No. 24-2931

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TOWN OF THORNAPPLE, WISCONSIN, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
Case No. 3:24-cv-00664
The Honorable Judge James D. Peterson

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument is unnecessary in this appeal from a preliminary injunction. The district court's determination that the United States is likely to succeed on the merits of its claim under the Help America Vote Act of 2002 turns on a straightforward question of statutory interpretation. In addition, the district court's finding that the United States satisfied the irreparable-harm requirement follows directly from undisputed facts. The decisional process would therefore not be significantly aided by oral argument. If, however, this Court believes that oral argument would be helpful, the United States stands ready to participate.

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TABLE OF CONTENTS

PAGE

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF CONTENTS (continued): **PAGE**

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

CASES: **PAGE**

RETRIEVED FROM DEMOCRACYDOCKET.COM

CASES (continued): **PAGE**

STATUTES:

RETRIEVED FROM DEMOCRACYDOCKET.COM

STATUTES (continued): **PAGE**

LEGISLATIVE HISTORY:

RETRIEVED FROM DEMOCRACYDOCKET.COM

RULE:

MISCELLANEOUS: **PAGE**

RETRIEVED FROM DEMOCRACYDOCKET.COM

STATEMENT OF JURISDICTION

Defendants' jurisdictional statement is not complete and correct. The United States brought this suit against the Town of Thornapple (Thornapple), Wisconsin, and other defendants to enforce Section 301(a)(3) of the Help America Vote Act of 2002 (HAVA), 52 U.S.C. 21081(a)(3). App. 1-4, 9 (Compl.).[1] The district court had jurisdiction under 28 U.S.C. 1331 and 1345. On October 4, 2024, the court entered a preliminary injunction requiring Thornapple and certain Thornapple officials to take particular steps to comply with the statute. App. 134-136. On October 25, 2024, Thornapple and those officials filed a timely notice of appeal from the preliminary injunction. Doc. 31; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

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STATEMENT OF THE ISSUES

This appeal of the grant of a preliminary injunction raises two issues:

[1] "Doc. __, at __" refers, respectively, to the document recorded on the district court docket sheet and page number. "App. __" refers to defendants' Short Appendix by page number. "Br. __" refers to defendants' opening brief by page number.

1. Whether the district court correctly concluded that Thornapple is likely subject to the mandates of Section 301 of HAVA because the Town's use of paper ballots for elections qualifies as a "voting system" under Section 301.

2. Whether the district court committed clear error when it found that the United States is likely to be irreparably harmed because Thornapple does not provide certain voters with disabilities any accessible options for casting their votes privately and independently.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to the brief.

STATEMENT OF THE CASE

A. Statutory Background

In response to shortcomings in the Nation's electoral systems revealed by the 2000 federal election, Congress enacted the Help America Vote Act of 2002, 52 U.S.C. 20901-21145. As relevant here, HAVA "establish[es] minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections." Pub. L. No. 107-252, 116 Stat. 1666 (preamble). Title III sets forth "uniform and nondiscriminatory election technology and administration requirements." 116 Stat. 1704

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(title) (capitalization omitted). In particular, Section 301 of that title directs state and local officials to meet certain requirements for each "voting system" used in elections for federal office. 52 U.S.C. 21081(a).

First, for example, Section 301 requires a "voting system" to provide voters an opportunity to "verify" their selections on their ballots and "correct any error" before their ballots are "cast and counted." 52 U.S.C. 21081(a)(1)(A)(i)-(ii). The term "verify" cannot, however, be defined in a manner that makes it impossible for a "paper ballot voting system" to meet these requirements. 52 U.S.C. 21081(c)(2). Second, if a voter selects "more than one candidate for a single office," the "voting system" must (1) "notify the voter" of that fact and the consequence of casting multiple votes; and (2) provide the voter an opportunity to correct the ballot. 52 U.S.C. 21081(a)(1)(A)(iii). Jurisdictions that "use[] a paper ballot voting system" or certain other systems are deemed to satisfy those mandates, however, by establishing a qualifying voter-education program and instructing voters on how to correct their ballots. 52 U.S.C. 21081(a)(1)(B).

Third, a "voting system" must "produce a record" to facilitate an "audit" of the system. 52 U.S.C. 21081(a)(2)(A). Fourth, States must

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"adopt uniform and nondiscriminatory standards" defining "what will be counted as a vote" for each type of "voting system" they use. 52 U.S.C. 21081(a)(6).

Section 301(a)(3)(A) imposes an additional requirement on "voting systems" that addresses voters with disabilities, who often face barriers to casting ballots with the privacy and independence that other voters are granted. That subsection requires that a "voting system" be "accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters." 52 U.S.C. 21081(a)(3)(A). To satisfy this requirement, the voting system must include "at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place." 52 U.S.C. 21081(a)(3)(B).

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The statute defines "voting system" to "mean[]" (1) "the total combination of mechanical, electromechanical, or electronic equipment" used to define ballots, cast and count votes, report election results, and produce audit-trail information; "and" (2) "the practices and associated

documentation" that are "used," to, among other things, "make available any materials to the voter (such as notices, instructions, forms, or paper ballots)." 52 U.S.C. 21081(b)(1) and (2)(E).

B. Factual and Procedural Background

1. Prior to June 2023, the Town of Thornapple allowed its voters to cast their votes using an electronic voting machine known as the "ImageCast Evolution." That machine can function as both a ballot-marking device—that is, a device that "electronically mark[s], and then physically print[s], the voter's ballot," *National Fed'n of the Blind, Inc. v. Lamone*, 438 F. Supp. 3d 510, 518 (D. Md. 2020)—and a tabulator of votes cast. App. 6, 35.

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The United States Election Assistance Commission has certified, and the Wisconsin Elections Commission has approved, the ImageCast Evolution machine as compliant with Section 301 of HAVA. App. 6-7, 19, 34. Rusk County, Wisconsin, purchased ImageCast Evolution machines for use in elections by each municipality within its jurisdiction, including the Town of Thornapple. App. 6. As of 2022, the Wisconsin Elections Commission listed Thornapple as using the

ImageCast Evolution as its "Accessible Voting Equipment." App. 34-35, 42.

In June 2023, the Town Board of Thornapple (the Thornapple Board) voted to "stop the use of the electronic voting machine and use paper ballots." App. 7, 19, 36, 52, 57. The Thornapple Board did not record any discussion of how it would satisfy HAVA's accessibility requirements absent use of the ImageCast Evolution machine. App. 20, 36, 52.

During the federal primary elections held in April and August 2024, Thornapple implemented the Thornapple Board's June 2023 decision by withholding the ImageCast Evolution machine and instead providing paper ballots as the sole means by which voters could record their choices at Thornapple's lone polling place. App. 7, 20-21, 36-38, 57. Since then, the Thornapple Board has not reconsidered its June 2023 decision to eliminate the use of electronic voting options for federal elections, notwithstanding multiple communications from the United States explaining that Thornapple's system does not comply with HAVA's accessibility requirements. App. 20-21, 36-37, 44-45, 54-55.

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2. In September 2024, the United States filed suit against, among others, the Town of Thornapple and four town officials in their official capacities—the Town Clerk and the three members of the Thornapple Board (defendants). App. 1-11. The complaint alleged that defendants violated HAVA's accessibility provision by "fail[ing] to ensure the availability of at least one required accessible voting system" during the April and August 2024 federal primary elections. App. 7-9. The complaint requested that the district court order defendants to take steps to ensure that a HAVA-compliant voting system is present at each polling place in Thornapple in the future. App. 10.[2]

The United States subsequently moved the district court for a preliminary injunction to prevent defendants from violating Section 301's accessibility provision in the November 2024 federal election and beyond. App. 12-14, 16. Defendants declined to file a response, instead filing a motion to dismiss the United States' complaint. That motion

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[2] The United States' complaint also alleged that the Town of Lawrence, Wisconsin, and certain Lawrence officials violated Section 301(a)(3) by failing to make an accessible voting system available to voters with disabilities during the April 2024 federal primary election. App. 8-9. Those claims have been resolved through the entry of a consent decree. Doc. 23.

argued that Thornapple's process for casting and hand-counting paper ballots is not a "voting system" within the meaning of HAVA and thus need not comply with Section 301's accessibility requirements. App. 60-66.

3. The district court held an evidentiary hearing at which it granted the United States' motion for a preliminary injunction and denied defendants' motion to dismiss.

Regarding likelihood of success on the merits, the district court found that the United States' position on the statutory-interpretation question "is almost certainly the correct one." App. 125. The court concluded that Thornapple's use of paper ballots qualifies as a "voting system" under Section 301, thus requiring Thornapple to comply with Section 301's accessibility requirements for individuals with disabilities. The court emphasized that Section 301 does not say that it applies only to mechanical and computerized systems and instead expressly references paper-ballot systems like the one Thornapple uses. App. 125. The court rejected defendants' contention that paper-ballot systems are covered by the statute only where, unlike here, they are tabulated by a machine, emphasizing that the statute's accessibility requirements

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concern a voter's ability to mark the ballot, not how it is counted. App. 125; *see also* App. 85-86 (defendants' argument).

The district court thus agreed with the Wisconsin Elections Commission that although municipalities like Thornapple are generally entitled to opt out of using voting machines, they must also comply with HAVA's accessibility requirements by making a HAVA-compliant system available. App. 126; *cf.* Doc. 15-1, at 1-4 (explaining in answers to "Frequently Asked Questions" that the Wisconsin Elections Commission takes the view that municipalities can hand-mark and hand-count ballots but "cannot entirely abandon all electronic equipment" because of accessibility mandates).

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The district court also found that the United States satisfied the irreparable-harm requirement for a preliminary injunction. The court observed that it was "clear" from the testimony it heard "that Thornapple has disabled voters" who "need assistance in voting," and that the assistance currently available does not give them the opportunity to vote independently and privately as HAVA requires. App. 126-127. That testimony included an acknowledgement by Thornapple's Chief Election Inspector of multiple past instances of

voters with disabilities who needed others to mark their paper ballots for them. App. 112-113. The court noted defendants' argument that no voter with a disability has requested to use the accessible electronic voting system but determined that Thornapple's failure to provide this system still burdens the rights of such voters, who might use the machine if given the opportunity. App. 126.

In balancing the harms to the parties that would result from the grant or denial of injunctive relief, the district court determined that the United States' "very compelling interest" in ensuring compliance with HAVA outweighed Thornapple's "quite slight" burden of reprogramming its existing electronic voting machine. App. 127-128 (noting the Town's cost for the November 2024 election would be approximately $500 to $1000). The court observed that this burden amounts to "the ordinary process" that "polling places go through." App. 127. Based on the above analysis, the court concluded that the injunction was "well supported." App. 128.

The district court memorialized its decision in an October 2024 order that concluded that defendants "violated Section 301" by failing to provide a voting system equipped for individuals with disabilities

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during the April and August 2024 federal primary elections. App. 134. The order explained that "[p]aper ballot voting systems are included in HAVA's definition of a voting system." App. 134-135.

The district court's order directed defendants to ensure that an accessible voting system is available for use in Thornapple during the November 2024 federal general election. App. 135. The order further (1) requires defendants to take all "steps necessary to ensure the availability of at least one required accessible voting system" in the future; (2) prohibits defendants from enforcing the Town's 2023 decision to stop using electronic voting machines to the extent it is inconsistent with the order; and (3) requires defendants to "cooperate fully" with any state efforts "to enforce federal law regarding the provision of accessible voting systems." App. 135-136; *see also* Doc. 41 (order clarifying that these terms extend beyond the November 2024 election).

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4. Defendants appealed the preliminary injunction but agreed that it should remain in effect pending appeal. Doc. 30, at 2; Doc. 31. The district court has stayed further proceedings in district court while this appeal is pending. Doc. 33.

SUMMARY OF ARGUMENT

This Court should affirm the district court's preliminary injunction. The district court correctly determined that the United States is likely to succeed on the merits of its HAVA claim, and the court did not clearly err in finding that the United States is likely to suffer irreparable harm without injunctive relief—the only two determinations that defendants challenge on appeal.

1. The district court correctly ruled that the United States is likely to succeed on the merits of its HAVA claim. The only issue in dispute is whether Thornapple's use of paper ballots is a "voting system" within the meaning of Section 301 of HAVA. The answer is clearly yes.

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The statute defines "voting system" to include (1) "mechanical . . . equipment" used to "cast and count votes"; "and" (2) the "practices and associated documentation" used to make "instructions, forms, or paper ballots" available to voters. 52 U.S.C. 21081(b)(1)(B) and (2)(E). The multiple uses of "and" in the definition make clear that it lists *components* of electoral processes that, when present, make up a "voting system"; the "ands" do not require that *all* listed components be present

for an electoral process to qualify as a "voting system." Paper-ballot systems are therefore encompassed by the plain text of the statutory definition.

Other parts of Section 301 confirm that paper-ballot systems are "voting systems." Indeed, those subsections specify how "paper ballot voting systems" can satisfy requirements that seek to ensure that "voting systems" avoid overvotes and allow voters to correct errors. 52 U.S.C. 21081(a)(1)(B) and (c)(2). Defendants' definition of "voting system," by contrast, would leave a gaping hole in coverage, exempting paper ballots counted by hand from the statute's carefully crafted "minimum election administration standards," Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (preamble), and "uniform . . . election . . . administration requirements," *id.* Tit. III, 116 Stat. 1704 (title of Title III) (capitalization omitted). Congress did not create such an exemption, nor would there have been any reason for it to do so.

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2. The district court did not clearly err in finding that individuals with disabilities, and by extension the United States, are likely to suffer irreparable harm in the absence of preliminary injunctive relief.

Thornapple's failure to make an accessible ballot-marking device available to voters is likely to infringe on the rights of individuals with disabilities to vote privately and independently. That is so because Thornapple's system requires some voters with disabilities to reveal their votes to another person, who then assists in marking their ballots. Such individuals have voted in past elections and are likely to vote in future ones as well. And still others may forgo their right to vote altogether if they cannot exercise the franchise in a private and independent manner. Injunctive relief was clearly warranted.

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STANDARD OF REVIEW

This Court reviews a district court's decision to grant a preliminary injunction for abuse of discretion, its legal conclusions de novo, and its factual findings for clear error. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017).

ARGUMENT

A party that seeks a preliminary injunction "must show that (1) [it] will suffer irreparable harm in the absence of an injunction, (2) traditional legal remedies are inadequate to remedy the harm, and

(3) [it] ha[s] some likelihood of success on the merits." *Camelot Banquet Rooms, Inc. v. United States Small Bus. Admin.*, 24 F.4th 640, 644 (7th Cir. 2022); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (holding that a movant for a preliminary injunction must show that it "is likely to succeed on the merits" and that it "is likely to suffer irreparable harm in the absence of preliminary relief"). If those showings are made, the district court must "balance the harm the moving part[y] would suffer if an injunction is denied against the harm the opposing parties would suffer if one is granted, and the court must consider the public interest, which takes into account the effects of a decision on non-parties." *Camelot Banquet Rooms*, 24 F.4th at 644; *Winter*, 555 U.S. at 20.

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Defendants challenge only the district court's threshold determinations that the United States is likely to succeed on the merits of its HAVA claim and that it satisfied the irreparable-harm requirement for a preliminary injunction.[3] Defendants do not challenge

[3] A footnote in defendants' Statement of the Case (1) asserts that the Thornapple officials sued in their official capacities are not proper defendants; and (2) notes that the district court has not yet opined on that issue. Br. 7 n.3. Because defendants do not ask this Court to rule

any other aspect of the district court's analysis of the preliminary-injunction factors and thus have waived any challenge to that analysis. *See, e.g.*, *Central States, Se. & Sw. Areas Pension Fund v. Midwest Motor Exp., Inc.*, 181 F.3d 799, 808 (7th Cir. 1999). Because the court properly found that the United States satisfied the likelihood-of-success and irreparable-harm requirements, this Court should affirm the preliminary injunction.

I. The district court correctly determined that the United States is likely to succeed on the merits of its HAVA claim.

A party moving for preliminary injunctive relief "must demonstrate that its claim has some likelihood of success on the merits, not merely a better than negligible chance." *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020) (internal quotation marks and citation omitted). This standard does not require the movant to prove its claim by a preponderance of the evidence, which "would spill too far into the

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on that issue and do not develop any argument on it, it is waived and not properly before this Court. *See, e.g.*, *Eichwedel v. Chandler*, 696 F.3d 660, 669-670 & n.27 (7th Cir. 2012) (concluding that party waived argument because, among other things, it appeared solely in a footnote in the Statement of the Case); *Jones v. Shalala*, 10 F.3d 522, 525 n.4 (7th Cir. 1993) ("Issues which are not discussed in the body of the brief are generally waived.").

ultimate merits for something designed to protect both the parties and the process while the case is pending," but generally requires the movant to demonstrate how it "proposes to prove the key elements of its case." *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020).

The dispute on the merits in this case is narrow. The parties agree that, under Section 301(a)(3) of HAVA, a jurisdiction's "voting system" must "be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters." 52 U.S.C. 21081(a)(3)(A). The parties further agree that, to satisfy this requirement, a voting system must include "at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place." 52 U.S.C. 21081(a)(3)(B).

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It is also undisputed that Thornapple did not provide a HAVA-compliant voting system accessible to individuals with disabilities at its lone polling place during the April and August 2024 primary elections, even though it had access to a HAVA-compliant electronic machine that

it had used in prior federal elections.[4] App. 7, 20-21, 36-38, 57. Accordingly, the parties agree that Thornapple violated Section 301(a)(3) so long as Thornapple's use of paper ballots qualifies as a "voting system" under Section 301—the only issue in dispute.

On that question, the district court correctly concluded that the United States far exceeded the applicable likelihood-of-success standard. The court concluded at the preliminary-injunction hearing that the United States' interpretation of the statute "is almost certainly the correct one" (App. 125), and the court ruled in its preliminary-injunction order that "[p]aper ballot voting systems are included in HAVA's definition of a voting system" (App. 134-135).

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A. The text, structure, and purposes of HAVA establish that paper ballots counted by hand qualify as a "voting system."

The United States' interpretation of the statute follows directly from HAVA's text, structure, and purposes. Interpreting Section 301's definition of "voting system" "begins and ends with the text," *Octane*

[4] The ImageCast Evolution used by Thornapple in past elections is not a direct recording electronic device. Instead, it falls under the category of "other voting system equipped for individuals with disabilities." App. 18-19 n.2, 105, 109-110.

Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 553 (2014), with "the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," *Turley v. Gaetz*, 625 F.3d 1005, 1008 (7th Cir. 2010) (citation omitted).

"A word or phrase in a statute should not be interpreted in a vacuum; rather, the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Loja v. Main St. Acquisition Corp.*, 906 F.3d 680, 683 (7th Cir. 2018) (internal quotation marks and citations omitted). This is because "statutory construction is a holistic endeavor and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Trustees of Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 828 (7th Cir. 1996) (internal quotation marks and citation omitted). Moreover, this Court "ha[s] a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Matter of Lifschultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995) (internal quotation marks and citation omitted).

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Section 301(b) states that "the term 'voting system' means":

> (1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—
>
> (A) to define ballots;
>
> (B) to cast and count votes;
>
> (C) to report or display election results; and
>
> (D) to maintain and produce any audit trail information; and
>
> (2) the practices and associated documentation used—
>
> (A) to identify system components and versions of such components;
>
> (B) to test the system during its development and maintenance;
>
> (C) to maintain records of system errors and defects;
>
> (D) to determine specific system changes to be made to a system after the initial qualification of the system; and
>
> (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

52 U.S.C. 21081(b).

Thornapple's paper-ballot system involves "mechanical . . . equipment" that is used to "cast and count votes" under Subsection (b)(1) (52 U.S.C. 21081(b)(1)(B)), given that voters must use pencils or

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pens—mechanical instruments—to vote, and they then place their ballots in a box secured with a lock—another mechanical device (App. 119). *See Mechanical*, *Merriam-Webster Dictionary*, https://perma.cc/62Z6-WZ7G (Jan. 26, 2025) (defining "mechanical" to include "produced or operated by a machine or tool"). And even if Subsection (b)(1) were inapplicable, the Town's paper-ballot system is plainly covered under Subsection (b)(2), which extends to any "practices and associated documentation" used to "make available any materials to the voter," "such as . . . instructions, forms, or *paper ballots*." 52 U.S.C. 21081(b)(2)(E) (emphasis added).

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Thornapple resists this straightforward conclusion, arguing that (1) its paper-ballot system does not utilize some combination of "mechanical, electromechanical, or electronic equipment" under Subsection (b)(1), 52 U.S.C. 21081(b)(1); and (2) the use of such equipment is *necessary* for a jurisdiction's system to qualify as a "voting system" under the statute. According to defendants, the word "and" connecting Subsections (b)(1) and (b)(2) requires that a "voting system" include *both* a combination of "mechanical, electromechanical, or electronic equipment" referenced in Subsection (b)(1), 52 U.S.C.

21081(b)(1), *and* the "practices and associated documentation" listed in Subsection (b)(2), 52 U.S.C. 21081(b)(2). Br. 10-14.

That argument founders on multiple independent grounds. Not only does it rest on a mistaken premise—that the pens, pencils, and locks used in connection with casting ballots in Thornapple do not qualify as "mechanical" equipment—but also it relies on a faulty understanding of how Subsections (b)(1) and (b)(2) fit together.

"'*And* is an elemental word[] in the English language' used to 'combine items,'" but "*and* alone tells us little of *how* two items are to be combined." *Navy Fed. Credit Union v. LTD Fin. Servs., LP*, 972 F.3d 344, 356 (4th Cir. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012)). Instead, this Court must "home in on the specific context in which *and* is used, and the broader context of the statute as a whole." *Id.* at 357 (alteration and citation omitted); *see also Pulsifer v. United States*, 601 U.S. 124, 133, 140-141, 151 (2024) ("[C]onjunctions are versatile words, which can work differently depending on context."); *United States v. Pace*, 48 F.4th 741, 754 (7th Cir. 2022) (explaining that although "the word 'and' is commonly utilized conjunctively . . . , the context of the

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word 'and' [in a statute can] support[] the view that it should be read disjunctively"), *cert. denied*, 144 S. Ct. 1092 (2024).

Section 301(b) defines the term "voting *system*," and it quite sensibly lists various *components* that may—but need not be—part of such a "system." 52 U.S.C. 21081(b) (emphasis added). A "voting system" is defined to "mean" all listed components that are present, even if some listed components are absent. *Ibid.* An example illustrates this understanding of the statute: Imagine a statute that defined a city's "public-transportation system" to "mean" its public "subways and buses." Plainly, a city operating public buses but no subways could not contend that it lacks a "public-transportation system."

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Here, because the "objects connected" by the word "and" are "independent" components that make up a larger whole, the objects are "generally taken 'in addition,'" not "jointly." *Navy Fed. Credit Union*, 972 F.3d at 357; *cf. Pulsifer*, 601 U.S. at 134-135 (explaining that the statement in Article III of the Constitution that "[t]he judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, *and* Treaties" does not "limit judges to hearing the

few cases arising simultaneously under all three kinds of law" (alterations in original; emphasis added; citation omitted)).

The other uses of the word "and" in the definition of "voting system" underscore the folly of defendants' argument. Subsection (b)(1), for example, references "mechanical, electromechanical, or electronic equipment . . . that is used" to "define ballots," "cast *and* count votes," "report or display election results," "*and*" "maintain *and* produce any audit trail information." 52 U.S.C. 21081(b)(1)(A)-(D) (emphases added). Defendants do not and cannot argue that the emphasized instances of the word "and" require equipment to accomplish *all* listed tasks before it can be considered part of a "voting system" under Section 301. Indeed, defendants correctly conceded in district court that a jurisdiction's use of paper ballots to "cast" ballots is part of a "voting system" so long as the jurisdiction also uses "mechanical, electromechanical, or electronic equipment" to "count" votes. App. 85-86. There is no reason to distinguish the meaning of the word "and" *within* Subsection (b)(1)—and *within* Subsection (b)(2), which is structured similarly—from the meaning of the word "and" *connecting* Subsections (b)(1) and (b)(2).

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Defendants' interpretation of 52 U.S.C. 21081(b) also renders other portions of the statute that expressly reference a "paper ballot voting system" superfluous absent a strained reading of those provisions, thus "creat[ing] more problems than solutions." *Pace*, 48 F.4th at 754. Section 301(a) requires that a "voting system" (1) "notify" any voter who selects "more than one candidate for a single office" of that fact and the consequence of casting multiple votes; and (2) provide voters with an opportunity to "verify" their selections and "correct any error" before their ballots are "cast and counted." 52 U.S.C. 21081(a)(1)(A)(i)-(iii). But the statute specifies that a jurisdiction that uses a "paper ballot voting system" may be able to satisfy these requirements in certain circumstances. 52 U.S.C. 21081(a)(1)(B) and (c)(2). Congress thus clearly contemplated that "paper ballot voting systems"—like Thornapple's—are covered by Section 301.

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In district court, defendants sought (App. 85-86) to explain away these statutory references to a "paper ballot voting system" by arguing that paper ballots are covered by the statute only if a machine counts the votes cast by paper. As the district court correctly determined, however, it is the *casting* of votes, not their *counting*, that Section 301's

accessibility requirements address. App. 125; *see* 52 U.S.C. 21081(a)(3)(A) (requiring a voting system to provide individuals with disabilities the "same opportunity for *access and participation* (including privacy and independence) as for other voters" (emphasis added)). Defendants provide no reason why the mere use of a mechanical counting device at the back end of an electoral process that uses paper ballots to cast votes makes all the difference in defining a "voting system" subject to these requirements.[5]

Nor would it make sense to interpret HAVA to leave such a gaping hole in coverage, requiring jurisdictions to follow certain best practices when voters cast ballots using paper, machines, or electronic equipment, *except* when jurisdictions use paper ballots in conjunction with hand counting. HAVA's preamble makes clear that the statute was enacted to "establish *minimum* election administration standards," Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (emphasis added), and Title III of the statute—which contains Section

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[5] Defendants make no attempt to explain Section 301's express references to a "paper ballot voting system" on appeal as they did below, even though they acknowledge that "statutes should be read in such a way as to give meaning to every section." Br. 17.

301—is entitled "*uniform* . . . election technology and administration requirements," *id.* Tit. III, 116 Stat. 1704 (emphasis added; capitalization omitted).

There is no reason to think Congress thought that paper ballots counted by hand—but not paper ballots counted by machine—should be exempt from the statute's carefully crafted requirements designed to ensure, among other things, that (1) all voters have the opportunity to correct any mistakes on their ballots and avoid overvoting-related errors; (2) voters with disabilities can cast their votes privately and independently; (3) voting systems can be audited; and (4) jurisdictions adopt "uniform and nondiscriminatory standards" defining what "count[s] as a vote." 52 U.S.C. 21081(a)(1)-(6); *see also* pp. 2-4, *supra*.

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Defendants respond that it is the district court's interpretation of Section 301's definition of "voting system" to cover "whatever voting system a municipality uses" that renders other portions of the statute superfluous—namely Section 301(b)(1)'s reference to "mechanical, electromechanical, or electronic equipment." Br. 16-17. But Section 301(b)(1) is quite plainly not superfluous, as it ensures that the

identified equipment—which is not fully covered by Section 301(b)(2)—qualifies as part of the "voting system."

It is true that Congress saw fit to spell out all potential components of a "voting system" to ensure that the term would cover, among other things, any approach a jurisdiction might take to the casting of voters' ballots. *See* 52 U.S.C. 21081(b)(1)(A)-(B) and (2)(E) (defining "voting system" to include (1) "mechanical, electromechanical, or electronic equipment" used for casting ballots; and (2) the "practices and associated documentation used" to "make available any materials to the voter," including "paper ballots"). Congress likely did so to ensure that it captured *all* critical aspects of voting systems that may be in play before, during, and after election day, such as the "software" used to "program . . . equipment," the "practices" used "to test the system during its development," and the equipment used "to produce any audit trail information" following an election. 52 U.S.C. 21081(b)(1)(D) and (2)(B). Although Congress may have been able to accomplish that goal using more concise language, courts "do not

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demand (or in truth expect) that Congress draft in the most translucent way possible." *Pulsifer*, 601 U.S. at 137.[6]

B. The legislative history confirms that paper-ballot systems are covered by HAVA.

Defendants attempt to save their argument by resorting to HAVA's legislative history, contending that HAVA "was crafted in response to the mechanical troubles which plagued the 2000 election and was never designed to cover the manual processes used by Thornapple." Br. 15 (citing HAVA's preamble and statements of Senators Dodd and Reid that reference that election and its associated problems). Defendants find further "compelling evidence of Congress's intent to narrowly address the mechanical balloting machines that plagued the 2000 general election rather than paper ballots" in HAVA's appropriations of funds to States for activities to improve the administration of elections and replace punch-card or lever voting machines. Br. 16.

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[6] Notably, this case does not present the question whether particular approaches jurisdictions may take to *counting* and *auditing* votes—such as hand-counting votes—can qualify as components of a jurisdiction's "voting system" and thus be considered in evaluating whether a "voting system" meets the requirements set forth in Section 301(a).

Even if resort to legislative history were warranted in this case—which it is not, given Section 301's clear language, structure, and purpose—the legislative history underscores the correctness of the *United States'* interpretation of the statute, not Thornapple's. Indeed, defendants' arguments miss the forest for the trees. Although HAVA was undoubtedly concerned with correcting the problems associated with the 2000 election, HAVA's legislative history consistently describes the statute as establishing minimum standards applicable to *all* jurisdictions conducting federal elections.

As explained above, HAVA's preamble states that Congress's purposes in passing the statute included "establish[ing] minimum election administration standards for States and units of local government." 116 Stat. 1666. Senator Bond, one of the Senate managers of the legislation, echoed this goal, explaining that Section 301 sets minimum standards "concern[ing] the voting system, which includes the type of voting machine *or method* used by a jurisdiction." 148 Cong. Rec. S10488, S10490 (daily ed. Oct. 16, 2002) (emphasis added). Senator Dodd, another Senate manager of the legislation, similarly recognized that voting systems governed by Section 301

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include "paper ballot systems," which he defined as "those systems where the individual votes a paper ballot that is tabulated by hand." *Id.* at S10506. These statements belie defendants' attempt to confine the term "voting systems" to electoral processes incorporating "mechanical, electromechanical, or electronic equipment."

II. The district court did not clearly err in finding that individuals with disabilities are likely to suffer irreparable harm absent injunctive relief.

A plaintiff seeking a preliminary injunction must show that it "is likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "This requires more than a mere possibility of harm," but does not require that the harm "actually occur" or "be certain to occur" before the court enters injunctive relief. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017). "[H]arm is considered irreparable if it cannot be prevented or fully rectified by the final judgment after trial." *Ibid.* (internal quotation marks and citation omitted). "Because a district court's determination regarding irreparable harm is a factual finding, it is reviewed for clear error." *Ibid.*

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The district court did not clearly err in determining that individuals with disabilities—and by extension, the United States—likely would suffer irreparable harm absent preliminary injunctive relief. App. 126-127. The right to vote is both "fundamental," *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009) (plurality opinion), and "the essence of a democratic society," meaning that "any restrictions on that right strike at the heart of representative government," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). It is well settled that infringing on the fundamental right to vote constitutes an irreparable injury. *See, e.g.*, *Jones v. Governor of Fla.*, 950 F.3d 795, 828-829 (11th Cir.), *overruled en banc on other grounds*, 975 F.3d 1016 (11th Cir. 2020); *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 9, 12-13 (D.C. Cir. 2016); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).

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The district court found, and defendants do not dispute, that Thornapple's failure to make an accessible ballot-marking device available infringes on the right HAVA guarantees to individuals with disabilities to vote privately and independently. App. 126-127. Moreover, it is undisputed that some of Thornapple's voters with

disabilities cannot vote privately and independently with paper ballots. Suzanne Pinnow, Thornapple's Chief Election Inspector, testified to multiple examples of such individuals. App. 112-113. A blind voter, for instance, needed her daughter's assistance to mark her ballot. App. 112. Another voter who had recently suffered a stroke came to the polling place with his wife and needed assistance. Because he and his wife "weren't agreeing on things," Pinnow asked him whom he wanted to vote for and guided his hand to help him make his selections with a pencil. App. 113.

By conditioning such individuals' right to vote on revealing their votes to another person who then assists them in marking their ballots, Thornapple's electoral process denied them "the same opportunity for access and participation (including privacy and independence) as for other voters." 52 U.S.C. 21081(a)(3)(A). "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C.*, 769 F.3d at 247; *see also Jones*, 950 F.3d at 829 ("The denial of the opportunity to cast [such] a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm."). Moreover, once an election passes without such opportunity, "there can

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be no do over and no redress." *League of Women Voters of N.C.*, 769 F.3d at 247. Accordingly, any harm sustained by individuals with disabilities caused by Thornapple's failure to provide them with an accessible electronic voting machine "cannot be prevented or fully rectified by the final judgment after trial." *Whitaker*, 858 F.3d at 1045.

On appeal, defendants emphasize (Br. 19) Pinnow's testimony that, as far as she knows, only "zero to one" voters with a disability cast their ballots in person in a given election. App. 112-113. But that is clearly an undercount, as Pinnow has no way of knowing with certainty whether a given voter has a disability and needs an accessible voting machine. Moreover, defendants are wrong to demand that the United States establish "actual harm" (Br. 19); instead, the controlling *Whitaker* and *Winter* decisions require the United States to establish only "likely" harm. *See Winter*, 555 U.S. at 20; *Whitaker*, 858 F.3d at 1045. Defendants' standard is also inconsistent with the holdings of other federal courts of appeals, which have found irreparable injury infringing on voting rights where an obstacle to voting "unquestionably make[s] it more difficult" to vote, *Newby*, 838 F.3d at 9, or "surely" will

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"disproportionately adversely affect[]" certain voters, *League of Women Voters of N.C.*, 769 F.3d at 247.

Here, the district court did not clearly err in finding that at least some voters with disabilities in Thornapple will likely be adversely affected by Thornapple's HAVA violation, thus satisfying the irreparable-harm requirement. The United States pointed out below that nearly 1.3 million voters in Wisconsin—nearly 28% of the State's population—have a disability. Many of these individuals have disabilities that make voting with paper ballots more difficult, including the 4% of Wisconsin's population with serious vision impairments. App. 25.

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In addition, as Pinnow's testimony vividly demonstrated, some individuals with a disability who have voted in past elections could not do so privately and independently, as HAVA mandates, but instead needed the assistance of others to mark their paper ballots. Thus, it is implausible that, in the future, Thornapple's actions will not affect the voting rights of the same or similar individuals with disabilities. Moreover, the fact that the population of individuals with disabilities, unlike other demographics, can fluctuate between elections underscores

the need for municipalities to provide at least one accessible ballot-marking device, regardless of whether they have advance notice of any voters with disabilities in the jurisdiction.

It bears emphasizing that individuals with disabilities are likely to be adversely affected by Thornapple's HAVA violation in multiple ways. Some—like the voters Pinnow testified about—will decide to vote with the assistance of another person, forgoing their right to privacy and independence. Others, however, may forgo their right to vote altogether because they do not wish to vote without privacy or to publicly disclose their disability and need for assistance. Pinnow's testimony about voters with disabilities does not speak to these voters or forecast which voters may develop a disability in the future and require assistance. The district court thus correctly observed that "Thornapple has disabled voters" who "need assistance in voting," and that the assistance currently available does not give them the opportunity to vote independently and privately as HAVA requires. App. 126-127.

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Moreover, the district court correctly determined that even if no voter with a disability has requested in the past to use an accessible

electronic voting machine, as Pinnow testified (App. 114), Thornapple's failure to provide such a machine still burdens the rights of such voters, who might use the machine if given the opportunity to do so. App. 126. Thornapple's actions likely will cause voters with disabilities irreparable harm by "unquestionably mak[ing] it more difficult" for them to vote independently and privately, *Newby*, 838 F.3d at 9, and by "disproportionately adversely affect[ing]" them, *League of Women Voters of N.C.*, 769 F.3d at 247. That individuals with disabilities *can* vote in Thornapple using paper ballots with assistance from another person, and that some voters prefer that method to electronic voting, is of no moment because "[t]he [irreparable] harm that occurs from eliminating one required procedural safeguard is not negated by the continued use of a different additional procedural safeguard." *Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139, 1155 (S.D. Ind. 2018).

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CONCLUSION

For the foregoing reasons, this Court should affirm the district court's preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Seventh Circuit Rule 32(c) because it contains 6955 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft 365.

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ADDENDUM

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ADDENDUM: TABLE OF CONTENTS

PAGE

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52 U.S.C. 21081. Voting systems standards.

(a) Requirements

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

(1) In general

(A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic voting system) shall—

(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;

(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and

(iii) if the voter selects votes for more than one candidate for a single office--

(I) notify the voter that the voter has selected more than one candidate for a single office on the ballot;

(II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and

(III) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.

(B) A State or jurisdiction that uses a paper ballot voting system, a punch card voting system, or a central count voting system (including mail-in absentee ballots and mail-in ballots), may meet the requirements of subparagraph (A)(iii) by—

(i) establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and

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(ii) providing the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).

(C) The voting system shall ensure that any notification required under this paragraph preserves the privacy of the voter and the confidentiality of the ballot.

(2) Audit capacity

(A) In general

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

(B) Manual audit capacity

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

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

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

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(3) Accessibility for individuals with disabilities

The voting system shall—

(A) be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters;

(B) satisfy the requirement of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place; and

(C) if purchased with funds made available under subchapter II on or after January 1, 2007, meet the voting system standards for disability access (as outlined in this paragraph).

(4) Alternative language accessibility

The voting system shall provide alternative language accessibility pursuant to the requirements of section 10503 of this title.

(5) Error rates

The error rate of the voting system in counting ballots (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission which are in effect on October 29, 2002.

(6) Uniform definition of what constitutes a vote

Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

(b) Voting system defined

In this section, the term "voting system" means—

(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used--

(A) to define ballots;

(B) to cast and count votes;

(C) to report or display election results; and

(D) to maintain and produce any audit trail information; and

(2) the practices and associated documentation used--

(A) to identify system components and versions of such components;

(B) to test the system during its development and maintenance;

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(C) to maintain records of system errors and defects;

(D) to determine specific system changes to be made to a system after the initial qualification of the system; and

(E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

(c) Construction

(1) In general

Nothing in this section shall be construed to prohibit a State or jurisdiction which used a particular type of voting system in the elections for Federal office held in November 2000 from using the same type of system after the effective date of this section, so long as the system meets or is modified to meet the requirements of this section.

(2) Protection of paper ballot voting systems

For purposes of subsection (a)(1)(A)(i), the term "verify" may not be defined in a manner that makes it impossible for a paper ballot voting system to meet the requirements of such subsection or to be modified to meet such requirements.

(d) Effective date

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

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