STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 WAUKESHA COUNTY

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

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APPENDIX OF NON-WISCONSIN LEGAL AUTHORITIES IN SUPPORT OF DSCC'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR ENTRY OF JUDGMENT AGAINST PLAINTIFFS UNDER WIS. STAT. § 802.08(6)

I. INTRODUCTION

Intervenor-Defendant DSCC hereby submits the non-Wisconsin authorities in support of its Brief in Opposition to Plaintiffs' Motion for Summary Judgment and Request for Entry of Judgment Against Plaintiffs Under Wis. Stat. § 802.08(6):

No.	AUTHORITY
1.	*Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336 (3d Cir. 2020)
2.	*Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021)
3.	*DNC v. Bostelmann*, 451 F. Supp. 3d 952 (W.D. Wis. 2020)
4.	*DNC v. Wis. State Legislature*, 141 S. Ct. 28 (2020)

No.	AUTHORITY
5.	*Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596 (E.D. Wis. 2020)
6.	*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)
7.	*Hotze v. Hudspeth*, No. 20-20574, 2021 WL 4947327 (5th Cir. Oct. 25, 2021)
8.	*Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020)
9.	*Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)
10.	*One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016)
11.	*Russello v. United States*, 464 U.S. 16 (1983)
12.	*Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620 (E.D. Wis. 2020)
13.	*Trump v. Wis. Elections Comm'n*, 983 F.3d 919 (7th Cir. 2020)
14.	*Trump v. Wis. Elections Comm'n*, 141 S. Ct. 1516 (2021)
15.	*Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020)
16.	*Wood v. Raffensperger*, 141 S. Ct. 1379 (2021)

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Dated this 15th day of November, 2021.

Respectfully submitted,

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APPENDIX NO. 1

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980 F.3d 336
United States Court of Appeals, Third Circuit.

Jim BOGNET, Donald K. Miller, Debra Miller, Alan Clark, Jennifer Clark, Appellants
v.
SECRETARY COMMONWEALTH OF PENNSYLVANIA; Adams County Board of Elections; Allegheny County Board of Elections; Armstrong County Board of Elections; Beaver County Board of Elections; Bedford County Board of Elections; Berks County Board of Elections; Blair County Board of Elections; Bradford County Board of Elections; Bucks County Board of Elections; Butler County Board of Elections; Cambria County Board of Elections; Cameron County Board of Elections; Carbon County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Clarion County Board of Elections; Clearfield County Board of Elections; Clinton County Board of Elections; Columbia County Board of Elections; Crawford County Board of Elections; Cumberland County Board of Elections; Dauphin County Board of Elections; Delaware County Board of Elections; Elk County Board of Elections; Erie County Board of Elections; Fayette County Board of Elections; Forest County Board of Elections; Franklin County Board of Elections; Fulton County Board of Elections; Greene County Board of Elections; Huntingdon County Board of Elections; Indiana County Board of Elections; Jefferson County Board of Elections; Juniata County Board of Elections; Lackawanna County Board of Elections; Lancaster County Board of Elections; Lawrence County Board of Elections; Lebanon County Board of Elections; Lehigh County Board of Elections; Luzerne County Board of Elections; Lycoming County Board of Elections; Mckean County Board of Elections; Mercer County Board of Elections; Mifflin County Board of Elections; Monroe County Board of Elections; Montgomery County Board of Elections; Montour County Board of Elections; Northampton County Board of Elections; Northumberland County Board of Elections; Perry County Board of Elections; Philadelphia County Board of Elections; Pike County Board of Elections; Potter County Board of Elections; Schuylkill County Board of Elections; Snyder County Board of Elections; Somerset County Board of Elections; Sullivan County Board of Elections; Susquehanna County Board of Elections; Tioga County Board of Elections; Union County Board of Elections; Venango County Board of Elections; Warren County Board of Elections; Washington County Board of Elections; Wayne County Board of Elections; Westmoreland County Board of Elections; Wyoming County Board of Elections; York County Board of Elections
Democratic National Committee, Intervenor

No. 20-3214
|
Submitted Pursuant to Third Circuit L.A.R. 34.1(a) November 9, 2020
|
(Filed: November 13, 2020)

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Synopsis

Background: Voters and congressional candidate brought action against Secretary of Commonwealth of Pennsylvania and county boards of elections, seeking to enjoin the counting of mail-in ballots received during the three-day extension of the ballot-receipt deadline ordered by the Pennsylvania Supreme Court, and seeking a declaration that the extension period and presumption of timeliness was unconstitutional. The United States District Court for the Western District of Pennsylvania, Kim R. Gibson, Senior District Judge, 2020 WL 6323121, denied voters' and candidate's motion for a temporary restraining order (TRO) and preliminary injunction. Voters and candidate appealed.

Holdings: The Court of Appeals, Smith, Chief Judge, held that:

the District Court's order was immediately appealable;

voters and candidate lacked standing to bring action alleging violation of Constitution's Elections Clause and Electors Clause;

voters lacked concrete injury for their alleged harm of vote dilution, and thus voters did not have standing for such claim;

voters lacked particularized injury for their alleged harm of vote dilution, and thus voters did not have standing for such claim;

voters failed to allege legally cognizable "preferred class," for purposes of standing to claim equal protection violation;

alleged harm from presumption of timeliness was hypothetical or conjectural, and thus voters did not have standing to challenge presumption; and

voters and candidate were not entitled to receive injunction so close to election.

Affirmed.

Procedural Posture(s): Interlocutory Appeal; Motion for Preliminary Injunction; Motion for Temporary Restraining Order (TRO); Request for Declaratory Judgment.

***341** On Appeal from the United States District Court for the Western District of Pennsylvania, District Court No. 3-20-cv-00215, District Judge: Honorable Kim. R. Gibson

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Before: SMITH, Chief Judge, SHWARTZ and SCIRICA, Circuit Judges

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OPINION OF THE COURT

SMITH, Chief Judge.

> ***342** *A share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.*—Alexander Hamilton [1]

[1] Second Letter from Phocion (April 1784), *reprinted in* 3 The Papers of Alexander Hamilton, 1782–1786, 530–58 (Harold C. Syrett ed., 1962).

The year 2020 has brought the country unprecedented challenges. The COVID-19 pandemic, which began early this year and continues today, has caused immense loss and vast disruption. As this is a presidential election year, the pandemic has also presented unique challenges regarding where and how citizens shall vote, as well as when and how

their ballots shall be tabulated. The appeal on which we now rule stems from the disruption COVID-19 has wrought on the national elections. We reach our decision, detailed below, having carefully considered the full breadth of statutory law and constitutional authority applicable to this unique dispute over Pennsylvania election law. And we do so with commitment to a proposition indisputable in our democratic process: that the lawfully cast vote of every citizen must count.

*343 I. BACKGROUND & PROCEDURAL HISTORY

A. The Elections and Presidential Electors Clause

The U.S. Constitution delegates to state "Legislature[s]" the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. This provision is known as the "Elections Clause." The Elections Clause effectively gives state governments the "default" authority to regulate the mechanics of federal elections, *Foster v. Love*, 522 U.S. 67, 69, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997), with Congress retaining "exclusive control" to "make or alter" any state's regulations, *Colegrove v. Green*, 328 U.S. 549, 554, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). Congress has not often wielded this power but, "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384, 399, 25 L.Ed. 717 (1879) ("[T]he Constitution and constitutional laws of the [United States] are ... the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation."). By statute, Congress has set "[t]he Tuesday next after the 1st Monday in November, in every even numbered year," as the day for the election. 2 U.S.C. § 7.

Much like the Elections Clause, the "Electors Clause" of the U.S. Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." U.S. Const. art. II, § 1, cl. 2. Congress can "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II, § 1, cl. 4. Congress has set the time for appointing electors as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 U.S.C. § 1.

This year, both federal statutes dictate that the day for the election was to fall on Tuesday, November 3 ("Election Day").

B. Pennsylvania's Election Code

In keeping with the Constitution's otherwise broad delegation of authority to states to regulate the times, places, and manner of holding federal elections, the Pennsylvania General Assembly has enacted a comprehensive elections code. In 2019, the General Assembly passed Act 77, which (among other things) established "no-excuse" absentee voting in Pennsylvania [2]: all eligible voters in Pennsylvania may vote by mail without the need to show their absence from their voting district on the day of the election. 25 Pa. Stat. and Cons. Stat. §§ 3150.11–3150.17. Under Act 77, "[a]pplications for mail-in ballots shall be processed if received not later than five o'clock P.M. of the first Tuesday prior to the day of any primary or election." *Id.* § 3150.12a(a). After Act 77, "a completed absentee [or mail-in] ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election" for that vote to count. *Id.* §§ 3146.6(c), 3150.16(c).

[2] Throughout this opinion, we refer to absentee voting and mail-in voting interchangeably.

C. The Pennsylvania Supreme Court Decision

Soon after Act 77's passage, Donald J. Trump for President, Inc., the Republican National Committee ("RNC"), and several Republican congressional candidates and ***344** voters brought suit against Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania, and all of Pennsylvania's county boards of elections. That suit, filed in the Western District of Pennsylvania, alleged that Act 77's "no-excuse" mail-in voting regime violated both the federal and Pennsylvania constitutions. *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, —— F.Supp.3d ——, ——, 2020 WL 4920952, at *1 (W.D. Pa. Aug. 23, 2020). Meanwhile, the Pennsylvania Democratic Party and several Democratic elected officials and congressional candidates filed suit in Pennsylvania's Commonwealth Court, seeking declaratory and injunctive relief related to statutory-interpretation issues involving Act 77 and the Pennsylvania Election Code. *See Pa. Democratic Party v. Boockvar*, —— Pa. ——, 238 A.3d 345, 352 (2020). Secretary Boockvar asked the Pennsylvania Supreme Court to exercise extraordinary jurisdiction to allow it to immediately consider the case, and her petition was granted without objection. *Id.* at 354–55.

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Pending resolution of the Pennsylvania Supreme Court case, Secretary Boockvar requested that the Western District of Pennsylvania stay the federal case. *Trump for Pres. v. Boockvar*, —— F.Supp.3d at ——, 2020 WL 4920952, at *1. The District Court obliged and concluded that it would abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *See Trump for Pres. v. Boockvar*, —— F.Supp.3d at ——, 2020 WL 4920952, at *21. The RNC then filed a motion for limited preliminary injunctive relief asking that all mailed ballots be segregated, but the District Court denied the motion, finding that the plaintiffs' harm had "not yet materialized in any actualized or imminent way." *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5407748, at *1 (W.D. Pa. Sept. 8, 2020).

With the federal case stayed, the state court matter proceeded. The Pennsylvania Democratic Party argued that a combination of the COVID-19 pandemic and U.S. Postal Service ("USPS") mail-delivery delays made it difficult for absentee voters to timely return their ballots in the June 2020 Pennsylvania primary election. *Pa. Democratic Party*, 238 A.3d at 362. The Pennsylvania Democratic Party claimed that this voter disenfranchisement violated the Pennsylvania Constitution's Free and Equal Elections Clause, art I., § 5,[3] and sought, among other things, a weeklong extension of the deadline for receipt of ballots cast by Election Day in the upcoming general election—the same deadline for the receipt of ballots cast by servicemembers residing overseas. *Id.* at 353–54. Secretary Boockvar originally opposed the extension deadline; she changed her position after receiving a letter from USPS General Counsel which stated that Pennsylvania's ballot deadlines were "incongruous with the Postal Service's delivery standards," and that to ensure that a ballot in Pennsylvania would be received by 8:00 P.M. on Election Day, the voter would need to mail it a full week in advance, by October 27, which was also the deadline to *apply* for a mail-in ballot. *Id.* at 365–66; 25 Pa. Stat. and Cons. Stat. § 3150.12a(a). Secretary Boockvar accordingly recommended a three-day extension to the received-by deadline. *Pa. Democratic Party*, 238 A.3d at 364–65.

3 The Free and Equal Elections Clause of the Pennsylvania Constitution provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. 1, § 5.

In a September 17, 2020 decision, the Pennsylvania Supreme Court concluded that USPS's existing delivery standards ***345** could not meet the timeline built into the Election Code and that circumstances beyond voters' control should not lead to their disenfranchisement. *Pa. Democratic Party*, 238 A.3d at 371. The Court accordingly held that the Pennsylvania Constitution's Free and Equal Elections Clause required a three-day extension of the ballot-receipt deadline for the November 3 general election. *Id.* at 371, 386–87. All ballots postmarked by 8:00 P.M. on Election Day and received by 5:00 P.M. on the Friday after Election Day, November 6, would be considered timely and counted ("Deadline Extension"). *Id.* at 386–87. Ballots postmarked or signed after Election Day, November 3, would be rejected. *Id.* If the postmark on a ballot received before the November 6 deadline was missing or illegible, the ballot would be presumed to be timely unless "a preponderance of the evidence demonstrates that it was mailed after Election Day" ("Presumption of Timeliness"). *Id.* Shortly after the ruling, Pennsylvania voters were notified of the Deadline Extension and Presumption of Timeliness.

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D. Appeal to the U.S. Supreme Court, and This Litigation

The Republican Party of Pennsylvania and several intervenors, including the President pro tempore of the Pennsylvania Senate, sought to challenge in the Supreme Court of the United States the constitutionality of the Pennsylvania Supreme Court's ruling. Because the November election date was fast approaching, they filed an emergency application for a stay of the Pennsylvania Supreme Court's order pending review on the merits. The U.S. Supreme Court denied the emergency stay request in a 4-4 decision. *Republican Party of Pa. v. Boockvar*, No. 20A54, 592 U.S. ——, 141 S.Ct. 643, —— L.Ed.2d —— (Oct. 19, 2020); *Scarnati v. Boockvar*, No. 20A53, 592 U.S. ——, 141 S.Ct. 644, —— L.Ed.2d —— (Oct. 19, 2020). After denial of the stay, the petitioners moved for expedited consideration of their petition for certiorari. In denying that motion, Justice Alito noted that, per the Pennsylvania Attorney General, all county boards of elections would segregate ballots received during the Deadline Extension period from those received by 8:00 P.M. on Election Day. *Republican Party of Pa. v. Boockvar*, No. 20-542, 592 U.S. ——, 141 S.Ct. 1, ——, —— L.Ed.2d —— (Oct. 28, 2020) (Alito, J., statement). Justice Alito later issued an order requiring that all county boards of

elections segregate such ballots and count them separately. *Republican Party of Pa. v. Boockvar*, No. 20A84, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6536912 (Mem.) (U.S. Nov. 6, 2020) (Alito, J.).

In the meantime, on October 22, 2020, three days after the U.S. Supreme Court declined to stay the Pennsylvania Supreme Court's order, Plaintiffs herein filed this suit in the Western District of Pennsylvania. Plaintiffs are four registered voters from Somerset County, Pennsylvania, who planned to vote in person on Election Day ("Voter Plaintiffs") and Pennsylvania congressional candidate Jim Bognet. Defendants are Secretary Boockvar and each Pennsylvania county's board of elections.

Bognet, the congressional candidate, claimed that the Deadline Extension and Presumption of Timeliness "allow[ ] County Boards of Elections to accept votes ... that would otherwise be unlawful" and "undermine[ ] his right to run in an election where Congress has paramount authority to set the 'times, places, and manner' " of Election Day. *Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121, at *2 (W.D. Pa. Oct. 28, 2020). The Voter Plaintiffs alleged that by voting in person, they had to comply with the single, uniform ***346** federal Election Day deadline, whereas mail-in voters could submit votes any time before 5:00 P.M. on November 6. *Id.* Thus, they alleged, the Pennsylvania Supreme Court treated them in an arbitrary and disparate way by elevating mail-in voters to a "preferred class of voters" in violation of the U.S. Constitution's Equal Protection Clause and the single, uniform, federal Election Day set by Congress. *Id.* The Voter Plaintiffs also asserted that counting ballots received after Election Day during the Deadline Extension period would unlawfully dilute their votes in violation of the Equal Protection Clause. *Id.*

All Plaintiffs sought to enjoin Defendants from counting ballots received during the Deadline Extension period. *Id.* They also sought a declaration that the Deadline Extension and Presumption of Timeliness are unconstitutional under the Elections Clause and the Electors Clause as well as the Equal Protection Clause. *Id.* Because Plaintiffs filed their suit less than two weeks before Election Day, they moved for a temporary restraining order ("TRO"), expedited hearing, and preliminary injunction. *Id.*

The District Court commendably accommodated Plaintiffs' request for an expedited hearing, then expeditiously issued a thoughtful memorandum order on October 28, denying the motion for a TRO and preliminary injunction. *Id.* at *7. The District Court held that Bognet lacked standing because his claims were too speculative and not redressable. *Id.* at *3. Similarly, the District Court concluded that the Voter Plaintiffs lacked standing to bring their Equal Protection voter dilution claim because they alleged only a generalized grievance. *Id.* at *5.

At the same time, the District Court held that the Voter Plaintiffs had standing to pursue their Equal Protection arbitrary-and-disparate-treatment claim. But it found that the Deadline Extension did not engender arbitrary and disparate treatment because that provision did not extend the period for mail-in voters to actually cast their ballots; rather, the extension only directed that the timely cast ballots of mail-in voters be counted. *Id.* As to the Presumption of Timeliness, the District Court held that the Voter Plaintiffs were likely to succeed on the merits of their arbitrary-and-disparate-treatment challenge. *Id.* at *6. Still, the District Court declined to grant a TRO because the U.S. Supreme Court "has repeatedly emphasized that ... federal courts should ordinarily not alter the election rules on the eve of an election." *Id.* at *7 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (per curiam)). The District Court concluded that with "less than two weeks before the election. ... [g]ranting the relief Plaintiffs seek would result in significant voter confusion; precisely the kind of confusion that *Purcell* seeks to avoid." *Id.*

Plaintiffs appealed the denial of their motion for a TRO and preliminary injunction to this Court on October 29, less than a week before Election Day. Plaintiffs requested an expedited briefing schedule: specifically, their opening brief would be due on October 30 and the response briefs on November 2. Notably, Plaintiffs sought to file a reply brief on November 3 —Election Day. Appellants' Emergency Mot. for Expedited Briefing, Dkt. No. 17. Defendants opposed the expedited briefing schedule, arguing that Plaintiffs' own delay had caused the case to reach this Court mere days before the election. Sec'y Boockvar's Opp. to Appellants' Emergency Mot. for Expedited Briefing, Dkt. No. 33. Defendants also contended that Plaintiffs sought to punish voters by invalidating the very rules mail-in voters had relied on when they cast their ballots. Defendants ***347** asked us to deny the motion for expedited briefing and offered to supply us with the actual numbers of mail-in ballots received during the Deadline Extension period together with an approximate count of how many of those mail-in ballots lacked legible postmarks. *Id.*

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Even had we granted Plaintiffs' motion for expedited briefing, the schedule they proposed would have effectively foreclosed us from ruling on this appeal before Election Day. So we denied Plaintiffs' motion and instead ordered that their opening brief be filed by November 6. Order, No. 20-3214, Oct. 30, 2020, Dkt. No. 37. We directed Defendants to file response briefs by November 9, forgoing receipt of a reply brief.[4] *Id.* With the matter now fully briefed, we consider Plaintiffs' appeal of the District Court's denial of a TRO and preliminary injunction.

4 Because we have received comprehensive briefing, and given the weighty public interest in a prompt ruling on the matter before us, we have elected to forgo oral argument.

II. STANDARD OF REVIEW

The District Court exercised jurisdiction under 28 U.S.C. § 1331. We exercise jurisdiction under § 1292(a)(1).

Ordinarily, an order denying a TRO is not immediately appealable. *Hope v. Warden York Cnty. Prison*, 956 F.3d 156, 159 (3d Cir. 2020). Here, although Bognet and the Voter Plaintiffs styled their motion as an Emergency Motion for a TRO and Preliminary Injunction, *see Bognet v. Boockvar*, No. 3:20-cv-00215, Dkt. No. 5 (W.D. Pa. Oct. 22, 2020), the District Court's order plainly went beyond simply ruling on the TRO request.

Plaintiffs filed their motion for a TRO and a preliminary injunction on October 22, along with a supporting brief. Defendants then filed briefs opposing the motion, with Plaintiffs filing a reply in support of their motion. The District Court heard argument from the parties, remotely, during a 90-minute hearing. The next day, the District Court ruled on the merits of the request for injunctive relief. *Bognet*, 2020 WL 6323121, at *7. The District Court's Memorandum Order denied both Bognet and the Voter Plaintiffs the affirmative relief they sought to obtain prior to Election Day, confirming that the Commonwealth was to count mailed ballots received after the close of the polls on Election Day but before 5:00 P.M. on November 6.

In determining whether Bognet and the Voter Plaintiffs had standing to sue, we resolve a legal issue that does not require resolution of any factual dispute. Our review is de novo. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 266 (3d Cir. 2014). "When reviewing a district court's denial 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 ... for an abuse of discretion." *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017) (quoting *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010)) (cleaned up).

III. ANALYSIS

A. Standing

Derived from separation-of-powers principles, the law of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (citations omitted). Article III of the U.S. Constitution vests "[t]he judicial Power of the United States" in both the Supreme Court and "such inferior Courts as the Congress may from ***348** time to time ordain and establish." U.S. Const. art. III, § 1. But this "judicial Power" extends only to "Cases" and "Controversies." *Id.* art. III, § 2; *see also Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). To ensure that judges avoid rendering impermissible advisory opinions, parties seeking to invoke federal judicial power must first establish their standing to do so. *Spokeo*, 136 S. Ct. at 1547.

Article III standing doctrine speaks in jargon, but the gist of its meaning is plain enough. To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests. If you are complaining about something that does not harm you—and does not harm you in a way that is concrete—then you lack standing. And if the injury that you claim is an injury that does no specific harm to you, or if it depends on a harm that may never happen, then you lack an injury for which you may seek relief from a federal court. As we will explain below, Plaintiffs here have not suffered a concrete, particularized, and non-speculative injury necessary under the U.S. Constitution for them to bring this federal lawsuit.

The familiar elements of Article III standing require a plaintiff to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–

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61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). To plead an injury in fact, the party invoking federal jurisdiction must establish three sub-elements: first, the "invasion of a legally protected interest"; second, that the injury is both "concrete and particularized"; and third, that the injury is "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130); *see also Mielo v. Steak 'n Shake Operations*, 897 F.3d 467, 479 n.11 (3d Cir. 2018). The second sub-element requires that the injury "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. 2130. As for the third, when a plaintiff alleges future injury, such injury must be "certainly impending." *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (quoting *Lujan*, 504 U.S. at 565 n.2, 112 S.Ct. 2130). Allegations of "possible" future injury simply aren't enough. *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). All elements of standing must exist at the time the complaint is filed. *See Lujan,* 504 U.S. at 569 n.4, 112 S.Ct. 2130.

With these guideposts in mind, we turn to whether Plaintiffs have pleaded an Article III injury. They bring several claims under 42 U.S.C. § 1983, asserting deprivation of their constitutional rights. They allege that Defendants' implementation of the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness violates the Elections Clause of Article I, the Electors Clause of Article II, and the Equal Protection Clause of the Fourteenth Amendment. Because Plaintiffs lack standing to assert these claims, we will affirm the District Court's denial of injunctive relief.

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1. Plaintiffs lack standing under the Elections Clause and Electors Clause.

Federal courts are not venues for plaintiffs to assert a bare right "to have the Government act in accordance with law." ***349** *Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). When the alleged injury is undifferentiated and common to all members of the public, courts routinely dismiss such cases as "generalized grievances" that cannot support standing. *United States v. Richardson*, 418 U.S. 166, 173–75, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). Such is the case here insofar as Plaintiffs, and specifically candidate Bognet, theorize their harm as the right to have government administered in compliance with the Elections Clause and Electors Clause.

To begin with, private plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause. For example, in *Lance v. Coffman*, 549 U.S. 437, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam), four private citizens challenged in federal district court a Colorado Supreme Court decision invalidating a redistricting plan passed by the state legislature and requiring use of a redistricting plan created by Colorado state courts. *Id.* at 438, 127 S.Ct. 1194. The plaintiffs alleged that the Colorado Supreme Court's interpretation of the Colorado Constitution violated the Elections Clause "by depriving the state legislature of its responsibility to draw congressional districts." *Id.* at 441, 127 S.Ct. 1194. The U.S. Supreme Court held that the plaintiffs lacked Article III standing because they claimed harm only to their interest, and that of every citizen, in proper application of the Elections Clause. *Id.* at 442, 127 S.Ct. 1194 ("The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed."). Their relief would have no more directly benefitted them than the public at large. *Id.* The same is true here. If anything, Plaintiffs' "interest in the State's ability to 'enforce its duly enacted laws' " is even less compelling because Pennsylvania's "election officials support the challenged decree." *Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 591 U.S. ——, 141 S.Ct. 206, ——, 207 L.Ed.2d 1154, (Mem.), at *1 (Aug. 13, 2020) (quoting *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2324 n.17, 201 L.Ed.2d 714 (2018)).

Because the Elections Clause and the Electors Clause have "considerable similarity," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (Roberts, C.J., dissenting) (discussing how Electors Clause similarly vests power to determine manner of appointing electors in "the Legislature" of each State), the same logic applies to Plaintiffs' alleged injury stemming from the claimed violation of the Electors Clause. *See also Foster*, 522 U.S. at 69, 118 S.Ct. 464 (characterizing Electors Clause as Elections Clause's "counterpart for the Executive Branch"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (noting that state's "duty" under Elections Clause "parallels the duty" described by Electors Clause).

Even a party that meets Article III standing requirements must ordinarily rest its claim for relief on violation of its own rights, not those of a third party. *Pitt News v. Fisher*, 215 F.3d 354, 361–62 (3d Cir. 2000). Plaintiffs assert that the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness usurped the General Assembly's prerogative under the Elections Clause to prescribe "[t]he Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. The Elections Clause grants that right to "the Legislature" of "each State." *Id.* Plaintiffs' Elections Clause claims thus ***350** "belong, if they belong to anyone, only to the Pennsylvania General Assembly." *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (three-judge panel) (per curiam). Plaintiffs here are four individual voters and a candidate for federal office; they in no way constitute the General Assembly, nor can they be said to comprise any part of the law-making processes of Pennsylvania. *Ariz. State Legislature*, 576 U.S. at 824, 135 S.Ct. 2652.[5] Because Plaintiffs are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the General Assembly's rights under the Elections and Electors Clauses. No member of the General Assembly is a party to this lawsuit.

5 Bognet seeks to represent Pennsylvania in Congress, but even if he somehow had a relationship to *state* lawmaking processes, he would lack personal standing to sue for redress of the alleged "institutional injury (the diminution of legislative power), which necessarily damage[d] all Members of [the legislature] ... equally." *Raines v. Byrd*, 521 U.S. 811, 821, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (plaintiffs were six out of 535 members of Congress); *see also Corman*, 287 F. Supp. 3d at 568–69 (concluding that "two of 253 members of the Pennsylvania General Assembly" lacked standing to sue under Elections Clause for alleged "deprivation of 'their legislative authority to apportion congressional districts' "); *accord Va. House of Delegates v. Bethune-Hill*, —— U.S. ——, 139 S. Ct. 1945, 1953, 204 L.Ed.2d 305 (2019).

That said, prudential standing can suspend Article III's general prohibition on a litigant's raising another person's legal rights. Yet Plaintiffs don't fit the bill. A plaintiff may assert the rights of another if he or she "has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (citation omitted). Plaintiffs cannot invoke this exception to the rule against raising the rights of third parties because they enjoy no close relationship with the General Assembly, nor have they alleged any hindrance to the General Assembly's ability to protect its own interests. *See, e.g.*, *Corman*, 287 F. Supp. 3d at 573. Nor does Plaintiffs' other theory of prudential standing, drawn from *Bond v. United States*, 564 U.S. 211, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011), advance the ball.

In *Bond*, the Supreme Court held that a litigant has prudential standing to challenge a federal law that allegedly impinges on the state's police powers, "in contravention of constitutional principles of federalism" enshrined in the Tenth Amendment. *Id.* at 223–24, 131 S.Ct. 2355. The defendant in *Bond* challenged her conviction under 18 U.S.C. § 229, which Congress enacted to comply with a chemical weapons treaty that the United States had entered. *Id.* at 214–15, 131 S.Ct. 2355. Convicted under the statute she sought to challenge, Bond satisfied Article III's standing requirements. *Id.* at 217, 131 S.Ct. 2355 (characterizing Bond's sentence and incarceration as concrete, and redressable by invalidation of her conviction); *id.* at 224–25, 131 S.Ct. 2355 (noting that Bond was subject to "[a] law," "prosecution," and "punishment" she might not have faced "if the matter were left for the Commonwealth of Pennsylvania to decide"). She argued that her conduct was "local in nature" such that § 229 usurped the Commonwealth's reserved police powers. *Id.* Rejecting the Government's contention that Bond was barred as a third party from asserting the rights of the Commonwealth, *id.* at 225, 131 S.Ct. 2355, the Court held that "[t]he structural principles secured by the separation of powers protect the individual as well" as the State. ***351** *Id.* at 222, 131 S.Ct. 2355 ("Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. ... When government acts in excess of its lawful powers, that [personal] liberty is at stake.").

But the nub of Plaintiffs' argument here is that the Pennsylvania Supreme Court intruded on the authority delegated to the Pennsylvania General Assembly under Articles I and II of the U.S. Constitution to regulate federal elections. They do not allege any violation of the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Nor could they. After all, states have no inherent or reserved power over federal

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elections. *U.S. Term Limits*, 514 U.S. at 804–05, 115 S.Ct. 1842. When "deciding issues raised under the Elections Clause," courts "need not be concerned with preserving a 'delicate balance' between competing sovereigns." *Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012). Either federal and state election law "operate harmoniously in a single procedural scheme," or they don't—and the federal law preempts ("alter[s]") state election law under the Elections Clause. *Id.* at 394. An assessment that the Pennsylvania Supreme Court lacked the legislative authority under the state's constitution necessary to comply with the Elections Clause (Appellants' Br. 24–27) does not implicate *Bond*, the Tenth Amendment, or even Article VI's Supremacy Clause.[6] *See Gonzalez*, 677 F.3d at 390–92 (contrasting Elections Clause with Supremacy Clause and describing former as "unique," containing "[an] unusual delegation of power," and "unlike virtually all other provisions of the Constitution"). And, of course, third-party standing under *Bond* still presumes that the plaintiff otherwise meets the requirements of Article III; as discussed above, Plaintiffs do not.

6 Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under *Bond* to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots. *See Carson v. Simon*, No. 20-3139, 978 F.3d 1051, 1058–59, (8th Cir. Oct. 29, 2020). The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the *Carson* court cited none.

Plaintiff Bognet, a candidate for Congress who is currently a private citizen, does not plead a cognizable injury by alleging a "right to run in an election where Congress has paramount authority," Compl. ¶ 69, or by pointing to a "threatened" reduction in the competitiveness of his election from counting absentee ballots received within three days after Election Day. Appellants' Br. 21. Bognet does not explain how that "right to run" affects him in a particularized way when, in fact, all candidates in Pennsylvania, including Bognet's opponent, are subject to the same rules. And Bognet does not explain how counting *more* timely cast votes would lead to a *less* competitive race, nor does he offer any evidence tending to show that a greater proportion of mailed ballots received after Election Day than on or before Election Day would be cast for Bognet's opponent. What's more, for Bognet to have standing to enjoin the counting of ballots arriving after Election Day, such votes would have to be sufficient in number ***352** to change the outcome of the election to Bognet's detriment. *See, e.g.*, *Sibley v. Alexander*, 916 F. Supp. 2d 58, 62 (D.D.C. 2013) ("[E]ven if the Court granted the requested relief, [plaintiff] would still fail to satisfy the redressability element [of standing] because enjoining defendants from casting the ... votes would not change the outcome of the election." (citing *Newdow v. Roberts,* 603 F.3d 1002, 1011 (D.C. Cir. 2010) (citations omitted)). Bognet does not allege as much, and such a prediction was inherently speculative when the complaint was filed. The same can be said for Bognet's alleged wrongfully incurred expenditures and future expenditures. Any harm Bognet sought to avoid in making those expenditures was not "certainly impending"—he spent the money to avoid a speculative harm. *See Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, —— F.Supp.3d ——, ——, 2020 WL 5997680, at *36 (W.D. Pa. Oct. 10, 2020). Nor are those expenditures "fairly traceable" under Article III to the actions that Bognet challenges. *See, e.g.*, *Clapper*, 568 U.S. at 402, 416, 133 S.Ct. 1138 (rejecting argument that plaintiff can "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending").[7]

7 The alleged injury specific to Bognet does not implicate the Qualifications Clause or exclusion from Congress, *Powell v. McCormack*, 395 U.S. 486, 550, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), nor the standing of members of Congress to bring actions alleging separation-of-powers violations. *Moore v. U.S. House of Reps.*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring).

Plaintiffs therefore lack Article III standing to challenge Defendants' implementation of the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness under the Elections Clause and Electors Clause.

2. The Voter Plaintiffs lack standing under the Equal Protection Clause.

Stressing the "personal" nature of the right to vote, the Voter Plaintiffs assert two claims under the Equal Protection

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Clause.[8] First, they contend that the influence of their votes, cast in person on Election Day, is "diluted" both by (a) mailed ballots cast on or before Election Day but received between Election Day and the Deadline Extension date, ballots which Plaintiffs assert cannot be lawfully counted; and (b) mailed ballots that were unlawfully cast (*i.e.*, placed in the mail) after Election Day but are still counted because of the Presumption of Timeliness. Second, the Voter Plaintiffs allege that the Deadline Extension and the Presumption of Timeliness create a preferred class of voters based on "arbitrary and disparate treatment" that values "one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The Voter Plaintiffs lack Article III standing to assert either injury.

8 Only the Voter Plaintiffs bring the Equal Protection count in the Complaint; Bognet did not join that count.

a. Vote Dilution

As discussed above, the foremost element of standing is injury in fact, which requires the plaintiff to show a harm that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1547–48 (citation omitted). The Voter Plaintiffs lack standing to redress their alleged vote dilution because that alleged injury is not concrete as to votes counted under the Deadline Extension, nor is it particularized for Article III purposes as to votes counted ***353** under the Deadline Extension or the Presumption of Timeliness.

i. No concrete injury from vote dilution attributable to the Deadline Extension.

The Voter Plaintiffs claim that Defendants' implementation of the Deadline Extension violates the Equal Protection Clause because "unlawfully" counting ballots received within three days of Election Day dilutes their votes. But the source of this purported illegality is necessarily a matter of state law, which makes any alleged harm abstract for purposes of the Equal Protection Clause. And the purported vote dilution is also not concrete because it would occur in equal proportion *without* the alleged procedural illegality—that is, had the *General Assembly* enacted the Deadline Extension, which the Voter Plaintiffs do not challenge substantively.[9]

9 We exclude the Presumption of Timeliness from our concreteness analysis. Plaintiffs allege that the federal statutes providing for a uniform election day, 3 U.S.C. § 1 and 2 U.S.C. § 7, conflict with, and thus displace, any state law that would authorize voting after Election Day. They claim that the Presumption permits, theoretically at least, some voters whose ballots lack a legible postmark to vote *after* Election Day, in violation of these federal statutes. So unlike the Deadline Extension, Plaintiffs contend that the General Assembly could not enact the Presumption consistent with the Constitution. This conceptualization of injury is thus more properly characterized as "concrete" than is the purported Deadline Extension injury attributable to voters having their timely voted ballots received and counted after Election Day. That said, we express no opinion about whether the Voter Plaintiffs have, in fact, alleged such a concrete injury for standing purposes.

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The concreteness of the Voter Plaintiffs' alleged vote dilution stemming from the Deadline Extension turns on the federal and state laws applicable to voting procedures. Federal law does not provide for *when* or *how* ballot counting occurs. *See, e.g.*, *Trump for Pres., Inc. v. Way*, No. 20-cv-01753, —— F.Supp.3d ——, ——, 2020 WL 5912561, at *12 (D.N.J. Oct. 6, 2020) ("Plaintiffs direct the Court to no federal law regulating methods of determining the timeliness of mail-in ballots or requiring that mail-in ballots be postmarked."); *see also Smiley v. Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 76 L.Ed. 795 (1932) (noting that Elections Clause delegates to state lawmaking processes all authority to prescribe "procedure and safeguards" for "counting of votes"). Instead, the Elections Clause delegates to each state's lawmaking function the authority to prescribe such procedural regulations applicable to federal elections. *U.S. Term Limits*, 514 U.S. at 832–35, 115 S.Ct. 1842 ("The Framers intended the Elections Clause to grant States authority to create procedural regulations .... [including] 'whether the electors should vote by ballot or vivâ voce ....' " (quoting James Madison, 2 Records of the Federal Convention of 1787, at 240 (M. Farrand ed. 1911) (cleaned up)); *Smiley*, 285 U.S. at 366, 52 S.Ct. 397 (describing state authority under Elections Clause "to provide a complete code for congressional elections ... in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns"). That delegation of authority embraces all procedures "which experience

shows are necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at 366, 52 S.Ct. 397. Congress exercises its power to "alter" state election regulations only if the state regime cannot "operate harmoniously" with federal election laws "in a single procedural scheme." *Gonzalez*, 677 F.3d at 394.

***354** The Deadline Extension and federal laws setting the date for federal elections can, and indeed do, operate harmoniously. At least 19 other States and the District of Columbia have post-Election Day absentee ballot receipt deadlines.[10] And many States also accept absentee ballots mailed by overseas uniformed servicemembers that are received after Election Day, in accordance with the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–20311. So the Voter Plaintiffs' only cognizable basis for alleging dilution from the "unlawful" counting of invalid ballots is state law defining lawful and unlawful ballot counting practices. *Cf. Wise v. Circosta*, 978 F.3d 93, 100–01 (4th Cir. 2020) ("Whether ballots are *illegally* counted if they are received more than three days after Election Day depends on an issue of state law from which we must abstain." (emphasis in original)), *application for injunctive relief denied sub nom. Moore v. Circosta*, No. 20A72, 592 U.S. ——, 141 S.Ct. 46, —— L.Ed.2d ——, 2020 WL 6305036 (Oct. 28, 2020). The Voter Plaintiffs seem to admit as much, arguing "that counting votes that are unlawful under the General Assembly's enactments will unconstitutionally dilute the lawful votes" cast by the Voter Plaintiffs. Appellants' Br. 38; *see also id.* at 31. In other words, the Voter Plaintiffs say that the Election Day ballot receipt deadline in Pennsylvania's codified election law renders the ballots untimely and therefore unlawful to count. Defendants, for their part, contend that the Pennsylvania Supreme Court's extension of that deadline under the Free and Equal Elections Clause of the state constitution renders them timely, and therefore lawful to count.

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10 *See* AS § 15.20.081(e) & (h) (Alaska – 10 days after Election Day if postmarked on or before Election Day); West's Ann. Cal. Elec. Code § 3020(b) (California – three days after Election Day if postmarked on or before Election Day); DC ST § 1-1001.05(a)(10A) (District of Columbia – seven days after the election if postmarked on or before Election Day); 10 ILCS 5/19-8, 5/18A-15 (Illinois – 14 days after the election if postmarked on or before Election Day); K.S.A. 25-1132 (Kansas – three days after the election if postmarked before the close of polls on Election Day); MD Code, Elec. Law, § 9-505 (Maryland – the second Friday after Election Day if postmarked on or before Election Day); Miss. Code Ann. § 23-15-637 (Mississippi – five business days after Election Day if postmarked on or before Election Day); NV Rev Stat § 293.317 (Nevada – by 5:00 P.M. on the seventh day after Election Day if postmarked by Election Day, and ballots with unclear postmarks must be received by 5:00 P.M. on the third day after Election Day); N.J.S.A. 19:63-22 (New Jersey – 48 hours after polls close if postmarked on or before Election Day); McKinney's Elec. Law § 8-412 (New York – seven days after the election for mailed ballots postmarked on Election Day); N.C. Gen. Stat. § 163-231(b)(2) and *Wise v. Circosta*, 978 F.3d 93, 96 (4th Cir. 2020) (North Carolina – recognizing extension from three to nine days after the election the deadline for mail ballots postmarked on or before Election Day); Texas Elec. Code § 86.007 (the day after the election by 5:00 P.M. if postmarked on or before Election Day); Va. Code 24.2-709 (Virginia – by noon on the third day after the election if postmarked on or before Election Day); West's RCWA 29A.40.091 (Washington – no receipt deadline for ballots postmarked on or before Election Day); W. Va. Code, §§ 3-3-5, 3-5-17 (West Virginia – five days after the election if postmarked on or before Election Day); *see also* Iowa Code § 53.17(2) (by noon the Monday following the election if postmarked by the day before Election Day); NDCC 16.1-07-09 (North Dakota – before the canvass if postmarked the day before Election Day); R.C. § 3509.05 (Ohio – 10 days after the election if postmarked by the day before Election Day); Utah Code Ann. § 20A-3a-204 (seven to 14 days after the election if postmarked the day before the election).

This conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment. Violation of state election laws by state officials ***355** or other unidentified third parties is not always amenable to a federal constitutional claim. *See Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) ("A deliberate violation of state election laws by state election officials does not transgress against the Constitution.") (cleaned up); *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (rejecting Equal Protection Clause claim

arising from state's erroneous counting of votes cast by voters unqualified to participate in closed primary). "It was not intended by the Fourteenth Amendment ... that all matters formerly within the exclusive cognizance of the states should become matters of national concern." *Snowden v. Hughes*, 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 497 (1944).

Contrary to the Voter Plaintiffs' conceptualization, vote dilution under the Equal Protection Clause is concerned with votes being weighed differently. *See Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 2501, 204 L.Ed.2d 931 (2019) (" '[V]ote dilution' in the one-person, one-vote cases refers to the idea that each vote must carry *equal weight*." (emphasis added)); *cf. Baten v. McMaster*, 967 F.3d 345, 355 (4th Cir. 2020), *as amended* (July 27, 2020) ("[N]o vote in the South Carolina system is diluted. Every qualified person gets one vote and each vote is counted equally in determining the final tally."). As explained below, the Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And if dilution of lawfully cast ballots by the "unlawful" counting of invalidly cast ballots "were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity." *Trump for Pres. v. Boockvar,* —— F.Supp.3d at ——– ——, 2020 WL 5997680, at *45–46. That is not how the Equal Protection Clause works. [11]

11 *Bush v. Gore* does not require us to perform an Equal Protection Clause analysis of Pennsylvania election law as interpreted by the Pennsylvania Supreme Court. *See* 531 U.S. at 109, 121 S.Ct. 525 ("Our consideration is limited to the present circumstances ...."); *id.* at 139–40, 121 S.Ct. 525 (Ginsburg, J., dissenting) (discussing "[r]are[ ]" occasions when Supreme Court rejected state supreme court's interpretation of state law, one of which was in 1813 and others occurred during Civil Rights Movement—and none decided federal equal protection issues).

Even if we were to entertain an end-run around the Voter Plaintiffs' lack of Elections Clause standing—by viewing the *federal* Elections Clause as the source of "unlawfulness" of Defendants' vote counting—the alleged vote dilution would not be a concrete injury. Consider, as we've noted, that the Voter Plaintiffs take no issue with the content of the Deadline Extension; they concede that the General Assembly, as other state legislatures have done, could have enacted exactly the same Deadline Extension as a valid "time[ ], place[ ], and manner" regulation consistent with the Elections Clause. *Cf. Snowden*, 321 U.S. at 8, 64 S.Ct. 397 (concluding that alleged "unlawful administration by state officers of a state statute *fair on its face*, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection" (emphasis added)); *Powell*, 436 F.2d at 88 ("Uneven or erroneous application of an *otherwise valid* statute constitutes a denial of equal protection ***356** only if it represents 'intentional or purposeful discrimination.' " (emphasis added) (quoting *Snowden*, 321 U.S. at 8, 64 S.Ct. 397)). Reduced to its essence, the Voter Plaintiffs' claimed vote dilution would rest on their allegation that federal law required a different state organ to issue the Deadline Extension. The Voter Plaintiffs have not alleged, for example, that they were prevented from casting their votes, *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), nor that their votes were not counted, *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915). Any alleged harm of vote dilution that turns not on the proportional influence of votes, but solely on the federal illegality of the Deadline Extension, strikes us as quintessentially abstract in the election law context and "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)). That the alleged violation here relates to election law and the U.S. Constitution, rather than the mine-run federal consumer privacy statute, does not abrogate the requirement that a concrete harm must flow from the procedural illegality. *See, e.g.*, *Lujan*, 504 U.S. at 576, 112 S.Ct. 2130 ("[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.").

The Voter Plaintiffs thus lack a concrete Equal Protection Clause injury for their alleged harm of vote dilution attributable to the Deadline Extension.

ii. No particularized injury from votes counted under the Deadline Extension or the Presumption of Timeliness.

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The opposite of a "particularized" injury is a "generalized grievance," where "the impact on plaintiff is plainly undifferentiated and common to all members of the public." *Id.* at 575, 112 S.Ct. 2130 (cleaned up); *see also Lance*, 549 U.S. at 439, 127 S.Ct. 1194. The District Court correctly held that the Voter Plaintiffs' "dilution" claim is a "paradigmatic generalized grievance that cannot support standing." *Bognet*, 2020 WL 6323121, at *4 (quoting *Carson v. Simon*, No. 20-cv-02030, —— F.Supp.3d ——, ——, 2020 WL 6018957, at *7 (D. Minn. Oct. 12, 2020), *rev'd on other grounds*, No. 20-3139, 978 F.3d 1051, (8th Cir. Oct. 29, 2020)). The Deadline Extension and Presumption of Timeliness, assuming they operate to allow the illegal counting of unlawful votes, "dilute" the influence of all voters in Pennsylvania equally and in an "undifferentiated" manner and do not dilute a certain group of voters particularly. [12]

12 In their complaint, the Voter Plaintiffs alleged that they are all "residents of Somerset County, a county where voters are requesting absentee ballots at a rate *far less* than the state average" and thus, somehow, the Voter Plaintiffs' votes "will be diluted to a greater degree than other voters." Compl. ¶ 71 (emphasis in original). Plaintiffs continue to advance this argument on appeal in support of standing, and it additionally suffers from being a conjectural or hypothetical injury under the framework discussed *infra* Section III.A.2.b.ii. It is purely hypothetical that counties where a greater percentage of voters request absentee ballots will more frequently have those ballots received after Election Day.

Put another way, "[a] vote cast by fraud or mailed in by the wrong person through mistake," or otherwise counted illegally, "has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged." *Martel v. Condos*, No. 5:20-cv-00131, —— F.Supp.3d ——, ——, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020). Such an alleged "dilution" is suffered equally by all voters and is not "particularized" for standing purposes. ***357** The courts to consider this issue are in accord. *See id.*; *Carson*, —— F.Supp.3d at —— – ——, 2020 WL 6018957, at *7–8; *Moore v. Circosta*, Nos. 1:20-cv-00911, 1:20-cv-00912, —— F.Supp.3d ——, ——, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020), *emergency injunction pending appeal denied sub nom. Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020), *application for injunctive relief denied sub nom. Moore v. Circosta*, No. 20A72, 592 U.S. ——, 141 S.Ct. 46, —— L.Ed.2d —— (U.S. Oct. 28, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. Apr. 30, 2020).

But the Voter Plaintiffs argue that their purported "vote dilution" is an injury in fact sufficient to confer standing, and *not* a generalized grievance belonging to all voters, because the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.' " *Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)). "Thus, 'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

The Voter Plaintiffs' reliance on this language from *Baker* and *Reynolds* is misplaced. In *Baker*, the plaintiffs challenged Tennessee's apportionment of seats in its legislature as violative of the Equal Protection Clause of the Fourteenth Amendment. 369 U.S. at 193, 82 S.Ct. 691. The Supreme Court held that the plaintiffs *did* have standing under Article III because "[t]he injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties." *Id.* at 207–08, 82 S.Ct. 691.

Although the *Baker* Court did not decide the merits of the Equal Protection claim, the Court in a series of cases—including *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), and *Reynolds*—made clear that the Equal Protection Clause prohibits a state from "diluti[ng] ... the *weight* of the votes of certain ... voters merely because of where they reside[ ]," just as it prevents a state from discriminating on the basis of the voter's race or sex. *Reynolds*, 377 U.S. at 557, 84 S.Ct. 1362 (emphasis added). The Voter Plaintiffs consider it significant that the Court in *Reynolds* noted—though not in the context of standing—that "the right to vote" is "individual and personal in nature." *Id.* at 561, 84 S.Ct. 1362 (quoting *United States v. Bathgate*, 246 U.S. 220, 227, 38 S.Ct. 269, 62 L.Ed. 676 (1918)). The Court then explained that a voter's right to vote encompasses both the right to cast that vote and the right to have that vote counted without "debasement or dilution":

> The right to vote can neither be denied outright, *Guinn v. United States*, 238 U.S. 347 [35 S.Ct. 926, 59 L.Ed. 1340 (1915)], *Lane v. Wilson*, 307 U.S. 268 [59 S.Ct.

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872, 83 L.Ed. 1281 (1939)], nor destroyed by alteration of ballots, see *United States v. Classic*, 313 U.S. 299, 315 [61 S.Ct. 1031, 85 L.Ed. 1368 (1941)], nor diluted by ballot-box stuffing, *Ex parte Siebold*, 100 U.S. 371 [25 L.Ed. 717 (1880)], *United States v. Saylor*, 322 U.S. 385 [64 S.Ct. 1101, 88 L.Ed. 1341 (1944)]. As the Court stated in *Classic*, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted ...." 313 U.S. at 315 [61 S.Ct. 1031].

...

***358** "The right to vote includes the right to have the ballot counted. ... It also includes the right to have the vote counted at full value without dilution or discount. ... That federally protected right suffers substantial dilution ... [where a] favored group has full voting strength ... [and] [t]he groups not in favor have their votes discounted."

Reynolds, 377 U.S. at 555 & n.29, 84 S.Ct. 1362 (alterations in last paragraph in original) (quoting *South v. Peters*, 339 U.S. 276, 279, 70 S.Ct. 641, 94 L.Ed. 834 (1950) (Douglas, J., dissenting)).

Still, it does not follow from the labeling of the right to vote as "personal" in *Baker* and *Reynolds* that *any* alleged illegality affecting voting rights rises to the level of an injury in fact. After all, the Court has observed that the harms underlying a racial gerrymandering claim under the Equal Protection Clause "are personal" in part because they include the harm of a voter "being personally subjected to a racial classification." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015) (cleaned up). Yet a voter "who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.' " *Gill*, 138 S. Ct. at 1930 (quoting *United States v. Hays*, 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995)) (alteration in original). The key inquiry for standing is whether the alleged violation of the right to vote arises from an invidious classification—including those based on "race, sex, economic status, or place of residence within a State," *Reynolds*, 377 U.S. at 561, 84 S.Ct. 1362—to which the plaintiff is subject and in which "the favored group has full voting strength and the groups not in favor have their votes discounted," *id.* at 555 n.29, 84 S.Ct. 1362 (cleaned up). In other words, "voters who allege facts *showing disadvantage to themselves*" have standing to bring suit to remedy that disadvantage, *Baker*, 369 U.S. at 206, 82 S.Ct. 691 (emphasis added), but a disadvantage to the plaintiff exists only when the plaintiff is part of a group of voters whose votes will be weighed differently compared to another group. Here, no Pennsylvania voter's vote will count for less than that of any other voter as a result of the Deadline Extension and Presumption of Timeliness. [13]

13 Plaintiffs also rely on *FEC v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), for the proposition that a widespread injury—such as a mass tort injury or an injury "where large numbers of voters suffer interference with voting rights conferred by law"—does not become a "generalized grievance" just because many share it. *Id.* at 24–25, 118 S.Ct. 1777. That's true as far as it goes. But the Voter Plaintiffs have not alleged an injury like that at issue in *Akins*. There, the plaintiffs' claimed injury was their inability to obtain information they alleged was required to be disclosed under the Federal Election Campaign Act. *Id.* at 21, 118 S.Ct. 1777. The plaintiffs alleged a statutory right to obtain information and that the same information was being withheld. Here, the Voter Plaintiffs' alleged injury is to their right under the Equal Protection Clause not to have their votes "diluted," but the Voter Plaintiffs have not alleged that their votes are less influential than any other vote.

This conclusion cannot be avoided by describing one group of voters as "those ... who lawfully vote in person and submit their ballots *on time*" and the other group of voters as those whose (mail-in) ballots arrive after Election Day and are counted because of the Deadline Extension and/or the Presumption of Timeliness. Appellants' Br. 33 (emphasis in original). Although the former group, under Plaintiffs' theory, should make up 100% of the total votes counted and the latter group 0%, there is ***359** simply no differential *weighing* of the votes. *See Wise*, 978 F.3d at 104 (Motz, J., concurring) ("But if the extension went into effect, plaintiffs' votes would not count for less *relative to other North Carolina voters*. This is the core of an Equal Protection Clause challenge." (emphasis in original)). Unlike the malapportionment or racial gerrymandering cases, a vote cast by a voter in the so-called "favored" group counts not one bit more than the same vote cast by the "disfavored" group—no matter what set of scales one might choose to employ. *Cf. Reynolds*, 377 U.S. at 555 n.29, 84 S.Ct. 1362. And, however one tries to draw a contrast, this division is not based on

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a voter's personal characteristics at all, let alone a person's race, sex, economic status, or place of residence. Two voters could each have cast a mail-in ballot before Election Day at the same time, yet perhaps only one of their ballots arrived by 8:00 P.M. on Election Day, given USPS's mail delivery process. It is passing strange to assume that one of these voters would be denied "equal protection of the laws" were *both* votes counted. U.S. Const. amend. XIV, § 1.

The Voter Plaintiffs also emphasize language from *Reynolds* that "[t]he right to vote can neither be denied outright ... nor diluted by ballot-box stuffing." 377 U.S. at 555, 84 S.Ct. 1362 (citing *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1879); *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944)). In the first place, casting a vote in accordance with a procedure approved by a state's highest court—even assuming that approval violates the Elections Clause—is not equivalent to "ballot-box stuffing." The Supreme Court has only addressed this "false"-tally type of dilution where the tally was false as a result of a scheme to cast falsified or fraudulent votes. *See Saylor*, 322 U.S. at 386, 64 S.Ct. 1101. We are in uncharted territory when we are asked to declare that a tally that includes false or fraudulent votes is equivalent to a tally that includes votes that are or may be unlawful for non-fraudulent reasons, and so is more aptly described as "incorrect." *Cf. Gray*, 372 U.S. at 386, 83 S.Ct. 801 (Harlan, J., dissenting) ("[I]t is hard to take seriously the argument that 'dilution' of a vote in consequence of a legislatively sanctioned electoral system can, without more, be analogized to an impairment of the political franchise by ballot box stuffing or other criminal activity.").

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Yet even were this analogy less imperfect, it still would not follow that every such "false" or incorrect tally is an injury in fact for purposes of an Equal Protection Clause claim. The Court's cases that describe ballot-box stuffing as an injury to the right to vote have arisen from criminal prosecutions under statutes making it unlawful for anyone to injure the exercise of another's constitutional right. *See, e.g.*, *Ex parte Siebold*, 100 U.S. at 373–74 (application for writ of habeas corpus); *Saylor*, 322 U.S. at 385–86, 64 S.Ct. 1101 (criminal appeal regarding whether statute prohibiting "conspir[ing] to injure ... any citizen in the free exercise ... of any right or privilege secured to him by the Constitution" applied to conspiracy to stuff ballot boxes); *Anderson v. United States*, 417 U.S. 211, 226, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974) (criminal prosecution for conspiracy to stuff ballot boxes under successor to statute in *Saylor*). Standing was, of course, never an issue in those cases because the Government was enforcing its criminal laws. Here, the Voter Plaintiffs, who bear the burden to show standing, have presented no instance in which an individual voter had Article III standing to claim an equal protection harm to his or her vote from the existence of an allegedly illegal vote cast by someone else in the same election.

***360** Indeed, the logical conclusion of the Voter Plaintiffs' theory is that whenever an elections board counts any ballot that deviates in some way from the requirements of a state's legislatively enacted election code, there is a *particularized* injury in fact sufficient to confer Article III standing on every other voter—provided the remainder of the standing analysis is satisfied. Allowing standing for such an injury strikes us as indistinguishable from the proposition that a plaintiff has Article III standing to assert a general interest in seeing the "proper application of the Constitution and laws"—a proposition that the Supreme Court has firmly rejected. *Lujan*, 504 U.S. at 573–74, 112 S.Ct. 2130. The Voter Plaintiffs thus lack standing to bring their Equal Protection vote dilution claim.

b. Arbitrary and Disparate Treatment

The Voter Plaintiffs also lack standing to allege an injury in the form of "arbitrary and disparate treatment" of a preferred class of voters because the Voter Plaintiffs have not alleged a legally cognizable "preferred class" for equal protection purposes, and because the alleged harm from votes counted solely due to the Presumption of Timeliness is hypothetical or conjectural.

i. No legally protected "preferred class."

The District Court held that the Presumption of Timeliness creates a "preferred class of voters" who are "able to cast their ballots after the congressionally established Election Day" because it "extends the date of the election by multiple days for a select group of mail-in voters whose ballots will be presumed to be timely in the absence of a verifiable postmark." [14] *Bognet*, 2020 WL 6323121, at *6. The District Court reasoned, then, that the differential treatment between groups of voters is by itself an injury for standing purposes. To the District Court, this supposed "unequal treatment of voters ... harms the [Voter] Plaintiffs because, as in-person voters, they must vote by the end of the congressionally established Election Day in order to have their votes counted."

Id. The District Court cited no case law in support of its conclusion that the injury it identified gives rise to Article III standing.

14 The District Court did not find that the Deadline Extension created such a preferred class.

The District Court's analysis suffers from several flaws. First, the Deadline Extension and Presumption of Timeliness apply to all voters, not just a subset of "preferred" voters. It is an individual voter's *choice* whether to vote by mail or in person, and thus whether to become a part of the so-called "preferred class" that the District Court identified. Whether to join the "preferred class" of mail-in voters was entirely up to the Voter Plaintiffs.

Second, it is not clear that the mere creation of so-called "classes" of voters constitutes an injury in fact. An injury in fact requires the "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. We doubt that the mere existence of groupings of voters qualifies as an injury per se. "An equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986)); *see also*, *e.g.*, *Batra v. Bd. of Regents of Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996) ("[T]he relevant prerequisite is unlawful discrimination, not whether plaintiff is part of a victimized class."). ***361** More importantly, the Voter Plaintiffs have shown no disadvantage to themselves that arises simply by being separated into groupings. For instance, there is no argument that it is inappropriate that some voters will vote in person and others will vote by mail. The existence of these two groups of voters, without more, simply does not constitute an injury in fact to in-person voters.

Plaintiffs may believe that injury arises because of a preference shown for one class over another. But what, precisely, is the preference of which Plaintiffs complain? In *Bush v. Gore*, the Supreme Court held that a State may not engage in arbitrary and disparate treatment that results in the valuation of one person's vote over that of another. 531 U.S. at 104–05, 121 S.Ct. 525. Thus, "the right of suffrage can be denied by a *debasement or dilution of the weight of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 105, 121 S.Ct. 525 (quoting *Reynolds*, 377 U.S. at 555, 84 S.Ct. 1362) (emphasis added). As we have already discussed, vote dilution is not an injury in fact here.

What about the risk that some ballots placed in the mail after Election Day may still be counted? Recall that no voter—whether in person or by mail—is *permitted* to vote after Election Day. Under Plaintiffs' argument, it might theoretically be easier for one group of voters—mail-in voters—to illegally cast late votes than it is for another group of voters—in-person voters. But even if that is the case, no group of voters has the *right* to vote after the deadline. [15] We remember that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973) (citations omitted). And "a plaintiff lacks standing to complain about his inability to commit crimes because no one has a right to commit a crime." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014). Without a showing of discrimination or other intentionally unlawful conduct, or at least some burden on Plaintiffs' own voting rights, we discern no basis on which they have standing to challenge the slim opportunity the Presumption of Timeliness conceivably affords wrongdoers to violate election law. *Cf. Minn. Voters Alliance v. Ritchie*, 720 F.3d 1029, 1033 (8th Cir. 2013) (affirming dismissal of claims "premised on potential harm in the form of vote dilution caused by insufficient pre-election verification of [election day registrants'] voting eligibility and the absence of post-election ballot rescission procedures").

15 Moreover, we cannot overlook that the mail-in voters potentially suffer a *disadvantage* relative to the in-person voters. Whereas in-person ballots that are timely cast will count, timely cast mail-in ballots may not count because, given mail delivery rates, they may not be received by 5:00 P.M. on November 6.

ii. Speculative injury from ballots counted under the Presumption of Timeliness.

Plaintiffs' theory as to the Presumption of Timeliness focuses on the potential for some voters to vote after Election Day and still have their votes counted. This argument reveals that their alleged injury in fact attributable to the Presumption is "conjectural or hypothetical" instead of "actual or imminent." *Spokeo*, 136 S. Ct. at 1547–48 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). The Supreme Court has emphasized that a threatened injury must be "*certainly impending*" and not merely "*possible*" for it to constitute an injury in fact.

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Clapper, 568 U.S. at 409, 133 S.Ct. 1138 (emphasis in original) (quoting ***362** *Whitmore v. Ark.*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). When determining Article III standing, our Court accepts allegations based on well-pleaded facts; but we do not credit bald assertions that rest on mere supposition. *Finkelman v. NFL*, 810 F.3d 187, 201–02 (3d Cir. 2016). The Supreme Court has also emphasized its "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414, 133 S.Ct. 1138. A standing theory becomes even more speculative when it requires that independent actors make decisions to act *unlawfully*. *See City of L.A. v. Lyons*, 461 U.S. 95, 105–06 & 106 n.7, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (rejecting Article III standing to seek injunction where party invoking federal jurisdiction would have to establish that he would unlawfully resist arrest or police officers would violate department orders in future).

Here, the Presumption of Timeliness could inflict injury on the Voter Plaintiffs only if: (1) another voter violates the law by casting an absentee ballot after Election Day; (2) the illegally cast ballot does not bear a legible postmark, which is against USPS policy; [16] (3) that same ballot still arrives within three days of Election Day, which is faster than USPS anticipates mail delivery will occur; [17] (4) the ballot lacks sufficient indicia of its untimeliness to overcome the Presumption of Timeliness; and (5) that same ballot is ultimately counted. *See Donald J. Trump for Pres., Inc. v. Way*, No. 20-cv-10753, 2020 WL 6204477, at *7 (D.N.J. Oct. 22, 2020) (laying out similar "unlikely chain of events" required for vote dilution harm from postmark rule under New Jersey election law); *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) (holding purported injury in fact was too conjectural where "we cannot now describe how Appellants will be injured in this case without beginning our explanation with the word 'if' "). This parade of horribles "may never come to pass," *Trump for Pres. v. Boockvar*, 2020 WL 5997680, at *33, and we are especially reluctant to endorse such a speculative theory of injury given Pennsylvania's "own mechanisms for deterring and prosecuting voter fraud," *Donald J. Trump for Pres., Inc. v. Cegavske*, No. 20-1445, —— F.Supp.3d ——, ——, 2020 WL 5626974, at *6 (D. Nev. Sept. 18, 2020). [18]

16 *See* Defendant-Appellee's Br. 30 (citing 39 C.F.R. § 211.2(a)(2); Postal Operations Manual at 443.3).

17 *See Pa. Democratic Party*, 238 A.3d at 364 (noting "current two to five day delivery expectation of the USPS").

18 Indeed, the conduct required of a voter to effectuate such a scheme may be punishable as a crime under Pennsylvania statutes that criminalize forging or "falsely mak[ing] the official endorsement on any ballot," 25 Pa. Stat. & Cons. Stat. § 3517 (punishable by up to two years' imprisonment); "willfully disobey[ing] any lawful instruction or order of any county board of elections," *id.* § 3501 (punishable by up to one year's imprisonment); or voting twice in one election, *id.* § 3535 (punishable by up to seven years' imprisonment).

To date, the Secretary has reported that at least 655 ballots without a legible postmark have been collected within the Deadline Extension period. [19] But it is mere speculation to say that any one of those ballots was cast after Election Day. We are reluctant to conclude that an independent ***363** actor —here, one of 655 voters—decided to mail his or her ballot after Election Day contrary to law. The Voter Plaintiffs have not provided any empirical evidence on the frequency of voter fraud or the speed of mail delivery that would establish a statistical likelihood or even the plausibility that any of the 655 ballots was cast after Election Day. Any injury to the Voter Plaintiffs attributable to the Presumption of Timeliness is merely "possible," not "actual or imminent," and thus cannot constitute an injury in fact.

19 As of the morning of November 12, Secretary Boockvar estimates that 655 of the 9383 ballots received between 8:00 P.M. on Election Day and 5:00 P.M. on November 6 lack a legible postmark. *See* Dkt. No. 59. That estimate of 655 ballots does not include totals from five of Pennsylvania's 67 counties: Lehigh, Northumberland, Tioga, Warren, and Wayne. *Id.* The 9383 ballots received, however, account for all of Pennsylvania's counties. *Id.*

B. Purcell

Even were we to conclude that Plaintiffs have standing, we could not say that the District Court abused its discretion in concluding on this record that the Supreme Court's election-law jurisprudence counseled against injunctive relief. Unique and important equitable considerations, including voters' reliance on the rules in place when they made their plans to vote and chose how to cast their ballots, support that

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disposition. Plaintiffs' requested relief would have upended this status quo, which is generally disfavored under the "voter confusion" and election confidence rationales of *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006). One can assume for the sake of argument that aspects of the now-prevailing regime in Pennsylvania are unlawful as alleged and still recognize that, given the timing of Plaintiffs' request for injunctive relief, the electoral calendar was such that following it "one last time" was the better of the choices available. *Perez,* 138 S. Ct. at 2324 ("And if a [redistricting] plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.").

Here, less than two weeks before Election Day, Plaintiffs asked the District Court to enjoin a deadline established by the Pennsylvania Supreme Court on September 17, a deadline that may have informed voters' decisions about whether and when to request mail-in ballots as well as when and how they cast or intended to cast them. In such circumstances, the District Court was well within its discretion to give heed to Supreme Court decisions instructing that "federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, —— U.S. ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (per curiam) (citing *Purcell*, 549 U.S. at 1, 127 S.Ct. 5).

In *Purcell*, an appeal from a federal court order enjoining the State of Arizona from enforcing its voter identification law, the Supreme Court acknowledged that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." 549 U.S. at 4, 127 S.Ct. 5. In other words, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4–5, 127 S.Ct. 5. Mindful of "the necessity for clear guidance to the State of Arizona" and "the imminence of the election," the Court vacated the injunction. *Id.* at 5, 127 S.Ct. 5.

The principle announced in *Purcell* has very recently been reiterated. First, in *Republican National Committee*, the Supreme Court stayed on the eve of the April 7 Wisconsin primary a district court order that altered the State's voting rules by extending certain deadlines applicable to absentee ballots. 140 S. Ct. at 1206. The Court noted that it was adhering to *Purcell* and had "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an ***364** election." *Id.* at 1207 (citing *Purcell*, 549 U.S. at 1, 127 S.Ct. 5). And just over two weeks ago, the Court denied an application to vacate a stay of a district court order that made similar changes to Wisconsin's election rules six weeks before Election Day. *Democratic Nat'l Comm. v. Wis. State Legislature*, No. 20A66, 592 U.S. ——, 141 S.Ct. 28, —— L.Ed.2d —— (Oct. 26, 2020) (denying application to vacate stay). Justice Kavanaugh explained that the injunction was improper for the "independent reason[ ]" that "the District Court changed Wisconsin's election rules too close to the election, in contravention of this Court's precedents." *Id.* at 30 (Kavanaugh, J., concurring). *Purcell* and a string[20] of Supreme Court election-law decisions in 2020 "recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled." *Id.*

20 *See, e.g.*, *Andino v. Middleton*, No. 20A55, 592 U.S. ——, 141 S.Ct. 9, 10, 208 L.Ed.2d 7 (Oct. 5, 2020) (Kavanaugh, J., concurring) ("By enjoining South Carolina's witness requirement shortly before the election, the District Court defied [the *Purcell*] principle and this Court's precedents." (citations omitted)); *Merrill v. People First of Ala.*, No. 19A1063, 591 U.S. ——, 141 S.Ct. 190, ——, 207 L.Ed.2d 1113 (Mem.), at *1 (July 2, 2020); *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *see also Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (per curiam) (holding that injunction issued six weeks before election violated *Purcell*); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. Oct. 2, 2020) ("[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus violate *Purcell*'s well-known caution against federal courts mandating new election rules—especially at the last minute." (citing *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5)).

The prevailing state election rule in Pennsylvania permitted voters to mail ballots up through 8:00 P.M. on Election Day so long as their ballots arrived by 5:00 P.M. on November 6. Whether that rule was wisely or properly put in place is not before us now. What matters for our purposes today is that Plaintiffs' challenge to it was not filed until sufficiently close to the election to raise a reasonable concern in the District Court that more harm than good would come from

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an injunction changing the rule. In sum, the District Court's justifiable reliance on *Purcell* constitutes an "alternative and independent reason[ ]" for concluding that an "injunction was unwarranted" here. *Wis. State Legislature*, 141 S.Ct. at 30 (Kavanaugh, J., concurring).

IV. CONCLUSION

We do not decide today whether the Deadline Extension or the Presumption of Timeliness are proper exercises of the Commonwealth of Pennsylvania's lawmaking authority, delegated by the U.S. Constitution, to regulate federal elections. Nor do we evaluate the policy wisdom of those two features of the Pennsylvania Supreme Court's ruling. We hold only that when voters cast their ballots under a state's facially lawful election rule and in accordance with instructions from the state's election officials, private citizens lack Article III standing to enjoin the counting of those ballots on the grounds that the source of the rule was the wrong state organ or that doing so dilutes their votes or constitutes differential treatment of voters in violation of the Equal Protection Clause. Further, and independent of our holding on standing, we hold that the District Court did not err in denying Plaintiffs' motion for injunctive relief out of concern for the settled expectations of voters and election officials. We will affirm the District Court's denial of Plaintiffs' ***365** emergency motion for a TRO or preliminary injunction.

All Citations

980 F.3d 336

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APPENDIX NO. 2

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141 S.Ct. 2508
Supreme Court of the United States.

Jim BOGNET, et al., Petitioners,
v.
Veronica DEGRAFFENREID, Acting Secretary of Pennsylvania, et al.

No. 20-740.
|
April 19, 2021

Case below, 980 F.3d 336.

Opinion

On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Third Circuit with instructions to dismiss the case as moot. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

All Citations

141 S.Ct. 2508 (Mem), 209 L.Ed.2d 544, 21 Cal. Daily Op. Serv. 3426, 2021 Daily Journal D.A.R. 3591

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APPENDIX NO. 3

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451 F.Supp.3d 952
United States District Court, W.D. Wisconsin.

DEMOCRATIC NATIONAL COMMITTEE and Democratic Party of Wisconsin, Plaintiffs,
v.
Marge BOSTELMANN, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr. and Mark L. Thomsen, Defendants,
and
Republican National Committee and Republican Party of Wisconsin, Intervening Defendants.
Sylvia Gear, Malekeh K. Hakami, Patricia Ginter, Claire Whelan, Wisconsin Alliance for Retired Americans and League of Women Voters of Wisconsin, Plaintiffs,
v.
Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., Mark L. Thomsen, and Meagan Wolfe, Defendants.
Reverand Greg Lewis, Souls To the Polls, Voces De La Frontera, Black Leaders Organizing for Communities, American Federation of Teachers, Local, 212, AFL-CIO, SEIU Wisconsin State Council and League of Women Voters of Wisconsin, Plaintiffs,
v.
Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., Mark L. Thomsen, and Meagan Wolfe, Defendants.

20-cv-249-wmc
|
20-cv-278-wmc
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20-cv-284-wmc
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Signed 04/02/2020

Synopsis

Background: Democratic National Committee (DNC), Democratic Party of Wisconsin, and individual voters filed suits against members of Wisconsin Election Commission (WEC), claiming violation of fundamental right to vote, due process, and equal protection, and seeking to bar enforcement of Wisconsin election statutes regarding deadlines for electronic and mail-in voter registration and for state's receipt of absentee ballots, as well as voter identification (ID) requirements in Wisconsin's impending statewide election, that included presidential primaries as well as state and local seats, during COVID-19 pandemic. The United States District Court for the Western District of Wisconsin, William M. Conley, J., 2020 WL 1320819, granted temporary restraining order (TRO) extending deadline for electronic voter registration, and subsequently, 2020 WL 1505640, allowed Wisconsin Legislature and Republican Party of Wisconsin to intervene as defendants. Following consolidation, plaintiffs moved for reconsideration and also moved for preliminary injunction seeking postponement of election, extension of deadline for receipt of absentee ballots, and suspension of witness signature requirement on absentee ballots.

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Holdings: The District Court, Conley, J., held that:

injunction delaying election was not warranted;

injunction extending deadline for receipt of absentee ballots and for requesting absentee ballots was warranted;

injunction providing limited relief from absentee ballot witness signature requirement was warranted;

injunction providing relief from proof of identification requirement was not warranted;

injunction extending mail-in registration deadline was not warranted;

request for injunction providing relief from proof of residence was moot; and

stay pending emergency appeal of injunctive relief was not warranted.

Motions granted in part.

Procedural Posture(s): Motion for Preliminary Injunction; Motion for Temporary Restraining Order (TRO); Motion for Reconsideration.

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Attorneys and Law Firms

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Jeffrey Matthew Harris, Consovoy McCarthy Park PLLC, Arlington, VA, Patrick Strawbridge, Consovoy McCarthy Park, Boston, MA, for Intervening Defendants.

OPINION AND ORDER

WILLIAM M. CONLEY, District Judge

In these three, consolidated cases, all filed in the last two weeks under the cloud of the emerging COVID-19 health crisis, plaintiffs [1] challenge a number of election-related, statutory requirements for the rapidly approaching April 7, 2020, election. Contrary to the view of at least a dozen other states, as well as the consensus of medical experts across the country as to the gathering of large groups of people, the State of Wisconsin appears determined to proceed with an in-person election on April 7, 2020. In the weeks leading up to the election, the extent of the risk of holding that election has become increasingly clear, and Wisconsin voters have begun to flock to the absentee ballot option in record numbers. As a result, state election officials are confronting a huge backlog in requests for absentee ballots made online, by mail or in person, including an unprecedented number of questions regarding how to satisfy certain registration requirements, properly request an absentee ballot, and return a properly completed absentee ballot in time to be considered for the April 7 election. On top of the burdens this influx has created for the Wisconsin Election Commission, its Administrator, staff and local municipalities in the days leading up to the election, that same group has been improvising in real time a method to proceed safely and effectively with in-person voting in the face of increasing COVID-19 risks, loss of poll workers due to age, fears or sickness, the resulting consolidation of polling locations, and inadequate resources.

1 For simplicity, all three groups of plaintiffs will be referred to simply as simply "plaintiffs" throughout this opinion unless otherwise indicated, while still recognizing that the three cases continue to retain their separate characters. *See Ivanov-McPhee v. Washington Nat. Ins. Co.*, 719 F.2d 927, 928 (7th Cir. 1983) ("[A]ctions which have been consolidated do not lose their separate identity.").

Despite these truly heroic efforts, the three most likely consequences of proceeding with the election on this basis are (1) a dramatic shortfall in the number of voters on election day as compared to recent ***958** primaries, even after accounting for the impressive increase in absentee voters, (2) a dramatic increase in the risk of cross-contamination of the coronavirus among in-person voters, poll workers and, ultimately, the general population in the State, or (3) a failure to achieve sufficient in-person voting to have a meaningful election *and* an increase in the spread of COVID-19. Nevertheless, the Wisconsin State Legislature and Governor apparently are hoping for a fourth possibility: that the efforts of the WEC Administrator, her staff, the municipalities and poll workers, as well as voters willing to ignore the obvious risk to themselves and others of proceeding with in-person voting, will thread the needle to produce a reasonable voter turnout and no increase in the dissemination of COVID-19.

However unlikely this outcome may be, or ill-advised in terms of the public health risks and the likelihood of a successful election, the only role of a federal district court is to take steps that help avoid the impingement on citizens' rights to exercise their voting franchise as protected by the United States Constitution and federal statutes. That is what the court attempts to do in this opinion and the order below, understanding that a consequence of these measures may be to further the public health crisis in this State. Unfortunately, that is beyond the power of this court to control.

In a prior opinion and order in the '249 case, the court granted plaintiffs the Democratic National Committee and the Democratic Party of Wisconsin's (jointly, the "DNC/DPW") motion for temporary restraining order in part, extending the deadline by which an individual can register to vote electronically to March 30, 2020. The court denied the other requests, but signaled to plaintiffs that the court would consider their request for extension of the date by which absentee ballots may be counted toward the election and other relief in a motion for preliminary injunction. On March 27, 2020, plaintiffs filed a motion for preliminary injunction and supporting evidence, seeking an extension of the deadline

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for receipt of absentee ballots and a suspension of the witness signature requirement on those ballots, as well as reconsideration of the court's ruling on the by-mail absentee deadline and documentation requirements. ('249 dkt. #61.) In addition, on March 28, 2020, plaintiffs in the '278 and '284 cases filed motions for temporary restraining orders, requesting postponement of the April 7, 2020, election and other relief duplicative of the relief requested in the '249 motion for preliminary injunction. ('278 dkt. #8; '284 dkt. #17.)

In response to these motions, the court consolidated the three cases, and set briefing on the various motions. After reviewing the opposition briefs filed by defendants the Commissioners and Administrator of the Wisconsin Election Commission ("WEC") and the intervening defendants the Republican National Committee and the Republican Party of Wisconsin (jointly, the "RNC/RPW"), as well as amici briefs, the court further conducted an evidentiary hearing and oral argument on April 1, 2020, at which the parties appeared by counsel and WEC Administrator Meagan Wolfe provided extensive testimony in response to the court's questions, as well as those posed by counsel. [2]

2 Initially, the Commissioners were represented by the Attorney General of Wisconsin. But on March 26, 2020, the Governor appointed special counsel to represent them pursuant to Wis. Stat. § 14.11(2)(a).

***959** For the reasons that follow and provided on the record during the hearing on plaintiffs' motions, the court will grant plaintiffs' motions in part, and provide the following preliminary relief: (1) enjoin the enforcement of the requirement under Wis. Stat. § 6.87(6) that absentee ballots must be received by 8:00 p.m. on election day to be counted and extend the deadline for receipt of absentee ballots to 4:00 p.m. on April 13, 2020; (2) enjoin the enforcement of the requirement under Wis. Stat. § 6.86(1)(b) that absentee ballot requests must be received by April 2, 2020, and extend the deadline for receipt of absentee ballot requests by mail, fax or email (and if deemed administratively feasible in the sole discretion of the WEC Administrator, online) to 5:00 p.m. on April 3, 2020; and (3) enjoin the enforcement of Wis. Stat. § 6.87(2) as to absentee voters who have provided a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so, provided that the ballots are otherwise valid. [3]

3 The court *will* reserve on the question as to whether the actual voter turnout, ability to vote on election day or overall conduct of the election and counting votes timely has undermined citizens' right to vote.

FACTS

A. Overview of the WEC and Voting in Wisconsin

The WEC is charged with overarching responsibility to administer and enforce Wisconsin's election laws. In administering elections, the WEC works with the state's 72 county clerks and 1,850 municipal clerks. The WEC issues clerk communications, training materials and forms for local clerks. In turn, local clerks are tasked with implementing any changes in policy or law in their community, including administering absentee ballot voting. About two-thirds of the clerks in Wisconsin municipalities are part-time.

After the polls close, election inspectors are charged with tabulating the votes received at the polling places; municipal clerks are to report the returns within two hours after tabulation; and the county clerks are to post the results within two hours after receiving the returns. Wis. Stat. §§ 7.51(1), (4), 7.60(1). Municipalities have two ways to count absentee ballots: (1) count absentee ballots at the polling places, Wis. Stat. §§ 6.88, 7.51; or (2) count absentee ballots at a central location by a municipal board of absentee ballot canvassers, Wis. Stat. § 7.52. Under either method, the election inspector or absentee ballot canvasser reviews the certification contained on the envelope, and if the certification is insufficient, the ballot is not counted. Wis. Stat. §§ 6.88(3)(b), 7.52(a).

For the upcoming April 7 election, municipal boards of canvass have until April 13 to certify the results to the county. The county boards of canvass also have 10 days after the election to certify their results to the WEC or April 17, 2020, for the upcoming election. Wis. Stat. § 7.60(5). The municipal boards of canvass must further publicly declare the results for municipal contests by the third Tuesday of April, or in the case of the April 7 election, by April 21, 2020. Wis. Stat. § 7.53(2)(d). Finally, the WEC has until May 15, 2020, to certify the election results for state and federal contests. Wis. Stat. § 7.70(3)(a).

In addition to the presidential primaries, the April 7, 2020, election has the following state and local seats on the ballot: a Wisconsin Supreme Court justice; three Wisconsin Court

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of Appeals judges; 34 Wisconsin circuit court judges; 102 municipal court judges; 1,596 county positions; 763 city positions; 464 village positions; 391 ***960** town positions; 565 school board seats; and 12 sanitary district supervisory board positions. (Gov. Evers Amicus Br. (dkt. #151) 6.)

B. Current State of COVID-19 Health Crisis

As of March 27, the date the DNC/DPW plaintiffs filed their motion for preliminary injunction, the state was reporting more than 710 cases of COVID-19 and at least 12 deaths. As of the date of this opinion and order, there are 1,550 confirmed cases in Wisconsin and 24 deaths.[4] Wis. Dep. of Health Servs., "Outbreaks in Wisconsin" (as of Apr. 1, 2020), available at https://www.dhs.wisconsin.gov/outbreaks/index.htm. While Wisconsin and other parts of the country are taking steps to "flatten the curve," it is clear that the outbreak in Wisconsin is still somewhat near the beginning of that curve, with evidence of increasing community spread. (Pls.' PFOFs ('284 dkt. #19) ¶¶ 56-57; *see also* Gov. Evers Amicus Br. ('249 dkt. #151) 8 ("[T]he COVID-19 epidemic in Wisconsin will get worse before it gets better," with the DHS Secretary-Designee estimating that "it could be '10-plus' days before the growth curve of COVID-19 flattens out in Wisconsin.").)

4 Moreover, Wisconsin's Department of Health Services' chief medical officers and state epidemiologist for communicable diseases estimate that the actual number of Wisconsinites with COVID-19 is up to ten times higher than the number who have tested positive. (Gov. Evers Amicus Br. ('249 dkt. #151) 7 & n.12.)

On Tuesday, March 24, Governor Evers issued a "Safer-at-Home Order," requiring all Wisconsinites to shelter in place to slow the spread of COVID-19 until April 24, 2020, or until a superseding order is issued. (Spiva Decl., Ex. 4 ('249 dkt. #63-4) (also known as "Emergency Order #12").) This order is consistent with the Centers for Disease Control and Prevention's ("CDC") recommendations that people in the at-risk category, which includes people who are 65 years old or older or who have underling health conditions and diseases, including chronic lung diseases, asthma, diabetes, serious heart conditions, and are otherwise immune-compromises, stay at home and avoid non-essential travel. (Pls.' PFOFs ('278 dkt. #16) ¶ 6.) According to U.S. Census Bureau 5-year estimates, 15 per cent of the 2,328,754 Wisconsin households include someone 65 years of age or older.[5]

5 Although the number of those households occupied by those *only* 65 years or older is unclear, 675,000 households in the state are one-person, and 862,900 are two-person households. (Dkt. #166-4, Ex. 54.) By extrapolation, plaintiffs represent that 250,000 of these are over 65. (Pls.' PFOF ('278 dkt. #16) ¶ 20.)

C. Increased Reliance on Absentee Ballots

State actors have increasingly focused on encouraging individuals to vote by absentee ballot, with Governor Evers recently calling on the Legislature to enable all registered voters to receive a ballot by mail and extend the time for mailed-in absentee ballots to be counted. (Pls.' PFOFs ('284 dkt. #19) ¶ 67.) On March 24, the Governor issued an "EMERGENCY ORDER #12: SAFER AT HOME ORDER," directing all Wisconsinites to stay at their home and places of residence, but a week later amended that order to explain that "the Safer at Home Order is not intended to eliminate in-person absentee voting for the April 7, 2020, election" or "in person voting on the scheduled election date." (Gov. Evers Amicus Br. ('249 dkt. #151) 5 & n.8.) In turn, the WEC indicated that it cannot cancel or postpone the election, and that "any change may require court intervention, an act of the Legislature, ***961** or an order of the Governor." (Pls.' PFOFs ('284 dkt. #19) ¶ 88.)

As a result, Governor Evers, the WEC Administrator, and the Mayor of Milwaukee, among other public officials, are encouraging voters to vote via absentee ballot. Ironically, while encouraging voting by absentee ballot, the options for in-person voting, either before the election day by absentee ballot or on election day are at risk of being eliminated or have been eliminated. In the City of Madison, 67% of poll workers are over 60 years of age, falling within the at-risk category for COVID-19, and 32% of poll workers have canceled their assigned, in-person voting shifts. Madison also limited in-person absentee voting to curbside voting and eliminated voting at other early voting locations. Similarly, the City of Milwaukee has reported that it no longer has sufficient staff to operate its three, in-person early voting locations, also eliminating the ability to register in-person before the election, although as the intervening defendants point out, drive-up early voting remains available through April 5. Milwaukee Elections Commission Website, available at https://city.milwaukee.gov/election#.XoFPkpNKiqA.

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As of the date of the DNC/DPW plaintiffs' motion, 699,431 absentee ballots have been requested statewide. As of the latest available data, that number has increased to 1,119,439, with today being the last remaining opportunity for individuals to request the mailing of an absentee ballot. WEC, "Absentee Ballot Report - April 7, 2020 Spring Election" (Apr. 2, 2020), available at https://elections.wi.gov/node/6806. As a point of reference, in the four spring elections from 2016 to 2019, the number of absentee ballots issued ranged from a low of 103,533 in 2017 to a high of 249,503 in 2016. (Burden Rept. ('249 dkt. #63-1) 7.)[6] In a March 23, 2020, hearing on the court's prior temporary restraining order, WEC Administrator Wolfe, stated "we're also seeing unprecedented traffic for people requesting their absentee ballot." (Pls.' PFOFs ('249 dkt. #62-1) ¶ 8.) Anticipating this growth in demand, the WEC has distributed 1.2 million absentee ballot envelopes to municipal clerks throughout the state. At the hearing, WEC Administrator Wolfe testified that for the 2012 and 2016 spring elections, approximately 80-85% of the absentee ballots sent to voters were returned in time to be counted.

6 Moreover, in previous spring elections, absentee ballots were about as likely to be returned in person as by mail, a highly unlikely scenario for this election given the health risks and reduced options for doing so. (Burden Rept. ('249 dkt. #63-1) 7-8.)

As a result of the significant uptick in absentee ballot requests, Madison City Clerk Maribeth Witzel-Behl represents that Madison has received an "unprecedented number of requests for absentee ballots"; Milwaukee City Clerk Neil Albrecht estimates that "absentee ballot requests this election are ten times the normal number"; and Hudson City Clerk Becky Eggen avers that "[t]his election cycle is by far the busiest I have experienced in terms of volume and speed of requests for absentee ballots." (*Id.* ¶¶ 9-11 (citing Witzel-Behl Decl. ('249 dkt. #77) ¶ 7; Albrecht Decl. ('249 dkt. #73) ¶ 5); Eggen Decl. ('249 dkt. #65) ¶ 2).)

In light of these unprecedented numbers, at least some clerks are having trouble processing the applications for absentee ballots. The Madison Clerk explains that "[a]ttempting to meet the extraordinary demand for absentee ballots and other requests from voters has strained the capabilities of the Clerk's office," and "[t]he ever increasing volume of requests for absentee ballots is threatening to overwhelm the staff available." (Pls.' PFOFs ('249 dkt. #62-1) ¶ 20 (quoting Witzel-Behl Decl. ('249 dkt. #77) ¶¶ 6, 8).) As of March ***962** 27, Madison had a backlog of more than 12,000 absentee ballots requests to process, and as a result it was experiencing at least a week-long delay in sending out absentee ballots. As of March 27, the City of Hudson had 2,000 pending requests for absentee ballots. The difficulty of processing the high volume requests is not limited to these cities, but extends to other municipal election offices across the state. Although WEC Administrator Wolfe represented at the April 1, 2020, hearing that the backlog had improved in recent days, she was unable to provide any specifics.

While recognizing the challenges in processing absentee ballot requests, the WEC maintains that "[i]t is not clear that the timely processing of requests for absentee ballots is impossible." (Defs.' PFOFs ('249 dkt. #109) ¶ 38.) In particular, the WEC represents that as of March 31, 2020, of the 972,232 absentee ballot requests, 942,350 have been sent out, leaving only a backlog of 30,000 statewide. WEC, "Absentee Ballot Report - April 7, 2020 Spring Election" (Mar. 31, 2020), available at https://elections.wi.gov/node/6794. As of April 2, the backlog was approximately 21,590. WEC, "Absentee Ballot Report - April 7, 2020 Spring Election" (Apr. 2, 2020), available at https://elections.wi.gov/node/6806.

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Nevertheless, in light of the challenges in processing requests and mailing out absentee ballots, the Madison City Clerk avers that "the 8:00 p.m. election day deadline for receipt of absentee ballots is completely unworkable." (Pls.' PFOFs ('249 dkt. #62-1) ¶ 29 (quoting Witzel-Behl Decl. ('249 dkt. #77) ¶ 13).) Specifically, the United States Postal Service estimates that two to three days are necessary for a ballot to arrive on time, although as the WEC points out during the past several years, USPS has advised voters to mail completed ballots one week before the election to ensure that they are received on or before election day, and since the beginning of the COVID-19 health crisis, the USPS is operating more slowly. (Defs.' PFOFs ('249 dkt. #109) ¶¶ 8-9.)

As a result, the City Clerks for Madison and Milwaukee represent that "[t]here is no practical way that a person submitting a request for an absentee ballot on the deadline for submitting the request ... will have the time to receive, vote and return their ballot by Election Day." (*Id.* ¶ 30 (quoting Cities' Amicus Br. ('249 dkt. #39) 5).) The Madison City Clerk estimates that more than 1,000 ballots will be received after the election day deadline; Milwaukee estimates that "thousands" will arrive late. Indeed, at the hearing, in light of the number of absentee ballot requests to date and

with reference to the 2016 spring election as a point of comparison, Wolfe acknowledged that approximately 27,500 voters absentee ballots will be received *after* the receipt deadline of 8:00 p.m. on the day of the election, April 7, 2020, and, therefore, will not be counted. No doubt at least in part for this reason, the WEC informed the court on March 31, 2020, that it no longer objects to any absentee ballot postmarked by April 7, 2020, and received by 4:00 p.m. on April 13, 2020, being counted in the election. ('249 dkt. #152.) In their notice to the court, the WEC also represented that "If the votes received by 4:00 p.m. on April 13, 2020, are counted it will not impact the ability to complete the canvass in a timely manner." (*Id.*) At the hearing, WEC Administrator Wolfe and her counsel reiterated this position..

D. Challenges to Absentee Voting Posed by Safer-At-Home Order

1. Absentee Ballot Witness Signature Requirement

The Safer-At-Home Order did not explain how its provisions would implicate ***963** any of the state's requirements for voting, including the witness signature requirement, although as the intervening defendants point out, there are numerous exceptions to the order including for "essential governmental functions" and "essential travel." The envelopes in which absentee voters enclose and send in their ballots include the following language in the "Certification of Voter" box:

> I certify that I exhibited the enclosed ballot unmarked to the witness, that I then in (his) (her) presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and any person rendering assistance under s. 6.87 (5), Wis. Stats., if I requested assistance, could know how I voted.

Wis. Stat. § 6.87(2). (*See also* Defs.' PFOFs (dkt. #109) ¶ 16.) A box labeled "Certification of Witness" provides:

> I, the undersigned witness, subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

Id. (*See also* Defs.' PFOFs (dkt. #109) ¶ 17.)

On March 26, 2020, the Madison City Clerk issued a statement indicating that "there is no exception to the witnessing and signature requirement for mail-in ballots," and referring voters to non-profit organizations who can assist with witness signatures while maintaining social distancing. (Pls.' PFOFs ('278 dkt. #16) ¶ 18 (quoting Aguilera Decl., Ex. T ('278 dkt. #15-20)).) On March 29, the WEC also issued guidance suggesting several options for voters to meet this requirement and avoid direct interaction, including a friend or neighbor may watch the voter mark their ballot through a window, open door or other physical barrier, and even may do so by video chat, like Skype or Facetime, with the voter then placing the ballot outside for the witness to sign and mail. WEC, "Absentee Witness Signature Requirement Guidance" (Mar. 29, 2020), available at https://elections.wi.gov/node/6790. The WEC even suggested that the voter could ask an individual delivering groceries or food to witness the ballot. *Id.* At the hearing, WEC Administrator Wolfe acknowledged that some of the guidance, in particular that concerning use of video chat, may not work for some elderly voters without access to or familiarity with the technology, and that the guidance may not account for all safety concerns about proper treatment of paper to avoid the spread of COVID-19. For its part, the City of Milwaukee has established five places where voters can drop off their completed absentee ballots and get them witnessed by staff, although obviously individuals would have to leave their home to access these services.

There are 675,850 single member households in Wisconsin, a substantial number of which are over the age of 65, including

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the four individual plaintiffs in the '278 case. (Pls.' PFOFs ('278 dkt. #16) ¶ 20.) Plaintiffs also submit declarations from several other individuals living alone, and in high risk groups, who explain the challenges they face in complying with the witness signature requirement for absentee ballots and averring that they have been unable to secure the necessary signatures. (Pls.' PFOFs ('249 dkt. #62-1) ¶¶ 36, 39 (citing declarations); Pls.' PFOFs ('278 dkt. #16) ¶¶ 21-31 (citing plaintiffs' declarations); ***964** Pls.' PFOFs ('284 dkt. #19) ¶ 76 (citing declaration).) Plaintiffs' expert further opines "for a person who lives alone, is immunocompromised and self-quarantining to protect their health, or who has contacted COVID-19 and is in quarantine to protect others, it may be nearly impossible to secure a witness signature in a timely fashion." (*Id.* ¶ 37 (quoting Burden Rept. ('249 dkt. #63-1) 9).) The Madison City Clerk also avers that her office has received "numerous requests daily from individuals who have received an absentee ballot, but live alone and have no person to witness the ballot ... [and] are afraid to leave their homes in search of a witness." (*Id.* ¶ 38 (quoting Witzel-Behl Decl. ('249 dkt. #77) ¶ 11); *see also* Eggen Decl. ('249 decl. #65) ¶ 6).) [7]

7 As of March 31, 2020, the Milwaukee Clerk also avers that the city has received 450 absentee ballots that are missing the necessary witness signature. (Albrecht Decl. ('249 dkt. #135).)

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2. Photo ID and Proof of Residency Requirements

Plaintiffs similarly contend that the Safer-At-Home Order, and specifically the requirement that all non-essential business close, poses challenges to individuals who need a copy of a photo ID or proof of residency in order to register to vote and request an absentee ballot online or by mail. While the intervening defendants point out that the Safer-At-Home order exempts business from closure that may provide photocopying services, a question remains whether voters, especially the elderly or other high-risk individuals, will feel safe venturing out to those businesses. Plaintiffs' expert again opines that "[w]ithout the assistance of an election official and perhaps other friends or family who are separated physically due to 'social distancing' measures taken in response to the virus pandemic, [the copying and mailing in a copy of a photo ID or proof of residency] will be an administrative and technological hurdle for some prospective voters," especially given that absentee voting is a "new and foreign process" for many Wisconsin voters, although recognizing that absentee voting has been in place in Wisconsin for some time. (Pls.' PFOFs ('249 dkt. #62-1) ¶¶ 43-44 (quoting Burden Rept. ('249 dkt. #63-1) 12.)

One individual specifically avers that because of her lack of access to a copier or scanner, she will not be able to vote in this election. (*Id.* ¶ 45 (citing Love Decl. (dkt. #68) ¶ 4.) Moreover, the Dane County Clerk avers that he has received "many calls from elderly voters who are unable to provide a copy of their photo ID as required to request an absentee ballot." (McDonell Decl. ('249 dkt. #74) ¶ 6.) [8] In response, he has advised these voters "to indicate on their absentee ballot requests that they are 'indefinitely confined' due to illness," and on March 25, 2020, he advised all Dane County voters that they "should continue to follow the law requiring a photo ID but that they may indicate as needed that they are indefinitely confined due to illness." (*Id.* ¶¶ 6-7.)

8 The intervening defendants dispute McDonell's account and other statements by clerks on hearsay grounds. At minimum, these statements are admissible for the impact they had on the declarants as voters. Fed. R. Evid. 803(3). To that extent, the court will at least credit the fact that some high risk voters have been paralyzed by the uncertain risks associated with venturing outside their homes.

In response, the WEC issued guidance for indefinitely confined electors on March 29, 2020, which provides in pertinent part:

> 1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or ***965** total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.
>
> 2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

WEC, "Guidance for Indefinitely Confined Electors COVID-19" (Mar. 29, 2020), available at https://elections.wi.gov/node/6788. This guidance goes on to explain:

> We understand the concern over the use of indefinitely confined status and do not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin. *During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates.* We have told clerks if they do not believe a voter understood the declaration they made when requesting an absentee ballot, they can contact the voter for confirmation of their status. They should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status. Any request for confirmation of indefinitely confined status should not be accusatory in nature.

Id. (emphasis added). [9]

9 In a March 31, 2020, order, the Wisconsin Supreme Court granted the Republican Party of Wisconsin's motion for temporary restraining order, directing the Dane County Clerk to "refrain from posting advice as the County Clerk for Dane County inconsistent with the above quote from the WEC guidance." *Jeffersom v. Dane Cty.*, No 2020AP557-OA (Mar. 31, 2020). ('249 dkt. #130.) In so holding, the Supreme Court effectively adopted the WEC's guidance of the term "indefinitely confined" as quoted above.

E. Challenges to In-Person Registration and Voting

While the significant increase in absentee ballot requests should decrease significantly the number of in-person voters on April 7, assuming the total votes for this election fall somewhere in the mid-range of the total number of votes in the 2012 spring election (approximately 1.1 million) and the 2016 spring election (approximately 2.1 million), WEC Administrator Wolfe testified during the hearing that roughly 500,000 people would still need to vote in-person on April 7. In light of the COVID-19 health crisis and the various government orders, municipal clerks have expressed concerns about safely administering in-person voting and registration either before election day or on April 7. In response, the WEC has issued various communications, acknowledging concerns, including shortages of absentee ballot envelopes, polling locations, poll workers, hand sanitizer and cleaning products, as well as the real possibility that the clerks themselves may not be able to serve in the days leading up to election day and the election day itself. (Pls.' PFOFs ('284 dkt. #19) ¶¶ 80-84.) Still, the WEC has directed municipal clerks to continue in-person registration and voting, while requiring at least six-feet of distance between voters and election workers.

As for election day, the WEC has directed that municipalities are required to conduct in-person election day voting and that local election officials and local elected officials are not authorized to terminate this option. (Defs.' PFOFs ('249 dkt. #157) ¶ 2.) After consulting the public health officials, the WEC recently provided guidance for polling stations on election day as well. (*Id.* ¶ 3; *see also* Wolfe Decl., Ex. F ***966** ('249 dkt. #106-6).) This guidance requires hand washing or sanitizing stations, wiping down tables, door handles, pens, etc., every ten minutes, ensuring at least six-feet distance between voters and between voters and election workers, and avoiding handling of photo IDs, among other requirements. The WEC has purchased a large quantity of 70% ethyl alcohol liquid sanitizing product to provide clerks a disinfecting solution for use at polling sites, and is in the process of securing cleaning wipes. In addition, Governor Evers has indicated that he has agreed to use members of the Wisconsin Army National Guard to assist poll workers, although it is "anticipated that the assistance of the National Guard will not satisfy all of the current staffing needs." (Gov. Evers Amicus Br. ('249 dkt. #151) 9.)

Even so, WEC Administrator Wolfe testified at the hearing that in a recent survey, 111 municipalities indicated that they did not have the capacity to staff even one polling place. Moreover, plaintiffs in the '284 case submit more disturbing proposed findings of facts with respect to specific election preparations for the Cities of Milwaukee, Madison, Green Bay and Racine. In Milwaukee, the City has 592,000 residency, of which 439,000 are of voting age and approximately 298,000 are currently registered to vote. Approximately 40% of City residents are African-American; 17% are Hispanic/Latino; and 28% live in poverty, as compared to the state average of 13%. Milwaukee has 327

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electoral wards and 180 polling stations, although 18 polling stations are unavailable due to risk of cross-contamination. In the 2016 spring presidential primary, Milwaukee documented 167,765 total ballots cast and processed 14,321 absentee ballots.

In preparation for the April 7, 2020, election, the City of Milwaukee will require some 300 staff members to assist in the processing of absentee ballots and 1,500 staff members for polling location operations. Due to the COVID-19 health crisis, as of March 30, 2020, there are less than 400 election workers (without confirmation from all) and 50 central count workers available. An estimated 50% of the City's regular election workers are over the age of 60, with approximately 33% over the age of 70. Milwaukee is concerned about training new poll workers due to the social distancing requirements. According to the City's Clerk, "[w]hether imposed *de jure* or *de facto*, the City of Milwaukee likely will be *unable* to conduct in-person voting in its 327 wards on April 7, leaving mail-in absentee voting as the only means currently [available] by which Milwaukee voters will be able to vote for the Spring Election scheduled to occur on April 7." (Pls.' PFOFs ('284 dkt. #19) ¶ 98 (citing Albrecht Decl. ('284 dkt. #12) ¶ 9) (emphasis added).) The WEC disputes this, pointing to its guidelines requiring municipalities to conduct in-person absentee and election day voting.

In addition, as of March 30, 2020, the City of Milwaukee has processed approximately 66,850 requests for absentee ballots. The Clerk estimates that if the City continues to receive approximately 5,000 requests per day until the last day such requests may be received, April 2, and assuming that 5% of the ballots mailed will not be returned, the City will process an additional 38,000 ballots for an estimated total of 90,000 ballots. Assuming in-person voting on election day is not possible, the Clerk estimates that the turnout for Milwaukee will be approximately 70,000 less than originally estimated.

In turn, the City of Madison has a population of approximately 255,650, with 213,725 of voting age, approximately 179,648 of which are registered to vote. The City has 152 voting wards and 92 polling stations, ***967** although 14 are not available due to COVID-19 health concerns, and the Madison Metropolitan School District is considering not allowing the City to use the 21 school facilities. Attempting to meet the demand for absentee ballots, other City of Madison employees have been reassigned to assist the City Clerk, but even with that influx of employees, some staff have been working 12-17 hour days. As of March 24, the City has sent 40,275 absentee ballots by mail and 1,273 by email, by March 30, the total number of absentee ballots issued was over 69,000. Nonetheless, the City is having a difficult time processing the applications for absentee ballots, and it now has a backlog of over 12,000 requests. In the 2016 spring presidential primary, Madison voters cast 118,219 ballots, including 10,272 absentee ballots. The City is anticipating as many as 118,000 absentee ballots to be cast in the April 7 election.

As of March 24, 2020, 666 poll workers have also canceled their assigned shift at the polls in the City of Madison for the April 7 election. As such, 774 of the 1,500 morning shifts and 715 of the 1,500 evening shifts are vacant. In addition, approximately 67% of the City's poll workers were in the "at risk" category -- being over the age of 65. Accordingly, the City anticipates additional poll workers will opt not to work. [10]

10 Dane County filed an amicus brief, in which it argues that the April 7 election should be postponed, including a statement from its Director of Public Health Madison & Dane County, in which she advises that a failure to postpone the election "would put all Wisconsin communities at greater risk of illness due to COVID-19, and puts our health care systems at risk of becoming overwhelmed and depleted of resources." ('249 dkt. #150-3 (quoting Ex. C. (dkt. #150-5)).)

As for Green Bay, as presented in the verified complaint in the Eastern District lawsuit, the City represents that it, too, is overwhelmed by the unprecedented demand for absentee ballots and has a backlog of over 4,000 requests with only six staff members, which includes employees from other departments, available to process the requests. As for election day, Green Bay currently lacks access to hand sanitizer or sanitation wipes, which are necessary to ensure cleanliness of polling places and limit potential exposure of COVID-19. [11] Moreover, 90% of its 278 poll workers are age 60 or older, and only 54 have agreed to work on election day. Of the 54 poll workers who have agreed to work, only 11 are chief inspectors. The City avers that with these staff shortages, proceeding with the April 7 election is "not only impractical, it is wholly irresponsible given that the integrity of the election will be jeopardized." (Pls.' PFOFs ('284 dkt. #19) ¶ 125.)

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11 In its complaint in the Eastern District of Wisconsin, the City of Green Bay and the City Clerk, described the typical, in-person voting process on election day, noting several places where poll workers and voters will be closer to one another than the recommended six-feet separation for proper social distancing. (Pls.' PFOFs ('284 dkt. #19) ¶ 78.)

Finally, with respect to Racine, like Milwaukee, it is more ethnically diverse than other cities in Wisconsin, with approximately 23% of its residents are African-American and 21% are Hispanic/Latino. In addition, 20% of Racine residents lives below the poverty level. Of Racine's more than 34,000 registered voters, the City typically sends approximately 1,500 absentee ballots. As of March 26, 2020, Racine has sent 4,500 ballots, which while a significant number, represents a small percentage of Racine's voters. (Coolidge Decl. (dkt. #7) ¶ 6.) For early voting, Racine has developed a process to ensure social distancing and attempt to limit exposure to COVD-19, ***968** but it does not believe these same protections will be viable on election day. Of the 135 poll workers who routinely and reliably work elections, fewer than 25 are under the age of 60, and as of March 31, 2020, only 50 are willing to work the April 7 election. Moreover, many of the chief election officials previously scheduled to work have also notified the City that they will not work the April 7 election.

In addition to considering the challenges faced by these four cities, plaintiffs in the '284 case also contend that African-American and Latino voters are particularly burdened by the impact of the COVID-19 health crisis with respect to the April 7 election. Since the 2008 election in Wisconsin, between 10 to 15% of all registrations have occurred at a polling place on the election day. (Pls.' PFOFs ('284 dkt. #19) ¶ 74.) For Milwaukee, approximately 20% of the total turnout for spring elections involve same-day registrants. (*Id.* ¶ 159.) Plaintiffs in the '284 case further aver that a "significant number of African-American voters have historically participated in same-day registration at the polls on election day, and will be unable to do this year due to the COVID-19 pandemic." (*Id.* ¶ 153.) Furthermore, due to the digital divide, registering to vote online or requesting an absentee ballot online may present more of a barrier for low-income African-American and Latino voters.

The burdens posed by this election will also likely disproportionately impact elderly voters, who are most vulnerable to the COVID-19 threat. On March 25, Bryan Boland, a Canvass Lead for SEIUWI, one of the plaintiffs in the '284 case, spoke with 43 people aged 60 and older living in the western part of Wisconsin. (Pls.' PFOFs ('284 dkt. #19) ¶¶ 163-68 (citing Boland Decl. ('284 dkt. #2) ¶¶ 3-8); *see also* Lizotte Decl. ('284 dkt. #3) ¶¶ 3-10 (detailing additional concerns raised by voters ages 60 or older).) He avers that about half of the people that he spoke with were planning on voting in-person and would not request an absentee ballot, but a number of them recognized that if the coronavirus risks amplified, they might not be able to vote. A number of the people Boland spoke with also expressed difficulty in requesting a ballot on-line because of technical problems or lack of a computer or smart phone. [12]

12 The WEC offered detailed facts about how postponing the election altogether would cause technical / logistics issues with respect to conducting the Special Election in the 7th Congressional District in particular (dkt. #157 at ¶¶ 8-17), but since the court does not believe this power lies within its purview, the court will not recite those here.

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OPINION

The standard for determining whether a preliminary injunction or a temporary restraining order is appropriate is the same. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 865 (W.D. Wis. 2013) (citing *Winnig v. Sellen*, 731 F. Supp. 2d 855, 857 (W.D. Wis. 2010)). Specifically, a plaintiff must first show "(1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017) (citing *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015)). Then, if this initial showing is successfully made, "the court must engage in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests." ***969** *Id.* (citing *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1057 (7th Cir. 2016)).

I. Irreparable Harm & Inadequate Remedies at Law

The threatened loss of constitutional rights constitutes irreparable harm. *See Preston v. Thompson*, 589 F.2d 300, 303 n.4 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm."); *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (where plaintiff had proven a probability of success on the merits, the threatened loss of First Amendment freedoms "unquestionably constitutes irreparable injury"). More specifically, courts have held that infringement on the fundamental right to vote amounts to an irreparable injury. *See Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) ("A restriction on the fundamental right to vote ... constitutes irreparable injury."); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (holding that plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon").

Further, infringement on a citizens' constitutional right to vote cannot be redressed by money damages, and therefore traditional legal remedies would be inadequate in this case. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate."); *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress."). Accordingly, at least to the extent that they have demonstrated a likely constitutional violation as discussed below, plaintiffs have satisfied the first two prongs of the initial showing -- irreparable harm and inadequate remedies at law.

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II. Likelihood of Success on the Merits & Balance of Equities

The court now turns to the heart of the matter -- whether plaintiffs have demonstrated a likelihood of success, and whether the balance of equities favors any of their requested relief. In the three motions, plaintiffs seek an order from the court restraining enforcement of the following six election-related requirements: (1) the current election day, April 7, 2020; (2) the current mail-in registration deadline under Wis. Stat. § 6.28(1); (3) the requirement that copies of proof of residence and voter ID accompany electronic and by-mail voter registration, under § 6.34; (4) the requirement that copies of photo identification accompany absentee ballot applications, under §§ 6.86, 6.87; (5) the requirement that absentee ballots be signed by a witness, under § 6.87(2); and (6) the requirement that polling places receive absentee ballots by 8:00 p.m. on election day to be counted, under § 6.87.

In these consolidated cases, the merits question is whether any of the challenged provisions impose an unconstitutional burden on the right to vote. The right to vote is fundamental, and any alleged infringement on this right "must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)). This right, however, is not absolute, *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986), and "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," ***970** *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).

Challenges to election laws are governed by the framework set forth by the Supreme Court 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).[13] Under the *Anderson-Burdick* standard, the court must (1) "determine the extent of the burden imposed by the challenged provision"; (2) "evaluate the interest that the state offers to justify that burden"; and (3) "judge whether the interest justifies the burden." *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 904 (W.D. Wis. 2016) (citing *Anderson*, 460 U.S. 780, 103 S.Ct. 1564; *Burdick*, 504 U.S. 428, 112 S.Ct. 2059). When voting rights are severely restricted, a law "must be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 280, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992). But even "slight" burdens must be "be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.' " *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (quoting *Norman*, 502 U.S. at 288-89, 112 S.Ct. 698).

13 A citizen's right to vote, and the *Anderson-Burdick* balancing test, is grounded in the First and Fourteenth Amendments. *See Burdick*, 504 U.S. at 434, 112 S.Ct. 2059. So, while plaintiffs' separately argue that the challenged provisions violate the equal protection clause and the due process clause of the Fourteenth Amendment, (*see* Pls.' Br. ('249 dkt. #62) 18-22), these concerns are properly addressed within the more

specific *Anderson-Burdick* framework. *See Harlan v. Scholz*, 866 F.3d 754, 759 (7th Cir. 2017) (the *Anderson-Burdick* framework addresses "the constitutional rules that apply to state election regulations"); *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (the constitutionality of an election law is governed by the *Anderson-Burdick* standard).

Even if plaintiffs are able to show that the challenged laws are likely unconstitutional, however, that does not automatically entitle them to the relief that they seek. Instead, the court must proceed "to weigh the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one." *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017) (citing *Ty, Inc. v. Jones Grp., Inc.,* 237 F.3d 891, 895 (7th Cir. 2001)). "In addition, the court must ask whether the preliminary injunction is in the public interest." *Id.* (citing *Jones*, 842 F.3d at 1057). This latter consideration is particularly critical here, as the Supreme Court has cautioned that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion .... As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006).

A. Postponement of Election Date

The court will begin with plaintiffs' broadest request: that the court delay the April 7, 2020, election. They assert that "if the election remains on April 7, it will disenfranchise hundreds of thousands or more Wisconsin voters." (Pls.' Br. ('284 dkt. #18) 2.) Although plaintiffs recognize that the decision to enjoin an impending election is serious, they maintain that such a measure is warranted given the immense burdens that will befall voters who attempt to exercise their franchise during the ongoing pandemic. (*Id.* at 8.)

First, plaintiffs contend that the burden that will be placed on citizens' right to vote will not only be severe, but unprecedented. (*Id.* at 6.) Plaintiffs write that "[n]ever has an electorate in our state or country of this magnitude confronted the extreme burden ***971** of literally risking their health and lives in order to cast a vote." (*Id.*) Moreover, they predict that in-person voting will be either cancelled or dysfunctionally understaffed as a result of poll workers' decisions to stay home rather than risk their own health to operate the polls. (*Id.* at 2, 6.) Next, plaintiffs argue that the state has "no compelling interest justifying keeping the April 7 election date." (*Id.* at 7.) According to plaintiffs, the election of candidates "by a mere fraction of qualified electors, under circumstances where a public crisis barred voters from participating, undermines the Defendants' claims that adherence to the election schedule is essential to public confidence in the democratic process." (*Id.* at 7-8.) Indeed, plaintiffs suggest that the state itself has an interest in postponing the election since it is in the state's interest to hold a "meaningful" election which does not exclude significant number of eligible voters from the polls. (*Id.* at 8.)

Defendants, for their part, argue against delaying the election. The Commissioners maintain that they are capable of conducting an in-person election on April 7, despite the fact that certain unorthodox measures will need to be taken, such as consolidating polling stations and even possibly calling on Wisconsin National Guard members to serve as poll workers. In particular, the Commissioners voice concern over the cascading effects that may be caused by a delay in the scheduled election, including problems with processing ballots for upcoming elections and staying in compliance with federal laws regarding electronic tabulating equipment. (Defs.' Opp'n (dkt. #155) 3-4.) More forcefully, the RNC/RPW argue that delaying the April 7 election would throw the state's election preparations into turmoil and would harm those candidates who have spent time and resources campaigning. (RNC/RPW Opp'n ('249 dkt. #138) 3-4.) Further, they note that such interference would be unprecedented, and urge that this court "should not be the first to grant that drastic relief." (*Id.* at 4.) [14]

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14 The RNC/RPW also argue that plaintiffs' claims should be denied because the additional burdens placed on voters are due not to state action, but the COVID-19 pandemic itself. (*See* RNC/RPW Opp'n ('249 dkt. #96) 3; ('249 dkt. #138) 2-3.) This argument is quickly dismissed. The state action challenged here is the enforcement of Wisconsin's election laws; just as a state may not enforce an apportionment scheme that, although once constitutional, has through the passage of time resulted in uneven representation, *Reynolds*, 377 U.S. at 587, 84 S.Ct. 1362, Wisconsin here cannot enforce laws that, even due to circumstances out of its control, impose unconstitutional burdens on voters.

On the one hand, it is undeniable that the asserted state interests are strong. "The public interest in the maintenance of order in the election process is not only important, it is compelling." *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D.

Fla. 2008). "Preventing ambiguity and confusion serves" this compelling state interest. *One Wisconsin Inst., Inc.*, 198 F. Supp. 3d at 948. Moreover, more generally states have "a strong interest in their ability to enforce state election law requirements." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 243 (6th Cir. 2011)

On the other hand, there is no doubt that the rapidly approaching election date in the midst of the COVID-19 pandemic means that citizens will face serious, and arguably unprecedented, burdens in exercising their right to vote in person. In-person absentee voting and pre-election, in-person registration has already been limited or even eliminated in some voting areas. An alarming number of poll workers have, understandably, cancelled their shifts, which is almost certain to lead to some degree of dysfunction on election ***972** day. Numerous polling stations have been ordered to close.

Although the Governor and other public officials have encouraged citizens to vote absentee, this is easier said than done. As plaintiffs have argued and as discussed below, the COVID-19 pandemic has raised concerns even for those seeking to vote absentee, particularly for those without access to the necessary technology. Further, unregistered voters at this point have no other option but to go in person to their clerk's office or polling place on election day in order to register and thereby vote. Finally, voters who did not or could not vote absentee will be forced on election day to choose between exercising their franchise and venturing into public spaces, contrary to the public message to "stay home" delivered by countless public officials during the course of this pandemic. And this dilemma must be considered not only as an individual burden, but as a collective public health concern as the state continues to recommend limiting in-person interactions as much as possible. Indeed, most at risk will be poll workers themselves, who may well be exposed to large number of voters throughout the day, and, as described in the facts above, the majority of which fall within the 60+ age range that is most at risk for serious complications due to COVID-19.

In light of these competing interests, the court cannot say with confidence that the state's asserted interests -- although strong -- are so compelling as to overcome the severe burdens that voters are sure to face in the upcoming election. Therefore, plaintiffs have demonstrated at least *some* likelihood of success on the merits of this claim. Even so, plaintiffs must further show that the balance of equities supports their requested relief.

In the balancing phase, "the court must compare the potential irreparable harms faced by both parties to the suit -- the irreparable harm risked by the moving party in the absence of a preliminary injunction against the irreparable harm risked by the nonmoving party if the preliminary injunction is granted." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008) (citing *Ty, Inc.*, 237 F.3d at 895). Here, failing to delay the election day may well subject voters to unconstitutional burdens on their right to vote. The possibility that any law might disenfranchise qualified voters "would caution any district judge to give careful consideration to the plaintiffs' challenges." *Purcell*, 549 U.S. at 4, 127 S.Ct. 5.

Yet an injunction delaying the election altogether is not without harm to defendants. As a general matter, "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2324 n.17, 201 L.Ed.2d 714 (2018). More specifically, the Commissioners have expressed serious concerns about the impacts of a delayed election. (*See* Defs.' Opp'n ('249 dkt. #155).) WEC Administrator Wolfe has explained that "changes to one aspect of the elections system have downstream impacts on voters, subsequent processes, and the ability of election officials to comply with statutory requirements and deadlines." (Third Wolfe Decl. ('249 dkt. #156) ¶ 9.) In particular, she has expressed concern that a delay to the April 7 election would interfere with the May election to be held in the 7th Congressional District, causing problems with "overlapping voter registration deadlines, overlapping absentee ballot procedures and time periods, voting equipment programming, and official canvass procedures." (*Id.* ¶ 11.) Indeed, at the hearing, she testified that there are *no* other dates available that would not have ***973** some impact on another election to be held through September.

Crucially, "[w]hen conducting this balancing, it is also appropriate to take into account any public interest, which includes the ramifications of granting or denying the preliminary injunction on nonparties to the litigation." *Girl Scouts*, 549 F.3d at 1100 (citing *Lawson Prod., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986); *Ty, Inc.*, 237 F.3d at 895). Here, the public interest cuts both in favor and against court involvement. As a general matter, "[e]nforcing a constitutional right is in the public interest." *Whole Woman's Health All. v. Hill*, 937 F.3d 864, 875 (7th Cir. 2019). And, certainly, the public interest "favors permitting as many

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qualified voters to vote as possible." *Obama for Am.*, 697 F.3d at 437.

That being recognized, a decision enjoining the election would not be an unequivocal benefit to all voters. As amicus Disability Rights Wisconsin points out, delaying the election day so that an all-mail election may be conducted, as has been suggested by some, may well adversely affect voters, including those with disabilities who may require accommodations only possible via in-person voting. (Disability Rights Wis. Amicus Br. ('249 dkt. #121-1) 14.) Further, WEC Administrator Wolfe's testimony regarding the administrability of a delayed April 7 election suggest that such an order could potentially hamper registration efforts, undermine absentee voting, and confuse voters. Finally, a court "is entitled to and should consider the proximity of a forthcoming election" when considering the propriety of equitable relief. *Reynolds*, 377 U.S. at 585, 84 S.Ct. 1362. This is because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion .... As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5, 127 S.Ct. 5.

Plaintiffs argue that the pandemic "has prompted a burgeoning chorus of calls by the general public, public health experts, Mayors, Clerks, and local election commissions to postpone the April 7 election." (Pls.' Br. ('284 dkt. #18) 9.) And indeed the court has received numerous amicus briefs urging the court to take action. (*See, e.g.*, Dane Cty. Amicus Br. (dkt. #150); City of Green Bay Amicus Br. (dkt. #112); City of Milwaukee Amicus Br. (dkt. #100).) Yet there is also a "chorus of calls" to keep the April 7 election date, including those from the Governor (Gov. Evers Amicus Br. (dkt. #151)) and the Legislature (Wis. Legislature Amicus Br. ('249 dkt. #90)), who have both filed amicus briefs requesting that the court decline to stay the election. At the center of this maelstrom is the WEC, whose governing body was reconstituted relatively recently from a group of non-partisan judges to six Commissioners appointed equally by the two major political parties. As a consequence, the WEC's Administrator Meagan Wolfe has been expressly charged with the near impossible task of accomplishing a viable *and* safe election through a combination of processing an unprecedented number of absentee ballots and an in-person election. If there is a hero to this story, it is the Administrator, her staff and municipal workers, all of whom continue to improvise election practices.

In doing so, the WEC retained the services of a medical expert approximately 3 weeks ago to advise how both can be accomplished under the threat of a COVID-19 outbreak and continued to consult with the Wisconsin State Emergency Operations Center ("SEOC") established by the Governor on March 12, 2020, as the magnitude of the COVID-19 threat began to emerge. Among the exhibits provided this ***974** court is a copy of a memorandum prepared by the Administrator, which outlines the steps that have been taken so far to accomplish that task, some of which has been disseminated out to municipalities for implementation by its clerks and poll workers. On a rolling basis, the Administrator and her staff have been trying to update that advice and gather supplies for use by poll workers on election day. Indeed, during yesterday's hearing, Administrator Wolfe learned for the first time that 25,000 masks were going to be provided at central locations for pick up by municipalities to be used during the local election next Tuesday. Until that moment, the advice by the Commissioner to municipalities was that masks would be unnecessary, apparently based on the previous advice of the medical expert and the fact that the CDC has not yet adopted the wearing of masks as a practice for the general public.

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Because the only direction from an equally split group of Commissioners to the Administrator and her staff is to do the best they can in conducting a safe, in-person election, it appears that no medical expert has been retained by the Commission to advise as to whether an in-person election *can* be conducted safely under any circumstances, nor even more remarkably does it appear that medical experts at SEOC have been asked to opine on this subject, despite the obvious risks of further dissemination of the coronavirus on election day, including the handling of recently submitted absentee ballots. The Administrator and her staff, as well as local municipalities and others are to be commended for their remarkable efforts to accomplish an in-person election that may well be unwise, not just for poll workers, but for voters and the general public given the crucial moment this state seems to be confronting in the COVID-19 growth curve.

This leaves the broader concern as to the propriety of a federal court taking the extraordinary step of delaying a state-wide election at the last minute, and the federalism problems that are necessarily implicated, which weigh heavily in favor of denying the plaintiffs' broadest, requested relief. Plaintiffs argue that "it is not uncommon for federal courts to enjoin state authorities from holding elections when doing so would violate the rights of voters that are protected by the

Constitution." (Pls.' Reply ('249 dkt. #162) 2-3.) However, none of the cases cited by plaintiffs authorize what plaintiffs are asking the court to do in this circumstance: delay the date of an impending, state-wide election.

In contrast, the Supreme Court has endorsed district court decisions to refrain from action, even in the face of undisputed constitutional violations. In *Ely v. Klahr*, 403 U.S. 108, 91 S.Ct. 1803, 29 L.Ed.2d 352 (1971), the Supreme Court upheld a district court's decision not to enjoin an election even under an unconstitutional apportionment plan. *Id.* at 113-14, 91 S.Ct. 1803. Faced with an election that was "close at hand," the district court explained that an injunction delaying the vote would "involve serious risk of confusion and chaos." *Id.* at 133, 91 S.Ct. 1803. In allowing the election to proceed, the Supreme Court recognized that the district court "chose what it considered the lesser of two evils," and affirmed the judgment of the court. *Id.* at 113-14, 91 S.Ct. 1803; *see also Reynolds*, 377 U.S. at 586, 84 S.Ct. 1362 (holding that the district court "acted in a most proper and commendable manner" in declining to enjoin Alabama's impending primary election, even under an unconstitutional apportionment scheme).

Without doubt, the April 7 election day will create unprecedented burdens not just for aspiring voters, but also for poll workers, clerks, and indeed the state. As much ***975** as the court would prefer that the Wisconsin Legislature and Governor consider the public health ahead of any political considerations, that does not appear in the cards. Nor is it appropriate for a federal district court to act as the state's chief health official by taking that step for them.

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At most, the court can only act in good faith to allow the WEC, local municipalities and poll workers to take what steps they can to vindicate the constitutional right to vote. Accordingly, the court must conclude that plaintiffs have not met their burden of showing that the balance of equities favors enjoining the upcoming election day. As the Supreme Court held in *Purcell*, "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction." 549 U.S. at 5-6, 127 S.Ct. 5.

B. Extension of Deadline for Receipt of Absentee Ballots

Plaintiffs next request that the court extend the deadline by which absentee ballots may be received. Under current law, clerks will not count an absentee ballot that is received after 8:00 p.m. on election day. Wis. Stat. § 6.87(6). Plaintiffs argue that this statutory deadline imposes an undue burden on voters because "it is a certainty that thousands of ballots will arrive after the April 7, 2020 deadline due to no fault of the voter." (Pls.' Br. ('249 dkt. #62) 12.)

In support, plaintiffs point to *Doe v. Walker*, 746 F. Supp. 2d 667 (D. Maryland 2010), in which the district court found that the statutory deadline for the receipt of absentee ballots imposed a severe burden on absent uniformed services and overseas voters that was not justified by the state's interest in finality and certainty in elections. *Id.* at 678-80. The court found that due to long international mail delivery times, "even the most diligent absent uniformed services or overseas voter might be unable to return his ballot" in time to be counted. *Id.* at 678-79. [15]

15 Plaintiffs also cite to *In re Holmes*, 346 N.J.Super. 372, 788 A.2d 291 (2002), but this case is largely unhelpful. There, anthrax attacks had caused a particular postal facility to close shortly before an election, delaying their receipt by the Board of Elections. *Id.* at 293. The court ordered that the ballots cast on or before election day but trapped in the facility and not received until after election day, should be counted. *Id.* The court's holding, however, was based on its interpretation of the state election law that set the deadline; the holding did not rely on or even discuss the federal constitutional analysis applicable to plaintiffs' argument, making it of limited use here. *See generally id.* at 292-95. Similarly, plaintiffs' citation to *United States v. Cunningham*, No. CIV. A. 3:08CV709, 2009 WL 3350028 (E.D. Va. Oct. 15, 2009), is unhelpful as that court bases its decision to extend the deadline by which absentee ballots should be received entirely on the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20401, *et seq*.

Initially, the Commissioners maintained that the court should deny plaintiffs' requests for any extension. (*See* Defs.' Opp'n ('249 dkt. #107) 9.) Later, however, the Commissioners submitted a notice to the court stating that they "do not object to any absentee ballot postmarked by April 7, 2020 and received by April 13, 2020 by 4:00 p.m. being counted in the Spring Election." (Defs.' Notice Mar. 31, 2020 ('249 dkt. #152) 1.) They further represented that "[i]f the votes received by 4:00 p.m. on April 13, 2020 are counted it will not impact the ability to complete the canvass in a timely manner." (*Id.*)

The RNC/RPW and the Wisconsin Legislature contend generally that deadlines ensure the orderly administration of elections and also provide certainty and reliability that minimizes disorder. (*See* RNC/RPW ***976** Opp'n ('249 dkt. #96) 2-3 (citing *Diaz*, 541 F. Supp. 2d at 1335; Wis. Legislature Amicus Br. ('249 dkt. #90) 24 (citing *Crawford*, 553 U.S. at 196, 128 S.Ct. 1610).) The RNC/RPW also argue that plaintiffs' requested relief should be rejected because voters "face no imminent harm until those ballots are cast, do not arrive on time, are not counted, and are deemed material to the outcome." (RNC/RPW Opp'n ('249 dkt. #96) 6.) Similarly, the Wisconsin Legislature suggests that the court "wait until after election day to determine whether any remedy is necessary or appropriate." (Wis. Legislature Amicus Br. ('249 dkt. #90) 25.)

At the outset, the Legislature's and RNC/RPW's invitation to postpone deciding this issue must be declined. The record now contains sufficient evidence to show that the asserted harm is imminent, and a timely resolution is necessary if there is any hope of vindicating the voting rights of Wisconsin citizens in an April 7 election. Indeed, the evidence is nearly overwhelming that the WEC, local election units and poll workers will need additional time to address the avalanche of absentee ballots, still arriving daily, much less to do so safely.

Turning then to the merits, the court first considers the burden that the absentee receipt deadline will place on voters. Here, as in *Doe*, 746 F. Supp. 2d at 678-79, the evidence presented by the parties and amici demonstrates that even the most diligent voter may be unable to return his or her ballot in time to be counted. Wisconsin clerks are facing a record number of absentee ballot requests, and despite diligent efforts, as of April 2, 2020, they are still working on sending out a backlog of over 21,000 absentee ballot applications. Both the Madison and Milwaukee City Clerks have represented that "[t]here is no practical way that a person submitting a request for an absentee ballot on the deadline for submitting the request ... will have the time to receive, vote and return their ballot by Election Day." (Pls.' PFOF ('249 dkt. #62-1) ¶ 30 (quoting Cities' Amicus Br. ('249 dkt. #39) 5).) Under these circumstances, the court finds that the burden placed on absentee voters is severe. Thus, defendants must demonstrate that the state has a compelling interest in enforcing the challenged law. *See Norman*, 502 U.S. at 280, 112 S.Ct. 698. They have not done so here.

Certainly, deadlines do generally provide certainty and reliability, and protect the orderly administration of elections. Yet election deadlines have already been disrupted, with the evidence showing that many voters who *timely* request an absentee ballot will be unable to receive, vote, and return their ballot before the receipt deadline. The state's interest in deadlines surely also extends to preserving the rights of those voters who themselves relied on those deadlines. More to the point, the state's general interest in the absentee receipt deadline is not so compelling as to overcome the burden faced by voters who, through no fault of their own, will be disenfranchised by the enforcement of the law.

Most persuasive is, of course, the fact that the WEC itself does not oppose extending the deadline and specifically averred that a receipt deadline of 4 p.m. on April 13, 2020, would "not impact the ability to complete the canvass in a timely manner." (Defs.' Notice Mar. 31, 2020 ('249 dkt. #152).) Thus, the court concludes that plaintiffs have shown a likelihood of success on the merits of their challenge to the absentee ballot receipt deadline. Moreover, the balance of harms favors preliminary injunctive relief. Specifically, an injunction moving the receipt deadline from 8 p.m. on April 7 to 4 p.m. on April 13 sufficiently ***977** accommodates canvassing deadlines while preserving citizens' rights. [16]

16 As such, this deadline addresses the concern raised in the Wisconsin Counties Association and Washington County's amicus brief, expressing concern about the expiration of county board supervisor's terms on the third Monday or Tuesday of April. ('249 dkt. #133.)

Similarly, the court will *not* add a postmarked-by date requirement; it is simply moving the statutory absentee receipt deadline. No persuasive evidence suggests that further altering statutory requirements will impose tangible benefits or harms, and indeed the amicus briefs from various local governments suggest that an extension of the deadline would be heartily welcomed by many local officials. (*See, e.g.*, City of Madison and Milwaukee Amicus Br. (dkt. #39); Dane Cty. Amicus Br. (dkt. #150).) Moreover, the WEC Administrator testified that the process of eliminating anyone who proceeded to vote in person after mailing an absentee ballot is already in place as part of the standard post-election canvassing of absentee ballots, and is not likely to create a substantial burden in this election. Finally, this relief is more generally in the public interest, which "favors permitting as

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many qualified voters to vote as possible." *Obama for Am.*, 697 F.3d at 437.

In light of the court's decision to extend the deadline for receipt of absentee ballots, the court will also extend slightly the receipt-deadline for absentee ballot requests. [17] As described above, the general deadline for which an absentee ballot request must be received is today, April 2, 2020. In an effort to expand absentee voting to as many Wisconsin individuals as possible and reduce the number of people who will face the difficult choice of voting in-person on April 7, the court will extend the deadline by one day, until 5:00 p.m., April 3, 2020. This slight extension aligns with the deadline by which indefinitely confined and military voters' requests must be received. *See* Wis. Stat. § 6.86(1)(c), (2). Moreover, the increased flexibility on the back-end, extending the receipt deadline to April 13, should allow individuals whose absentee ballot request by 5:00 p.m. on Friday, April 3, 2020, to receive the ballot via mail, complete it, and return it via mail in time to meet the April 13, 2020, deadline.

17 The court assumes that because the MyVote Wisconsin website still allows requests of absentee ballots online at the time this opinion issues, the WEC will be able to simply extend the clock until April 3, 2020, without having to engage in complex or risky computer changes. To the extent this assumption is incorrect, the WEC Administrator is empowered in her discretion not to implement this relief online, although municipalities are still required to accept requests locally through tomorrow, April 3, 2020.

C. Relief from Requirement of Witness Signature for Absentee Ballots

According to plaintiffs, the requirement that an absentee ballot be signed by a witness should also be enjoined because it imposes an unconstitutional burden under the current circumstances and is currently being applied in a way that violates the equal protection clause. Plaintiffs argue that for voters who do not have another adult U.S. citizen in their household, the witness requirement compels them to interact with a non-household member and "that interaction -- both the witnessing and signing of the ballot -- would require the individuals to come within six feet of each other" in violation of the Governor's Safer-at-Home Order. (Pls.' Br. ('249 dkt. #62) 13.) Even aside from the Governor's order, plaintiffs urge that interacting with another person to receive the necessary signature creates serious health risks due to the ***978** ongoing pandemic, especially for those who are elderly or immunocompromised. (*Id.* at 13; Pls.' Br. ('278 dkt. #17) 6-7.)

In support, plaintiffs have submitted a number of declarations by aspiring voters who have testified that they have been unable to secure a witness signature for their absentee ballot. (*See* Wilson Decl. ('249 dkt. #75); Larson Decl. ('249 dkt. #67); Keel Decl. ('249 dkt. #66); Trapp Decl. ('249 dkt. #70); Gear Decl. ('278 dkt. #9); Ginter Decl. ('278 dkt. #10); Hakami Decl. ('278 dkt. #11); Whelan Decl. ('278 dkt. #12); Ott Decl. ('278 dkt. #13).) For example, Ben Wilson stated that he was "facing difficulty in finding a witness" because he lived alone and felt that "[k]nocking on a neighbor's door or asking a gas station clerk would have me violate social distancing guidelines." (Wilson Decl. (dkt. #75) ¶¶ 4-5.) Similarly, Jeff Trapp explained that he was "finding it difficult to get a witness" for his ballot, conceding that he "could sit on [his] doorstep and ask someone passing by," but that he "really [did] not want to put someone else in the position of possible contact with the virus." (Trapp Decl. (dkt. #70) ¶ 4.) Thus, plaintiffs conclude, the signature "requirement severely burdens individuals' voting rights because, absent disobeying state law and severely compromising their health, it results in disenfranchisement." (Pls.' Br. ('249 dkt. #62) 14; *see also* Pls.' Br. ('278 dkt. #17).)

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In contrast, plaintiffs maintain that the state has no compelling interest in enforcing this requirement, and therefore the severe burden cannot be justified. Plaintiffs contend that "the witness requirement is an incredibly weak, borderline ineffectual, anti-fraud tool." (Pls.' Br. ('278 dkt. #17) 7.) Moreover, according to plaintiffs, the state itself has an interest in encouraging individuals to observe social distancing guidelines, and the witness requirement undermines the state's own interest in protecting the public health. (*Id.* at 9-10.) [18]

18 Plaintiffs also suggested that the requirement is not narrowly tailored because the state's interests may be satisfied by other, less risky means. In particular, plaintiffs argued that the remote presence of a witness -- either through a live audio or video feed -- sufficiently accommodates the state's asserted interests. (Pls.' Br. ('249 dkt. #62) 14-15, 20-21.) On March 29, 2020, however, the WEC issued guidance specifically confirming that a voter may complete their ballot in the remote presence of a witness. While the witness will still have to sign

the physical certificate, this can be accomplished without a direct interaction with the age or health compromised voter.

The RNC/RPW and Wisconsin Legislature oppose enjoining the witness requirement at all, arguing first that the burden on voters is not so severe as plaintiffs suggest. First, they point out that, if a voter can satisfy an election requirement with "reasonable effort," then that requirement does not qualify as a substantial burden. (RNC/RPW Opp'n ('249 dkt. #96) 5; Wis. Legislature Amicus Br. ('249 dkt. #90) 20-21 (citing *Frank*, 819 F.3d at 386-87).) In particular, they argue that a voter can complete the requirement while abiding by the Governor's orders and social distancing guidelines by, for example, having a witness observe through a window or even a videocall, then passing the ballot under a closed door to be signed and returned. (Wis. Legislature Amicus Br. ('249 dkt. #90) 20-21.)

Second, the RNC/RPW and Wisconsin Legislature argue that any burdens imposed by the witness requirement are overcome by legitimate state interests. They both point to *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), in which the Seventh Circuit explained that voting fraud is a "serious problem" and is "facilitated by absentee voting." (RNC/RPW ***979** Opp'n ('249 dkt. #96) 2 (quoting *Griffin*, 385 F.3d at 1130-31); Wis. Legislature Amicus Br. ('249 dkt. #90) 18 (quoting *Griffin*, 385 F.3d at 1130-31).) As to the specific witnessing requirement, they contend that it helps to prevent voter fraud "by adding an additional layer of protection, ensuring that the person filling out the absentee ballot is the actual voter listed on the ballot, and preventing undue influence or coercion." (Wis. Legislature Amicus Br. ('249 dkt. #90) 18.)

While generally arguing that the court should not enjoin the witnessing requirement, the Commissioners do not explicitly explain how the burdens imposed by the requirement are justified by state interests. (Defs.' Opp'n ('249 dkt. #107) 9.) Instead, they simply provide the court with the guidance developed by the WEC "for meeting the witness requirement ... while either self-isolating or in quarantine." (*Id.* at 17.)

It is undeniable that the COVID-19 pandemic and social distancing orders will make it harder for some aspiring absentee voters to satisfy the witness requirement. At the same time, for many voters, this requirement may easily be met by a fellow household member, with whom the strict social distancing guidelines discussed by plaintiffs do not apply. And even for those who do not reside with an adult U.S. citizen, in general the additional barriers they face may be overcome with some reasonable effort. In particular, the guidance published by the WEC suggests a variety of witnessing options for voters. (Aguilera Supp. Decl., Ex. W (dkt. #105-1) 2.) For example, the WEC suggests that a "family member, friend or neighbor" or even a "mail delivery person[ ]" or "food delivery person[ ]" "may watch the voter mark their ballot through a window, open door or other physical barrier." (*Id.*) They also note that the "process can be done via video chat like Skype or Facetime with the ballot left outside of the door or in a mailbox for the witness to sign and provide their address after the fact." (*Id.*) These options do not require the voter or their witness to violate the Governor's Safer-at-Home Order, which allows individuals to interact so long as they "maintain social distancing of at least six (6) feet." (Spiva Decl., Ex. 4 ('249 dkt. #63-4) 2.)

Understood in this way, the state's asserted interests in the witness requirement as a tool against voter fraud justify the general application of the requirement. *See Crawford*, U.S. at 191 (preventing voter fraud is an important state interest); *Griffin*, 385 F.3d at 1130-31 (same); *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (same). As such, plaintiffs have not met the "heavy burden of persuasion" needed to enjoin the requirement "in all its applications." *Crawford*, 553 U.S. at 200, 128 S.Ct. 1610.

Even so, given the current unknowns regarding COVID-19 infection and transmittal risks, plaintiffs have shown that at least some isolated voters, and in particular those who are immunocompromised or elderly, will likely not be able to secure a witness certification safely even with reasonable efforts, or at minimum have reasonable concerns about their ability to do so and, therefore, may be particularly burdened by this requirement. To be clear, while this requirement may impose severe burdens on some limited subset of voters, that burden does not justify a wholesale rejection of the requirement. *See Crawford*, 553 U.S. at 199-200, 128 S.Ct. 1610 (a conclusion that a burden "may not be justified as to a few voters" is not sufficient to strike down an election law). However, it may entitle those particular voters facing unreasonably high burdens to specific relief. In *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016), the Seventh Circuit considered ***980** a similar question related to Wisconsin's requirement that a voter present a valid photo ID in order to vote. After arguing unsuccessfully that the photo ID requirement should be struck down entirely, plaintiffs in *Frank* returned to court with a different argument: that

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"high hurdles for *some* persons eligible to vote entitle those *particular* persons to relief." *Id.* at 386 (emphasis added). The court reasoned that "[p]laintiffs' approach is potentially sound if even a single person eligible to vote is unable to get acceptable photo ID with reasonable effort. The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily." *Id.*

Here, the particularly high hurdles faced by this subset of voters are not overcome by the state's general anti-fraud goals, and some limited relief is therefore appropriate. In particular, the court will order defendants to accept an unwitnessed ballot that contains a written affirmation or other statement by an absentee voter that due to the COVID-19 pandemic, he or she was unable to safely obtain a witness certification despite his or her reasonable efforts to do so, provided that the ballot is otherwise valid. No magic words are required by a voter to successfully make this affirmation, and it will be left up to the individual discretion of clerks as to whether to accept a voter's excuse for not completing the witness certification requirement based on the written affirmation by the individual voter.

Moreover, the balance of harms favors this approach. Plaintiffs have adequately demonstrated that the harm some voters are likely to face includes unjustified burdens in the exercise of their right to vote. On the other side, the WEC already has the ability to communicate this new exception rapidly to the various clerks across the state. While the additional burden on the election process is not minimized, it is overcome by voters' right to exercise their franchise without undue burdens, especially as the court has given local canvassers additional time to complete the review of absentee ballots and to follow up as to any written affirmation or statement they believe to be suspect, just as is already done with respect to the exceptions for Wisconsin IDs as discussed immediately below.

D. Relief from Proof of Identification Provision

Third, plaintiffs argue that the court should enjoin the statutory requirement that a photo ID be submitted with an absentee ballot. Wisconsin law provides that an individual requesting an absentee ballot for the first time must submit proof of a valid photo ID. Wis. Stat. § 6.86. Plaintiffs contend that many aspiring voters do not have in their homes the means necessary to submit the required proof, such as a copier, scanner, printer, and/or smartphone. Further, plaintiffs point out that while under normal conditions, individuals might be able to go to a library or copyshop to access these machines, due to the Safer-at-Home Order issued on March 24, 2020, most if not all of these locations have closed. Moreover, plaintiffs contend that even if such locations were still open, the Safer-at-Home order prohibits individuals from venturing outside of their homes in an attempt to find a machine that would allow them to submit their photo ID. The burden imposed by the proof of ID requirement for first-time absentee voters, plaintiffs argue, is severe because it requires voters without access to the necessary technology to disobey a statewide order to satisfy the requirement.

According to plaintiffs, any asserted state interest in preventing voter fraud or ensuring electoral integrity cannot justify ***981** the severe burden currently imposed by the requirement. First, plaintiffs suggest that the state's interests may be satisfied by less risky means, such as having a voter complete a certificate -- subject to penalties for false statements -- affirming his or her identity. Second, plaintiffs point out that "state law already recognizes that there may be a need for exceptions to these types of rules, finding that voters who are 'indefinitely confined' due to age, illness, infirmity, or disability do not have to comply with the absentee photo ID requirements." (Pls.' Br. ('249 dkt. #62) 17.)

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The RNC/RPW and Wisconsin Legislature oppose enjoining the absentee ID requirement, arguing first that the burden on voters is not so severe as plaintiffs suggest. They point out that, if a voter can satisfy an election requirement with "reasonable effort," then that requirement does not qualify as a substantial burden. (RNC/RPW Opp'n ('249 dkt. #96) 5; Wis. Legislature Amicus Br. ('249 dkt. #90) 15 (citing *Frank*, 819 F.3d at 386-87; *Crawford*, 553 U.S. at 198, 128 S.Ct. 1610).) Here, according to the RNC/RPW and the Legislature, a voter could use their smartphone to upload proof of their ID or with reasonable effort could locate a person who could help them to do so, all while abiding by the Governor's Stay-at-Home Order which permits interacting with others while staying six feet apart. (RNC/RPW Opp'n ('249 dkt. #96) 5-6; Wis. Legislature Amicus Br. ('249 dkt. #90) 15-16.) They further argue that any potential burdens are outweighed by the state's interest in deterring fraud, which is particularly acute in the absentee ballot context. (RNC/RPW Opp'n ('249 dkt. #96) 3; Wis. Legislature Amicus Br. ('249 dkt. #90) 9.)

Again, under current conditions, there is little question that for some voters satisfying the proof of ID requirement will become more difficult, especially if fearful of any contact with others because of age or other high risk factor. At the same time, the court recognizes that for many if not most

voters the requirement may be satisfied easily, and even for voters who face barriers those may be overcome with only reasonable effort. (*See* Strang Decl. ('249 dkt. #76) ¶¶ 6, 9 (testifying that he initially had difficulty in attempting to provide proof of identification in requesting his absentee ballot, but that he was able to successfully upload his photo ID after spending 40 to 45 minutes on the effort).) Further, two days ago the Wisconsin Supreme Court issued an order in *Jefferson v. Dane County*, 2020AP557-OA, adopting the WEC's guidance of the term "indefinitely confined." The guidance provides in relevant part that the "[d]esignation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence." In light of these developments, the court is satisfied that the current proof of ID requirement, as being applied under the WEC guidance and state court order, does not impose an undue burden on the right to vote, and accordingly will deny plaintiffs' requested relief as to this requirement.

E. Extension of Mail-In Registration Deadline and Relief from Proof of Residence Provision

Plaintiffs also argue that the court should extend the by-mail registration deadline until April 2, 2020. (Pls.' Br. ('249 dkt. #62) 18.) The court will not dwell long on this question, because even if plaintiffs were to demonstrate a strong likelihood of success on the merits, the balance of equities does not favor the injunction they seek. Even given the best efforts of the court to expedite this case, as well as the diligent advocacy of all parties ***982** involved, the evidentiary hearing was held on April 1, 2020, and this court's opinion and order is being issued the following day, on April 2, 2020. Plaintiffs' requested injunction as to the by-mail registration deadline would open the registration window for less than one day. Given this timeline, it is implausible that the order could be implemented in a way that would provide relief to any meaningful number of voters, but it *would* be sure to add additional burdens on an already overwhelmed state election apparatus. Accordingly, plaintiffs' request as to the by-mail registration deadline will be denied. Finally, plaintiffs ask the court to enjoin the requirement that copies of proof of residence be submitted with their mailed registration application. Because voters are no longer able to register by-mail for the upcoming election, this claim will be denied as moot.

III. Oral Motion for Stay

One final note. At the end of yesterday's hearing, counsel for the intervening defendants RNC and Republican Party of Wisconsin requested that if the court grants plaintiffs' request for preliminary relief, the court also stay its order for a limited amount of time to allow the intervening defendants to seek emergency relief from the Seventh Circuit Court of Appeals under Federal Rule of Civil Procedure 62(c). While the court is sympathetic to the intervening defendants' request, the relief being granted is not of the sweeping nature sought by plaintiffs and the court is also cognizant of the impending election, and the immediate steps the WEC and local clerks will need to take to implement the court's narrow injunction, along with the numerous other changes being made in real time by the WEC Administrator, her staff, local counties and municipalities, and poll workers in response to the current COVID-19 crisis. Regardless, the most significant relief provided at this time does not kick in until the evening of April 7, 2020, when, under the court's order, local municipalities may continue to count absentee ballots received after 8:00 p.m. [19] As such, the preliminary injunction implicitly contains a window of time during which the intervening defendants may seek an emergency appeal and relief from the injunction. The court, therefore, will deny defendants' oral motion for a stay. At the same time, both defendants WEC and its Administrator, as well as intervening defendants, are encouraged to return to this court if some modification of the preliminary injunction is necessary to accomplish the goals set out in this opinion.

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19 The extension of the deadline by which individuals may request absentee ballots is a more immediate action, but even then, it is unlikely that the requests for absentee ballots received on April 3, 2020, would be processed, mailed, received by the voter, completed, and returned before April 7, 2020, and, therefore, in appealing the extension of the deadline for receipt of absentee ballots, the intervening defendants necessarily would also be able to appeal the extension of the deadline for requesting an absentee ballot online.

ORDER

IT IS ORDERED that:

1) In Case No. 20-cv-249, plaintiffs' motion for preliminary injunction and motion for reconsideration ('249 dkt. #61)

is GRANTED IN PART AND DENIED IN PART as set forth below in the order.

2) In Case No. 20-cv-278, plaintiffs' motion for temporary restraining order ('278 dkt. #8) is GRANTED IN PART AND DENIED IN PART as set forth below in the order.

***983** 3) In Case No. 20-cv-284, plaintiffs' motion for temporary restraining order ('278 dkt. #17) is GRANTED IN PART AND DENIED IN PART as set forth below in the order.

4) Wisconsin Legislature's motion for leave to file an amicus curiae brief in opposition to the motions for preliminary injunction and temporary restraining order ('249 dkt. #89) is GRANTED.

5) Honest Elections Project's motion for leave to file amicus brief ('249 dkt. #94) is GRANTED.

6) The City of Milwaukee's motion for leave to file an amicus brief ('249 dkt. #98) is GRANTED.

7) The City of Green Bay's motion for leave to file an amicus brief ('249 dkt. #111) is GRANTED.

8) American Civil Liberties Union of Wisconsin, Disability Rights Wisconsin, Inc., and Wisconsin Conservation Voters' motion to file amici curiae brief (dkt. #121) is GRANTED.

9) Governor Tony Evers' motion for leave to file amicus brief (dkt. #125) is GRANTED.

10) City of Racine's motion for leave to file amicus brief (dkt. #129) is GRANTED.

11) Washington County and Wisconsin Counties Association's motion for leave to file amicus brief (dkt. #131) is GRANTED.

12) Plaintiffs Democratic National Committee and Democratic Party of Wisconsin's motion for leave to file a reply brief (dkt. #153) is GRANTED.

13) Plaintiffs American Federal of Teachers Local, 212, AFL-CIO, Black Leaders Organizing for Communities, League of Women Voters of Wisconsin, Greg Lewis, SEIU Wisconsin State Council, Souls to the Polls, Voces De La Frontera's motion to supplement brief addressing remedies (dkt. #161) is GRANTED.

14) Defendants the Commissioners of the Wisconsin Election Commission and its Administrator are ENJOINED as follows:

a) Defendants are enjoined from enforcing the requirement under Wis. Stat. § 6.87(6) that absentee ballots must be received by 8:00 p.m. on election day to be counted. The deadline for receipt of absentee ballots is extended to 4:00 p.m. on April 13, 2020.

b) Defendants are enjoined from enforcing the requirement under Wis. Stat. § 6.86(1)(b) that absentee ballot requests must be received by April 2, 2020. The deadline for receipt of absentee ballot requests by mail, fax or email (and if deemed administratively feasible in the sole discretion of the WEC Administrator, online) is extended to 5:00 p.m. on April 3, 2020.

c) Defendants are enjoined from enforcing Wis. Stat. § 6.87(2) as to absentee voters who have provided a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so, provided that the ballots are otherwise valid.

15) Intervening defendants' oral motion to stay this order and preliminary injunction is DENIED.

All Citations

451 F.Supp.3d 952

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APPENDIX NO. 4

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141 S.Ct. 28
Supreme Court of the United States.

DEMOCRATIC NATIONAL COMMITTEE, et al.
v.
WISCONSIN STATE LEGISLATURE, et al.

No. 20A66
|
October 26, 2020

Opinion
The application to vacate stay presented to Justice KAVANAUGH and by him referred to the Court is denied.

CHIEF JUSTICE ROBERTS, concurring in denial of application to vacate stay.
In this case, as in several this Court has recently addressed, a District Court intervened in the thick of election season to enjoin enforcement of a State's laws. Because I believe this intervention was improper, I agree with the decision of the Seventh Circuit to stay the injunction pending appeal. I write separately to note that this case presents different issues than the applications this Court recently denied in *Scarnati* v. *Boockvar*, —— U.S. ——, ——, —— S.Ct. ——, ——, —— L.Ed.2d —— (2020) *ante*, at ——, 2020 WL 6128194 and *Republican Party of Pennsylvania* v. *Boockvar*, —— U.S. ——, ——, 141 S.Ct. 1, ——, —— L.Ed.2d —— (2020) *ante*, at ——. While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin.

Justice GORSUCH, with whom Justice KAVANAUGH joins, concurring in denial of application to vacate stay.
Weeks before a national election, a Federal District Judge decreed that Wisconsin law violates the Constitution by requiring absentee voters to return their ballots no later than election day. The court issued its ruling even though over 30 States have long enforced the very same absentee voting deadline—and for understandable reasons: Elections must end sometime, a single deadline supplies clear notice, and requiring ballots be in by election day puts all voters on the same footing. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections," and States have always required voters "to act in a timely fashion if they wish to express their views in the voting booth." *Burdick v. Takushi*, 504 U.S. 428, 433, 438, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992).

Why did the district court seek to scuttle such a long-settled tradition in this area? COVID. Because of the current pandemic, the court suggested, it was free to substitute its own election deadline for the State's. Never mind that, in response to the pandemic, the Wisconsin Elections Commission decided to mail registered voters an absentee ballot application and return envelope over the summer, so no one had to ask for one. Never mind that voters have also been free to seek and return absentee ballots since September. ***29** Never mind that voters may return their ballots not only by mail but also by bringing them to a county clerk's office, or various "no touch" drop boxes staged locally, or certain polling places on election day. Never mind that those unable to vote on election day have still other options in Wisconsin, like voting in-person during a 2-week voting period before election day. And never mind that the court itself found the pandemic posed an insufficient threat to the health and safety of voters to justify revamping the State's in-person election procedures.

So it's indisputable that Wisconsin has made considerable efforts to accommodate early voting and respond to COVID. The district court's only possible complaint is that the State hasn't done *enough*. But how much is enough? If Wisconsin's statutory absentee voting deadline can be discarded on the strength of the State's status as a COVID "hotspot," what about the identical deadlines in 30 other States? How much of a "hotspot" must a State (or maybe some sliver of it) be before judges get to improvise? Then there's the question what these new ad hoc deadlines should be. The judge in this case tacked 6 days onto the State's election deadline, but what about 3 or 7 or 10, and what's to stop different judges choosing (as they surely would) different deadlines in different jurisdictions? A widely shared state policy seeking to make election day real would give way to a Babel of decrees. And what's to stop courts from tinkering with in-person voting rules too? This judge declined to go that far, but the plaintiffs thought he should have, and it's not hard to imagine other judges accepting invitations to unfurl the precinct maps and decide whether States should add polling places, revise their hours, rearrange the voting booths within

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them, or maybe even supplement existing social distancing, hand washing, and ventilation protocols.

The Constitution dictates a different approach to these how-much-is-enough questions. The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules. Art. I, § 4, cl. 1. And the Constitution provides a second layer of protection too. If state rules need revision, Congress is free to alter them. *Ibid.* ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations ... "). Nothing in our founding document contemplates the kind of judicial intervention that took place here, nor is there precedent for it in 230 years of this Court's decisions.

Understandably so. Legislators can be held accountable by the people for the rules they write or fail to write; typically, judges cannot. Legislatures make policy and bring to bear the collective wisdom of the whole people when they do, while courts dispense the judgment of only a single person or a handful. Legislatures enjoy far greater resources for research and factfinding on questions of science and safety than usually can be mustered in litigation between discrete parties before a single judge. In reaching their decisions, legislators must compromise to achieve the broad social consensus necessary to enact new laws, something not easily replicated in courtrooms where typically one side must win and the other lose.

Of course, democratic processes can prove frustrating. Because they cannot easily act without a broad social consensus, legislatures are often slow to respond and tepid when they do. The clamor for judges to sweep in and address emergent problems, and the temptation for individual ***30** judges to fill the void of perceived inaction, can be great. But what sometimes seems like a fault in the constitutional design was a feature to the framers, a means of ensuring that any changes to the status quo will not be made hastily, without careful deliberation, extensive consultation, and social consensus.

Nor may we undo this arrangement just because we might be frustrated. Our oath to uphold the Constitution is tested by hard times, not easy ones. And succumbing to the temptation to sidestep the usual constitutional rules is never costless. It does damage to faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures, for the more we assume their duties the less incentive they have to discharge them. Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes. No one doubts that conducting a national election amid a pandemic poses serious challenges. But none of that means individual judges may improvise with their own election rules in place of those the people's representatives have adopted.

Justice KAVANAUGH, concurring in denial of application to vacate stay.

Approximately 30 States, including Wisconsin, require that absentee ballots be received by election day in order to be counted. Like most States, Wisconsin has retained that deadline for the November 2020 election, notwithstanding the COVID–19 pandemic. In advance of the November election, however, a Federal District Court in Wisconsin unilaterally changed the State's deadline for receipt of absentee ballots. Citing the pandemic, the court extended the deadline for receipt of absentee ballots by six days—from election day, November 3, to November 9, so long as the ballots are postmarked on or before election day, November 3.

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The Seventh Circuit stayed the District Court's injunction, ruling that the District Court had violated this Court's precedents in two fundamental ways: first, by changing state election rules too close to an election; and second, by usurping the state legislature's authority to either keep or make changes to state election rules in light of the pandemic.

Applicants here ask that we vacate the Seventh Circuit's stay and reinstate the District Court's order extending the deadline for absentee ballots to be received in Wisconsin. The Court today denies the applications and maintains the Seventh Circuit's stay of the District Court's order. I agree with the Court's decision to deny the applications, and I write separately to explain why.

I

For three alternative and independent reasons, I conclude that the District Court's injunction was unwarranted.

First, the District Court changed Wisconsin's election rules too close to the election, in contravention of this Court's

precedents. This Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle. See *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (*per curiam*); see also *Merrill* v. *People First of Ala.*, —— U.S. ——, 141 S.Ct. 25, —— L.Ed.2d —— (2020) *ante*, p. —— (*Merrill II*); *Andino* v. *Middleton*, —— U.S. ——, 141 S.Ct. 190, —— L.Ed.2d —— (2020) *ante*, p. ——, 2020 WL 5887393; *Merrill* v. *People First of Ala.*, 591 U. S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 3604049 (2020) (*Merrill I*); ***31** *Clarno* v. *People Not Politicians*, 591 U. S. ——, 141 S.Ct. 206, —— L.Ed.2d —— (2020); *Little* v. *Reclaim Idaho*, 591 U. S. ——, 140 S.Ct. 2616, —— L.Ed.2d —— (2020); *Republican National Committee* v. *Democratic National Committee*, 589 U. S. ——, 140 S.Ct. 1205, 206 L.Ed.2d 452 (2020) (*per curiam*) (*RNC*).

The Court's precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled. That is because running a statewide election is a complicated endeavor. Lawmakers initially must make a host of difficult decisions about how best to structure and conduct the election. Then, thousands of state and local officials and volunteers must participate in a massive coordinated effort to implement the lawmakers' policy choices on the ground before and during the election, and again in counting the votes afterwards. And at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting.

Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences. If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes. It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent.

That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion—and thereby protects the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election. See *Purcell*, 549 U.S., at 4–5, 127 S.Ct. 5; *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (plurality opinion). The principle also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process. For those reasons, among others, this Court has regularly cautioned that a federal court's last-minute interference with state election laws is ordinarily inappropriate.

In this case, however, just six weeks before the November election and after absentee voting had already begun, the District Court ordered several changes to Wisconsin's election laws, including a change to Wisconsin's deadline for receipt of absentee ballots. Although the District Court's order was well intentioned and thorough, it nonetheless contravened this Court's longstanding precedents by usurping the proper role of the state legislature and rewriting state election laws in the period close to an election.

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Applicants retort that the *Purcell* principle precludes an appellate court—such as the Seventh Circuit here—from overturning a district court's injunction of a state election rule in the period close to an election. That argument defies common sense and would turn *Purcell* on its head. Correcting an erroneous lower court injunction of a state election rule cannot ***32** itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election rule. That obviously is not the law. To be sure, it would be preferable if federal district courts did not contravene the *Purcell* principle by rewriting state election laws close to an election. But when they do, appellate courts must step in. See, *e.g.*, *Andino*, —— U.S. ——, 141 S.Ct. 9, —— L.Ed.2d ——, *ante* p. ——; *RNC*, 589 U. S., at ——, 140 S.Ct., at 1207-1208.

Second, even apart from the late timing, the District Court misapprehended the limited role of the federal courts in COVID–19 cases. This Court has consistently stated that the Constitution principally entrusts politically accountable state legislatures, not unelected federal judges, with the responsibility to address the health and safety of the people during the COVID–19 pandemic.

The COVID–19 pandemic has caused the deaths of more than 200,000 Americans, and it remains a serious threat, including in Wisconsin. The virus poses a particular risk to the elderly and to those with certain pre-existing conditions. But federal judges do not possess special expertise or competence about how best to balance the costs and benefits of potential policy responses to the pandemic, including with respect to elections. For that reason, this Court's cases during the pandemic have adhered to a basic jurisprudential principle: When state and local officials " 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' " *Andino*, —— U.S., at ——, 141 S.Ct., at 10, *ante*, at 34 - 35 (KAVANAUGH, J., concurring in grant of application for stay). It follows "that a State legislature's decision either to keep or to make changes to election rules to address COVID–19 ordinarily 'should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.' " *Ibid.* (some internal quotation marks omitted). As the Seventh Circuit rightly explained, "the design of electoral procedures is a legislative task," including during the pandemic. *Democratic National Committee* v. *Bostelmann*, 977 F.3d 639, 642 (2020).

Over the last seven months, this Court has stayed numerous federal district court injunctions that second-guessed state legislative judgments about whether to keep or make changes to election rules during the pandemic. See *Merrill II*, —— U.S. ——, 141 S.Ct. 25, —— L.Ed.2d ——, *ante*, p. ——; *Andino*, —— U.S. ——, 141 S.Ct. 9, —— L.Ed.2d ——, *ante*, p. ——; *Merrill I*, 591 U. S. ——, 141 S.Ct. 190, 207 L.Ed.2d 1113; *Clarno*, 591 U. S. ——, —— S.Ct. ——, —— L.Ed.2d ——; *Little*, 591 U. S.——, 140 S.Ct. 2616, 207 L.Ed.2d 1141; *RNC*, 589 U. S. ——, 140 S.Ct. 1205, 206 L.Ed.2d 452.

To be sure, in light of the pandemic, some state legislatures have exercised their Article I, § 4, authority over elections and have changed their election rules for the November 2020 election. Of particular relevance here, a few States such as Mississippi no longer require that absentee ballots be received before election day. See, *e.g.,* Miss. Code Ann. § 23–15–637 (2020). Other States such as Vermont, by contrast, have decided not to make changes to their ordinary election-deadline rules, including to the election-day deadline for receipt of absentee ballots. See, *e.g.,* Vt. Stat. Ann., Tit. 17, § 2543 (2020). The variation in state responses reflects our constitutional system of federalism. Different state legislatures may make different choices. Assessing the complicated tradeoffs involved in changing or retaining election deadlines, or other election rules, ***33** in light of public health conditions in a particular State is primarily the responsibility of state legislatures and falls outside the competence of federal courts.

Applicants respond that this principle of deference to state legislatures applies only when a state legislature has affirmatively made some changes, but not others, to the election code in light of COVID–19. And they say that Wisconsin's legislature has not done so, unlike the South Carolina legislature in *Andino*, for example. But the Wisconsin State Legislature's decision *not* to modify its election rules in light of the pandemic is itself a policy judgment worthy of the same judicial deference that this Court afforded the South Carolina legislature in *Andino*, —— U.S. ——, 141 S.Ct. 9, —— L.Ed.2d ——, *ante*, p. ——. In short, state legislatures, not federal courts, primarily decide whether and how to adjust election rules in light of the pandemic.

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Third, the District Court did not sufficiently appreciate the significance of election deadlines. This Court has long recognized that a State's reasonable deadlines for registering to vote, requesting absentee ballots, submitting absentee ballots, and voting in person generally raise no federal constitutional issues under the traditional *Anderson-Burdick* balancing test. See *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992).

To state the obvious, a State cannot conduct an election without deadlines. It follows that the right to vote is not substantially burdened by a requirement that voters "act in a timely fashion if they wish to express their views in the voting booth." *Burdick*, 504 U.S., at 438, 112 S.Ct. 2059. For the same reason, the right to vote is not substantially burdened by a requirement that voters act in a timely fashion if they wish to cast an *absentee ballot*. Either way, voters need to vote on time. A deadline is not unconstitutional merely because of voters' "own failure to take timely steps" to ensure their franchise. *Rosario v. Rockefeller*, 410 U.S. 752, 758, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973). Voters who, for example, show up to vote at midnight after the polls close on election night do not have a right to demand that the State nonetheless count their votes. Voters who submit their absentee ballots after the State's deadline similarly do not have a right to demand that the State count their votes.

For important reasons, most States, including Wisconsin, require absentee ballots to be *received* by election day, not just *mailed* by election day. Those States want to avoid the chaos and suspicions of impropriety that can ensue if thousands of absentee ballots flow in after election day and potentially flip the results of an election. And those States also want to be able to definitively announce the results of the election on election night, or as soon as possible thereafter. Moreover, particularly in a Presidential election, counting all the votes quickly can help the State promptly resolve any disputes, address any need for recounts, and begin the process of canvassing and certifying the election results in an expeditious manner. See 3 U.S.C. § 5. The States are aware of the risks described by Professor Pildes: "[L]ate-arriving ballots open up one of the greatest risks of what might, in our era of hyperpolarized political parties and existential politics, destabilize the election result. If the apparent winner the morning after the election ends up losing due to late-arriving ballots, charges of a rigged election could explode." Pildes, How to Accommodate a Massive Surge in Absentee Voting, U. Chi. L. Rev. Online (June 26, 2020) (online source archived at www.supremecourt.gov). The "longer after Election Day any ***34** significant changes in vote totals take place, the greater the risk that the losing side will cry that the election has been stolen." *Ibid.*

One may disagree with a State's policy choice to require that absentee ballots be received by election day. Indeed, some States require only that absentee ballots be *mailed* by election day. See, *e.g.,* W. Va. Code Ann. § 3–3–5(g)(2) (Lexis 2020). But the States requiring that absentee ballots be received by election day do so for weighty reasons that warrant judicial respect. Federal courts have no business disregarding those state interests simply because the federal courts believe that later deadlines would be better.

That constitutional analysis of election deadlines still applies in the pandemic. After all, during the pandemic, a State still cannot conduct an election without deadlines. And the States that require absentee ballots to be received by election day still have strong interests in avoiding suspicions of impropriety and announcing final results on or close to election night.

To be sure, more people are voting absentee during the pandemic. But the State of Wisconsin has repeatedly instructed voters to request and mail their ballots well ahead of time, and the State has taken numerous steps to accommodate the increased number of absentee ballots. Moreover, the State now has some experience to draw upon when administering an election during the pandemic. Wisconsin conducted primary elections in April and August, and has incorporated the lessons from those experiences into its extensive planning for the November election. See Wisconsin Elections Commission, April 7, 2020 Absentee Voting Report 24 (May 15, 2020) (online source archived at www.supremecourt.gov). And that planning has paid off so far: For the November election, more than a million Wisconsin voters have *already* voted by absentee ballot.

In attempting to justify the District Court's injunction, Applicants also rely on this Court's decision in April regarding the Wisconsin primary election. They claim that the Court there approved the District Court's change of the deadline for receipt of absentee ballots in the primary election, so long as the ballots were postmarked by election day. *RNC*, 589 U. S. ——, 140 S.Ct. 1205, 206 L.Ed.2d 452. That assertion is incorrect. In that case, this Court explicitly stated that the District Court's last-minute extension of the deadline for receipt of absentee ballots was "not challenged in this Court." *Id.*, at ——, 140 S.Ct., at 1206.

In sum, the District Court's injunction was unwarranted for three alternative and independent reasons: The District Court changed the state election laws too close to the election. It misapprehended the limited role of federal courts in COVID–19 cases. And it did not sufficiently appreciate the significance of election deadlines. [1]

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1 A *federal court's* alteration of state election laws such as Wisconsin's differs in some respects from a *state court's* (or state agency's) alteration of state election laws. That said, under the U. S. Constitution, the state courts do not have a blank check to rewrite state election laws for federal elections. Article II expressly provides that the rules for Presidential elections are established by the States "in such Manner as the *Legislature* thereof may direct." § 1, cl. 2 (emphasis added). The text of Article II means that "the clearly expressed intent of the legislature must prevail" and that a state court may not depart from the state election code enacted by the legislature. *Bush v. Gore*, 531 U.S. 98, 120, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (Rehnquist, C. J., concurring); see *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76–78, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000) (*per curiam*); *McPherson v. Blacker*, 146 U.S. 1, 25, 13 S.Ct. 3, 36 L.Ed. 869 (1892). In a

Presidential election, in other words, a state court's "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. at 113, 121 S.Ct. 525 (Rehnquist, C. J., concurring). As Chief Justice Rehnquist explained in *Bush* v. *Gore*, the important federal judicial role in reviewing state-court decisions about state law in a federal Presidential election "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II." *Id.*, at 115, 121 S.Ct. 525.

The dissent here questions why the federal courts would have a role in that kind of case. *Post*, at 45, n. 6 (opinion of KAGAN, J.). The answer to that question, as the unanimous Court stated in *Bush* v. *Palm Beach County Canvassing Bd.*, and as Chief Justice Rehnquist persuasively explained in *Bush* v. *Gore*, is that the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws.

***35** II

The dissent rejects all three of the above conclusions and applies the ordinary *Anderson-Burdick* balancing test for analyzing state election rules. In the dissent's view, the District Court permissibly concluded that the benefits of the State's deadline for receipt of absentee ballots are outweighed by the burdens of the deadline on voters. In light of the three alternative and independent conclusions outlined above, I do not think that we may conduct that kind of open-ended balancing test in this case. But even on its own terms, the dissent's balancing analysis is faulty, in my respectful view.

Start by considering the implications of the dissent's analysis. In reinstating the District Court's order extending Wisconsin's deadline for receipt of absentee ballots, the dissent's approach would necessarily invalidate (or at least call into question) the laws of approximately 30 States for the upcoming election and compel all of those States to accept absentee ballots received after election day. The dissent's *de facto* green light to federal courts to rewrite dozens of state election laws around the country over the next two weeks seems to be rooted in a belief that federal judges know better than state legislators about how to run elections during a pandemic. But over the last several months, this Court has consistently rejected that federal-judges-know-best vision of election administration.

The dissent does not fully come to grips with the destabilizing consequences of its analysis, saying that the facts may differ in other States. But the key facts underlying the District Court's injunction are similar in other States: the existence of the virus and its effects on election workers, voters, mail systems, and in-person voting. The dissent's claim that its reasoning would not necessarily invalidate the absentee-ballot deadlines of approximately 30 other States therefore rings hollow.

Turning to the dissent's balancing analysis, the dissent does not sufficiently appreciate the necessity of deadlines in elections, and does not sufficiently account for all the steps that Wisconsin has already taken to help voters meet those deadlines.

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The dissent claims that the State's election-day deadline for receipt of absentee ballots will "disenfranchise" some Wisconsin voters. But that is not what a reasonable election deadline does. This Court has long explained that a State's election deadline does not disenfranchise voters who are capable of meeting the deadline but fail to do so. See *Rosario*, 410 U.S., at 757–758, 93 S.Ct. 1245. In other words, reasonable election deadlines do not "disenfranchise" anyone under any legitimate understanding of that term. And the dissent cannot ***36** plausibly argue that the absentee-ballot deadline imposed—and still in place as of today—in most of the States is not a reasonable one. Those voters who disregard the deadlines or who fail to take the state-prescribed steps for meeting the deadlines may have to vote in person. But no one is disenfranchised by Wisconsin's reasonable and commonplace deadline for receiving absentee ballots. Indeed, more than *one million* Wisconsin voters have already requested, received, *and returned* their absentee ballots.

To help voters meet the deadlines, Wisconsin makes it easy to vote absentee and has taken several extraordinary steps this year to inform voters that they should request and return absentee ballots well before election day.

For starters, as the Seventh Circuit aptly noted, Wisconsin has "lots of rules" that "make voting easier than do the

rules of many other states." *Luft v. Evers*, 963 F.3d 665, 672 (2020). Wisconsin law allows voters to vote absentee without an excuse, no questions asked. Wis. Stat. § 6.85 (2017–2018). Registered voters may request an absentee ballot by mail, e-mail, online, or fax. Wisconsin Elections Commission, Absentee Voting, https://elections.wi.gov/ voters/absentee.

Since August, moreover, the Wisconsin Elections Commission has been regularly reminding voters of the need to act early so as to avoid backlogs and potential mail delays. See, *e.g.,* Wisconsin Elections Commission, Wisconsin Voting Deadlines and Facts for November 2020 (Aug. 20, 2020), http://elections.wi.gov/node/7039. In August and September, for example, Wisconsin's chief elections official explicitly urged voters not to wait to request a ballot: "It takes time for Wisconsin clerks to process your request. Then it may take up to seven days for you to receive your ballot in the mail. It can then take another seven days for your ballot to be returned by mail." Wisconsin Elections Commission, Wisconsin Mails Voting Information to Registered Voters (Sept. 3, 2020), http://elections.wi.gov/node/7077.

Perhaps most importantly, in early September, Wisconsin decided to leave little to chance and mailed every registered voter in the State who had not already requested an absentee ballot (2.6 million of Wisconsin's registered voters) an absentee ballot application, as well as information about how to vote absentee. *Ibid.*

Returning an absentee ballot in Wisconsin is also easy. To begin with, voters can return their completed absentee ballots by mail. But absentee voters who do not want to rely on the mail have several other options. Until election day, voters may, for example, hand-deliver their absentee ballots to the municipal clerk's office or other designated site, or they may place their absentee ballots in a secure absentee ballot drop box. Some absentee ballot drop boxes are located outdoors, either for drive-through or walk-up access, and some are indoors at a location like a municipal clerk's office. Memorandum from M. Wolfe, Administrator of the Wisconsin Elections Commission, et al. to All Wisconsin Election Officials (Aug. 19, 2020) (online source archived at www.supremecourt.gov). The Wisconsin Elections Commission has made federal grant money available to local municipalities to purchase additional absentee ballot drop boxes to accommodate expanded absentee voting.

Alternatively, absentee voters may vote "in-person absentee" beginning two weeks before election day. Wis. Stat. § 6.86(1)(b). A Wisconsin voter who votes "in-person absentee" fills out an absentee ballot in person at a municipal clerk's office or other designated location before election day. Some municipalities have created drive-up absentee voting sites to allow voters to ***37** vote "in-person absentee" without leaving their cars. See, *e.g.,* City of Madison Clerk's Office, In-Person Absentee Voting Hours and Locations (online source archived at www.supremecourt.gov).

Finally, on election day, a voter may drop off an absentee ballot at a polling place until 8:00 p.m. Memorandum from M. Wolfe, Administrator of the Wisconsin Elections Commission, to Wisconsin Municipal Clerks (Mar. 31, 2020) (online source archived at www.supremecourt.gov).

In sum, as the Governor of Wisconsin correctly said back in March as the COVID–19 crisis broke: "The good news is that absentee voting in Wisconsin is really easy." Marley, The Deadline to Request an Absentee Ballot in Wisconsin Is Friday. Here's How You Do It., Milwaukee Journal Sentinel, Mar. 13, 2020 (online source archived at www.supremecourt.gov).

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The current statistics for the November election bear out the Governor's statement that absentee voting in Wisconsin is "really easy." In huge and unprecedented numbers, Wisconsin voters have already taken advantage of the State's generous absentee voting procedures for the November election. As of October 26, 2020, the Wisconsin Elections Commission has mailed 1,706,771 absentee ballots to Wisconsin voters. And it has already received back from voters 1,344,535 completed absentee ballots. Wisconsin Elections Commission, Absentee Ballot Report—November 3, 2020 General Election (Oct. 26, 2020), https://elections.wi.gov/node/7207.

As those statistics suggest, the dissent's charge that Wisconsin has disenfranchised absentee voters is not tenable. As the Seventh Circuit explained, the "district court did not find that any person who wants to avoid voting in person on Election Day would be unable to cast a ballot in Wisconsin by planning ahead and taking advantage of the opportunities allowed by state law." *Bostelmann*, 977 F. 3d, at 642.

The dissent insists, however, that "tens of thousands" and perhaps even 100,000 votes will not be counted if we do not reinstate the District Court's extension of the deadline. *Post*, at 42 – 43 (opinion of KAGAN, J.). The District Court arrived

at the same prediction, but it was a prediction, not a finding of fact. Indeed, the District Court did not include this prediction in the facts section of its opinion. *Democratic National Committee* v. *Bostelmann*, —— F. Supp. 3d ——, ——, 2020 WL 5627186 (WD Wis., Sept. 21, 2020). For its part, the dissent makes the same prediction by looking at the number of absentee ballots that arrived after the primary election day in April. But in the April primary, the received-by deadline had been extended to allow receipt of absentee ballots after election day. The dissent's statistic tells us nothing about how many voters might miss the deadline when voters know that the ballots must be received by election day. To take an analogy: How many people would file their taxes after April 15 if the filing deadline were changed to April 21? Lots. That fact tells us nothing about how many people would file their taxes after April 15 if the deadline remained at April 15.

The dissent also seizes on the fact that Wisconsin law allows voters to request absentee ballots until October 29, five days before election day. But the dissent does not grapple with the good reason why the State allows such late requests. The State allows those late requests for ballots because it wants to accommodate late requesters who still want to obtain an absentee ballot so that they can drop it off in person and avoid lines at the polls on election day. No one thinks that voters who request absentee ballots as late as October 29 can both receive the ballots and ***38** *mail* them back in time to be received by election day. As we stated in April, "even in an ordinary election, voters who request an absentee ballot at the deadline for requesting ballots ... will usually receive their ballots on the day before or day of the election." *RNC*, 589 U. S., at ——, 140 S.Ct., at 1207. Rather, those late requesters would, after receiving the ballots, necessarily have to drop their absentee ballots off in person at one of the designated locations. In short, Wisconsin provides an option to request absentee ballots until October 29 for voters who decide relatively late in the game that they would prefer to avoid lines at the polls on election day.

The dissent's October 29-based argument falls short for another reason as well: The dissent's approach would actually penalize Wisconsin for being too generous with its absentee voting regime. Under the dissent's theory, if Wisconsin had just set a *more restrictive* deadline for voters to request absentee ballots—say, two weeks before election day—there presumably would not be a constitutional problem with the State's election-day deadline for receipt of absentee ballots. But it makes little sense to penalize Wisconsin for accommodating voters and making it easier for them to vote absentee and avoid lines on election day.

The dissent's rhetoric of "disenfranchisement" is misplaced for still another reason. As the dissent uses that term, the dissent's own position would itself "disenfranchise" voters. What about voters who request an absentee ballot after October 29? What about voters who mail their ballots after November 3? What about voters who mail their ballots by November 3 but whose ballots arrive after November 9? Even if we reinstated the District Court's order as the dissent would have us do, those votes would not count. The dissent's position would itself therefore "disenfranchise" some voters, at least as the dissent uses the term. All of which simply shows that the dissent's rhetoric of disenfranchisement is mistaken.

The dissent responds that I am just disagreeing with the facts found by the District Court. Not so. I do not disagree with any of the relevant historical facts that the District Court found and that the dissent highlights. The dissent, for example, calls attention to the District Court's finding that nearly two million Wisconsin voters in this election are likely to request mail ballots. I agree. Indeed, the Wisconsin Elections Commission has already sent nearly that number of absentee ballots to voters who have requested them. The dissent notes that the influx of ballots has imposed a serious burden on some local election offices. I agree. The dissent points out that the District Court found that ballots can sometimes take two weeks to be sent and returned in light of Postal Service delays. I agree. The dissent highlights that the pandemic has gotten worse, not better, in Wisconsin over the last few weeks. I agree. And the dissent notes that the in-person voting option can pose a health risk to elderly and ill voters. I agree; I am fully aware of and sensitive to that reality.

Contrary to the dissent's attempt to characterize our disagreement as factual, the facts in this case are largely undisputed. I have zero disagreement with the dissent on the question of whether COVID–19 is a serious problem. It is. Instead, I disagree with some of the District Court's and the dissent's speculative predictions about how the voting process might unfold with an election-day deadline for receipt of absentee ballots. And I disagree with the District Court's and the dissent's legal analysis of whether, given the agreed-upon facts, the State has done enough to protect the right to vote under the Constitution and this Court's precedents, ***39** given the necessity of having election deadlines.

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In short, I agree with the dissent that COVID–19 is a serious problem. But you need deadlines to hold elections—there is just no wishing away or getting around that fundamental point. And Wisconsin's deadline is the same as that in 30 other States and is a reasonable deadline given all the circumstances.

To be clear, in every election a voter who requests an absentee ballot, particularly a voter who waits until the last moments to request an absentee ballot, might not receive a ballot in time to mail it back in, or in some cases may not receive a ballot until after election day. Or in some cases, a voter may mail a completed ballot, but it may get delayed and arrive too late to be counted. [2] Indeed, in 2012 and 2016, the States rejected more than 70,000 ballots in each election because the ballots missed the deadlines. U. S. Election Assistance Commission, 2012 Election Administration and Voting Survey 42 (2013); U. S. Election Assistance Commission, 2016 Election Administration and Voting Survey 11, 25 (2017). But moving a deadline would not prevent ballots from arriving after the newly minted deadline any more than moving first base would mean no more close plays. And more to the point, the fact that some ballots will be late in any system with deadlines does not make Wisconsin's widely used deadline facially unconstitutional. See *Crawford*, 553 U.S. at 202–203, 128 S.Ct. 1610.

2 In Wisconsin, a voter can track his or her ballot online. MyVote Wisconsin, Track My Ballot, https://myvote.wi.gov/en-us/TrackMyBallot. If a voter is concerned that the ballot may not be received in time, the voter can cancel the absentee ballot and request a new one or vote in person, as long as the voter meets the deadlines set by the municipality for doing so, which typically fall a few days before election day. Memorandum from M. Wolfe, Administrator of the Wisconsin Elections Commission, to Wisconsin County Clerks et al. (Oct. 19, 2020) (online source archived at www.supremecourt.gov).

Put another way, the relevant question is not whether any voter would ever miss the deadlines. After all, in every deadline case, the answer would always be yes, and no election deadline would ever be permissible. The proper question under the Constitution is whether the deadline is reasonable under the circumstances. See *Rosario*, 410 U.S. at 760, 93 S.Ct. 1245. Again, Wisconsin's deadline is the same as that in about 30 other States for the November election and is reasonable, for the reasons I have explained.

In any event, if a Wisconsin voter does not receive an absentee ballot in time to cast it, the voter still has the option of voting in person. And Wisconsin, like many other States, demonstrated in the April and August primary elections that it can run an in-person election in a way that is reasonably safe for Wisconsin voters, with socially distanced lines, mask requirements, and sanitizing protocols. The District Court acknowledged that in-person voting can be done "safely" again in November "if the majority of votes are cast in advance, sufficient poll workers, polling places, and PPE are available, and social distancing and masking protocols are followed." *Bostelmann*, —— F. Supp. 3d, at ——. If a voter requests a ballot at the last minute—long after the State has told voters that they should request ballots—and if that voter does not receive a ballot by election day, the voter still has the option of voting in person. That said, the better option, as Wisconsin has repeatedly announced, is for voters who wish to vote absentee to request and submit their ballots well ahead of time. That is what tens of millions of voters across America —including ***40** more than one million voters in Wisconsin —have already done.

* * *

For those reasons, I concur in the denial of the applications to vacate the stay.

Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.

In April, residents of Wisconsin voted in presidential primaries. That election was one of the first during the COVID–19 pandemic, which has turned in-person voting (with its often-long lines, touch screens, and enclosed booths) into a health risk, especially for older and less healthy Americans. Given these emergency conditions, a district judge directed the State to accept mail ballots received in the six days after the polls closed. That extension of Wisconsin's ballot-receipt deadline ensured that COVID-related delays in the delivery and processing of mail ballots would not disenfranchise citizens fearful of voting in person. Because of the court's ruling, state officials counted 80,000 ballots—about five percent of the total cast—that were postmarked by Election Day but would have been discarded for arriving a few days later.

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Today, millions of Wisconsin citizens are preparing to vote in the November election. But COVID is not over. In Wisconsin, the pandemic is much worse—more than 20 times worse, by one measure—than it was in the spring: The State's health department now reports a weekly average of 3,879 cases per day, compared to 175 per day when the April election took place. See Wisconsin Department of Health Services, COVID–19: Wisconsin Cases (Oct. 26, 2020), www.dhs.wisconsin.gov/covid-19/cases.htm. Indeed, Wisconsin is one of the hottest of all COVID hotspots in the Nation. So rather than vote in person, many Wisconsinites will again choose to vote by mail. State election officials report that 1.7 million people—about 50 percent of Wisconsin's voters—have already asked for mail ballots. And more are expected to do so, because state law gives voters until October 29, five days before Election Day, to make that request.

To ensure that these mail ballots are counted, the district court ordered in September the same relief afforded in April: a six-day extension of the receipt deadline for mail ballots postmarked by Election Day. The court supported that order with specific facts and figures about how COVID would affect the electoral process in Wisconsin. See *Democratic National Committee* v. *Bostelmann*, —— F. Supp. 3d ——, —— – ——, —— – ——, ——, 2020 WL 5627186, *6–*7, *9–*10, *21 (W.D. Wis., Sept. 21, 2020). The court found that the surge in requests for mail ballots would overwhelm state officials in the weeks leading up to the October 29 ballot-application deadline. And it discovered unusual delays in the United States Postal Service's delivery of mail in the State. The combination of those factors meant, as a high-ranking elections official testified, that a typical ballot would take a full two weeks "to make its way through the mail from a clerk's office to a voter and back again"—even when the voter instantly turns the ballot around. *Id.*, at ——, n. 10, 2020 WL 5627186, *5, n. 10. Based on the April election experience, the court determined that many voters would not even *receive* mail ballots by Election Day, making it impossible to vote in that way. And as many as 100,000 citizens would not have their votes counted—even though timely requested and postmarked—without the six-day extension. (To put that number in perspective, a grand total of 284 Wisconsin mail ballots were not counted in the 2016 ***41** election. [1]) In the court's view, the discarding of so many properly cast ballots would severely burden the constitutional right to vote. The fit remedy was to create a six-day grace period, to allow those ballots a little extra time to arrive in the face of unprecedented administrative and delivery delays.

1 See U. S. Election Assistance Commission, 2016 Election Administration and Voting Survey 25.

But a court of appeals halted the district court's order, and today this Court leaves that stay in place. I respectfully dissent because the Court's decision will disenfranchise large numbers of responsible voters in the midst of hazardous pandemic conditions.

I

Start with this fact: The court of appeals did not dispute any of the district court's careful findings about the effect of COVID on voting in Wisconsin. The appellate court did not question the health risks—now increasing daily—of in-person voting in the State, especially to senior citizens and those with some pre-existing conditions. [2] It did not deny that, because of those dangers, state election offices will be swamped until the end of October by timely mail-ballot applications. It did not contest that backlogs in those offices, combined with unusual delays in mail delivery, will prevent tens of thousands of Wisconsinites—through no fault of their own—from successfully casting a mail ballot. Nor did the appellate court express doubt that disenfranchisement of that kind, and on that scale, imposes a severe burden on the right to vote. See generally *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). In fact, the court never even addressed the constitutional issue.

2 See C. Cotti, B. Engelhardt, J. Foster, E. Nesson, & P. Niakamp, The Relationship Between In-Person Voting and COVID–19: Evidence From the Wisconsin Primary, NBER Working Paper No. 27187, p. 11 (rev. Oct. 2020) ("Across all models, we find an increase in the positive share of COVID–19 cases in the weeks following the election in counties that had more in-person votes per voting location, all else equal").

How could that be? In the appellate court's view, this Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (*per curiam*), prohibited the district court from modifying Wisconsin's election rules so close to (*i.e.,* six weeks before) Election Day. See *Democratic National Committee v. Bostelmann*, 977 F. 3d 639, 641–43 (C.A.7, Oct. 8, 2020) (*per curiam*); see also *ante*, at 30 – 34 (KAVANAUGH, J., concurring). But that is a

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misunderstanding of *Purcell*'s message. In fixating on timing alone, the court of appeals went astray.

The Court in *Purcell* considered an appellate decision reversing a district court's refusal to enjoin a voter identification law shortly before an election. We vacated the decision because the court of appeals—much like the one here—failed to "give deference to [a district court's] discretion" in assessing the propriety of injunctive relief. 549 U.S., at 5, 127 S.Ct. 5. In doing so, we briefly addressed how to "weigh" whether an injunction of an election rule should issue. *Id.*, at 4, 127 S.Ct. 5. A court, we counseled, must balance the "harms attendant upon issuance or nonissuance of an injunction," together with "considerations specific to election cases" that may affect "the integrity of our electoral processes." *Ibid.* Among those election-specific factors, we continued, was the potential for a court order, especially close to Election Day, to "result in voter confusion and ***42** consequent incentive to remain away from the polls." *Id.*, at 4–5, 127 S.Ct. 5.

That statement, as the dissent below saw, "articulated not a rule but a caution." 977 F. 3d, at 644 (Rovner, J., dissenting). Last-minute changes to election processes may baffle and discourage voters; and when that is likely, a court has strong reason to stay its hand. But not every such change poses that danger. And a court must also take account of other matters—among them, the presence of extraordinary circumstances (like a pandemic), the clarity of a constitutional injury, and the extent of voter disenfranchisement threatened. At its core, *Purcell* tells courts to apply, not depart from, the usual rules of equity. See, *e.g.*, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) ("In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief" (internal quotation marks omitted)). And that means courts must consider all relevant factors, not just the calendar. Yes, there is a danger that an autumn injunction may confuse voters and suppress voting. But no, there is not a moratorium on the Constitution as the cold weather approaches. Remediable incursions on the right to vote can occur in September or October as well as in April or May.

And so the district court rightly held here. It is hard to see how the extension of a ballot-receipt deadline could confuse citizens about how to vote: At worst, a voter not informed of the new deadline would (if she could) put her ballot in the mail a few days earlier than needed. Nor would that measure discourage Wisconsin citizens from exercising their right to the franchise. To the contrary, it would prevent the State from throwing away the votes of people actively participating in the democratic process. And what will undermine the "integrity" of that process is not the counting but instead the discarding of timely cast ballots that, because of pandemic conditions, arrive a bit after Election Day. *Purcell*, 549 U.S., at 4, 127 S.Ct. 5.[3] On the scales of both constitutional justice and electoral accuracy, protecting the right to vote in a health crisis outweighs conforming to a deadline created in safer days.

3 Justice KAVANAUGH alleges that "suspicions of impropriety" will result if "absentee ballots flow in after election day and potentially flip the results of an election." *Ante*, at 33. But there are no results to "flip" until all valid votes are counted. And nothing could be more "suspicio[us]" or "improp[er]" than refusing to tally votes once the clock strikes 12 on election night. To suggest otherwise, especially in these fractious times, is to disserve the electoral process.

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Indeed, I see no more apt time for the district court to have issued its injunction than when it did. The court of appeals insisted that the injunction would better have come in May, a half-year before Election Day; then, the court said, the order "could not be called untimely." 977 F. 3d at 642. But "untimely" can mean too early as well as too late. And a May order could have been premature, perhaps even foolishly so. At that time, the district court could not have known the course COVID would take. Cf. *FDA* v. *American College of Obstetricians & Gynecologists*, —— U.S ——, 141 S.Ct. 10, —— L.Ed.2d —— (2020) *ante*, p. —— (instructing a district court to consider whether pandemic conditions have changed enough to warrant modifying an injunction). Nor could the court have known about the current ability of Wisconsin election offices or the Postal Service to handle increased demand for mail ballots. (Doubts about the Postal Service's ***43** delivery performance, for example, did not arise until August.) In waiting until late September, the district court resolved to base its ruling on concrete evidence—not on unfounded speculation.

And without *Purcell*, not much is left in the appellate court's opinion to justify its stay. That court separately argued that "the design of electoral procedures" is a solely "legislative task." 977 F. 3d at 642; see also *ante*, at 33 – 36 (KAVANAUGH, J., concurring). But that is not so when those procedures infringe the constitutionally enshrined right to vote. See, *e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 786,

103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (invalidating a state filing deadline); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (invalidating a state poll tax); *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (invalidating state districting maps). To be sure, deference is usually due to a legislature's decisions about how best to manage the COVID pandemic. See *South Bay Pentecostal Church* v. *Newsom*, 590 U. S. ——, ——, 140 S.Ct. 1613, 1613-1614, 207 L.Ed.2d 154 (2020) (ROBERTS, C. J., concurring in denial of application for injunctive relief). But the Wisconsin legislature has not for a moment considered whether recent COVID conditions demand changes to the State's election rules; that body has not even met since April. Compare Litke, Fact Check: Wisconsin Legislators Have Gone About 6 Months Without Passing a Bill, USA Today, Oct. 7, 2020 (online source archived at www.supremecourt.gov) ("Wisconsin lawmakers have been among the least active in the country, according to a database of all COVID-related legislation across the country maintained by the National Conference of State Legislatures"), with *Andino* v. *Middleton*, —— U.S. ——, 141 S.Ct. 9, —— L.Ed.2d —— (2020) *ante*, p. —— (staying an order enjoining South Carolina's witness requirement for mail ballots when that rule was part of a legislative package to adjust voting procedures in response to COVID). And if there is one area where deference to legislators should not shade into acquiescence, it is election law. For in that field politicians' incentives often conflict with voters' interests—that is, whenever suppressing votes benefits the lawmakers who make the rules.

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II

Justice KAVANAUGH's concurring opinion goes further than the court of appeals. Rather than relying on *Purcell* and deference alone, he also concludes that Wisconsin's election rules, as applied during the COVID pandemic, do not violate the right to vote. See *ante*, at 33 – 35. That follows, in his view, because voting by mail is "easy" in Wisconsin and because in-person voting is "reasonably safe." *Ante*, at 35 – 36, 36 – 37, 39. [4] (In another concurrence, Justice GORSUCH agrees. *Ante*, at 28 – 30.)

4 Oddly, the concurrence suggests that no change in the State's ballot-receipt deadline is needed because Wisconsin has "incorporated the lessons" from April's primary "into its extensive planning for the November election." *Ante*, at 34. But the April election was conducted under the same extended deadline that the Court today precludes. See *supra*, at 40. One might have thought the April election's principal lesson is that a slightly altered ballot-receipt deadline can save thousands of timely cast mail ballots from the garbage bin.

The first problem with that reasoning is that the district court found to the contrary. As this Court constantly states, a district court has the greatest familiarity with the facts in a case, because it oversees the development and presentation of ***44** evidence. See, *e.g.*, *Purcell*, 549 U.S., at 5, 127 S.Ct. 5; see also Fed. Rule Civ. Proc. 52(a). That is why the court of appeals rightly did not question any of the lower court's findings. See *supra*, at 42 – 43. And why the concurrence is wrong to take a different tack.

Recall that the district court's findings include the following. See *supra*, at 42 – 43. The COVID pandemic has been getting worse and worse in Wisconsin. And as the State has "broken numerous new case records," in-person voting—according to credible expert testimony—creates a "significant [health] risk," especially for older and sicker citizens. —— F. Supp. 3d, at —— – ——, 2020 WL 5627186, *9–*10. For that reason, Wisconsinites have turned to the mails. According to the state elections commission, close to 2 million people are likely to request mail ballots. See *id.*, at ——, 2020 WL 5627186, *9. (That is about double the number of already-returned ballots that the concurrence chooses to emphasize. See *ante*, at 34, 35 – 36, 39 – 40.) State election offices have not received the resources they need to deal with that influx of applications, and severe administrative backlogs have therefore developed. See —— F. Supp. 3d, at ——, 2020 WL 5627186, *9. Postal Service delays, detailed by both state and federal officials, compound the risk that voters will be unable to return timely requested mail ballots by Election Day. See *ibid*. And if a voter discovers on Election Day that her mail ballot has not yet arrived, Wisconsin law prevents her from voting in person—even assuming she would undertake the risk. See Wis. Stat. § 6.86(6). All these facts would mean, as the chair of the Wisconsin Elections Commission testified, that many thousands of timely requested and postmarked votes—potentially into the six-figure range—would not be counted without a short extension of the ballot-receipt deadline. See —— F. Supp. 3d, at ——, 2020 WL 5627186, *21; Electronic Case Filing in No. 3–20–cv–459, Doc. 299 (WD Wis.), p. 9.

The concurrence fails to give those findings the respect they are due. Of course, the concurrence *says* it is not committing

that elementary error; according to Justice KAVANAUGH, he disputes only the district court's "speculative predictions," not its statement of "historical facts." *Ante*, at 38. But the concurrence alternately rejects, ignores, or accepts only *pro forma* the district court's account of the facts (just the facts). In responding to this dissent, the concurring opinion acknowledges that in-person voting in Wisconsin "can pose a health risk." *Ante*, at 38. Yet in condemning the injunction, it continues to insist—how else could it reach the decision it does?—that going to the polls is "reasonably safe" for Wisconsin's citizens, contrary to the expert testimony the district court relied on. *Ante*, at 39. Similarly, the concurrence nods glancingly to increased ballot applications, see *ante*, at 38 – 39, but it fails to recount (as the district court did in detail) how that influx has created heavy backlogs and prevented ballots from issuing in timely fashion. And it does not discuss the evidence of unusual, even unprecedented, delays in postal delivery service in Wisconsin. In short, the concurrence refuses to engage with the core of the analysis supporting the district court's injunction: that a veritable tsunami (in the form of a pandemic) has hit Wisconsin's election machinery, and disrupted all its usual mail ballot operations. And as to the supposedly "speculative prediction" that without the ballot-receipt extension as many as 100,000 timely cast mail votes would go uncounted? That estimate itself derived from the factual findings just listed, along with the credible testimony of the elections commission's chair—all matters indisputably entitled to deference ***45** from an appellate tribunal. Those findings, and not the concurrence's substitute facts purporting to show that voting in Wisconsin is safe and easy, should properly ground today's decision. [5]

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5 Note as well that nothing rides on the exactness of the district court's estimate. Suppose that without the ballot-receipt extension, only (only?) half as many votes would be discarded as the district court thought. The court's decision would have remained the same, and so too everything I say here. But as for the concurrence? Who can know? Justice KAVANAUGH does not reveal how many uncounted votes he thinks would violate the Constitution. Nor does he suggest how many votes short of that level will be discarded because of the Court's decision today.

A related flaw in the concurring opinion is how much it reasons from normal, pre-pandemic conditions. Cf. *Republican National Committee* v. *Democratic National Committee*, 589 U. S. ——, ——, 140 S.Ct. 1205, 1210, 206 L.Ed.2d 452 (2020) (Ginsburg, J., dissenting) ("The Court's suggestion that the current situation is not substantially different from an ordinary election boggles the mind") (internal quotation marks omitted). A "reasonable election deadline," the concurrence says, "does not disenfranchise voters." *Ante*, at 35. I have no argument with that statement, even though some voters may overlook the deadline. See *Rosario v. Rockefeller*, 410 U.S. 752, 757–758, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973). But what is "reasonable" in one set of circumstances may become unreasonable in another. And when that switch occurs, a constitutional problem arises. So it matters not that Wisconsin could apply its ballot-receipt deadline when ballots moved rapidly through the mails and people could safely vote in person. At *this* time, neither condition holds—again, according to the district court's eminently believable findings. Today, mail ballots often travel at a snail's pace, and the elderly and ill put themselves in peril if they go to the polls. So citizens—thousands and thousands of them—who have followed all the State's rules still cannot cast a successful vote. And because that is true, the ballot-receipt deadline that once survived constitutional review no longer does. [6]

6 The concurrence is wrong to view that conclusion as casting doubt on all similar deadlines in all other States. See *ante*, at 35. The district court rested its constitutional judgment, as I would too, on a confluence of factors: COVID conditions in Wisconsin, the scarce time between the State's ballot-application and ballot-receipt deadlines, evidence about in-state mail delivery and the administrative capacity of state election offices. See *supra*, at 40 – 41, 44. In another State with all the same facts, the same result should obtain. But in another State with different facts—say, a less intense outbreak of COVID, an earlier ballot-application deadline, faster mail delivery, and better staffed and funded election offices—the constitutional analysis should come out a different way.

That deadline, contrary to Justice KAVANAUGH's view, now disenfranchises Wisconsin citizens—however much he objects to applying that term here. Far from using the word "rhetoric[ally]," *ante*, at 38, I mean it precisely. During COVID, the State's ballot-receipt deadline and the Court's decision upholding it disenfranchise citizens by depriving them of their constitutionally guaranteed right to vote. Because the Court refuses to reinstate the district court's

injunction, Wisconsin will throw out thousands of timely requested and timely cast mail ballots. And today's decision does not stand alone. In other recent cases as well, the Court has halted injunctions necessary for people to cast ballots safely. See *Merrill* v. *People First of Ala.*, —— U.S. ——, 141 S.Ct. 25, —— L.Ed.2d —— (2020) *ante*, p. ——, 2020 WL 6156545; *Merrill* v. *People First of Ala.*, 591 U. S. ——, 141 S.Ct. 190, 207 L.Ed.2d 1113 (2020); ***46** *Republican National Committee*, 589 U. S. ——, 140 S.Ct. 1205, 206 L.Ed.2d 452. [7] As the COVID pandemic rages, the Court has failed to adequately protect the Nation's voters.

7 At the same time that Justice KAVANAUGH defends this stance by decrying a "federal-judges-know-best vision of election administration," *ante*, at 35, he calls for *more* federal court involvement in "reviewing state-court decisions about state [election] law," *ante*, at 34, n. 1. It is hard to know how to reconcile those two views about the federal judiciary's role in voting-rights cases. Contrary to Justice KAVANAUGH's attempted explanation, neither the text of the Elections Clause nor our precedent interpreting it leads to his inconstant approach. See *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 817–818, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015); *Smiley v. Holm*, 285 U.S. 355, 372, 52 S.Ct. 397, 76 L.Ed. 795 (1932).

* * *

For all these reasons, I would vacate the court of appeals' stay. The facts, as found by the district court, are clear: Tens of thousands of Wisconsinites, through no fault of their own, may receive their mail ballots too late to return them by Election Day. Without the district court's order, they must opt between "brav[ing] the polls," with all the risk that entails, and "los[ing] their right to vote." *Republican National Committee*, 589 U. S., at ——, 140 S.Ct., at 1211 (Ginsburg, J., dissenting). The voters of Wisconsin deserve a better choice.

All Citations

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APPENDIX NO. 5

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506 F.Supp.3d 596
United States District Court, E.D. Wisconsin.

William FEEHAN, Plaintiff,
v.
WISCONSIN ELECTIONS COMMISSION, Commissioner Ann S. Jacobs, Mark L. Thomsen, Julie M. Glancey, Commissioner Marge Bostelmann, Commissioner Dean Knudson, Robert F. Spindell, Jr. and Tony Evers, Defendants.

Case No. 20-cv-1771-pp
|
Signed 12/09/2020

Synopsis

Background: Political party's nominee to be Presidential elector brought action against Wisconsin Elections Commission, governor, and state elections officials alleging that Presidential election was subject of wide-spread ballot fraud, and violated Elections and Electors Clauses, Equal Protection Clause, and Due Process Clause. Defendants moved to dismiss.

Holdings: The District Court, Pamela Pepper, Chief Judge, held that:

plaintiff lacked standing as voter to bring action;

plaintiff standing as elector nominee to bring action;

governor's certification of election's results rendered action moot;

Commission was not suable "person" under § 1983; and

Eleventh Amendment barred action against governor and officials in their official capacities.

Motion granted.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

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ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS (DKT. NOS. 51, 53), DENYING AS MOOT PLAINTIFF'S AMENDED MOTION FOR INJUNCTIVE RELIEF (DKT. NO. 6) AND DISMISSING CASE

PAMELA PEPPER, Chief United States District Judge

At 8:24 a.m. on Tuesday, December 1, 2020—twenty-eight days after the November 3, 2020 general Presidential election, thirteen days after President Donald J. Trump petitioned for a recount in Milwaukee and Dane Counties and one day after the Wisconsin Elections Commission and the Governor certified that Joseph R. Biden and Kamala D. Harris had received the highest number of votes following that ***600** recount—two plaintiffs filed this lawsuit in federal court for the Eastern District of Wisconsin. Although state law governs the election process, the plaintiffs brought the suit in a federal court, asking that federal court to order state officials to decertify the election results that state officials had certified the day before, order the Governor not to transmit to the Electoral College the certified results he'd transmitted the day before and order the Governor to instead transmit election

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results that declared Donald Trump to be "the winner of this election."

The election that preceded this lawsuit was emotional and often divisive. The pleadings that have been filed over the past week are passionate and urgent. People have strong, deep feelings about the right to vote, the freedom and opportunity to vote and the value of their vote. They should. But the legal question at the heart of this case is simple. Federal courts have limited jurisdiction. Does a federal court have the jurisdiction and authority to grant the relief this lawsuit seeks? The answer is no.

Federal judges do not appoint the president in this country. One wonders why the plaintiffs came to federal court and asked a federal judge to do so. After a week of sometimes odd and often harried litigation, the court is no closer to answering the "why." But this federal court has no authority or jurisdiction to grant the relief the remaining plaintiff seeks. The court will dismiss the case.

I. Background

According to defendant the Wisconsin Elections Commission's November 18, 2020 canvass results, 3,297,352 Wisconsin residents voted in the November 3, 2020 general election for President. https://elections.wi.gov/sites/elections.wi.gov/files/Statewide% 20Results% 20All% 20Offices% 20% 28pre-Presidential% 20recount% 29.pdf. Of those, 49.45%—1,630,673—voted for Biden for President and Harris for Vice-President. Id. Biden and Harris received approximately 20,600 more votes than Donald J. Trump for President and Michael R. Pence for Vice-President. Id.

Under Wis. Stat. § 9.01(1)(a)(1), any candidate in an election where more than 4,000 votes were cast for the office the candidate seeks and who trails the leading candidate by no more than 1 percent of the total votes cast for that office may petition for a recount. On November 18, 2020, Donald J. Trump filed a recount petition seeking a recount of "all ballots in all wards in every City, Village, Town and other voting unit in Dane and Milwaukee Counties." https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/WEC% 20-% 20Final % 20Recount% 20Order_0.pdf. The Wisconsin Elections Commission granted that petition and ordered a recount "using the ballot count method selected per Wis. Stat. § 5.90(1) unless otherwise ordered by a court per Wis. Stat. § 5.90(2)." Id. The WEC ordered the recount to be completed by 12:00 p.m. on December 1, 2020. Id.

The partial recount was completed on November 29, 2020. https://elections.wi.gov/elections-voting/recount. On November 30, 2020, the chair of the Wisconsin Elections Commission signed the statement of canvass certifying that Joseph R. Biden and Kamala D. Harris received the greatest number of votes and certified their electors. https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs% 20-% 20Signed% 20Canvass% 20for % 20President% 20-% 20Vice% 20President.pdf. The same day—November 30, 2020—Wisconsin Governor Tony Evers announced that he had signed the Certificate of Ascertainment for the electors for Biden and Harris. https://content.govdelivery.com/accounts/WIGOV/bulletins/2aef6ff. The web site for the National Archives contains the Certificate ***601** of Ascertainment signed by Evers on November 30, 2020, certifying that out of 3,298,041 votes cast, Biden and Harris and their electors received 1,630,866 votes, while Trump and Pence and their electors received 1,610,184 votes. https://www.archives.gov/files/electoral-college/2020/ascertainment-wisconsin.pdf.

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On December 1, 2020, Donald J. Trump filed a petition for an original action in the Wisconsin Supreme Court. Trump v. Evers, Case No. 2020AP001971-OA (available at https://wscca.wicourts.gov). On December 3, 2020, the court denied leave to commence an original petition because under Wis. Stat. § 9.01(6), appeals from the board of canvassers or the Wisconsin Elections Commission must be filed in circuit court. Dkt. No. 59-7. The same day—December 3, 2020—Donald J. Trump filed lawsuits in Milwaukee and Dane Counties. Trump v. Biden, Case No. 2020CV007092 (Milwaukee County Circuit Court); Trump v. Biden, Case No. 2020CV002514 (Dane County Circuit Court) (both available at https://wcca.wicourts.gov). Those cases have been consolidated and are scheduled for hearing on December 10, 2020 at 1:30 (or for December 11, 2020 at 9:00 a.m. if the parties are litigating in another court).

Meanwhile, on December 2, 2020, Donald J. Trump filed suit in federal court for the Eastern District of Wisconsin, suing the defendants in this case and others. Trump v. Wisconsin Elections Commission, *et al.*, Case No. 20-cv-1785-BHL (E.D. Wis.). There is an evidentiary hearing scheduled for December 10, 2020 at 9:00 a.m. by videoconference. Id. at Dkt. No. 45.

II. Procedural History of the Case

On December 1, 2020—the day after Governor Evers signed the Certificate of Ascertainment—William Feehan and

Derrick Van Orden filed a complaint in the federal court for the Eastern District of Wisconsin. Dkt. No. 1. Feehan identified himself as a resident of La Crosse, Wisconsin, a registered voter and "a nominee of the Republican Party to be a Presidential Elector on behalf of the State of Wisconsin." Id. at ¶23. Van Orden was identified as a resident of Hager City, Wisconsin and the 2020 Republican nominee for Wisconsin's Third Congressional District Seat for the U.S. House of Representatives. Id. at ¶26. The complaint alleged that "Mr. Van Orden 'lost' by approximately 10,000 votes to the Democrat incumbent," and stated that "[b]ecause of the illegal voting irregularities as will be shown below, Mr. Van Orden seeks to have a new election ordered by this court in the Third District, with that election being conducted under strict adherence with the Wisconsin Election Code." Id. at ¶27.

The complaint alleged "massive election fraud, multiple violations of the Wisconsin Election Code, *see e.g.,* Wis. Stat. §§ 5.03, *et seq.*, in addition to the Election and Electors Clauses and Equal Protection Clause of the U.S. Constitution" based on "dozens of eyewitnesses and the statistical anomalies and mathematical impossibilities detailed in the affidavits of expert witnesses." Dkt. No. 1 at ¶1. The plaintiffs alleged four causes of action: (1) violation of the Elections and Electors Clauses and 42 U.S.C. § 1983; (2) violation of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1983 and the "invalid enactment of regulations & disparate treatment of absentee vs. mail-in ballots"; (3) denial of the Fourteenth Amendment due process right to vote and 42 U.S.C. § 1983; and (4) "wide-spread ballot fraud." Id. at ¶¶106-138. The plaintiffs asked for the following emergency relief:

> 1. An order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results:
>
> ***602** 2. An order enjoining Governor Evers from transmitting the currently certified election results [sic] the Electoral College;
>
> 3. An order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election;
>
> 4. An immediate emergency order to seize and impound all servers, software, voting machines, tabulators, printers, portable media, logs, ballot applications, ballot return envelopes, ballot images, paper ballots, and all "election materials" referenced in Wisconsin Statutes § 9.01(1)(b) 11 related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiffs;
>
> 5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;
>
> 6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;
>
> 7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. Const. Amend. XIV;
>
> 8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies the signatures on absentee ballot envelopes and that invalidates the certified results if the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;
>
> 9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under state law;
>
> 10. A permanent injunction prohibiting the Governor and Secretary of State from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;
>
> 11. Immediate production of 48 hours of security camera recording of all rooms used in the voting process at the TCF Center [1] for November 3, 2020 and November 4, 2020;
>
> 12. Plaintiffs further request the Court grant such relief as is just and proper including but not limited to, the costs of this action and their reasonable attorney fees and expenses pursuant to 42 U.S.C. § 1988.

Id. at 50.

[1] The plaintiff may be referring to the TCF convention center in Detroit, Michigan; the court is unaware of a "TCF Center" in Wisconsin.

With the complaint, the plaintiffs filed a motion for declaratory, emergency, and permanent injunctive relief, dkt. no. 2, and memorandum in support of that motion, dkt. no. 3. The motion stated that the specific relief the plaintiff

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requested was set out in an attached order, dkt. no. 2 at 1, but there was no order attached. The memorandum asked the court to grant the motion and enter the proposed order, dkt. no. 3 at 10; again, no proposed order was provided.

Later that day, the plaintiffs filed a corrected motion for declaratory, emergency, and permanent injunctive relief. Dkt. No. 6. The plaintiff did not file a memorandum in support of this motion but did file a proposed order. Dkt. No. 1. The relief described in the proposed order was almost identical to the relief requested in the complaint, with a notable exception. Instead of the request for an order requiring production of forty-eight hours of security ***603** camera footage from the TCF Center, the plaintiffs asked for an order prohibiting "any wiping or alteration of data or other records or materials" from voting machines, tabulations machines, servers, software and printers, and any alteration or destruction of ballot applications, ballot return envelopes, ballot images, paper ballots, registration lists, poll lists or other election materials, "across the state of Wisconsin." Dkt. No. 6-1 at 7-8.

Two days later, plaintiff Freehan filed an amended complaint removing Derrick Van Orden as a plaintiff. Dkt. No. 9. It differed from the original complaint only in the removal of Van Orden as a plaintiff.

Along with the amended complaint, the plaintiff filed a motion for temporary restraining order and preliminary injunction "to be considered in an expedited manner." Dkt. No. 10. The plaintiff did not file a memorandum in support of the motion; his main purpose in filing the amended motion appears to have been to ask the court to rule on the motion quickly. The plaintiff attached a proposed briefing schedule, suggesting that the court should require the defendants to respond by 8:00 p.m. on Friday, December 4, 2020 and require him to file his reply by 8:00 p.m. on Saturday, December 5, 2020; he proposed to submit the matter on briefs without argument. Dkt. No. 10-1. The defendants objected to this severely truncated schedule. Dkt. Nos. 25 (defendant Evers), 26 (defendants Wisconsin Election Commission and its members).

Construing the amended motion as a Civil L.R. 7(h) expedited, non-dispositive motion for an expedited briefing schedule, the court granted the request on December 4, 2020, setting a schedule that, while not as expedited as the plaintiff requested, gave the parties a short leash. Dkt. No. 29.

Wisconsin voter James Gesbeck filed a motion to intervene, dkt. no. 14, and later an expedited motion to intervene, dkt. no. 33. The Democratic National Committee (DNC) also sought to intervene. Dkt. No. 22. The court denied both requests, dkt. nos. 41 (DNC), 74 (Gesbeck), but allowed both to file *amicus curiae* briefs by the December 7, 2020 deadline it had set for the defendants to oppose the plaintiff's motion for injunctive relief, dkt. nos. 37 (Gesbeck), 41 (DNC).

Recall that the plaintiff had not filed a memorandum in support of the December 1, 2020 corrected motion for injunctive relief or in support of the December 3, 2020 amended motion. On Sunday, December 6, 2020, the plaintiff filed an amended memorandum in support of the motion. Dkt. No. 42. In the first paragraph, the plaintiff indicated that he filed the amended memorandum to "avoid possible confusion from removal of Mr. Van Orden is [sic] plaintiff." Id. at 1. He said that the memorandum was identical to the original memorandum "except for amending references to plaintiffs to refer to Mr. Meehan [sic] only and correcting several inadvertent references to the State of Georgia." Id.

On Sunday, December 6, the plaintiff also filed a motion asking the court to schedule an evidentiary hearing "on the merits" for Wednesday, December 9, 2020 at 9:00 a.m. Dkt. No. 44. Although the plaintiff had not asked for a hearing in any prior motion, and had represented in the amended motion that he was submitting the matter on the briefs without argument, the plaintiff explained that he had changed his position based on the court's December 4, 2020 order. Id. at ¶4. The court denied the motion in a telephonic hearing on December 8, 2020, explaining that before it could reach the merits of the motion for injunctive relief, it must resolve issues regarding justiciability. Dkt. Nos. 70, 71.

In opposing the plaintiff's amended motion for injunctive relief, defendants Wisconsin Election Commission and its members ***604** argued that the case has jurisdictional and procedural defects that require dismissal. Dkt. No. 52 at 5. They asserted that the plaintiff lacks Article III standing, id. at 6, that the doctrine of laches bars consideration of his claims, id. at 8 and that the Eleventh Amendment shields them from the relief he seeks, id. at 10. They asserted that the complaint fails to state a claim for relief under the Election or Electors Clauses, id. at 11, or under the Equal Protection or Due Process Clauses, id. at 13, and they contended that the plaintiff's purported evidence fails to meet basic evidentiary standards, id. at 20.

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In his brief opposing injunctive relief, defendant Governor Evers argued that there is no evidence of fraud in Wisconsin's election results, dkt. no. 55 at 10, that the plaintiff's witnesses and experts lack qualifications and are unreliable, id. at 12, and that the plaintiff has failed to state valid claims, id. at 22. Evers also argued that an adequate remedy at law exists because the recount procedures under Wis. Stat. § 9.01 unambiguously constitute the "exclusive remedy" for challenging election results. Id. at 55. With respect to the balancing of harms, Evers argued that the requested relief would prejudice the defendants and "retroactively deprive millions of Wisconsin voters of their constitutional right to vote in the 2020 presidential election." Id. at 32.

James Gesbeck, filing as friend of the court, opposed the motion for injunctive relief on the grounds that the plaintiff has not established subject matter jurisdiction and that the court should defer to the Wisconsin courts and Wisconsin's procedural mechanism for resolving disputed elections. Dkt. No. 47 at 11, 12. Gesbeck applied the balancing analysis for injunctive relief, asserting that relief in this court would moot the Wis. Stat. § 9.01 challenge pending in the Wisconsin courts. Id. at 17. He argued that this, in turn, would put the "insurmountable weight of the Federal Government on the election result in Wisconsin and would be unbalancing the scale created by the system of checks and balances that have been maintained since the Constitution was adopted." Id. at 17.

Amicus DNC opposed the motion on many of the same grounds as the other defendants. Dkt. No. 57. The DNC argued that the plaintiff lacks standing, that the doctrine of laches bars the plaintiff's claims, that the defendants are immune from suit under the Eleventh Amendment, that principles of federalism and comity require abstention, and that the plaintiff fails to state a claim upon which relief can be granted. Dkt. No. 57. It asserted that the plaintiff cannot establish irreparable harm and has an adequate remedy of law. Id. at 36.

The defendants have filed motions to dismiss the case. The WEC and its members seek dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 53. Defendant Evers seeks dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), failure to plead fraud with particularity under Fed. R. Civ. P. 9(b) and failure to state a claim under Fed. R. Civ. P. 12(b)(6).

The Wisconsin State Conference of the NAACP and three of its members (Dorothy Harrell, Wendell J. Harris, Jr. and Earnestine Moss) sought leave to file an *amicus* brief on the question of whether the court should dismiss the case. Dkt. No. 56. The court granted that motion. Dkt. No. 69.

III. Procedural Posture

From the outset, the plaintiff has sought to have the claims in the complaint resolved through a motion for injunctive relief under Fed. R. Civ. P. 65. The relief he ***605** requests in the second iteration of his motion for injunctive relief is the same relief he requests in the lawsuit itself. As defendant Evers points out in his motion to dismiss, the plaintiff's December 6, 2020 motion for an evidentiary hearing (which the court has denied) "makes clear that what [the plaintiff] seeks—without any discovery or basic adversarial development of evidence—is a trial and final adjudication on the merits." Dkt. No. 51 at 2.

Evers points to Fed. R. Civ. P. 12(i), which states that "[i]f a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial." Because Evers has raised defenses under Rule 12(b)(1) and (b)(6), and because in asking for a hearing the plaintiff sought what would have been a trial on the merits of the causes of action raised in the complaint, the court must resolve the defenses before moving to the merits.

As the court stated in the hearing on December 8, that requirement is more than a procedural nicety. The defendants and the *amici* have raised questions about this federal court's authority to decide the claims alleged in the amended complaint. If this court does not have jurisdiction to hear and decide those claims, any decision it might make regarding the merits of the claims would be invalid. For that reason, the court considers the motions to dismiss before considering the plaintiff's request for injunctive relief.

IV. The Motions to Dismiss

A. Legal Standards

1. *Rule 12(b)(1)—Lack of Subject Matter Jurisdiction*

In evaluating a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), "the court must

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first determine whether a factual or facial challenge has been raised." Silha v. ACT, Inc., 807 F.3d 169, 173 (7th Cir. 2015) (citing Apex Dig., Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 443 (7th Cir. 2009)). A *factual* challenge alleges that even if the pleadings are sufficient, no subject matter jurisdiction exists. A *facial* challenge alleges that the complaint is deficient—that the plaintiff has not sufficiently alleged subject matter jurisdiction. Id. The difference matters—a court reviewing a factual challenge "may look beyond the pleadings and view any evidence submitted to determine if subject matter exists," while a court reviewing a facial challenge "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff." Id.

2. *Rule 12(b)(6)—Failure to State a Claim*

A motion to dismiss for failure to state a claim under Rule 12(b)(6) challenges the legal sufficiency of the complaint. A complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint must contain enough facts, accepted as true, to "state a claim for relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556, 127 S.Ct. 1955). "[T]he plausibility determination is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." W. Bend Mut. Ins. Co. v. Schumacher, 844 F.3d 670, 676 (7th Cir. 2016).

***606** 3. *42 U.S.C. § 1983*

To state a claim for a civil rights violation under 42 U.S.C. § 1983, a plaintiff must allege that someone deprived him of a right secured by the Constitution or the laws of the United States and that whoever deprived him of that right was acting under the color of state law. D.S. v. E. Porter Cty. Sch. Corp., 799 F.3d 793, 798 (7th Cir. 2015) (citing Buchanan–Moore v. Cty. of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009)).

B. Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Subject matter jurisdiction has to do with "the courts' statutory or constitutional *power* to adjudicate the case." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (emphasis in the original). "Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.' " Id. at 102, 118 S.Ct. 1003. The defendants raise a factual challenge to the court's subject matter jurisdiction, arguing that regardless of the pleadings, subject matter jurisdiction does not exist. The court may look outside the four corners of the complaint in considering that challenge.

1. *Standing*

Article III standing is an "essential component of Article III's case-or-controversy requirement," and therefore a "threshold jurisdictional question." Apex Dig., Inc., 572 F.3d at 443 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Raines v. Byrd, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). "Standing to sue is part of the common understanding of what it takes to make a justiciable case." Id. "Standing is an element of subject-matter jurisdiction in a federal civil action ...." Moore v. Wells Fargo Bank, N.A., 908 F.3d 1050, 1057 (7th Cir. 2018).

> The "irreducible constitutional minimum of standing contains three requirements." *Lujan v. Defenders of Wildlife*, [504 U.S. 555], at 560[, 112 S.Ct. 2130] [(1992)]. First and foremost, there must be (and ultimately proved) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.' " *Whitmore v. Arkansas*, [495 U.S. 149], at 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 [1990] (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S.Ct. 1660, 75 L.Ed.2d 675 ... (1983)). Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 48 L.Ed.2d 450 ... (1976). And third, there must be redressability—a likelihood that the

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requested relief will redress the alleged injury. *Id.*, at 45-46, 96 S.Ct. 1917 ...; see also *Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 45 L.Ed.2d 343 ... (1975). This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 ... (1990).

Steel Co., 523 U.S. at 102-104, 118 S.Ct. 1003.

Regarding the "injury in fact" leg of the triad, the injury must be "particularized," ***607** such that it "affect[s] the plaintiff in a personal and individual way." Spokeo, Inc. v. Robins, —— U.S. ——, 136 S. Ct. 1540, 1548, 194 L.Ed.2d 635 (2016) (citations omitted). The injury also must be "concrete"—it must be "real," not "abstract." Id. A plaintiff cannot show a particularized and concrete injury by showing "that he has merely a general interest common to all members of the public." Ex parte Levitt, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937). A plaintiff may not use a "federal court as a forum in which to air his generalized grievances about the conduct of government ...." United States v. Richardson, 418 U.S. 166, 174, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (quoting Flast v. Cohen, 392 U.S. 83, 106, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)).

As for the redressability leg of the triad, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." Steel Co., 523 U.S. at 107, 118 S.Ct. 1003. The plaintiff must show that it is "likely," not merely "speculative," that the injury the plaintiff alleges will be "redressed by a favorable decision." Lujan, 504 U.S. at 561, 112 S.Ct. 2130 (quoting Simon, 426 U.S. at 38, 96 S.Ct. 1917).

In addition to the Article III case-or-controversy requirement, there is a prudential limitation in Fed. R. Civ. P. 17(a), requiring that "[e]very action must be prosecuted in the name of the real party in interest," Fed. R. Civ. P. 17(a), and "requir[ing] that the complaint be brought in the name of the party to whom that claim 'belongs' or the party who 'according to the governing substantive law, is entitled to enforce the right.' " Rawoof v. Texor Petroleum Co., Inc., 521 F.3d 750, 756 (7th Cir. 2008) (quoting Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 193 (2d Cir. 2003)); see also RK Co. v. See, 622 F.3d 846, 850 (7th Cir. 2010) ("the real party in interest rule is only concerned with whether an action can be maintained in the plaintiff's name," and is "similar to, but distinct from, constitutional ... standing"). The real party in interest is "the one who by the substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." Act II Jewelry, LLC v. Wooten, 301 F. Supp. 3d 905, 910-911 (N.D. Ill. 2018) (quoting Checkers, Simon & Rosner v. Lurie Corp., 864 F.2d 1338, 1343 (7th Cir. 1988) (internal citations omitted)). The purpose of the rule is to "protect the defendant against a subsequent action by the party actually entitled to recover." RK Co., 622 F.3d at 850 (citing Fed. R. Civ. P. 17(a) advisory committee note (2009)).

The amended complaint alleges that the plaintiff has standing "as a voter and as a candidate for the office of Elector under Wis. Stat. §§ 5.10, *et seq* (election procedures for Wisconsin electors)." Dkt. No. 9 at 8. The defendants argue that the plaintiff lacks standing in either capacity. Dkt. No. 43 at 4-5; Dkt. No. 59 at 8-9.

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a. Standing as a voter

The amended complaint does not assert that the plaintiff voted in the 2020 general Presidential election in Wisconsin. It says that he is a registered voter, but it does not affirmatively state that he voted in the election the results of which he asks the court to decertify. His counsel asserts in the brief in opposition to the defendants' motion to dismiss—filed eight days after the original complaint and five days after the amended complaint—that the plaintiff "voted for President Trump in the 2020 General Election." Dkt. No. 72 at 17. For the first time at the motion to dismiss stage, the plaintiff provided his own declaration, in which he attests that he voted for President Donald J. Trump in the November 3, 2020 election. Dkt. No. 72-1.

***608** The plaintiff claims that the defendants failed to comply "with the requirements of the Wisconsin Election Code and thereby diluted the lawful ballots of the Plaintiff and of other Wisconsin voters and electors in violation of the United States Constitution guarantee of Equal Protection." Dkt. No. 9 at ¶116. He alleges that the defendants enacted regulations or issued guidance that, in intent and effect, favored Democratic absentee voters over Republican voters, and that these regulations and this guidance enable and facilitated voter fraud. Id. The plaintiff also asserts that he has a right to have his vote count and claims that a voter is injured if "the important of his vote is nullified." Id. at ¶127.

Several lower courts have addressed the plaintiff's theory that a single voter has standing to sue as a result of his vote being diluted by the possibility of unlawful or invalid ballots being counted. The district court for the Middle District of North Carolina catalogued a few of those decisions, all finding that the harm was too speculative and generalized —not sufficiently "concrete"—to bestow standing. These courts concluded that the vote dilution argument fell into the "generalized grievance" category. In Moore v. Circosta, the court wrote:

> Indeed, lower courts which have addressed standing in vote dilution cases arising out of the possibility of unlawful or invalid ballots being counted, as Plaintiffs have argued here, have said that this harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters. See, e.g., Donald Trump for President, Inc. v. Cegavske, Case No. 2:20-CV-1445 JCM (VCF), 488 F. Supp. 3d 993, 999–1000, (D. Nev. Sept. 18, 2020) ("As with other generally available grievances about the government, plaintiffs seek relief on behalf of their member voters that no more tangibly benefits them than it does the public at large.") (internal quotations and modifications omitted); Martel v. Condos, Case No. 5:20-cv-131, 487 F. Supp. 3d 247, 252–53, (D. Vt. Sept. 16, 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); Paher v. Cegavske, 457 F. Supp. 3d 919, 926-27 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); Am. Civil Rights Union v. Martinez-Rivera, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution [is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.")
>
> Although "[i]t would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because affects all voters," Martel, 487 F. Supp. 3d at 252, , the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury necessary for Article III standing. Compared to a claim of gerrymandering, in which the injury is specific to a group of voters based on their racial identity or the district in which they live, all voters in North Carolina, not just Individual Plaintiffs, would suffer the injury Individual Plaintiffs allege. This court finds this injury to generalized to give rise to a claim of vote dilution ....

Moore v. Circosta, Nos. 1:20CV911, 1:20CV912, 494 F.Supp.3d 289, 312–13, (M.D.N.C. Oct. 14, 2020),

***609** The court agrees. The plaintiff's alleged injuries are injuries that any Wisconsin voter suffers if the Wisconsin election process were, as the plaintiff alleges, "so riddled with fraud, illegality, and statistical impossibility that this Court, and Wisconsin's voters, courts, and legislators, cannot rely on, or certify, any numbers resulting from this election." Dkt. No. 9 at ¶5. The plaintiff has not alleged that, as a voter, he has suffered a particularized, concrete injury sufficient to confer standing.

The plaintiff argues that it is incorrect to say that his standing is based on a theory of vote dilution. Dkt. No. 72 at 19. He then proceeds to opine that he has shown in great detail how his vote and the votes of others who voted for Republican candidates was diluted. Id. at 19-20. He says the vote dilution did not affect all Wisconsin voters equally, asserting that it had a negative impact on those who voted for Republican candidates and a positive impact on those who voted for Democratic candidates. Id. at 20. He asserts that he also has shown that the defendants sought to actively disenfranchise voters for Republican candidates. Id. These are the same arguments he made in the amended complaint and they still show no more than a generalized grievance common to any voter. Donald J. Trump carried some Wisconsin counties; the voters who voted for Joseph R. Biden in those counties could make the same complaints the plaintiff makes here.

The plaintiff says that his interests and injury are "identical to that of President Trump," and cites to Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), which he characterizes as holding that "then-candidate George W. Bush of Texas had standing to raise the equal protection rights of Florida voters that a majority of the Supreme Court deemed decisive." Id. at 21 (quoting Hawkins v. Wayne Twp. Bd. of Marion Cty., Ind, 183 F. Supp. 2d 1099, 1103 (S.D. Ind. 2002)). The court is stymied by the plaintiff's assertion that his interests and injury are identical to that of President Trump. As the court will explain in the next section, contrary to his assertions, the plaintiff is not a "candidate" in the way that President Trump was a candidate for office. President Trump's interest is in being re-elected, while the plaintiff has said that his interest is in having his vote count and not be diluted. If his interest is solely in getting President Trump re-elected, as opposed to having his vote be counted as part of a valid election process, the court is aware of no constitutional

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provision that gives him the right to have his candidate of choice declared the victor.

Nor does the decision in Bush v. Gore say what the plaintiff claims it says. As far as the court can tell, the word "standing" does not appear in the majority opinion. In the Indiana decision the plaintiff cites, then-district court judge David Hamilton wrote: "If candidate Hawkins did not have standing to raise equal protection rights of voters, it would be difficult to see how then-candidate George W. Bush of Texas had standing to raise equal protection rights of Florida voters ... in Bush v. Gore." Hawkins, 183 F. Supp.2d at 1103. But the Supreme Court in Bush v. Gore never explained how candidate Bush had standing, and even if it had, the plaintiff is not a candidate.

Nor has the plaintiff demonstrated redressability. He complains that his vote was diluted and that he wants his vote to count. But he asks the court to order the results of the election de-certified and then to order defendant Evers to certify the election for Donald J. Trump. Even if this *federal* court had the authority to order the governor of the *state* of Wisconsin to certify the results of a national presidential election for any candidate—and the plaintiff ***610** has presented *no* case, statute or constitutional provision providing the court with that authority—doing so would further invalidate and nullify the plaintiff's vote. The plaintiff wants Donald J. Trump to be certified as the winner of the Wisconsin election *as a result of the plaintiff's vote.* But what he asks is for Donald J. Trump to be certified the winner *as a result of judicial fiat.* That remedy does not redress the plaintiff's alleged injury. Even the plaintiff concedes in his brief in opposition to dismissal that "[d]efendant Evers can ... provide partial redress in terms of the requested injunctive relief, namely, by refusing to certify or transmit the election results, and providing access to voting machines, records and other 'election materials.' " Dkt. No. 72 at 21. The plaintiff is wrong in that regard, as the court will explain when it discusses the related doctrine of mootness; the point is that even from the plaintiff's perspective, the remedy he seeks will not fully redress the injury he claims.

Circling back to Article III's "case or controversy" requirement, the Supreme Court has held that "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (quoting Lewis v. Casey, 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)). In other words, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." Gill v. Whitford, —— U.S. ——, 138 S. Ct. 1916, 1934, 201 L.Ed.2d 313 (2018) (citing Cuno, 547 U.S. at 353, 126 S.Ct. 1854). Even if the plaintiff had alleged a particularized, concrete injury and even if the relief he seeks would redress that injury, that relief is not tailored to the alleged injury. As the Michigan court explained in King v. Whitmer, Case No. 20-13134, 505 F.Supp.3d 720, 734–35(E.D. Mich. Dec. 7, 2020), "Plaintiffs' alleged injury does not entitle them to seek their requested remedy because the harm of having one's vote invalidated or diluted is not remedied by denying millions of others *their* right to vote."

The plaintiff's status as a registered voter does not give him standing to sue.

b. Standing as a nominee for elector

The amended complaint alleges that the plaintiff has standing to bring the suit "as a candidate for the office of Elector under Wis. Stat. §§ 5.10, et seq." Dkt. No. 9 at ¶26. The amended complaint cites to "Wis. Stat. §§ 5.10, et seq.," but the court is not sure what the "*et seq.*"—"and what follows"—contributes to the plaintiff's belief that he has standing. Wis. Stat. § 5.10 is followed by Wis. Stat. § 5.15, which concerns the "Division of municipalities into wards," as well as other sections concerning polling places and voting machines. The court assumes the plaintiff meant to reference only Wis. Stat. § 5.10.

Wis. Stat. § 5.10 states:

> Although the names of the electors do not appear on the ballot and no reference is made to them, a vote for the president and vice president named on the ballot is a vote for the electors of the candidates for whom an elector's vote is cast. Under chs. 5 to 12, all references to the presidential election, the casting of votes and the canvassing of votes for president, or for president and vice president, mean votes for them through their pledged presidential electors.

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Relying on this section, the amended complaint directs the court's attention to Carson v. Simon, 978 F.3d 1051, 1057 (8th Cir. 2020).[2] In Carson, two certified nominees ***611** of the Republican Party to be presidential electors sued the Minnesota secretary of state, challenging a consent decree that "essentially ma[de] the statutorily-mandated absentee ballot receipt deadline inoperative." Id. at 1054. As a result of the decree, the secretary of state had directed election officials "to count absentee ballots received up to a week after election day, notwithstanding Minnesota law." Id. The potential electors sought an injunction in federal court, but the district court found they lacked standing. Id.

2 The complaint also cites two Supreme Court cases: McPherson v. Blacker, 146 U.S. 1, 27, 13 S.Ct. 3, 36 L.Ed. 869 (1892) and Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000) (*per curiam*). Neither address the Article III standing of an elector. In McPherson, the Court reviewed the Michigan supreme court's decision on the constitutionality of the Michigan statute governing selection of electors. While the parties who brought the suit in state court were nominees for presidential electors, the Court did not address their standing (or lack of it). The petitioner in Bush was the then-Republican candidate, George W. Bush, who was challenging the Florida supreme court's interpretation of its election statutes; again, the Court did not address (and had no need to address) the standing of an elector to sue.

The Eighth Circuit reversed, finding that the potential electors had standing as candidates "because the plain text of Minnesota law treats prospective presidential electors as candidates." Id. at 1057. The court found that candidates suffered particularized and concrete injury from an inaccurate vote tally. Id. at 1058.

The plaintiff urges this court to reach the same conclusion. An Eighth Circuit decision is not binding on this court, but the question is whether the reasoning in that decision is persuasive. A member of the panel in Carson dissented from the majority opinion and expressed doubt about the potential electors' standing. Circuit Judge Jane Kelley wrote:

> ... I am not convinced the Electors have Article III standing to assert claims under the Electors Clause. Although Minnesota law at times refers to them as "candidates," see, e.g., Minn. Stat. § 204B.03 (2020), the Electors are not candidates for public office as that term is commonly understood. Whether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president. Id. § 208.04 subdiv. 1 ("[A] vote cast for the party candidates for president and vice president shall be deemed a vote for that party's electors.") They are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals. But even if we nonetheless assume the Electors should be treated like traditional political candidates for standing purposes, I question whether these particular candidates have demonstrated the "concrete and particularized" injury necessary for Article III standing. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 ... (1992). To the contrary, their claimed injury—a potentially "inaccurate vote tally" ... —appears to be "precisely the kind of undifferentiated, generalized grievance about the conduct of government: that the Supreme Court has long considered inadequate for standing." Lance v. Coffman, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 ... (2007) (examining standing in the context of a claim under the Elections Clause). Because the Electors, should they in fact assume that office, must swear an oath to mark their Electoral College ballots for the presidential candidate who won the popular vote, Minn. Stat. § 208.43 (2015), it is difficult to discern how they have more of a "particularized stake," Lance, 549 U.S. at 442, 127 S.Ct. 1194 ..., in Minnesota conducting fair and ***612** transparent elections than do the rest of the state's voters.

Id. at 1063.

Judge Kelly's reasoning is the more persuasive. Under Wisconsin law, a vote for the candidates of president and vice president is a vote for the electors of those candidates. Wis. Stat. § 5.65(3)(a). When the electors meet, they must vote for the candidates of the party that nominated the electors. Wis. Stat. § 7.75(2). Like Minnesota electors, Wisconsin electors may be referred to as "candidates" by statute but they are not traditional political candidates presented to and chosen by the voting public. Their interest in seeing that every valid vote is correctly counted and that no vote is diluted is no different than that of an ordinary voter. And the court has concluded, as did Judge Kelly, that the plaintiff's status as a voter does not give him standing.

The amended complaint does not mention the Elections Clause or the Electors Clause of the Constitution in relation to

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standing. In his brief in opposition to the motions to dismiss, the plaintiff alleges that he has standing under "Electors and Elections Clause." Dkt. No. 72 at 17. He asserts that the Eighth Circuit found in Carson that electors had "both Article III and Prudential standing under the Electors and Elections Clauses." Id. The plaintiff reads Carson differently than does this court. The Carson majority did not mention the Electors or Elections Clause in its discussion of Article III standing. The entire discussion of Article III standing was based on Minnesota law. See Carson, 978 F.3d at 1057-1058. In its discussion of *prudential* standing, the Carson majority stated that "[a]lthough the Minnesota Legislature may have been harmed by the Secretary's usurpation of its constitutional right under the Elector Clause, the Electors have been as well." Id. at 1058-59.

This court has found that the plaintiff does not have Article III standing, but even if had not, it disagrees that the Elector Clause[3] provides prudential standing to electors. Article II, Section 1, Clause 2 of the Constitution—known as the "Elector Clause"—states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." The clause confers on the *state* the right to appoint electors and confers on the *legislature* the right to decide the way those electors will be appointed. It confers no right on the *electors* themselves. Just a few months ago, the Supreme Court stated as much in Chiafalo v. Washington, —— U.S. ——, 140 S. Ct. 2316, 2328, 207 L.Ed.2d 761 (2020), in the context of considering whether a state could penalize an elector for breaking his pledge and voting for someone other than the candidate who won his state's popular vote:[4] "Article II and the Twelfth Amendment ***613** give States broad powers over electors, and give electors themselves no rights." The Court went on to say,

> Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like [the state of] Washington, it chooses to sanction an elector for breaching his promise. Then, too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

Id.

3 The plaintiff cites the "Elector and Elections Clause" or "Clauses" in the same breath but does not discuss the text of either. It is not clear how the plaintiff sees the Elections Clause—Article II, Sec. 1, cl. 3—as providing him with standing and the plaintiff has not developed that argument. The court notes only that in Lance v. Coffman, the Supreme Court found that plaintiffs whose only alleged injury was that the Elections Clause had not been followed did not have standing because they alleged "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." Lance, 549 U.S. at 442, 127 S.Ct. 1194.

4 Wisconsin's "pledge law"—Wis. Stat. § 7.75(1)—does not impose a penalty on a "faithless elector."

The plaintiff's status as a nominee to be a Republican elector does not give him Article III or prudential standing.

2. *Mootness*

Mootness "has sometimes been called 'the doctrine of standing set in a time frame.' " Chi. Joe's Tea Room, LLC v. Vill. of Broadview, 894 F.3d 807, 812-13 (7th Cir. 2018) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). A case becomes moot " 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " Already, LLC v. Nike, Inc., 568 U.S. 85, 91, 133 S.Ct. 721, 184 L.Ed.2d

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553 (2013) (quoting Murphy v. Hunt, 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982) (per curiam)). "Mootness strips a federal court of subject-matter jurisdiction." Id. at 815 (citing DJL Farm LLC v. EPA, 813 F.3d 1048, 1050 (7th Cir. 2016)). This is because "[a] case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III.' " United States v. Sanchez-Gomez, —— U.S. ——, 138 S. Ct. 1532, 1537, 200 L.Ed.2d 792 (2018) (quoting Already, LLC, 568 U.S. at 91, 133 S.Ct. 721).

The amended complaint states that the plaintiff brought this suit "to prohibit certification of the election results for the Office of President of the United States in the State of Wisconsin ...." Dkt. No. 9 at ¶27. The plaintiff asks the court to prohibit from occurring an event that already has occurred —an event that occurred the day before he filed this lawsuit and nine days before the court issues this order. He asks the court to enjoin defendant Evers from transmitting the certified election results, id. at ¶142—an event that already has occurred. He asks the court to order that certain votes not be counted, id., when the vote counting has been over since November 29.

The plaintiff himself demonstrates the mootness problem in his brief in opposition to dismissal. He states that defendant Evers can provide partial redress for his alleged injuries "by refusing to certify or transmit the election results." Dkt. No. 72 at 21. But Evers already has certified and transmitted the elections results—he cannot refuse to do that which he already has done.

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At the December 8 hearing, the plaintiff argued that there remains a live controversy because the electors have not yet voted and will not do so until Monday, December 14, 2020. Dkt. No. 70. This argument ignores the fact that several of the events that dictate which slate of nominees are certified to vote already have taken place and had taken place at the time the plaintiff filed his complaint. The votes have been counted. In two counties, they've been counted twice. The WEC chair has signed the canvass and certified electors ***614** for Biden/Harris. The governor has signed the Certificate of Ascertainment and the National Archive has that certificate.

In his brief in opposition to dismissal, the plaintiff points to this court's own order earlier in this case, determining that the plaintiff had not demonstrated why the December 8, 2020 "safe harbor" deadline under 3 U.S.C. § 5 was the date by which the plaintiff needed the court to issue a decision to preserve his rights. Dkt. No. 72 at 25 (citing Dkt. No. 29 at 7). The court noted in that order that the plaintiff's brief in opposition to a motion to reassign another case erroneously referred to December 8 as the date that the College of Electors was scheduled to meet. Dkt. No. 29 at 7. The court pointed out that that was incorrect, and that December 8 was the deadline by which the state would have to make its final determination of any election dispute in order to avoid congressional challenge. Id. The court then said, "Because the electors do not meet and vote until December 14, 2020, the court will impose a less truncated briefing schedule than the one the plaintiff proposes ...." Dkt. No. 29.

The plaintiff says that "[i]mplicit in this Court's determination" is the assumption that "this Court can still grant some or perhaps all of the relief requested and this Plaintiff's claims are not moot." Dkt. No. 72 at 25. The plaintiff reads more into the court's language than the court intended. In the plaintiff's earliest pleadings—the first motion for injunctive relief, the "corrected" motion for injunctive relief, the "amended" motion for injunctive relief—the plaintiff failed to identify a date by which he needed the court to act. The first time he identified such a date was in his brief in opposition to a motion to reassign another case—and then, the reference was oblique. In his opposition brief, the plaintiff stated, "With the College of Electors scheduled to meet December 8, there could never be a clearer case of 'justice delayed is justice denied.' " Dkt. No. 18 at 1. From that, the court deduced that the plaintiff needed the court to act by the date the College of Electors was scheduled to meet. But the College of Electors was not scheduled to meet December 8—it was (and is) scheduled to meet December 14. So the court set a briefing schedule that would give the defendants a chance to respond, but would complete briefing ahead of the event the plaintiff deemed important—the electoral meeting and vote. That was not a decision by this court—implicit or explicit—on the mootness of the plaintiff's claims.

The plaintiff also asserts that the "cutoff for election-related challenges, at least in the Seventh Circuit, appears to be the date that the electors meet, rather than the date of certification." Dkt. No. 72 at 24. He cites Swaffer v. Deininger, No. 08-CV-208, 2008 WL 5246167 (E.D. Wis. Dec. 17, 2008). Swaffer is not a Seventh Circuit case, and the court is not aware of a Seventh Circuit case that establishes a "cutoff for election-related challenges." And the plaintiff seems to have made up the "quote" in his brief that purports to be from Swaffer. The plaintiff asserts that these words appear on page 4 of the Swaffer decision: "even though

the ***election*** has passed, the meeting of electors obviously has not, so plaintiff's claim here is hardly moot." Dkt. No. 72 at 24-25. The court has read page 4 of Swaffer—a decision by this court's colleague, Judge J.P. Stadtmueller—three times and cannot find these words. In fact, Swaffer did not involve a challenge to a presidential election and it did not involve electors. Mr. Swaffer sought to challenge a Wisconsin statute requiring individuals or groups promoting or opposing a referendum to file a registration statement and take other actions. Swaffer, 2008 WL 5246167, at *1. The defendants argued that the election (in ***615** which the plaintiff had taken steps to oppose a referendum on whether to allow liquor sales in the Town of Whitewater) was over and that Swaffer's claims thus were moot. Id. at *2. Judge Stadtmueller disagreed, finding that because Swaffer alleged that he intended to violate the statutes at issue in the future, a credible threat of prosecution remained. Id. at *3.

Some of the relief the plaintiff requests may not be moot. For example, he asks for an immediate order seizing voting machines, ballots and other materials relating to the physical mechanisms of voting. And there remain five days until the electors vote—as the events of this year have shown, anything can happen. But most of the relief the plaintiff seeks is beyond this court's ability to redress absent the mythical time machine.

3. *Conclusion*

The plaintiff does not have Article III standing to sue in federal court for the relief he seeks.

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C. Other Arguments

Standing is the *sine qua non* of subject matter jurisdiction. Absent standing, the court does not have jurisdiction to consider the plaintiff's claims on the merits. Arguably, it has no jurisdiction to consider the other bases the defendants and *amici* assert for why the court should dismiss the case. At the risk of producing dicta (and spilling even more ink on a topic that has received an ocean's worth by now), the court will briefly address some of the other bases for the sake of completeness.

1. *Eleventh Amendment Immunity*

The defendants argue that the plaintiff's claims are barred by the Eleventh Amendment. Dkt. No. 59 at 15; Dkt. No. 54 at 10. The Eleventh Amendment "bars most claims in federal court against a state that does not consent to suit." Carmody v. Bd. of Trs. of Univ. of Ill., 893 F.3d 397, 403 (7th Cir. 2018) (citations omitted). States are immune from suit in federal court "unless the State consents to the suit or Congress has abrogated their immunity." Tucker v. Williams, 682 F.3d 654, 658 (7th Cir. 2012) (citing Seminole Tribe v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)). This includes suits brought in federal court against nonconsenting states by their own citizens. See, *e.g.*, Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Hans v. Louisiana, 134 U.S. 1, 15, 10 S.Ct. 504, 33 L.Ed. 842 (1890) ("Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?").

The plaintiff has sued the Governor of Wisconsin, Tony Evers, in his official capacity; the Wisconsin Elections Commission and each member of the WEC in his or her official capacity. Before going too much further down the Eleventh Amendment road, the court notes that the vehicle for the plaintiff to bring his constitutional claims—his claims under the Elector Clause, the Elections Clause, the Equal Protection Clause and the Due Process Clause—is 42 U.S.C. § 1983. Section 1983 prohibits a "person" acting under color of state law from violating another's civil rights. The Wisconsin Elections Commission is not a "person." It is an arm of the state of Wisconsin, Wis. Stat. § 5.05, and "states are not suable 'persons' under 42 U.S.C. § 1983." Phillips v. Baxter, 768 F. App'x 555, 559-560 (7th Cir. 2019) (citing Sebesta v. Davis, 878 F.3d 226, 231 (7th Cir. 2017)). See also, Will v. Mich. Dept. of State Police, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ("a State is not a person within the meaning of § 1983"). "Section 1983 provides a federal ***616** forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." Will, 491 U.S. at 66, 109 S.Ct. 2304. The WEC is not the proper defendant for the plaintiff's constitutional claims.

The plaintiff faces the same problem with his claims against the individual defendants, all of whom are state officials whom he sues in their official capacities. [5]

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 83 L.Ed.2d 878 ... (1985). As such, it is no different from a suit against the State itself. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L.Ed.2d 114 ... (1985); *Monell* [*v. New York City Dept. of Social Services*, 436 U.S. 658], at 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 [(1978)].

Id. at 71. Arguably, *none* of the defendants are subject to suit under 42 U.S.C. § 1983, which means that even if the plaintiff had standing, the court would have to dismiss Counts I, II and III of the amended complaint.

5 Had the plaintiff sued the individual defendants in their *personal* capacities, he could have sought relief against them under 42 U.S.C. § 1983, assuming he had standing.

Circling back to the defendants' Eleventh Amendment argument, "The Eleventh Amendment extends to state agencies and departments and, subject to the Ex Parte Young doctrine, to state employees acting in their official capacities." Nelson v. La Crosse Cty. Dist. Atty. (State of Wis.), 301 F.3d 820, 827 n.7 (7th Cir. 2002) (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123-24, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984)).

There are three exceptions to Eleventh Amendment immunity: (1) congressional abrogation, Nuñez v. Ind. Dep't of Child Servs., 817 F.3d 1042, 1044 (7th Cir. 2016) (citing Alden v. Maine, 527 U.S. 706, 754-55, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)); (2) "a state's waiver of immunity and consent to suit," id. (citing College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999)); and (3) a suit "against state officials seeking only prospective equitable relief," id. (citing Ex parte Young, 209 U.S. 123, 159-60, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). None of the exceptions apply here.

Congress did not abrogate the sovereign immunity of the states when it enacted 42 U.S.C. § 1983. Will, 491 U.S. at 66, 109 S.Ct. 2304. Wisconsin has not waived its immunity from civil actions under § 1983. See Shelton v. Wis. Dep't of Corr., 376 Wis. 2d 525, 2017 WL 2349109, *2 (Table) (Ct. App. 2017) (citing Boldt v. State, 101 Wis. 2d 566, 584-85, 305 N.W.2d 133 (1981)). And the Ex parte Young doctrine does not apply when a plaintiff asserts a claim—regardless of the relief requested—against a state official based on *state* law. Pennhurst, 465 U.S. at 106, 104 S.Ct. 900 ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). "In determining whether the Ex parte Young doctrine avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry' into whether the complaint alleges an ongoing violation of ***617** federal law and seeks relief properly characterized as prospective." Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 636, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (quoting Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 296, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997); McDonough Assocs., Inc. v. Grunloh, 722 F.3d 1043, 1051 (7th Cir. 2013)).

Count IV of the amended complaint alleges "[w]ide-spread ballot fraud," a *state*-law claim. The Eleventh Amendment bars that claim against the defendants in their official capacities. The Eleventh Amendment also bars the plaintiff's federal claims to the extent that the plaintiff seeks retrospective relief. The Supreme Court has refused to extend the Ex Parte Young doctrine to claims for retrospective relief. Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985) (citing Pennhurst, 465 U.S. at 102-103, 104 S.Ct. 900). The amended complaint seeks (1) a "temporary restraining order instructing Defendants to de-certify the results of the General Election for the Office of President," dkt. no. 9 at 47; (2) "an order instructing the Defendants to certify the results of the General Election for Office of the President in favor of President Donald Trump," id.; (3) "a temporary restraining order" prohibiting the tabulation of unlawful votes," id.; (4) an order preserving voting equipment and data, id.; (5) "the elimination of the mail ballots from counting in the 2020 election," id. at 48; (6) the disqualification of Wisconsin's electors from participating in

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the 2020 election, id.; and (7) an order directing Wisconsin's electors to vote for President Donald Trump, id. As the court already has noted, with the possible exception of the request for an order preserving voting equipment and data, the relief the plaintiff requests is retrospective.

The plaintiff disagrees—he characterizes the certification of the election results as "ongoing violations of federal law ... ongoing violations of the Electors and Elections Clauses, the Equal Protection and Due Process Clauses, as well as likely violations of federal law including the Voting Rights Act and the Help America Vote Act." Dkt. No. 72 at 25-26. The plaintiff has not brought claims under the latter two statutes and saying that a completed event is an ongoing violation doesn't make it so.

2. *Exclusive Remedy/Exhaustion/Abstention*

Defendant Evers moves to dismiss because Wisconsin provides a remedy to address irregularities or defects during the voting or canvassing process: Wis. Stat. § 9.01(11). Four days ago, the Wisconsin Supreme Court held that § 9.01(6) requires that a party aggrieved after a recount must appeal by filing suit in circuit court. Trump v. Evers, No. 2020AP1971-OA, Order at *2 (Wis. Dec. 3, 2020). In a concurring opinion, Justice Hagedorn noted that Wis. Stat. § 9.01(11) provides that § 9.01 is the exclusive judicial remedy for an aggrieved candidate. Defendant Evers points out that President Trump has lawsuits pending in state circuit courts and argues that those cases raise many of the claims the plaintiff raises here. Dkt. No. 59 at 11. He argues that the process detailed in Wis. Stat. § 9.01 is designed to allow an aggrieved candidate to resolve election challenges promptly, and that for this court to permit the plaintiff to circumvent that process "would eviscerate Wisconsin's careful process for properly and quickly deciding election challenges." Id. at 11-12.

Of course, the plaintiff has no redress under Wis. Stat. § 9.01, because he is not a "candidate" in the sense of that statute. But Evers argues that there was a form of state-law relief available to the plaintiff. He asserts that the plaintiff should have filed a complaint with the Wisconsin Elections ***618** Commission under Wis. Stat. § 5.06. Dkt. No. 59 at 13. That statute allows a voter dissatisfied with the Wisconsin election process to file a written, sworn complaint with the elections board. Wis. Stat. § 5.06(1). The statute states that no voter may "commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official" without first filing a complaint under § 5.06(1). Wis. Stat. § 5.06(2). Evers points out that the plaintiff has not demonstrated that he followed this procedure and thus that the plaintiff did not exhaust his remedies before coming to federal court. Dkt. No. 59 at 14.

The plaintiff does not directly respond to the exhaustion argument. He simply maintains that he has a right to bring his constitutional claims in federal court, argues that there is no evidence that the statute Evers cites is an exhaustion requirement and asserts that the court has federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction over any state-law claims under 28 U.S.C. § 1367.[6] Dkt. No. 72 at 27-28. He neatly sidesteps the question of why he did not follow a procedure that would have allowed him to direct his concerns to the entity in charge of enforcing the state's election laws and in a way that likely would have brought those concerns to that entity's attention long before the election results were certified.

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6 The court could exercise supplemental jurisdiction over state-law claims only if there remained federal claims to which those state-law claims related. As the court has noted, it likely would have been required to dismiss the federal claims because the plaintiff asserted them through § 1983 against state officials in their official capacities, which in turn would have required dismissal of any state claims for lack of subject matter jurisdiction.

Because the court has concluded that the plaintiff does not have standing, and because the plaintiff has sued defendants who either are not suable under § 1983 or are protected by Eleventh Amendment immunity, the court will not accept the invitations of the defendants and *amici* to wade into the waters of the various types of abstention. If this court does not have subject matter jurisdiction, there is no case or controversy from which it should abstain. The court agrees with the parties, however, that the relief the plaintiff requests —asking a federal judge to order a state governor to decertify the election results for an entire state and direct that governor to certify a different outcome—constitutes "an extraordinary intrusion on state sovereignty from which a federal court should abstain under longstanding precedent." Dkt. No. 57 at 28.

3. *Laches*

The defendants argue that the equitable defense of laches requires dismissal, because the plaintiff "inexplicably waited until after the election, after the canvassing, after the recount, after the audit, after results were certified, and indeed until the eve of the electoral college vote, to bring his claim of state law violations and widespread fraud ...." Dkt. No. 52 at 11. See also, Dkt. No 59 at 17 ("the doctrine of laches bars [the plaintiff's] claims because he has unreasonably delayed bringing his claims to the detriment not only of Defendants, but also of the nearly 3.3 million voters in Wisconsin who voted in this last election under the good-faith belief that they were following the correct procedures to have their votes counted.").

The doctrine of laches "addresses delay in the pursuit of a right when a party must assert that right in order to benefit from it." Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 820 (7th Cir. 1999). "For laches to apply in a particular case, the party asserting the defense ***619** must demonstrate: (1) an unreasonable lack of diligence by the party against whom the defense is asserted and (2) prejudice arising therefrom." Id. (citing Cannon v. Univ. of Health Scis./The Chicago Med. Sch., 710 F.2d 351, 359 (7th Cir. 1983)). "Timeliness must be judged by the knowledge of the plaintiffs as well as the nature of the right involved." Jones v. Markiewicz-Qualkinbush, 842 F.3d 1053, 1061 (7th Cir. 2016).

"The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept." Id. at 1060-61. In fact, the Seventh Circuit has held that such "claims must be brought expeditiously ... to afford the district court sufficient time in advance of an election to rule without disruption of the electoral cycle." Id. at 1061 (internal quotation marks and citations omitted).

The amended complaint asserts that the alleged problems with the Dominion voting machine software "have been widely reported in the press and have been subject to investigation." Dkt. No. 9 at ¶12. It cites to exhibits from January and August of 2020. Dkt. No. 9 at 5 n.1. It cites to the WEC's May 13, 2020 directive to clerks that they should not reject the ballots of "indefinitely confined" absentee voters. Id. at ¶40. It cites an October 18, 2016 memorandum issued by the WEC instructing clerks on how to handle absentee envelope certifications that did not bear the address of the witness. Id. at ¶44. It cites October 19, 2020 instructions by the WEC to clerks about filling in missing ballot information. Id. at ¶45.

Defendant Evers points out that the plaintiff's own allegations demonstrate that he has known about the Dominion voting machine issues since long before the election. Dkt. No. 59 at 17-18. He argues that the WEC guidance about which the plaintiff complains came in directives issued in October 2016, May 2020 and October 2020. Id. He asserts that the plaintiff has made no effort "to offer a justifiable explanation for why he waited until weeks after the election to challenge" these issues. Id. at 18. The WEC defendants advise the court that the issue regarding "indefinitely confined" voters was litigated in state court almost eight months ago. Dkt. No. 54 at 9 (citing Pet. For Original Action dated March 27, 2020, Supreme Court of Wisconsin, No. 2020AP000557-OA). They assert that the plaintiff "waited to challenge widely-known procedures until after millions of voters cast their ballots in reliance on those procedures." Id. at 6. They state that "[i]f the doctrine of laches means anything, it is that Plaintiff here cannot overturn the results of a completed and certified election through preliminary relief in this late-filed case." Id.

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The plaintiff first responds that laches is a defense and shouldn't be raised on a motion to dismiss. Dkt. No. 72 at 22. He then claims that he could not have known the bases of any of these claims until after the election. Id. at 22-23. He says that because Wisconsin election officials did not "announce or publicize their misconduct," and because, he alleges, they "prevented Republican poll watchers from observing the ballot counting and handling," it took him time to gather the evidence and testimony he attached to the amended complaint. Id. at 23. Finally, he alleges that the delay post-November 3, 2020 is attributable to the defendants' failure to timely complete the election count. Id. He insists that he filed this suit at the earliest possible moment—the day after the certification. Id.

The court has determined that the plaintiff does not have standing. That means that the court does not have jurisdiction to assess the plaintiff's credibility, and it will refrain from doing so.

***620** 4. *Failure to state a claim upon which relief can be granted*

Both defendants asked the court to dismiss the case for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Because

the court does not have subject matter jurisdiction, it will not address the sufficiency of the substantive claims in the amended complaint.

5. *Requests for injunctive relief*

For the same reason, the court cannot address the merits of the plaintiff's request for preliminary injunctive relief.

V. Conclusion

This court's authority to grant relief is confined by the limits of the Constitution. Granting the relief the plaintiff requests would take the court far outside those limits, and outside the limits of its oath to uphold and defendant the Constitution. The court will grant the defendants' motion to dismiss.

The court **GRANTS** Defendant Governor Tony Evers's Motion to Dismiss Plaintiff's Amended Complaint. Dkt. No. 51.

The court **GRANTS** Defendant Wisconsin Elections Commission and Its Members' Motion to Dismiss. Dkt. No. 53.

The court **DENIES AS MOOT** Plaintiff's Corrected Motion for Declaratory, Emergency, and Permanent Injunctive Relief. Dkt. No. 6.

The court **DENIES AS MOOT** Plaintiff's Amended Motion for Temporary Restraining Order and Preliminary Injunction to be Considered in an Expedited Manner Dkt. No. 10.

The court **DISMISSES** the Amended Complaint for Declaratory, Emergency, and Permanent Injunctive Relief. Dkt. No. 9.

The court **ORDERS** that this case is **DISMISSED.**

All Citations

506 F.Supp.3d 596

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APPENDIX NO. 6

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126 S.Ct. 2749
Supreme Court of the United States

Salim Ahmed HAMDAN, Petitioner,
v.
Donald H. RUMSFELD, Secretary of Defense, et al.

No. 05–184.
|
Argued March 28, 2006.
|
Decided June 29, 2006.

Synopsis
Background: Alien, who was detained at Guantanamo Bay, Cuba, and charged with various terrorism-related offenses, was designated for trial before a military commission. He petitioned for habeas relief. The United States District Court for the District of Columbia granted petition. Government appealed. The United States Court of Appeals for the District of Columbia, 415 F.3d 33, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Stevens, held that:

Detainee Treatment Act (DTA) did not deprive Supreme Court of jurisdiction;

abstention was not appropriate;

military commission was not expressly authorized by any congressional act;

military commission's procedures violated Uniform Code of Military Justice (UCMJ); and

military commission did not satisfy Geneva Conventions.

Reversed and remanded.

Justice Breyer filed concurring opinion in which Justices Kennedy, Souter and Ginsburg joined.

Justice Kennedy concurred in part and filed opinion in which Justices Souter, Ginsburg and Breyer joined in part.

Justice Scalia filed dissenting opinion in which Justices Thomas and Alito joined.

Justice Thomas filed dissenting opinion in which Justice Scalia joined and Justice Alito joined in part.

Justice Alito filed dissenting opinion in which Justices Scalia and Thomas joined in part.

Chief Justice Roberts did not participate.

Procedural Posture(s): On Appeal.

****2752 *557** *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 Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

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Pursuant to Congress' Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11, 2001, al ****2753** Qaeda terrorist attacks (AUMF), U.S. Armed Forces invaded Afghanistan. During the hostilities, in 2001, militia forces captured petitioner Hamdan, a Yemeni national, and turned him over to the U.S. military, which, in 2002, transported him to prison in Guantanamo Bay, Cuba. Over a year later, the President deemed Hamdan eligible for trial by military commission for then-unspecified crimes. After another year, he was charged with conspiracy "to commit ... offenses triable by military commission." In habeas and mandamus petitions, Hamdan asserted that the military commission lacks authority to try him because (1) neither congressional Act nor the common law of war supports trial by this commission for conspiracy, an offense that, Hamdan says, is not a violation of the law of war; and (2) the procedures adopted to try him violate basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

The District Court granted habeas relief and stayed the commission's proceedings, concluding that the President's authority to establish military commissions extends only to offenders or offenses triable by such a commission under the law of war; that such law includes the Third Geneva Convention; that Hamdan is entitled to that Convention's full

protections until adjudged, under it, not to be a prisoner of war; and that, whether or not Hamdan is properly classified a prisoner of war, the commission convened to try him was established in violation of both the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801 *et seq.,* and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear. The D.C. Circuit reversed. Although it declined the Government's invitation to abstain from considering Hamdan's challenge, cf. *Schlesinger v. Councilman,* 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591, the appeals court ruled, on the merits, that Hamdan was not entitled to relief because the Geneva Conventions are not judicially enforceable. The court also concluded ***558** that *Ex parte Quirin,* 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3, foreclosed any separation-of-powers objection to the military commission's jurisdiction, and that Hamdan's trial before the commission would violate neither the UCMJ nor Armed Forces regulations implementing the Geneva Conventions.

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

415 F.3d 33, reversed and remanded.

Justice STEVENS delivered the opinion of the Court, except as to Parts V and VI–D–iv, concluding:

1. The Government's motion to dismiss, based on the Detainee Treatment Act of 2005(DTA), is denied. DTA § 1005(e)(1) provides that "no court ... shall have jurisdiction to hear or consider ... an application for ... habeas corpus filed by ... an alien detained ... at Guantanamo Bay." Section 1005(h)(2) provides that §§ 1005(e)(2) and (3)—which give the D.C. Circuit "exclusive" jurisdiction to review the final decisions of, respectively, combatant status review tribunals and military commissions—"shall apply with respect to any claim whose review is ... pending on" the DTA's effective date, as was Hamdan's case. The Government's argument that §§ 1005(e)(1) and (h) repeal this Court's jurisdiction to review the decision below is rebutted by ordinary principles of statutory construction. A negative inference may be drawn from Congress' failure to include § 1005(e)(1) within the scope of § 1005(h)(2). Cf., *e.g., Lindh v. Murphy,* 521 U.S. 320, 330, 117 S.Ct. 2059, 138 L.Ed.2d 481. "If ... Congress was ****2754** reasonably concerned to ensure that [§§ 1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [§ 1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." *Id.,* at 329, 117 S.Ct. 2059. If anything, the evidence of deliberate omission is stronger here than it was in *Lindh*. The legislative history shows that Congress not only considered the respective temporal reaches of §§ 1005(e)(1), (2), and (3) together at every stage, but omitted paragraph (1) from its directive only after having *rejected* earlier proposed versions of the statute that would have included what is now paragraph (1) within that directive's scope. Congress' rejection of the very language that would have achieved the result the Government urges weighs heavily against the Government's interpretation. See *Doe v. Chao,* 540 U.S. 614, 621–623, 124 S.Ct. 1204, 157 L.Ed.2d 1122. Pp. 2762–2769.

2. The Government argues unpersuasively that abstention is appropriate under *Councilman,* which concluded that, as a matter of comity, federal courts should normally abstain from intervening in pending courts-martial against service members, see 420 U.S., at 740, 95 S.Ct. 1300. Neither of the comity considerations *Councilman* identified weighs in favor of abstention here. First, the assertion that military discipline and, therefore, ***559** the Armed Forces' efficient operation, are best served if the military justice system acts without regular interference from civilian courts, see *id.,* at 752, 95 S.Ct. 1300, is inapt because Hamdan is not a service member. Second, the view that federal courts should respect the balance Congress struck when it created "an integrated system of military courts and review procedures" is inapposite, since the tribunal convened to try Hamdan is not part of that integrated system. Rather than *Councilman,* the most relevant precedent is *Ex parte Quirin,* where the Court, far from abstaining pending the conclusion of ongoing military proceedings, expedited its review because of (1) the public importance of the questions raised, (2) the Court's duty, in both peace and war, to preserve the constitutional safeguards of civil liberty, and (3) the public interest in a decision on those questions without delay, 317 U.S., at 19, 63 S.Ct. 1. The Government has identified no countervailing interest that would permit federal courts to depart from their general duty to exercise the jurisdiction Congress has conferred on them. Pp. 2769–2772.

3. The military commission at issue is not expressly authorized by any congressional Act. *Quirin* held that Congress had, through Article of War 15, sanctioned the use of military commissions to try offenders or offenses against the law of war. 317 U.S., at 28, 63 S.Ct. 1. UCMJ Art. 21, which is substantially identical to the old Art. 15, reads: "The jurisdiction [of] courts-martial shall not be construed as depriving military commissions ... of concurrent jurisdiction

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in respect of offenders or offenses that by statute or by the law of war may be tried by such ... commissions." 10 U.S.C. § 821. Contrary to the Government's assertion, even *Quirin* did not view that authorization as a sweeping mandate for the President to invoke military commissions whenever he deems them necessary. Rather, *Quirin* recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President already had to convene military commissions—with the express condition that he and those under his command comply with the law of war. See 317 U.S., at 28–29, 63 S.Ct. 1. Neither the AUMF nor the DTA can be read to provide specific, overriding authorization for the commission convened ****2755** to try Hamdan. Assuming the AUMF activated the President's war powers, see *Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578, and that those powers include authority to convene military commissions in appropriate circumstances, see, *e.g., id.,* at 518, 124 S.Ct. 2633, there is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the authorization set forth in UCMJ Art. 21. Cf. *Ex parte Yerger,* 8 Wall. 85, 105, 19 L.Ed. 332. Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Art. 21 or the AUMF, was enacted after the President convened Hamdan's ***560** commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war. Absent a more specific congressional authorization, this Court's task is, as it was in *Quirin,* to decide whether Hamdan's military commission is so justified. Pp. 2772–2775.

4. The military commission at issue lacks the power to proceed because its structure and procedures violate both the UCMJ and the four Geneva Conventions signed in 1949. Pp. 2786–2798.

(a) The commission's procedures, set forth in Commission Order No. 1, provide, among other things, that an accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding the official who appointed the commission or the presiding officer decides to "close." Grounds for closure include the protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods, or activities, and "other national security interests." Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to the client what took place therein. Another striking feature is that the rules governing Hamdan's commission permit the admission of *any* evidence that, in the presiding officer's opinion, would have probative value to a reasonable person. Moreover, the accused and his civilian counsel may be denied access to classified and other "protected information," so long as the presiding officer concludes that the evidence is "probative" and that its admission without the accused's knowledge would not result in the denial of a full and fair trial. Pp. 2786–2787.

(b) The Government objects to this Court's consideration of a procedural challenge at this stage on the grounds, *inter alia,* that Hamdan will be able to raise such a challenge following a final decision under the DTA, and that there is no basis to presume, before the trial has even commenced, that it will not be conducted in good faith and according to law. These contentions are unsound. First, because Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a prison sentence shorter than 10 years, he has no automatic right to federal-court review of the commission's "final decision" under DTA § 1005(e)(3). Second, there *is* a basis to presume that the procedures employed during Hamdan's trial will violate the law: He will be, and *indeed already has been,* excluded from his own trial. ***561** Thus, review of the procedures in advance of a "final decision" is appropriate. Pp. 2787–2788.

(c) Because UCMJ Article 36 has not been complied with here, the rules specified for Hamdan's commission trial are ****2756** illegal. The procedures governing such trials historically have been the same as those governing courts-martial. Although this uniformity principle is not inflexible and does not preclude all departures from court-martial procedures, any such departure must be tailored to the exigency that necessitates it. That understanding is reflected in Art. 36(b), which provides that the procedural rules the President promulgates for courts-martial and military commissions alike must be "uniform insofar as practicable," 10 U.S.C. § 836(b). The "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. The President here has determined, pursuant to the requirement of *Art. 36(a),* that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts" to Hamdan's commission. The President has not, however, made a similar official determination

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that it is impracticable to apply the rules for courts-martial. And even if subsection (b)'s requirements could be satisfied without an official practicability determination, that subsection's requirements are not satisfied here. Nothing in the record demonstrates that it would be impracticable to apply court-martial rules here. There is no suggestion, *e.g.,* of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. It is not evident why the danger posed by international terrorism, considerable though it is, should require, in the case of Hamdan's trial, any variance from the court-martial rules. The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts–Martial but also by the UCMJ itself: The right to be present. See 10 U.S.C. § 839(c). Because the jettisoning of so basic a right cannot lightly be excused as "practicable," the court-martial rules must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Art. 36(b). Pp. 2788–2793.

(d) The procedures adopted to try Hamdan also violate the Geneva Conventions. The D.C. Circuit dismissed Hamdan's challenge in this regard on the grounds, *inter alia,* that the Conventions are not judicially enforceable and that, in any event, Hamdan is not entitled to their protections. Neither of these grounds is persuasive. Pp. 2793–2796.

***562** i) The appeals court relied on a statement in *Johnson v. Eisentrager,* 339 U.S. 763, 789, n. 14, 70 S.Ct. 936, 94 L.Ed. 1255, suggesting that this Court lacked power even to consider the merits of a Convention argument because the political and military authorities had sole responsibility for observing and enforcing prisoners' rights under the Convention. However, *Eisentrager* does not control here because, regardless of the nature of the rights conferred on Hamdan, cf. *United States v. Rauscher,* 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425, they are indisputably part of the law of war, see *Hamdi,* 542 U.S., at 520–521, 124 S.Ct. 2633, compliance with which is the condition upon which UCMJ Art. 21 authority is granted. Pp. 2793–2794.

(ii) Alternatively, the appeals court agreed with the Government that the Conventions do not apply because Hamdan was captured during the war with al Qaeda, which is not a Convention signatory, and that conflict is distinct from the war with signatory Afghanistan. The Court need not decide the merits of this argument because there is at least one provision ****2757** of the Geneva Conventions that applies here even if the relevant conflict is not between signatories. Common Article 3, which appears in all four Conventions, provides that, in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties [*i.e.,* signatories], each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons ... placed *hors de combat* by ... detention," including a prohibition on "the passing of sentences ... without previous judgment ... by a regularly constituted court affording all the judicial guarantees ... recognized as indispensable by civilized peoples." The D.C. Circuit ruled Common Article 3 inapplicable to Hamdan because the conflict with al Qaeda is international in scope and thus not a "conflict not of an international character." That reasoning is erroneous. That the quoted phrase bears its literal meaning and is used here in contradistinction to a conflict between nations is demonstrated by Common Article 2, which limits its own application to any armed conflict between signatories and provides that signatories must abide by all terms of the Conventions even if another party to the conflict is a nonsignatory, so long as the nonsignatory "accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict does not involve a clash between nations (whether signatories or not). Pp. 2794–2796.

(iii) While Common Article 3 does not define its "regularly constituted court" phrase, other sources define the words to mean an "ordinary military cour[t]" that is "established and organized in accordance ***563** with the laws and procedures already in force in a country." The regular military courts in our system are the courts-martial established by congressional statute. At a minimum, a military commission can be "regularly constituted" only if some practical need explains deviations from court-martial practice. No such need has been demonstrated here. Pp. 2796–2797.

(iv) Common Article 3's requirements are general, crafted to accommodate a wide variety of legal systems, but they are *requirements* nonetheless. The commission convened to try Hamdan does not meet those requirements. P. 2798.

(e) Even assuming that Hamden is a dangerous individual who would cause great harm or death to innocent civilians

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given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment. P. 2798.

Justice STEVENS, joined by Justice SOUTER, Justice GINSBURG, and Justice BREYER, concluded in Parts V and VI–D–iv:

1. The Government has not charged Hamdan with an "offens[e] ... that ... by the law of war may be tried by military commissio[n]," 10 U.S.C. § 821. Of the three sorts of military commissions used historically, the law-of-war type used in *Quirin* and other cases is the only model available to try Hamdan. Among the preconditions, incorporated in Article of War 15 and, later, UCMJ Art. 21, for such a tribunal's exercise of jurisdiction are, *inter alia,* that it must be limited to trying offenses committed within the convening commander's field of command, *i.e.,* within the theater of war, and that the offense charged must have been committed during, not before or after, the war. Here, Hamdan is not alleged to have committed any overt act in a theater of war or on any ****2758** specified date after September 11, 2001. More importantly, the offense alleged is not triable by law-of-war military commission. Although the common law of war may render triable by military commission certain offenses not defined by statute, *Quirin,* 317 U.S., at 30, 63 S.Ct. 1, the precedent for doing so with respect to a particular offense must be plain and unambiguous, cf., *e.g., Loving v. United States,* 517 U.S. 748, 771, 116 S.Ct. 1737, 135 L.Ed.2d 36. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war. Moreover, that conspiracy is not a recognized violation of the law of war is confirmed by other international sources, including, *e.g.,* the International Military Tribunal at Nuremberg, which pointedly refused to recognize conspiracy to commit war crimes as such a violation. Because the conspiracy charge ***564** does not support the commission's jurisdiction, the commission lacks authority to try Hamdan. Pp. 2775–2786.

2. The phrase "all the judicial guarantees ... recognized as indispensable by civilized peoples" in Common Article 3 of the Geneva Conventions is not defined, but it must be understood to incorporate at least the barest of the trial protections recognized by customary international law. The procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by practical need, and thus fail to afford the requisite guarantees. Moreover, various provisions of Commission Order No. 1 dispense with the principles, which are indisputably part of customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. Pp. 2797–2798.

Justice KENNEDY, agreeing that Hamdan's military commission is unauthorized under the Uniform Code of Military Justice, 10 U.S.C. §§ 836 and 821, and the Geneva Conventions, concluded that there is therefore no need to decide whether Common Article 3 of the Conventions requires that the accused have the right to be present at all stages of a criminal trial or to address the validity of the conspiracy charge against Hamdan. Pp. 2768–2769.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, VI through VI–D–iii, VI–D–v, and VII, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts V and VI–D–iv, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which KENNEDY, SOUTER, and GINSBURG, JJ., joined, *post,* p. 2799. KENNEDY, J., filed an opinion concurring in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined as to Parts I and II, *post,* p. 2799. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post,* p. 2810. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ALITO, J., joined as to all but Parts I, II–C–1, and III–B–2, *post,* p. 2823. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined ****2759** as to Parts I through III, *post,* p. 2849. ROBERTS, C. J., took no part in the consideration or decision of the case.

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Opinion

Justice STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, Parts VI through VI–D–iii, Part VI–D–v, and Part VII, and an opinion with respect to Parts V and VI–D–iv, in which Justice SOUTER, Justice GINSBURG, and Justice BREYER join.

***566** Petitioner Salim Ahmed Hamdan, a Yemeni national, is in custody at an American prison in Guantanamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (which then governed Afghanistan), Hamdan was captured by militia forces and turned over to the U.S. military. In June 2002, he was transported to Guantanamo Bay. Over a year later, the President deemed him eligible for trial by military commission for then-unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy "to commit ... offenses triable by military commission." App. to Pet. for Cert. 65a.

***567** Hamdan filed petitions for writs of habeas corpus and mandamus to challenge the Executive Branch's intended means of prosecuting this charge. He concedes that a court-martial constituted in accordance with the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801 *et seq.* (2000 ed. and Supp. III), would have authority to try him. His objection is that the military commission the President has convened lacks such authority, for two principal reasons: First, neither congressional Act nor the common law of war supports trial by this commission for the crime of conspiracy—an offense that, Hamdan says, is not a violation of the law of war. Second, Hamdan contends, the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

The District Court granted Hamdan's request for a writ of habeas corpus. 344 F.Supp.2d 152 (DC 2004). The Court of Appeals for the District of Columbia Circuit reversed. 415 F.3d 33 (2005). Recognizing, as we did over a half century ago, that trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure, *Ex parte Quirin,* 317 U.S. 1, 19, 63 S.Ct. 1, 87 L.Ed. 3 (1942), we granted certiorari. 546 U.S. 1002, 126 S.Ct. 622, 163 L.Ed.2d 504 (2005).

For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions. Four of us also conclude, see Part V, *infra,* that the offense with which Hamdan ****2760** has been charged is not an "offens[e] that by ... the law of war may be tried by military commissions." 10 U.S.C. § 821.

I

On September 11, 2001, agents of the al Qaeda terrorist organization hijacked commercial airplanes and attacked the ***568** World Trade Center in New York City and the national headquarters of the Department of Defense in Arlington, Virginia. Americans will never forget the devastation wrought by these acts. Nearly 3,000 civilians were killed.

Congress responded by adopting a Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks ... in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 ed., Supp. III). Acting pursuant to the AUMF, and having determined that the Taliban regime had supported al Qaeda, the President ordered the Armed Forces of the United States to invade Afghanistan. In the ensuing hostilities, hundreds of individuals, Hamdan among them, were captured and eventually detained at Guantanamo Bay.

On November 13, 2001, while the United States was still engaged in active combat with the Taliban, the President issued a comprehensive military order intended to govern the "Detention, Treatment, and Trial of Certain Non–Citizens in the War Against Terrorism," 66 Fed.Reg. 57833 (hereinafter November 13 Order or Order). Those subject to the November 13 Order include any noncitizen for whom the President determines "there is reason to believe" that he or she (1) "is or was" a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States. *Id.,* at 57834. Any such individual "shall, when tried, be tried by military commission for any and all offenses

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triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death." *Ibid.* The November ***569** 13 Order vested in the Secretary of Defense the power to appoint military commissions to try individuals subject to the Order, but that power has since been delegated to John D. Altenburg, Jr., a retired Army major general and longtime military lawyer who has been designated "Appointing Authority for Military Commissions."

On July 3, 2003, the President announced his determination that Hamdan and five other detainees at Guantanamo Bay were subject to the November 13 Order and thus triable by military commission. In December 2003, military counsel was appointed to represent Hamdan. Two months later, counsel filed demands for charges and for a speedy trial pursuant to Article 10 of the UCMJ, 10 U.S.C. § 810. On February 23, 2004, the legal adviser to the Appointing Authority denied the applications, ruling that Hamdan was not entitled to any of the protections of the UCMJ. Not until July 13, 2004, after Hamdan had commenced this action in the United States District Court for the Western District of Washington, did the Government finally charge him with the offense for which, a year earlier, he had been deemed eligible for trial by military commission.

The charging document, which is unsigned, contains 13 numbered paragraphs. The first two paragraphs recite the asserted bases for the military commission's ****2761** jurisdiction—namely, the November 13 Order and the President's July 3, 2003, declaration that Hamdan is eligible for trial by military commission. The next nine paragraphs, collectively entitled "General Allegations," describe al Qaeda's activities from its inception in 1989 through 2001 and identify Usama bin Laden as the group's leader. Hamdan is not mentioned in these paragraphs.

Only the final two paragraphs, entitled "Charge: Conspiracy," contain allegations against Hamdan. Paragraph 12 charges that "from on or about February 1996 to on or about November 24, 2001," Hamdan "willfully and knowingly ***570** joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." App. to Pet. for Cert. 65a. There is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity.

Paragraph 13 lists four "overt acts" that Hamdan is alleged to have committed sometime between 1996 and November 2001 in furtherance of the "enterprise and conspiracy": (1) he acted as Usama bin Laden's "bodyguard and personal driver," "believ[ing]" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks of September 11, 2001; (2) he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them); (3) he "drove or accompanied [U]sama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures," at which bin Laden encouraged attacks against Americans; and (4) he received weapons training at al Qaeda-sponsored camps. *Id.,* at 65a–67a.

After this formal charge was filed, the United States District Court for the Western District of Washington transferred Hamdan's habeas and mandamus petitions to the United States District Court for the District of Columbia. Meanwhile, a Combatant Status Review Tribunal (CSRT) convened pursuant to a military order issued on July 7, 2004, decided that Hamdan's continued detention at Guantanamo Bay was warranted because he was an "enemy combatant."[1] ***571** Separately, proceedings before the military commission commenced.

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1 An "enemy combatant" is defined by the military order as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal § *a* (July 7, 2004), available at http://www.defenselink. mil/news/Jul2004/d20040707review.pdf (all Internet materials as visited June 26, 2006, and available in Clerk of Court's case file).

On November 8, 2004, however, the District Court granted Hamdan's petition for habeas corpus and stayed the commission's proceedings. It concluded that the President's authority to establish military commissions extends only to "offenders or offenses triable by military [commission] under the law of war," 344 F.Supp.2d, at 158; that the law of war includes the Geneva Convention (III) Relative to the

Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 (Third Geneva Convention); that Hamdan is entitled to the full protections of the Third Geneva Convention until adjudged, in compliance with that treaty, not ****2762** to be a prisoner of war; and that, whether or not Hamdan is properly classified as a prisoner of war, the military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear. 344 F.Supp.2d, at 158–172.

The Court of Appeals for the District of Columbia Circuit reversed. Like the District Court, the Court of Appeals declined the Government's invitation to abstain from considering Hamdan's challenge. Cf. *Schlesinger v. Councilman,* 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975). On the merits, the panel rejected the District Court's further conclusion that Hamdan was entitled to relief under the Third Geneva Convention. All three judges agreed that the Geneva Conventions were not "judicially enforceable," 415 F.3d, at 38, and two thought that the Conventions did not in any event apply to Hamdan, *id.,* at 40–42; but see *id.,* at 44 (Williams, J., concurring). In other portions of its opinion, the court concluded that our decision in *Quirin* foreclosed any separation-of-powers objection to ***572** the military commission's jurisdiction, and held that Hamdan's trial before the contemplated commission would violate neither the UCMJ nor U.S. Armed Forces regulations intended to implement the Geneva Conventions. 415 F.3d, at 38, 42–43.

On November 7, 2005, we granted certiorari to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings.

II

On February 13, 2006, the Government filed a motion to dismiss the writ of certiorari. The ground cited for dismissal was the recently enacted Detainee Treatment Act of 2005(DTA), Pub.L. 109–148, 119 Stat. 2739. We postponed our ruling on that motion pending argument on the merits, 546 U.S. 1166, 126 S.Ct. 622, 163 L.Ed.2d 504 (2006), and now deny it.

The DTA, which was signed into law on December 30, 2005, addresses a broad swath of subjects related to detainees. It places restrictions on the treatment and interrogation of detainees in U.S. custody, and it furnishes procedural protections for U.S. personnel accused of engaging in improper interrogation. DTA §§ 1002–1004, 119 Stat. 2739–2740. It also sets forth certain "PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES." § 1005, *id.,* at 2740. Subsections (a) through (d) of § 1005 direct the Secretary of Defense to report to Congress the procedures being used by CSRTs to determine the proper classification of detainees held in Guantanamo Bay, Iraq, and Afghanistan, and to adopt certain safeguards as part of those procedures.

Subsection (e) of § 1005, which is entitled "JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS," supplies the basis for the Government's jurisdictional argument. The subsection contains three numbered paragraphs. The first paragraph amends the judicial code as follows:

> ***573** "(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:
>
> " '(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—
>
> " '(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> ****2763** " '(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—
>
> " '(A) is currently in military custody; or
>
> " '(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.' " § 1005(e), *id.,* at 2741–2742.

Paragraph (2) of subsection (e) vests in the Court of Appeals for the District of Columbia Circuit the "exclusive jurisdiction to determine the validity of any final decision of a [CSRT]

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that an alien is properly detained as an enemy combatant." Paragraph (2) also delimits the scope of that review. See §§ 1005(e)(2)(C)(i)-(ii), *id.,* at 2742.

Paragraph (3) mirrors paragraph (2) in structure, but governs judicial review of final decisions of military commissions, not CSRTs. It vests in the Court of Appeals for the District of Columbia Circuit "exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)." § 1005(e)(3)(A), *id.,* at 2743.[2] ***574** Review is as of right for any alien sentenced to death or a term of imprisonment of 10 years or more, but is at the Court of Appeals' discretion in all other cases. The scope of review is limited to the following inquiries:

2 The military order referenced in this section is discussed further in Parts III and VI, *infra*.

"(i) whether the final decision [of the military commission] was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

"(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States." § 1005(e)(3)(D), *ibid*.

Finally, § 1005 contains an "effective date" provision, which reads as follows:

"(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

"(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act." § 1005(h), *id.,* at 2743–2744.[3]

3 The penultimate subsections of § 1005 emphasize that the provision does not "confer any constitutional right on an alien detained as an enemy combatant outside the United States" and that the "United States" does not, for purposes of § 1005, include Guantanamo Bay. §§ 1005(f)-(g).

The DTA is silent about whether paragraph (1) of subsection (e) "shall apply" to claims pending on the date of enactment.

The Government argues that §§ 1005(e)(1) and 1005(h) had the immediate effect, upon enactment, of repealing federal jurisdiction not just over detainee habeas actions yet to be filed but also over any such actions then pending in any federal court—including this Court. Accordingly, it argues, we ***575** lack jurisdiction to review the Court of Appeals' decision below.

Hamdan objects to this theory on both constitutional and statutory grounds. ****2764** Principal among his constitutional arguments is that the Government's preferred reading raises grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases. Support for this argument is drawn from *Ex parte Yerger,* 8 Wall. 85, 19 L.Ed. 332 (1869), in which, having explained that "the denial to this court of appellate jurisdiction" to consider an original writ of habeas corpus would "greatly weaken the efficacy of the writ," *id.,* at 102–103, we held that Congress would not be presumed to have effected such denial absent an unmistakably clear statement to the contrary. See *id.,* at 104–105; see also *Felker v. Turpin,* 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996); *Durousseau v. United States,* 6 Cranch 307, 314, 3 L.Ed. 232 (1810) (opinion for the Court by Marshall, C.J.) (The "appellate powers of this court" are not created by statute but are "given by the constitution"); *United States v. Klein,* 13 Wall. 128, 20 L.Ed. 519 (1872). Cf. *Ex parte McCardle,* 7 Wall. 506, 514, 19 L.Ed. 264 (1869) (holding that Congress had validly foreclosed one avenue of appellate review where its repeal of habeas jurisdiction, reproduced in the margin,[4] could not have been "a plainer instance of positive exception"). Hamdan also suggests that, if the Government's reading is correct, Congress has unconstitutionally suspended the writ of habeas corpus.

4 " '*And be it further enacted,* That so much of the act approved February 5, 1867, entitled "An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789," as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed.' " 7 Wall., at 508, 19 L.Ed. 264.

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We find it unnecessary to reach either of these arguments. Ordinary principles of statutory construction suffice to rebut ***576** the Government's theory—at least insofar as this case, which was pending at the time the DTA was enacted, is concerned.

The Government acknowledges that only paragraphs (2) and (3) of subsection (e) are expressly made applicable to pending cases, see § 1005(h)(2), 119 Stat. 2743–2744, but argues that the omission of paragraph (1) from the scope of that express statement is of no moment. This is so, we are told, because Congress' failure to expressly reserve federal courts' jurisdiction over pending cases erects a presumption against jurisdiction, and that presumption is rebutted by neither the text nor the legislative history of the DTA.

The first part of this argument is not entirely without support in our precedents. We have in the past "applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf v. USI Film Products,* 511 U.S. 244, 274, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (citing *Bruner v. United States,* 343 U.S. 112, 72 S.Ct. 581, 96 L.Ed. 786 (1952); *Hallowell v. Commons,* 239 U.S. 506, 36 S.Ct. 202, 60 L.Ed. 409 (1916)); see *Republic of Austria v. Altmann,* 541 U.S. 677, 693, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). But the "presumption" that these cases have applied is more accurately viewed as the nonapplication of another presumption—viz., the presumption against retroactivity—in certain limited circumstances.[5] If a statutory provision ****2765** "would operate retroactively" as applied to cases pending at the time the provision was enacted, then "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf,* 511 U.S., at 280, 114 S.Ct. 1483. We have explained, however, that, unlike other intervening changes in the law, a ***577** jurisdiction-conferring or jurisdiction-stripping statute usually "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell,* 239 U.S., at 508, 36 S.Ct. 202. If that is truly all the statute does, no retroactivity problem arises because the change in the law does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf,* 511 U.S., at 280, 114 S.Ct. 1483.[6] And if a new rule has no retroactive effect, the presumption against retroactivity will not prevent its application to a case that was already pending when the new rule was enacted.

5 See *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 951, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) ("The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity ...").

6 Cf. *ibid.* ("Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties" (emphasis in original)).

That does not mean, however, that all jurisdiction-stripping provisions—or even all such provisions that truly lack retroactive effect—must apply to cases pending at the time of their enactment.[7] "[N]ormal rules of construction," including a contextual reading of the statutory language, may dictate otherwise. ***578** *Lindh v. Murphy,* 521 U.S. 320, 326, 117 S.Ct. 2059, 138 L.Ed.2d 481 1997).[8] A familiar principle of statutory construction, relevant both in *Lindh* and here, is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute. See *id.,* at 330, 117 S.Ct. 2059; see also, *e.g., Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally ****2766** presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' "). The Court in *Lindh* relied on this reasoning to conclude that certain limitations on the availability of habeas relief imposed by AEDPA applied only to cases filed after that statute's effective date. Congress' failure to identify the temporal reach of those limitations, which governed noncapital cases, stood in contrast to its express command in the same legislation that new rules governing habeas petitions in capital cases "apply to cases pending on or after the date of enactment." § 107(c), 110 Stat. 1226; see *Lindh,* 521 U.S., at 329–330, 117 S.Ct. 2059. That contrast, combined with the fact that the amendments at issue "affect[ed] substantive entitlement to relief," *id.,* at 327, 117 S.Ct. 2059, warranted drawing a negative inference.

7 In his insistence to the contrary, Justice SCALIA reads too much into *Bruner v. United States,* 343

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U.S. 112, 72 S.Ct. 581, 96 L.Ed. 786 (1952), *Hallowell v. Commons,* 239 U.S. 506, 36 S.Ct. 202, 60 L.Ed. 409 (1916), and *Insurance Co. v. Ritchie,* 5 Wall. 541, 18 L.Ed. 540 (1867). See *post,* at 2810–2811 (dissenting opinion). None of those cases says that the absence of an express provision reserving jurisdiction over pending cases trumps or renders irrelevant any other indications of congressional intent. Indeed, *Bruner* itself relied on such other indications—including a negative inference drawn from the statutory text, cf. *infra,* at 2765–2766—to support its conclusion that jurisdiction was not available. The Court observed that (1) Congress had been put on notice by prior lower court cases addressing the Tucker Act that it ought to specifically reserve jurisdiction over pending cases, see 343 U.S., at 115, 72 S.Ct. 581, and (2) in contrast to the congressional silence concerning reservation of jurisdiction, reservation *had* been made of " 'any rights or liabilities' existing at the effective date of the Act" repealed by another provision of the Act, *ibid.,* n. 7.

8 The question in *Lindh* was whether new limitations on the availability of habeas relief imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, applied to habeas actions pending on the date of AEDPA's enactment. We held that they did not. At the outset, we rejected the State's argument that, in the absence of a clear congressional statement to the contrary, a "procedural" rule must apply to pending cases. 521 U.S., at 326, 117 S.Ct. 2059.

A like inference follows *a fortiori* from *Lindh* in this case. "If ... Congress was reasonably concerned to ensure that [§§ 1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [§ 1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." *Id.,* at 329, 117 S.Ct. 2059. If anything, the evidence of deliberate omission is stronger here than it ***579** was in *Lindh*. In *Lindh,* the provisions to be contrasted had been drafted separately but were later "joined together and ... considered simultaneously when the language raising the implication was inserted." *Id.,* at 330, 117 S.Ct. 2059. We observed that Congress' tandem review and approval of the two sets of provisions strengthened the presumption that the relevant omission was deliberate. *Id.,* at 331, 117 S.Ct. 2059; see also *Field v. Mans,* 516 U.S. 59, 75, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects"). Here, Congress not only considered the respective temporal reaches of paragraphs (1), (2), and (3) of subsection (e) together at every stage, but omitted paragraph (1) from its directive that paragraphs (2) and (3) apply to pending cases only after having *rejected* earlier proposed versions of the statute that would have included what is now paragraph (1) within the scope of that directive. Compare DTA § 1005(h)(2), 119 Stat. 2743–2744, with 151 Cong. Rec. S12655 (Nov. 10, 2005) (S.Amdt.2515); see *id.,* at S14257–S14258 (Dec. 21, 2005) (discussing similar language proposed in both the House and the Senate). [9] Congress' rejection of the very language that would have ***580** achieved the result the Government urges here weighs heavily against the Government's interpretation. See *Doe v. Chao,* 540 U.S. 614, 621–623, 124 S.Ct. 1204, 157 L.Ed.2d 1122 (2004). [10]

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9 That paragraph (1), along with paragraphs (2) and (3), is to "take effect on the date of the enactment," DTA § 1005(h)(1), 119 Stat. 2743, is not dispositive; "a 'statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.' " *INS v. St. Cyr,* 533 U.S. 289, 317, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (quoting *Landgraf v. USI Film Products,* 511 U.S. 244, 257, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). Certainly, the "effective date" provision cannot bear the weight Justice SCALIA would place on it. See *post,* at 2812, and n. 1. Congress deemed that provision insufficient, standing alone, to render subsections (e)(2) and (e)(3) applicable to pending cases; hence its adoption of subsection (h)(2). Justice SCALIA seeks to avoid reducing subsection (h)(2) to a mere redundancy—a consequence he seems to acknowledge must otherwise follow from his interpretation—by speculating that Congress had special reasons, not also relevant to subsection (e)(1), to worry that subsections (e)(2) and (e)(3) would be ruled inapplicable to pending cases. As we explain *infra,* at 2768–2769, and n. 12, that attempt fails.

10 We note that statements made by Senators preceding passage of the DTA lend further support

to what the text of the DTA and its drafting history already make plain. Senator Levin, one of the sponsors of the final bill, objected to earlier versions of the DTA's "effective date" provision that would have made subsection (e)(1) applicable to pending cases. See, *e.g.,* 151 Cong. Rec. S12667 (Nov. 10, 2005) (amendment proposed by Sen. Graham that would have rendered what is now subsection (e)(1) applicable to "any application or other action that is pending on or after the date of the enactment of this Act"). Senator Levin urged adoption of an alternative amendment that "would apply only to new habeas cases filed after the date of enactment." *Id.,* at S12802 (Nov. 15, 2005). That alternative amendment became the text of subsection (h)(2). (In light of the extensive discussion of the DTA's effect on pending cases prior to passage of the DTA, see, *e.g., id.,* at S12664 (Nov. 10, 2005); *id.,* at S12755 (Nov. 14, 2005); *id.,* at S12799–S12802 (Nov. 15, 2005); *id.,* at S14245, S14252–S14253, S14257–S14258, S14274–S14275 (Dec. 21, 2005), it cannot be said that the changes to subsection (h)(2) were inconsequential. Cf. *post,* at 2817 (SCALIA, J., dissenting).)

While statements attributed to the final bill's two other sponsors, Senators Graham and Kyl, arguably contradict Senator Levin's contention that the final version of the DTA preserved jurisdiction over pending habeas cases, see 151 Cong. Rec. S14263–S14264 (Dec. 21, 2005), those statements appear to have been inserted into the Congressional Record *after* the Senate debate. See Reply Brief for Petitioner 5, n. 6; see also 151 Cong. Rec. S14260 (statement of Sen. Kyl) ("I would like to say a few words about the *now-completed* National Defense Authorization Act for fiscal year 2006" (emphasis added)). All statements made during the debate itself support Senator Levin's understanding that the final text of the DTA would not render subsection (e)(1) applicable to pending cases. See, *e.g., id*., at S14245, S14252–S14253, S14274–S14275 (Dec. 21, 2005). The statements that Justice SCALIA cites as evidence to the contrary construe *subsection (e)(3)* to strip this Court of jurisdiction, see *post,* at 2816, n. 4 (dissenting opinion) (quoting 151 Cong. Rec. S12796 (Nov. 15, 2005) (statement of Sen. Specter))—a construction that the Government has expressly disavowed in this litigation, see n. 11, *infra*. The inapposite November 14, 2005, statement of Senator Graham, which Justice SCALIA cites as evidence of that Senator's "assumption that pending cases are covered," *post,* at 2816, and n. 3 (citing 151 Cong. Rec. S12756 (Nov. 14, 2005)), follows directly after the uncontradicted statement of his cosponsor, Senator Levin, assuring members of the Senate that "the amendment will not strip the courts of jurisdiction over [pending] cases," *id.,* at S12755.

****2767 *581** The Government nonetheless offers two reasons why, in its view, no negative inference may be drawn in favor of jurisdiction. First, it asserts that *Lindh* is inapposite because "Section 1005(e)(1) and (h)(1) remove jurisdiction, while Section 1005(e)(2), (3) and (h)(2) create an exclusive review mechanism and define the nature of that review." Reply Brief in Support of Respondents' Motion to Dismiss 4. Because the provisions being contrasted "address wholly distinct subject matters," *Martin v. Hadix,* 527 U.S. 343, 356, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999), the Government argues, Congress' different treatment of them is of no significance.

This argument must fail because it rests on a false distinction between the "jurisdictional" nature of subsection (e)(1) and the "procedural" character of subsections (e)(2) and (e)(3). In truth, all three provisions govern jurisdiction over detainees' claims; subsection (e)(1) addresses jurisdiction in habeas cases and other actions "relating to any aspect of the detention," while subsections (e)(2) and (e)(3) vest exclusive,[11] but limited, *jurisdiction* in the ****2768** Court of Appeals for the District of Columbia Circuit to review "final decision[s]" of CSRTs and military commissions.

11 The District of Columbia Circuit's jurisdiction, while "exclusive" in one sense, would not bar this Court's review on appeal from a decision under the DTA. See Reply Brief in Support of Respondents' Motion to Dismiss 16–17, n. 12 ("While the DTA does not expressly call for Supreme Court review of the District of Columbia Circuit's decisions, Section[s] 1005(e)(2) and (3) ... do not remove this Court's jurisdiction over such decisions under 28 U.S.C. § 1254(1)").

That subsection (e)(1) strips jurisdiction while subsections (e)(2) and (e)(3) restore it in limited form is hardly a distinction upon which a negative inference must founder.

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Justice SCALIA, in arguing to the contrary, maintains that Congress ***582** had "ample reason" to provide explicitly for application of subsections (e)(2) and (e)(3) to pending cases because "jurisdiction-ousting" provisions like subsection (e)(1) have been treated differently under our retroactivity jurisprudence than "jurisdiction-creating" ones like subsections (e)(2) and (e)(3). *Post,* at 2814 (dissenting opinion); see also Reply Brief in Support of Respondents' Motion to Dismiss 5–6. That theory is insupportable. Assuming, *arguendo,* that subsections (e)(2) and (e)(3) "confer *new* jurisdiction (in the D.C. Circuit) where there was none before," *post,* at 2813 (emphasis in original); but see *Rasul v. Bush,* 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004), and that our precedents can be read to "strongly indicat[e]" that jurisdiction-creating statutes raise special retroactivity concerns not also raised by jurisdiction-stripping statutes, *post,* at 2813, [12] subsections (e)(2) and (e)(3) "confer" jurisdiction in a manner that cannot conceivably give rise to retroactivity questions under our precedents. The provisions impose no additional liability or obligation on any private party or even on the United States, unless one counts the burden of litigating an appeal—a burden not a single one of our cases suggests triggers retroactivity concerns. [13] ***583** Moreover, it strains credulity to suggest that the desire to reinforce the application of subsections (e)(2) and (e)(3) to pending cases drove Congress to *exclude* subsection (e)(1) from § 1005(h)(2).

12 This assertion is itself highly questionable. The cases that Justice SCALIA cites to support his distinction are *Republic of Austria v. Altmann,* 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004), and *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997). See *post,* at 2813. While the Court in both of those cases recognized that statutes "creating" jurisdiction may have retroactive effect if they affect "substantive" rights, see *Altmann,* 541 U.S., at 695, and n. 15, 124 S.Ct. 2240; *Hughes Aircraft,* 520 U.S., at 951, 117 S.Ct. 1871, we have applied the same analysis to statutes that have jurisdiction-stripping effect, see *Lindh v. Murphy,* 521 U.S. 320, 327–328, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *id.,* at 342–343, 117 S.Ct. 2059 (Rehnquist, C. J., dissenting) (construing AEDPA's amendments as "ousting jurisdiction").

13 See *Landgraf,* 511 U.S., at 271, n. 25, 114 S.Ct. 1483 (observing that "the great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties," though "we have applied the presumption in cases involving *new monetary obligations* that fell only on the government" (emphasis added)); see also *Altmann,* 541 U.S., at 728–729, 124 S.Ct. 2240 (KENNEDY, J., dissenting) (explaining that if retroactivity concerns do not arise when a new monetary obligation is imposed on the United States it is because "Congress, by virtue of authoring the legislation, is itself fully capable of protecting the Federal Government from having its rights degraded by retroactive laws").

The Government's second objection is that applying subsections (e)(2) and (e)(3) but not (e)(1) to pending cases "produces an absurd result" because it grants (albeit only temporarily) dual jurisdiction over detainees' cases in circumstances where the statute plainly envisions that the D.C. Circuit will have "*exclusive*" and immediate jurisdiction over such cases. Reply Brief in Support of Respondents' Motion to Dismiss 7. But the premise here is faulty; subsections (e)(2) and (e)(3) grant jurisdiction only over actions to "determine the validity of any final decision" of a CSRT or ****2769** commission. Because Hamdan, at least, is not contesting any "final decision" of a CSRT or military commission, his action does not fall within the scope of subsection (e)(2) or (e)(3). There is, then, no absurdity. [14]

14 There may be habeas cases that were pending in the lower courts at the time the DTA was enacted that do qualify as challenges to "final decision[s]" within the meaning of subsection (e)(2) or (e)(3). We express no view about whether the DTA would require transfer of such an action to the D.C. Circuit.

The Government's more general suggestion that Congress can have had no good reason for preserving habeas jurisdiction over cases that had been brought by detainees prior to enactment of the DTA not only is belied by the legislative history, see n. 10, *supra,* but is otherwise without merit. There is nothing absurd about a scheme under which pending habeas actions—particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed—are preserved, and more routine challenges to final decisions rendered ***584** by those tribunals are carefully channeled to a particular court and through a particular lens of review.

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Finally, we cannot leave unaddressed Justice SCALIA's contentions that the "meaning of § 1005(e)(1) is entirely clear," *post,* at 2813, and that "the *plain import* of a statute repealing jurisdiction is to eliminate the power to consider and render judgment—in an already pending case no less than in a case yet to be filed," *post,* at 2811 (emphasis in original). Only by treating the *Bruner* rule as an inflexible trump (a thing it has never been, see n. 7, *supra*) and ignoring both the rest of § 1005's text and its drafting history can one conclude as much. Congress here expressly provided that subsections (e)(2) and (e)(3) applied to pending cases. It chose not to so provide—after having been presented with the option—for subsection (e)(1). The omission is an integral part of the statutory scheme that muddies whatever "plain meaning" may be discerned from blinkered study of subsection (e)(1) alone. The dissent's speculation about what Congress might have intended by the omission not only is counterfactual, cf. n. 10, *supra* (recounting legislative history), but rests on both a misconstruction of the DTA and an erroneous view of our precedents, see *supra,* at 2768, and n. 12.

For these reasons, we deny the Government's motion to dismiss. [15]

15 Because we conclude that § 1005(e)(1) does not strip federal courts' jurisdiction over cases pending on the date of the DTA's enactment, we do not decide whether, if it were otherwise, this Court would nonetheless retain jurisdiction to hear Hamdan's appeal. Cf. *supra,* at 2763–2764. Nor do we decide the manner in which the canon of constitutional avoidance should affect subsequent interpretation of the DTA. See, *e.g., St. Cyr,* 533 U.S., at 300, 121 S.Ct. 2271 (a construction of a statute "that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions").

III

Relying on our decision in *Councilman,* 420 U.S. 738, 95 S.Ct. 1300, the Government argues that, even if we have statutory jurisdiction, ***585** we should apply the "judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings." Brief for Respondents 12. Like the District Court and the Court of Appeals before us, we reject this argument.

In *Councilman,* an army officer on active duty was referred to a court-martial ****2770** for trial on charges that he violated the UCMJ by selling, transferring, and possessing marijuana. 420 U.S., at 739–740, 95 S.Ct. 1300. Objecting that the alleged offenses were not " 'service connected,' " *id.,* at 740, 95 S.Ct. 1300, the officer filed suit in Federal District Court to enjoin the proceedings. He neither questioned the lawfulness of courts-martial or their procedures nor disputed that, as a serviceman, he was subject to court-martial jurisdiction. His sole argument was that the subject matter of his case did not fall within the scope of court-martial authority. See *id.,* at 741, 759, 95 S.Ct. 1300. The District Court granted his request for injunctive relief, and the Court of Appeals affirmed.

We granted certiorari and reversed. *Id.,* at 761, 95 S.Ct. 1300. We did not reach the merits of whether the marijuana charges were sufficiently "service connected" to place them within the subject-matter jurisdiction of a court-martial. Instead, we concluded that, as a matter of comity, federal courts should normally abstain from intervening in pending court-martial proceedings against members of the Armed Forces, [16] and ***586** further that there was nothing in the particular circumstances of the officer's case to displace that general rule. See *id.,* at 740, 758, 95 S.Ct. 1300.

16 *Councilman* distinguished service personnel from civilians, whose challenges to ongoing military proceedings are cognizable in federal court. See, *e.g., United States ex rel. Toth v. Quarles,* 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955). As we explained in *Councilman,* abstention is not appropriate in cases in which individuals raise " 'substantial arguments denying the right of the military to try them at all,' " and in which the legal challenge "turn[s] on the status of the persons as to whom the military asserted its power." 420 U.S., at 759, 95 S.Ct. 1300 (quoting *Noyd v. Bond,* 395 U.S. 683, 696, n. 8, 89 S.Ct. 1876, 23 L.Ed.2d 631 (1969)). In other words, we do not apply *Councilman* abstention when there is a substantial question whether a military tribunal has personal jurisdiction over the defendant. Because we conclude that abstention is inappropriate for a more basic reason, we need not consider whether the jurisdictional exception recognized in *Councilman* applies here.

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Councilman identifies two considerations of comity that together favor abstention pending completion of ongoing court-martial proceedings against service personnel. See *New v. Cohen,* 129 F.3d 639, 643 (C.A.D.C.1997); see also 415 F.3d, at 36–37 (discussing *Councilman* and *New*). First, military discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts. See *Councilman,* 420 U.S., at 752, 95 S.Ct. 1300. Second, federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created "an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges 'completely removed from all military influence or persuasion ... .' " *Id.,* at 758, 95 S.Ct. 1300 (quoting H.R.Rep. No. 491, 81st Cong., 1st Sess., 7 (1949)). Just as abstention in the face of ongoing state criminal proceedings is justified by our expectation that state courts will enforce federal rights, so abstention in the face of ongoing court-martial proceedings is justified by our expectation that the military court system established by Congress—with its substantial procedural protections and provision for appellate review by independent civilian judges—"will vindicate servicemen's constitutional rights," 420 U.S., at 758, 95 S.Ct. 1300. See *id.,* at 755–758, 95 S.Ct. 1300. [17]

17 See also *Noyd,* 395 U.S., at 694–696, 89 S.Ct. 1876 (noting that the Court of Military Appeals consisted of "disinterested civilian judges," and concluding that there was no reason for the Court to address an Air Force Captain's argument that he was entitled to remain free from confinement pending appeal of his conviction by court-martial "when the highest military court stands ready to consider petitioner's arguments"). Cf. *Parisi v. Davidson,* 405 U.S. 34, 41–43, 92 S.Ct. 815, 31 L.Ed.2d 17 (1972) ("Under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks ... would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its processing of the court-martial charge").

****2771** ***587** The same cannot be said here; indeed, neither of the comity considerations identified in *Councilman* weighs in favor of abstention in this case. First, Hamdan is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply. Second, the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established. Unlike the officer in *Councilman,* Hamdan has no right to appeal any conviction to the civilian judges of the Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces, see § 924, 108 Stat. 2831). Instead, under Dept. of Defense Military Commission Order No. 1 (Commission Order No. 1), App. C to Brief for Petitioner 46a, which was issued by the Secretary of Defense on March 21, 2002, and amended most recently on August 31, 2005, and which governs the procedures for Hamdan's commission, any conviction would be reviewed by a panel consisting of three military officers designated by the Secretary. *Id.,* § 6(H)(4). Commission Order No. 1 provides that appeal of a review panel's decision may be had only to the Secretary himself, § 6(H)(5), and then, finally, to the President, § 6(H)(6). [18]

18 If he chooses, the President may delegate this ultimate decisionmaking authority to the Secretary of Defense. See § 6(H)(6).

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We have no doubt that the various individuals assigned review power under Commission Order No. 1 would strive to act impartially and ensure that Hamdan receive all protections to which he is entitled. Nonetheless, these review bodies clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the ***588** Armed Forces, and thus bear insufficient conceptual similarity to state courts to warrant invocation of abstention principles. [19]

19 Justice SCALIA chides us for failing to include the D.C. Circuit's review powers under the DTA in our description of the review mechanism erected by Commission Order No. 1. See *post,* at 2821. Whether or not the limited review permitted under the DTA may be treated as akin to the plenary review exercised by the Court of Appeals for the Armed Forces, petitioner here is not afforded a right to such review. See *infra,* at 2787–2788; § 1005(e)(3), 119 Stat. 2743.

In sum, neither of the two comity considerations underlying our decision to abstain in *Councilman* applies to the circumstances of this case. Instead, this Court's decision in *Quirin* is the most relevant precedent. In *Quirin,* eight German saboteurs were captured upon arrival by submarine in New York and Florida. 317 U.S., at 21, 63 S.Ct. 1. The President convened a military commission to try seven

of the saboteurs, who then filed habeas corpus petitions in the United States District Court for the District of Columbia challenging their trial by commission. We granted the saboteurs' petition for certiorari to the Court of Appeals before judgment. See *id.,* at 19, 63 S.Ct. 1. Far from ****2772** abstaining pending the conclusion of military proceedings, which were ongoing, we convened a special Term to hear the case and expedited our review. That course of action was warranted, we explained, "[i]n view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay." *Ibid*.

As the Court of Appeals here recognized, *Quirin* "provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the ***589** processes of military commissions." 415 F.3d, at 36.[20] The circumstances of this case, like those in *Quirin,* simply do not implicate the "obligations of comity" that, under appropriate circumstances, justify abstention. *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 733, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (KENNEDY, J., concurring).

20 Having correctly declined to abstain from addressing Hamdan's challenge to the lawfulness of the military commission convened to try him, the Court of Appeals suggested that *Councilman* abstention nonetheless applied to bar its consideration of one of Hamdan's arguments—namely, that his commission violated Article 3 of the Third Geneva Convention, 6 U.S.T. 3316, 3318. See Part VI, *infra*. Although the Court of Appeals rejected the Article 3 argument on the merits, it also stated that, because the challenge was not "jurisdictional," it did not fall within the exception that *Schlesinger v. Councilman,* 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975), recognized for defendants who raise substantial arguments that a military tribunal lacks personal jurisdiction over them. See 415 F.3d, at 42.

In reaching this conclusion, the Court of Appeals conflated two distinct inquiries: (1) whether Hamdan has raised a substantial argument that the military commission lacks authority to try him; and, more fundamentally, (2) whether the comity considerations underlying *Councilman* apply to trigger the abstention principle in the first place. As the Court of Appeals acknowledged at the beginning of its opinion, the first question warrants consideration only if the answer to the second is yes. See 415 F.3d, at 36–37. Since, as the Court of Appeals properly concluded, the answer to the second question is in fact no, there is no need to consider any exception.

At any rate, it appears that the exception would apply here. As discussed in Part VI, *infra,* Hamdan raises a substantial argument that, because the military commission that has been convened to try him is not a " 'regularly constituted court' " under the Geneva Conventions, it is ultra vires and thus lacks jurisdiction over him. Brief for Petitioner 5.

Finally, the Government has identified no other "important countervailing interest" that would permit federal courts to depart from their general "duty to exercise the jurisdiction that is conferred upon them by Congress." *Id.,* at 716, 116 S.Ct. 1712 (majority opinion). To the contrary, Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law and operates ***590** free from many of the procedural rules prescribed by Congress for courts-martial—rules intended to safeguard the accused and ensure the reliability of any conviction. While we certainly do not foreclose the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings (such as military commissions convened on the battlefield), the foregoing discussion makes clear that, under our precedent, abstention is not justified here. We therefore proceed to consider the merits of Hamdan's challenge.

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IV

The military commission, a tribunal neither mentioned in the Constitution nor ****2773** created by statute, was born of military necessity. See W. Winthrop, Military Law and Precedents 831 (rev.2d ed.1920) (hereinafter Winthrop). Though foreshadowed in some respects by earlier tribunals like the Board of General Officers that General Washington convened to try British Major John Andre for spying during the Revolutionary War, the commission "as such" was inaugurated in 1847. *Id.,* at 832; G. Davis, A Treatise on the Military Law of the United States 308 (rev. 3d ed.1915) (hereinafter Davis). As commander of occupied Mexican territory, and having available to him no other tribunal,

General Winfield Scott that year ordered the establishment of both " '*military commissions*' " to try ordinary crimes committed in the occupied territory and a "*council of war*" to try offenses against the law of war. Winthrop 832 (emphasis in original).

When the exigencies of war next gave rise to a need for use of military commissions, during the Civil War, the dual system favored by General Scott was not adopted. Instead, a single tribunal often took jurisdiction over ordinary crimes, war crimes, and breaches of military orders alike. As further discussed below, each aspect of that seemingly broad jurisdiction was in fact supported by a separate military exigency. Generally, though, the need for military commissions ***591** during this period—as during the Mexican War—was driven largely by the then very limited jurisdiction of courts-martial: "The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code." *Id.,* at 831 (emphasis in original).

Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that document authorizes a response to the felt need. See *Ex parte Milligan,* 4 Wall. 2, 121, 18 L.Ed. 281 (1866) ("Certainly no part of the judicial power of the country was conferred on [military commissions]"); *Ex parte Vallandigham,* 1 Wall. 243, 251, 17 L.Ed. 589 (1864); see also *Quirin,* 317 U.S., at 25, 63 S.Ct. 1 ("Congress and the President, like the courts, possess no power not derived from the Constitution"). And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war. See *id.,* at 26–29, 63 S.Ct. 1; *In re Yamashita,* 327 U.S. 1, 11, 66 S.Ct. 340, 90 L.Ed. 499 (1946).

The Constitution makes the President the "Commander in Chief" of the Armed Forces, Art. II, § 2, cl. 1, but vests in Congress the powers to "declare War ... and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11, to "raise and support Armies," *id.,* cl. 12, to "define and punish ... Offences against the Law of Nations," *id.,* cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," *id.,* cl. 14. The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan:*

> "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in ***592** peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.... Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of ****2774** Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature." 4 Wall., at 139–140. [21]

21 See also Winthrop 831 ("[I]n general, it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of *war,* authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction" (emphasis in original)).

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Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions "without the sanction of Congress" in cases of "controlling necessity" is a question this Court has not answered definitively, and need not answer today. For we held in *Quirin* that Congress had, through Article of War 15, sanctioned the use of military commissions in such circumstances. 317 U.S., at 28, 63 S.Ct. 1 ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases"). Article 21 of the UCMJ, the language of which is substantially identical to the old Article 15 and was preserved by Congress after World War II, [22] reads as follows:

22 Article 15 was first adopted as part of the Articles of War in 1916. See Act of Aug. 29, 1916, ch. 418, § 3, Art. 15, 39 Stat. 652. When the Articles of War were codified and reenacted as the UCMJ in 1950, Congress determined to retain Article 15 because it had been "construed by the Supreme Court (*Ex Parte Quirin,* 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3

(1942))." S.Rep. No. 486, 81st Cong., 1st Sess., 13 (1949).

***593** "Jurisdiction of courts-martial not exclusive.

"The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals." 64 Stat. 115.

We have no occasion to revisit *Quirin's* controversial characterization of Article of War 15 as congressional authorization for military commissions. Cf. Brief for Legal Scholars and Historians as *Amici Curiae* 12–15. Contrary to the Government's assertion, however, even *Quirin* did not view the authorization as a sweeping mandate for the President to "invoke military commissions when he deems them necessary." Brief for Respondents 17. Rather, the *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war. See 317 U.S., at 28–29, 63 S.Ct. 1. [23] That much is evidenced by the Court's inquiry, *following* its conclusion that Congress had authorized military commissions, into whether the law of war had indeed been complied with in that case. See *ibid.*

23 Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). The Government does not argue otherwise.

The Government would have us dispense with the inquiry that the *Quirin* ****2775** Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the ***594** President's authority to convene military commissions. First, while we assume that the AUMF activated the President's war powers, see *Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion), and that those powers include the authority to convene military commissions in appropriate circumstances, see *id.,* at 518, 124 S.Ct. 2633; *Quirin,* 317 U.S., at 28–29, 63 S.Ct. 1; see also *Yamashita,* 327 U.S., at 11, 66 S.Ct. 340, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ. Cf. *Yerger,* 8 Wall., at 105 ("Repeals by implication are not favored"). [24]

24 On this point, it is noteworthy that the Court in *Ex parte Quirin,* 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942), looked beyond Congress' declaration of war and accompanying authorization for use of force during World War II, and relied instead on Article of War 15 to find that Congress had authorized the use of military commissions in some circumstances. See *id*., at 26–29, 63 S.Ct. 1. Justice THOMAS' assertion that we commit "error" in reading Article 21 of the UCMJ to place limitations upon the President's use of military commissions, see *post,* at 2825 (dissenting opinion), ignores the reasoning in *Quirin*.

Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Article 21 or the AUMF, was enacted after the President had convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. The DTA obviously "recognize[s]" the existence of the Guantanamo Bay commissions in the weakest sense, Brief for Respondents 15, because it references some of the military orders governing them and creates limited judicial review of their "final decision[s]," DTA § 1005(e)(3), 119 Stat. 2743. But the statute also pointedly reserves judgment on whether "the Constitution and laws of the United States are applicable" in reviewing such decisions and whether, if they are, the "standards and procedures" used to try Hamdan and other detainees actually violate the "Constitution and laws." *Ibid.*

Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military ***595** commissions in circumstances where justified under the "Constitution and laws," including the law of war. Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin,* to decide whether Hamdan's military commission is so justified. It is to that inquiry we now turn.

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V

The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists. Commissions historically have been used in three situations. See Bradley & Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L.Rev.2048, 2132–2133 (2005); Winthrop 831–846; Hearings on H.R. 2498 before the Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 975 (1949). First, they have substituted for civilian courts at times and in places where martial law has been declared. Their use in these circumstances has raised constitutional questions, see *Duncan v. Kahanamoku,* 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688 (1946); *Milligan,* 4 Wall., at 121–122, but is well recognized.[25] ****2776** See Winthrop 822, 836–839. Second, commissions have been established to try civilians "as part of a temporary military government over occupied enemy territory or territory regained from an ***596** enemy where civilian government cannot and does not function." *Duncan,* 327 U.S., at 314, 66 S.Ct. 606; see *Milligan,* 4 Wall., at 141–142 (Chase, C. J., concurring in judgment) (distinguishing "MARTIAL LAW PROPER" from "MILITARY GOVERNMENT" in occupied territory). Illustrative of this second kind of commission is the one that was established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II. See *Madsen v. Kinsella,* 343 U.S. 341, 356, 72 S.Ct. 699, 96 L.Ed. 988 (1952).[26]

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25 The justification for, and limitations on, these commissions were summarized in *Milligan:*
"If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then,* on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." 4 Wall., at 127 (emphasis in original).

26 The limitations on these occupied territory or military government commissions are tailored to the tribunals' purpose and the exigencies that necessitate their use. They may be employed "pending the establishment of civil government," *Madsen,* 343 U.S., at 354–355, 72 S.Ct. 699, which may in some cases extend beyond the "cessation of hostilities," *id.,* at 348, 72 S.Ct. 699.

The third type of commission, convened as an "incident to the conduct of war" when there is a need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war," *Quirin,* 317 U.S., at 28–29, 63 S.Ct. 1, has been described as "utterly different" from the other two. Bickers, Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe, 34 Tex. Tech. L.Rev. 899, 902 (2002–2003).[27] Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a factfinding one—to determine, typically on the battlefield ***597** itself, whether the defendant has violated the law of war. The last time the U.S. Armed Forces used the law-of-war military commission was during World War II. In *Quirin,* this Court sanctioned President Roosevelt's use of such a tribunal to try Nazi saboteurs captured on American soil during the War. 317 U.S. 1, 63 S.Ct. 1. And in *Yamashita,* we held that a military commission had jurisdiction to try a Japanese commander for failing to prevent troops under his command from committing atrocities in the Philippines. 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499.

27 So much may not be evident on cold review of the Civil War trials often cited as precedent for this kind of tribunal because the commissions established during that conflict operated as both martial law or military government tribunals and law-of-war commissions. Hence, "military commanders began the practice [during the Civil War] of using the same name, the same rules, and often, the same tribunals" to try both ordinary crimes and war crimes. Bickers, 34 Tex. Tech. L.Rev., at 908. "For the first time, accused horse thieves and alleged saboteurs found themselves subject to trial by the same military commission." *Id.,* at 909. The Civil War precedents must therefore be considered with caution; as we recognized in *Quirin,* 317 U.S., at 29, 63 S.Ct. 1, and as further

discussed below, commissions convened during time of war but under neither martial law nor military government may try only offenses against the law of war.

****2777** *Quirin* is the model the Government invokes most frequently to defend the commission convened to try Hamdan. That is both appropriate and unsurprising. Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available. At the same time, no more robust model of executive power exists; *Quirin* represents the high-water mark of military power to try enemy combatants for war crimes.

The classic treatise penned by Colonel William Winthrop, whom we have called "the 'Blackstone of Military Law,' " *Reid v. Covert,* 354 U.S. 1, 19, n. 38, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion), describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. First, "[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offences committed within the field of the command of the convening commander." Winthrop 836. The "field of the command" in these circumstances means the "theatre of war." *Ibid.* Second, the offense charged "must have been committed within the period of the war." [28] *Id.,* at 837. No jurisdiction exists to try offenses "committed either before or after the war." *Ibid.* Third, a military commission not established pursuant to martial law or an occupation may try ***598** only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war." *Id.,* at 838. Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." *Id.,* at 839. [29]

28 If the commission is established pursuant to martial law or military government, its jurisdiction extends to offenses committed within "the exercise of military government or martial law." Winthrop 837.

29 Winthrop adds as a fifth, albeit not-always-complied-with, criterion that "the *trial* must be had within the theatre of war ...; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram non judice*." *Id.,* at 836. The Government does not assert that Guantanamo Bay is a theater of war, but instead suggests that neither Washington, D. C., in 1942 nor the Philippines in 1945 qualified as a "war zone" either. Brief for Respondents 27; cf. *Quirin,* 317 U.S. 1, 63 S.Ct. 1; *In re Yamashita,* 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946).

All parties agree that Colonel Winthrop's treatise accurately describes the common law governing military commissions, and that the jurisdictional limitations he identifies were incorporated in Article of War 15 and, later, Article 21 of the UCMJ. It also is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge "properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction*." *Id.,* at 842 (emphasis in original). The question is whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.

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The charge against Hamdan, described in detail in Part I, *supra,* alleges a conspiracy extending over a number of years, from 1996 to November 2001. [30] All but two months of that more than 5–year–long ****2778** period preceded the attacks of ***599** September 11, 2001, and the enactment of the AUMF—the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions. [31] Neither the purported agreement with ***600** Usama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.

30 The elements of this conspiracy charge have been defined not by Congress but by the President. See Military Commission Instruction No. 2, 32 CFR § 11.6 (2005).

31 Justice THOMAS would treat Usama bin Laden's 1996 declaration of jihad against Americans as the inception of the war. See *post,* at 2826–2828 (dissenting opinion). But even the Government does not go so far; although the United States had

for some time prior to the attacks of September 11, 2001, been aggressively pursuing al Qaeda, neither in the charging document nor in submissions before this Court has the Government asserted that the President's *war powers* were activated prior to September 11, 2001. Cf. Brief for Respondents 25 (describing the events of September 11, 2001, as "an act of war" that "triggered a right to deploy military forces abroad to defend the United States by combating al Qaeda"). Justice THOMAS' further argument that the AUMF is "backward looking" and therefore authorizes *trial by military commission* of crimes that occurred prior to the inception of war is insupportable. See *post,* at 2827, n. 3. If nothing else, Article 21 of the UCMJ requires that the President comply with the law of war in his use of military commissions. As explained in the text, the law of war permits trial only of offenses "committed within the period of the war." Winthrop 837; see also *Quirin,* 317 U.S., at 28–29, 63 S.Ct. 1 (observing that law-of-war military commissions may be used to try "those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war" (emphasis added)). The sources that Justice THOMAS relies on to suggest otherwise simply do not support his position. Colonel Green's short exegesis on military commissions cites Howland for the proposition that "[o]ffenses committed before a *formal declaration of war* or *before the declaration of martial law* may be tried by military commission." The Military Commission, 42 Am. J. Int'l L. 832, 848 (1948) (emphasis added) (cited *post,* at 2827–2828). Assuming that to be true, nothing in our analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law. Our focus instead is on the September 11, 2001, attacks that the Government characterizes as the relevant "act[s] of war," and on the measure that authorized the President's deployment of military force—the AUMF. Because we do not question the Government's position that the war commenced with the events of September 11, 2001, the *Prize Cases,* 2 Black 635, 17 L.Ed. 459 (1863) (cited *post,* at 2823, 2826, 2827, and 2828 (THOMAS, J., dissenting)), are not germane to the analysis.

Finally, Justice THOMAS' assertion that Julius Otto Kuehn's trial by military commission "for conspiring with Japanese officials to betray the United States Fleet to the Imperial Japanese Government prior to its attack on Pearl Harbor" stands as authoritative precedent for Hamdan's trial by commission, *post,* at 2827, misses the mark in three critical respects. First, Kuehn was tried for *federal espionage crimes* under what were then 50 U.S.C. §§ 31, 32, and 34, *not* with common-law violations of the law of war. See Hearings before the Joint Committee on the Investigation of the Pearl Harbor Attack, 79th Cong., 1st Sess., pt. 30, pp. 3067–3069 (1946). Second, he was tried by *martial law* commission (a kind of commission Justice THOMAS acknowledges is not relevant to the analysis here, and whose jurisdiction extends to offenses committed within "the exercise of ... martial law," Winthrop 837; see, n. 28, *supra*,) *not* a commission established exclusively to try violations of the law of war, see Winthrop 837. Third, the martial law commissions established to try crimes in Hawaii were ultimately declared illegal by this Court. See *Duncan v. Kahanamoku,* 327 U.S. 304, 324, 66 S.Ct. 606, 90 L.Ed. 688 (1946) ("The phrase 'martial law' as employed in [the Hawaiian Organic Act], while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals").

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These facts alone cast doubt on the legality of the charge and, hence, the commission; ****2779** as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and *during,* not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore—indeed are symptomatic of—the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission. See *Yamashita,* 327 U.S., at 13, 66 S.Ct. 340 ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is of a violation of the law of war"). [32]

32 Justice THOMAS adopts the remarkable view, not advocated by the Government, that the charging document in this case actually includes more than one charge: Conspiracy *and* several other ill-

defined crimes, like "joining an organization" that has a criminal purpose, " '[b]eing a guerrilla,' " and aiding the enemy. See *post,* at 2831–2834, and n. 9. There are innumerable problems with this approach.

First, the crimes Justice THOMAS identifies were not actually charged. It is one thing to observe that charges before a military commission " 'need not be stated with the precision of a common law indictment,' " *post,* at 2831, n. 7; it is quite another to say that a crime *not charged* may nonetheless be read into an indictment. Second, the Government plainly had available to it the tools and the time it needed to charge petitioner with the various crimes Justice THOMAS refers to, if it believed they were supported by the allegations. As Justice THOMAS himself observes, see *post,* at 2833–2834, the crime of aiding the enemy may, in circumstances where the accused owes allegiance to the party whose enemy he is alleged to have aided, be triable by military commission pursuant to Article 104 of the UCMJ, 10 U.S.C. § 904. Indeed, the Government has charged detainees under this provision when it has seen fit to do so. See Brief for David Hicks as *Amicus Curiae* 7.

Third, the cases Justice THOMAS relies on to show that Hamdan may be guilty of violations of the law of war not actually charged do not support his argument. Justice THOMAS begins by blurring the distinction between those categories of "offender" who may be tried by military commission (*e.g.,* jayhawkers and the like) with the "offenses" that may be so tried. Even when it comes to " 'being a guerrilla,' " cf. *post,* at 2832–2833, n. 9, a label alone does not render a person susceptible to execution or other criminal punishment; the charge of " 'being a guerrilla' " invariably is accompanied by the allegation that the defendant " 'took up arms' " as such. This is because, as explained by Judge Advocate General Holt in a decision upholding the charge of " 'being a guerrilla' " as one recognized by "the universal usage of the times," the charge is simply shorthand (akin to "being a spy") for "the perpetration of a succession of similar acts" of violence. Record Books of the Judge Advocate General Office, R. 3, 590. The sources cited by Justice THOMAS confirm as much. See cases cited *post,* at 2832–2833, n. 9.

Likewise, the suggestion that the Nuremberg precedents support Hamdan's conviction for the (uncharged) crime of joining a criminal organization must fail. Cf. *post,* at 2833–2834. The convictions of certain high-level Nazi officials for "membership in a criminal organization" were secured pursuant to specific provisions of the Charter of the International Military Tribunal that permitted indictment of individual organization members following convictions of the organizations themselves. See Arts. 9 and 10, in 1 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946, p. 12 (1947). The initial plan to use organizations' convictions as predicates for mass individual trials ultimately was abandoned. See T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 584–585, 638 (1992).

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***601** There is no suggestion that Congress has, in exercise of its constitutional authority to "define and punish ... Offences against the Law of Nations," U.S. Const., Art. I, § 8, cl. 10, ***602** positively identified "conspiracy" as a war crime. [33] As we explained in *Quirin,* that is not necessarily ****2780** fatal to the Government's claim of authority to try the alleged offense by military commission; Congress, through Article 21 of the UCMJ, has "incorporated by reference" the common law of war, which may render triable by military commission certain offenses not defined by statute. 317 U.S., at 30, 63 S.Ct. 1. When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution. Cf. *Loving v. United States,* 517 U.S. 748, 771, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996) (acknowledging that Congress "may not delegate the power to make laws"); *Reid,* 354 U.S., at 23–24, 77 S.Ct. 1222 ("The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds"); The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison) ("The accumulation of all powers legislative, executive and judiciary in the same hands ... may justly be pronounced the very definition of tyranny"). [34]

33 Cf. 10 U.S.C. § 904 (making triable by military commission the crime of aiding the enemy); § 906

(same for spying); War Crimes Act of 1996, 18 U.S.C. § 2441 (2000 ed. and Supp. III) (listing war crimes); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, § 583, 111 Stat. 2436 (same).

34 While the common law necessarily is "evolutionary in nature," *post,* at 2829 (THOMAS, J., dissenting), even in jurisdictions where common-law crimes are still part of the penal framework, an act does not become a crime without its foundations having been firmly established in precedent. See, *e.g., Queen v. Rimmington,* [2006] 2 All E.R. 257, 275–279 (2005) (House of Lords); *id.,* at 279 (while "some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts[,] ... the law-making function of the courts must remain within reasonable limits"); see also *Rogers v. Tennessee,* 532 U.S. 451, 472–478, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001) (SCALIA, J., dissenting). The caution that must be exercised in the incremental development of common-law crimes by the judiciary is, for the reasons explained in the text, all the more critical when reviewing developments that stem from military action.

***603** This high standard was met in *Quirin;* the violation there alleged was, by "universal agreement and practice" both in this country and internationally, recognized as an offense against the law of war. 317 U.S., at 30, 63 S.Ct. 1; see *id.,* at 35–36, 63 S.Ct. 1 ("This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War" (footnote omitted)). Although the picture arguably was less clear in *Yamashita,* compare 327 U.S., at 16, 66 S.Ct. 340 (stating that the provisions of the Fourth Hague Convention of 1907, 36 Stat. 2306, "plainly" required the defendant to control the troops under his command), with 327 U.S., at 35, 66 S.Ct. 340 (Murphy, J., dissenting), the disagreement between the majority and the dissenters in that case concerned whether the historic and textual evidence constituted clear precedent—not whether clear precedent was required to justify trial by law-of-war military commission.

At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission ***604** not exercising some other form of jurisdiction,[35] ****2781** and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war.[36] Winthrop explains that under the common law governing military commissions, it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt. See Winthrop 841 ("[T]he jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts, i.e.* in unlawful commissions or actual attempts to commit, and not in intentions merely" (emphasis in original)).

35 The 19th-century trial of the "Lincoln conspirators," even if properly classified as a trial by law-of-war commission, cf. W. Rehnquist, All the Laws But One: Civil Liberties in Wartime 165–167 (1998) (analyzing the conspiracy charges in light of ordinary criminal law principles at the time), is at best an equivocal exception. Although the charge against the defendants in that case accused them of "combining, confederating, and conspiring together" to murder the President, they were also charged (as we read the indictment, cf. *post,* at 2835, n. 12 (THOMAS, J., dissenting)), with "maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln." H.R. Doc. No. 314, 55th Cong., 3d Sess., 696 (1899). Moreover, the Attorney General who wrote the opinion defending the trial by military commission treated the charge as if it alleged the substantive offense of assassination. See 11 Op. Atty. Gen. 297 (1865) (analyzing the propriety of trying by military commission "the offence of having assassinated the President"); see also *Mudd v. Caldera,* 134 F.Supp.2d 138, 140 (DC 2001).

36 By contrast, the Geneva Conventions do extend liability for substantive war crimes to those who "orde[r]" their commission, see Third Geneva Convention, Art. 129, 6 U.S. T., at 3418, and this Court has read the Fourth Hague Convention of 1907 to impose "command responsibility" on

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military commanders for acts of their subordinates, see *Yamashita,* 327 U.S., at 15–16, 66 S.Ct. 340.

The Government cites three sources that it says show otherwise. First, it points out that the Nazi saboteurs in *Quirin* were charged with conspiracy. See Brief for Respondents 27. Second, it observes that Winthrop at one ***605** point in his treatise identifies conspiracy as an offense "prosecuted by military commissions." *Ibid.* (citing Winthrop 839, and n. 5). Finally, it notes that another military historian, Charles Roscoe Howland, lists conspiracy " 'to violate the laws of war by destroying life or property in aid of the enemy' " as an offense that was tried as a violation of the law of war during the Civil War. Brief for Respondents 27–28 (citing C. Howland, Digest of Opinions of the Judge Advocates General of the Army 1071 (1912) (hereinafter Howland)). On close analysis, however, these sources at best lend little support to the Government's position and at worst undermine it. By any measure, they fail to satisfy the high standard of clarity required to justify the use of a military commission.

That the defendants in *Quirin* were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war —let alone one triable by military commission. The *Quirin* defendants were charged with the following offenses:

"[I.] Violation of the law of war.

"[II.] Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.

"[III.] Violation of Article 82, defining the offense of spying.

"[IV.] Conspiracy to commit the offenses alleged in charges [I, II, and III]." 317 U.S., at 23, 63 S.Ct. 1.

The Government, defending its charge, argued that the conspiracy alleged "constitute[d] an additional violation of the law of war." *Id.,* at 15, 63 S.Ct. 1. The saboteurs ****2782** disagreed; they maintained that "[t]he charge of conspiracy can not stand if the other charges fall." *Id.,* at 8, 63 S.Ct. 1. The Court, however, declined to resolve the dispute. It concluded, first, that the ***606** specification supporting Charge I adequately alleged a "violation of the law of war" that was not "merely colorable or without foundation." *Id.,* at 36, 63 S.Ct. 1. The facts the Court deemed sufficient for this purpose were that the defendants, admitted enemy combatants, entered upon U.S. territory in time of war without uniform "for the purpose of destroying property used or useful in prosecuting the war." That act was "a hostile and warlike" one. *Id.,* at 36, 37, 63 S.Ct. 1. The Court was careful in its decision to identify an overt, "complete" act. Responding to the argument that the saboteurs had "not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations" and therefore had not violated the law of war, the Court responded that they had actually "passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose." *Id.,* at 38, 63 S.Ct. 1. "The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification." *Ibid.*

Turning to the other charges alleged, the Court explained that "[s]ince the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional." *Id.,* at 46, 63 S.Ct. 1. No mention was made at all of Charge IV—the conspiracy charge.

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If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the *completion* of an offense; it took seriously the saboteurs' argument that there can be no violation of a law of war—at least not one triable by military commission—without the ***607** actual commission of or attempt to commit a "hostile and warlike act." *Id.,* at 37–38, 63 S.Ct. 1.

That limitation makes eminent sense when one considers the necessity from whence this kind of military commission grew: The need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield. See S.Rep. No. 130, 64th Cong., 1st Sess., 40 (1916) (testimony of Brig. Gen. Enoch H. Crowder) (observing that Article of War 15 preserves the power of "the military commander *in the field in time of war*" to use military commissions (emphasis added)). The same urgency would not have been felt vis-à-vis enemies who had done little more than agree to violate the laws of war. Cf. 31 Op. Atty. Gen. 356, 357, 361 (1918) (opining that a German spy could not be tried by military commission because, having been apprehended before entering "any camp, fortification or other

military premises of the United States," he had "committed [his offenses] outside of the field of military operations"). The *Quirin* Court acknowledged as much when it described the President's authority to use law-of-war military commissions as the power to "seize and subject to disciplinary measures those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war." 317 U.S., at 28–29, 63 S.Ct. 1 (emphasis added).

****2783** Winthrop and Howland are only superficially more helpful to the Government. Howland, granted, lists "conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy" as one of over 20 "offenses against the laws and usages of war" "passed upon and punished by military commissions." Howland 1070–1071. But while the records of cases that Howland cites following his list of offenses against the law of war support inclusion of the other offenses mentioned, they provide no support for the inclusion of conspiracy as a violation of the law of war. See *id.,* at 1071 (citing Record Books of the Judge Advocate General Office, R. 2, 144; R. 3, 401, 589, 649; R. 4, 320; R. 5, ***608** 36, 590; R. 6, 20; R. 7, 413; R. 8, 529; R. 9, 149, 202, 225, 481, 524, 535; R. 10, 567; R. 11, 473, 513; R. 13, 125, 675; R. 16, 446; R. 21, 101, 280). Winthrop, apparently recognizing as much, excludes conspiracy of any kind from his own list of offenses against the law of war. See Winthrop 839–840.

Winthrop does, unsurprisingly, include "criminal conspiracies" in his list of "[c]rimes and statutory offenses cognizable by State or U.S. courts" and triable by martial law or military government commission. See *id.,* at 839. And, in a footnote, he cites several Civil War examples of "conspiracies of this class, *or of the first and second classes combined*." *Id.,* at 839, n. 5 (emphasis added). The Government relies on this footnote for its contention that conspiracy was triable both as an ordinary crime (a crime of the "first class") and, independently, as a war crime (a crime of the "second class"). But the footnote will not support the weight the Government places on it.

As we have seen, the military commissions convened during the Civil War functioned at once as martial law or military government tribunals and as law-of-war commissions. See n. 27, *supra*. Accordingly, they regularly tried war crimes and ordinary crimes together. Indeed, as Howland observes, "[n]ot unfrequently the crime, as charged and found, was a combination of the two species of offenses." Howland 1071; see also Davis 310, n. 2; Winthrop 842. The example he gives is " 'murder in violation of the laws of war.' " Howland 1071–1072. Winthrop's conspiracy "of the first and second classes combined" is, like Howland's example, best understood as a species of compound offense of the type tried by the hybrid military commissions of the Civil War. It is not a stand-alone offense against the law of war. Winthrop confirms this understanding later in his discussion, when he emphasizes that "*overt acts*" constituting war crimes are the only proper subject at least of those military tribunals not convened to stand in for local courts. Winthrop 841, and nn. 22, 23 (citing W. Finlason, Martial Law 130 (1867); emphasis in original).

***609** Justice THOMAS cites as evidence that conspiracy is a recognized violation of the law of war the Civil War indictment against Henry Wirz, which charged the defendant with " '[m]aliciously, willfully, and traitorously ... combining, confederating, and conspiring [with others] to injure the health and destroy the lives of soldiers in the military service of the United States ... to the end that the armies of the United States might be weakened and impaired, in violation of the laws and customs of war.' " *Post,* at 2836 (dissenting opinion) (quoting H.R. Doc. No. 314, 55th Cong., 3d Sess., 785 (1899); emphasis deleted). As shown by the specification supporting that charge, however, Wirz was alleged to have *personally committed* a number of atrocities against his victims, including torture, injection of prisoners with poison, and use of "ferocious and bloodthirsty dogs" to "seize, tear, mangle, and maim the bodies and limbs" of prisoners, many of whom died as a ****2784** result. *Id.,* at 789–790. Crucially, Judge Advocate General Holt determined that one of Wirz's alleged co-conspirators, R.B. Winder, should *not* be tried by military commission because there was as yet insufficient evidence of his own personal involvement in the atrocities: "[I]n the case of R.B. Winder, *while the evidence at the trial of Wirz was deemed by the court to implicate him in the conspiracy* against the lives of all Federal prisoners in rebel hands, *no such specific overt acts of violation of the laws of war* are as yet fixed upon him as to make it expedient to prefer formal charges and bring him to trial." *Id.,* at 783 (emphasis added). [37]

37 The other examples Justice THOMAS offers are no more availing. The Civil War indictment against Robert Louden, cited *post,* at 2836, alleged a conspiracy, but not one in violation of the law of war. See War Dept., General Court Martial Order No. 41, p. 20 (1864). A separate charge of " '[t]ransgression of the laws and customs of war' " made no mention of conspiracy. *Id.,*

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at 17. The charge against Leger Grenfel and others for conspiring to release rebel prisoners held in Chicago only supports the observation, made in the text, that the Civil War tribunals often charged hybrid crimes mixing elements of crimes ordinarily triable in civilian courts (like treason) and violations of the law of war. Judge Advocate General Holt, in recommending that Grenfel's death sentence be upheld (it was in fact commuted by Presidential decree, see H.R. Doc. No. 314, at 725), explained that the accused "united himself with traitors and malefactors for the overthrow of our Republic in the interest of slavery." *Id.,* at 689.

***610** Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war.[38] As observed above, see *supra,* at 2780–2781, none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only "conspiracy" crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a "concrete plan to wage war." 1 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946, p. 225 (1947) (hereinafter Trial of Major War Criminals). The International Military Tribunal at Nuremberg, over the prosecution's objections, pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes, see, *e.g.,* 22 *id.,* at 469,[39] and convicted only Hitler's most senior associates of conspiracy to wage aggressive war, see S. Pomorski, Conspiracy ***611** and Criminal Organization, in the Nuremberg Trial and International Law 213, 233–235 (G. Ginsburgs & V. Kudriavtsev eds.1990). As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that "[t]he Anglo–American concept of conspiracy was ****2785** not part of European legal systems and arguably not an element of the internationally recognized laws of war." T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992); see also *id.,* at 550 (observing that Francis Biddle, who as Attorney General prosecuted the defendants in *Quirin,* thought the French judge had made a " 'persuasive argument that conspiracy in the truest sense is not known to international law' ").[40]

38 The Court in *Quirin* "assume[d] that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury." 317 U.S., at 29, 63 S.Ct. 1. We need not test the validity of that assumption here because the international sources only corroborate the domestic ones.

39 Accordingly, the Tribunal determined to "disregard the charges ... that the defendants conspired to commit War Crimes and Crimes against Humanity." 22 Trial of Major War Criminals 469; see also *ibid.* ("[T]he Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war").

40 See also 15 United Nations War Crimes Commissions, Law Reports of Trials of War Criminals 90–91 (1949) (observing that, although a few individuals were charged with conspiracy under European domestic criminal codes following World War II, "the United States Military Tribunals" established at that time did not "recognis[e] as a separate offence conspiracy to commit war crimes or crimes against humanity"). The International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a "joint criminal enterprise" theory of liability, but that is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own. See *Prosecutor v. Tadíc,* Judgment, Case No. IT–94–1–A (ICTY App. Chamber, July 15, 1999); see also *Prosecutor v. Milutinovíc,* Decision on Dragoljub Ojdaníc's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT–99–37–AR72, ¶ 26 (ICTY App. Chamber, May 21, 2003) (stating that "[c]riminal liability pursuant to a joint criminal enterprise is not a liability for ... conspiring to commit crimes").

In sum, the sources that the Government and Justice THOMAS rely upon to show that conspiracy to violate the law of war is itself a violation of the law of war in fact demonstrate quite the opposite. Far from making the

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requisite substantial showing, the Government has failed even to offer a "merely colorable" case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission. Cf. *Quirin,* 317 U.S., at 36, 63 S.Ct. 1. Because the charge does not ***612** support the commission's jurisdiction, the commission lacks authority to try Hamdan.

The charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity. Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. Cf. *Rasul v. Bush,* 542 U.S., at 487, 124 S.Ct. 2686 (KENNEDY, J., concurring in judgment) (observing that "Guantanamo Bay is ... far removed from any hostilities"). Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001, and the AUMF. That may well be a crime,[41] but it is not an offense that "by the law of war may be tried by military commissio[n]." 10 U.S.C. § 821. None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid–2004. These simply are not the circumstances in which, by any ****2786** stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority ***613** of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.

41 Justice THOMAS' suggestion that our conclusion precludes the Government from bringing to justice those who conspire to commit acts of terrorism is therefore wide of the mark. See *post,* at 2827, n. 3, 2838–2839. That conspiracy is not a violation of the law of war triable by military commission does not mean the Government may not, for example, prosecute by court-martial or in federal court those caught "plotting terrorist atrocities like the bombing of the Khobar Towers." *Post,* at 2838.

VI

Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the "rules and precepts of the law of nations," *Quirin,* 317 U.S., at 28, 63 S.Ct. 1—including, *inter alia,* the four Geneva Conventions signed in 1949. See *Yamashita,* 327 U.S., at 20–21, 23–24, 66 S.Ct. 340. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.

A

The commission's procedures are set forth in Commission Order No. 1, which was amended most recently on August 31, 2005—after Hamdan's trial had already begun. Every commission established pursuant to Commission Order No. 1 must have a presiding officer and at least three other members, all of whom must be commissioned officers. § 4(A)(1). The presiding officer's job is to rule on questions of law and other evidentiary and interlocutory issues; the other members make findings and, if applicable, sentencing decisions. § 4(A)(5). The accused is entitled to appointed military counsel and may hire civilian counsel at his own expense so long as such counsel is a U.S. citizen with security clearance "at the level SECRET or higher." §§ 4(C)(2)-(3).

The accused also is entitled to a copy of the charge(s) against him, both in English and his own language (if different), to a presumption of innocence, and to certain other rights typically afforded criminal defendants in civilian courts and courts-martial. See §§ 5(A)-(P). These rights ***614** are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable ...; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." § 6(B)(3).[42]

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Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein. *Ibid.*

42 The accused also may be excluded from the proceedings if he "engages in disruptive conduct." § 5(K).

Another striking feature of the rules governing Hamdan's commission is that they permit the admission of *any* evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." § 6(D)(1). Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be ****2787** sworn. See §§ 6(D)(2)(b), (3). Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," §§ 6(B)(3), 6(D)(5)(a)(v)), so long as the presiding officer concludes that the evidence is "probative" under § 6(D)(1) and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." § 6(D)(5)(b).[43] Finally, a presiding officer's determinationthat ***615** evidence "would [not] have probative value to a reasonable person" may be overridden by a majority of the other commission members. § 6(D)(1).

43 As the District Court observed, this section apparently permits reception of testimony from a confidential informant in circumstances where "Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts." 344 F.Supp.2d 152, 168 (DC 2004).

Once all the evidence is in, the commission members (not including the presiding officer) must vote on the accused's guilt. A two-thirds vote will suffice for both a verdict of guilty and for imposition of any sentence not including death (the imposition of which requires a unanimous vote). § 6(F). Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. § 6(H)(4). The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission." *Ibid.* Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. § 6(H)(5). The President then, unless he has delegated the task to the Secretary, makes the "final decision." § 6(H)(6). He may change the commission's findings or sentence only in a manner favorable to the accused. *Ibid.*

B

Hamdan raises both general and particular objections to the procedures set forth in Commission Order No. 1. His general objection is that the procedures' admitted deviation from those governing courts-martial itself renders the commission illegal. Chief among his particular objections are that he may, under the Commission Order, be convicted ***616** based on evidence he has not seen or heard, and that any evidence admitted against him need not comply with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings.

The Government objects to our consideration of any procedural challenge at this stage on the grounds that (1) the abstention doctrine espoused in *Councilman,* 420 U.S. 738, 95 S.Ct. 1300, precludes preenforcement review of procedural rules, (2) Hamdan will be able to raise any such challenge following a "final decision" under the DTA, and (3) "there is ... no basis to presume, before the trial has even commenced, that the trial will not be conducted in good faith and according to law." Brief for Respondents 45–46, nn. 20–21. The first of these contentions was disposed of in Part III, *supra,* and neither of the latter two is sound.

****2788** First, because Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a sentence shorter than 10 years' imprisonment, he has no automatic right to review of the commission's "final decision"[44] before a federal court under the DTA. See § 1005(e)(3), 119 Stat. 2743. Second, contrary to the Government's assertion, there *is* a "basis to presume" that the procedures employed during Hamdan's trial will violate the law: The procedures are described with particularity in Commission Order No. 1, and implementation of some of them has already occurred. One of Hamdan's complaints is that he will be, and *indeed already has been,* excluded from

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his own trial. See Reply Brief for Petitioner 12; App. to Pet. for Cert. 45a. Under these circumstances, review of the procedures in advance of a "final decision"—the timing of which is left entirely to the discretion of the President under the DTA—is appropriate. We turn, then, to consider the merits of Hamdan's procedural challenge.

44 Any decision of the commission is not "final" until the President renders it so. See Commission Order No. 1, § 6(H)(6).

***617** C

In part because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial. See, *e.g.,* 1 The War of the Rebellion 248 (2d series 1894) (General Order 1 issued during the Civil War required military commissions to "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise"). Accounts of commentators from Winthrop through General Crowder—who drafted Article of War 15 and whose views have been deemed "authoritative" by this Court, *Madsen,* 343 U.S., at 353, 72 S.Ct. 699—confirm as much. [45] As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity was espoused as a background assumption. See Paust, Antiterrorism Military Commissions: Courting Illegality, 23 Mich. J. Int'l L. 1, 3–5 (2001–2002).

45 See Winthrop 835, and n. 81 ("military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial"); *id.,* at 841–842; S.Rep. No. 130, 64th Cong., 1st Sess., 40 (1916) (testimony of Gen. Crowder) ("Both classes of courts have the same procedure"); see also, *e.g.,* H. Coppee, Field Manual of Courts–Martial 105 (1863) ("[Military] commissions are appointed by the same authorities as those which may order courts-martial. They are constituted in a manner similar to such courts, and their proceedings are conducted in exactly the same way, as to form, examination of witnesses, etc.").

There is a glaring historical exception to this general rule. The procedures and evidentiary rules used to try General Yamashita near the end of World War II deviated in significant respects from those then governing courts-martial. ***618** See 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499. The force of that precedent, however, has been seriously undermined by post-World War II developments.

Yamashita, from late 1944 until September 1945, was Commanding General of the Fourteenth Army Group of the Imperial Japanese Army, which had exercised control over the Philippine Islands. On September 3, 1945, after American forces regained control of the Philippines, Yamashita ****2789** surrendered. Three weeks later, he was charged with violations of the law of war. A few weeks after that, he was arraigned before a military commission convened in the Philippines. He pleaded not guilty, and his trial lasted for two months. On December 7, 1945, Yamashita was convicted and sentenced to hang. See *id.,* at 5, 66 S.Ct. 340; *id.,* at 31–34, 66 S.Ct. 340 (Murphy, J., dissenting). This Court upheld the denial of his petition for a writ of habeas corpus.

The procedures and rules of evidence employed during Yamashita's trial departed so far from those used in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court. See *id.,* at 41–81, 66 S.Ct. 340 (Rutledge, J., joined by Murphy, J., dissenting). [46] Among the dissenters' primary concerns was that the commission had free rein to consider all evidence "which in the commission's opinion 'would be of assistance in proving or disproving the charge,' without any of the usual modes of authentication." *Id.,* at 49, 66 S.Ct. 340 (opinion of Rutledge, J.).

46 The dissenters' views are summarized in the following passage:
"It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense; in capital or other serious crimes to convict on 'official documents ...; affidavits; ... documents or translations thereof; diaries ..., photographs, motion picture films, and ... newspapers' or on hearsay, once, twice or thrice removed, more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion

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but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination." *Yamashita,* 327 U.S., at 44, 66 S.Ct. 340 (footnotes omitted).

***619** The majority, however, did not pass on the merits of Yamashita's procedural challenges because it concluded that his status disentitled him to any protection under the Articles of War (specifically, those set forth in Article 38, which would become Article 36 of the UCMJ) or the Geneva Convention of 1929, 47 Stat.2021 (1929 Geneva Convention). The Court explained that Yamashita was neither a "person made subject to the Articles of War by Article 2" thereof, 327 U.S., at 20, 66 S.Ct. 340, nor a protected prisoner of war being tried for crimes committed during his detention, *id.,* at 21, 66 S.Ct. 340.

At least partially in response to subsequent criticism of General Yamashita's trial, the UCMJ's codification of the Articles of War after World War II expanded the category of persons subject thereto to include defendants in Yamashita's (and Hamdan's) position,[47] and the Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed before their capture. See 3 Int'l Comm. of Red Cross,[48] Commentary: ****2790** Geneva Convention Relative to the Treatment of Prisoners of War 413 (J. Pictet gen.ed.1960) (hereinafter GCIII Commentary) (explaining ***620** that Article 85, which extends the Convention's protections to "[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture," was adopted in response to judicial interpretations of the 1929 Geneva Convention, including this Court's decision in *Yamashita*). The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.

47 Article 2 of the UCMJ now reads:
"(a) The following persons are subject to [the UCMJ]:
"(9) Prisoners of war in custody of the armed forces.
"(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." 10 U.S.C. § 802(a).
Guantanamo Bay is such a leased area. See *Rasul v. Bush,* 542 U.S. 466, 471, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004).

48 The International Committee of the Red Cross is referred to by name in several provisions of the 1949 Geneva Conventions and is the body that drafted and published the official commentary to the Conventions. Though not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions' provisions.

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it. See Winthrop 835, n. 81. That understanding is reflected in Article 36 of the UCMJ, which provides:

"(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

"(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress." 70A Stat. 50.

Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ—however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.

***621** Hamdan argues that Commission Order No. 1 violates both of these restrictions; he maintains that the procedures described in the Commission Order are inconsistent with the UCMJ and that the Government has offered no explanation for their deviation from the procedures governing courts-martial, which are set forth in the Manual for Courts–Martial, United States (2005 ed.) (Manual for Courts–Martial). Among the inconsistencies Hamdan identifies is

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that between § 6 of the Commission Order, which permits exclusion of the accused from proceedings and denial of his access to evidence in certain circumstances, and the UCMJ's requirement that "[a]ll ... proceedings" other than votes and deliberations by courts-martial "shall be made a part of the record and shall be in the presence of the accused." 10 U.S.C. § 839(c) (2000 ed., Supp.V). Hamdan also observes that the Commission Order dispenses with virtually all evidentiary rules applicable in courts-martial.

The Government has three responses. First, it argues, only 9 of the UCMJ's 158 Articles—the ones that expressly mention "military commissions"[49]—actually apply ****2791** to commissions, and Commission Order No. 1 sets forth no procedure ***622** that is "contrary to or inconsistent with" those 9 provisions. Second, the Government contends, military commissions would be of no use if the President were hamstrung by those provisions of the UCMJ that govern courts-martial. Finally, the President's determination that "the danger to the safety of the United States and the nature of international terrorism" renders it impracticable "to apply in military commissions ... the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," November 13 Order § 1(f), is, in the Government's view, explanation enough for any deviation from court-martial procedures. See Brief for Respondents 43–47, and n. 22.

49 Aside from Articles 21 and 36, discussed at length in the text, the other seven Articles that expressly reference military commissions are: (1) 28 (requiring appointment of reporters and interpreters); (2) 47 (making it a crime to refuse to appear or testify "before a court-martial, military commission, court of inquiry, or any other military court or board"); (3) 48 (allowing a "court-martial, provost court, or military commission" to punish a person for contempt); (4) 49(d) (permitting admission into evidence of a "duly authenticated deposition taken upon reasonable notice to the other parties" *only* if "admissible under the rules of evidence" and *only* if the witness is otherwise unavailable); (5) 50 (permitting admission into evidence of records of courts of inquiry "if otherwise admissible under the rules of evidence," and if certain other requirements are met); (6) 104 (providing that a person accused of aiding the enemy may be sentenced to death or other punishment by military commission or court-martial); and (7) 106 (mandating the death penalty for spies convicted before military commission or court-martial).

Hamdan has the better of this argument. Without reaching the question whether any provision of Commission Order No. 1 is strictly "contrary to or inconsistent with" other provisions of the UCMJ, we conclude that the "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. Subsection (b) of Article 36 was added after World War II, and requires a different showing of impracticability from the one required by subsection (a). Subsection (a) requires that the rules the President promulgates for courts-martial, provost courts, and military commissions alike conform to those that govern procedures in *Article III courts,* "so far as *he considers* practicable." 10 U.S.C. § 836(a) (emphasis added). Subsection (b), by contrast, demands that the rules applied in courts-martial, provost courts, and military commissions —whether or not they conform with the Federal Rules of Evidence—be "uniform *insofar as practicable*." § 836(b) (emphasis added). Under the latter provision, then, the rules set forth in the Manual for Courts–Martial must apply to military commissions unless impracticable.[50]

50 Justice THOMAS relies on the legislative history of the UCMJ to argue that Congress' adoption of Article 36(b) in the wake of World War II was "motivated" solely by a desire for "uniformity across the separate branches of the armed services." *Post,* at 2842. But even if Congress was concerned with ensuring uniformity across service branches, that does not mean it did not also intend to codify the longstanding practice of procedural parity between courts-martial and other military tribunals. Indeed, the suggestion that Congress did *not* intend uniformity across tribunal types is belied by the textual proximity of subsection (a) (which requires that the rules governing criminal trials in federal district courts apply, absent the President's determination of impracticability, to courts-martial, provost courts, and *military commissions* alike) and subsection (b) (which imposes the uniformity requirement).

***623** The President here has determined, pursuant to subsection (a), that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts," § 836(a), to Hamdan's commission. We assume that complete deference is owed that

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determination. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial. [51] ****2792** And even if subsection (b)'s requirements may be satisfied without such an official determination, the requirements of that subsection are not satisfied here.

51 We may assume that such a determination would be entitled to a measure of deference. For the reasons given by Justice KENNEDY, see *post,* at 2801 (opinion concurring in part), however, the level of deference accorded to a determination made under subsection (b) presumably would not be as high as that accorded to a determination under subsection (a).

Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. Assuming, *arguendo,* that the reasons articulated in the President's Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism. [52] ***624** Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial.

52 Justice THOMAS looks not to the President's official Article 36(a) determination, but instead to press statements made by the Secretary of Defense and the Under Secretary of Defense for Policy. See *post,* at 2842–2843 (dissenting opinion). We have not heretofore, in evaluating the legality of executive action, deferred to comments made by such officials to the media. Moreover, the only additional reason the comments provide—aside from the general danger posed by international terrorism—for departures from court-martial procedures is the need to protect classified information. As we explain in the text, and as Justice KENNEDY elaborates in his separate opinion, the structural and procedural defects of Hamdan's commission extend far beyond rules preventing access to classified information.

The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts–Martial but also by the UCMJ itself: the right to be present. See 10 U.S.C. § 839(c) (2000 ed., Supp.V). Whether or not that departure technically is "contrary to or inconsistent with" the terms of the UCMJ, 10 U.S.C. § 836(a), the jettisoning of so basic a right cannot lightly be excused as "practicable."

Under the circumstances, then, the rules applicable in courts-martial must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b).

The Government's objection that requiring compliance with the court-martial rules imposes an undue burden both ignores the plain meaning of Article 36(b) and misunderstands the purpose and the history of military commissions. The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. See Winthrop 831. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. ***625** That history explains why the military commission's procedures typically have been the ones used by courts-martial. That the jurisdiction of the two tribunals today may sometimes overlap, see *Madsen,* 343 U.S., at 354, 72 S.Ct. 699, does not detract from the force of this history; [53] ****2793** Article 21 did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool. Article 36, confirming as much, strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war. That Article not having been complied with here, the rules specified for Hamdan's trial are illegal. [54]

53 Justice THOMAS relies extensively on *Madsen* for the proposition that the President has free rein to set the procedures that govern military commissions. See *post,* at 2839–2840, 2840, 2841, n. 16, and 2847. That reliance is misplaced. Not only did *Madsen* not involve a law-of-war military commission, but (1) the petitioner there did not challenge the procedures used to try her, (2) the UCMJ, with its new Article 36(b), did not become

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effective until May 31, 1951, *after* the petitioner's trial, see 343 U.S., at 345, n. 6, 72 S.Ct. 699, and (3) the procedures used to try the petitioner actually afforded *more* protection than those used in courts-martial, see *id.,* at 358–360, 72 S.Ct. 699; see also *id.,* at 358, 72 S.Ct. 699 ("[T]he Military Government Courts for Germany ... have had a less military character than that of courts-martial").

54 Prior to the enactment of Article 36(b), it may well have been the case that a deviation from the rules governing courts-martial would not have rendered the military commission " '*illegal*.' " *Post,* at 2839–2840, n. 15 (THOMAS, J., dissenting) (quoting Winthrop 841). Article 36(b), however, imposes a statutory command that must be heeded.

D

The procedures adopted to try Hamdan also violate the Geneva Conventions. The Court of Appeals dismissed Hamdan's Geneva Convention challenge on three independent grounds: (1) the Geneva Conventions are not judicially enforceable; (2) Hamdan in any event is not entitled to their protections; and (3) even if he is entitled to their protections, *Councilman* abstention is appropriate. Judge Williams, concurring, rejected the second ground but agreed with the ***626** majority respecting the first and the last. As we explained in Part III, *supra,* the abstention rule applied in *Councilman,* 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591, is not applicable here.[55] And for the reasons that follow, we hold that neither of the other grounds the Court of Appeals gave for its decision is persuasive.

55 Justice THOMAS makes the different argument that Hamdan's Geneva Convention challenge is not yet "ripe" because he has yet to be sentenced. See *post,* at 2846–2847. This is really just a species of the abstention argument we have already rejected. See Part III, *supra*. The text of the Geneva Conventions does not direct an accused to wait until sentence is imposed to challenge the legality of the tribunal that is to try him.

i

The Court of Appeals relied on *Johnson v. Eisentrager,* 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950), to hold that Hamdan could not invoke the Geneva Conventions to challenge the Government's plan to prosecute him in accordance with Commission Order No. 1. *Eisentrager* involved a challenge by 21 German nationals to their 1945 convictions for war crimes by a military tribunal convened in Nanking, China, and to their subsequent imprisonment in occupied Germany. The petitioners argued, *inter alia,* that the 1929 Geneva Convention rendered illegal some of the procedures employed during their trials, which they said deviated impermissibly from the procedures used by courts-martial to try American soldiers. See *id.,* at 789, 70 S.Ct. 936. We rejected that claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity "between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank," and in any event could claim no protection, under the 1929 Geneva Convention, during trials for crimes that occurred before their confinement as prisoners of war. *Id.,* at 790, 70 S.Ct. 936.[56]

56 As explained in Part VI–C, *supra,* that is no longer true under the 1949 Conventions.

****2794** ***627** Buried in a footnote of the opinion, however, is this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument:

> "We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat.2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Id.,* at 789, n. 14, 70 S.Ct. 936.

The Court of Appeals, on the strength of this footnote, held that "the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court." 415 F.3d, at 40.

Whatever else might be said about the *Eisentrager* footnote, it does not control this case. We may assume that "the obvious

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scheme" of the 1949 Conventions is identical in all relevant respects to that of the 1929 Geneva Convention,[57] and even that that scheme would, absent some other provision of law, preclude Hamdan's invocation of the Convention's provisions as an independent source of law binding the Government's ***628** actions and furnishing petitioner with any enforceable right.[58] For, regardless of the nature of the rights conferred on Hamdan, cf. *United States v. Rauscher,* 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), they are, as the Government does not dispute, part of the law of war. See *Hamdi,* 542 U.S., at 520–521, 124 S.Ct. 2633 (plurality opinion). And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.

57 But see, *e.g.,* 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 21 (J. Pictet gen.ed.1958) (hereinafter GCIV Commentary) (the 1949 Geneva Conventions were written "first and foremost to protect individuals, and not to serve State interests"); GCIII Commentary 91 ("It was not ... until the Conventions of 1949 ... that the existence of 'rights' conferred on prisoners of war was affirmed").

58 But see generally Brief for Louis Henkin et al. as *Amici Curiae;* 1 Int'l Comm. of Red Cross, Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 84 (1952) ("It should be possible in States which are parties to the Convention ... for the rules of the Convention ... to be evoked before an appropriate national court by the protected person who has suffered the violation"); GCIII Commentary 92; GCIV Commentary 79.

ii

For the Court of Appeals, acknowledgment of that condition was no bar to Hamdan's trial by commission. As an alternative to its holding that Hamdan could not invoke the Geneva Conventions at all, the Court of Appeals concluded that the Conventions did not in any event apply to the armed conflict during which Hamdan was captured. The court accepted the Executive's assertions that Hamdan was captured in connection with the United States' war with al Qaeda and that that war is distinct from the war with the Taliban in Afghanistan. It further reasoned ****2795** that the war with al Qaeda evades the reach of the Geneva Conventions. See 415 F.3d, at 41–42. We, like Judge Williams, disagree with the latter conclusion.

The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting ***629** Parties." 6 U.S.T., at 3318.[59] Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a "High Contracting Party"—*i.e.,* a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.[60]

59 For convenience's sake, we use citations to the Third Geneva Convention only.

60 The President has stated that the conflict with the Taliban is a conflict to which the Geneva Conventions apply. See White House Memorandum, Humane Treatment of Taliban and al Qaeda Detainees 2 (Feb. 7, 2002), available at http://www.justicescholars.org/pegc/archive/White_ House/bush_memo_20020207_ed.pdf.

We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories.[61] Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party[[[62] to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including ***630** members of armed forces who have laid down their arms and those placed *hors de combat* by ... detention." *Ibid.* One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.,* at 3320.

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61 Hamdan observes that Article 5 of the Third Geneva Convention requires that if there be "any doubt" whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a "competent tribunal." 6 U.S.T., at 3324. See also Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, Army Regulation 190–8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), App. 116. Because we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved.

62 The term "Party" here has the broadest possible meaning; a Party need neither be a signatory of the Convention nor "even represent a legal entity capable of undertaking international obligations." GCIII Commentary 37.

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being " 'international in scope,' " does not qualify as a " 'conflict not of an international character.' " 415 F.3d, at 41. That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its **2796 application." *Id.,* at 44 (Williams, J., concurring). Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U.S.T., at 3318 (Art. 2, ¶ 1). High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-à-vis the nonsignatory if "the latter accepts and applies" those terms. *Ibid.* (Art. 2, ¶ 3). Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. See, *e.g.,* J. Bentham, Introduction to the Principles of Morals and Legislation 6, 296 (J. ***631** Burns & H. Hart eds.1970) (using the term "international law" as a "new though not inexpressive appellation" meaning "betwixt nation and nation"; defining "international" to include "mutual transactions between sovereigns as such"); Intl'l Comm. of Red Cross, Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1351 (1987) ("[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other").

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of "conflict not of an international character," *i.e.,* a civil war, see GCIII Commentary 36–37, the commentaries also make clear "that the scope of application of the Article must be as wide as possible," *id.,* at 36. [63] In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion," was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations. See *id.,* at 42–43.

63 See also *id.,* at 35 (Common Article 3 "has the merit of being simple and clear.... Its observance does not depend upon preliminary discussions on the nature of the conflict"); GCIV Commentary 51 ("[N]obody in enemy hands can be outside the law"); U.S. Army Judge Advocate General's Legal Center and School, Dept. of the Army, Law of War Workshop Deskbook 228 (June 2000) (reprint 2004) (Common Article 3 "serves as a 'minimum yardstick of protection' in all conflicts, not just internal armed conflicts" (quoting *Nicaragua v. United States,* 1986 I.C.J. 14, ¶ 218, 25 I.L.M. 1023)); *Prosecutor v. Tadíc,* Case No. IT–94–1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (ICTY App. Chamber, Oct. 2, 1995) (stating that "the character of the conflict is irrelevant" in deciding whether Common Article 3 applies).

iii

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Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a "regularly ***632** constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U.S.T., at 3320 (Art. 3, ¶ 1*(d)*). While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines " 'regularly constituted' " tribunals to include "ordinary military courts" and "definitely exclud[e] all special ****2797** tribunals." GCIV Commentary 340 (defining the term "properly constituted" in Article 66, which the commentary treats as identical to "regularly constituted");[64] see also *Yamashita,* 327 U.S., at 44, 66 S.Ct. 340 (Rutledge, J., dissenting) (describing military commission as a court "specially constituted for the particular trial"). And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organised in accordance with the laws and procedures already in force in a country." Int'l Comm. of Red Cross, 1 Customary Int'l Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").

64 The commentary's assumption that the terms "properly constituted" and "regularly constituted" are interchangeable is beyond reproach; the French version of Article 66, which is equally authoritative, uses the term "réguliérement constitués" in place of "properly constituted." 6 U.S.T., at 3559.

The Government offers only a cursory defense of Hamdan's military commission in light of Common Article 3. See Brief for Respondents 49–50. As Justice KENNEDY explains, that defense fails because "[t]he regular military courts in our system are the courts-martial established by congressional statutes." *Post,* at 2803 (opinion concurring in part). At a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice system ***633** only if some practical need explains deviations from court-martial practice." *Post,* at 2804. As we have explained, see Part VI–C, *supra,* no such need has been demonstrated here.[65]

65 Further evidence of this tribunal's irregular constitution is the fact that its rules and procedures are subject to change midtrial, at the whim of the Executive. See Commission Order No. 1, § 11 (providing that the Secretary of Defense may change the governing rules "from time to time").

iv

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U.S.T., at 3320 (Art. 3, ¶ 1*(d)*). Like the phrase "regularly constituted court," this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." Taft, The Law of Armed Conflict After 9/11: Some Salient Features, 28 Yale J. Int'l L. 319, 322 (2003). Among the rights set forth in Article 75 is the "right to be tried in [one's] presence." Protocol I, Art. 75(4)(e).[66]

66 Other international instruments to which the United States is a signatory include the same basic protections set forth in Article 75. See, *e.g.,* International Covenant on Civil and Political Rights, Art. 14, ¶ 3(*d*), Mar. 23, 1976, 999 U.N.T.S. 171 (setting forth the right of an accused "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing"). Following World War II, several defendants were tried and convicted by military commission for violations of the law of war in their failure to afford captives fair trials before imposition and execution of sentence. In two such trials, the prosecutors argued that the defendants' failure to apprise accused individuals of all evidence against them constituted violations of the law of war. See 5 U.N. War Crimes Commission, Law Reports of Trials of War Criminals 25, 30 (1948) (reprint 1997) (trial of Sergeant–Major

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Shigeru Ohashi), 66, 75 (trial of General Tanaka Hisakasu).

***634** We agree with Justice KENNEDY that the procedures adopted to try Hamdan ****2798** deviate from those governing courts-martial in ways not justified by any "evident practical need," *post,* at 2805, and for that reason, at least, fail to afford the requisite guarantees. See *post,* at 2804–2808. We add only that, as noted in Part VI–A, *supra,* various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. See §§ 6(B)(3), (D). [67] That the ***635** Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. Cf. *post,* at 2848–2849 (THOMAS, J., dissenting). But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.

67 The Government offers no defense of these procedures other than to observe that the defendant may not be barred from access to evidence if such action would deprive him of a "full and fair trial." Commission Order No. 1, § 6(D)(5)(b). But the Government suggests no circumstances in which it would be "fair" to convict the accused based on evidence he has not seen or heard. Cf. *Crawford v. Washington,* 541 U.S. 36, 49, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (" 'It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine' " (quoting *State v. Webb,* 2 N.C. 103, 104, 1794 WL 98 (Super. L. & Eq. 1794) *(per curiam)*)); *Diaz v. United States,* 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500 (1912) (describing the right to be present as "scarcely less important to the accused than the right of trial itself"); *Lewis v. United States,* 146 U.S. 370, 372, 13 S.Ct. 136, 36 L.Ed. 1011 (1892) (exclusion of defendant from part of proceedings is "contrary to the dictates of humanity" (internal quotation marks omitted)); *Joint Anti—Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 170, n. 17, 171, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring) ("The plea that evidence of guilt must be secret is abhorrent to free men" (internal quotation marks omitted)). More fundamentally, the legality of a tribunal under Common Article 3 cannot be established by bare assurances that, whatever the character of the court or the procedures it follows, individual adjudicators will act fairly.

v

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.

VII

We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

****2799** *It is so ordered.*

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

Justice BREYER, with whom Justice KENNEDY, Justice SOUTER, and Justice GINSBURG join, concurring.

***636** The dissenters say that today's decision would "sorely hamper the President's ability to confront and defeat a new and deadly enemy." *Post,* at 2838 (opinion of THOMAS, J.). They suggest that it undermines our Nation's ability to "preven[t] future attacks" of the grievous sort that we have already suffered. *Post,* at 2849. That claim leads me to state

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briefly what I believe the majority sets forth both explicitly and implicitly at greater length. The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Cf. *Hamdi v. Rumsfeld,* 542 U.S. 507, 536, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion). Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.

Justice KENNEDY, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join as to Parts I and II, concurring in part.

Military Commission Order No. 1, which governs the military commission established to try petitioner Salim Hamdan for war crimes, exceeds limits that certain statutes, duly enacted by Congress, have placed on the President's authority to convene military courts. This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent ***637** branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.

These principles seem vindicated here, for a case that may be of extraordinary importance is resolved by ordinary rules. The rules of most relevance here are those pertaining to the authority of Congress and the interpretation of its enactments.

It seems appropriate to recite these rather fundamental points because the Court refers, as it should in its exposition of the case, to the requirement of the Geneva Conventions of 1949 that military tribunals be "regularly constituted," *ante,* at 2796—a requirement that controls here, if for no other reason, because Congress requires that military commissions like the ones at issue conform to the "law of war," 10 U.S.C. § 821. Whatever the substance and content of the term "regularly constituted" ****2800** as interpreted in this and any later cases, there seems little doubt that it relies upon the importance of standards deliberated upon and chosen in advance of crisis, under a system where the single power of the Executive is checked by other constitutional mechanisms. All of which returns us to the point of beginning—that domestic statutes control this case. If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.

***638** I join the Court's opinion, save Parts V and VI–D–iv. To state my reasons for this reservation, and to show my agreement with the remainder of the Court's analysis by identifying particular deficiencies in the military commissions at issue, this separate opinion seems appropriate.

I

Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review. Cf. *Loving v. United States,* 517 U.S. 748, 756–758, 760, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996). Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive.

The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.,* at 635, 72 S.Ct. 863.

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"When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.,* at 637, 72 S.Ct. 863. And "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Ibid.*

In this case, as the Court observes, the President has acted in a field with a history of congressional participation and regulation. *Ante,* at 2774, 2789–2790. In the Uniform Code ***639** of Military Justice (UCMJ), 10 U.S.C. § 801 *et seq.,* which Congress enacted, building on earlier statutes, in 1950, see Act of May 5, 1950, ch. 169, 64 Stat. 107, and later amended, see, *e.g.,* Military Justice Act of 1968, 82 Stat. 1335, Congress has set forth governing principles for military courts. The UCMJ as a whole establishes an intricate system of military justice. It authorizes courts-martial in various forms, 10 U.S.C. §§ 816–820 (2000 ed. and Supp. III); it regulates the organization and procedure of those courts, *e.g.,* §§ 822–835, 851–854; it defines offenses, §§ 877–934, and rights for the accused, *e.g.,* §§ 827(b)-(c), 831, 844, 846, 855 (2000 ed.); and it provides mechanisms for appellate review, §§ 859–876b (2000 ed. and Supp. III). As explained below, the statute further recognizes that special military commissions may be convened to try war crimes. See *infra,* at 2801–2802; § 821 (2000 ed.). While these laws provide authority for certain forms of military courts, they also ****2801** impose limitations, at least two of which control this case. If the President has exceeded these limits, this becomes a case of conflict between Presidential and congressional action—a case within Justice Jackson's third category, not the second or first.

One limit on the President's authority is contained in Article 36 of the UCMJ. That section provides:

> "(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> "(b) All rules and regulations made under this article shall be uniform insofar as practicable." 10 U.S.C. § 836 (2000 ed.).

***640** In this provision the statute allows the President to implement and build on the UCMJ's framework by adopting procedural regulations, subject to three requirements: (1) Procedures for military courts must conform to district-court rules insofar as the President "considers practicable"; (2) the procedures may not be contrary to or inconsistent with the provisions of the UCMJ; and (3) "insofar as practicable" all rules and regulations under § 836 must be uniform, a requirement, as the Court points out, that indicates the rules must be the same for military commissions as for courts-martial unless such uniformity is impracticable, *ante,* at 2790, 2791, and n. 50.

As the Court further instructs, even assuming the first and second requirements of § 836 are satisfied here—a matter of some dispute, see *ante,* at 2790–2791—the third requires us to compare the military-commission procedures with those for courts-martial and determine, to the extent there are deviations, whether greater uniformity would be practicable. *Ante,* at 2791–2793. Although we can assume the President's practicability judgments are entitled to some deference, the Court observes that Congress' choice of language in the uniformity provision of 10 U.S.C. § 836(b) contrasts with the language of § 836(a). This difference suggests, at the least, a lower degree of deference for § 836(b) determinations. *Ante,* at 2791–2792. The rules for military courts may depart from federal-court rules whenever the President "considers" conformity impracticable, § 836(a); but the statute requires procedural uniformity across different military courts "insofar as [uniformity is] practicable," § 836(b), not insofar as the President considers it to be so. The Court is right to conclude this is of relevance to our decision. Further, as the Court is also correct to conclude, *ante,* at 2792, the term "practicable" cannot be construed to permit deviations based on mere convenience or expedience. "Practicable" means "feasible," that is, "possible to practice or perform" or "capable of being put into practice, done, or accomplished." Webster's ***641** Third New International Dictionary 1780 (1961). Congress' chosen language, then, is best understood to allow the selection of procedures based on logistical constraints, the accommodation of witnesses, the security of the proceedings, and the like. Insofar as the "[p]retrial, trial, and post-trial procedures" for the military commissions at issue deviate from court-martial practice, the deviations must be explained by some such practical need.

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****2802** In addition to § 836, a second UCMJ provision, 10 U.S.C. § 821, requires us to compare the commissions at issue to courts-martial. This provision states:

> "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

In § 821 Congress has addressed the possibility that special military commissions—criminal courts other than courts-martial—may at times be convened. At the same time, however, the President's authority to convene military commissions is limited: It extends only to "offenders or offenses" that "by statute or by the law of war may be tried by" such military commissions. *Ibid.;* see also *ante,* at 2774. The Government does not claim to base the charges against Hamdan on a statute; instead it invokes the law of war. That law, as the Court explained in *Ex parte Quirin,* 317 U.S. 1, 63 S.Ct. 1 (1942), derives from "rules and precepts of the law of nations"; it is the body of international law governing armed conflict. *Id.,* at 28, 63 S.Ct. 1. If the military commission at issue is illegal under the law of war, then an offender cannot be tried "by the law of war" before that commission.

The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict ***642** with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan. *Ante,* at 2795–2797; see also 415 F.3d 33, 44 (C.A.D.C.2005) (Williams, J., concurring). That provision is Common Article 3 of the four Geneva Conventions of 1949. It prohibits, as relevant here, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." See, *e.g.,* Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364. The provision is part of a treaty the United States has ratified and thus accepted as binding law. See *id.,* at 3316. By Act of Congress, moreover, violations of Common Article 3 are considered "war crimes," punishable as federal offenses, when committed by or against United States nationals and military personnel. See 18 U.S.C. § 2441. There should be no doubt, then, that Common Article 3 is part of the law of war as that term is used in § 821.

The dissent by Justice THOMAS argues that Common Article 3 nonetheless is irrelevant to this case because in *Johnson v. Eisentrager,* 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950), it was said to be the "obvious scheme" of the 1929 Geneva Convention that "[r]ights of alien enemies are vindicated under it only through protests and intervention of protecting powers," *i.e.*, signatory states, *id.,* at 789, n. 14, 70 S.Ct. 936. As the Court explains, *ante,* at 2793–2794, this language from *Eisentrager* is not controlling here. Even assuming the*Eisentrager* analysis has some bearing upon the analysis of the broader 1949 Conventions and that, in consequence, rights are vindicated "under [those Conventions]" only through protests and intervention, 339 U.S., at 789, n. 14, 70 S.Ct. 936, Common Article 3 is nonetheless relevant to the question of authorization under § 821. Common Article 3 is part of the law of war that Congress has directed the President to follow in establishing military ***643** commissions. *Ante,* at 2795. Consistent ****2803** with that view, the *Eisentrager* Court itself considered on the merits claims that "procedural irregularities" under the 1929 Convention "deprive[d] the Military Commission of jurisdiction." 339 U.S., at 789, 790, 70 S.Ct. 936.

In another military-commission case, *In re Yamashita,* 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946), the Court likewise considered on the merits—without any caveat about remedies under the Convention—a claim that an alleged violation of the 1929 Convention "establish[ed] want of authority in the commission to proceed with the trial." *Id.,* at 23, 24, 66 S.Ct. 340. That is the precise inquiry we are asked to perform here.

Assuming the President has authority to establish a special military commission to try Hamdan, the commission must satisfy Common Article 3's requirement of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," 6 U.S.T., at 3320. The terms of this general standard are yet to be elaborated and further defined, but Congress has required compliance with it by referring to the "law of war" in § 821. The Court correctly concludes that the military commission here does not comply with this provision.

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Common Article 3's standard of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," *ibid.,* supports, at the least, a uniformity principle similar to that codified in § 836(b). The concept of a "regularly constituted court" providing "indispensable" judicial guarantees requires consideration of the system of justice under which the commission is established, though no doubt certain minimum standards are applicable. See *ante,* at 2796–2797; 1 Int'l Comm. of Red Cross, 1 Customary Int'l Humanitarian Law 355 (2005) (explaining that courts are "regularly constituted" under Common Article 3 if they are "established and organised in accordance with the laws and procedures already in force in a country").

***644** The regular military courts in our system are the courts-martial established by congressional statutes. Acts of Congress confer on those courts the jurisdiction to try "any person" subject to war crimes prosecution. 10 U.S.C. § 818. As the Court explains, moreover, while special military commissions have been convened in previous armed conflicts—a practice recognized in § 821—those military commissions generally have adopted the structure and procedure of courts-martial. See, *e.g.,* 1 The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies 248 (2d series 1894) (Civil War general order requiring that military commissions "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise"); W. Winthrop, Military Law and Precedents 835, n. 81 (rev.2d ed. 1920) ("[M]ilitary commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial"); 1 U.N. War Crimes Commission, Law Reports of Trials of War Criminals 116–117 (1947) (reprint 1997) (hereinafter Law Reports) (discussing post-World War II regulations requiring that military commissions "hav[e] regard for" rules of procedure and evidence applicable in general courts-martial); see also *ante,* at 2788–2790; *post,* at 2839, n. 15 (THOMAS, J., dissenting). Today, moreover, § 836(b)—which took effect after the military trials in the World War II cases invoked by the dissent, see *Madsen v. Kinsella,* 343 U.S. 341, 344–345, and n. 6, 72 S.Ct. 699, 96 L.Ed. 988 (1952); *Yamashita,* ****2804** *supra,* at 5, 66 S.Ct. 340; *Quirin,* 317 U.S., at 23, 63 S.Ct. 1—codifies this presumption of uniformity at least as to "[p]retrial, trial, and post-trial procedures." Absent more concrete statutory guidance, this historical and statutory background—which suggests that some practical need must justify deviations from the court-martial model—informs the understanding of which military courts are "regularly constituted" under United States law.

***645** In addition, whether or not the possibility, contemplated by the regulations here, of midtrial procedural changes could by itself render a military commission impermissibly irregular, *ante,* at 2797, n. 65; see also Military Commission Order No. 1, § 11 (Aug. 31, 2005), App. to Brief for Petitioner 46a–72a (hereinafter MCO), an acceptable degree of independence from the Executive is necessary to render a commission "regularly constituted" by the standards of our Nation's system of justice. And any suggestion of executive power to interfere with an ongoing judicial process raises concerns about the proceedings' fairness. Again, however, courts-martial provide the relevant benchmark. Subject to constitutional limitations, see *Ex parte Milligan,* 4 Wall. 2, 18 L.Ed. 281 (1866), Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them. The guidance Congress has provided with respect to courts-martial indicates the level of independence and procedural rigor that Congress has deemed necessary, at least as a general matter, in the military context.

At a minimum a military commission like the one at issue—a commission specially convened by the President to try specific persons without express congressional authorization—can be "regularly constituted" by the standards of our military justice system only if some practical need explains deviations from court-martial practice. In this regard the standard of Common Article 3, applied here in conformity with § 821, parallels the practicability standard of § 836(b). Section 836, however, is limited by its terms to matters properly characterized as procedural—that is, "[p]retrial, trial, and post-trial procedures"—while Common Article 3 permits broader consideration of matters of structure, organization, and mechanisms to promote the tribunal's insulation from command influence. Thus the combined effect of the two statutes discussed here— §§ 836 and 821—is that considerations of practicability must support departures from court-martial ***646** practice. Relevant concerns, as noted earlier, relate to logistical constraints, accommodation of witnesses, security of the proceedings, and the like, not mere expedience or convenience. This determination, of course, must be made with due regard for the constitutional principle that congressional statutes can be controlling,

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including the congressional direction that the law of war has a bearing on the determination.

These principles provide the framework for an analysis of the specific military commission at issue here.

II

In assessing the validity of Hamdan's military commission the precise circumstances of this case bear emphasis. The allegations against Hamdan are undoubtedly serious. Captured in Afghanistan during our Nation's armed conflict with the Taliban and al Qaeda—a conflict that continues as we speak—Hamdan stands accused of overt acts in furtherance of a conspiracy to commit terrorism: delivering weapons and ammunition to al Qaeda, acquiring trucks for use by Usama bin Laden's ****2805** bodyguards, providing security services to bin Laden, and receiving weapons training at a terrorist camp. App. to Pet. for Cert. 65a–67a. Nevertheless, the circumstances of Hamdan's trial present no exigency requiring special speed or precluding careful consideration of evidence. For roughly four years, Hamdan has been detained at a permanent United States military base in Guantanamo Bay, Cuba. And regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant.

Against this background, the Court is correct to conclude that the military commission the President has convened to try Hamdan is unauthorized. *Ante,* at 2792–2793, 2796–2797, 2798. The following analysis, which expands on the Court's discussion, explains my reasons for reaching this conclusion.

***647** To begin with, the structure and composition of the military commission deviate from conventional court-martial standards. Although these deviations raise questions about the fairness of the trial, no evident practical need explains them.

Under the UCMJ, courts-martial are organized by a "convening authority"—either a commanding officer, the Secretary of Defense, the Secretary concerned, or the President. 10 U.S.C. §§ 822–824 (2000 ed. and Supp. III). The convening authority refers charges for trial, Manual for Courts–Martial, United States, Rule for Courts–Martial 401 (2005 ed.) (hereinafter R.C. M.), and selects the court-martial members who vote on the guilt or innocence of the accused and determine the sentence, 10 U.S.C. §§ 825(d)(2), 851–852 (2000 ed.); R.C.M. 503(a). Paralleling this structure, under MCO No. 1 an " 'Appointing Authority' " —either the Secretary of Defense or the Secretary's "designee"—establishes commissions subject to the order, MCO No. 1, § 2, approves and refers charges to be tried by those commissions, § 4(B)(2)(a), and appoints commission members who vote on the conviction and sentence, §§ 4(A)(1)–(3). In addition the Appointing Authority determines the number of commission members (at least three), oversees the chief prosecutor, provides "investigative or other resources" to the defense insofar as he or she "deems necessary for a full and fair trial," approves or rejects plea agreements, approves or disapproves communications with news media by prosecution or defense counsel (a function shared by the General Counsel of the Department of Defense), and issues supplementary commission regulations (subject to approval by the General Counsel of the Department of Defense, unless the Appointing Authority is the Secretary of Defense). See MCO No. 1, §§ 4(A)(2), 5(H), 6(A)(4), 7(A); Military Commission Instruction No. 3, § 5(C) (July 15, 2005) (hereinafter MCI), available at www.defenselink. mil/news/Aug2005/d20050811MCI3.pdf; MCI No. 4, § 5(C) (Sept. 16, 2005), available at www. ***648** defenselink.mil/news/Oct2005/d20051003MCI4.pdf; MCI No. 6, § 3(B)(3) (Apr. 15, 2004), available at www.defenselink. mil/news/Apr2004/d20040420ins6.pdf (all Internet materials as visited June 27, 2006, and available in Clerk of Court's case file).

Against the background of these significant powers for the Appointing Authority, which in certain respects at least conform to ordinary court-martial standards, the regulations governing the commissions at issue make several noteworthy departures. At a general court-martial—the only type authorized to impose penalties of more than one year's incarceration or to adjudicate offenses against the law of war, ****2806** R.C.M. 201(f); 10 U.S.C. §§ 818–820 (2000 ed. and Supp. III)—the presiding officer who rules on legal issues must be a military judge. R.C.M. 501(a)(1), 801(a)(4)-(5); 10 U.S.C. § 816(1) (2000 ed., Supp. III); see also R.C.M. 201(f)(2)(B)(ii) (likewise requiring a military judge for certain other courts-martial); 10 U.S.C. § 819 (2000 ed. and Supp. III) (same). A military judge is an officer who is a member of a state or federal bar and has been specially certified for judicial duties by the Judge Advocate General for the officer's Armed Service. R.C.M. 502(c); 10 U.S.C. § 826(b). To protect their independence, military judges at general courts-martial are "assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee." R.C.M. 502(c). They must be detailed

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to the court, in accordance with applicable regulations, "by a person assigned as a military judge and directly responsible to the Judge Advocate General or the Judge Advocate General's designee." R.C.M. 503(b); see also 10 U.S.C. § 826(c); see generally *Weiss v. United States,* 510 U.S. 163, 179–181, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994) (discussing provisions that "insulat[e] military judges from the effects of command influence" and thus "preserve judicial impartiality"). Here, by contrast, the Appointing Authority selects the presiding officer, MCO No. 1, §§ 4(A)(1), (A)(4); ***649** and that officer need only be a judge advocate, that is, a military lawyer, § 4(A)(4).

The Appointing Authority, moreover, exercises supervisory powers that continue during trial. Any interlocutory question "the disposition of which would effect a termination of proceedings with respect to a charge" is subject to decision not by the presiding officer, but by the Appointing Authority. § 4(A)(5)(e) (stating that the presiding officer "shall certify" such questions to the Appointing Authority). Other interlocutory questions may be certified to the Appointing Authority as the presiding officer "deems appropriate." *Ibid.* While in some circumstances the Government may appeal certain rulings at a court-martial—including "an order or ruling that terminates the proceedings with respect to a charge or specification," R.C.M. 908(a); see also 10 U.S.C. § 862(a)—the appeals go to a body called the Court of Criminal Appeals, not to the convening authority. R.C.M. 908; 10 U.S.C. § 862(b); see also R.C.M. 1107 (requiring the convening authority to approve or disapprove the findings and sentence of a court-martial but providing for such action only after entry of sentence and restricting actions that increase penalties); 10 U.S.C. § 860 (same); cf. § 837(a) (barring command influence on court-martial actions). The Court of Criminal Appeals functions as the military's intermediate appeals court; it is established by the Judge Advocate General for each Armed Service and composed of appellate military judges. R.C.M. 1203; 10 U.S.C. § 866. This is another means in which, by structure and tradition, the court-martial process is insulated from those who have an interest in the outcome of the proceedings.

Finally, in addition to these powers with respect to the presiding officer, the Appointing Authority has greater flexibility in appointing commission members. While a general court-martial requires, absent a contrary election by the accused, at least five members, R.C.M. 501(a)(1); 10 U.S.C. § 816(1) (2000 ed. and Supp. III), the Appointing Authority ***650** here is free, as noted earlier, to select as few as three. MCO No. 1, § 4(A)(2). This difference may affect the deliberative process and the prosecution's burden of persuasion.

As compared to the role of the convening authority in a court-martial, the greater powers of the Appointing Authority here—including even the resolution of dispositive ****2807** issues in the middle of the trial—raise concerns that the commission's decisionmaking may not be neutral. If the differences are supported by some practical need beyond the goal of constant and ongoing supervision, that need is neither apparent from the record nor established by the Government's submissions.

It is no answer that, at the end of the day, the Detainee Treatment Act of 2005(DTA), 119 Stat. 2739, affords military-commission defendants the opportunity for judicial review in federal court. As the Court is correct to observe, the scope of that review is limited, DTA § 1005(e)(3)(D), *id.,* at 2743; see also *ante,* at 2762–2763, and the review is not automatic if the defendant's sentence is under 10 years, § 1005(e)(3)(B), 119 Stat. 2743. Also, provisions for review of legal issues after trial cannot correct for structural defects, such as the role of the Appointing Authority, that can cast doubt on the factfinding process and the presiding judge's exercise of discretion during trial. Before military-commission defendants may obtain judicial review, furthermore, they must navigate a military review process that again raises fairness concerns. At the outset, the Appointing Authority (unless the Appointing Authority is the Secretary of Defense) performs an "administrative review" of undefined scope, ordering any "supplementary proceedings" deemed necessary. MCO No. 1, § 6(H)(3). After that the case is referred to a three-member Review Panel composed of officers selected by the Secretary of Defense. § 6(H)(4); MCI No. 9, § 4(B) (Oct. 11, 2005), available at www.defenselink.mil/news/Oct2005/d20051014MCI9.pdf. Though the Review Panel may return the case for further ***651** proceedings only if a majority "form[s] a definite and firm conviction that a material error of law occurred," MCO No. 1, § 6(H)(4); MCI No. 9, § 4(C)(1)(a), only one member must have "experience as a judge," MCO No. 1, § 6(H)(4); nothing in the regulations requires that other panel members have legal training. By comparison to the review of court-martial judgments performed by such independent bodies as the Judge Advocate General, the Court of Criminal Appeals, and the Court of Appeals for the Armed Forces, 10 U.S.C. §§ 862, 864, 866, 867, 869, the review process here lacks structural protections designed to help ensure impartiality.

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These structural differences between the military commissions and courts-martial—the concentration of functions, including legal decisionmaking, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress—remove safeguards that are important to the fairness of the proceedings and the independence of the court. Congress has prescribed these guarantees for courts-martial; and no evident practical need explains the departures here. For these reasons the commission cannot be considered regularly constituted under United States law and thus does not satisfy Congress' requirement that military commissions conform to the law of war.

Apart from these structural issues, moreover, the basic procedures for the commissions deviate from procedures for courts-martial, in violation of § 836(b). As the Court explains, *ante,* at 2786–2787, 2791–2792, the MCO abandons the detailed Military Rules of Evidence, which are modeled on the Federal Rules of Evidence in conformity with § 836(a)'s requirement of presumptive compliance with district-court rules.

Instead, the order imposes just one evidentiary rule: "Evidence shall be admitted if ... the evidence would have probative ****2808** value to a reasonable person," MCO No. 1, § 6(D)(1). Although it is true some military commissions applied ***652** an amorphous evidence standard in the past, see, *e.g.,* 1 Law Reports 117–118 (discussing World War II military-commission orders); Exec. Order No. 9185, 7 Fed.Reg. 5103 (1942) (order convening military commission to try Nazi saboteurs), the evidentiary rules for those commissions were adopted before Congress enacted the uniformity requirement of 10 U.S.C. § 836(b) as part of the UCMJ, see Act of May 5, 1950, ch. 169, 64 Stat. 107, 120, 149. And while some flexibility may be necessary to permit trial of battlefield captives like Hamdan, military statutes and rules already provide for introduction of deposition testimony for absent witnesses, 10 U.S.C. § 849(d); R.C.M. 702, and use of classified information, Military Rule Evid. 505. Indeed, the deposition-testimony provision specifically mentions military commissions and thus is one of the provisions the Government concedes must be followed by the commission at issue. See *ante,* at 2790, and n. 49. That provision authorizes admission of deposition testimony only if the witness is absent for specified reasons, § 849(d)—a requirement that makes no sense if military commissions may consider all probative evidence. Whether or not this conflict renders the rules at issue "contrary to or inconsistent with" the UCMJ under § 836(a), it creates a uniformity problem under § 836(b).

The rule here could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability. Indeed, the commission regulations specifically contemplate admission of unsworn written statements, MCO No. 1, § 6(D)(3); and they make no provision for exclusion of coerced declarations save those "established to have been made as a result of torture," MCI No. 10, § 3(A) (Mar. 24, 2006), available at www. defenselink.mil/news/ Mar2006/ d20060327MCI10.pdf; cf. Military Rule Evid. 304(c)(3) (generally barring use of statements obtained "through the use of coercion, unlawful influence, or unlawful inducement"); 10 U.S.C. § 831(d) (same). Besides, even if ***653** evidence is deemed nonprobative by the presiding officer at Hamdan's trial, the military-commission members still may view it. In another departure from court-martial practice the military-commission members may object to the presiding officer's evidence rulings and determine themselves, by majority vote, whether to admit the evidence. MCO No. 1, § 6(D)(1); cf. R. C. M. 801(a)(4), (e)(1) (providing that the military judge at a court-martial determines all questions of law).

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As the Court explains, the Government has made no demonstration of practical need for these special rules and procedures, either in this particular case or as to the military commissions in general, *ante,* at 2791–2792; nor is any such need self-evident. For all the Government's regulations and submissions reveal, it would be feasible for most, if not all, of the conventional military evidence rules and procedures to be followed.

In sum, as presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in Articles 36 and 21 of the UCMJ, 10 U.S.C. §§ 836, 821. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.

III

In light of the conclusion that the military commission here is unauthorized under **2809 the UCMJ, I see no need to consider several further issues addressed in the plurality opinion by Justice STEVENS and the dissent by Justice THOMAS.

First, I would not decide whether Common Article 3's standard—a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," 6 U.S.T., at 3320(¶ (1)*(d)*)—necessarily *654 requires that the accused have the right to be present at all stages of a criminal trial. As Justice STEVENS explains, MCO No. 1 authorizes exclusion of the accused from the proceedings if the presiding officer determines that, among other things, protection of classified information so requires. See §§ 6(B)(3), (D)(5); *ante,* at 2786. Justice STEVENS observes that these regulations create the possibility of a conviction and sentence based on evidence Hamdan has not seen or heard—a possibility the plurality is correct to consider troubling. *Ante,* at 2798, n. 67 (collecting cases); see also *In re Oliver,* 333 U.S. 257, 277, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (finding "no support for sustaining petitioner's conviction of contempt of court upon testimony given in petitioner's absence").

As the dissent by Justice THOMAS points out, however, the regulations bar the presiding officer from admitting secret evidence if doing so would deprive the accused of a "full and fair trial." MCO No. 1, § 6(D)(5)(b); see also *post,* at 2848. This fairness determination, moreover, is unambiguously subject to judicial review under the DTA. See § 1005(e)(3)(D)(i), 119 Stat. 2743 (allowing review of compliance with the "standards and procedures" in MCO No. 1). The evidentiary proceedings at Hamdan's trial have yet to commence, and it remains to be seen whether he will suffer any prejudicial exclusion.

There should be reluctance, furthermore, to reach unnecessarily the question whether, as the plurality seems to conclude, *ante,* at 2797, Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding the earlier decision by our Government not to accede to the Protocol. For all these reasons, and without detracting from the importance of the right of presence, I would rely on other deficiencies noted here and in the opinion by the Court—deficiencies that relate to the structure and procedure of the commission and that inevitably will affect the proceedings—as the basis for finding the military commissions lack authorization *655 under 10 U.S.C. § 836 and fail to be regularly constituted under Common Article 3 and § 821.

I likewise see no need to address the validity of the conspiracy charge against Hamdan—an issue addressed at length in Part V of Justice STEVENS' opinion and in Part II–C of Justice THOMAS' dissent. See *ante,* at 2778–2786; *post,* at 2829–2838. In light of the conclusion that the military commissions at issue are unauthorized, Congress may choose to provide further guidance in this area. Congress, not the Court, is the branch in the better position to undertake the "sensitive task of establishing a principle not inconsistent with the national interest or with international justice." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 428, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).

Finally, for the same reason, I express no view on the merits of other limitations on military commissions described as elements of the common law of war in Part V of Justice STEVENS' opinion. See *ante,* at 2775–2778, 2785–2786; *post,* at 2828–2829 (THOMAS, J., dissenting).

With these observations I join the Court's opinion with the exception of Parts V and VI–D–iv.

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**2810 Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, dissenting.

On December 30, 2005, Congress enacted the Detainee Treatment Act (DTA). It unambiguously provides that, as of that date, "no court, justice, or judge" shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee. Notwithstanding this plain directive, the Court today concludes that, on what it calls the statute's *most natural* reading, *every* "court, justice, or judge" before whom such a habeas application was pending on December 30 has jurisdiction to hear, consider, and render judgment on it. This conclusion is patently erroneous. And even if it were not, the jurisdiction supposedly retained should, in an exercise of sound equitable discretion, not be exercised.

*656 I

A

The DTA provides: "[N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of

habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." § 1005(e)(1), 119 Stat. 2742 (internal division omitted). This provision "t[ook] effect on the date of the enactment of this Act," § 1005(h)(1), *id.,* at 2743, which was December 30, 2005. As of that date, then, *no* court had jurisdiction to "hear or consider" the merits of petitioner's habeas application. This repeal of jurisdiction is simply not ambiguous as between pending and future cases. It prohibits *any* exercise of jurisdiction, and it became effective as to *all* cases last December 30. It is also perfectly clear that the phrase "no court, *justice,* or judge" includes this Court and its Members, and that by exercising our appellate jurisdiction in this case we are "hear[ing] or consider[ing] ... an application for a writ of habeas corpus."

An ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date. For example, in *Bruner v. United States,* 343 U.S. 112, 72 S.Ct. 581, 96 L.Ed. 786 (1952), we granted certiorari to consider whether the Tucker Act's provision denying district court jurisdiction over suits by "officers" of the United States barred a suit by an *employee* of the United States. After we granted certiorari, Congress amended the Tucker Act by adding suits by " 'employees' " to the provision barring jurisdiction over suits by officers. *Id.,* at 114, 72 S.Ct. 581. This statute narrowing the jurisdiction of the district courts "became effective" while the case was pending before us, *ibid.,* and made no explicit reference to pending cases. Because the statute "did not reserve jurisdiction over pending cases," *id.,* at 115, 72 S.Ct. 581, we held that it clearly ousted jurisdiction over them. Summarizing centuries of practice, we said: "This ***657** rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by this Court." *Id.,* at 116–117, 72 S.Ct. 581. See also *Landgraf v. USI Film Products,* 511 U.S. 244, 274, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (opinion for the Court by STEVENS, J.) ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed").

This venerable rule that statutes ousting jurisdiction terminate jurisdiction in pending cases is not, as today's opinion for the Court would have it, a judge-made "presumption against jurisdiction," *ante,* at 2764, that we have invented to resolve an ambiguity in the statutes. It is simple ****2811** recognition of the reality that the *plain import* of a statute repealing jurisdiction is to eliminate the power to consider and render judgment—in an already pending case no less than in a case yet to be filed.

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. *And this is not less clear upon authority than upon principle*." *Ex parte McCardle,* 7 Wall. 506, 514, 19 L.Ed. 264 (1869) (emphasis added).

To alter this plain meaning, our cases have required an explicit reservation of pending cases in the jurisdiction-repealing statute. For example, *Bruner,* as mentioned, looked to whether Congress made "any reservation as to pending cases." 343 U.S., at 116–117, 72 S.Ct. 581; see also *id.,* at 115, 72 S.Ct. 581 ("Congress made no provision for cases pending at the effective date of the Act withdrawing jurisdiction and, for this reason, Courts of Appeals ordered pending cases terminated for want of jurisdiction"). Likewise, in *Hallowell v. Commons,* 239 U.S. 506, 36 S.Ct. 202, 60 L.Ed. 409 (1916), Justice Holmes relied on the fact ***658** that the jurisdiction-ousting provision "made no exception for pending litigation, but purported to be universal," *id.,* at 508, 36 S.Ct. 202. And in *Insurance Co. v. Ritchie,* 5 Wall. 541, 18 L.Ed. 540 (1867), we again relied on the fact that the jurisdictional repeal was made "without any saving of such causes as that before us," *id.,* at 544. As in *Bruner, Hallowell,* and *Ritchie,* the DTA's directive that "no court, justice, or judge shall have jurisdiction," § 1005(e)(1), 119 Stat. 2742, is made "without any reservation as to pending cases" and "purport[s] to be universal." What we stated in an earlier case remains true here: "[W]hen, if it had been the intention to confine the operation of [the jurisdictional repeal] ... to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, and that the old law should be unconditionally repealed." *Railroad Co. v. Grant,* 98 U.S. 398, 403, 25 L.Ed. 231 (1879).

The Court claims that I "rea[d] too much into" the *Bruner* line of cases, *ante,* at 2765, n. 7, and that "the *Bruner* rule" has never been "an inflexible trump," *ante,* at 2769. But the Court sorely misdescribes *Bruner*—as if it were a kind of early-day *Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), resolving statutory ambiguity by oblique negative inference. On the contrary, as described above, *Bruner* stated its holding as an unqualified "rule," which "has been adhered to consistently by this Court." 343 U.S., at 116–117, 72 S.Ct. 581. Though *Bruner* referred to an express

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saving clause elsewhere in the statute, *id.,* at 115, n. 7, 72 S.Ct. 581, it disavowed any reliance on such oblique indicators to vary the plain meaning, quoting *Ritchie* at length: " 'It is quite possible that this effect of the [jurisdiction-stripping statute] was not contemplated by Congress.... [B]ut when terms are unambiguous we may not speculate on probabilities of intention.' " 343 U.S., at 116, 72 S.Ct. 581 (quoting 5 Wall., at 544–545).

The Court also attempts to evade the *Bruner* line of cases by asserting that "the 'presumption' [of application to pending ***659** cases] that these cases have applied is more accurately viewed as the nonapplication of another presumption—viz., the presumption against retroactivity—in certain limited circumstances." *Ante,* at 2764. I have already explained that what the Court calls a "presumption" is simply the acknowledgment of the unambiguous ****2812** meaning of such provisions. But even taking it to be what the Court says, the effect upon the present case would be the same. *Prospective* applications of a statute are "effective" upon the statute's effective date; that is what an effective-date provision like § 1005(h)(1) *means*.[1] " '[S]hall take effect upon enactment' is presumed to mean 'shall have prospective effect upon enactment,' and that presumption is too strong to be overcome by any negative inference [drawn from other provisions of the statute]." *Landgraf, supra,* at 288, 114 S.Ct. 1483 (SCALIA, J., concurring in judgments). The Court's "nonapplication of ... the presumption against retroactivity" to § 1005(e)(1) is thus just another way of stating that the statute takes immediate effect in pending cases.

1 The Court apparently believes that the effective-date provision means nothing at all. "That paragraph (1), along with paragraphs (2) and (3), is to 'take effect on the date of the enactment,' DTA § 1005(h)(1), 119 Stat. 2743, is not dispositive," says the Court, *ante,* at 2766, n. 9. The Court's authority for this conclusion is its quote from *INS v. St. Cyr,* 533 U.S. 289, 317, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), to the effect that "a statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct *that occurred at an earlier date*." *Ante,* at 2766, n. 9 (emphasis added and internal quotation marks omitted). But this quote merely restates the obvious: An effective-date provision does not render a statute applicable to "conduct that occurred at an *earlier* date," but of course it renders the statute applicable to conduct that occurs *on the effective date and all future dates*—such as the Court's exercise of jurisdiction here. The Court seems to suggest that, because the effective-date provision does not authorize retroactive application, it also fails to authorize prospective application (and is thus useless verbiage). This cannot be true.

Though the Court resists the *Bruner* rule, it cannot cite a *single case* in the history of Anglo–American law (before ***660** today) in which a jurisdiction-stripping provision was denied immediate effect in pending cases, absent an explicit statutory reservation. By contrast, the cases granting such immediate effect are legion, and they repeatedly rely on the plain language of the jurisdictional repeal as an "inflexible trump," *ante,* at 2769, by requiring an express reservation to save pending cases. See, *e.g., Bruner, supra,* at 115, 72 S.Ct. 581; *Kline v. Burke Constr. Co.,* 260 U.S. 226, 234, 43 S.Ct. 79, 67 L.Ed. 226 (1922); *Hallowell,* 239 U.S., at 508, 36 S.Ct. 202; *Gwin v. United States,* 184 U.S. 669, 675, 22 S.Ct. 526, 46 L.Ed. 741 (1902); *Gurnee v. Patrick County,* 137 U.S. 141, 144, 11 S.Ct. 34, 34 L.Ed. 601 (1890); *Sherman v. Grinnell,* 123 U.S. 679, 680, 8 S.Ct. 260, 31 L.Ed. 278 (1887); *Railroad Co. v. Grant, supra,* at 403, *Assessors v. Osbornes,* 9 Wall. 567, 575, 19 L.Ed. 748 (1870); *Ex parte McCardle,* 7 Wall., at 514, 19 L.Ed. 264; *Ritchie, supra,* at 544; *Norris v. Crocker,* 13 How. 429, 440, 14 L.Ed. 210 (1852); *Yeaton v. United States,* 5 Cranch 281, 3 L.Ed. 101 (1809) (Marshall, C. J.), discussed in *Gwin, supra,* at 675, 22 S.Ct. 526; *King v. Justices of the Peace of London,* 3 Burr. 1456, 1457, 97 Eng. Rep. 924, 925 (K.B.1764). Cf. *National Exchange Bank of Baltimore v. Peters,* 144 U.S. 570, 572, 12 S.Ct. 767, 36 L.Ed. 545 (1892).

B

Disregarding the plain meaning of § 1005(e)(1) and the requirement of explicit exception set forth in the foregoing cases, the Court instead favors "a negative inference ... from the exclusion of language from one statutory provision that is included in other provisions of the same statute," *ante,* at 2765. Specifically, it appeals to the fact that § 1005(e)(2) and (e)(3) are explicitly made applicable to pending cases (by § 1005(h)(2)). A negative inference of the sort the Court relies upon might clarify the meaning of an ambiguous ****2813** provision, but since the meaning of § 1005(e)(1) is entirely clear, the omitted language in that context would have been redundant.

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Even if § 1005(e)(1) were at all ambiguous in its application to pending cases, the "negative inference" from § 1005(h)(2) touted by the Court would have no force. The numerous ***661** cases in the *Bruner* line would at least create a powerful default "presumption against jurisdiction," *ante,* at 2764. The negative inference urged by the Court would be a particularly awkward and indirect way of rebutting such a longstanding and consistent practice. This is especially true since the negative inference that might be drawn from § 1005(h)(2)'s specification that certain provisions *shall* apply to pending cases is matched by a negative inference in the opposite direction that might be drawn from § 1005(b)(2), which provides that certain provisions shall *not* apply to pending cases.

The Court's reliance on our opinion in *Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), is utterly misplaced. *Lindh* involved two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA): a set of amendments to chapter 153 of the federal habeas statute that redefined the scope of collateral review by federal habeas courts; and a provision creating a new chapter 154 in the habeas statute specially to govern federal collateral review of state capital cases. See 521 U.S., at 326–327, 117 S.Ct. 2059. The latter provision explicitly rendered the new chapter 154 applicable to cases pending at the time of AEDPA's enactment; the former made no specific reference to pending cases. *Id.,* at 327, 117 S.Ct. 2059. In *Lindh,* we drew a negative inference from chapter 154's explicit reference to pending cases, to conclude that the chapter 153 amendments did *not* apply in pending cases. It was essential to our reasoning, however, that both provisions appeared to be *identically difficult* to classify under our retroactivity cases. First, we noted that, after *Landgraf,* there was reason for Congress to suppose that an explicit statement was required to render the amendments to chapter 154 applicable in pending cases, because the new chapter 154 "will have substantive as well as purely procedural effects." 521 U.S., at 327, 117 S.Ct. 2059. The next step—and the critical step—in our reasoning was that Congress had *identical* reason to suppose that an explicit statement would be required to apply the chapter 153 ***662** amendments to pending cases, but did not provide it. *Id.,* at 329, 117 S.Ct. 2059. The negative inference of *Lindh* rested on the fact that "[n]othing ... but a different intent explain[ed] the different treatment." *Ibid*.

Here, by contrast, there is ample reason for the different treatment. The exclusive-review provisions of the DTA, unlike both § 1005(e)(1) and the AEDPA amendments in *Lindh,* confer *new* jurisdiction (in the D.C. Circuit) where there was none before. For better or for worse, our recent cases have contrasted jurisdiction-*creating* provisions with jurisdiction-*ousting* provisions, retaining the venerable rule that the latter are not retroactive even when applied in pending cases, but strongly indicating that the former are typically retroactive. For example, we stated in *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 951, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), that a statute that "*creates* jurisdiction where none previously existed" is "as much subject to our presumption against retroactivity as any other." See also *Republic of Austria v. Altmann,* 541 U.S. 677, 695, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004) (opinion for the Court by STEVENS, J.); *id.,* at 722, 124 S.Ct. 2240 (KENNEDY, J., dissenting). The Court gives our retroactivity jurisprudence ****2814** a dazzling clarity in asserting that "subsections (e)(2) and (e)(3) 'confer' jurisdiction in a manner that cannot conceivably give rise to retroactivity questions under our precedents."[2] ***663** *Ante,* at 2768. This statement rises to the level of sarcasm when one considers its author's description of the governing test of our retroactivity jurisprudence:

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2 A comparison with *Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), shows this not to be true. Subsections (e)(2) and (e)(3) of § 1005 resemble the provisions of AEDPA at issue in *Lindh* (whose retroactivity as applied to pending cases the *Lindh* majority did not rule upon, see *id.,* at 326, 117 S.Ct. 2059), in that they "g[o] beyond 'mere' procedure," *id.,* at 327, 117 S.Ct. 2059. They impose novel and unprecedented disabilities on the Executive Branch in its conduct of military affairs. Subsection (e)(2) imposes judicial review on the Combatant Status Review Tribunals (CSRTs), whose implementing order did not subject them to review by Article III courts. See Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunals, p. 3, § *h* (July 7, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (all Internet materials as visited June 27, 2006, and available in Clerk of Court's case file). Subsection (e)(3) authorizes the D. C. Circuit to review "the validity of any final decision rendered pursuant to Military Commission Order No. 1," § 1005(e)(3)(A), 119 Stat. 2743. Historically, federal courts have *never* reviewed the validity of the final decision of any military commission; their jurisdiction has been

restricted to considering the commission's "lawful *authority* to hear, decide and condemn," *In re Yamashita,* 327 U.S. 1, 8, 66 S.Ct. 340, 90 L.Ed. 499 (1946) (emphasis added). See also *Johnson v. Eisentrager,* 339 U.S. 763, 786–787, 70 S.Ct. 936, 94 L.Ed. 1255 (1950). Thus, contrary to the Court's suggestion, *ante,* at 2767–2768, subsections (e)(2) and (e)(3) confer new jurisdiction: They impose judicial oversight on a traditionally unreviewable exercise of military authority by the Commander in Chief. They arguably "spea[k] not just to the power of a particular court but to ... substantive rights ... as well," *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 951, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997)—namely, the unreviewable powers of the President. Our recent cases had reiterated that the Executive is protected by the presumption against retroactivity in such comparatively trivial contexts as suits for tax refunds and increased pay, see *Landgraf v. USI Film Products,* 511 U.S. 244, 271, n. 25, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

"The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have 'sound ... instinct[s],' ... and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Landgraf,* 511 U.S., at 270, 114 S.Ct. 1483 (opinion for the Court by STEVENS, J.).

The only "familiar consideration," "reasonable reliance," and "settled expectation" I am aware of pertaining to the present ***664** case is the rule of *Bruner*—applicable to § 1005(e)(1), but not to § 1005(e)(2) and (e)(3)—which the Court stubbornly disregards. It is utterly beyond question that § 1005(e)(2)'s and (3)'s application to pending cases (without explicit specification) was not as clear as § 1005(e)(1)'s. That is alone enough to explain the difference in treatment.

Another obvious reason for the specification was to stave off any Suspension Clause problems raised by the immediately effective ouster of jurisdiction brought about by subsection (e)(1). That is to say, specification of the immediate effectiveness ****2815** of subsections (e)(2) and (e)(3) (which, unlike subsection (e)(1), would not fall within the *Bruner* rule and would not *automatically* be deemed applicable in pending cases) could reasonably have been thought essential to be sure of replacing the habeas jurisdiction that subsection (e)(1) eliminated in pending cases with an adequate substitute. See *infra,* at 2818–2819.

These considerations by no means prove that an explicit statement would be *required* to render subsections (e)(2) and (e)(3) applicable in pending cases. But they surely gave Congress ample reason to *doubt* that their application in pending cases would unfold as naturally as the Court glibly assumes. In any event, even if it were true that subsections (e)(2) and (e)(3) " 'confer' jurisdiction in a manner that cannot conceivably give rise to retroactivity questions," *ante,* at 2768, this would merely establish that subsection (h)(2)'s reference to pending cases was wholly superfluous when applied to subsections (e)(2) and (e)(3), just as it would have been for subsection (e)(1). *Lindh's* negative inference makes sense only when Congress would have perceived "the wisdom of being explicit" with respect to the immediate application of *both* of two statutory provisions, 521 U.S., at 328, 117 S.Ct. 2059, but chose to be explicit only for one of them—not when it would have perceived *no need* to be explicit for both, but enacted a redundancy only for one.

***665** In short, it is simply untrue that Congress " 'should have been just as concerned about' " specifying the application of § 1005(e)(1) to pending cases, *ante,* at 2766 (quoting *Lindh, supra,* at 329, 117 S.Ct. 2059). In fact, the negative-inference approach of *Lindh* is particularly inappropriate in this case, because the negative inference from § 1005(h)(2) would tend to defeat the purpose of the very provisions that *are* explicitly rendered applicable in pending cases, § 1005(e)(2) and (3). Those provisions purport to vest "exclusive" jurisdiction in the D.C. Circuit to consider the claims raised by petitioner here. See *infra,* at 2818–2819. By drawing a negative inference *à la Lindh,* the Court supplants this exclusive-review mechanism with a dual-review mechanism for petitioners who were expeditious enough to file applications challenging the CSRTs or military commissions before December 30, 2005. Whatever the force of *Lindh's* negative inference in other cases, it surely should not apply here to defeat the purpose of the very provision from which the negative inference is drawn.

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C

Worst of all is the Court's reliance on the legislative history of the DTA to buttress its implausible reading of § 1005(e)(1). We have repeatedly held that such reliance is impermissible where, as here, the statutory language is unambiguous. But the Court nevertheless relies both on floor statements from the Senate and (quite heavily) on the drafting history of the DTA. To begin with floor statements: The Court urges that some "statements made by Senators preceding passage of the Act lend further support to" the Court's interpretation, citing excerpts from the floor debate that support its view, *ante,* at 2767, n. 10. The Court immediately goes on to discount numerous floor statements by the DTA's sponsors that flatly contradict its view, because "those statements appear to have been inserted into the Congressional Record *after* the Senate debate." *Ibid.* Of course this observation, even if true, makes no difference ***666** unless one indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness. ****2816** Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator. In any event, the Court greatly exaggerates the one-sidedness of the portions of the floor debate that clearly occurred before the DTA's enactment. Some of the statements of Senator Graham, a sponsor of the bill, only make sense on the assumption that pending cases are covered.[3] And at least one opponent of the DTA unmistakably expressed his understanding that it would terminate our jurisdiction in this very case.[4] (Of course in its discussion of legislative history the Court wholly ignores the President's signing statement, which explicitly set forth *his* understanding that the DTA ousted jurisdiction over pending cases.[5])

3 "Because I have described how outrageous these claims are—about the exercise regime, the reading materials—most Americans would be highly offended to know that terrorists are suing us in our own courts about what they read." 151 Cong. Rec. S12756 (Nov. 14, 2005). "Instead of having unlimited habeas corpus opportunities under the Constitution, we give every enemy combatant, all 500, a chance to go to Federal court, the Circuit Court of Appeals for the District of Columbia.... It will be a one-time deal." *Id.,* at S12754. "This Levin–Graham–Kyl amendment allows every detainee under our control to have their day in court. They are allowed to appeal their convictions." *Id.,* at S12801 (Nov. 15, 2005); see also *id.,* at S12799 (rejecting the notion that "an enemy combatant terrorist al-Qaida member should be able to have access to our Federal courts under habeas like an American citizen").

4 "An earlier part of the amendment provides that no court, justice, or judge shall have jurisdiction to consider the application for writ of habeas corpus.... Under the language of exclusive jurisdiction in the DC Circuit, the U.S. Supreme Court would not have jurisdiction to hear the Hamdan case ... ." *Id.,* at S12796 (statement of Sen. Specter).

5 "[T]he executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005." President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), available at http://www.whitehouse. gov/news/ releases/2005/12/print/20051230-8.html.

***667** But selectivity is not the greatest vice in the Court's use of floor statements to resolve today's case. These statements were made when Members of Congress were fully aware that our continuing jurisdiction *over this very case* was at issue. The question was divisive, and floor statements made on both sides were undoubtedly opportunistic and crafted *solely* for use in the briefs in this very litigation. See, *e.g.,* 151 Cong. Rec. S14257–S14258 (Dec. 21, 2005) (statement of Sen. Levin) (arguing against a reading that would "stri[p] the Federal courts of jurisdiction to consider pending cases, *including the Hamdan case now pending in the Supreme Court,*" and urging that *Lindh* requires the same negative inference that the Court indulges today (emphasis added)). The Court's reliance on such statements cannot avoid the appearance of similar opportunism. In a virtually identical context, the author of today's opinion has written for the Court that "[t]he legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement." *Landgraf,* 511

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U.S., at 262, 114 S.Ct. 1483 (opinion for the Court by STEVENS, J.). Likewise, the handful of floor statements that the Court treats as authoritative do not "reflec[t] any general agreement." They reflect the now-common tactic—which the ****2817** Court once again rewards—of pursuing through floor-speech *ipse dixit* what could not be achieved through the constitutionally prescribed method of putting language into a bill that a majority of both Houses vote for and the President signs.

With regard to the floor statements, at least the Court shows some semblance of seemly shame, tucking away its ***668** reference to them in a halfhearted footnote. Not so for its reliance on the DTA's drafting history, which is displayed prominently, see *ante,* at 2766. I have explained elsewhere that such drafting history is no more legitimate or reliable an indicator of the objective meaning of a statute than any other form of legislative history. This case presents a textbook example of its unreliability. The Court, *ante,* at 2766, trumpets the fact that a bill considered in the Senate included redundant language, not included in the DTA as passed, reconfirming that the abolition of habeas jurisdiction "shall apply to any application or other action that is pending on or after the date of the enactment of this Act." 151 Cong. Rec. S12655 (Nov. 10, 2005). But this earlier version of the bill also differed from the DTA in other material respects. Most notably, it provided for postdecision review by the D.C. Circuit only of the decisions of *CSRTs,* not military commissions, *ibid.;* and it limited that review to whether "the status determination ... was consistent with the procedures and standards specified by the Secretary of Defense," *ibid.,* not whether "the use of such standards and procedures ... is consistent with the Constitution and laws of the United States," DTA § 1005(e)(2)(C)(ii), 119 Stat. 2742. To say that what moved Senators to reject this earlier bill was the "action that is pending" provision surpasses the intuitive powers of even this Court's greatest Justices.[6] And to think that the House and the President also had this rejection firmly in mind is absurd. As always—but *especially* in the context of strident, partisan legislative conflict of the sort that characterized enactment of this legislation—the language of the statute that was actually passed by both Houses of Congress and signed by the President is our only authoritative and only reliable guidepost.

6 The Court asserts that "it cannot be said that the changes to subsection (h)(2) were inconsequential," *ante,* at 2767, n. 10, but the Court's sole evidence is the self-serving floor statements that it selectively cites.

***669** D

A final but powerful indication of the fact that the Court has made a mess of this statute is the nature of the consequences that ensue. Though this case concerns a habeas application challenging a trial by military commission, DTA § 1005(e)(1) strips the courts of jurisdiction to hear or consider *any* "application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of "detention" such as the terms and conditions of confinement. See *Rasul v. Bush,* 542 U.S. 466, 498, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004) (SCALIA, J., dissenting). The Solicitor General represents that "[h]abeas petitions have been filed on behalf of a purported 600 [Guantanamo Bay] detainees," including one that "seek[s] relief on behalf of every Guantanamo detainee who has not already filed an action," Respondents' Motion to Dismiss for Lack of Jurisdiction 20, n. 10 (hereinafter Motion to Dismiss). The Court's interpretation transforms a provision abolishing jurisdiction over *all* Guantanamo-related ****2818** habeas petitions into a provision that retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come.

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II

Because I would hold that § 1005(e)(1) unambiguously terminates the jurisdiction of all courts to "hear or consider" pending habeas applications, I must confront petitioner's arguments that the provision, so interpreted, violates the Suspension Clause. This claim is easily dispatched. We stated in *Johnson v. Eisentrager,* 339 U.S. 763, 768, 70 S.Ct. 936, 94 L.Ed. 1255 (1950):

> "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the

text of the Constitution ***670** extends such a right, nor does anything in our statutes."

Notwithstanding the ill-considered dicta in the Court's opinion in *Rasul,* 542 U.S., at 480–481, 124 S.Ct. 2686, it is clear that Guantanamo Bay, Cuba, is outside the sovereign "territorial jurisdiction" of the United States. See *id.,* at 500–505, 124 S.Ct. 2686 (SCALIA, J., dissenting). Petitioner, an enemy alien detained abroad, has no rights under the Suspension Clause.

But even if petitioner were fully protected by the Clause, the DTA would create no suspension problem. This Court has repeatedly acknowledged that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain v. Pressley,* 430 U.S. 372, 381, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977); see also *INS v. St. Cyr,* 533 U.S. 289, 314, n. 38, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) ("Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals").

Petitioner has made no showing that the postdecision exclusive review by the D.C. Circuit provided in § 1005(e)(3) is inadequate to test the legality of his trial by military commission. His principal argument is that the exclusive-review provisions are inadequate because they foreclose review of the claims he raises here. Though petitioner's brief does not parse the statutory language, his argument evidently rests on an erroneously narrow reading of DTA § 1005(e)(3)(D)(ii), 119 Stat. 2743. That provision grants the D.C. Circuit authority to review, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States." In the quoted text, the phrase "such standards and procedures" refers to "the standards and procedures specified in the military order referred to in subparagraph (A)," namely, "Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)." DTA ***671** § 1005(e)(3)(D)(i), (e)(3)(A), *ibid*. This Military Commission Order (Order No. 1) is the Department of Defense's fundamental implementing order for the President's order authorizing trials by military commission. Order No. 1 establishes commissions, § 2; delineates their jurisdiction, § 3; provides for their officers, § 4(A); provides for their prosecution and defense counsel, § 4(B), (C); lays out all their procedures, both pretrial and trial, § 5(A)-(P), § 6(A)-(G); and provides for post-trial military review through the Secretary of Defense and the President, § 6(H). In short, the "standards and procedures specified in" Order No. 1 include *every aspect* of the ****2819** military commissions, including the fact of their existence and every respect in which they differ from courts-martial. Petitioner's claims that the President lacks legal authority to try him before a military commission constitute claims that "the use of such standards and procedures," as specified in Order No. 1, is "[in]consistent with the Constitution and laws of the United States," DTA § 1005(e)(3)(D)(ii), 119 Stat. 2743. The D.C. Circuit thus retains jurisdiction to consider these claims on postdecision review, and the Government does not dispute that the DTA leaves unaffected our certiorari jurisdiction under 28 U.S.C. § 1254(1) to review the D.C. Circuit's decisions. Motion to Dismiss 16, n. 8. Thus, the DTA merely *defers* our jurisdiction to consider petitioner's claims; it does not eliminate that jurisdiction. It constitutes neither an "inadequate" nor an "ineffective" substitute for petitioner's pending habeas application. [7]

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7 Petitioner also urges that he could be subject to indefinite delay if military officials and the President are deliberately dilatory in reviewing the decision of his commission. In reviewing the constitutionality of legislation, we generally presume that the Executive will implement its provisions in good faith. And it is unclear in any event that delay would inflict any injury on petitioner, who (after an adverse determination by his CSRT, see 344 F.Supp.2d 152, 161 (DC 2004)) is *already* subject to indefinite detention under our decision in *Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion). Moreover, the mere possibility of delay does not render an alternative remedy "inadequate [o]r ineffective to test the legality" of a military commission trial. *Swain v. Pressley,* 430 U.S. 372, 381, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977). In an analogous context, we discounted the notion that postponement of relief until postconviction review inflicted any cognizable injury on a serviceman charged before a military court-martial. *Schlesinger v. Councilman,* 420 U.S. 738, 754–755, 95 S.Ct. 1300, 43 L.Ed.2d

591 (1975); see also *Younger v. Harris,* 401 U.S. 37, 46, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

***672** Though it does not squarely address the issue, the Court hints ominously that "the Government's preferred reading" would "rais[e] grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases." *Ante,* at 2764 (citing *Ex parte Yerger,* 8 Wall. 85, 19 L.Ed. 332 (1869); *Felker v. Turpin,* 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996); *Durousseau v. United States,* 6 Cranch 307, 3 L.Ed. 232 (1810); *United States v. Klein,* 13 Wall. 128, 20 L.Ed. 519 (1872); and *Ex parte McCardle,* 7 Wall. 506, 19 L.Ed. 264). It is not clear how there could be any such lurking questions, in light of the aptly named "*Exceptions* Clause" of Article III, § 2, which, in making our appellate jurisdiction subject to "such Exceptions, and under such Regulations as the Congress shall make," explicitly permits exactly what Congress has done here. But any doubt our prior cases might have created on this score is surely chimerical in *this* case. As just noted, the exclusive-review provisions provide a substitute for habeas review adequate to satisfy the Suspension Clause, which *forbids* the suspension of the writ of habeas corpus. *A fortiori* they provide a substitute adequate to satisfy any implied substantive limitations, whether real or imaginary, upon the Exceptions Clause, which *authorizes* such exceptions as § 1005(e)(1).

III

Even if Congress had not clearly and constitutionally eliminated jurisdiction over this case, neither this Court nor the lower courts ought to exercise it. Traditionally, equitable principles govern both the exercise of habeas jurisdiction and the granting of the injunctive relief sought by petitioner. See *Schlesinger v. Councilman,* 420 U.S. 738, 754, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975); ***673** *Weinberger v.* ****2820** *Romero–Barcelo,* 456 U.S. 305, 311, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). In light of Congress's provision of an alternate avenue for petitioner's claims in § 1005(e)(3), those equitable principles counsel that we abstain from exercising jurisdiction in this case.

In requesting abstention, the Government relies principally on *Councilman,* in which we abstained from considering a serviceman's claim that his charge for marijuana possession was not sufficiently "service-connected" to trigger the subject-matter jurisdiction of the military courts-martial. See 420 U.S., at 740, 758, 95 S.Ct. 1300. Admittedly, *Councilman* does not squarely control petitioner's case, but it provides the closest analogue in our jurisprudence. As the Court describes, *ante,* at 2770, *Councilman* "identifie [d] two considerations of comity that together favor[ed] abstention pending completion of ongoing court-martial proceedings against service personnel." But the Court errs in finding these considerations inapplicable to this case. Both of them, and a third consideration not emphasized in *Councilman,* all cut in favor of abstention here.

First, the Court observes that *Councilman* rested in part on the fact that "military discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts," and concludes that "Hamdan is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply." *Ante,* at 2770, 2771. This is true enough. But for some reason, the Court fails to make any inquiry into whether military commission trials might involve *other* "military necessities" or "unique military exigencies," 420 U.S., at 757, 95 S.Ct. 1300, comparable in gravity to those at stake in *Councilman*. To put this in context: The charge against the respondent in *Councilman* was the off-base possession and sale of marijuana while he was stationed in Fort Sill, Oklahoma, see *id.,* at 739–740, 95 S.Ct. 1300. The charge against the petitioner here is joining and actively abetting the murderous conspiracy that slaughtered thousands of innocent Americancivilians ***674** without warning on September 11, 2001. While *Councilman* held that the prosecution of the former charge involved "military necessities" counseling against our interference, the Court *does not even ponder the same question* for the latter charge.

The reason for the Court's "blinkered study" of this question, *ante,* at 2769, is not hard to fathom. The principal opinion on the merits makes clear that it does not believe that the trials by military commission involve any "military necessity" *at all:* "The charge's shortcomings ... are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition ... for establishment of military commissions: military necessity." *Ante,* at 2785. This is quite at odds with the views on this subject expressed by our political branches. Because of "military necessity," a joint session of Congress authorized the President to "use all necessary and appropriate force," including military commissions, "against those nations, organizations, or persons [such as petitioner] he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, § 2(a), 115 Stat.

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224, note following 50 U.S.C. § 1541 (2000 ed., Supp. III). In keeping with this authority, the President has determined that "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order ... to be detained, and, when tried, to be tried for violations of the laws of war ****2821** and other applicable laws by military tribunals." Military Order of Nov. 13, 2001, 3 CFR, 2001 Comp., § 1(e), p. 918 (2002) (hereinafter Military Order). It is not clear where the Court derives the authority—or the audacity—to contradict this determination. If "military necessities" relating to "duty" and "discipline" required abstention in *Councilman, supra,* at 757, 95 S.Ct. 1300, military necessities relating to the disabling, deterrence, and punishment ***675** of the mass-murdering terrorists of September 11 require abstention all the more here.

The Court further seeks to distinguish *Councilman* on the ground that "the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established." *Ante,* at 2771. To be sure, *Councilman* emphasized that "Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges completely removed from all military influence or persuasion, who would gain over time thorough familiarity with military problems." 420 U.S., at 758, 95 S.Ct. 1300 (internal quotation marks and footnote omitted). The Court contrasts this "integrated system" insulated from military influence with the review scheme established by Order No. 1, which "provides that appeal of a review panel's decision may be had only to the Secretary himself, § 6(H)(5), and then, finally, to the President, § 6(H)(6)." *Ante,* at 2771.

Even if we were to accept the Court's extraordinary assumption that the President "lack[s] the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces," *ibid.,* [8] the Court's description of the review scheme here is anachronistic. As of December 30, 2005, the "fina[l]" review of decisions by military commissions is now conducted by the D.C. Circuit pursuant to § 1005(e)(3) of the DTA, and by this Court under 28 U.S.C. § 1254(1). This provision for review by Article III courts creates, if anything, a review scheme *more* insulated ***676** from executive control than that in *Councilman.* [9] At the time we decided *Councilman,* Congress had not "conferred on any Art [icle] III court jurisdiction directly ****2822** to review court-martial determinations." 420 U.S., at 746, 95 S.Ct. 1300. The final arbiter of direct appeals was the Court of Military Appeals (now the Court of Appeals for the Armed Forces), an Article I court whose members possessed neither life tenure, nor salary protection, nor the constitutional protection from removal provided to federal judges in Article III, § 1. See 10 U.S.C. § 867(a)(2) (1970 ed.).

8 The very purpose of Article II's creation of a *civilian* Commander in Chief in the President of the United States was to generate "structural insulation from military influence." See The Federalist No. 28 (A.Hamilton); *id.,* No. 69 (same). We do not live under a military junta. It is a disservice to both those in the Armed Forces and the President to suggest that the President is subject to the undue control of the military.

9 In rejecting our analysis, the Court observes that appeals to the D.C. Circuit under subsection (e)(3) are discretionary, rather than as of right, when the military commission imposes a sentence less than 10 years' imprisonment, see *ante,* at 2771, n. 19, 2788; § 1005(e)(3)(B), 119 Stat. 2743. The relevance of this observation to the abstention question is unfathomable. The fact that Article III review is discretionary does not mean that it lacks "structural insulation from military influence," *ante,* at 2771, and its discretionary nature presents no obstacle to the courts' future review of these cases.

The Court might more cogently have relied on the discretionary nature of review to argue that the statute provides an inadequate substitute for habeas review under the Suspension Clause. See *supra,* at 2818–2819. But this argument would have no force, even if *all* appeals to the D.C. Circuit were discretionary. The exercise of habeas jurisdiction has traditionally been entirely a matter of the court's equitable discretion, see *Withrow v. Williams,* 507 U.S. 680, 715–718, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (SCALIA, J., concurring in part and dissenting in part), so the fact that habeas jurisdiction is replaced by discretionary appellate review does not render the substitution "inadequate." *Swain,* 430 U.S., at 381, 97 S.Ct. 1224.

Moreover, a third consideration counsels strongly in favor of abstention in this case. *Councilman* reasoned that the "considerations of comity, the necessity of respect for

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coordinate judicial systems" that motivated our decision in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), were inapplicable to courts-martial, because "the peculiar demands of federalism are not implicated." 420 U.S., at 756, 757, 95 S.Ct. 1300. Though military commissions likewise do not implicate "the peculiar demands of federalism," considerations of *interbranch* comity ***677** at the federal level weigh heavily against our exercise of equity jurisdiction in this case. Here, apparently for the first time in history, see Motion to Dismiss 6, a District Court enjoined ongoing military commission proceedings, which had been deemed "necessary" by the President "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks." Military Order § 1(e). Such an order brings the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to *avoid* such conflict. Instead, the Court rushes headlong to meet it. Elsewhere, we have deferred exercising habeas jurisdiction until state courts have "the first opportunity to review" a petitioner's claim, merely to "reduc[e] friction between the state and federal court systems." *O'Sullivan v. Boerckel,* 526 U.S. 838, 844, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). The "friction" created today between this Court and the Executive Branch is many times more serious.

In the face of such concerns, the Court relies heavily on *Ex parte Quirin,* 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942): "Far from abstaining pending the conclusion of military proceedings, which were ongoing, [in *Quirin*] we convened a special Term to hear the case and expedited our review." *Ante,* at 2771–2772. It is likely that the Government in *Quirin,* unlike here, preferred a hasty resolution of the case in this Court, so that it could swiftly execute the sentences imposed, see *Hamdi v. Rumsfeld,* 542 U.S. 507, 569, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (SCALIA, J., dissenting). But the Court's reliance on *Quirin* suffers from a more fundamental defect: Once again, it ignores the DTA, which creates an avenue for the consideration of petitioner's claims that did not exist at the time of *Quirin*. Collateral application for habeas review was the *only* vehicle available. And there was no compelling reason to postpone consideration of the *Quirin* application until the termination of military proceedings, because the only cognizable claims presented were general ***678** challenges to the authority of the commissions that would not be affected by the specific proceedings. See *supra,* at 2814, n. 2. In the DTA, by contrast, Congress has expanded the scope of Article III review and has channeled it exclusively through a single, postverdict appeal to Article III courts. Because Congress has created a novel unitary scheme of Article III review of military commissions that was absent in 1942, *Quirin* is no longer governing precedent.

I would abstain from exercising our equity jurisdiction, as the Government requests.

****2823** * * *

For the foregoing reasons, I dissent.

Justice THOMAS, with whom Justice SCALIA joins, and with whom Justice ALITO joins in all but Parts I, II–C–1, and III–B–2, dissenting.

For the reasons set forth in Justice SCALIA's dissent, it is clear that this Court lacks jurisdiction to entertain petitioner's claims, see *ante,* at 2810–2818. The Court having concluded otherwise, it is appropriate to respond to the Court's resolution of the merits of petitioner's claims because its opinion openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs. The plurality's evident belief that *it* is qualified to pass on the "military necessity," *ante,* at 2785, of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered. I respectfully dissent.

I

Our review of petitioner's claims arises in the context of the President's wartime exercise of his Commander in Chief authority in conjunction with the complete support of Congress. Accordingly, it is important to take measure of the ***679** respective roles the Constitution assigns to the three branches of our Government in the conduct of war.

As I explained in *Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004), the structural advantages attendant to the Executive Branch—namely, the decisiveness, " 'activity, secrecy, and dispatch' " that flow from the Executive's " 'unity,' " *id.,* at 581, 124 S.Ct. 2633 (dissenting opinion) (quoting The Federalist No. 70, p. 472 (J. Cooke ed. 1961) (A.Hamilton))—led the Founders to conclude that the "President ha[s] primary responsibility—along with the necessary power—to protect the national security and to

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conduct the Nation's foreign relations." 542 U.S., at 580, 124 S.Ct. 2633. Consistent with this conclusion, the Constitution vests in the President "[t]he executive Power," Art. II, § 1, provides that he "shall be Commander in Chief" of the Armed Forces, § 2, and places in him the power to recognize foreign governments, § 3. This Court has observed that these provisions confer upon the President broad constitutional authority to protect the Nation's security in the manner he deems fit. See, *e.g., Prize Cases,* 2 Black 635, 668, 17 L.Ed. 459 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force ... without waiting for any special legislative authority"); *Fleming v. Page,* 9 How. 603, 615, 13 L.Ed. 276 (1850) (acknowledging that the President has the authority to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy").

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," and "[s]uch failure of Congress ... does not, 'especially ... in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore v. Regan,* 453 U.S. 654, 678, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) (quoting *Haig v. Agee,* 453 U.S. 280, 291, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981)). Rather, in these domains, ***680** the fact that Congress has provided the President with broad authorities ****2824** does not imply —and the Judicial Branch should not infer—that Congress intended to deprive him of particular powers not specifically enumerated. See *Dames & Moore,* 453 U.S., at 678, 101 S.Ct. 2972 ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to invite measures on independent presidential responsibility" (internal quotation marks omitted)).

When "the President acts pursuant to an express or implied authorization from Congress," his actions are " 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion ... rest[s] heavily upon any who might attack it.' " *Id.,* at 668, 101 S.Ct. 2972 (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring)). Accordingly, in the very context that we address today, this Court has concluded that "the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex parte Quirin,* 317 U.S. 1, 25, 63 S.Ct. 2, 87 L.Ed. 3 (1942).

Under this framework, the President's decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference. In the present conflict, Congress has authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 ... in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat. ***681** 224, note following 50 U.S.C. § 1541 (2000 ed., Supp. III) (emphasis added). As a plurality of the Court observed in *Hamdi,* the "capture, detention, and *trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war,' " 542 U.S., at 518, 124 S.Ct. 2633 (quoting *Quirin, supra,* at 28, 30, 63 S.Ct. 1; emphasis added), and are therefore "an exercise of the 'necessary and appropriate force' Congress has authorized the President to use," *Hamdi,* 542 U.S., at 518, 124 S.Ct. 2633; *id.*, at 587, 124 S.Ct. 2633 (THOMAS, J., dissenting). *Hamdi's* observation that military commissions are included within the AUMF's authorization is supported by this Court's previous recognition that "[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *In re Yamashita,* 327 U.S. 1, 11, 66 S.Ct. 340, 90 L.Ed. 499 (1946); see also *Quirin, supra,* at 28–29, 63 S.Ct. 1; *Madsen v. Kinsella,* 343 U.S. 341, 354, n. 20, 72 S.Ct. 699, 96 L.Ed. 988 (1952) (" '[T]he military commission ... is an institution of the greatest importance in a period of war and should be preserved' " (quoting S.Rep. No. 229, 63d Cong., 2d Sess., 53 (1914) (testimony of Gen. Crowder))).

Although the Court concedes the legitimacy of the President's use of military commissions in certain circumstances, *ante,* at 2775, it suggests that the AUMF has no bearing on the scope of the President's power to utilize military commissions in the

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present conflict, *ibid.* Instead, ****2825** the Court determines the scope of this power based exclusively on Article 21 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 821, the successor to Article 15 of the Articles of War, which *Quirin* held "authorized trial of offenses against the law of war before [military] commissions." 317 U.S., at 29, 63 S.Ct. 1. As I shall discuss below, Article 21 alone supports the use of commissions here. Nothing in the language of Article 21, however, suggests that it outlines the entire reach of congressional authorization of military commissions in all ***682** conflicts—quite the contrary, the language of Article 21 presupposes the existence of military commissions under an independent basis of authorization.[1] Indeed, consistent with*Hamdi's* conclusion that the AUMF itself authorizes the trial of unlawful combatants, the original sanction for military commissions historically derived from congressional authorization of "the initiation of war" with its attendant authorization of "the employment of all necessary and proper agencies for its due prosecution." W. Winthrop, Military Law and Precedents 831 (rev. 2d ed.1920) (hereinafter Winthrop) (emphasis deleted). Accordingly, congressional authorization for military commissions pertaining to the instant conflict derives not only from Article 21 of the UCMJ, but also from the more recent, and broader, authorization contained in the AUMF.[2]

1 As previously noted, Article 15 of the Articles of War was the predecessor of Article 21 of the UCMJ. Article 21 provides as follows: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U.S.C. § 821.

2 Although the President very well may have inherent authority to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question because Congress has authorized the President to do so. Cf. *Hamdi v. Rumsfeld,* 542 U.S. 507, 587, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (THOMAS, J., dissenting) (same conclusion respecting detention of unlawful combatants).

I note the Court's error respecting the AUMF not because it is necessary to my resolution of this case—Hamdan's military commission can plainly be sustained solely under Article 21—but to emphasize the complete congressional sanction of the President's exercise of his Commander in Chief authority to conduct the present war. In such circumstances, as previously noted, our duty to defer to the Executive's military and foreign policy judgment is at its zenith; it does not countenance ***683** the kind of second-guessing the Court repeatedly engages in today. Military and foreign policy judgments

> " 'are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.' " *Hamdi, supra,* at 582–583, 124 S.Ct. 2633 (THOMAS, J., dissenting) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948)).

It is within this framework that the lawfulness of Hamdan's commission should be examined.

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II

The plurality accurately describes some aspects of the history of military commissions ****2826** and the prerequisites for their use. Thus, I do not dispute that military commissions have historically been "used in three [different] situations," *ante,* at 2775 and that the only situation relevant to the instant case is the use of military commissions " 'to seize and subject to disciplinary measures those enemies who ... have violated the law of war,' " *ante,* at 2776 (quoting *Quirin, supra,* at 28–29, 63 S.Ct. 1). Similarly, I agree with the plurality that Winthrop's treatise sets forth the four relevant considerations for determining the scope of a military commission's jurisdiction, considerations relating to the (1) time and (2) place of the offense, (3) the status of the offender, and (4) the nature of the offense charged. Winthrop 836–840. The Executive has easily satisfied these considerations here. The plurality's contrary conclusion rests upon an incomplete accounting and an unfaithful application of those considerations.

A

The first two considerations are that a law-of-war military commission may only assume jurisdiction of "offences committed ***684** within the field of the command of the convening commander," and that such offenses "must have been committed within the period of the war." See *id.,* at 836, 837; *ante,* at 2777. Here, as evidenced by Hamdan's charging document, the Executive has determined that the theater of the present conflict includes "Afghanistan, Pakistan and other countries" where al Qaeda has established training camps, App. to Pet. for Cert. 64a, and that the duration of that conflict dates back (at least) to Usama bin Laden's August 1996 Declaration of Jihad Against the Americans, *ibid*. Under the Executive's description of the conflict, then, every aspect of the charge, which alleges overt acts in "Afghanistan, Pakistan, Yemen and other countries" taking place from 1996 to 2001, satisfies the temporal and geographic prerequisites for the exercise of law-of-war military commission jurisdiction. *Id*., at 65a–67a. And these judgments pertaining to the scope of the theater and duration of the present conflict are committed solely to the President in the exercise of his Commander in Chief authority. See *Prize Cases,* 2 Black, at 670, 17 L.Ed. 459 (concluding that the President's Commander in Chief judgment about the nature of a particular conflict was "a question to be decided *by him,* and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted").

Nevertheless, the plurality concludes that the legality of the charge against Hamdan is doubtful because "Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war ... but with an *agreement* the inception of which long predated ... the [relevant armed conflict]." *Ante,* at 2785 (emphasis in original). The plurality's willingness to second-guess the Executive's judgments in this context, based upon little more than its unsupported assertions, constitutes an unprecedented departure from the traditionally limited role of the courts with respect to war and an unwarranted intrusion on executive authority. And ***685** even if such second-guessing were appropriate, the plurality's attempt to do so is unpersuasive.

As an initial matter, the plurality relies upon the date of the AUMF's enactment to determine the beginning point for the "period of the war," Winthrop 836–837, thereby suggesting that petitioner's commission does not have jurisdiction to try him for offenses committed prior to the AUMF's enactment. *Ante,* at 2777–2779, 2785. But this suggestion betrays the plurality's ****2827** unfamiliarity with the realities of warfare and its willful blindness to our precedents. The starting point of the present conflict (or indeed any conflict) is not determined by congressional enactment, but rather by the initiation of hostilities. See *Prize Cases, supra,* at 668 (recognizing that war may be initiated by "invasion of a foreign nation," and that such initiation, and the President's response, usually *precedes* congressional action). Thus, Congress' enactment of the AUMF did not mark the beginning of this Nation's conflict with al Qaeda, but instead authorized the President to use force in the midst of an ongoing conflict. Moreover, while the President's "war powers" may not have been activated until the AUMF was passed, *ante,* at 2778, n. 31 (emphasis deleted), the date of such activation has never been used to determine the scope of a military commission's jurisdiction. [3] Instead, the traditional rule is that "[o]ffenses ***686** committed before a formal declaration of war or before the declaration of martial law may be tried by military commission." Green, The Military Commission, 42 Am. J. Int'l L. 832, 848 (1948) (hereinafter Green); see also C. Howland, Digest of Opinions of the Judge–Advocates General of the Army 1067 (1912) (hereinafter Howland) ("A military commission ... exercising ... jurisdiction ... under the laws of war ... may take cognizance of offenses committed, during the war, *before* the initiation of the military government or martial law" (emphasis in original)); [4] cf. *Yamashita,* 327 U.S., at 13, 66 S.Ct. 340 ("The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government"). Consistent with this principle, on facts virtually identical to those here, a military commission tried Julius Otto Kuehn for conspiring with Japanese officials to betray the United States Fleet to the Imperial Japanese Government prior to its attack on Pearl Harbor. Green 848. [5]

3 Even if the formal declaration of war were generally the determinative act in ascertaining the temporal reach of the jurisdiction of a military commission, the AUMF itself is inconsistent with the plurality's suggestion that such a rule is appropriate in this case. See *ante,* at 2777–2779, 2785. The text of the AUMF is backward looking, authorizing the use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks

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that occurred on September 11, 2001." § 2(a), 115 Stat. 224. Thus, the President's decision to try Hamdan by military commission—a use of force authorized by the AUMF—for Hamdan's involvement with al Qaeda prior to September 11, 2001, fits comfortably within the framework of the AUMF. In fact, bringing the September 11 conspirators to justice is the *primary point* of the AUMF. By contrast, on the plurality's logic, the AUMF would not grant the President the authority to try Usama bin Laden himself for his involvement in the events of September 11, 2001.

4 The plurality suggests these authorities are inapplicable because nothing in its "analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law. Our focus instead is on the ... AUMF." *Ante,* at 2778, n. 31. The difference identified by the plurality is purely semantic. Both Green and Howland confirm that the date of the enactment that establishes a legal basis for forming military commissions—whether it be a declaration of war, a declaration of martial law, *or* an authorization to use military force—does not limit the jurisdiction of military commissions to offenses committed after that date.

5 The plurality attempts to evade the import of this historical example by observing that Kuehn was tried before a martial law commission for a violation of federal espionage statutes. *Ibid.* As an initial matter, the fact that Kuehn was tried before a martial law commission for an offense committed prior to the establishment of martial law provides strong support for the President's contention that he may try Hamdan for offenses committed prior to the enactment of the AUMF. Here the AUMF serves the same function as the declaration of martial law in Hawaii in 1941, establishing legal authority for the constitution of military commissions. Moreover, Kuehn was not tried and punished "by statute, but by the laws and usages of war." *United States v. Kuehn,* Board of Review 6 (Office of the Military Governor, Hawaii 1942). Indeed, in upholding the imposition of the death penalty, a sentence "not authorized by the Espionage statutes," *id.,* at 5, Kuehn's Board of Review explained that "[t]he fact that persons may be tried and punished ... by a military commission for committing acts defined as offenses by ... federal statutes does not mean that such persons are being tried for violations of such ... statutes; they are, instead, being tried for acts made offenses only by orders of the ... commanding general," *id*., at 6. Lastly, the import of this example is not undermined by *Duncan v. Kahanamoku,* 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688 (1946). The question before the Court in that case involved only whether "loyal civilians in loyal territory should have their daily conduct governed by military orders," *id*., at 319, 66 S.Ct. 606; it did "not involve the well-established power of the military to exercise jurisdiction over ... enemy belligerents," *id*., at 313, 66 S.Ct. 606.

****2828** ***687** Moreover, the President's determination that the present conflict dates at least to 1996 is supported by overwhelming evidence. According to the State Department, al Qaeda *declared war* on the United States as early as August 1996. See Dept. of State Fact Sheet: Usama bin Ladin (Aug. 21, 1998); Dept. of State Fact Sheet: The Charges against International Terrorist Usama Bin Laden (Dec. 20, 2000); cf. *Prize Cases,* 2 Black, at 668, 17 L.Ed. 459 (recognizing that a state of war exists even if "the declaration of it be *unilateral* " (emphasis in original)). In February 1998, al Qaeda leadership issued another statement ordering the indiscriminate—and, even under the laws of war as applied to legitimate nation-states, plainly illegal—killing of American civilians and military personnel alike. See Jihad Against Jews and Crusaders: World Islamic Front Statement 2 (Feb. 23, 1998), in Y. Alexander & M. Swetnam, Usama bin Laden's al-Qaida: Profile of a Terrorist Network, App. 1B (2001) ("The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it"). This was ***688** not mere rhetoric; even before September 11, 2001, al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the Khobar Towers in Saudi Arabia in 1996, the bombing of the U.S. Embassies in Kenya and Tanzania in 1998, and the attack on the U.S.S. *Cole* in Yemen in 2000. See *id.,* at 1. In response to these incidents, the United States "attack[ed] facilities belonging to Usama bin Ladin's network" as early as 1998. Dept. of State Fact Sheet: Usama bin Ladin (Aug. 21, 1998). Based on the foregoing, the President's judgment—that the present conflict substantially predates the AUMF, extending at least as far back as al Qaeda's 1996 declaration of war on our Nation, and that the theater of war extends at least as far as the localities of al Qaeda's principal bases of operations—

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is beyond judicial reproach. And the plurality's unsupportable contrary determination merely confirms that " 'the Judiciary has neither aptitude, facilities nor responsibility' " for making military or foreign affairs judgments. *Hamdi,* 542 U.S., at 585, 124 S.Ct. 2633 (THOMAS, J., dissenting) (quoting *Chicago & Southern Air Lines,* 333 U.S., at 111, 68 S.Ct. 431).

B

The third consideration identified by Winthrop's treatise for the exercise of military commission jurisdiction pertains to the persons triable before such a commission, see *ante,* at 2777; Winthrop 838. ****2829** Law-of-war military commissions have jurisdiction over " '[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war,' " *ante,* at 2777 (quoting Winthrop 838). They also have jurisdiction over "[i]rregular armed bodies or persons not forming part of the organized forces of a belligerent" "who would not be likely to respect the laws of war." *Id.,* at 783, 784. Indeed, according to Winthrop, such persons are not "within the protection of the laws of war" and were "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or ***689** upon trial and conviction by military commission." *Id.*, at 784. This consideration is easily satisfied here, as Hamdan is an unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war. 344 F.Supp.2d 152, 161 (DC 2004); App. to Pet. for Cert. 63a–67a.

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C

The fourth consideration relevant to the jurisdiction of law-of-war military commissions relates to the nature of the offense charged. As relevant here, such commissions have jurisdiction to try " '[v]iolations of the laws and usages of war cognizable by military tribunals only,' " *ante,* at 2777 (quoting Winthrop 839). In contrast to the preceding considerations, this Court's precedents establish that judicial review of "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal" is appropriate. *Quirin,* 317 U.S., at 29, 63 S.Ct. 1. However, "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Yamashita,* 327 U.S., at 17, 66 S.Ct. 340. And whether an offense is a violation of the law of war cognizable before a military commission must be determined pursuant to "the system of common law applied by military tribunals." *Quirin, supra,* at 30, 63 S.Ct. 1; *Yamashita, supra,* at 8, 66 S.Ct. 340.

The common law of war as it pertains to offenses triable by military commission is derived from the "experience of our wars" and our wartime tribunals, Winthrop 839, and "the laws and usages of war as understood and practiced by the civilized nations of the world," 11 Op. Atty. Gen. 297, 310 (1865). Moreover, the common law of war is marked by two important features. First, as with the common law generally, it is flexible and evolutionary in nature, building upon the experience of the past and taking account of the exigencies of the present. Thus, "[t]he law of war, like every other code of laws, declares what shall not be done, and does not say what may be done. The legitimate use of the great ***690** power of war, or rather the prohibitions upon the use of that power, increase or diminish as the necessity of the case demands." *Id.*, at 300. Accordingly, this Court has recognized that the "jurisdiction" of "our common-law war courts" has not been "prescribed by statute," but rather "has been adapted in each instance to the need that called it forth." *Madsen,* 343 U.S., at 346–348, 72 S.Ct. 699. Second, the common law of war affords a measure of respect for the judgment of military commanders. Thus, "[t]he commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war." 11 Op. Atty. Gen., at 305. In recognition of these principles, Congress has generally " 'left it to the President, and the military commanders representing him, to employ the commission, *as occasion may require,* for the investigation and punishment of violations of the laws of war.' " *Madsen,* ****2830** *supra,* at 347, n. 9, 72 S.Ct. 699 (quoting Winthrop 831; emphasis added).

In one key respect, the plurality departs from the proper framework for evaluating the adequacy of the charge against Hamdan under the laws of war. The plurality holds that where, as here, "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent [establishing whether an offense is triable by military commission] must be plain and unambiguous." *Ante,* at 2780. This is a pure contrivance, and a bad one at that. It is contrary to the presumption we acknowledged in *Quirin,* namely, that the actions of military commissions are "not to be set aside by the courts without the *clear conviction* that they are" unlawful, 317 U.S., at 25, 63 S.Ct. 1 (emphasis added). It is also contrary to *Yamashita,* which recognized

the legitimacy of that military commission notwithstanding a substantial disagreement pertaining to whether Yamashita had been charged with a violation of the law of war. Compare 327 U.S., at 17, 66 S.Ct. 340 (noting that the allegations were "adequat[e]" ***691** and "need not be stated with ... precision"), with *id*., at 35, 66 S.Ct. 340 (Murphy, J., dissenting) (arguing that the charge was inadequate). Nor does it find support from the separation-of-powers authority cited by the plurality. Indeed, Madison's praise of the separation-of-powers in The Federalist No. 47, quoted *ante,* at 2780, if it has any relevance at all, merely highlights the illegitimacy of today's judicial intrusion onto core executive prerogatives in the waging of war, where executive competence is at its zenith and judicial competence at its nadir.

The plurality's newly minted clear-statement rule is also fundamentally inconsistent with the nature of the common law which, by definition, evolves and develops over time and does not, in all cases, "say what may be done." 11 Op. Atty. Gen., at 300. Similarly, it is inconsistent with the nature of warfare, which also evolves and changes over time, and for which a flexible, evolutionary common-law system is uniquely appropriate.[6] Though the charge against Hamdan easily satisfies even the plurality's manufactured rule, see *infra,* at 2830–2839, the plurality's inflexible approach has dangerous implications for the Executive's ability to discharge his duties as Commander in Chief in future cases. We should undertake to determine whether an unlawful combatant has been charged with an offense against the law of war with an understanding that the common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders.

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6 Indeed, respecting the present conflict, the President has found that "the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war." App. 34–35. Under the Court's approach, the President's ability to address this "new paradigm" of inflicting death and mayhem would be completely frozen by rules developed in the context of conventional warfare.

***692** 1

Under either the correct, flexible approach to evaluating the adequacy of Hamdan's charge, or under the plurality's new, clear-statement approach, Hamdan has been charged with conduct constituting two distinct violations of the law of war cognizable before a military commission: membership in a war-criminal enterprise and conspiracy to commit war crimes. ****2831** The charging section of the indictment alleges both that Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose," App. to Pet. for Cert. 65a, and that he "conspired and agreed with [al Qaeda] to commit ... offenses triable by military commission," *ibid.*[7]

7 It is true that both of these separate offenses are charged under a single heading entitled "CHARGE: CONSPIRACY," App. to Pet. for Cert. 65a. But that does not mean that they must be treated as a single crime, when the law of war treats them as separate crimes. As we acknowledged in *In re Yamashita,* 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946), "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Id.,* at 17, 66 S.Ct. 340; cf. W. Birkhimer, Military Government and Martial Law 536 (3d rev.ed.1914) (hereinafter Birkhimer) ("[I]t would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction before a justice of the peace" (internal quotation marks omitted)).
Nevertheless, the plurality contends that Hamdan was "not actually charged," *ante,* at 2779, n. 32 (emphasis deleted), with being a member in a war-criminal organization. But that position is demonstrably wrong. Hamdan's charging document expressly *charges* that he "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose." App. to Pet. for Cert. 65a. Moreover, the plurality's contention that we may only look to the label affixed to the charge to determine if the charging document alleges an offense triable by military commission is flatly inconsistent with its treatment of the Civil War cases—where it accepts as valid charges that

did not appear in the heading or title of the charging document, or even the listed charge itself, but only in the supporting specification. See, *e.g., ante,* at 2783–2784 (discussing the military commission trial of Wirz). For example, in the Wirz case, Wirz was charged with conspiring to violate the laws of war, and that charge was supported with allegations that he personally committed a number of atrocities. The plurality concludes that military commission jurisdiction was appropriate in that case not based upon the charge of conspiracy, but rather based upon the allegations of various atrocities in the specification which were *not* separately charged. *Ibid.* Just as these atrocities, not separately charged, were independent violations of the law of war supporting Wirz's trial by military commission, so too here Hamdan's membership in al Qaeda and his provision of various forms of assistance to al Qaeda's top leadership are independent violations of the law of war supporting his trial by military commission.

***693** The common law of war establishes that Hamdan's willful and knowing membership in al Qaeda is a war crime chargeable before a military commission. Hamdan, a confirmed enemy combatant and member or affiliate of al Qaeda, has been charged with willfully and knowingly joining a group (al Qaeda) whose purpose is "to support violent attacks against property and nationals (both military and civilian) of the United States." *Id.,* at 64a; 344 F.Supp.2d, at 161. Moreover, the allegations specify that Hamdan joined and maintained his relationship with al Qaeda even though he "believed that Usama bin Laden and his associates were involved in the attacks on the U.S. Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001." App. to Pet. for Cert. 65a. These allegations, against a confirmed unlawful combatant, are alone sufficient to sustain the jurisdiction of Hamdan's military commission.

For well over a century it has been established that "to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; *the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced* ****2832** *by the laws of* ***694** *war*." 11 Op. Atty. Gen., at 312 (emphasis added). [8] In other words, unlawful combatants, such as Hamdan, violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the "killing [and] disabling ... of peaceable citizens or soldiers." Winthrop 784; see also 11 Op. Atty. Gen., at 314 ("A bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war"). This conclusion is unsurprising, as it is a "cardinal principle of the law of war ... that the civilian population must enjoy complete immunity." 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 3 (J. Pictet gen.ed.1958). "Numerous instances of trials, for 'Violation of the laws of war,' of offenders of this description, are published in the General Orders of the years 1862 to 1866." Winthrop 784, and n. 57. [9] Accordingly, ****2833** on this basis alone, ***695** "the allegations of [Hamdan's] charge, tested by any reasonable standard, adequately allege a violation of the law of war." *Yamashita,* 327 U.S., at 17, 66 S.Ct. 340.

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8 These observations respecting the law of war were made by the Attorney General in defense of the military commission trial of the Lincoln conspirators. As the foregoing quoted portion of that opinion makes clear, the Attorney General did not, as the plurality maintains, "trea[t] the charge as if it alleged the substantive offense of assassination." *Ante,* at 2781, n. 35. Rather, he explained that the conspirators' "high offence against the laws of war" was "complete" when their band was "organized or joined," and did not depend upon "atrocities committed by such a band." 11 Op. Atty. Gen. 297, 312 (1865). Moreover, the Attorney General's conclusions specifically refute the plurality's unsupported suggestion that I have blurred the line between "those categories of 'offender' who may be tried by military commission ... with the 'offenses' that may be so tried." *Ante,* at 2779, n. 32.

9 The General Orders establishing the jurisdiction for military commissions during the Civil War provided that such offenses were violations of the laws of war cognizable before military commissions. See H.R. Doc. No. 65, 55th Cong., 3d Sess., 164 (1894) ("[P]ersons charged with the violation of the laws of war as spies, bridge-burners, marauders, & c., will ... be held for trial under such charges"); *id.*, at 234 ("[T]here are numerous rebels ... that ... furnish the enemy

with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste the country. *All such persons are by the laws of war in every civilized country liable to capital punishment* " (emphasis added)). Numerous trials were held under this authority. See, *e.g.,* U.S. War Dept., General Court Martial Order No. 51, p. 1 (1866) (hereinafter G.C.M.O.) (indictment in the military commission trial of James Harvey Wells charged " '[b]eing a guerrilla' " and specified that he " 'willfully ... [took] up arms as a guerrilla marauder, and did join, belong to, act and co-operate with guerrillas' "); G.C.M.O. No. 108, Head–Quarters Dept. of Kentucky, p. 1 (1865) (indictment in the military commission trial of Henry C. Magruder charged " '[b]eing a guerrilla' " and specified that he " 'unlawfully, and of his own wrong, [took] up arms as a guerrilla marauder, and did join, belong to, act, and co-operate with a band of guerrillas' "); G.C.M.O. No. 41, p. 1 (1864) (indictment in the military commission trial of John West Wilson charged that Wilson " 'did take up arms as an insurgent and guerrilla against the laws and authorities of the United States, and did join and co-operate with an armed band of insurgents and guerrillas who were engaged in plundering the property of peaceable citizens ... in violation of the laws and customs of war' "); G.C.M.O. No. 153, p. 1 (1864) (indictment in the military commission trial of Simeon B. Kight charged that defendant was " 'a guerrilla, and has been engaged in an unwarrantable and barbarous system of warfare against citizens and soldiers of the United States' "); G.C.M.O. No. 93, pp. 3–4 (1864) (indictment in the military commission trial of Francis H. Norvel charged " '[b]eing a guerrilla' " and specified that he " 'unlawfully and by his own wrong, [took] up arms as an outlaw, guerrilla, and bushwhacker, against the lawfully constituted authorities of the United States government' "); *id.,* at 9 (indictment in the military commission trial of James A. Powell charged " '[t]ransgression of the laws and customs of war' " and specified that he " '[took] up arms in insurrection as a military insurgent, and did join himself to and, in arms, consort with ... a rebel enemy of the United States, and the leader of a band of insurgents and armed rebels' "); *id.,* at 10–11 (indictment in the military commission trial of Joseph Overstreet charged " '[b]eing a guerrilla' " and specified that he " 'did join, belong to, consort and co-operate with a band of guerrillas, insurgents, outlaws, and public robbers' ").

The conclusion that membership in an organization whose purpose is to violate the laws of war is an offense triable by military commission is confirmed by the experience of the ***696** military tribunals convened by the United States at Nuremberg. Pursuant to Article 10 of the Charter of the International Military Tribunal (IMT), the United States convened military tribunals "to bring individuals to trial for membership" in "a group or organization ... declared criminal by the [IMT]." 1 Trials of War Criminals Before the Nuremberg Military Tribunals, p. XII, Art. 10 (hereinafter Trials). The IMT designated various components of four Nazi groups—the Leadership Corps, Gestapo, SD, and SS—as criminal organizations. 22 IMT, Trial of the Major War Criminals 505, 511, 517 (1948); see also T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 584–585 (1992). "[A] member of [such] an organization [could] be ... convicted of the crime of membership and be punished for that crime by death." 22 IMT, at 499. Under this authority, the United States Military Tribunal at Nuremberg convicted numerous individuals for the act of knowing and voluntary membership in these organizations. For example, in Military Tribunal Case No. 1, *United States v. Brandt*, Karl Brandt, Karl Gebhardt, Rudolf Brandt, Joachim Mrugowsky, Wolfram Sievers, Viktor Brack, and Waldemar Hoven were convicted and sentenced to death for the crime of, *inter alia,* membership in an organization declared criminal by the IMT; Karl Genzken and Fritz Fischer were sentenced to life imprisonment for the same; and Helmut Poppendick was convicted of no other offense than membership in a criminal organization and sentenced to a 10–year term of imprisonment. 2 Trials 180–300. This Court denied habeas relief, 333 U.S. 836, 68 S.Ct. 603, 92 L.Ed. 1119 (1948), and the executions were carried out at Landsberg prison on June 2, 1948. 2 Trials 330.

Moreover, the Government has alleged that Hamdan was not only a member of al Qaeda while it was carrying out terrorist attacks on civilian targets in the United States and abroad, but also that Hamdan aided and assisted al Qaeda's top leadership by supplying weapons, transportation, and other services. App. to Pet. for Cert. 65a–67a. These allegations ***697** further confirm that Hamdan is triable before a law-of-war military commission for his involvement with al Qaeda. See H.R. Doc. No. 65, 55th Cong., 3d Sess., 234

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(1894) ("[T]here are numerous rebels ... that ... furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste [to] the country. *All such persons are by the laws of war in every civilized country liable to capital punishment* " (emphasis added)); Winthrop 840 (including in the list of offenses triable by law-of-war military commissions "dealing with ... enemies, or furnishing them with money, arms, provisions, medicines, &c."). [10] Undoubtedly, ****2834** the conclusion that such conduct violates the law of war led to the enactment of Article 104 of the UCMJ, which provides that "[a]ny person who ... aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things ... shall suffer death or such other punishment as a court-martial or military commission may direct." 10 U.S.C. § 904.

10 Even if the plurality were correct that a membership offense must be accompanied by allegations that the "defendant 'took up arms,' " *ante,* at 2779, n. 32, that requirement has easily been satisfied here. Not only has Hamdan been charged with providing assistance to top al Qaeda leadership (itself an offense triable by military commission), he has also been charged with receiving weapons training at an al Qaeda camp. App. to Pet. for Cert. 66a–67a.

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Separate and apart from the offense of joining a contingent of "uncivilized combatants who [are] not ... likely to respect the laws of war," Winthrop 784, Hamdan has been charged with "conspir[ing] and agree[ing] with ... the al Qaida organization ... to commit ... offenses triable by military commission," App. to Pet. for Cert. 65a. Those offenses include "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." *Ibid*. This, ***698** too, alleges a violation of the law of war triable by military commission.

"[T]he experience of our wars," Winthrop 839, is rife with evidence that establishes beyond any doubt that conspiracy to violate the laws of war is itself an offense cognizable before a law-of-war military commission. World War II provides the most recent examples of the use of American military commissions to try offenses pertaining to violations of the laws of war. In that conflict, the orders establishing the jurisdiction of military commissions in various theaters of operation provided that conspiracy to violate the laws of war was a cognizable offense. See Letter, General Headquarters, United States Army Forces, Pacific (Sept. 24, 1945), Record in *Yamashita v. Styer,* O.T.1945, No. 672, pp. 14, 16 (Exh. F) (Order respecting the "Regulations Governing the Trial of War Criminals" provided that "participation in a common plan or conspiracy to accomplish" various offenses against the law of war was cognizable before military commissions); 1 U.N. War Crimes Commission, Law Reports of Trials of War Criminals 114–115 (1947) (reprint 1997) (hereinafter U.N. Commission) (recounting that the orders establishing World War II military commissions in the Pacific and China included "participation in a common plan or conspiracy" pertaining to certain violations of the laws of war as an offense triable by military commission). Indeed, those orders authorized trial by military commission of participation in a conspiracy to commit " 'murder ... or other inhumane acts ... against any civilian population.' " *id*., at 114, which is precisely the offense Hamdan has been charged with here. And conspiracy to violate the laws of war was charged in the highest profile case tried before a World War II military commission, see *Quirin,* 317 U.S., at 23, 63 S.Ct. 1, and on numerous other occasions. See, *e.g., Colepaugh v. Looney,* 235 F.2d 429, 431 (C.A.10 1956); Green 848 (describing the conspiracy trial of Julius Otto Kuehn).

***699** To support its contrary conclusion, *ante,* at 2778–2779, the plurality attempts to evade the import of *Quirin* (and the other World War II authorities) by resting upon this Court's failure to address the sufficiency of the conspiracy charge in the *Quirin* case, *ante,* at 2781–2782. But the common law of war cannot be ascertained from this Court's failure to pass upon an issue, or indeed to even mention the issue ****2835** in its opinion; [11] rather, it is ascertained by the practice and usage of war. Winthrop 839; *supra,* at 2828–2829.

11 The plurality recounts the respective claims of the parties in *Quirin* pertaining to this issue and cites the United States Reports. *Ante,* at 2781. But the claims of the parties are not included in the opinion of the Court, but rather in the sections of the Reports entitled "Argument for Petitioners" and "Argument for Respondent." See 317 U.S., at 6–17, 63 S.Ct. 1.

The Civil War experience provides further support for the President's conclusion that conspiracy to violate the laws of war is an offense cognizable before law-of-war military

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commissions. Indeed, in the highest profile case to be tried before a military commission relating to that war, namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men had "combin[ed], confederat[ed], and conspir[ed] ... to kill and murder" President Lincoln. G.C.M.O. No. 356 (1865), reprinted in H.R. Doc. No. 314, 55th Cong., 3d Sess., 696 (1899) (hereinafter G.C.M.O. No. 356). [12]

12 The plurality concludes that military commission jurisdiction was appropriate in the case of the Lincoln conspirators because they were charged with " 'maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln,' " *ante,* at 2781, n. 35. But the sole charge filed in that case alleged conspiracy, and the allegations pertaining to "maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln" were not charged or labeled as separate offenses, but rather as overt acts "in pursuance of and in prosecuting said malicious, unlawful, and traitorous *conspiracy*." G.C.M.O. No. 356, at 696 (emphasis added). While the plurality contends the murder of President Lincoln was charged as a distinct separate offense, the foregoing quoted language of the charging document unequivocally establishes otherwise. Moreover, though I agree that the allegations pertaining to these overt acts provided an independent basis for the military commission's jurisdiction in that case, that merely confirms the propriety of examining all the acts alleged—whether or not they are labeled as separate offenses—to determine if a defendant has been charged with a violation of the law of war. As I have already explained, Hamdan has been charged with violating the law of war not only by participating in a conspiracy to violate the law of war, but also by joining a war-criminal enterprise and by supplying provisions and assistance to that enterprise's top leadership.

***700** In addition to the foregoing high-profile example, Winthrop's treatise enumerates numerous Civil War military commission trials for conspiracy to violate the law of war. Winthrop 839, n. 5. The plurality attempts to explain these examples away by suggesting that the conspiracies listed by Winthrop are best understood as "a species of compound offense," namely, violations both of the law of war and ordinary criminal laws, rather than "stand-alone offense[s] against the law of war." *Ante,* at 2783 (citing, as an example, murder in violation of the laws of war). But the fact that, for example, conspiracy to commit murder can at the same time violate ordinary criminal laws and the law of war, so that it is "a combination of the two species of offenses," Howland 1071, does not establish that a military commission would not have jurisdiction to try that crime solely on the basis that it was a violation of the law of war. Rather, if anything, and consistent with the principle that the common law of war is flexible and affords some level of deference to the judgments of military commanders, it establishes that military commissions would have the discretion to try the offense as (1) one against the law of war, or (2) one against the ordinary criminal laws, or (3) both.

In any event, the plurality's effort to avoid the import of Winthrop's footnote through the smokescreen of its "compound offense" theory, *ante,* at 2783, cannot be ****2836** reconciled with the particular charges that sustained military commission jurisdiction in the cases that Winthrop cites. For example, ***701** in the military commission trial of Henry Wirz, Charge I provided that he had been

> "[m]aliciously, willfully, and traitorously ... *combining, confederating, and conspiring,* together [with various other named and unnamed co-conspirators], to injure the health and destroy the lives of soldiers in the military service of the United States, then held and being prisoners of war within the lines of the so-called Confederate States, and in the military prisons thereof, to the end that the armies of the United States might be weakened and impaired, *in violation of the laws and customs of war*." G.C.M.O. No. 607 (1865), reprinted in H.R. Doc. No. 314, at 785 (emphasis added).

Likewise, in the military commission trial of Leger Grenfel, Charge I accused Grenfel of "*[c]onspiring, in violation of the laws of war,* to release rebel prisoners of war confined by authority of the United States at Camp Douglas, near Chicago, Ill." G.C.M.O. No. 452 (1865), reprinted in H.R. Doc. No. 314, at 724 (emphasis added); [13] see also G.C.M.O. ***702** No. 41, p. 20 (1864) (indictment in the military commission trial of Robert Louden charged " '[c]onspiring with the rebel enemies of the United States to embarrass and impede the military authorities in the suppression of the existing rebellion, by the burning and destruction of steamboats and means of transportation on the Mississippi river' "). These examples provide incontrovertible support for the President's conclusion that the common law of war permits military commission trials for conspiracy to violate the law of war. And they specifically contradict the plurality's conclusion to

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the contrary, thereby easily satisfying its requirement that the Government "make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Ante,* at 2780. [14]

13 The plurality's attempt to undermine the significance of these cases is unpersuasive. The plurality suggests the Wirz case is not relevant because the specification supporting his conspiracy charge alleged that he "*personally committed* a number of atrocities." *Ante,* at 2783. But this does not establish that conspiracy to violate the laws of war, the very crime with which Wirz was charged, is not itself a violation of the law of war. Rather, at best, it establishes that in addition to conspiracy Wirz violated the laws of war by committing various atrocities, just as Hamdan violated the laws of war not only by conspiring to do so, but also by joining al Qaeda and providing provisions and services to its top leadership. Moreover, the fact that Wirz was charged with overt acts that are more severe than the overt acts with which Hamdan has been charged does not establish that conspiracy is not an offense cognizable before military commission; rather it merely establishes that Wirz's offenses may have been comparably worse than Hamdan's offenses.

The plurality's claim that the charge against Leger Grenfel supports its compound offense theory is similarly unsupportable. The plurality does not, and cannot, dispute that Grenfel was charged with conspiring to violate the laws of war by releasing rebel prisoners—a charge that bears no relation to a crime "ordinarily triable in civilian courts." *Ante,* at 2784, n. 37. Tellingly, the plurality does not reference or discuss this charge, but instead refers to the conclusion of Judge Advocate Holt that Grenfel also " 'united himself with traitors and malefactors for the overthrow of our Republic in the interest of slavery.' " *Ibid.* (quoting H.R. Doc. No. 314, at 689). But Judge Advocate Holt's observation provides no support for the plurality's conclusion, as it does not discuss the charges that sustained military commission jurisdiction, much less suggest that such charges were not violations of the law of war.

14 The plurality contends that international practice —including the practice of the IMT at Nuremberg —supports its conclusion that conspiracy is not an offense triable by military commission because " '[t]he Anglo–American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war.' " *Ante,* at 2784–2785 (quoting T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992)). But while the IMT did not criminalize all conspiracies to violate the law of war, it did criminalize "participation in a common plan or conspiracy" to wage aggressive war. See 1 Trials, at XI–XII, Art. 6(a). Moreover, the World War II military tribunals of several European nations recognized conspiracy to violate the laws of war as an offense triable before military commissions. See 15 U.N. Commission 90–91 (noting that the French Military Tribunal at Marseilles found Henri Georges Stadelhofer "guilty of the crime of *association de malfaiteurs,*" namely, of " 'having formed with various members of the German Gestapo an association with the aim of preparing or committing crimes against persons or property, without justification under the laws and usages of war' "); 11 *id.,* at 98 (noting that the Netherlands' military tribunals were authorized to try conspiracy to violate the laws of war). Thus, the European legal systems' approach to domestic conspiracy law has not prevented European nations from recognizing conspiracy offenses as violations of the law of war. This is unsurprising, as the law of war is derived not from domestic law but from the wartime practices of civilized nations, including the United States, which has consistently recognized that conspiracy to violate the laws of war is an offense triable by military commission.

****2837 *703** The plurality further contends, in reliance upon Winthrop, that conspiracy is not an offense cognizable before a law-of-war military commission because "it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt." *Ante,* at 2781. But Winthrop does not support the plurality's conclusion. The passage in Winthrop cited by the plurality states only that "the jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts, i.e.* in unlawful commissions or actual attempts

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to commit, and not in intentions merely." Winthrop 841 (emphasis in original). This passage would be helpful to the plurality if its subject were "conspiracy," rather than the "jurisdiction of the military commission." Winthrop is not speaking here of the requirements for a conspiracy charge, but of the requirements for *all* charges. Intentions do not suffice. An unlawful act—such as committing the crime of conspiracy—is necessary. Winthrop says nothing to exclude either conspiracy or membership in a criminal enterprise, both of which go beyond "intentions merely" and "consis[t of] *overt acts, i.e.* ... unlawful commissions or actual attempts to commit," and both of which are *expressly* recognized by Winthrop as crimes against the law of war triable by military commissions. *Id.,* at 784; *id.,* at 839, and n. 5, 840. Indeed, the ***704** commission of an *"overt ac [t]"* is the traditional requirement for the completion of the crime of conspiracy, and the charge against Hamdan alleges numerous such overt acts. App. to Pet. for Cert. 65a. The plurality's approach, unsupported by Winthrop, requires that any overt act to further a conspiracy must *itself* be a completed war crime *distinct from conspiracy*—which merely begs the question the plurality sets out to answer, namely, whether conspiracy itself may constitute a violation of the law of war. And, even the plurality's unsupported standard is satisfied here. Hamdan has been charged with the overt acts of providing protection, transportation, weapons, and other services to the enemy, *id.,* at 65a–67a, acts which in and of themselves are ****2838** violations of the laws of war. See *supra,* at 2833–2834; Winthrop 839–840.

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Ultimately, the plurality's determination that Hamdan has not been charged with an offense triable before a military commission rests not upon any historical example or authority, but upon the plurality's raw judgment of the "inability on the Executive's part here to satisfy the most basic precondition ... for establishment of military commissions: military necessity." *Ante,* at 2785. This judgment starkly confirms that the plurality has appointed itself the ultimate arbiter of what is quintessentially a policy and military judgment, namely, the appropriate military measures to take against those who "aided the terrorist attacks that occurred on September 11, 2001." AUMF § 2(a), 115 Stat. 224. The plurality's suggestion that Hamdan's commission is illegitimate because it is not dispensing swift justice on the battlefield is unsupportable. *Ante,* at 2782. Even a cursory review of the authorities confirms that law-of-war military commissions have wide-ranging jurisdiction to try offenses against the law of war in exigent and nonexigent circumstances alike. See, *e.g.,* Winthrop 839–840; see also *Yamashita,* 327 U.S., at 5, 66 S.Ct. 340 (military commission trial after the cessation ***705** of hostilities in the Philippines); *Quirin,* 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (military commission trial in Washington, D. C.). Traditionally, retributive justice for heinous war crimes is as much a "military necessity" as the "demands" of "military efficiency" touted by the plurality, and swift military retribution is precisely what Congress authorized the President to impose on the September 11 attackers in the AUMF.

Today a plurality of this Court would hold that conspiracy to massacre innocent civilians does not violate the laws of war. This determination is unsustainable. The judgment of the political branches that Hamdan, and others like him, must be held accountable before military commissions for their involvement with and membership in an unlawful organization dedicated to inflicting massive civilian casualties is supported by virtually every relevant authority, including all of the authorities invoked by the plurality today. It is also supported by the nature of the present conflict. We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers. But according to the plurality, when our Armed Forces capture those who are plotting terrorist atrocities like the bombing of the Khobar Towers, the bombing of the U.S.S. *Cole,* and the attacks of September 11—even if their plots are advanced to the very brink of fulfillment—our military cannot charge those criminals with any offense against the laws of war. Instead, our troops must catch the terrorists "redhanded," *ante,* at 2785, in the midst of *the attack itself,* in order to bring them to justice. Not only is this conclusion fundamentally inconsistent with the cardinal principle of the law of war, namely, protecting noncombatants, but it would sorely hamper the President's ability to confront and defeat a new and deadly enemy.

***706** After seeing the plurality overturn longstanding precedents in order to seize jurisdiction over this case, *ante,* at 2810–2811 (SCALIA, J., dissenting), and after seeing them disregard the clear prudential counsel that they abstain in

these circumstances **2839 from using equitable powers, *ante,* at 2769–2772, it is no surprise to see them go on to overrule one after another of the President's judgments pertaining to the conduct of an ongoing war. Those Justices who today disregard the Commander in Chief's wartime decisions, only 10 days ago deferred to the judgment of the Corps of Engineers with regard to a matter much more within the competence of lawyers, upholding that agency's wildly implausible conclusion that a storm drain is a tributary of the waters of the United States. See *Rapanos v. United States,* 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006). It goes without saying that there is much more at stake here than storm drains. The plurality's willingness to second-guess the determination of the political branches that these conspirators must be brought to justice is both unprecedented and dangerous.

III

The Court holds that even if "the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed" because of its failure to comply with the terms of the UCMJ and the four Geneva Conventions signed in 1949. *Ante,* at 2786. This position is untenable.

A

As with the jurisdiction of military commissions, the procedure of such commissions "has [not] been prescribed by statute," but "has been adapted in each instance to the need that called it forth." *Madsen,* 343 U.S., at 347–348, 72 S.Ct. 699. Indeed, this Court has concluded that "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander–in–Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe *707 the jurisdiction and procedure of military commissions." *Id.,* at 348, 72 S.Ct. 699. This conclusion is consistent with this Court's understanding that military commissions are "our common-law war courts." *Id.*, at 346–347, 72 S.Ct. 699.[15] As such, "[s]hould the conduct **2840 of those who compose martial-law tribunals become [a] matter of judicial determination subsequently before the civil courts, those courts will give great weight to the opinions of the officers as to what the customs of war in any case justify and render necessary." Birkhimer 534.

15 Though it does not constitute a basis for any holding of the Court, the Court maintains that, as a "general rule," "the procedures governing trials by military commission historically have been the same as those governing courts-martial." *Ante,* at 2788. While it is undoubtedly true that military commissions have invariably employed most of the procedures employed by courts-martial, that is not a requirement. See Winthrop 841 ("[M]ilitary commissions ... are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of war, and ... their proceedings ... will not be rendered *illegal* by the omission of details required upon trials by courts-martial" (emphasis in original; footnotes omitted)); 1 U.N. Commission 116–117 ("The [World War II] Mediterranean Regulations (No. 8) provide that Military Commissions shall conduct their proceedings as may be deemed necessary for full and fair trial, having regard for, *but not being bound by,* the rules of procedure prescribed for General Courts Martial" (emphasis added)); *id.*, at 117 ("In the [World War II] European directive it is stated ... that Military Commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings consistent with the powers of such Commissions, and with the rules of procedure ... as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for General Courts Martial"). Moreover, such a requirement would conflict with the settled understanding of the flexible and responsive nature of military commissions and the President's wartime authority to employ such tribunals as he sees fit. See Birkhimer 537–538 ("[M]ilitary commissions may so vary their procedure as to adapt it to any situation, and may extend their powers to any necessary degree .... The military commander decides upon the character of the military tribunal which is suited to the occasion ... and his decision is final").

*708 The Court nevertheless concludes that at least one provision of the UCMJ amounts to an attempt by Congress to limit the President's power. This conclusion is not only contrary to the text and structure of the UCMJ, but it is also inconsistent with precedent of this Court. Consistent

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with *Madsen's* conclusion pertaining to the common-law nature of military commissions and the President's discretion to prescribe their procedures, Article 36 of the UCMJ authorizes the President to establish procedures for military commissions "which shall, *so far as he considers practicable,* apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. § 836(a) (emphasis added). Far from constraining the President's authority, Article 36 recognizes the President's prerogative to depart from the procedures applicable in criminal cases whenever *he alone* does not deem such procedures "practicable." While the procedural regulations promulgated by the Executive must not be "contrary to" the UCMJ, only a few provisions of the UCMJ mention "military commissions," see *ante,* at 2790–2791, n. 49, and there is no suggestion that the procedures to be employed by Hamdan's commission implicate any of those provisions.

Notwithstanding the foregoing, the Court concludes that Article 36(b) of the UCMJ, 10 U.S.C. § 836(b), which provides that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable," *ante,* at 2790, requires the President to employ the same rules and procedures in military commissions as are employed by courts-martial " 'insofar as practicable,' " ante, at 2791. The Court further concludes that Hamdan's commission is unlawful because the President has not explained why it is not practicable to apply the same rules and procedures to Hamdan's commission as would be applied in a trial by court-martial. *Ante,* at 2792.

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***709** This interpretation of § 836(b) is unconvincing. As an initial matter, the Court fails to account for our cases interpreting the predecessor to Article 21 of the UCMJ—Article 15 of the Articles of War—which provides crucial context that bears directly on the proper interpretation of Article 36(b). Article 15 of the Articles of War provided that:

> "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals." 41 Stat. 790.

In *Yamashita,* this Court concluded that Article 15 of the Articles of War preserved the President's unfettered authority to prescribe military commission procedure. The Court explained, "[b]y thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction ... to *any use* of the military commission contemplated ****2841** by the common law of war." 327 U.S., at 20, 66 S.Ct. 340 (emphasis added);[16] see also *Quirin,* 317 U.S., at 28, 63 S.Ct. 2; *Madsen,* 343 U.S., at 355, 72 S.Ct. 699. In reaching this conclusion, this Court treated as authoritative the congressional testimony of Judge Advocate ***710** General Crowder, who testified that Article 15 of the Articles of War was enacted to preserve the military commission as " 'our common-law war court.' " *Yamashita, supra,* at 19, n. 7, 66 S.Ct. 340. And this Court recognized that Article 15's preservation of military commissions as common-law war courts preserved the President's Commander in Chief authority to both "establish" military commissions and to "prescribe [their] procedure[s]." *Madsen,* 343 U.S., at 348, 72 S.Ct. 699; *id.*, at 348–349, 72 S.Ct. 699 (explaining that Congress had "refrain[ed] from legislating" in the area of military commission procedures, in "contrast[t] with its traditional readiness to ... prescrib[e], with particularity, the jurisdiction and procedure of United States courts-martial"); cf. Green 834 ("The military commission exercising jurisdiction under common law authority is usually appointed by a superior military commander and is limited in its procedure only by the will of that commander. Like any other common law court, in the absence of directive of superior authority to the contrary, the military commission is free to formulate its own rules of procedure").

16 The Court suggests that Congress' amendment to Article 2 of the UCMJ, providing that the UCMJ applies to "persons within an area leased by or otherwise reserved or acquired for the use of the United States," 10 U.S.C. § 802(a)(12), deprives *Yamashita's* conclusion respecting the President's authority to promulgate military commission procedures of its "precedential value." *Ante,* at 2790. But this merely begs the question of the scope and content of the remaining provisions of the UCMJ. Nothing in the additions to Article 2, or any other provision of the UCMJ, suggests that Congress has disturbed this Court's unequivocal interpretation of Article 21 as preserving the common-law status of military commissions and the corresponding authority of the President to set their procedures pursuant to his Commander in Chief powers. See *Quirin,* 317 U.S., at 28, 63 S.Ct.

1; *Yamashita,* 327 U.S., at 20, 66 S.Ct. 340; *Madsen v. Kinsella,* 343 U.S. 341, 355, 72 S.Ct. 699, 96 L.Ed. 988 (1952).

Given these precedents, the Court's conclusion that Article 36(b) requires the President to apply the same rules and procedures to military commissions as are applicable to courts-martial is unsustainable. When Congress codified Article 15 of the Articles of War in Article 21 of the UCMJ it was "presumed to be aware of ... and to adopt" this Court's interpretation of that provision as preserving the common-law status of military commissions, inclusive of the President's unfettered authority to prescribe their procedures. *Lorillard v. Pons,* 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). The Court's conclusion that Article 36(b) repudiates this settled meaning of Article 21 is not based upon a specific textual reference to military commissions, but rather on a one-sentence subsection providing that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable." 10 U.S.C. § 836(b). This is little more than an impermissible repeal by implication. ***711** See *Branch v. Smith,* 538 U.S. 254, 273, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003) (plurality opinion). ("We have repeatedly stated ... that absent a clearly expressed congressional intention, repeals by implication are not favored" (citations and internal quotation marks omitted)). Moreover, the Court's conclusion is flatly contrary to its duty not to set aside Hamdan's commission "without the *clear* conviction that [it is] in conflict with the ... laws of Congress ****2842** constitutionally enacted." *Quirin, supra,* at 25, 63 S.Ct. 1 (emphasis added).

Nothing in the text of Article 36(b) supports the Court's sweeping conclusion that it represents an unprecedented congressional effort to change the nature of military commissions from common-law war courts to tribunals that must presumptively function like courts-martial. And such an interpretation would be strange indeed. The vision of uniformity that motivated the adoption of the UCMJ, embodied specifically in Article 36(b), is nothing more than uniformity across the separate branches of the armed services. See Act of May 5, 1950, ch. 169, 64 Stat. 107 (preamble to the UCMJ explaining that the UCMJ is an Act "[t]o unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard"). There is no indication that the UCMJ was intended to require uniformity in procedure between courts-martial and military commissions, tribunals that the UCMJ itself recognizes are different. To the contrary, the UCMJ expressly recognizes that different tribunals will be constituted in different manners and employ different procedures. See 10 U.S.C. § 866 (providing for three different types of courts-martial—general, special, and summary—constituted in different manners and employing different procedures). Thus, Article 36(b) is best understood as establishing that, so far as practicable, the rules and regulations governing tribunals convened by the Navy must be uniform with the rules and regulations governing tribunals convened by the Army. But, consistent with this Court's prior interpretations ***712** of Article 21 and over a century of historical practice, it cannot be understood to require the President to conform the procedures employed by military commissions to those employed by courts-martial. [17]

17 It bears noting that while the Court does not hesitate to cite legislative history that supports its view of certain statutory provisions, see *ante,* at 2766–2767, and n. 10, it makes no citation of the legislative history pertaining to Article 36(b), which contradicts its interpretation of that provision. Indeed, if it were authoritative, the *only* legislative history relating to Article 36(b) would confirm the obvious—Article 36(b)'s uniformity requirement pertains to uniformity between the three branches of the Armed Forces, and no more. When that subsection was introduced as an amendment to Article 36, its author explained that it would leave the three branches "enough leeway to provide a different provision where it is absolutely necessary" because "there are some differences in the services." Hearings on H.R. 2498 before the Subcommittee No. 1 of the House Committee on Armed Services, 81st Cong., 1st Sess., 1015 (1949). A further statement explained that "there might be some slight differences that would pertain as to the Navy in contrast to the Army, but at least [Article 36(b)] is an expression of the congressional intent that we want it to be as uniform as possible." *Ibid*.

Even if Article 36(b) could be construed to require procedural uniformity among the various tribunals contemplated by the UCMJ, Hamdan would not be entitled to relief. Under the Court's reading, the President is entitled to prescribe different rules for military commissions than for courts-martial when he determines that it is not "practicable" to prescribe uniform rules. The Court does not resolve the level of deference such determinations would be owed, however, because, in its view, "[t]he President has not ... [determined] that it is impracticable to apply the rules for courts-martial." *Ante,*

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at 2791. This is simply not the case. On the same day that the President issued Military Commission Order No. 1, the Secretary of Defense explained that "the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely, the federal ****2843** court system ... and the military court system," Dept. of ***713** Defense News Briefing on Military Commissions (Mar. 21, 2002) (remarks of Donald Rumsfeld), available at http://www.dod. gov/transcripts/2002/t03212002_t0321sd.html (as visited June 26, 2006, and available in Clerk of Court's case file) (hereinafter News Briefing), and that "[t]he commissions are intended to be different ... because the [P]resident recognized that there had to be differences to deal with the unusual situation we face and that a different approach was needed." *Ibid*. The President reached this conclusion because

> "we're in the middle of a war, and ... had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States.... [T]here was a constant balancing of the requirements of our war policy and the importance of providing justice for the individuals ... and *each* deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike this balance between individual justice and the broader war policy." *Ibid*. (remarks of Douglas J. Feith, Under Secretary of Defense for Policy (emphasis added)).

The Court provides no explanation why the President's determination that employing court-martial procedures in the military commissions established pursuant to Military Commission Order No. 1 would hamper our war effort is in any way inadequate to satisfy its newly minted "practicability" requirement. On the contrary, this determination is precisely the kind for which the "Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial ***714** intrusion or inquiry.' " *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S., at 111, 68 S.Ct. 431, 92 L.Ed. 568. And, in the context of the present conflict, it is exactly the kind of determination Congress countenanced when it authorized the President to use all necessary and appropriate force against our enemies. Accordingly, the President's determination is sufficient to satisfy any practicability requirement imposed by Article 36(b).

The Court further contends that Hamdan's commission is unlawful because it fails to provide him the right to be present at his trial, as recognized in 10 U.S.C. § 839(c) (2000 ed., Supp.V). *Ante,* at 2792. But § 839(c) applies to courts-martial, not military commissions. It provides:

> "When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge."

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In context, "all other proceedings" plainly refers exclusively to "other proceedings" pertaining to a court-martial. [18] This is ****2844** confirmed by the provision's subsequent reference to "members of the *court* " and to "cases in which a military judge has been detailed to the *court*." It is also confirmed by the other provisions of § 839, which refer only to courts-martial. See §§ 839(a)(1)-(4) ("[A]ny time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military ***715** judge may ... call the court into session without the presence of the members for the purpose of" hearing motions, issuing rulings, holding arraignments, receiving pleas, and performing various procedural functions). See also § 839(b) ("Proceedings under subsection (a) shall be conducted in the presence of the accused"). Section 839(c) simply does not address the procedural requirements of military commissions.

18 In addition to being foreclosed by the text of the provision, the Court's suggestion that 10 U.S.C. § 839(c) (2000 ed., Supp.V) applies to military commissions is untenable because it would require, in military commission proceedings, that the accused be present when the members of the commission voted on his guilt or innocence.

B

The Court contends that Hamdan's military commission is also unlawful because it violates Common Article 3 of the Geneva Conventions, see *ante,* at 2795–2798. Furthermore, Hamdan contends that his commission is unlawful because it violates various provisions of the Third Geneva Convention. These contentions are untenable.

1

As an initial matter, and as the Court of Appeals concluded, both of Hamdan's Geneva Convention claims are foreclosed by *Johnson v. Eisentrager,* 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950). In that case the respondents claimed, *inter alia,* that their military commission lacked jurisdiction because it failed to provide them with certain procedural safeguards that they argued were required under the Geneva Conventions. *Id*., at 789–790, 70 S.Ct. 936. While this Court rejected the underlying merits of the respondents' Geneva Convention claims, *id*., at 790, 70 S.Ct. 936, it also held, in the alternative, that the respondents could "not assert ... that anything in the Geneva Convention makes them immune from prosecution or punishment for war crimes," *id*., at 789, 70 S.Ct. 936. The Court explained:

> "We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat.2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These ***716** prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Id.,* at 789, n. 14, 70 S.Ct. 936.

This alternative holding is no less binding than if it were the exclusive basis for the Court's decision. See *Massachusetts v. United States,* 333 U.S. 611, 623, 68 S.Ct. 747, 92 L.Ed. 968 (1948). While the Court attempts to cast *Eisentrager's* unqualified, alternative holding as footnote dictum, *ante,* at 2794, it does not dispute the correctness of its conclusion, namely, that the provisions of the 1929 Geneva Convention were not judicially enforceable because that Convention contemplated that diplomatic measures by political and military authorities were the exclusive mechanisms ****2845** for such enforcement. Nor does the Court suggest that the 1949 Geneva Conventions departed from this framework. See *ibid.* ("We may assume that 'the obvious scheme' of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention").

Instead, the Court concludes that petitioner may seek judicial enforcement of the provisions of the Geneva Conventions because "they are ... part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." *Ante,* at 2794 (citation omitted). But Article 21 authorizes the use of military commissions; it does not purport to render judicially enforceable aspects of the law of war that are not so enforceable of their own accord. See *Quirin,* 317 U.S., at 28, 63 S.Ct. 1 (by enacting Article 21, "Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war"). The Court cannot escape *Eisentrager's* holding ***717** merely by observing that Article 21 mentions the law of war; indeed, though *Eisentrager* did not specifically consider the Court's novel interpretation of Article 21, *Eisentrager* involved a challenge to the legality of a World War II military commission, which, like all such commissions, found its authorization in Article 15 of the Articles of War, the predecessor to Article 21 of the UCMJ. Thus, the Court's interpretation of Article 21 is foreclosed by *Eisentrager*.

In any event, the Court's argument is too clever by half. The judicial nonenforceability of the Geneva Conventions derives from the fact that those Conventions have exclusive enforcement mechanisms, see *Eisentrager, supra,* at 789, n. 14, 70 S.Ct. 936, and this, too, is part of the law of war. The Court's position thus rests on the assumption that Article 21's reference to the "laws of war" selectively incorporates only those aspects of the Geneva Conventions that the Court finds convenient, namely, the substantive requirements of Common Article 3, and not those aspects of the Conventions that the Court, for whatever reason, disfavors, namely, the Conventions' exclusive diplomatic enforcement scheme. The Court provides no account of why the *partial* incorporation of the Geneva Conventions should extend only so far—and no further—because none is available beyond its evident preference to adjudicate those matters that the law of war,

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through the Geneva Conventions, consigns exclusively to the political branches.

Even if the Court were correct that Article 21 of the UCMJ renders judicially enforceable aspects of the law of war that are not so enforceable by their own terms, Article 21 simply cannot be interpreted to render judicially enforceable the particular provision of the law of war at issue here, namely, Common Article 3 of the Geneva Conventions. As relevant, Article 21 provides that "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions ... of concurrent jurisdiction with respect to *offenders or offenses* that by statute *or by* ***718** *the law of war* may be tried by military commissions." 10 U.S.C. § 821 (emphasis added). Thus, to the extent Article 21 can be interpreted as authorizing judicial enforcement of aspects of the law of war that are not otherwise judicially enforceable, that authorization only extends to provisions of the law of war that relate to whether a particular "offender" or a particular "offense" is triable by military commission. Common Article 3 of the Geneva Conventions, the sole provision of the Geneva Conventions relevant to the Court's holding, relates to neither. Rather, it relates exclusively to the particulars of the ****2846** tribunal itself, namely, whether it is "regularly constituted" and whether it "afford[s] all the judicial guarantees which are recognized as indispensable by civilized peoples." Third Geneva Convention, Art. 3, ¶ 1*(d),* Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3320, T.I.A.S. No. 3364.

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2

In addition to being foreclosed by *Eisentrager,* Hamdan's claim under Common Article 3 of the Geneva Conventions is meritless. Common Article 3 applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." 6 U.S.T., at 3318. "Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States," the President has "accept[ed] the legal conclusion of the Department of Justice ... that common Article 3 of Geneva does not apply to ... al Qaeda ... detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.' " App. 35. Under this Court's precedents, "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 184–185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982); *United States v. Stuart,* 489 U.S. 353, 369, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989). Our duty to defer to the ***719** President's understanding of the provision at issue here is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict. See generally *United States v. Curtiss–Wright Export Corp.,* 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936).

The President's interpretation of Common Article 3 is reasonable and should be sustained. The conflict with al Qaeda is international in character in the sense that it is occurring in various nations around the globe. Thus, it is also "occurring in the territory of" more than "one of the High Contracting Parties." The Court does not dispute the President's judgments respecting the nature of our conflict with al Qaeda, nor does it suggest that the President's interpretation of Common Article 3 is implausible or foreclosed by the text of the treaty. Indeed, the Court concedes that Common Article 3 is principally concerned with "furnish[ing] minimal protection to rebels involved in ... a civil war," *ante,* at 2796, precisely the type of conflict the President's interpretation envisions to be subject to Common Article 3. Instead, the Court, without acknowledging its duty to defer to the President, adopts its own, admittedly plausible, reading of Common Article 3. But where, as here, an ambiguous treaty provision ("not of an international character") is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation.

3

But even if Common Article 3 were judicially enforceable and applicable to the present conflict, petitioner would not be entitled to relief. As an initial matter, any claim petitioner has under Common Article 3 is not ripe. The only relevant "acts" that "are and shall remain prohibited" under Common Article 3 are "the *passing of sentences* and the *carrying out of executions* without previous judgment pronounced ***720** by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by ****2847** civilized peoples." Art. 3, ¶ 1*(d),* 6 U.S.T., at 3318, 3320 (emphasis added). As its terms make clear, Common Article 3 is only violated, as relevant here, by the act of "passing of sentenc[e]," and thus Hamdan will only have a

claim *if* his military commission convicts him and imposes a sentence. Accordingly, as Hamdan's claim is "contingent [upon] future events that may not occur as anticipated, or indeed may not occur at all," it is not ripe for adjudication. *Texas v. United States,* 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (internal quotation marks omitted). [19] Indeed, even if we assume he will be convicted and sentenced, whether his trial will be conducted in a manner so as to deprive him of "the judicial guarantees which are recognized as indispensable by civilized peoples" is entirely speculative. And premature adjudication of Hamdan's claim is especially inappropriate here because "reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd,* 521 U.S. 811, 819–820, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

19 The Court does not dispute the conclusion that Common Article 3 cannot be violated unless and until Hamdan is convicted and sentenced. Instead, it contends that "the Geneva Conventions d[o] not direct an accused to wait until sentence is imposed to challenge the legality of the tribunal that is to try him." *Ante,* at 2793, n. 55. But the Geneva Conventions do not direct defendants to enforce their rights through litigation, but through the Conventions' exclusive diplomatic enforcement provisions. Moreover, neither the Court's observation respecting the Geneva Conventions nor its reference to the equitable doctrine of abstention bears on the *constitutional* prohibition on adjudicating unripe claims.

In any event, Hamdan's military commission complies with the requirements of Common Article 3. It is plainly "regularly constituted" because such commissions have been employed throughout our history to try unlawful combatants for crimes against the law of war. This Court has recounted that history as follows:

***721** " 'By a practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in this country in time of war .... Their competency has been recognized not only in acts of Congress, but in executive proclamations, in rulings of the courts, and in the opinions of the Attorneys General.' " *Madsen,* 343 U.S., at 346, n. 8, 72 S.Ct. 699.

Hamdan's commission has been constituted in accordance with these historical precedents. As I have previously explained, the procedures to be employed by that commission, and the Executive's authority to alter those procedures, are consistent with the practice of previous American military commissions. See *supra,* at 2839–2842, and n. 15.

The Court concludes Hamdan's commission fails to satisfy the requirements of Common Article 3 not because it differs from the practice of previous military commissions but because it "deviate[s] from [the procedures] governing courts-martial." *Ante,* at 2798. But there is neither a statutory nor historical requirement that military commissions conform to the structure and practice of courts-martial. A military commission is a different tribunal, serving a different function, and thus operates pursuant to different procedures. The 150–year pedigree of the military commission is itself sufficient to establish that such tribunals are "regularly constituted court [s]." Art. 3, ¶ 1*(d),* 6 U.S. T., at 3320.

****2848** Similarly, the procedures to be employed by Hamdan's commission afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." Neither the Court nor petitioner disputes the Government's description of those procedures.

"Petitioner is entitled to appointed military legal counsel, 32 C.F.R. 9.4(c)(2), and may retain a civilian attorney (which he has done), 32 C.F.R. 9.4(c)(2)(iii)(B). Petitioner is entitled to the presumption of innocence, ***722** 32 C.F.R. 9.5(b), proof beyond a reasonable doubt, 32 C.F.R. 9.5(c), and the right to remain silent, 32 C.F.R. 9.5(f). He may confront witnesses against him, 32 C.F.R. 9.5(i), and may subpoena his own witnesses, if reasonably available, 32 C.F.R. 9.5(h). Petitioner may personally be present at every stage of the trial unless he engages in disruptive conduct or the prosecution introduces classified or otherwise protected information for which no adequate substitute is available and whose admission will not deprive him of a full and fair trial, 32 C.F.R. 9.5(k); Military Commission Order No. 1 (Dep't of Defense Aug. 31, 2005) § 6(B)(3) and (D)(5)(b). If petitioner is found guilty, the judgment will be reviewed by a review panel, the Secretary of Defense, and the President, if he does not designate the Secretary as the final decisionmaker. 32 C.F.R. 9.6(h). The final judgment is subject to review in the Court of Appeals for the District of Columbia Circuit and ultimately in this

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Court. See DTA § 1005(e)(3), 119 Stat. 2743; 28 U.S.C. 1254(1).” Brief for Respondents 4.

Notwithstanding these provisions, which in my judgment easily satisfy the nebulous standards of Common Article 3,[20] the plurality concludes that Hamdan's commission is unlawful because of the possibility that Hamdan will be barred from proceedings and denied access to evidence that may be used to convict him. *Ante,* at 2797–2798. But, under the commissions' rules, the Government may not impose such bar or denial on Hamdan if it would render his trial unfair, ***723** a question that is clearly within the scope of the appellate review contemplated by regulation and statute.

20 Notably, a prosecutor before the *Quirin* military commission has described these procedures as “a substantial improvement over those in effect during World War II,” further observing that “[t]hey go a long way toward assuring that the trials will be full and fair.” National Institute of Military Justice, Procedures for Trials by Military Commissions of Certain Non–United States Citizens in the War Against Terrorism, p. x (2002) (foreword by Lloyd N. Cutler).

Moreover, while the Executive is surely not required to offer a particularized defense of these procedures prior to their application, the procedures themselves make clear that Hamdan would only be excluded (other than for disruption) if it were necessary to protect classified (or classifiable) intelligence, Dept. of Defense, Military Commission Order No. 1, § 6(B)(3) (Aug. 31, 2005), including the sources and methods for gathering such intelligence. The Government has explained that “we want to make sure that these proceedings, which are going on in the middle of the war, do not interfere with our war effort and ... because of the way we would be able to handle interrogations and intelligence information, may actually assist us in promoting our war aims.” News Briefing (remarks of Douglas J. Feith, Under Secretary of Defense for Policy). And this Court has concluded, in the very context of a threat to reveal our Nation's intelligence gathering sources and methods, that “[i]t is ‘obvious and unarguable’ that no governmental interest ****2849** is more compelling than the security of the Nation,” *Haig,* 453 U.S., at 307, 101 S.Ct. 2766 (quoting *Aptheker v. Secretary of State,* 378 U.S. 500, 509, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964)), and that “[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests,” *Haig, supra,* at 307, 101 S.Ct. 2766. See also *Snepp v. United States,* 444 U.S. 507, 509, n. 3, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980) *(per curiam)* (“The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service”); *Curtiss–Wright,* 299 U.S., at 320, 57 S.Ct. 216. This interest is surely compelling here. According to the Government, “[b]ecause al Qaeda operates as a clandestine force relying on sleeper agents to mount surprise attacks, one of the most critical fronts in the current war involves gathering intelligence about future terrorist attacks and how the terrorist network ***724** operates —identifying where its operatives are, how it plans attacks, who directs operations, and how they communicate.” Brief for United States in No. 03–4792, *United States v. Moussaoui* (CA4), p. 9. We should not rule out the possibility that this compelling interest can be protected, while at the same time affording Hamdan (and others like him) a fair trial.

In these circumstances, “civilized peoples” would take into account the context of military commission trials against unlawful combatants in the war on terrorism, including the need to keep certain information secret in the interest of preventing future attacks on our Nation and its foreign installations so long as it did not deprive the accused of a fair trial. Accordingly, the President's understanding of the requirements of Common Article 3 is entitled to “great weight.” See *supra,* at 2846.

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In addition to Common Article 3, which applies to conflicts “not of an international character,” Hamdan also claims that he is entitled to the protections of the Third Geneva Convention, which applies to conflicts between two or more High Contracting Parties. There is no merit to Hamdan's claim.

Article 2 of the Convention provides that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” 6 U.S.T., at 3318. “Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States,” the President has determined that the Convention is inapplicable here, explaining that “none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party.” App. 35. The President's findings about the nature

of the present conflict with respect to members of al Qaeda operating in Afghanistan represents a core ***725** exercise of his Commander in Chief authority that this Court is bound to respect. See *Prize Cases,* 2 Black, at 670, 17 L.Ed. 459.

* * *

For these reasons, I would affirm the judgment of the Court of Appeals.

Justice ALITO, with whom Justices SCALIA and THOMAS join in Parts I–III, dissenting.

For the reasons set out in Justice SCALIA's dissent, which I join, I would hold that we lack jurisdiction. On the merits, I join Justice THOMAS' dissent with the ****2850** exception of Parts I, II–C–1, and III–B–2, which concern matters that I find unnecessary to reach. I add the following comments to provide a further explanation of my reasons for disagreeing with the holding of the Court.

I

The holding of the Court, as I understand it, rests on the following reasoning. A military commission is lawful only if it is authorized by 10 U.S.C. § 821; this provision permits the use of a commission to try "offenders or offenses" that "by statute or by the law of war may be tried by" such a commission; because no statute provides that an offender such as petitioner or an offense such as the one with which he is charged may be tried by a military commission, he may be tried by military commission only if the trial is authorized by "the law of war"; the Geneva Conventions are part of the law of war; and Common Article 3 of the Conventions prohibits petitioner's trial because the commission before which he would be tried is not "a regularly constituted court," Third Geneva Convention, Art. 3, ¶ 1*(d),* Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3320, T.I.A.S. No. 3364. I disagree with this holding because petitioner's commission is "a regularly constituted court."

***726** Common Article 3 provides as follows:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> "(1) ... [T]he following acts are and shall remain prohibited ...:
>
> .....
>
> "*(d)* [T]he passing of sentences and the carrying out of executions without previous judgment pronounced by *a regularly constituted court* affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.,* at 3318–3320 (emphasis added).

Common Article 3 thus imposes three requirements. Sentences may be imposed only by (1) a "court" (2) that is "regularly constituted" and (3) that affords "all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id*., at 3320.

I see no need here to comment extensively on the meaning of the first and third requirements. The first requirement is largely self-explanatory, and, with respect to the third, I note only that on its face it imposes a uniform international standard that does not vary from signatory to signatory.

The second element ("regularly constituted") is the one on which the Court relies, and I interpret this element to require that the court be appointed or established in accordance with the appointing country's domestic law. I agree with the Court, see *ante,* at 2797, n. 64, that, as used in Common Article 3, the term "regularly" is synonymous with "properly." The term "constitute" means "appoint," "set up," or "establish," Webster's Third New International Dictionary 486 (1961), and therefore "regularly constituted" means properly appointed, set up, or established. Our cases repeatedly use the phrases "regularly constituted" and "properly constituted" in this sense. See, *e.g., Hamdi v.* ***727** *Rumsfeld,* 542 U.S. 507, 538, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion of O'Connor, J.); *Nguyen v. United States,* 539 U.S. 69, 83, 123 S.Ct. 2130, 156 L.Ed.2d 64 (2003); *Ryder v. United States,* 515 U.S. 177, 187, 115 S.Ct. 2031, 132 L.Ed.2d 136 (1995); *Williams v. Bruffy,* 96 U.S. 176, 185, 24 L.Ed. 716 (1878).

****2851** In order to determine whether a court has been properly appointed, set up, or established, it is necessary to refer to a body of law that governs such matters. I interpret Common Article 3 as looking to the domestic law of the appointing country because I am not aware of any international law standard regarding the way in which such a court must be appointed, set up, or established,

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and because different countries with different government structures handle this matter differently. Accordingly, "a regularly constituted court" is a court that has been appointed, set up, or established in accordance with the domestic law of the appointing country.

II

In contrast to this interpretation, the opinions supporting the judgment today hold that the military commission before which petitioner would be tried is not "a regularly constituted court" (1) because "no evident practical need explains" why its "structure and composition ... deviate from conventional court-martial standards," *ante,* at 2805 (KENNEDY, J., concurring in part); see also *ante,* at 2796–2797 (opinion of the Court); and (2) because, contrary to 10 U.S.C. § 836(b), the procedures specified for use in the proceeding before the military commission impermissibly differ from those provided under the Uniform Code of Military Justice (UCMJ) for use by courts-martial, *ante,* at 2787-2793 (opinion of the Court); *ante,* at 2807–2808 (KENNEDY, J., concurring in part). I do not believe that either of these grounds is sound.

A

I see no basis for the Court's holding that a military commission cannot be regarded as "a regularly constituted court" unless it is similar in structure and composition to a ***728** regular military court or unless there is an "evident practical need" for the divergence. There is no reason why a court that differs in structure or composition from an ordinary military court must be viewed as having been improperly constituted. Tribunals that vary significantly in structure, composition, and procedures may all be "regularly" or "properly" constituted. Consider, for example, a municipal court, a state trial court of general jurisdiction, an Article I federal trial court, a federal district court, and an international court, such as the International Criminal Tribunal for the former Yugoslavia. Although these courts are "differently constituted" and differ substantially in many other respects, they are all "regularly constituted."

If Common Article 3 had been meant to require trial before a country's military courts or courts that are similar in structure and composition, the drafters almost certainly would have used language that expresses that thought more directly. Other provisions of the Convention Relative to the Treatment of Prisoners of War refer expressly to the ordinary military courts and expressly prescribe the "uniformity principle" that Justice KENNEDY sees in Common Article 3, see *ante,* at 2803–2804. Article 84 provides that "[a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war." 6 U.S.T., at 3382. Article 87 states that "[p]risoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." *Id.*, at 3384. Similarly, Article 66 of the Geneva ****2852** Convention Relative to the Protection of Civilian Persons in Time of War—a provision to which the Court looks for guidance in interpreting Common Article 3, see *ante,* at 2796–2797—expressly provides that civilians ***729** charged with committing crimes in occupied territory may be handed over by the occupying power "to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country." 6 U.S.T. 3516, 3558–3560, T.I.A.S. No. 3365. If Common Article 3 had been meant to incorporate a "uniformity principle," it presumably would have used language like that employed in the provisions noted above. For these reasons, I cannot agree with the Court's conclusion that the military commission at issue here is not a "regularly constituted court" because its structure and composition differ from those of a court-martial.

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Contrary to the suggestion of the Court, see *ante,* at 2796–2797, the commentary on Article 66 of the Fourth Geneva Convention does not undermine this conclusion. As noted, Article 66 permits an occupying power to try civilians in its "properly constituted, non-political military courts," 6 U.S.T., at 3558. The commentary on this provision states:

> "The courts are to be 'regularly constituted.' This wording definitely excludes all special tribunals. It is the ordinary military courts of the Occupying Power which will be competent." 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 340 (J. Pictet gen.ed.1958) (hereinafter GCIV Commentary).

The Court states that this commentary "defines ' "regularly constituted" ' tribunals to include 'ordinary military courts' and 'definitely exclud[e] all special tribunals.' " *Ante,* at 2796–2797 (alteration in original). This much is clear from the commentary itself. Yet the mere statement that a military

court *is* a regularly constituted tribunal is of no help in addressing petitioner's claim that his commission *is not* such a tribunal. As for the commentary's mention of "special tribunals," it is doubtful whether we should take this gloss on Article 66—which prohibits an *occupying power* from trying *civilians* in courts set up specially for that purpose—to tell ***730** us much about the very different context addressed by Common Article 3.

But even if Common Article 3 recognizes this prohibition on "special tribunals," that prohibition does not cover petitioner's tribunal. If "special" means anything in contradistinction to "regular," it would be in the sense of "special" as "relating to a single thing," and "regular" as "uniform in course, practice, or occurrence." Webster's Third New International Dictionary 2186, 1913. Insofar as respondents propose to conduct the tribunals according to the procedures of Military Commission Order No. 1 and orders promulgated thereunder —and nobody has suggested respondents intend otherwise— then it seems that petitioner's tribunal, like the hundreds of others respondents propose to conduct, is very much regular and not at all special.

B

I also disagree with the Court's conclusion that petitioner's military commission is "illegal," *ante,* at 2793, because its procedures allegedly do not comply with 10 U.S.C. § 836. Even if § 836(b), unlike Common Article 3, does impose at least a limited uniformity requirement amongst the tribunals contemplated by the UCMJ, but see *ante,* at 2842 (THOMAS, J., dissenting), and even if it is assumed for the sake of argument that some of the procedures specified in Military Commission Order No. 1 impermissibly deviate from ****2853** court-martial procedures, it does not follow that the military commissions created by that order are not "regularly constituted" or that trying petitioner before such a commission would be inconsistent with the law of war. If Congress enacted a statute requiring the federal district courts to follow a procedure that is unconstitutional, the statute would be invalid, but the district courts would not. Likewise, if some of the procedures that may be used in military commission proceedings are improper, the appropriate remedy is to proscribe the use of those particular procedures, not to outlaw ***731** the commissions. I see no justification for striking down the entire commission structure simply because it is possible that petitioner's trial might involve the use of some procedure that is improper.

III

Returning to the three elements of Common Article 3— (1) a court, (2) that is appointed, set up, and established in compliance with domestic law, and (3) that respects universally recognized fundamental rights—I conclude that all of these elements are satisfied in this case.

A

First, the commissions qualify as courts.

Second, the commissions were appointed, set up, and established pursuant to an order of the President, just like the commission in *Ex parte Quirin,* 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942), and the Court acknowledges that *Quirin* recognized that the statutory predecessor of 10 U.S.C. § 821 "preserved" the President's power "to convene military commissions," *ante,* at 2774. Although Justice KENNEDY concludes that "an acceptable degree of independence from the Executive is necessary to render a commission 'regularly constituted' by the standards of our Nation's system of justice," *ante,* at 2804, he offers no support for this proposition (which in any event seems to be more about fairness or integrity than regularity). The commission in *Quirin* was certainly no more independent from the Executive than the commissions at issue here, and 10 U.S.C. §§ 821 and 836 do not speak to this issue. [1]

1 Section 821 looks to the "law of war," not separation-of-powers issues. And § 836, as Justice KENNEDY notes, concerns procedures, not structure, see *ante,* at 2804.

Finally, the commission procedures, taken as a whole, and including the availability of review by a United States Court of Appeals and by this Court, do not provide a basis for ***732** deeming the commissions to be illegitimate. The Court questions the following two procedural rules: the rule allowing the Secretary of Defense to change the governing rules " 'from time to time' " (which does not rule out midtrial changes), see *ante,* at 2797, n. 65 (opinion of the Court); *ante,* at 2804 (KENNEDY, J., concurring in part), and the rule that permits the admission of any evidence that would have " 'probative value to a reasonable person' " (which departs from our legal system's usual rules of evidence), see *ante,*

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at 2786–2787, 2791–2792 (opinion of the Court); *ante,* at 2807–2808 (KENNEDY, J., concurring in part).[2] Neither of ****2854** these two rules undermines the legitimacy of the commissions.

2 The plurality, but not Justice KENNEDY, suggests that the commission rules are improper insofar as they allow a defendant to be denied access to evidence under some circumstances. See *ante,* at 2797–2798. But here too, if this procedure is used in a particular case and the accused is convicted, the validity of this procedure can be challenged in the review proceeding in that case. In that context, both the asserted need for the procedure and its impact on the accused can be analyzed in concrete terms.

Surely the entire commission structure cannot be stricken merely because it is possible that the governing rules might be changed during the course of one or more proceedings. *If* a change is made and applied during the course of an ongoing proceeding and *if* the accused is found guilty, the validity of that procedure can be considered in the review proceeding for that case. After all, not every midtrial change will be prejudicial. A midtrial change might amend the governing rules in a way that is inconsequential or actually favorable to the accused.

As for the standard for the admission of evidence at commission proceedings, the Court does not suggest that this rule violates the international standard incorporated into Common Article 3 ("the judicial guarantees which are recognized as indispensable by civilized peoples," 6 U.S.T., at 3320). Rules of evidence differ from country to country, and much of the world does not follow aspects of our evidence ***733** rules, such as the general prohibition against the admission of hearsay. See, *e.g.,* Blumenthal, Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective, 13 Pace Int'l L.Rev. 93, 96–101 (2001). If a particular accused claims to have been unfairly prejudiced by the admission of particular evidence, that claim can be reviewed in the review proceeding for that case. It makes no sense to strike down the entire commission structure based on speculation that some evidence might be improperly admitted in some future case.

In sum, I believe that Common Article 3 is satisfied here because the military commissions (1) qualify as courts, (2) that were appointed and established in accordance with domestic law, and (3) any procedural improprieties that might occur in particular cases can be reviewed in those cases.

B

The commentary on Common Article 3 supports this interpretation. The commentary on Common Article 3, ¶ 1*(d),* in its entirety states:

> "[A]lthough [sentences and executions without a proper trial] were common practice until quite recently, they are nevertheless shocking to the civilized mind .... Sentences and executions without previous trial are too open to error. 'Summary justice' may be effective on account of the fear it arouses ..., but it adds too many further innocent victims to all the other innocent victims of the conflict. All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. *We must be very clear about one point: it is only 'summary' justice which it is intended to prohibit.* No sort of immunity is given to anyone under this provision. There is nothing in it to prevent ***734** a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law." GCIV Commentary 39 (emphasis added).

It seems clear that the commissions at issue here meet this standard. Whatever else may be said about the system that was created by Military Commission Order No. 1 and augmented by the Detainee Treatment Act, § 1005(e)(1), 119 Stat. 2742, this system—which features formal ****2855** trial procedures, multiple levels of administrative review, and the opportunity for review by a United States Court of Appeals and by this Court—does not dispense "summary justice."

* * *

For these reasons, I respectfully dissent.

All Citations

548 U.S. 557, 126 S.Ct. 2749, 165 L.Ed.2d 723, 74 USLW 4579, 06 Cal. Daily Op. Serv. 5677, 2006 Daily Journal D.A.R. 8443, 19 Fla. L. Weekly Fed. S 452

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APPENDIX NO. 7

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2021 WL 4947327
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

Steven F. HOTZE, M.D.; Wendell Champion; Honorable Steve Toth; Sharon Hemphill, Plaintiffs—Appellants,

v.

Teneshia HUDSPETH, in her official capacity as Harris County Clerk, Defendant—Appellee, Andrea Chilton Greer; Yekaterina Snezhkova; Joy Davis-Harasemay; Diana Untermeyer; Michelle Colvard; Karen Vidor; Malkia Hutchinson-Arvizu; Anton Montano; Helen Shelton; Elizabeth Furler; Alan Mauk; Jenn Rainey; Brian Singh; Mary Bacon; Kimberly Phipps-Nichol; Nyguen Griggs; Nelson Vanegas; Jessica Goodspero; Amy Ashmore; Richard Frankel; Elaine Frankel; Ryan Frankel; Celia Veselka; Sergio Aldana; Russell "Rusty" Hardin; Douglas Moll; Carey Jordan; Christina Massara; Jerelyn M. Gooden; Stanley G. Schneider; Mary Currie; Carlton Currie, Jr.; Jekaya Simmons; Daniel Coleman; David Hobbs; Bettye Hobbs, Intervenor Defendants—Appellees.

No. 20-20574
|
FILED October 25, 2021

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Synopsis

Background: Voter and candidates for state representative, state district judge, and for United States Congress brought action against county clerk alleging county's plan for drive-thru voting violated the Equal Protection Clause and the Elections Clause of the United States Constitution. The United States District Court for the Southern District of Texas, Andrew S. Hanen, J., 2020 WL 6437668, denied plaintiffs' motion for preliminary injunction to enjoin the county's administration of drive-thru voting in the then-upcoming election and dismissed for want of jurisdiction. Plaintiffs appealed.

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

plaintiffs' request for preliminary injunction with regard to previous election was moot;

request for preliminary injunction as to future elections was moot; and

plaintiffs did not have standing to challenge upcoming election in which they were not candidates.

Affirmed in part and vacated in part.

Oldham, Circuit Judge, filed dissenting opinion.

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

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:20-CV-3709, Andrew S. Hanen, U.S. District Judge

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Before Davis, Haynes, and Oldham, Circuit Judges.

Opinion

Haynes, Circuit Judge:

***1** Having fully considered the briefing, record, and oral argument on appeal, we conclude that Plaintiffs' request to enjoin Harris County's administration of drive-thru voting in the November 2020 election is moot. *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010).[1] Since Plaintiffs filed their appeal, the November 2020 election has been completed; the results have been certified; and new officeholders have been sworn in. Therefore, the "issues presented are no longer 'live.' " *La. Env't Action Network v. EPA*, 382 F.3d 575, 581 (5th Cir. 2004) (quotation omitted).

1 Although Plaintiffs sought various forms of relief from the district court, they only briefed arguments concerning injunctive relief on appeal and have therefore forfeited any arguments concerning the continuing vitality of any other form of relief. *Douglas W. ex rel. Jason D.W. v. Hous. Indep. Sch. Dist.*, 158 F.3d 205, 210 n.4 (5th Cir. 1998) (per curiam).

Plaintiffs recognize that their claims are moot as to the November 2020 election and argue instead that drive-thru voting should be enjoined for future elections. In their briefing, they failed to identify any evidence in the record before the district court demonstrating that Harris County will offer that sort of voting again in the future, let alone that it will offer it in such a way as to evade judicial review. *See Libertarian Party v. Dardenne*, 595 F.3d 215, 218 (5th Cir. 2010). While this appeal was pending, the Texas legislature passed S.B.1, which addresses drive-thru voting. The parties filed supplemental briefing regarding the fact that this statute takes effect on December 2, 2021. We conclude that the challenge raised in last year's case before the district court is moot as to elections after December 2, 2021.

Nothing in the district court record specifically addresses the gap in time between now and December 2, 2021, of course. But the only election Plaintiffs can point to during that time gap, where Harris County could conceivably once again engage in drive-thru voting and where the merits would fall under law preceding S.B.1, is the election set for November 2, 2021.

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Thus, we turn to a different jurisdictional question—standing. "Unless a party seeking a remedy can show direct injury, this court will deny standing." *Friends of St. Frances Xavier Cabrini Church v. FEMA*, 658 F.3d 460, 466 (5th Cir. 2011). One of the plaintiffs, Hotze, is a Harris County voter. The other three were candidates in the 2020 election, two for state positions (Toth for state representative and Hemphill for state district judge) and one for a federal position (Champion for Congress). The four plaintiffs asserted a joint contention that drive-thru voting hurt the "integrity" of the election process. This claim is far too generalized to warrant standing. *Lance v. Coffman*, 549 U.S. 437, 441–42, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam) (concluding that voters lacked standing to bring an Elections Clause challenge regarding a congressional redistricting plan enforced by a state supreme court). While they addressed the separate question of candidate standing in passing in their brief to this court, we conclude that they failed to meaningfully brief that issue, therefore forfeiting it. *See Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004).

***2** Even if we consider the argument that candidates have standing and assume arguendo that candidates do have standing to challenge election procedures,[2] that standing would pertain only to their claim as to the November 2020 election, the only election in which they claimed to be

candidates. Standing, while addressed at the time of filing, is evaluated "on a claim-by-claim basis." *Id.* The November 2021 election does not include congressional offices, and Plaintiffs have not even claimed that they are otherwise up for election in November 2021 or have any other basis for standing that differs from any other Harris County voter. Thus, they fall simply in the general group of voters, who, as stated above, lack standing in this case. Thus, we lack jurisdiction to address any claims regarding the November 2021 election as well.

2 This issue is far from clear, but we need not reach it here. *Compare Carson v. Simon*, 978 F.3d 1051, 1058–59 (8th Cir. 2020) (per curiam) (concluding that candidates for presidential elector had standing under the Electors Clause), *with Bognet v. Sec'y of Pa.*, 980 F.3d 336, 351–52 & n.6 (3d Cir. 2020) (specifically declining to follow *Carson* and concluding that a candidate lacked a cognizable injury under the Elections and Electors Clauses), *vacated and remanded with instructions to dismiss as moot sub nom. Bognet v. Degraffenreid*, —— U.S. ——, 141 S.Ct. 2508, 209 L.Ed.2d 544 (2021) (mem.). Notably, however, contrary to the dissenting opinion's assertion, there was no indication of how the candidates would be specifically harmed by allowing *all* voters to do drive-thru voting. Just challenging the "integrity" of the voting process is too general to suffice. As the Supreme Court explained in *Lance v. Coffman*, an alleged injury based solely on an allegation "that the law—specifically, the Elections Clause—has not been followed" amounts to an "undifferentiated, generalized grievance about the conduct of government" insufficient to establish standing. 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam) (concluding that voters lacked standing to bring an Elections Clause challenge regarding a congressional redistricting plan enforced by a state supreme court). That is precisely the sort of alleged harm that all of the Plaintiffs claim that they experienced here.

Accordingly, we AFFIRM the district court's denial of injunctive relief and the district court's dismissal of Plaintiffs' claims for want of jurisdiction. Since the district court likewise lacked jurisdiction, we also VACATE its advisory discussion of the legality of drive-thru voting without offering any opinion as to the merits of that reasoning.

Andrew S. Oldham, Circuit Judge, dissenting:
The majority confuses standing and mootness. I respectfully dissent.

I.

Let's start with standing. The plaintiff invoking our judicial power must have an injury-in-fact, traceable to the defendant, and redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Standing is determined at the time a suit is filed. *See Davis v. FEC*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) ("While the proof required to establish standing increases as the suit proceeds, the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome *when the suit was filed.*" (emphasis added) (quotation omitted)); *see also Lujan*, 504 U.S. at 570 n.4, 112 S.Ct. 2130 (opinion of Scalia, J.) (noting the Court's "longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed"); *accord Pederson v. La. State Univ.*, 213 F.3d 858, 870 (5th Cir. 2000).

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At the time the plaintiffs filed this action, at least one candidate for office had standing. The candidate's injury-in-fact should be self-evident. Candidates for office spend money, devote time, and otherwise injuriously rely on provisions of the Election Code in organizing, funding, and running their campaigns. Suppose, for example, the Election Code specifies a 12-day period for in-person early voting. Suppose further a candidate injuriously relies on that Code provision and budgets $500,000 for get-out-the-vote efforts during that 12-day period. Would she be injured in fact if the county clerk unlawfully shortened in-person voting from 12 *days* to 12 *hours*? Of course she would: The candidate could point to, among other injuries, the fact that she injuriously relied on the Code to set aside $500,000 that she could've spent elsewhere. It should be equally obvious that the injury is traceable to the county clerk's unlawful decision, and that the injury is redressable by enjoining the unlawful shortening of in-person voting. In short, the candidate would have Article III standing.

***3** The majority's response is to suggest that a candidate might not suffer a "cognizable injury" from an unlawful election. *See ante*, at —— n.2. That's equally startling and wrong. For one thing, the majority's support for that

proposition is a now-vacated decision by the Third Circuit. *See Bognet v. Sec'y of Pa.*, 980 F.3d 336 (3d Cir. 2020), *vacated and remanded with instructions to dismiss as moot sub nom. Bognet v. Degraffenreid*, —— U.S. ——, 141 S.Ct. 2508, 209 L.Ed.2d 544 (2021) (mem.). Vacated authority, of course, is no authority at all. For another thing, it makes no sense to say (as the Third Circuit said) that violations of the Election Code do not affect a candidate "in a particularized way." *Bognet*, 980 F.3d at 351. The candidate who pours money and sweat into a campaign, who spends time away from her job and family to traverse the campaign trail, and who puts her name on a ballot has an undeniably different —and more particularized—interest in the lawfulness of the election as compared to the interests of some random voter. In fact, it's hard to imagine anyone who has a more particularized injury than the candidate has. And that presumably explains why the only non-vacated circuit authorities to confront this question have held that candidates *do* have standing to contest violations of election law. *See Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020) (per curiam) (framing the interest as being "in ensuring that the final vote tally accurately reflects the legally valid votes cast"); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020) ("As a candidate for elected office, the President's alleged injury is one that affects him in a personal and individual way." (quotation omitted) (citing *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130, and *Carson*, 978 F.3d at 1058)).

The majority further suggests that the candidates' injuries are "undifferentiated, generalized grievances." *See ante*, at —— n.2 (quoting *Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam)). There are at least two problems with that. First, *Lance* was about whether *voters* had standing to bring an Elections Clause claim. It said nothing about *candidates*, who clearly have different (and more particularized) interests. And second, an injury is a "generalized grievance" if the injured party is "claiming only harm to his *and every citizen's* interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him that it does the public at large." *Lujan*, 504 U.S. at 573–75, 112 S.Ct. 2130 (emphasis added). But the injury suffered by a candidate for office is in no sense "common to all members of the public." *Ex parte Levitt*, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937) (per curiam). It's not something "all citizens share." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). It's something only candidates experience.

If one of the candidate plaintiffs had standing at the time the suit was filed, the candidate has standing now. "It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." *Smith v. Sperling*, 354 U.S. 91, 93 n.1, 77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539, 6 L.Ed. 154 (1824)); *see also Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428, 111 S.Ct. 858, 112 L.Ed.2d 951 (1991) (per curiam) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events."); *accord Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991) ("As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint, and subsequent events do not deprive the court of jurisdiction."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189–92, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (comparing standing with the doctrine of mootness, which *is* affected by subsequent events). It's therefore not true that the standing "issue is far from clear." *Ante*, at —— n.2. It's pellucid. At least one candidate had standing at the filing, and that's the only standing that matters.

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II.

Now let's talk about mootness. There was a time, a long time ago, when some thought that mootness was "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness)." Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973); *see also, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (appearing to endorse Monaghan's view). If that were the law today, you might understand the majority's approach because the majority could concede (the undeniable proposition) that the candidates had standing when the suit started but then conclude (the erroneous proposition) that the candidates lost standing after the election, thus mooting the case.

***4** But the law has been otherwise for more than a generation. In 2000, the *Laidlaw* Court largely rejected Monaghan's view of mootness. The Court held that "[c]areful reflection on the long-recognized exceptions to mootness," such as the capable-of-repetition-yet-evading-

review doctrine, "reveals that the description of mootness as 'standing set in a time frame' is not comprehensive." *Laidlaw*, 528 U.S. at 190, 120 S.Ct. 693. "[T]here are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Ibid.*

This is the precise case that *Laidlaw* described. In a supplemental letter brief, Harris County not only refused to disclaim unlawful drive-through voting for future elections —it promised to continue that practice. [1] No matter whether that's enough to confer standing, Harris County's promise is certainly enough to prevent the case from becoming moot. The plaintiffs sought prospective relief: They asked for an injunction prohibiting unlawful drive-through voting in future elections. And in contrast to its earlier representations, Harris County now *promises* to use drive-through voting in future elections. *See* n.1, *supra*.

1 This is a 180 from Harris County's previous litigation position. *Compare* Red Br. at 14 ("[N]othing in this record indicates that drive-through voting will recur in the future."), *with* Suppl. Br. at 3 ("[T]he newly-appointed Harris County Elections Administrator has publicly stated an intention to conduct drive-through voting in [the November 2021] election using the same measures as in prior elections."), *and id.* at 2 (arguing that "S.B. 1 appears to validate [Harris County's] approach" to drive-through voting).

The majority's only response is that the candidate plaintiffs might have standing to challenge violations of the Election Code in the November 2020 election, but that "claim" is now moot. *See ante*, at —— & n.2. Again, this confuses standing and mootness. Mootness does not attach to *claims*; mootness is a function of the Article III power over an *entire case*. *See DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (per curiam); R. FALLON, J. MANNING, D. MELTZER & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 201 (7th ed. 2015). And the *case* plainly is not moot for the reasons given above.

III.

Because the district court had subject-matter jurisdiction, I turn briefly to the merits. I can be brief because the merits are straightforward.

The plaintiffs sought relief under 42 U.S.C. § 1983 for, *inter alia*, violations of the Elections Clause. *See* U.S. CONST. art. I, § 4, cl. 1. The Elections Clause provides that "The Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof." *Ibid.* To show a violation of the Elections Clause, the plaintiffs must show a "significant departure" from the election scheme enacted by the Legislature. *Bush v. Gore*, 531 U.S. 98, 113, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (Rehnquist, C.J., concurring). [2] Such a departure occurs when the "general coherence" of the legislative scheme is "altered" or "wholly change[d]" by officials outside the Legislature. *Id.* at 114, 121 S.Ct. 525.

2 The parties agree that Chief Justice Rehnquist's concurrence in *Bush v. Gore* provides the relevant legal standard. *See* Blue Br. at 26; Red Br. at 31. That proposition is not self-evident. *Bush v. Gore* involved the Elect*ors* Clause in Article II; this case involves the Elect*ions* Clause in Article I. *Compare* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."), *with* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."). But any distinction between the two clauses militates in the plaintiffs' favor: The text of the Elections Clause is arguably more specific, tasking the Legislature with prescribing "The Times, Places, and Manner" of holding elections. So while "significant departure" is the standard for assessing violations of the Elect*ors* Clause, the Elect*ions* Clause is at least that protective of the Legislature's choices if not more protective.

***5** Harris County has taken the remarkable position that it (1) wholly ignored provisions of the Texas Election Code in 2020, and (2) can continue wholly ignoring those provisions in future elections—notwithstanding the Legislature's express instructions to the contrary. The Texas Election Code specifically contemplates voting without entering a polling place—but only for a limited class of voters. The Legislature made this accommodation available *only* to those "physically

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unable to enter the polling place without personal assistance or likelihood of injuring the voter's health." TEX. ELEC. CODE § 64.009; *see also* Red Br. at 41 (acknowledging the accommodation applies only to "voters with special physical disabilities or health risks"). Harris County made this option available to "all voters who would like to be able to vote from the safety and comfort of [their] vehicle[s]."

Harris County's decision to permit *all* voters to participate in drive-through voting poses two clear textual problems. First, it violates the principle that the expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*). *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107–11 (2012). In § 64.009, the Texas Legislature clearly specified that voters with special physical disabilities or health risks be permitted to vote without entering a polling place. By extending the accommodation to that group *only*, the Legislature impliedly excluded everyone else.

Second, reading the Election Code to permit drive-through voting for all voters renders § 64.009 meaningless: There is no need for a special accommodation if the voters covered by § 64.009—like everyone else—can vote from their vehicles. And an interpretation that reads § 64.009 right out of the Code cannot be correct. *See Marx v. Gen Revenue Corp.*, 568 U.S. 371, 385, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013) (surplusage canon is "strongest when an interpretation would render superfluous another part of the same statutory scheme"); Scalia & Garner, *supra*, at 174 (No provision should "be given an interpretation that causes it ... to have no consequence.").

And of course, Election Code § 64.009 is not the only provision of Texas law Harris County has ignored (and promises to continue ignoring). *See* Blue Br. at 22–23, 26 (pointing to other provisions). Consider just a few more examples:

- Texas Election Code § 61.003 makes it a criminal offense for a person to post or use "political signs or literature" within 100 feet of a polling place. Yet Harris County candidly admits that it did nothing to enforce this provision against electioneering bumper stickers on vehicles in its drive-through voting stations.

- Texas Election Code § 64.002(a) provides that, "[e]xcept as otherwise provided by this code, only one person at a time may occupy a voting station." Yet Harris County candidly admits that it did nothing to prevent more than one person from occupying vehicles in its drive-through voting stations. To the contrary, Harris County publicly invited its residents to violate this provision by carpooling.

- Texas Election Code § 62.004(1) requires Harris County to arrange its voting stations so that "the voting area is in view of the election officers, watchers, and persons waiting to vote but is separated from the persons waiting to vote." The same section requires Harris County to ensure that "the voting area is adequately lighted." *Id.* § 62.004(3). The undisputed record evidence shows that Harris County wholly ignored this provision, too.

- Texas Penal Code § 46.03(a)(2) makes it a criminal offense to possess a firearm (among other weapons) "on the premises of a polling place on the day of an election or while early voting is in progress." Yet again, Harris County candidly admits that it did nothing to prevent voters from bringing firearms to its drive-through voting stations.

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***6** Harris County's only response to these problems is that it can wholly ignore *some* provisions of Texas law without altering the "general coherence" of the legislative scheme enacted by the Legislature. *Bush v. Gore*, 531 U.S. at 114, 121 S.Ct. 525 (Rehnquist, C.J., concurring). When asked at argument how many provisions of Texas law the County could ignore before violating the Elections Clause, Harris County had no answer. And when invited to file a supplemental brief to address a new law—passed by the Legislature to put beyond doubt the illegality of Harris County's conduct—the County doubled down with the head-scratching insistence that the new law somehow *blessed* its violations of the law in the past and its plans to violate it in the future.

Reasonable people can disagree about the wisdom or folly of drive-through voting. The place for that debate is in the Legislature. Once the dispute enters our courts, however, the only question is what the law commands. And the law could not be clearer in its prohibition of Harris County's conduct.

I respectfully dissent.

All Citations

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APPENDIX NO. 8

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963 F.3d 665
United States Court of Appeals, Seventh Circuit.

Justin LUFT, et al., Plaintiffs-Appellees, Cross-Appellants,
v.
Tony EVERS, Governor of Wisconsin, et al., Defendants-Appellants, Cross-Appellees.
One Wisconsin Institute, Inc., et al., Plaintiffs-Appellants, Cross-Appellees,
v.
Ann S. Jacobs, Chair, Wisconsin Elections Commission, et al., Defendants-Appellees, Cross-Appellants.

Nos. 16-3003 16-3052
|
Nos. 16-3083 & 16-3091
|
Argued February 24, 2017
|
Decided June 29, 2020

Synopsis

Background: Voters and advocacy organizations brought actions to challenge Wisconsin voting laws requiring presentation of documentation including photographic identification (photo ID). The United States District Court for the Eastern District of Wisconsin, Lynn Adelman, J., 17 F.Supp.3d 837, entered permanent injunction. State appealed. The Court of Appeals, 768 F.3d 744, reversed, and denied rehearing en banc, 773 F.3d 783. The District Court, Adelman, J., 141 F.Supp.3d 932, denied plaintiffs' motions for permanent injunction and class certification. Plaintiffs appealed. The Court of Appeals, 819 F.3d 384, vacated in part and remanded. On remand, the District Court, Adelman, 196 F.Supp.3d 893, issued preliminary injunction. In separate case, the United States District Court for the Western District of Wisconsin, James D. Peterson, J., 198 F.Supp.3d 896, determined that the laws contained unconstitutional restrictions on voting and issued permanent injunction, and, 351 F.Supp.3d 1160, granted motion to enforce injunction. Appeal and cross-appeal were taken.

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

statute reducing number of hours available for in-person absentee voting, i.e., early voting, was not made unconstitutional by disparate impact on black voters;

statute did not violate Voting Rights Act;

Family Educational Rights and Privacy Act preempted statute permitting use of educational institution's dormitory list for voter registration if the list contained citizenship information;

statute increasing from 10 to 28 days the durational residency requirement for a voter to cast a vote in a new district for an office other than President and Vice President was constitutional;

statute requiring documentary proof of residence for voter registration and authorizing proof via any document issued by a unit of government was constitutional;

statute prohibiting election officials from sending absentee ballots via email or fax to all but a few categories of voters was constitutional;

statute making a student identification card sufficient for voting only if student also showed proof of current enrollment violated equal protection clause.

Affirmed in part, reversed in part, vacated in part, and remanded.

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

West Codenotes

Preempted
Wis. Stat. Ann. § 6.34(3)(a)(7)(b)

Negative Treatment Reconsidered
Wis. Stat. Ann. §§ 6.15(1), 6.86(1)(b), 6.87(3)(d)

Held Unconstitutional
Wis. Stat. Ann. § 5.02(6m)(f)

***667** Appeals from the United States District Court for the Eastern District of Wisconsin. No. 11-C-1128 — **Lynn Adelman**, *Judge*.

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Appeals from the United States District Court for the Western District of Wisconsin. No. 15-cv-324-jdp — **James D. Peterson**, *Chief Judge*.

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Before Easterbrook, Kanne, and Sykes, Circuit Judges.

Opinion

Easterbrook, Circuit Judge.

***668** Change is a constant in Wisconsin's rules for holding elections. Two suits, which we have consolidated for decision on appeal, present challenges to more than a dozen provisions that have been enacted or amended since 2011. Although we have tried to treat similar legal questions together and otherwise simplify the exposition, a brief introduction may help the reader.

Wisconsin used to rely on special registration deputies, who registered voters at places such as high schools. Municipalities could require landlords to distribute registration forms to new tenants. The state replaced these mechanisms with an electronic registration system. 2011 Wis. Acts 23, 240; 2013 Wis. Act 76; 2015 Wis. Act 261. Persons who want to register now must send proof of residence in either electronic or hard-copy format. 2013 Wis. ***669** Act 182, as elaborated in a ruling by the Government Accountability Board. (The Board has since been replaced by the Wisconsin Elections Commission, whose members are defendants.) Students who want to prove residence using an educational institution's dormitory list may do so only if the list contains citizenship information. 2011 Wis. Act 23. And to vote for an office other than President or Vice President, voters must have been residents for at least 28 days (instead of 10 days, as before). *Ibid*.

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Voters may cast absentee ballots. A ballot may be picked up in person, or the state will mail one, but email and fax can be used to obtain a ballot in only a few circumstances. 2011 Wis. Act 75. Wisconsin will reject or return an absentee ballot for spoilage, damage, or defective certification. 2011 Wis. Act 227. Such irregularities are visible without opening the ballot; thus they may be remedied before officials feed the ballots through counting machines. Wisconsin also has a variant of early voting: voters may cast their absentee ballots in person. The number of days, and hours per day, allowed for this procedure have fluctuated. See 2011 Wis. Act 23; 2013 Wis. Act 146. Currently the state allows in-person absentee voting (which is to say, early voting) from 14 days before the election through the Sunday preceding it, without any restriction on the number of hours per day that a municipality may choose to keep its offices open. 2017 Wis. Act 369 § 1K. Municipalities may offer in-person absentee voting at multiple locations. *Id*. at § 1JS.

At the polls, voting a straight ticket is no longer an option. 2011 Wis. Act 23. Observers must remain between three and eight feet from the places where voters announce their presence and register to vote. 2013 Wis. Act 177.

Photographic identification is necessary for in-person voting. 2011 Wis. Act 23. Students may use college-issued credentials, but only before an ID's expiration date. Wis. Stat. § 5.02(6m)(f). People who lack the documents required to receive a photo ID may petition the state for assistance and a temporary receipt. 2017 Wis. Act 369 §§ 91–95.

This isn't the first time that recent changes in Wisconsin's election system have been before us. We reversed a federal district court's determination, 17 F. Supp. 3d 837 (E.D. Wis. 2014), that the state's requirement of photo ID violates the Constitution and the Voting Rights Act. *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (*Frank I*). And we vacated a subsequent decision, 141 F. Supp. 3d 932 (E.D. Wis. 2015), that construed *Frank I* as having resolved in Wisconsin's favor all arguments relating to particular voters' difficulty in obtaining qualifying photo IDs. *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) (*Frank II*). Because the right to vote is personal, the state must accommodate voters who cannot obtain qualifying photo IDs with reasonable effort.

On remand, one district judge ordered Wisconsin to implement an "affidavit option" that excuses the requirement for photo ID when any voter states that obtaining one requires too much effort. 196 F. Supp. 3d 893 (E.D. Wis. 2016). That injunction was promptly stayed, 2016 WL 4224616, 2016 U.S. App. LEXIS 14917 (7th Cir. Aug. 10, 2016), and the court declined to hear the dispute en banc, though we issued an opinion holding the state to certain representations it made about enforcement. *Frank v. Walker*, 835 F.3d 649 (7th Cir. 2016) (en banc) (*Frank III*). Around the same time a different district court decided that many of Wisconsin's other electoral changes violate either the Constitution or the Voting Rights Act. *One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016). Everyone ***670** has appealed from almost every aspect of both district courts' decisions, and we consolidated the appeals.

I

One Wisconsin involves more than a dozen of the provisions mentioned above, each contested under a number of theories. The court's rationales for ruling in the plaintiffs' favor on several provisions overlap, and we consolidate our treatment of them here.

A

The judge held that several provisions reflect racial discrimination. For example, the court concluded that the state's reduction in the number of hours available for in-person absentee voting (i.e., early voting) would have a disparate impact on black voters in Milwaukee, because those voters are more likely to use that procedure. What's more, the judge found, state legislators knew of that effect. Yet the state did not have a reason for this change that the judge found persuasive. Many of its explanations, the judge thought, boil down to a desire to promote the chances of Republican candidates compared with Democratic candidates. Because that is a poor if not illegitimate reason, the judge believed, and produces a racially disparate effect, the judge inferred that racial discrimination is the correct explanation.

There are two problems with this approach. First, it is incompatible with the standard for discriminatory intent articulated in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). Second, the belief that a legislature cannot take politics into account when making decisions that affect voting was disapproved (after the district court's decision) by *Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 204 L.Ed.2d 931 (2019). If one party can make changes that it believes help its candidates, the other can restore the original rules or revise the new ones. The process does not include a constitutional ratchet.

Racial discrimination, as a constitutional matter, occurs only when a public official intends to hold a person's race against him. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). See also *Reno v. Bossier Parish School Board*, 520 U.S. 471, 481–82, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997), and *Mobile v. Bolden*, 446 U.S. 55, 66–67, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion), which apply *Davis* to voting-rights cases. This is equally true of claims under the Fifteenth Amendment. See *Bossier Parish School Board*, 520 U.S. at 481, 117 S.Ct. 1491. And *Feeney* concludes that *knowledge* of a law's consequences differs from *intent* to produce those consequences; equating the two would treat disparate impact as a constitutional violation, something that *Davis* rejected. *Feeney* observed that government often does things that have disparate impact but can be said to intend that effect only when it acts because of, rather than in spite of (or with indifference to), the disparate effect. 442 U.S. at 279, 99 S.Ct. 2282.

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"*Feeney* holds that it is not enough to show that state actors knew that women would fare worse than men under an official policy; instead the plaintiff must show that the state actors adopted the policy because of, not in spite of or with indifference to, its effect on women." *Bond v. Atkinson*, 728 F.3d 690, 693 (7th Cir. 2013). After all, a legislature "may know what its laws do, yet may not 'intend' all of the consequences." Some may be "fallout from activities undertaken for another reason." *Bieneman v. Chicago*, 864 F.2d 463, 467 (7th Cir. 1988). The doctrine of *Feeney* ***671** applies to electoral rules, because it concerns how a court identifies the prohibited intent, rather than any one subject matter.

The district court itself identified one "other reason" for many of the new rules: the desire of a legislature with a Republican majority to improve the chances of Republican candidates. See 198 F. Supp. 3d at 920–21, 925, 934. (There may be other reasons, such as a politically neutral desire to improve the electoral process, but we can bypass them here.) The parties agree, and the district judge found, that race and politics are correlated: black voters are likely to prefer Democratic candidates. Yet the record does not show that the legislators made any of the changes because Democratic voters are more likely to be black (or because black voters are more likely to support Democrats). The changes were made because of politics.

If *Rucho* had held that legislators must disregard politics when modifying the rules for voting (in *Rucho*, drawing district lines), then the district court's analysis would have been stronger: making changes that have a disparate effect, but lack a valid reason, looks discriminatory. But given the holding of *Rucho* that legislators are *entitled* to consider politics when changing the rules about voting—or at least that any contention to the contrary is not justiciable—the basis for inferring discrimination evaporates. This record does not support a conclusion that the legislators who voted for the contested statutes cared about race; they cared about voters' political preferences. Cf. *Cooper v. Harris*, —— U.S. ——, 137 S. Ct. 1455, 1463–64, 197 L.Ed.2d 837 (2017) (plaintiffs must show that racial considerations predominated over factors such as partisan advantage).

B

A second part of the district court's method was to look at each provision in isolation when applying what it called the "*Anderson-Burdick* balancing analysis" (after *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)) to claims under the First Amendment (or the Fourteenth Amendment, a qualifier that we drop from here on). The judge understood these decisions to allow the judiciary to decide whether any given election law is necessary because, if not, it is by definition an excessive burden. That allows a political question—whether a rule is beneficial, on balance—to be treated as a constitutional question and resolved by the courts rather than by legislators.

Burdick forecloses that sort of substitution of judicial judgment for legislative judgment. *Burdick* upheld a ban on write-in candidates after concluding that the state's election code *as a whole* imposed only reasonable burdens. Judges must not evaluate each clause in isolation. So we held in *Griffin v. Roupas*, 385 F.3d 1128, 1130–32 (7th Cir. 2004). That decision considered the balance struck by other states, noted the variance in political cultures, and discussed the interaction of individual provisions with the election system as a whole. *Ibid*. A state with liberal access to absentee ballots may well offset this with more stringent verification of eligibility. Another, concerned about the effects of late-breaking information, may favor a system with a shorter (or no) window for early voting.

Because the "right to vote in any manner ... [is not] absolute" and the government must play an "active role in structuring elections", election laws "invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433, 112 S.Ct. 2059. Courts weigh these burdens against the state's interests by looking at the ***672** whole electoral system. *Id*. at 434, 439, 112 S.Ct. 2059. Only when voting rights have been severely restricted must states have compelling interests and narrowly tailored rules. *Id*. at 434, 112 S.Ct. 2059; *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564; *Acevedo v. Cook County Officers Electoral Board*, 925 F.3d 944 (7th Cir. 2019).

Wisconsin has lots of rules that make voting easier. It extends the privilege of voting by absentee ballot to otherwise qualified electors who, for any reason, are unable or unwilling to appear at the polls. Wis. Stat. § 6.85. It keeps the polls open for thirteen hours, and longer if voters are waiting in line at closing time. Wis. Stat. § 6.78. It entitles employees to three hours off from work to vote. Wis. Stat. § 6.76. It funds specialized transportation assistance programs that seniors

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and people with disabilities can use to get to the polls. Wis. Stat. § 85.21. It permits registration in person, by mail, or online. Wis. Stat. § 6.30. And it allows voters to register at the polling place immediately before casting a ballot. Wis. Stat. § 6.55. These rules make voting easier than do the rules of many other states. We observed in *Frank I* (citing a report by the Census Bureau) that the net effect of Wisconsin's rules had been a higher turnout rate than other states for voters of all races. 768 F.3d at 748–49. These facts matter when assessing challenges to a handful of rules that make voting harder.

C

Several of plaintiffs' arguments invoke section 2 of the Voting Rights Act, 52 U.S.C. § 10301. The district court analyzed these arguments using a two-part test that it attributed to *Frank I*. See 198 F. Supp. 3d at 951. But the two-part test that the district court articulated is one adopted by the Fourth and Sixth Circuits, not by this one. We considered their approach and registered skepticism, not approval. 768 F.3d at 755. Plaintiffs recognize as much and ask us to overrule *Frank I*, but we stick with that decision.

Section 2(b) provides the standard for interpreting § 2(a)'s "denial or abridgment" result. Section 2(a) is violated only when, under the totality of the circumstances, the election system is "not equally open to participation" by members of a protected class so that group's members have "less opportunity than other members of the electorate to participate". To the extent that claims related to voter qualification and election mechanics require a comparative "baseline," see *Reno v. Bossier Parish School Board*, 528 U.S. 320, 334, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000), § 2(b) provides it: opportunity to participate. In other words, § 2(b) is an equal-treatment requirement, not an equal-outcome command. See *Frank I*, 768 F.3d at 754. The court must look at the state's actions rather than those of other persons, *id*. at 753, and intent is not an element. See *Chisom v. Roemer*, 501 U.S. 380, 394–95, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991).

Much § 2 jurisprudence involves gerrymandering. To the extent that voters of different races make different choices —for whatever reasons—redistricting that relies on practices like packing and fracturing of racial blocs can dilute the value of voicing those differences. See *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Voicing differences is central to participation, and drawing suspect lines means, *ex ante*, that some groups will have less opportunity to do so while others might have more opportunity.

Plaintiffs do not contend that any of Wisconsin's changes reduces their (legal) opportunity to participate in the electoral process. They do say that some changes reduce the likelihood that they will use the ***673** opportunities they possess, but *Frank I* held that this does not establish a violation. And although it used a standard from the Fourth and Sixth Circuits instead of the one from *Frank I*, the district court largely agreed with the state's contention that its laws do not reduce voting opportunities. It rejected § 2 challenges to the state's elimination of registration by corroboration, requirement of documentary proof of residence, elimination of statewide special registration deputies, and elimination of straight-ticket voting. Nor did it see a § 2 problem related to the state's increased durational residence requirement, decreased distance for the election observers' zone, or the ID petition process.

Plaintiffs do not challenge most of these findings on appeal. They do contest the ruling that the petition process—the mechanism by which people who lack the documents required to receive a photo ID may obtain a receipt valid for voting—doesn't violate § 2. We are skeptical that the petition process results in race-based problems under the standard that we articulated in *Frank I*. But for reasons we explain later, the process for implementing the photo-ID rule needs more attention on remand.

Many of plaintiffs' arguments, and some of the district court's rulings, suppose that § 2 forbids any change in state law that makes voting harder for any identifiable group. *Frank I* rejected that line of argument. 768 F.3d at 752–53. The Voting Rights Act does contain an anti-retrogression rule, but it is in § 5(b), 52 U.S.C. § 10304(b). Section 5 of the Act has never applied to Wisconsin. Section 2 must not be read as equivalent to § 5(b).

D

Plaintiffs presented arguments under the Twenty-Sixth Amendment (which gives the vote to persons 18 and older) and what they styled "partisan fencing" arguments. Indeed, plaintiffs contested almost every feature of state law under almost every line of argument. The district judge thought that it was not necessary to analyze these arguments separately, provision by provision. He treated arguments under the

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Twenty-Sixth Amendment (for age) the same as those under the Fifteenth Amendment (for race), and arguments about "partisan fencing" as just different ways of presenting contentions under *Anderson* and *Burdick*. We agree with that assessment, which means that the Twenty-Sixth Amendment and "partisan fencing" need not be mentioned again.

This brings us to the district court's rulings on particular provisions.

II

A

The district court determined that 2013 Wis. Act 146 violates the Fifteenth Amendment and permanently enjoined the state from restricting the number of hours municipal clerks could offer in-person absentee voting. 198 F. Supp. 3d at 964. Wisconsin has since eliminated its restriction on the number of hours per day and adjusted the number of days on which municipalities may offer in-person absentee voting. 2017 Wis. Act 369 § 1K. The district court, which had the authority to monitor compliance with its injunction, see *Frank III*, 835 F.3d at 652, enjoined § 1K on January 17, 2019. The original claim is not moot because both 2013 Wis. Act 146 and 2017 Wis. Act 369 § 1K govern the total amount of allowable time for in-person absentee voting. See *Zessar v. Keith*, 536 F.3d 788, 794 (7th Cir. 2008) (discussing recurrence of the complained-of conduct). The order enjoining § 1K means that we must address the dispute about its predecessor, on which the new injunction depends.

***674** The district judge found that the reduced hours have a disparate impact on racial minorities. Part I.A of this opinion explains why we disagree with the conclusion that this renders the law unconstitutional. Part I.B shows why this provision cannot be analyzed in isolation. The judge thought that the change made early voting too hard.

Some of the district court's analysis of this provision reflects the assurance of several municipal clerks that their offices have the resources to handle additional hours of early voting. Yet, as far as national government is concerned, which decisions a state wishes to make statewide, and which locally, are for the state to decide. See *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014). That some local clerks may disagree with the state's approach does not permit them to enlist a federal court to override the state's judgment about how public employees' time should be allocated. Many states (approximately 20, by the briefs' count) do not offer any early voting; it is hard to see why Wisconsin's marginal adjustment of the number of days and hours when that voting occurs could violate the Constitution.

Part I.C of this opinion largely disposes of challenges to this statute under the Voting Rights Act, but some additional explanation is appropriate.

The district court found that the state's restrictions on in-person absentee voting violate § 2 in two ways: by allowing just one location per municipality and by restricting the number of days and hours offered. As for the first: if the single authorized location is convenient for one racial group and inconvenient for another, that could violate § 2's equal-treatment principle. The opportunity to participate may decrease as distance increases. Yet the Milwaukee clerk's office is centrally located. What's more, 2017 Wis. Act 369 § 1JS amended Wis. Stat. § 6.855 to authorize municipalities to designate multiple sites for in-person absentee voting. See Wis. Stat. § 6.855(5). The one-location rule is gone, and its replacement is not substantially similar to the old one. It seems unlikely that Wisconsin would return to a single-site requirement if allowed to do so. We remand with instructions to dismiss this aspect of the suit as moot. See *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Zessar*, 536 F.3d at 794.

The changes to Wis. Stat. § 6.86(1)(b) do not moot the parties' dispute about the amount of time allowed for in-person absentee voting. Act 369 § 1K removed time-of-day restrictions and increased the permissible number of days on which voters could cast absentee ballots in person. Marginal changes of this kind do not amount to the sort of voluntary discontinuation, with assurances against recurrence, that produce mootness.

We do not see a substantive problem with days-and-hours limitations, however. They leave all voters with equal opportunities to participate. Early voting is not a fundamental right in itself; it is but one aspect of a state's election system. As we have stressed, Wisconsin's system as a whole is accommodating. So long as a state treats all voters equally, § 2 does not limit the state's control of details such as hours for early voting.

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Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016), holds that a change similar to Wisconsin's comports with both the Constitution and § 2 of the Voting Rights Act. We agree with that decision and reverse the district court's finding that the time-of-day and number-of-days ***675** restrictions violate § 2 of the Voting Rights Act.

B

The district court analyzed a variety of provisions under the *Anderson-Burdick* framework, which we introduced in Part I.B.

1. One of these is the one-location rule and the restrictions on both the number of hours per day and number of days for in-person absentee voting, which we have addressed (for purposes of other theories) immediately above. The judge thought that these provisions together place a moderate burden on the right to vote. 198 F. Supp. 3d at 931. Because the state's justification fails to outweigh the burden, in the judge's eyes, he concluded that the restrictions violate the First Amendment. *Id*. at 934–35.

This instantiates the sort of analysis that Part I.B disapproves. In isolation, any rule reducing the number of days or hours available for any kind of voting seems like an unjustified burden. But electoral provisions cannot be assessed in isolation. Wisconsin's many other provisions that make it easy to vote cut in its favor. One less-convenient feature does not an unconstitutional system make.

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The district court erred, too, in assessing these features as written ("on their face," lawyers like to say) rather than as applied. The judge did not find that either the electoral system as a whole, or the days-and-hours rules for early voting, makes it hard for anyone to vote in Wisconsin. And the single-location provision has been rescinded. We reverse the district court's finding that the number of hours per day and the number of days for in-person absentee voting violate the First Amendment.

2. The district court found that Act 23's requirement that college and university "dorm lists" include citizenship information violates the First Amendment. 198 F. Supp. 3d at 938. We need not reach the constitutional issue; federal law preempts the requirement. In particular, as a condition to its grant of federal funds, the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, prohibits educational agencies or institutions from releasing "personally identifiable information ... other than directory information", except for circumstances not pertinent here. Directory information does not include citizenship status. 20 U.S.C. § 1232g(a)(5)(A). Wisconsin does not argue that it wants its educational agencies and institutions to decline federal funds in order to comply with Wis. Stat. § 6.34(3)(a)(7)(b), nor does it contend that we should apply any presumption against preemption. And the state may encounter an additional problem under § 5 of the National Voter Registration Act, 52 U.S.C. § 20504, though we need not decide. We conclude that 20 U.S.C. § 1232g precludes the state from requiring educational agencies and institutions to include citizenship information on certified lists of students who reside in sponsored housing. Thus we affirm the district court's judgment, though for a different reason.

3. The district court also deemed Act 23's increase in the durational residence requirement (from 10 days to 28 days) to be unconstitutional. 198 F. Supp. 3d at 944. Otherwise-qualified voters who move to a new district within 28 days before an election may not vote in the new district for an office other than President and Vice President. Wis. Stat. § 6.15(1). Residents unable to qualify as electors in a new state may cast absentee ballots in their former Wisconsin district for any presidential election that occurs within 24 ***676** months of leaving Wisconsin. Wis. Stat. § 6.18. If the move occurred within Wisconsin, the voter may cast a ballot for any office in the former district. Wis. Stat. § 6.10. Voters may do this in person or by absentee ballot. Wis. Stat. §§ 6.85(2), 6.86(1), (3). As the district court notes, these options "reduce the burden that the law imposes, but they do not negate it entirely." 198 F. Supp. 3d at 941. Yet "negation" is not the constitutional standard.

Wisconsin's 28-day window is close to the national norm and less than the 30-day window that is subject to a safe harbor for federal elections. 52 U.S.C. § 20302(a)(2). It is less than the 50-day window that the Supreme Court held to be constitutional for Arizona. See *Marston v. Lewis*, 410 U.S. 679, 93 S.Ct. 1211, 35 L.Ed.2d 627 (1973). Plaintiffs have not identified any feature of Wisconsin's law that makes a 28-day window more onerous in that state than 50 days was in Arizona. Although *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), holds that 90 days in Tennessee is too long, it added that 30 days is permissible.

"States have valid and sufficient interests in providing for *some* period of time—prior to an election—in order to prepare

adequate voter records and protect its electoral process from possible fraud." *Marston*, 410 U.S. at 680, 93 S.Ct. 1211 (emphasis in original). Wisconsin's interests in safeguarding its open primaries and polling-place registration, Wis. Stat. §§ 5.37(4), 6.55(2)(a), are sufficient in this sense. Plaintiffs seek to distinguish *Marston* and *Dunn* on their facts. It's true that Wisconsin's election system differs from those of Arizona and Tennessee, but most differences that we perceive make it easier to vote in Wisconsin. We reverse the district court's finding that the 28-day durational residence requirement violates the Constitution.

4. The district court concluded that, together, 2013 Wis. Act 182's requirement for documentary proof of residence and Act 23's elimination of proof by other persons' corroboration imposed slight burdens on voters, 198 F. Supp. 3d at 935, and that the provisions do not violate the Constitution. Plaintiffs challenge this aspect of the decision. In considering the burden, the district court observed that, because Wis. Stat. § 6.34(3)(a)(11) authorizes proof via any "document issued by a unit of government", clerks may mail a letter to a voter's address so that the letter itself suffices as proof. 198 F. Supp. 3d at 936. It also noted that the Government Accountability Board issued a ruling in August 2012 requiring election officials to accept electronic versions of proof of residence. *Id.* at 907, 936. To this analysis we add that Wisconsin's election system is generous in permitting same-day registration at the polling place. Wis. Stat. § 6.55(2)(a). However, "a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot." *Marston*, 410 U.S. at 680, 93 S.Ct. 1211. Proof of residence helps assign voters to their proper districts and is valid for that reason alone. We affirm the district court's decision on this issue.

5. The district court determined that 2011 Wis. Act 75, which prohibits election officials from sending absentee ballots via email or fax to all but a few categories of voters, Wis. Stat. § 6.87(3), violates the Constitution. 198 F. Supp. 3d at 948. We reverse this aspect of the decision. The district court identified some voters who might be inconvenienced by this rule—road warriors who may be out of state, or leisure travelers who don't plan ahead. This is not a plausible application of *Anderson* and *Burdick*. As we have emphasized, ***677** all parts of the electoral code must be considered, and travelers have many ways to vote in Wisconsin. Some travelers' potential inconvenience does not permit a court to override the state's judgment that other interests predominate. Wisconsin wants to control errors arising from the fact that faxed or emailed ballots cannot be counted by machine and to protect the secrecy of the ballot.

Plaintiffs observe that Wisconsin allows military voters to use fax or email, but a state could reasonably conclude that members of the military face special problems (they cannot travel freely and may be unable to return to the state to use its regular voting methods), which justify willingness on the state's part to accept the burdens that fax or email cause for the vote-counting process.

C

Unexpired student IDs (that expire within two years of the date of issuance) may be used when voting, but expired student IDs may not. Wis. Stat. § 5.02(6m)(f). The district court held that this difference violates the Equal Protection Clause. It concluded that the state lacks a rational basis for its treatment of students. 198 F. Supp. 3d at 962. Wisconsin has since added technical colleges to the list of institutions authorized to issue valid student IDs, 2017 Wis. Act 369 § 1, which the district court enjoined on January 17, 2019.

The district court's conclusion is hard to accept. The rational-basis standard is not demanding. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, —— U.S. ——, 139 S. Ct. 1780, 204 L.Ed.2d 78 (2019). Drawing a line between current and expired documents serves a "legitimate governmental purpose". *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). The Transportation Security Administration draws the same line for the purpose of boarding an airplane; we do not see why the line is forbidden for voting. Section 5.02(6m) requires almost all identifying documents—operators' licenses, passports, military identification, veteran's identification, and identification issued under § 343.50—to be current, if they are to be used for voting. The period of validity varies by type of identification. Compare Wis. Stat. § 5.02(6m)(a)(4), with subsection (b). Only identification issued by federally recognized Wisconsin tribes escapes the expiration conditions. *Id.* at § 5.02(6m)(e). There's nothing wrong with a requirement that IDs be current.

There is still a problem. A student ID card, alone among the sorts of photo ID that Wisconsin accepts, is not sufficient for voting unless the student also shows proof of current enrollment. *Id.* at § 5.02(6m)(f). No other category of acceptable identification—including for drivers, military

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members, passport holders, or veterans—depends on ongoing affiliation of any sort. The statute sets students apart in this respect, and the state has not tried to justify this distinction. We take the omission as a concession that it lacks a rational basis. This is not, as the district judge believed, because redundant requirements in statutes—such as current ID + proof of enrollment—are invariably irrational. Many a lawyer prefers a belt-and-suspenders approach. The problem here is that students are treated differently from other potential voters, and the state has left that difference unjustified. We affirm that part of the judgment on this alternate ground.

III

Both district courts found fault with the way Wisconsin implements the holding of *Frank II* that voting rights are personal, ***678** so that each eligible person must have a path to cast a vote. Wisconsin's requirement that persons produce photo IDs at the polls may block voting by persons who encounter substantial difficulty in obtaining the documents (such as birth certificates) that Wisconsin requires for those who do not already have passports, drivers' licenses, or other acceptable credentials.

Wisconsin decided to address this problem with what it calls the petition process. A person who has trouble assembling essential documents can petition the state for an exception. Wis. Stat. § 343.165(8)(a); Wis. Admin. Code § Trans 102.15(5m). Both district courts found that some voters would expend more than reasonable effort navigating the petition process. For some people it can entail lots of time, personal effort, red tape, and heightened emotion. See 196 F. Supp. 3d at 909–11; 198 F. Supp. 3d at 914–16. Both courts considered the process unconstitutional as implemented, or likely so. Both issued injunctions. We review each in turn.

A

The injunction issued by the Eastern District of Wisconsin permitted any registered voter to declare that reasonable effort failed to yield acceptable photo ID. The injunction allowed a voter to make his or her choice about how much effort was too much—some people might deem even one trip to a governmental bureau excessive—and barred the state from contesting any person's conclusion. 196 F. Supp. 3d at 919–20. We stayed that injunction, explaining:

> Our most recent decision in this case [*Frank II*] concluded that anyone who is eligible to vote in Wisconsin, but cannot obtain a qualifying photo ID with reasonable effort, is entitled to an accommodation that will permit him or her to cast a ballot. *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016). On remand, the district court concluded that at least some voters fall in this category, notwithstanding the most recent revisions to the procedures that Wisconsin uses to issue photo IDs. But instead of attempting to identify these voters, or to identify the kinds of situations in which the state's procedures fall short, the district court issued an injunction that permits any registered voter to declare by affidavit that reasonable effort would not produce a photo ID—even if the voter has never tried to secure one, and even if by objective standards the effort needed would be reasonable (and would succeed).
>
> The district court's injunction allows any registered voter to check a box stating a reason why reasonable effort would not produce a qualifying photo ID. The boxes include lack of necessary documents (apparently including situations in which the person has not tried to obtain them), "work", "family responsibilities", and "other"—and the voter can put anything in the "other" box, including a belief that spending a single minute to obtain a qualifying photo ID is not reasonable. The injunction adds that state officials are forbidden to dispute or question any reason the registered voter gives. Yet the Supreme Court held in *Crawford v. Marion County Election Board*, 553 U.S. 181, 198, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008), that "the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." A given voter's disagreement with this approach does not show that requiring one ***679** trip to a governmental office is unreasonable.
>
> Because the district court has not attempted to distinguish genuine difficulties of the kind our opinion mentioned, 819 F.3d at 385–86, or any other variety of substantial obstacle to voting, from any given voter's unwillingness to make the effort that the Supreme Court has held that a state can require, there is a substantial likelihood that the injunction will be reversed on appeal.

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2016 WL 4224616, 2016 U.S. App. LEXIS 14917 (7th Cir. Aug. 10, 2016). That brief discussion says all that really needs to be said about this injunction.

Permitting voters to file affidavits to obtain voting credentials isn't problematic when the legislature authorizes it. Other states have done so. See, e.g., Idaho Code § 34-1114; Ind. Code § 3-11.7-5-2.5(c); La. Rev. Stat. § 18:562(A)(2)(b); S.C. Code § 7-13-710(D)(1)(b). But when the legislature uses different means, courts must ask whether those means are themselves invalid. One federal judge's preference for using affidavits does not prevent a state legislature from implementing a different approach.

B

The injunction issued by the Western District of Wisconsin requires the state to issue a voting credential promptly on receipt of materials sufficient to initiate the petition process, unless the state has information showing that the potential voter is disqualified. 198 F. Supp. 3d at 964–65. We denied a motion to stay that injunction pending appeal. The state does not disagree with the district court's fundamental approach—which for the most part requires the state to do what it told the judge it *is* doing—as much as it worries that an injunction will make it impossible to alter the petition process as it learns how things work. Persuading a court to modify an injunction under Fed. R. Civ. P. 60(b)(5) can be difficult. See *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S.Ct. 460, 76 L.Ed. 999 (1932); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). And that has proven to be so. The state replaced its temporary rule with a final one, Wis. Admin. Reg. CR 16-040 (Apr. 24, 2017), then adjusted and codified portions of that approach. 2017 Wis. Act 369. The district court enjoined § 92 of Act 369 on January 17, 2019. The 2019 injunction is not part of this appeal, but we do have to consider the injunction the district court issued earlier, and on which the 2019 relief rests.

The constitutional question under *Frank II* is whether the state ensures that every eligible voter can get a qualifying photo ID with reasonable effort. *Frank III* says that the state's process, *as the state describes it*, is adequate to that end, *if reliably implemented*. But are those conditions met?

The state's procedure gives each person claiming eligibility to vote a rebuttable presumption of eligibility: on receipt of designated materials, the state issues a credential as a matter of course (though the person may need to appear to be photographed). Wis. Stat. § 343.50(1)(c); Wis. Admin. Code § Trans 102.15(6m). Administrative steps such as gathering documents, making a trip, and posing for a photograph, are no more than what *Crawford v. Marion County Election Board*, 553 U.S. 181, 198, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008), considered reasonable. Those who find it difficult to assemble the required documentation face "somewhat heavier" burdens. 553 U.S. at 199, 128 S.Ct. 1610. To prevent the burden from becoming excessive, Wisconsin promised to provide photo ID to anyone who, "more likely than not", meets the requirements. ***680** Wis. Stat. § 343.165(8)(h); Wis. Admin. Reg. CR 16-040 § 10.

Plaintiff Johnny Randle's experience shows why that may be hard to implement reliably. The name he used for more than seven decades differs from that of his birth certificate in spelling but not in pronunciation. After submitting his petition, Randle needed more than a dozen telephone calls, two in-person visits, and responses to multiple requests for information. The state demanded that he legally change his name and then declined to issue a voting credential because it asserted inability to verify his statement that he had done that already. The state asked him to sign a declaration that he had changed his name's spelling at common law. It capped the five-month process by denying the petition when his agent did not produce a power of attorney.

Wisconsin asserts that the procedures it has recently established would have short-circuited that process by allowing the employees who interviewed Randle to look up the records using his date of birth and his mother's maiden name, conclude that he had innocently been using a variation on the original spelling, and issue a voting credential. Wisconsin recognizes name changes at common law as long as the usage is consistent, continuous, and non-fraudulent. *State v. Hansford*, 219 Wis. 2d 226, 246–47, 580 N.W.2d 171 (1998). It asserts that the current version of its petition process, which it wants to implement, recognizes this and would simplify life for Randle and many others. Wisconsin allows common-law name changes for driver's licenses and the like, and its new petition process requires the officials to accept a name change when an applicant submits a statement declaring the common-law elements as well as the prior name and its discontinuance. Wis. Stat. § 343.50(3)(c); Wis. Admin. Reg. CR 16-040 §§ 1–3.

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We stressed in *Frank III* that appropriate treatment of the petition process depends on how it works. Although that process has been a moving target from *Frank II* until today, we do not blame the state for displaying flexibility. It has had to see what problems are easy to solve and which are tougher. The district court acted on a record assembled years ago. Instead of trying to evaluate the adequacy of a process that the state once championed, but now wants to change, the best approach is to let it try and see what happens. Adequacy cannot be evaluated in the abstract.

The state's interest in the "integrity and reliability of the electoral process" is strong. *Crawford*, 553 U.S. at 204, 128 S.Ct. 1610; *Frank I*, 768 F.3d at 755. Every citizen's interest in individual treatment also is strong. That's the holding of *Frank II*. Although the state must be allowed to experiment and see what happens, we can say a bit more about the injunction the district court issued. The judge stated that a would-be voter's "failure to provide additional information or communication to the DMV [Department of Motor Vehicles] is not good cause" for declining to issue a photo ID. 198 F. Supp. 3d at 964. That language allows applicants to convert a rebuttable presumption of eligibility into an absolute entitlement just by declining to cooperate with a request for information that is either readily available or obtainable with reasonable effort. Our decisions in *Frank I* and *Frank II* do not permit applicants to stop the verification process unilaterally. When the district court looks into this subject again on remand, it must not order any relief that excuses applicants from the failure to comply with reasonable requests for information that is material to voting eligibility.

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IV

This is complex litigation, and to keep this opinion manageable we have omitted ***681** some lines of argument and abbreviated the treatment of others. A few contentions pursued in the district court have been dropped on appeal. We have considered all that remain, and we agree with the district courts' handling of any issues that we have not mentioned.

We affirm in part, reverse in part, and vacate in part, the judgments of the Western District. We reverse the district court's finding that the adjustments to the number of days and hours for in-person absentee voting, the state's durational residence requirement, and the prohibition on sending absentee ballots by email or fax violate the Constitution, the Voting Rights Act, or both. We vacate the district court's orders related to the one-location rule and the ID petition process and remand both, the former with instructions to dismiss as moot and the latter for further proceedings. We affirm the district court's judgment that Wisconsin's student-ID provision is invalid and its judgment concerning citizenship on educational institution's dorm lists, though on alternate grounds for each. We otherwise affirm the district court's judgment. We reverse the Eastern District's injunction requiring Wisconsin to implement an affidavit option.

We suggest that all of these cases be assigned on remand to a single judge. The Chief Judge of the Seventh Circuit has designated the judges of each district to sit in the other. Using that cross-designation to place all of this litigation before a single judge will eliminate the sort of inconsistent treatment that has unfortunately occurred in the photo-ID parts of the multiple suits.

All Citations

963 F.3d 665, 378 Ed. Law Rep. 724

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APPENDIX NO. 9

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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

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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.*

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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).

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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

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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"

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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

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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.

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***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

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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

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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,

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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

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> 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

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'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."

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****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.

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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).

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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).

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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

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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,

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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.

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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.,*

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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

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> 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

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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*

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& 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.

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APPENDIX NO. 10

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198 F.Supp.3d 896
United States District Court, W.D. Wisconsin.

ONE WISCONSIN INSTITUTE, INC., Citizen Action of Wisconsin Education Fund, Inc., Renee M. Gagner, Anita Johnson, Cody R. Nelson, Jennifer S. Tasse, Scott T. Trindl, Michael R. Wilder, Johnny M. Randle, David Walker, David Aponte, and Cassandra M. Silas, Plaintiffs,
v.
Mark L. THOMSEN, Ann S. Jacobs, Beverly R. Gill, Julie M. Glancey, Steve King, Don M. Mills, Michael Haas, Mark Gottlieb, and Kristina Boardman, all in their official capacities, Defendants.

15-cv-324-jdp
|
Signed July 29, 2016

Synopsis
Background: Advocacy groups and individual voters brought action challenging constitutionality of state's voter identification law.

Holdings: The District Court, James D. Peterson, J., held that:

advocacy groups had standing;

reduction in in-person absentee voting violated the Fifteenth Amendment

limits on in-person absentee voting violated the First and Fourteenth Amendments;

law prohibiting in-person absentee voting on Monday before an election did not violate the First and Fourteenth Amendments;

laws requiring documentary proof of residence and eliminating ability to use corroboration to prove residence did not violate the First and Fourteenth Amendments;

law requiring dorm lists to indicate whether students were United States citizens violated the First and Fourteenth Amendments; and

law increasing durational residency requirement from 10 to 28 days in order to vote in Wisconsin or a given municipality violated the First and Fourteenth Amendments.

Ordered accordingly.

West Codenotes

Held Unconstitutional
Wis. Stat. Ann. § 5.02(6m)(f), 6.02, 6.10(3), 6.15, 6.34(3)(a)(7), 6.15(1), 6.855, 6.86, 6.87(3)(d).

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FINDINGS OF FACT & CONCLUSIONS OF LAW

JAMES D. PETERSON, District Judge

Mrs. Smith has lived in Milwaukee since 2003.[1] She was born at home, in Missouri, in 1916. In her long life she has survived two husbands, and she has left many of the typical traces of her life in public records. But, like many older African Americans born in the South, she does not have a birth certificate or other documents that would definitively prove her date and place of birth. After Wisconsin's voter ID law took effect, she needed a photo ID to vote. So she entered the ID Petition Process (IDPP) at the Wisconsin Department of Motor Vehicles (DMV) to get a Wisconsin ID. DMV employees were able to find Mrs. Smith's record in the 1930 census, but despite their sustained efforts, they could not link Mrs. Smith to a Missouri birth record, so they did not issue her a Wisconsin ID. She is unquestionably a qualified Wisconsin elector, and yet she could not vote in 2016. Because she was born in the South, barely 50 years after slavery, her story is particularly compelling. But it is not unique: Mrs. Smith is

one of about 100 qualified electors who tried to but could not obtain a Wisconsin ID for the April 2016 primary.

1 "Mrs. Smith" is not her real name, which I withhold to protect her privacy. The record of her interaction with the DMV is PX421.

Wisconsin's voter ID law is part of 2011 Wis. Act 23, enacted the year after Wisconsin Republicans won the governorship and majorities in both houses of the legislature. Act 23 was the first of eight laws enacted over the next four years that transformed Wisconsin's election system. Plaintiffs in this case challenge the voter ID law, the IDPP, and more than a dozen other provisions in these new laws, none of which make voting easier for anyone. Plaintiffs contend that the new voting requirements and restrictions were driven by partisan objectives rather than by any legitimate concern for election integrity, that these laws unduly burden the right to vote, and that they discriminate against minorities, Democrats, and the young. Plaintiffs contend that the new election laws violate the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments to the Constitution, and § 2 of the Voting Rights Act.

This case was tried to the court in May. Over nine extended days, the court heard the testimony of 45 live witnesses, including six experts, with additional witnesses presented by deposition. The parties submitted lengthy post-trial briefs, and the court heard closing arguments on June 30. The opinion that follows is the court's verdict. It sets out in detail the facts that the ***903** court finds and the legal conclusions that the court draws from those facts. Because of the large number of claims asserted in this case, and the volume of evidence submitted, the opinion is necessarily long, and few readers will endure to the end. But I will try, in a few pages of introduction, to explain succinctly the court's essential holdings and the reasons for them.

I start with a word about my role. It is not the job of a federal judge to decide whether a state's laws are wise, and I certainly do not have free-floating authority to rewrite Wisconsin's election laws. My task here is the more limited one of pointing out where Wisconsin's election laws cross constitutional boundaries. The Constitution leaves important decisions about election administration to the states. But election laws inevitably bear on the fundamental right to vote, so constitutional principles come into play. The standards that I must apply to plaintiffs' claims require me to examine carefully the purposes behind these laws, and sometimes to draw inferences about the motives of the lawmakers who enacted them. I conclude that some of these laws cannot stand.

Wisconsin's voter ID law has been challenged as unconstitutional before, in both federal and state court. In the federal case, *Frank v. Walker*, the Seventh Circuit held that Wisconsin's voter ID law is similar, in all the ways that matter, to Indiana's voter ID law, which the United States Supreme Court upheld in *Crawford v. Marion County Election Board*. The important takeaways from *Frank* and *Crawford* are: (1) voter ID laws protect the integrity of elections and thereby engender confidence in the electoral process; (2) the vast majority of citizens have qualifying photo IDs, or could get one with reasonable effort; and (3) even if some people would have trouble getting an ID, and even if those people tend to be minorities, voter ID laws are not facially unconstitutional. I am bound to follow *Frank* and *Crawford*, so plaintiffs' effort to get me to toss out the whole voter ID law fails.

If it were within my purview, I would reevaluate *Frank* and *Crawford*, but not because I would necessarily reach a different conclusion. A well-conceived and carefully implemented voter ID law can protect the integrity of elections without unduly impeding participation in elections. But the rationale of these cases should be reexamined. The evidence in this case casts doubt on the notion that voter ID laws foster integrity and confidence. The Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine rather than enhance confidence in elections, particularly in minority communities. To put it bluntly, Wisconsin's strict version of voter ID law is a cure worse than the disease. But I must follow *Frank* and *Crawford* and reject plaintiffs' facial challenge to the law as a whole.

The most pointed problem with Wisconsin's voter ID law is that it lacks a functioning safety net for qualified electors who cannot get a voter ID with reasonable effort. The IDPP is supposed to be this safety net, but as Mrs. Smith's story illustrates, the IDPP is pretty much a disaster. It disenfranchised about 100 qualified electors—the vast majority of whom were African American or Latino—who should have been given IDs to vote in the April 2016 primary. But the problem is deeper than that: even voters who succeed in the IDPP manage to get an ID only after surmounting severe burdens. If the petitioner lacks a birth certificate and does not have one of the usual alternatives to a birth certificate, on average, it takes five communications with the

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DMV after the initial application to get an ID. I conclude that the IDPP is unconstitutional and ***904** needs to be reformed or replaced. Because time is short with the fall elections approaching, I will issue an injunction targeted to the constitutional deficiencies that I identify.

Judge Lynn Adelman for the U.S. District Court for the Eastern District of Wisconsin has also concluded that the IDPP is likely unconstitutional, and he has issued a preliminary injunction requiring Wisconsin to institute an affidavit procedure. This procedure would allow an elector without an ID to vote by signing an affidavit stating that he or she is a qualified elector but could not get a photo ID. Judge Adelman's injunction provides one type of safety net. But plaintiffs have not asked me to impose that solution, and I will not. The state has already issued an emergency rule under which those who are in the IDPP will get receipts valid for voting. Although that is not a complete or permanent solution, it blunts the harshest effects of the IDPP. I will also order the state to publicize that anyone who enters the IDPP will promptly get a receipt valid for voting. To address this problem over the longer term, I will order the state to reform the IDPP to meet certain standards, leaving it to the state to determine how best to cure its constitutional problems. I take this approach because it respects the state's decision to have a strict voter ID law rather than an affidavit system. But Wisconsin may adopt a strict voter ID system *only* if that system has a well-functioning safety net, as both the Seventh Circuit and the Wisconsin Supreme Court have held.

The heart of the opinion considers whether each of the other challenged provisions unduly burdens the right to vote, in violation of the First and Fourteenth Amendments. This analysis proceeds under what is known as the *Anderson–Burdick* framework, which sets out a three-step analysis. First, I determine the extent of the burden imposed by the challenged provision. Second, I evaluate the interest that the state offers to justify that burden. Third, I judge whether the interest justifies the burden. Certain of Wisconsin's election laws fail *Anderson–Burdick* review. For reasons explained in the opinion, I conclude that the state may not enforce:

- most of the state-imposed limitations on the time and location for in-person absentee voting (although the state may set a uniform rule disallowing in-person absentee voting on the Monday before elections);
- the requirement that "dorm lists" to be used as proof of residence include citizenship information;
- the 28-day durational residency requirement;
- the prohibition on distributing absentee ballots by fax or email; and
- the bar on using expired but otherwise qualifying student IDs.

The purported justifications for these laws do not justify the burdens they impose.

Plaintiffs also contend that the challenged laws intentionally discriminate on the basis of race and age. This is a serious charge against Wisconsin public officials. I reject most of it, applying the framework set out by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*. But applying that same framework, I find that 2013 Wis. Act 146, restricting hours for in-person absentee voting, intentionally discriminates on the basis of race. I reach this conclusion because I am persuaded that this law was specifically targeted to curtail voting in Milwaukee without any other legitimate purpose. The legislature's immediate goal was to achieve a partisan objective, but the means of achieving that objective was to suppress the reliably Democratic vote of Milwaukee's African ***905** Americans. Thus, I conclude that the limits on in-person absentee voting imposed by Act 146 fail under the Fifteenth Amendment, as well as under the *Anderson–Burdick* analysis.

In sum, Wisconsin has the authority to regulate its elections to preserve their integrity, and a voter ID requirement can be part of a well-conceived election system. But, as explained in the pages that follow, parts of Wisconsin's election regime fail to comply with the constitutional requirement that its elections remain fair and equally open to all qualified electors.

One last point: I do not intend to disrupt the August 6, 2016 election. My decision and the injunction will have no effect on that election.

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FACTS

Although extensive evidence has been presented in this case, material factual disputes few and quite circumscribed. The parties sharply dispute plaintiffs' allegations that any of the challenged laws were motivated by improper purposes, particularly intentional race and age discrimination. The parties also dispute the effect of the challenged laws on voter turnout, and whether these effects are felt more heavily by minorities and other groups of voters. But much is undisputed.

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The parties have stipulated to a set of background facts, most of which describe the challenged provisions and how they operate. *See* Dkt. 184. The court adopts these facts and recounts them below, along ***906** with other facts about Wisconsin's election system before the challenged provisions went into effect. The court also adopts the facts found by Judge Adelman concerning the history and operation of the IDPP, which he based substantially on the evidence presented in this case. *Frank v. Walker*, 196 F.Supp.3d 893, No. 11–cv–1128, 2016 WL 3948068 (E.D.Wis. July 19, 2016). The court will incorporate the rest of its factual findings in the analysis section of this opinion.

Historically, Wisconsin has had a well-respected election system, and the state has consistently had turnout rates among the highest in the country. Presidential elections were close in Wisconsin: the 2000 and 2004 elections were decided by less than one-half of one percentage point. In 2008, however, President Obama won Wisconsin by almost 14 percentage points. Two years later, Republicans took control of both houses of the state legislature, and voters elected a Republican governor. Since then, Wisconsin has implemented a series of election reforms. These laws covered almost every aspect of voting: registration, absentee voting, photo identification, and election-day mechanics.

A. The challenged provisions

On May 25, 2011, Wisconsin enacted 2011 Wis. Act 23. That legislation made the following changes to Wisconsin election law:

- It imposed a voter ID requirement.
- It reduced the window of time during which municipalities could offer in-person absentee voting from a period of as much as 30 days that ended on the day before election day to a period of 12 days that ended on the Friday before election day.
- It eliminated "corroboration" as a means of proving residence for the purpose of registering to vote. [2]
- It mandated that any "dorm list" provided to a municipal clerk to be used in connection with college IDs to prove residence for the purpose of registering to vote include a certification that the students on the dorm list were United States citizens.
- It increased the in-state durational residency requirement for voting for offices other than president and vice president from 10 days to 28 days before an election and required individuals who moved within Wisconsin later than 28 days before an election to vote in their previous wards or election districts.
- It eliminated straight-ticket voting on official ballots.
- It eliminated the authority of the Government Accountability Board (GAB) to appoint special registration deputies (SRDs) who could register voters on a statewide basis.

2 Corroboration allows a registered voter to sign a statement verifying the residence of another person, which allows that person to register to vote.

On November 16, 2011, Wisconsin enacted 2011 Wis. Act 75, which prohibited municipal clerks from faxing or emailing absentee ballots to absentee voters other than overseas and military voters.

On April 6, 2012, Wisconsin enacted 2011 Wis. Act 227, which prohibited municipal clerks from returning an absentee ballot to an elector unless the ballot was spoiled or damaged, had an improperly completed certificate, or had no certificate.

Also on April 6, 2012, Wisconsin enacted 2011 Wis. Act 240, which eliminated the requirements that SRDs be appointed at public high schools; that, in certain circumstances, SRDs be appointed at or sent to ***907** private high schools and tribal schools; and that voter-registration applications from enrolled students and members of a high school's staff be accepted at that high school.

In August 2012, the GAB directed election officials to accept electronic versions of documents that could be used to prove residence for the purpose of registering to vote.

On March 20, 2013, Senate Bill 91 was introduced in the Wisconsin State Senate. This bill would have permitted municipalities to open multiple in-person absentee voting locations (under existing law, municipalities were limited to only one location). The bill failed to pass.

On December 12, 2013, Wisconsin enacted 2013 Wis. Act 76. This legislation had the effect of overturning a city ordinance in Madison that required landlords to provide voter-registration forms to new tenants.

On March 27, 2014, Wisconsin enacted 2013 Wis. Act 146, which reduced the window during which municipalities could offer in-person absentee voting. This law eliminated the option of offering in-person absentee voting on weekends and on weekdays before 8 a.m. or after 7 p.m.

On April 2, 2014, Wisconsin enacted 2013 Wis. Act 177, which required that observation areas at polling places be placed between three and eight feet from the location where voters signed in and obtained their ballots and from the location where voters registered to vote.

Also on April 2, 2014, Wisconsin enacted 2013 Wis. Act 182, which required all voters, other than statutory overseas and military voters, to provide documentary proof of residence when registering to vote. Before the passage of this legislation, the requirement that a voter provide documentary proof of residence when registering to vote applied only to those who registered after the third Wednesday preceding (i.e., 20 days before) an election.

B. Parties and procedural history

The plaintiffs in this case include two organizations and several individuals. One Wisconsin Institute, Inc. is a nonprofit corporation with a mission "to advance progressive values, ideas, and policies through strategic research and

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sophisticated communications." Dkt. 141, ¶ 4. Citizen Action of Wisconsin Education Fund, Inc. is also a nonprofit corporation focused on pursuing social and economic justice. The individual plaintiffs are Renee Gagner, Anita Johnson, Cody Nelson, Jennifer Tasse, Scott Trindl, Michael Wilder, Johnny Randle, David Walker, David Aponte, and Cassandra Silas. They all allege that the challenged provisions injure their rights to vote, register to vote, register others to vote, or vote for Democratic candidates.

The initial defendants in this case were the members of the GAB and two of its officers. Plaintiffs have added and removed some defendants along the way, and the list now includes: Mark Thomsen, Ann Jacobs, Beverly Gill, Julie Glancey, Steve King, and Don Mills, the members of the Wisconsin Elections Commission; Michael Haas, the administrator of the Wisconsin Elections Commission; Mark Gottlieb, the secretary of the Wisconsin Department of Transportation (DOT); and Kristina Boardman, the administrator of the DMV. Plaintiffs have sued all defendants in their official capacities.

Plaintiffs filed this suit in May 2015, alleging that the challenged provisions were unconstitutional, violated the Voting Rights Act, and resulted from intentional discrimination by the Wisconsin legislature. The court granted defendants' motion to dismiss plaintiffs' challenge to the voter ID law, as well as some of their Equal Protection challenges to other provisions. ***908** Dkt. 66. But the court later permitted plaintiffs to partially reinstate their claims regarding the voter ID law, based on evidence that defendants produced during discovery. Dkt. 139. A few months later, the court substantially denied defendants' motion for summary judgment, Dkt. 185, and the case proceeded to trial.

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ANALYSIS

The court will structure its analysis as follows:

First, standing. The court concludes that plaintiffs have standing to challenge each of the provisions at issue, and that the corporation plaintiffs can pursue claims under the Voting Rights Act.

Second, plaintiffs' facial challenges to Wisconsin's voter ID law. This law has already been upheld after extensive litigation in the federal courts. The court concludes that invalidating the entire voter ID law would not be appropriate in this case.

Third, plaintiffs' claims of intentional discrimination. Plaintiffs have proven by a preponderance of the evidence that the legislature passed the provisions limiting the hours for in-person absentee voting at least partially with the intent to discriminate against voters on the basis of race. But the court concludes that the remaining provisions do not violate the Fifteenth Amendment. The court also concludes that none of the challenged provisions violate the Twenty-Sixth Amendment.

Fourth, plaintiffs' "partisan fencing" claims. Although plaintiffs allege a separate claim for partisan fencing, the court concludes that their constitutional claim provides an adequate framework for analyzing these allegations.

Fifth, plaintiffs' First and Fourteenth Amendment claims for unduly burdening the right to vote. The court concludes that some, but not all, of the challenged provisions are unconstitutional because the state's justifications for them do not outweigh the burdens that they impose.

Sixth, plaintiffs' Voting Rights Act claims. The court concludes that one of the challenged provisions violates the Voting Rights Act.

Seventh, plaintiffs' Fourteenth Amendment Equal Protection claim. The court concludes that defendants have failed to articulate a rational basis for the state's decision to exclude expired student IDs as acceptable forms of voter ID.

A. Standing

The court begins with standing. At summary judgment, the court rejected defendants' justiciability arguments, including arguments related to standing. Defendants now renew some of these arguments, contending that no plaintiff has standing to challenge the voter ID law. Defendants also contend that plaintiffs lack standing to challenge almost all of the other provisions that are at issue. For plaintiffs' Voting Rights Act claims, defendants contend that no plaintiff qualifies as an "aggrieved person" able to pursue claims under the act.

"[T]he 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v.*

Robins, —— U.S. ——, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (citation omitted), *as revised*, (May 24, 2016). Defendants contend that plaintiffs have not proven the first of these elements: a cognizable injury in fact. As the parties invoking this court's jurisdiction, plaintiffs bear the burden of establishing that they have standing. *Id.* But only one plaintiff needs to have standing to challenge a given provision because the complaint seeks only injunctive relief. ***909** *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir.2007), *aff'd*, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008).

Of the 10 individual plaintiffs in this case, 6 received qualifying IDs from the DMV and 4 received receipts through the IDPP. DX022; PX445. Defendants want to stop there, arguing that none of the individual plaintiffs are harmed by the voter ID law because they all currently have qualifying IDs. But there are several problems with this argument. The most obvious problem is that under the DMV's current rules, the receipts that four of the individual plaintiffs received will expire after two automatic renewals, which means 180 days after issuance. Although these plaintiffs will be able to vote in the upcoming August and November elections, there is essentially no plan in place for them after they use their two renewals. Without a valid ID, these plaintiffs will not be able to vote. Thus, they have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo*, 136 S.Ct. at 1548.

Even setting aside the plaintiffs who will lack acceptable IDs and be unable to vote after the November 2016 election, the voter ID law also injures the remaining individual plaintiffs. At summary judgment, the court concluded that having to *present* an ID at the polls was a sufficient injury for purposes of conferring Article III standing. Dkt. 185, at 10 (citing *Frank v. Walker*, 17 F.Supp.3d 837, 866 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir.2014), *cert. denied*, —— U.S. ——, 135 S.Ct. 1551, 191 L.Ed.2d 638 (2015), and *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir.2009)). The court also concluded that the plaintiffs who have IDs will have to renew them or acquire other forms of identification once their current IDs expire, which would be another injury that confers standing. *Id.*

Defendants do not substantively engage these issues; they simply assert that "[t]his Court was wrong when it held that voters who have a qualifying ID have Article III standing to challenge the voter photo ID law." Dkt. 206, at 13. If defendants want to preserve the issue for appeal, then they have done so. But they have not identified reasons for the court to depart from its earlier conclusion that plaintiffs have standing to challenge the voter ID law.

As for the other provisions at issue, the corporation plaintiffs have standing to challenge these laws. "An organization may establish an injury to itself sufficient to support standing to challenge a statute or policy by showing that the statute or policy frustrates the organization's goals and necessitates the expenditure of resources in ways that would not otherwise be required." 15 James Wm. Moore et al., *Moore's Federal Practice* § 101.60[1][f] (3d ed. 2015) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)); *see also Crawford*, 472 F.3d at 951 ("[T]he new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote."). To establish standing, an organization must point "to a 'concrete and demonstrable injury to its activities,' not 'simply a setback to the organization's abstract social interests.' " *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C.Cir.1990) (alterations omitted) (quoting *Havens Realty Corp.*, 455 U.S. at 379, 102 S.Ct. 1114).

At trial, plaintiffs adduced evidence that One Wisconsin and Citizen Action each devoted money, staff time, and other resources away from their other priorities to educate voters about the new laws. For example, Analiese Eicher, One Wisconsin's program and development director, testified ***910** that she researched all but one of the challenged provisions. Tr. 5p, at 145:12-17.[3] The purpose of this research was to allow One Wisconsin to educate its supporters, its partners, and the press. *Id.* at 145:18-25. Eicher also testified that had she not been researching the legislation, she would have been working on other programs or initiatives for One Wisconsin. *Id.* at 147:4-16. Eicher would have been advocating for other voting-related changes, such as automatic voter registration, online registration, and felony reenfranchisement. *Id.* at 147:18-24. On an organizational level, One Wisconsin developed a website to help voters navigate the registration process in an effort to remediate some of the confusion surrounding the challenged provisions. *Id.* at 148:7-9, 149:3-8.

3 Citations to trial transcripts are by day, session, page, and line. Thus, "Tr. 5p, at 145:12-17" refers

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to the transcript from the fifth day of trial, afternoon session, page 145, lines 12 through 17.

Likewise, Anita Johnson, an individual plaintiff and one of Citizen Action's community organizers, testified that her job responsibilities have "ballooned" over the last few years as the laws have changed. Tr. 1p, at 4:16-5:1. Her presentations to community groups now take longer, she has been able to register fewer people, and she has stopped working on other issues for Citizen Action to focus exclusively on voting rights. *Id.* at 5:15-16, 7:20-8:5, 11:7-25, 32:24-33:11.

Based on this evidence, the court finds that the corporation plaintiffs are not simply redirecting their resources to litigation, which would not be an injury-in-fact that would confer standing. *See N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir.2010). Instead, both corporations are devoting resources away from other tasks and toward researching, or educating voters about, the challenged provisions. These expenditures are injuries that give both corporations standing to challenge the provisions at issue in this case because the corporations are counteracting what they perceive to be unlawful practices. *Cf. Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir.2008).

Defendants' final justiciability challenge relates to the Voting Rights Act and whether any plaintiff qualifies as an "aggrieved person" for purposes of bringing suit pursuant to 52 U.S.C. § 10302. The court rejected this challenge at summary judgment, adopting the Eastern District of Wisconsin's reasoning in *Frank* and concluding that the corporation plaintiffs could assert claims under the Voting Rights Act. Dkt. 185, at 14-15. Once again, defendants do not substantively confront this analysis. *See* Dkt. 206, at 15. In fact, the authority on which defendants rely—*Roberts v. Wamser*, 883 F.2d 617 (8th Cir.1989)—does not actually support their assertion that corporations cannot file suit under the Voting Rights Act. *Roberts* involved an unsuccessful political candidate whose alleged injury was the loss of votes that he would have received but for the challenged voting practice. 883 F.2d at 621. The Eighth Circuit held "that an unsuccessful candidate attempting to challenge election results does not have standing under the Voting Rights Act." *Id.* But the Eighth Circuit also noted that the candidate was not suing on behalf of others who were unable to protect their own rights, *id.* which is what the corporation plaintiffs are doing in this case. The court will adhere to its earlier conclusion that One Wisconsin and Citizen Action can pursue claims under the Voting Rights Act.

B. Facial challenges to Wisconsin's voter ID law

Wisconsin's voter ID law has been through the federal courts before. The ***911** Seventh Circuit upheld the law in *Frank v. Walker*, 768 F.3d 744 (7th Cir.2014), *cert. denied*, —— U.S. ——, 135 S.Ct. 1551, 191 L.Ed.2d 638 (2015), relying on the Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008). Thus, this court will begin its consideration of the merits by addressing plaintiffs' contention that despite the holdings in *Crawford* and *Frank*, Wisconsin's voter ID law is facially unconstitutional and violates the Voting Rights Act.

Crawford considered a facial challenge to Indiana's voter ID law. 553 U.S. at 185, 128 S.Ct. 1610. The critical holding in *Crawford* is that requiring a voter to show a photo ID before voting serves the important governmental interest in ensuring the integrity of elections, particularly by preventing in-person voting fraud, thereby engendering confidence in elections. *Id.* at 200–03, 128 S.Ct. 1610. *Crawford* also held that securing an Indiana photo ID, which required assembling certain vital documents and going to the DMV to apply for the ID, imposed only modest burdens that were not much greater than the effort ordinarily required to register and vote. *Id.* at 198, 128 S.Ct. 1610. *Crawford* upheld Indiana's voter ID law against a facial challenge even though the burdens of the law fell somewhat more heavily on minority voters, and even though some individual voters might not be able to get a photo ID without surmounting more severe burdens.

In *Frank*, the Seventh Circuit considered a facial challenge to Wisconsin's voter ID law. 768 F.3d at 745. The district court had determined that there were factual distinctions between Wisconsin's law and Indiana's law: most significantly, that there were many more voters who did not have a qualifying photo ID in Wisconsin, and that those voters tended to be minorities. The Seventh Circuit expressed skepticism about the evidence of how many voters lacked ID, but concluded that, in any case, those distinctions were not material to the facial challenge. The Seventh Circuit held that Wisconsin's voter ID law was not materially different from the Indiana law at issue in *Crawford*, and that under *Crawford*, Wisconsin's voter ID law was facially constitutional. *Id.*

It is hard to deny that a state and its citizens have a truly compelling interest in maintaining election integrity. As the evidence in this case proved once again, voter fraud is rare but not non-existent. The court credits the evidence of plaintiffs' expert on the subject, Dr. Lorraine C. Minnite, who testified and filed two expert reports. PX039; PX044. But the

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more compelling evidence comes from Milwaukee County, the one county in the state that has tried to systematically discover and track violations of election law. The county has an assistant district attorney devoted full-time to the job, Bruce Landgraf. Based on Landgraf's testimony, and on other evidence discussed below, the court finds that impersonation fraud—the type of fraud that voter ID is designed to prevent—is extremely rare. In most elections there are a very few incidents in which impersonation fraud cannot be ruled out. But as *Crawford* and *Frank* held, despite rarity with which election fraud occurs, it is nevertheless reasonable for states to take steps to prevent it.

Any system that requires voters to get a credential will necessarily impose a burden on them. But if the burden is a modest one, and if the credential meaningfully fosters integrity, then the constitution is satisfied. Under *Crawford* and *Frank*, collecting the necessary records and making a trip to the DMV to get an ID is a modest burden in light of the state interest that it serves. Those cases probably reflected an unduly rosy view of DMV field offices, but the evidence in this case confirms, yet ***912** again, that the vast majority of Wisconsin citizens already have the necessary ID. And most citizens who do not have an ID can get one with relative ease.

This court is, of course, bound to follow *Crawford* and *Frank*, which defendants contend doom plaintiffs' facial challenge to Wisconsin's voter ID law. Defendants are correct. But *Crawford* and *Frank* deserve reappraisal. The court is skeptical that voter ID laws engender confidence in elections, which is one of the important governmental purposes that courts have used to sustain the constitutionality of those laws.

The evidence in this case showed that portions of Wisconsin's population, especially those who live in minority communities, perceive voter ID laws as a means of suppressing voters. This means that they undermine rather than enhance confidence in our electoral system. Good national research suggests that voter ID laws suppress turnout, and that they have a small, but demonstrable, disparate effect on minority groups. *See* PX072. At trial, testimony of African American community leaders confirmed that voter ID laws engender acute resentment in minority communities. *See, e.g.*, Tr. 1p, at 131:21-24. And some of the Wisconsin legislators who supported voter ID laws believed that they would have partisan effects. Their willingness to publically tout the partisan impact of those laws deepens the resentment and undermines belief in electoral fairness.

Underlying the philosophical debate is a fundamentally factual question: do voter ID laws protect the integrity of elections? According to the *Frank* court, *Crawford* definitively answered this question. 768 F.3d at 750 ("[W]hether a photo ID requirement promotes public confidence in the electoral system is a 'legislative fact'—a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state."). The primary integrity-based justification offered for voter ID laws is that they prevent voter fraud. But that seems to be a dubious proposition. A voter ID requirement addresses only certain types of election malfeasance; specifically, impersonation fraud, by which one person poses as another and votes under his or her name. This happens from time to time by accident, when a voter signs the poll book on the wrong line. That produces some frustration for voters and poll workers, but it does not represent a fundamental threat to the integrity of elections because it does not happen that often and because everyone ultimately gets to vote.

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The real fear is multiple voting: that a committed but unethical partisan could cast many votes for his or her candidate under different names. Yet there is utterly no evidence that this is a systematic problem, or even a common occurrence in Wisconsin or anywhere in the United States. PX039, at 2, 35. True, it is not unheard of: in one well-known case, a Milwaukee man was so committed to Governor Walker's re-election that he voted 14 times. Tr. 8a, at 184:3-24. He was charged with and convicted of voter fraud (even without the benefits of the voter ID law). Proponents of voter ID would say that there could be other incidents of voter fraud that have gone undetected. But there is no evidence to support that hypothesis. As many have pointed out, multiple voting is not a very effective way of influencing an election, and few people would risk the penalties to do so. The bottom line is that impersonation fraud is a truly isolated phenomenon that has not posed a significant threat to the integrity of Wisconsin's elections.

The same cannot be said for Wisconsin's voter ID law, which has so far been implemented in a rigorously strict form: the only way to vote is to secure a state-approved ID. As part of Act 23, Wisconsin ***913** enacted a statute allowing citizens to receive free IDs to vote. But it was not until the eve of trial in this case that the state started paying for the underlying documents (e.g., birth certificates) that citizens needed to submit to obtain these free IDs. Even now, citizens who lack vital records can obtain free IDs only after navigating the complicated IDPP. Wisconsin's strict implementation of its

voter ID law has disenfranchised more citizens than have ever been shown to have committed impersonation fraud.

In theory, the well-designed and easy-to-use registration and voting system imagined in *Crawford* and *Frank* facilitates public confidence without eroding participation in elections. But in practice, Wisconsin's system bears little resemblance to that ideal.

So where does that leave plaintiffs' facial challenge to the voter ID law? Plaintiffs contend that two aspects of the factual record of this case distinguish it from *Crawford* and *Frank*, paving the way to a fresh facial challenge.

1. Facial relief because of intentional discrimination

First, plaintiffs assert that Wisconsin's voter ID law was motivated, at least in part, by racial animus. This is a serious allegation against the public officials of Wisconsin, but the court cannot easily dismiss it here. There is manifest racial disparity in the operation of the IDPP: of the 61 actual denials that the DMV had issued as of April 2016, 85 percent were to African Americans or Latinos. PX475. And government witnesses concede that 60 of these denials were issued to qualified electors entitled to vote, but who could not meet the IDPP's criteria for a state-issued ID. *See* Tr. 6, at 75:24-76:17 (DMV administrator); Tr. 8p, at 191:2-5 (investigations unit employee). The legislative history suggests that some of the provisions challenged in this case were specifically intended to curtail voting in Milwaukee, where 40 percent of the population is African American and 17.3 percent is Latino (approximately two-thirds of the state's minority population). Both sides agree that if the court finds that the Wisconsin legislature enacted a voter ID law for the at least partially with the intent to discriminate on the basis of race, then the law is constitutionally unsound and cannot stand. The court will address this issue below, in discussing the intentional discrimination claims that plaintiffs have alleged in this case.

2. Facial relief because the IDPP has failed

The second factual distinction concerns the IDPP, which plaintiffs contend imposes severe and discriminatory burdens on some qualified Wisconsin electors. The IDPP was the subject of a great deal of testimony at trial, and it has become a dominant issue in this case. Plaintiffs contend that the IDPP demonstrates Wisconsin's intentional race discrimination, is unconstitutional under the *Anderson–Burdick* framework, and violates the Voting Rights Act.[4] And because this constitutionally required safety net is not working, plaintiffs argue that the court must strike down the entire voter ID law.

4 The court will analyze the IDPP under these legal theories later in this opinion.

The context for, and history of, Wisconsin's effort to implement the IDPP began with Act 23, passed in 2011. Besides establishing voter ID, this legislation created Wis. Stat. § 343.50(5)(a)3., which provided that a voter could get a Wisconsin ID from the DMV for free, if the voter requested it for voting. But voters who did not have their birth certificates had to get copies, which typically required paying a fee to a government agency. Thus, getting a free ID was not really free.

***914** Many thought that the fees that voters had to pay for copies of their vital records were tantamount to an unconstitutional poll tax. Indeed, that was the conclusion that the Wisconsin Supreme Court reached in *Milwaukee Branch of NAACP v. Walker*, which relied on *Crawford* to uphold Wisconsin's voter ID law against a facial challenge. 2014 WI 98, ¶ 7, 357 Wis.2d 469, 851 N.W.2d 262, *reconsideration dismissed*, —— Wis.2d ——, 856 N.W.2d 177 (2014). The state supreme court applied a savings construction to the Wisconsin Administrative Code to provide that the required vital documents were "unavailable" to a prospective voter if he or she would have to pay a fee to get them. *Id.* ¶¶ 66–71. Thus, a person who had to pay to get a birth certificate could use the DMV's special petition process in Wis. Admin. Code DOT § 102.15 (i.e., the IDPP) to ask for a free ID on the grounds that a birth certificate was unavailable. As the Seventh Circuit recognized in *Frank*, the availability of a truly free ID provided a necessary safety net that preserved the constitutionality of Wisconsin's voter ID law. 768 F.3d at 747. But since then, effectuating the savings construction to provide free photo IDs to voters who lacked the requisite vital records has proven to be difficult for the DMV, to say the least.

For purposes of this opinion, the court does not need to retrace every detail of DOT's response to *NAACP v. Walker*; plaintiffs have set out the timeline in a chart appended to their brief. Dkt. 207, at 253-57. In summary, the DOT instituted an emergency rule on September 11, 2014 (the day before the appellate argument in *Frank*). PX456. The emergency rule changed the definition of "unavailable," following the Wisconsin Supreme Court's direction, and it reorganized the IDPP into a new subsection of Wisconsin's Administrative Code, DOT § 102.15(5m). The emergency rule also created a procedure that, in essence, required the DMV to track

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down the birth record of any person who requested a free voter ID, if the person did not have a copy of their birth record. The procedure was complicated because the process required interaction between various divisions of the DMV, the Wisconsin Department of Health Services, and agencies of other states. PX472. The main task of investigating and evaluating petitions fell to the DMV's Compliance and Fraud Unit (CAFU), which, as its name implies, has staff members whose normal duties are to investigate allegations of fraud.

Many people successfully navigated the IDPP. Out of 1,389 petitions for free IDs, the DVM issued IDs to 1,132 petitioners. Of the petitioners who applied, 487 had to go through "adjudication," which included a full investigation by CAFU [5] and a final decision from Jim Miller, the head of the DMV's Bureau of Field Services (a different unit from CAFU). 230 of the petitioners who went through adjudication received IDs; 257 petitioners did not. DMV records indicate that 98 of the petitioners who did not receive IDs after adjudication cancelled their petitions. [6]

5 Full investigation by CAFU commonly involved acquiring a CLEAR background report. These reports contained a substantial amount of deeply personal information, including any criminal records, judgments and liens, residence history, home and vehicle ownership history, and a list of possible relatives and associates. The DMV witnesses testified that the DMV never used CLEAR reports to the disadvantage of petitioners. But even assuming that CLEAR reports were acquired only to connect petitioners to vital records, the court finds that having DMV personnel acquire and review a compilation of personal information imposes a substantial burden on the right to vote.

6 The DMV's code for "customer initiated cancel" covers a wide range of results. For example, petitions received this code when the petitioner died while the petition was pending. Petitions also received this code if a petitioner simply gave up or if he or she found a birth certificate and applied for a standard state-issued ID.

***915** The petitioners in suspended or denied status were the ones who faced serious roadblocks in the IDPP: their birth records did not exist, or those records did not perfectly match their names or other aspects of their identities, such as Social Security records. The problems arose because the DMV evaluated IDPP petitions for voting IDs by using the same identification standards that it applied to applications for Wisconsin driver licenses and standard IDs. To acquire any one of these products from the DMV, a person must prove both their identity and their legal presence in the United States. Thus, the DMV refused to issue IDs to IDPP petitioners until CAFU could confirm their identities with a match to a valid birth record, or to some equivalently secure alternative. Some petitioners simply could not meet the DMV's standard of proof, and so they could not obtain free IDs.

The lack of a valid birth record correlated strikingly, yet predictably, with minority status. The evidence at trial demonstrated that Puerto Rico, Cook County, Illinois, and states with a history of *de jure* segregation have systematic deficiencies in their vital records systems. Voters born in those places were commonly unable to confirm their identities under the DMV's standards. For example, many African American residents in Wisconsin were born in Cook County or in southern states. PX479. And many of the state's Latino residents were born in Puerto Rico. *Id.* As of April 2016, more than half of the petitioners who had entered the IDPP were born in Illinois, Mississippi, or a southern state that had a history of *de jure* segregation. PX478.

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In June 2015, the DMV begin issuing denials to IDPP petitioners. By the time of trial in this case, the DMV had issued 61 denials, 53 of which were to minority petitioners. [7] Again, with one exception, the DMV had no reason to doubt that those who were denied a photo ID were Wisconsin residents, United States citizens, at least 18 years of age, and qualified to vote. Tr. 6, at 75:24-76:17. The sole exception was a Latina woman who mistakenly believed that she had been naturalized.

7 Nine of the petitioners who received denial letters were able to track down vital records on their own and receive free IDs without using the IDPP. *See* Dkt. 207, at 69 (discussing examples). The DMV re-coded these denials to "customer-initiated cancellations."

Since the state first implemented the IDPP, another related problem has prevented petitioners from successfully navigating the process. Until recently, the state had not appropriated any funds to pay for petitioners' vital records. Although no petitioner was asked to pay for any vital record,

the state did not acquire any vital record for which a fee was required. The result was that some petitioners fell into limbo: the DMV did not deny their petitions, but the petitioners could not confirm their identities. These petitioners ended up in "suspend" status, with the DMV essentially waiting either for the petitioner to turn up new records, or for enough time to pass that the DMV could officially deny the petition.

On March 7, 2016, DMV officials and state legal counsel met to discuss the state's failure to pay for vital records. At some point after the meeting, the DMV received funds, and during the second week of trial in this case, the DMV made its first payment to acquire a vital record for a petitioner. Tr. 7p, at 111:2-17.

On May 10, 2016, a week before the trial in this case began, the governor approved ***916** another emergency rule modifying the IDPP. PX452. The new rule acknowledged that emergency rulemaking was required to ensure that qualified electors could get a photo ID with reasonable effort in time for the next elections:

> This emergency rulemaking [was] also necessary to preserve the integrity of the verification process utilized by the Department in issuing an identification card while still preserving the public welfare by ensuring that qualified applicants who may not be able to obtain acceptable photographic identification for voting purposes with reasonable effort will be able to obtain photographic identification before the next scheduled elections.

PX453, at 14. The rule ameliorated some of the deficiencies of the IDPP: it established procedures and standards for evaluating petitions; it provided a means to surmount common impediments such as minor mismatches between a birth record and other aspects of a petitioner's identity; and it established "more likely than not" as the standard for evaluating evidence of identity, birthdate, and citizenship.[8] Perhaps most important, the emergency rule required the DMV to issue petitioners temporary identification card receipts that were valid for voting purposes while their petitions were pending.

8 At trial, DMV witnesses testified that the new emergency rule codified current practice. Tr. 8p, at 190:7-193:7. This testimony was not credible. The testimony of CAFU employees showed that petitioners were held to a much higher standard than "more likely than not." The court finds that IDPP petitions were decided by a standard that was at least as rigorous as "clear and convincing proof."

Defendants contend that the latest emergency rule fixes the problems with the IDPP, and that because all petitioners still in the process have a receipt valid for voting, the dispute over the IDPP is moot. The court disagrees for two reasons.

First, the receipts issued under the emergency rule are not permanent. Those who hold them will be able to vote only so long as the receipts are renewed. But qualified electors are entitled to vote as a matter of constitutional right, not merely by the grace of the executive branch of the state government. The state has promised to renew the receipts for 180 days so that they will be good through the November 2016 election. But the state has been utterly silent on what happens after that. As things stand now, after these receipts expire, petitioners will once again find themselves in IDPP limbo. Thus, at best, the emergency rule gives the state time to devise a new solution (but the court has not seen any evidence to suggest that the state is actually working on a solution).

Second, even under the emergency rule, petitioners will have to convince the DMV to exercise its discretion to issue them IDs. Although the emergency rule guides that discretion and specifies that the applicable standard of proof is "more likely than not," the process is still far more arduous than collecting documents and making a trip to the DMV, as envisioned in *Crawford* and *Frank*. Being investigated by CAFU, even under the newest iteration of Wisconsin's emergency rule, still makes it unnecessarily difficult to obtain an ID.

For now, suffice it to say that the court agrees that the IDPP is a wretched failure: it has disenfranchised a number of citizens who are unquestionably qualified to vote, and these disenfranchised citizens are overwhelmingly African American and Latino. The IDPP violates the constitutional rights of those who must use it, and so Wisconsin must therefore replace or substantially reform the process. But that does not mean that the voter ID law is unconstitutional in all of its applications. ***917** Because a targeted remedy can cure the constitutional flaws of the IDPP (and thus, the entire voter ID law), facial relief is not necessary or appropriate.

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Crawford and *Frank* effectively foreclose invalidating Wisconsin's voter ID law outright. Based on the evidence presented at trial, the court has some misgivings about whether the law actually promotes confidence and integrity. But precedent is precedent, and so the court will deny plaintiffs' request to invalidate the entire voter ID regime.

C. Intentional discrimination

Plaintiffs assert claims under the Fifteenth and Twenty-Sixth Amendments, alleging intentional discrimination on the basis of race and on the basis of age. The legal standards for evaluating these claims are substantially identical, and most of the pertinent evidence for each claim is the same. With the exception of Wisconsin's restriction on the number of hours that municipal clerks can offer in-person absentee voting, the court concludes that plaintiffs have failed to prove their claims of intentional discrimination.

1. Race discrimination

Plaintiffs contend that the Wisconsin legislature passed many of the challenged provisions in violation of the Fifteenth Amendment. To succeed on these claims, plaintiffs must demonstrate that the legislature intentionally discriminated against voters because of their race. *Rogers v. Lodge*, 458 U.S. 613, 617, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Discriminatory animus does not need to be the only reason for Wisconsin's new laws, or even the primary reason, but "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Arlington Heights*, 429 U.S. at 264–65, 97 S.Ct. 555. Nor do plaintiffs have to prove discriminatory intent with direct evidence of racial animus. *Rogers*, 458 U.S. at 618, 102 S.Ct. 3272.

Whether a law is motivated by racial discrimination is a difficult factual determination, guided by sparse precedent. *Arlington Heights* provides the essential template: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266, 97 S.Ct. 555. The starting point of the analysis is whether the law has had a disparate impact. But unless there is a startling pattern, inexplicable on grounds other than race, impact alone is not determinative. In that case, other evidence must support a finding of discrimination. This evidence can include the historical background and context of the law and the legislative history, especially any contemporaneous statements by the decision-making body. *See id.* at 266–68, 97 S.Ct. 555.

Before turning to the *Arlington Heights* analysis, the court considers defendants' evidentiary objection to one of plaintiffs' experts, historian Allan Lichtman, PhD. At trial, Dr. Lichtman testified that several of the challenged provisions were motivated by intentional race discrimination. *See* Tr. 6, at 237:5-18. Defendants contend that Dr. Lichtman's testimony invaded the province of the court by offering an opinion on an ultimate issue in the case, and that it was therefore not a proper topic for expert analysis. The court agrees. Dr. Lichtman provided some useful factual background to the legislation at issue—background that defendants did not dispute—but the court will not otherwise adopt his analysis or opinions about the specific issue of the legislature's intent in passing the challenged provisions.

***918** With these considerations in mind, the court turns to the merits of plaintiffs' intentional race discrimination claim. The court will analyze this claim first in the context of Wisconsin's voter ID law, then in the context of the IDPP, and finally in the context of the other challenged provisions.

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a. The voter ID law

To analyze whether Wisconsin's voter ID law violates the Fifteenth Amendment, the court begins by summarizing the disparate impact that the law has had on racial minorities. The question of how many people in Wisconsin have a driver license or a Wisconsin ID has proved to be surprisingly hard to answer. The district court in *Frank* estimated that about 300,000, about 9 percent of the state's registered voters, lacked a valid photo ID. 17 F.Supp.3d at 854. The Seventh Circuit doubted this, partly because the district court in *Crawford* estimated that only 43,000 lacked ID in Indiana, and partly because it just seems implausible that 9 percent of the adult population could get by without a photo ID. 768 F.3d at 748.

To answer this question, both sides' experts matched the statewide voter registration database to the DMV database. Both sides recognize that the databases are not readily matched, which makes errors likely. After identifying and correcting for errors, plaintiffs' expert, Kenneth Mayer, PhD, estimated that 8.4 percent of registered voters lack a Wisconsin ID. Defendants' expert, M.V. Hood III, PhD, put the estimate at only 4.54 percent. The primary difference

between the two experts is that Dr. Hood had the help of a DMV programmer, Fred Eckhardt, who was able to match an additional 112,817 registered voters to valid Wisconsin IDs. Tr. 4p, at 201:17-202:1. The court finds that Eckhardt's work was reliable, and that Dr. Hood's estimate is therefore the more credible one as to the number of registered voters without ID.

Unfortunately, Dr. Hood did not break those numbers down by race. Dr. Mayer did, PX038, at 19 (Table 3), and he shows that African Americans and Latinos are more likely to lack ID. But his starting point uses the inflated 8.4 percent of voters without ID. With some of its own arithmetic to reconcile Dr. Mayer's proportions to Dr. Hood's base, [9] the court finds that approximately 4.5 percent of white voters lack ID; 5.3 percent of African American voters lack ID; and 6.0 percent of Latino voters lack ID. The court notes that these numbers say nothing about what proportions of voters lack the documentation that would allow them to get a qualifying ID if they sought one.

9 The court also assumes that the errors corrected by Eckhardt are distributed evenly across racial groups. Nothing in Eckhardt's description of the errors that he found suggested that they would correlate with race.

Dr. Hood's evidence shows that African Americans and Latinos make up a disproportionate share of those seeking free IDs for voting. African Americans accounted for 35.6 percent of free IDs, whereas they make up only 5.6 percent of the citizen voting age population. Latinos accounted for 8.3 percent of the free IDs, against only 3.3 percent of the citizen voting age population. These numbers show very pronounced racial differences among those who seek IDs. This, in turn, strongly suggests that a greatly disproportionate share of African Americans and Latinos will have to go to the trouble of acquiring a qualifying ID to vote. But most of those who seek free IDs are probably voters who have the documents necessary to get a qualifying ID. *Frank* recognizes that this disparity could well have a corresponding disparate effect on turnout because any procedural requirement will dissuade some voters. ***919** But under *Frank*, the burden of going to the DMV to get a free ID is not constitutionally significant because it is a modest burden no greater than the ordinary burdens involved in voting. Still, the evidence here shows that patterns of ID possession are racially disparate, and that is likely to have a racially disparate effect on turnout. And some proportion of those seeking IDs will lack the usual documentation and have to enter the IDPP. Those individuals, too, tend to be minorities: 67.9 percent of those who entered the IDPP were minorities. PX474.

The bottom line is that the evidence suggests that the vast majority of Wisconsin voters have a qualifying ID or could get one. But both ID possession and the lack of qualifying documentation correlate strongly with race.

Next, the court considers the historical background of the voter ID law. As plaintiffs showed, before 2011, Wisconsin had an exemplary election system that produced high levels of voter participation without significant irregularities. *See* PX036, at 23 (Lichtman report discussing studies from the Pew Charitable Trusts ranking Wisconsin second best in the nation in electoral performance in 2008 and fourth best in 2010). The court will not go so far as to say that Wisconsin could not have improved its elections. But there was no evidence that Wisconsin elections actually suffered from identifiable problems, despite unsubstantiated allegations of fraud in the 2004 presidential election.

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Plaintiffs contend that demographic shifts in Wisconsin made the minority vote critical to the outcome of elections. For example, from 2010 to 2014, the white voting age population in Wisconsin declined by 1.3 percent, while the African American population increased by 3.5 percent, and the Latino population increased by 8.7 percent. *Id.* at 16-17. Voting in Wisconsin is sharply polarized by race: in statewide elections over the last decade, 90 percent of African Americans and 63 percent of Latinos voted for Democratic candidates. Because Wisconsin is a closely divided swing state, marginal differences in turnout can be decisive in close elections. Plaintiffs contend that demographic and political considerations combined to give Wisconsin Republicans a motive to discriminate against minorities in voting laws.

The Wisconsin political environment changed dramatically in 2010: Republican Scott Walker was elected governor, and Republicans won control of both houses of the legislature. Although the recall elections in summer 2012 briefly shifted control of the state senate to Democrats, Republicans regained control of the chamber a few months later. The legislature and the governorship have been in Republican control since then. Plaintiffs contend that sustained one-party control over the legislature and governorship gave Republicans the opportunity to pass discriminatory election legislation.

Plaintiffs concede that there were no procedural irregularities in how Wisconsin's voter ID law, or any of the

other challenged provisions, were passed. "Given unified Republican control of the legislature and governorship ... Republicans did not have to violate procedural rules to enact many of the limitations on voting" that are at issue. *Id.* at 48. Nevertheless, plaintiffs contend that the bills were rushed through the legislature, depriving the GAB of time to review them, and providing inadequate time for public input. *See* PX084. This dovetails with plaintiffs' contention that there were *substantive* irregularities with the laws, by which plaintiffs mean that the laws were not well justified or consistent. Defendants are correct that the legislature had no obligation to provide any rationale to support a validly ***920** enacted law. But plaintiffs have a point: the challenged laws were passed by a process that allowed limited public input and little actual debate. The legislative history demonstrates that Democrats and members of the public voiced concerns about the discriminatory impact of the laws, and that those concerns largely went unrebutted. Thus, the court has little information about what actually prompted these bills and the reasons why the legislature enacted them into law. Most of them were passed with only summary statements of legislative purpose, typically invoking only generic concerns for election integrity or consistency. *See, e.g.*, PX058; PX216.

Plaintiffs would fill the gap in the official legislative record with extra-legislative comments by Republican legislators and staffers, which plaintiffs contend strongly indicate discriminatory intent. The court will not recapitulate all such statements in the record, but plaintiffs have identified a few as particularly telling. First, plaintiffs cite to a recent comment by former state senator Glenn Grothman (now a U.S. representative) that he thought that Wisconsin's voter ID law would help Republicans in the 2016 presidential election. PX068. Second, plaintiffs cite to Grothman's statements on the floor of the senate in 2014 concerning the need to limit the hours for in-person absentee voting in Milwaukee. PX022. Third, plaintiffs cite to statements by former state senator Dale Schulz and by his staffer Todd Albaugh. During a radio interview, Schultz indicated that the Republican leadership of the legislature passed the voter ID law for partisan purposes, not out of any legitimate concern for the integrity of Wisconsin elections. PX067. Albaugh testified that at the last meeting of the Republican caucus before the vote on Act 23, the Republican leadership insisted that Republicans get in line to support the bill because it was important to future Republican electoral success. *See* Tr. 1a, at 84:1-24. [10]

10 At trial, defendants disputed Albaugh's interpretation and evaluation of the meeting, and they also objected to his testimony on hearsay grounds. The court overrules the hearsay objection because Lazich's out-of-court statements were not offered for their truth. The point was not that the voter ID law would actually help Republicans in future elections. The point was that Lazich thought they would, and that was part of her motive for encouraging support for the voter ID law. Defendants offered no evidence to dispute the accuracy of Albaugh's recounting of what was said at the meeting.

The parties have also stipulated to the admissibility of notes and correspondence from the files of various Republican legislators. *See* Dkt. 184, at 3-4. Among other things, this evidence includes senator Alberta Darling's expressed opinion that had it been in effect, the voter ID law would have made a difference in the November 2012 election, *id.* at 4, which like Grothman's more recent statement, shows that legislators believed that Act 23 would have a partisan impact on elections.

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The court may consider these statements under *Arlington Heights*. But ample authority counsels skepticism, and the court will not simplistically assign discriminatory intent to the legislature based on the comments of individual legislators. *See Veasey v. Abbott*, 830 F.3d 216, 234, No. 14–41127, 2016 WL 3923868, at *9 (5th Cir. July 20, 2016) ("While probative in theory, even those (after-the-fact) stray statements made by a few individual legislators voting for SB 14 may not be the best indicia of the Texas Legislature's intent."). The comments that plaintiffs have identified paint a consistent picture that resonates with the rest of the record, particularly the lack of a verified problem with voter fraud, and the increasingly partisan divisions in support for the law. The conclusion is hard to resist: the Republican leadership believed that voter ID would ***921** help the prospects of Republicans in future elections. (And for that matter, Democrats apparently thought that, too.)

As for other context surrounding Wisconsin's voter ID law, the court notes that Act 23 was the first in a series of election reforms that the Republican-controlled legislature passed between 2011 and 2014. None of these laws made registration or voting easier for anyone, but they had only minimal effect on less transient, wealthier voters. For reasons explained more fully below, the stated rationales for many provisions of Act 23, and for the election laws that followed it, were meager. Accordingly, in light of the record of the case as a whole, the conclusion is nearly inescapable: the election

laws passed between 2011 and 2014 were motivated in large part by the Republican majority's partisan interests.

Against this background, the court turns to the more difficult question of whether Act 23 was motivated by racial animus. For the following reasons, the court finds that it was not.

First, the legislature passed the voter ID bill in 2011, three years after the Supreme Court upheld a facial challenge to a similar voter ID law in *Crawford*. The Court had held that voter ID laws served a legitimate government interest in election integrity, and that they did not have an unduly disparate impact on racial minorities. Legislators would have been entitled to embrace the rationale that the Supreme Court endorsed, even if other legislators or members of the public contended that the law would have a disparate impact on minorities.

Second, voter ID bills have a long history in Wisconsin and in the United States, and that history does not suggest that such laws are inherently motivated by racial animus. In 2005, the Commission on Federal Election Reform, co-chaired by Jimmy Carter and James Baker III, identified a voter ID system with photo ID as one of five pillars of a reformed U.S. election system. Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (September 2005), http://www.eac.gov/assets/1/AssetManager/Exhibit%20M.PDF. That same year, the Wisconsin legislature passed a photo ID bill that was ultimately vetoed by Governor Doyle, a Democrat. Although Democrats tended to oppose that bill, it garnered significant bipartisan support. This history shows that legislators and politicians with no motive to discriminate against minorities have nevertheless supported voter ID laws.

Third, even though there is scant evidence of actual voter fraud in Wisconsin, the concern for election integrity provides a valid, non-discriminatory reason for supporting a voter ID law. To be sure, there is a legitimate countervailing concern that voter ID requirements impede access to the polls. But the existence of a robust, non-discriminatory rationale in favor of voter ID makes it hard to draw the inference that support for voter ID must be racially motivated. [11]

[11] Dr. Lichtman points out that in 2015, during consideration of a bill to require photo IDs for the Food Share program, the Wisconsin Assembly rejected an amendment that would have allowed Food Share IDs to be used for voting. PX036, at 36-37. According to Dr. Lichtman, if the legislature were sincerely interested in election integrity, it would accept Food Share IDs for voting because they are every bit as secure as Wisconsin IDs. The refusal to accept Food Share IDs is, therefore, evidence of discriminatory intent. The argument would be persuasive, if it were contemporaneous with Act 23, the voter ID law. The force of the argument is also blunted because the Food Share ID bill has not been enacted.

Plaintiffs nevertheless contend that the strict version of voter ID enacted in 2011 suggests a discriminatory motive. But by then, the potential for a voter ID requirement to have a racially disparate impact ***922** had long been recognized. *See, e.g.*, *id.* at 20 ("The introduction of voter ID requirements has raised concerns that they may present a barrier to voting, particularly by traditionally marginalized groups, such as the poor and minorities, some of whom lack a government issued photo ID."). Democrats, private citizens, and the GAB repeatedly raised these types of concerns to the legislature. *See, e.g.*, PX014; PX084; PX263; PX299. The legislature passed the voter ID bill anyway, and the governor signed it.

Plaintiffs contend that the legislature's apparent willful blindness to Act 23's disparate effects is strong evidence of discrimination. But the legislature did not entirely ignore these concerns. Act 23 created Wis. Stat. § 343.50(5)(a)3., which required the DMV to provide a free ID to any citizen over the age of 18 who requested one for voting. Since the introduction of the IDPP in 2014, the profound difficulty of providing traditional DMV-issued IDs to some voters has become apparent, and the state has been painfully reluctant to address these problems. But in 2011, to the legislature that passed Act 23, the free ID seemed like a reasonable response to the concerns that opponents raised. *C.f. Building Confidence in U.S. Elections*, at 20 ("Part of these concerns are addressed by assuring that government-issued photo identification is available without expense to any citizen.").

In sum, the court concludes that plaintiffs have not proven by a preponderance of the evidence that the voter ID provision of Act 23 was motivated, even in part, by racial animus. Wisconsin's voter ID law therefore does not violate the Fifteenth Amendment.

b. The IDPP

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The racial imbalances among IDPP petitioners, and among the results of the process, are striking. Minorities make up only 11 percent of Wisconsin's citizen voting age population, but they make up 55 percent of the voters who have received free IDs since Act 23 was passed. DX265. As of April 2016, two-thirds of those who entered the process were minorities; African Americans alone represented 55.9 percent of IDPP petitioners. PX474. Worse yet, African Americans and Latinos represented 85 percent (52 out of 61) of all IDPP denials. PX475.

Plaintiffs contend that these numbers present the kind of striking pattern that is inexplicable as anything but intentional discrimination. They argue that the court should find the IDPP to be unconstitutional on that basis alone, relying on decisions such as *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (allegations of extreme gerrymandering, if proven, would be tantamount to a "mathematical demonstration" of discrimination).

The court is not persuaded that statistics about the petitioners who have used the IDPP, or been denied free IDs, compel a finding of intentional race discrimination. And the reasoning is simple: the free ID procedure and the IDPP were designed to blunt the potential for disenfranchisement that might arise from Wisconsin's voter ID law. The potential for disenfranchisement, as all recognized, fell more heavily on minorities. Thus, it is no surprise that those who sought free IDs, or who entered the IDPP because they lacked vital records, were predominantly minorities. It is also no surprise that minorities foundered at high rates in a process that required documentary proof of identity, birthdate, and citizenship.

Make no mistake: the IDPP as it currently exists has failed to fulfill its constitutional purpose. But plaintiffs have not shown that it is the result of intentional race discrimination. As plaintiffs' counsel repeatedly reiterated to the DMV witnesses, plaintiffs do not allege that DMV ***923** employees intended to discriminate against anyone. And as the court observed during trial, some CAFU employees undertook nearly heroic efforts to track down documents to prove petitioners' identities and birthdates. The court finds that DMV employees, especially CAFU employees, undertook their duties in good faith, trying as best they could under the governing regulations to get IDs into the hands of as many petitioners as possible.

Another reason why the court cannot find that the legislature intentionally discriminated on the basis of race is that the legislature did not design or implement the IDPP. The fault lies with the executive branch, which let the IDPP grind on until plaintiffs in this litigation exposed its many flaws. But plaintiffs have not shown that anyone in the executive branch knew that the IDPP was disenfranchising voters and ignored the problem. The flaws would not have been hard to find, and Wisconsin should have done better. But based on the evidence presented at trial, the court cannot find that members of the executive branch acted with racial animus in creating or implementing the IDPP.

c. Other challenged provisions

The court now turns to the other provisions that plaintiffs challenge under the Fifteenth Amendment. Setting aside the provisions relating to in-person absentee voting, plaintiffs contend that the legislature enacted the following regulations, at least in part, with the intent to discriminate against African Americans and Latinos: (1) eliminating corroboration; (2) requiring documentary proof-of-residence; (3) eliminating statewide SRDs; (4) increasing the durational residency requirement; (5) changing the location for election observers; and (6) eliminating straight-ticket voting.

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Plaintiffs contend that each of these changes in Wisconsin's voting laws particularly disadvantage minorities, who tend to be poorer, less educated, and more transient. But disparate impact alone is not enough to show intentional discrimination. *Arlington Heights*, 429 U.S. at 264–65, 97 S.Ct. 555. These regulations are all facially neutral, and the extra burdens that they impose would fall on anyone who is poorer, less educated, or more transient, regardless of race. As explained in other parts of this opinion, some of these regulations are not justified by significant government interests, which puts their legitimacy under *Anderson–Burdick* in doubt. But plaintiffs give the court no reason to find that any of these regulations were targeted at minority voters or that the legislature was racially motivated in passing any of them. Accordingly, the court concludes that plaintiffs have not shown by a preponderance of the evidence that any of these changes in Wisconsin's voting laws were motivated, even in part, by racial animus.

As for the one-location rule, plaintiffs proved that forcing all municipalities to offer only one location for in-person absentee voting imposed greater burdens on voters in large

municipalities like Milwaukee than it did on voters in smaller towns. And because Milwaukee has a predominantly minority population, the one-location rule was all but guaranteed to have a disparate impact. But this provision has been in effect since 2005, long before the legislature enacted the restrictions to the hours for in-person absentee voting. *See* Wis. Stat. § 6.855(1). Thus, the legislative history and other contextual evidence discussed above does not bear on the issue of whether the legislature passed the one-location rule with the intent to discriminate. Indeed, plaintiffs have not offered any evidence addressing the legislature's intent in enacting this statute. The court therefore concludes that plaintiffs have ***924** failed to prove that the one-location rule violates the Fifteenth Amendment.

That leaves the provisions that reduce the days and hours in which in-person absentee voting is allowed. Plaintiffs have adduced evidence that weekend and evening voting is particularly important for socioeconomically disadvantaged voters, and that, in Wisconsin and nationwide, African American and Latino voters have made particularly good use of various forms of early voting. *See, e.g.*, PX036, at 42; PX047. Early voting in groups on Sundays—including church-supported "Souls to the Polls" efforts—is a widespread practice among African American voters, in Wisconsin and nationwide. Tr. 1p, at 134:6-135:1; PX245, at 38. But again, a disparate impact, without more, does not prove intentional discrimination.

But plaintiffs have more. Statements by legislators show that Act 146 reduced the hours allowed for in-person absentee voting specifically to curtail voting in Milwaukee, and, secondarily, in Madison. Senator Grothman made repeated statements objecting to the extended hours for in-person absentee voting in Milwaukee and Madison, indicating that hours for voting needed to be "reined in."[12] On the floor of the senate, he said, "I want to nip this in the bud before too many other cities get on board." PX022, at 5. Senate Majority Leader Scott Fitzgerald made similar comments. *Id.* at 12. As he put it, "But the question of where this is coming from and why are we doing this and why are we trying to disenfranchise people, I mean, I say it's because the people I represent in the 13th district continue to ask me, 'What is going on in Milwaukee?' " *Id.* at 16.

12 Plaintiffs have adduced evidence that might suggest personal bias on Grothman's part. PX078 (statements about Martin Luther King, Jr. Day); PX073 (about Milwaukee voters who would not be able to vote on weekends: "[A]nybody who can't vote with all these options, they've really got a problem. I really don't think they care that much about voting in the first place, right?"). The court does not ascribe Grothman's personal antagonism toward minority voters to the legislature.

Defendants contend that Grothman and Fitzgerald were simply trying to achieve a measure of statewide uniformity because smaller towns were unable to afford the extended hours that Milwaukee was offering. That explanation is hard to credit. Under Act 146, the legislature still tolerates disparities in voting hours among Wisconsin municipalities. Each municipality can set its own hours for in-person absentee voting. Larger cities can still outdo smaller municipalities by having their full-time clerks hold office hours that cover the full work week, while smaller towns with part-time clerks will hold limited hours, sometimes as little as an afternoon a week. Thus, rather than achieving uniformity, the provisions governing the hours for in-person absentee voting preserved great disparities from town-to-town. The legislative record shows that Act 146 was uniformly opposed by municipal clerks. PX216. Its only supporter of record was the Republican election activist Ardis Cerny. *Id.* And Governor Walker partially vetoed the bill as too extreme a reduction in opportunities to vote. PX058.

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The acknowledged impetus for this law was the sight of long lines of Milwaukee citizens voting after hours. Yet instead of finding a way to provide more access to voters in small towns, the legislature responded by reining in voters in Milwaukee, the state's most populous city, where two-thirds of its African American citizens live. At trial, Kevin Kennedy, director of the GAB, confirmed that the purpose of reducing the hours for in-person absentee voting was to restrain voting in Milwaukee:

> Clearly in the recall election, the City of Milwaukee opened its in-person absentee ***925** voting for Memorial Day, which was the day before the gubernatorial recall election, and that did not sit well with the Republican majority. They thought that was designed purposely ... to allow more Democratic voters, even though it could also be said it was designed to facilitate the needs of the unique voters in Milwaukee. But that was

> not lost on the Legislature that the largest city made that choice whereas other municipalities wouldn't make that choice.

Tr. 5a, at 109:21-110:5.

The legislature's ultimate objective was political: Republicans sought to maintain control of the state government. But the methods that the legislature chose to achieve that result involved suppressing the votes of Milwaukee's residents, who are disproportionately African American and Latino. The legislature did not act out of pure racial animus; rather, suppressing the votes of reliably Democratic minority voters in Milwaukee was a means to achieve its political objective. But that, too, constitutes race discrimination. *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir.1984) ("We think there is little point for present purposes in distinguishing discrimination based on an ultimate objective of keeping certain incumbent whites in office from discrimination borne of pure racial animus."); *see also Rogers*, 458 U.S. at 617, 102 S.Ct. 3272 ("[M]ultimember districts violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population.").

Based on the evidence that plaintiffs have presented, the court finds that Wisconsin's restrictions on the hours for in-person absentee voting have had a disparate effect on African Americans and Latinos. The court also finds that the legislature's justification for these restrictions was meager, and that the intent was to secure partisan advantage. Finally, the court finds that the legislature specifically targeted large municipalities—Milwaukee in particular—intending to curtail minority voting. Combined, these findings lead the court to further find that the legislature passed the provisions restricting the hours for in-person absentee voting motivated in part by the intent to discriminate against voters on the basis of race.

2. Age discrimination

Plaintiffs contend that some of the challenged provisions discriminate against younger voters on the basis of age, in violation of the Twenty-Sixth Amendment. The Twenty-Sixth Amendment provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

The federal courts that have considered Twenty-Sixth Amendment claims recognize that there is "a dearth of guidance on what test applies to Twenty-Sixth Amendment claims." *N.C. State Conference of the NAACP v. McCrory*, 182 F.Supp.3d 320, 522–24, No. 13–cv–658, 2016 WL 1650774, at *165 (M.D.N.C. Apr. 25, 2016), *rev'd*, 831 F.3d 204, No. 16–1468, 2016 WL 4053033 (4th Cir. July 29, 2016) [13] ; *see also Walgren v. Bd. of Selectmen of Amherst*, 519 F.2d 1364, 1367 (1st Cir.1975) ("[W]e are still without the assistance of any precedents guiding us in evaluating the impact of the Twenty-sixth Amendment."); ***926** *Nashville Student Org. Comm. v. Hargett*, 155 F.Supp.3d 749, 757, No. 15–cv–210, 2015 WL 9307284, at *6 (M.D.Tenn. Dec. 21, 2015) ("As the parties note in their briefing, there is no controlling caselaw from the Sixth Circuit or the Supreme Court regarding the proper interpretation of the Twenty-Sixth Amendment or the standard to be used in deciding claims for Twenty-Sixth Amendment violations based on an alleged abridgment or denial of the right to vote.").

13 The court has reviewed the Fourth Circuit's decision invalidating North Carolina's voter ID law on the grounds that it was motivated by an intent to discriminate on the basis of race. The decision relies on factual considerations unique to North Carolina, and, accordingly, it has no bearing on this case.

The text of the Twenty-Sixth Amendment is patterned on the Fifteenth Amendment, which prohibits the denial or abridgement of the right to vote on the basis of race. This suggests that *Arlington Heights* provides the appropriate framework for evaluating plaintiffs' claims of intentional age discrimination. Indeed, other courts have taken this approach when confronted with similar allegations. *See, e.g.*, *Lee v. Va. State Bd. of Elections*, 188 F.Supp.3d 577, 608–10, No. 15–cv–357, 2016 WL 2946181, at *26 (E.D.Va. May 19, 2016). Although the district court in *North Carolina State Conference of the NAACP* expressed doubt that the Twenty-Sixth Amendment was intended to operate just like the Fifteenth Amendment, the court followed an *Arlington Heights*-style analysis for the purposes of its decision. 182 F.Supp.3d at 523, 2016 WL 1650774, at *165.

Anderson–Burdick provides a framework through which the court could evaluate the burdens that fall on younger voters

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and the state's justification for those burdens. But "[i]t is difficult to believe that [the Twenty-Sixth Amendment] contributes no added protection to that already offered by the Fourteenth Amendment, particularly if a significant burden were found to have been intentionally imposed solely or with marked disproportion on the exercise of the franchise by the benefactors of that amendment." *Walgren*, 519 F.2d at 1367. Thus, for plaintiffs' age discrimination claims, the court will apply the *Arlington Heights* framework, beginning by considering whether plaintiffs have shown that the challenged provisions have had a disparate impact on younger voters. All of the challenged provisions are facially neutral, but plaintiffs have offered anecdotal evidence that some of them disproportionately affect younger voters. *See generally* Dkt. 207, at 236-41 (discussing trial evidence). As a class, younger voters are poorer and less established. They are therefore less likely to have a driver license and documentary proof of residence. They are also more transient, and thus will likely face the burden of registration more often.

But this evidence falls short of showing that young people are more likely to face burdens that they cannot overcome with reasonable effort. Young people may be more likely to lack a driver license. But that does not show that they are more likely to lack the credentials that one needs to get a Wisconsin ID. Young people may move more often, and they may be more likely to conduct their affairs online. But that does not mean that they will lack the documents needed to register, particularly because online documents can serve as proof of residence. The court does not find strong evidence of a disparate impact, which puts plaintiffs' Twenty-Sixth Amendment claim on weak footing.

Plaintiffs have some evidence of anti-youth comments made by legislators, particularly those by Senate Majority Leader Mary Lazich. Before the vote on Act 23, Lazich told the senate Republican caucus that they should support the bill because of what it "could mean for the neighborhoods of Milwaukee and the college campuses across this state." Tr. 1a, at 84:1-24. As the court has already concluded, the Republican majority was motivated, in ***927** part, by partisan objectives. But without more, this type of evidence did not establish discrimination on the basis of race, and it does not establish discrimination on the basis of age either.

Much of plaintiffs' evidence concerns the restrictions that the legislature placed on the use of college IDs. The rationale for these restrictions is not as weak as the rationale for the reduction in hours for in-person absentee voting. Under *Anderson–Burdick*, the court will evaluate whether these restrictions impose burdens that are warranted in light of the interests that they serve. But in the context of intentional age discrimination, the question is more limited: were these restrictions so baseless as to suggest purposeful discrimination against young voters? The court concludes that the answer is "no." The restrictions served a legitimate interest in election integrity because many college students have documentation of two residences: their school addresses, and their permanent home addresses. The legislature had a legitimate interest in ensuring that students registered in only one place. *See, e.g.*, PX229 (legislative note expressing interest in tightening up registration requirements so that out-of-state students would have to declare residency in Wisconsin to vote in the state). The court will review the state's rationales for the other challenged restrictions later in this opinion. For the purposes of plaintiffs' age discrimination claim, however, it is sufficient to say that these rationales are not so feeble as to suggest intentional discrimination.

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One last point. College students may use any of the means of identification or proof of residence that are available to all citizens generally. The legislature also extended to students the *additional* ability to use their college IDs, albeit under certain restrictive conditions. As a practical matter, these restrictions meant that the standard student IDs that many University of Wisconsin campuses issue were not valid for voting. But some universities have provided workarounds in the form of special university-issued voting IDs. This seems like an unwarranted rigmarole, but the end result is that college students have more ID options than other citizens do.

The court concludes that plaintiffs have not proven by a preponderance of the evidence that the challenged provisions were motivated by intentional age discrimination.

D. Partisan fencing claim

At the heart of this case is plaintiffs' contention that the Wisconsin legislature passed the challenged provisions with the intent to suppress Democratic votes to gain a partisan advantage in future elections. Plaintiffs contend that to accomplish this objective, the legislature identified groups of voters who would likely vote for Democrats and then passed measures to frustrate those voters' access to the ballot box. Put differently, the legislature targeted minorities, younger citizens, and citizens in urban areas like Milwaukee, not necessarily because of racial or age-based animus, but because it believed that these groups tended to vote for

Democrats. Plaintiffs bundle these allegations into a "partisan fencing" claim. Dkt. 141, ¶¶ 197-99.

This is not the first time that a group of plaintiffs in a voting rights case has asserted a partisan fencing claim. *See, e.g.*, *Lee v. Virginia State Bd. of Elections*, No. 15-cv-357 (E.D. Va. filed June 11, 2015); *Ohio Org. Collaborative v. Husted*, No. 15–cv–1802 (S.D.Ohio filed May 8, 2015). But the legal theory is still a novel one, and neither party directs the court to precedent—binding or otherwise—that definitively establishes a framework for analyzing partisan fencing claims. Plaintiffs extrapolate that ***928** their partisan fencing claim is essentially a claim for intentional discrimination, relying on statements in various Supreme Court decisions. They therefore urge the court to consider their evidence of partisan motivation by using the *Arlington Heights* framework, which would lead the court to invalidate any election qualification that was motivated, even in part, by partisan objectives. Defendants contend that a partisan fencing claim is really just a unique species of an undue burden claim, for which the *Anderson–Burdick* framework is appropriate.

Plaintiffs derive the term "partisan fencing" from *Carrington v. Rash*, a case in which the Supreme Court invalidated a Texas constitutional provision that prevented members of the United States armed forces from voting if they moved to Texas during their service. 380 U.S. 89, 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). The Court held that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Id.* at 94, 85 S.Ct. 775. But the Court decided *Carrington* well before *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), the two namesake cases for the *Anderson–Burdick* framework that courts now apply to evaluate whether voting regulations burden First and Fourteenth Amendment rights. Moreover, *Carrington* dealt with an outright prohibition on voting—service members who moved to Texas during their military service could not vote while they were in the armed forces. *Id.* at 89, 85 S.Ct. 775. And cases applying *Carrington* tend to involve outright prohibitions on the right to vote. *See, e.g.*, *Evans v. Cornman*, 398 U.S. 419, 419–20, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970) (Maryland citizens who lived on a federal reservation prohibited from voting because they were not residents of Maryland); *Cipriano v. City of Houma*, 395 U.S. 701, 702, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) (per curiam) ("[O]nly 'property taxpayers' [had] the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility."). Here, none of the challenged provisions categorically bar any citizen of Wisconsin from voting. For these reasons, *Carrington* is not directly on point here.

Looking toward more recent cases, at least one Justice of the Supreme Court has suggested that there would be First Amendment implications for state restrictions on voting that place burdens on voters because of their political views. *See Vieth v. Jubelirer*, 541 U.S. 267, 315, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (Kennedy, J., concurring) ("If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest."). Several years later, a unanimous Court noted that this suggestion was "uncontradicted by the majority in any of our cases." *Shapiro v. McManus*, —— U.S. ——, 136 S.Ct. 450, 456, 193 L.Ed.2d 279 (2015). But these decisions involved gerrymandering, which is not at issue in this case.

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The import of these cases is that analyzing a partisan fencing claim involves a balancing analysis under the First Amendment. And that is exactly what the *Anderson–Burdick* framework provides. The framework requires the court to identify the nature and severity of the burden that a given voting regulation creates and then weigh that burden against the state's justification for it. *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 917 (7th Cir.2015). Thus, *Anderson–Burdick* appears to fit the bill for plaintiffs' partisan fencing claim.

***929** Two federal district courts that have confronted this question reached the same conclusion. In *Ohio Organizing Collaborative v. Husted*, the Southern District of Ohio concluded that *Carrington* does not "appear to create a separate equal protection cause of action to challenge a facially neutral law that was allegedly passed with the purpose of fencing out voters of a particular political affiliation." 189 F.Supp.3d 708, 766, No. 15–cv–1802, 2016 WL 3248030, at *48 (S.D.Ohio May 24, 2016). Instead, the court relied on the *Anderson–Burdick* framework as "the proper standard under which to evaluate an equal protection challenge to laws that allegedly burden the right to vote of certain groups of voters." *Id.* Likewise, in *Lee v. Virginia State Board of Elections*, the Eastern District of Virginia acknowledged that "[t]he term 'partisan fencing' is derived from *Carrington* ... and is somewhat of an aberration." 188 F.Supp.3d at 609,

2016 WL 2946181, at *26. The court concluded that the term "has been rarely deployed in election law litigation thereafter. It does not appear to create a separate cause of action but may be a useful analytical tool in evaluating First Amendment and Equal Protection Clause cases." *Id.* The reasoning in these decisions is persuasive, and this court will follow their guidance.

The court will not adopt plaintiffs' partisan fencing theory, but the theory is not completely without basis. This case challenges state laws governing voter qualifications and election mechanics; it is not a redistricting case. That distinction is important. The redistricting process is inherently political through and through, and a gerrymandering claim requires a court to decide how much partisan politics is too much. *See generally League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 413–23, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006). By contrast, voter qualifications and election administration should not be political at all, and partisan gain can never justify a legislative enactment that burdens the right to vote. So, plaintiffs argue, a state should not be allowed to manipulate its election regime by imposing even slight burdens, if the purpose is to suppress turnout to achieve a partisan advantage.

Despite the appeal of plaintiffs' theory, *Crawford* and *Frank* foreclose the argument that partisan fencing claims should be handled like claims of intentional race or age discrimination, for which *any* discriminatory legislative intent is sufficient to invalidate a law. *See Frank*, 768 F.3d at 755 (" '[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.' " (quoting *Crawford*, 553 U.S. at 204, 128 S.Ct. 1610)). Put differently, a provision is not unconstitutional if the legislators who passed it were partly motivated by partisan gain, so long as there were sufficient valid justifications. The *Anderson–Burdick* framework enables federal courts to undertake this type of review.

In sum, the court rejects plaintiffs' proposal to treat their partisan fencing claim as distinct from their undue burden claims under the First and Fourteenth Amendments. As explained below, the evidence of partisan motivation that plaintiffs have adduced is pertinent to the legislature's justifications for passing the challenged provisions. The court will therefore consider this evidence as part of its *Anderson–Burdick* balancing analysis.

E. First and Fourteenth Amendment claims for undue burdens on the right to vote

Plaintiffs contend that each of the challenged provisions violates the First ***930** and Fourteenth Amendments by impermissibly burdening the right of Wisconsin citizens to vote. "A state election law, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.' " *Common Cause Ind.*, 800 F.3d at 917 (quoting *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564). But that is not to say that every voting-related law must survive strict scrutiny. Requiring states to narrowly tailor their election regulations to advance only compelling interests "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433, 112 S.Ct. 2059. Federal courts must therefore apply a "more flexible standard" when reviewing challenges to a state's election laws. *Common Cause Ind.*, 800 F.3d at 917.

Under the flexible *Anderson–Burdick* standard, "the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059. The court must undertake a three-step analysis for each of the challenged provisions. First, the court must determine the nature and severity of the burden that a given provision imposes. Second, the court must identify the state's justification for the provision. Third, the court must weigh the burdens against the state's justifications for imposing them "and then make the 'hard judgment' that our adversary system demands." *Crawford*, 553 U.S. at 190, 128 S.Ct. 1610.

For the first step in the *Anderson–Burdick* analysis, the court must focus on the burdens that the challenged provisions place on eligible voters who cannot comply with the new requirements (e.g., who lack registration documents, who need to vote during a different in-person absentee voting period or at a different location, or who prefer to vote straight-ticket). *See id.* at 198, 128 S.Ct. 1610 ("The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483."). Just because the majority of Wisconsin voters are able to comply with the state's registration requirements, absentee voting procedures, and miscellaneous election regulations

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does not mean that the burdens that these laws impose are constitutionally insignificant. But just as important, the fact that a few Wisconsin voters have difficulty complying with these laws is not enough to invalidate them across the board. *Crawford*, 553 U.S. at 199–200, 128 S.Ct. 1610 ("And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the [facial] relief they seek in this litigation.").

For the second step in the *Anderson–Burdick* analysis, the court must "consider 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 plaintiff's rights." *Common Cause Ind.*, 800 F.3d at 921 (citations and internal quotation marks omitted).

For the third step in the *Anderson–Burdick* analysis, the court must weigh the burdens of a given provision against the state's justification for it. When the state imposes a "severe" restriction on the right to vote, then "the regulation must be narrowly drawn to advance a state interest of compelling importance." ***931** *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 (citations and internal quotation marks omitted). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564).

With these considerations in mind, the court turns to the specific provisions that plaintiffs challenge in this case.

1. Limiting in-person absentee voting

In 2005, Wisconsin enacted Wis. Stat. § 6.855, which limited municipalities to one location for in-person absentee voting. At that time, the state did not limit the hours for in-person absentee voting. But as a practical matter, in-person absentee voting could not begin until municipal clerks received the ballots from the company that printed them, which was usually three to five weeks before the election. Tr. 2, at 265:5-7; Tr. 4p, at 121:3-11; Tr. 7a, at 114:9-15. Through Act 23, passed in 2011, and Act 146, passed in 2014, the legislature narrowed the window for in-person absentee voting to 10 days and prohibited municipal clerks from offering in-person absentee voting on weekends or on the Monday before an election. The legislature also limited the hours available for in-person absentee voting to between 8:00 a.m. and 7:00 p.m.

The court finds that the challenged in-person absentee voting provisions place a moderate burden on the right to vote.

Wisconsin's changes to its in-person absentee voting regime came amidst an increase in the use of absentee voting, both nationally and in Wisconsin. About 60,000 voters cast in-person absentee ballots on the Monday before the November 2008 general election. PX435, at 13. As plaintiffs' expert, Barry Burden, PhD, testified, absentee voting in Wisconsin (both by mail and in-person) increased from 10.6 percent to 15.5 percent between the 2010 and 2014 midterm elections. PX037, at 23. For presidential elections, the increase was not as significant: 21.1 percent in 2008 to 21.4 percent in 2012. *Id.* Defendants' expert, Dr. Hood, reached similar conclusions. Tr. 8a, at 32-41; DX001, at 11.

In spite of these trends, plaintiffs contend that the one-location rule and hour limit stifled in-person absentee voting in Wisconsin. Their theory is that if the legislature had not passed the challenged provisions, then in-person absentee voting would have increased even more, particularly among minorities and young voters, who tend to vote for Democrats. The court agrees with Dr. Hood that it would be nearly impossible to directly prove this theory—there is no way to redo the 2012 and 2014 elections without the in-person absentee provisions in place. Tr. 8a, at 44:3-6. Neither side had compelling statistical evidence that African Americans in Wisconsin had made disproportionate use of in-person absentee voting.

But plaintiffs had good anecdotal and circumstantial evidence that the in-person absentee laws impose burdens for certain voters by demonstrating that the changes had profound effects in larger municipalities like Madison and Milwaukee. These cities are home to populations of voters who disproportionately lack the resources, transportation, or flexible work schedules necessary to vote in-person absentee during the decreased timeframe. PX037, at 26-27. At trial, clerks from both cities testified that the new laws forced them to drastically cut back on the amount of time that they could offer in-person absentee voting. For example, before the November 2012 elections, Madison offered in-person absentee voting until 8:00 p.m. on weekdays, and for a few hours on Saturdays and ***932** Sundays. Tr. 2, at 265:16-20. Up to 1,200 voters a day would use in-person absentee voting. *Id.* at 266:1-6. As for Milwaukee, defendants' own expert

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summarized how the changes have similarly affected the availability of in-person absentee voting since 2008.

Table 2. In-Person Absentee Voting Characteristics, City of Milwaukee, 2008-2014

Election	Start	Stop	Hours	Weekends Permitted	Days Available	Total Hours
2008 General	10/13	11/3	8:00 am-8: pm, M-F; 9:00 am-5:00 pm, Sat.	Yes	17 days	200
2010 General	10/5	11/1	8:30 am-4:30 pm, M-F; 8:30 am-12:30 pm, Sat.	Yes	21 days	164
→Act 23						
2012 General	10/22	11/2	8:30 am-7:00 pm, M-F; 9:00 am-5:00 pm, S-S	Yes	12 days	121
→Act 146						
2014 General	10/20	10/31	8:00 am-7:00 pm, M-F	No	10 days	110

DX001, at 9. Voters in both municipalities took advantage of the opportunities available before the state limited in-person absentee voting, particularly weekend voting. PX206.
In Wisconsin, voters in larger cities experience disadvantages in education, income, employment, and access to transportation. PX036, at 5-15; PX037, at 26-27. Several lay witnesses testified that these pre-existing disadvantages interact with the new laws to make it more difficult for these voters to vote during the shorter period for in-person absentee voting. For example, eliminating weekend voting and reducing the number of days on which a clerk's office can accept in-person absentee ballots is problematic for a person whose job or class schedule is less flexible. Tr. 1p, at 14:13-15:8, 75:8-25, 144:19-25; Tr. 3p, at 31:2-5. Combined with the one-location rule, limiting hours leads to longer lines at clerk's offices, which in turn requires voters to be prepared to devote more time to voting. Tr. 1p, at 92:18-96:3; Tr. 2, at 266:7-16. Having only one location creates difficulties for voters who lack access to transportation.

Eliminating weekend voting also prevented groups from holding voting drives like "Souls to the Polls"—an initiative that encouraged church congregations to vote in-person absentee after church on Sunday. Tr. 1p, at 134:20-135:1; Tr. 2, at 183:14-17. But these types of collateral effects only indirectly burden voters; impediments for groups trying to get individuals to vote do not necessarily implicate the First Amendment. *Cf. Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388–96 (5th Cir.2013) ("[W]e are unpersuaded that the smorgasbord of activities comprising voter registration drives involves expressive conduct or conduct so inextricably intertwined with speech as to require First Amendment scrutiny."); *Coal. for Sensible & Humane Sols. v. Wamser*, 771 F.2d 395, 400 (8th Cir.1985) (acknowledging the claim that "refusal to appoint qualified volunteers as deputy registrars restricts the accessibility of voter registration facilities and thus indirectly constitutes an unconstitutional infringement of the right to vote," ***933** but refusing to "agree that there is a constitutional right to greater access to voter registration facilities per se").

The challenged provisions do not categorically bar individuals from voting. The state has shrunk the window in which municipalities can offer in-person absentee voting, but it has not closed that window completely. If the shortened period is not convenient for certain voters, then they can vote using mail-in absentee voting or vote on election day. Regardless, both sides' evidence confirms that in-person absentee voting is still widely used, and its use has increased over the last several years. As noted above, plaintiffs argue that without the challenged provisions, in-person absentee voting would be increasing *more*. But their anecdotal evidence is not sufficient to prove this assertion.

Before turning to step two of the *Anderson–Burdick* analysis, the court will address defendants' preliminary argument that there is no constitutionally protected right to cast an absentee ballot. Defendants invoke *Griffin v. Roupas*, a case in which a group of working mothers challenged Illinois's refusal to let them vote absentee because they did not satisfy any of the statutory prerequisites (out of the county, physical incapacity, religious observance, etc.). 385 F.3d 1128, 1129 (7th Cir.2004). The *Griffin* court rejected the idea "that the Constitution requires all states to allow unlimited absentee voting," *id.* at 1130, which defendants implicitly contend should end the discussion. But this case is not about Wisconsin's outright refusal to allow in-person absentee voting. Rather, plaintiffs allege that the state is denying them the opportunity to exercise a right that they already have. Put differently, plaintiffs contend that by choosing to give its citizens the privilege of in-person absentee voting, the state must administer that privilege evenhandedly. *See Zessar v. Helander*, No. 05–cv–1917, 2006 WL 642646, at *6 (N.D.Ill. Mar. 13, 2006) ("[O]nce [states] create such a regime, they must administer it in accordance with the Constitution." (citing *Paul v. Davis*, 424 U.S. 693, 710–12, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976))). The court therefore rejects defendants' argument that plaintiffs' challenge to the in-person absentee voting provisions does not implicate their constitutional rights.

Defendants advance four justifications for the challenged in-person absentee voting provisions. First, they contend that shortening the timeframe for in-person absentee voting will allow the state to conduct uniform, orderly elections. Municipal clerks can better control the process and manage

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staffing. Clerks can also guarantee that absentee ballots will be available once in-person absentee voting starts (ballots are delivered at different times, which means that a clerk's office might have them available four weeks before an election one year, but only two weeks before that same election in a different year).

Second, defendants contend that municipal clerks are busy during election season. With the reduced window for in-person absentee voting, clerks have more time for other tasks, such as conducting voting at residential care facilities, mailing absentee ballots, and entering voter registrations. Clerks also have non-election-related duties, and it becomes difficult to attend to them during business hours once in-person absentee voting begins. The reduced window allows them to take care of other responsibilities before turning their exclusive attention to voting.

Third, defendants contend that limiting in-person absentee voting to one location saves money. More locations mean more staff, supplies, and security. Clerks are also able to directly supervise the entire process because it is occurring in one location rather than across the municipality.

***934** Fourth, defendants contend that limiting in-person absentee voting to one location avoids voter confusion by creating uniformity. Their concern is that voters might accidentally believe that because they can vote in-person absentee at multiple locations, they can also vote at multiple polling locations on election day.

With one exception, these interests do not justify the moderate burdens that the challenged provisions impose. Alleviating the workload for clerks could be a sufficient reason to limit the hours for in-person absentee voting. But the laws that the challenged provisions replaced did not *require* municipal clerks to offer in-person absentee voting during the now-eliminated days and times or at multiple locations. A clerk who wanted to retain control over the process, save money by using less staff, or reduce the hours to have time to attend to other duties could have chosen to do so under the old laws. Thus, any burdens on clerks that the state was purporting to address were voluntarily undertaken, which undermines the state's interest in alleviating those burdens.

Furthermore, the state's interest in establishing uniform times for in-person absentee voting does not make sense because clerks can currently set whatever hours and days they want for in-person absentee voting, within the parameters of the statutes. Contrary to defendants' assertion, Dkt. 206, at 65, the new laws do not actually "provide[ ] a set date when in-person absentee voting begins." Municipal clerks are still free to start in-person absentee voting at different times, so long as it is not before the window opens. Under the new law, smaller towns with part-time clerks can still conduct in-person absentee voting by appointment only or on just a few days a week, *see, e.g.*, Tr. 7a, at 166:21-177:14; PX161, while larger municipalities can offer in-person absentee voting from 8:00 a.m. to 7:00 p.m., Monday through Friday, for two weeks, *see, e.g.*, Tr. 2, at 265:2-12. Thus, the challenged provisions do not actually create any consistency in when individual clerk's offices offer in-person absentee voting.

Requiring all municipalities to have one location for in-person absentee voting may have a superficial appeal. But uniformity for uniformity's sake gets the state only so far. In 2014, the number of adults per municipality in Wisconsin ranged from 33 to 433,496. PX037, at 26. The state's one-location rule ignores the obvious logistical difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location. There is simply no evidence that a one-location rule prevents voter confusion, or that any confusion would be as widespread or burdensome as the types of difficulties that voters face when having only one location at which to vote in-person absentee.

Evidence at trial suggested that one of the justifications for the challenged in-person absentee provisions was to "rein in" the big cities in the state, principally for political purposes. *See generally* PX022. State legislators were concerned that smaller municipalities could not keep up with the cities that had the resources to provide 60 to 70 hours of in-person absentee voting each week. *Id.* Ensuring equal access to the franchise is certainly a valid state interest, probably even a compelling one. But stifling votes for partisan gain is not a valid interest. And Wisconsin's approach in this instance was backward: rather than *expanding* in-person absentee voting in smaller municipalities, the state *limited* in-person absentee voting in larger municipalities. By doing so, the state has imposed moderate burdens on the residents of those larger municipalities.

The court concludes that most of the challenged in-person absentee voting provisions ***935** violate the First and Fourteenth Amendments for three reasons: the moderate burdens that they impose are not justified by the state's proffered interests; local control addresses the needs of the communities; and the purported consistency is illusory.

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The one exception is the state's decision to prohibit in-person absentee voting on the Monday before an election. The Wisconsin Municipal Clerks Association advocated for this provision, emphasizing that the day before an election is usually very busy. Tr. 4p, at 123:8-124:12; Tr. 7a, at 158:22-160:9. The GAB advocated for this provision as well. Tr. 5a, at 102:2-4. The state's interest in preventing clerks from incurring additional responsibilities on the day before an election, even voluntarily, is considerably more important than during the weeks leading up to the election. Clerks cannot complete some of their preparation for election day until all absentee ballots are cast, and so allowing in-person absentee voting right up through the eve of the election necessarily prevents clerks from completing those tasks until after hours. Prohibiting in-person absentee voting on the day before an election allows clerks to focus on preparing for the election, go home at a reasonable hour, and be as sharp as possible for election day, which will itself be a long day. The state's interest in prohibiting in-person absentee voting on the day before an election outweighs the moderate burdens that this measure imposes. Thus, the court concludes that this one provision does not violate the First and Fourteenth Amendments.

2. Requiring documentary proof of residence and eliminating corroboration

Wisconsin requires voters to provide documentary proof of residence when registering to vote. Wis. Stat. § 6.34(2). Before Act 23, passed in 2011, voters could use corroboration to prove their residence. And before Act 182, passed in 2014, voters needed to provide documentary proof of residence only when registering to vote within 20 days before an election. Plaintiffs challenge both the requirement of documentary proof of residence and the elimination of corroboration. These are two aspects of an overall challenge to what Wisconsin requires from voters who want to register. Plaintiffs contend that Wisconsin's proof of residence requirement burdens Wisconsin voters, particularly young voters who live with their parents, elderly voters, economically disadvantaged voters who live with friends or relatives, women voters whose residency documents are in their husbands' names, and minority voters who suffer from higher rates of residential instability. [14]

14 Plaintiffs also contend that Wisconsin's registration requirements have effectively put an end to voter registration drives. As explained above, the court's primary task under *Anderson–Burdick* is to evaluate the burden that a given provision places on *voters*. "[T]here is nothing 'inherently expressive' about receiving a person's completed application and being charged with getting that application to the proper place," *Voting for Am., Inc.*, 732 F.3d at 392 (citations omitted), which means that the First Amendment would not protect a group's mere desire to register voters. Plaintiffs' evidence regarding voter registration drives is mostly tangential to the main issues in this case.

The court finds that the challenged registration provisions impose only slight burdens on voters.

Between 2006 and 2012, about 35,000 Wisconsin citizens used corroboration to register to vote. PX038, at 39. But plaintiffs have adduced only anecdotal evidence to support their contention that the elimination of corroboration imposes a severe burden. They have not proven that minorities, Democrats, or young voters experience any widespread or insurmountable ***936** difficulties registering to vote on account of this change in the law. Indeed, plaintiffs' expert conceded that he did "not have specific data on how many people were unable to register because they were no longer permitted to use corroborating witnesses to prove residency." *Id.* The same is true of plaintiffs' evidence about voters who could not provide documentary proof of residence: although plaintiffs have identified examples of voters who were turned away at the polls, there is no evidence about how prevalent the problem is, or about how many voters cannot obtain documentary proof of residence with reasonable effort.

Voters in Wisconsin can satisfy the proof of residence requirement with a little planning. For example, rather than trying to register on election day, voters can contact their municipal clerk beforehand, when there is still time to update mailing addresses for bank statements, utility bills, or other acceptable forms of proof of residence. *See* PX490, at 5-6 (voter tried to use corroboration at the polls); PX045, at 3 (same); PX059, at 1 (183 people not able to register at polls because they did not have proof of residence). Wisconsin also allows voters to present electronic copies of their proof of residence documents (e.g., online bank statements or utility bills), which eliminates the need to wait for a document to arrive by mail.

At least some clerks have even identified a solution for voters who are simply unable to obtain the necessary documentation. Under Wis. Stat. § 6.34(3)(a)11., a person can register to vote

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by providing a document issued by a unit of government. Thus, if a voter provides a municipal clerk with the address at which the voter wants to register, the clerk can send the voter a letter and *that letter* then becomes a government document that the voter can use to register. *See, e.g.*, Tr. 1p, at 163-65; Tr. 2, at 301-02. This system is not much different from the one that Wisconsin used to have. When a voter registered, the clerk's office would send him or her a postcard to confirm the registration address. If the card came back as undeliverable, then the clerk's office knew that there was a problem; if the card did not come back, then the clerk's office considered the registration verified. The current laws merely add the step that a voter must return to the clerk's office to verify receiving the document.

The lone context in which proof of residence requirements and the elimination of corroboration can be more problematic is election day registration. An unregistered voter who lacks easy access to documentary proof of residence and decides on election day that he or she will vote may be unable to register without corroboration. The specific burdens on voters who plan to register on election day are still slight. With a little advanced planning, even a voter who lacks access to standard methods for proving residence can register to vote on election day.

For many voters, registering to vote will not be a regular event: once registered, a voter can continue voting under that registration until he or she moves. And even for voters who move often, if they complete the registration process once, they will be prepared for it in the future. Wisconsin law allows voters to choose from an array of documents to prove residence, and this flexibility means that the loss of corroboration does not impose a severe burden on the right to vote. It may be inconvenient to plan ahead to register at the polls on election day, particularly without corroboration, and it may be cumbersome to update account information with a bank or utility company. But these activities are no more burdensome than those that the Supreme Court has already considered. *See Crawford*, 553 U.S. at 198, 128 S.Ct. 1610 ***937** ("For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.").

Defendants justify the registration requirements as ensuring that voters actually reside in the municipalities where they register to vote. Asking for proof of residence, and not accepting corroboration, also helps prevent fraud. Defendants adduced no actual evidence of fraudulent use of corroboration though. *See, e.g.*, Tr. 7a, at 118:20-119:6 (voter attempted to pressure other voters to corroborate his residence but they all refused).

These interests justify the slight burdens that the challenged registration provisions impose. Residence is a bona fide voter qualification. Plaintiffs are correct that defendants have not adduced evidence of a genuine threat or history of registration-related fraud. But "[l]egislatures ... should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986). Pursuant to *Frank* and *Crawford*, states can anticipate and guard against fraudulent voting, and public confidence in elections is a legitimate state interest. [15] Regardless, a voter's residence in a particular municipality is a qualification for voting in that municipality. The state has an interest in making sure that only qualified voters are participating in elections, and the proof of residence requirement is directly linked to that goal.

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15 *Frank* and *Crawford* dealt with the requirement of presenting ID at the polls on election day. Presenting documentary proof of residence is the functional equivalent of a photo ID for the registration side of elections.

The court concludes that the challenged registration requirements do not violate the First and Fourteenth Amendments.

3. Changing how students can use "dorm lists" to register

Before Act 23, college and university students could register to vote use their student IDs and a "dorm list" that their institutions provided to municipal clerks. [16] The legislature has changed this provision by requiring that dorm lists also indicate whether students are U.S. citizens. This change requires colleges and universities to provide information that the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, prevents them from disclosing without consent. PX435, at 34-35. [17] Rather than obtaining consent to provide this information, most colleges and universities have

stopped providing dorm lists to municipal clerks. PX436, at 10.

16 A dorm list is "a certified and current list of students who reside in housing sponsored by the university, college, or technical college." Wis. Stat. § 6.34(3)(a)7.b.

17 FERPA permits colleges and universities to release only "directory information" without parental consent. This information includes "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." 20 U.S.C. § 1232g(a)(5)(A).

The court finds that the dorm list provision places only a slight burden on student voters.

***938** The dorm list provision is a special accommodation that allows college and university students to prove their residences with student IDs. This option is *in addition to* the standard options that all voters have. Act 23 pulls back only some of the special dispensation that the legislature gave students. The challenged provisions do not deny students the ability to register outright. Students can also register using a student ID and a fee receipt showing that they paid tuition in the last nine months. *See* Wis. Stat. § 6.34(3)(a)7.a. And of course, students can register by presenting any of the other listed documents to prove residence. Plaintiffs did not present evidence showing how often students used dorm lists before Act 23, or how many students are now unable to register without the option. Without this sort of proof, plaintiffs cannot demonstrate that any burden on student voters is more than slight.

Act 23 nevertheless burdens student voters who want to use their student IDs as proof of residence to register because it conditions their registration on proof of citizenship, which is something that no other voter must present to register. When any voter registers in Wisconsin, including a student voter, the voter must sign a statement certifying that he or she is a U.S. citizen. *See* DX101. But that is it. Voters do not need to actually *prove* that they are citizens. True, the primary burden that this provision imposes is on colleges and universities, which must provide compliant dorm lists. But if colleges and universities are unwilling to provide these lists, then for all practical purposes, Act 23 has taken away a method through which students can register to vote.

Defendants justify the provision by arguing that U.S. citizenship is a qualification for voting in Wisconsin, *see* Wis. Const. art. III, § 1, and so "it makes sense to confirm it." Dkt. 206, at 87. [18] That is a weak justification for two reasons. First, none of the state's other methods for proving residence require voters to "confirm" their U.S. citizenship beyond signing a citizenship certification on the registration form. Students sign this certification too. Defendants do not explain how this certification procedure, which apparently satisfies the state's interest in confirming citizenship for the overwhelming majority of non-students who register to vote, is insufficient in the context of student voters. Second, even if the state is particularly worried about non-citizen students voting—and at trial, the state presented no evidence of such a problem—the challenged provision does not allay that concern. Non-citizen students could easily skirt the requirement of demonstrating citizenship by using one of the other methods for proving residence.

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18 Defendants also argue that students have other options for proving residence. But that is not a justification for the law; as explained above, it is a reason for concluding that the law imposes only slight burdens on student voters.

Although the changes to using a dorm list to register impose only slight burdens, the state has not offered even a minimally rational justification for the law. The court therefore concludes that this provision violates the First and Fourteenth Amendments.

4. Eliminating statewide SRDs and eliminating SRDs and registration locations at high schools

Plaintiffs challenge the provisions of Act 23, passed in 2011, that eliminated statewide SRDs and the provisions of Act 240, passed in 2012, that eliminated the requirement that high schools accept registrations from staff and enrolled students.

The court finds that the challenged SRD and high school registration provisions place only slight burdens on voters.

***939** Most of the burdens that plaintiffs identify from these laws do not fall directly on voters. For example, plaintiffs contend that eliminating statewide SRDs hinders individuals who register voters during off-site registration drives. *See, e.g.*, Tr. 1p, at 7:20-8:25 (Citizen Action employee cannot

register voters outside the municipalities in which she is an SRD), 187:15-188:6 (college student cannot be a statewide SRD); Tr. 3a, at 101:1-102:21 (organizations cannot conduct voter-registration drives). Plaintiffs also contend that without statewide SRDs, more voters will be forced to register at a municipal clerk's office or at the polls, which will cause congestion and additional work for clerks and poll workers. Tr. 2, at 327:14-20. The *Anderson–Burdick* framework does not focus on these burdens; rather, the relevant issue is the nature and severity of the burdens that fall on *voters* and on the right to vote.

The real burden for voters is the loss of potentially convenient options for registering through a statewide SRD or at a high school. But plaintiffs have not adduced evidence of how widespread or significant this problem is. No testimony or expert opinion established how many voters want to register through statewide SRDs or at high schools and are unable to do so. Nor did any testimony establish how many voters are unable to register at all without these options. The closest that plaintiffs came was an anecdote about one municipality not appointing any SRDs in 2011 and 2012, which meant that all voters had to register through the clerk's office those years. PX490, at 3. Yet that burden was principally the result of that particular clerk refusing to appoint any SRDs. Plaintiffs do not argue that all, or even many, other municipalities refuse to appoint SRDs.

Defendants justify these provisions by arguing that statewide SRDs make mistakes that municipal clerks have to spend time correcting. Tr. 4p, at 133:3-20 (continuous difficulties in municipalities across the state with untimely or incorrect registrations from SRDs); Tr. 7a, at 121:2-7 (statewide SRDs submit incomplete forms, "which complicates things and requires follow-up"), 170:6-19 (same); Tr. 8p, at 133:8-12 (GAB auditor had problems with legibility and missing information from statewide SRDs). Defendants also presented evidence that students and staff did not use high school registration locations that frequently, and that high school SRDs also had problems submitting registrations. Tr. 4p, at 130:18-23 (problems with high school SRDs), 131:8-17 (less than 10 registrations per year from a high school), 132:3-9 (high school students like to register on election day or in the clerk's office because "it's a Facebook picture-taking time"); Tr. 7a, at 169: 11-19 (clerk has never received a registration from a high school and has not heard complaints about eliminating high schools as registration locations). Although this evidence was not conclusive for every municipality in the state, it supported defendants' assertion that voters did not use high school registration locations that much.

Plaintiffs counter these concerns by pointing out that they came only from small municipalities. Clerks from larger municipalities supported having statewide SRDs. Tr. 1p, at 88:3-8. Plaintiffs also argue that even if statewide SRDs make mistakes, these lead municipal clerks to engage with voters to correct those mistakes, and so the net result is beneficial. Plaintiffs' criticisms are not persuasive: a state certainly does not have to stand by and watch problems fester in smaller municipalities just because one or two larger municipalities do not have, or can easily overcome, those same problems. The legislature was entitled to conclude that the problems with statewide SRDs outweighed the benefits.

***940** Defendants also justify eliminating statewide SRDs on the grounds that it gave clerks direct control over the SRDs in their municipalities.[19] The state supervised statewide SRDs, which made it difficult for municipal clerks to revoke or train SRDs when problems occurred. Tr. 4p, at 132:10-24. The benefits of local control led the Wisconsin Municipal Clerks Association to support eliminating statewide SRDs. *Id.* Now, clerks train and supervise each SRD in their municipality, which allows them to address issues quicker and more efficiently.

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19 The court notes that for this issue, the parties have switched sides on the importance of local control. Plaintiffs—for whom local control was so important in the context of in-person absentee voting—now appear to want statewide control, and defendants—for whom uniformity was so important in the context of in-person absentee voting—now argue that local control is vital.

The state's interests in eliminating mistakes from high school and statewide SRDs, and in giving municipal clerks the ability to directly manage the SRDs with whom they work, justify the slight burdens that the challenged provisions impose. There is nothing stopping an individual from registering to be an SRD in as many municipalities as he or she likes. And alternative registration options alleviate virtually any inconvenience to voters who would benefit from being able to register with a statewide SRD.

The court concludes that the challenged SRD and high school registration provisions do not violate the First and Fourteenth Amendments.

5. Preempting Madison's landlord ordinance

Act 76, passed in 2013, overrode an ordinance that Madison passed in July 2012 requiring landlords to distribute voter registration forms to new tenants. Plaintiffs contend that the act burdens the right to vote by making it harder to register.

The court finds that the landlord provision imposes only a slight burden on voters.

There is some evidence that Madison's ordinance was an effective tool for reaching voters who rented their homes. *See, e.g.*, Tr. 3a, at 24:17-25:4. In the short time that Madison's ordinance was in effect, Madison registered at least 500 voters who submitted the forms that their landlords had given them. *Id.* at 168:4-9. That was right before the November 2012 presidential election.[20] Madison is also home to a large student population, with many students renting their homes.

20 The municipal clerk could not remember if it was the 2010 or 2012 election. But the ordinance went into effect in July 2012. *See* Madison, Wis., Code of Ordinances, § 32.06(5).

As with other challenged provisions, plaintiffs have not adduced evidence of a significant or widespread burden. The state statute does not preclude landlords from distributing materials; it just prevents municipalities from *requiring* that they distribute materials. Even assuming that in practice the law means that no landlord will provide forms, the only real burden that voters experience is having to obtain registration forms elsewhere—the rest of the steps for registering are the same. At most, the state has denied Madison voters a convenience. Plaintiffs have not adduced evidence of voters in Madison (or anywhere in Wisconsin) who did not receive registration forms from their landlords and were unable to register to vote.

Defendants justify the law on the grounds that requiring landlords to provide voting materials creates the possibility ***941** for voter confusion. At trial, two municipal clerks opined that landlords, who are not trained election officials, could distribute outdated materials or inaccurate information. Tr. 4p, at 136:22-137:20; Tr. 7p, at 19:10-20:7. This testimony was speculative; defendants did not introduce evidence that landlords have actually distributed the wrong information. But the potential for confusion is at least plausible, which makes the state's interest in avoiding it a reasonable one.

The state has an interest in ensuring that voters receive the correct information about where and how to register to vote. Here, the possibility that landlords will provide outdated or inaccurate information seems minimal, and defendants' justification for overriding Madison's ordinance is relatively weak. If the statute more than minimally burdened the right to vote, then it probably would not withstand constitutional scrutiny. But defendants have put forth a rational explanation for it, and that explanation is sufficient to justify the slight burden that the law imposes.

The court concludes that the landlord provision does not violate the First and Fourteenth Amendments.

6. Increasing the durational residency requirement

Act 23, passed in 2011, increased Wisconsin's durational residency requirement from 10 days to 28 days. This means that residents who move within Wisconsin fewer than 28 days before an election have to vote in their former municipalities. And residents who move into Wisconsin from out-of-state fewer than 28 days before an election cannot vote in Wisconsin at all (except for the offices of president and vice president, pursuant to Wis. Stat. § 6.15(1)).

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The court finds that the increased durational residency requirement imposes a moderate burden on voters in Wisconsin, particularly for populations that tend to be more transient or lack access to transportation.

"Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of a fundamental political right, preservative of all rights." *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (citations, internal quotations, and alterations omitted). Plaintiffs have adduced evidence from which the court can infer that a longer residency requirement leads to increased difficulties for certain types of voters. That is an important consideration because the court must evaluate the burdens that the law imposes on voters who cannot comply with it. *See Crawford*, 553 U.S. at 198, 128 S.Ct. 1610. Here, the burden is significant. A voter who does not satisfy the durational residency requirement cannot vote unless he or she: (1) travels back to his or her former municipality; or (2) votes absentee by mail. These options reduce the burden that the law imposes, but they do not negate it entirely.

Plaintiffs seek a return to the old 10-day rule, presumably because the rule does not impermissibly burden the right to vote. Thus, their contention is really that the *increase* from 10 days to 28 days burdens the right to vote. Given the specific burdens at issue, plaintiffs' evidence of problems with the overall durational residency requirement, *see e.g.*, Tr. 1p, at 44:19-45:6; PX055, at 2; PX059, at 1, is not particularly relevant.

Plaintiffs have not adduced direct evidence of the burdens that the change from 10 days to 28 days imposes. They have not identified how many voters would be able to comply with a 10-day rule but not with a 28-day rule. *See* Tr. 1p, at 44:9-14 (Citizen Action employee unable to identify how ***942** many voters were affected by the increase); Tr. 2, at 292:17-25 (municipal clerk testified to an unspecified "increase"); PX490, at 18 (one voter affected by the increase).[21] Nor could plaintiffs' experts pin down how widespread the problem is. For example, Dr. Lichtman presented 2010 census data to show that only 1.6 percent of the white population had moved into the state during the previous year, compared 2.1 percent of African Americans and 2.4 percent of Latinos. PX036, at 47. For in-state moves, 12.5 percent of white residents had lived in a different house in the previous year, compared to 26.2 percent of African Americans and 19.5 percent of Latinos. *Id.* at 41. But this information covered the entire year and was not limited to eligible voters.

21 Defendants offered anecdotal evidence that not very many voters fall into the window between 10 and 28 days. *See, e.g.*, Tr. 7a, at 122:4-10, 172:22-173:6. But this evidence, too, is inconclusive.

As with many of their other claims, plaintiffs attempted to indirectly prove the nature and severity of the burdens that the increased durational residency requirement creates. Voters who move more often have to confront residency requirements more often. Wisconsin has a significant population of African American and Latino voters, who are more likely to be transient than white voters are. PX036, at 40-41; PX037, at 27. Thus, the court can infer that the durational residency requirement will impose considerable burdens on a class of voters within the state that will have difficulty complying with the requirement.

For voters who move into Wisconsin from another state, the 28-day residency requirement disenfranchises them from state and local elections in Wisconsin (although they can vote for president and vice president). Voters who move within the state at least have the option of voting in their former municipalities. But that option is realistically available only to those who can travel. Although voting absentee by mail can alleviate some of the burden for voters who cannot travel, that option presents its own obstacles. There is considerable public distrust of voting absentee by mail, the process is cumbersome and difficult to understand for some voters, and it presents added security challenges for municipal clerks. Tr. 1p, at 76:13-77:24; Tr. 2, at 114:18-117:10; Tr. 4p, at 158:7-159:14.

On top of the burdens of actually voting in a former municipality, the durational residency requirement presents unique registration problems as well. Voters who must register in their former municipalities may no longer have documents to prove their residence. Tr. 1p, at 79:16-22; Tr. 2, at 290:3-291:2. And even if a voter has adequate documentation, the registration form requires signing a certification that the voter has "resided at the [former] residential address for at least 28 consecutive days immediately preceding this election, with no present intent to move." DX101, at 1. Signing this certification puts voters in an uncomfortable position because the form states that "[f]alsification of information on this form is punishable under Wisconsin law as a Class I felony." *Id.*; *see also* Tr. 1p, at 79:7-15; Tr. 2, at 290:3-291:2. Also, for voters who sign the form and are able to register, there may still be confusion when the municipal clerk sends a confirmation postcard to confirm the new registration at the old address and the card is returned as undeliverable. PX436, at 24.

Defendants justify the longer residency requirement as preserving election integrity, safeguarding voter confidence, and avoiding voter confusion. Specifically, the requirement serves these interests by preventing ***943** voter "colonization," which "involve[s] voting by nonresidents, either singly or in groups. The main concern is that nonresidents will temporarily invade the State or county, falsely swear that they are residents to become eligible to vote, and, by voting, allow a candidate to win by fraud." *Dunn*, 405 U.S. at 345, 92 S.Ct. 995. Defendants also contend that the requirement prevents "party raiding," "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario v. Rockefeller*, 410 U.S. 752, 760, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973).

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Defendants' purported interests in the 28-day durational residency requirement do not justify the severe burdens that the provision imposes for several reasons. First, defendants did not introduce any evidence at trial of a genuine threat of colonization or party raiding. Nor have defendants explained how a durational residency requirement prevents party raiding, which is a problem that involves voters who are *already registered.*

Second, even if the threat of colonization motivated the state's actions, defendants failed to address the difference between a durational residency requirement in the abstract, and increasing that requirement from 10 days to 28 days. The state's interests certainly justify some sort of residency requirement. *See Marston v. Lewis*, 410 U.S. 679, 680, 93 S.Ct. 1211, 35 L.Ed.2d 627 (1973) (per curiam) (upholding a 50-day rule and holding that "[s]tates have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds"). But defendants have not explained how a 28-day rule serves these interests better than a 10-day rule does. The court is not persuaded that increasing a durational residency requirement by 18 days actually inhibits colonization, raiding, or fraud, at least not to the extent necessary to justify the burdens that the increase imposes on otherwise-qualified voters. To the contrary, the requirement appears to simply make it harder for otherwise eligible voters to vote. It is also somewhat inconsistent with allowing election day registration, which lets voters decide to vote at the last minute.

The state also advances a few practical points, which go toward avoiding voter confusion. For example, a GAB official testified that "the justification put forward to support the 28-day residency is partly that it was maybe more consistent with what some other states had." Tr. 8p, at 41:16-18. Indeed, 25 states and the District of Columbia have a durational residency requirement, and the average length is 28.8 days. DX001, at 23. In 77 percent of those states, the requirement is 30 days. *Id.* The shortest requirement is 20 days. *Id.* at 24. Consistency with other states is a superficial rationale that does not justify burdening (or completely disenfranchising) voters within the state who cannot comply with the requirement. Nor did defendants present evidence that there were such persistent problems with registration fraud (or *any* problems, for that matter) that the state needed to lengthen its durational residency requirement.

Defendants also argue that the increased requirement allows voters more time to gather documents and plan for voting. For example, a voter who moves to a new district 11 days before an election might not have enough time to obtain documentary proof of the new residence, and a voter who moves 9 days before an election might not have enough time to request an absentee ballot from his or her former municipality. Any such convenience is utterly speculative—defendants did not ***944** identify a single voter who benefitted from the increased time in which to gather registration documents. Regardless, the rule adds considerable *inconvenience.* As one municipal clerk testified during trial, the rule is cumbersome for a person who moves 20 days before an election and is able to gather the necessary registration documents. Tr. 7a, at 140:16-142:1. Thus, defendants' convenience-based justification is not persuasive.

The court concludes that the state's change to the durational residency requirement violates the First and Fourteenth Amendments.

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7. Establishing a zone for election observers

Act 177, passed in 2014, established a statutorily prescribed zone in which election observers must stand at the polls to oversee voting on election day. The zone had to be between three and eight feet away from the table at which voters announced their names or registered to vote. Wis. Stat. § 7.41(2). This act overrode an existing GAB rule that allowed observers to be between 6 and 12 feet from the location where voters were announcing their presence and registering to vote. Part of the impetus for Act 177 was that a select group of election observers complained that officials were invoking the GAB's rule to keep them too far away to be able to hear and see events at polling places. *See* PX240; PX441, at 14-15. Plaintiffs allege that the state burdened the right to vote by moving observers closer to voters and facilitating harassment and intimidation.

The court finds that the provisions governing where election officials can position election observers imposes only a slight burden on the right to vote.

Although the executive director for Milwaukee's Election Commission confirmed that "99.5% of election observers respect the state's election observer rules," Tr. 1p, at 112:16-18, some municipalities have had problems with disruptive, harassing, and intimidating observers. These problems are prevalent in high-minority areas like Milwaukee

and Racine. PX045, at 3; PX436, at 19. Besides intimidating voters, having observers close to poll workers implicates voter privacy concerns: depending on the types of documents that a voter presents for registering or as identification, an observer could be able to see financial statements, social security numbers, or other personal information. Overly zealous election observers also potentially slow down poll workers and cause delays at the polls. Plaintiffs contend that these problems would not exist, or would at least not rise to the level of constitutional violations, under the GAB's former 6-to-12-foot rule.

Despite the evidence of problems with some observers, plaintiffs have not shown that Act 177 imposes a significant burden on voters. The court does not doubt that election observers can create consternation for many voters. But Wis. Stat. § 7.41(2) gives municipal clerks and chief election inspectors discretion to create an observation area at each polling place; it does not require that they place observers closer than the GAB rule allowed. The court is not persuaded that the statute imposes any significant burden on voters. Local election officials have the discretion, under the statute, to manage the position of observers.

In the anecdotes that plaintiffs presented at trial, problems with election observers occurred when poll workers or chief inspectors failed to exercise the authority that the state gave them to control or even remove observers. Problems also occurred when observers were closer than three feet, which was not a situation that the state even allowed, let alone imposed on ***945** voters. *See, e.g.*, Tr. 1p, at 85:4-6 ("Well, to be clear, that wasn't related to the space, the space issue; that was just related to the conduct of the observer."). Also, plaintiffs' evidence of problems consisted of incidents that occurred *before* the state passed Act 177, which undermines their assertion that the new law burdens the right to vote.

Plaintiffs' challenge to Wisconsin's election observer law is essentially dissatisfaction with the choices that clerks or chief inspectors have made, or with their failure to address unruly observers. By establishing a range in which officials can place observers, the state has arguably made it possible for others to impose burdens on voters. But plaintiffs have failed to prove that election officials consistently exercise their authority under Wis. Stat. § 7.41(2) in a way that impedes or intimidates voters. At most, then, the law imposes only a slight burden on the right to vote.

Defendants offer a compelling justification for giving municipal clerks and chief election inspectors discretion to establish an observation zone. "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election– and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997). Here, the state balanced the right that observers have to be present at the polls with the rights that voters have to keep their personal information private and with the flexibility that poll workers need to conduct efficient and fair elections. Rather than setting a one-size-fits-all rule, the legislature created guidelines to allow local municipalities to organize and control their polling places. Flexibility is important because not all polling places can accommodate a uniform distance. Tr. 2, at 286:17-289:22; Tr. 4p, at 139:18-140:2. And the range that the legislature selected was not unreasonable: three feet may be necessary to accommodate elderly observers or cramped polling places; eight feet allows observers to see and hear without interfering with poll workers.

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To be clear, the court does not condone harassment or intimidation by election observers, at any distance from registration or announcement tables. The state would be well served to impress upon municipal clerks and chief inspectors the importance of managing election observers. And those election officials must in turn exercise their authority to protect voters from unruly observers. As far as Act 177 is concerned, however, the state's justification for the act outweighs any burdens that it creates.

The court concludes that the challenged election observer provisions do not violate the First and Fourteenth Amendments.

8. Eliminating straight-ticket voting

Act 23, passed in 2011, eliminated straight-ticket voting: voters must now select individual candidates on their ballots. Plaintiffs contend that this burdens the right to vote, particularly for voters with lower levels of educational attainment.

The court finds that this provision creates only a slight burden on the right to vote, even among populations with lower levels of educational attainment or who have less time to spend voting.

The burdens that plaintiffs identify include longer lines at the polls (because voters must mark an entire ballot) and

increased confusion and likelihood of mistakes. But there was limited evidence about whether the elimination of straight-ticket voting caused these burdens and, if so, to what extent. Dr. Lichtman wrote in his report that "[t]he elimination of straight-ticket voting in Act 23 also has an adverse impact on waiting time since it ***946** makes voting lengthier for those who would otherwise use this option." PX036, at 44. Yet Dr. Lichtman did not identify evidence to support this assertion or indicate how much delay the elimination of straight-ticket voting actually caused. As for lay witnesses, plaintiffs elicited testimony that the lack of straight-ticket voting could confuse voters. *See, e.g.*, Tr. 1p, at 82:17-83:3. But the actual evidence of confusion involved voters who remembered having the option in the past and asking about whether it still existed. PX490, at 22-23. Beyond that, straight-ticket voting was mostly a convenience, and plaintiffs did not adduce evidence that the lack of straight-ticket voting deterred anyone from voting.

Defendants' first justification for eliminating straight-ticket voting is that it was joining a national trend. As another district court recently explained, that argument does not get the state very far. *Mich. State A. Philip Randolph Inst. v. Johnson*, —— F.Supp.3d ——, ——, No. 16–cv–11844, 2016 WL 3922355, at *8 (E.D.Mich. July 21, 2016) ("The fact that some other states do not allow straight party voting changes none of the facts that are before this Court. Furthermore, and more importantly, the behaviors of other states are *irrelevant* to the question of constitutionality. If the Ohio Legislature successfully instituted poll-taxes and literacy tests without challenge, it would not change the fact that poll-taxes and literacy tests are still clearly unconstitutional burdens on the right to vote." (original emphasis)).

Defendants also argue that eliminating straight-ticket voting decreases the chance of a voter selecting a straight-ticket option and then voting for candidates on the rest of the ballot. This type of over-voting would invalidate some or all of a voter's choices. Wis. Stat. § 7.50(1)(b). Defendants did not introduce evidence that these types of problems were prevalent, although they seem no more or less likely than the confusion that some voters might experience after not seeing a straight-ticket option that they are used to. Nevertheless, defendants' justification is reasonable.

Finally, defendants argue that eliminating straight-ticket voting encourages voters to become more informed about candidates or issues, and it ensures that voters do not accidentally overlook items on a ballot. Defendants did not introduce evidence of how often these problems occur, but the danger is there: in elections with referenda or non-partisan races, a voter who uses a straight-ticket option could overlook some items on a ballot. Tr. 7p, at 20:8-21:23. This justification is reasonable.

The court concludes that the straight-ticket provision does not violate the First and Fourteenth Amendments.

9. Prohibiting clerks from sending absentee ballots by fax or email

Act 75, passed in 2011, prevents municipal clerks from faxing or emailing absentee ballots, except to military or overseas electors. Plaintiffs contend that this provision unjustifiably burdens voters who are traveling but who do not qualify as overseas electors.

The court finds that this provision places a moderate burden on voters who are traveling, particularly if they are outside of the country or in locations with unreliable mail delivery.

Before Act 75, some municipalities sent hundreds of ballots by fax or email. Tr. 1p, at 87:8-12; Tr. 2, at 332:11-22. Now, without the option for electronic ballots, absentee voters must rely on mail service. This is particularly problematic for students or researchers who are abroad in remote areas, but it also affects domestic travelers, especially for elections in which ballots are not finalized until close to election day. Tr. 2, at 329:8-332:10; Tr. 7a, at 144:25-145:23; PX491, at 6-9. In at least some cases, ***947** voters who cannot receive ballots by fax or email are simply unable to vote. Although voters are able to request their ballots by fax or email, that does them little good if the mailed ballot itself does not ever arrive, or if it arrives too late for a voter to return it in time to be counted.

Defendants justify the law by contending that faxing or emailing ballots requires significant time and energy from municipal clerks. They also contend that there is a higher chance of human error because clerks have to re-create electronically returned ballots in paper form on election day, and that this process invades the voter's privacy because those officials will see the voter's selections. And a voter who receives an electronic copy of a ballot could forward that ballot to other voters, who might incorrectly believe that they can vote with it. According to defendants' expert, Dr. Hood, these considerations supported the state's decision to do away with faxing and emailing ballots to most absentee voters. DX001, at 19. As to the specific instances in which voters have had difficulty with receiving or sending absentee ballots

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by mail, defendants contend that voters can overcome these difficulties with planning, and they observe that electronic methods for sending ballots may not be any more reliable than using mail.

Defendants' justifications are not persuasive. Wisconsin already requires municipal clerks to send ballots by fax or email to military voters and to voters who are permanently overseas, which undercuts most of defendants' justifications. At trial, defendants principally relied on the testimony of two municipal clerks to defend this law. *See* Tr. 4p, at 141:12-142:25; Tr. 7a, at 116:11-118:8. These clerks testified that electronic ballots can create a little more work before and on election day. Defendants did not present evidence of widespread opposition to sending ballots by fax or email. Indeed, other election officials could not see reasons for eliminating the practice, or testified that it did not create significant logistical problems. Tr. 2, at 332:23-333:4 ("It took a few minutes to compile the email."), 333:15-17; PX435, at 48. From a practical perspective, the court simply does not credit the assertion that in the year 2016, printing a paper ballot and instructions, putting them into an envelope, and physically sending the envelope overseas is less burdensome on municipal clerks than compiling a PDF and sending an email. This is especially so because clerks are already sending ballots electronically to military and overseas electors.

Defendants also overstate their concerns about privacy, security, and errors. A voter who chooses to submit an absentee ballot electronically is voluntarily giving up some of the privacy that a mailed ballot would have. That is the voter's problem, not the state's problem: a voter who is concerned about privacy can simply avoid voting by fax or email. As for defendants' concern that voters may forward electronic copies of absentee ballots, they presented only one example of this occurring. There is no reason to think that it is a widespread problem. Even if it occurs regularly, a municipal clerk can correct the issue with an email to the voter who submitted a forwarded ballot. Finally, even crediting defendants' assertion that there is a higher *chance* for human error when re-creating an electronically received ballot in paper form, that chance is minimal because two election officials perform the task together. Defendants did not adduce evidence that mistakes ever actually happened, or that they happen with any frequency.

If the challenges of sending and receiving electronic ballots are as severe as defendants make them out to be, then the state can make the practice optional instead of mandatory. [22] But the state's justifications ***948** for flatly prohibiting clerks from sending ballots by fax or email do not outweigh the moderate burdens that the challenged provision places on voters who are affected by it.

22 Before 2011, the statute was permissive, not mandatory.

The court concludes that the provision prohibiting municipal clerks from sending absentee ballots by fax or email violates the First and Fourteenth Amendments.

10. Limiting when clerks can return absentee ballots to voters

Act 227, passed in 2012, prevents clerks from returning a received absentee ballot to a voter unless the ballot is damaged or has an incomplete certification. Plaintiffs contend that these provisions place undue burdens on voters with lower levels of educational attainment, who tend to be African Americans and Latinos.

The court finds that the provisions governing when clerks can return absentee ballots to voters place only a slight burden on the right to vote.

After Act 227, municipal clerks cannot return absentee ballots to voters to correct mistakes such as over-voting or improper marks. According to plaintiffs, minorities are more likely to make these kinds of mistakes because they have lower levels of educational attainment. PX036, at 9. Dr. Lichtman opined that "[t]his problem is especially acute for Wisconsin Hispanics. According to the US Census American Community Survey 2010, 3-Year Estimates, 33.2 percent of Hispanics in Wisconsin speak English 'less than very well.' " *Id.* at 48. The court does not give these opinions much value because Dr. Lichtman did not link his conclusion to the voting context. He did not identify what percentage of minority *voters* would have difficulty understanding a ballot, nor did he explain whether (and why) absentee ballots would be a type of printed document that minority voters would struggle to understand. Likewise, plaintiffs have not directed the court to any evidence demonstrating that comprehension problems with absentee ballots actually occur. *See* Dkt. 207, at 67.

Defendants' justification for this provision is straightforward and persuasive. Election officials do not open absentee ballots until election day, when they feed the ballots through counting

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machines. Thus, the only time that clerks would see the types of mistakes that plaintiffs identify is when they are actually preparing to feed the ballots through the machines. At that point, it is too late to return the ballot to the voter. In contrast, the errors for which clerks are now allowed to return absentee ballots are visible without opening the ballot envelope: "a spoiled or damaged absentee ballot," Wis. Stat. § 6.86(5), and "an absentee ballot with an improperly completed certificate or with no certificate," *id.* § 6.87(9).

Beyond the procedural justification, defendants argue that permitting clerks to return ballots to correct "mistakes"—as plaintiffs want—leaves clerks without any real guidance. One clerk could determine that a voter made a mistake by not voting for each office on a ballot, while a different clerk could determine that the same voter apparently did not want to vote for each office. Preventing ambiguity and confusion serves the state's interest in running efficient and orderly elections.

The court concludes that the limits on when clerks can return absentee ballots to voters do not violate the First and Fourteenth Amendments.

11. The IDPP

Plaintiffs contend that the IDPP impermissibly burdens the right to vote. They seek to invalidate the process not only for the petitioners who are currently trapped within it, but also for future petitioners ***949** who use the IDPP to obtain a free ID for voting purposes.

The court finds that the IDPP imposes severe burdens on the right to vote.

At least 60 qualified electors—those whose petitions were denied—were disenfranchised for the 2016 spring primary in Wisconsin. There were also 36 people in "suspend" status who had not been issued IDs. There is no evidence that any of these people were not qualified electors. And as defendants' expert, Dr. Hood, acknowledged, there are "undoubtedly" people who are discouraged from even entering the process because they lack the documents or think that it is too cumbersome. Tr. 7p, at 199:11-200:8.

Even petitioners who succeed in navigating the IDPP do so only after enduring severe burdens. Becky Beck, a CAFU research agent, indicated that once a petition gets to CAFU, it typically takes five separate contacts between the investigator and the petitioner to verify the petitioner's identity, birthdate, and citizenship. Tr. 8p, at 159:12-16. CAFU's Case Activity Reports document many instances in which petitioners are repeatedly sent to family members, hospitals, or schools to hunt for additional documentation, even when there is no doubt that the person is a qualified elector. Sometimes these petitioners succeed—but only after they have engaged in months of back-and-forth with CAFU—when the DMV finally determines, in its discretion, that the petitioner has made a strong enough case to warrant issuing an ID. Even when the effort is ultimately successful, the IDPP imposes burdens that far exceed those contemplated in *Crawford* and *Frank*.

Defendants invoke the same justifications that *Crawford* and *Frank* discuss. They contend that Wisconsin's voter ID law (which includes the IDPP) deters fraud, promotes public confidence in elections, and promotes the orderly administration of elections. These interests justify a voter ID law in general, but they do not justify the severe burdens that the IDPP imposes. The Seventh Circuit has anticipated that such burdens could pose constitutional problems for Wisconsin's voter ID law; it noted in *Frank* that:

> *Milwaukee Branch of NAACP* and the regulations leave much to the discretion of the employees at the Department of Motor Vehicles who decide whether a given person has an adequate claim for assistance or dispensing with the need for a birth certificate. Whether that discretion will be properly exercised is not part of the current record, however, and could be the subject of a separate suit if a problem can be demonstrated.

768 F.3d at 747 n. 1.

The evidence presented at trial confirms that the IDPP disenfranchises otherwise qualified voters. And even when confronted with lawsuits in two different federal courts, the state has utterly failed to devise a workable solution for getting these voters IDs. The state's most recent emergency rule allows the petitioners who are currently in the IDPP to vote in the November 2016 election. But there is no plan in place for after the petitioners' current receipts expire. Kicking the problem down the road does not alleviate the severe burdens that these petitioners must endure, nor

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does it prevent any future petitioners from suffering the same severe burdens. In short, many IDPP petitioners face insurmountable obstacles that serve no important interest because the government concedes that these petitioners are qualified electors. These justifications, such as they are, do not outweigh the burdens that the IDPP imposes.

The court concludes that the current version of the IDPP violates the First and Fourteenth Amendments.

***950 12. Cumulative effect**

Plaintiffs contend that the cumulative effect of the challenged provisions in this case imposes an undue burden on the right to vote. According to plaintiffs, even if individual provisions comport with the First and Fourteenth Amendments, the court must still consider the overall effect of Wisconsin's election system on voters, particularly on Democratic voters. To prove this aspect of their case, plaintiffs rely heavily on the "calculus of voting" theory that Dr. Burden explained in his expert report. PX037, at 4-5. Under this theory, a voter's likelihood of voting is essentially the result of a formula that reflects a cost-benefit analysis. A person will vote if his or her probability of determining the outcome of the election, multiplied by the net psychological benefit of seeing his or her preferred candidate win, is greater than the "cost" of voting (i.e., the effort needed to become informed, and the time and resources needed to register to vote and cast a ballot). *Id.*

Plaintiffs argue that Wisconsin has imposed a series of independently minor burdens that, collectively, increase the cost of voting enough to deter voters who tend to vote for Democrats. As explained above, plaintiffs did not present compelling statistical evidence of the deterrent effects that the challenged provisions have. But the nature of the challenged provisions, none of which facilitate voting or registration, makes it reasonable to infer that there will be some such effect. And as the Seventh Circuit recognized in *Frank*, "*any* procedural step filters out some potential voters." 768 F.3d at 749 (original emphasis). But a deterrent effect alone, especially one that is not reliably quantified, does not render the cumulative effect somehow unconstitutional.

The *Anderson–Burdick* framework requires the court to evaluate "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059. This requirement is difficult in the context of "cumulative effects" because the state can have different justifications for different rules, each with varying levels of persuasiveness. Plaintiffs do not propose a legal framework for evaluating a "cumulative effects" claim under *Anderson–Burdick*. But even looking broadly at the laws that they challenge in this case, the court's analysis of the individual provisions already addresses the problematic aspects of Wisconsin's election system.

Take the challenged registration provisions: the court agrees that aspects of Wisconsin's registration requirements burden the right to vote, particularly for voters who are more likely to move (which includes minority and younger voters, and thus, Democratic voters) and for voters who lack convenient access to documentary proof of residence (again, minority and younger voters, and thus, Democratic voters). But the state's interests in preempting fraud, avoiding confusion, and ensuring that only qualified voters register to vote are compelling enough to justify at least some of the burdens that the challenged provisions collectively impose. Removing the restrictions on using dorm lists and reducing the durational residency requirement will ease the burdens of Wisconsin's registration laws, at least to a degree that the state's interests can justify.

Likewise, the principal problem with Wisconsin's in-person absentee system is that it addresses inequality across municipalities by suppressing voting in larger cities rather than by enabling increased voting in smaller cities. Invalidating that approach not only addresses the burdens on in-person absentee voting, but it also alleviates burdens in other aspects of Wisconsin's election system. A voter who is intimidated by election observers or who is ***951** concerned about long lines at the polls because there is no straight-ticket voting, for example, may be able to vote in-person absentee and avoid those concerns altogether.

In short, although plaintiffs press a separate claim for the cumulative effects of the challenged provisions, the court concludes that they are entitled to no broader relief than the invalidation of the specific provisions that the court has identified as constitutionally infirm. A remedy directed at the diffuse cumulative effects of Wisconsin's election regime would invite, essentially, a rewrite of the state's election laws. That would be an unwarranted intervention by a federal court into an area reserved to the state legislature.

F. Voting Rights Act claims

Plaintiffs challenge the following provisions under § 2 of the Voting Rights Act: the reductions to in-person absentee voting; the one-location rule for in-person absentee voting; the elimination of corroboration; the requirement of

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documentary proof of residence; the elimination of statewide SRDs; the increased durational residency requirement; the zone for election observers; and the elimination of straight-ticket voting. Plaintiffs contend that these provisions disparately burden African Americans and Latinos.

Section 2 of the Voting Rights Act prohibits states and political subdivisions from implementing any "voting qualification or prerequisite to voting or standard, practice, or procedure ... in a manner which 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). Plaintiffs can establish a violation of § 2 by showing that, based on the totality of the circumstances, Wisconsin's election process is "not equally open to participation by members of a class of [protected] citizens ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). Plaintiffs do not need to adduce proof of discriminatory intent to prevail on their Voting Rights Act claims. *Chisom v. Roemer*, 501 U.S. 380, 394–95, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991).

Most case law applying § 2 of the Voting Rights Act pertains to so-called "vote dilution" claims, which generally involve gerrymandering. Plaintiffs in this case bring claims over voting and registration requirements, which are "vote denial" claims for which Voting Rights Act law is less developed. In *Frank*, the Seventh Circuit endorsed a two-step inquiry for reviewing vote-denial challenges to voting qualifications under the Voting Rights Act:

> 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.
>
> 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.

768 F.3d at 754–55 (citations and internal quotation marks omitted). But the Seventh Circuit also cautioned that "§ 2(a) does not condemn a voting practice just because it has a disparate effect on minorities." *Id.* at 753. "It is better to understand § 2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command." *Id.* at 754. The court must therefore analyze whether plaintiffs have proven that: (1) the challenged provisions impose disparate burdens on African Americans and Latinos; and (2) under the ***952** totality of the circumstances, these burdens are linked to the state's historical conditions of discrimination.

1. Disparate burdens

Two threshold issues affect how the court evaluates plaintiffs' evidence of disparate burdens. First, defendants contend that the Voting Rights Act requires plaintiffs to couch their evidence in terms of a departure from an "objective benchmark," rather than a departure from what Wisconsin's laws used to be. Dkt. 206, at 114. The Supreme Court has indicated that a different baseline is part of what distinguishes § 2 claims from § 5 claims:

> In § 5 preclearance proceedings—which uniquely deal only and specifically with *changes* in voting procedures —the baseline is the status quo that is proposed to be changed: If the change "abridges the right to vote" relative to the status quo, preclearance is denied, and the status quo (however discriminatory *it* may be) remains in effect. In § 2 or Fifteenth Amendment proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the *status quo* "results in [an] abridgement of the right to vote" or "abridge[s] [the right to vote]" relative to what the right to vote *ought to be,* the status quo itself must be changed.

Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 334, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000) (original emphasis).

But *Reno* and the other cases on which defendants rely are vote *dilution* cases; this is a vote *denial* case. The few other federal courts that have considered how to evaluate burdens in vote denial cases have determined that this distinction is important. Relying on the text of the Voting Rights Act, the Southern District of Ohio recently concluded that "the relevant benchmark is inherently built into § 2 claims and is whether members of the minority have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." *Ohio Org. Collaborative*, 189 F.Supp.3d at 757, 2016 WL 3248030, at *39; *see also Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 556 (6th Cir.2014) ("Section 2 vote denial claims inherently provide a clear, workable benchmark.... under the challenged law or practice, how do minorities fare in their ability 'to participate in the political process' *as*

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compared to other groups of voters?" (original emphasis) (quoting 42 U.S.C. § 1973(b), which has been transferred to 52 U.S.C. § 10301)), *vacated on other grounds*, No. 14–3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). The reasoning in these cases is persuasive, and the court rejects defendants' argument that plaintiffs must identify an objective benchmark to prevail on their Voting Rights Act claims.

Part of determining whether minority voters have less opportunity to participate than other members of the electorate may involve comparing the challenged provisions with the laws that they replaced. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 241–42 (4th Cir.2014), *cert. denied*, —— U.S. ——, 135 S.Ct. 1735, 191 L.Ed.2d 702 (2015); *Ohio Org. Collaborative*, 189 F.Supp.3d at 758, 2016 WL 3248030, at *40 ("[A]n analysis of whether a change in law results in a decreased opportunity of minorities to vote as compared to other voters is exactly the type of analysis required by § 2 claims."). But that is not to say that a given provision would violate the Voting Rights Act just because it leaves minority voters worse off than a prior law. The appropriate inquiry at this first step is whether the challenged provision burdens ***953** minority voters more than other voters. *See Frank*, 768 F.3d at 753.

The second threshold issue concerns the type of evidence that the parties have presented to prove (or disprove) that African Americans and Latinos have suffered disparate burdens under the challenged provisions. Experts on both sides have presented extensive statistical evidence derived from election turnout data in Wisconsin over time. Given the information available about Wisconsin's elections, turnout rates may be the best that the parties can offer. But raw turnout statistics reveal very little about the disparate burdens that a state's election system imposes. For example, defendants tout the high turnout numbers for the April 2016 election —the first statewide election in which the voter ID law and other challenged provisions were in effect—as evidence that minorities are not suffering disparate burdens under Wisconsin's election laws. Tr. 1a, at 60:8-17. But turnout in a given election depends on many factors, ranging from which offices are on the ballot to the amount of money spent on campaigning and the contentiousness of the races. The April 2016 Wisconsin involved unusually sharply contested primaries on both sides, which undoubtedly contributed to the higher-than-average turnout for an April election. Tr. 2, at 42:10-43:9. One cannot infer from the high overall turnout that Wisconsin's election laws have no impact, or that they have no differential impact on minorities.

That is not to say that turnout statistics are utterly useless. Plaintiffs' expert, Dr. Mayer, used the statewide voter database, correlated to a separate database of demographic and political information, to track several cohorts of voters across the 2010 and 2014 elections (i.e., before and after some of the challenged provisions went into effect). Both sides' experts agreed that comparing midterm elections, rather than presidential elections, made sense, because Barack Obama's presence on the ballot in 2008 and 2012 would likely skew minority turnout. And, although the usual constellation of factors affected voting in 2010 and 2014, a change in election law regime was one significant difference between those elections, and no one was aware of any other major factor likely to affect turnout. Dr. Mayer also opined that, based on survey research, in 2014 most voters believed that the voter ID law was in effect, even though it was actually still enjoined. Thus, Dr. Mayer was of the view that the 2014 election would be a good test of the impact of the laws challenged in this case.

Dr. Mayer used statistical regression analysis to isolate some of the variables that contribute to a voter's likelihood of voting. Based on this analysis, Dr. Mayer concluded that African Americans, Latinos, and those who lived in student wards, were slightly less likely to vote in the 2014 election than the average voter was. PX043, at 14 (updated Table 8). By contrast, in the 2010 election, African Americans and those in student wards were actually *more* likely to have voted. For Latinos, the difference between 2010 and 2014 was small (though slightly in the opposite direction; they were slightly less likely to vote in 2010). Plaintiffs contend that Dr. Mayer's analysis shows that they challenged the provisions decreased likelihood that minorities will vote. These conclusions are in line with other national studies, which conclude that voter ID laws tend to suppress minority turnout at elections. *See* PX072.

Defendants' expert, Nolan McCarty, PhD, criticized Dr. Mayer's conclusions because Dr. Mayer does not account for "roll-off" in the statewide voter database. That database provides a "snapshot" in that it includes voting records only for ***954** those voters who are registered as of the date the report of the database is generated, which in Dr. Mayer's case was September 24, 2015. Thus the September 24, 2015 database does not include the voting records of any voter who was not registered as of that date, even though that voter might have been registered for the 2010 or 2014 elections. Dr. McCarty surmises that minority voters would have been more likely to rolloff, so that Dr. Mayer's turnout rates for 2010

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were too high, and thus the difference between those rates and the 2014 rates would be smaller. DX005, at 9. Dr. Mayer response is that despite the roll-off effect, his conclusions are sound, because he finds the effect even among the cohort of committed voters (because they stayed registered from 2010 to 2015 without rolling off the database). The court finds that, despite Dr. McCarty's criticism, Dr. Mayer's regression analysis supports the conclusion that the probability of an African American voting, relative to an average voter, was less in 2014 than it was in 2010. The court finds that Dr. Mayer's conclusions about those who live in student wards are not informative, because his definition of those who live in student wards does not include only students. The bottom line is that Dr. Mayer's analysis lends some support to the plaintiffs' claim that the challenged provisions tend to reduce African American voting by some modest amount. But nothing presented by either side demonstrated that the challenged laws had a striking impact on turnout overall or among any class of voters.

And even with the support of other empirical evidence, Dr. Mayer's conclusions, without more, are not enough to carry the day for plaintiffs. "It is better to understand § 2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command." *Frank*, 768 F.3d at 754. At the end of the day, turnout statistics report outcomes, not the burdens of the election regulations that might have influenced those outcomes. Thus, the court must look for specific evidence demonstrating that the challenged provisions fall disparately on minorities.

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a. Registration provisions

Plaintiffs challenge three registration-related provisions under the Voting Rights Act: proof of residence, elimination of corroboration, and elimination of statewide SRDs. Plaintiffs contend that these provisions impose disparate burdens on minority voters, who are more likely to move than white voters are. The court accepts plaintiffs' expert evidence that minority populations are more transient. PX036, at 47. If those populations register at the same rate that white populations do, then they would need to complete registration more often. For minority voters who do not have convenient access to proof of residence, this requirement could be disparately burdensome, as could the elimination of corroboration.

Wisconsin's registration requirements apply to all voters, regardless of race. The fact that voters must register after they move does not itself impose a disparate burden. Instead, plaintiffs must demonstrate that it is categorically more difficult for African American or Latino voters to comply with the registration requirements, and that registering more often therefore forces these populations to confront those difficulties more often. Plaintiffs have failed to make this showing.

Even acknowledging that minorities are more likely to lack driver licenses or state-issued IDs, those are only 2 of the 12 options for proving residence that Wis. Stat. § 6.34(3)(a) authorizes. Dr. Lichtman indicates that minorities are more likely to be unemployed, *id.* at 7-8, which could mean that they would lack access to paychecks. But that still leaves residential leases, utility bills, bank statements, and documents issued by any unit of government. ***955** Indeed, as discussed above, municipal clerks have devised a strategy for sending letters to voters and then letting them use those letters to register. *See, e.g.*, Tr. 1p, at 163-65; Tr. 2, at 301-02. Plaintiffs therefore cannot demonstrate that the documentary proof of residence requirement burdens minorities for purposes of § 2. *Cf. Frank*, 768 F.3d at 752–53 ("[P]ersons who rely on the waiver procedure still must apply for it, which means that on average black and Latino residents must file more paperwork than white residents. Although these findings document a disparate outcome, they do not show a 'denial' of anything by Wisconsin, as § 2(a) requires.").

As for corroboration, plaintiffs' evidence of a disparate burden substantially consists of anecdotes and lay observations. *See, e.g.*, Tr. 1p, at 78:7-20 (corroboration is useful to people who are transient or in poverty); Tr. 3a, at 88:15-20 (corroboration facilitates participation by homeless or marginally housed voters). This testimony does not establish a verifiable disparate effect. And although some voters have been unable to register at the polls because corroboration is no longer an option, plaintiffs do not identify a racial slant to this problem. In fact, Dr. Lichtman expressly acknowledged that statistics about the use of corroboration by race are not available. PX036, at 40. This leaves plaintiffs unable to prove that the elimination of corroboration disparately prevents minorities from registering to vote.

In the abstract, African Americans and Latinos could have more difficulties presenting documentary proof of residence, particularly without corroboration. But plaintiffs have not

actually *proven* that the challenged burdens disparately burden minorities. There is no persuasive evidence that minorities who want to register are systematically unable to comply with the requirement that they present proof of residence. The challenged provision violates the Voting Rights Act only if it gives "members of the protected class ... less opportunity than other members of the electorate to participate in the political process." *Frank*, 768 F.3d at 755 (citations and internal quotation marks omitted). Given the number of documents that voters can use to prove their residence, African American and Latino voters do not have "less opportunity" to participate in elections just because they are less likely to be able to use certain types of documents. *Cf. Ohio Org. Collaborative*, 189 F.Supp.3d at 758, 2016 WL 3248030, at *40 (prohibiting officials from sending unsolicited applications for absentee ballots does not create a burden for § 2 purposes).

Plaintiffs also argue that minority voters are more likely to register through SRDs at voter-registration drives than white voters are. But plaintiffs' only citation for this proposition is a website. *See* Dkt. 207, at 204. Plaintiffs did not introduce the website as evidence at trial, and they do not direct the court to other evidence admitted at trial that supports this contention. The court therefore concludes that plaintiffs have failed to prove that the elimination of statewide SRDs has had a disparate effect on minorities.

The court concludes that the challenged provisions requiring documentary proof of residence, eliminating corroboration, and eliminating statewide SRDs do not disparately burden African Americans or Latinos.

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b. Durational residency provision

In the context of plaintiffs' constitutional challenge, the court concluded that the increased durational residency requirement imposes disparate burdens on African Americans and Latinos. For substantially the same reasons, the court concludes that this provision also disparately ***956** burdens minorities for purposes of the plaintiffs' Voting Rights Act claims.

Wisconsin's minority populations are much more transient than its white population is, in terms of both moving into the state and moving within the state. PX036, at 47. Unlike the methods for proving residence, there is no flexibility in the durational residency requirement: a voter either satisfies the requirement or does not satisfy it. Voters who have not been in a municipality for at least 28 days must either return to their former municipalities (if they moved within Wisconsin) or be disenfranchised. Because African Americans and Latinos are also more likely to lack access to transportation and to have less flexible work schedules, traveling to another municipality is not always feasible. On top of these burdens, voters who first have to register in their former municipalities must complete the awkward process of certifying that they have "resided at the [former] residential address for at least 28 consecutive days immediately preceding this election, with no present intent to move." DX101, at 1.

The court concludes that the durational residency provision disparately burdens African Americans and Latinos.

c. In-person absentee voting provisions

In the context of plaintiffs' constitutional challenge, the court concluded that Wisconsin's in-person absentee voting provisions burden the right to vote, particularly for minority populations in larger municipalities. For substantially the same reasons, the court concludes that these provisions also disparately burden minorities for purposes of plaintiffs' Voting Rights Act claims.

Wisconsin's rules for in-person absentee voting all but guarantee that voters will have different experiences with in-person absentee voting depending on where they live: voters in large cities will have to crowd into one location to cast a ballot, while voters in smaller municipalities will breeze through the process. And because most of Wisconsin's African American population lives in Milwaukee, the state's largest city, the in-person absentee voting provisions necessarily produce racially disparate burdens. Moreover, plaintiffs have demonstrated that minorities actually used the extended hours for in-person absentee voting that were available to them under the old laws. PX036, at 43.

The court concludes that the in-person absentee voting provisions disparately burden African Americans and Latinos.

d. Election observer and straight-ticket voting provisions

Plaintiffs contend that African Americans and Latinos are disparately affected by the state's rules governing where

election observers can stand at polling places and by the state's elimination of straight-ticket voting.

Problems with election observers are more prevalent in high-minority areas like Milwaukee and Racine. But, as with plaintiffs' constitutional challenges to this provision, the problem for plaintiffs' Voting Rights Act claims is that municipal clerks and chief election inspectors decide where observers stand, not the state. The individual decisions that election officials make may lead to increased harassment at certain polling places. But that is not the same as saying that the state has imposed a disparate burden on minorities just by defining a range in which to position observers.

Plaintiffs rely exclusively on anecdotal evidence to prove that observers intimidate or harass African Americans and Latino voters more often than white voters. This evidence is insufficient to prove a violation of the Voting Rights Act, and most of it is not directly relevant. Plaintiffs have not presented evidence—expert or otherwise—that minorities disparately suffer ***957** burdens when election observers stand close to them, or that the state's zone for election observers leads election officials to place observers closer to voters in minority-heavy municipalities. Indeed, plaintiffs' anecdotal evidence does not address the distances at which observers have caused problems, except to suggest that many observers were closer than three feet. That is not a result of Act 177—the state prohibited election officials from allowing observers to be closer than three feet. Thus, plaintiffs cannot attribute these problems to the state for purposes of proving a disparate burden.

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This leaves plaintiffs' evidence that problems are more prevalent in Milwaukee and Racine. These problems occurred under the GAB's rule, not under the statute that replaced it, which undermines plaintiffs' assertion that Act 177 disparately burdens minorities. But even inferring that problems are more common in these municipalities under the new rule, the burden that minorities experience still comes from election officials not using the authority that the state has given them to control election observers. Plaintiffs have not proven that the state has imposed a disparate burden on African Americans or Latinos by giving election officials discretion to designate zones for election observers that are appropriate for their polling locations.

As for the elimination of straight-ticket voting, the court has already found that this provision imposes only slight burdens on the right to vote. For substantially similar reasons, the court concludes that the provision does not create a disparate burden for purposes of plaintiffs' Voting Rights Act claims. Again, plaintiffs' evidence is entirely anecdotal and mainly establishes only that African Americans and Latinos would prefer to use straight-ticket voting. The elimination of straight-ticket voting applies to all voters, regardless of race. Plaintiffs have failed to prove that this provision gives minorities less opportunity to vote than other voters.

The court concludes that the challenged provisions governing election observers and straight-ticket voting do not disparately burden African Americans or Latinos.

e. The IDPP

As explained above, the IDPP imposes a discriminatory burden on racial minority groups, meaning that their members have less opportunity than others do to participate in the political process. Plaintiffs have made a more than ample showing on this element.

The court concludes that the IDPP disparately burdens African Americans and Latinos.

2. Caused by or linked to social and historical conditions

The second step in analyzing a claim under the Voting Rights Act is to consider whether a discriminatory burden is "in part ... caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Frank*, 768 F.3d at 755. Having concluded that Wisconsin's durational residency requirement, provisions for in-person absentee voting, and IDPP disparately burden African Americans and Latinos, the court now considers whether those burdens are linked to social and historical conditions of discrimination.

Plaintiffs contend that the court should apply the so-called *Gingles* factors to analyze their Voting Rights Act claims. The Supreme Court has endorsed these factors, at least in the context of vote dilution cases. *See Thornburg v. Gingles*, 478 U.S. 30, 44–45, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). But the Seventh Circuit has found them to be "unhelpful in voter-qualification cases," *Frank*, 768 F.3d at 754, and so the ***958** court will not organize its analysis by factor. Nevertheless, the Voting Rights Act requires courts to examine "the totality of circumstances," 52 U.S.C. §

10301(b), which essentially comprises the same inquiries that the *Gingles* factors address. Thus, plaintiffs' evidence about Wisconsin's history of discrimination and about the effects of past discrimination that minority groups suffer is relevant to their Voting Rights Act claims.

Wisconsin has a relatively scant history of state-sanctioned discrimination. When Wisconsin became a state in 1848, its constitution did not extend the right to vote to African Americans; they obtained that right after the measure was passed at a statewide election in 1849. But the effect of the election remained in doubt until 1866, when the Wisconsin Supreme Court clarified that African Americans had the right to vote. *See generally Gillespie v. Palmer*, 20 Wis. 544 (1866).

Other statewide policies (or lack thereof) have disparately affected minorities to some degree, even if they were not facially discriminatory. For example, from 1913 to 2006, only municipalities with more than 5,000 residents had to register voters. In other municipalities, voters did not have to register. According to Dr. Burden, the result of this practice was that "98% of blacks and 91% of Latinos lived in municipalities where registration was required. In contrast, only 68% of whites lived in these municipalities." PX037, at 11. Thus, until 2006, minorities in Wisconsin disproportionately faced more impediments to voting than white citizens faced.

Few municipalities outside of Milwaukee provide election-related materials in languages other than English, despite the fact that the GAB makes these forms available for clerks to use, and no other municipality provides ballots in Spanish. *Id.* Given the significant percentages of Spanish-speaking voters in municipalities across the state, *id.*; PX036, at 48, Wisconsin's failure to address the issue is significant.

Plaintiffs' other evidence of historical conditions of discrimination concerns Milwaukee. This makes sense, given that Milwaukee is home to most of the state's minority population. Along with other large cities in the state, Milwaukee is where the disparate burdens that the challenged provisions impose are most prevalent. But under the Voting Rights Act, "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Frank*, 768 F.3d at 753. Thus, defendants have argued in this case that Milwaukee's history of discrimination, which is technically not the state's own discrimination, cannot give rise to liability under the Voting Rights Act.

Drawing such a rigid distinction for purposes of plaintiffs' Voting Rights Act claims would undermine the purposes of the law. *See Chisom*, 501 U.S. at 403, 111 S.Ct. 2354 ("Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of ridding the country of racial discrimination in voting.... [T]he Act should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination." (citations, internal quotation marks, and alterations omitted)). But even assuming that the Voting Rights Act does not impose liability on the state for a municipality's discrimination—a questionable assumption—the act certainly prevents a state from enacting laws that interact with a municipality's history of discrimination to impose disparate burdens. *See Frank*, 768 F.3d at 754 ("We are not saying that, as long as blacks register and vote more frequently than whites, a state is entitled to make changes for the purpose of curtailing black voting. Far from it; that would clearly violate § 2 [of the Voting Rights Act]. ").

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***959** Beginning with the in-person absentee provisions, there is evidence that the state legislature passed these laws, at least in part, to specifically address what it perceived to be a problem with larger municipalities, like Milwaukee. Legislators were concerned that these municipalities offered residents more opportunities to vote than smaller municipalities offered. For example, during a floor session in the state senate, proponents of limiting the window for in-person absentee voting specifically referred to nipping Milwaukee and Madison's practices "before too many other cities get on board." PX022, at 6. Even if the state was not directly responsible for creating the socioeconomic disparities that exist in Milwaukee and other larger cities, the in-person absentee provisions impose burdens *because* of those disparities. For these reasons, the court concludes that evidence of discrimination in Milwaukee is relevant to the causation element of plaintiffs' Voting Rights Act claims.

During the 1960s and 1970s, Milwaukee experienced considerable white flight. Although the city's Common Council passed an open housing law, discriminatory housing practices continued to limit housing choices for African Americans, confining them to the inner city. PX037, at 12. Zoning regulations in the municipalities surrounding Milwaukee further reinforced the segregation. As a result, two-thirds of Wisconsin's African American residents now live in Milwaukee, which remains one of the most segregated cities in the country. *Id.* at 13.

Coupled with segregated housing practices, Milwaukee has also had a difficult history with discrimination in education. In 1976—more than 20 years after *Brown v. Board of Education*—a federal judge concluded that Milwaukee's schools were illegally segregated. *Amos v. Bd. of Sch. Dirs. of Milwaukee*, 408 F.Supp. 765 (E.D.Wis.), *aff'd sub nom.*, *Armstrong v. Brennan*, 539 F.2d 625 (7th Cir.1976), *vacated*, 433 U.S. 672, 97 S.Ct. 2907, 53 L.Ed.2d 1044 (1977). The case settled after going to the Supreme Court. But the results of educational inequality have persisted. In 2015, high school graduation rates in Wisconsin were 66 percent for blacks, 78 percent for Latinos, and 93 percent for whites.[23] PX037, at 16.

23 Although these are statewide statistics, the problem is likely just as prevalent in Milwaukee.

Most of the rest of plaintiffs' expert evidence does not link to the disparate burdens that the in-person absentee provisions create. For example, Dr. Burden catalogs other instances of racial disparities in incarceration rates, income, and health. *Id.* at 15-18. Although this evidence is credible, it is only tangentially relevant to plaintiffs' Voting Rights Act claims. Likewise, Dr. Burden's analysis of other *Gingles* factors (i.e., racially polarized voting, race-based appeals in political campaigns, minority members elected to public office) does not bear directly on the disparate burdens that the court has found.

Disparities in housing, education, and employment, have left minority groups condensed into high-density urban areas, which makes them particularly vulnerable to Wisconsin's rules for in-person absentee voting. With only one location for in-person absentee voting, voters must travel farther than they would otherwise have to travel if municipalities could establish more locations. And basic math confirms that one location in a larger municipality will have to contend with a larger volume of voters than one location in a smaller municipality will have to confront. Lower levels of educational attainment and employment decrease the flexibility that minority ***960** populations will have to spend time waiting in line to vote in-person absentee, which makes the reduced hours problematic as well. The court therefore finds that the burdens that Wisconsin's in-person absentee provisions impose are linked to historical conditions of discrimination. These provisions are invalid under the Voting Rights Act.

As for durational residency, African Americans and Latinos will have to deal with this requirement more often than white voters will because they move more often. These populations are also more likely to lack access to transportation, meaning that if they do not satisfy the durational residency requirement, they will be less able to travel back to vote in their former municipalities. But plaintiffs have not persuasively explained how these burdens are linked to the historical conditions of discrimination described above. "Section 2(a) forbids discrimination by 'race or color' but does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Frank*, 768 F.3d at 753. The court therefore finds that the burdens that Wisconsin's durational residency requirement imposes are not linked the historical conditions of discrimination. These provisions do not violate the Voting Rights Act.

Finally, based on the evidence adduced at trial, the court cannot conclude that the burdens that the IDPP imposes are linked to historical conditions of discrimination in Wisconsin. Most of the problems that petitioners have had with getting through the IDPP relate to their inability to provide vital records to the DMV or to CAFU. But those failures tend to result from historical conditions of discrimination in the petitioner's home state or country. Under *Frank*, it is not clear that the Voting Rights Act authorizes the court to hold Wisconsin accountable for these conditions. *See* 768 F.3d at 753 ("The judge did not conclude that the state of Wisconsin has discriminated in any of these respects. That's important, because units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination."). It would be up to the Seventh Circuit, not this court, to clarify the scope of the inquiry under § 2.

Plaintiffs contend that this is an excessively narrow reading of the Voting Rights Act, because it would allow Wisconsin to ignore rank discrimination by other states. They may be right, but the result appears to follow from *Frank*. Because the IDPP is manifestly unconstitutional under the *Anderson–Burdick* framework, the court will invalidate the IDPP regardless of its status under the Voting Rights Act.

G. Fourteenth Amendment claims for disparate treatment of voters

Plaintiffs initially challenged three of the provisions at issue under the Fourteenth Amendment, alleging that the legislature lacked a rational basis for: (1) implementing a 28-day

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durational residency requirement; (2) eliminating straight-ticket voting; and (3) excluding technical college, out-of-state, and other expired IDs as qualifying forms of voter ID. Dkt. 19, ¶¶ 164-69. The court dismissed the claims concerning Wisconsin's durational residency requirement and straight-ticket voting. Dkt. 66, at 5-9. At summary judgment, plaintiffs dropped their challenge to excluding technical college IDs, and the court granted summary judgment to defendants on most of the rest of plaintiffs' remaining rational basis claim. Dkt. 185, at 20-24. The court denied defendants' motion for summary judgment with regard to plaintiffs' challenge that the state lacked a rational basis for excluding expired college or university IDs from the list of qualifying forms of voter ID.

***961** In their post-trial brief, plaintiffs purport to "continue to challenge the rational basis of excluding three forms of ID: 1) out-of-state driver's licenses, 2) driving receipts issued under Wis. Stat. § 343.11, and 3) state ID card receipts." Dkt. 207, at 128. Plaintiffs are free to pursue these issues on appeal, but the court has already entered summary judgment for defendants on these aspects of plaintiffs' rational basis claims.

Plaintiffs also note that at summary judgment, the court "ruled that excluding expired college or university IDs lacked a rational basis." *Id.* at 128 n.32. That is incorrect. In denying defendants' motion, the court did not affirmatively conclude that the state lacked a rational basis for excluding expired college or university IDs. As the pertinent section of the summary judgment opinion stated: "[a]t this point, defendants have failed to identify a rational basis for the legislature's decision to exclude expired student IDs. The court will deny this aspect of defendants' motion for summary judgment." Dkt. 185, at 24. The court essentially concluded that defendants' proffered justifications for excluding expired student IDs were insufficient, and that defendants would have to do better at trial if they wanted to overcome plaintiffs' rational basis challenge.

Ultimately, plaintiffs' misreading of the summary judgment decision is immaterial because rational basis review focuses on the state's justification for its actions, rather than on plaintiffs' disagreement with those actions. "[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). The court will uphold the state's decision to exclude expired college or university IDs if defendants identify "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 320, 113 S.Ct. 2637. Defendants did not need to produce evidence at trial to support the rationality of the state's decision, nor are they limited to the justifications that the legislature had in mind at the time that it passed the challenged provisions—any rational justification for the laws will overcome an equal protection challenge. *Id.* at 320–21, 113 S.Ct. 2637.

The state's approach to college and university IDs is somewhat inconsistent. The state purports to have given students the flexibility and convenience to choose how to verify their identities at the polls. In addition to the other forms of acceptable ID that are available to citizens generally, students have the unique option of using the IDs that they receive from their schools. But that option is not as convenient as it appears. College or university IDs are acceptable only if they expire within two years after issuance. Wis. Stat. § 5.02(6m)(f). The standard ID that the University of Wisconsin-Madison—the state's flagship university—issues does not comply with this requirement. Tr. 1p, at 173:2-174:18; Tr. 3a, at 44:13-21. Instead, UW-Madison offers a second, voting-specific ID to its students who want to use university-issued IDs to vote. Tr. 3a, at 45:15-46:19. Thus, in practice, the option to use a college or university ID does not provide much flexibility or convenience.

The state has also taken considerable pains to limit the use of college or university IDs to current students only. The three requirements in Wis. Stat. § 5.02(6m)(f) are redundant: (1) the ID card itself must be unexpired; (2) the card must have an expiration date that is no more than two years after its date of issuance; and (3) the voter must present proof of current enrollment. If each of these requirements provided some additional level of protection against former students using their IDs to ***962** vote, then those requirements might be rational. But as it stands, defendants have not explained why any requirement beyond proof of current enrollment is necessary to protect against fraudulent voting with a college or university ID. Nevertheless, plaintiffs' rational basis claim challenges only the requirement that the ID card be unexpired when a voter presents it at the polls.

Defendants argue that it is rational to require voters to present unexpired college and university IDs because voters can use these IDs only in conjunction with proof of enrollment. *See* Wis. Stat. § 5.02(6m)(f). According to defendants, the state reasonably has presumed that anyone with an expired

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ID is probably no longer enrolled at the issuing college or university. Thus, it makes no sense to allow a voter to use an expired college or university ID because that voter will not be able to also provide proof of enrollment. This is a circular argument. Worse, it is the exact argument that defendants presented at summary judgment. The court concluded that this argument was not persuasive for two reasons:

> First, defendants apparently make no room for the possibility that a student could be enrolled at an institution but have an expired student ID. If incoming freshmen at four-year universities receive student IDs that expire two years after issuance, then any junior or senior who fails to obtain a new student ID would have to find a different way to prove his or her identity. Second, unlike receipts for driver licenses and ID cards, expired student IDs are not later replaced with entirely different documents. Defendants therefore cannot rely on the same arguments about simplifying elections by eliminating unnecessary duplicative forms of ID.

Dkt. 185, at 24. Repetition has not made defendants' argument any more persuasive.

At a macro level, the state's concern with ensuring that only current students vote with student IDs may be rational. But Wis. Stat. § 5.02(6m)(f) adequately addresses that concern by requiring a voter to present proof of enrollment with the student ID. Adding the requirement that a voter's college or university ID be unexpired does not provide any additional protection against fraudulent voting. If anything, this measure prevents otherwise qualified voters from voting simply because they have not renewed their IDs since beginning school. Thus, even under an exceedingly deferential rational basis review, the state has failed to justify its disparate treatment of voters with expired IDs. The court concludes that requiring unexpired college or university IDs violates the Fourteenth Amendment.

To be clear, the court is not concluding that voters have carte blanche to use expired college or university IDs at the polls; they must still comply with the other requirements of Wis. Stat. § 5.02(6m)(f). Plaintiffs have not directed their rational basis challenge to the requirement that a voter with a college or university ID also present proof of enrollment at the issuing institution. Nor have plaintiffs challenged the rational basis for permitting only IDs that expire no more than two years after issuance.[24] These requirements still apply. The only thing that will change is that the ID card that a college or university student actually presents at the polls can be expired.

24 Without the requirement that a voter present an unexpired college or university ID, it seems unnecessary to regulate the ID's expiration date. But that is outside the scope of plaintiffs' challenge, and so the court will leave it to the state to determine whether this provision is still necessary.

*963 CONCLUSION AND REMEDIES

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The court has identified several constitutional and statutory violations, and the court will grant declaratory and injunctive relief accordingly.

For the challenged provisions relating to in-person absentee voting, Wisconsin's statutes establishing a one-location rule, Wis. Stat. § 6.855–.86, violate the First and Fourteenth Amendments and § 2 of the Voting Rights Act. Likewise, the sections of Act 146 amending Wis. Stat. §§ 6.86(1)(b) to limit the days and times for in-person absentee voting violate the Fifteenth Amendment. These provisions, along with the sections of Act 23 that limit the hours for in-person absentee voting, also violate § 2 of the Voting Rights Act and the First and Fourteenth Amendments, except with regard to preventing municipal clerks from holding hours for in-person absentee voting on the Monday before an election.

For the challenged provisions relating to registering to vote, the sections of Act 23 amending Wis. Stat. § 6.34(3)(a)7. to require dorm lists to include proof of a student's citizenship violate the First and Fourteenth Amendments. Likewise, the sections of Act 23 amending Wis. Stat. §§ 6.02, .10(3), and .15 to increase the durational residency requirement from 10 days to 28 days violate the First and Fourteenth Amendments.

For the challenged provisions relating to election procedures, the sections of Act 75 amending Wis. Stat § 6.87(3)(d) to prohibit municipal clerks from emailing or faxing

absentee ballots to voters violate the First and Fourteenth Amendments.

For the challenged provisions relating to voter ID, the statutes and administrative rules that create and govern the IDPP that voters can use to obtain free IDs for purposes of voting violate the First and Fourteenth Amendments.

Plaintiffs seek a permanent injunction. Dkt. 207, at 244. They must therefore demonstrate that: (1) they have succeeded on the merits; (2) no adequate remedy at law exists; (3) they will suffer irreparable harm without injunctive relief; (4) the irreparable harm suffered without injunctive relief outweighs the irreparable harm that Wisconsin will suffer if the injunction is granted; and (5) the injunction will not harm the public interest. *Old Republic Ins. Co. v. Emp'rs Reinsurance Corp.*, 144 F.3d 1077, 1081 (7th Cir.1998). Based on the court's conclusion that several of the challenged provisions violate the Constitution or the Voting Rights Act, or both, the court finds that plaintiffs have made the requisite showing and injunctive relief is appropriate. With the exception of the IDPP, the court will permanently enjoin defendants from enforcing the invalid provisions.

The IDPP does not require wholesale invalidation. As described in the introduction to this opinion, another federal court has already issued a preliminary injunction against enforcing the IDPP. That injunction imposes an affidavit-based solution, essentially allowing voters to sign a form instead of presenting an ID at the polls. Plaintiffs have not asked for that type of relief here, and the court will not grant it. Nothing would prevent the state from complying with both Judge Adelman's injunction and the one that this court will impose.

This court will require that the IDPP be reformed to satisfy two criteria. First, Wisconsin cannot make it unreasonably difficult for voters to obtain a free ID. Once a petitioner has submitted materials sufficient to initiate the IDPP, the DMV must promptly issue a credential valid for voting, unless readily available information shows that the petitioner is not a qualified elector entitled to such a credential. Second, ***964** the state must inform the general public that those who enter the IDPP will promptly receive a credential valid for voting, unless readily available information shows that the petitioner is not a qualified elector entitled to such a credential.

For further clarification: the credentials issued under this procedure need not be valid for any purpose other than voting; the court is not ordering the state to issue Wisconsin IDs to all those who enter the IDPP. But the credentials issued are not temporary: petitioners and the public must be informed that these credentials have a term equivalent to that of a driver license or Wisconsin ID, and that they will be valid for voting until they expire or are revoked for good cause. Good cause is shown if the petitioner is not a qualified elector; the failure to provide additional information or communication to the DMV is not good cause. The receipts issued under the most recent Emergency Rule would meet these requirements, with the exception of the currently stated term of expiration.

ORDER

IT IS ORDERED that:

1. The IDPP as implemented is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

2. 2013 Wis. Act 146 is unconstitutional under the Fifteenth Amendment to the United States Constitution;

3. The restriction limiting municipalities to one location for in-person absentee voting is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

4. The state-imposed limits on the time for in-person absentee voting, with the exception of the prohibition applicable to the Monday before election day, are unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

5. The requirement that "dorm lists" to be used as proof of residence include citizenship information is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

6. The increase of the durational residency requirement from 10 days to 28 days is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

7. The prohibition on distributing absentee ballots by fax or email is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

8. The prohibition on using expired, but otherwise qualifying, student IDs is unconstitutional under the

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First and Fourteenth Amendments to the United States Constitution;

9. Plaintiffs' request for a permanent injunction is GRANTED, and defendants are permanently enjoined from enforcing any of the provisions held unlawful in sections 1 through 8 of this ORDER;

10. Defendants, and their officers, agents, servants, employees, attorneys, and all those acting in active concert or participation with them, or having actual or implicit knowledge of this order, are further ORDERED to:

a. Promptly issue a credential valid as a voting ID to any person who enters the IDPP or who has a petition pending;

b. Provide that any such credential has a term of expiration equivalent to that of a Wisconsin driver license or photo ID and will not be cancelled without cause;

***965** c. Inform the general public that credentials valid for voting will be issued to persons who enter the IDPP;

d. Further reform the IDPP so that qualified electors will receive a credential valid for voting without undue burden, consistent with this opinion;

11. Provisions 10.a. through 10.d. are to be effectuated within 30 days so that they will be in place and available for voters well before the November 8, 2016, election.

12. The court retains jurisdiction to oversee compliance with the injunction;

13. The court intends this ruling to be immediately appealable; for the avoidance of doubt, the court grants permission to any party to file an interlocutory appeal if this order is not final for appeal purposes.

All Citations

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APPENDIX NO. 11

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104 S.Ct. 296
Supreme Court of the United States

Joseph C. RUSSELLO, Petitioner
v.
UNITED STATES.

No. 82–472.
|
Argued Oct. 5, 1983.
|
Decided Nov. 1, 1983.

Synopsis
After petitioner was convicted of violating Racketeer Influenced and Corrupt Organizations Act by being involved in arson ring that resulted in his fraudulently receiving insurance proceeds in payment for fire loss of building he owned, and judgment of forfeiture was entered against petitioner by the United States District Court for the Middle District of Florida for amount of insurance proceeds. Petitioner appealed. The United States Court of Appeals for the Fifth Circuit, 681 F.2d 952, affirmed forfeiture judgment, and certiorari was granted. The Supreme Court, Justice Blackmun, held that insurance proceeds petitioner received as result of his arson activities constituted "interest" within meaning of forfeiture provision of RICO.

Affirmed.

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****296** *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.

***16** Petitioner was convicted in Federal District Court, under the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, of violating 18 U.S.C. §§ 1962(c) and (d) by being involved in an arson ring that resulted in his fraudulently receiving insurance proceeds in payment for the fire loss of a building he owned. The District Court also entered a judgment of forfeiture against petitioner for the amount of the insurance proceeds pursuant to 18 U.S.C. § 1963(a)(1), which provides that a person convicted under § 1962 shall forfeit to the United States "any interest he has acquired or maintained in violation ****297** of § 1962." The Court of Appeals affirmed.

Held: The insurance proceeds petitioner received as a result of his arson activities constitute an "interest" within the meaning of § 1963(a)(1) and are therefore subject to forfeiture. Pp. 299 – 304.

(a) Section 1963(a)(1) does not reach only "interests in an enterprise." Where the term "interest" is not specifically defined in the RICO statute, it is assumed that the legislative purpose is expressed by the term's ordinary meaning, which comprehends all forms of real and personal property, including profits and proceeds. Congress apparently selected the broad term "interest" because it did not wish the forfeiture provision to be limited by rigid and technical definitions drawn from other areas of law and because the term was fully consistent with the RICO statute's pattern in utilizing broad terms and concepts. Every property interest, including a right to profits or proceeds, may be described as an interest in something. Before profits of an illegal enterprise are divided, each participant may be said to own an "interest" in the ill-gotten gains, and after distribution each has a possessory interest in currency or other items so distributed. Pp. 299 – 300.

(b) Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in § 1963(a)(2). To construe § 1963(a)(1) to reach only interests in an enterprise would blunt the section's effectiveness in combating illegitimate enterprises and would mean that whole areas of organized crime activity would be placed beyond the reach of the RICO statute. Pp. 300 – 301.

(c) The fact that the Controlled Substances Act specifically authorizes the forfeiture of "profits" obtained in illegal drug enterprises cannot be read as imposing a limitation upon § 1963(a)(1)'s broader language, particularly ***17** where the RICO statute was aimed at organized crime's economic power in all its forms, whereas the narcotics activity proscribed by the Controlled Substances Act usually generates only monetary profits. Pp. 301 – 302.

(d) Nor is a limiting construction of § 1963(a)(1) supported by the fact that certain state racketeering statutes expressly provide for the forfeiture of "profits," "money," "interest or property," or "all property, real or personal," acquired from racketeering, since those States presumably used such

language so as to avoid narrow interpretations of their laws such as was given the federal statute in certain Federal District Court opinions. P. 302.

(e) The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots, and thus was intended to authorize forfeiture of racketeering profits. The rule of lenity does not apply here, where § 1963(a)(1)'s language is clear. Pp. 302 – 304.

681 F.2d 952 (5th Cir. 1982), affirmed.

Attorneys and Law Firms

Ronald A. Dion argued the cause for petitioner. With him on the brief was *Alvin E. Entin.*

Samuel A. Alito, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey,* and *Sara Criscitelli.*

Opinion

Justice BLACKMUN delivered the opinion of the Court.

This is yet another case concerning the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970. Pub.L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961–1968. At issue here is the interpretation of the chapter's forfeiture provision, § 1963(a)(1), and, specifically, the meaning of the words "any interest [the defendant] has acquired ... in violation of section 1962."

I

On June 8, 1977, petitioner Joseph C. Russello and others were indicted for racketeering, conspiracy, and mail fraud, in violation of 18 U.S.C. §§ 1341, 1962(c) and (d), and 2. App. 5. After a jury trial in the ****298** United States District Court for ***18** the Middle District of Florida, petitioner was convicted as charged in four counts of the indictment. The jury then returned special verdicts for the forfeiture to the United States, under 18 U.S.C. § 1963(a), of four payments, aggregating $340,048.09, made to petitioner by a fire insurance company. App. 54–57. These verdicts related to the racketeering activities charged in the second count of the indictment under which petitioner had been convicted. The District Court, accordingly, entered a judgment of forfeiture against petitioner in that amount. *Id.,* at 58.

Petitioner took an appeal to the former United States Court of Appeals for the Fifth Circuit. A panel of that court affirmed petitioner's criminal conviction, *United States v. Martino,* 648 F.2d 367, 406 (1981), and this Court denied certiorari, 456 U.S. 943, 102 S.Ct. 2006, 72 L.Ed.2d 465 (1982), as to that aspect of the case. The panel, however, reversed the judgment of forfeiture. App. 64–69. The full court granted rehearing en banc on the forfeiture issue and, by a vote of 16–7, vacated that portion of the panel opinion, and then affirmed the forfeiture judgment entered by the District Court. 681 F.2d 952 (1982). Because of this significant division among the judges of the Court of Appeals, and because the Fifth Circuit majority, *id.,* at 959, stated that its holding "squarely conflict[ed]" with that of the Ninth Circuit in *United States v. Marubeni America Corp.,* 611 F.2d 763 (1980), we granted certiorari. —— U.S. ——, 104 S.Ct. ——, 77 L.Ed.2d —— (1983).[1] Since then, the Seventh Circuit has issued an opinion agreeing with the Ninth Circuit. *United States v. McManigal,* 708 F.2d 276, 283–287 (1983).

1 The Solicitor General, while perceiving "a factual distinction between *Marubeni* and the present case," felt that "the holding and reasoning of *Marubeni* would require the Ninth Circuit to reach the opposite result from the Fifth Circuit on the facts of the instant case." Memorandum for United States 4, n. 3. Accordingly, he joined in the prayer that a writ of certiorari be granted.

***19** II

So far as the case in its present posture is concerned, the basic facts are not in dispute. The majority opinion of the en banc court described them succinctly:

> "Briefly, the evidence showed that a group of individuals associated for the purposes of committing arson with the intent to defraud insurance companies. This association in fact enterprise, composed of an insurance adjuster, homeowners, promoters, investors, and arsonists, operated to destroy properties in Tampa and Miami, Florida between July 1973 and April 1976. The panel summarized the ring's operations as follows:

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> 'At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds' (footnote omitted)." 681 F.2d, at 953.

Specifically, petitioner was the owner of the Central Professional Building in Tampa. This structure had two parts, an original smaller section in front and a newer addition at the rear. The latter contained apartments, offices, and parking facilities. Petitioner arranged for arsonists to set fire to the front portion. He intended to use the insurance proceeds to rebuild that section. The fire, however, spread to the rear. Joseph Carter, another member of the arson ring, was the adjuster for petitioner's insurance claim and helped him to obtain the highest payments possible. The resulting payments made up the aggregate sum of $340,043.09 ***20** mentioned above. From those proceeds, petitioner paid Carter $30,000 for his assistance.

****299** III

Title 18 U.S.C. § 1962(c) states that it shall be unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate ... commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1962(d) makes it unlawful to conspire to violate § 1962(c). Section 1963(a)(1) provides that a person convicted under § 1962 shall forfeit to the United States "any interest he has acquired or maintained in violation of section 1962."

The sole issue in this case is whether profits and proceeds derived from racketeering constitute an "interest" within the meaning of this statute and are therefore subject to forfeiture. Petitioner contends that § 1963(a)(1) reaches only "interests in an enterprise" and does not authorize the forfeiture of mere "profits and proceeds." He rests his argument upon the propositions that criminal forfeitures are disfavored in law and that forfeiture statutes, as a consequence, must be strictly construed.

In a RICO case recently decided, this Court observed: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *United States v. Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981), quoting from *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). See, also, *Dickerson v. New Banner Institute, Inc.,* ——U.S. ——, ——, 103 S.Ct. 986, 990, 74 L.Ed.2d 845; *Lewis v. United States,* 445 U.S. 55, 60, 100 S.Ct. 915, 918, 63 L.Ed.2d 198 (1980).

Here, 18 U.S.C. § 1963(a)(1) calls for the forfeiture to the United States of "any interest ... acquired ... in violation ***21** of section 1962." There is no question that petitioner Russello acquired the insurance proceeds at issue in violation of § 1962(c); that much has been definitely and finally settled. Accordingly, if those proceeds qualify as an "interest," they are forfeitable.

The term "interest" is not specifically defined in the RICO statute. This silence compels us to "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States,* 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962). The ordinary meaning of "interest" surely encompasses a right to profits or proceeds. See Webster's Third New International Dictionary 1178 (1976), broadly defining "interest," among other things, as a "good," "benefit," or "profit." Random House Dictionary of the English Language (1979) defines interest to include "profit," "welfare," or "benefit." Black's Law Dictionary 729 (5th ed., 1979) provides a significant definition of "interest": "The most general term that can be employed to denote a right, claim, title or legal share in something." It is thus apparent that the term "interest" comprehends all forms of real and personal property, including profits and proceeds.

This Court repeatedly has relied upon the term "interest" in defining the meaning of "property" in the Due Process Clause of the Fourteenth Amendment of the Constitution. See *Perry v. Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972) (" 'property' denotes a broad range of interests"); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982); *Jago v. Van Curen,* 454 U.S. 14, 17–18, 102 S.Ct. 31, 33–34, 70 L.Ed.2d 13 (1981). It undoubtedly was because Congress did not wish

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the forfeiture provision of § 1963(a) to be limited by rigid and technical definitions drawn from other areas of the law that it selected the broad term "interest" to describe those things that are subject to forfeiture under the statute. Congress selected this general term apparently because ****300** it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth. Among these are "enterprise" in § 1961(4); "racketeering ***22** activity" in § 1961(1) (1976 ed., Supp. V); and "participate" in § 1962(c).

Petitioner himself has not attempted to define the term "interest" as used in § 1963(a)(1). He insists, however, that the term does not reach money or profits because, he says: " 'Interest,' by definition, includes of necessity an interest in something." Brief for Petitioner 9. Petitioner then asserts that the "something" emerges from the wording of § 1963(a)(1) itself, that is, an interest "acquired ... in violation of section 1962," and thus derives its meaning from the very activities barred by the statute. In other words, a direct relationship exists between that which is subject to forfeiture as a result of racketeering activity and that which constitutes racketeering. This relationship, it is said, means that forfeiture is confined to an interest in an "enterprise" itself. Petitioner derives support for this approach from *United States v. Marubeni America Corp., supra,* and from language contained in two federal district court opinions, *United States v. Meyers,* 432 F.Supp. 456, 461 (WD Pa.1977), and *United States v. Thevis,* 474 F.Supp. 134, 142 (ND Ga.1979), aff'd on other grounds, 665 F.2d 616 (CA5 1982). He also now relies on the *McManigal* case, *supra,* recently decided by the Seventh Circuit. Tr. of Oral Arg. 4.

We do not agree. Every property interest, including a right to profits or proceeds, may be described as an interest in something. Before profits of an illegal enterprise are divided, each participant may be said to own an "interest" in the ill-gotten gains. After distribution, each will have a possessory interest in currency or other items so distributed. We therefore conclude that the language of the statute plainly covers the insurance proceeds petitioner received as a result of his arson activities.

IV

We are fortified in this conclusion by our examination of the structure of the RICO statute. We disagree with those ***23** courts that have felt that a broad construction of the word "interest" is necessarily undermined by the statute's other forfeiture provisions. The argument for a narrow construction of § 1963(a)(1) is refuted by the language of the succeeding subsection (a)(2). The former speaks broadly of "any interest ... acquired," while the latter reaches only "any interest in ... any enterprise which [the defendant] has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." Similar less expansive language appears in §§ 1962(b) and 1964(a). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (CA5 1972). See *United States v. Wooten,* 688 F.2d 941, 950 (CA4 1982). Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2). See *North Haven Board of Education v. Bell,* 456 U.S. 512, 521, 102 S.Ct. 1912, 1917, 72 L.Ed.2d 299 (1982); *United States v. Naftalin,* 441 U.S. 768, 773–774, 99 S.Ct. 2077, 2081–2082, 60 L.Ed.2d 624 (1979). In the latter case, *id.,* at 773, 99 S.Ct., at 2082, the Court said: "The short answer is that Congress did not write the statute that way." We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

The evolution of these statutory provisions supplies further evidence that Congress intended § 1963(a)(1) to extend beyond an interest in an enterprise. An early proposed version of RICO, S. 1861, ****301** 91st Cong., 1st Sess. (1969), had a single forfeiture provision for § 1963(a) that was limited to "all interest in the enterprise." This provision, however, later was divided into the present two subsections and the phrase "in the enterprise" was excluded from the first. Where Congress includes limiting language in an earlier version of a bill ***24** but deletes it prior to enactment, it may be presumed that the limitation was not intended. See *Arizona v. California,* 373 U.S. 546, 580–581, 83 S.Ct. 1468, 1487–1488, 10 L.Ed.2d 542 (1963). See Weiner, Crime Must Not Pay: RICO Criminal Forfeiture in Perspective, 1981 N.Ill.U.L.Rev. 225, 238 and n. 49. It is no answer to say, as petitioner does, Brief for Petitioner 17–18, that if the term "interest" were as all-encompassing as suggested by the majority opinion of the Court of Appeals, § 1963(a)(2) would have no meaning independent of § 1963(a)(1), and would be mere surplusage. This argument is plainly incorrect. Subsection (a)(1) reaches "any interest," whether or not in an enterprise, provided it was "acquired ... in violation of section 1962." Subsection (a)(2),

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on the other hand, is restricted to an interest in an enterprise, but that interest itself need not have been illegally acquired. Thus, there are things forfeitable under one, but not the other, of each of the subsections. [2]

2 There may well be factual situations to which both subsections apply. The subsections, however, are clearly not wholly redundant.

We note that the RICO statute's definition of the term "enterprise" in § 1961(4) encompasses both legal entities and illegitimate associations-in-fact. See *United States v. Turkette,* 452 U.S., at 580–593, 101 S.Ct., at 2527–2533. Forfeiture of an interest in an illegitimate association-in-fact ordinarily would be of little use because an association of that kind rarely has identifiable assets; instead, proceeds or profits usually are distributed immediately. Thus, construing § 1963(a)(1) to reach only interests in an enterprise would blunt the effectiveness of the provision in combatting illegitimate enterprises, and would mean that "[w]hole areas of organized criminal activity would be placed beyond" the reach of the statute. *United States v. Turkette,* 452 U.S., at 589, 101 S.Ct., at 2531.

Petitioner stresses that 21 U.S.C. § 848(a)(2), contained in the Controlled Substances Act, 84 Stat. 1242, as amended, specifically authorizes the forfeiture of "profits" obtained in a continuing criminal enterprise engaged in certain drug offenses. Brief for Petitioner 6–7. The Ninth Circuit in ***25** *Marubeni,* 611 F.2d, at 766, n. 7, placed similar reliance upon § 848(a)(2) and observed that the two statutes were passed by the same Congress in the same month. We feel, however, that the specific mention of "profits" in the Controlled Substances Act cannot be accepted as an indication that the broader language of § 1963(a)(1) was not meant to reach profits as well as other types of property interests. Language in one statute usually sheds little light upon the meaning of different language in another statute, even when the two are enacted at or about the same time. The term "profits" is specific; the term "interest" is general. The use of the specific in the one statute cannot fairly be read as imposing a limitation upon the general provision in the other statute. In addition, the RICO statute was aimed at organized crime's economic power in all its forms, and it was natural to use the broad term "interest" to fulfill that aim. In contrast, the narcotics activity proscribed by § 848 usually generates only monetary profits, a fact which would explain the use of the narrower term in § 848(a)(2).

Petitioner, of course, correctly suggests that members of Congress who voted for the RICO statute were aware of the Controlled Substances Act. See 116 Cong.Rec. 33651 (1970) (remarks of Rep. Brotzman); *id.,* at 1180–1182 (remarks of Sen. Thurmond); *id.,* at 33631 (remarks of Rep. Weicker); *id.,* at 33646 (remarks of Rep. Kastenmeier); *id.,* at 35318 (remarks of ****302** Rep. Anderson). It is most unlikely, however, that without explanation a potent forfeiture weapon was withheld from the RICO statute, intended for use in a broad assault on organized crime, while the same weapon was included in the Controlled Substances Act, meant for use in only one part of the same struggle. If this was Congress' intent, one would expect it to have said so in clear and understandable terms.

Petitioner also suggests that subsequent proposed legislation demonstrates that the RICO forfeiture provision of 1970 excludes profits. Brief for Petitioner 29–34. The bills to which petitioner refers, however, were introduced in order to ***26** overcome the decisions in *Marubeni, Meyers,* and *Thevis.* See, *e.g.,* S. 2320, 97th Cong., 2d Sess. (1982). The introduction of these bills hardly suggests that their sponsors viewed those decisions as correct interpretations of § 1963(a)(1). See *United States v. Gordon,* 638 F.2d 886, 888, n. 5 (CA5), cert. denied, 452 U.S. 909, 101 S.Ct. 3038, 69 L.Ed.2d 411 (1981). In any event, it is well settled that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories,* —— U.S. ——, ——, n. 27, 103 S.Ct. 1011, 1020, n. 27, 74 L.Ed.2d 882 (1983), quoting from *United States v. Price,* 361 U.S. 304, 313, 80 S.Ct. 326, 331, 4 L.Ed.2d 334 (1960). See, also, *United States v. Clark,* 445 U.S. 23, 33, n. 9, 100 S.Ct. 895, 902, n. 9, 63 L.Ed.2d 171 (1980).

Neither are we persuaded by petitioner's argument that his position is supported by the fact that certain state racketeering statutes expressly provide for the forfeiture of "profits," "money," "interest or property," or "all property, real or personal," acquired from racketeering. Brief for Petitioner 8–9. Nearly all of the state statutes post-date the *Meyers* and *Thevis* district court decisions. See, *e.g.,* Colo.Rev.Stat. § 18–17–106 (Supp.1982) (enacted in 1981); R.I. Gen.Laws § 7–15–3 (Supp.1982) (enacted in 1979). The legislatures of those States presumably employed language different from that of § 1963(a)(1) so as to avoid narrow interpretations of their laws along the lines of the narrow interpretations given the federal statute by the courts in *Meyers* and *Thevis.*

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V

If it is necessary to turn to the legislative history of the RICO statute, one finds that that history does not reveal, as petitioner would have us hold, see Brief for Petitioner 11–21, a limited congressional intent.

The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots. Congress' statement of findings and purpose in ***27** enacting Pub.L. 91–452, 84 Stat. 922 (1970), is set forth in its § 1. This statement dramatically describes the problem presented by organized crime. Congress declared, *id.,* at 923: "It is the purpose of this Act to seek the eradication of organized crime in the United States ... by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." This Court has recognized the significance of this statement of findings and purpose. *United States v. Turkette,* 452 U.S., at 588–589, 101 S.Ct., at 2531–2532. Further, Congress directed, by § 904(a) of Pub.L. 91–452, 84 Stat. 947: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." So far as we have been made aware, this is the only substantive federal criminal statute that contains such a directive; a similar provision, however, appears in the Criminal Appeals Act, 18 U.S.C. § 3731.

Congress emphasized the need to fashion new remedies in order to achieve its far-reaching objectives. See S.Rep. No. 91–617, p. 76 (1969).

> "What is needed here ... are new approaches that will deal not only with individuals, but also with the economic ****303** base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." *Id.,* at 79.

Senator Scott spoke of "new legal weapons," 116 Cong.Rec. 819 (1970), and Senator McClellan stressed the need for new penal remedies. *Id.,* at 591–592. Representative Poff, floor manager of the bill in the House, made similar observations. *Id.,* at 35193. Representative Rodino observed that "drastic methods ... are essential, and we must develop law enforcement measures at least as efficient as those of organized crime." *Id.,* at 35199. The RICO statute was viewed as one such "extraordinary" weapon. *Id.,* at 602 (remarks of Sen. Hruska). And the forfeiture provision was ***28** intended to serve all the aims of the RICO Statute, namely, to "punish, deter, incapacitate, and ... directly to remove a corrupting influence from the channels of commerce." *Id.,* at 18955 (remarks of Sen. McClellan).

The legislative history leaves no doubt that, in the view of Congress, the economic power of organized crime derived from its huge illegal profits. See Blakey, The RICO Civil Fraud Action in Context: Reflections on *Bennett v. Berg,* 58 Notre Dame L.Rev. 237, 249–256 (1982). Congress could not have hoped successfully to attack organized crime's economic roots without reaching racketeering profits. During the congressional debates, the sources and magnitude of organized crime's income were emphasized repeatedly. See, *e.g.,* 115 Cong.Rec. 5873, 5884–5885 (1969); 116 Cong.Rec. 590, 592 (1970) (remarks of Sen. McClellan). From all this, the intent to authorize forfeiture of racketeering profits seems obvious. H.R.Rep. No. 91–1549, p. 57 (1970), U.S.Code Cong. & Admin.News, p. 4007, recites that the forfeiture provision extends "to all property and interests, as broadly defined, which are related to the violations."

It is true that Congress viewed the RICO statute in large part as a response to organized crime's infiltration of legitimate enterprises. *United States v. Turkette,* 452 U.S., at 591, 101 S.Ct., at 2532. But Congress' concerns were not limited to infiltration. The broader goal was to remove the profit from organized crime by separating the racketeer from his dishonest gains. Forfeiture of interest in an enterprise often would do little to deter; indeed, it might only encourage the speedy looting of an infiltrated company. It is unlikely that Congress intended to enact a forfeiture provision that provided an incentive for activity of this kind while authorizing forfeiture of an interest of little worth in a bankrupt shell.

We are not persuaded otherwise by the presence of a 1969 letter from the then Deputy Attorney General to Senator McClellan. See Measures Relating to Organized Crime: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st ***29** Cong., 1st Sess., 407 (1969). That letter, with its reference to "one's interest in the enterprise" does not indicate, for us, any congressional intent to preclude forfeiture of racketeering profits. The reference, indeed, is not to § 1963(a) as finally enacted but to an earlier version in which forfeiture was to be expressly limited to an interest in an enterprise. The

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letter was merely following the language of the then pending bill. Furthermore, the real purpose of the sentence was not to explain what the statutory provision meant, but to explain why the Department of Justice believed it was constitutional.

The rule of lenity, which this Court has recognized in certain situations of statutory ambiguity, see *United States v. Turkette,* 452 U.S., at 587, n. 10, 101 S.Ct., at 2531 has no application here. That rule "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrong-doers." ****304** *Callanan v. United States,* 364 U.S. 587, 596, 81 S.Ct. 321, 326, 5 L.Ed.2d 312 (1961). Here, the language of the RICO forfeiture provision is clear, and "the rule of lenity does not come into play." *United States v. Turkette,* 452 U.S., at 588, n. 10, 101 S.Ct., at 2531, n. 10.

We therefore disagree with the reasoning of the respective courts in the *Marubeni, McManigal, Meyers,* and *Thevis* cases, and we affirm the judgment of the United States Court of Appeals for the Fifth Circuit. [3]

3 In our ruling today, we recognize that we have not resolved any ambiguity that might be inherent in the terms "profits" and "proceeds." Our use of those terms is not intended to suggest a particular means of calculating the precise amount that is subject to RICO forfeiture in any given case. We hold simply that the "interests" subject to forfeiture under § 1963(a)(1) are not limited to interests in an enterprise.

It is so ordered.

All Citations

464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17, RICO Bus.Disp.Guide 6100

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APPENDIX NO. 12

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506 F.Supp.3d 620
United States District Court, E.D. Wisconsin.

Donald J. TRUMP, Plaintiff,
v.
The WISCONSIN ELECTIONS COMMISSION, et al., Defendants.

Case No. 20-cv-1785-BHL
|
Signed 12/12/2020

Synopsis

Background: President of United States brought action under § 1983 against Wisconsin Elections Commission and its members, alleging that his rights under Electors Clause were violated. Commission moved to dismiss.

Holdings: The District Court, Brett H. Ludwig, J., held that:

President alleged injury in fact, as required for standing;

harms to President were traceable to Commission;

Eleventh Amendment immunity did not apply to claim by President;

claim by President was not moot;

Pullman or *Colorado River* abstention principles would not be utilized to defer to state court proceedings;

"Manner" for selection of Presidential Electors did not encompass anything more than "mode" of appointment; and

Wisconsin's "Manner" of choosing Presidential Electors did not violate Electors Clause even if "Manner" encompassed more than just "mode" of appointment.

Motion granted.

Procedural Posture(s): Motion to Dismiss.

Attorneys and Law Firms

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Elleny B. Christopoulos, Tyrone Martin St, Junior, II, City of Milwaukee, James M. Carroll, Julie P. Wilson, Kathryn Z. Block, Patrick J. McClain, Scott Brown, Tearman Spencer, Milwaukee City Attorney's Office, Milwaukee, WI, for Defendants Claire Woodall-Vogg, Mayor Tom Barrett, Jim Owczarski.

Barry J. Blonien, James E. Bartzen, Michael P. May, Boardman & Clark LLP, Madison, WI, for Defendants Mayor Satya Rhodes-Conway, Maribeth Witzel-Behl, Scott McDonell.

Daniel Bach, Lawton & Cates, S.C., Jefferson, WI, Daniel S. Lenz, Dixon R. Gahnz, Terrence M. Polich, Lawton & Cates SC, Madison, WI, for Defendants Mayor Cory Mason, Tara Coolidge, Mayor John Antaramian, Matt Krauter, Eric Genrich, Kris Teske.

Davida Brook, Susman Godfrey LLP, Los Angeles, CA, Jeffrey A. Mandell, Rachel E. Snyder, Richard Manthe, Stafford Rosenbaum LLP, Madison, WI, Justin A. Nelson, Susman Godfrey LLP, Houston, TX, Paul M. Smith, Campaign Legal Center, Washington, DC, Stephen Morrissey, Susman Godfrey LLP, Seattle, WA, Stephen Shackelford, Jr., Susman Godfrey LLP, New York, NY, for Defendant Tony Evers.

DECISION AND ORDER

BRETT H. LUDWIG, United States District Judge

***624** This is an *extraordinary* case. Plaintiff Donald J. Trump is the current president of the United States, having narrowly won the state of Wisconsin's electoral votes four years ago, through a legislatively mandated popular vote,

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with a margin of just over 22,700 votes. In this lawsuit, he seeks to set aside the results of the November 3, 2020 popular vote in Wisconsin, an election in which the recently certified results show he was defeated by a similarly narrow margin of just over 20,600 votes. Hoping to secure federal court help in undoing his defeat, plaintiff asserts that the defendants, a group of some 20 Wisconsin officials, violated his rights under the "Electors Clause" in Article II, Section 1 of the Constitution.[1] Plaintiff seizes upon three pieces of election guidance promulgated by the Wisconsin Elections Commission (WEC)—a creation of the Wisconsin Legislature that is specifically authorized to issue guidance on the state election statutes—and argues that the guidance, along with election officials' conduct in reliance on that guidance, deviated so significantly from the requirements of Wisconsin's election statutes that the election was itself a "failure."

1 Plaintiff's complaint also refers to the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. At the December 9, 2020 final pre-hearing conference, plaintiff disclaimed reliance on any First Amendment or Due Process claims. While counsel purported to reserve the Equal Protection claim, the complaint offers no clue of a coherent Equal Protection theory and plaintiff offered neither evidence nor argument to support such a claim at trial. It is therefore abandoned. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (undeveloped arguments and arguments unsupported by pertinent authority are waived).

Plaintiff's requests for relief are even more *extraordinary.* He seeks declarations that defendants violated his Constitutional rights and that the violations "likely" tainted more than 50,000 ballots. Based on this declaratory relief, his complaint seeks a "remand" of the case to the Wisconsin Legislature to consider and remedy the alleged violations. Plaintiff's ask has since continued to evolve. In his briefing, he says he wants "injunctive relief" requiring the Governor "to issue a certificate of determination consistent with, and only consistent with, the appointment of electors by the Wisconsin legislature." In argument, counsel made plain that plaintiff wants the Court to declare the election a failure, with the results discarded, and the door thus opened for the Wisconsin Legislature to appoint Presidential Electors in some fashion other than by following the certified voting results.

Defendants want plaintiff's claims thrown out, arguing his complaint fails to state a claim and raising several knotty issues of federal jurisdiction. With the Electoral College meeting just days away, the Court declined to address the issues in piecemeal fashion and instead provided plaintiff with an expedited hearing on the merits of his claims. On the morning of the hearing, the parties reached agreement on a stipulated set of facts and then presented arguments to the Court. Given the significance of the case, the Court promised, and ***625** has endeavored, to provide a prompt decision. Having reviewed the caselaw and plaintiff's allegations, the Court concludes it has jurisdiction to resolve plaintiff's claims, at least to the extent they rest on federal law, specifically the Electors Clause. And, on the merits of plaintiff's claims, the Court now further concludes that plaintiff has not proved that defendants violated his rights under the Electors Clause. To the contrary, the record shows Wisconsin's Presidential Electors are being determined in the very manner directed by the Legislature, as required by Article II, Section 1 of the Constitution. Plaintiff's complaint is therefore dismissed with prejudice.[2]

2 This decision constitutes the Court's findings of fact and conclusions of law under Federal Rule of Civil Procedure 52.

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PROCEDURAL BACKGROUND AND FINDINGS OF FACT

1. THE PARTIES

Plaintiff Donald J. Trump is the current, properly elected, President of the United States. In 2016, after a statewide recount, plaintiff won Wisconsin's Presidential Electors by 22,748 votes. *Certificate of Ascertainment for President, Vice President and Presidential Electors General Election – November 8, 2016*, seal affixed by Governor Scott Walker, National Archives, https://www.archives.gov/electoral-college/2016. Plaintiff went on to win the 2016 Electoral College with 304 electoral votes. 2016 Electoral College Results, National Archives, https://www.archives.gov/electoral-college/2016. He was a candidate for reelection to a second term as President in the November 3, 2020 election.

Defendant Wisconsin Elections Commission is a creation of the Wisconsin Legislature. *See* 2015 Wis. Act 118 § 4, Wis. Stat. § 5.05. It is a bi-partisan, six-person commission that has "responsibility for the administration" of the state election

laws in Chapters 5 to 10 and 12 of the Wisconsin Statutes. [3] Wis. Stat. § 15.61. Any action by the commission requires the affirmative vote of at least two-thirds of its members. Wis. Stat. § 5.05(1e). Defendants Ann S. Jacobs, Mark L. Thomsen, Marge Bostelmann, Dean Knudson, and Robert F. Spindell, Jr. are five of the six members of the commission. [4]

3 Chapter 11 of the Wisconsin Statutes contains the state's campaign finance laws, which are outside of the WEC's authority.

4 For reasons not explained, plaintiff did not name Commissioner Julie M. Glancey as a defendant.

Defendant Scott McDonnell is sued in his official capacity as the Dane County Clerk. As the county clerk, McDonnell has a host of election-related responsibilities, including providing ballots and elections supplies to the municipalities, preparing ballots, educating voters, and training election officials. *See* Wis. Stat. § 7.10. Additionally, McDonnell serves on the county board of canvassers, which is responsible for examining election returns and certifying the results to the WEC. Wis. Stat. § 7.60.

Defendants Maribeth Witzel-Behl, Tara Coolidge, Matt Krauter, and Kris Teske are sued in their official capacities as the City Clerks of Madison, Racine, Kenosha, and Green Bay. As city clerks, they supervise both voter registration and elections. Wis. Stat. § 7.15. They provide training for voters and election officials and equip the polling places. *Id.* Additionally, they are part of each respective city's board of canvassers. Wis. Stat. § 7.53.

Because of their substantial populations, Milwaukee County and the City of Milwaukee ***626** have additional "election boards." Milwaukee County has a county board of election commissioners and the City of Milwaukee has a municipal board of election commissioners. Wis. Stat. § 7.20(1). These boards have the same powers and duties assigned to the municipal and county clerks in other parts of the state. Wis. Stat. § 7.21. Defendant George L. Christiansen is sued in his official capacity as the Milwaukee County Clerk. As the county clerk, he serves as the executive director of the county board of election commissioners, *id.*, but he is not on the county board of canvassers. *See* Wis. Stat. § 7.60. Jim Owczarski is sued in his official capacity as the Milwaukee City Clerk. Like Defendant Christiansen, Owczarski maintains some election-related responsibilities, but he is not on the city's board of canvassers. Wis. Stat. § 7.53.

Julietta Henry is sued in her official capacity as Milwaukee County Elections Director. The record in unclear on Henry's duties as Elections Director. Claire Woodall-Vogg is sued in her official capacity as the Executive Director of the City of Milwaukee Election Commission. She has the same powers and duties assigned to city clerks throughout the rest of the state. *See* Wis. Stat. § 7.21.

Defendants Tom Barrett, Satya Rhodes-Conway, Cory Mason, John Antaramian, and Eric Genrich are sued in their official capacities as the Mayors of Milwaukee, Madison, Racine, Kenosha, and Green Bay. Plaintiff contends that these five mayors unlawfully promoted the expansion of mail-in voting in their cities by adopting practices that were banned by the Wisconsin Legislature. Under Wisconsin's election statutes, mayors play no formal role in presidential elections.

Defendants Tony Evers and Douglas La Follette are sued in their official capacities as the Governor and Secretary of State of Wisconsin. As governor, in accordance with Wis. Stat. § 7.70, Defendant Evers signed the certificate of ascertainment prepared by the WEC, affixed the state seal, and forwarded the certificate to the U.S. administrator of general services. Wis. Stat. § 7.70(5)(b). Defendant La Follette also signed the certificate of ascertainment.

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2. WISCONSIN'S MANNER OF CHOOSING PRESIDENTIAL ELECTORS

Article II, Section 1, Clause 2 of the United States Constitution (the "Electors Clause") states, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors ..." U.S. CONST. art. II, § 1, cl. 2. Pursuant to this federal Constitutional command, the Wisconsin Legislature has directed that Wisconsin choose its Presidential Electors through a general election. *See* Wis. Stat. § 8.25. Specifically, the Wisconsin Legislature has directed:

> (1) Presidential electors. By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and

> representatives in congress. A vote for the president and vice president nominations of any party is a vote for the electors of the nominees.

Wis. Stat. § 8.25(1). The statutes define "general election" as "the election held in even-numbered years on the Tuesday after the first Monday in November to elect United States ... presidential electors." Wis. Stat. § 5.02(5).

The Wisconsin Legislature has also established laws detailing the particulars of election administration; these details are set forth in Chapters 5 to 12 of the Wisconsin Statutes. For the last five years, responsibility for the administration of ***627** Wisconsin elections has rested with the WEC. The Wisconsin Legislature created the WEC in 2015 specifically to "have the responsibility for the administration of ... laws relating to elections and election campaigns." 2015 Wis. Act 118 § 4; Wis. Stat. § 5.05. To carry out these duties, the legislature has delegated significant authority to the WEC. The Wisconsin Legislature directed the WEC to appoint an administrator to "serve as the chief election officer" of the state. Wis. Stat. § 5.05(3d), (3g). The Wisconsin Legislature has authorized the WEC to conduct investigations, issue subpoenas, and sue for injunctive relief. Wis. Stat. § 5.05(b), (d). The legislature also directed the WEC to receive reports of "possible voting fraud and voting rights violations," Wis. Stat. § 5.05(13), and to "investigate violations of laws administered by the commission and ... prosecute alleged civil violations of those laws." Wis. Stat. § 5.05(2m)(a).

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The Wisconsin Legislature has also assigned powers and duties under the state election laws to municipal and county clerks, municipal and county boards of canvassers, and in Milwaukee, the municipal and county boards of election commissioners. Wis. Stat. §§ 7.10, 7.15, 7.21. The Wisconsin Legislature has directed that these officials, along with the WEC, administer elections in Wisconsin. *See* Wis. Stat. chs. 5 to 10 and 12. When the polls close after an election, these officials make sure that "all ballots cast at an election ... be counted for the person ... for whom ... they were intended." Wis. Stat. § 7.50(2). Once all the votes have been counted, the WEC chairperson "shall publicly canvass the returns and make his or her certifications and determinations on or before ... the first day of December following a general election." Wis. Stat. § 7.70(3)(a). For the determination of Presidential Electors, the Wisconsin Legislature has directed the WEC to "prepare a certificate showing the determination of the results of the canvass and the names of the persons elected." Wis. Stat. § 7.70(5)(b). The legislature has further directed that "the governor shall sign [the certificate], affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services." *Id.* At noon on the first Monday after the second Wednesday in December, the Presidential Electors meet to vote for the presidential candidate from the political party which nominated them. Wis. Stat. § 7.75.

In addition to logistically administering the election, the Wisconsin Legislature has directed the WEC to issue advisory opinions, Wis. Stat. § 5.05(6a), and "[p]romulgate rules ... applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns." Wis. Stat. § 5.05(1)(f). The WEC is to "conduct or prescribe requirements for educational programs to inform electors about voting procedures, voting rights, and voting technology." Wis. Stat. § 5.05(12).

Finally, the Wisconsin Legislature has provided detailed recount procedures. Wis. Stat. § 9.01. After requesting a recount, "any candidate ... may appeal to circuit court." Wis. Stat. § 9.01(6). The legislature has also directed that "[Wis. Stat. § 9.01] constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process." Wis. Stat. § 9.01(11).

3. WEC'S GUIDANCE IN ADVANCE OF THE 2020 PRESIDENTIAL ELECTION IN WISCONSIN

Consistent with its statutory mandate, since the start of the year, the WEC has published more than 175 messages to County and Municipal elections officials in ***628** anticipation of the November 2020 general election. *See Recent Clerk Communications*, Wisconsin Elections Commission, https://elections.wi.gov/clerks/recent-communications. In addition to notifying elections officials of training opportunities, relevant court decisions, and upcoming deadlines, these messages provided detailed guidance on how to prepare for the election and count the resulting votes. *See id.* As stipulated by the parties, the WEC issued specific guidance on three specific issues flagged by plaintiff: missing or incorrect absentee ballot witness certificate addresses, voters claiming indefinitely confined status, and absentee ballot drop boxes. (Stipulation of Proposed Facts and Exhibits, ECF No. 127 ¶11.)

WEC's guidance on at least one of these issues dates back even further. More than four years ago, on October 18, 2016, the WEC issued written guidance to city and county elections boards providing guidance on the topic of witness addresses provided in connection with absentee balloting. (Stipulation, ECF No. 127 ¶4.)[5] This guidance explained to elections officials how to handle missing or incorrect witness addresses on absentee certificate envelopes. (Pl. Ex. 73, ECF No. 117-72.) The memo highlighted Wis. Stat. § 6.87, which states "[i]f a certificate is missing the address of a witness, the ballot may not be counted." (*Id.*) Since the statute does not provide any additional details, the WEC defined "address" as a "street number, street name and name of municipality." (*Id.*) The memo then provided guidance for situations where a voter may have left off the certificate one or more components of the witness address. In the memorandum, the WEC states "clerks **must** take corrective actions in an attempt to remedy a witness address error." (*Id.*) The guidance allowed clerks to contact the voter to notify them of the address requirement; however, the clerk only had to contact the voter if the clerk could not "remedy the address insufficiency from extrinsic sources." (*Id.*) The WEC stated "clerks shall do all that they can reasonably do to obtain any missing part of the witness address." (*Id.*) The purpose of the guidance was to "assist voters in completing the absentee certificate sufficiently so their votes may be counted." (*Id.*) This has been the unchallenged guidance on the issue for more than four years.

5 The parties' stipulation describes this as an October 19, 2016 memorandum. (Stipulation of Proposed Facts and Exhibits, ECF No. 127 ¶4.) The memo itself is dated October 18, 2016, however. (ECF No. 117-72.) The Court will use the date on the actual document.

In September 2020, as directed in Wis. Stat. § 7.08(3), the WEC updated the Wisconsin Election Administration Manual. The updated manual states "[c]lerks may add a missing witness address using whatever means are available." *Wis. Election Admin. Manual*, 99 (September 2020). Finally, on October 19, 2020, the WEC issued "Spoiling Absentee Ballot Guidance," reaffirming the previous guidance, and stating "the clerk should attempt to resolve any missing witness address information prior to Election Day if possible, and this can be done through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness). The witness does not need to appear to add a missing address." (Pl. Ex. 35, ECF No. 117-35.)

On March 29, 2020, in the early stages of the COVID-19 pandemic, the WEC issued "Guidance for Indefinitely Confined Electors COVID-19" to election officials across the state. (Pl. Ex. 2, ECF No. 117-2.) Through the published guidance, the WEC stated that "many voters of a certain age or in at-risk populations" may meet the standard of indefinitely confined due to the ongoing pandemic. (*Id.*) The Guidance also stated:

> ***629** 1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.
>
> 2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness or infirmity, or disability.

(*Id.*) The WEC issued this guidance after the Dane County Clerk issued a statement advising that the pandemic itself was sufficient to establish indefinite confinement for all voters. (*See* Stipulation, ECF No. 127 ¶23.) The statement was challenged in court, and the Wisconsin Supreme Court granted a temporary injunction against the Dane County Clerk. *See Jefferson v. Dane County*, 2020AP557-OA (March 31, 2020). In concluding that the Dane County guidance was incorrect, the Wisconsin Supreme Court expressly confirmed that the WEC guidance quoted above provided "the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." *Id.*

On August 19, 2020, the WEC sent all Wisconsin election officials additional guidance that, among other things, discussed absentee ballot drop boxes. (Pl. Ex. 13, ECF No. 117-13.) Wisconsin law provides that absentee ballots "shall be mailed by the elector, or delivered in person, to the municipal clerk." Wis. Stat. § 6.87(4)(b). The WEC memorandum provided advice on how voters could return their ballots to the municipal clerk, including "information and guidance on drop box options for secure absentee ballot return for voters." (Pl. Ex. 13, ECF No. 117-13.) Citing to a resource developed by the U.S. Cybersecurity and Infrastructure Security Agency (CISA), the guidance states

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the "drop boxes can be staffed or unstaffed, temporary or permanent." (*Id.*) The memorandum stated that the "drop boxes ... allow voters to deliver their ballots in person" and will allow voters "who wait until the last minute to return their ballot." (*Id.*) The memorandum lists potential types of drop boxes, along with security requirements, chain of custody, and location suggestions for the drop boxes. (*Id.*)

As stipulated by the parties, election officials in Milwaukee County, the City of Milwaukee, Dane County, and the City of Madison relied on the above WEC guidance when handling absentee ballots with missing or incorrect witness address, using absentee ballot drop boxes, and handling voters that had claimed indefinitely confined status. (Stipulation, ECF No. 127 ¶11.) Because they relied on the guidance, election workers added missing information to the witness address on at least some absentee ballots, more than five hundred drop boxes were used throughout the state, and approximately 240,000 "indefinitely confined" voters requested absentee ballots. (*Id.* ¶¶ 17, 18, 28.)

4. THE 2020 PRESIDENTIAL ELECTION IN WISCONSIN

On November 3, 2020, nearly 3.3 million Wisconsin voters cast their ballots in the general election for the President and Vice President of the United States. (Stipulation, ECF No. 127 ¶7.) At 8:00 p.m., all polls in Wisconsin closed. Wis. Stat. § 6.78. The respective boards of canvassers began to publicly canvass all the votes received at the polling place. Wis. Stat. § 7.51.

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Voting officials in Milwaukee dealt with an unprecedented number of absentee ballots during this election. (Pl. Ex. 62, ECF No. 117-61.) In Milwaukee and Dane Counties, ***630** and likely other locations, election officials processed the absentee ballots in accordance with guidance published by the WEC. (Stipulation, ECF No. 127 ¶11.) The WEC received the last county canvass on November 17, 2020. (*Id.* ¶8.) On November 18, 2020, the deadline for requesting a recount, plaintiff sought a recount under Wis. Stat. § 9.01 of only Dane and Milwaukee Counties. [6] (*Id.* ¶9.) The Milwaukee County recount was completed on November 27, 2020 and the Dane County recount was completed on November 29, 2020. (Id. ¶10.) Once the recount was complete, the WEC prepared the Certificate of Ascertainment for the Governor's signature. *See* Wis. Stat. § 7.70(5)(b). On November 30, 2020, Governor Evers signed the certificate and affixed the state seal. (Def. Ex. 501, ECF No. 119-1.)

6 After receiving a recount petition and $3 million payment from the Trump campaign, the six-member, bipartisan commission conducted a meeting on November 18, 2020, at which the commission unanimously approved the recount order. The WEC ordered a partial recount of the presidential election results in Dane and Milwaukee Counties on November 19, 2020. The recount order required Dane and Milwaukee Counties' boards of canvassers to convene by 9 a.m. Saturday, November 21, and complete their work by noon on Tuesday, December 1. Wis. Elections Comm'n Order for Recount, Recount EL 20-01, https://elections.wi.gov/node/7250.

On December 1, 2020, the day after Wisconsin certified its election results, Donald Trump, Michael Pence, and the Trump campaign filed a petition in the Wisconsin Supreme Court against Governor Tony Evers, the Wisconsin Elections Commission, and other state election officials. *Trump v. Evers*, No. 2020AP001971 (Wis. S. Ct.). The issues presented by the plaintiffs included whether absentee ballots should be excluded due to various alleged deviations from legislated election procedures. As a remedy, they asked the Court to decertify the state's election results and exclude 221,000 votes in Milwaukee and Dane Counties from the count. On December 3, 2020, the Wisconsin Supreme Court denied the petition for leave to commence an original action in the state Supreme Court, but noted that, as an aggrieved candidate, plaintiff could refile at the circuit court level.

That same day, plaintiff filed his complaint in this Court. Additionally on that day, plaintiff, along with Michael R. Pence, and Donald J. Trump for President, Inc. filed complaints in Dane and Milwaukee County Circuit Courts against Joseph R. Biden, Kamala D. Harris, and several Wisconsin election officials, some of whom are defendants in this case. *Trump v. Biden*, No. 2020CV007092 (Milw. Co. Cir. Ct.), No. 2020CV002514 (Dane Co. Cir. Ct.). Chief Justice Roggensack of the Wisconsin Supreme Court combined the cases and appointed Racine County Reserve Judge Stephen A. Simanek to hear it. The suits are substantially similar and both allege irregularities in the way absentee ballots were administered. In the Milwaukee County case, the plaintiffs allege the ballots were issued without the elector having first submitted a written application; there were incomplete and altered certification envelopes; and there was a massive surge in indefinitely confined absentee ballot voters. The Dane County case included the same claims, plus one involving an

allegation that absentee ballots were improperly completed or delivered to City of Madison employees at a public event, "Democracy in the Park." The plaintiffs asked the state court to set aside the county board of canvassers' legal determinations that certain absentee ballots should be counted due to deviations in state elections laws. [7]

[7] On December 11, Judge Simanek affirmed the recount and ruled against plaintiff in the state court proceeding. *Trump v. Biden*, No. 2020CV007092, Doc. 101 (Milw. Co. Cir. Ct. Dec. 11, 2020). Plaintiff has since filed an appeal in the Wisconsin Supreme Court.

*631 LEGAL CONCLUSIONS AND ANALYSIS

Plaintiff claims that defendants violated his rights under the Electors Clause by "deviating from the law, substituting their 'wisdom' for the laws passed by the State Legislature and signed by the Governor." (Pl. Br., ECF No. 109.) In the complaint, plaintiff contends three specific pieces of guidance issued by the WEC, and followed by the named defendants, contradict Wisconsin's election statutes, and that the WEC lacked the authority to issue any guidance in contravention of Wisconsin law. (Compl., ECF No. 1.) Invoking the Court's federal question jurisdiction under 28 U.S.C. § 1331, plaintiff asserts claims for the violation of his federal Constitutional rights under 42 U.S.C. § 1983. (*Id.*) Among other remedies, he seeks declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, and asks this Court to declare the Wisconsin general election void under the U.S. Constitution. (*Id.*)

I. This Court Has Limited Jurisdiction to Resolve Plaintiff's Electors Clause Challenge.

Before addressing the merits of plaintiff's claims, this Court has the obligation of confirming that it has jurisdiction even to consider them. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (federal district courts "possess only that power authorized by Constitution and statute"). Defendants offer a host of arguments related to the justiciability of plaintiff's claims. They insist that plaintiff lacks standing to assert his claims, that his claims are barred by the Eleventh Amendment, and that they are moot. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.) Finally, they contend that even if this Court could resolve plaintiff's claims, it should abstain from doing so. (Defs. Brs., ECF No. 70, 81, 87, 95, 101, and 120.) Despite the tricky questions of federal jurisdiction implicated by plaintiff's claims and requests for relief, the Court concludes plaintiff's claims are justiciable, at least in part. Given the importance of the issues at stake and the need for a prompt resolution, the Court will not abstain from ruling on whether defendants violated plaintiff's federal rights under the Electors Clause.

A. Plaintiff Has Standing to Seek an Adjudication of the Alleged Violation of His Rights under the Electors Clause.

Defendants insist that plaintiff lacks standing to assert claims and obtain declaratory relief based on the Electors Clause. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.) That plaintiff seeks primarily declaratory relief does not remove his obligation to establish standing. The Declaratory Judgment Act permits the Court to "declare the rights and other legal relations of any interested party," but only when there is "a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201(a). "A 'controversy' in this sense must be one that is appropriate for judicial determination," *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 81 L.Ed. 617 (1937), and "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

To establish standing, plaintiff bears the burden of proving that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be ***632** redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016), as revised (May 24, 2016). An injury in fact is one in which plaintiff claims to have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Id.* (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130).

Plaintiff asserts that he suffered an injury in fact when he "was denied the Constitutional right to have electors appointed in a lawful manner in an election in which he was a candidate." (Pl. Br., ECF No. 109.) The Court agrees. The Eighth Circuit and the Eleventh Circuit have concluded that losing candidates likely have standing to bring a claim under the Electors Clause, because such a candidate has suffered a "personal, distinct injury." *Wood v. Raffensperger*, No. 20-14418, 981 F.3d 1307, 1314, (11th Cir. Dec. 5, 2020);

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Carson v. Simon, 978 F.3d 1051, 1057 (8th Cir. 2020) ("An inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors."). That is the situation here: plaintiff, a candidate for election, claims he was harmed by defendants' alleged failure to comply with Wisconsin law. Assuming he could prove his claims, he has suffered an injury. Plaintiff, as a candidate for election, has a concrete, particularized interest in the actual results of the general election. *Carson*, 978 F.3d at 1057; *see Carney v. Adams*, —— U.S. ——, 141 S.Ct. 493, 208 L.Ed.2d 305, (Dec. 10, 2020) (holding plaintiff had not proved injury in fact sufficient to establish standing where plaintiff was merely potential candidate and had not yet applied for judicial position). Plaintiff has therefore established injury in fact.

Based on the allegations in his complaint, plaintiff also meets the other requirements for standing. He contends that defendants' failure to comply with Wisconsin law has resulted in a failed election, one in which he was one of the two major-party candidates for President. (Compl., ECF No. 1.) As administrators of the election, defendants implemented the Wisconsin election statutes and WEC's guidance. His harms are therefore traceable to defendants. And as redress, he seeks a declaration that defendants violated the Electors Clause by failing to follow the directions of the Wisconsin Legislature during the 2020 Presidential Election.[8] (*Id.*) Redressability is established because "plaintiff 'personally would benefit in a tangible way from the court's intervention.' " *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 n.5, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Thus, his alleged injury is fairly traceable to the challenged conduct of the defendants and would be redressed by a favorable judicial decision.

8 The complaint alleges the exclusive remedy for a failed election resides in the Wisconsin Legislature. (Compl., ECF No. 1.) That allegation brought strongly into question whether this Court could redress Plaintiff's injury, a point raised by the Court at the initial hearing with the parties. Plaintiff has since explained that he seeks a declaration that the Wisconsin general election was a failed election under 3 U.S.C. § 2, a declaration he argues is a predicate to allowing the Wisconsin Legislature to take action to determine the manner in which the state should appoint its Presidential Electors now that the originally chosen method has "failed." (Transcript, ECF No. 130.) While this explanation is tenuous, it sufficiently ties the relief requested to a potential remedy to establish standing.

Defendants' arguments against standing are largely premised on their challenges to the merits of plaintiff's claims. For example, defendants complain that "[p]laintiff offers no proof whatsoever of how many votes were affected in the three categories ***633** of alleged state election law violations he identifies." (Def. Br., ECF No. 98.) But that argument puts the cart before the horse. A court must determine standing based on the allegations in the complaint, not based on its final resolution of the veracity of those allegations. *Spokeo*, 136 S. Ct. at 1547 ("Where, as here, a case is at the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element."). If plaintiff were to succeed in proving that defendants violated the Electors Clause, causing Wisconsin's Presidential Electors to be appointed in a manner inconsistent with the Wisconsin Legislature's directives, and depriving plaintiff of his opportunity to win those Presidential Electors, he should have the ability (and the standing) to enforce the Constitution's plain terms in federal court.

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B. The Eleventh Amendment and *Pennhurst* Do Not Apply to Plaintiff's Unique Article II Claims.

Defendants next argue that plaintiff's claims are barred by the Eleventh Amendment and the Supreme Court's decision in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). (Defs. Brs., ECF No. 75, 81, 98, 101, and 120.) They contend that plaintiff is complaining that defendants failed to comply with state law such that the Eleventh Amendment bars this Court from entertaining such claims. (*Id.*)

The Eleventh Amendment provides that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Defendants are correct that, as a general matter, the Eleventh Amendment bars litigation in federal courts against a state.[9] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 336 (7th Cir. 2000) ("[The Eleventh] Amendment bars federal jurisdiction over suits brought against a state ... [and] extends to state agencies as well."). But the Supreme Court has long held that suits against state agents, rather than against the state itself, based on those agents' violations of federal law, can

be maintained in federal court without running afoul of the Eleventh Amendment. *See Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 52 L.Ed. 714 (1908). A federal court thus may adjudicate and order relief against state officers based on allegations of ongoing unconstitutional conduct. *Id.*; *MCI Telecommunications Corp.*, 222 F.3d at 345.

9 The Eleventh Amendment precludes a federal suit against state agencies, and this likely includes the Wisconsin Elections Commission. *See* Wis. Stat. § 5.05; *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 336 (7th Cir. 2000); *Feehan v. Wisconsin Elections Commission*, No. 20-cv-1771, 506 F.Supp.3d 596, (E.D. Wis. Dec. 9, 2020). The WEC has not made this argument. Even if it had, plaintiff's claims against the individual commission members would survive.

In *Pennhurst*, the Supreme Court clarified that the rule in *Ex parte Young* does not extend to claims based merely on alleged violations of state law. 465 U.S. at 106, 104 S.Ct. 900 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). Thus, under the Eleventh Amendment and state sovereign immunity, a federal court "cannot enjoin a state officer from violating state law." *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999).

***634** The *Pennhurst* exception to *Ex parte Young* does not apply here, because plaintiff's claims are based on federal law—the Electors Clause of Article II, Section 1 of the U.S. Constitution. *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 493 F.Supp.3d 331, 422–23, (W.D. Pa. Oct. 10, 2020) (holding that claims under the Electors Clause are not barred by the Eleventh Amendment); *cf. Dean Foods Co.*, 187 F.3d at 614 ("the question at the heart of this jurisdictional matter is what is the source of the regulations' potential invalidity"). While plaintiff also cites provisions of Wisconsin's election statutes, he does so in an attempt to show that defendants violated not merely those statutes, but rather the Electors Clause itself. In this unique context, alleged violations of state laws implicate and may violate federal law. *See Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000) ("[I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution."). This is the opposite of what the Eleventh Amendment forbids; here, a truly federal cause of action is being articulated. Because plaintiff's claims and request for relief are premised on a federal Constitutional violation, not merely a violation of state law, *Pennhurst* does not apply, and the Eleventh Amendment does not bar plaintiff's claims.

C. Plaintiff's Claims Are Not Moot.

Defendants also contend plaintiff's claims are moot. (Defs. Brs., ECF No. 70, 75, 95, 120.) They insist that because plaintiff waited until after Wisconsin certified the election results to file suit, his suit is too late. (*Id.*) They further maintain that plaintiff's claims are moot because Governor Evers has already signed a "Certificate of Ascertainment For President, Vice President, and Presidential Electors General Election - November 3, 2020" (2020 Electoral College Results, National Archives, https://www.archives.gov/electoral-college/2020) on November 30, 2020, an act they contend makes this action irrelevant. (*Id.*)

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The final determination of the next President and Vice President of the United States has not been made, however, and the issuance of a Certificate of Ascertainment is not necessarily dispositive on a state's electoral votes. *See Bush v. Gore*, 531 U.S. 98, 144, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (Ginsburg J., dissenting) (noting none of the various Florida elector deadlines "has ultimate significance in light of Congress' detailed provisions for determining, on 'the sixth day of January,' the validity of electoral votes").

Under the federal statute governing the counting of electoral votes, a state governor may issue a certificate of ascertainment based on the canvassing and then a subsequent certificate of "determination" upon the conclusion of all election challenges. 3 U.S.C. § 6. The certificate of "determination" notifies the U.S. Congress of the state decision when Congress convenes on January 6 to count the electoral votes. Indeed, the WEC acknowledged that plaintiff's claims are not moot in a filing with the Wisconsin Supreme Court. (Response of Respondents Wisconsin Elections Commission and Commissioner Ann Jacobs, *Trump v. Evers*, No. 20AP1971-OA, filed Dec. 1, 2020, ECF No. 109-1.) At this time, it is also unclear whether the litigation commenced in state court, *Trump v. Biden*, No. 2020CV007092 (Milw. Co. Cir. Ct.), No. 2020CV002514 (Dane Co. Cir. Ct.), is coming to a final resolution ***635** sufficient to resolve plaintiff's challenges. Given plaintiff's pending appeal and the limited time available should that appeal succeed on the state law

issues, this Court will proceed to decide the merits of the federal law claims. The Court concludes this case is not yet moot.

D. This Court Is Not Required to Abstain from Deciding Plaintiff's Challenge under the Electors Clause.

Defendants also contend that even if this Court could adjudicate plaintiff's claims, it should abstain from doing so. (Defs. Brs., ECF No. 70, 81, 87, 95, 101, and 120.) They focus on three different abstention doctrines: (1) *Wilton/Brillhart* abstention; (2) *Pullman* abstention; and (3) *Colorado River* abstention. (*Id.*) After reviewing the law under all three forms of abstention, this Court will decline defendants' invitation to abstain.

Defendants first invoke the *Wilton/Brillhart* abstention doctrine, derived from *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995), and *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942). Under the *Wilton/Brillhart* abstention doctrine, "district courts possess significant discretion to dismiss or stay claims seeking declaratory relief, even though they have subject matter jurisdiction over such claims." *R.R. St. & Co. v. Vulcan Materials Co.*, 569 F.3d 711, 713 (7th Cir. 2009). While labelled with Supreme Court case names, this form of abstention arises from the plain terms of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, itself. Section 2201 expressly provides that district courts "*may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). The statute thus gives district courts the discretion not to declare the rights of litigants. The Seventh Circuit has confirmed that a district court properly exercises discretion to abstain where, for example, "declaratory relief is sought and parallel state proceedings are ongoing." *Envision Healthcare, Inc. v. PreferredOne Ins. Co.*, 604 F.3d 983, 986 (7th Cir. 2010).

Defendants also invoke *Pullman* abstention. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501-02, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The *Pullman* doctrine "applies when 'the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law.' " *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 150 (7th Cir. 2011) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-17, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996)). *Pullman* abstention is appropriate if there is (1) "a substantial uncertainty as to the meaning of the state law" and (2) "a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Id.* (internal quotation marks omitted).

Finally, defendants ask the Court to avoid deciding this case under *Colorado River* abstention. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Under *Colorado River* abstention principles, a federal court should abstain in favor of a parallel state court lawsuit if (1) "the concurrent state and federal actions are actually parallel" and (2) "the necessary exceptional circumstances exist to support a stay or dismissal." *DePuy Synthes Sales, Inc. v. OrthoLA, Inc.*, 953 F.3d 469, 477 (7th Cir. 2020) (internal quotation marks omitted).

The Court declines to abstain under any of these doctrines. The federal Constitutional issues raised in plaintiff's ***636** complaint are obviously of tremendous public significance. For the first time in the nation's history, a candidate that has lost an election for president based on the popular vote is trying to use federal law to challenge the results of a statewide popular election. While there is parallel litigation pending in the state court, that litigation does not address the federal constitutional issue that is the center of plaintiff's case. Given the importance of the federal issue and the limited timeline available, it would be inappropriate to wait for the conclusion of the state court case. In these circumstances, the Court will exercise its discretion to declare plaintiff's rights under the Electors Clause and will decline to utilize *Pullman* or *Colorado River* abstention principles to defer to the state court proceedings.

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II. Plaintiff's Claims Fail on Their Merits—Wisconsin's Appointment of Presidential Electors for the 2020 Presidential Election Was Conducted in the Manner Directed by the Wisconsin Legislature.

To succeed on his claims for relief under 42 U.S.C. § 1983, plaintiff must prove that defendants acted under the color of state law and deprived him of a right secured by the Constitution or laws of the United States. *Wilson v. Warren Cnty., Ill.*, 830 F.3d 464, 468 (7th Cir. 2016) (citations omitted). Plaintiff alleges that the defendants violated his rights under the Electors Clause in Article II, Section 1. (Compl., ECF No. 1.) There is no dispute that defendants' actions as alleged in the complaint were undertaken under the color of Wisconsin law. Defendants strongly and uniformly dispute, however, that their conduct

violated any Constitutional provision. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.)

A. The Wisconsin Legislature Has Directed the Appointment of Presidential Electors to Be by Popular Vote.

The Electors Clause directs state legislatures to appoint presidential electors in a manner of their choosing. U.S. CONST. art. II, § 1, cl. 2. As the Supreme Court explained just this past summer, the Electors Clause was the result of "an eleventh-hour compromise" at the 1787 Constitutional convention. *Chiafalo v. Washington*, —— U.S. ——, 140 S. Ct. 2316, 2320, 207 L.Ed.2d 761 (2020). Apparently fatigued and ready to return to their homes, the delegates decided on language that would give state legislatures the responsibility of choosing the "Manner" in which presidential electors would be appointed. *Id.* And the Supreme Court has confirmed that state legislators have "the broadest power of determination" over who becomes a Presidential Elector. *Id.* at 2324 (quoting *McPherson v. Blacker*, 146 U.S. 1, 27, 13 S.Ct. 3, 36 L.Ed. 869 (1892)).

Today, the manner of appointment among the states is largely uniform. *See Chiafalo*, 140 S. Ct. at 2321. All states use an appointment process tied to the popular vote, with political parties fielding presidential candidates having the responsibility to nominate slates of Presidential Electors. *Id.* at 2321-22. But that manner of appointing Presidential Electors is not required by the Constitution. As Chief Justice Fuller explained in 1892:

> The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature ***637** exclusively to define the method of effecting the object.

McPherson, 146 U.S. at 27, 13 S.Ct. 3. Historically, presidential electors have been appointed directly by state legislatures, by general ticket, by districts, and by majority popular vote. *Id.* at 27-32, 13 S.Ct. 3 (summarizing the methods by which presidential electors were appointed by state legislatures during the first four presidential elections). But by 1832, "all States but one had introduced popular presidential elections." *Chiafalo*, 140 S. Ct. at 2321.

The Wisconsin Legislature's decision to appoint the state's presidential electors by popular vote is embodied in Wis. Stat. § 8.25(1). This statute provides:

> Presidential electors. By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress. A vote for the president and vice president nominations of any party is a vote for the electors of the nominees.

Wis. Stat. § 8.25(1). The statutes define "general election" as "the election held in even-numbered years on the Tuesday after the first Monday in November to elect United States ... presidential electors." Wis. Stat. § 5.02(5).

Plaintiff contends defendants have violated the Electors Clause by failing to appoint the state's presidential electors in the "Manner" directed by the Wisconsin Legislature. (Compl., ECF No. 1.) By this, plaintiff means that he has raised issues with the WEC's guidance on three issues related to the administration of the election. This argument confuses and conflates the "Manner" of appointing presidential electors—popular election—with underlying rules of election administration. As used in the Electors Clause, the word "Manner" refers to the "[f]orm" or "method" of selection of the Presidential Electors. *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring) (citations omitted). It "requires state legislatures merely to set the approach for selecting Presidential electors." *Id.* Put another way, it refers simply to "the mode of appointing electors—consistent with the plain meaning of the term." *Id.*; *see also McPherson v. Blacker*, 146 U.S. 1, 27, 13 S.Ct. 3, 36 L.Ed. 869 (1892) ("It has been said that the word 'appoint' is not the most appropriate word to

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describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode ...").

The approach, form, method, or mode the Wisconsin Legislature has set for appointing Presidential electors is by "general ballot at the general election." Wis. Stat. § 8.25(1). There is no dispute that this is precisely how Wisconsin election officials, including all the defendants, determined the appointment of Wisconsin's Presidential Electors in the latest election. They used "general ballot[s] at the general election for choosing the president and vice president of the United States" and treated a "vote for the president and vice president nominations of any party is a vote for the electors of the nominees." Absent proof that defendants failed to follow this "Manner" of determining the state's Presidential Electors, plaintiff has not and cannot show a violation of the Electors Clause.

Plaintiff's complaints about the WEC's guidance on indefinitely confined voters, the use of absentee ballot drop boxes, and corrections to witness addresses accompanying absentee ballots are not challenges to the "Manner" of Wisconsin's appointment of Presidential Electors; they are disagreements over election administration. Indeed, the existence of these (or other) disagreements in the implementation ***638** of a large election is hardly surprising, especially one conducted statewide and involving more than 3.2 million votes. But issues of mere administration of a general election do not mean there has not been a "general ballot" at a "general election." Plaintiff's conflation of these potential nonconformities with Constitutional violations is contrary to the plain meaning of the Electors Clause. If plaintiff's reading of "Manner" was correct, any disappointed loser in a Presidential election, able to hire a team of clever lawyers, could flag claimed deviations from the election rules and cast doubt on the election results. This would risk turning every Presidential election into a federal court lawsuit over the Electors Clause. Such an expansive reading of "Manner" is thus contrary both to the plain meaning of the Constitutional text and common sense.

B. Even If "Manner" Includes Aspects of Election Administration, Defendants Administered Wisconsin's 2020 Presidential Election as Directed by the Wisconsin Legislature.

Plaintiff's claims would fail even if the Court were to read the word "Manner" in Article II, Section 1, Clause 2 to encompass more than just the "mode" of appointment. Including material aspects of defendants' election administration in "Manner" does not give plaintiff a win for at least two reasons. First, the record shows defendants acted consistently with, and as expressly authorized by, the Wisconsin Legislature. Second, their guidance was not a significant or material departure from legislative direction.

Plaintiff's "Manner" challenges all stem from the WEC's having issued guidance concerning indefinitely confined voters, the use of absentee ballot drop boxes, and corrections to witness addresses on absentee ballots. (Compl., ECF No. 1.) Plaintiff expresses strong disagreement with the WEC's interpretations of Wisconsin's election statutes, accusing the WEC of "deviat[ing] from the law" and "substitut[ing] their 'wisdom' for the laws passed by the State Legislature and signed by the Governor." (Pl. Br., ECF No. 109.) While plaintiff's statutory construction arguments are not frivolous, when they are cleared of their rhetoric, they consist of little more than ordinary disputes over statutory construction.

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These issues are ones the Wisconsin Legislature has expressly entrusted to the WEC. Wis. Stat. § 5.05(2w) ("The elections commission has the responsibility for the administration of chs. 5 to 10 and 12."). When the legislature created the WEC, it authorized the commission to issue guidance to help election officials statewide interpret the Wisconsin election statutes and new binding court decisions. Wis. Stat. § 5.05(5t). The WEC is also expressly authorized to issue advisory opinions, Wis. Stat. § 5.05(6a), and to "[p]romulgate rules ... applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns." Wis. Stat. § 5.05(1)(f). The Wisconsin Legislature also directed that the WEC would have "responsibility for the administration of ... laws relating to elections and election campaigns." Wis. Stat. § 5.05(1). In sum, far from defying the will of the Wisconsin Legislature in issuing the challenged guidance, the WEC was in fact acting pursuant to the legislature's express directives.

If "Manner" in the Electors Clause is read to includes legislative enactments concerning election administration, the term necessarily also encompasses the Wisconsin Legislature's statutory choice to empower the WEC to perform the very roles that plaintiff now condemns. Thus, the guidance that plaintiff claims constitutes an unconstitutional deviation from the Wisconsin Legislature's direction, is, to ***639** the contrary, the direct consequence of legislature's express command. And, defendants have acted consistent

with the "Manner" of election administration prescribed by the legislature.

Plaintiff points to language in Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*, stating that "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (Rehnquist, C.J., concurring). But the record does not show any *significant* departure from the legislative scheme during Wisconsin's 2020 Presidential election. At best, plaintiff has raised disputed issues of statutory construction on three aspects of election administration. [10] While plaintiff's disputes are not frivolous, the Court finds these issues do not remotely rise to the level of a material or significant departure from Wisconsin Legislature's plan for choosing Presidential Electors.

10 Even these three statutory construction issues were raised only after-the-fact. If these issues were as significant as plaintiff claims, he has only himself to blame for not raising them *before* the election. Plaintiff's delay likely implicates the equitable doctrine of laches. The Court does not need to reach that issue, however, and therefore makes no findings or holdings on laches.

Because plaintiff has failed to show a clear departure from the Wisconsin Legislature's directives, his complaint must be dismissed. As Chief Justice Rehnquist stated, "in a Presidential election the clearly expressed intent of the legislature must prevail." *Bush v. Gore*, 531 U.S. 98, 120, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (Rehnquist, C.J., concurring). That is what occurred here. There has been no violation of the Constitution.

CONCLUSION

Plaintiff's Electors Clause claims fail as a matter of law and fact. The record establishes that Wisconsin's selection of its 2020 Presidential Electors was conducted in the very manner established by the Wisconsin Legislature, "[b]y general ballot at the general election." Wis. Stat. § 8.25(1). Plaintiff's complaints about defendants' administration of the election go to the implementation of the Wisconsin Legislature's chosen manner of appointing Presidential Electors, not to the manner itself. Moreover, even if "Manner" were stretched to include plaintiff's implementation objections, plaintiff has not shown a significant departure from the Wisconsin Legislature's chosen election scheme.

This is an *extraordinary* case. A sitting president who did not prevail in his bid for reelection has asked for federal court help in setting aside the popular vote based on disputed issues of election administration, issues he plainly could have raised before the vote occurred. This Court has allowed plaintiff the chance to make his case and he has lost on the merits. In his reply brief, plaintiff "asks that the Rule of Law be followed." (Pl. Br., ECF No. 109.) It has been.

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IT IS HEREBY ORDERED:

1. Plaintiff's complaint, ECF No. 1, is DISMISSED WITH PREJUDICE.
2. Plaintiff's motion for preliminary injunction, ECF No. 6, is DENIED as moot.
3. Defendants' motions to dismiss, ECF No. 69, 71, 78, 84, 86, 96, 97, and 99, are GRANTED.
4. Defendant Governor Evers' oral motion for judgment under Fed. R. Civ. P. 52 is GRANTED.

All Citations

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APPENDIX NO. 13

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983 F.3d 919
United States Court of Appeals, Seventh Circuit.

Donald J. TRUMP, Plaintiff-Appellant,
v.
WISCONSIN ELECTIONS COMMISSION,
et al., Defendants-Appellees.

No. 20-3414
|
Submitted December 21, 2020 *
|
Decided December 24, 2020

* We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Synopsis

Background: Following presidential election, incumbent candidate, who received fewer votes in state than did challenger candidate, brought action for declaratory and injunctive relief against state Elections Commission, Governor, Secretary of State, and local officials, alleging that certain procedures state had used in conducting election violated the Electors Clause of the federal constitution. The United States District Court for the Eastern District of Wisconsin, Brett H. Ludwig, J., 2020 WL 7318940, entered judgment in favor of defendants. Incumbent candidate appealed.

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

incumbent candidate sufficiently alleged concrete and particularized harm, as required to support Article III standing; but

length of delay in bringing action precluded grant of relief; and

even if court were to consider merits, state Elections Commission's issuance of disputed guidance did not infringe on state legislature's prerogative and directions under Electors Clause.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment.

***921** Appeal from the United States District Court for the Eastern District of Wisconsin. No. 2:20-cv-1785 — **Brett H. Ludwig**, *Judge*.

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Before Flaum, Rovner, and Scudder, Circuit Judges.

Opinion

Scudder, Circuit Judge.

***922** Two days after Wisconsin certified the results of its 2020 election, President Donald J. Trump invoked the Electors Clause of the U.S. Constitution and sued the Wisconsin Elections Commission, Governor, Secretary of State, and several local officials in federal court. The district court concluded that the President's challenges lacked merit, as he objected only to the administration of the election, yet the Electors Clause, by its terms, addresses the authority of the State's Legislature to prescribe the manner of appointing its presidential electors. So, too, did the district court conclude that the President's claims would fail even under a broader, alternative reading of the Electors Clause that extended to a state's conduct of the presidential election. We agree that Wisconsin lawfully appointed its electors in the manner directed by its Legislature and add that the President's claim also fails because of the unreasonable delay that accompanied the challenges the President now wishes to advance against Wisconsin's election procedures.

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I

A

On November 3, the United States held its 2020 presidential election. The final tally in Wisconsin showed that Joseph R. Biden, Jr. won the State by 20,682 votes. On November 30, the Wisconsin Elections ***923** Commission certified the results, the Governor signed an accompanying certification, and Wisconsin notified the National Archives that it had selected Biden's ten electors to represent the State in the Electoral College.

Two days later, the President brought this lawsuit challenging certain procedures Wisconsin had used in conducting the election. The President alleged that the procedures violated the Electors Clause of the U.S. Constitution:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress ....

U.S. CONST. art. II, § 1, cl. 2.

To implement the obligation imposed by the Electors Clause, Wisconsin's Legislature has directed that the State's electors be appointed "[b]y general ballot at the general election for choosing the president and vice president of the United States." WIS. STAT. § 8.25(1). It has further assigned "responsibility for the administration of ... laws relating to elections and election campaigns" to the Commission. *Id.* § 5.05(1). Municipalities run the election, and each municipality's own clerk "has charge and supervision of elections and registration in the municipality." *Id.* § 7.15(1).

The President alleges that the Commission and municipal officials so misused the power granted to them by the Legislature that they had unconstitutionally altered the "Manner" by which Wisconsin appointed its electors. His allegations challenge three pieces of guidance issued by the Commission well in advance of the 2020 election. (Each guidance document is available on the Commission's website, https://elections.wi.gov.)

First, in March 2020, the Commission clarified the standards and procedures for voters to qualify as "indefinitely confined" and therefore be entitled to vote absentee without presenting a photo identification. See WIS. STAT. §§ 6.86(2)(a), 6.87(4)(b)2. The Commission explained that many voters would qualify based on their personal circumstances and the COVID-19 pandemic, adding that Wisconsin law established no method for a clerk to demand proof of a voter's individual situation. The Wisconsin Supreme Court endorsed the Commission's interpretation when it enjoined the Dane County Clerk from offering any contrary view of the law. See *Jefferson v. Dane County*, 2020 WI 90 ¶¶ 8–9, 951 N.W.2d 556 (2020).

Second, the Commission issued guidance in August 2020 endorsing the use of drop boxes for the return of absentee ballots. The Commission explained that drop boxes could be "staffed or unstaffed, temporary or permanent," and offered advice on how to make them both secure and available to voters during the pandemic.

Third, four years ago, before the 2016 election, the Commission instructed municipal clerks on best practices for correcting a witness's address on an absentee ballot certificate. See WIS. STAT. § 6.87(2), (6d), (9). Clerks were able, the Commission explained, to contact the voter or witness or use another source of reliable information to correct or complete address information on an absentee ballot.

The President's complaint alleges that the Commission, in issuing this guidance, expanded the standards for "indefinitely confined" voters, invited voter fraud by authorizing the use of unstaffed drop boxes, and misled municipal clerks about their powers to complete or correct address information on absentee ballots, all contrary to Wisconsin statutory law. The President sought declaratory and injunctive relief on the view that these alleged misinterpretations of state law "infringed and invaded ***924** upon the Wisconsin Legislature's prerogative and directions under [the Electors Clause of] Article II of the U.S. Constitution."

B

After an evidentiary hearing, the district court rejected the President's claims on the merits and entered judgment for the Commission and other defendants. The Electors Clause, the court determined, addressed the "Manner"—the "approach, form, method, or mode"—by which Wisconsin appointed its electors. For Wisconsin, that meant only by "general ballot at the general election," WIS. STAT. § 8.25(1), with the court further observing that any mistakes in administering the election did not change that the electors were appointed by general election.

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Even if the Electors Clause was read more broadly to address the "Manner" in which Wisconsin conducted the election, the district court determined that the Legislature had authorized the Commission to issue the guidance now challenged by the President. None of that guidance, the district court reasoned, reflected such a deviation from the Wisconsin Legislature's directives as to violate the Electors Clause.

The President promptly appealed, and we expedited the case for decision.

II

We begin, as we must, by assessing whether the President has presented a Case or Controversy over which we have jurisdiction. The inquiry turns on the doctrine of standing and, more specifically, whether the President has alleged an injury traceable to the actions of the defendants and capable of being redressed by a favorable judicial ruling. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d

351 (1992). The district court answered the question in the President's favor. We do too.

On the injury prong of standing, the President has alleged "concrete and particularized" harm stemming from the allegedly unlawful manner by which Wisconsin appointed its electors. *Id.* at 560, 112 S.Ct. 2130. As a candidate for elected office, the President's alleged injury is one that "affect[s] [him] in a personal and individual way." *Id.* at 560, 112 S.Ct. 2130 n.1; see also *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020) ("An inaccurate vote tally is a concrete and particularized injury to candidates."). The alleged injury-in-fact is likewise "fairly traceable" to the challenged action of the defendants, see *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), all of whom played some role in administering the election.

The final requirement for Article III standing—that the alleged injury "likely" would be redressed by a favorable decision—presents a closer question. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. The difficulty is attributable to the gap between what the President ultimately desires (to be declared the victor of Wisconsin) on one hand, and what a court can award him on the other. But the President's complaint can be read as more modestly requesting a declaration that the defendants' actions violated the Electors Clause and that those violations tainted enough ballots to "void" the election. Were we to grant the President the relief he requests and declare the election results void, the alleged injury—the unlawful appointment of electors—would be redressed. True, our declaration would not result in a new slate of electors. But the fact that a judicial order cannot provide the full extent or exact type of relief a plaintiff might desire does not render the entire case nonjusticiable. See *Church of Scientology v. United States*, 506 U.S. 9, 12–13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992). A favorable ruling ***925** would provide the opportunity for the appointment of a new slate of electors. From there, it would be for the Wisconsin Legislature to decide the next steps in advance of Congress's count of the Electoral College's votes on January 6, 2021. See 3 U.S.C. § 15. All of this is enough to demonstrate Article III standing.

We also conclude that the President's complaint presents a federal question, despite its anchoring in alleged violations of state law. The Eleventh Amendment and principles of federalism bar federal courts from directing state officials to follow state law. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). But we can decide whether their interpretation of state law violated a provision of the federal Constitution, here the Electors Clause. This distinction alleviates any federalism concerns that might otherwise preclude our consideration of the President's claims.

III

On the merits, the district court was right to enter judgment for the defendants. We reach this conclusion in no small part because of the President's delay in bringing the challenges to Wisconsin law that provide the foundation for the alleged constitutional violation. Even apart from the delay, the claims fail under the Electors Clause.

A

The timing of election litigation matters. "[A]ny claim against a state electoral procedure must be expressed expeditiously." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (citing *Williams v. Rhodes,* 393 U.S. 23, 34–35, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968)). The Supreme Court underscored this precise point in this very election cycle, and with respect to this very State. See *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, —— U.S. ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020). The Court's direction was clear: federal courts should avoid announcing or requiring changes in election law and procedures close in time to voting. Doing so risks offending principles of federalism and reflects an improper exercise of the federal judicial power. Even more, belated election litigation risks giving voters "incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006); see also *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."). On this reasoning, we have rejected as late claims brought too close in time *before* an election occurs. See *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 642 (7th Cir. 2020); *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1060–62 (7th Cir. 2016); *Navarro v. Neal*, 716 F.3d 425, 429 (7th Cir. 2013).

The same imperative of timing and the exercise of judicial review applies with much more force on the back end of elections. Before a court can contemplate entering a judgment that would void election results, it "*must* consider whether the plaintiffs filed a timely pre-election request for relief."

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Gjersten v. Bd. of Election Comm'rs, 791 F.2d 472, 479 (7th Cir. 1986) (emphasis added) (footnote omitted).

These very considerations underpin the doctrine of laches. At its core, laches is about timing. "Laches cuts off the right to sue when the plaintiff has delayed 'too long' in suing. 'Too long' for this purpose means that the plaintiff delayed inexcusably and the defendant was harmed by the delay." ***926** *Teamsters & Emps. Welfare Tr. of Ill. v. Gorman Bros. Ready Mix*, 283 F.3d 877, 880 (7th Cir. 2002).

The President had a full opportunity before the election to press the very challenges to Wisconsin law underlying his present claims. Having foregone that opportunity, he cannot now—after the election results have been certified as final—seek to bring those challenges. All of this is especially so given that the Commission announced well in advance of the election the guidance he now challenges. Indeed, the witness-address guidance came four years ago, before the 2016 election. The Commission issued its guidance on indefinitely confined voters in March 2020 and endorsed the use of drop boxes in August.

Allowing the President to raise his arguments, at this late date, after Wisconsin has tallied the votes and certified the election outcome, would impose unquestionable harm on the defendants, and the State's voters, many of whom cast ballots in reliance on the guidance, procedures, and practices that the President challenges here. The President's delay alone is enough to warrant affirming the district court's judgment.

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B

The President would fare no better even if we went further and reached the merits of his claims under the Electors Clause.

Defining the precise contours of the Electors Clause is a difficult endeavor. The text seems to point to at least two constructions, and the case law interpreting or applying the Clause is sparse. This case does not require us to answer the question, as the Commission's guidance did not amount to a violation under the two most likely interpretations.

Recall that the Electors Clause requires each State to "appoint, in such Manner as the Legislature thereof may direct," presidential electors. U.S. CONST. art. II, § 1, cl. 2. By its terms, the Clause could be read as addressing only the manner of appointing electors and thus nothing about the law that governs the administration of an election (polling place operations, voting procedures, vote tallying, and the like). The word "appoint" is capacious, "conveying the broadest power of determination," including but not limited to the "mode" of popular election. *McPherson v. Blacker*, 146 U.S. 1, 27, 13 S.Ct. 3, 36 L.Ed. 869 (1892). Historically, the states used a variety of manners for appointing electors, such as direct legislative appointment. See *id.* at 29–33, 13 S.Ct. 3. For its part, the Wisconsin Legislature has consistently chosen a general election to appoint its electors. See WIS. STAT. § 8.25(1) (2020); WIS. STAT. §§ 6.3, 7.3 (1849). The complaint does not allege that the Commission's guidance documents shifted Wisconsin from a general election to some other manner of appointing electors, like those used in other states in the past. On this reading of the Electors Clause, the President has failed to state a claim. See FED. R. CIV. P. 12(b)(6).

But perhaps the better construction is to read the term "Manner" in the Electors Clause as also encompassing acts necessarily antecedent and subsidiary to the method for appointing electors—in short, Wisconsin's conduct of its general election. Even on this broader reading, the President's claims still would fall short. In his concurring opinion in *Bush v. Gore*, Chief Justice Rehnquist suggested that the proper inquiry under the Electors Clause is to ask whether a state conducted the election in a manner substantially consistent with the "legislative scheme" for appointing electors. 531 U.S. 98, 113, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (Rehnquist, C.J., concurring). We would not go further and ask, for example, whether Wisconsin's officials interpreted perfectly "[i]solated sections" ***927** of the elections code. *Id.* at 114, 121 S.Ct. 525.

The Wisconsin Legislature expressly assigned to the Commission "the responsibility for the administration of ... laws relating to elections," WIS. STAT. § 5.05(1), just as Florida's Legislature had delegated a similar responsibility to its Secretary of State. See *Bush*, 531 U.S. at 116, 121 S.Ct. 525 (Rehnquist, C.J., concurring). Florida's legislative scheme included this "statutorily provided apportionment of responsibility," *id.* at 114, 121 S.Ct. 525, and three Justices found a departure from that scheme when the Florida Supreme Court rejected the Secretary's interpretation of state law. See *id.* at 119, 123, 121 S.Ct. 525. And it was the Minnesota Secretary of State's lack of a similar responsibility that prompted two judges of the Eighth Circuit to conclude that he likely violated the Electors Clause by adding a week to the deadline for receipt of absentee ballots. See *Carson*, 978

F.3d at 1060. By contrast, whatever actions the Commission took here, it took under color of authority expressly granted to it by the Legislature. And that authority is not diminished by allegations that the Commission erred in its exercise.

We confine our conclusions to applications of the Electors Clause. We are not the ultimate authority on Wisconsin law. That responsibility rests with the State's Supreme Court. Put another way, the errors that the President alleges occurred in the Commission's exercise of its authority are in the main matters of state law. They belong, then, in the state courts, where the President had an opportunity to raise his concerns. Indeed, the Wisconsin Supreme Court rejected his claims regarding the guidance on indefinitely confined voters, see *Trump v. Biden*, 2020 WI 91 ¶ 8, 951 N.W.2d 568 (2020), and declined to reach the rest of his arguments on grounds of laches.

For our part, all we need to say is that, even on a broad reading of the Electors Clause, Wisconsin lawfully appointed its electors in the manner directed by its Legislature.

For these reasons, we AFFIRM.

All Citations

983 F.3d 919

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APPENDIX NO. 14

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141 S.Ct. 1516
Supreme Court of the United States.

Donald J. TRUMP, Petitioner,
v.
WISCONSIN ELECTIONS COMMISSION, et al.

No. 20-883.
|
March 8, 2021

Case below, 983 F.3d 919.

Opinion
Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

All Citations

141 S.Ct. 1516 (Mem), 209 L.Ed.2d 253

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APPENDIX NO. 15

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981 F.3d 1307
United States Court of Appeals, Eleventh Circuit.

L. Lin WOOD, Jr., Plaintiff-Appellant,
v.
Brad RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, Rebecca N. Sullivan, in her official capacity as Vice Chair of the Georgia State Election Board, et al., Defendants-Appellees.

No. 20-14418
|
(December 5, 2020)

Synopsis

Background: Voter brought post-election action against Georgia election officials alleging violations of equal protection, due process, and election and electors clauses and seeking to enjoin certification of general election results, to secure a new recount under different rules, and to establish new rules for upcoming runoff election. The United States District Court for the Northern District of Georgia, No. 1:20-cv-04651-SDG, Steven D. Grimberg, J., 2020 WL 6817513, denied voter's motion for temporary restraining order (TRO). Voter appealed.

Holdings: The Court of Appeals, William H. Pryor, Chief Judge, held that:

voter did not satisfy the injury-in-fact requirement for Article III standing;

voter's requests to delay certification of election results and commence a new recount were moot; and

exception to mootness doctrine for issues that are capable of repetition yet evading review did not apply.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Temporary Restraining Order (TRO).

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Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket No. 1:20-cv-04651-SDG

Before WILLIAM PRYOR, Chief Judge, JILL PRYOR and LAGOA, Circuit Judges.

Opinion

WILLIAM PRYOR, Chief Judge:

This appeal requires us to decide whether we have jurisdiction over an appeal from the denial of a request for emergency relief in a post-election lawsuit. Ten days after the presidential election, L. Lin Wood Jr., a Georgia voter, sued state election officials to enjoin certification of the general election results, to secure a new recount under different rules, and to establish new rules for an upcoming runoff election. Wood alleged that the extant absentee-ballot and recount procedures violated Georgia law and, as a result, his federal constitutional rights. After Wood moved for emergency relief, the district court denied his motion. We agree with the district court that Wood lacks standing to sue because he fails to allege a particularized injury. And because Georgia has already certified its election

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results and its slate of presidential electors, Wood's requests for emergency relief are moot to the extent they concern the 2020 election. The Constitution makes clear that federal courts are courts of limited jurisdiction, U.S. Const. art. III; we may not entertain post-election contests about garden-variety issues of vote counting and misconduct that may properly be filed in state courts. We affirm.

I. BACKGROUND

Secretary of State Brad Raffensperger is the "chief election official" of Georgia. Ga. Code Ann. § 21-2-50(b). He manages ***1311** the state system of elections and chairs the State Election Board. *Id.* § 21-2-30(a), (d). The Board has the authority to promulgate rules and regulations to ensure uniformity in the practices of county election officials and, "consistent with law," to aid "the fair, legal, and orderly conduct of primaries and elections." *Id.* § 21-2-31(1)–(2). The Board may also publish and distribute to county election officials a compilation of Georgia's election laws and regulations. *Id.* § 21-2-31(3). Many of these laws and regulations govern absentee voting.

Any voter in Georgia may vote by absentee ballot. *Id.* § 21-2-380(b). State law prescribes the procedures by which a voter may request and submit an absentee ballot. *Id.* §§ 21-2-381; 21-2-384; 21-2-385. The ballot comes with an oath, which the voter must sign and return with his ballot. *Id.* § 21-2-385(a). State law also prescribes the procedures for how county election officials must certify and count absentee ballots. *Id.* § 21-2-386(a). It directs the official to "compare the identifying information on the oath with the information on file" and "compare the signature or mark on the oath with the signature or mark" on file. *Id.* § 21-2-386(a)(1)(B). If everything appears correct, the official certifies the ballot. *Id.* But if there is a problem, such as a signature that does not match, the official is to "write across the face of the envelope 'Rejected.' " *Id.* § 21-2-386(a)(1)(C). The government must then notify the voter of this rejection, and the voter may cure the problem. *Id.*

In November 2019, the Democratic Party of Georgia, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee challenged Georgia's absentee ballot procedures as unconstitutional under the First and Fourteenth Amendments. They sued Secretary Raffensperger and members of the Board for declaratory and injunctive relief. Secretary Raffensperger and the Board maintained that the procedures were constitutional, but they agreed to promulgate regulations to ensure uniform practices across counties. In March 2020, the parties entered into a settlement agreement and dismissed the suit.

In the settlement agreement, Secretary Raffensperger and the Board agreed to issue an Official Election Bulletin regarding the review of signatures on absentee ballots. The Bulletin instructed officials to review the voter's signature with the following process:

> If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file ..., the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks. A mail-in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file ....

Secretary Raffensperger and the Board also agreed to train county election officials to follow this process.

This procedure has been in place for at least three elections since March, including the general election on November 3, 2020. Over one million Georgians voted by absentee ballot in the general election. No one challenged the settlement agreement until the filing of this action. By then, the general election returns had been tallied and a statewide hand recount of the presidential election results was underway.

On November 13, L. Lin Wood Jr. sued Secretary Raffensperger and the members of the Board in the district court. Wood alleged that he sued "in his capacity as a private citizen." He is a registered voter in ***1312** Fulton County, Georgia, and a donor to various 2020 Republican candidates. His amended complaint alleged that the settlement agreement violates state law. As a result, he contends, it violates the Election Clause of Article I; the Electors Clause of Article II; and the Equal Protection Clause of the Fourteenth

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Amendment. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2; *id.* amend. XIV, § 1. Wood also alleged that irregularities in the hand recount violated his rights under the Due Process Clause of the Fourteenth Amendment. *Id.* amend. XIV, § 1.

State law requires that such recounts be done in public view, and it permits the Board to promulgate policies that facilitate recounting. Ga. Code Ann. § 21-2-498(c)(4), (d). Secretary Raffensperger directed county election officials to designate viewing areas for members of the public and the news media to observe the recount. He also permitted the Democratic and Republican Parties to designate special recount monitors.

Wood alleged that officials ignored their own rules and denied Wood and President Donald Trump's campaign "meaningful access to observe and monitor the electoral process." Although Wood did not personally attempt to observe or monitor the recount, he alleged that Secretary Raffensperger and the Board violated his "vested interest in being present and having meaningful access to observe and monitor the electoral process to ensure that it is properly administered ... and ... otherwise free, fair, and transparent."

Wood submitted two affidavits from volunteer monitors. One monitor stated that she was not allowed to enter the counting area because there were too many monitors already present, and she could not be sure from a distance whether the recount was accurate. The other explained that the counting was hard for her to follow and described what she thought were possible tabulation errors.

Wood moved for extraordinary relief. He asked that the district court take one of three steps: prohibit Georgia from certifying the results of the November election; prevent it from certifying results that include "defective absentee ballots, regardless of whether said ballots were cured"; or declare the entire election defective and order the state to fix the problems caused by the settlement agreement. He also sought greater access for Republican election monitors, both at a new hand recount of the November election and in a runoff election scheduled for January 5, 2021.

Wood's lawsuit faced a quickly approaching obstacle: Georgia law requires the Secretary of State to certify its general election results by 5:00 p.m. on the seventeenth day after Election Day. Ga. Code Ann. § 21-2-499(b). And it requires the Governor to certify Georgia's slate of presidential electors by 5:00 p.m. on the eighteenth day after Election Day. *Id.* Secretary Raffensperger's deadline was November 20, and Governor Brian Kemp had a deadline of November 21.

To avoid these deadlines, Wood moved to bar officials from certifying the election results until a court could consider his lawsuit. His emergency motion reiterated many of the requests from his amended complaint, including requests for changes to the procedures for the January runoff. He also submitted additional affidavits and declarations in support of his motion.

The district court held a hearing on November 19 to consider whether it should issue a temporary restraining order. It heard from Wood, state officials, and two groups of intervenors. Wood also introduced testimony from Susan Voyles, a poll manager who participated in the hand recount. Voyles described her experience ***1313** during the recount. She recalled that one batch of absentee ballots felt different from the rest, and that that batch favored Joe Biden to an unusual extent. At the end of the hearing, the district court orally denied Wood's motion.

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On November 20, the district court issued a written opinion and order that explained its denial. It first ruled that Wood lacked standing because he had alleged only generalized grievances, instead of injuries that affected him in a personal and individual way. It next explained that, even if Wood had standing, the doctrine of laches prevented him from challenging the settlement agreement now: he could have sued eight months earlier, yet he waited until two weeks after the election. Finally, it explained why Wood would not be entitled to a temporary restraining order even if the district court could reach the merits of his claims. On the same day, Secretary Raffensperger certified the results of the general election and Governor Kemp certified a slate of presidential electors.

II. STANDARD OF REVIEW

"We are required to examine our jurisdiction *sua sponte*, and we review jurisdictional issues *de novo*." *United States v. Lopez*, 562 F.3d 1309, 1311 (11th Cir. 2009) (citation omitted).

III. DISCUSSION

This appeal turns on one of the most fundamental principles of the federal courts: our limited jurisdiction. Federal courts are not "constituted as free-wheeling enforcers of the Constitution and laws." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc). As the Supreme Court "ha[s] often explained," we are instead "courts of limited jurisdiction." *Home Depot U.S.A., Inc. v. Jackson*, —— U.S. ——, 139 S. Ct. 1743, 1746, 204 L.Ed.2d 34 (2019) (internal quotation marks omitted). Article III of the Constitution establishes that our jurisdiction —that is, our judicial power—reaches only "Cases" and "Controversies." U.S. Const. art. III, § 2. Absent a justiciable case or controversy between interested parties, we lack the "power to declare the law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

When someone sues in federal court, he bears the burden of proving that his suit falls within our jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Wood had the choice to sue in state or federal court. Georgia law makes clear that post-election litigation may proceed in a state court. Ga. Code Ann. §§ 21-2-499(b), 21-2-524(a). But Wood chose to sue in federal court. In doing so, he had to prove that his suit presents a justiciable controversy under Article III of the Constitution. *See Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (listing examples of problems that preclude our jurisdiction). He failed to satisfy this burden.

We divide our discussion in two parts. We first explain why Wood lacks standing to sue. We then explain that, even if he had standing, his requests to recount and delay certification of the November election results are moot. Because this case is not justiciable, we lack jurisdiction. *Id.* And because we lack the power to entertain this appeal, we will not address the other issues the parties raise.

A. Wood Lacks Standing Because He Has Not Been Injured in a Particularized Way.

Standing is a threshold jurisdictional inquiry: the elements of standing are "an indispensable part of the plaintiff's ***1314** case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To prove standing, Wood "must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020). If he cannot satisfy these requirements, then we may not decide the merits of his appeal. *Steel Co.*, 523 U.S. at 94, 118 S.Ct. 1003.

Wood lacks standing because he fails to allege the "first and foremost of standing's three elements": an injury in fact. *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (alteration adopted) (internal quotation marks omitted). An injury in fact is "an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020) (internal quotation marks omitted). Wood's injury is not particularized.

Wood asserts only a generalized grievance. A particularized injury is one that "affect[s] the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks omitted). For example, if Wood were a political candidate harmed by the recount, he would satisfy this requirement because he could assert a personal, distinct injury. *Cf. Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 579 (11th Cir. 1995). But Wood bases his standing on his interest in "ensur[ing that] ... only lawful ballots are counted." An injury to the right "to require that the government be administered according to the law" is a generalized grievance. *Chiles v. Thornburgh*, 865 F.2d 1197, 1205–06 (11th Cir. 1989) (alteration adopted) (internal quotation marks omitted). And the Supreme Court has made clear that a generalized grievance, "no matter how sincere," cannot support standing. *Hollingsworth v. Perry*, 570 U.S. 693, 706, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013).

A generalized grievance is "undifferentiated and common to all members of the public." *Lujan*, 504 U.S. at 575, 112 S.Ct. 2130 (internal quotation marks omitted). Wood cannot explain how his interest in compliance with state election laws is different from that of any other person. Indeed, he admits that any Georgia voter could bring an identical suit. But the logic of his argument sweeps past even that boundary. All Americans, whether they voted in this election or whether they reside in Georgia, could be said to share Wood's interest in "ensur[ing] that [a presidential election] is properly administered."

Wood argues that he has two bases for standing, but neither satisfies the requirement of a distinct, personal injury. He first asserts that the inclusion of unlawfully processed absentee ballots diluted the weight of his vote. To be sure, vote dilution

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can be a basis for standing. *Cf. Jacobson*, 974 F.3d at 1247–48. But it requires a point of comparison. For example, in the racial gerrymandering and malapportionment contexts, vote dilution occurs when voters are harmed compared to "irrationally favored" voters from other districts. *See Baker v. Carr*, 369 U.S. 186, 207–08, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). By contrast, "no single voter is specifically disadvantaged" if a vote is counted improperly, even if the error might have a "mathematical impact on the final tally and thus on the proportional effect of every vote." *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 356 (3d Cir. Nov. 13, 2020) (internal quotation marks omitted). Vote dilution in this context is a "paradigmatic generalized grievance that cannot ***1315** support standing." *Id.* (internal quotation marks omitted).

Wood's second theory—that Georgia "value[d] one person's vote over that of another" through "arbitrary and disparate treatment"—fares no better. He argues that Georgia treats absentee voters as a "preferred class" compared to those who vote in person, both by the terms of the settlement agreement and in practice. In his view, all voters were bound by law before the settlement agreement, but the rules for absentee voting now run afoul of the law, while in-person voters remain bound by the law. And he asserts that in practice Georgia has favored absentee voters because there were "numerous irregularities" in the processing and recounting of absentee ballots. Setting aside the fact that "[i]t is an individual voter's *choice* whether to vote by mail or in person," *Bognet*, 980 F.3d at 360, these complaints are generalized grievances. Even if we assume that absentee voters are favored over in-person voters, that harm does not affect Wood as an individual—it is instead shared identically by the four million or so Georgians who voted in person this November. "[W]hen the asserted harm is ... shared in substantially equal measure by ... a large class of citizens," it is not a particularized injury. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). And irregularities in the tabulation of election results do not affect Wood differently from any other person. His allegation, at bottom, remains "that the law ... has not been followed." *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1332 (11th Cir. 2007) (quoting *Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007)).

Wood's attempts to liken his injury to those we have found sufficient in other appeals fall short. In *Common Cause/Georgia v. Billups*, we ruled that "[r]equiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury sufficient for standing." 554 F.3d 1340, 1351–52 (11th Cir. 2009). But the injury there was the burden of producing photo identification, not the existence of separate rules for in-person and absentee voters. *Id.* And the burden to produce photo identification affected each voter in a personal way. For example, some plaintiffs in *Common Cause* alleged that they "would be required to make a special trip" to obtain valid identification "that is not required of voters who have driver's licenses or passports." *Id.* at 1351 (internal quotation marks omitted). By contrast, even Wood agrees that he is affected by Georgia's alleged violations of the law in the same way as every other Georgia voter. "This injury is precisely the kind of undifferentiated, generalized grievance that the Supreme Court has warned must not be countenanced." *Dillard*, 495 F.3d at 1335 (internal quotation marks omitted).

Roe v. Alabama ex rel. Evans, 43 F.3d 574, also does not support Wood's argument for standing. In *Roe*, we ruled that the post-election inclusion of previously excluded absentee ballots would violate the substantive-due-process rights of Alabama voters and two political candidates. *Id.* at 579–81. But no party raised and we did not address standing in *Roe*, so that precedent provides no basis for Wood to establish standing. *Cf. Lewis v. Casey*, 518 U.S. 343, 352 n.2, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (noting that in cases where "standing was neither challenged nor discussed ... the existence of unaddressed jurisdictional defects has no precedential effect"). And Wood's purported injury is far more general than the voters' injury in *Roe*. The voters in *Roe* bore individual burdens—to obtain notarization or witness signatures if ***1316** they wanted to vote absentee—that state courts post-election retroactively permitted other voters to ignore. *Roe*, 43 F.3d at 580–81. In contrast, Georgia applied uniform rules, established before the election, to all voters, who could choose between voting in person or by absentee ballot, and Wood asserts that the effect of those rules harmed the electorate collectively. That alleged harm is not a particularized injury.

Wood suggested in his amended complaint that his status as a donor contributed to standing and aligned his interests with those of the Georgia Republican Party. But he forfeited this argument when he failed to raise it in his opening brief. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1335 (11th Cir. 2004); *see also Nat'l All. for the Mentally Ill v. Bd. of Cnty. Comm'rs*, 376 F.3d 1292, 1296 (11th Cir. 2004) (ruling standing claims forfeited for failure to comply with the Federal Rules of Appellate Procedure). And the donor argument fails on its own terms. True, a donor can establish

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standing based on injuries that flow from his status as a donor. *See, e.g.*, *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1125 (11th Cir. 2019). But donors, like voters, "have no judicially enforceable interest in the *outcome* of an election." *Jacobson*, 974 F.3d at 1246. Nor does a donation give the donor a legally cognizable interest in the proper administration of elections. Any injury to Wood based on election irregularities must flow from his status as a voter, unrelated to his donations. And that fact returns him to the stumbling block of particularization.

"[T]he 'injury in fact' test requires ... that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563, 112 S.Ct. 2130 (internal quotation marks omitted). Wood's allegations suggest that various nonparties might have a particularized injury. For example, perhaps a candidate or political party would have standing to challenge the settlement agreement or other alleged irregularities. Or perhaps election monitors would have standing to sue if they were denied access to the recount. But Wood cannot place himself in the stead of these groups, even if he supports them. *Cf. Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006) (explaining that "associational standing ... does not operate in reverse," so a member cannot represent an association). He is at most a "concerned bystander." *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir. 2004) (internal quotation marks omitted). So he is not "entitled to have the court[s] decide the merits of [his] dispute." *Warth*, 422 U.S. at 498, 95 S.Ct. 2197.

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B. Wood's Requested Relief Concerning the 2020 General Election Is Moot.

Even if Wood had standing, several of his requests for relief are barred by another jurisdictional defect: mootness. We are "not empowered to decide moot questions." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (internal quotation marks omitted). "An issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011) (alteration rejected) (internal quotation marks omitted). And an issue can become moot at any stage of litigation, even if there was a live case or controversy when the lawsuit began. *Id.* at 1189–90.

Wood asked for several kinds of relief in his emergency motion, but most of his requests pertained to the 2020 election results. He moved the district court to prohibit either the certification of the election results or certification that included ***1317** the disputed absentee ballots. He also asked the district court to order a new hand recount and to grant Republican election monitors greater access during both the recount and the January runoff election. But after the district court denied Wood's motion, Secretary Raffensperger certified the election results on November 20. And Governor Kemp certified the slate of presidential electors later that day.

Because Georgia has already certified its results, Wood's requests to delay certification and commence a new recount are moot. "We cannot turn back the clock and create a world in which" the 2020 election results are not certified. *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). And it is not possible for us to delay certification nor meaningful to order a new recount when the results are already final and certified. *Cf. Tropicana Prods. Sales, Inc. v. Phillips Brokerage Co.*, 874 F.2d 1581, 1582 (11th Cir. 1989) ("[A]n appeal from the denial of a motion for preliminary injunction is mooted when the requested effective end-date for the preliminary injunction has passed."). Nor can we reconstrue Wood's previous request that we temporarily prohibit certification into a new request that we undo the certification. A district court "must first have the opportunity to pass upon [every] issue," so we may not consider requests for relief made for the first time on appeal. *S.F. Residence Club, Inc. v. 7027 Old Madison Pike, LLC*, 583 F.3d 750, 755 (11th Cir. 2009).

Wood's arguments reflect a basic misunderstanding of what mootness is. He argues that the certification does not moot anything "because this litigation is ongoing" and he remains injured. But mootness concerns the availability of relief, not the existence of a lawsuit or an injury. *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1304 (11th Cir. 2011). So even if post-election litigation is not always mooted by certification, *see, e.g.*, *Siegel v. LePore*, 234 F.3d 1163, 1172–73 (11th Cir. 2000) (en banc), Wood's particular requests are moot. Wood is right that certification does not moot his requests for relief concerning the 2021 runoff—although Wood's lack of standing still forecloses our consideration of those requests—but the pendency of other claims for relief cannot rescue the otherwise moot claims. *See, e.g.*, *Adler v. Duval Cnty. Sch. Bd.*, 112 F.3d 1475, 1478–79, 1481 (11th Cir. 1997) (instructing the district court to dismiss moot claims but resolving other claims on the merits). Wood finally tells us that President Trump has also requested a recount, but that fact is irrelevant to whether Wood's requests remain live.

Nor does any exception to mootness apply. True, we often review otherwise-moot election appeals because they are "capable of repetition yet evading review." *ACLU v. The Fla. Bar*, 999 F.2d 1486, 1496 (11th Cir. 1993) (internal quotation marks omitted). We may apply this exception when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Nat'l Broad. Co. v. Commc'ns Workers of Am.*, 860 F.2d 1022, 1023 (11th Cir. 1988) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975)). But we will not apply this exception if there is "some alternative vehicle through which a particular policy may effectively be subject to" complete review. *Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004).

The "capable of repetition yet evading review" exception does not save Wood's appeal because there is no "reasonable expectation" that Wood will again face ***1318** the issues in this appeal. Based on the posture of this appeal, the challenged action is the denial of an emergency injunction against the certification of election results. *See Fleming*, 785 F.3d at 446 (explaining that whether the issues in an interlocutory appeal are "capable of repetition, yet evading review" is a separate question from whether the issues in the overall lawsuit are capable of doing so). That denial is the decision we would review but for the jurisdictional problems. But Wood cannot satisfy the requirement that there be a "reasonable expectation" that he will again seek to delay certification. Wood does not suggest that this situation might recur. *Cf. FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 463–64, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007). And we have no reason to think it would: he is a private citizen, so the possibility of a recurrence is purely theoretical. *Cf. Hall v. Sec'y, Ala.*, 902 F.3d 1294, 1305 (11th Cir. 2018).

IV. CONCLUSION

We **AFFIRM** the denial of Wood's motion for emergency relief.

All Citations

981 F.3d 1307, 28 Fla. L. Weekly Fed. C 2219

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APPENDIX NO. 16

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141 S.Ct. 1379
Supreme Court of the United States.

L. Lin WOOD, Jr., Petitioner,
v.
Brad RAFFENSPERGER,
Georgia Secretary of State, et al.

No. 20-799.
|

February 22, 2021

Case below, 981 F.3d 1307.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

All Citations

141 S.Ct. 1379 (Mem), 209 L.Ed.2d 124

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