STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 1

Richard Teigen, *et al.*, Plaintiffs, vs. Wisconsin Elections Commission, Defendant, and Democratic Senatorial Campaign Committee, *et al.*, Defendant-Intervenors.	Case No. 2021CV0958 Case Code: 30701 Hon. Michael O. Bohren

APPENDIX OF NON-WISCONSIN LEGAL AUTHORITIES IN SUPPORT OF DSCC'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Intervenor-Defendant DSCC hereby submits the non-Wisconsin authorities in support of its Brief in Opposition to Plaintiff's Motion for Preliminary Injunction:

No.	AUTHORITY
1.	*League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014)
2.	*Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)
3.	*Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012)

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APPENDIX NO. 1

769 F.3d 224
United States Court of Appeals,
Fourth Circuit.

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA; A. Philip Randolph Institute; Unifour Onestop Collaborative; Common Cause North Carolina; Goldie Wells; Kay Brandon; Octavia Rainey; Sara Stohler; Hugh Stohler, Plaintiffs,
and
Louis M. Duke; Charles M. Gray; Asgod Barrantes; Josue E. Berduo; Brian M. Miller; Nancy J. Lund; Becky Hurley Mock; Mary–Wren Ritchie; Lynne M. Walter; Ebony N. West, Intervenors/Plaintiffs–Appellants,
v.
State of NORTH CAROLINA; Joshua B. Howard, in his official capacity as a member of the State Board of Elections; Rhonda K. Amoroso, in her official capacity as a member of the State Board of Elections; Joshua D. Malcolm, in his official capacity as a member of the State Board of Elections; Paul J. Foley, in his official capacity as a member of the State Board of Elections; Maja Kricker, in her official capacity as a member of the State Board of Elections; Patrick L. McCrory, in his official capacity as Governor of the state of North Carolina, Defendants–Appellees.
United States Of America, Amicus Curiae,
Brennan Center for Justice at NYU School of Law, Amicus Supporting Appellants,
Judicial Watch, Incorporated; Allied Educational Foundation; Christina Kelley Gallegos–Merrill, Amici Supporting Appellees.
North Carolina State Conference of Branches of the Naacp; Rosanell Eaton; Emmanuel Baptist Church; Bethel A. Baptist Church; Covenant Presbyterian Church; Clinton Tabernacle Ame Zion Church; Barbee's Chapel Missionary Baptist Church, Inc.; Armenta Eaton; Carolyn Coleman; Jocelyn Fergusonkelly; Faith Jackson; Mary Perry; Maria Teresa Unger Palmer, Plaintiffs—Appellants,
and
New Oxley Hill Baptist Church; Baheeyah Madany; John Doe 1; Jane Doe 1; John Doe 2; Jane Doe 2; John Doe 3; Jane Doe 3, Plaintiffs,
v.
Patrick L. McCrory, in his official capacity as Governor of the state of North Carolina; Joshua B. Howard, in his official capacity as a member of the State Board of Elections; Rhonda K. Amoroso, in her official capacity as a member of the State Board of Elections; Joshua D. Malcolm, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; Maja Kricker, in her official capacity as a member of the State Board of Elections, Defendants–Appellees.
United States of America, Amicus Curiae,
Brennan Center for Justice at NYU School of Law, Amicus Supporting Appellants,
Judicial Watch, Incorporated; Allied Educational Foundation; Christina Kelley Gallegos–Merrill, Amici Supporting Appellees.
League of Women Voters of North Carolina; A. Philip Randolph Institute; Unifour Onestop Collaborative; Common Cause North Carolina; Goldie Wells; Octavia Rainey; Hugh Stohler; Kay Brandon; Sara Stohler, Plaintiffs–Appellants,
and
Louis M. Duke; Charles M. Gray; Asgod Barrantes; Josue E. Berduo; Brian M. Miller; Nancy J. Lund; Becky Hurley Mock; Mary–Wren Ritchie; Lynne M. Walter; Ebony N. West, Intervenors/Plaintiffs,
v.
State Of North Carolina; Joshua B. Howard, in his official capacity as a member of the State Board of Elections; Rhonda K. Amoroso, in her official capacity as a member of the State Board of Elections; Joshua D. Malcolm, in his official capacity as a member of the State Board of Elections; Paul J. Foley, in his official capacity as a member of the State Board of Elections; Maja Kricker, in her official capacity as a member of the State Board of Elections; Patrick L. McCrory, in his official capacity as Governor of the state of North Carolina, Defendants–Appellees.
United States of America, Amicus Curiae,

Brennan Center for Justice at NYU School of Law, Amicus Supporting Appellants, Judicial Watch, Incorporated; Allied Educational Foundation; Christina Kelley Gallegos–Merrill, Amici Supporting Appellees.

Nos. 14–1845, 14–1856, 14–1859.
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Argued: Sept. 25, 2014.
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Decided: Oct. 1, 2014.

Synopsis

Background: United States and various individuals, churches, and civil rights organizations brought actions against State of North Carolina and various state officials, raising constitutional and Voting Rights Act (VRA) challenges to several provisions of omnibus election reform law. Group of young voters intervened as plaintiffs in one case. After actions were consolidated, the United States District Court for the Middle District of North Carolina, Thomas D. Schroeder, J., 997 F.Supp.2d 322, denied plaintiffs' motion for preliminary injunction, and they appealed.

Holdings: The Court of Appeals, Wynn, Circuit Judge, held that:

order enjoining state's reduction in early-voting days would pose significant risk of substantial burden to state and county boards of election;

district court did not abuse its discretion in determining that 16-and 17–year–olds who would not be 18 years old by next general election failed to show irreparable harm;

district court did not abuse its discretion in finding that plaintiffs failed to show irreparable harm as result of elimination of discretion of county boards of elections to keep polls open;

determination that harm arising from soft roll-out of North Carolina's voter identification requirements was speculative was not clear error;

district court did not abuse its discretion in finding that no likelihood of irreparable harm as result of poll observer and voter challenges provisions; and

plaintiffs were likely to succeed on claims that elimination of same-day registration and out-of-precinct voting violated Voting Rights Act.

Affirmed in part, reversed in part, and remanded.

Diana Gribbon Motz, Circuit Judge, dissented and filed opinion.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

Attorneys and Law Firms

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Before MOTZ, WYNN, and FLOYD, Circuit Judges.

Opinion

Reversed in part, affirmed in part, and remanded with instructions by published opinion. Judge WYNN wrote the majority opinion, in which Judge FLOYD joined. Judge MOTZ wrote a dissenting opinion.

WYNN, Circuit Judge:

The right to vote is fundamental. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). And a tight timeframe before an election does not diminish that right.

"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 v. Blumstein,* 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Congress sought to further ensure equal access to the ballot box by passing the Voting Rights Act, which was aimed at preventing "an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles,* 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

On June 25, 2013, the Supreme Court lifted certain Voting Rights Act restrictions that had long prevented jurisdictions like North Carolina from passing laws that would deny minorities equal access. *See Shelby Cnty., Ala. v. Holder,* —— U.S. ——, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013). The very next day, North Carolina began pursuing sweeping voting reform-House Bill 589–which is at the heart of this appeal.

With House Bill 589, North Carolina imposed strict voter identification requirements, cut a week off of early voting, prohibited local election boards from keeping the polls open on the final Saturday afternoon before elections, eliminated same-day voter registration, opened up precincts to "challengers," eliminated pre-registration of sixteen- and seventeen-year-olds in high schools, and barred votes cast in the wrong precinct from being counted at all.

In response, various Plaintiffs and the United States Government sued North Carolina, alleging that House Bill 589 violates equal protection provisions of the United States Constitution as well as the Voting Rights Act. Plaintiffs sought to prevent ***230** House Bill 589 from taking effect by asking the district court for a preliminary injunction. Such an injunction would maintain the status quo to prevent irreparable harm while the lawsuit plays itself out in the courts.

But the district court refused. In so doing, the district court laid out what it believed to be the applicable law. Notably, however, the district court got the law plainly wrong in several crucial respects. When the applicable law is properly understood and applied to the facts as the district court portrayed them, it becomes clear that the district court abused its discretion in denying Plaintiffs a preliminary injunction and not preventing certain provisions of House Bill 589 from taking effect while the parties fight over the bill's legality. Accordingly, we reverse the district court's denial of the preliminary injunction as to House Bill 589's elimination of same-day registration and prohibition on counting out-of-precinct ballots.

However, we affirm the district court's denial of Plaintiffs' request for a preliminary injunction with respect to the following House Bill 589 provisions: (i) the reduction of early-voting days; (ii) the expansion of allowable voter challengers; (iii) the elimination of the discretion of county boards of elections to keep the polls open an additional hour on Election Day in "extraordinary circumstances";

(iv) the elimination of pre-registration of sixteen- and seventeen-year-olds who will not be eighteen years old by the next general election; and (v) the soft roll-out of voter identification requirements to go into effect in 2016. With respect to these provisions, we conclude that, although Plaintiffs may ultimately succeed at trial, they have not met their burden of satisfying all elements necessary for a preliminary injunction. We therefore affirm in part, reverse in part, and remand to the district court with specific instructions to enter, as soon as possible, an order granting a preliminary injunction enjoining enforcement of certain provisions of House Bill 589. [1]

[1] While the separate opinion is styled as a dissent, it concurs with the majority opinion in affirming the district court's decision to deny an injunction as to multiple House Bill 589 provisions. We agree with a number of the concerns the separate opinion raises as to all but two of the challenged provisions-the elimination of same-day registration and out-of-precinct voting.

I. *Background* [2]

[2] As an appellate court, we neither re-weigh evidence nor make factual findings. And though we may, in this procedural posture, call out clear error if the district court "ma[de] findings without properly taking into account substantial evidence to the contrary[,]" *United States v. Caporale,* 701 F.3d 128, 140 (4th Cir.2012), we are taking the facts as they have been depicted by the district court in *North Carolina State Conference of Branches of the NAACP v. McCrory,* 997 F.Supp.2d 322 (M.D.N.C.2014).

In spring 2013, the North Carolina General Assembly began working on a voter identification law. The House Committee on Elections, chaired by Representative David R. Lewis, held public hearings, and an initial version of House Bill 589 was introduced in the House on April 4. In April, House Bill 589 was debated, amended, and advanced; it ultimately passed the House essentially along party lines, with no support from any African American representatives.

In March 2013, before the bill was introduced to the house, the various sponsors of House Bill 589 sent an e-mail to the State Board of Elections asking for a "cross matching of the registered voters in [North Carolina] with the [DMV] to determine ***231** a list of voters who have neither a [North Carolina] Driver's License nor a [North Carolina] Identification Card." *Id.* at 357. The legislators also wanted "that subset broken down into different categories within each county by all possible demographics that [the State Board of Elections] typically captures (party affiliation, ethnicity, age, gender, etc.)." *McCrory,* 997 F.Supp.2d at 357. The State Board of Elections sent the data in a large spreadsheet the next day.

Later in March 2013, Representative Lewis sent a ten-page letter to State Board of Elections Director Gary Bartlett asking about the State Board of Elections' conclusion that 612,955 registered voters lacked a qualifying photo identification. He asked the State Board of Elections to "provide the age and racial breakdown for voters who do not have a driver's license number listed." *Id.* In April, Bartlett sent a nineteen-page response along with a spreadsheet that included the requested race data. That same day, Speaker of the House Thom Tillis's general counsel e-mailed the State Board of Elections, asking for additional race data on people who requested absentee ballots in 2012; that data, too, the State Board of Elections provided.

In late April 2013, House Bill 589 made its way to the North Carolina Senate, passed first reading, and was assigned to the Senate Rules Committee. That committee took no action on the bill for three months, until July 23. "The parties do not dispute that the Senate believed at this stage that [House Bill] 589 would have to be submitted to the United States Department of Justice ... for 'preclearance' under Section 5 of the [Voting Rights Act], 42 U.S.C. § 1973c(a), because many North Carolina counties were 'covered jurisdictions' under that Section. However, at that time the United States Supreme Court was considering a challenge to the ... ability to enforce Section 5." *McCrory,* 997 F.Supp.2d at 336. [3]

[3] Under Section 5's preclearance requirement, no change in voting procedures in covered jurisdictions could take effect until approved by federal authorities. A jurisdiction could obtain such preclearance only by proving that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color." 52 U.S.C. § 10304(a).

On June 25, the Supreme Court issued its decision in *Shelby County,* declaring the formula used to determine the Section 5 covered jurisdictions unconstitutional. The very next day, Senator Thomas Apodaca, Chairman of the North Carolina

Senate Rules Committee, publicly stated, "So, now we can go with the full bill." *Id.* at 336. The contents of the "full bill" were not disclosed at the time.

A meeting of the Rules Committee was subsequently scheduled for July 23. The night before the Rules Committee meeting, the new bill, by then fifty-seven pages in length, was posted for the members on the Rules Committee website. Unlike the original bill, which focused mainly on voter identification, the amended House Bill 589 expanded the list of restrictive provisions to include (1) the reduction of early-voting days; (2) the elimination of same-day registration; (3) a prohibition on counting out-of-precinct ballots; (4) an expansion of allowable poll observers and voter challenges; (5) the elimination of the discretion of county boards of elections to keep the polls open an additional hour on Election Day in extraordinary circumstances; and (6) the elimination of pre-registration of sixteen- and seventeen-year-olds who will not be eighteen years old by the next general election.

***232** After debate on July 23, the amended bill passed the committee and proceeded to the floor. On July 25, the Senate began its session with the third reading of the substantially amended House Bill 589. Proponents and opponents of the bill debated its provisions and various proposed amendments for four hours. "Several Senators characterized the bill as voter suppression of minorities." *McCrory,* 997 F.Supp.2d at 337. Nevertheless, at the close of debate, a party-line vote sent House Bill 589, as amended, back to the House for concurrence.

That same day, after the bill had been modified and passed by the Senate, a State Board of Elections employee e-mailed data to Representative Lewis, one of the bill's House sponsors. The data contained verification rates for same-day registration in the 2010 and 2012 elections and information about the type of identifications presented by same-day registrants.

On the evening of July 25, the House received the Senate's version of House Bill 589. During debate, opponents characterized the measure "variously as voter suppression, partisan, and disproportionately affecting" African Americans, young voters, and the elderly. *McCrory,* 997 F.Supp.2d at 337. At 10:39 p.m. that night, the House voted—again along party lines—to concur in the Senate's version of House Bill 589.

The bill was ratified the next day, July 26, and presented to Governor Patrick McCrory on July 29. The Governor signed House Bill 589 into law on August 12, 2013.

That very same day, Plaintiffs filed lawsuits challenging certain House Bill 589 provisions in the federal district court for the Middle District of North Carolina. Plaintiffs alleged that the challenged provisions violated both the United States Constitution and the Voting Rights Act. Soon thereafter, in September 2013, the United States filed a lawsuit challenging certain House Bill 589 provisions exclusively under the Voting Rights Act. And finally, a group of young voters intervened, also asserting constitutional claims.

The lawsuits were consolidated, the parties undertook discovery, and Plaintiffs moved for a preliminary injunction. House Bill 589 contains numerous provisions, only some of which Plaintiffs challenge. Specifically, Plaintiffs challenge the legality of, and asked the court to enjoin: the elimination of same-day voter registration; the elimination of out-of-precinct voting; the reduction of early-voting days; an increase in at-large observers at the polls and the deputizing of any resident to challenge ballots at the polls; the elimination of the discretion of county boards of elections to extend poll hours under extraordinary circumstances; and the soft roll-out of voter identification requirements to go into effect in 2016.

A. *Same–Day Registration*

In 2007, the General Assembly passed legislation permitting same-day registration at early-voting sites. The law provided that "an individual who is qualified to register to vote may register in person and then vote at [an early-voting] site in the person's county of residence during the period for [early] voting provided under [Section] 163–227.2." 2007 N.C. Sess. Laws 253, § 1 (codified at N.C. Gen.Stat. § 163–82.6A(a) (2008)). The law required a prospective voter to complete a voter-registration form and produce a document to prove his or her current name and address. *Id.* (codified at N.C. Gen.Stat. § 163–82.6A(b) (2008)).

If the registrant wanted to vote immediately, he or she could "vote a retrievable absentee ballot as provided in [***233** Section] 163–227.2 immediately after registering." *Id.* (codified at N.C. Gen.Stat. § 163–82.6A(c) (2008)). Within two business days, both the pertinent county board of elections and the State Board of Elections were required to verify the voter's driver's license or social security number,

update the database, proceed to verify the voter's proper address, and count the vote unless it was determined that the voter was not qualified to vote. *Id.* (codified at N.C. Gen.Stat. § 163–82.6A(d) (2008)).

House Bill 589 eliminated same-day registration. A voter's registration must now be postmarked at least twenty-five days before Election Day or, if delivered in person or via fax or scanned document, received by the county board of elections at a time established by the board. N.C. Gen.Stat. § 163–82.6(c)(1)-(2).

Plaintiffs' expert presented unrebutted testimony that African American North Carolinians have used same-day registration at a higher rate than whites in the three federal elections during which it was offered. Specifically, in 2012, 13.4% of African American voters who voted early used same-day registration, as compared to 7.2% of white voters; in the 2010 midterm, the figures were 10.2% and 5.4%, respectively; and in 2008, 13.1% and 8.9%. The district court therefore concluded that the elimination of same-day registration would "bear more heavily on African–Americans than whites." *McCrory,* 997 F.Supp.2d at 355.

B. *Out–of–Precinct Voting*

In 2002, Congress passed the Help America Vote Act, 42 U.S.C. §§ 15301–15545. Under the Help America Vote Act, states are required to offer provisional ballots to Election Day voters who changed residences within thirty days of an election but failed to report the move to their county board of elections. *See* 42 U.S.C. § 15482(a). However, such provisional ballots are only required to be counted "in accordance with State law." *Id.* § 15482(a)(4).

In response, the North Carolina General Assembly passed Session Law 2005–2, removing the requirement that voters appear in the proper precinct on Election Day in order to vote. 2005 N.C. Sess. Law 2, § 2 (codified at N.C. Gen.Stat. § 163–55(a) (2006)). The law provided that "[t]he county board of elections shall count [out-of-precinct provisional ballots] for all ballot items on which it determines that the individual was eligible under State or federal law to vote." *Id.* § 4 (codified at N.C. Gen.Stat. § 163–166.11(5) (2006)).

The General Assembly made a finding when it adopted the mechanism in SL 2005–2 that " 'of those registered voters who happened to vote provisional ballots outside their resident precincts on the day of the November 2004 General Election, a disproportionately high percentage were African–American.' " *McCrory,* 997 F.Supp.2d at 368 (citation omitted).

The district court found that (1) between the years 2006 and 2010, an average of 17.1% of African Americans in North Carolina moved within the State, as compared to only 10.9% of whites; and (2) 27% of poor African Americans in North Carolina lack access to a vehicle, compared to 8.8% of poor whites. Also, the court accepted the determinations of Plaintiffs' experts that "the prohibition on counting out-of-precinct provisional ballots will disproportionately affect black voters." *Id.* at 366. According to calculations the district court accepted, the total number of African Americans using out-of-precinct voting represents 0.342% of the African American vote in that election. The total share of the overall white vote that voted out-of-precinct was 0.21%. *Id.* House Bill 589 ***234** bars county boards of elections from counting such ballots.

C. *Early Voting*

"No-excuse" early voting was established for even-year general elections in North Carolina beginning in 2000. 1999 N.C. Sess. Law 455, § 1 (codified at N.C. Gen.Stat. §§ 163–226(a1), 163–227.2(a1) (2000)). At that point, a registered voter could present herself at her county board of elections office "[n]ot earlier than the first business day after the twenty-fifth day before an election ... and not later than 5:00 p.m. on the Friday prior to that election" to cast her ballot. N.C. Gen.Stat. § 163–227.2(b) (2000).

After the 2000 election cycle, the General Assembly expanded no-excuse early voting to all elections. 2001 N.C. Sess. Law 337, § 1. It also amended the early-voting period so that voters could appear at the county board of elections office to vote "[n]ot earlier than the third Thursday before an election ... and not later than 1:00 P.M. on the last Saturday before that election." 2001 N.C. Sess. Law 319, § 5(a) (codified at N.C. Gen.Stat. § 163–227.2(b) (2002)). Under this law, county boards of elections were required to remain open for voting until 1:00 p.m. on that final Saturday, but retained the discretion to allow voting until 5:00 p.m. *Id.* They were also permitted to maintain early-voting hours during the evening or on weekends throughout the early-voting period. *Id.* § 5(b) (codified at N.C. Gen.Stat. § 163–227.2(f) (2002)).

House Bill 589 changes the law to allow only ten days of early voting. It also eliminates the discretion county boards of elections had to stay open until 5:00 p.m. on the final Saturday of early voting.

The district court found that in 2010, 36% of all African American voters that cast ballots utilized early voting, as compared to 33.1% of white voters. By comparison, in the presidential elections of 2008 and 2012, over 70% of African American voters used early voting compared to just over 50% of white voters.

D. *Poll Observers and Challengers*

North Carolina law permits the chair of each political party in every county to "designate two observers to attend each voting place at each primary and election." N.C. Gen.Stat. § 163–45(a). House Bill 589 allows the chair of each county party to "designate 10 additional at-large observers who are residents of that county who may attend any voting place in that county." 2013 N.C. Sess. Law 381, § 11.1 (codified at N.C. Gen.Stat. § 163–45(a)). "Not more than two observers from the same political party shall be permitted in the voting enclosure at any time, except that in addition one of the at-large observers from each party may also be in the voting enclosure." *Id.* The list of at-large observers must be "provided by the county director of elections to the chief judge [for each affected precinct]." *Id.* (codified at § 163–45(b)).

In conjunction with the addition of at-large observers, the law now permits any registered voter in the county to challenge a ballot on Election Day. *Id.* § 20.2 (codified at N.C. Gen.Stat. § 163–87)). And during early voting, any state resident may now challenge ballots. *Id.* § 20.1 (codified at N.C. Gen.Stat. § 163–84)).

E. *County Boards of Elections Discretion to Keep the Polls Open*

Under North Carolina law, the polls on Election Day are to remain open from 6:30 a.m. until 7:30 p.m. N.C. Gen.Stat. § 163–166.01. Beginning in 2001, each county board of elections had the power to "direct ***235** that the polls remain open until 8:30 p.m." in "extraordinary circumstances." 2001 N.C. Sess. Laws 460, § 3 (codified at N.C. Gen.Stat. § 163–166 (2002)). House Bill 589 eliminates the discretion of the county boards of elections by deleting the "extraordinary circumstances" clause. 2013 N.C. Sess. Law 381, § 33.1.

The law now provides "If the polls are delayed in opening for more than 15 minutes, or are interrupted for more than 15 minutes after opening, the State Board of Elections may extend the closing time by an equal number of minutes. As authorized by law, the State Board of Elections shall be available either in person or by teleconference on the day of election to approve any such extension." N.C. Gen.Stat. § 163–166.01.

F. *Socioeconomic Disparities in North Carolina*

The district court found that Plaintiffs' expert testimony "demonstrate[d] that black citizens of North Carolina currently lag behind whites in several key socioeconomic indicators, including education, employment, income, access to transportation, and residential stability." *McCrory,* 997 F.Supp.2d at 348. Plaintiffs presented "unchallenged statistics," for example, that (1) as of 2011–12, 34% of African American North Carolinians live below the federal poverty level, compared to 13% of whites; (2) as of the fourth quarter of 2012, unemployment rates in North Carolina were 17.3% for African Americans and 6.7% for whites; (3) 15.7% of African American North Carolinians over age 24 lack a high school degree, as compared to 10.1% of whites; (4) 27% of poor African American North Carolinians do not have access to a vehicle, compared to 8.8% of poor whites; and (5) 75.1% of whites in North Carolina live in owned homes as compared to 49.8% of African Americans. *Id.* at 348 n. 27. The district court accepted that "North Carolina's history of official discrimination against blacks has resulted in current socioeconomic disparities with whites." *Id.* at 366.

II. ***Standard of Review***

The district court made these and other findings and conclusions in an opinion and order filed August 8, 2014. Therein, the district court denied completely Plaintiffs' request for a preliminary injunction. Plaintiffs in turn filed an Emergency Motion for Injunction Pending Appeal, which we denied, instead granting Plaintiffs' motion to expedite this appeal.

We evaluate the district court's decision to deny a preliminary injunction "for an abuse of discretion[,] review[ing] the district court's factual findings for clear error and ... its legal

conclusions de novo." *Pashby v. Delia,* 709 F.3d 307, 319 (4th Cir.2013) (internal quotation marks and citations omitted). A district court abuses its discretion when it misapprehends or misapplies the applicable law. *See, e.g., Centro Tepeyac v. Montgomery Cnty.,* 722 F.3d 184, 188 (4th Cir.2013)(en banc). "Clear error occurs when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Harvey,* 532 F.3d 326, 336 (4th Cir.2008)(internal quotation marks and citations omitted).

III. *Preliminary Injunction Analysis*

A preliminary injunction may be characterized as being either prohibitory or mandatory. Here, Plaintiffs assert that the preliminary injunction they seek is prohibitory while Defendants claim it is mandatory, which "in any circumstance is disfavored." *Taylor v. Freeman,* 34 F.3d 266, 270 n. 2 (4th Cir.1994).

***236** Whereas mandatory injunctions alter the status quo, prohibitory injunctions "aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending." *Pashby,* 709 F.3d at 319. We have defined the status quo for this purpose to be "the last uncontested status between the parties which preceded the controversy." *Id.* at 320 (internal quotation marks and citation omitted). "To be sure, it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions, but ... [s]uch an injunction restores, rather than disturbs, the status quo ante." *Aggarao v. MOL Ship Mgmt. Co.,* 675 F.3d 355, 378 (4th Cir.2012) (internal quotation marks and citation omitted).

Here, Plaintiffs brought their lawsuits challenging elements of House Bill 589 on the very same day it was signed into law-August 12, 2013. Plaintiffs then filed motions seeking to enjoin House Bill 589's "*elimination* of [same-day registration], out-of-precinct provisional voting, and preregistration[, and] its *cutback* of early voting." *McCrory,* 997 F.Supp.2d at 339 (emphasis added). Without doubt, this is the language and stuff of a prohibitory injunction seeking to maintain the status quo.

To win such a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

IV. *Preliminary Injunction Denied On Certain House Bill 589 Provisions*

At the outset, we determine that Plaintiffs have failed to establish at least one element necessary to win a preliminary injunction with respect to the following provisions of House Bill 589: (i) the reduction of early-voting days; (ii) the expansion of allowable voter challengers; (iii) the elimination of the discretion of county boards of elections to keep the polls open an additional hour on Election Day in "extraordinary circumstances"; (iv) the elimination of pre-registration of sixteen- and seventeen-year-olds who will not be eighteen years old by the next general election; and (v) the soft roll-out of voter identification requirements to go into effect in 2016.

With respect to early voting, we are convinced that the significant risk of a substantial burden to the State tips the balance of hardships in its favor. Were we to enjoin House Bill 589's reduction in early-voting days, early voting would need to begin in approximately two weeks. We conclude that this very tight timeframe represents a burden not only on the State, but also on the county boards of elections. The balance of hardships thus favors denying a preliminary injunction as to early voting.

With respect to pre-registration of sixteen- and seventeen-year-olds, as the district court correctly noted, only citizens eighteen years and older may vote. The State's refusal to preregister sixteen- and seventeen-year-olds will, therefore, not harm citizens who may vote in the upcoming general election. The district court therefore did not abuse its discretion in determining that, while Plaintiffs could well succeed on this claim at trial, they have not shown that "they will be irreparably harmed before trial absent an injunction." *McCrory,* 997 F.Supp.2d at 378.

Regarding the elimination of the discretion of county boards of elections to keep the polls open an additional hour on ***237** Election Day in "extraordinary circumstances," the district court did not abuse its discretion in finding that Plaintiffs have failed to show that they will be irreparably harmed by this provision in the upcoming election. This is particularly true, as the district court noted, given that the State Board of Elections "retains the ability to make up significant losses in time by ordering the polls to remain open on the event of a delay." *Id.* at 380. Again, this is not to say that Plaintiffs will not ultimately succeed with their challenge to this provision at trial. They simply have not shown irreparable harm for purposes of the preliminary injunction.

With respect to the soft roll-out of voter identification requirements to go into effect in 2016, as the district court noted, Plaintiffs did provide evidence that a husband and wife were improperly advised that they needed a photo identification in order to vote in the May 2014 primary. *McCrory,* 997 F.Supp.2d at 377. While that couple was certainly misinformed, and while that fact raises a red flag, Plaintiffs cannot escape the fact that even that couple was, in fact, allowed to vote. *Id.* While we share Plaintiffs' concern that requiring poll workers to implement the soft rollout without adequate training might result in some confusion, we are unable to find that the district court committed clear error in deeming this argument "speculative." *McCrory,* 997 F.Supp.2d at 377. Again, Plaintiffs may well succeed with their challenge to the identification law at trial. We hold only that, for purposes of the upcoming election, they have not shown irreparable injury.

Finally, with respect to House Bill 589's poll challenger and observer provision, we agree with the district court that "African–American voters in North Carolina and elsewhere have good reason to be concerned about intimidation and other threats to their voting rights. Any intimidation is unlawful and cannot be tolerated, and courts must be vigilant to ensure that such conduct is rooted out where it may appear." *McCrory,* 997 F.Supp.2d at 380. Nevertheless, the district court did not abuse its discretion in finding that Plaintiffs have not shown that any such irreparable harm is likely to occur in the upcoming election. The district court found that "Plaintiffs have provided no basis to suggest that poll observers or any challenger(s) will abuse their statutory power." *Id.* Although we are skeptical as to the ultimate accuracy of this prediction, we cannot say that the district court committed clear error.

We do not mean to suggest that Plaintiffs cannot prove and eventually succeed on their challenges to all of these provisions when their case goes to trial. Indeed, a proper application of the law to a more developed factual record could very well result in some or all of the challenged House Bill 589 provisions being struck down. At this point in time, however, we hold that, for purposes of a preliminary injunction as to this November's election and based on the facts as found by the district court for the limited purpose of addressing Plaintiffs' request for a preliminary injunction, the district court did not abuse its discretion in determining that Plaintiffs have not shown that the balance of hardships tips in their favor as to early voting or that they will suffer irreparable harm as to the other provisions discussed above.

V. *Analysis Of Same–Day Registration and Out–of–Precinct Voting Challenges*

We now turn to the remaining two challenged provisions of House Bill 589: the elimination of same-day registration and the prohibition on counting out-of-precinct ***238** ballots. We begin our analysis by evaluating Plaintiffs' likelihood of success on the merits of their Section 2 claims. Determining that Plaintiffs have shown that they are likely to succeed on the merits, we then proceed to the remaining elements of the preliminary injunction analysis: whether Plaintiffs are likely to suffer irreparable harm; whether the injunction is in the public interest; and finally, whether the balance of hardships tips in Plaintiffs' favor.

A. *Likelihood of Success on the Merits on Section 2*

Section 2 of the Voting Rights Act forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a) (formerly codified at 42 U.S.C. § 1973(a)). "A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by" citizens of protected races "in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

With Section 2, Congress effectuated a "permanent, nationwide ban on racial discrimination" because "any racial discrimination in voting is too much." *Shelby Cnty.,* 133 S.Ct. at 2631. Accordingly, Section 2 "prohibits all forms of voting discrimination" that lessen opportunity for minority voters. *Gingles,* 478 U.S. at 45 n. 10, 106 S.Ct. 2752.

"Both the Federal Government and individuals" may sue to enforce Section 2, under which "injunctive relief is available ... to block voting laws from going into effect." *Shelby Cnty.,* 133 S.Ct. at 2619. Thus, in two very recent cases, courts granted injunctive relief to plaintiffs with vote-denial claims where state election laws less sweeping than North Carolina's had recently been passed. *Ohio State Conference of N.A.A.C.P. v. Husted,* —— F.Supp.3d ——, 2014 WL 4377869 (S.D.Ohio 2014), *aff'd,* No. 14–3877, 768 F.3d 524, 2014 WL 4724703 (6th Cir. Sept. 24, 2014),

stayed, No. 14A336, Order List 573 U.S. ——, 135 S.Ct. 42, 189 L.Ed.2d 894, 2014 WL 4809069 (U.S. Sept. 29, 2014); *Frank v. Walker,* 17 F.Supp.3d. 837, 2014 WL 1775432 (E.D.Wis.2014), *stayed,* 766 F.3d 755, 2014 WL 4494153 (7th Cir. Sept. 12, 2014).

Under Section 2 as it exists today, showing intentional discrimination is unnecessary. [4] Instead, a Section 2 violation can "be established by proof of discriminatory results alone." *Chisom v. Roemer,* 501 U.S. 380, 404, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991). Thus, the "right" Section 2 inquiry "is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.' " *Gingles,* 478 U.S. at 44, 106 S.Ct. 2752 (footnote omitted) (quoting S.Rep. No. 97–417, 97th Cong.2nd Sess. 28 (1982), U.S.Code Cong. & Admin. News 1982, p. 206). In other words, "[t]he essence of a [Section] 2 claim ***239** is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47, 106 S.Ct. 2752.

4 The Supreme Court had previously read an intent requirement into Section 2, but Congress quickly amended the law to reject that interpretation. *See e.g., Gingles,* 478 U.S. at 43–44, 106 S.Ct. 2752 (noting that Congress "dispositively reject[ed] the position of the plurality in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters").

Section 2's use to date has primarily been in the context of vote-dilution cases. "Vote dilution claims involve challenges to methods of electing representatives-like redistricting or at-large districts-as having the effect of diminishing minorities' voting strength." *Husted,* 768 F.3d at 553, 2014 WL 4724703, at *24. The district court in this case correctly noted that there is a paucity of appellate case law evaluating the merits of Section 2 claims in the vote-denial context. *McCrory,* 997 F.Supp.2d at 346. It may well be that, historically, Section 2 claims focused on vote dilution. But the predominance of vote dilution in Section 2 jurisprudence likely stems from the effectiveness of the now-defunct Section 5 preclearance requirements that stopped would-be vote denial from occurring in covered jurisdictions like large parts of North Carolina. Even the district court recognized as much. *Id.*

The facts of this case attest to the prophylactic success of Section 5's preclearance requirements. It appears that Section 5, which required covered jurisdictions to prove that a change in electoral law had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color," 52 U.S.C. § 10304(a), was the only reason House Bill 589's sponsors did not reveal the "full bill" to the public until after the *Shelby County* decision came down. *McCrory,* 997 F.Supp.2d at 336.

Nonetheless, despite the success of Section 5's preclearance requirement at tamping down vote denial in covered jurisdictions, Section 2's use to date has not been entirely dilution-focused. Rather, courts have entertained vote-denial claims regarding a wide range of practices, including restrictive voter identification laws (*Frank,* 17 F.Supp.3d 837, 2014 WL 1775432); unequal access to voter registration opportunities (*Operation Push v. Allain,* 674 F.Supp. 1245 (N.D.Miss.1987), *aff'd sub nom, Operation Push v. Mabus,* 932 F.2d 400 (5th Cir.1991)); unequal access to polling places (*Brown v. Dean,* 555 F.Supp. 502 (D.R.I.1982)); and omnibus laws combining registration and voting restrictions (*Husted,* —— F.Supp.3d ——, 2014 WL 4377869, *aff'd,* 768 F.3d 524, 2014 WL 4724703).

Indeed, Section 2's plain language makes clear that vote denial is precisely the kind of issue Section 2 was intended to address. Section 2 of the Voting Rights Act forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). *See also Gingles,* 478 U.S. at 45 n. 10, 106 S.Ct. 2752 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution.").

Further, the principles that make vote dilution objectionable under the Voting Rights Act logically extend to vote denial. Everyone in this case agrees that Section 2 has routinely been used to address vote dilution—which basically allows all voters to 'sing' but forces certain groups to do so pianissimo. Vote denial is simply a more extreme form of the same pernicious violation—those groups are not simply made to sing quietly; instead their voices are silenced completely. A fortiori, then, Section 2 must support vote-denial claims.

Justice Scalia has provided a helpful illustration of what a Section 2 vote-denial claim might look like:

> If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks ***240** would have less opportunity "to participate in the political process" than whites, and [Section] 2 would therefore be violated....

Chisom, 501 U.S. at 408, 111 S.Ct. 2354 (Scalia, J., dissenting).

Based on our reading of the plain language of the statute and relevant Supreme Court authority, we agree with the Sixth Circuit that a Section 2 vote-denial claim consists of two elements:

- First, "the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' " *Husted,* 768 F.3d at 553, 2014 WL 4724703, at *24 (quoting 42 U.S.C. § 1973(a)-(b));
- Second, that burden "must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Id.* (quoting *Gingles,* 478 U.S. at 47, 106 S.Ct. 2752).

"In assessing both elements, courts should consider 'the totality of circumstances.' " *Id.* at 553, 2014 WL 4724703 at *24 (quoting 42 U.S.C. § 1973(b)). In evaluating Section 2 claims, courts have looked to certain "typical" factors pulled directly from the Voting Rights Act's legislative history:

- The history of voting-related discrimination in the pertinent State or political subdivision;
- The extent to which voting in the elections of the pertinent State or political subdivision is racially polarized;
- The extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;
- The exclusion of members of the minority group from candidate slating processes;
- The extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
- The use of even subtle racial appeals in political campaigns;
- The extent to which members of the minority group have been elected to public office in the jurisdiction;
- Evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group; and
- The extent to which the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous.

Gingles, 478 U.S. at 44–45, 106 S.Ct. 2752. These factors may shed light on whether the two elements of a Section 2 claim are met.

Notably, while these factors "may be relevant" to a Section 2 analysis, " 'there is no requirement that any particular number of factors be proved, or [even] that a majority of them point one way or the other.' " *Id.* at 45, 106 S.Ct. 2752 (quoting S.Rep. No. 97–417, 97th Cong.2nd Sess. 29 (1982), U.S.Code Cong. & Admin. News 1982, p. 207). This is not surprising, given that Congress intended to give the Voting Rights Act "the broadest possible scope." *Allen v. State Bd. of Elections,* 393 U.S. 544, 567, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

***241** Instead, courts must undertake "a searching practical evaluation of the 'past and present reality,' [with] a 'functional' view of the political process." *Gingles,* 478 U.S. at 45, 106 S.Ct. 2752 (quoting S. Rep. at 30, U.S.Code Cong. & Admin. News 1982, p. 208). Courts must make "an intensely local appraisal of the design and impact of" electoral administration "in the light of past and present reality." *Id.* at 78, 106 S.Ct. 2752 (quoting *White v. Regester,* 412 U.S. 755, 769–70, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)).

With this legal framework in mind, we turn now to the district court's Section 2 analysis.

1. *The District Court Misapprehended and Misapplied the Law*

A close look at the district court's analysis here reveals numerous grave errors of law that constitute an abuse of discretion. *Centro Tepeyac,* 722 F.3d at 188.

First, the district court bluntly held that "Section 2 does not incorporate a 'retrogression' standard" and that the court therefore was "not concerned with whether the elimination of [same-day registration and other features] will worsen the position of minority voters in comparison to the preexisting voting standard, practice or procedure—a Section 5 inquiry." *McCrory,* 997 F.Supp.2d at 351–52 (internal quotation marks and citations omitted).

Contrary to the district court's statements, Section 2, on its face, requires a broad "totality of the circumstances" review. 52 U.S.C. § 10301(b). Clearly, an eye toward past practices is part and parcel of the totality of the circumstances.

Further, as the Supreme Court noted, "some parts of the [Section] 2 analysis may overlap with the [Section] 5 inquiry." *Georgia v. Ashcroft,* 539 U.S. 461, 478, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). Both Section 2 and Section 5 invite comparison by using the term "abridge[ ]." Section 5 states that any voting practice or procedure "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color ... to elect their preferred candidates of choice denies or *abridges* the right to vote." 52 U.S.C. § 10304(b) (emphasis added). Section 2 forbids any "standard, practice, or procedure" that "results in a denial or *abridgement* of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). The Supreme Court has explained that "[t]he term 'abridge,' ... whose core meaning is 'shorten,'... necessarily entails a comparison. It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320, 333–34, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000) (citations omitted).

Neither the Supreme Court nor this Court has ever held that, in determining whether an abridgement has occurred, courts are categorically barred from considering past practices, as the district court here suggested. In fact, opinions from other circuits support the opposite conclusion. For example, the Tenth Circuit, quoting directly from Section 2's legislative history, has explained that " '[i]f [a challenged] procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact.' " *Sanchez v. State of Colo.,* 97 F.3d 1303, 1325 (10th Cir.1996) (quoting 1982 U.S.C.C.A.N. at 207, n.117). And as the Sixth Circuit recently held, under Section 2, "the focus is whether minorities enjoy less opportunity to vote as compared to other voters. The fact that a practice or law eliminates voting opportunities ***242** that used to exist under prior law that African Americans disproportionately used is therefore relevant to an assessment of whether, under the current system, African Americans have an equal opportunity to participate in the political process as compared to other voters." *Husted,* 768 F.3d at 558, 2014 WL 4724703, at *28.

In this case, North Carolina's previous voting practices are centrally relevant under Section 2. They are a critical piece of the totality-of-the-circumstances analysis Section 2 requires. In refusing to consider the elimination of voting mechanisms successful in fostering minority participation, the district court misapprehended and misapplied Section 2.

Second, the district court considered each challenged electoral mechanism only separately. *See McCrory,* 997 F.Supp.2d at 344 (addressing same-day registration), at 365 (addressing out-of-precinct voting), at 370 (early voting), at 375 (identification requirements), at 378 (pre-registration of teenagers), and at 379 (poll challengers and elimination of discretion to keep the polls open). Yet "[a] panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition." *Clingman v. Beaver,* 544 U.S. 581, 607–08, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005) (O'Connor, J., concurring in part and concurring in the judgment).

By inspecting the different parts of House Bill 589 as if they existed in a vacuum, the district court failed to consider the sum of those parts and their cumulative effect on minority access to the ballot box. Doing so is hard to square with Section 2's mandate to look at the "totality of the circumstances," 52 U.S.C. § 10301(b), as well as Supreme Court precedent requiring "a searching practical evaluation" with a "functional view of the political process." *Gingles,* 478 U.S. at 45, 106 S.Ct. 2752 (internal quotation marks and citations omitted). By looking at each provision separately and failing to consider the totality of the circumstances, then, the district court misapprehended and misapplied the pertinent law.

Third, the district court failed to adequately consider North Carolina's history of voting discrimination. Instead the district court parroted the Supreme Court's proclamation that " 'history did not end in 1965,' " *McCrory,* 997 F.Supp.2d at 349 (quoting *Shelby Cnty.,* 133 S.Ct. at 2628) and that " '[p]ast discrimination cannot, in the manner of original sin, condemn governmental action.' " *Id.* (quoting *City of Mobile, Ala. v. Bolden,* 446 U.S. 55, 74, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980)).

Of course, the history of voting discrimination in many states in fact did substantially end in 1965—due in large part to the Voting Rights Act. The Supreme Court's observation that a state's history should not serve to condemn its future, however, does not absolve states from their future transgressions. As Justice Ginsburg pointed out in her *Shelby County* dissent, casting aside the Voting Rights Act because it has worked "to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." 133 S.Ct. at 2650 (Ginsburg, J., dissenting).

Immediately after *Shelby County,* i.e., literally the next day, when "history" without the Voting Rights Act's preclearance requirements picked up where it left off in 1965, North Carolina rushed to pass House Bill 589, the "full bill" legislative leadership likely knew it could not have gotten past federal preclearance in the pre-*Shelby County* era. *McCrory,* 997 F.Supp.2d at 336. Thus, to whatever extent the Supreme Court could rightly celebrate voting ***243** rights progress in *Shelby County,* the post-*Shelby County* facts on the ground in North Carolina should have cautioned the district court against doing so here.

Fourth, in analyzing the elimination of same-day registration, the district court looked to the National Voter Registration Act, which generally allows for a registration cutoff of thirty days before an election. *McCrory,* 997 F.Supp.2d at 352. The district court then declared that "it is difficult to conclude that Congress intended that a State's adoption of a registration cut-off before election day would constitute a violation of Section 2." *Id.* In doing so, the district court lost sight of the fact that the National Voter Registration Act merely sets a floor for state registration systems.

That North Carolina used to exceed National Voter Registration Act registration minimums does not entitle it to eliminate its more generous registration provisions without ensuring that, in doing so, it is not violating Section 2. Indeed, Congress made that quite clear by including in the National Voter Registration Act an express warning that the rights and remedies it established shall not "supersede, restrict, or limit the application of the Voting Rights Act." 52 U.S.C. § 20510(d)(1).

Fifth, also with respect to same-day registration, the district court suggested that because voting was not completely foreclosed and because voters could still register and vote by mail, a likely Section 2 violation had not been shown. *See McCrory,* 997 F.Supp.2d at 356 (noting that "North Carolina provides several other ways to register" besides same-day registration that "have not been shown to be practically unavailable to African–American residents").

However, nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance. Instead, it requires "that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles,* 478 U.S. at 47, 106 S.Ct. 2752. In waiving off disproportionately high African American use of certain curtailed registration and voting mechanisms as mere "preferences" that do not absolutely preclude participation, the district court abused its discretion. *See McCrory,* 997 F.Supp.2d at 351.

Sixth, Section 2, on its face, is local in nature. Under Section 2, "[a] violation ... is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the *State or political subdivision* are not equally open to participation by citizens of protected races." 52 U.S.C. § 10301(b) (emphasis added). As the Supreme Court has noted, in undertaking a Section 2 analysis, courts make "an intensely local appraisal of the design and impact of" electoral administration "in the light of past and present reality." *Gingles,* 478 U.S. at 78, 106 S.Ct. 2752.

Nevertheless, without any basis in the statute or binding precedent, the district court suggested that a practice must be discriminatory on a nationwide basis to violate Section 2 and held that a conclusion it might reach as to North Carolina would somehow throw other states' election laws into turmoil. For example, the district court stated that "a determination that North Carolina is in violation of Section 2 merely for maintaining a system that does not count out-of-precinct provisional ballots could place in jeopardy the laws of the majority of the States, which have made the decision not

to count such ballots." *McCrory,* 997 F.Supp.2d at 367. The district court's failure to understand the local nature of Section 2 constituted grave error. ***244** *Cf. Husted,* 768 F.3d at 559, 2014 WL 4724703, at *29 ("There is no reason to think our decision here compels any conclusion about the early-voting practices in other states, which do not necessarily share Ohio's particular circumstances.").

Seventh, the district court minimized Plaintiffs' claim as to out-of-precinct voting because "so few voters cast" ballots in the wrong precincts. *McCrory,* 997 F.Supp.2d at 366. The district court accepted evidence that "approximately 3,348 out-of-precinct provisional ballots cast by [African American] voters were counted to some extent in the 2012 general election." *Id.* Going forward under House Bill 589, a substantial number of African American voters will thus likely be disenfranchised.

Though the district court recognized that "failure to count out-of-precinct provisional ballots will have a disproportionate effect on [African American] voters," it held that such an effect "will be minimal." *Id.* Setting aside the basic truth that even one disenfranchised voter—let alone several thousand—is too many, what matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that "any" minority voter is being denied equal electoral opportunities. 52 U.S.C. § 10301(a) (forbidding any "standard, practice, or procedure" that interacts with social and historical conditions and thereby "results in a denial or abridgement of the right of *any* citizen of the United States to vote on account of race or color") (emphasis added).

Eighth and finally, the district court rationalized election administration changes that disproportionately affected minority voters on the pretext of procedural inertia and under-resourcing. For example, in evaluating Plaintiffs' Section 2 challenge to the elimination of same-day registration, the district court noted that county boards of elections "sometimes lack [ ] sufficient time to verify registrants." *McCrory,* 997 F.Supp.2d at 353. But in detailing why that was so, the district court exposed that the problem's roots lie largely in boards of elections' own procedures. *Id.* at 353 and n. 36. The district court then noted that "a voter who registered before the 'close of books' 25 days before election day will have more time to pass the verification procedure than a voter who registered and voted during early voting." *McCrory,* 997 F.Supp.2d at 353. But more time alone guarantees nothing, and nothing suggests that a voter who registers earlier will therefore be verified before voting.

The district court failed to recognize, much less address, the problem of sacrificing voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing. After all, Section 2 does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens' right to vote. The district court thus abused its discretion when it held that "[i]t is sufficient for the State to voice concern that [same-day registration] burdened [county boards of elections] and left inadequate time for elections officials to properly verify voters." *Id.* at 354.

These flaws in the district court's Section 2 analysis make it clear that the district court both misapprehended and misapplied the pertinent law. Accordingly, the district court abused its discretion. *Centro Tepeyac,* 722 F.3d at 188.

2. *Proper Application of Section 2*

Properly applying the law to the facts, even as the district court portrayed them, shows that Plaintiffs are, in fact, likely to succeed on the merits of their Section 2 claims regarding the elimination of same-day registration and out-of-precinct ***245** voting, contrary to the district court's determination.

In the first step of our Section 2 analysis, we must determine whether House Bill 589's elimination of same-day registration and out-of-precinct voting imposes a discriminatory burden on members of a protected class, meaning that members of the protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301. *See also Husted,* 768 F.3d at 553, 2014 WL 4724703, at *24 (identifying the two steps of the Section 2 vote-denial inquiry).

There can be no doubt that certain challenged measures in House Bill 589 disproportionately impact minority voters. The district court found that Plaintiffs "presented unrebutted testimony that [African American] North Carolinians have used [same-day registration] at a higher rate than whites in the three federal elections during which [same-day registration] was offered" and recognized that the elimination of same-day registration would "bear more heavily on African–Americans than whites." *McCrory,* 997 F.Supp.2d at 348–49. The district court also "accept[ed] the determinations of Plaintiffs' experts

that" African American voters disproportionately voted out of precinct and that "the prohibition on counting out-of-precinct provisional ballots will disproportionally affect [African American] voters." *Id.* at 366.

Second, we must determine whether this impact was in part "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Husted,* 768 F.3d at 553, 2014 WL 4724703, at *24 (quoting *Gingles,* 478 U.S. at 47, 106 S.Ct. 2752). Here, when we apply the proper legal standard to the district court's findings, the disproportionate impacts of eliminating same-day registration and out-of-precinct voting are clearly linked to relevant social and historical conditions.

In making this determination, we are aided by consideration of the "typical" factors that Congress noted in Section 2's legislative history. However we recognize that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Gingles,* 478 U.S. at 45, 106 S.Ct. 2752 (internal quotation marks and citation omitted).

Regarding the history of voting-related discrimination in the pertinent State, the district court found that "North Carolina ... has an unfortunate history of official discrimination in voting and other areas that dates back to the Nation's founding. This experience affects the perceptions and realities of [African American] North Carolinians to this day." *McCrory,* 997 F.Supp.2d at 349.

One of Plaintiffs' witnesses testified, for example, that at around age 19–in the 1940s-she was required to recite the Preamble to the Constitution from memory in order to register to vote. *Id.* at 349 n. 29. As of 1965, 39 counties in North Carolina were considered covered jurisdictions under the Voting Rights Act, having "maintained a test or device as a prerequisite to voting as of November 1, 1964, and [having] had less than 50 percent voter registration or turnout in the 1964 Presidential election." *Shelby Cnty.,* 133 S.Ct. at 2620. And in 1975, when the Voting Rights Act's preclearance formula was extended to cover jurisdictions that provided "English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English," several additional North Carolina counties became covered jurisdictions. *Id.*

The district court recognized that the legacy of overtly discriminatory practices ***246** such as these and the concurrent "struggle for African–Americans' voting rights" justifies North Carolinians' skepticism of changes to voting laws. *McCrory,* 997 F.Supp.2d at 349. The fact that the Supreme Court struck down the Voting Rights Act's "covered jurisdictions" formula in *Shelby County* does not allow us to simply ignore Congress's directive to view current changes to North Carolina's voting laws against the mire of its past.

Regarding effects of past discrimination that hinder minorities' ability to participate effectively in the political process, the district court pronounced that "Plaintiffs' expert testimony demonstrates that [African American] citizens of North Carolina currently lag behind whites in several key socioeconomic indicators, including education, employment, income, access to transportation, and residential stability." *McCrory,* 997 F.Supp.2d at 348. To this end, Plaintiffs presented the following unchallenged statistics: (1) as of 2011–12, 34% of African American North Carolinians live below the federal poverty level, compared to 13% of whites; (2) as of the fourth quarter of 2012, unemployment rates in North Carolina were 17.3 % for African Americans and 6.7 % for whites; (3) 15.7 % of African American North Carolinians over age 24 lack a high school degree, as compared to 10.1% of whites; (4) 27% of poor African American North Carolinians do not have access to a vehicle, compared to 8.8% of poor whites; and (5) 75.1% of African Americans in North Carolina live in owned homes as compared to 49.8% of whites. *Id.* at n. 27.

Finally, as to the tenuousness of the reasons given for the restrictions, North Carolina asserts goals of electoral integrity and fraud prevention. But nothing in the district court's portrayal of the facts suggests that those are anything other than merely imaginable. And "states cannot burden the right to vote in order to address dangers that are remote and only 'theoretically imaginable.' " *Frank,* —— F.Supp.3d at ——, 2014 WL 1775432, at *8 (quoting *Williams v. Rhodes,* 393 U.S. 23, 33, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968)).

Indeed, the best fact for North Carolina in the district court's opinion—the only specific problem cited, beyond naked statements of bureaucratic difficulty attributable at least as much to under-resourcing of boards of elections—is that a thousand votes that had not yet been properly verified had been counted in an election. *McCrory,* 997 F.Supp.2d at 353. But nothing in the district court's opinion suggests that any of those were fraudulently or otherwise improperly cast. Thus, even the best fact the State could muster is tenuous indeed.

At the end of the day, we cannot escape the district court's repeated findings that Plaintiffs presented undisputed evidence showing that same-day registration and out-of-precinct voting were enacted to increase voter participation, that African American voters disproportionately used those electoral mechanisms, and that House Bill 589 restricted those mechanisms and thus disproportionately impacts African American voters. To us, when viewed in the context of relevant "social and historical conditions" in North Carolina, *Gingles,* 478 U.S. at 47, 106 S.Ct. 2752, this looks precisely like the textbook example of Section 2 vote denial Justice Scalia provided:

> If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity "to participate in the political process" than whites, and [Section] 2 would therefore be violated....

Chisom, 501 U.S. at 408, 111 S.Ct. 2354.

Further, even if we were to accept North Carolina's purported non-discriminatory ***247** basis for keeping the full bill a secret until the federal preclearance regime had been thrown over in *Shelby County,* we cannot ignore the discriminatory results that several measures in House Bill 589 effectuate. Section 2's " 'results' criterion provides a powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination." *Chisom,* 501 U.S. at 406, 111 S.Ct. 2354 (Scalia, J., dissenting). Neither North Carolina nor any other jurisdiction can escape the powerful protections Section 2 affords minority voters by simply "espous[ing]" rationalizations for a discriminatory law. *McCrory,* 997 F.Supp.2d at 357.

While plaintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they "need not show a certainty of success." *Pashby,* 709 F.3d at 321. For the reasons set out above, Plaintiffs here have shown that with respect to the challenged provisions of House Bill 589 affecting same-day registration and out-of-precinct voting, they are likely to succeed with their Section 2 claims. In deciding otherwise, the district court abused its discretion.

B. *Irreparable Harm, the Public Interest, and the Balance of Hardships*

Having concluded that Plaintiffs have met the first test for a preliminary injunction, likelihood of success on the merits, as to their same-day registration and out-of-precinct voting challenges, we must consider whether the other elements have similarly been met. In other words, we must analyze whether Plaintiffs are likely to suffer irreparable harm; the balance of the hardships; and whether the injunction is in the public interest. *Winter,* 555 U.S. at 20, 129 S.Ct. 365.

Courts routinely deem restrictions on fundamental voting rights irreparable injury. *See, e.g., Obama for Am. v. Husted,* 697 F.3d 423, 436 (6th Cir.2012); *Williams v. Salerno,* 792 F.2d 323, 326 (2d Cir.1986); *cf. Alternative Political Parties v. Hooks,* 121 F.3d 876 (3d Cir.1997). And discriminatory voting procedures in particular are "the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." *United States v. City of Cambridge,* 799 F.2d 137, 140 (4th Cir.1986). This makes sense generally and here specifically because whether the number is thirty or thirty-thousand, surely some North Carolina minority voters will be disproportionately adversely affected in the upcoming election. And once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law. [5]

5 The district court seemingly failed to understand this point. For instance, in ruling that reduction in early voting was unlikely to cause irreparable harm to African American voters, the district court noted that during the 2010 midterm election, "the racial disparity in early-voting usage that was observed in 2008 and 2012 all but disappeared." *McCrory,* 997 F.Supp.2d at 372. In fact, the disparity was reduced from twenty percent to three percent. Thus, the district court seemed to believe that the injury to a smaller margin of African American voters that would occur during a midterm election year would be somehow less "irreparable." That conclusion misapprehends the irreparable harm standard and constituted an abuse of discretion.

By definition, "[t]he public interest ... favors permitting as many qualified voters to vote as possible." ***248** *Husted,* 697 F.3d at 437. *See also Purcell v. Gonzalez,* 549 U.S. 1, 4, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (The public has a "strong interest in exercising the fundamental political right to vote." (citations omitted)). And "upholding constitutional rights serves the public interest." *Newsom v. Albemarle*

Cnty. Sch. Bd., 354 F.3d 249, 261 (4th Cir.2003). The election laws in North Carolina prior to House Bill 589's enactment encouraged participation by qualified voters. But the challenged House Bill 589 provisions stripped them away. The public interest thus weighs heavily in Plaintiffs' favor.

By contrast, balancing the hardships is not wholly unproblematic for Plaintiffs. North Carolina will have little time to implement the relief we grant. But for some of the challenged changes, such as the elimination of same-day registration, systems have existed, do exist, and simply need to be resurrected. Similarly, counting out-of-precinct ballots merely requires the revival of previous practices or, however accomplished, the counting of a relatively small number of ballots. [6]

6 In *Purcell,* 549 U.S. 1, 127 S.Ct. 5, on which the dissenting opinion relies, the Supreme Court seemed troubled by the fact that a two-judge motions panel of the Ninth Circuit entered a factless, groundless "bare order" enjoining a new voter identification provision in an impending election. At the time of the "bare order," the appellate court also lacked findings by the district court. By contrast, neither district court nor appellate court reasoning, nor lengthy opinions explaining that reasoning, would be lacking in this case.

In conclusion, Plaintiffs have satisfied every element required for a preliminary injunction as to their Section 2 claims relating to same-day registration and out-of-precinct voting. [7] Accordingly, the district court abused its discretion in refusing to grant the requested injunctive relief as to those provisions. [8]

7 By not addressing Plaintiffs' constitutional claims, we do not mean to suggest that we agree with the district court's analysis. But because we find that Plaintiffs are likely to succeed on the merits under the Voting Rights Act, we need not, and therefore do not, reach the constitutional issues.

8 We respectfully disagree with the dissenting opinion that our decision today will create any significant voter confusion. The continuation of same-day registration and out-of-precinct voting after today's decision means more opportunity to register and vote than if the entirety of House Bill 589 were in effect for this election. Voters who are confused about whether they can, for example, still register and vote on the same day will have their votes counted. In this sense, our decision today acts as a safety net for voters confused about the effect of House Bill 589 on their right to vote while this litigation proceeds.

VI. ***Relief Granted***

Appellate courts have the power to vacate and remand a denial of a preliminary injunction with specific instructions for the district court to enter an injunction. *See, e.g., Elrod v. Burns,* 427 U.S. 347, 350, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (affirming the Seventh Circuit's grant of a preliminary injunction the district court had denied); *Am. Civil Liberties Union of Ill. v. Alvarez,* 679 F.3d 583, 608 (7th Cir.2012) (reversing and remanding with instructions to enter a preliminary injunction); *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.,* 354 F.3d 249, 252 (4th Cir.2003) (vacating the district court's order and remanding with instructions to enter a preliminary injunction).

For the many reasons above, we remand with instructions to the district court to enter as swiftly as possible a preliminary injunction granting the following relief:

- Part 16: House Bill 589's elimination of Same–Day Voter Registration, previously codified at G.S. 163–82.6A, is enjoined, with the provisions in effect ***249** prior to House Bill 589's enactment in full force pending the conclusion of a full hearing on the merits;

- Part 49: House Bill 589's elimination of Voting in Incorrect Precinct, previously codified at G.S. 163–55, is enjoined, with the provisions in effect prior to House Bill 589's enactment in full force pending the conclusion of a full hearing on the merits.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED WITH INSTRUCTIONS TO ENTER A PRELIMINARY INJUNCTION

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:
With great respect for my colleagues' contrary views and genuine regret that we cannot agree on the outcome of these important cases, I dissent.

At the center of these cases are changes made by the North Carolina General Assembly to the State's election laws. Plaintiff–Appellants and the United States moved the district court to grant a preliminary injunction prohibiting the State of North Carolina from enforcing many of the new laws. After considering the evidence offered at a week-long hearing (including the testimony of twelve witnesses and thousands of pages of written material) and the extensive written and oral legal arguments, the district court denied the motions. The court explained its reasoning in a 125–page opinion and order. Three sets of plaintiffs appealed; the United States did not. The district court's order is now before us, on interlocutory appeal, less than five weeks before voters in North Carolina go to the polls in a statewide general election.

Nothing in the record suggests that any dilatoriness by either the parties or the court caused this unfortunate timing. For, to give the important issues at stake here their due required extensive preparation, including months of discovery by the parties, and consideration and analysis by the district court. But the fact of the timing remains. Appellants ask this court to reverse the district court's denial of relief, and to grant a preliminary injunction requiring the State to revert to abandoned election procedures for which the State maintains it has not, and is not, prepared. For the reasons that follow, I cannot agree that such extraordinary relief should issue.

I.

To obtain a preliminary injunction, a plaintiff must establish that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council,* 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Critically, *each* of these four requirements must be satisfied. *Id.* Moreover, a plaintiff must make a "clear" showing both that he is likely to suffer irreparable harm absent relief *and* he is likely succeed on the merits at trial. *Id.; Real Truth About Obama, Inc. v. Fed. Election Comm'n,* 575 F.3d 342, 346 (4th Cir.2009), *vacated on other grounds,* 559 U.S. 1089, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010).

The majority emphasizes that unlawfully or unconstitutionally depriving North Carolinians of the opportunity to vote is an irreparable harm. I do not contend to the contrary. But by the same token, the requested injunction will require the State to halt the ongoing implementation of one of its duly enacted statutes—a statute that, for now at least, has not been rendered invalid. As the Chief Justice recently reminded us, this itself constitutes "a form of irreparable injury." ***250** *Maryland v. King,* —— U.S. ——, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (Roberts, C.J., in chambers).

Moreover, even a showing of irreparable harm does not, without more, entitle a plaintiff to a preliminary injunction. While we once permitted the mere presence of "grave or serious questions for litigation" to tip the balance in the movant's favor, *Rum Creek Coal Sales, Inc. v. Caperton,* 926 F.2d 353, 363 (4th Cir.1991), we have since recognized that this approach is in "fatal tension" with the Supreme Court's instruction in *Winter* that all four factors must be independently satisfied. *Real Truth,* 575 F.3d at 346. Accordingly, no matter how likely the irreparable injury absent an injunction, a plaintiff can obtain a preliminary injunction only if he demonstrates a clear likelihood of success on the merits, *and* the balance of equities favors him, *and* the injunction is in the public interest.

Such plaintiffs comprise a small class. As the Supreme Court explained in *Winter,* the grant of a preliminary injunction is "an extraordinary remedy never awarded as of right." 555 U.S. at 24, 129 S.Ct. 365; *see also id.* at 32, 129 S.Ct. 365 (noting that even issuance of a permanent injunction after trial "is a matter of equitable discretion; it does not follow from success on the merits as a matter of right."). In a recent case, our *en banc* court similarly recognized that the grant of such a remedy involves "the exercise of a very far-reaching power, which is to be applied only in [the] limited circumstances which clearly demand it." *Centro Tepeyac v. Montgomery Cnty.,* 722 F.3d 184, 188 (4th Cir.2013) (en banc) (internal citation and quotation marks omitted).

Our review of a district court's denial of such an "extraordinary remedy" is also highly deferential. We review the grant or denial of a preliminary injunction for "abuse of discretion." *Real Truth,* 575 F.3d at 345–47. Under this standard, we review the district court's factual findings for clear error. *Pashby v. Delia,* 709 F.3d 307, 319 (4th Cir.2013). We review its "legal rulings de novo" but we review the district court's "ultimate decision to issue the preliminary injunction for abuse of discretion." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 428, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). Thus, as the Third Circuit has explained, an appellate court "use[s] a three-part standard to review a District Court's grant of a preliminary

injunction: we review the Court's findings of fact for clear error, its conclusions of law de novo, and the ultimate decision to grant the preliminary injunction for abuse of discretion." *Miller v. Mitchell,* 598 F.3d 139, 145 (3d Cir.2010).

While securing reversal of a denial of preliminary relief is an uphill battle for any movant, Appellants face a particularly steep challenge here. For "considerations specific to election cases," including the risk of voter confusion, *Purcell v. Gonzalez,* 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006), counsel extreme caution when considering preliminary injunctive relief that will alter electoral procedures. [*] ***251** Because those risks increase "[a]s an election draws closer," *id.* at 5, 127 S.Ct. 5, so too must a court's caution. *Cf. Riley v. Kennedy,* 553 U.S. 406, 426, 128 S.Ct. 1970, 170 L.Ed.2d 837 (2008) ("[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges."). Moreover, election cases like the one at hand, in which an appellate court is asked to *reverse* a district court's denial of a preliminary injunction, risk creating "conflicting orders" which "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell,* 549 U.S. at 4–5, 127 S.Ct. 5.

[*] Although the majority steadfastly asserts that the requested injunction seeks only to maintain the status quo, the provisions challenged by Appellants were enacted more than a year ago and governed the statewide primary elections held on May 6, 2014. Appellants did not move for a preliminary injunction until May 19, 2014, almost two weeks after the new electoral procedures had been implemented in the primary. Moreover, regardless of how one conceives of the status quo, there is simply no way to characterize the relief requested by Appellants as anything but extraordinary. Appellants ask a federal court to order state election officials to abandon their electoral laws without first resolving the question of the legality of those laws.

II.

Given the standard of review, and the Supreme Court's teaching on injunctive relief in the weeks before an election, I cannot join the majority in reversing the judgment of the district court.

My colleagues argue that we should reverse because, in assessing the likelihood of Appellants' success on the merits, the district court articulated certain legal standards incorrectly. Such a misstep, they assert, constitutes an abuse of discretion and so requires reversal and grant of injunctive relief. Usually an error of law does constitute an abuse of discretion and does require reversal. But when reviewing the denial of a preliminary injunction, an appellate court can find an abuse of discretion requiring reversal only if the appellant demonstrates that the corrected standard renders its likelihood of success clear and establishes that the other requirements for a preliminary injunction have been met.

In my view, Appellants have not done this here. That is, Appellants have neither established a clear likelihood of success on the merits, nor demonstrated, particularly at this late juncture, that the balance of the equities and the public interest weigh in their favor. Absent the required showing on *each* of these elements, the district court's "ultimate decision" to deny preliminary relief was not an abuse of discretion. *O Centro,* 546 U.S. at 428, 126 S.Ct. 1211.

III.

Giving due deference, as we must, to the district court's findings of fact, Appellants have not established that the district court abused its discretion in finding no clear likelihood of their success on the merits. This is not to say that I believe the district court's legal analysis was without error, only that Appellants have not shown that correcting the errors would render clear their likelihood of success.

For instance, I am troubled by the court's failure to consider the cumulative impact of the changes in North Carolina voting law. Specifically, the district court found that prohibiting the counting of out-of-precinct provisional ballots would not burden minority voters because early voting provides "ample opportunity" for individuals "who would vote out-of-precinct" to otherwise cast their ballot. *North Carolina State Conference of Branches of the NAACP v. McCrory,* 997 F.Supp.2d 322, 367 (M.D.N.C.2014). That finding rests on the assumption that eliminating a week of early voting still leaves minority voters with "ample opportunity." But the district court discussed plaintiffs' challenges to these two provisions without acknowledging that the burden imposed by one restriction could reinforce the burden imposed by others. *Compare id.* at 366–68 *with id.* at 370–75. Similarly, the district court discussed same-day registration, *id.* at 46,

without recognizing that eliminating, in one fell swoop, preferred methods of both registration and ballot casting has a more profound impact on the opportunity to vote than simply eliminating one or ***252** the other. *Cf. Pisano v. Strach,* 743 F.3d 927, 933 (4th Cir.2014) ("When deciding whether a state's filing deadline is unconstitutionally burdensome, we evaluate the *combined effect* of the state's ballot-access regulations." (emphasis added)).

At this stage, however, I cannot conclude that correcting these, or similar, errors requires the holding that Appellants are clearly likely to succeed on the merits. The district court's factual findings about early voting and same-day registration suggest Appellants' *evidence* simply did not sway the court. The court rejected as unpersuasive evidence offered that constricting the early voting period assertedly would create long lines at the polls, *McCrory,* 997 F.Supp.2d at 372, affect black voters disproportionately, *id.,* or cut down on Sunday voting hours in the upcoming election. *Id.* at 373. So too with same-day registration: the district court rejected Appellants' assertions that eliminating same-day registration would cause registration rates among black North Carolinians to drop. *Id.* at 350. Whatever the wisdom of these factual findings, they are not clearly erroneous.

In short, had I been overseeing this case in the district court, I might have reached a different conclusion about Plaintiffs' chances of success on the merits. But neither I nor my colleagues oversaw this case and its 11,000–page record. Nor did we consider the evidence and arguments produced in five days of hearings. And though I share some of my colleagues' concerns about the district court's legal analysis, those concerns do not establish that plaintiffs have shown a clear likelihood of success on the merits.

IV.

Further, Appellants have not shown that the balance of equities and the public interest support issuance of the preliminary injunction they seek. Any such showing would require overcoming the burden the State faces in complying with ordered changes to its election procedures and the risk of confusing voters with dueling opinions so close to the election.

Election day is less than five weeks away, and other deadlines loom even closer. In fact, for the many North Carolina voters that have already submitted absentee ballots, this election is already underway. The majority's grant of injunctive relief requires boards of elections in North Carolina's 100 counties to offer same-day registration during the early voting period and count out-of-precinct provisional ballots—practices for which neither the State nor the local boards have prepared. *See, e.g.,* Poucher Decl. 4, ECF No. 146–1 ("To have to revert back to conducting an election under the prior statute would be confusing to [election] officials, and again unfunded.").

The majority suggests that the State exaggerates the burden imposed on it, and that resurrecting past practices is a simple matter. Perhaps. But the logistics of running an election seem to me far more complex than my colleagues suggest. Poll workers have been trained and polling centers have been equipped in reliance on the procedures that governed the most recent statewide primary. An injunction will render some of those procedures a nullity. Additionally, it is undisputed that the same-day registration system used in elections under the prior law was administered electronically through an application embedded within a comprehensive computer program. That application was disengaged after the enactment of SL 2013–381, and is now out of date. Reliable restoration of the application in time for the general election is apparently impossible. For this reason, the injunction will require the same-day registration process to be manually ***253** administered by each county board, risking delays, errors, and general confusion. Thus, while reverting to the old procedure may make for a simple order, it will require substantial effort to effectuate in practice.

In addition to the burden it places on the State, an about-face at this juncture runs the very real risk of confusing voters who will receive incorrect and conflicting information about when and how they can register and cast their ballots. Under North Carolina law, ensuring voters have the correct information in a timely fashion is not just good policy, it is a statutory mandate. *See* N.C. Gen.Stat. § 163–278.69(a). The State is required to send to every household a Judicial Voter Guide "no more than 28 days nor fewer than seven days before" early voting begins. *Id.* We were told at oral argument that this Guide, and a timeline of important dates, have already been printed and sent to every household in the State, and have been made available on the State Board of Elections' website. *See 2014 General Election Judicial Voter Guide*, http://www.ncsbe.gov/ncsbe/Portals/0/FilesT/JudicialVoterGuide2014.pdf (last visited Sept. 30, 2014). The majority's order renders this information inaccurate. For instance, the current Guide lists a registration cut-off date of October 10 and instructs voters that they must vote in their

proper precinct. *Id.* Moreover, the widespread dissemination of flat-out contradictory information undermines confidence in the State's ability to carry out orderly elections.

Recognizing the importance of avoiding confusion at the polls, both we and the Supreme Court have deferred to a state's own assessment of when such confusion is likely to occur. *See, e.g., U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 834, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995); *Munro v. Socialist Workers Party,* 479 U.S. 189, 195–96, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986); *Pisano,* 743 F.3d at 937. The majority downplays the State's concerns about confusion here, suggesting that the effect of any confusion will be minimal. My colleagues see the injunction as a "safety net" that will ensure that any confused voters at least have the opportunity to cast a ballot. But this assumes that those who may be confused by "conflicting orders" will resist the "consequent incentive to remain away from the polls." *Purcell,* 549 U.S. at 5, 127 S.Ct. 5. For "conflicting orders" cause not only uncertainty about the status of particular voting procedures, but also general frustration with and distrust of an election process changed on the eve of the election itself.

In sum, to obtain a preliminary injunction, Appellants must establish that the balance of hardships and public interest weigh in their favor. I cannot conclude that they have done so here.

V.

Appellants will have the opportunity at trial to demonstrate precisely how SL 2013–381 burdens voters in North Carolina. And if Appellants can show that the multiple provisions of that law work in tandem to limit voting opportunities, I am confident that the district court will consider the totality of that burden. A law that adopts a "death by a thousand cuts" approach to voting rights is no more valid than a law that constricts one aspect of the voting process in a particularly onerous manner. But at this juncture, in my view, Plaintiffs have not met the high bar necessary to obtain the relief they seek. Accordingly, I respectfully dissent.

All Citations

769 F.3d 224

APPENDIX NO. 2

112 S.Ct. 2130
Supreme Court of the United States

Manuel LUJAN, Jr., Secretary
of the Interior, Petitioner
v.
DEFENDERS OF WILDLIFE, et al.

No. 90–1424.
|
Argued Dec. 3, 1991.
|
Decided June 12, 1992.

Synopsis
Environmental groups brought action challenging regulation of the Secretary of the Interior which required other agencies to confer with him under the Endangered Species Act only with respect to federally funded projects in the United States and on the high seas. The United States District Court for the District of Minnesota, Donald D. Alsop, Chief Judge, dismissed for lack of standing, 658 F.Supp. 43. The Court of Appeals for the Eighth Circuit reversed, 851 F.2d 1035. The District Court entered judgment in favor of environmental groups, 707 F.Supp. 1082, and the Court of Appeals affirmed, 911 F.2d 117. On certiorari, the Supreme Court, Justice Scalia, held that: (1) plaintiffs did not assert sufficiently imminent injury to have standing, and (2) plaintiffs' claimed injury was not redressable.

Reversed and remanded.

Justice Kennedy filed an opinion concurring in part and concurring in the judgment in which Justice Souter joined.

Justice Stevens filed an opinion concurring in the judgment.

Justice Blackmun dissented and filed an opinion in which Justice O'Connor joined.

****2133** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Section 7(a)(2) of the Endangered Species Act of 1973 divides responsibilities regarding the protection of endangered species between petitioner Secretary of the Interior and the Secretary of Commerce, and requires each federal agency to consult with the relevant Secretary to ensure that any action funded by the agency is not likely to jeopardize the continued existence or habitat of any endangered or threatened species. Both Secretaries initially promulgated a joint regulation extending § 7(a)(2)'s coverage to actions taken in foreign nations, but a subsequent joint rule limited the section's geographic scope to the United States and the high seas. Respondents, wildlife conservation and other environmental organizations, filed an action in the District Court, seeking a declaratory judgment that the new regulation erred as to § 7(a)(2)'s geographic scope and an injunction requiring the Secretary of the Interior to promulgate a new rule restoring his initial interpretation. The Court of Appeals reversed the District Court's dismissal of the suit for lack of standing. Upon remand, on cross-motions for summary judgment, the District Court denied the Secretary's motion, which renewed his objection to standing, and granted respondents' motion, ordering the Secretary to publish a new rule. The Court of Appeals affirmed.

****2134** *Held:* The judgment is reversed, and the case is remanded.

911 F.2d 117, (CA 8 1990), reversed and remanded.

Justice SCALIA delivered the opinion of the Court, except as to Part III–B, concluding that respondents lack standing to seek judicial review of the rule. Pp. 2135–2140, 2142–2146.

(a) As the parties invoking federal jurisdiction, respondents bear the burden of showing standing by establishing, *inter alia,* that they have suffered an injury in fact, *i.e.,* a concrete and particularized, actual or imminent invasion of a legally protected interest. To survive a summary judgment motion, they must set forth by affidavit or other evidence specific facts to support their claim. Standing is particularly difficult to show here, since third parties, rather than respondents, are the object of the Government action or inaction to which respondents object. Pp. 2135–2137.

***556** b) Respondents did not demonstrate that they suffered an injury in fact. Assuming that they established that funded activities abroad threaten certain species, they failed to show

that one or more of their members would thereby be directly affected apart from the members' special interest in the subject. See *Sierra Club v. Morton,* 405 U.S. 727, 735, 739, 92 S.Ct. 1361, 1366, 1368, 31 L.Ed.2d 636. Affidavits of members claiming an intent to revisit project sites at some indefinite future time, at which time they will presumably be denied the opportunity to observe endangered animals, do not suffice, for they do not demonstrate an "imminent" injury. Respondents also mistakenly rely on a number of other novel standing theories. Their theory that any person using any part of a contiguous ecosystem adversely affected by a funded activity has standing even if the activity is located far away from the area of their use is inconsistent with this Court's opinion in *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695. And they state purely speculative, nonconcrete injuries when they argue that suit can be brought by anyone with an interest in studying or seeing endangered animals anywhere on the globe and anyone with a professional interest in such animals. Pp. 2137–2140.

(c) The Court of Appeals erred in holding that respondents had standing on the ground that the statute's citizen-suit provision confers on all persons the right to file suit to challenge the Secretary's failure to follow the proper consultative procedure, notwithstanding their inability to allege any separate concrete injury flowing from that failure. This Court has consistently held that a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state an Article III case or controversy. See, *e.g., Fairchild v. Hughes,* 258 U.S. 126, 129–130, 42 S.Ct. 274, 275, 66 L.Ed. 499. Vindicating the public interest is the function of the Congress and the Chief Executive. To allow that interest to be converted into an individual right by a statute denominating it as such and permitting all citizens to sue, regardless of whether they suffered any concrete injury, would authorize Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. Pp. 2142–2146.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, in which REHNQUIST, C.J., and WHITE, KENNEDY, SOUTER, and THOMAS, JJ., joined, and an opinion with respect to Part III–B, in which REHNQUIST, C.J., and WHITE and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER, J., joined, *post,* p. 2146. STEVENS, J., filed an opinion concurring in the judgment, *post,* **2135 *557 p. 2147. BLACKMUN, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post,* p. 2151.

Attorneys and Law Firms

Edwin S. Kneedler argued the cause for petitioner. With him on the briefs were *Solicitor General Starr, Acting Assistant Attorney General Hartman, Deputy Solicitor General Wallace, Robert L. Klarquist, David C. Shilton, Thomas L. Sansonetti,* and *Michael Young.*

Brian B. O'Neill argued the cause for respondents. With him on the brief were *Steven C. Schroer* and *Richard A. Duncan.**

* *Terence P. Ross, Daniel J. Popeo,* and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the City of Austin et al. by *William A. Butler, Angus E. Crane, Michael J. Bean, Kenneth Oden, James M. McCormack,* and *Wm. Robert Irvin;* for the American Association of Zoological Parks & Aquariums et al. by *Ronald J. Greene* and *W. Hardy Callcott;* for the American Institute of Biological Sciences by *Richard J. Wertheimer* and *Charles M. Chambers;* and for the Ecotropica Foundation of Brazil et al. by *Durwood J. Zaelke.*

A brief of *amici curiae* was filed for the State of Texas et al. by *Patrick J. Mahoney, Dan Morales,* Attorney General of Texas, *Will Pryor,* First Assistant Attorney General, *Mary F. Keller,* Deputy Attorney General, and *Nancy N. Lynch, Mary Ruth Holder,* and *Shannon J. Kilgore,* Assistant Attorneys General, *Grant Woods,* Attorney General of Arizona, *Winston Bryant,* Attorney General of Arkansas, *Daniel E. Lungren,* Attorney General of California, *Robert A. Butterworth,* Attorney General of Florida, *Michael E. Carpenter,* Attorney General of Maine, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Robert J. Del Tufo,* Attorney General of New Jersey, *Robert Abrams,* Attorney General of New York, *Lee Fisher,* Attorney General of Ohio, and *Jeffrey L. Amestoy,* Attorney General of Vermont, *Victor A. Kovner, Leonard J. Koerner, Neal M. Janey,* and *Louise H. Renne.*

Opinion

Justice SCALIA delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, and an opinion with respect to Part III–B, in which THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered ***558** Species Act of 1973 (ESA), 87 Stat. 884, 892, as amended, 16 U.S.C. § 1536, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

I

The ESA, 87 Stat. 884, as amended, 16 U.S.C. § 1531 *et seq.,* seeks to protect species of animals against threats to their continuing existence caused by man. See generally *TVA v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. 16 U.S.C. §§ 1533, 1536. Section 7(a)(2) of the Act then provides, in pertinent part:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." 16 U.S.C. § 1536(a)(2).

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce respectively, promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. 43 Fed.Reg. 874 (1978). The next year, however, the Interior Department began to reexamine its position. Letter from Leo Kuliz, Solicitor, Department of the Interior, to Assistant Secretary, Fish and Wildlife and Parks, Aug. 8, 1979. A revised joint regulation, reinterpreting ***559** § 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed in 1983, 48 Fed.Reg. 29990, and promulgated in 1986, 51 Fed.Reg. 19926; 50 CFR 402.01 (1991).

Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. The District Court granted the Secretary's motion to dismiss for lack of standing. *Defenders of Wildlife v. Hodel,* 658 F.Supp. 43, 47–48 (Minn.1987). The Court of Appeals for the Eighth Circuit reversed by a divided vote. *Defenders of Wildlife v. Hodel,* 851 F.2d 1035 (1988). On remand, the Secretary moved for summary judgment on the standing issue, and respondents moved for summary judgment on the merits. The District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion, and ordered the Secretary to publish a revised regulation. *Defenders of Wildlife v. Hodel,* 707 F.Supp. 1082 (Minn.1989). The Eighth Circuit affirmed. 911 F.2d 117 (1990). We granted certiorari, 500 U.S. 915, 111 S.Ct. 2008, 114 L.Ed.2d 97 (1991).

II

While the Constitution of the United States divides all power conferred upon ****2136** the Federal Government into "legislative Powers," Art. I, § 1, "[t]he executive Power," Art. II, § 1, and "[t]he judicial Power," Art. III, § 1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to "Cases" and "Controversies," but an executive inquiry can bear the name "case" (the Hoffa case) and a legislative dispute can bear the name "controversy" (the Smoot–Hawley controversy). Obviously, then, the Constitution's central mechanism of separation of powers depends ***560** largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. In The Federalist No. 48, Madison expressed the view that "[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere," whereas "the executive power [is] restrained within a narrower compass and ... more simple in its nature," and "the judiciary [is] described by landmarks still less uncertain."

The Federalist No. 48, p. 256 (Carey and McClellan eds. 1990). One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III—"serv[ing] to identify those disputes which are appropriately resolved through the judicial process," *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990)—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. See, *e.g., Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, see *id.,* at 756, 104 S.Ct., at 3327; *Warth v. Seldin,* 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton,* 405 U.S. 727, 740–741, n. 16, 92 S.Ct. 1361, 1368–1369, n. 16, 31 L.Ed.2d 636 (1972); [1] and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " *Whitmore, supra,* 495 U.S., at 155, 110 S.Ct., at 1723 (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare* ***561** *Rights Organization,* 426 U.S. 26, 41–42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.,* at 38, 43, 96 S.Ct., at 1924, 1926.

1 By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.

The party invoking federal jurisdiction bears the burden of establishing these elements. See *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990); *Warth, supra,* 422 U.S., at 508, 95 S.Ct., at 2210. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation. See *Lujan v. National Wildlife Federation,* 497 U.S. 871, 883–889, 110 S.Ct. 3177, 3185–3189, 111 L.Ed.2d 695 (1990); *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 114–115, and n. 31, 99 S.Ct. 1601, 1614–1615, and n. 31, 60 L.Ed.2d 66 (1979); ****2137** *Simon, supra,* 426 U.S., at 45, n. 25, 96 S.Ct., at 1927, and n. 25; *Warth, supra,* 422 U.S., at 527, and n. 6, 95 S.Ct., at 2219, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra,* 497 U.S., at 889, 110 S.Ct., at 3189. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone, supra,* 441 U.S., at 115, n. 31, 99 S.Ct., at 1616, n. 31.

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has ***562** caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish,* 490 U.S. 605, 615, 109 S.Ct. 2037, 2044, 104 L.Ed.2d 696 (1989) (opinion of KENNEDY, J.); see also *Simon, supra,* 426 U.S., at 41–42, 96 S.Ct., at 1925, 1926; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. *E.g., Warth, supra,* 422 U.S., at 505, 95 S.Ct., at 2208. Thus, when the plaintiff is not himself the object of the government action or inaction

he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. *Allen, supra,* 468 U.S., at 758, 104 S.Ct., at 3328; *Simon, supra,* 426 U.S., at 44–45, 96 S.Ct., at 1927; *Warth, supra,* 422 U.S., at 505, 95 S.Ct., at 2208.

III

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

A

Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." Complaint ¶ 5, App. 13. Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of ***563** standing. See, *e.g., Sierra Club v. Morton,* 405 U.S., at 734, 92 S.Ct., at 1366. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.,* at 734–735, 92 S.Ct., at 1366. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by ****2138** funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their " 'special interest' in th[e] subject." *Id.,* at 735, 739, 92 S.Ct., at 1366, 1368. See generally *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and "observed the traditional habitat of the endangered nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly," and that she "will suffer harm in fact as the result of [the] American ... role ... in overseeing the rehabilitation of the Aswan High Dam on the Nile ... and [in] develop [ing] ... Egypt's ... Master Water Plan." App. 101. Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued, "will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited ... [, which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." *Id.,* at 145–146. When Ms. Skilbred was asked ***564** at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future." *Id.,* at 318.

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to Mses. Kelly and Skilbred. That the women "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, " 'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.' " *Lyons,* 461 U.S., at 102, 103 S.Ct., at 1665 (quoting *O'Shea v. Littleton,* 414 U.S. 488, 495–496, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974)). And the affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the "actual or imminent" injury that our cases require. See *supra,* at 2136. [2]

2 The dissent acknowledges the settled requirement that the injury complained of be, if not actual, then at least *imminent*, but it contends that respondents could get past summary judgment because "a reasonable finder of fact could conclude ... that ... Kelly or Skilbred will soon return to the project sites." *Post,* at 2152. This analysis suffers either from a factual or from a legal defect, depending on what the "soon" is supposed to mean. If "soon"

refers to the standard mandated by our precedents —that the injury be "imminent," *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990)—we are at a loss to see how, as a factual matter, the standard can be met by respondents' mere profession of an intent, some day, to return. But if, as we suspect, "soon" means nothing more than "in this lifetime," then the dissent has undertaken quite a departure from our precedents. Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is " ' "*certainly* impending," ' " *id.,* at 158, 110 S.Ct., at 1725 (emphasis added). It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all. See, *e.g., id.,* at 156–160, 110 S.Ct., at 1723–1726; *Los Angeles v. Lyons,* 461 U.S. 95, 102–106, 103 S.Ct. 1660, 1665–1667, 75 L.Ed.2d 675 (1983).

There is no substance to the dissent's suggestion that imminence is demanded only when the alleged harm depends upon "the affirmative actions of third parties beyond a plaintiff's control," *post,* at 2153. Our cases *mention* third-party-caused contingency, naturally enough; but they also mention the plaintiff's failure to show that he will soon expose *himself* to the injury, see, *e.g., Lyons, supra,* at 105–106, 103 S.Ct., at 1666–1667; *O'Shea v. Littleton,* 414 U.S. 488, 497, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974); *Ashcroft v. Mattis,* 431 U.S. 171, 172–173, n. 2, 97 S.Ct. 1739, 1740 n. 2, 52 L.Ed.2d 219 (1977) (*per curiam*). And there is certainly no reason in principle to demand evidence that third persons will take the action exposing the plaintiff to harm, while *presuming* that the plaintiff himself will do so.

Our insistence upon these established requirements of standing does not mean that we would, as the dissent contends, "demand ... detailed descriptions" of damages, such as a "nightly schedule of attempted activities" from plaintiffs alleging loss of consortium. *Post,* at 2153. That case and the others posited by the dissent all involve *actual* harm; the existence of standing is clear, though the precise extent of harm remains to be determined at trial. Where there is no actual harm, however, its imminence (though not its precise extent) must be established.

****2139** ***565** Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled "ecosystem nexus," proposes that any person who uses *any part* of a "contiguous ecosystem" adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in *National Wildlife Federation,* which held that a plaintiff claiming injury from environmental damage ***566** must use the area affected by the challenged activity and not an area roughly "in the vicinity" of it. 497 U.S., at 887–889, 110 S.Ct., at 3188–3189; see also *Sierra Club,* 405 U.S., at 735, 92 S.Ct., at 1366. It makes no difference that the general-purpose section of the ESA states that the Act was intended in part "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U.S.C. § 1531(b). To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not "an ingenious academic exercise in the conceivable," *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973), but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who

observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible —though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals **2140 of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that *567 might have been the subject of his interest will no longer exist, see *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection. [3]

3 The dissent embraces each of respondents' "nexus" theories, rejecting this portion of our analysis because it is "unable to see how the distant location of the destruction *necessarily* (for purposes of ruling at summary judgment) mitigates the harm" to the plaintiff. *Post,* at 2154. But summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Respondents had to adduce facts, therefore, on the basis of which it could reasonably be found that concrete injury to their members was, as our cases require, "certainly impending." The dissent may be correct that the geographic remoteness of those members (here in the United States) from Sri Lanka and Aswan does not "*necessarily* " prevent such a finding—but it assuredly does so when no further facts have been brought forward (and respondents have produced none) showing that the impact upon animals in those distant places will in some fashion be reflected here. The dissent's position to the contrary reduces to the notion that distance *never* prevents harm, a proposition we categorically reject. It cannot be that a person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world. Were that the case, the plaintiff in *Sierra Club,* for example, could have avoided the necessity of establishing anyone's use of Mineral King by merely identifying one of its members interested in an endangered species of flora or fauna at that location. Justice BLACKMAN's accusation that a special rule is being crafted for "environmental claims," *post,* at 2154, is correct, but *he* is the craftsman.

Justice STEVENS, by contrast, would allow standing on an apparent "animal nexus" theory to all plaintiffs whose interest in the animals is "genuine." Such plaintiffs, we are told, do not have to visit the animals because the animals are analogous to family members. *Post,* at 2148–2149, and n. 2. We decline to join Justice STEVENS in this Linnaean leap. It is unclear to us what constitutes a "genuine" interest; how it differs from a "nongenuine" interest (which nonetheless prompted a plaintiff to file suit); and why such an interest in animals should be different from such an interest in anything else that is the subject of a lawsuit.

***568** B

Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations ... [are], even when premised on allegations of several instances of violations of law, ... rarely if ever appropriate for federal-court adjudication." *Allen,* 468 U.S., at 759–760, 104 S.Ct., at 3329.

The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question. Whereas in other contexts the ESA is quite explicit as to the Secretary's controlling authority, see, *e.g.,* 16 U.S.C. § 1533(a)(1)

("The Secretary shall" promulgate regulations determining endangered species); § 1535(d)(1) ****2141** ("The Secretary is authorized to provide financial assistance to any State"), with respect to consultation the initiative, and hence arguably the initial responsibility for determining statutory necessity, lies with ***569** the agencies, see § 1536(a)(2) ("*Each Federal agency shall,* in consultation with and with the assistance of the Secretary, insure that any" funded action is not likely to jeopardize endangered or threatened species) (emphasis added). When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies, see 51 Fed.Reg. 19928 (1986). The Solicitor General, however, has repudiated that position here, and the agencies themselves apparently deny the Secretary's authority. (During the period when the Secretary took the view that § 7(a)(2) did apply abroad, AID and FWS engaged in a running controversy over whether consultation was required with respect to the Mahaweli project, AID insisting that consultation applied only to domestic actions.)

Respondents assert that this legal uncertainty did not affect redressability (and hence standing) because the District Court itself could resolve the issue of the Secretary's authority as a necessary part of its standing inquiry. Assuming that it is appropriate to resolve an issue of law such as this in connection with a threshold standing inquiry, resolution by the District Court would not have remedied respondents' alleged injury anyway, because it would not have been binding upon the agencies. They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.[4] The ***570** Court of Appeals tried to finesse this problem by simply proclaiming that "[w]e are satisfied that an injunction requiring the Secretary to publish [respondents' desired] regulatio[n] ... would result in consultation." *Defenders of Wildlife,* 851 F.2d, at 1042, 1043–1044. We do not know what would justify that confidence, particularly when the Justice Department (presumably after consultation with the agencies) has taken the ****2142** position that the regulation is not binding.[5] The ***571** short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.

4 We need not linger over the dissent's facially impracticable suggestion, *post,* at 2154–2155, that one agency of the Government can acquire the power to direct other agencies by simply claiming that power in its own regulations and in litigation to which the other agencies are not parties. As for the contention that the other agencies will be "collaterally estopped" to challenge our judgment that they are bound by the Secretary of the Interior's views, because of their participation in this suit, *post,* at 2155–2156: Whether or not that is true now, it was assuredly not true when this suit was filed, naming the Secretary alone. "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*" *Newman–Green, Inc. v. Alfonzo–Larrain,* 490 U.S. 826, 830, 109 S.Ct. 2218, 2222, 104 L.Ed.2d 893 (1989) (emphasis added). It cannot be that, by later participating in the suit, the State Department and AID retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset.

The dissent's rejoinder that redressability *was* clear at the outset because the *Secretary* thought the regulation binding on the agencies, *post,* at 2156, n. 4, continues to miss the point: The *agencies* did not *agree* with the Secretary, nor would they be bound by a district court holding (as to this issue) in the Secretary's favor. There is no support for the dissent's novel contention, *ibid.,* that Rule 19 of the Federal Rules of Civil Procedure, governing joinder of indispensable parties, somehow alters our longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed. The redressability element of the Article III standing requirement and the "*complete* relief" referred to by Rule 19 are not identical. Finally, we reach the dissent's contention, *post,* at 2156, n. 4, that by refusing to waive our settled rule for purposes of this case we have made "federal subject-matter jurisdiction ... a one-way street running the Executive Branch's way." That is so, we are told, because the Executive can dispel jurisdiction where it previously existed (by either conceding the merits or by pointing out that nonparty agencies would not be bound by a ruling), whereas a plaintiff cannot retroactively create jurisdiction based on postcomplaint litigation conduct. But *any* defendant, not just the Government, can dispel jurisdiction by conceding the merits (and presumably thereby

suffering a judgment) or by demonstrating standing defects. And permitting a defendant to point out a pre-existing standing defect late in the day is not remotely comparable to permitting a plaintiff to *establish* standing on the basis of the defendant's litigation conduct occurring after standing is erroneously determined.

5 Seizing on the fortuity that the case has made its way to *this* Court, Justice STEVENS protests that no agency would ignore "an authoritative construction of the [ESA] by this Court." *Post,* at 2149. In that he is probably correct; in concluding from it that plaintiffs have demonstrated redressability, he is not. Since, as we have pointed out above, standing is to be determined as of the commencement of suit; since at that point it could certainly not be known that the suit would reach this Court; and since it is not likely that an agency would feel compelled to accede to the legal view of a district court expressed in a case to which it was not a party; redressability clearly did not exist.

A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. As in *Simon,* 426 U.S., at 43–44, 96 S.Ct., at 1926–1927, it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve. [6] There is no standing.

6 The dissent criticizes us for "overlook[ing]" memoranda indicating that the Sri Lankan Government solicited and required AID's assistance to mitigate the effects of the Mahaweli project on endangered species, and that the Bureau of Reclamation was advising the Aswan project. *Post,* at 2157–2158. The memoranda, however, contain no indication whatever that the projects will cease or be less harmful to listed species in the absence of AID funding. In fact, the Sri Lanka memorandum suggests just the opposite: It states that AID's role will be to *mitigate* the " 'negative impacts to the wildlife,' " *post,* at 2157, which means that the termination of AID funding would *exacerbate* respondents' claimed injury.

IV

The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a "procedural injury." The so-called "citizen-suit" provision of the ESA provides, in pertinent part, that "any person may commence ***572** a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g). The court held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a "procedural righ[t]" to consultation in all "persons"—so that *anyone* can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure. 910 F.2d, at 121–122. To understand the remarkable nature of this holding one must be clear about what it does *not* rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.,* the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). [7] Nor is it simply a case where concrete injury has been ****2143** suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the ***573** unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view. [8]

7 There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to

challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the Government's argument that, *even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice.) What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.

8 The dissent's discussion of this aspect of the case, *post,* at 2157–2160, distorts our opinion. We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing. The dissent, however, asserts that there exist "classes of procedural duties ... so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty." *Post,* at 2159. If we understand this correctly, it means that the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed). We cannot agree. The dissent is unable to cite a single case in which we actually found standing solely on the basis of a "procedural right" unconnected to the plaintiff's own concrete harm. Its suggestion that we did so in *Japan Whaling Assn. v. American Cetacean Soc.,* 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), and *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989), *post,* at 2158–2159, is not supported by the facts. In the former case, we found that the environmental organizations had standing because the "whale watching and studying of their members w [ould] be adversely affected by continued whale harvesting," see 478 U.S., at 230–231, n. 4, 106 S.Ct., at 2866, n. 4; and in the latter we did not so much as mention standing, for the very good reason that the plaintiff was a citizens' council for the area in which the challenged construction was to occur, so that its members would obviously be concretely affected, see *Methow Valley Citizens Council v. Regional Forester,* 833 F.2d 810, 812–813 (CA9 1987).

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that ***574** no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. For example, in *Fairchild v. Hughes,* 258 U.S. 126, 129–130, 42 S.Ct. 274, 275, 66 L.Ed. 499 (1922), we dismissed a suit challenging the propriety of the process by which the Nineteenth Amendment was ratified. Justice Brandeis wrote for the Court:

> "[This is] not a case within the meaning of ... Article III.... Plaintiff has [asserted] only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit...." *Ibid.*

In *Massachusetts v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), we dismissed for lack of Article III standing a taxpayer suit challenging the propriety of certain federal expenditures. We said:

> "The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.... Here the parties plaintiff have no such case.... [T]heir complaint ... is merely that officials of the executive department of the government are executing and will execute ****2144** an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.,* at 488–489, 43 S.Ct., at 601.

In *Ex parte Lévitt,* 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937), we dismissed a suit contending that Justice Black's appointment to this Court violated the Ineligibility Clause,

Art. I, § 6, cl. 2. ***575** "It is an established principle," we said, "that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U.S., at 634, 58 S.Ct., at 1. See also *Doremus v. Board of Ed. of Hawthorne,* 342 U.S. 429, 433–434, 72 S.Ct. 394, 396–397, 96 L.Ed. 475 (1952) (dismissing taxpayer action on the basis of *Mellon*).

More recent cases are to the same effect. In *United States v. Richardson,* 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), we dismissed for lack of standing a taxpayer suit challenging the Government's failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement, Art. I, § 9, cl. 7, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." We held that such a suit rested upon an impermissible "generalized grievance," and was inconsistent with "the framework of Article III" because "the impact on [plaintiff] is plainly undifferentiated and 'common to all members of the public.' " *Richardson, supra,* at 171, 176–177, 94 S.Ct., at 2944, 2946. And in *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), we dismissed for the same reasons a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause, Art. I, § 6, cl. 2, for Members of Congress to hold commissions in the military Reserves. We said that the challenged action, "standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance.... We reaffirm *Levitt* in holding that standing to sue may not be predicated upon an interest of th[is] kind...." *Schlesinger, supra,* at 217, 220, 94 S.Ct., at 2930, 2932. Since *Schlesinger* we have on two occasions held that an injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable because ***576** " 'assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.' " *Allen,* 468 U.S., at 754, 104 S.Ct., at 3326; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 483, 102 S.Ct. 752, 764, 70 L.Ed.2d 700 (1982). And only two Terms ago, we rejected the notion that Article III permits a citizen suit to prevent a condemned criminal's execution on the basis of " 'the public interest protections of the Eighth Amendment' "; once again, "[t]his allegation raise [d] only the 'generalized interest of all citizens in constitutional governance' ... and [was] an inadequate basis on which to grant ... standing." *Whitmore,* 495 U.S., at 160, 110 S.Ct., at 1725.

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental ****2145** to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. "The province of the court," as Chief Justice Marshall said in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), "is, solely, to decide on the rights of individuals." Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and ***577** that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," *Massachusetts v. Mellon,* 262 U.S., at 489, 43 S.Ct., at 601, and to become " 'virtually continuing monitors of the wisdom and soundness of Executive action.' " *Allen, supra,* 468 U.S., at 760, 104 S.Ct., at 3329 (quoting *Laird v. Tatum,* 408 U.S. 1, 15, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972)). We have always rejected that vision of our role:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of

those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers.... This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents.... But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Stark v. Wickard,* 321 U.S. 288, 309–310, 64 S.Ct. 559, 571, 88 L.Ed. 733 (1944) (footnote omitted).

***578** "Individual rights," within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public. See also *Sierra Club,* 405 U.S., at 740–741, n. 16, 92 S.Ct., at 1369, n. 16.

Nothing in this contradicts the principle that "[t]he ... injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth,* 422 U.S., at 500, 95 S.Ct., at 2206 (quoting *Linda R. S. v. Richard D.,* 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 1148, n. 3, 35 L.Ed.2d 536 (1973)). Both of the cases used by *Linda R. S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, see *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 208–212, 93 S.Ct. 364, 366–368, 34 L.Ed.2d 415 (1972), and injury to a company's interest in marketing its product free from competition, see *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1, 6, 88 S.Ct. 651, 654, 19 L.Ed.2d 787 (1968)). As we said in *Sierra Club,* "[Statutory] broadening [of] the categories of injury that may be alleged in support ****2146** of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U.S., at 738, 92 S.Ct., at 1368. Whether or not the principle set forth in *Warth* can be extended beyond that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain.

* * *

We hold that respondents lack standing to bring this action and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

***579** Justice KENNEDY, with whom Justice SOUTER joins, concurring in part and concurring in the judgment.
Although I agree with the essential parts of the Court's analysis, I write separately to make several observations.

I agree with the Court's conclusion in Part III–A that, on the record before us, respondents have failed to demonstrate that they themselves are "among the injured." *Sierra Club v. Morton,* 405 U.S. 727, 735, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972). This component of the standing inquiry is not satisfied unless

"[p]laintiffs ... demonstrate a 'personal stake in the outcome.' ... Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *Los Angeles v. Lyons,* 461 U.S. 95, 101–102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) (citations omitted).

While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, see *ante,* at 2138, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, see *Sierra Club v. Morton, supra,* 405 U.S., at 735, n. 8, 92 S.Ct., at 1366, n. 8, nor do the affiants claim to have visited the sites since the projects commenced. With respect to the Court's discussion of respondents' "ecosystem nexus," "animal nexus," and "vocational nexus" theories, *ante,* at 2139–2140, I agree that on this record respondents' showing is insufficient to establish standing on any of these bases. I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing. See *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986) ("[R]espondents ... undoubtedly have alleged a sufficient

'injury in fact' in that ***580** the whale watching and studying of their members will be adversely affected by continued whale harvesting").

In light of the conclusion that respondents have not demonstrated a concrete injury here sufficient to support standing under our precedents, I would not reach the issue of redressability that is discussed by the plurality in Part III–B.

I also join Part IV of the Court's opinion with the following observations. As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission, *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), or Ogden seeking an injunction to halt Gibbons' steamboat operations, *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, ****2147** and I do not read the Court's opinion to suggest a contrary view. See *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); *ante,* at 2145–2146. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on "any person ... to enjoin ... the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter," it does not of its own force establish that there is an injury in "any person" by virtue of any "violation." 16 U.S.C. § 1540(g)(1)(A).

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence ***581** of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that "the legal questions presented ... will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.

An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.

With these observations, I concur in Parts I, II, III–A, and IV of the Court's opinion and in the judgment of the Court.

Justice STEVENS, concurring in the judgment.

Because I am not persuaded that Congress intended the consultation requirement in § 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2), to apply to activities in foreign countries, I concur in the judgment of reversal. I do not, however, agree with the Court's conclusion ***582** that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not "imminent." Nor do I agree with the plurality's additional conclusion that respondents' injury is not "redressable" in this litigation.

I

In my opinion a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."

**2148 16 U.S.C. § 1531(a)(3). Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species. Indeed, this Court has often held that injuries to such interests are sufficient to confer standing,[1] and the Court reiterates that holding today. See *ante,* at 2137.

1 See, *e.g., Sierra Club v. Morton,* 405 U.S. 727, 734, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 686–687, 93 S.Ct. 2405, 2415–2416, 37 L.Ed.2d 254 (1973); *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 230–231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986).

The Court nevertheless concludes that respondents have not suffered "injury in fact" because they have not shown that the harm to the endangered species will produce "imminent" injury to them. See *ante,* at 2138. I disagree. An injury to an individual's interest in studying or enjoying a species and its natural habitat occurs when someone (whether it be the Government or a private party) takes action that harms that species and habitat. In my judgment, *583 therefore the "imminence" of such an injury should be measured by the timing and likelihood of the threatened environmental harm, rather than—as the Court seems to suggest, *ante,* at 2138–2139, and n. 2—by the time that might elapse between the present and the time when the individuals would visit the area if no such injury should occur.

To understand why this approach is correct and consistent with our precedent, it is necessary to consider the purpose of the standing doctrine. Concerned about "the proper—and properly limited—role of the courts in a democratic society," we have long held that "Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Warth v. Seldin,* 422 U.S. 490, 498–499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The plaintiff must have a "personal stake in the outcome" sufficient to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). For that reason, "[a]bstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct.... The injury or threat of injury must be both 'real and immediate,' not 'conjectural,' or 'hypothetical.' " *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974) (quoting *Golden v. Zwickler,* 394 U.S. 103, 109–110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969)).

Consequently, we have denied standing to plaintiffs whose likelihood of suffering any concrete adverse effect from the challenged action was speculative. See, *e.g., Whitmore v. Arkansas,* 495 U.S. 149, 158–159, 110 S.Ct. 1717, 1724–1725, 109 L.Ed.2d 135 (1990); *Los Angeles v. Lyons,* 461 U.S. 95, 105, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983); *O'Shea,* 414 U.S., at 497, 94 S.Ct., at 676. In this case, however, the likelihood that respondents will be injured by the destruction of the endangered species is not speculative. If respondents are genuinely interested in the preservation of the endangered species and intend to study or observe these animals in the future, their injury will occur as soon as the animals are destroyed. Thus the only potential *584 source of "speculation" in this case is whether respondents' intent to study or observe the animals is genuine.[2] In my view, Joyce Kelly and Amy Skilbred have **2149 introduced sufficient evidence to negate petitioner's contention that their claims of injury are "speculative" or "conjectural." As Justice BLACKMUN explains, *post,* at 2152–2153, a reasonable finder of fact could conclude, from their past visits, their professional backgrounds, and their affidavits and deposition testimony, that Ms. Kelly and Ms. Skilbred will return to the project sites and, consequently, will be injured by the destruction of the endangered species and critical habitat.

2 As we recognized in *Sierra Club v. Morton,* 405 U.S., at 735, 92 S.Ct. at 1366, the impact of changes in the esthetics or ecology of a particular area does "not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use [the area,] and for whom the aesthetic and recreational values of the area will be lessened...." Thus, respondents would not be injured by the challenged projects if they had not visited the sites or studied the threatened species and habitat. But, as discussed above, respondents did visit the sites; moreover, they have expressed an intent to do so again. This intent to revisit the area is significant evidence tending to confirm the genuine character of respondents' interest, but I am not at all sure that an intent to revisit would be indispensable in every

case. The interest that confers standing in a case of this kind is comparable, though by no means equivalent, to the interest in a relationship among family members that can be immediately harmed by the death of an absent member, regardless of when, if ever, a family reunion is planned to occur. Thus, if the facts of this case had shown repeated and regular visits by the respondents, cf. *ante,* at 2146 (opinion of KENNEDY, J.), proof of an intent to revisit might well be superfluous.

The plurality also concludes that respondents' injuries are not redressable in this litigation for two reasons. First, respondents have sought only a declaratory judgment that the Secretary of the Interior's regulation interpreting § 7(a)(2) to require consultation only for agency actions in the United States or on the high seas is invalid and an injunction requiring him to promulgate a new regulation requiring consultation for agency actions abroad as well. But, the plurality opines, even if respondents succeed and a new regulation is ***585** promulgated, there is no guarantee that federal agencies that are not parties to this case will actually consult with the Secretary. See *ante,* at 2140–2142. Furthermore, the plurality continues, respondents have not demonstrated that federal agencies can influence the behavior of the foreign governments where the affected projects are located. Thus, even if the agencies consult with the Secretary and terminate funding for foreign projects, the foreign governments might nonetheless pursue the projects and jeopardize the endangered species. See *ante,* at 2142. Neither of these reasons is persuasive.

We must presume that if this Court holds that § 7(a)(2) requires consultation, all affected agencies would abide by that interpretation and engage in the requisite consultations. Certainly the Executive Branch cannot be heard to argue that an authoritative construction of the governing statute by this Court may simply be ignored by any agency head. Moreover, if Congress has required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results. As Justice BLACKMUN explains, *post,* at 2156–2157, it is not mere speculation to think that foreign governments, when faced with the threatened withdrawal of United States assistance, will modify their projects to mitigate the harm to endangered species.

II

Although I believe that respondents have standing, I nevertheless concur in the judgment of reversal because I am persuaded that the Government is correct in its submission that § 7(a)(2) does not apply to activities in foreign countries. As with all questions of statutory construction, the question whether a statute applies extraterritorially is one of congressional intent. *Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 284–285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). We normally assume that "Congress is primarily concerned with domestic conditions," *id.,* at 285, 69 S.Ct., at 577, and therefore presume that " 'legislation of Congress, unless a ***586** contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,' " ****2150** *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 248, 111 S.Ct. 1227,1230, 113 L.Ed.2d 274 (1991) (quoting *Foley Bros.,* 336 U.S., at 285, 69 S.Ct., at 577).

Section 7(a)(2) provides, in relevant part:

"Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate [3]], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section...." 16 U.S.C. § 1536(a)(2).

3 The ESA defines "Secretary" to mean "the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970." 16 U.S.C. § 1532(15). As a general matter, "marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior." 51 Fed.Reg. 19926 (1986) (preamble to final regulations governing interagency consultation promulgated by the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce).

Nothing in this text indicates that the section applies in foreign countries.[4] Indeed, the only geographic reference in ***587** the section is in the "critical habitat" clause,[5] which mentions "affected States." The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See 42 Fed.Reg. 4869 (1977) (initial regulations of the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce). Consequently, neither Secretary interprets § 7(a)(2) to require federal agencies to engage in consultations to ensure that their actions in foreign countries will not adversely affect the critical habitat of endangered or threatened species.

4 Respondents point out that the duties in § 7(a)(2) are phrased in broad, inclusive language: "Each Federal agency" shall consult with the Secretary and ensure that "any action" does not jeopardize "any endangered or threatened species" or destroy or adversely modify the "habitat of such species." See Brief for Respondents 36; 16 U.S.C. § 1536(a)(2). The Court of Appeals correctly recognized, however, that such inclusive language, by itself, is not sufficient to overcome the presumption against the extraterritorial application of statutes. 911 F.2d 117, 122 (CA8 1990); see also *Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 282, 287–288, 69 S.Ct. 575, 578–579, 93 L.Ed. 680 (1949) (statute requiring an 8–hour day provision in " '[e]very contract made to which the United States ... is a party' " is inapplicable to contracts for work performed in foreign countries).

5 Section 7(a)(2) has two clauses which require federal agencies to consult with the Secretary to ensure that their actions (1) do not jeopardize threatened or endangered species (the "endangered species clause"), and (2) are not likely to destroy or adversely affect the habitat of such species (the "critical habitat clause").

That interpretation is sound, and, in fact, the Court of Appeals did not question it.[6] There is, moreover, no indication that Congress intended to give a different geographic scope to the two clauses in § 7(a)(2). To the contrary, Congress recognized that one of the "major causes" of extinction of ***588** endangered species is the "destruction of ****2151** natural habitat." S.Rep. No. 93–307, p. 2 (1973); see also H.Rep. No. 93–412, p. 2 (1973), U.S.Code Cong. & Admin.News 1973, pp. 2989, 2990; *TVA v. Hill,* 437 U.S. 153, 179, 98 S.Ct. 2279, 2294, 57 L.Ed.2d 117 (1978). It would thus be illogical to conclude that Congress required federal agencies to avoid jeopardy to endangered species abroad, but not destruction of critical habitat abroad.

6 Instead, the Court of Appeals concluded that the endangered species clause and the critical habitat clause are "severable," at least with respect to their "geographical scope," so that the former clause applies extraterritorially even if the latter does not. 911 F.2d, at 125. Under this interpretation, federal agencies must consult with the Secretary to ensure that their actions in foreign countries are not likely to threaten any endangered species, but they need not consult to ensure that their actions are not likely to destroy the critical habitats of these species. I cannot subscribe to the Court of Appeals' strained interpretation, for there is no indication that Congress intended to give such vastly different scope to the two clauses in § 7(a)(2).

The lack of an express indication that the consultation requirement applies extraterritorially is particularly significant because other sections of the ESA expressly deal with the problem of protecting endangered species abroad. Section 8, for example, authorizes the President to provide assistance to "any foreign country (with its consent) ... in the development and management of programs in that country which [are] ... necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title." 16 U.S.C. § 1537(a). It also directs the Secretary of the Interior, "through the Secretary of State," to "encourage" foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. § 1537(b). Section 9 makes it unlawful to import endangered species into (or export them from) the United States or to otherwise traffic in endangered species "in interstate or foreign commerce." §§ 1538(a)(1)(A), (E), (F). Congress thus obviously thought about endangered species abroad and devised specific sections of the ESA to protect them. In this context, the absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that § 7(a)(2) apply extraterritorially.

Finally, the general purpose of the ESA does not evince a congressional intent that the consultation requirement be applicable to federal agency actions abroad. The

congressional findings explaining the need for the ESA emphasize that "various species of fish, wildlife, and plants *in the United States* have been rendered extinct as a consequence ***589** of economic growth and development untempered by adequate concern and conservation," and that these species "are of aesthetic, ecological, educational, historical, recreational, and scientific value to the *Nation and its people*." §§ 1531(1), (3) (emphasis added). The lack of similar findings about the harm caused by development in other countries suggests that Congress was primarily concerned with balancing development and conservation goals in this country. [7]

7 Of course, Congress also found that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to [several international agreements]," and that "encouraging the States ... to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments...." 16 U.S.C. §§ 1531(4), (5). The Court of Appeals read these findings as indicative of a congressional intent to make § 7(a)(2)'s consultation requirement applicable to agency action abroad. See 911 F.2d, at 122–123. I am not persuaded, however, that such a broad congressional intent can be gleaned from these findings. Instead, I think the findings indicate a more narrow congressional intent that the United States abide by its international commitments.

In short, a reading of the entire statute persuades me that Congress did not intend the consultation requirement in § 7(a)(2) to apply to activities in foreign countries. Accordingly, notwithstanding my disagreement with the Court's disposition of the standing question, I concur in its judgment.

Justice BLACKMUN, with whom Justice O'CONNOR joins, dissenting.

I part company with the Court in this case in two respects. First, I believe that respondents have raised genuine issues of fact—sufficient to survive summary judgment—both as to injury and as to redressability. Second, I question the Court's breadth of language in rejecting standing for "procedural" injuries. I fear the Court seeks to impose fresh limitations on the constitutional ****2152** authority of Congress to allow ***590** citizen suits in the federal courts for injuries deemed "procedural" in nature. I dissent.

I

Article III of the Constitution confines the federal courts to adjudication of actual "Cases" and "Controversies." To ensure the presence of a "case" or "controversy," this Court has held that Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

A

To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a "genuine issue" of material fact as to standing. Fed.Rule Civ.Proc. 56(c). This is not a heavy burden. A "genuine issue" exists so long as "the evidence is such that a reasonable jury could return a verdict for the nonmoving party [respondents]." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). This Court's "function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.,* at 249, 106 S.Ct., at 2511.

The Court never mentions the "genuine issue" standard. Rather, the Court refers to the type of evidence it feels respondents failed to produce, namely, "affidavits or other evidence showing, through specific facts" the existence of injury. *Ante,* at 2137. The Court thereby confuses respondents' evidentiary burden (*i.e.,* affidavits asserting "specific facts") in withstanding a summary judgment motion under Rule 56(e) with the standard of proof (*i.e.,* the existence of a "genuine issue" of "material fact") under Rule 56(c).

***591** 1

Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for

trial concerning whether one or both would be imminently harmed by the Aswan and Mahaweli projects. In the first instance, as the Court itself concedes, the affidavits contained facts making it at least "questionable" (and therefore within the province of the factfinder) that certain agency-funded projects threaten listed species.[1] *Ante,* at 2138. The only remaining issue, then, is whether Kelly and Skilbred have shown that they personally would suffer imminent harm.

[1] The record is replete with genuine issues of fact about the harm to endangered species from the Aswan and Mahaweli projects. For example, according to an internal memorandum of the Fish and Wildlife Service, no fewer than eight listed species are found in the Mahaweli project area (Indian elephant, leopard, purple-faced langur, toque macaque, red face malkoha, Bengal monitor, mugger crocodile, and python). App. 78. The memorandum recounts that the Sri Lankan Government has specifically requested assistance from the Agency for International Development (AID) in "mitigating the negative impacts to the wildlife involved." *Ibid.* In addition, a letter from the Director of the Fish and Wildlife Service to AID warns: "The magnitude of the Accelerated Mahaweli Development Program could have massive environmental impacts on such an insular ecosystem as the Mahaweli River system." *Id.,* at 215. It adds: "The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife." *Id.,* at 216. Finally, in an affidavit submitted by petitioner for purposes of this litigation, an AID official states that an AID environmental assessment "showed that the [Mahaweli] project could affect several endangered species." *Id.,* at 159.

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the "actual or imminent" injury standard. The Court dismisses ****2153** Kelly's and Skilbred's general statements ***592** that they intended to revisit the project sites as "simply not enough." *Ibid.* But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court's contention that Kelly's and Skilbred's past visits "prov[e] nothing," *ibid.,* the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again. Cf. *Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) ("Past wrongs were evidence bearing on whether there is a real and immediate threat of repeated injury") (internal quotation marks omitted). Similarly, Kelly's and Skilbred's professional backgrounds in wildlife preservation, see App. 100, 144, 309–310, also make it likely—at least far more likely than for the average citizen—that they would choose to visit these areas of the world where species are vanishing.

By requiring a "description of concrete plans" or "specification of *when* the some day [for a return visit] will be," *ante,* at 8, the Court, in my view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects. This case differs from other cases in which the imminence of harm turned largely on the affirmative actions of third parties beyond a plaintiff's control. See *Whitmore v. Arkansas,* 495 U.S. 149, 155–156, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990) (harm to plaintiff death-row inmate from fellow inmate's execution depended on the court's one day reversing plaintiff's conviction or sentence and considering comparable sentences at resentencing); *Los Angeles v. Lyons,* 461 U.S., at 105, 103 S.Ct., at 1667 (harm dependent on police's arresting plaintiff again ***593** and subjecting him to chokehold); *Rizzo v. Goode,* 423 U.S. 362, 372, 96 S.Ct. 598, 605, 46 L.Ed.2d 561 (1976) (harm rested upon "what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures"); *O'Shea v. Littleton,* 414 U.S. 488, 495–498, 94 S.Ct. 669, 675–677, 38 L.Ed.2d 674 (1974) (harm from discriminatory conduct of county magistrate and judge dependent on plaintiffs' being arrested, tried, convicted, and sentenced); *Golden v. Zwickler,* 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969) (harm to plaintiff dependent on a former Congressman's (then serving a 14–year term as a judge) running again for Congress). To be sure, a plaintiff's unilateral control over his or her exposure to harm does not *necessarily* render the harm nonspeculative. Nevertheless, it suggests that a finder of fact would be far more likely to conclude the harm is actual or imminent,

especially if given an opportunity to hear testimony and determine credibility.

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. Just to survive summary judgment, for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again. A nurse turned down for a job on grounds of her race had better be prepared to show on what date she was prepared to start work, that she had arranged daycare for her child, and that she ****2154** would not have accepted work at another hospital instead. And a Federal Tort Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a "description of concrete plans" for her nightly schedule of attempted activities.

***594** 2

The Court also concludes that injury is lacking, because respondents' allegations of "ecosystem nexus" failed to demonstrate sufficient proximity to the site of the environmental harm. *Ante,* at 2139. To support that conclusion, the Court mischaracterizes our decision in *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), as establishing a general rule that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity." *Ante,* at 2139. In *National Wildlife Federation,* the Court required specific geographical proximity because of the particular type of harm alleged in that case: harm to the plaintiff's visual enjoyment of nature from mining activities. 497 U.S., at 888, 110 S.Ct., at 3188. One cannot suffer from the sight of a ruined landscape without being close enough to see the sites actually being mined. Many environmental injuries, however, cause harm distant from the area immediately affected by the challenged action. Environmental destruction may affect animals traveling over vast geographical ranges, see, *e.g., Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (harm to American whale watchers from Japanese whaling activities), or rivers running long geographical courses, see, *e.g., Arkansas v. Oklahoma,* 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) (harm to Oklahoma residents from wastewater treatment plant 39 miles from border). It cannot seriously be contended that a litigant's failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot show injury.

The Court also rejects respondents' claim of vocational or professional injury. The Court says that it is "beyond all reason" that a zoo "keeper" of Asian elephants would have standing to contest his Government's participation in the eradication of all the Asian elephants in another part of the world. *Ante,* at 2139. I am unable to see how the distant location of the destruction *necessarily* (for purposes of ruling ***595** at summary judgment) mitigates the harm to the elephant keeper. If there is no more access to a future supply of the animal that sustains a keeper's livelihood, surely there is harm.

I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I understand it, environmental plaintiffs are under no special constitutional standing disabilities. Like other plaintiffs, they need show only that the action they challenge has injured them, without necessarily showing they happened to be physically near the location of the alleged wrong. The Court's decision today should not be interpreted "to foreclose the possibility ... that in different circumstances a nexus theory similar to those proffered here might support a claim to standing." *Ante,* at 2146 (KENNEDY, J., concurring in part and concurring in judgment).

B

A plurality of the Court suggests that respondents have not demonstrated redressability: a likelihood that a court ruling in their favor would remedy their injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 74–75, and n. 20, 98 S.Ct. 2620, 2630–2631, and n. 20, 57 L.Ed.2d 595 (1978) (plaintiff must show "substantial likelihood" that relief requested will redress the injury). The plurality identifies two obstacles. The first is that the "action agencies" (*e.g.,* AID) cannot be required to undertake consultation with petitioner Secretary, because they are not directly bound as parties to the suit and are otherwise not indirectly ****2155** bound by being subject to petitioner

Secretary's regulation. Petitioner, however, officially and publicly has taken the position that his regulations regarding consultation under § 7 of the Act are binding on action agencies. 50 CFR § 402.14(a) (1991).[2] And he has previously ***596** taken the same position in this very litigation, having stated in his answer to the complaint that petitioner "admits the Fish and Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the [Endangered Species Act]." App. 246. I cannot agree with the plurality that the Secretary (or the Solicitor General) is now free, for the convenience of this appeal, to disavow his prior public and litigation positions. More generally, I cannot agree that the Government is free to play "Three–Card Monte" with its description of agencies' authority to defeat standing against the agency given the lead in administering a statutory scheme.

2 This section provides in part:

> "(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required...."

The Secretary's intent to make the regulations binding upon other agencies is even clearer from the discussion accompanying promulgation of the consultation rules. See 51 Fed.Reg. 19928 (1986) ("Several commenters stated that Congress did not intend that the Service interpret or implement section 7, and believed that the Service should recast the regulations as 'nonbinding guidelines' that would govern only the Service's role in consultation.... The Service is satisfied that it has ample authority and legislative mandate to issue this rule, and believes that uniform consultation standards and procedures are necessary to meet its obligations under section 7").

Emphasizing that none of the action agencies are parties to this suit (and having rejected the possibility of their being indirectly bound by petitioner's regulation), the plurality concludes that "there is no reason they should be obliged to honor an incidental legal determination the suit produced." *Ante,* at 2141. I am not as willing as the plurality is to assume that agencies at least will not try to follow the law. Moreover, I wonder if the plurality has not overlooked the extensive involvement from the inception of this litigation by the Department of State and AID.[3] Under ***597** principles of collateral estoppel, these agencies are precluded from subsequently relitigating the issues decided in this suit.

3 For example, petitioner's motion before the District Court to dismiss the complaint identified four attorneys from the Department of State and AID (an agency of the Department of State) as "counsel" to the attorneys from the Justice Department in this action. One AID lawyer actually entered a formal appearance before the District Court on behalf of AID. On at least one occasion petitioner requested an extension of time to file a brief, representing that " '[a]n extension is necessary for the Department of Justice to consult with ... the Department of State [on] the brief.' " See Brief for Respondents 31, n. 8. In addition, AID officials have offered testimony in this action.

"[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record." *Souffront v. Compagnie des Sucreries de Puerto Rico,* 217 U.S. 475, 487, 30 S.Ct. 608, 612, 54 L.Ed. 846 (1910).

This principle applies even to the Federal Government. In *Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), this Court held that the Government was estopped from relitigating in federal court the constitutionality of Montana's gross receipts tax, because that issue previously had been litigated in state court by an individual contractor whose litigation had been financed and controlled by the Federal Government. "Thus, although not a party, the United States plainly had a sufficient 'laboring ****2156** oar' in the conduct of the state-court litigation to actuate principles of estoppel." *Id.,*

at 155, 99 S.Ct., at 974. See also *United States v. Mendoza,* 464 U.S. 154, 164, n. 9, 104 S.Ct. 568, 574, n. 9, 78 L.Ed.2d 379 (1984) (Federal Government estopped where it "constituted a 'party' in all but a technical sense"). In my view, the action agencies have had sufficient "laboring oars" in this litigation since its inception to be bound from subsequent ***598** relitigation of the extraterritorial scope of the § 7 consultation requirement.[4] As a result, I believe respondents' injury would likely be redressed by a favorable decision.

4 The plurality now suggests that collateral-estoppel principles can have no application here, because the participation of other agencies in this litigation arose *after* its inception. Borrowing a principle from this Court's statutory diversity jurisdiction cases and transferring it to the constitutional standing context, the Court observes: " 'The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*' ". *Ante,* at 2141, n. 4 (quoting *Newman–Green, Inc. v. Alfonzo–Larrain,* 490 U.S. 826, 830, 109 S.Ct. 2218, 2222, 104 L.Ed.2d 893 (1989)). See also *Mollan v. Torrance,* 9 Wheat. 537, 539, 6 L.Ed. 154 (1824) (Marshall, C.J.). The plurality proclaims that "[i]t cannot be" that later participation of other agencies in this suit retroactively created a jurisdictional issue that did not exist at the outset. *Ante,* at 2141, n. 4.

The plurality, however, overlooks at least three difficulties with this explanation. In the first place, assuming that the plurality were correct that events as of the initiation of the lawsuit are the only proper jurisdictional reference point, were the Court to follow this rule in this case there would be no question as to the compliance of other agencies, because, as stated at an earlier point in the opinion: "When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies." *Ante,* at 2141. This suit was commenced in October 1986, just three months after the regulation took effect. App. 21; 51 Fed.Reg. 19926 (1986). As the plurality further admits, questions about compliance of other agencies with the Secretary's regulation arose only by later participation of the Solicitor General and other agencies in the suit. *Ante,* at 2141. Thus, it was, to borrow the plurality's own words, "assuredly not true when this suit was filed, naming the Secretary alone," *ante,* at 2141, n. 4, that there was any question before the District Court about other agencies being bound.

Second, were the plurality correct that, for purposes of determining redressability, a court may look only to facts as they exist when the complaint is filed, then the Court by implication would render a nullity part of Rule 19 of the Federal Rules of Civil Procedure. Rule 19 provides in part for the joinder of persons if "in the person's absence complete relief cannot be accorded among those already parties." This presupposes nonredressability at the outset of the litigation. Under the plurality's rationale, a district court would have no authority to join indispensable parties, because it would, as an initial matter, have no jurisdiction for lack of the power to provide redress at the outset of the litigation.

Third, the rule articulated in *Newman–Green* is that the existence of federal jurisdiction "*ordinarily*" depends on the facts at the initiation of the lawsuit. This is no ironclad *per se* rule without exceptions. Had the Solicitor General, for example, taken a position during this appeal that the § 7 consultation requirement does in fact apply extraterritorially, the controversy would be moot, and this Court would be without jurisdiction.

In the plurality's view, federal subject-matter jurisdiction appears to be a one-way street running the Executive Branch's way. When the Executive Branch wants to dispel jurisdiction over an action against an agency, it is free to raise at any point in the litigation that other nonparty agencies might not be bound by any determinations of the one agency defendant. When a plaintiff, however, seeks to preserve jurisdiction in the face of a claim of nonredressability, the plaintiff is not free to point to the involvement of nonparty agencies in subsequent parts of the litigation. The plurality does not explain why the street runs only one way—why some actions of the Executive Branch subsequent to initiation of a lawsuit are cognizable for jurisdictional purposes but others simply are not.

More troubling still is the distance this one-way street carries the plurality from the underlying

> purpose of the standing doctrine. The purpose of the standing doctrine is to ensure that courts do not render advisory opinions rather than resolve genuine controversies between adverse parties. Under the plurality's analysis, the federal courts are to ignore their *present* ability to resolve a concrete controversy if at some distant point in the past it could be said that redress could not have been provided. The plurality perverts the standing inquiry.

***599** The second redressability obstacle relied on by the plurality is that "the [action] agencies generally supply only a fraction of the funding for a foreign project." *Ante,* at 2142. What this Court might "generally" take to be true does not eliminate the existence of a genuine issue of fact to withstand ****2157** summary judgment. Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species.

The plurality states that "AID, for example, has provided less than 10% of the funding for the Mahaweli project." *Ibid.* The plurality neglects to mention that this "fraction" amounts to $170 million, see App. 159, not so paltry a sum for a country of only 16 million people with a gross national product of less than $6 billion in 1986 when respondents filed ***600** the complaint in this action. Federal Research Division, Library of Congress, Sri Lanka: A Country Study (Area Handbook Series) xvi-xvii (1990).

The plurality flatly states: "Respondents have produced nothing to indicate that the projects they have named will ... do less harm to listed species, if that fraction is eliminated." *Ante,* at 2142. As an initial matter, the relevant inquiry is not, as the plurality suggests, what will happen if AID or other agencies stop funding projects, but what will happen if AID or other agencies comply with the consultation requirement for projects abroad. Respondents filed suit to require consultation, not a termination of funding. Respondents have raised at least a genuine issue of fact that the projects harm endangered species and that the actions of AID and other United States agencies can mitigate that harm.

The plurality overlooks an Interior Department memorandum listing eight endangered or threatened species in the Mahaweli project area and recounting that "[t]he Sri Lankan government has requested the assistance of AID in mitigating the negative impacts to the wildlife involved." App. 78. Further, a letter from the Director of the Fish and Wildlife Service to AID states:

> "The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife. The donor nations and agencies that are financing the [Mahaweli project] will be the key as to how successfully the wildlife is preserved. If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated. This means that there has to be long-term funding in sufficient amounts to stem the negative impacts of this project." *Id.,* at 216.

***601** I do not share the plurality's astonishing confidence that, on the record here, a factfinder could only conclude that AID was powerless to ensure the protection of listed species at the Mahaweli project.

As for the Aswan project, the record again rebuts the plurality's assumption that donor agencies are without any authority to protect listed species. Kelly asserted in her affidavit—and it has not been disputed—that the Bureau of Reclamation was "overseeing" the rehabilitation of the Aswan project. *Id.,* at 101. See also *id.,* at 65 (Bureau of Reclamation publication stating: "In 1982, the Egyptian government ... requested that Reclamation serve as its engineering advisor for the nine-year [Aswan] rehabilitation project").

I find myself unable to agree with the plurality's analysis of redressability, based as it is on its invitation of executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say. In my view, respondents have satisfactorily shown a genuine issue of fact as to whether their injury would likely be redressed by a decision in their favor.

II

The Court concludes that any "procedural injury" suffered by respondents is insufficient to confer standing. It rejects the view that the "injury-in-fact requirement [is] satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental ****2158** 'right' to have the Executive observe the procedures required by law." *Ante,* at 2143. Whatever the Court might mean with that very broad

language, it cannot be saying that "procedural injuries" *as a class* are necessarily insufficient for purposes of Article III standing.

Most governmental conduct can be classified as "procedural." Many injuries caused by governmental conduct, therefore, are categorizable at some level of generality as ***602** "procedural" injuries. Yet, these injuries are not categorically beyond the pale of redress by the federal courts. When the Government, for example, "procedurally" issues a pollution permit, those affected by the permittee's pollutants are not without standing to sue. Only later cases will tell just what the Court means by its intimation that "procedural" injuries are not constitutionally cognizable injuries. In the meantime, I have the greatest of sympathy for the courts across the country that will struggle to understand the Court's standardless exposition of this concept today.

The Court expresses concern that allowing judicial enforcement of "agencies' observance of a particular, statutorily prescribed procedure" would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Ante,* at 2145. In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.

Under the Court's anachronistically formal view of the separation of powers, Congress legislates pure, substantive mandates and has no business structuring the procedural manner in which the Executive implements these mandates. To be sure, in the ordinary course, Congress does legislate in black-and-white terms of affirmative commands or negative prohibitions on the conduct of officers of the Executive Branch. In complex regulatory areas, however, Congress often legislates, as it were, in procedural shades of gray. That is, it sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements.

The Court recently has considered two such procedurally oriented statutes. In *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), the Court examined a ***603** statute requiring the Secretary of Commerce to certify to the President that foreign nations were not conducting fishing operations or trading which "diminis[h] the effectiveness" of an international whaling convention. *Id.,* at 226, 106 S.Ct., at 2864. The Court expressly found standing to sue. *Id.,* at 230–231, n. 4, 106 S.Ct., at 2865–2866, n. 4. In *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 348, 109 S.Ct. 1835, 1844, 104 L.Ed.2d 351 (1989), this Court considered injury from violation of the "action-forcing" procedures of the National Environmental Policy Act (NEPA), in particular the requirements for issuance of environmental impact statements.

The consultation requirement of § 7 of the Endangered Species Act is a similar, action-forcing statute. Consultation is designed as an integral check on federal agency action, ensuring that such action does not go forward without full consideration of its effects on listed species. Once consultation is initiated, the Secretary is under a duty to provide to the action agency "a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). The Secretary is also obligated to suggest "reasonable and prudent alternatives" to prevent jeopardy to listed species. *Ibid.* The action agency must undertake as well its own "biological ****2159** assessment for the purpose of identifying any endangered species or threatened species" likely to be affected by agency action. § 1536(c)(1). After the initiation of consultation, the action agency "shall not make any irreversible or irretrievable commitment of resources" which would foreclose the "formulation or implementation of any reasonable and prudent alternative measures" to avoid jeopardizing listed species. § 1536(d). These action-forcing procedures are "designed to protect some threatened concrete interest," *ante,* at 2143, n. 8, of persons who observe and work with endangered or threatened species. That is why I am mystified by the Court's unsupported conclusion that "[t]his is not a case where plaintiffs ***604** are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Ante,* at 2142.

Congress legislates in procedural shades of gray not to aggrandize its own power but to allow maximum Executive discretion in the attainment of Congress' legislative goals. Congress could simply impose a substantive prohibition on Executive conduct; it could say that no agency action shall result in the loss of more than 5% of any listed species. Instead, Congress sets forth substantive guidelines and allows the Executive, within certain procedural constraints, to decide how best to effectuate the ultimate goal. See *American Power*

& Light Co. v. SEC, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946). The Court never has questioned Congress' authority to impose such procedural constraints on Executive power. Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.

To prevent Congress from conferring standing for "procedural injuries" is another way of saying that Congress may not delegate to the courts authority deemed "executive" in nature. *Ante,* at 2145 (Congress may not "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3"). Here Congress seeks not to delegate "executive" power but only to strengthen the procedures it has legislatively mandated. "We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches." *Touby v. United States,* 500 U.S. 160, 165, 111 S.Ct. 1752, 1756, 114 L.Ed.2d 219 (1991). "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive *or judicial actors*." *Ibid.* (emphasis added).

***605** Ironically, this Court has previously justified a relaxed review of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review. *INS v. Chadha,* 462 U.S. 919, 953–954, n. 16, 103 S.Ct. 2764, 2785–2786, n. 16, 77 L.Ed.2d 317 (1983); *American Power & Light Co. v. SEC,* 329 U.S., at 105–106, 67 S.Ct. at 142–143. The Court's intimation today that procedural injuries are not constitutionally cognizable threatens this understanding upon which Congress has undoubtedly relied. In no sense is the Court's suggestion compelled by our "common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Ante,* at 2136. In my view, it reflects an unseemly solicitude for an expansion of power of the Executive Branch.

It is to be hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty. For example, in the context of the NEPA requirement of environmental-impact statements, ****2160** this Court has acknowledged "it is now well settled that NEPA itself does not mandate particular results [and] simply prescribes the necessary process," but "*these procedures are almost certain to affect the agency's substantive decision.*" *Robertson v. Methow Valley Citizens Council,* 490 U.S., at 350, 109 S.Ct., at 1846 (emphasis added). See also *Andrus v. Sierra Club,* 442 U.S. 347, 350–351, 99 S.Ct. 2335, 2337, 60 L.Ed.2d 943 (1979) ("If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of [the environmental-impact statement requirement] would be lost"). This acknowledgment of an inextricable link between procedural and substantive harm does not reflect improper appellate factfinding. It reflects nothing more than the proper deference owed to the judgment of a coordinate branch —Congress—that certain procedures are directly tied to protection against a substantive harm.

***606** In short, determining "injury" for Article III standing purposes is a fact-specific inquiry. "Typically ... the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright,* 468 U.S., at 752, 104 S.Ct., at 3325. There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant. But, as a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement. In all events, "[o]ur separation-of-powers analysis does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural.' " *Mistretta v. United States,* 488 U.S. 361, 393, 109 S.Ct. 647, 665, 102 L.Ed.2d 714 (1989). There is no room for a *per se* rule or presumption excluding injuries labeled "procedural" in nature.

III

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

I dissent.

All Citations

504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351, 34 ERC 1785, 60 USLW 4495, 22 Envtl. L. Rep. 20,913

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APPENDIX NO. 3

697 F.3d 423
United States Court of Appeals,
Sixth Circuit.

OBAMA FOR AMERICA; Democratic National Committee; Ohio Democratic Party, Plaintiffs–Appellees,
v.
Jon HUSTED, Ohio Secretary of State; Mike Dewine, Ohio Attorney General, Defendants–Appellants (12–4055), National Guard Association of the United States, et al., Intervenor Defendants–Appellants (12–4076).

Nos. 12–4055, 12–4076.
|
Oct. 5, 2012.

Synopsis

Background: The United States District Court for the Southern District of Ohio, Peter C. Economus, J., 2012 WL 3765060, issued a preliminary injunction prohibiting Ohio's Secretary of State and Attorney General from enforcing Ohio statute to the extent that it prevented nonmilitary Ohio voters from casting in-person early ballots during the three days before the November 2012 election on the basis that the statute violated the Equal Protection Clause of the Fourteenth Amendment. State defendants appealed.

Holdings: The Court of Appeals, Clay, Circuit Judge, held that:

nonmilitary voters were likely to succeed on their claim that Ohio statute violated the Equal Protection Clause, and

preliminary injunction was warranted to prevent Ohio officials from enforcing Ohio statute.

Affirmed.

Helene N. White, Circuit Judge, filed opinion concurring in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

West Codenotes

Validity Called into Doubt
Ohio R.C. § 3509.03

Attorneys and Law Firms

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Before: CLAY and WHITE, Circuit Judges; HOOD, District Judge. *

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

CLAY, J., delivered the opinion of the court, in which HOOD, D.J., joined. WHITE, J. (pp. 437–43), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge.

Defendants Jon Husted, the Secretary of State of Ohio, and Mike DeWine, the Attorney General of Ohio (collectively the "State"), joined by Intervenors representing numerous military service associations ("Intervenors"), appeal from the district court's order granting Plaintiffs' motion for a preliminary injunction. The district court enjoined the State from enforcing Ohio Rev.Code § 3509.03 to the extent that

it prevents some Ohio voters from casting in-person early ballots during the three days before the November 2012 election on the basis that the statute violates the Equal Protection Clause of the Fourteenth Amendment. For the reasons set forth below, we **AFFIRM** the district court's order granting the preliminary injunction.

BACKGROUND

I. Procedural History

On July 17, 2012, Plaintiffs Obama for America, the Democratic National Committee, and the Ohio Democratic Party filed a complaint in district court against Jon Husted, in his official capacity as Secretary of State of Ohio, and Mike DeWine, in his official capacity as Attorney General of Ohio. Plaintiffs alleged that Ohio Rev.Code § 3509.03 was unconstitutional insofar as it imposes on non-military voters a deadline of 6:00 p.m. on the Friday before Election Day for in-person early voting. [1] On the same day, Plaintiffs moved for a preliminary injunction preventing the statute's enforcement. They argued that the relevant statutory provisions "burden the fundamental right to vote but are not necessary to any sufficiently weighty state interest." (R. 2, at 2.)

[1] All references to the election or Election Day refer to the November 6, 2012 election. The three-day period prior to Election Day specifically refers to Saturday, November 3, 2012; Sunday, November 4, 2012; and Monday, November 5, 2012. "Military and overseas voters" are those voters identified in the federal Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. § 1973ff ("UOCAVA"), as amended by the Military and Overseas Voter Empowerment Act, Pub. L. 111–84, 123 Stat. 2190 (2009) ("MOVE Act"), and corresponding sections of the Ohio Election Code, Ohio Rev.Code § 3511.01. "Non-military voters" are all other eligible voters.

On August 1, 2012, numerous military service associations filed a motion to intervene, and the district court granted the motion. The State and Intervenors opposed Plaintiffs' motion for a preliminary injunction. They argued that the State's interest in providing military voters with added in-person early voting time and the burden on local boards of elections of providing that same extra time for all voters justified imposing a different deadline on military and overseas voters than all other voters.

The district court conducted a hearing on Plaintiffs' motion on August 15, 2012. The parties filed numerous exhibits, including ***426** legislative history, declarations of career military officers and voting experts, and statistical and demographic studies by various governmental agencies and non-governmental organizations. On August 31, 2012, the district court issued an opinion and order granting Plaintiffs' motion for a preliminary injunction. The district court concluded that § 3509.03 violated the Equal Protection Clause to the extent that it set a different in-person early voting deadline for non-military voters because "the State's interests are insufficiently weighty to justify the injury to Plaintiffs." 888 F.Supp.2d 897, ——, No. 2:12–cv–00636, 2012 WL 3765060, at *10 (S.D.Ohio Aug. 31, 2012). The district court enjoined the enforcement of § 3509.03 and ordered that in-person early voting be available to non-military voters on the same terms as before the enactment of Amended Substitute House Bill 224 and Substitute Senate Bill 295. *Id.* at ——, 2012 WL 3765060, at *22–23. The preliminary injunction ensures that all Ohio voters—military, overseas, and non-military—are afforded the same opportunity for in-person early voting that was available to them prior to the enactment of § 3509.03.

The State and Intervenors now appeal the district court's order granting a preliminary injunction. On September 12, 2012, the district court denied the State's motion to stay its order pending appeal, and the preliminary injunction remains in effect.

II. Facts

A. In–Person Early Voting in Ohio

Ohio introduced in-person early voting largely in response to the myriad problems faced by voters during the 2004 election. During that election, Ohio voters faced long lines and wait-times that, at some polling places, stretched into the early morning of the following day. To prevent similar problems from disenfranchising voters in the future and to ease the strain of accommodating all voters on a single day, the State established no-fault absentee voting in October 2005. The new rules eliminated the need for absentee voters to have an excuse for not voting on election day. *See* 2005 Ohio Laws 40 (Sub. H.B. 234). After the creation of in-person early voting, any registered voter could cast an absentee ballot at the appropriate board of elections office through the Monday before the election. *See id.* (amending Ohio Rev.Code §§ 3509.02–3509.04).

The evidence considered by the district court showed that a large number of Ohio voters chose to utilize the new early voting procedures in elections from 2006 through 2010. Early voting peaked during the 2008 election, when approximately 1.7 million Ohioans cast their ballots before election day, amounting to 20.7% of registered voters and 29.7% of the total votes cast. In Ohio's twelve largest counties, approximately 340,000 voters, or about 9% of the total votes cast in those counties, chose to vote early at a local board of elections office. Using data from seven of Ohio's largest counties, one study projected that, in 2008, approximately 105,000 Ohioans cast their ballots in person during the final three days before the election. In 2010, approximately 1 million Ohioans voted early, and 17.8% of them chose to cast their ballots in person. In a poll conducted after the 2010 election, 29.6% of early voters reported voting within one week of election day.

Voters who chose to cast their ballots early tended to be members of different demographic groups than those who voted on election day. Early voters were "more likely than election-day voters to be women, older, and of lower income and education attainment." (R. 34–31, Pls.' Ex. 27, ***427** at 1.) Data from Cuyahoga and Franklin Counties suggests that early voters were disproportionately African–American and that a large majority of early in-person votes (82% in Franklin County) were cast after hours on weekdays, on the weekend, or on the Monday before the election.

B. Legislative Changes to In–Person Early Voting

On July 1, 2011, Ohio Governor John Kasich signed Amended Substitute House Bill 194, an omnibus bill that made broad changes to Ohio election law. Among other things, the Ohio legislature apparently intended to change the deadlines for in-person early voting from the Monday before the election to 6:00 p.m. on the Friday before the election. Instead, H.B. 194 created two separate and contradictory deadlines: one on Friday and one on Monday. For non-military voters, Ohio Rev.Code § 3509.03 contained the former Monday deadline, but an amended § 3509.01 imposed the new Friday deadline. Military and overseas voters found themselves in much the same position, with § 3511.02 containing the former deadline, and an amended § 3511.10 containing the new one.

In an attempt to correct its mistake, the Ohio General Assembly passed Amended Substitute House Bill 224, which became effective on October 27, 2011. H.B. 224 fixed the inconsistent deadlines in § 3509.03 and § 3511.02, changing the deadlines for all voters to 6:00 p.m. on the Friday before the election. Before the technical corrections in H.B. 224 could take effect, however, a petition with more than 300,000 signatures was filed to put the omnibus election law, H.B. 194, to a referendum. The referendum petition was certified by the Secretary of State on December 9, 2011, and pursuant to the Ohio Constitution, the implementation of H.B. 194 was suspended for the 2012 election cycle.

On May 8, 2012, the General Assembly repealed the then-suspended H.B. 194 through Substitute Senate Bill 295. However, neither the organizers of the referendum petition nor the Ohio legislature thought to attack or repeal the bill containing the technical changes, H.B. 224, which remained in effect. Therefore, even though the original bill, H.B. 194, was repealed, the technical changes contained in H.B. 224 remained in place, and Ohio voters were still left with inconsistent deadlines. Nonmilitary voters could cast ballots in-person until 6:00 p.m. on the Friday before the election. But military and overseas voters had two deadlines: Friday at 6:00 p.m. pursuant to § 3511.02, and the close of the polls on election day pursuant to § 3511.10.

In order to correct this confusion, Defendant Husted construed the statute to apply the more generous deadline contained in § 3511.10 to military and overseas voters. Attempts by local boards of elections to provide in-person early voting to non-military voters through the Monday before the election were denied by the Secretary of State on the grounds that the statute does not permit it. On August 15, 2012, Defendant Husted issued Directive 2012–35, instructing the local boards of election that they were to maintain regular business hours between October 2, 2012 and November 2, 2012. This directive eliminated the local boards' discretion to be open on weekends during that period. Between October 2, 2012 and October 19, 2012, the boards must close at 5:00 p.m. During the last two weeks of the election, the boards will remain open until 7:00 p.m. but may not remain open afterwards or on the weekends. The directive does not address office hours on the final three-day period before Election Day, when, according to the statute, only military and overseas voters can cast ballots in person.

***428 DISCUSSION**

I. Standard of Review

We review a district court's grant of a preliminary injunction for an abuse of discretion. *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati,* 363 F.3d 427, 432 (6th Cir.2004). While the ultimate decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion, we review the district court's legal conclusions *de novo* and its factual findings for clear error. *Hunter v. Hamilton Cnty. Bd. of Elections,* 635 F.3d 219, 233 (6th Cir.2011). "This standard of review is 'highly deferential' to the district court's decision." *Id.* (quoting *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.,* 511 F.3d 535, 541 (6th Cir.2007)). "The injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Mascio v. Pub. Emps. Ret. Sys. of Ohio,* 160 F.3d 310, 312 (6th Cir.1998).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). The district court's determination that a plaintiff is likely to succeed on the merits is a question of law that we review *de novo. Hunter,* 635 F.3d at 233.

II. Likelihood of Succeed on the Merits

A. Equal Protection in the Voting Context

The right to vote is a "precious" and "fundamental" right. *Harper v. Va. State Bd. of Elections,* 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *see also Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (finding that the right to vote is "preservative of all rights"). " 'The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.' " *League of Women Voters v. Brunner,* 548 F.3d 463, 477 (6th Cir.2008) (quoting *Bush v. Gore,* 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000)). "[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, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). "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,* 531 U.S. at 104–05, 121 S.Ct. 525; *see also Wesberry,* 376 U.S. at 17, 84 S.Ct. 526 ("Our Constitution leaves no room for classification of people in a way that unnecessarily abridges [the right to vote.]").

The Equal Protection Clause applies when a state either classifies voters in disparate ways, *see Bush,* 531 U.S. at 104–05, 121 S.Ct. 525 (arbitrary and disparate treatment of votes violates equal protection), or places restrictions on the right to vote, *see League of Women Voters,* 548 F.3d at 478 (voting system that burdens the exercise of the right to vote violates equal protection). The precise character of the state's action and the nature of the burden on voters will determine the appropriate equal protection standard. *See* ***429** *Biener v. Calio,* 361 F.3d 206, 214 (3d Cir.2004) ("The scrutiny test depends on the [regulation's] effect on [the plaintiff's] rights.").

If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used. *See McDonald v. Bd. of Election Comm'rs,* 394 U.S. 802, 807–09, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969) (applying rational basis to a state statute that prohibited plaintiffs' access to absentee ballots where no burden on the right to vote was shown); *Biener,* 361 F.3d at 214–15 (applying rational basis where there was no showing of an "infringement on the fundamental right to vote"). On the other extreme, when a state's classification "severely" burdens the fundamental right to vote, as with poll taxes, strict scrutiny is the appropriate standard. *Burdick v. Takushi,* 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *see also Harper,* 383 U.S. at 670, 86 S.Ct. 1079 ("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.").

Most cases fall in between these two extremes. When a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, we review the claim using the "flexible standard" outlined in *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). *See Hunter,* 635 F.3d at 238 (applying *Anderson–Burdick* balancing in an equal protection challenge to the counting of provisional ballots). Although *Anderson* and *Burdick* were both ballot-access cases, the Supreme Court

has confirmed their vitality in a much broader range of voting rights contexts. *See Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 204, 128 S.Ct. 1610, 170 L.Ed.2d 574 (Scalia, J., concurring.) ("To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick....* "). The *Burdick* Court stated the standard as follows:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights."

Burdick, 504 U.S. at 434, 112 S.Ct. 2059 (quoting *Anderson,* 460 U.S. at 789, 103 S.Ct. 1564). This standard is sufficiently flexible to accommodate the complexities of state election regulations while also protecting the fundamental importance of the right to vote. There is no "litmus test" to separate valid from invalid voting regulations; courts must weigh the burden on voters against the state's asserted justifications and "make the 'hard judgment' that our adversary system demands." *Crawford,* 553 U.S. at 190, 128 S.Ct. 1610 (Stevens, J., announcing the judgment of the Court).

The district court applied the *Anderson–Burdick* standard and ultimately concluded that the justifications proffered by the State were insufficient to outweigh the burden on Plaintiffs' voting rights. Instead of the *Anderson–Burdick* standard, the State and Intervenors urge ***430** us to apply a rational basis standard of review to the early voting restriction at issue. Because Plaintiffs' complaint alleges a straightforward equal protection violation, they argue, a straightforward equal protection analysis should follow. However, when a state regulation is found to treat voters differently in a way that burdens the fundamental right to vote, the *Anderson–Burdick* standard applies. *See Hunter,* 635 F.3d at 238; *see also Clements v. Fashing,* 457 U.S. 957, 965, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) (rejecting the assertion that traditional equal protection principles should automatically apply in the voting rights context "without first examining the nature of the interests that are affected and the extent of the burden").

The State and Intervenors argue that the *Anderson–Burdick* standard is applicable only when a state regulation is alleged to have violated the free association and due process guarantees of the First and Fourteenth Amendments, not when a plaintiff alleges only an equal protection violation. The State seeks to disconnect and isolate these areas of constitutional law as they apply to voting rights, but its approach would create inflexible doctrinal silos. The Supreme Court in *Anderson* explicitly imported the analysis used in equal protection cases to evaluate voting rights challenges brought under the First Amendment, *see Anderson,* 460 U.S. at 786 n. 7, 103 S.Ct. 1564, thus creating a single standard for evaluating challenges to voting restrictions.[2] The Supreme Court confirmed this approach in *Crawford* by directly connecting its equal protection voting rights jurisprudence in *Harper v. Va. State Bd. of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), with *Anderson* and *Burdick,* and finally applying the standard derived from those cases to a state statute allegedly burdening the right to vote. *See Crawford,* 553 U.S. 181, 189–91, 128 S.Ct. 1610. Plaintiffs have demonstrated that their right to vote is unjustifiably burdened by the changes in Ohio's early voting regime.[3] The *Anderson–Burdick* standard therefore applies.

2 The *Anderson* Court stated that it based its "conclusions directly on the First and Fourteenth Amendments" and did not "engage in a separate Equal Protection Clause analysis." *Anderson,* 460 U.S. at 786 n. 7, 103 S.Ct. 1564. The Court did not need to conduct a separate equal protection analysis because it had already incorporated that analysis into its new "flexible standard." The Court continued, "We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment." *Id.* (citing *Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Lubin v. Panish,* 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); *Ill. Elections Bd. v. Socialist Workers Party,* 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)).

3 Plaintiffs' complaint alleges that the State's disparate treatment of non-military voters burdens their fundamental right to vote, and that this burden violates equal protection. (*See* R. 1, Pls.' Compl., at ¶¶ 6, 12.) The State would presumably agree that if Plaintiffs had challenged the restriction based solely on the First Amendment, the *Anderson–Burdick* standard would apply. The State cannot escape that standard by asserting that not

> only does the restriction burden Plaintiffs' right to vote, but it also does so *disparately.*

The State relies heavily on *McDonald v. Bd. of Election Comm'rs,* 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969), for the proposition that rational basis is the appropriate standard when a state denies absentee ballots to some citizens and not others. In *McDonald,* unsentenced Illinois inmates were denied access to absentee ballots because they were not among the categories of voters that were provided those ballots under Illinois law. ***431** *Id.* at 803, 89 S.Ct. 1404. The Court applied a rational basis standard of review, reasoning that the state had not classified the inmates based on race or wealth, nor was there any evidence "in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote." *Id.* at 807, 89 S.Ct. 1404. The Court found no fundamental right to receive an absentee ballot as such, and stated, "[W]e cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting." *Id.* at 808, 89 S.Ct. 1404. The *McDonald* plaintiffs failed to make out a claim for heightened scrutiny because they had presented no evidence to support their allegation that they were being prevented from voting. *See O'Brien v. Skinner,* 414 U.S. 524, 529, 94 S.Ct. 740, 38 L.Ed.2d 702 (1974) ("Essentially the Court's disposition of the claims in *McDonald* rested on failure of proof."); *Goosby v. Osser,* 409 U.S. 512, 520–22, 93 S.Ct. 854, 35 L.Ed.2d 36 (finding that *McDonald* itself suggested a different result if plaintiffs had presented evidence that the state was effectively preventing them from voting).

On the contrary, Plaintiffs introduced extensive evidence that a significant number of Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting. (*See, e.g.,* R. 34–32, Pls.' Ex. 28, at 2.) The district court credited statistical studies that estimated approximately 100,000 Ohio voters would choose to vote during the three-day period before Election Day, and that these voters are disproportionately "women, older, and of lower income and education attainment." 888 F.Supp.2d at ——, 2012 WL 3765060, at *3. The district court concluded that the burden on Plaintiffs was "particularly high" because their members, supporters, and constituents represent a large percentage of those who participated in early voting in past elections. *Id.* at ——, 2012 WL 3765060, at *15. The State did not dispute the evidence presented by Plaintiffs, nor did it offer any evidence to contradict the district court's findings of fact. *Id.* Plaintiffs did not need to show that they were legally prohibited from voting, but only that "burdened voters have few alternate means of access to the ballot." *Citizens for Legislative Choice v. Miller,* 144 F.3d 916, 921 (6th Cir.1998) (citing *Burdick,* 504 U.S. at 436–37, 112 S.Ct. 2059).

The State argues that the burden on non-military voters is slight because they have "ample" other means to cast their ballots, including by requesting and mailing an absentee ballot, voting in person prior to the final weekend before Election Day, or on Election Day itself. However, the district court concluded that because early voters have disproportionately lower incomes and less education than election day voters, and because all evening and weekend voting hours prior to the final weekend were eliminated by Directive 2012–35, "thousands of voters who would have voted during those three days will not be able to exercise their right to cast a vote in person." 888 F.Supp.2d at ——, 2012 WL 3765060, at *7. Based on the evidence in the record, this conclusion was not clearly erroneous. Because the district court found that Plaintiffs' right to vote was burdened, it properly applied the *Anderson–Burdick* standard.[4] Therefore, ***432** if Plaintiffs can show that the State's burden on their voting rights is not sufficiently justified, they are likely to succeed on their claim that the State has violated the Equal Protection Clause.

4 Intervenors cite to several cases purportedly applying a rational basis standard to similar election regulations, but these cases were either decided before *Anderson* and *Burdick, see, e.g., Prigmore v. Renfro,* 356 F.Supp. 427 (N.D.Ala.1972), or dealt with generally applicable, nondiscriminatory election regulations, *see Gustafson v. Ill. State Bd. of Elections,* No. 06–C–1159, 2007 WL 2892667 (N.D.Ill. Sept. 30, 2007).

B. Ohio's Justifications

The State offers two justifications for eliminating in-person early voting for nonmilitary voters during the three days before Election Day. First, it asserts that local county boards of elections are too busy preparing for Election Day to accommodate early voters after 6:00 p.m. on the Friday before the election. Second, the State claims that the unique challenges faced by military service members and their families justify maintaining in-person early voting for them but not for other Ohio voters.

The State correctly argues that its two justifications are relevant to two separate aspects of the equal protection analysis: the first justification—the burden on local boards of elections—should be considered in relation to the State's restriction of voting rights, while the second justification—the need to accommodate military voters and their families—should be considered in relation to the State's disparate treatment of military and non-military voters. *See* State's Br. 46 n.3. These two strands are part of the same equal protection analysis. If the State merely placed "nonsevere, nondiscriminatory restrictions" on all voters, the restrictions would survive if they could be sufficiently justified. *See Crawford,* 553 U.S. at 190, 128 S.Ct. 1610 (discussing the application of the *Anderson–Burdick* standard to "reasonable, nondiscriminatory restrictions"). On the other hand, if the State merely classified voters disparately but placed no restrictions on their right to vote, the classification would survive if it had a rational basis. *See McDonald,* 394 U.S. at 807–09, 89 S.Ct. 1404 (applying rational basis review where no burden on the right to vote was shown). However, the State has done both; it has classified voters disparately and has burdened their right to vote. Therefore, both justifications proffered by the State must be examined to determine whether the challenged statutory scheme violates equal protection. We will address each proposed justification in turn.

1. Burden on Local Boards of Elections

The State contends that halting in-person early voting at 6:00 p.m. on the Friday before the election is necessary to give local county boards of elections enough time to prepare for Election Day. The State introduced the affidavit of Deputy Assistant Secretary of State Matthew Damschroder, who explained the myriad tasks that the boards must complete during the Saturday, Sunday, and Monday before the election. Among these duties are: (1) validating, scanning, and tabulating absentee ballots that have been cast in-person or received by mail prior to the final weekend, (2) securing all the necessary ballots, instruction cards, registration forms, and other materials for use by voters, (3) ensuring that each polling place has the proper voting equipment, tables, chairs, and signs, (4) ensuring that each polling place is accessible and making any temporary improvements that are necessary, such as installing ramps, (5) preparing the official lists of registered voters, including notations for those voters who have already requested absentee ballots, and (6) handling any last-minute issues that arise, including moving polling places and replacing poll workers who are suddenly unable to serve. (*See* R. 35–9, Defs.' Ex. 8, at 3.)

Granted, the list of responsibilities of the boards of elections is long, and the staff ***433** and volunteers who prepare for and administer elections undoubtedly have much to accomplish during the final few days before the election. But the State has shown no evidence indicating how this election will be more onerous than the numerous other elections that have been successfully administered in Ohio since early voting was put into place in 2005. During that time, the Ohio boards of elections have effectively conducted a presidential election and a gubernatorial election, not to mention many other statewide and local elections, all while simultaneously handling in-person early voting during the three days prior to the election. The State has not shown that any problems arose as a result of the added responsibilities of administering early voting, and in fact, it seems that one of the primary motivations behind instituting early voting was to relieve local boards of the strain caused by all voters casting their ballots on a single day. *See League of Women Voters,* 548 F.3d at 477–78 (describing the many problems faced by voters during the November 2004 election in Ohio, including extremely long lines and wait-times on Election Day).

The district court considered evidence from several of Ohio's counties that contradicts the State's assertions. Ohio's most populous county, Cuyahoga County, asserted that maintaining in-person early voting would actually alleviate some of its burden by spreading out the demand for voting over more days, thus reducing lines and wait times at polling places on Election Day. Further evidence showed that several more Ohio counties have already allocated funding for early voting, thus allaying concerns about the financial hardship that early voting might cause. While these counties cannot speak for all of Ohio's counties, the State introduced no specific evidence to refute any of their assertions, nor has it suggested that the experience of these counties is unique.

Under the *Anderson–Burdick* standard, we must weigh "the character and magnitude of the asserted injury" against the "precise interests put forward by the State ... taking into consideration the extent to which those interests make it *necessary* to burden the plaintiff's rights." *Burdick,* 504 U.S. at 434, 112 S.Ct. 2059 (emphasis added). The State must propose an "interest sufficiently weighty to justify the limitation." *Norman v. Reed,* 502 U.S. 279, 288–89, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992). The burden on Plaintiffs' voting rights is surely real, as the district court found, but

the elimination of in-person early voting during the three-day period prior to the election does not absolutely prohibit early voters from voting. However, because early voters tend to be members of demographic groups that may be unable to vote on Election Day or during the workday at local boards of elections because of work schedules, their ability to cast a ballot is impeded by Ohio's statutory scheme. [6] The burden on non-military Ohio voters is not severe, but neither is it slight.

6 The Equal Protection Clause permits states to enact neutrally applicable laws, even if the impact of those laws falls disproportionately on a subset of the population. *See, e.g., Crawford,* 553 U.S. at 207, 128 S.Ct. 1610 (Scalia, J., concurring) (citing *Washington v. Davis,* 426 U.S. 229, 248, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). However, Ohio's statutory scheme is self-evidently not neutrally applicable; it restricts the rights of some voters and not others.

The State's proffered interest in smooth election administration must be "sufficiently weighty" to justify the elimination of in-person early voting for non-military voters during the three-day period in question. If the State had enacted a generally applicable, nondiscriminatory voting regulation that limited in-person early voting for all ***434** Ohio voters, its "important regulatory interests" would likely be sufficient to justify the restriction. *See Burdick,* 504 U.S. at 434, 112 S.Ct. 2059. However, Ohio's statutory scheme is not generally applicable to all voters, nor is the State's justification sufficiently "important" to excuse the discriminatory burden it has placed on some but not all Ohio voters. The State advances only a vague interest in the smooth functioning of local boards of elections. The State simply indicates that allowing in-person early voting, as was done in the past, "*could* make it much more difficult for the boards of elections to prepare for Election Day." (R. 35–9, Defs.' Ex. 8, at 3 (emphasis added).) With no evidence that local boards of elections have struggled to cope with early voting in the past, no evidence that they may struggle to do so during the November 2012 election, and faced with several of those very local boards in opposition to its claims, the State has not shown that its regulatory interest in smooth election administration is "important," much less "sufficiently weighty" to justify the burden it has placed on nonmilitary Ohio voters.

2. Unique Challenges to Military Service Members and Their Families

The State's asserted goal of accommodating the unique situation of members of the military, who may be called away at a moment's notice in service to the nation, is certainly a worthy and commendable goal. However, while there is a compelling reason to provide more opportunities for military voters to cast their ballots, there is no corresponding satisfactory reason to prevent non-military voters from casting their ballots as well.

Federal and state law makes numerous exceptions and special accommodations for members of the military, within the voting context and without, and no one argues that these exceptions are somehow constitutionally suspect. By and large, these statutes and regulations—from UOCAVA and the MOVE Act to the Uniformed Services Employment and Reemployment Act—are based on highly relevant distinctions between service members and the civilian population, and they confer benefits accordingly. For example, UOCAVA's accommodations for military and overseas voters are based almost entirely on the difficulties that arise from being physically located outside the United States. To address communication difficulties, Ohio law permits absent military and overseas voters to request an absentee ballot by mail, fax, email, or in person, while other voters may only do so by mail or in person. Ohio Rev.Code §§ 3509.03, 3509.05, 3511.04. To account for inconsistencies and delays in foreign mail systems, UOCAVA, as amended by the MOVE Act, requires states to provide absentee ballots to absent military and overseas voters at least 45 days prior to an election. 42 U.S.C. § 1973ff–1(a)(8). These special accommodations are tailored to address the problems that arise from being overseas.

Providing more time for military and overseas voters to cast their ballots in-person is not a response to the problem of these voters being absent, because absent voters obviously cannot cast ballots in person. Rather, the State argues that these voters need more time to vote early because they could be called away from the jurisdiction in an emergency with little notice. (*See* R. 35–8, Defs.' Ex. 7; R. 35–10, Defs.' Ex. 9.) We acknowledge the difficult circumstances of members of the military and their families, who constantly face the possibility of a sudden and unexpected deployment, and we admire their dedication and sacrifice. For that reason, Ohio's commitment to providing as many opportunities as

possible for service members ***435** and their families to vote early is laudable. However, the State has offered no justification for not providing similarly situated voters those same opportunities. *See S.S. v. E. Ky. Univ.,* 532 F.3d 445, 457 (6th Cir.2008) ("In essence, a State must 'treat similarly situated individuals in a similar manner.' " (quoting *Buchanan v. City of Bolivar,* 99 F.3d 1352, 1360 (6th Cir.1996))).

The State asserts that military and overseas voters are not similarly situated to other Ohio voters for equal protection purposes. "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all *relevant* respects alike." *Nordlinger v. Hahn,* 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (emphasis added); *see also TriHealth, Inc. v. Bd. of Comm'rs,* 430 F.3d 783, 790 (6th Cir.2005) (finding that two groups of hospitals were not similarly situated for equal protection purposes because "they differ [ed] in several material respects"). In many respects, absent military and overseas voters are not similarly situated to other Ohio voters. Typically, their absence from the country is the factor that makes them distinct, and this is reflected in the exceptions and special accommodations afforded to these voters under federal and state law.

With respect to in-person early voting, however, there is no relevant distinction between the two groups. The State argues that military voters need extra early voting time because they could be suddenly deployed. But any voter could be suddenly called away and prevented from voting on Election Day. At any time, personal contingencies like medical emergencies or sudden business trips could arise, and police officers, firefighters and other first responders could be suddenly called to serve at a moment's notice. There is no reason to provide these voters with fewer opportunities to vote than military voters, particularly when there is no evidence that local boards of elections will be unable to cope with more early voters. While we readily acknowledge the need to provide military voters more time to vote, we see no corresponding justification for giving others less time.

The State and Intervenors worry about the logical extensions and practical implications of Plaintiffs' position. If states are forced to provide the same accommodations to every voter that they currently provide to military and overseas voters, such as added flexibility and extra time, states may simply eliminate these special accommodations altogether. (*See* R. 35–10, Defs.' Ex. 9, at 5.) However, virtually all of the special voting provisions in federal and Ohio law address problems that arise when military and overseas voters are *absent* from their voting jurisdictions. *See Doe v. Walker,* 746 F.Supp.2d 667, 670–71 (D.Md.2010) (describing the purpose of the MOVE Act as facilitating the receiving and sending of absentee ballots from overseas). They are not similarly situated to all other voters in this respect, and states are justified in accommodating their particular needs. With respect to in-person voting, the two groups are similarly situated, and the State has not shown that it would be burdensome to extend early voting to all voters. Its argument to the contrary is not borne out by the evidence. *See supra* Part II.B.1.

Equally worrisome would be the result if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges. Partisan state legislatures could give extra early voting time to groups that traditionally support the party in power and impose corresponding burdens on the other party's core constituents. *See Clingman* ***436** *v. Beaver,* 544 U.S. 581, 603, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005) (O'Connor, J., concurring) ("[P]articularly where [voting restrictions] have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition."). To avoid this dangerous result, courts must carefully weigh the asserted injury against the "precise interests" proffered by the State. *Burdick,* 504 U.S. at 434, 112 S.Ct. 2059. Although the State argues that it has justifiably given more early voting time to military and overseas voters, in fact, the time available to those voters has not changed and will not be affected by the district court's order. Rather, the State must show that its decision to reduce the early voting time of non-military voters is justified by a "sufficiently weighty" interest. The State has proposed no interest which would justify reducing the opportunity to vote by a considerable segment of the voting population.

Having found that neither interest proposed by the State is sufficient to justify the limitation on in-person early voting imposed on all non-military Ohio voters, we find that Plaintiffs are likely to succeed on their claim that Ohio Rev.Code § 3509.03, as implemented by the Ohio Secretary of State, violates the Equal Protection Clause.

III. Equitable Factors

When a party seeks a preliminary injunction on the basis of a potential constitutional violation, "the likelihood of success on the merits often will be the determinative factor." *Jones v. Caruso,* 569 F.3d 258, 265 (6th Cir.2009). We have concluded

that Plaintiffs are likely to succeed on the merits of their equal protection challenge, but we nevertheless address the remaining three factors of the preliminary injunction test. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter,* 555 U.S. at 20, 129 S.Ct. 365. The equitable factors of the preliminary injunction test also weigh in favor of granting the preliminary injunction.

Plaintiffs, their members and constituents, and all non-military Ohio voters would be irreparably injured absent a preliminary injunction. "A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Tenke Corp.,* 511 F.3d at 550. When constitutional rights are threatened or impaired, irreparable injury is presumed. *See ACLU of Ky. v. McCreary County, Ky.,* 354 F.3d 438, 445 (6th Cir.2003). A restriction on the fundamental right to vote therefore constitutes irreparable injury. *See Williams v. Salerno,* 792 F.2d 323, 326 (2d Cir.1986) (finding that the denial of the right to vote is "irreparable harm").

The balance of equities and the public interest also weigh in Plaintiff's favor. The burden on non-military Ohio voters' ability to cast ballots, particularly when many of those voters will likely be unable to vote on Election Day or during the day at local boards of elections because of work schedules, outweighs any corresponding burden on the State, which has not shown that local boards will be unable to cope with three extra days of in-person early voting—as they have successfully done in past elections. While states have "a strong interest in their ability to enforce state election law requirements," *Hunter,* 635 F.3d at 244, the public has a "strong interest in exercising the 'fundamental political right' to vote." ***437** *Purcell v. Gonzalez,* 549 U.S. 1, 4, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (quoting *Dunn,* 405 U.S. at 336, 92 S.Ct. 995). "That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Hunter,* 635 F.3d at 244. The public interest therefore favors permitting as many qualified voters to vote as possible. Because the district court properly found that the equitable factors favor Plaintiffs, its decision to issue a preliminary injunction was appropriate.

IV. District Court's Remedy

The State argues that the district court's remedy was overbroad because it could be read to affirmatively require the State to mandate early voting hours during the three-day period prior to the election. We do not read the district court's order in this way. The order clearly restores the *status quo ante,* returning discretion to local boards of elections to allow all Ohio voters to vote during Saturday, November 3, 2012; Sunday, November 4, 2012; and Monday, November 5, 2012. Because Ohio Rev.Code § 3509.03 is unconstitutional to the extent that it prohibits non-military voters from voting during this period, the State is enjoined from preventing those voters from participating in early voting. But the State is not affirmatively required to order the boards to be open for early voting. Under the district court's order, the boards have discretion, just as they had before the enactment of § 3509.03. The district court's remedy was therefore appropriate.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's order granting a preliminary injunction.

HELENE N. WHITE, Circuit Judge (concurring in part and dissenting in part).

Except with respect to the remedy, I join in the affirmance but arrive there by a different route.

I

First, I think it clear that the elimination of non-UOCAVA voters' access to in-person absentee ballots after 6 p.m. the Friday before the election was not a fluke, but rather the considered intent of a majority of Ohio's legislators.

A

In enacting H.B. 194[1] and H.B. 224[2] the Ohio General Assembly attempted to treat all voters equally by imposing a uniform in-person absentee-voter deadline. H.B. 194 included a new section, 3509.01(B)(3),[3] imposing the 6 p.m. Friday deadline for in-person absentee voters, but neglected to amend parallel sections 3509.03(I) and 3511.02(C)(12), which permitted non-UOCAVA and UOCAVA voters to obtain and submit in-person absentee ballots at their local election boards until the close of regular business the day before election day (PID 418–19, 421, 436). The prior statute

also contained a provision that applied only to UOCAVA voters, section 3511.10, allowing them to obtain and vote by in-person absentee ballot until the polls close on election day. The legislature apparently caught this provision, and amended that section in H.B. 194, placing UOCAVA voters on the same footing as non-UOCAVA voters by allowing them in-person absentee-voting ***438** "during the time that absent voter's ballots may be cast in person before an election." (PID 441) After the legislature realized that it had failed to amend existing provisions that permitted voters to obtain and vote by in-person absentee ballots through the Monday before election day, it passed H.B. 224 by unanimous vote and amended sections 3509.03(I) and 3511.02(C)(12) to make all deadlines uniform (PID 580, 590, 974, 993). Thus, the combined effect of H.B. 194 and H.B. 224 was to eliminate weekend voting for everyone; the only difference between UOCAVA and non-UOCAVA voters was that for non-UOCAVA voters only one section of the prior law required amendment, and for UOCAVA voters two sections required amendment, one of which was amended by H.B. 194 and the other by H.B. 224. When H.B. 194 was stayed by the referendum certification and later repealed by S.B. 295,[4] the provision of H.B. 194 that added the Friday 6 p.m. deadline was no longer effective, but the original versions of sections 3509.03(I) and 3511.02(C)(12) had been amended by H.B. 224 to reflect the Friday deadline, and the effect of that statute was not suspended. Further, the amendment to section 3511.10 that had made UOCAVA absentee-voting hours consistent with the new Friday deadline was also suspended, resulting in the reinstatement of the language allowing UOCAVA absentee-voting through election day and a conflict between the two provisions relating to UOCAVA voters—the original version providing for in-person absentee voting until the polls close, and the H.B. 224 deadline that corresponded to the same H.B. 224 non-UOCAVA deadline of 6 p.m. Friday (PID 791–93, 804–05, 809–10).

1 Amended Substitute House Bill Number 194, 2011 Ohio Laws 40.

2 Amended Substitute House Bill Number 224, 2011 Ohio Laws 46.

3 Ohio Rev.Code § 3509.01(B)(3).

4 Substitute Senate Bill Number 295, 2012 Ohio Laws 105.

When considering H.B. 295, the legislature understood that sections 3509.03(I) and 3511.02(C)(12) had been amended by H.B. 224, not H.B. 194, and debated whether to repeal H.B. 224 as well. The vote was divided along party lines. Thus, notwithstanding assertions to the contrary, there is no question that the failure to repeal H.B. 224 at the same time H.B. 194 was repealed was not inadvertent. That is, the legislature knew that the net effect of repealing H.B. 194 and enacting S.B. 295 would be that the Friday deadlines of H.B. 224 would survive the repeal of H.B. 194. It is less clear, however, whether the legislature was aware that another provision of the former statute, section 3511.10, had not been amended by H.B. 224, but by H.B. 194, and therefore that provision would continue in its unamended state and provide for a conflicting end-of-election-day deadline for in-person absentee voting by UOCAVA voters (PID 809–10).

B

Section 3509.03(I) ends in-person non-UOCAVA absentee voting at 6 p.m. the Friday before election day. It is silent regarding all other hours and days for in-person absentee voting once voting begins, except that section 3501.10(B) requires election offices to remain open until 9 p.m. on the last day of registration. The statute does not prohibit a county board of elections from permitting in-person absentee voting in the evenings or during the weekends preceding the final pre-election-day weekend. Nevertheless, Secretary Husted issued a directive setting mandatory hours and forbidding local elections offices from maintaining night and weekend hours for non-UOCAVA voters.[5] This directive ***439** is incorporated in the voting restrictions plaintiffs challenge and the court ruled unconstitutional. Therefore, I consider both section 3509.03(I) and the Secretary's directive in considering the burden on non-UOCAVA voters.

5 Secretary Husted directed all counties to adopt the following regular business hours:
• 8:00 a.m. to 5:00 p.m., Tuesday through Friday, from October 2, 2012 through October 5, 2012;
• 8:00 a.m. to 9:00 p.m., Tuesday, October 9, 2012; [mandated by Section 3501.10(B)]
• 8:00 a.m. to 5:00 p.m., Wednesday through Friday, from October 10, 2012 through October 12, 2012;
• 8:00 a.m. to 5:00 p.m., Monday through Friday, from October 15, 2012 through October 19, 2012;
• 8:00 a.m. to 7:00 p.m., Monday through Friday, from October 22, 2012 through October 26, 2012;

> • 8:00 a.m. to 7:00 p.m., Monday through Thursday, [from] October 29, 2012 through November 1, 2012; and
> • 8:00 a.m. to 6:00 p.m., Friday, November 2, 2012. Directive 2012–35 (PID 1481) (internal footnotes omitted). Any voter in line at the end of these regular business hours must be permitted to make his or her application and vote. *Id.*

II

There is no constitutional right to an absentee ballot. This is made clear in *McDonald v. Board of Election Commissioners,* 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969), *Prigmore v. Renfro,* 356 F.Supp. 427 (N.D.Ala.1972), *summ. aff'd,* 410 U.S. 919, 93 S.Ct. 1369, 35 L.Ed.2d 582 (1973), *O'Brien v. Skinner,* 414 U.S. 524, 94 S.Ct. 740, 38 L.Ed.2d 702 (1974), *and Goosby v. Osser,* 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973). The Constitution protects the right to vote, and it is only when there is no alternative vehicle for voting that the Supreme Court has found a right to an absentee ballot. *Compare Skinner,* 414 U.S. at 529–31, 94 S.Ct. 740 *and Goosby,* 409 U.S. at 519–23, 93 S.Ct. 854 *with McDonald,* 394 U.S. at 807–09, 89 S.Ct. 1404 *and Prigmore,* 356 F.Supp. 427. These absentee-ballot cases applied the rational-basis test to claims of entitlement to an absentee ballot as well as to equal protection challenges based on differentiations between voters with regard to absentee ballots, and recognized the state interest in regulating elections. One may understandably ask, then, how Ohio's restrictions on in-person absentee voting can violate the Constitution. For me, the answer is that the Supreme Court has since applied the *Anderson/Burdick*[6] balancing test in evaluating a state's interest in the regulation of elections, and that in applying that test, it is proper to look at the facts on the ground in Ohio.

6 *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992).

III

The instant case raises several preliminary questions that affect the result. The first is which standard governs our consideration of plaintiffs' claims—the rational-basis test employed in the absentee-ballot cases, or the more recent *Anderson/Burdick* balancing test, which weighs the burden on the right to vote against the state's important regulatory interests. The Supreme Court has not decided an absentee-ballot case since the *Anderson/ Burdick* test was announced, but two circuit courts have, and both applied the balancing test. In *Price v. New York State Board of Elections,* 540 F.3d 101 (2d Cir.2008), the Second Circuit considered a challenge to New York statutes that permitted absentee voting in all elections except county party committee elections. The court rejected New York's argument that rational-basis review should apply, analyzed the case under *Anderson/Burdick*, and found New ***440** York's interests did not justify the burden on voters. *Price,* 540 F.3d at 107–12. In *Griffin v. Roupas,* 385 F.3d 1128 (7th Cir.2004), the Seventh Circuit considered a challenge brought by Illinois working mothers who asserted a constitutional right to vote by absentee ballot (or some other alternative means) on the same basis as other voters who were granted the right to vote by absentee ballot because, like the other voters, they too had great difficulty voting between 6 a.m. and 7 p.m. on election day. Although the court denied the challenge, it applied the *Anderson/ Burdick* balancing test. *See Griffin,* 385 F.3d at 1130–33.

Thus, I agree with the district court and the majority that the *Anderson/ Burdick* balancing test is, indeed, the proper test. The Supreme Court has applied this test in its election jurisprudence since *Anderson, see, e.g., Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008), and the test is flexible enough to approximate the rational-basis test when appropriate, i.e., where the burden is slight, the required showing by the state is correspondingly light.

IV

In applying this balancing test, I cannot agree with the majority's assertion that "Plaintiffs introduced extensive evidence that a significant number of Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting. (*See, e.g.,* R. 34–32, Pls.' Ex. 28, at 2.)" Maj. Op. at 431. If that were in fact the case, this would be a simple matter. The burden would be great and the rationales offered by Ohio, which are plausible and rational on their face but find little support in the record, would not outweigh the burden on those precluded from exercising their right to vote. However, though the record clearly establishes that a significant number of Ohio voters found it most convenient to vote after hours and the weekend before the election, the study did not consider the extent to which these voters would or

could avail themselves of other voting options, either by mail ballot or in-person absentee ballot at other times, or in-person voting on election day (PID 1053–54). Convenience cannot be equated with necessity without more. Thus, it cannot be fairly said that there was evidence that a significant number of Ohio voters will be precluded from voting unless weekend and after-hours voting is restored.

Nevertheless, the burden may be substantial without being preclusive. A report by the Franklin County Board of Elections concluded that in-person early voting accounted for 9 percent of all ballots cast in the 2008 election, that a disproportionately higher number of African–Americans voted early and, most significantly, that 82 percent of all early in-person votes were cast either after hours on weekdays, on weekends, or the Monday before the election (PID 1068). A study by a voter advocacy group indicating that restrictions on in-person early voting would disproportionately affect African–American voters in Cuyahoga County revealed that African–Americans in that county had voted in disproportionately large numbers during extended hours and weekends, and in the three days before the 2008 general election, although they had the option of voting by mail and in-person during regular business hours; and that restricting in-person early voting in 2012 would likely lead to crowded conditions during regular board hours, raising concern that voters would find it necessary to abandon their attempts to vote due to extremely long wait times (PID 1077, 1082–83). To be sure, these studies as well do not establish that voters will be precluded from voting if ***441** after-hours and weekend in-person absentee voting is not restored. But they are strong evidence that a significant number of voters in Ohio's two largest counties have come to depend on after-hours and weekend voting as a vehicle for exercising their right to vote. [7]

7 Justices Scalia, Thomas and Alito would hold that the weighing of the burden on voters against the state's legitimate regulatory interests must be conducted by looking at the electorate at large, not a particular group of voters who may be burdened disproportionately by an otherwise nondiscriminatory law. *See Crawford,* 553 U.S. at 205–06, 128 S.Ct. 1610 (Scalia, J., concurring). However, Justice Stevens' opinion in *Crawford* (the narrowest opinion, thus the controlling one for our purposes) examined the evidence and concluded that, "on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters." *Id.* at 202, 128 S.Ct. 1610 (quoting *Storer v. Brown,* 415 U.S. 724, 738, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974)). Justice Stevens' opinion does not reveal any disinclination to evaluate evidence of an excessive burden; rather, the purely anecdotal evidence did not support that the voter-ID statute at issue imposed such a burden. *See Crawford,* 553 U.S. at 197–203, 128 S.Ct. 1610.

Still, no case has held that voting has to be convenient. The question then is whether the elimination of in-person after-hours and weekend voting should be viewed in a vacuum —as if plaintiffs were simply asserting that because of their long work hours and other demographics they should be able to vote after hours and on weekends so that they can get the full benefit of early in-person voting—or in the context of Ohio voting over the last decade, which includes Ohio's remedial grant of such extended in-person absentee-voting opportunities, the substantial exercise of that right, and the boards of Ohio's largest counties' reliance on the availability of such voting. If the weighing must be done in the abstract, I would be compelled to dissent because the election case law does not support the proposition that there is a constitutional right to have voting on terms that are equally convenient for all voters. I conclude, however, that the *Anderson/Burdick* balancing in this case should not be divorced from reality, and that both the burden and the legitimate regulatory interest should be evaluated in context.

V

The key distinguishing factor here is that Ohio voters were granted the statutory right to in-person absentee voting through the close of business hours on the Monday before election day, and the election boards of the largest counties broadly embraced and facilitated that right, in response to the unacceptably burdensome situation at many Ohio polling sites during the 2004 election where, in some counties, voters were required to stand in line for long hours and until late at night (PID 1432–40, 1657–58). Thus, section 3509.03(I), as originally enacted, was intended to relieve the pressure on the system resulting from heavy turnout on election day. Further, experience shows that Ohio voters have taken increasing advantage of in-person absentee voting. In the last presidential election, close to 500,000 Ohio voters cast in-person absentee ballots, of which it appears a little over 100,000 were cast the weekend before the election

(PID 1053). Further, in the 2008 election, the residents of Ohio's two largest counties, Cuyahoga and Franklin, cast over 100,000 in-person absentee votes, the vast majority during after-hours and on weekends. These counties have budgeted and planned for the expected extended hours and weekend in-person absentee voting, especially the weekend before the election (PID 1432–40, 1057–58). They ***442** have not budgeted or planned for any increase in election-day voting caused by the elimination of weekend and after-hours voting, and fear that the restrictions on the hours for in-person absentee voting will cause some citizens not to vote and others to vote on election day, leading to long lines and unreasonable delays at the polls, which in turn will cause some voters to abandon their attempts at voting, as happened in 2004.

Although states are permitted broad discretion in devising the election scheme that fits best with the perceived needs of the state, and there is no abstract constitutional right to vote by absentee ballot, eleventh-hour changes to remedial voting provisions that have been in effect since 2005 and have been relied on by substantial numbers of voters for the exercise of their franchise are properly considered as a burden in applying *Anderson/Burdick* balancing. To conclude otherwise is to ignore reality. This does not mean that states cannot change their voting schemes, only that in doing so they must consider the burden the change and the manner of implementing the change places on the exercise of the right to vote.

VI

Defendants argue that the new restricted in-person absentee voting hours are necessary to relieve election workers and election officials from the burdens of in-person absentee voting immediately before the election, and to assure uniformity in absentee-voting hours throughout the state. These are legitimate regulatory interests; but neither bears any relation to the elimination of all after-hours and weekend voting preceding the final weekend. Regarding the final weekend, these concerns provide little explanation for the elimination of the right to obtain an absentee ballot in person the Saturday before the election, when election workers are still honoring mail requests for absentee ballots until noon pursuant to statute. And in weighing the elimination of in-person absentee voting the remainder of the weekend, the record shows that many of the specific complaints voiced by election officials stemmed from in-person absentee voting the Monday before the election, not the entire weekend.[8] The desire for uniformity has little to do with the elimination of all weekend and after-hours in-person voting. Defendants offer no explanation for curtailing hours other than on the final weekend, and uniformity without some underlying reason for the chosen rule is not a justification in and of itself. Nor is there a showing that eliminating all weekend and after-hours voting will in fact produce uniform access, as opposed to uniform hours.

8 In 2009, former Secretary of State Jennifer Brunner suggested that consideration be given to the pressure on the election commissions caused by in-person absentee voting and that the voting period be shortened from 30 to 20 days, with in-person absentee voting ending at 5 p.m. the Sunday before the election.

Given the studies presented regarding the heavy use of in-person after-hours and weekend voting, and the legitimate concerns of Ohio's largest counties and their voters regarding the smooth and efficient running of the 2012 presidential election, I conclude that defendants' legitimate regulatory interests do not outweigh the burden on voters whose right to vote in the upcoming election would be burdened by the joint effect of the statute and the directive.

Finally, I conclude that this is the unusual case where distinctions between UOCAVA and non-UOCAVA voters cannot support the disparate treatment at issue. The record adequately supports the district court's conclusion that the State's ***443** proffered reason for the distinction between UOCAVA and non-UOCAVA voters—concern that military voters might be deployed sometime between Friday evening and election day—had no relation to the statutory distinction and is not supported by the Secretary's directive.

VII

Turning to the question of remedy, I understand the district court to have required Secretary Husted to restore in-person absentee voting through the Monday preceding election day. I would remand the matter with instructions to give the Secretary and the General Assembly a short and finite period in which cure the constitutional defects, with the understanding that a failure to do so will result in the reinstatement of the preliminary injunction.

All Citations

697 F.3d 423