UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

BETTY JANE AYERS, DAVID RUSSELL AYERS, and SARAH WALKER BRUUN, as residents and registered voters in Anderson and Bradley Counties, Tennessee, Pro se,	)	
Plaintiffs	)	No. 3:22-cv-370
TRE HARGETT, Secretary of State of the State of Tennessee, MARK STEPHENS, Administrator, Anderson County Election Commission, JONATHAN SKRMETTI[1], 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.	)	

MEMORANDUM OF LAW IN SUPPORT OF STATE DEFENDANT'S MOTION TO DISMISS

Defendants Tre Hargett, in his official capacity as Secretary of State for the State of Tennessee, Jonathan Skrmetti, in his official capacity as Attorney General and Reporter for the

[1] Jonathan Skrmetti was appointed Attorney General and Reporter for the State of Tennessee and his term began on September 1, 2022. Pursuant to Tenn. R. App. P. 19(c), "[w]hen an officer of the state ... or other governmental agency is a party to an appeal or other proceeding ... in the officer's official capacity and ... ceases to hold office, ... the officer's successor is automatically substituted as a party."

State of Tennessee, and Janet M. Kleinfelter, in her official capacity as Deputy Attorney General for the State of Tennessee, (the "State Defendants") hereby submit this Memorandum of Law in support of their motion to dismiss Plaintiffs' Complaint in its entirety and with prejudice for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

INTRODUCTION AND BACKGROUND

In the November 3, 2020, federal election, President Trump received over 61% of the vote in Tennessee statewide. *See* Nov 2020 General Totals.pdf (tnsosfiles.com). Consequently, pursuant to Tenn. Code Ann. § 2-15-104(c)(1), all of Tennessee's ballots in the electoral college were cast for President Trump. Despite these facts, Plaintiffs have filed suit alleging that "the methods by which elections at the local, state, and Federal levels in Tennessee were conducted in 2020 and are being conducted in 2022 cannot be shown to provide the fair elections guaranteed to every citizen under the U.S. and Tennessee Constitutions" in violation of the 14th Amendment and Art. I, § 4, cl 1 of the federal constitution and art. I, § 5 and art. IV, § 1, of the state constitution. (DE 1-1, Compl. at PageID# 17, ¶ 1.) Specifically, Plaintiffs allege that "Tennessee's voting systems possess the capability to be accessed by the internet" and that during the November 2020 elections, it is "highly likely that some were either connected to the Internet or transmitted data that manipulated votes, denying some in Tennessee our right of suffrage." (*Id*. at ¶¶ 3, 16.)

Plaintiffs have sued the Tennessee Secretary of State and the Administrator of Elections for Anderson County for their failure to "rid[] the state of these compromised voting machines, or 'impure ballot boxes,'" thereby violating their oath to uphold the Tennessee Constitution. (*Id*. at PageID# 12-14.) Plaintiffs have also sued the Attorney General and Deputy Attorney General for failing to represent Plaintiffs in this matter and for failing to investigate Plaintiffs' "evidence"

concerning the "compromised voting machines" in violation of their oath to uphold the Tennessee Constitution. (*Id*. at PageID# 15-16.) Plaintiffs have further sued U.S. Senators Blackburn and Hagerty and U.S. Congressmen Cooper, Cohen and Kustoff "for their failure to vote to send the vote back to the States to be re-certified on January 6, 2021, . . . which was an act of treason in light of the content of the evidence they were given, as they allowed a man they knew We the People had not elected to be sworn in as President." (*Id*. at PageID# 12.) Finally, Plaintiffs appear to seek to enforce provisions of the Help America Vote Act, 52 U.S.C. §§ 20901, *et seq*. ("HAVA"), and the Federal Election Records statutes, 52 U.S.C. U.S.C. § 20701.

Plaintiffs previously filed suit against Secretary Hargett and the Anderson County Administrator of Elections in this Court raising similar allegations concerning the voting machines used in and seeking similar injunctive relief. *See Sarah Walker Bruun, et al. v. Tre Hargett, et al*., No. 3:22-cv-292 (DE 1 Complaint). After Secretary Hargett filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6), (DE 16 Motion and DE 17 Memorandum in Support), Plaintiffs filed a notice of voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(A). (DE 20 Notice).

Based on the claims asserted in the present Complaint, Plaintiffs ask this Court to exercise its broad injunctive powers not only to enjoin further use of any electronic voting equipment or method in Tennessee and to require all future elections be conducted using a paper ballot, but to also require a "full forensic audit and investigation of Tennessee's November 2020 election results, data and electronic machines" and to require Defendant Hargett "to re-tabulate the results of every county in Tennessee for the 2020 elections, using our state's volunteers to verify each vote from ballot results from every electronic machine with each voter." (DE 1-1, Compl. at PageID# 35-36.). And Plaintiffs ask this Court to grant such extensive relief in the absence of *any* allegations

or proof that the current voting systems in Tennessee have in fact manipulated votes, as well as in the absence of any concrete or specific factual allegations from which the Court could infer that Plaintiffs' votes have not been counted or that they have been denied access to vote.

Regardless of the merits of any of Plaintiffs' allegations, Plaintiffs' claims against the State Defendants in their official capacities are barred by sovereign immunity. Accordingly, pursuant to the doctrine of derivative jurisdiction, Plaintiffs' complaint against the State Defendants in their official capacities should be dismissed for lack of subject matter jurisdiction. Plaintiffs' claims against the State Defendants should also be dismissed as Plaintiffs lack the requisite standing to confer Article III jurisdiction on this Court. Finally, even if Plaintiffs could demonstrate the requisite standing, their Complaint fails to state a claim upon which relief can be granted. Indeed, nothing alleged in Plaintiffs' Complaint justifies the extraordinary relief they seek.

STANDARD OF REVIEW FOR 12(B) MOTION TO DISMISS

I. Dismissal for Lack of Subject Matter Jurisdiction

A challenge to the court's subject-matter jurisdiction under Rule 12(b)(1) may be either a facial attack or a factual attack. *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co*., 491 F.3d 320, 330 (6th Cir. 2007). A facial attack "questions merely the sufficiency of the pleadings." *Id*. When reviewing a facial attack, this Court must take the allegations in the complaint to be true. *Id*.

But when there is a factual attack, the Court must weigh conflicting evidence provided by the plaintiff and the defendant to determine whether subject-matter jurisdiction exists. *Id*. Thus, in reviewing a factual attack, the Court may consider evidence outside the pleadings and both parties are free to supplement the record by affidavits. *Id*. *See Rogers v. Stratton Industries*, 798 F.2d 913, 916 (6th Cir. 1986).

II. Dismissal for Failure to State a Claim

To state a claim upon which relief can be granted, a complaint must contain either direct or inferred allegations respecting all material elements to sustain a recovery under some viable legal theory. *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005); *Wittstock v. Mark A Van Sile, Inc*., 330 F.3d 889, 902 (6th Cir. 2003). While the factual allegations in a complaint need not be detailed, they "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-95 (2007)).

The United States Supreme Court has encapsulated the appropriate standard to be applied in considering a motion to dismiss for failure to state a claim:

> Two working principles underlie our decision in [*Bell Atlantic v.*] *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "show[n]" – "that the pleader is entitled to relief."

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-1950 (2009) (citations omitted).

ARGUMENT

The gravamen of Plaintiffs' Complaint is the general assertion that, because the voting machines used in Tennessee are allegedly capable of being accessed by the internet and votes switched or manipulated, given the number of machines in use in Tennessee, there is a high likelihood that such infiltration and manipulation has occurred. But Plaintiffs' Complaint, to the extent it seeks declaratory and injunctive relief against the State Defendants is barred by sovereign immunity. Further, Plaintiffs' Complaint, when viewed as a whole, is nothing more than a generalized grievance and not the kind of controversy that is justiciable in federal court. And without a justiciable controversy, the Complaint should be dismissed for lack of subject matter jurisdiction.

Plaintiffs' Complaint should also be dismissed because the complaint fails to state a claim under federal law, and the federal statutes under which Plaintiffs seek relief do not confer private rights of action.

I. This Court Lacks Jurisdiction Over Plaintiffs' Claims Against the State Defendants Pursuant to the Doctrine of Derivative Jurisdiction.

The doctrine of derivative jurisdiction holds that if the state court where an action is filed lacks subject matter jurisdiction, the federal court, upon removal, also lacks subject matter jurisdiction, even if the federal court would have had subject matter jurisdiction if the suit had originally been filed in federal court. *Minnesota v. United States*, 305 U.S. 382, 389 (1939); *Fed. Home Loan Mortg. Corp. v. Gilbert*, 565 F. App'x 45, 49 (6th Cir. 2016). The doctrine operates as a "procedural bar to the exercise of federal judicial power rather than an essential ingredient to federal subject matter jurisdiction." *Id* at 53 (internal quotations and citations omitted.) While Congress abolished the doctrine with respect to civil actions removed under 28 U.S.C. § 144(f), the doctrine still applies to cases, such as this one, removed under 28 U.S.C. § 1442. *See Hargrave*

v. Hollyfield, No. 3:21-cv-266, 2022 WL 1174988, at *2 (S.D. Ohio Apr. 20, 2022). Here, the Federal Defendants have removed the case to this Court pursuant to 28 U.S.C. § 1442(a)(4) and 28 U.S.C. § 1446, and thus, the derivative jurisdiction doctrine is applicable.

To the extent Plaintiffs seek declaratory or injunctive relief against the Defendants in their official capacities, such claims are barred by sovereign immunity. The rule of sovereign immunity in Tennessee is both constitutional and statutory. Article I, section 17, of the Tennessee Constitution provides in part that "[s]uits may be brought against the State in such a manner and in such courts as the Legislature may by law direct." Tennessee courts have interpreted this section as a grant of sovereign immunity to the State, and, accordingly, no suit against the State may be sustained absent express authorization from the Legislature. *See Spencer v. Cardwell*, 937 S.W.2d 422, 423 (Tenn. Ct. App. 1996) (citing *Coffman v. City of Pulaski*, 422 S.W.2d 429 (1967)). The constitutional prohibition found in art. I, sec. 17, has been codified by the Legislature in Tenn. Code Ann. § 20-13-102(a), which provides as follows:

> No court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea or demurrer of the law officer of the state, or counsel employed for the state.

Pursuant to these constitutional and statutory provisions, no suit against the State of Tennessee may be sustained absent express authorization from the Tennessee Legislature. *Greenhill v. Carpenter*, 718 S.W.2d 268, 270 (Tenn. Ct. App. 1986). Moreover, the Tennessee Supreme Court has expressly held that any such legislation authorizing suit against the State, being in derogation of the State's inherent exemption from suit:

> must strictly pursue the constitutional requirements, and be so plain, clear, and unmistakable in its provisions as to the manner and form in which suits may be brought as to leave nothing to surmise or conjecture.

State ex rel. Allen v. Cook, 106 S.W.2d 858, 869 (1937); s*ee also Hill v. Beeler*, 286 S.W.2d 868, 871 (Tenn. 1956) (any statute permitting suit against the State under art. I, sec. 17 of the Constitution of Tennessee must be strictly construed and the jurisdiction cannot be enlarged by implication); *Stokes v. University of Tennessee*, 737 S.W.2d 545, 546 (Tenn. Ct. App. 1987).

In *Hill v. Beeler*, the Tennessee Supreme Court interpreted Tenn. Code Ann. § 20-13-102 as prohibiting Tennessee courts from entertaining a declaratory judgment action against a State officer. 286 S.W.2d at 871. Subsequently, in *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853 (Tenn. 2008), the Tennessee Supreme Court specifically addressed the interplay between the doctrine of sovereign immunity and the Declaratory Judgment Act in the context of subject-matter jurisdiction. That Court held that the Declaratory Judgment Act does not waive sovereign immunity and that the only instance in which the Act grants subject-matter jurisdiction is in a suit against state officials *to prevent them from enforcing an allegedly unconstitutional statute. Id*. at 850-53.

Thus, *Colonial Pipeline* makes clear that *the only time* sovereign immunity does not bar a suit against a state agency or state officials for a declaratory judgment is when the suit seeks to prevent the enforcement of an unconstitutional statute. *Id*. at 853 (finding the "Chancery Court may issue declaratory and injunctive relief against the Defendants in their individual capacity, so long as the court's judgment is tailored to prevent the implementation of unconstitutional legislation and does not 'reach the state, its treasury, funds or property'"). Otherwise, the constitutionally guaranteed principle of sovereign immunity bars any suit against a state agency or state official to construe statutes under the Declaratory Judgment Act. *See Hall v. McLesky*, 83 S.W.3d 752, 756 (Tenn. Ct. App. 2001) ("We note, however, that the courts of Tennessee are prohibited from entertaining an action for declaratory judgment against a state officer . . ..").

Accordingly, because Plaintiffs' complaint does not assert a facial challenge to the constitutionality of a state statute, Plaintiff's claims for declaratory relief as against the State Defendants are barred by sovereign immunity thus depriving the state court of subject matter jurisdiction. And because the state court had no subject matter jurisdiction, the derivative jurisdiction doctrine divests this Court of subject matter jurisdiction as well, and Plaintiffs' complaint as against the State Defendants should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). *See Graber v. Astrue*, No. 2:07-cv-1254, 2009 WL 728564, at *2 (S.D. Ohio Mar. 17, 2009).

II. Plaintiffs Complaint Should Be Dismissed for Lack of Article III Standing.

Even if the derivative jurisdiction doctrine is not applicable, Plaintiffs lack the standing necessary to vest jurisdiction in this Court. Nothing in the Complaint alters this inescapable conclusion.

Federal courts are not "constituted as free-wheeling enforcers of the Constitution and laws." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc). Rather, they are "courts of limited jurisdiction." *Home Depot U.S.A., Inc. v. Jackson*, 139 S.Ct. 1246 (2019) (internal quotation marks omitted). Thus, "[t]he first and fundamental question presented by every case brought to the federal courts is whether it has jurisdiction to hear a case." *Evans v. Allen*, No. 3:13-CV-480-TAV-CCS, 2014 WL 585392, at *1 (E.D. Tenn. Feb. 14, 2014) (quoting *Douglas v. E.G. Baldwin & Assocs.*, 150 F.3d 604, 607 (6th Cir.1998), *abrogation on other grounds recognized by Heartwood, Inc. v. Agpaoa*, 628 F.3d 261, 266 (6th Cir.2010)). "Standing goes to a court's subject matter jurisdiction." *Kepley v. Lanz*, 715 F.3d 969, 972 (6th Cir.2013) (internal quotation and brackets omitted). And a complaint must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) if the plaintiff lacks standing to bring suit. *See, e.g., Taylor v. KeyCorp*, 680 F.3d 609 (6th Cir.2012) (affirming district court's grant of Rule

12(b)(1) motion to dismiss for lack of standing); *Allstate Ins. Co. Global Med. Billing, Inc.*, 520 F. App'x 409, 410–11 (6th Cir.2013) (stating that lack of standing is treated as an attack on the court's subject matter jurisdiction and is therefore considered under Rule 12(b)(1)).

The requirement of standing is "rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). Plaintiffs have the burden "clearly to allege facts demonstrating that [they are] proper part[ies] to invoke judicial resolution of the dispute." *Warth v. Seldin*, 422 U.S. 490, 518 (1975). Furthermore, standing "must affirmatively appear in the record"; it cannot be "inferred argumentatively from averments in the pleadings." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). And the inquiry into whether plaintiffs have standing should be "especially rigorous" where, as here, Plaintiffs seek to have the actions of a sovereign state declared unconstitutional. *Crawford v. U.S. Dept. of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017) (citing *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013)).

The "irreducible constitutional minimum" of standing is that each plaintiff must allege an actual or imminent injury that is traceable to the defendant and redressable by the court for each claim asserted. *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560-62 (1992). An injury must be an "injury in fact," i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan*, 504 U.S. at 560 (citations omitted). In *Spokeo*, the Court held that an injury must be both "concrete *and* particularized," and for an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." 136 S.Ct. at 1548-49 (emphasis in original) (citations omitted). For an injury to be "concrete," it must be " 'de facto'; that is, it must actually exist." *Id.*

In the context of a declaratory judgment action, the Sixth Circuit has stated that allegations of past injury alone are not sufficient to confer standing; rather, the plaintiff must allege and/or "demonstrate actual present harm or a significant possibility of future harm." *Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006) (citations omitted). And the Supreme Court has "repeatedly reiterated that threatened injury must be *clearly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper*, 133 S.Ct. at 1147 (internal quotation marks and citations omitted; emphasis in original). Finally, that Court has recognized that lawsuits that do not challenge "specifically identifiable Government violations of law," but instead challenge "particular programs agencies establish to carry out their legal obligations are . . . rarely if ever appropriate for federal-court adjudication." *Crawford*, 868 F.3d 438, 455 (6th Cir. 2017) (quoting *Lujan*, 504 U.S. at 568).

Even if a plaintiff alleges an actual or imminent injury that is concrete and particularized, the plaintiff must also show that the injury is "fairly traceable to the defendant's allegedly unlawful conduct." *Id*. (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). An injury is not fairly traceable to the defendant's conduct if the plaintiffs have "inflict[ed] the harm on themselves based on their fears of hypothetical future harm." *Clapper*, 133 S.Ct. at 1151. Finally, a plaintiff must also plead facts sufficient to establish that the court is capable of providing relief that would redress the alleged injury. *Lujan*, 504 U.S. at 561-62.

Here, Plaintiffs do not allege any facts establishing a "concrete and particularized injury," i.e., an injury affecting the Plaintiffs in a personal and individual way, resulting from the use of the current voting systems in Tennessee. Instead, Plaintiffs allege that "it is highly likely that some [voting machines] were either connected to the Internet or transmitted data that manipulated votes, denying some in Tennessee our right of suffrage" and that "[b]y utilizing voting machines subject

to the Trapdoor mechanism . . . Tennessee has deprived its voters of the capability of knowing that their vote was accurately counted." (DE 1-1, Compl. at pp. 10, 24)

But this injury is one that is common to all citizens of the State and not just the Plaintiffs. In fact, Plaintiffs throughout the complaint style themselves as representatives of "We the People," reinforcing the conclusion that they are pressing a generalized, as opposed to a personal grievance. (DE 1-1, Compl. at pp. 2, 3, 6, 7, 8, 13, 21.) But the Supreme Court has consistently held that a plaintiff raising only such a generally available grievance about government—claiming only harm to his and other citizens' interest in the proper application of the Constitution and laws and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *See also Allen v. Wright*, 468 U.S. 737, 754 (1984) and *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483 (1982

In *Schlesinger v. Reservatists Committee to Stop the War*, the Supreme Court stated:

> [S]tanding to sue may not be predicated upon an interest of the kind alleged here, which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, where actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution.

418 U.S. 208, 220-21 (1974). And the Supreme Court reaffirmed this holding in a case involving the Elections Clause of the federal constitution. In *Lance v. Coffman*, 549 U.S. 437 (2007), four private citizens brought suit in federal district court arguing that Article V, § 44 of the Colorado Constitution, as interpreted by the Colorado Supreme Court, violated their rights under the Elections Clause of Art. I, § 4, cl. 1 of the United States Constitution. *Id*. at 439. The Supreme Court first noted that its "refusal to serve as a forum for generalized grievances has a lengthy pedigree," citing to *Fairchild v. Hughes*, 258 U.S. 126 (1922) and its progeny. *Id*. at 440. The

Court then found that the only injury the plaintiffs had alleged was that the law—specifically the Elections Clause—had not been followed and that this "injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Id*. at 442. Accordingly, the Court held that the plaintiffs lacked standing to bring their Elections Clause claim because they had no particularized stake in the litigation. *Id*.

The instant case parallels *Lance* as the injuries Plaintiffs have alleged from the continued use of the current voting systems in Tennessee are "plainly undifferentiated" and "shared in substantially equal measure" by all voters in Tennessee. *Warth v. Seldin*, 422 U.S. at 499. Accordingly, the bar on generalized grievances as a basis for Article III standing applies in the instant case for a simple reason: Plaintiffs are not affected by the continued use of the current voting systems in Tennessee in any "personal and individual way." *Davis v. Detroit Pub. Sch. Cmty. Dist*., 889 F.3d 437, 444 (6th Cir. 2018) (qoting *Spokeo,* 136 S.Ct. at 1548) (quotation marks and citation omitted)). On the contrary, the State's continued used of these voting systems affects all Tennessee voters equally.

"The law of Article III standing, which is built on separation-of-powers principles serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U.S. at 408. Furthermore, " '[a] federal court is not a forum for generalized grievances, and the requirement of such a personal stake ensures that courts exercise power that is judicial in nature.'" *Williams v. Thomas*, No. 2019 WL 1905166, at *3 (W.D. Tenn. Apr. 29, 2019) (quoting *Gill*, 138 S.Ct. 1916, 2018). Here, Plaintiffs' allegations are simply insufficient to confer Article III standing and accordingly, Plaintiffs' complaint should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

III. Plaintiffs' Complaint Fails to State a Claim for Violation of the Federal Constitution.

Since all of Plaintiffs' claims are precluded by fatal threshold problems, the Court need not even consider the merits of those claims. Were the Court to reach the merits, though, it should conclude that Plaintiffs have failed to establish that use of the current voting systems in Tennessee violates the Fourteenth Amendment.

A. Legal standard for claims challenging state election practices.

The Sixth Circuit has held that the level of scrutiny to be applied in evaluating a state election law or practice depends on the degree of burden imposed on the fundamental right to vote. *See Ohio Council 8 Am. Fed'n of State v. Husted*, No. 14-3678, 2016 WL 537398, at *3 (6th Cir. Feb. 11, 2016); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 545-46 (6th Cir. 2014); *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012). An election regulation that imposes no burden on the fundamental right to vote and does not discriminate on the basis of a protected class is subject only to rational basis review. *Obama for Am.*, 697 F.3d at 429. Regulations that impose at least *some* burden are subject to the "flexible standard" established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1982). *See Obama for Am.*, 697 F.3d at 429. Under that standard, a court "must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," while taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted).

In practice, regulations that are only minimally burdensome and non-discriminatory are subject essentially to rational basis review and "will usually pass constitutional muster if the state can identify important regulatory interests that they further." *Green Party of Tenn.*, 767 F.3d at

546 (internal quotation marks omitted). Regulations that impose a severe burden are subject to strict scrutiny and "will fail unless they are narrowly tailored and advance a compelling state interest." *Id.* For regulations falling between these two extremes, the court must "weigh[] the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Id.*

The flexible standard that applies to state election practices reflects the "considerable leeway" that States possess to manage election processes. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999); *see also Weber v. Shelley*, 347 F.3d 1101, 1105 (9th Cir. 2003). That leeway is especially great with respect to a State's management of its own state elections. *See Warf v. Bd. of Elections of Green Cnty., Ky.*, 619 F.3d 553, 559 (6th Cir. 2010). "[P]rinciples of federalism . . . limit the power of federal courts to intervene in state elections," and only "in extraordinary circumstances will a challenge to a state . . . election rise to the level of a constitutional deprivation." *Id.* (internal quotation marks omitted); *see also, e.g., Gonzalez-Cancel v. Partido Nuevo Progresista*, 696 F.3d 115, 119 (1st Cir. 2012); *Burton v. State of Ga.*, 953 F.2d 1266, 1268 (11th Cir. 1992). For the reasons explained below, this case—involving a challenge to the voting systems in Tennessee—does not present such extraordinary circumstances.

B. The use of the current voting systems in Tennessee does not create a fundamentally unfair voting system in violation of the Fourteenth Amendment.

Plaintiffs' complaint generally asserts that the use of the current voting systems in Tennessee is in violation of the Fourteenth Amendment. It is presumed that Plaintiffs are asserting a claim for violation of their substantive due process rights under the Fourteenth Amendment. The Sixth Circuit has held that a state's election practices may violate a voter's substantive due process rights if it 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 Cnty., Ky.*, 619 F.3d 553, 559 (6th Cir. 2010) (internal quotation marks and citation omitted). None of these irregularities is present in this case. While Plaintiffs speculate that the voting systems in Tennessee may have been tampered with and/or voting results manipulated, they have failed to present any credible evidence to that effect or that the current voting systems in Tennessee have actually disenfranchised any Tennessee voter. And given that many of these same voting systems were used in state and federal elections in 2016 and 2018, Plaintiffs' lack of evidence of any disenfranchisement is fatal to their claims that the use of these voting systems is fundamentally unfair in violation of the Fourteenth Amendment.

The Sixth Circuit has held that a due process claim may also be implicated where a state's election process impairs citizens' ability to participate in state elections on an equal basis with other qualified voters." *George v. Hargett*, 879 F.3d 711, 727 (6th Cir. 2018) (citing *Phillips v. Snyder*, 836 F.3d 707, 716 (6th Cir. 2016)). Again, Plaintiffs have failed to allege any credible evidence demonstrating that the use of the current voting system impairs the freedom and ability of any Tennessee voter to participate equally in elections. And, while Plaintiffs speculate that the machines may have been tampered with and/or votes manipulated, such speculation is insufficient to establish that Plaintiffs are not able to vote and have their votes counted on the same basis as other Tennessee voters.

Finally, in *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003), the Ninth Circuit considered a voter's challenge to the use of electronic voting machines. The *Weber* court held that the system did not violate the Fourteenth Amendment because the plaintiff's concerns were mostly "hypothetical." *Id.* at 1102-03. In refusing to find a constitutional violation, the court noted "no balloting system is perfect" and that states must be free to choose balloting systems as "long as their choice is reasonable and neutral." *Id.* at 1106-07. And in *Mills v. Shelby Cty. Election*

Comm'n, 218 S.W.3d 33 (Tenn. Ct. App. 2006), the Tennessee Court of Appeals affirmed that point of the Ninth Circuit, holding that the use of electronic voting machines, as a matter of State constitutional law, is a reasonable choice of election officials because " '[w]e cannot say that use of paperless, touchscreen voting systems severely restricts the right to vote'." *Id*. at 42 (quoting *Weber*, 347 F.3d at 1106).

In light of these authorities, Plaintiffs' complaint fails to state a claim upon which relief can be granted for violation of the Fourteenth Amendment and such claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

C. Plaintiffs' complaint fails to state a claim under the Elections Clause of the federal constitution.

Plaintiffs' complaint also asserts that the use of the current voting systems in Tennessee violates the Elections Clause of the federal constitution. But the Elections Clause confers no private cause of action. Rather, "[t]he 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." *Texas Voters All. v. Dallas Cnty*., 495 F.Supp.3d 441, 461-62 (E.D. Tex. 2020) (internal citations omitted). Thus, no cause of action based solely on the text of the Elections Clause exists. Rather, any rights and remedies for alleged violations of the Elections Clause must be found in laws enacted by Congress—and no such laws exists. Accordingly, Plaintiffs' Elections Clause claim should be dismissed for failure to state a claim.

IV. Plaintiffs' Complaint Fails to State a Claim for Relief Under Federal Law.

In addition to alleging federal constitutional claims, Plaintiffs' complaint also appears to assert claims under federal laws, specifically HAVA and the Federal Election Records law. *See* DE 1 at ¶¶ 3, 4, 20, 24, 26 and 27. But neither of these statutes confers a private right of action. Indeed, the Sixth Circuit has held that "HAVA does not itself create a private right of action." *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 571 (6th Cir. 2004); *see also Soudelier v. Dept. of State Louisiana*, No. 22-2436, 2022 WL 3686422, at *1 (E.D. La. Aug. 25, 2022) (citing *Texas Voters All.*, 495 F.Supp.3d 441, 459 (E.D. Tex. 2020); *Morales-Garza v. Lorenzo-Giguere*, 277 F.App's 444, at *2 (5th Cir. 2008) ("HAVA does not provide the declaratory relief sought by [plaintiff].").

Similarly, the Federal Election Records statute, 52 U.S.C. § 20701, does not confer any private cause of action. Rather, the plain language of that statute reflects that "the enforcement mechanism appears to rest with the Attorney General of the United States or his representative." *See Fox v. Lee*, No. 18-529, 2019 WL 13141701, at *1 (N.D. Fla. Apr. 2, 2019) (order on motion to dismiss); *James Pirtle v. Scott Nago*, No. 22-00381 JMS-WRP, 2022 WL 3915570, at *3 (D. Haw. Aug. 31, 2022) (order on motion for temporary restraining order).

Accordingly, to the extent Plaintiffs seek relief pursuant to HAVA and the Federal Election Records law, such claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

V. Plaintiffs' Complaint Fails to State a Claim for Relief Under the Tennessee Constitution.

Finally, to the extent this Court determines that it has subject matter jurisdiction with respect to Plaintiffs' complaint, Plaintiffs' claims for declaratory or injunctive relief against the State Defendants in their official capacity for violations of the Tennessee Constitution are barred

by Eleventh Amendment sovereign immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); s*ee also In re Ohio Execution Protocol Litigation*, 709 Fed. Appx. 779, 782-83 (6th Cir. 2017); *Ernst v. Rising*, 427 F.3d 351, 368 (6th Cir. 2005); *Sherman v. State of Tennessee, et al.*, No. 16-02625, 2017 WL 2589410, at *7 (W.D. Tenn. June 14, 2017).

Additionally, to the extent Plaintiffs seek to invoke this Court's supplemental jurisdiction over a state-law claim, this Court should decline to exercise such jurisdiction, given that Plaintiffs' federal law claims should be dismissed for lack of subject matter jurisdiction and/or for failure to state a claim. Supplemental jurisdiction is codified at 28 U.S.C. § 1367, which states, in pertinent part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.
> …
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
>
> (1) The claim raises a novel or complex issue of State law,
> …
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

In determining whether to retain supplemental jurisdiction, "[a] district court should consider the interests of judicial economy and the avoidance of multiplicity of litigation and balance those interests against needlessly deciding state law issues." *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993). When all federal claims are dismissed before

trial, the balance of considerations usually will point to dismissing the state law claims. *Musson Theatrical, Inc. v. Fed. Exp. Corp.*, 89 F.3d 1244, 1254-1255 (6th Cir. 1996).

In the present case, Plaintiffs have done nothing more than make a general demand for relief that the Court declare that use of electronic voting machines in Tennessee is unconstitutional under the Tennessee State Constitution. Under a plain reading of Fed. R. Civ. P. 8, Plaintiffs have failed to plead a claim for relief, and applying the plausibility standard for pleading certainly causes this claim to fail. Nonetheless, even if a claim for relief were stated, the Court should decline supplemental jurisdiction because (1) the issue of constitutionality has already been decided in a Tennessee state court, *Mills*, (2) all the federal claims should be dismissed for the reasons stated above, and (3) the deference federal courts usually pay to state election processes is even more warranted when a plaintiff asks the federal court to interpret and apply state law to a state election process. Therefore, the amorphous claim for relief under the Tennessee State Constitution should be dismissed along with Plaintiffs' claims under the federal Constitution and federal law.

CONCLUSION

For these reasons, the State Defendants respectfully requests that this Court dismiss Plaintiffs' complaint against them in its entirety and with prejudice for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Law has been sent by the Court's electronic filing system and/or by first class U.S. Mail, postage prepaid, to:

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