No. 16-5563

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

v.

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

On appeal from the United States District Court for the Middle District of Tennessee, No. 3:14-cv-02182 (The Honorable Kevin H. Sharp)

BRIEF OF PLAINTIFFS-APPELLEES TRACEY E. GEORGE, *et al.*

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, Plaintiffs-Appellees offer the following disclosures:

Plaintiffs-Appellees, Tracey E. George, Ellen Wright Clayton, Deborah Webster-Clair, Kenneth T. Whalum, Jr., Meryl Rice, Jan Liff, Teresa M. Halloran, and Mary Howard Hayes, are all individuals; none is a corporation or a subsidiary or affiliate of any publicly owned corporation.

No publicly traded corporations have a financial interest in the outcome of this appeal.

DATED: November 10, 2016 /s/ *William L. Harbison*

Attorney for Plaintiffs-Appellees

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Because this case involves Plaintiffs-Appellees' voting rights as protected by the Fourteenth Amendment and addresses constitutional issues of exceptional importance, Plaintiffs-Appellees join Defendants-Appellants in requesting oral argument.

STATEMENT OF JURISDICTION

Because this action arises under the United States Constitution and under 42 U.S.C. § 1981 and § 1983, the District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. *See* Joint Proposed Pretrial Order, R.95, PageID#1791-92. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

Plaintiffs-Appellees—Tracey E. George, Ellen Wright Clayton, Deborah Webster-Clair, Kenneth T. Whalum, Jr., Meryl Rice, Jan Liff, Teresa M. Halloran, and Mary Howard Hayes (collectively "Appellee-Voters")—contend their Fourteenth Amendment rights were violated by Defendants-Appellants William Edward "Bill" Haslam, Tre Hargett, Mark Goins, Herbert H. Slatery III, the State Election Commission of Tennessee, Judy Blackburn, Donna Barrett, Gregg Duckett, Tommy Head, Jimmy Wallace, Tom Wheeler, and Kent Younce (collectively "State Actors") in their method of determining the ratification of proposed Constitutional Amendment Number 1 to the Tennessee Constitution in the November 4, 2014 state and federal general election ("Amendment 1"). The issues presented for review are:

1. Whether State Actors violated Appellee-Voters' equal protection rights by weighing their "no" votes less than certain "yes" votes on Amendment 1.
2. Whether State Actors violated Appellee-Voters' due process rights by subjecting them to a fundamentally unfair voting system.
3. Whether State Actors violated Appellee-Voters' due process rights by compelling them to vote for governor.

4. Whether State Actors violated Appellee-Voters' Fourteenth Amendment rights by tabulating votes on Amendment 1 contrary to the plain language of Article XI, Section 3 of the Tennessee Constitution.[1]

5. Whether the District Court granted appropriate relief.

[1] A copy of Article XI, Section 3's full text is attached at A-6.

STATEMENT OF THE CASE

The essence of Appellee-Voters' claims is that State Actors' determination of the threshold for the passage of Amendment 1 infringed on Appellee-Voters' and others' federal constitutional rights. Appellee-Voters sued days after the release of preliminary election results (but before certification), asserting that State Actors' tabulation method violated Appellee-Voters' Fourteenth Amendment rights and conflicted with the plain language of Article XI, Section 3's requirement that a proposed constitutional amendment must pass by "a majority of all citizens voting for governor, voting in [its] favor." Among other relief, Appellee-Voters sought a judgment declaring State Actors' counting scheme unconstitutional on its face or as-applied and either voiding the November 4, 2014 election results on Amendment 1 or requiring a recount pursuant to Article XI, Section 3's plain language. *See* Joint Proposed Pretrial Order at 2-3, 5, R.95, PageID#1792-93, 1795.

The District Court found that Appellee-Voters' votes "were not given the same weight as those who voted for Amendment 1 but did not vote in the governor's race…because the way the votes were counted, voters who did not vote in the Governor's race but who voted on Amendment 1 effectively lowered the requisite threshold passage of Amendment 1." Findings and Conclusions at 43, R.119, PageID#3054.

The court further found that "an opponent of Amendment 1…was compelled to vote in the Governor's race in order for his or her vote to have an impact on the denominator used in determining whether a constitutional amendment had obtained the threshold for passage." *Id.*

And the court found that the State Actors' "tabulation method affected two separate races—the vote for governor and the vote on Amendment 1 [because] Amendment 1 supporters who subscribed to the 'double your vote' theory likely abstained from the governor's race, so as to make their votes on Amendment 1—a wholly separate race—count more [and] [t]hose who opposed Amendment 1 likely felt compelled to vote for governor." *Id.* at 46, PageID#3057.

The fundamental question presented to this Court is whether, in light of these unchallenged findings of fact, Appellee-Voters' constitutional rights were violated.

SUMMARY OF ARGUMENT

State Actors' method for determining the ratification of Amendment 1 infringed on Appellee-Voters' and others' federal constitutional rights by:

(i) diluting Appellee-Voters' votes on Amendment 1 by basing ratification of that proposed constitutional amendment on the number of total votes cast in the separate-ballot gubernatorial race;

(ii) creating a fundamentally unfair voting system by disenfranchising Appellee-Voters and other opponents of Amendment 1 and commensurately rewarding proponents of Amendment 1 who refrained from voting in the governor's race;

(iii) compelling Appellee-Voters and other voters against Amendment 1 to vote in the governor's race in order for their vote to count for purposes of ratification (while conversely inducing proponents to forego voting for governor to increase the likelihood of the passage of Amendment 1); and

(iv) deviating from the plain-language meaning of Article XI, Section 3 in certifying the election results on Amendment 1.

State Actors do not challenge the District Court's factual findings as clearly erroneous, nor could they as State Actors' counting scheme weighed votes differently as a matter of mathematical computation. Moreover, the uncontroverted record establishes that State Actors' ratification method enabled Amendment 1

supporters to propagate a multichannel scheme using traditional and social media, phone calls, yard signs, mailers, leaflets, the internet, and church communications to encourage pro-Amendment 1 voters to abstain from the governor's race and thereby increase or "double" the weight of their votes on Amendment 1. Findings and Conclusions at ¶¶21-22, R.119, PageID#3024-25. The election results[2] reflect that this scheme worked and for the first time in Tennessee history the number of votes on a constitutional amendment exceeded the number of gubernatorial votes, meaning that the threshold for ratification fell below a majority of the votes cast on the proposed constitutional amendment. *See* Stipulations at ¶6, R.96, PageID#1799.

The District Court correctly held that State Actors' counting scheme resulted in vote dilution, fundamental unfairness, disenfranchisement, and compelled voting while also disregarding the plain language meaning of Article XI, Section 3 of the Tennessee Constitution. State Actors agree that their actions were not narrowly tailored to achieve a compelling state interest, and the interests they do assert fail even rational basis review because State Actors' ratification method undermines, rather than advances, the purported state interest.

[2] These were: (i) 1,430,117 ballots cast; (ii) 1,353,728 total votes in the Governor's race; (iii) 729,163 votes for Amendment 1; and (iv) 657,192 votes against Amendment 1. There were 32,627 more votes on Amendment 1 (1,386,355) than in the gubernatorial race (1,353,728). *See* Stipulations at ¶5, R.96, PageID#1798-99.

Accordingly, regardless of whether the Court applies strict scrutiny, heightened review, or rational basis analysis, this Court has four separate and independent grounds on which to affirm the District Court: violations of the Equal Protection Clause from vote dilution, violations of the Due Process Clause due to a fundamentally unfair voting system, violations of the Due Process Clause because of compelled voting, and violations of the Due Process Clause because State Actors did not follow the Tennessee Constitution.

Of these four independent bases for affirming the District Court's ruling, only one directly relates to the proper interpretation of Article XI, Section 3. The District Court therefore properly declined to abstain from this case under the *Pullman* doctrine because questions of state law are not determinative of this case for State Actors (and, in any event, the Tennessee Supreme Court has already spoken on the issue). The District Court likewise properly declined to recognize State Actors' after-the-fact state-court declaratory judgment action they filed against Appellee-Voters because (i) State Actors' never raised collateral estoppel in the proceedings below, (ii) State Actors cannot meet four of the five requirement elements for preclusion under Tennessee law, and (iii) State Actors' filing of the state court lawsuit was itself a violation of Appellee-Voters' federal rights.

The constitutional violations and attendant equitable considerations justify—if not demand—that the election results on Amendment 1 be set aside.

STANDARD OF REVIEW

As an appeal of a bench trial verdict,[3] this Court reviews the District Court's conclusions of law de novo and findings of fact for clear error, affording "great deference" to the District Court's factual findings. *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 547 (6th Cir. 2010); *see also Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005). A finding of fact is clearly erroneous only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (quotation omitted). All findings, including those based on "physical or documentary evidence or inferences from other facts," are subject to the clearly erroneous standard. *Anderson*, 470 U.S. at 574; *see also Ale v. TVA*, 269 F.3d 680, 689 (6th Cir. 2001); *Mahoney v. United States*, 831 F.2d 641, 645 (6th Cir. 1987) (warning to vigilantly refrain from conducting a de novo review of the evidence); *Franklin v. Aycock*, 795 F.2d 1253, 1257-58 (6th Cir. 1986) (explaining that appellant's showing conflict does not meet this standard).

This Court reviews the scope of the District Court's injunction for abuse of discretion. *See, e.g., Lee v. City of Columbus*, 636 F.3d 245, 249 (6th Cir. 2011).

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[3] The parties agreed to the trial-on-the-papers format the District Court used for this bench trial. *See* Transcript of Pretrial Conference at 16:8-17:20, R.108, PageID#2138-39.

ARGUMENT

I. The District Court properly concluded that State Actors diluted Appellee-Voters' votes on Amendment 1 in violation of the Fourteenth Amendment's Equal Protection Clause.

a. The Equal Protection Clause prohibits vote dilution.

Voting is so "precious" and "fundamental," *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670, (1966), that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (stating the right to vote is "preservative of all rights"). Accordingly, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). "The Equal Protection Clause applies when a state either classifies voters in disparate ways, or places restrictions on the right to vote." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (internal quotation marks and citations omitted) (emphasis added).

"Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *see also Wesberry*, 376 U.S. at 17 ("Our Constitution leaves no room for classification of people in a way that unnecessarily abridges [the right to vote.]"). Courts apply strict scrutiny when state actors impair the fundamental right to vote. *See Burdick v. Takushi*, 504 U.S. 428 (1992); *Harper*, 383 U.S. at 670. To survive strict scrutiny, state actors must demonstrate that their

actions were narrowly tailored to achieve a compelling interest. *See, e.g.*, *O'Toole v. O'Connor*, 802 F.3d 783, 789 (6th Cir. 2015).

b. The District Court correctly found that Appellee-Voters' votes were diluted.

It is an undisputed fact that "[Appellee-Voters'] votes…were not given the same weight as those who voted for Amendment 1 but did not vote in the governor's race." Findings and Conclusions at 43, R.119, PageID#3054. As the District Court explained, "[t]his is because the way the votes were counted, voters who did not vote in the Governor's race but who voted on Amendment 1 effectively lowered the requisite threshold passage of Amendment 1" and that "Amendment 1 supporters who subscribed to the 'double your vote' theory likely abstained from the governor's race, so as to make their votes on Amendment 1—a wholly separate race—count more." *Id.* at 43, 46, PageID#3054, 3057.

State Actors do not challenge the District Court's factual finding of vote dilution. Both basic math and the record support the District Court's finding. First, from a mathematical perspective, there were four possible voting permutations for those voting for or against Amendment 1:

(1) not voting for governor and voting against Amendment 1;

(2) voting for governor and voting against Amendment 1;

(3) voting for governor and voting in favor of Amendment 1; or

(4) not voting for governor and voting in favor of Amendment 1.

These different voting pairs yielded different relative weights under State Actors' ratification method. Option 1 (not voting for governor and voting against Amendment 1) was a valueless vote because it neither added to the numerator nor the denominator; Options 2 and 3 (voting for governor and voting for/against Amendment 1) had the same value regarding the ratification threshold because both added to the denominator (as well as the numerator for those who favored Amendment 1); and Option 4 (voting for Amendment 1 but not for governor) had the greatest influence on whether Amendment 1 was ratified under State Actors' counting scheme by adding to the numerator without affecting the denominator. State Actors do not dispute this basic math, which demonstratively supports the District Court's finding of vote dilution.

Second, the record supports the District's Court finding that State Actor's counting scheme resulted in actual vote dilution. State Actors concede that "assorted groups, organizations, and individuals…in favor of Amendment 1 were urged to vote only for Amendment 1 and not for governor…so as to increase the likelihood that Amendment 1 would pass." Findings and Conclusions at ¶¶21-22, 22(A)-(C), R.119, PageID#3024-25. In "[f]ar and away the largest campaign," Amendment 1 supporters widely disseminated the theory that "if you want to double your vote, don't vote in the governor's race" across the state "by phone calls, yard signs, mailers, leaflets, newspapers, the Internet, and church bulletins." *Id.* (providing

examples of this theory that "give the flavor of the messages and their widespread scope").

State Actors do not dispute these facts. Indeed, when Appellee-Voters announced their intention to call numerous witnesses to further demonstrate the vote dilution scheme resulting from State Actor's counting scheme, *see* Plaintiffs' Witness List at 2-4, R.98, PageID#1945-47, State Actors stipulated to the obviousness of the "double your vote" campaign. *See* Pretrial Conference Transcript at 9:15-22, R.108, PageID#2131.[4] The results of the November 4, 2014 election themselves drive home this point: for the first time in Tennessee history, there were more votes for a proposed constitutional amendment, Amendment 1, than there were for governor and "the percentage (96.94%) of voters who cast ballots in the 2014 election voted on Amendment 1 at a higher rate than the equivalent percentage on past constitutional amendments."[5] Findings and Conclusions at ¶26 n.6, R.119, PageID#3026-27.

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[4] The Yes on 1 Ballot Committee ("Yes on 1") filed an amicus brief that effectively attempts to rewrite the record. *See, e.g.*, Br. of Amicus Curiae "Yes on 1" Campaign at 21-23. But this case's factual record is established and not now subject to revision based on the untested statements of non-parties. *See, e.g.*, *Anderson*, 470 U.S. at 574; *Ale*, 269 F.3d at 689; *Mahoney*, 831 F.2d at 645; *Franklin*, 795 F.2d at 1257-58.

[5] "88.68% for the single amendment in 2010; 93.5%, and 87.77% for the two amendments in 2006; 92.1% and 78.57% for the two amendments in 2002; and 74.79% and 74.68% for the two amendments in 1998." *Id.* In other words, this

c. State Actors' ratification method violated Appellee-Voters' equal protection rights.

"If one person's vote is given less weight…his right to equal voting participation is impaired…." *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 55 (1970). The dilution found by the District Court and demonstrated above impeded Appellee-Voters' right to vote in violation of the Equal Protection Clause. "In decision after decision, [the Supreme] Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 U.S. at 336 (string citations omitted). "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

This one-person-one-vote principle exists most rigidly for equality of representation and with a degree of slightly increased flexibility in other contexts. *See Town of Lockport, N.Y. v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259, 265 (1977). As the District Court recognized, such flexibility does not eliminate wholesale the Equal Protection Clause's requirement that citizens within a jurisdiction be afforded a right to participate in elections on an equal basis. *Id.*; *see generally Dunn*, 405 U.S. at 336.

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percentage for Amendment 1 is roughly 10 percentage-points higher than the mean of this percentage from the previous elections (86.75%).

State Actors, however, attempt to stretch this permissible flexibility to the point that it eliminates any protection. In so doing, State Actors seek refuge in inapposite cases such as *Lockport*, which addressed a situation in which different stakeholder groups in a referendum were classified differently based on the way in which a referendum was to affect them—*i.e.*, that a new county charter would go into effect only if it were approved by separate majorities of those voters who lived in the cities within the county and those voters who lived outside of the cities. *Lockport*, 430 U.S. at 260. A similar classification existed in *Tigrett v. Cooper*, where consolidating a county and city government into a single metropolitan government required separate majorities of county and city voters. *See Tigrett v. Cooper*, 7 F. Supp. 3d 792, 798-801 (W.D. Tenn. 2014), *appeal dismissed as moot*, 595 F. App'x 554 (6th Cir. 2014); *see also Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (addressing differing stakeholder interest in "a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents" in the form of a water district).

These differential majority requirements in *Lockport* and *Tigrett* preserved—rather than undercut—equal protection by acknowledging differing interest of differing stakeholders (*i.e.*, city versus county voters) and permitting them to vote accordingly. *See also Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632 (1969) (requiring "exacting precision" for the identification of such differential

interest groups). Here, however, there are no such differing stakeholders: each voter on a state constitutional amendment has the same interest in whether it passes.

Similarly, State Actors misapply cases such as *Gordon v. Lance*, 403 U.S. 1 (1971), and its progeny, where the threshold required for a resolution or amendment is a fixed value greater than a simple majority—*e.g.*, West Virginia's 60% majority requirement in *Gordon* for political subdivisions to levy higher taxes or incur bond debt. *Id.* at 2-3. The Supreme Court explained that departing from a strict majority rule may empower a minority (*i.e.* the less than 50% of voters who opposed the measures) but that this supermajority threshold did not violate equal protection because it applied equally to all voters. *Id*. at 5-6. In other words, the value of votes remained the same relative to all voters in the state—that is, every vote cast had the same potential impact on reaching/blocking the 60% threshold. But as the District Court found, Appellee-Voters' votes did not have the same potential weight compared to other voters who favored Amendment 1 and did not vote for governor.

Finally, the equal protection violations in this case are easily distinguished from permissible forms of strategic voting through the process of "single-shot" or bullet voting.[6] First, in bullet voting, the choice to/not to vote for more than one

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

candidate is limited to the single race where a voter opts to self-limit. State Actors' counting scheme, however, creates a decision not to vote that reached across the ballot to two separate races: the vote for governor and the vote on Amendment 1. Unlike bullet voting, pro-Amendment-1 "double-your-vote" voters wholly abstained from the governor's race (as opposed to casting a single vote out of several potential votes in one race) and thereby empowered their votes on Amendment 1 in a wholly separate race.

Second, whereas the decision to bullet vote is available to all voters, State Actors' ratification method created one-sided manipulation with only pro-Amendment-1 voters being able to forego voting for governor and bolster their Amendment 1 vote. Conversely, Appellee-Voters and others who opposed Amendment 1 were left with decidedly lesser options: vote for governor and against Amendment 1 to cast a diluted vote or vote against Amendment 1 without voting for governor and cast a vote with no bearing on ratification.[7] Previously condoned strategic voting systems have not permitted this one-way manipulation and instead have provided all voters, regardless of viewpoint, the option to bullet vote. State Actors have never cited a single case tolerating a system that invited viewpoint-limited strategic voting and thereby caused vote dilution. *Cf., e.g.*, *Thornburg v.*

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

Gingles, 748 U.S. 30, 38-39 (1986); *City of Rome*, 446 U.S. at 184; *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1113 (5th Cir. 1991).

As the District Court found, votes on Amendment 1 were not allotted equal relative weight, either overall or during what State Actors have defined as "ratification." Rather, the four possible permutations of voting on Amendment 1 crossed with voting for governor resulted in three different vote-values. Appellee-Voters' votes specifically had less weight than those cast by pro-Amendment 1 voters who did not vote for governor. This unequal ability for voters on only one side of an issue (here the voters who favored Amendment 1) to shift the threshold for ratification is an element unique to this counting scheme and one that differentiates this case from instances of fixed majority or bullet voting systems.

d. State Actors' voting method fails strict scrutiny, otherwise heightened scrutiny, and even rational basis review.

The infringements on the Appellee-Voters' fundamental right to vote warrant strict scrutiny. *See Burdick*, 504 U.S. at 434; *see also Harper*, 383 U.S. at 670 ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."). State Actors offer no compelling interest and do not contend that their actions were narrowly tailored. Accordingly, State Actors concede that their ratification method fails strict scrutiny.

Even if this Court were to determine that the infringements of Appellee-Voters' rights merit less-heightened scrutiny under the *Anderson-Burdick* standard or even rational basis review, as State Actors' advocate, *see Green Party of Tenn. v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015) (citations omitted) ("If the burden on the right to vote is 'severe,' the statute will be subject to strict scrutiny"; "[i]f the burden is 'reasonable' and 'nondiscriminatory,' the statute will be subject to rational basis"; and "[i]f the burden lies somewhere in between, courts will weigh" the state's interest against the burden on plaintiff), State Actors' ratification method still does not pass constitutional muster because it is not rationally related to the interest they assert. *See generally Obama for Am.*, 697 F.3d at 429; *Craigmiles v. Giles*, 312 F.3d 220, 223-24 (6th Cir. 2002).

Counsel for State Actors[8] advance three interwoven government interests to which they claim the ratification method relates: making it difficult to amend the fundamental laws of the state, ensuring that constitutional amendments have broad support, and preventing small interest groups[9] from exerting undue influence on

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[8] State Actors themselves professed to not know the governmental interest advanced by their counting scheme. *See* 30(b)(6)/Goins Dep., at 207:1-20, R.89-1, PageID# 1313 ("I don't know your answer.")

[9] Although the Tennessee Constitution has long allowed for amendments, the so-called legislative amendment method has only been used with any frequently in the past five election cycles as various interest groups have sought to entomb certain social policies in the state's governing document. *See* Findings and Conclusions at ¶ 13 n.4, R.119, PageID#3020.

Tennessee's fundamental laws. As the facts establish here, State Actors' counting scheme actually subverts these interests.

To this first asserted interest, State Actors concede that "the whole point of the ratification threshold is to make it difficult for a proposed constitutional amendment to pass." Appellants' Br. at 54. Yet they acknowledge that, as applied to Amendment 1, their counting scheme made it easier, rather than more difficult, to pass Amendment 1 because "proponents of an amendment can shift that threshold by abstaining from voting for governor." *Id*. Accordingly, State Actors' ratification method is thus not even rationally related to its purported governmental interest.[10]

Turning to the latter two purported interests, State Actors' counting scheme undermined the interest of ensuring that Amendment 1 had broad support by actively permitting, rather than preventing, narrow interests—most notably "certain groups in favor of Amendment 1, who essentially told voters to get more bang for their buck by voting for Amendment 1 and abstaining from voting for governor," Findings and Conclusions at 45, R.119, PageID#3056—to disproportionately influence the

[10] State Actors then compound the matter by claiming that "opponents of an amendment can also shift that threshold by voting for governor." *Id*. This statement reflects a fundamental misunderstanding of mathematical principles because voting for governor and voting against an amendment affects the threshold for ratification the same as voting for governor and not voting for an amendment; this is fundamentally different than the option afforded to amendment proponents who can decrease the threshold for ratification while still voting in favor of an amendment.

election's outcome. Indeed, the District Court explicitly found that State Actors' tabulation method did not preclude interest groups from exerting outsized influence. The prevalence of the don't-vote-for-governor-double-your-vote schemes coupled with the election's outcome commands the conclusion that "[i]f the real goal is in fact to prevent certain interests groups from exerting undue influence, then it may have failed in the 2014 Election on Amendment 1." *Id.* at 39, PageID#3050.

State Actors' own statement that amending the Constitution should not be "too easy or too readily influenced by small interest groups, and yet not so difficult that it can never be accomplished," Appellants' Br. at 58, again belies their asserted legitimate government interests. Because "proponents…can shift that threshold by abstaining from voting for governor," small interest groups can influence the outcome on an amendment. And indeed, the outcome of the vote on Amendment 1 demonstrates that the Amendment 1 proponents adhering to the double-your-vote theory did just that. Because State Actors' tabulation method does not, in fact, rationally relate to their purported governmental interests, it does not survive even rational basis review—to say nothing of the strict scrutiny it warrants.

e. State Actors' evolving articulation of their ratification method does not change this conclusion.

During the course of this litigation, State Actors have offered three different accounts of how they administered the vote on Amendment 1. Initially, State Actors took the position that "for a proposed amendment to pass, it must receive votes equal

to the majority of the total votes cast for governor." 30(b)(6)/Goins Dep. at 103:20-104:19, R.89-1, PageID#1287. Accordingly, they certified the election results by simply comparing the number of votes in favor of Amendment 1 (729,163) to one-half, plus one, of votes cast in the gubernatorial race on the same ballot (676,865).

After the District Court observed in an interlocutory order that "[u]nder [State Actors'] implementation of Article XI, Section 3, negative votes are effectively meaningless [because] if 2,000,000 persons participated in an election, but only 1,000,000 people voted in the gubernatorial race, an Amendment will be deemed approved so long as it received 500,001 'yes' votes, even if 1,499,999 votes were cast against the amendment," Memorandum at 17, R.62, PageID#780, State Actors offered a new explanation of how they administered the vote, which they described as the "two-step process":

> The two-step process, as I've explained, is you look at the number of votes that -- the number of voters who voted in the gubernatorial election. So you add those numbers up for the different candidates, and then you divide that in half, and then you look to add one to that. That gives you -- that's where it needs to get in order to be ratified.
>
> For it to be approved, you look at the number of yes votes and no votes on the individual amendment, so that's a two-step process. You're looking to see if more voters voted yes as opposed to voting no, and then you're looking to see if it reached that number of the total in the governor's race.

Id. at 201:1-14, PageID#1312.[11]

Now, for the first time on appeal, State Actors offer a third permutation: "an amendment must at least receive more 'yes' votes than 'no' votes. If more people vote for governor than on the amendment, however, the threshold for passage increases to a majority of the total votes cast for governor." Appellants' Br. at 5-6.

Whether State Actors press the dual majority articulation ultimately advanced in the District Court or the modified interpretation in their brief to this Court,[12] the fact remains that Appellee-Voters' votes were diluted. At base, under any of the

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[11] State Actors have struggled to consistently explain this so-called two-step process. *See, e.g.*, Plaintiffs' Proposed Findings and Conclusions at ¶ 39, R.112, PageID#2867-69 (tracing Defendant-Appellant Goins's struggling during his deposition—both as the Fed. R. Civ. P. 30(b)(6) representative for the Tennessee Department of State and as the Coordinator of Election—to explain this two-step process in the context of Article XI, Section 3's text and characterizing his definition of "approve" as "the true vote" or "the major test").

At trial, the District Court explicitly noted this evolving, two-step position and that State Actors struggled to conform it onto Article XI, Section 3's text. *See* Trial Transcript at 3:9-14, R.135, PageID#3199 ("[T]his two-step process is new to me. And I've read through the testimony of Mr. Goins, and that seemed to me—maybe I missed it. But that was the first time that I had heard it explained that way."); *id*. at 29:4, PageID#3225 ("My recollection is that Mr. Goins had trouble with that, too, on making a distinction between approve and ratify.…").

[12] State Actors' wholly unfounded assertion that their intended ratification scheme was consistent with the guidance posted on the Tennessee Secretary of State's website misstates the record. *Id.* at 11. As just described, State Actors have offered shifting definitions of how votes were to be counted, and State Actors consciously declined to issue an official release regarding the ratification method other than to tell proponents of Amendment 1 that they need not vote for governor. *See, e.g.*, R.109-6, PageID#2205.

methods articulated by State Actors, someone favoring Amendment 1 may vote for governor and for the amendment (and thereby sacrifice the potential weight of their vote for the amendment) or just vote for the amendment (and thereby increase the relative weight of the vote for the amendment). Conversely, someone who opposes an amendment can only meaningfully register this opposition by voting for governor: a vote from someone who does not vote in the gubernatorial race and who votes against an amendment may be permissible, but it is meaningless because such a vote would not factor into either the numerator (votes in favor of Amendment 1) or the denominator (votes cast in the gubernatorial race) of State Actors' ratification fraction and thus has no influence.

Accordingly, regardless of how State Actors may now explain their counting scheme, Appellee-Voters' votes were treated differently than other votes and afforded less weight in violation of their federally-secured equal protection rights.

II. The District Court correctly concluded that State Actors' ratification method created a fundamentally unfair voting system in violation of the Fourteenth Amendment's Due Process Clause.

"The Due Process clause is implicated, and § 1983 relief is appropriate, in the exceptional case where a state's voting system is fundamentally unfair." *League of Women Voters v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (citing *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978)); *accord Warf v. Bd. of Elections of Green Cnty.*, 619 F.3d 553, 559 (6th Cir. 2010) (quoting with approval). Under State

Actors' ratification method, a vote on Amendment 1 from anyone who voted for governor—regardless of whether the vote was for or against Amendment 1—has less value than a vote for Amendment 1 from someone who did not vote for governor. By devaluing Amendment 1 votes from voters who voted for governor, State Actors carried out "an officially-sponsored election procedure which, in its basic aspect, was flawed" so that "[d]ue process, '[r]epresenting a profound attitude of fairness between man and man, and more particularly between individual and government,' is implicated…." *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978) (quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring)). As a matter of law, this constitutes disenfranchisement of Appellee-Voters and other voters opposing Amendment 1. *See generally Reynolds*, 377 U.S. at 555 ("The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

The fundamental unfairness of State Actors' counting scheme is exemplified even within voters who opposed Amendment 1. On one hand, Appellee-Voters (and other voters like them) relied on the election procedures established by Article XI, Section 3 of Tennessee's Constitution—*i.e.*, that Amendment 1's passage depended on those voting for governor. This reliance was neither unfounded nor unlikely given that Article XI, Section 3 spells out how the Tennessee Constitution is to be amended

as found by the District Court. *See* Findings and Conclusions at 41, R.119, PageID#3052.[13] As described above, however, Appellee-Voters and these other voters had their votes against Amendment 1 diluted vis-à-vis proponents of Amendment 1 who did not vote for governor. *See generally Reynolds*, 377 U.S. at 555.

Conversely, Amendment 1 opponents who were aware of State Actors' pre-election statements that "there was no requirement to vote in any race" relied on these statements to understand that they did not need to vote for governor in order to have their vote against Amendment 1 count.[14] But, under State Actors' counting scheme for Amendment 1's "ratification," votes from these voters, in fact, did not count because they neither contributed to the numerator (votes for Amendment 1) or denominator (total votes cast for governor). Accordingly, these voters were disenfranchised because the votes they cast against Amendment 1 were wholly

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[13] The record contradicts State Actors' claim that voters "would have expected their votes on the proposed amendments to be counted, regardless of whether they had also voted for governor." Appellants' Br. at 11. Rather, the finding of fact is that it is "[not] inconceivable that voters would expect the votes to be counted in accordance with the language of the state constitution [*i.e.*, by the method advance by Appellee-Voters], or that counting them that way would be absurd." Findings and Conclusions at 41, R.119, PageID#3052.

[14] Notably, although State Actors made statements like "[w]hether people vote in the governor's race doesn't affect their eligibility to vote on the amendments" to the media, they did not—and in fact, explicitly decided not to—issue any sort of formal release about tabulating votes on Amendment 1. *See*, *e.g.*, Email, R.109-6, PageID#2205.

deprived of value. *See Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998) *as amended on denial of reh'g and en banc reh'g* (June 23, 1998).

And this fundamental unfairness proved to be a two-way street. Based on State Actors' ratification method, a vote on Amendment 1 from anyone who voted for governor, regardless of whether the vote was for or against Amendment 1, has less value than a vote for Amendment 1 from someone who did not vote for governor. Pro-amendment voters were thus in the untenable position of having to decide whether they most valued voting in the governor's race (but thereby diminishing the value of their Amendment 1 vote) or maximizing their vote for Amendment 1 (at the cost of not being able to vote for governor).

These due process violations go to the heart of the fundamental right to vote and subject State Actors' counting scheme to strict scrutiny. *See generally Warf*, 619 F.3d at 559. And at minimum, it is subject to more than rational basis review under the *Anderson-Burdick* standard. *See Obama for Am.*, 697 F.3d at 429 (explaining that this framework applies to a broad range of right-to-vote issues) (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring)). These burdens do not pass constitutional muster even under this lower standard. As explained in the preceding section, the precise interests State Actors assert—making it difficult to amend Tennessee's fundamental laws, ensuring broad support for constitutional amendments, and preventing undue influence by small groups—are

not served by and thus do not in any way justify the burdens on due process imposed by State Actors' ratification method.

III. State Actors' ratification method violated the Fourteenth Amendment by unconstitutionally compelling voters to vote for governor.

Compelled voting derives generally from the First and Fourteenth Amendments and from the Supreme Court's opinion in *Wooley v. Maynard*, 430 U.S. 705 (1977).[15] In *Wooley*, the Court explained that the First Amendment, as incorporated through the Fourteenth, protects the right to "refrain from speaking at all." *Id.* at 714. Accordingly, voting systems that induce citizens to vote in a particular race are constitutionally suspect. *See, e.g.*, *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 727 (1st Cir. 1994); *Partnoy v. Shelley*, 277 F. Supp. 2d 1064 (S.D. Ca. 2003) *as modified on reconsideration* (Aug. 21, 2003); *see also Wooley*, 430 U.S. at 714. As State Actors acknowledge, "Courts have repeatedly invalidated state laws imposing conditions precedent on voting because they impose a severe burden on

[15] Lest State Actors revisit in their reply brief their argument from below that this issue was not properly raised, compelled voting—although derived initially through the First Amendment—applies to a state and to state officials through the Fourteenth Amendment's Due Process Clause. *See, e.g.*, *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 5, 8 (1947) (acknowledging the First Amendment to apply to states through the Fourteenth Amendment's Due Process Clause). Appellee-Voters compelled-voting claims are part and parcel of their due process claims. And State Actors cannot claim surprise or prejudice regarding this claim, given that it has been briefed and argued repeatedly ever since their own initial Motion to Dismiss raised the issue in the district court nearly two years ago. *See, e.g.*, Memo. in Support of Motion to Dismiss at 20-23, R.25, PageID#94-97.

voters' First and Fourteenth Amendment rights without furthering any compelling state interest." App. Br. at 37 (collecting cases)

Here, the District Court found that "[t]hose who opposed Amendment 1 likely felt compelled to vote for governor." Findings and Conclusions at 46, R.119, PageID# 3057. This finding of fact is not challenged as clearly erroneous. Indeed, State Actors conceded that their ratification method encouraged opponents of a proposed constitutional amendment to vote for someone in governor's race and in fact compels them to do so if they want to affect the threshold for ratification. *See* Hargett Dep. at 124:3-14, R.89-5, PageID#1458.

The compelled voting problem in State Actors' counting scheme is made all the more insidious by the fact that it is viewpoint dependent because it does not impose the same burden on those voters favoring an amendment. Under State Actors' ratification method, a voter against Amendment 1 was compelled to vote for governor to have his or her vote count toward ratification; a vote from someone who does not vote in the gubernatorial race and who votes against an amendment is permissible but meaningless: it would not factor into either the numerator (votes in favor of Amendment 1) or the denominator (votes cast in the gubernatorial race) of State Actors' ratification fraction and thus has no meaning. Someone favoring an amendment under this scheme faced no such compulsion and could have voted for governor and for the amendment (such that it equaled that of a voter who voted for

governor and voted against the amendment) or just voted for the amendment (and thereby increased the relative weight of the vote for the amendment). In short, opponents of Amendment 1 were penalized for not voting for governor while opponents of Amendment 1 were rewarded for the same choice. As State Actors themselves acknowledge, "it's illegal" to either "prevent someone from voting" or to "discourage people from voting." 30(b)(6)/Goins Dep. at 102:4-12, R.89-1, PageID#1287. And they have conceded that there is no state interest, compelling or otherwise, "to require voters to vote for governor as it pertains to the passage of an amendment to the Tennessee Constitution." *Id*. at 103:4-17.

State Actors' ratification method placed an actual—rather than hypothetical—burden on the fundamental right to vote in the form of compelled voting, thereby triggering heightened scrutiny. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807-09 (1969); *Obama for Am.*, 697 F.3d at 429. Accordingly, the restriction on the right to vote posed by State Actors' method must be narrowly drawn to advance a state interest of compelling importance. *See Burdick*, 504 U.S. at 434. Here again, State Actors' ratification method does not advance the asserted interests of ensuring broad support and preventing undue influence by small interest groups and thus would not even suffice under rational basis review. And State Actors' ratification method is certainly not narrowly drawn.

Accordingly, the District Court properly held it was unconstitutional for this third reason.

IV. As the District Court correctly concluded, State Actors' application of Article XI, Section 3 defies that provision's plain language and thereby violates Appellee-Voters' Fourteenth Amendment rights.

Each of the three Fourteenth Amendment violations detailed in the preceding sections warrants affirmance; as the District Court explained, these violations remain "whether [Appellee-Voters'] or [State Actors'] understanding of the meaning of Article XI, Section 3 is correct." Findings and Conclusions at 39, R.119, PageID#3050. Nonetheless, the fact that State Actors' application of Article XI, Section 3 of the Tennessee Constitution also fails to conform to that provision's plain language creates a fourth basis on which to affirm the District Court's ruling. *See id.* at 40, PageID#3051.

a. Appellee-Voters' interpretation of Article XI, Section 3 is the only one that complies with that provision's plain language.

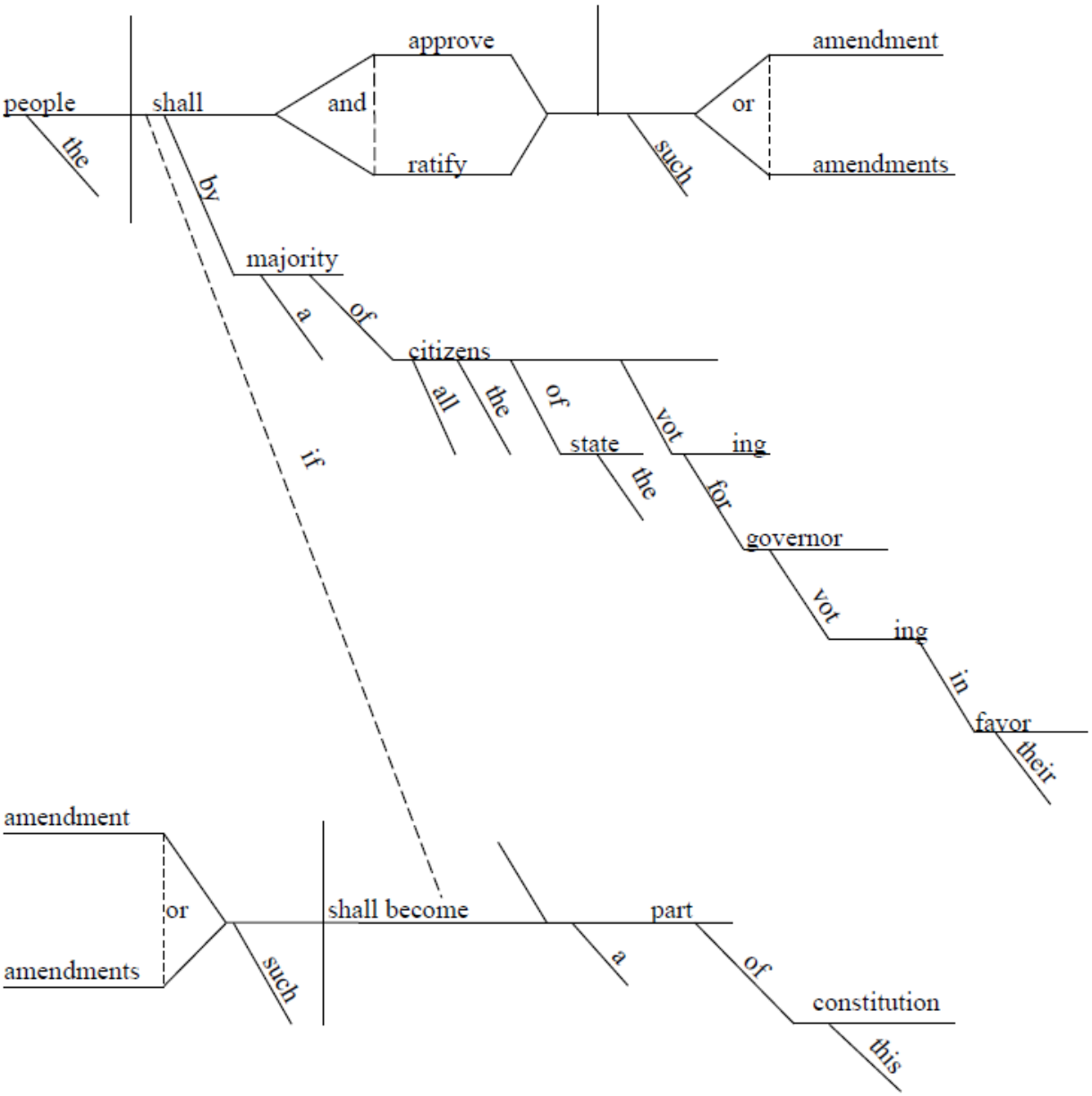
The language of Article XI, Section 3 at issue states that "if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the state voting for governor, voting in their favor, such amendment or amendments shall become a part of this Constitution." Tenn. Const. art. XI, § 3.

As both this Court and the Tennessee Supreme Court have emphasized time and again, the words of a law should be interpreted to mean what they say. *See, e.g.*, *Norfolk S. Ry. Co. v. Perez*, 778 F.3d 507, 512 (6th Cir. 2015); *Hooker v. Haslam*,

437 S.W.3d 409, 426 (Tenn. 2014) ("The intent of the people adopting the Constitution should be given effect as that meaning is found in the instrument itself, and courts must presume that the language in the Constitution has been used with sufficient precision to convey that intent."); *Shelby Cnty. v. Hale*, 292 S.W.2d 745, 748 (Tenn. 1956) (explaining that constitutional provisions should be interpreted literally); *see also Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010); *Bandy v. Duncan*, 665 S.W.2d 387, 391 (Tenn. Ct. App. 1983). State Actors correctly acknowledge this principle: "The text of the provision is the best evidence of its purpose." Appellant Br. at 32.

Under Article XI, Section 3's plain language, amendments to Tennessee's constitution must pass "by a majority of all the citizens of the state voting for governor, voting in their favor." Tenn. Const. Art. XI, § 3. Parsing Article XI, Section 3, an amendment must pass not just by a majority of the number of citizens voting for governor but instead by an actual majority of "all the citizens of the state voting for governor." To adopt State Actors' approach and disregard whether a majority of those voting for governor voted in favor of the amendment gives no effect to the actual words and punctuation in the relevant language of Article XI, Section 3.

This is reflected by a sentence diagram of the provision:



Rather than follow the natural construction of the provision, State Actors read the use of the phrase "the people"—which they decree means the electorate as a whole—unnaturally to say that the plain language qualifiers of "voting for governor, voting in their favor" do not actually modify the provision's majority requirement.

This assertion, however, disregards the need to give meaning to every word and relevant punctuation mark in Article XI, Section 3.

State Actors also twist the definitions of "approve" and "ratify." As State Actors note, "approve" and "ratify" can be functionally synonymous, but "ratify" can also connote the final step in a process. This connotation gives "ratify" its meaning in Article XI, Section 3; the phrasing "approve and ratify" indicates that the submission of a proposed amendment to the people constitutes the final step in passing an amendment. Using "ratify" to signal that this vote is the final step is critical because it indicates that the final sentence describing the legislative method—"[w]hen any amendment or amendments to the Constitution shall be proposed in pursuance of the foregoing provisions the same shall at each of said sessions be read three times on three several days in each house"—is merely an instruction, rather than another subsequent step to a proposed amendment's becoming a part of Tennessee's constitution.

All of the interpretations State Actors have offered over the course of this litigation attempt to rewrite Article XI, Section 3. Whether partitioning "approve" and "ratify" to create a two-step process[16] or to create two thresholds that shift

[16] Saying that, in order to pass, a proposed constitutional amendment must be approved by a having a majority of votes cast on it be cast in its favor and ratified by receiving enough votes cast in its favor to constitute a majority of the votes cast for governor.

depending on the number of votes cast for governor versus the number of votes cast on the amendment,[17] these interpretations starkly depart from the actual text of Article XI, Section 3. The Court should not credit them because State Actors cannot "amend or alter the Constitution under the guise of construction." *Mayhew v. Wilder*, 46 S.W.3d 760, 784 (Tenn. Ct. App. 2001) (citing *Ashe v. Leech*, 653 S.W.2d 398, 401 (Tenn. 1983)).

In support of their unnatural reading, State Actors argue that only their interpretation comports with Article IV, Section 1 of the Tennessee Constitution. Nothing in that provision, however, is incompatible with the plain language reading of Article XI, Section 3 advanced by Appellee-Voters and adopted by the District Court. Article XI, Section 3's strictures apply uniformly so as not to impede any citizen's right to suffrage. Regardless of whether or how a voter were to choose to vote on an amendment or vote for governor, every eligible citizen has their right of suffrage preserved.[18] Indeed, as detailed in the first three sections of this brief, it is

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[17] Saying that an amendment must either be "approved" when the number of votes on an amendment exceeds the number of votes in the governor's race or "ratified" when the number of votes on the amendment falls short of the number of votes cast in the governor's race.

[18] Additionally, Article IV, Section 1's current language was adopted in 1978—25 years after Article XI, Section 3's current iteration. If one provision should be read to conform with another, it should be Article IV, Section 1 needing to conform with Article XI, Section 3. Were the revised Article IV, Section 1 meant to modify Article XI, Section 3, it would have done so explicitly; as the Supreme Court is fond of emphasizing, elephants do not come hidden in mouse holes. *See, e.g.*, *Gonzalez*

State Actors' interpretation that conflicts with the U.S. Constitution. As State Actors concede, an "interpretation must be rejected because it would…violate the U.S. Constitution." Appellant Br. at 36 (collecting cases).

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

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

v. Oregon, 546 U.S. 243, 267 (2006); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001); *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 160 (2000).

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

Id.[19] Although *Snow*'s observation about "obtaining voter ratification of a majority of those voting for representatives" may be *dicta* in that it was not central to the holding of the case, it robustly supports the plain language reading of Article XI, Section 3 and should not be "view[ed] lightly." *Galli v. New Jersey Meadowlands Comm'n,* 490 F.3d 265, 274 (3d Cir. 2007) (explaining such *dicta* is "highly persuasive").

b. State Actors' use of extra-textual materials to circumvent the plain meaning of the provision fails procedurally and substantively.

Without the plain language of Article XI, Section 3 favoring their actions, State Actors devote a sizeable portion of their brief to asserting that the meaning of Article XI, Section 3 is ambiguous so as to merit introduction of a host of extra-textual documents. But because the plain language of Article XI, Section 3 is unambiguous, the Court need not go beyond the text of the Tennessee Constitution.

Yet even if the Court were to move beyond the plain language, State Actors' extra-textual documents (i) are not properly in the record or before this Court and (ii) fail to support State Actors' position as the District Court's unchallenged

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[19] In an accompanying footnote, the *Snow* court set forth the relevant language of Article XI, Section 3 which is identical to the present language, except that "voting for governor" read as "voting for Representatives" in the 1870 version of that constitutional provision.

findings ably catalogue. *See* Findings and Conclusions at ¶¶9-24, R.119, PageID#3017-3026.

First, the extra-textual documents are not properly in the record because State Actors took the position throughout the proceedings below that these materials were "irrelevant" and thus not discoverable. *See* Response to Requests for Production, R.48-4, PageID# 505; Response to Interrogatories, R.48-5, PageID# 516; Response to First Set of Requests for Admission, R.48-6, PageID# 524. Appellee-Voters' discovery requests sought the very documents that State Actors now seek to introduce.[20] State Actors cannot assert during discovery that these items were irrelevant and now seek to use these "irrelevant" items to advance their position. *Cf.*, *Warda v. C.I.R.*, 15 F.3d 533, 538 (6th Cir. 1994) (indicating courts should "preserve[] the integrity of the courts by preventing a party from abusing the judicial

[20] Notwithstanding State Actors refusing to provide written discovery, Appellee-Voters proceeded with depositions during which time Appellee-Voters sought to designate the unproduced items as late-filed exhibits. Although this designation gave State Actors an opportunity to introduce documents six months after the written discovery deadline, they still refused. Depositions also revealed that numerous potentially relevant digital documents were and continued to be destroyed per the State's document destruction protocol. *See* Appellee-Voters' Response in Opposition to State Actors' Motion in Limine at 14-17, R.97, PageID#1814-17 (detailing and cataloguing this destruction of evidence). In light of their essential total refusal to participate in discovery, State Actors' assertion that "[t]here is no evidence" that they participated in the double-your-vote-type efforts on Amendment 1 or "acted in anything less than good faith" applying Article XI, Section 3 to Amendment 1 cannot be fully evaluated, although irrelevant for present purposes.

process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment.") (citations and internal quotation marks omitted).

Second, the bulk of State Actors' assertions regarding the "history and purpose" of Article XI, Section 3 and the State's historical interpretation of it, including those found on page 7 of their brief, were explicitly rejected by the District Court. Likewise, State Actors' assertions that the state has consistently understood and applied Article XI, Section 3 to count amendment votes from 1845 onward both relies on information not found in the record and contradicts the District Court's findings. *See id*. at 8-9. To wit, the District Court explicitly declined to find that the delegates articulated an understanding of this provision different from the plain meaning of the text. Findings and Conclusions, ¶11, R 119, PageID#3018; *see also id*. at ¶ 12, PageID#3020 ("In short, the record, assuming it is complete, is far from definitive regarding what the Delegates at the 1953 convention were thinking. The record is even less clear as to what the public may have understood. And, tellingly, neither the 1953 Journal excerpts, nor the contemporary newspaper articles explicitly mention the two-step reading of Article XI, Section 3 that Defendants now advance").

Beyond the issues with these materials neither being in the record nor supporting State Actors' assertions, the Court need not countenance any of them for

a more fundamental reason: the text of Article XI, Section 3 makes its meaning plain so that the Court need not move beyond it. *E.g.*, *Hooker*, 437 S.W.3d at 426 (stating "[w]hen a provision clearly means one thing, courts should not give it another meaning" and "[w]hen the words are free from ambiguity and doubt and express plainly and clearly the sense of the framers of the Constitution there is no need to resort to other means of interpretation").

c. State Actors' failure to follow the plain language of Article XI, Section 3 violated Appellee-Voters' due process rights.

State Actors' failure to follow Article XI, Section 3's plain language methodology to determine whether Amendment 1 passed, *e.g.* Findings and Conclusions at ¶¶27-28, R.119, PageID#3027, constitutes yet another due process violation separate and beyond the fundamental unfairness and compelling voting issues discussed in Sections II and III above. *See, e.g.*, *League of Women Voters*, 548 F.3d at 478. This deviation from Article XI, Section 3, as a violation that profoundly interferes with Appellee-Voters' franchise, is subject to strict scrutiny. *See Warf*, 619 F.3d at 559. And this failure would not pass any other level of review because State Actors concede they have no legitimate interest in deviating from state constitutional law. Accordingly, for this fourth reason, the Court should affirm the District Court.

V. State Actors' procedural defenses are neither consequential nor correct.

This Court has four separate and independent grounds on which to affirm the District Court: violations of the Equal Protection Clause from vote dilution, violations of the Due Process Clause due to a fundamentally unfair voting system, violations of the due process claims because of compelled voting, and violations of the Due Process Clause because State Actors did not follow the Tennessee Constitution. With respect to this last ground, State Actors offer two procedural defenses – abstention and collateral estoppel. These defenses are neither consequential nor correct.

a. Because an authoritative interpretation of Article XI, Section 3 would not be determinative for State Actors, abstention was not appropriate.

Of the four independent bases for affirming the District Court's ruling, only one directly relates to the proper interpretation of Article XI, Section 3. Because questions of state law would not be determinative of this case for State Actors, the District Court properly declined to abstain from this case under the *Pullman* doctrine or to certify a question to the Tennessee Supreme Court. *See generally Railroad Comm'n of Tx. v. Pullman Co.*, 312 U.S. 496 (1941).

The basic premise of *Pullman* abstention is that "where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain until a state court has addressed the state questions." *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999) (emphasis added). This Court

has "established two requirements for Pullman abstention: [1] an unclear state law and [2] the likelihood that a clarification of the state law would obviate the necessity of deciding the federal claim question." *Slyman v. City of Willoughby*, 134 F.3d 372 (6th Cir. 1998) (table) (citing *Tyler v. Collins*, 709 F.2d 1106, 1108 (6th Cir. 1983)); *accord Accident Fund v. Baerwaldt*, 767 F.2d 919 (6th Cir. 1985). Because State Actors violated Appellee-Voters' rights regardless of whether their actions complied with or defied Article XI, Section 3, a clarification of state law would not obviate Appellee-Voters' federal claims. Further, *Snow*'s observation that Article XI, Section 3 requires "obtaining voter ratification of a majority of those voting for [governor]" eliminates any need for a clarification of state law because the Tennessee Supreme Court has already spoken. 527 S.W.2d at 61. Accordingly, the Court properly exercised its discretion not to abstain under *Pullman*.[21]

[21] Certifying the interpretation of Article XI, Section 3 to the Tennessee Supreme Court is similarly improper. As the Tennessee Supreme Court Rules explain, certification is appropriate when "the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee." Tenn. S. Ct. R. 23, § 1 (emphasis added). The Tennessee Supreme Court cannot answer any certified question that would determinatively resolve the Fourteenth Amendment issues in this case in favor of State Actors.

b. State Actors' unprecedented state-court lawsuit against Appellee-Voters was improper and is not preclusive.

Ten months after this § 1983 lawsuit was filed, two months after the District Court denied State Actors' motions to dismiss, and only six months before the trial date in this case, State Actors sued Appellee-Voters—eight private individuals who have no special obligations or duties under Article XI, Section 3 separate from any other Tennessee voters—in Williamson County, Tennessee Chancery Court *serving them at their individual homes without any notice to their counsel*. State Actors' decision to file in Williamson County Chancery Court—a venue unavailable to Voter-Appellees[22] and one of the counties where Amendment 1 passed by the highest margin—was a blatant exercise in forum shopping. The District Court implicitly recognized as much, acerbically observing "[f]or unexplained reasons, that case…was filed in the Williamson County Chancery Court.…" Findings and Conclusions at 24, R.119, PageID#3035 (emphasis added).

The state-court lawsuit ostensibly sought a declaration[23] regarding the meaning of Article XI, Section 3 in response to the purported uncertainty this lawsuit

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[22] Because Davidson County is the official residence of both the Secretary of State and the Coordinator of Election—the state court plaintiffs who sued in their official capacities—Appellee-Voters would have had to file in Davidson County had they attempted to sue in state court. *See* Tenn. Code Ann. § 4-4-104.

[23] This declaration is not binding on all Tennessee voters because Appellee-Voters were sued in their individual capacities, not a representative capacity. *See* Tenn. Code. Ann. § 29-14-107(a) ("[N]o declaration shall prejudice the rights of

caused and premised standing on Secretary Hargett's and Coordinator Goins's future needs to "correctly perform their official duties [including] administering elections and interpreting the election laws" to be ready for the 2018 elections. In actuality, this lawsuit represented State Actors circumventing the District Court's denial of their motion to dismiss and seeking a cooperative state venue to attempt to stymie Appellee-Voters' federal civil rights lawsuit. This Court should give no credence to the state court lawsuit for at least two reasons.

i. State Actors cannot use state court process to interfere with a Section 1983 lawsuit under federal law.

Civil rights actions under 42 U.S.C. § 1983 serve a vital public purpose and "vindicate[e] a policy that Congress considered of the highest importance." *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (citations omitted). "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey v. Piphus*, 435 U.S. 247, 254-257 (1978)); *see also, e.g., Nabozny v. NCS Pearson, Inc.*, 270 F. Supp. 2d 1201, 1204 (D. Nev. 2003) ("The essence of [§ 1983] is to authorize a court

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persons not parties to the proceedings."); *see also, e.g., Commercial Cas. Ins. Co. v. Tri-State Transit Co. of La.*, 146 S.W.2d 135, 136 (Tenn. 1941); *Chattanooga Firemen's & Policemen's Ins. & Pension Fund v. City of Chattanooga*, 1996 WL 465535, at *1 (Tenn. Ct. App. Aug. 16, 1996).

to grant relief when a party's federally protected rights have been violated by a state or local official or other person who acted under color of state law.").

As this Court explained, "§ 1983 is one of the most important vehicles for the vindication of constitutional and statutory rights and to insure that persons acting under of the color of state law comply with constitutional mandates." *Harrison v. Ash*, 539 F.3d 510, 523 (6th Cir. 2008). In light of this importance and to preserve the strength of § 1983, the Supreme Court has rejected imposing state-level prerequisites because such a burden is "inconsistent in both design and effect with the compensatory aims of the federal civil rights laws." *Felder v. Casey*, 487 U.S. 131, 141 (1988). In the same way, courts "prohibit state law from imposing additional prerequisites to § 1983 suits." *Wyant v. City of Lynnwood*, 621 F. Supp. 2d 1108, 1111 (W.D. Wash. 2008).

Nonetheless, State Actors attempted to do just that with their state court lawsuit.[24] By filing a declaratory judgment action against only Appellee-Voters in a

[24] Both State Actors and the state court relied on *Buntin v. Crowder*, 118 S.W.2d 221 (Tenn. 1938) as a basis for standing, justiciability, and the premise that Appellee-Voters were proper defendants. In *Buntin*, a state official challenged the constitutionality of a private act; here, however, State Actors were not seeking a declaration regarding Article XI, Section 3's constitutionality and instead sought an advisory interpretation. Both the scope of private act in question (pertaining to the licensing and taxation of a county's fur trade) and the defendants (fur dealers in that county) in *Buntin* were extremely discrete. In contrast, Article XI, Section 3 is a constitutional provision of general applicability, and Appellee-Voters are no different other voters. Concluding Appellee-Voters' federal lawsuit differentiated them creates dangerous precedent that anyone who files a federal § 1983 action

shopped-for forum, rushing that lawsuit while simultaneously seeking to delay this one, and now (erroneously) asserting preclusion, State Actors have effectively attempted to impose a prerequisite—or at minimum—a co-requisite burden that Appellee-Voters defend themselves in state court before/while they attempt to vindicate their federal constitutional rights under § 1983. This additional burden of Appellee-Voters having to litigate in another forum against a lawsuit premised on "uncertainty" created by a federal civil rights lawsuit is antithetical to § 1983's purpose and design, and itself represents a violation of § 1983 by State Actors acting under the color of law to deprive Appellee-Voters' additional constitutional right to redress. *See Felder*, 487 U.S. at 141.

ii. The state court lawsuit has no effect on this Section 1983 lawsuit under state preclusion law.

Contrary to State Actors' assertion, the state court's ruling from this improper parallel proceeding is not preclusive to Appellee-Voters' claim that State Actors' failure to follow the plain language of Article XI, Section 3—and it certainly has no bearing on the first three grounds for affirmance. Both collateral estoppel (issue preclusion) and res judicata (claim preclusion) are affirmative defenses and it is "incumbent on the defendant to plead and prove such a defense." *Taylor v. Sturgell*,

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immediately opens themselves to having to defend against a parallel state-court action from the very same officials they sued in federal court or risk fighting preclusion.

553 U.S. 880, 907 (2008) (citations omitted). Because State Actors did not raise preclusion as a defense below, they have waived it and cannot do so now.

Although there are "particular circumstances," *Lesher v. Lavrich*, 784 F.2d 193, 195 (6th Cir. 1986), where courts will overlook this waiver, this case does not present such a circumstance. State Actors cite *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 418-19 (6th Cir. 2012), for the proposition that they can now assert preclusion. *Gooch* arose out of a radically different circumstances and addressed a "serpentine" class action that was certified, decertified, and eventually recertified. *Id.* at 411-14. But before *Gooch* was recertified, a parallel nation-wide class action, *Runyan*, settled. On the appeal of *Gooch*'s recertification, this Court considered preclusion—even though it had not been pled as an affirmative defense—and ultimately decertified *Gooch* "because the *Runyan* settlement precludes the claims of most class members." *Id.* at 417. This case and State Actors' improper state declaratory judgment action (a case initiated many months after this case and then rushed by State Actors and the state court so as to try to beat the District Court to judgment) is such a far cry from *Gooch*'s circumstances (where a long-dormant class action was recertified shortly after a parallel action was finally settled) that *Gooch*'s holding permitting the defendant to assert preclusion is inapposite.

Nonetheless, and assuming arguendo that collateral estoppel were an available defense, State Actors cannot establish the five elements for the state-court decision regarding Article XI, Section 3's meaning to collaterally estop this Court:

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

Mullins v. State, 294 S.W.3d 529, 535 (Tenn. 2009); *see also Anderson v. City of Blue Ash*, 798 F.3d 338, 350 (6th Cir. 2015) (explaining that state law governs the preclusive effect of state court's decisions in federal court actions).

First, the state court proceeding was not an earlier proceeding but, in fact, arose almost a year after this action. Appellee-Voters initiated this lawsuit on November 7, 2014. Complaint, R.1, PageID#1. State Actors did not sue Appellee-Voters in state court until September 1, 2015, and the purported jurisdiction for the lawsuit was explicitly connected to Appellee-Voters' having already filed this lawsuit. *See, e.g.*, Appellants' Br. at A-8.

Second, State Actors offer no record to fulfill their burden of proof that the issue to be precluded was actually raised, litigated, and decided on the merits in the "earlier proceeding." The reality is that State Actors, acting under the color of state

law and represented by the Attorney General, sought to rush a judgment in the state court proceeding without actually litigating and deciding the issue on the merits.[25] Even more egregious, however, was the state court's "clarification" entered after the District Court's opinion. On May 19, 2016—nearly a month after the District Court entered its Findings and Conclusions—the state court held a hearing on a motion to intervene. During this hearing, the state court expressed a great deal of incredulity regarding the District Court's ruling. In denying the motion to intervene, the state court made a specific "clarification" (subsequently memorialized in an Order entered on May 23, 2016) that its summary judgment ruling was not merely prospective—despite that being the premise for State Actors' standing to bring the case, the basis for a live case/controversy, and the reason that lawsuit was not either a compulsory counterclaim under Fed. R. Civ. P. 13(a) or an impermissible corollary action under Tennessee's Declaratory Judgment Act—but was, in fact, retrospective so that it applied to the November 4, 2014 election. The state court then purported to hold that Amendment 1 had been approved and ratified as required by Article XI, Section 3.

This "clarification" dramatically reframed the entire nature of the state court case and went beyond the issue presented by the declaratory judgment action and

[25] State Actors explicitly characterized their quickly moving for summary judgment in the state court as a part of a race to judgment. Yet even with this acknowledgment, State Actors lobbied the District Court, in scheduling the bench trial format in this case, to adjust the long-set trial date—a request the District Court accommodated. *See* Pretrial Conference Transcript at 24:2-7, R.108, PageID#2146.

upon which State Actors moved for summary judgment. Accordingly, State Actors cannot establish the second element for collateral estoppel.

Third, the state court did not issue a final judgment until after the District Court issued its ruling from which State Actors have appealed. When the District Court issued its April 22, 2016 order now on appeal or even when State Actors initiated this appeal on April 26, 2016, there was no state-court final order. *Accord* Appellants' Br. at 28. Rather, the state court's order did not become final until several months later, on August 10, 2016.

Finally, because Appellee-Voters were not given a full and fair opportunity in the state court proceeding, collateral estoppel cannot apply. For example, Appellee-Voters were denied the opportunity for *any* discovery in the state court proceeding. After the state court denied Appellee-Voter's Motion to Stay or Dismiss, Appellee-Voters answered State Actors' state-court complaint. Two days later, State Actors filed a motion for summary judgment in the state court case that featured, among other things, over 400 pages of materials—the vast majority of which had never been produced in the federal case and none of which had been produced in the state proceeding—along with 27 pages of affidavit testimony from four individuals who were never deposed in any case. Shortly thereafter, Appellee-Voters propounded discovery on State Actors, requested an opportunity to depose the affiants, and then filed a Motion to Enter Scheduling Order, Reset Hearing Date, and Amend Briefing

Schedule in the state court case both because discovery was still outstanding and because the state court had mistakenly given Appellee-Voters fewer than thirty days to respond as required by Tennessee law. The state court refused to "enter a new scheduling order or permit the delay of the hearing on [State Actors'] for Summary Judgment in order to allow Defendants to engage in additional discovery."

That ruling, however, belied the fact that there had not been any discovery in the state court case. Indeed, State Actors never responded to the discovery served on them and the state court did not address the Appellee-Voters' pending motion to compel until after ruling on State Actors' motion for summary judgment, at which time the state court denied it as moot because it had already granted summary judgment. As such, the state court based its summary judgment ruling on an untested and selectively furnished factual record provided by State Actors. Appellee-Voters were not given a full or fair opportunity to test this evidence or take discovery from State Actors or their employees—despite those persons being the ones possessing essentially all of the potentially relevant information and materials.

Accordingly, four of the five necessary factors for collateral estoppel are not satisfied, so that preclusion is inapplicable. *See Mullins*, 294 S.W.3d at 535. Moreover, even if preclusion were not waived and these factors were satisfied, the Court should nonetheless decline to apply collateral estoppel. Preclusion is not rigidly applied and may be qualified, relaxed, or rejected when—as in this case—its

application would violate equity and good conscience, contravene an overriding public policy, or result in manifest injustice. *See Napier v. Dir.*, 999 F.2d 1032, 1037 (6th Cir. 1993); *United States v. Sandoz Pharm. Corp.*, 894 F.2d 825, 828 (6th Cir. 1990).

VI. The correct remedy in this case is either to void the Amendment 1 vote or, as the District Court did, to order a recount pursuant to the plain language of Article XI, Section 3.

There are four independent bases for affirming the District Court's ruling that their constitutional rights were violated—(1) State Actors' ratification method violated Appellee-Voters' equal protection rights; (2) State Actors' ratification method violated Appellee-Voters' due process rights by creating a fundamentally unfair voting system; (3) State Actors' ratification method violated Appellee-Voters' due process rights by compelling them to vote; and (4) State Actor's ratification method defied the plain language of Article XI, Section 3 and thereby violated Appellee-Voters' due process rights. Should the Court affirm on this fourth basis, then it should affirm the District Court's ordering a recount. But for any of these first three bases for affirmance, the Court should remand with instructions to void the results of the vote on Amendment 1. *See United States v. Mich.*, 940 F.2d 143, 151-52 (6th Cir. 1991) (explaining that the Court can exercise plenary review to "allow disposition of all matters appropriately raised by the record, including entry of final judgment"); *Brown & Williamson Tobacco Corp. v. FTC*, 717 F.2d 963, 964 (6th

Cir. 1983) (denying petition for rehearing en banc) ("We have jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the Court of Appeals without further trial court development."); *see also Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1060 (6th Cir. 1999), *overruled on other grounds by Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157 (2003).

In fashioning remedies for voting rights violations, courts weigh the relevant equitable considerations. *See Gjersten v. Bd. of Election Comm'rs*, 791 F.2d 472, 478 (7th Cir. 1986). The case law demonstrates that the equities militate toward voiding the vote on Amendment 1. For example, the Southern District of New York—as affirmed by the Second Circuit—has explained that an election result should be set aside if the constitutional violations therein "could very well have modified the outcome of the election." *See Coalition for Educ. v. Bd. of Elections*, 370 F. Supp. 42, 57 (S.D.N.Y. 1974), *aff'd* 495 F.2d 1090 (2d Cir. 1974). Similarly, the Seventh Circuit has condoned voiding an election where there is a "reasonable possibility" that the unconstitutional factors "affected the outcome of the election." *Smith v. Cherry*, 489 F.2d 1098, 1103 (7th Cir. 1973). As indicated by the election results, State Actors' unconstitutional counting scheme both had a "reasonable possibility" of and "could very well" have affected the outcome of the vote on Amendment 1.

The election results also demonstrate that Tennessee's own "incurably uncertain" standard justifies setting aside the results of the vote on Amendment 1. As this Court has recognized "[t]his 'incurably uncertain' standard can be found in Tennessee Supreme Court opinions dating back 140 years." *Kurita v. State Primary Bd. of Tenn. Dem. Party*, No. 3:08-0948, 2008 WL 4601574, at *16 (M.D. Tenn. Oct. 14, 2008) *aff'd* 472 F. App'x 398 (6th Cir. 2012) (citing *Barry v. Lauck*, 45 Tenn. 588 (1868)). Under this standard, courts may "void elections upon a sufficient quantum of proof that fraud or illegality so permeated the conduct of the election as to render it incurably uncertain, even though it cannot be shown to a mathematical certainty that the result might have been different." *Emery v. Robertson County Election Comm'n*, 586 S.W.2d 103, 109 (Tenn. 1979) (emphasis added); *see also Kurita*, 2008 WL 4601574, at *16.

In the face of these equities justifying setting aside the results of the vote on Amendment 1, State Actors' only defense is the suggestion peppered throughout their brief that Appellee-Voters are not entitled relief because they did not sue until after the November 4, 2014 election. This argument was neither asserted in State-Actors' answer nor advanced in the pretrial order and thus was waived. Nonetheless, it is also wholly misplaced.

First, before the election, John Jay Hooker, through an open letter addressed and sent to State Actors, put them on notice about the very issues regarding their

counting scheme that Appellee-Voters asserted here. Findings and Conclusions at ¶24 n.5, R.119, PageID#3026; *see also, e.g.*, TN Press Release Center, *Hooker Seeks Clarification on TN Constitutional Amendment Voting Process*, TN REPORT, Oct. 28, 2014, http://tnreport.com/2014/10/28/hooker-seeks-clarity-tn-constitutional-amendment-voting-process/ (last visited November 7, 2016). State Actors were even asked to participate in a declaratory judgment action but they declined to do so. Moreover, given State Actors' decision in response to Mr. Hooker's letter, Appellee-Voters could not know exactly how they were going to apply Article XI, Section 3 until they did so. State Actors' still-shifting interpretation of Article XI, Section 3 and explanation of how they administered the election over the course of this lawsuit emphasizes this point.

Second, State Actors did not actually tabulate the vote on Amendment 1 until after polls closed on November 4, 2014. Given how robustly and persistently State Actors contested Appellee-Voters' standing in the court below (arguing that Appellee-Voters lacked a concrete injury or only asserted generalized grievances), Appellee-Voters can only imagine that State Actors would have done so had Appellee-Voters attempted to file suit before the election. Because State Actors' actual constitutional violations primarily occurred both before, during, and after the election, Appellee-Voters suffered could not fully challenge State Actors' tabulation method beforehand.

Finally, State Actors' implication that Appellee-Voters should have filed suit before the election results were tabulated[26] present a "heads-I-win-tails-you-lose" scenario. Below, State Actors argued Appellee-Voters lacked standing. Now, State Actors argue Appellee-Voters should have sued earlier. Taking both of State Actors' arguments together would prevent citizens injured by unconstitutional election processes from obtaining relief because those citizens would lack standing to challenge the election process beforehand and would be barred from relief as "wily plaintiffs" if they tried to sue after the election.

Given that Appellee-Voters' constitutional rights were violated and that the equitable considerations justify—if not demand—the election be set aside, Appellee-Voters respectfully request that this Court, depending on its grounds for affirmance,

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[26] Although a few out-of-circuit cases indicate that, in some instances, courts will not award relief to plaintiffs who gamble on a favorable election result and then sue once their side loses, *see, e.g.*, *Hendon v. N. Car. State Bd. of Elec.*, 710 F.2d 177, 182 (4th Cir. 1983) (citing *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)), this case is not such a situation. Before the occurrences of the November 4, 2014 election, Appellee-Voters' claims were not all accrued or justiciable in the same manner as after the election. And these anti-gamesmanship cases recognize that not every election-process challenge can be brought beforehand. For example, the Fifth Circuit has contrasted the duty to challenge pre-election constitutional violations (*e.g.*, race-based registration procedures) before the election occurs with violations—like the ones here—that do not actually occur until during/after the election so that post-election challenges are appropriate. *See Bell v. Southwell*, 376 F.2d 659, 663 (5th Cir. 1967) (explaining that when violations do not actually occur until election day, voters need not challenge beforehand on the mere anticipation that their rights could be violated—even where there were pre-election indications that those voters' right could be violated).

either void the results of the vote on Amendment 1[27] or affirm the District Court's order requiring a recount.

[27] The Court's voiding the vote on Amendment 1 would not compel the same for the other amendments that were on November 4 ballot. These amendments are not before the Court in this, or any, case. But even if they were, the same equitable considerations that warrant voiding the vote on Amendment 1 are not present.

CONCLUSION

For the foregoing reasons, Appellee-Voters respectfully request that this Court affirm the findings and conclusions of the District Court, either affirm the District Court's order regarding a recount or order the District Court to void the election, and award any other relief it finds appropriate.

Respectfully submitted,

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November 10, 2016

ADDENDUM

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 6th Cir. R. 32(a), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B):

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,636 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 6th Cir. R. 32(b)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Word 2013 in a proportionally-spaced typeface, 14-point Times New Roman.

Dated: November 10, 2016

/s/ *William L. Harbison*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on November 10, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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DESIGNATION OF RELEVANT COURT DOCUMENTS

George, et al. v. Haslam, et al., No. 3:14-cv-02182 (M.D. Tenn.)

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62	Memorandum Accompanying Order Denying Defendants' Motions to Dismiss	764-785
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89-1	Designated Transcript of Deposition of Mark Goins in his individual capacity, as the Fed. R. Civ. P. 30(b)(6) designee for the Department of State of Tennessee, and as Coordinator of Elections, Vol. 1	1262-1316
89-2	Designated Transcript of Deposition of Mark Goins in his individual capacity, as the Fed. R. Civ. P. 30(b)(6) designee for the Department of State of Tennessee, and as Coordinator of Elections, Vol. 2	1326-1357

89-3	Designated Transcript of Deposition of Mark Goins in his individual capacity, as the Fed. R. Civ. P. 30(b)(6) designee for the Department of State of Tennessee, and as Coordinator of Elections, Vol. 3	1364-1399
89-5	Designated Transcript of Deposition of Tre Hargett	1428-1462
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118	Order	3011-3012
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135	Transcript of Bench Trial	3197-3262

ARTICLE XI, SECTION 3 OF THE TENNESSEE CONSTITUTION

Section 3. Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals with the yeas and nays thereon, and referred to the General Assembly then next to be chosen; and shall be published six months previous to the time of making such choice; and if in the General Assembly then next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people at the next general election in which a governor is to be chosen. And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the state voting for governor, voting in their favor, such amendment or amendments shall become a part of this Constitution. When any amendment or amendments to the Constitution shall be proposed in pursuance of the foregoing provisions the same shall at each of said sessions be read three times on three several days in each house.

The Legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform or abolish any specified part or parts of it; and when, upon such submission, a majority of all the voters voting upon the proposal sub mitted shall approve the proposal to call a convention, the delegates to such convention shall be chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and manner as shall be prescribed. No change in, or amendment to, this Constitution proposed by such convention shall become effective, unless within the limitations of the call of the convention, and unless approved and ratified by a majority of the qualified voters voting separately on such change or amendment at an election to be held in such manner and on such date as may be fixed by the convention. No such convention shall be held oftener than once in six years.