

**IN THE COURT OF APPEALS OF TENNESSEE,**  
**WESTERN DIVISION**

**DAVID G. MILLS**  
Appellant,

vs.

**SHELBY COUNTY  
ELECTION  
COMMISSION,**  
Appellee,

No. **W2005-02883-  
COA-R3-CV**

and

**PAUL G. SUMMERS,  
ATTORNEY GENERAL,**  
Appellee

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**BRIEF OF THE APPELLANT**

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Respectfully submitted,

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## **STATEMENT OF THE ISSUES**

- I. Whether the Chancery Court erred in Dismissing Appellant's Cause of Action if the Dismissal was based on the Chancellor's conclusion that Appellant did not have standing to sue.
  
- II. Whether the Chancery Court erred in Dismissing Appellant's Cause of Action if the Dismissal was based on the Chancellor's conclusion that Appellant did not state a claim upon which relief could be granted.

## **STATEMENT OF THE CASE**

This is a voting rights case. The Appellant, a Shelby County attorney, alleged in both his Original Complaint and in his Amended Complaint that, as a citizen voter of Shelby County, he was being denied equal voting rights when compared to other citizens of Tennessee. It is his general allegation that citizens of other Tennessee counties are permitted to vote on paper or have paper records reflecting their votes while he and the other citizen voters of Shelby County do not vote on paper nor do they have a paper record of their vote. Appellant alleges that the inability to have a paper record of his vote diminishes his voting rights when compared with other citizens of Tennessee who get a paper ballot or record. Appellant alleges there is a disparity because without a paper ballot or paper record of his vote, there can be no meaningful recount in a questionable election outcome, nor can there be a meaningful election contest if one becomes necessary. Paper ballots or a paper record of the vote provide both.

Appellant's Original Complaint and his Amended Complaint allege that his inability to vote on paper, or have a paper record of his vote, violate both Article I, § 5 and Article IV, § 1 of the Tennessee Constitution. He asks for a declaration that the Shelby County Election Commission's decision to require the voters of Shelby County to vote on a system that does not produce a paper ballot or a paper record of his vote constitutes an act in violation of the Tennessee Constitution and makes a further request that the Shelby County Election Commission be ordered to cease and desist from this practice.

The Appellee, the Intervening Tennessee Attorney General and Reporter, and the Appellee, the Shelby County Election Commission were served with process but never answered, both electing instead, to file Motions to Dismiss.

On December 2, 2005, the Chancellor in this cause heard both Motions to Dismiss the Appellant's Original Complaint and Amended Complaint. Both Motions to Dismiss alleged that the Appellant lacked standing to sue and that his Original and Amended Complaints failed to state a claim upon which relief could be granted. The Chancellor orally granted both Motions to Dismiss on the day of the hearing but made no mention of whether he decided that Appellant lacked standing to sue, or whether he decided that Appellant failed to state a claim upon which relief could be granted, or whether he decided that Appellant failed on both grounds.

On December 9, 2005, the Chancellor signed a Final Order of Dismissal in this cause. The grounds for dismissal were not stated.

The Appellant timely gave notice of his intent to appeal the Final Order of Dismissal of his cause.

The Appellant then filed an application to have the Supreme Court assume jurisdiction pursuant to T.C.A. § 16-3-201 because Appellant believed this case to be one of unusual public importance, to be one in which there is a special need for an expedited decision, and to be one which involves issues of Tennessee Constitutional law.

The Supreme Court rejected Appellant's application to assume jurisdiction pursuant to T.C.A. § 16-3-201 and the case is now properly before this Court.

## **STATEMENT OF FACTS**

Since this case was dismissed without either Appellee ever filing answers, there really are no definitive facts.

However, Appellant has argued numerous times as the major basis of his complaint that while he does not get to vote on paper ballots or have a paper record of his vote that other citizens of other Tennessee counties vote on paper ballots or have paper records of their votes. Neither the Shelby County Election Commission, nor the Attorney General, has ever denied these allegations in any of the motions or arguments that have been filed by them.

Moreover, Appellant has also alleged many times that the electronic voting systems used in Shelby County are operated with proprietary software, which software is owned by a private corporation that zealously protects its software as a trade secret;. Appellant has alleged many times that the trade secret claims of the software owners make independent recounting and election contests nearly impossible. Appellant has alleged many times that the trade secret claims of the software owners usurp the governmental control of elections and de facto privatize it. None of these claims have ever been denied in any of the motions or arguments of the Appellees though numerous opportunities to do so existed.

These really are about the only facts that have any bearing on the case. It was Appellant's intention to move for a judgment on the pleadings had these facts been admitted in an answer.

# **ARGUMENT**

## **I. INTRODUCTION AND BACKGROUND**

The Appellant's lawsuit is in principle, the fraternal twin of **Brown vs. Board of Education**, 347 U.S. 483 (1954), the landmark case that abolished separate and unequal educational systems. In **Brown**, the Appellant alleged, and the court agreed, that separate black and white educational systems did not produce equal educational systems as required by the equal protection clause of the Fourteenth Amendment to the United States Constitution. Similarly, in this suit, the Appellant alleges that the paper and paperless voting systems now in existence in Tennessee, do not produce "***equal***" voting systems as required by Article 1 § 5 of the Tennessee Constitution and that voting rights are substantially reduced when the right to vote on paper, or the right to have a paper record, is taken away. The legal principals of inequality are the same.

This case is also a legal derivative of **Bush v. Gore**, 351 U.S. 98 (2000), and Appellant used the equal protection principles espoused in **Bush** as a template when drafting both his Original Complaint and Amended Complaint. Subsequent to the dismissal of Appellant's action by the Chancery Court, another case, which may well become another landmark case on the issue of voting rights, was handed down by the Sixth Circuit on April 21, 2006, **Stewart, et al v. Blackwell, et al**, <http://www.ca6.uscourts.gov/opinions.pdf/06a0143p-06.pdf>, a copy of which is attached to this brief as Exhibit 1.

Both *Bush* and *Stewart* make it clear that voting processes and systems, which demonstrably treat voters unequally within the same state or jurisdiction, violate the equal protection clause of the Fourteenth Amendment of the United States Constitution. *Bush* stands for the proposition that the recounting of ballots of a particular voting system must be uniform and equal. A dangling chad cannot be counted as a vote in one precinct when only one of its four corners is attached, while in another precinct be counted as a vote when two or three of its corners are attached. *Bush* mandates a standard of counting, which treats uniformly, all attempts to count an imperfectly marked or punched ballot.

Similarly, *Stewart* stands for the proposition that voters of the same jurisdiction must not be forced to vote on different types of equipment that have substantially different abilities to record a vote. The *Stewart* court made the following statement concerning the issue in question:

“voters in punch card counties are approximately four times as likely not to have their votes counted as a voter using reliable electronic voting equipment. In some counties specific precincts encountered more severe problems with residual voting.” *Stewart* at 4.

There is now case law that mandates the standardization of the counting and recounting process and case law that standardizes the voting technology. What remains to be determined or clarified with respect to voting rights law is case law which standardizes the usage or non-usage of paper based voting systems. In the instant case, Appellant asks this court to take the national stage and lead on the issue of the inequality of paper versus paperless voting systems.

This court should make it clear that voting on paper based systems versus voting on paperless systems produce an inherent inequality when it comes to validating votes, recounting votes or when it comes to an election contest, and that such inequality does not pass constitutional muster. This will require the court to review the Tennessee Supreme Court's holding in Mooney v. Phillips, 118 S.W.2d 224 (1938), which permitted paperless voting and has allowed for both paper systems and paperless systems of voting to co-exist in Tennessee ever since.

To be an "equal" voting system, the system must be one where the accuracy of the count is nearly the same regardless of the technology used (Stewart). It must also be one where the ability to recount is essentially the same with essentially the same procedures (Bush). The ideal voting system would use extremely accurate technologies with essentially no demonstrable difference in accuracy, and through the use of paper, be one that is extremely capable of validating the count, be one which is capable of producing recounts virtually the same way everywhere the system is used, and be one that produces a simple but highly valid election contest where necessary. A pre-printed paper ballot, hand marked and verified by the voter, which is both capable of being counted by electronic scanner and counted by hand, seems to be the most ideal system for both accuracy, recountability, and for use in election contests.

Appellant chose to base his claims solely on the Tennessee Constitution which guarantees free and equal elections, but believes that the cases under the equal protection clause of the Fourteenth Amendment of the U.S. Constitution should be instructive, and even precedential, on what constitutes "equal" elections under the Tennessee

Constitution. The Appellant also asserts that federal voting rights cases should also be instructive, and even precedential, on the issue of standing.

This lawsuit, brought under the Tennessee Declaratory Judgment statutes, initially seeks to have answered the question of whether voting by paper ballot or with a paper record of each individual vote is required in Tennessee by the Tennessee Constitution. If voting by paper ballot is the Tennessee Constitutional standard, as Appellant alleges, no system of paperless balloting, even if uniformly mandated across the entire state, would pass Constitutional muster. Alternatively, if the Constitutional standard does not require paper ballots, then the Constitutional requirement that all voting be equal would still bar any system of inequality. Appellant claims that there is an inherent inequality between voting on a tangible paper ballot versus voting on any paperless system, whether the paperless system is mechanical or electronic. Additionally, Appellant avers that a court finding of any substantial inequality between systems must force the Court to choose one system over the other to produce uniform equality. Appellant further claims that paper systems guarantee much more voting rights, and since paper systems guarantee more rights, the Appellant alleges that paper systems are the systems that should be mandated.

Finally, Appellant alleges that if the court must chose between systems, it should choose the system which best guarantees that the election process remains a governmental function as opposed to a privately run process. Appellant avers that the system that best guarantees that suffrage remains a governmental function is a paper system; the system that most likely leads to privatization is a paperless one. The electronic paperless systems are operated by software, the owners of which, claim to be

proprietary and a trade secret. It is the proprietary and trade secret aspects of the software which basically cause the usurpation of the governmental process.

For the Appellees to prevail on the merits of this case, the court must be convinced that the Tennessee Constitution does: (1) not mandate the usage of paper ballots or a paper record and (2) that voting with paper and that voting paperless are substantially equal in the voting rights they bestow upon voters throughout the state. Should the court not be convinced of these two things, it should grant Appellant the relief he seeks.

## **II. THE TENNESSEE CONSTITUTION, THE TENNESSEE ELECTION CODE, AND APPELLANT'S TENNESSEE CONSTITUTIONAL CLAIMS**

Article 1 § 5 of the Tennessee Constitution requires that all elections be “free and *equal*.” Article IV § 1 states that the General Assembly shall have the power to secure the “*purity* of the *ballot box*.”

Interestingly, the General Assembly, when it enacted the Tennessee Election Code, in its preamble to the code, TCA § 2-1-102, as it tracked the language of the Constitution, it left out two important words from the Constitution: the word “*equal*,” and the word “*box*.” Instead of using the words “*equal*” and “*box*” the General Assembly used these: “The freedom and purity of the ballot are secured.”

Given these omissions in the opening language of the Election Code, it is apparent that the legislature recognized a potential Constitutional problem with paperless voting;

and it also appears that it drafted legislation hoping to hide the Constitutional problem that paperless voting created.

Appellant also asserts that the words “*purity of the ballot box*” set the Constitutional standard for the voting system. Webster’s Unabridged English Dictionary (2001) defines *ballot box* as “a receptacle for voter’s ballots.” Webster’s defines *ballot* as “a slip or sheet of paper or cardboard or the like on which a voter marks his or her vote.” Webster’s defines *purity* as “the condition or quality of being pure; freedom from anything that debases, contaminates or pollutes, etc; freedom from any admixture or modifying addition.” Appellant asserts that a paperless system debases, contaminates, pollutes, and both adds to and subtracts from the system contemplated by the Tennessee Constitution.

Moreover, Appellate asserts that word “*equal*” in Article 1 § 5 of the Tennessee Constitution means that all voting systems must substantially guarantee equal voting rights, and essentially the same equal protection of voting rights guaranteed under the Fourteenth Amendment of the U.S. Constitution and the case law construing it.

Appellate asserts that the Constitutional standard set forth in the words “*purity of the ballot box*” is a two part voting system, a dual system: there is a paper ballot, and there is its depository, its ballot box.

Appellant also avers that the General Assembly, when it enacted the present legislative scheme, retained the Constitutional system of duality, but it also impermissibly created a system of singularity when the General Assembly permitted the functions of voting to be integrated into a single paperless system. Both systems now exist in Tennessee.

Appellant avers that when the purity of a voting system of duality is reduced to a voting system of singularity, many important legal rights are lost in the process and significant inequality in voting rights occurs.

To the Appellant, the losses of legal voting rights are stark. Appellant asserts that a voter who, like himself, votes paperless loses:

- (1) the right to an individual ballot, a tangible ballot that the voter can inspect, verify, and on which the voter can observe the recording of the vote;
- (2) the right to have a poll worker inspect the individual ballot to decipher voter intent;
- (3) the right to have poll workers count individual ballots either mechanically or electronically or , by hand, or by both means;
- (4) the right to have poll workers do statistical checks counting every “nth” (pick a number) individual ballot;
- (5) the right to have a meaningful recount due to the loss of the ability to recount ballots individually;
- (6) the right to have a meaningful election contest due to the loss of the ability to count or recount ballots individually;
- (7) the right in Presidential elections to have a recount or an election contest before the “federal clock” runs out, because of the loss of the ability to recount ballots timely and efficiently or because of the expertise required in proving an election’s invalidity;
- (8) the right to have the government run the election process rather than the private sector, which de facto occurs when the voting equipment can only be operated by the private sector; and
- (9) the right to vote at all, if too few machines are available, or if the machines malfunction, or if a power outage occurs.

Appellant asserts that the loss of these voting rights to himself, and to the other voters of Shelby County, are not hypothetical losses, are not conjectural losses, but that they are in fact very real.

### III. STANDING TO SUE

In the fourth paragraph of Appellant's Complaint, Appellant stated the following:  
The Appellant has standing to bring this action pursuant to TCA § 29 –14-103.

TCA § 29 –14-103 states as follows:

*“Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.”* (Emphasis added).

Despite this statute being invoked in the third paragraph of Appellant's Complaint, neither of the Appellees even mentioned it in their Motions to Dismiss. The language of this statute is global in its scope. It begins with the words, “Any person.” It clearly pertains to persons who think their rights have been affected by a statute or statutes. It could not be any more plain. Appellant would aver that the failure to mention or address this statute, which was so clearly pled, constituted less than full candor with the Chancery Court. The failure to address or mention this statute on standing should have been enough in and of itself for the Chancery Court to have determined that the Appellant had standing.

However, to convince the court further, numerous voting rights cases have held that similarly situated Plaintiffs have had standing to sue. Appellant would first turn the court's attention to the landmark case of voting rights by the United States Supreme Court, *Baker v. Carr*, 369 U.S. 186 (1962). *Baker* is often referred to as the “one man, one vote” case. Coincidentally, the case's origins are in Tennessee; the case involved a

constitutional plea for reapportionment of representatives due to population changes. The claim essentially was that population shifts had “effect[ed] a gross disproportion of representation to voting population.” (Id. at 207). The court explained the claim further: “The injury which appellants assert is that this classification *disfavors the voters in the counties in which they reside placing them in a position of constitutionally unjustifiable inequality.*” (Id at 207-208). (Emphasis added). One of the primary questions the court addressed in Baker was whether the Plaintiffs had standing to sue based upon these claims. This is what the Baker court said, relying upon the previously decided case of Colegrove v. Green, 328 U.S. 549 (1946), which “squarely held that *voters who allege facts showing disadvantage to themselves as individuals have standing to sue.*” (Baker at 206). (Emphasis added).

The factual parallels between Baker and the instant case are noteworthy. In both cases, voters have alleged that voters within their particular counties have been disadvantaged when compared to voters of other counties. The principles of inequality are the same. Moreover, Baker is only one of many cases that speak to inequality of voting based upon geographics. A year after Baker, the United States Supreme Court in Gray v. Sanders, 372 U.S. 368 (1963) again decided a voting rights case based on apportionment, making the following comment:

The District Court ... stated that ...the vote of each citizen counts for less and less as the population of the county of his residence increases.... (Id. at 373). (Italics added). Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote - whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept “we the people” under the Constitution visualizes no preferred class of voters but equality

among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions. (Id. at 380-381). (Italics added).

Moreover, often the issue of standing to sue in constitutional cases is commingled with the question of whether a constitutional issue has been raised. The Appellant would ask rhetorically, if the Gray Appellants had standing to sue in a case that is hugely similar to the instant case, why shouldn't the Appellant have standing in this case? Moreover, in the discussion that follows concerning whether or not Appellant has filed a case that raises a justiciable question, the court should keep in mind that everyone of these Appellants either expressly or impliedly had standing to sue.

Interestingly, one of the cases most relied upon by the Appellees in their Motions to Dismiss, Landes v. Tartaglione , 2004 WL 2415074 (E.D. Pa.) is quite instructive on the issue of standing. The court stated:

“In plaintiff’s complaint she alleges that she is a registered voter of the City and County of Philadelphia, but she fails to allege that she intends to vote by voting machine in the upcoming election. She also fails to allege that she has ever voted in any prior election either by voting machine or by other means. Absent such allegations, plaintiff cannot establish an injury in fact. Cf. American Ass’n of People with Disabilities v. Hood, 278 F. Supp. 2d 1345, 1351-52 (M.D. Fla. 2003) (*holding plaintiffs had standing where they were registered voters, consistently voted in the past and intended to vote in future elections*).” (Id. at 2). (Emphasis added).

Apparently, both the Appellees failed to read, or chose to ignore, Paragraphs 1 and 6 of Appellant’s Complaint, where he expressly alleges each and every one of these very things. (Appellant had read Landes before pleading his case and was well aware of its requirements).

As a final point on this issue, the Sixth Circuit's recent case of Stewart has much to say on the issue of standing and especially upon the history of standing in voting rights cases in particular. Some very key quotes from the opinion are as follows:

Byrant [v. Yellen, 447 U.S. 352 (1980)] indicates that *the increased probability of a future injury is sufficient to confer Article III standing.* Stewart at 9. (Emphasis added).

In fact, after Lujan [v. Defenders of Wildlife, 504 U.S. 555 (1992)], *courts have continued to recognize that the increased risk of harm constitutes an injury sufficient to support standing.* Stewart at 9. (Emphasis added).

[B]y their nature, mistakes cannot be specifically identified in advance. Thus, a voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place. Stewart at 10, citing Sandusky County Democratic Party v. Blackwell, 387 F. 3<sup>rd</sup> 565, 574 (6<sup>th</sup> Cir. 2004).

So too here, the plaintiffs are unable to articulate which voter will be harmed in the future by deficient equipment.<sup>7</sup> *It is inevitable, however, that errors have been made and will be made in the future.* As the district court found, “[a] flaw in the punch card ballot is its fragile nature and the fact that running the punch card ballots repeated times through the counting machinery will result in different results.” *The claims of the plaintiffs here are not speculative or remote, but real and imminent.* Stewart at 10. (Emphasis added).

Stewart makes it quite clear that if it is inevitable that at some point in the future the Plaintiff will be a victim of the voting process, he has standing to sue to prevent the harm that will naturally occur.

In sum, based upon the Declaratory Judgment statute that Appellant pled, which grants him standing, and the cases of similar nature that acknowledge standing in circumstances such as these, the Appellant clearly has standing to sue in this case.

**IV. DID APPELLANT ASSERT A CLAIM FOR WHICH RELIEF  
COULD BE GRANTED?**

To begin with, Appellant has asked this Court to interpret the meaning of the Constitutional words: “*equal*” and “*purity of the ballot box.*” Appellant alleges that these words uniformly require the use of a paper ballots in all elections in this state. It seems self-evident that: (1) when a party with standing asks the Court in a Declaratory Judgment Action, (2) what certain words of the Tennessee Constitution mean, (3) shows that legislation has been passed which appears to ignore the plain meaning of the Constitutional words, (4) shows that he or she is personally affected by the legislation, (5) shows that subsequent federal constitutional case law appears to conflict with the legislation and may override it, (6) that a constitutional question or justiciable question has been raised.

Nowhere, in Appellees’ Motions to Dismiss did they suggest otherwise. This omission alone should be enough to resolve the issue of whether a constitutional question has been raised or whether a justiciable controversy exists.

Appellant also alleges that the underlying premise of this case is that two voting systems have been permitted to co-exist in this state, which are unequal and which violate principles of equal protection under the law.

As previously mentioned, Appellant considers this case to be a fraternal twin of *Brown*. Appellant asserts that the inequality created by voting on paper versus voting paperless is similar in principle to the inequality of black and white educational systems.

In ***Brown***, the inequality of educational systems, was summed up by the Supreme Court this way:

Today, education is perhaps the ***most important function of state and local governments***. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. ***It is the very foundation of good citizenship***. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. ***Such an opportunity***, where the state has undertaken to provide it, is a right which ***must be made available to all on equal terms***.

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are ***inherently unequal***. Therefore, ***we hold that the plaintiffs and others similarly situated*** for whom the actions have been brought ***are***, by reason of the segregation complained of, ***deprived of the equal protection*** of the laws guaranteed by the Fourteenth Amendment. (Id. at 493). (Emphasis added).

Similarly, Appellant would argue that voting is also one of the government’s most important functions and is also at the very foundation of good citizenship. Appellant would aver that paper and paperless voting systems are inherently unequal and the usage of both deprives those citizens who have fewer rights under the paperless system, equal protection under the law. Note also that the instant voting case concerns the loss of opportunities that the better system provides just as ***Brown*** noted the loss of opportunities provided by a better educational system.

The reasoning in ***Brown***, has clearly been applied in voting rights cases. ***Baker***, *supra*, makes equally clear, that in voting rights cases, a justiciable controversy is raised when denial of equal protection is the issue. The ***Baker*** court had this to say:

We conclude that the complaint's *allegations of a denial of equal protection present a justiciable constitutional cause of action* upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment. (Id. at 237). (Emphasis added).

In ***Gray*** *supra*, the Supreme Court held, in another reapportionment case, that arbitrary and disparate treatment of voters was unconstitutional.

The Supreme Court reiterated this proposition again in ***Moore v. Ogilvie***, 394 U.S. 814, 817 (1969), when citing ***Baker*** it said the following:

*“When a State makes classifications of voters which favor residents of some counties over residents of other counties, a justiciable controversy is presented.”* (Emphasis added).

Like ***Baker*** and ***Gray***, ***Moore*** was also a case involving reapportionment. The Supreme Court continued to expand the same logic and principles, to other voting rights situations. For example, in a case involving the requirement of paying a poll tax as a condition of voting, ***Harper v. Virginia Board of Elections***, 383 U.S. 663, 666 (1966), the Supreme Court had this to say:

*“We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.”*

Lest the court think that these cases from the 1950's & 1960's are somehow passé and no longer have any judicial precedence, the Appellant would remind this court that

perhaps the most publicized case in the last fifty years, and a case also cited by both Appellees in their Motions to Dismiss, ***Bush***, *supra*, was also a voting rights case and also a case decided on equal protection grounds (the claim was that different counties or precincts within counties used different standards to recount ballots). ***Bush*** relied upon many of these older decisions. The ***Bush*** Court reiterated the following principles from earlier cases:

It must be remembered that “*the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.*” ***Reynolds v. Sims***, 377 U.S. 533, 555 (1964). (Id. at 105). (Emphasis added)

An early case in our one person, one vote jurisprudence arose *when a State accorded arbitrary and disparate treatment to voters in its different counties.* ***Gray v. Sanders***, 372 U. S. 368 (1963). *The Court found a constitutional violation.* We relied on these principles in the context of the Presidential selection process in ***Moore v. Ogilvie***, 394 U. S. 814 (1969), where we invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process. There we observed that “*[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.*” (Id. at 107). (Emphasis added).

In ***Bush*** the court held that an equal protection question existed because some counties in Florida were counting votes as having been legally cast under standards that were different than the standards other counties were using. Some counties were not even using the same standard within the county itself. Some counties and precincts started with one standard then changed to another during the recount process.

If a differing count in the number of attached corners of a dangling chad raises an equal protection question, certainly an equal protection question is raised when the rights

of voters using paper ballots are alleged to be greater than the rights of voters who vote on paperless systems.

Now, within the last month, the Sixth Circuit in *Stewart*, *supra*, has raised the bar of equal protection even further, by deciding that there is an unconstitutional violation of equal protection when differing voting technologies are used which produce a demonstrably different ability to capture and record a vote. The following quotes from *Stewart*, which chart the case history of voting dilution and disparate treatment, are noteworthy:

Nor may the right to vote be diluted by alteration of ballots or improper counting of ballots. *United States v. Classic*, 313 U.S. 299, 315 (1941). In *Classic*, the Court stated that: “Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and *have them counted* . . . This Court has consistently held that this is a right secured by the Constitution.” *Id.* (emphasis added). Dilution of the right to vote through various techniques, including racial gerrymandering, *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960), and conducting white primaries, *Terry v. Adams*, 345 U.S. 461, 469 (1953), likewise violate the Constitution due to the effect of denying some citizens the right to vote. What is clear from all of the Supreme Court’s voting rights cases is that “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds*, 377 U.S. at 555. The Supreme Court’s cases have also made another principle unmistakable: “[T]he 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.*” *Id.* *Stewart* at 11. (Italics added).

Within this framework, the Court then inquired “whether the recount procedures the Florida Supreme Court has adopted [whereby it instructed that the intent of the voter be determined] are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.” *Bush*, 531 U.S. at 104. The Court answered that “[t]he recount mechanisms implemented . . . do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right.” *Id.*

Thus, *standards for counting votes that “might vary . . . from county to county” and sometimes from within a single county, violate the Equal Protection Clause.* *Id.* at 106. Quite correctly, at the end of the per curiam opinion, the Court noted that its “consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” *Id.* at 109. The Court’s substantial voting rights precedent demonstrates as much. The facts change, but the principles and the fundamental nature of the right to vote remain the same. *Stewart* at 11, Footnote 9. (Emphasis added).

Supreme Court precedent and our own *Mixon* [ *v. Ohio*, 193 F.3d. 389 (6<sup>th</sup> Cir. 1999)] framework instructs that *if the Ohio statute permitting localities to use deficient voting technology “infringe[s] on the right to vote,” then strict scrutiny applies; if the statute does not “infringe on the right to vote,” and merely regulates some tangential aspect of the franchise, then rational basis review applies.* *Mixon*, 193 F.3d at 402. This begs the question of what the “right to vote” encompasses. We easily conclude that the right to have one’s vote counted on equal terms is part of the right to vote. No other conclusion is possible from the case law and thus, strict scrutiny applies. All of the precedent indicates that having one’s vote properly counted is fundamental to the franchise. *See e.g., Bush*, 531 U.S. at 104-05 (indicating that having one’s vote counted on equal terms with others in the relevant jurisdiction is the quintessential “right to vote” case); *Reynolds*, 377 U.S. at 555 (“[T]he 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.”); *South* [ *v. Peters*, 339 U.S. 276, 279 (1950)] (Douglas, J., dissenting) (“There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right includes the right to have the ballot counted. It also includes the right to have the vote counted at full value without dilution or discount.”) (citations omitted); *Colegrove*, 328 U.S. at 569-71 (Black, J., dissenting) (“The Constitutionally guaranteed right to vote and *the right to have one’s vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast.*”); *Classic*, 313 U.S. at 315. *Stewart* at 21. (Emphasis added).

Case law, statutory definitions, and common sense indicate that the “right to vote” is infringed in this case by the use of the two deficient technologies challenged by the plaintiffs. *Stewart* at 22.

*By maintaining a system in which these two technologies are utilized, voters in Ohio vote under two separate standards. Although voters approach the polls with the opportunity to vote in the same elections for the same candidates, once they step into the voting booth, they have an unequal chance of their vote being counted, not as a result of any action on the part of the voter, but because of the different technology utilized.* Voters able to utilize *notice technology* choose candidates and before their vote is turned in and counted, the technology notifies them of any errors that would result in the vote being disregarded. Those voters forced to use *nonnotice technology* are not notified of any errors in their ballot and, should errors exist, their votes are disregarded. Stewart at 23. (Emphasis added).

The Stewart concluded that the two technologies (notice vs. nonnotice) involved were different enough to set up two different standards of voting, and thus violated equal protection guarantees. Appellant would point out that Stewart's description of notice and nonnotice technology may very well have been paper versus paperless systems, but not described as such.

Whether notice/nonnotice equals paper/paperless or not, Appellant now asks this court to make unequivocally clear that Tennessee's two systems of voting, paper vs. paperless, are not equal systems, and to hold that paperless systems do not guarantee the same voting protection that paper based systems do.

As additional support for the return to a paper based voting system the court should also be mindful of recent legislation. The return to paper based systems and away from paperless systems has now become part of the federal legislation. Appellant would show that a certain provision of the federal law commonly known as the Help America Vote Act, (HAVA), 42 U.S.C. 15301 et seq., went into effect on January 1, 2006. The specific provision is 42 USC § 15481, the pertinent parts of which, read as follows:

## **Voting systems standards**

### **(a) Requirements**

Each voting system used in an election for Federal office shall meet the following requirements:

...

### **(2) Audit capacity**

#### **(A) In general**

The voting system shall produce a record with an audit capacity for such system.

#### **(B) Manual audit capacity**

(i) The voting system shall produce a *permanent paper record* with a manual audit capacity for such system.

(ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.

(iii) The *paper record produced under subparagraph (A) shall be available as an official record* for any recount conducted with respect to any election in which the system is used.

...

### **(d) Effective date**

*Each State and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2006.*

(Emphasis added).

On September 8, 2005, the United States Election Assistance Commission, the federal agency charged with the administration of HAVA, issued an advisory opinion (attached as Exhibit 2) concerning the above section of HAVA, and concluded:

HAVA makes it clear that the reason it requires a paper record trail is to ensure all voting systems create a permanent, manually auditable record for use in a recount. (HAVA Section [15481] (a)(2)(B)(i) and (iii). Given these facts, to meet HAVA's *Audit Capacity* requirement, *systems must create a paper record* that can serve as an audit trail. In other words, *the document must be [part of] a "chain of evidence connecting ... summary results to original transactions.* (Emphasis added).

As previously mentioned, the Tennessee Supreme Court has previously held, sixty–seven years ago, (on other constitutional grounds) that paperless systems in Tennessee are constitutional. Mooney, *supra*, addressed the issue of whether under Article IV § 4 of the Tennessee Constitution required the usage of a paper ballot. In Mooney, this court’s rationale for the approval of paperless systems was that the term “ballot” was only meant to ensure a voting system that guaranteed voter secrecy. *Id.* at 226. In Mooney, this court noted that this particular rationale for permitting paperless voting had been previously adopted by many other jurisdictions. But in the sixty-seven years since Mooney, it has become apparent that paper voting systems did much more than just guarantee voter secrecy; paper guaranteed a more accurate process, an auditable process, guaranteed a legitimate recount, and guaranteed a meaningful and efficient election contest.

In the sixty-seven years since Mooney, it has become apparent that the loss of paper voting systems has created severe weaknesses in the ability to audit elections, perform legitimate recounts, have meaningful election contests, as well as several other well-documented deficiencies. Not only have the co-existence of paper and paperless systems created a demonstrable disparity in the rights guaranteed to voters, paperless systems have created a crisis in public confidence of those who are forced to use them.

Appellant would assert that 42 UCS § 15481 is Congress’ recognition, that the rationale of cases decided like Mooney, has just not passed the test of time, and that a crisis in public confidence exists due to paperless voting.

Since January 1, 2006, the election commissions of this state have be left with a quandary: “May they continue to rely upon the ruling in Mooney, or must they comply with the requirements of HAVA?”

The answer to this question takes on even greater significance than would normally be the case, because the federal government under HAVA has promised significant financial aid to the states to help ensure compliance with HAVA’s requirements, some of which aid is due to be distributed imminently to the Shelby County Election Commission.

Appellant asks this Court to answer this question and to overturn Mooney to make Tennessee Constitutional law consistent both with the federal common law and with HAVA and to do so on an expedited basis.

It is Appellant’s belief that the Shelby County Election Commission presently has no imminent intent to meet the paper requirements of HAVA and is reluctant to discard the paperless systems authorized by Mooney. Should the Court see fit to overturn Mooney and make Tennessee Constitutional law compatible with HAVA, the Plaintiff would ask this court to direct the Shelby County Election Commission to forthwith comply with its decision.

Secondly, Appellant would show that HAVA is not the only reason this court should revisit Mooney. Mooney allowed two voting systems to emerge in this state, unintentionally permitting two voting systems to evolve into inherently unequal systems in the voting rights they grant to citizens of this state. Paper systems and paperless systems are so disparate in voting rights they bestow upon the citizenry that the disparity between the two violates the requirement of Article I § 5 of the Tennessee Constitution

that states: “elections shall be free and *equal*.” Mooney never addressed the issue of whether two co-existing systems, one of paper and one without, would violate the requirement that elections in this state be “equal” under Article I § 5 of the Tennessee Constitution. It also never addressed the issue of whether paperless systems jeopardize the “purity of the ballot box” which Article 4 § 1 of the Tennessee Constitution requires.

In conclusion, Appellant has presented a justiciable controversy for two reasons: (1) he asks the court to interpret the language of the Tennessee Constitution itself and (2) he asks the court to determine whether voters of this state have voting rights which are equally protected under the law. Both issues affect him personally.

### **PRAYER**

Appellant prays that this court do several things. Appellant first requests that this Court make a determination and a declaration that Articles I § 5, and IV § 1, of the Tennessee Constitution, require that voting in Tennessee have either a paper ballot, or at minimum a paper record, of each and every vote cast by the citizens of this state and further that no longer shall there co-exist paper and paperless systems of voting in this state.

Appellant would next request that this Court make a determination and a declaration that those provisions of the Tennessee Election Code which permit paperless voting be declared unconstitutional in Tennessee.

Appellant would further request that this Court make a determination and a declaration that the paperless system used by the Shelby County Election commission is

unconstitutional and that it is prohibited under the Tennessee Constitution and must be changed henceforth.

Appellant would further request that this Court make a determination and a declaration that every paper based system be one where the paper ballot or record is easily read by a voter or poll worker (in large and conspicuous type) and easily and quickly recountable for election recounts and election contests.

Wherefore premises considered, he be granted this relief and any other which he may show himself entitled.

Respectfully submitted,

---

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I sent a true copy of this Amended Complaint to the following attorneys by regular mail or facsimile at these addresses:

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Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
David G. Mills

# EXHIBIT 1

<http://www.ca6.uscourts.gov/opinions.pdf/06a0143p-06.pdf>

## EXHIBIT 2

<http://www.eac.gov/docs/EAC%20Advisory%202005-005.pdf>