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The Scope of Election Litigation

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Abstract

One way to think about the "scope" of a case is based on the range of parties who are—or must be—involved in it. The broader a case's scope in this regard, the more burdensome and costly it can be for plaintiffs to file and the more complicated and time-consuming it may be for a court to adjudicate. Requiring large numbers of parties to be involved in a case can sometimes effectively preclude otherwise meritorious suits from being filed. This is especially true in election law disputes which often arise under harried circumstances and can be subject to strict time constraints.

This Essay explores doctrines courts have applied in recent years that have unnecessarily expanded the scope of certain election litigation. For example, some courts have applied Bush v. Gore*'s Uniformity Principle at the remedial stage of election cases. Under this approach, equal protection concerns would arise from allowing plaintiffs to seek relief against allegedly invalid electoral rules only for themselves, rather than for all impacted voters within the jurisdiction. Such reasoning has led some courts to hold that relief is unavailable unless a challenge to election-related legal provisions is brought by, or otherwise on behalf of, all such voters. Because serving as the plaintiff in a case and obtaining a favorable judgment are legally significant distinctions, courts need not expand the scope of*

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election litigation by applying Bush*'s Uniformity Principle at the remedial stage.*

Other courts have applied standing doctrine to expand the range of defendants who must be involved in election litigation. These jurisdictions have prohibited plaintiffs from suing a state's chief election officers (such as a Secretary of State or members of a state election board) to challenge a state law, regulation, or other election-related provision which county officials are primarily responsible for implementing or enforcing. They have instead required plaintiffs to identify, serve, and sue each county election administrator throughout the state, often totaling scores of defendants. Courts need not apply standing doctrine in this manner, however, in order to ensure they can redress plaintiffs' alleged harm. Since state and county election officials work together to conduct elections, Federal Rule of Civil Procedure 65(d)(2) would likely allow a court to enforce an order involving state election officials against their county counterparts. Moreover, the authority of state election officials in most jurisdictions to make rules, issue directives and guidance to county administrators, and otherwise assure uniformity in elections should also generally be deemed sufficient to ensure such state-level defendants can assure compliance with court orders.

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INTRODUCTION

Voting rights cases often play an important role in ensuring free and fair elections, yet they face the same range of procedural, jurisdictional, and other non-merits barriers as

other types of purely private lawsuits.[1] Indeed, such issues are often even more complicated in the context of election litigation. For example, although the right to vote is an individual right,[2] it must be exercised collectively, together with other ideologically aligned voters, to have full effect.[3] The litigation process, however, is not always well-suited to recognizing or enforcing such collective interests, thereby raising challenging questions.[4]

Scholars have examined election litigation from many perspectives.[5] Many pieces focus on the substance of such lawsuits. Professor Derek Muller, for example, has explained that the Supreme Court's rulings in election law cases over the past two decades "suggest[] that the federal courts should play a smaller role in the patrolling of how states administer elections."[6] In contrast, Professor Ned Foley argues that federal

1. *See generally* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017) (describing the procedural challenges in the enforcement of constitutional rights).

2. *See* Gill v. Whitford, 585 U.S. 48, 65 (2018) ("[A] person's right to vote is 'individual and personal in nature.'" (quoting Reynolds v. Sims, 377 U.S. 533, 561 (1964))).

3. *See* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1599 (1993) ("[T]he right of the individual to participate politically is a right best realized in association with other individuals, i.e., as a group."); *see also* James Thomas Tucker, *Affirmative Action and Misrepresentation Part II—Deconstructing the Obstructionist Vision of the Right to Vote*, 43 HOW. L.J. 405, 414 (2000) ("When an electoral scheme systematically prevents the collective exercise of voting rights for particular groups, the individual right to vote is diminished accordingly.").

4. *See* Atiba R. Ellis, *Economic Precarity, Race, and Voting Structures*, 104 KY. L.J. 607, 618–19 (2015) (explaining how challenges to laws governing the voting process often raise "concerns . . . regarding individual versus collective interests"); *see also* Kevin C. McMunigal, *Of Causes and Clients: Two Tales of* Roe v. Wade, 47 HASTINGS L.J. 779, 805 (1996) ("A recurring issue in public interest litigation is the tension between representing individual interests and collective interests.").

5. This Essay focuses on challenges to legal provisions governing the administration of elections. Professor Joshua A. Douglas has written the definitive piece on statutory provisions governing post-election contests of electoral outcomes. *See* Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1 (2013).

6. Derek T. Muller, Brnovich v. DNC*: Election Litigation Migrates from the Federal Courts to the Political Process*, 2021 CATO SUP. CT. REV. 217, 236 (2021). Elsewhere, Professor Muller has pointed out how federal campaign

courts should more vigorously enforce due process norms of "fair play" when reviewing challenges to election statutes,[7] effectively advocating a ratchet-type approach for such cases.[8]

Other pieces instead address various jurisdictional and other procedural aspects of election-related lawsuits. Professor Michael E. Solimine, for example, wrote the seminal piece on the various issues implicated by the use of three-judge district courts in redistricting litigation.[9] Professor Saul Zipkin has defended courts' broad application of standing doctrine in the context of election challenges.[10] Similarly, Professor Rick Hasen has emphasized the need for courts to apply ripeness doctrine more broadly in such cases. He explains that, whenever possible, challenges should be brought before an election is conducted, rather than forcing litigants to raise their claims after the election has been held, votes have been cast, and the candidates

finance law enables political parties and candidates to raise funds specifically to facilitate election litigation. *See* Derek T. Muller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561, 562–63 (2021) (tracing the recent rise in election-related litigation partly to campaigns' legal "incentives to focus on litigation-centric fundraising").

7. *See* Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 730 (2017) ("If voters have reasonably come to rely on the availability of a particular type of voting procedure, and if the government removes its availability without a legitimately nonpartisan reason for doing so, then this removal is a form of inappropriate partisanship in violation of fair play and due process.").

8. *Cf.* Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 453 (2019) (arguing that courts already scrutinize legislatures' attempts to limit voting opportunities that states were not obligated to establish in the first place).

9. *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 136 (1996) (arguing that "Congress should seriously consider abolishing" the use of three-judge district courts in voting cases because of their "problematic aspects"); *see also* Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 706 (2020) (arguing that three-judge district courts are bound by circuit precedent, even though their judgments are appealable directly to the Supreme Court).

10. *See* Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179, 184 (2011) (explaining how courts have applied standing doctrine flexibly in many election-related cases by "remodeling the structural or probabilistic harm" the plaintiff voters face "to fit the injury-in-fact assessment").

who will benefit from various possible rulings are definitively known.[11]

This Essay focuses on an aspect of election litigation that has been increasingly discussed in recent court rulings, yet received little academic scrutiny: the scope of lawsuits challenging election-related provisions such as statutes, regulations, policies, or procedures. The term "scope" refers to the breadth of a lawsuit in terms of the parties who must be involved. This Essay explores justiciability and other constitutional rulings which broaden the range of plaintiffs and defendants who must be parties to challenges to election-related legal provisions in order for such litigation to proceed.

Part I of this Essay examines how Equal Protection concerns about the potential remedies available in election challenges have led some courts to question the viability of claims brought by, or for the benefit of, only certain members of an electorate. Part II shows how, somewhat counterintuitively, standing concerns have led some courts to require plaintiffs to sue scores of county election officials in certain types of cases, rather than a state's chief election officer(s). The Conclusion briefly closes, urging courts to allow election litigation to retain a reasonable scope by limiting the parties who must participate as mandatory plaintiffs and defendants in challenges to election laws, regulations, and procedures of statewide applicability.

I. EQUAL PROTECTION, ELECTION REMEDIES, AND PROPER PLAINTIFFS

One of the most basic considerations that determines the scope of a case is the range of plaintiffs who must be involved. The range of plaintiffs who must participate in a case, in turn, can depend among other things on the scope of relief the court must award if the plaintiffs prevail. Some courts have held that, when plaintiffs challenge election-related legal provisions or procedures, injunctive relief cannot be limited only to certain voters or the particular plaintiffs before the court.[12] Rather, the

11. *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 991 (2005) ("Courts should be more willing to entertain pre-election challenges and less willing to entertain post-election challenges . . . .").

12. *See infra* notes 31–40 and accompanying text.

injunction must extend to all similarly situated voters participating in that election.[13]

Such rulings are often influenced in large part by *Bush v. Gore*'s[14] Uniformity Principle,[15] which extends Equal Protection principles to "nuts-and-bolts" election administration issues.[16] Article III standing doctrine and other procedural requirements, however, can limit the ability of plaintiffs to seek relief on behalf of people other than themselves.[17] Accordingly, to the extent courts apply both of those lines of authority, challenges to election-related legal provisions would have to be brought, if at all, only as class actions on behalf of all impacted voters in the jurisdiction, or by plaintiff entities (if any) with standing to seek such broad relief.

This Part begins by reviewing the ways in which courts have applied the Uniformity Principle to remedial issues in constitutional and other challenges to election-related requirements. It then outlines the obstacles which plaintiffs may face in seeking broad relief to benefit all affected voters. In general, applying the Uniformity Principle at the remedial stage of election litigation would likely limit the ability of many plaintiffs, especially individual voters, to challenge election laws.

In *Bush v. Gore*, the Supreme Court held that the Fourteenth Amendment's Equal Protection Clause[18] not only restricts a state's ability to exclude people from its electorate, but prohibits "arbitrary and disparate treatment" of voters

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13. *See infra* notes 31–40 and accompanying text.

14. 531 U.S. 98, 104–05 (2000).

15. *See* Michael T. Morley, Bush v. Gore's *Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 230–31 (2020) [hereinafter *Equal Protection Right to Vote*] (citing *Bush*, 531 U.S. at 104–05).

16. Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378 (2001).

17. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs . . . ."); *see also* Califano v. Yamasaki, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.").

18. U.S. CONST. amend. XIV, § 1; *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the Fifth Amendment's Due Process Clause contains an implicit equal protection component which restricts the federal government to the same extent as the Equal Protection Clause limits states).

participating in the same election regarding their ability to cast a vote and have it counted.[19] I have called this extension of Equal Protection to election administration issues the "Uniformity Principle."[20] Though language in *Bush* led many commentators to question the case's status as precedent,[21] several lower courts have applied the Uniformity Principle to a wide range of election-related rules.[22] Violations of *Bush*'s Uniformity Principle have become a viable cause of action in election litigation.

Some courts have gone even further, applying the Uniformity Principle when determining the proper scope of remedies in challenges to election-related legal provisions.[23] They have held that enjoining an unconstitutional or otherwise invalid requirement as to only certain voters participating in an election would violate the Uniformity Principle by giving those voters a materially greater opportunity than others to cast a ballot or have it counted.[24] Courts have applied the Uniformity Principle to such remedial issues in two main ways.

On the one hand, some of these courts have granted relief for all voters impacted by allegedly unconstitutional or invalid provisions, policies, or procedures to avoid Equal Protection

19. 531 U.S. at 104–05.

20. Morley, *Equal Protection Right to Vote*, *supra* note 15, at 230–31.

21. *See Bush*, 531 U.S. at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."); *see, e.g.*, Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001) ("[T]he limiting instruction is either meaningless or reveals the new equal protection as a cynical vessel used to engage in result-oriented judging by decree.").

22. *See* Morley, *Equal Protection Right to Vote*, *supra* note 15, at 248–93; *see also* Michael T. Morley, Bush v. Gore's *Uniformity Principle and the 2020 Election*, 58 WAKE FOREST L. REV. 179 (2023) [hereinafter *2020 Election*].

23. *See* Morley, *Equal Protection Right to Vote*, *supra* note 15, at 293–99; Morley, *2020 Election*, *supra* note 22, at 215–20.

24. *See infra* notes 31–32, 35–40 and accompanying text.

problems.[25] In *Gallagher v. New York State Board of Elections*,[26] for example, individual voters and legislative candidates from New York City sued the state board of elections.[27] They sought an order requiring the board to accept absentee ballots without timely postmarks from all voters throughout the state.[28] The plaintiffs argued that the postal service occasionally failed to postmark envelopes and, due to the COVID-19 pandemic, recent policy changes by the postal service created a risk that it would take longer than usual for completed absentee ballots to reach election officials.[29] The court held that enforcing the state's postmark requirement under such circumstances "subjects absentee voters across the state to unjustifiable differences in the way that their ballots are counted."[30]

The court ordered the state election board to direct all local boards throughout the state to count absentee ballots received up to two days late (subject to a few immaterial exceptions).[31] Citing *Bush*, it declared that "counting absentee ballots without timely postmarks in New York City but not counting them in the rest of the state would risk running afoul of the Constitution's guarantee of equal treatment."[32] The court also

25. *See, e.g.*, Jones v. USPS, 488 F. Supp. 3d 103, 140 n.21, 142 (S.D.N.Y. 2020) (entering nationwide defendant-oriented injunction requiring the U.S. Postal Service to take steps throughout the country to ensure expeditious delivery of all voters' absentee ballots); Democratic Party of Ga., Inc. v. Crittenden, 347 F. Supp. 3d 1324, 1341 (N.D. Ga. 2018) (ordering all county election officials to count absentee mail-in ballots that were "rejected solely because of an omitted or erroneous birth date" because another court had ordered one county's officials to count them, "for the sake of uniformity and assurance that all . . . are equally treated" (citing Martin v. Crittenden, 347 F. Supp. 3d 1302, 1306 (N.D. Ga. 2018))); *see also* Tenney v. Oswego Cnty. Bd. of Elections, 140 N.Y.S.3d 670, 681 (N.Y. Sup. Ct. 2021) (ordering a county election board to review all ballots rejected as "'not registered' . . . because the Equal Protection Clause requires . . . every single ballot—and every single voter—[be treated] the same," and declaring the same relief would be granted against any other county boards which "failed to timely process voter registration applications").

26. 477 F. Supp.3d 19 (S.D.N.Y. 2020).

27. *Id.* at 26.

28. *Id.*

29. *Id.* at 30.

30. *Id.* at 49.

31. *Id.* at 27.

32. *Id.* at 52 (citing Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam)).

ruled that the voter and legislative candidate plaintiffs had standing to seek such statewide relief, although it did not explain how any of them could enforce the rights of voters in other counties who had not participated in those candidates' elections.[33] Nor did the court address other potential concerns about statewide defendant-oriented injunctions.[34]

Rather than granting statewide relief despite potential jurisdictional and other obstacles, a few courts have addressed concerns about the Uniformity Principle by instead denying motions for injunctions that would protect only certain affected voters participating in an election. These courts have held that such limited relief may[35] or would[36] violate the Uniformity Principle. In *Friedman v. Snipes*,[37] for example, the district

33. *See id.* at 35–36. The court's reasoning was even more tenuous because it held that winning candidates had standing to seek to have additional absentee ballots counted in order to ensure the election results were accurate. *Id.*

34. *See id.*; *see also Jones*, 488 F. Supp.3d at 140 & n.21 (issuing nationwide defendant-oriented injunction against the Postal Service to expedite the delivery and return of absentee ballots). A "defendant-oriented injunction" is an order barring a governmental defendant from enforcing a challenged legal provision against anyone, anywhere in the pertinent jurisdiction, including third-party non-litigants. Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 490–91 (2016) [hereinafter *De Facto Class Actions?*].

35. *See, e.g.*, Trump v. Biden, 951 N.W.2d 568, 577 n.12 (Wis. 2020) (rejecting a challenge to the state's decision to count certain absentee ballots, in part because such relief "may be unconstitutional" under *Bush*'s Uniformity Principle, since the plaintiff candidate sought to invalidate votes "in only two of Wisconsin's 72 counties when the disputed practices were followed by hundreds of thousands of absentee voters statewide"); Fair Elections Ohio v. Husted, No. 1:12-cv-797, 2012 U.S. Dist. LEXIS 161614, at *66–67 (S.D. Ohio Nov. 1, 2012) ("If the Court were to issue the injunction requested by Plaintiffs and extend the absentee ballot request deadline only as it applies to prisoners, the Court might actually create an equal protection violation where none may have existed under the current statutory scheme."); *cf.* Republican Party of Ark. v. Kilgore, 98 S.W.3d 798, 799 (Ark. 2002) (noting, without adjudicating, the argument that a court order extending the hours for only certain polling places would violate equal protection).

36. *See, e.g.*, Friedman v. Snipes, 345 F. Supp. 2d 1356, 1381 (S.D. Fla. 2004) (holding that an order extending the ballot return deadline only for certain voters "would result in the very granting of greater voting strength to one group over another which the United States Supreme Court found violated the one man, one vote principle").

37. 345 F. Supp. 2d 1356 (S.D. Fla. 2004).

court held that extending the deadline for receiving absentee ballots only for voters from two counties in a statewide election "would result in a denial of the equal protection of the laws to all domestic absentee voters outside of [those two] counties."[38] It added that a court order establishing "a standard for accepting or rejecting contested ballots that varies from county to county . . . [would] result[] in 'arbitrary and disparate treatment' of voters in Florida's different counties" in violation of *Bush*'s Uniformity Principle.[39]

The Sixth Circuit likewise recognized an injunction limited to protecting only certain voters could create "an equal protection violation," but held a court could not automatically rectify that problem simply by "expand[ing] the class of voters" the order covers.[40] It declared that plaintiffs may not assert standing to alleviate such equal protection concerns by seeking relief on behalf of "people who are not before the court, who have not requested relief."[41] In these cases, the Uniformity Principle was typically either an alternative holding or a concern the court voiced to bolster its ruling on other grounds.[42]

At least one judge has rejected both of these approaches, instead concluding that the Uniformity Principle does not apply to judicially ordered remedies in election cases. In *Pennsylvania State Conference of NAACP Branches v. Secretary, Commonwealth of Pennsylvania*,[43] the majority on the Third Circuit panel overturned a preliminary injunction that had required twelve county boards of elections to count absentee ballots without proper dates.[44] The majority held the plaintiffs

38. *Id.* at 1381.

39. *Id.*

40. Ne. Ohio Coal. for the Homeless v. Husted, No. 12-4354, 2012 U.S. App. LEXIS 26926, at *10–11 (6th Cir. Nov. 16, 2012) (per curiam).

41. *Id.* at *11.

42. *See, e.g.*, *Trump*, 951 N.W.2d at 577 ("[T]he challenge to indefinitely confined voter ballots is without merit, and . . . laches bars relief on the remaining three categories of challenged ballots."); *Husted*, 2012 U.S. Dist. LEXIS 161614, at *63 ("Plaintiffs failed to demonstrate a likelihood of success as to any of their claims . . . .").

43. 97 F.4th 120 (3d Cir. 2024).

44. *Id.* at 139.

were unlikely to succeed in their claim[45] under the "materiality provision" of the Voting Rights Act.[46]

Judge Shwartz, dissenting, would have upheld the injunction.[47] In a footnote, she explained that the limited scope of the district court's order "did not violate the Equal Protection Clause."[48] Judge Shwartz pointed out that, in the 1966 case *Katzenbach v. Morgan*,[49] the Supreme Court held that a law selectively extending additional voting rights or opportunities to certain people was subject only to rational basis scrutiny rather than strict scrutiny under the Equal Protection Clause.[50] *Bush* did not mention *Katzenbach* and instead emphasized that its "consideration was limited to the present circumstances," which involved ballot-counting standards.[51] Judge Shwartz therefore concluded that an injunction that "mak[es] voting rights more accessible . . . need not be an all-or-nothing proposition."[52]

As I have explained in previous work, lower courts have applied the Uniformity Principle in a variety of contexts notwithstanding *Bush v. Gore*'s disclaimer language.[53] Moreover, the distinction Judge Shwartz implicitly draws between selective expansions of voting opportunities, which are generally permissible, and laws selectively restricting voting opportunities, which are not, seems difficult in practice to draw and largely a function of how an election statute is phrased. Judge Shwartz is correct, however, that *Katzenbach*'s endorsement of selective expansions of voting rights for particular voters is in tension with *Bush*'s Uniformity Principle, which requires that all voters participating in an election have

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45. *Id.*

46. *See* 52 U.S.C. § 10101(a)(2)(B).

47. *Pa. State Conf. of NAACP Branches*, 97 F.4th at 143 (Shwartz, J., dissenting).

48. *Id.* at 142 n.6 (Shwartz, J., dissenting).

49. 384 U.S. 641 (1966).

50. *Pa. State Conf. of NAACP Branches*, 97 F.4th at 142 n.6 (Shwartz, J., dissenting) (noting that *Katzenbach* upheld a federal law requiring states to allow "non-English speakers who attended schools in Puerto Rico that taught predominantly in a non-English language" to vote, while allowing states to apply literacy requirements to other voters (citing *Katzenbach*, 384 U.S. at 654–58)).

51. *Id.* (quoting Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam)).

52. *Id.* (Shwartz, J., dissenting).

53. *See* Morley, *2020 Election*, *supra* note 22.

substantially equivalent opportunities to cast a ballot and have it counted.[54] But it is far from clear that she should have followed the Court's earlier ruling in *Katzenbach* rather than its later one in *Bush*. At some point, the Supreme Court will have to reconcile this seeming contradiction between the two cases.

Notwithstanding Judge Shwartz's analysis, the Uniformity Principle appears to be evolving into an established component of the constitutional law governing elections.[55] On the one hand, exempting court orders from the Uniformity Principle would allow courts to issue injunctions selectively barring election officials from enforcing challenged legal provisions only against the plaintiffs in a case. Such limited orders may be undesirable since they could achieve outcomes that would otherwise be unconstitutional; the Uniformity Principle and other constitutional restrictions would generally bar legislatures or election officials from selectively exempting only certain individuals from election-related requirements.

On the other hand, serving as a plaintiff in a case and obtaining a favorable judgment are legally significant acts that may justifiably be regarded as placing such parties in a materially different position than third-party non-litigants, making it appropriate for courts to limit injunctive relief to them.[56] Indeed, litigation concerning constitutional rights has never been treated as an all-or-nothing proposition. Courts have endorsed plaintiff-oriented injunctions, protecting only the rights of particular plaintiffs, in First Amendment suits.[57] Similarly, when a criminal defendant successfully challenges

54. Morley, *Equal Protection Right to Vote*, *supra* note 15, at 301–02.

55. *See, e.g.*, Obama for Am. v. Husted, 697 F.3d 423, 435–36 (6th Cir. 2012) (holding that states may not "pick and choose among groups of similarly situated voters to dole out special privileges").

56. *See* Morley, *De Facto Class Actions?*, *supra* note 34, at 550–51.

57. *See, e.g.*, N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 489 (2d Cir. 2013) (directing the district court to enter a plaintiff-oriented preliminary injunction barring election officials from applying contribution limits to the plaintiff, an independent expenditure-only state political committee); Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n, 263 F.3d 379, 392–93 (4th Cir. 2001) (holding the district court should have entered a plaintiff-oriented injunction barring the Federal Election Commission from enforcing its definition of "express advocacy" against the plaintiff political committee, rather than a defendant-oriented injunction prohibiting the Commission from applying that definition to anyone); *see also* Morley, *De Facto Class Actions?*, *supra* note 34, at 510–11 n.94–99 (collecting cases).

the constitutionality or validity of legal provisions in the context of a criminal prosecution, the res judicata effect of the district court's ruling does not extend beyond that person[58] (and the district court's ruling has no stare decisis effect at all[59]). Thus, while the Equal Protection Clause generally prohibits unequal treatment with regard to constitutional rights,[60] court rulings may lead to differences in interpretation, protection, or enforcement. Even if courts accept *Bush*'s Uniformity Principle as generally valid, they may be justified in declining to extend it to the remedial stage of election-related litigation.

Should courts instead conclude, however, that the Uniformity Principle applies to injunctions in challenges to election-related legal provisions, then those cases must be brought by plaintiffs with standing to seek relief on behalf of all affected voters in the relevant electorate. Courts are currently debating whether nationwide or statewide defendant-oriented injunctions are permissible;[61] several Justices have repeatedly declared such relief is inappropriate.[62] One of the key arguments against such orders is that plaintiffs lack Article III standing to seek relief that goes beyond protecting their own rights, to

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58. *See* United States v. Mendoza, 464 U.S. 154, 158–64 (1984) (holding that the government is not subject to non-mutual offensive collateral estoppel).

59. *See* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 134.02[1][d] (3d ed. 2011))).

60. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislative classification . . . [which] impermissibly interferes with the exercise of a fundamental right . . . .").

61. Morley, *De Facto Class Actions?*, *supra* note 34, at 503–16; *see* Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 28–41 (2019) [hereinafter *Disaggregating Nationwide Injunctions*]. *See generally* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018).

62. *See, e.g.*, Labrador v. Poe, 144 S. Ct. 921, 921 (2024) (mem.) (Gorsuch, J., concurring in grant of stay); United States v. Texas, 599 U.S. 670, 693–95 (2023) (Gorsuch, J., concurring in judgment); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (mem.) (Gorsuch, J., concurring in grant of stay).

enforcing those of third-party non-litigants.[63] Extending the Uniformity Principle to remedial issues in election law and other constitutional cases makes resolution of this issue even more important.

Standing considerations differ depending on whether the plaintiffs are individual voters, a candidate, a political party, or a voting rights group. Individual voters likely lack standing to seek relief on behalf of others, at least outside the context of a class action suit. Many courts afford broader standing to candidates,[64] though that rule is far from universal[65] and there may be some uncertainty about whether candidates may seek relief on behalf of people who voted, or will vote, against them. Regardless, at most, a candidate could assert direct or third-party standing to seek relief only for voters participating in that candidate's own election.[66] Consequently, only statewide candidates could seek relief on behalf of all voters within a state.

Entities such as political parties and voting rights groups, in contrast, may assert associational standing to enforce their members' rights.[67] For political parties, this includes both

63. *See* Morley, *De Facto Class Actions?*, *supra* note 34; *Texas*, 599 U.S. at 693 (Gorsuch, J., concurring in judgment); *Dep't of Homeland Sec.*, 140 S. Ct. at 600 (Gorsuch, J., concurring in grant of stay).

64. *See, e.g.*, Mancuso v. Taft, 476 F.2d 187, 190 (1st Cir. 1973) ("A candidate for public office . . . is so closely related to and dependent upon those who wish to vote for him and his litigation will so vitally affect their rights that courts . . . will permit a candidate to raise the constitutional rights of voters.").

65. *See, e.g.*, Stiles v. Blunt, 912 F.2d 260, 265 (8th Cir. 1990) ("[W]e are unpersuaded that appellant [candidate] has standing to raise the voters' claims."); Towers v. Unified Gov't of Wyandotte Cnty., No. 21-4089-EFM-ADM, 2022 U.S. Dist. LEXIS 246892, at *16–17 (D. Kan. Mar. 9, 2022) (collecting cases); *see also* Roberts v. Wamser, 883 F.2d 617, 623 (8th Cir. 1989) ("We conclude that . . . a defeated candidate[] does not have standing to sue under the Voting Rights Act.").

66. A plaintiff may assert third-party standing to assert the rights of another person when the plaintiff and that person share a close relationship and some impediment exists to that person suing to enforce their own rights. *See* Powers v. Ohio, 499 U.S. 400, 410–11 (1991); Singleton v. Wulff, 428 U.S. 106, 114–16 (1976).

67. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977) (identifying requirements for associational standing); *see, e.g.*, Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1163 (11th Cir. 2008) ("To satisfy the requirements of associational standing, all that plaintiffs need to establish is that at least one member faces a realistic danger of having his or her [voter registration] application rejected due to a mistaken mismatch.").

voters[68] and candidates.[69] Although some courts use associational standing cases as opportunities to grant "backdoor" nationwide or statewide defendant-oriented injunctions,[70] the doctrine does not on its face allow a group to seek relief on behalf of non-members.[71]

Finally, a state political party or voting rights group that operates on a statewide basis may assert organizational standing to challenge enforcement of an election-related provision against all voters within a state.[72] Political parties suing to enforce their own rights as entities often invoke competitive standing, alleging that the challenged legal provision or governmental action makes their candidates less likely to win.[73] While such a showing is easy when it comes to

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But see Michael T. Morley & F. Andrew Hessick, *Against Associational Standing*, U. CHI. L. REV. (forthcoming 2024) (arguing that associational standing is an unwarranted exception to Article III's injury-in-fact requirement) (available at https://perma.cc/7GE3-2DYA).

68. Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565, 574 (6th Cir. 2004) (holding that state and county political parties had "standing to assert, at least, the rights of their members who will vote in the November 2004 election").

69. Tex. Democratic Party v. Benkiser, 459 F.3d 582, 587–88 (5th Cir. 2006) (holding that a political party could assert associational standing to pursue its candidates' claims because "after the primary election, a candidate steps into the shoes of his party, and their interests are identical").

70. Morley, *Disaggregating Nationwide Injunctions*, *supra* note 61, at 25–27; *see* Ass'n of Am. Physicians & Surgeons v. FDA, 13 F.4th 531, 541 (6th Cir. 2021) ("Some courts have used [associational] standing as a 'backdoor' way to grant a universal injunction and avoid the difficult task of crafting member-limited relief.").

71. *See, e.g.*, *Ass'n of Am. Physicians & Surgeons*, 13 F.4th at 540; Bone v. Univ. of N.C. Health Care Sys., 678 F. Supp. 3d 660, 703 (M.D.N.C. 2023); *see, e.g.*, Hancock v. Symington, No. 93-16691, 1995 U.S. App. LEXIS 4579, at *4 (9th Cir. Mar. 3, 1995).

72. An entity asserts "organizational standing" when it seeks to enforce its own rights as an entity, rather than those of its members. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 378–79 (1982).

73. *See Benkiser*, 459 F.3d at 586 (holding that a political party had competitive standing to challenge another party's replacement of its congressional candidate since such replacement would allegedly "reduce[]" the "chances of victory" of the plaintiff party's candidate); Schulz v. Williams, 44 F.3d 48, 53 (2d Cir. 1994) (holding a state party chair had standing to contest the allegedly improper inclusion of another party's candidates on the ballot, because such additional "competition" and the "resulting loss of votes" constituted injury-in-fact); Fulani v. Hogsett, 917 F.2d 1028, 1030 (7th Cir. 1990) (holding that a political party had standing to challenge the allegedly

ballot access disputes,[74] it can be more challenging to make in other types of cases.[75] Entities may alternatively establish organizational standing by showing that the challenged voting-related restrictions will require them to divert resources from pursuing their other organizational goals.[76] The Supreme Court, however, has recently cut back on the scope of organizational standing, cautioning that a group cannot "spend its way into standing simply by spending money to gather information and advocate against" a challenged legal provision.[77] "[P]ublic education" efforts an organization

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illegal inclusion of other parties' candidates on the ballot because the "increased competition" would require "additional campaigning and outlay of funds" and reduce the plaintiff party's "press exposure" and chances of winning); *see also* Shays v. Fed. Election Comm'n, 414 F.3d 76, 85 (D.C. Cir. 2005) (holding that "illegal structuring of a competitive environment" is "sufficient to support Article III standing," even when "the forum . . . is an election").

74. Excluding a party's candidate from the ballot obviously makes it impossible for that party to win. *See* Indep. Party of Fla. v. Sec'y, State of Fla., 967 F.3d 1277, 1281 (11th Cir. 2020) ("The party will be injured if its candidate is denied access to the ballot."). And the erroneous inclusion of other candidates can reduce that party's chances of winning. *See supra* note 73 and accompanying text.

75. *See, e.g.*, Ga. Republican Party v. SEC, 888 F.3d 1198, 1202–03 (11th Cir. 2018) (holding a state party lacked standing to challenge a Financial Industry Regulatory Authority (FINRA) rule regulating political contributions of FINRA members); Republican Party v. Klobuchar, 381 F.3d 785, 792–93 (8th Cir. 2004) (holding a state party lacked standing to pursue a facial First Amendment challenge against a state law).

76. *See, e.g.*, Vote.org v. Callahan, 89 F.4th 459, 470–71 (5th Cir. 2023) (concluding that the plaintiff entity established organizational standing to challenge the state's "original signature" requirement for voter registration forms, because the rule "took up significant staff time and resources across [the plaintiff's] engineering, partnership, and operations teams that could have been spent on other efforts"); Nat'l Council of La Raza v. Cegavske, 800 F.3d 1032, 1040 (9th Cir. 2015) (holding plaintiff group had organizational standing to sue for alleged violations of the National Voter Registration Act which led the group to "expend[] additional resources that [it] would not otherwise have expended, and in ways [it] would not have expended them").

77. FDA v. Alliance for Hippocratic Med., 602 U.S. 367, 394 (2024); *see, e.g.*, Tenn. Conf. of the NAACP v. Lee, No. 24-5546, 2024 U.S. App. LEXIS 15834, at *40, *44 (6th Cir. June 28, 2024) (staying district court injunction against the state's requirements for registering felons to vote in part due to justiciability concerns since "*Alliance for Hippocratic Medicine* creates uncertainty over when a plaintiff's choice to spend money can give it standing to challenge a government action that allegedly caused the expenditure"); Republican Nat'l Comm. v. Burgess, No. 3:24-cv-00198-MMD-CLB, 2024 U.S.

undertakes in response to, or to mitigate the perceived consequences of, a legal provision are likewise insufficient to establish organizational standing.[78]

Thus, if courts (properly) decline to issue statewide defendant-oriented injunctions against challenged legal provisions, then the (questionable) application of the Uniformity Principle to remedial issues will tend to expand the scope of election litigation. This expansion will tend to require challenges to statutes, regulations, and other rules of statewide applicability to be brought, if at all, either by certain organizations (including state political parties), by statewide candidates, or as Rule 23(b)(2) class actions on behalf of all voters participating in an election who are adversely affected by the challenged provision.[79] A lawsuit on behalf of all voters directly impacted by the restriction at issue would be most likely to satisfy Article III.[80]

Requiring election litigation to proceed as Rule 23(b)(2) class actions would not necessarily be onerous. Courts have discretion in such cases to decide whether to afford putative class members notice and an opportunity to opt out.[81] When the putative class includes all voters in a jurisdiction, such notice would be impracticable.[82] And a district court would not have to definitively rule on class certification before granting interim

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Dist. LEXIS 126371, at *17 (D. Nev. July 17, 2024) ("[O]rganizations who train and hire poll watchers and ballot counters do not have standing to challenge the expansion of access to mail voting merely because it might create more work for them." (citing *Alliance for Hippocratic Med.*, 602 U.S. at 391–92)).

78. *Alliance for Hippocratic Med.*, 602 U.S. at 394.

79. *See* FED. R. CIV. P. 23(b)(2) (allowing classes seeking injunctive relief).

80. *See* J.D. v. Azar, 925 F.3d 1291, 1315 (D.C. Cir. 2019) ("[Rule 23(b)(2)] classes challenging voter-qualification laws often include anyone disenfranchised by the challenged laws."); *see, e.g.*, Griffin v. Burns, 570 F.2d 1065, 1074 (1st Cir. 1978) (affirming district court certification of Rule 23(b)(2) class of voters whose absentee ballots had been rejected).

81. *See* FED. R. CIV. P. 23(c)(2)(A), (c)(2)(B)(v).

82. *See, e.g.*, Brooks v. State Bd. of Elections, 173 F.R.D. 552, 554 (S.D. Ga. 1997) (holding that putative class members in a suit against the state election board were not entitled to notice prior to certification under Rule 23(b)(2) and dismissal); McKay v. Cnty. Election Comm'rs, 158 F.R.D. 620, 626 (E.D. Ark. 1994) (holding, in a challenge regarding accommodations for disabled voters, "plaintiffs will not be directed to serve notice on plaintiff class members").

class-wide relief, such as a preliminary injunction.[83] The main practical consequence of having election litigation proceed as a Rule 23(b)(2) class action case would be that a single trial court's ruling, whether favorable or not, would bind all class members, precluding those voters from bringing separate lawsuits in other, potentially more favorable venues.[84] For federal court challenges to state legal provisions, such concerns should be minimal as most states include only one or two federal judicial districts.[85]

In short, should courts apply *Bush*'s Uniformity Principle to determine the proper scope of injunctive relief in election-related cases, plaintiffs in such lawsuits will need Article III standing to seek sufficiently broad relief.[86] Courts should be hesitant to adopt a doctrine that restricts a voter's ability to enforce his or her own rights, or makes it more difficult for a voter to do so, in this way.

II. STANDING AND PROPER DEFENDANTS

A second factor impacting the scope of election litigation is the use of standing doctrine to not only play its typical role of identifying whether someone is an appropriate plaintiff,[87] but also to assess whether they have sued the proper defendant. In the context of challenges to election-related legal provisions,

83. Gallagher v. N.Y. State Bd. of Elections, 477 F. Supp. 3d 19, 26, 39 n.2 (S.D.N.Y. 2020) (citing authorities).

84. *See* Taylor v. Sturgell, 553 U.S. 880, 894 (2008) ("Representative suits with preclusive effects on nonparties include properly conducted class actions . . . ."); Hansberry v. Lee, 311 U.S. 32, 41 (1940) ("[T]he judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.").

85. *See Court Website Links*, UNITED STATES COURTS, https://perma.cc/PYK3-CHG5 (last visited May 24, 2024).

86. Courts should ensure that all necessary parties are included as plaintiffs, or address other potential defects in the plaintiffs' standing, at the outset of the case. *See* FED. R. CIV. P. 19(a)(1)(A) (requiring joinder of necessary parties); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (discussing the plaintiff's burden to demonstrate standing at the pleading stage); *see also* Morley, *De Facto Class Actions?*, *supra* note 34, at 553–56.

87. *See* Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1194 (2014) ("According to the Court, standing exists to ensure that each claimant who brings a case in federal court 'is a proper party to invoke judicial resolution of the dispute.'" (quoting Warth v. Seldin, 422 U.S. 490, 518 (1975))).

such expansive application of standing doctrine can impact whether a plaintiff may bring a constitutional, Voting Rights Act, or other challenge simply by suing the Secretary of State (or other statewide chief election official(s)), or instead must sue every county—or potentially even local—election official within the state.[88]

To establish standing, a plaintiff must show three things: (i) it has suffered a concrete, particularized injury-in-fact, (ii) that injury is "fairly . . . traceable" to the defendant's conduct (i.e., a "causal connection" exists between the defendant's conduct and the injury), and (iii) a favorable judgment would "likely" redress that injury.[89] Courts have long held that a plaintiff cannot establish standing to challenge a legal provision by suing a government official who is not responsible for its enforcement.[90] Such a claim would fail the last two prongs of the test for standing. An official who lacks authority to enforce a challenged legal provision is not the cause of any harm that the provision causes for the plaintiff.[91]

88. I have previously discussed this issue in the context of election emergencies. *See* Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, 80 WASH. & LEE L. REV. 359, 424–25 (2022) [hereinafter *Election Emergencies*].

89. *Lujan*, 504 U.S. at 560–61.

90. *See* Okpalobi v. Foster, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (discussing "the long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute"); *see, e.g.*, California v. Texas, 593 U.S. 659, 673 (2021) (holding the plaintiffs lacked standing to "enjoin the Secretary of Health and Human Services, because he has no power to enforce [the challenged legal provision] against them"). This principle is also often invoked to prevent plaintiffs from circumventing sovereign immunity, which prohibits suits directly against the federal government or states. *See Ex parte* Young, 209 U.S. 123, 157 (1908) (holding a plaintiff may sue a state officer for an injunction against an allegedly unconstitutional act only when that officer is responsible for—or has some connection with—the act's enforcement, and cannot "attempt[] to make the State a party" by suing the officer "as a representative of the State"); *see, e.g.*, Whole Women's Health v. Jackson, 595 U.S. 30, 39 (2021) (explaining that the plaintiffs did not have standing to sue judges or clerks because "those individuals do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties").

91. *See, e.g.*, *Okpalobi*, 244 F.3d at 426–28 (determining that plaintiffs lacked standing to challenge a law which created a private right of action against abortion providers by suing state officials, in part because "[t]he plaintiffs have never suggested that any act of the defendants has caused, will cause, or could possibly cause any injury to them").

Moreover, a judgment against such an official is incapable of redressing the plaintiff's injury because it would not preclude others from enforcing the provision against the plaintiff.[92] This doctrine makes it difficult for plaintiffs to bring pre-enforcement challenges to determine the validity of statutes or regulations that are enforceable solely through a private right of action, especially when a wide range of potential litigants may sue under those laws.[93]

Challenges to election statutes often involve somewhat different standing issues in this respect. The main question tends to be whether a state's chief election officer(s)—generally the Secretary of State and/or members of the state election board—are sufficiently responsible for other officials' implementation or execution of the challenged legal provisions to be proper defendants. Though substantial variation exists from state to state, most chief election officers have the power to oversee county and local officials in the performance of their duties, as well as the authority to issue binding regulations, directives, orders, or interpretations of legal provisions to county and local officials.[94] They also are often responsible for maintaining uniformity among a state's local election jurisdictions.[95]

The Eleventh Circuit's recent ruling in *Jacobson v. Florida Secretary of State*,[96] however, holds that plaintiffs lack standing to sue a state's chief election officer to challenge a legal provision

92. *See id.* (holding that an injunction against officials who were not responsible for enforcing the challenged statute would not "redress the asserted injuries").

93. *See* Michael T. Morley, *Constitutional Tolling and Pre-Enforcement Challenges to Private Rights of Action*, 97 NOTRE DAME L. REV. 1825, 1834–41 (2022) (outlining obstacles to such pre-enforcement suits).

94. *See* Rebecca Green, *Adversarial Election Administration*, 101 N.C. L. REV. 1077, 1096–97 (2023) (discussing the scope of chief election officers' powers); *see also* Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 374–76 (2008) (discussing various aspects of "election day administration over which the Secretary of State is able to exercise authority sufficient to ensure the protection of integrity and accuracy and the encouragement of uniform and equal access to the ballot box").

95. *See, e.g.*, CAL. GOV'T CODE § 12172.5(d) (2022); IDAHO CODE § 34-201 (2024); TEX. ELEC. CODE § 31.003 (2023).

96. 974 F.3d 1236 (11th Cir. 2020).

regulating elections if county (or local) officials are responsible for implementing it.[97] In that case, the plaintiffs sued Florida's Secretary of State to challenge the Florida law setting forth the rules for determining candidates' order on ballots.[98] "The statute require[d] the candidate of the party that won the last gubernatorial election to appear first beneath each office listed on the ballot, with the candidate of the second-place party appearing second."[99]

Among other things, the Eleventh Circuit held that the plaintiffs lacked standing to sue the Secretary of State.[100] The Secretary had not caused the alleged injury from the ballot ordering, and a favorable judgment would not redress that claimed harm.[101] The court explained that "Florida law tasks the Supervisors, independently of the Secretary, with printing the names of candidates on ballots in the order prescribed by the ballot statute."[102] It concluded, "To satisfy traceability and redressability, the voters and organizations should have sued the Supervisors of Elections instead of the Secretary of State," even though "[t]hat approach would have made for more defendants."[103] The court recognized that the Secretary of State has authority to promulgate regulations[104] and provide written directions to Supervisors,[105] but held that neither of those statutory grants made the plaintiffs' claim justiciable.[106]

The *Jacobson* Court made a telling comment: "If rulemaking authority were sufficient to establish traceability, plaintiffs could presumably also challenge a law by suing the legislators who enacted it instead of the officials who execute it."[107] Just so. Constitutional litigation would be much easier—and make a lot more sense in many cases—if challenges to statutes could be brought against the legislative bodies or

97. *See id.* at 1241–42.
98. *See id.* at 1241.
99. *Id.* at 1242 (citing FLA. STAT. § 101.151(3)(a) (2024)).
100. *Id.* at 1241.
101. *Id.*
102. *Id.* at 1253 (citing FLA. STAT. § 99.121 (2024)).
103. *Id.* at 1258.
104. *Id.* at 1256 (citing FLA. STAT. § 101.151(9)(a) (2024)).
105. *Id.* at 1256–57 (citing FLA. STAT. § 97.012(16) (2024)).
106. *Id.*
107. *Id.* at 1257.

legislators that enacted them, rather than against executive officials who may have little interest in defending them. Many doctrines, including sovereign immunity,[108] legislative immunities under both the Constitution[109] and common law,[110] standing, and others preclude such suits from being brought. Putative plaintiffs are forced to sue executive officials due to the technical legal fictions that the Supreme Court established in *Ex parte Young*[111] to facilitate constitutional litigation despite such constraints.[112] It is beyond the scope of this Essay to assess whether the obstacles to claims against legislative bodies could be overcome and, if so, whether it would be normatively desirable to do so.[113] Such a change, while certainly worth exploring, would represent a fundamental restructuring of constitutional litigation in the United States and is unnecessary to address concerns about standing doctrine as applied in *Jacobson*.

Some courts within the Eleventh Circuit have applied *Jacobson*'s restrictions to dismiss claims against the Secretary of State in a wide variety of contexts, including challenges to counties' allocations of voting machines among polling places (and allegedly resulting long lines),[114] state laws mandating

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108. *See, e.g.*, Maarawi v. U.S. Cong., 24 F. App'x 43, 44 (2d Cir. 2001); Keener v. Cong. of United States, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam); Bowhall v. Ala. Legislature, No. 3:20-cv-1039-RAN-JA, 2022 U.S. Dist. LEXIS 12299, at *6–7 (M.D. Ala. Jan. 24, 2022).

109. *See* U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place.").

110. *See* Sup. Ct. of Va. v. Consumers Union of U.S., Inc., 446 U.S. 719, 732 (1980) ("[S]tate legislators enjoy common-law immunity from liability for their legislative acts . . . "); *see also* Tenney v. Brandhove, 341 U.S. 367, 378–79 (1951) (holding 42 U.S.C. § 1983 does not create a cause of action against state legislators for their legislative acts).

111. 209 U.S. 123, 157 (1908) (holding a person may sue a state official to enjoin enforcement of an unconstitutional state law only if that official has "some connection with the enforcement of the act").

112. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 712 (1978) (Powell, J., concurring) (discussing "the Eleventh Amendment fiction of *Ex parte Young*").

113. *See, e.g.*, Morley, *Disaggregating Nationwide Injunctions*, *supra* note 61, at 41–47 (discussing possible ways of mitigating the negative consequences of *Young*'s limitations).

114. *See* Anderson v. Raffensperger, 497 F. Supp. 3d 1300, 1328–30 (N.D. Ga. 2020) (holding that, although the state is required to provide counties with election equipment, counties are responsible for deciding how to allocate it).

rejection of absentee ballots which lack voters' accurate birthdates,[115] signature-match requirements for absentee ballots,[116] and restrictions on "line warming."[117]

Jacobson has been applied to lower levels of government as well. For example, in *People First of Alabama v. Merrill*,[118] the plaintiffs sued a variety of defendants including several county probate judges because they were the chief election officials within their respective counties.[119] The court held that the plaintiffs lacked standing to sue a particular probate judge over the application of the state's voter identification requirement within his county during the COVID-19 pandemic because he did not "play[] any role in processing absentee ballot applications, enforcing the photo ID requirement, or directly supervising the relevant staff."[120] On the other hand, that probate judge was a proper defendant in the challenge to the state's witness requirement for absentee ballots because he served on the board that appointed the poll workers who counted and tabulated those ballots.[121]

Though *Jacobson* is binding only within the Eleventh Circuit, other courts have adopted a comparable approach.[122] For example, the Pennsylvania Supreme Court declined to consider a challenge to Pennsylvania's requirement that voters properly date their absentee ballots due to the plaintiffs' "failure to name the county boards of election of all 67 counties, and

115. *See In re* Ga. Senate Bill 202, No. 1:21-cv-1284-JPB, 2023 U.S. Dist. LEXIS 144918, at *63–64 (N.D. Ga. Aug. 18, 2023).

116. *See* Ga. Republican Party, Inc. v. Sec'y of State for the State of Ga., No. 20-14741-RR, 2020 U.S. App. LEXIS 39969, at *5–6 (11th Cir. Dec. 21, 2020).

117. *See* League of Women Voters of Fla. v. Lee, 566 F. Supp. 3d 1238, 1255 (N.D. Fla. 2021).

118. 491 F. Supp. 3d 1076 (N.D. Ala. 2020).

119. *Id.* at 1122.

120. *Id.* at 1135–36.

121. *Id.* at 1136.

122. *See, e.g.*, Donald J. Trump for President v. Boockvar, 493 F. Supp. 3d 331, 374 & n.8, 375 (W.D. Pa. 2020) ("[I]f county boards engage in unconstitutional conduct, the Court would not be able to remedy the violation by enjoining only Secretary Boockvar."). *But see infra* note 146–147 (recognizing courts' power to enforce injunctions against certain non-parties working in concert with an enjoined state official).

because the joinder of . . . [the] Secretary of the Commonwealth[] did not suffice . . . ."[123]

Jacobson's approach substantially expands the scope of election litigation by requiring plaintiffs who wish to challenge many types of election-related legal provisions to sue every county or potentially even every local election official, rather than the Secretary of State or other statewide chief election officer(s).[124] As a practical matter, election litigation is not enhanced by having scores of identically situated defendants. Rather, the cost of defending against such lawsuits is multiplied many times over, even if a single firm represents several county election officials. The case becomes more complicated as the various defendants attempt to coordinate their arguments and defenses with each other, and the court may become burdened with duplicative briefs.

In many cases, statewide election officials such as the Secretary of State will have more resources and better access to in-house specialist attorneys, enabling them to mount more effective defenses than county-level officials—at least some of whom may work in single-person offices and, in some states, engage in election administration as only one job among many others.[125] State election officials also will generally have much closer working relationships than county officials with the legislative committees and legislators responsible for maintaining the election code and, often, enacting the challenged legal provisions. Moreover, coordinating service of process for dozens of county election officials can be a substantial obstacle for plaintiffs that needlessly delays time-sensitive election litigation. In sum, a state's chief election official will almost always be preferable to scores of county election officials as a defendant to advocate for statewide election rules.

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123. Black Pol. Empowerment Proj. v. Schmidt, No. 68 MAP 2024, 2024 Pa. LEXIS 1348, at *1 (Pa. Sept. 13, 2024) (per curiam).

124. *See* Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1242 (11th Cir. 2020).

125. *Cf.* Rebecca Green, *Legal Support for Local Election Officials*, 81 WASH. & LEE L. REV. 1017, 1036 (2024) (discussing how "[b]usy county officials with full plates . . . may understandably lack the bandwidth to advise" on election law issues).

Additionally, attempting to identify the precise bounds of state and county officials' respective responsibilities for conducting elections can lead to hair splitting that results in *all* of them becoming defendants, with some claims being brought against state officers and other closely related claims being maintained against county officials. In *Fair Fight Action, Inc. v. Raffensperger*,[126] for example, the district court held that the plaintiffs had standing to sue the Georgia Secretary of State and members of the state election board over "felon matching and vitals matching" procedures for the voter registration database, but not with regard to duplicate matching since county officials were responsible for that aspect of database maintenance.[127]

The *Jacobson* approach can also be deceptively difficult for lower courts to apply, leading to highly subjective and potentially even inconsistent results. For example, the U.S. District Court for the Northern District of Florida held that plaintiffs had standing to sue the Secretary of State for an injunction extending the voter registration deadline because state law required the Secretary to establish a website for online voter registration.[128] Conversely, in *Trump v. Kemp*,[129] presidential candidate Donald Trump sued the Georgia Secretary of State following the 2020 election, seeking an injunction barring him from certifying the election's results because they were ostensibly based on illegally counted votes.[130] The court held that Trump lacked standing to sue the Secretary because, "[u]nder Georgia law, county election officials are solely responsible for processing, validating, and tabulating both absentee and in-person ballots."[131] It concluded that, because the Secretary "did not have any role in the counting of any allegedly illegal votes," Trump could not establish causation or

126. 634 F. Supp. 3d 1128 (N.D. Ga. 2022).

127. *Id.* at 1194. Earlier in the case, the court held that the plaintiffs lacked standing to sue the Secretary of State and members of the State Elections Board for encouraging counties to consolidate polling places since county superintendents were responsible for determining polling place locations. *See* Fair Fight Action, Inc. v. Raffensperger, No. 1:18-cv-5391-SCJ, 2021 U.S. Dist. LEXIS 261570, at *46–47, *54–56 (N.D. Ga. Feb. 16, 2021).

128. *See* Namphy v. DeSantis, 493 F. Supp. 3d 1130, 1140 (N.D. Fla. 2020).

129. 511 F. Supp. 3d 1325 (N.D. Ga. 2021).

130. *Id.* at 1329–30.

131. *Id.* at 1333.

redressability against him.[132] Although this case would have failed on the merits regardless, at least for the sole purpose of standing, it appears that a court order barring certification of allegedly inaccurate results would have at least partly redressed the harm alleged. This is all to say, *Jacobson* is far from easy to apply.

Indeed, some district courts within the Eleventh Circuit appear to have either misunderstood or ignored *Jacobson*. In *Curling v. Raffensperger*,[133] for example, the court held that the plaintiffs had standing to sue Georgia's Secretary of State for an order requiring him to direct county election superintendents to print and distribute paper copies of the electronic voter database that the Secretary maintains.[134] The *Jacobson* Court, however, had rejected the argument that the Secretary of State was a proper defendant because a court could order him to instruct county election officials to act contrary to any state law the court held unconstitutional.[135]

Similarly, in *Rose v. Raffensperger*,[136] the plaintiffs sued the Secretary of State to challenge Georgia's at-large system for electing members of the state Public Service Commission.[137] The Secretary argued he was an inappropriate defendant because the state legislature had established the statewide electoral districts for commission members.[138] He further pointed out that, if he were enjoined from conducting elections on a statewide basis, then vacancies would arise on the commission and the Governor would have statutory authority to simply appoint replacements.[139] The court nevertheless held that the

132. *Id.* at 1334.

133. No. 1:17-cv-2989-AT, 2020 U.S. Dist. LEXIS 189759 (N.D. Ga. Oct. 14, 2020).

134. *Id.* at *28–29.

135. Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1257 (11th Cir. 2020).

136. 511 F. Supp. 3d 1340 (N.D. Ga. 2021).

137. *Id.* at 1344. The Eleventh Circuit ultimately rejected this claim on the merits because the state's "chosen form of government for the [commission] is afforded protection by federalism and our precedents." Rose v. Sec'y, 87 F.4th 469, 486 (11th Cir. 2023).

138. *Rose*, 511 F. Supp. 3d at 1351.

139. *Id.* at 1356.

Secretary was an appropriate defendant since he had overall responsibility to conduct elections in the state.[140]

Most problematically, *Jacobson* overlooks the full extent of state officials' power to implement a court's judgment and orders. For example, the Florida Secretary of State—like chief election officials and election boards in many other states—has authority to adopt rules to establish "uniform standards" for the "interpretation and implementation of state election laws" and voter registration laws;[141] administer the state's voter registration system[142] and coordinate compliance with the National Voter Registration Act;[143] provide "written direction and opinions" to county supervisors regarding the state election code or implementing regulations;[144] and sue supervisors or other officials when necessary to ensure compliance with state law and implementing regulations.[145] The authority of a state election official or board to issue rules, instructions, and opinions that are legally binding on county election officials throughout the state to ensure their compliance with federal court orders should be sufficient to satisfy Article III's redressability requirement.[146]

Additionally, beyond these broad powers, Federal Rule of Civil Procedure 65(d)(2) specifies that an injunction applies not only to a named party but to all others who have actual notice of the order and "are in active concert or participation" with that party.[147] A state's chief election official or election board

140. *Id.*

141. FLA. STAT. § 97.012(1)–(2) (2024).

142. *Id.* § 97.012(11).

143. *Id.* § 97.012(7), (9).

144. *Id.* § 97.012(16).

145. *Id.* § 97.012(14).

146. *See, e.g.*, Mecinas v. Hobbs, 30 F.4th 890, 900 (9th Cir. 2022) (holding a lawsuit against the Arizona Secretary of State to challenge a state election law was justiciable because county election officials were required to follow both state law and the Secretary's procedures manual, which the Secretary adopted pursuant to her rulemaking authority); Gallagher v. N.Y. State Bd. of Elections, 477 F. Supp. 3d 19, 26 (S.D.N.Y. 2020) (holding plaintiffs had standing to sue the state election board because it had "the power to direct that absentee ballots be counted, if the Court finds that not counting them violates the Constitution").

147. *See* FED. R. CIV. P. 65(d)(2)(C); *see also* Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13–14 (1945).

members work in concert with county officials to conduct elections.[148] A federal injunction against a state legal provision could be directly enforced against either state officials for failing to exercise their authority to ensure it is implemented, or county officials who are more immediately responsible for implementing it.

Courts which have followed the *Jacobson* approach should abandon it, and other jurisdictions should decline to adopt it in the first place. *Jacobson*'s approach to standing expands the scope of election litigation by requiring the addition of scores of defendants; increases the cost, burden, and complexity of election challenges; unnecessarily injects complex and tangentially relevant new issues in such cases; has been applied inconsistently at best by lower courts; and erroneously overlooks the full scope of most state election officials' authority to implement and enforce court rulings. If particular county or local officials wish to participate in litigation to help defend a challenged legal provision, they may seek leave to intervene[149] or file an amicus brief. But federal courts should not substantially expand the scope of challenges to state election laws, regulations, or other such issuances by requiring the participation of county election officials—indeed, *all* chief county election officials—to make such cases justiciable.

CONCLUSION

With over 400 legal challenges filed in the months leading up to the 2020 election—many arising from COVID-19[150]—courts have generated scores of new precedents concerning various aspects of election law. While many of these cases involve substantive issues, such as the *Anderson*[151]*-Burdick*[152] balancing test for First Amendment and Due Process challenges to election procedures, many others deal with jurisdictional, procedural, and other technical aspects of election litigation itself. In particular, recent rulings greatly broaden the scope of

148. *See Election Administration at State and Local Levels*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 22, 2023), https://perma.cc/BT2E-XPHQ.

149. *See* FED. R. CIV. P. 24.

150. *See* Morley, *Election Emergencies*, *supra* note 88, at 421.

151. Anderson v. Celebrezze, 460 U.S. 780, 789–90 (1983).

152. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

election litigation arising from challenges to state election laws, regulations, and other requirements. Specifically, some rulings require cases to be brought by plaintiffs with Article III standing to seek relief on behalf of all impacted voters within a jurisdiction, for example by a Rule 23(b)(2) statewide class. Other precedents, in contrast, require plaintiffs to sue all county election officials within a state, rather than the state's chief election officer or election board.

Courts should be leery of construing Article III justiciability requirements in ways that dramatically expand the range of plaintiffs and defendants who are necessary parties in election cases. Being party to a lawsuit and obtaining a favorable judgment are legally valid grounds for distinguishing plaintiffs to a case from third-party non-litigants. Accordingly, *Bush v. Gore*'s Uniformity Principle is likely inapplicable at the remedial stage of challenges to election-related legal provisions. Such lawsuits therefore do not necessarily have to be filed by plaintiffs with standing to seek relief on behalf of all adversely affected voters throughout the jurisdiction in which an election is being held.

Likewise, at least in most jurisdictions, a court order barring a state's chief election official or state election board from enforcing an unconstitutional or invalid state election law or other legal provision should be sufficient to redress the harm that provision poses to plaintiffs. The ability of state officials to issue orders, instructions, or interpretations to county election officials obviates any need to include all county election officials as defendants in election-related challenges. This approach to standing in election litigation will help keep cases manageable; reduce the time, burden, expense, and complexity of such litigation; and eliminate the need for case-by-case adjudication of challenging yet tangential justiciability issues.