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 (Honorable Kevin H. Sharp/Honorable Bernard A. Friedman)

PETITION FOR REHEARING EN BANC

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Pursuant to Fed. R. App. P. 35, 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") respectfully submit this petition for rehearing en banc.

INTRODUCTION

Appellee-Voters are cognizant that en banc review is an "extraordinary procedure," 6 Cir. I.O.P 35, that it is "not favored," Fed. R. App. P. 35(a), and that Rule 35 imposes "rigid standards," 6 Cir. R. 35(c). And while Appellee-Voters respectfully contend that the panel opinion disregarded the facts found at trial, misunderstood the applicable mathematical principles, and incorrectly applied federal voting rights law, they recognize that a panel's "getting it wrong" does not necessarily qualify as a matter of exceptional importance sufficient for en banc review. *Bell v. Bell*, 512 F.3d 223, 250 (6th Cir. 2008) (Moore, J. dissenting). Nonetheless, and aside from those issues, this case presents an issue of exceptional importance and therefore merits en banc review because, as discussed below, the panel opinion endorses a novel procedure that threatens the very basis of federal court jurisdiction. The panel opinion now holds that state-actor defendants in a 42 U.S.C. § 1983 action can file a retaliatory suit against individual civil rights plaintiffs seeking a state-court declaratory judgment that the state actors acted lawfully in order to stymie a pending federal civil rights lawsuit, circumvent the civil rights plaintiffs' choice of forum, bypass a federal district court's ruling against the

state-actor defendants, short-circuit this Court's own appellate review, and intimidate civil rights plaintiffs by forcing them to personally defend a lawsuit against them in a new forum.

This procedure, endorsed by the panel opinion, conflicts with not only a significant body of federal case law, but also the fundamental right of access to the courts and the bedrock premise that, subject to the limits of jurisdiction and venue, plaintiffs can select the forum in which they choose to litigate. Accordingly, en banc review is appropriate.[1]

BACKGROUND

Appellee-Voters are eight private citizens of Tennessee who filed an action in federal district court under 42 U.S.C. § 1983 against Defendants-Appellants—Governor of Tennessee William Edward "Bill" Haslam, Secretary of State Tre Hargett, Coordinator of Elections Mark Goins, Attorney General Herbert H. Slatery III, the State Election Commission of Tennessee, and its then-members Judy Blackburn, Donna Barrett, Gregg Duckett, Tommy Head, Jimmy Wallace, Tom Wheeler, and Kent Younce, all in their official capacities (collectively "State

[1] En banc review would also be beneficial to: (i) correct the panel's misunderstanding of the nature of the mathematical asymmetry created by the state-sponsored voting scheme whereby the votes of Voter-Appellees are afforded less weight than other voters, *compare* Doc. 51-2 at 23-24, *with* Doc. 26 at 11-17 and Doc. 31 at 2-9, and (ii) correct the panel's legal error that the State Actors' compulsion of Voter-Appellees and others to vote for governor constituted a burden by governmental action, *compare* Doc. 51-2 at 18-21, *with* Doc. 26 at 28-30.

Actors")—on November 7, 2014. Appellee-Voters asserted numerous Fourteenth Amendment violations based on the method by which State Actors determined the threshold for passage of proposed Constitutional Amendment Number 1 to the Tennessee Constitution in the November 4, 2014 state and federal general election ("Amendment 1"): (1) that State Actors violated Appellee-Voters' federal equal protection rights by weighing their "no" votes less than certain "yes" votes on Amendment 1; (2) that State Actors violated Appellee-Voters' federal due process rights by subjecting them to a fundamentally unfair voting system; (3) that State Actors violated Appellee-Voters' federal due process rights by compelling them to vote for governor; and (4) that 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.[2]

State Actors filed multiple motions to dismiss, requested that the district court exercise *Pullman* abstention, and sought certification to the Tennessee Supreme Court in the alternative. The district court denied these motions. Rather than seek appeal to this Court and with trial set only a few months away, two of the State Actors—Secretary of State Tre Hargett and Coordinator of Elections Mark Goins, acting in their official capacities and represented by Tennessee's Attorney General—

[2] A copy of Article XI, Section 3's full text is appended to Appellee-Voter's principal brief in this case. Document 26 at A-6.

filed a new state-court declaratory judgment lawsuit, *Hargett et al. v. George et al.* ("*Hargett*"), against Appellee-Voters. The State Actors chose to file suit in Williamson County, Tennessee Chancery Court, a venue unavailable to Appellee-Voters[3] and one of the counties where the contested vote passed by the highest margin, "even though the Davidson County Chancery Court would seem to have been the most logical venue." R. 119, PageID# 3035.

Hargett essentially sought a declaration that the State Actors did nothing wrong in response to the federal civil rights lawsuit filed by Appellee-Voters. Although couched as a declaratory judgement action to help clarify state law, because the eight Appellee-Voters were sued only in their individual capacities, the judgment would neither be binding on Tennessee voters[4] nor provide any future certainty to the State Actors. Instead, it would, at most, only have offensive value against the Appellee-Voters in their federal civil rights action. *Hargett* was nothing

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[3] Because Davidson County, Tennessee is the official residence of both the Secretary of State and the Coordinator of Election, Appellee-Voters would have had to file in Davidson County had they attempted to sue these parties in state court. *See* Tenn. Code Ann. § 4-4-104.

[4] This declaration is not binding on all Tennessee voters because Appellee-Voters were sued as individuals, not in a representative capacity. *See* Tenn. Code. Ann. § 29-14-107 ("[N]o declaration shall prejudice the rights of 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). Moreover, as Appellee-Voters demonstrated to the state court before the judgment in *Hargett* became final, the absolute soonest Hargett and Goins could have even theoretically next need to apply Article XI, Section 3 will be 2022.

more than an attempt to circumvent Appellee-Voters' choice of forum, to use a cooperative state-court venue to stymie Appellee-Voters' federal civil rights lawsuit, to bypass the district court's rulings on abstention and certification, to short-circuit this Court's own appellate review, and to intimidate Appellee-Voters by forcing them to personally defend a lawsuit against them in a new forum.

Although Appellee-Voters moved to dismiss *Hargett* on a host of jurisdictional and justiciability grounds, the state court summarily denied this motion. As State Actors sought to prolong the federal court proceeding, they simultaneously moved as quickly as possible to judgment in *Hargett*, serving their motion for summary judgment a mere two days after Appellee-Voters filed their answer in state court. The state court fast-tracked the summary judgment process, initially setting a response deadline for Appellee-Voters that was shorter than the minimum time under Tennessee law and denying Appellee-Voters any discovery. Despite the state case being filed nearly a year after the federal civil rights action, the state court set the hearing on State Actors' motion for summary judgment in *Hargett* three days after the bench trial in this case concluded.

The state court, at the behest of the State Actors represented by the State Attorney General, then rushed to issue an order before the federal district court could issue its 50-plus page findings of fact and conclusions of law after the bench trial. The state court declared that State Actors acted lawfully in their treatment of the

Appellee-Voters and thereby effectively declared that Appellee-Voters' due process rights had not been violated. The rush to judgment in the state court was in stark contrast to the record developed before the district court, which found that the State Actors had acted unlawfully in their application of the law toward Appellee-Voters and other Tennessee voters and further concluded that, regardless of such application, State Actors' operation and tabulation of the vote on the proposed constitutional amendment violated Appellee-Voters' and other voters' due process and equal protection rights. Accordingly, the district court issued an injunction requiring a recount of the votes on Amendment 1.

State Actors appealed, *raising for the first time* that the state court's decision in *Hargett*—rendered after the bench trial but one day before the publication of the district court's findings of fact and conclusions of law—precluded this lawsuit. This novel procedural argument caught the attention of federal courts professors and constitutional scholars from across the country, culminating in an amicus brief submission from Erwin Chemerinsky (the Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law), Barry Friedman (Jacob D. Fuchsberg Professor of Law, Affiliated Professor of Politics, and Director, Policing Project, New York University School of Law), Suzanna Sherry (Herman O. Loewenstein Professor of Law, Vanderbilt University Law School), and Adam Steinman (Professor of Law, University of Alabama) addressing

the impropriety and danger of endorsing such litigation tactics, *see generally* Doc. 34. Without so much as acknowledging this unrebutted brief (or the policy arguments made by Appellee-Voters in their principal brief, *see* Doc. 26 at 51-60), this Court ruled that the State Actors' retaliatory declaratory judgment action bound Appellee-Voters in this lawsuit.

The panel opinion based this ruling in large part on the conclusion that Appellee-Voters' federal lawsuit created a controversy between the parties sufficient for a justiciable state court lawsuit against private citizens when such a case or controversy might otherwise not exist. *See* Doc. 51-2 at 12.

ARGUMENT

This case satisfies Rule 35(a)'s "exceptional importance" threshold because the panel opinion's endorsement of the State Actors' litigation tactics both violates Appellee-Voters' constitutional rights and critically undermines federal court authority in conflict with long-standing precedent from the Supreme Court, this Court, and its sister circuits. In contrast to normal parallel litigation where two parties with independent but interrelated claims each seek a forum advantage, State Actors initiated a state court declaratory judgment action in an unconstitutional attempt to circumvent Appellee-Voters' preexisting federal court case, to retaliate against them for bringing their federal suit, and to deter future plaintiffs from bringing civil rights lawsuits in federal court.

I. The panel opinion validates a new procedure by which any state actor facing a federal civil rights lawsuit can circumvent federal court jurisdiction by suing the federal court plaintiffs in a favorable state court forum.

The panel opinion's endorsing and condoning this litigation tactic shifts the 42 U.S.C. § 1983 landscape and creates a new roadmap for other state actors to circumvent this statute. Indeed, any state actor defending against a § 1983 lawsuit (or conceivably any other federal statute) can now turn around to sue the federal court plaintiffs in state court to declare that their conduct was lawful on the basis that there is a justiciable controversy created by the federal court lawsuit.

Citizens whose only distinguishing characteristic is that they filed a federal lawsuit will routinely be named as defendants in state-court actions, thereby depriving federal courts of their role in enforcing constitutional rights. For example, citizens challenging redistricting as being improperly gerrymandered could be sued in state court by the very officials who drew the district lines for a declaration that the redistricting was lawful. Or a plaintiff bringing a Fourth Amendment malicious prosecution claim in federal court could once again face a state-court lawsuit brought by the same entities who previously prosecuted them. *See also* Federal Courts Professors' Amicus Brief, Doc. 34 at 1 (acknowledging this same risk and providing examples of a city defending against a federal pattern-and-practice discrimination lawsuit suing the victims of that discrimination in state court or police officers facing a federal-court excessive force lawsuit bringing a state-court action against the

victim of that force seeking a declaration that the force was not excessive). Indeed, any citizen asserting that a state actor's implementation or application of a law violates federal constitutional rights is now open to being the defendant in state court declaratory judgment action seeking to pre-clear the state actor's action before (or even after) the federal court has reached its decision.[5]

In short, as this Court's opinion now stands, it encourages state actors to answer federal complaints with state-court lawsuits. As even the panel majority appears to acknowledge, Secretary Hargett and Coordinator Goins could not have brought their state lawsuit in the absence of this preexisting federal court litigation—at least not against the Appellee-Voters, who are merely private citizens subject to the same voting laws as all other citizens of Tennessee. Respectfully, the panel's endorsing State Actor's claim that a pending lawsuit against them creates a justiciable case or controversy opens the door to the very issues described above. *See generally* Federal Courts Professors' Amicus Brief, Doc. 34 (discussing the same).

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[5] Further, unlike a federal court lawsuit under § 1983 (or Title VII) where a successful plaintiff is entitled to fee shifting, citizens facing a retaliatory state court lawsuit must defend themselves at their own cost without any possibility of fee shifting when they prevail. Whereas this lack of fee-shifting imposes a substantial additional financial burden on the private citizens trying to advance their federal court claims, state actors incur no additional costs in both defending the federal lawsuit and prosecuting the state-court case because they are or would be represented by the state attorney general in both actions.

II. The panel opinion conflicts with longstanding precedent regarding access to the courts.

Both the Supreme Court and this Court have long held that access to the courts is a fundamental right and that this right includes a meaningful opportunity to be heard "through the remov[al] [of] obstacles to [] full participation in judicial proceedings." *Tenn. v. Lane*, 541 U.S. 509, 522-23 (2004); *see also, e.g., Bounds v. Smith*, 430 U.S. 817, 821 (1977); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971); *In re Primus*, 436 U.S 412, 426 (1978); *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts . . . is the right conservative of all other rights, and lies at the foundation of orderly government."); *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997).

This Court has recognized that the right of access to the courts is anchored in various constitutional provisions, including the First Amendment's right to petition the government for redress of grievances. *See, e.g., EJS Properties LLC v. City of Toledo*, 698 F.3d 845, 863 (6th Cir. 2012); *John L. v. Adams*, 969 F.2d 228, 231-32 (6th Cir. 1992); *accord Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004). The panel opinion has now deviated from this well-recognized principle by permitting the State Actors here—and endorsing this maneuver for other state actors in the future both within and outside the Sixth Circuit—to encumber federal civil rights plaintiffs with having to defend themselves and their federal-court claims in a parallel state court lawsuit.

Numerous appellate courts have held that state action taken in retaliation for the exercise of the right to sue, or that chills the exercise of that right, violates the fundamental right of access to the courts. As this Court noted in *EJS Properties*, "right-to-petition claims are viewed in kind with right-to-speech claims," and thus can rest on a showing that "government actions chilled [the plaintiffs'] expression." 698 F.3d 845, 863 (6th Cir. 2012). Similarly the Eighth Circuit's decision in *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422 (8th Cir. 1986)—which relies on case law from the Fifth, Seventh, Tenth, and Eleventh Circuits and which this circuit positively cited in *Graham v. NCAA*, 804 F.2d 953, 959 (6th Cir. 1986)—explains that access to the court "cannot be impaired, either directly . . . or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits" and further explains that it "is not necessary that the [individual] succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the [individual's] right of access." *Harrison*, 780 F.2d at 1427-28 (citations omitted) (alterations in original).

The cases from this circuit and others have previously held that state officials may not take retaliatory action against individuals designed either to punish them for having exercised their constitutional right to seek judicial relief or to intimidate or chill their exercise of that right in the future. The panel opinion, however, endorses just such an action, in the form of state actors suing in state court the parties who

have previously sued them in federal court, as "unorthodox [but] efficient and fruitful," and provides a roadmap for this retaliatory litigation tactic.

Until now, this Court had implemented constitutional protections against retaliatory or chilling state action. *See, e.g.*, *ACLU v. Livingston County*, 796 F.3d 636, 645 (6th Cir. 2015) (affirming an injunction against a policy permitting reading prisoners' incoming "legal mail," because doing so "chills important First Amendment rights" including "the right of access to the courts"); *Carmen's East, Inc. v. Huggins*, 995 F.2d 1066, 1066 (6th Cir. 1993) (denying qualified immunity for public officials for allegedly "retaliat[ing] against plaintiffs for exercising their right to sue under the petition for redress of grievances clause"); *Biver v. Saginaw Township Community Schools*, 878 F.2d 1436, n.4 (6th Cir. 1989) ("When actors, like the defendants here, take actions that have a chilling effect on an individual's ability to seek redress through the courts, those actors violate a constitutional right and 'interference with or deprivation of the right of access to the courts is actionable under § 1983'" (quoting *Graham*, 804 F.2d at 959)). Yet the panel's opinion endorses state actors' subjecting plaintiffs who have brought a federal civil rights suit against them to having to defend themselves in state court—an action that, at bare minimum, chills the right to petition.

This case is unusual—and perhaps unprecedented—because State Actors' retaliatory action was filing of a state lawsuit, as opposed to other perhaps more

common forms of official harassment.[6] But the principle in this circuit and others should be the same: the state actors' conduct should not interfere directly or indirectly with plaintiffs' access to the courts. State Actors did so here, and the panel opinion approves, if not endorses, just such a method of interference.

III. The panel opinion's giving preclusive effect to *Hargett* defies this Circuit's and the Supreme Court's precedent regarding constitutionally infirm judgments.

It is well settled that "federal courts are not required to accord full faith and credit" to a "constitutionally infirm judgment." *See, e.g.*, *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 420 (6th Cir. 2012) (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982)); *Hamilton v. Herr*, 540 F.3d 367, 374 (6th Cir. 2008) ("Infirm judgments are not entitled to full faith and credit in federal courts."); *see also Montana v. United States*, 440 U.S. 147, 164 n.11 (1979) ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation"); *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1309 (2015) (same); *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293, 299 (6th Cir. 2005) (no preclusion "for state-court rulings made in the absence of . . . due process"); *Rainey Bros. Constr. Co. v. Memphis & Shelby Cty.*

[6] Indeed, neither Appellee-Voters nor the amici curiae federal courts professors have been able to find another case in which state actors resorted to this tactic of suing federal civil rights plaintiffs in state court. *See* Doc. 34 at 21.

Bd. of Adjustment, 178 F.3d 1295 (6th Cir. 1999) (not giving preclusive effect if state's procedures were not "constitutionally sufficient").

Likewise, this Court's precedent refuses to give preclusive effect to state-court judgments where doing so would "result in manifest injustice to a party or violate an overriding public policy." *United States v. LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977). Avoiding frustration of "[p]aramount congressional policy" is a sufficient reason to deny application of preclusion doctrines. *Westwood Chem. Co., Inc. v. Kulick*, 656 F.2d 1224, 1229 (6th Cir. 1981). The *Hargett* judgment is not only "constitutionally infirm" and "made in the absence of due process" as asserted above and detailed more extensively in Appellee-Voters' briefing before the panel, but also a deliberate attempt to interfere with Appellees-Voters' fundamental constitutional rights. Giving it preclusive effect frustrates not only congressional, but also constitutional policy.

The panel opinion defies two fundamental principles of the American judicial system: first that plaintiffs are the masters of their complaints and thus entitled to choose the forum (from among those with jurisdiction) and second that a suit will be heard in federal court if either party prefers federal court (and the federal courts have subject-matter jurisdiction). The Supreme Court has long held that that the plaintiff is master of the complaint, meaning that "the plaintiff is absolute master of what jurisdiction he will appeal to," *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480

(1915), and "plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous," *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 581 (2013). *See, e.g., Holmes Grp., Inc. v. Vornado Air Circulations Sys., Inc.*, 535 U.S. 826, 831 (2002); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986); *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); *see also Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (stating "plaintiff's choice of forum should rarely be disturbed."). Appellee-Voters chose to appeal to the federal courts, yet the panel opinion effectively relegates them to having to litigate in state court.

The one-way ratchet of removal stems from the principle that either party is entitled to invoke federal-court jurisdiction where it exists. *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) (explaining that the right to elect to have a case heard by the federal courts is not limited to plaintiffs); *see generally* 28 U.S.C. § 1441. Removal limits plaintiffs' ability to choose an appropriate forum but only to level the playing field and protect defendants' access to federal court. In this case, however, the panel opinion permits state actors to thwart a plaintiff's choice of a *federal* forum by filing their independent action in state court and do so not only in retaliation, but also to circumvent appellate review.[7]

[7] In essence, State Actors created their own self-help version of appellate review, but rather than seeking an interlocutory appeal to this Court after the district court denied their motion to abstain and/or to certify the question to the Tennessee

CONCLUSION

The exceptional importance of the issues at stake in this case—meaningful access to the courts, the ability of plaintiffs to choose the appropriate forum for their case, and not rewriting the § 1983 landscape—satisfy Rule 35(a)'s rigid standard and justify the extraordinary procedure of en banc review.

Respectfully submitted,

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Supreme Court, State Actors instead sought parallel review by filing a state-court lawsuit and the attempting to use the ruling therein to preclude either this Court or the district court from meaningfully reviewing the issues.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and 6th Cir. R. 32(a), I hereby certify that this brief complies with the type-volume limitations and typeface requirements:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 35(b)(2)(A) because it contains 3,886 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 January 23, 2018

/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 January 23, 2018.

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

/s/ *William L. Harbison*