. 346 (1911) (holding that the United States as defendant had no interest adverse to the claimants).

In the instant case, Plaintiffs' allegation that the voting machines in Tennessee have the potential to be compromised and their votes switched is in no way traceable to the Federal Officers. Regulation and certification of voting systems in the State of Tennessee is entirely at the discretion of the state itself. Specifically, in Tennessee the state election commission is responsible for appointing election commissioners for every county in the state who are tasked with the responsibility of approving and certifying voting equipment. *See* Tenn. Code Ann. §§ 2-11-101, 2-12-101-116. The Federal Officers have no responsibility for selecting, monitoring, certifying, or anything else related to Tennessee's voting systems. Thus, there is no causal connection fairly traceable to the Federal Officers. While Plaintiffs' general grievance does not constitute a justiciable injury-in-fact, any such alleged injury was not caused by the Federal Officers as they have no role in the enforcement of any regulation related to state electronic voting systems, nor is it redressable through them, as explained in detail below.

c. The alleged injury is not redressable.

Causation and redressability are closely linked because a federal court can only redress an injury that is fairly traceable to the defendant's conduct, and not that of some unconnected third party. *Lujan*, 504 U.S. 562. Because the Federal Officers have no role in the selection or certification of electronic voting systems in the State of Tennessee, no order against them will redress the purported "injury," nor will it preclude the use of electronic voting systems in future

Tennessee elections. Not only would an order fail to correct Plaintiffs' alleged wrongs, but courts lack the power or authority to order a member of Congress, as Plaintiffs' demand, to resign. *Mississippi v. Johnson*, 71 U.S. 475, 500 (1867) ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department . . .."). Furthermore, the general rule is that legislative action cannot be interfered with by injunction by the judiciary. *McChord v. Louisville & N.R. Co*, 183 U.S. 483, 495, 97 (1902) ("It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."). Thus, this Court is also without authority to order members of Congress take any specific vote on proposed electronic voting machines, leaving Plaintiffs without redressability against the Federal Officers. It is clear Plaintiffs have failed to satisfy all of the required elements of standing and, therefore, this Court should dismiss Plaintiffs' Complaint against the Federal Officers.

ii. The Federal Officers are immune from suit.

In addition to Plaintiffs' lack of standing, the Federal Officers, sued in their official capacities, are also immune from suit pursuant to sovereign immunity. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit [against government officials] is, in all respects other than name, to be treated as a suit against the [government] entity."]); *Keener v. Congress*, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam) (affirming dismissal of action seeking to order Congress to adopt a uniform method of valuation for United States currency because Congress "is protected from suit by sovereign immunity"); *Danihel v. Office of the President of the United States*, 616 F. App'x 467, 470, n.2 (3d Cir. 2015) (noting at the outset that constitutional claims against members of Congress in their official capacity were barred by

sovereign immunity); *Voinche v. Fine*, 278 F. App'x 373 (5th Cir. 2008) (finding sovereign immunity barred suit against members of Congress for failure to take official action in response to plaintiff's claims); *Rockfeller v. Bingaman*, 234 F. App'x 852, 855–56 (10th Cir. 2007) (dismissing suit against a Senator and Representative in their official capacity on sovereign immunity grounds).

Plaintiffs have filed suit against the Federal Officers in their official capacities. Despite any of Plaintiffs' claims to the contrary, their allegations against the Federal Officers relate to conduct taken in their official capacities as members of Congress. Even assuming *arguendo* that Plaintiffs otherwise had standing to bring suit against the Federal Officers, they have failed to identify an applicable waiver of sovereign immunity which would permit such a suit against the Federal Officers based on their roles as members of Congress.

In addition to the general grant of sovereign immunity available to the Federal Officers, federal legislators are shielded with absolute immunity regarding all matters arising out of the discharge of their legislative duties under the Speech or Debate Clause of the United States Constitution. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 510 (1975) (noting that members of Congress "are immune from liability for their actions within the 'legislative sphere.'"); *Doe v. McMillan*, 412 U.S. 306, 311–13 (1973). The purpose of affording such immunity to members of Congress is to ensure a "co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats" and to "protect[] members against prosecutions that directly impinge or threaten the legislative process." *Id.* at 311. The Speech or Debate Clause has been read to "broadly effectuate its purposes" and protects anything done in a "session of the House by one of its members in relation to the business before it." *Id.* (quoting *United States v. Johnson*, 383 U.S. 169, 180 (1966) and *Gravel*

v. United States, 408 U.S. 606, 624 (1972)). Accordingly, "voting by members" is protected and afforded absolute immunity and may not be the basis for civil action against a member as such conduct is "within the sphere of legitimate legislative activity" *Id.* at 311-312 (quoting *Gravel*, 408 U.S. at 624) (internal quotation marks omitted).

In this case, Plaintiffs allege the Federal Officers failed to "vote to send the vote back to the States to be re-certified on January 6, 2021" and "allowed a man they knew We the People had not elected to be sworn in as President." (Compl., PageID# 12.) This alleged conduct falls squarely within the official duties of a member of Congress. Plaintiffs also allege that the Federal Officers failed to protect "the purity of [their] ballot box" and failed to "take steps as per their oaths and powers under the law to protect us from known threats against the purity of [their] ballot box." (*Id.*, PageID# 14.) Voting to pass legislation related to the use of electronic voting systems, in addition to voting to send the electoral vote back to the states for recertification, are precisely the types of legislative activity protected from suit under the Speech or Debate Clause and the Federal Officers are therefore immune from Plaintiffs' suit.

C. Plaintiffs' Complaint Fails to State a Claim Upon Which Relief May Be Granted.

Despite independent grounds for dismissal for lack of subject matter jurisdiction, this Court should also dismiss Plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. Plaintiffs have failed to identify any cognizable cause of action against the Federal Officers for failing to take legislative action, failing to vote against the certification of electronic voting systems, failing to vote against certification of electoral votes, or violating their oaths of office. Courts have consistently held that there is no private right of action for a plaintiff to enforce an alleged violation of the oath of office by an office holder. *See e.g., Marshall v. Richardson Props.*, No. 3:09-CV-379-H, 2010 U.S. Dist.

LEXIS 20423, at *9 (W.D. Ky. Mar. 8, 2010) (refusing to find a violation of oath of office); *Scheiner v. Bloomberg*, No. 1:08-cv-9072-SHS, 2009 U.S. Dist. LEXIS 21176, at *9 (S.D. N.Y. Mar. 17, 2009) ("Courts have held that there is no private cause of action for an official's alleged violation of an oath of office."); *Mechler v. Hodges*, No. 1:02-cv-948, 2005 U.S. Dist. LEXIS 45448, at *20-21 (S.D. Ohio June 15, 2005) (same); *Conner v. Tate*, 130 F. Supp. 2d 1370, 1380 (N.D. Ga. 2001) (same). With no available cause of action for such allegations, Plaintiffs' Complaint fails to state a claim upon which relief can be granted and should therefore be dismissed.

Finally, Plaintiffs' Complaint alleges violations of the Elections Clause of the U.S. Constitution, Art. I § 4, the Help America Vote Act ("HAVA") 52 U.S.C. § 20901, and the Federal Elections Records statute 52 U.S.C. § 20701. (Compl., PageID# 13-15, 17, 20, 24-25, 30-31, 34, 36-37.) However, none of these confer a private right of action and, therefore, these claims should also be dismissed for failure to state a claim. Private citizens acting on their own behalf cannot derive a cause of action from the Elections Clause. *Lance*, 549 U.S. at 44. Specifically, the Elections Clause "outlines a structural principle of the American system of federalism, dividing power concurrently between the states and Congress. The Clause does not speak to individual rights." *Tex. Voters Alliance v. Dallas Cty.*, 495 F. Supp. 3d 441, 462 (E.D. Tex. 2020) (internal citation omitted). Similarly, while HAVA was enacted to create a system for provisional voting thereby ensuring that a qualified citizen's casted vote was counted, the Sixth Circuit has specifically held that HAVA itself does not confer a private right of action. *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569-572 (6th Cir. 2004). Finally, the Federal Elections statute also does not confer a private right of action, and instead vests the

enforcement mechanism solely with the Attorney General of the United States. *Fox v. Lee*, No. 4:18-cv-529-MW/CAS, 2019 U.S. Dist. LEXIS 241528, at *5 (N.D. Fla. Apr. 2, 2019).

Accordingly, Plaintiffs' claims for violations of the Elections Clause, HAVA, and the Federal Elections Records statute should be dismissed for failure to state a claim upon which relief may be granted.

IV. CONCLUSION

For the foregoing reasons, Federal Officers David Kustoff, Jim Cooper, Steve Cohen, Marsha Blackburn, and Bill Hagerty respectfully request that the Court grant this motion and dismiss all of Plaintiffs' claims against them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2022, a true and correct copy of the foregoing was electronically filed. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served via regular U.S. mail and/or email. Parties may access this filing through the Court's electronic filing system.

s/ Nicole L. Antolic
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