"DO NOT PASS GO, DO NOT COLLECT $200, DO NOT SUBMIT YOUR ABSENTEE BALLOT, GO DIRECTLY TO JAIL, AND LOSE YOUR RIGHT TO VOTE": WHY TRADITIONAL STANDING TESTS INSULATE VOTING-RIGHTS CLAIMS

*Alex Beck**

I. INTRODUCTION

The bedrock principle and guiding spirit of America is the right to participate in the democratic process. The Revolutionary War, the conflict that paved the way for the Constitution and Bill of Rights, was fought in part over the lack of a fair democratic process.[1] America's drive to promote a free and fair democratic process is also evidenced by the Preamble to the United States' Constitution, signified by the phrase "We the People of the United States, in order to form a more perfect Union . . . ."[2]

Prior to the Civil War, participation in the democratic process was only available to white adult males.[3] While some states took small steps to erode historical voting criteria and open up the democratic process to the average citizen, white males remained the largest subset of voters through the antebellum period.[4] The Civil War paved the way for the first constitutional protections aimed at expanding voters' rights.[5] Although the Fifteenth Amendment initially provided African American males with the opportunity to vote, its effects were nullified through enactment of Jim Crow laws.[6] However, Reconstruction Amendments ultimately provided the basis for national citizenship and equal protection, two concepts that are swords for the disenfranchised today.[7]

The first quarter of the twentieth century was defined not only by the First World War, but also served as the stage for the women's suffrage

* Associate Member, 2015–2016 *University of Cincinnati Law Review*.

1. *See* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1346–47 (2003).

2. U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

3. Karlan, *supra* note 1, at 1438.

4. *See id.*

5. *Id.* at 1348–49.

6. *Id.* at 1350 (noting that the Fifteenth Amendment "resulted in a huge upsurge of voting as nearly a million freedmen were enfranchised").

7. *See* DONALD W. RODGERS ET AL., VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 10–11 (Donald W. Rodgers et al. eds., 1990).

movement and passage of the Nineteenth Amendment.[8] By the year 1920, voting rights were, in theory, constitutionally protected based on sex and race.[9] However, both male and female African Americans were still excluded from the political process despite the existence of the Fifteenth Amendment.[10] The Civil Rights Movement brought this systematic exclusion to the national stage, resulting in the passage of the Voting Rights Act of 1965.[11] Section Two of the Voting Rights Act revitalized the language of the Fifteenth Amendment, and provided more mechanisms for its enforcement through federal intervention.[12]

The resulting erosion of voting restrictions based on sex and race did not end the struggle for enfranchisement; tensions surrounding the Vietnam War led to the passage of the Twenty-Sixth Amendment, extending constitutionally protected voting rights—while at the same time redefining adulthood—to American citizens ages eighteen and up.[13] As of today, voting rights have more textually explicit, constitutional protections than any other arena of citizenship.[14]

Notwithstanding these vast protections, many states still legally disenfranchise convicted felons.[15] As of 2003, state felon-conviction laws disenfranchised nearly four million voting-age citizens.[16] While disenfranchising convicted felons prevailed at the time of the founders—along with many other archaic voting restrictions—it is unclear why that segment of the population is still politically exiled. As discussed later, even those citizens who are merely confined in county and city jails are treated categorically differently for absentee voting purposes.

Most citizens who are long-term guests of the American penitentiary system come from a low socioeconomic status;[17] it only follows that

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8. *Id.*

9. *Id.*

10. *Id.* at 13 ("After federal troops were withdrawn in the late-1870s, white southern Democrats systematically undercut black voting rights, virtually excluding blacks from southern politics during the first half of the twentieth century.").

11. *See id.*

12. Terrye Conroy, *The Voting Rights Act of 1965: A Selected Annotated Bibliography*, 98 LAW LIBR. J. 663, 664–65 (2006) (providing a description of Section Two of the Voting Rights Act of 1965).

13. Karlan, *supra* note 1, at 1359 (noting that as of 1968, twenty-nine percent of Vietnam casualties were under the age of twenty-one and unable to vote).

14. U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XIX, § 1; U.S. CONST. amend. XXIII, § 1; U.S. CONST. amend. XXIV, § 1; U.S. CONST. amend. XXVI, § 1. Note that all these amendments are explicitly adopted to enfranchise subsets of citizens within the United States.

15. Karlan, *supra* note 1, at 1363–64 (noting that the Court has distinguished disenfranchising individuals convicted of crimes from other limitations on the right to vote).

16. *Id.* at 1634 (roughly 1.4 million have completed their sentences).

17. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, AM. ACAD. ARTS & SCI. (Summer 2010), https://www.amacad.org/content/publications/pubContent.aspx?d=808.

they do not have the time or funds to hire an attorney and challenge disenfranchisement in federal court. Luckily, many nonprofits are willing to fight for the rights of these men and women, and also pick up the tab for legal services. Unfortunately, the cobweb of the judicial system thwarts these groups' efforts, most often due to principles of Article III standing. These principles effectively bar third parties from bringing claims on behalf of plaintiffs who, from the judicial system's perspective, should be bringing the suit on their own.

This article addresses current flaws in standing jurisprudence that prevent nonprofit organizations from fighting discriminatory voting laws in federal court. It utilizes *Fair Elections Ohio v. Husted*,[18] a case out of the Sixth Circuit Court of Appeals, as a case study for demonstrating how current standing criteria stifles efforts to attack discriminatory voting laws. Part II provides background on the current state of standing jurisprudence. Part III introduces *Fair Elections Ohio v. Husted*, and addresses both the district court and appellate court decisions. Part IV demonstrates why this case presents a quintessential example of standing requirements creating barriers and disincentives for nonprofits to bring claims on behalf of underprivileged voters. As a solution, it suggests that courts apply principles of overbreadth standing to claims of discriminatory and unconstitutional voting laws, thereby making it easier for nonprofits to protect the underprivileged voters' fundamental right to vote. Part V concludes this article.

II. BACKGROUND: ARTICLE III STANDING AND THE FEDERAL JUDICIARY

Federal standing principles have many different tests and exceptions that are far beyond the scope of this Casenote. This section introduces the basic foundations of constitutional standing, and then walks through the relevant doctrines for purposes of this Casenote.

A. Foundations of Constitutional Article III Standing

Article III of the United States Constitution extends the judicial power of federal courts to hear "Cases" or "Controversies."[19] A careful reading of this section will not provide an explicit textual justification

18. 770 F.3d 456 (6th Cir. 2014).

19. Bradford C. Mank, Clapper v. Amnesty International*: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV 211, 218–19 (2014); *see* U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States.").

for this rule, but the U.S. Supreme Court has read the Cases or Controversies requirement into the Article III language in 1944.[20] This limitation on judicial power gave birth to the principles of Article III standing.[21] This constitutional foundation imposes jurisdictional limitation on the federal judiciary's power, and plaintiffs must satisfy standing requirements before their cases may proceed to their merits.[22] If a plaintiff fails to carry his or her burden of proving standing requirements, a federal court must dismiss the case for lack of jurisdiction.[23]

The standing requirements are not just an arbitrary gatekeeper to the judiciary; they gain justification from broader constitutional principles.[24] For instance, standing requirements make plaintiffs prove that their cases are suitable for judicial resolution, thereby protecting the court from issuing advisory opinions.[25] Standing principles also confine the judiciary to its constitutionally prescribed scope by requiring a Case or Controversy before the judiciary can issue a legally binding decision.[26] Without such requirements, the unelected judiciary could breach the constitutional separation of powers and interfere with the legislative and executive functions as it pleased. Standing requirements, therefore, play an important role in the judicial system. However, before discussing the judicial test for standing further, it is important to consider two prevailing theories that assist in understanding the proper role of the federal judiciary.

B. Dispute Resolution and Law Declaration

The dispute-resolution and law-declaration theories center on the proper scope and purpose of the federal judiciary, and are related to the justiciability concerns that underlie standing principles. The dispute-resolution model calls for the court to treat its ability to declare the law as incidental to its constitutionally prescribed ability to hear Cases or Controversies.[27] This theory calls for strict adherence to the Case or Controversies mandate, and calls on courts to avoid being a "general

20. Bradford C. Mank, *Judge Posner's "Practical" Theory of Standing: Closer to Justice Breyer's Approach to Standing Than to Justice Scalia's*, 50 HOUS. L. REV. 71, 77–78 (2012).

21. Mank, *supra* note 19.

22. *Id.* at 218–20 (noting that a plaintiff must prove standing for each form of relief sought).

23. *See id.*

24. Mank, *supra* note 20, at 79.

25. *Id.*

26. *See id.* ("[S]tanding requirements support separation-of-powers principles by defining the division of powers between the judiciary and political branches of government. . . .").

27. RICHARD H. FALLON, JR. ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73–76 (7th ed. 2015).

overseer of government conduct" by only exercising its power to issue a legally binding opinion when a constitutionally adequate dispute presents itself.[28] Put another way, the dispute-resolution model seeks to protect the other branches from judicial encroachment through strict adherence to the Article III standing requirements.

A converse of this view is the law-declaration approach.[29] This theory developed over the second half of the twentieth century and centers on the idea that federal courts should be able to stray away from strict adherence to Article III standing requirements in order to enforce the rule of law.[30] The approach is based on the notion that that the federal judiciary has constitutional powers outside of dispute resolution that allow it to declare what the law is and create legal norms.[31] One justification for this approach is the vast expansion of constitutionally protected rights in the twentieth century.[32] Supporters of this view contend that the citizenry should be able to use these expansive rights as public interest "swords" to governmental overreach, rather than shields when unconstitutional governmental conduct reaches an individual's doorstep.[33]

Although the Supreme Court has never explicitly rejected either approach, there will not be an explicit adoption of either model in most opinions.[34] Both are fluid concepts, and courts may take a little from each theory when crafting an opinion without explicitly adopting one or the other. They are important for a broader understanding of the constant push and pull between judges and scholars who promote strict adherence to standing requirements, and those that look outside the requirements in instances of important legal questions in need of judicial intervention.

C. The Judicial Test for Constitutional Article III Standing

Federal courts apply a three-part test to find constitutional standing.[35] A plaintiff must first show that (1) he has suffered an "injury-in-fact" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[36] Next, the plaintiff must demonstrate a

28. *See id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. FALLON, *supra* note 27, at 73–76.
34. *Id.*
35. Mank, *supra* note 19, at 220.
36. *Id.*

(2) "causal connection between the injury and the conduct complained of," showing that "the injury [is] fairly traceable" to the defendant's conduct.[37] Lastly, the plaintiff must demonstrate (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[38] Boiled down, these elements bear the monikers (1) injury-in-fact; (2) causation; and (3) redressability.[39] The plaintiff carries the burden of proof in demonstrating standing for each form of relief sought.[40]

Ambiguity still surrounds the "imminent injury" requirement under the injury-in-fact analysis.[41] It is unclear how probable a risk of injury must be for a plaintiff to satisfy this test.[42] For example, the Court in *Lujan v. Defenders of Wildlife* did not find standing where a plaintiff's group members had less-than-certain plans to visit a habitat of an endangered species threatened by governmental conduct.[43] The Court noted that the injury-in-fact test "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[44] Although the Court thus applied the "imminent-injury" requirement in a narrow fashion, it did not define exactly what type of immanency is required to fulfill the injury-in-fact test.[45]

D. Prudential Standing Barriers and Associational Standing

In addition to the constitutional test for standing, the Supreme Court developed what are known as "prudential barriers" to standing.[46] Prudential standing requirements were put in place as a tool for federal courts to restrict certain kinds of standing relationships due to limited judicial resources or other policy reasons.[47] Prudential standing exists outside the constitutional barriers, and may be applied at the discretion of courts.[48] Common prudential-standing barriers include (1) the bar

37. *Id.*

38. *Id.*

39. *See id.*

40. Mank, *supra* note 20, at 78–79.

41. Mank, *supra* note 19, at 221 (providing an overview of the *Lujan* decision).

42. *Id.* ("The imminent injury test in *Lujan* . . . fails to define what constitutes a sufficient probability of risk to a plaintiff and how quickly such an injury must result for it to constitute a sufficient injury for Article III standing purposes.").

43. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 563–64 (1992).

44. *Id.* at 563.

45. *See* Mank, *supra* note 19, at 221.

46. Kelsey McCowan Heilman, Comment, *The Rights of Others: Protection and Advocacy Organization's Associational Standing to Sue*, 157 U. PA. L. REV. 237, 250 (2008).

47. Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. 413, 421 (2013).

48. Heilman, *supra* note 46, at 250 ("[U]nlike the constitutional requirements, [prudential

against asserting the interests of third parties; (2) the prohibition against generalized grievances; and (3) the requirement that the complaint fall within the "zone of interest" protected by the statute or the constitutional right under which the plaintiff seeks relief.[49]

Recently, the Supreme Court called prudential standing into question in *Lexmark International, Inc. v. Static Control Components, Inc.*[50] A unanimous Court dispensed with two of the three prudential barriers, leaving only the bar against third-party standing in the prudential realm.[51] Federal courts have allowed an exception to the ban on third-party standing in the form of "associational standing."[52] The Court recognized this exception because there are situations where associations, such as unions and nonprofits, sufficiently represent the interest of their members where their interests align enough to satisfy constitutional standing concerns.[53]

Federal courts apply a three-part test in situations where associations claim standing on behalf of their members.[54] To have standing to sue on behalf of its members, an association must demonstrate: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[55] Courts have not clarified exactly what constitutes membership in an organization for purposes of this test.[56] At a minimum, this test serves as a judicial safety net by forcing associations to demonstrate that they have a close enough relationship with the members on whose behalf they are bringing suit to ensure the associations will adequately represent and enthusiastically promote their members' legal interests.[57]

The Court's recognition of associational standing is likely related to the practical conclusion that individuals sometimes need an organization's resources and expertise to adequately pursue or vindicate

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barriers] can be removed at the discretion of the court.").

49. *Id.*

50. 134 S. Ct. 1377 (2014).

51. Mank, *supra* note 47, at 421–22 (noting that the Court found the zone of interest test and ban on generalized grievances to be outside the "rubric" of prudential standing).

52. Heilman, *supra* note 46, at 251 (noting that because prudential barriers exist outside the Article III constitutional barriers, federal courts can make exceptions).

53. *See id.* at 251–52.

54. *Id.*

55. *Id.*

56. *Id.* This test leaves unclear, however, the important question of what exactly "membership" in an organization means for these purposes.

57. Heilman, *supra* note 46 (noting that the relationship must be close enough to "ensure vigorous litigation and proper respect for the appropriate sphere of the judicial branch").

legal interests.[58] In fact, there are plausible scenarios where the individual has a better chance of zealously representing his own personal interests by allowing an organization to bring suit on his behalf.[59] For example: a plaintiff who feels his congressional district was altered due to gerrymandering by the state legislature. For the average citizen, it is not difficult to look at the congressional-districting map and easily conclude that it has been gerrymandered due to an odd shape or incongruous extensions. However, this potential plaintiff lacks the time and financial latitude to bring a claim against a state that has an arsenal of attorneys. The only possible chance this plaintiff has to bring suit is through joining an organization that supports a fair-districting process and has the resources to effectively vindicate these interests on the plaintiff's behalf. Scenarios like this are why the associational-standing exception is important for a fair and balanced legal system; this provides justification for why the Court has maintained the exception.[60]

E. Overbreadth Standing

Within the realm of third-party standing, the Supreme Court has created a special exception when the free-speech rights of third parties are at issue.[61] The Court developed this doctrine in *Broadrick v. Oklahoma*.[62] In *Broadrick*, two civil servants brought claims challenging a state statute that restricted their political activities.[63] The plaintiffs claimed the statute was facially unconstitutional and sought an injunction due to its vagueness and overbreadth.[64] Put another way, the plaintiffs believed the statute's prohibitions swept too broadly by prohibiting conduct protected by the First Amendment.[65]

At the outset of its standing discussion in *Broadrick*, the Court noted the lasting importance of First Amendment rights, and provided a reminder that state statutes that unjustly restrict these rights must give

58. *Id.* at 252–53 (describing the possible justifications for why the Court has carved out an associational standing exception to the prudential barrier of representing the interests of third parties).

59. *Id.* ("Where a member of the organization has an actual injury and the expert organization has an interest in litigating the claim, the quality of the organization's case presentation will potentially exceed that of the individual plaintiff.").

60. *See id.*

61. Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1226–27 (2014) (providing an overview of overbreadth standing).

62. CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., 13A FEDERAL PRACTICE & PROCEDURE § 3531.9.4 (3d ed. 2015).

63. Broadrick v. Oklahoma, 413 U.S. 601, 602 (1973).

64. *Id.*

65. *See id.* at 606–607 ("[A]ppellants maintain that however permissible, even commendable, the goals of § 818 may be, its language is unconstitutionally vague and its prohibitions too broad in their sweep, failing to distinguish between conduct that must be permitted.").

way to "compelling needs of society."[66] The Court's sacrosanct approach to free expression justified its alteration of the "traditional rules of standing" to allow more third parties to bring suit in situations where the First Amendment rights of others were threatened by overly broad statutes. [67] As Justice White eloquently put it, this exception allows litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[68] As this statement shows, the Court used the fear of chilling effects on free expression as justification to excuse general standing principles. This "strong medicine," as Justice White put it, is strong enough in the Court's mind to trump prudential, third-party standing barriers.[69]

In summation, a plaintiff who believes that a statute is overbroad—by reaching expressive conduct otherwise protected by the First Amendment—may bring suit in federal court without having to demonstrate a concrete and particularized injury or third-party standing. In fact, the plaintiff's expressive conduct does not even have to be threatened by the statute under scrutiny.[70] The Court sees the exception as useful in situations where other potential plaintiffs, particularly those whose conduct is threatened by the statute under scrutiny, do not have a strong stake in filing suit due to lack of time, motivation, or financial resources.[71] Notably however, this exception has rarely extended beyond the narrow class of cases where the Court allows plaintiffs to bring overbroad claims.[72] Plaintiffs outside of these classes of cases must rely on general Article III or third-party-standing principles when bringing suit on behalf of others whose fundamental rights have allegedly been violated by a state or federal statute. The difficulties are

66. *Id.* at 611–12 (noting that the Court carved out an exception to the general rule of standing where "individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves").

67. *Id.* ("[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.").

68. *Id.* at 611–12.

69. *Broadrick*, 413 U.S. at 613 (noting that this doctrine is a "departure from traditional rules of standing").

70. WRIGHT & MILLER et al., *supra* note 62, § 3531.9.4.

71. *See* Re, *supra* note 61, at 1226 ("If those other potential plaintiffs possessed a strong stake in filing suit, then there would be no need for a special First Amendment Standing rule.").

72. *See Broadrick*, 413 U.S. at 613; WRIGHT & MILLER et al., *supra* note 62, § 3531.9.4 ("The Court has stated that overbreadth can be invoked under other constitutional provisions as well . . . [such as] the right to travel; abortion; and legislation under § 5 of the Fourteenth Amendment.").

particularly noteworthy in the realm of voting rights, and the following case demonstrates how standing barriers potentially insulate unlawful statues from judicial review.

III. THE RIGHT TO VOTE AND ASSOCIATIONAL STANDING

Section A introduces the procedures for "Special-Circumstances Voters" in Ohio, the subject of dispute in *Fair Elections Ohio v. Husted*. Section B will address the district court opinion in *Fair Elections Ohio v. Husted*, while Section C addresses the majority and dissent of the Sixth Circuit's decision.

A. Ohio Special-Circumstances Voters

Like most states, Ohio has two basic methods for casting a ballot.[73] Voters may either brave the lines and hassles of Election Day, or utilize one of the "absent voter's ballot procedures" allowed by the Ohio Revised Code (ORC).[74] ORC section 3509 also sets forth procedures for specialized instances of voting, one of which is section 3509.08, setting forth voting procedures for "[d]isabled or confined electors; medical emergencies; hospitalization of elector or minor child."[75]

Voters requesting special-circumstances absentee ballots commonly include deployed military personnel, disabled or confined voters, and those subject to surprise hospitalization.[76] One subset of special-circumstances voters includes "those confined under a sentence for a misdemeanor or awaiting trial on a felony or misdemeanor," referred to as "confined voters."[77] These voters have ninety days prior to the election to submit an application for an absentee ballot.[78] A completed application must be either hand delivered by 6:00 p.m. the Friday before Election Day, or received by mail before noon on the Saturday before Election Day. After confined-voter applications are processed, boards of elections send two-person teams to obtain the ballots in person.[79] Due to the unanticipated flow of "confined voters" in and out of jail, the

73. Fair Elections Ohio v. Husted, 47 F. Supp. 3d 607, 610 (S.D. Ohio 2014), *rev'd*, 770 F.3d 456 (6th Cir. 2014). Both the district court opinion and the appellate opinion use the same set of facts, so, for purposes of this paper, it assumes the parties stipulated to these facts.

74. *Id.* (citing to OHIO REV. CODE ANN. § 3509 (LexisNexis 2016)).

75. OHIO REV. CODE ANN. § 3509.08 (LexisNexis 2016). Ohio has three categories of absentee voting: (1) by mail; (2) voting early in person; and (3) special-circumstances voters. *See Fair Elections Ohio*, 47 F. Supp. 3d at 610.

76. *Fair Elections Ohio*, 47 F. Supp. 3d at 610.

77. *Id.*

78. OHIO REV. CODE ANN. § 3509.08(A) (LexisNexis 2016).

79. *Fair Elections Ohio*, 47 F. Supp. 3d at 610.

boards of elections teams "can and do" wait until Election Day to send teams to county jails to avoid duplicate ballots.[80]

This procedure creates a gap for confined voters.[81] If a non-confined registered voter is arrested after 6:00 p.m. the Friday before Election Day, he or she subsequently becomes a special-circumstances confined voter for purposes of Ohio election law. If they did not vote early or failed to submit a valid absentee application prior to the arrest, it is impossible to vote under the confined-voter procedures because the window for submitting an absentee application has, in all practical purposes, passed.[82] A confined voter who was arrested in this timeframe must thus be released in time to vote in person on Election Day or remain in jail long enough for boards of election teams to come to the jail on Election Day.[83]

In contrast, the special-circumstances-voter procedures outline an exception for voters who are themselves, or their minor child, "confined in a hospital as a result of an accident or unforeseeable medical emergency."[84] These "late-hospital voters" can have an absentee ballot application delivered to the board of elections by 3:00 p.m. on Election Day.[85] The absentee ballot may then be entrusted to a family member for delivery, or the board of elections can send a two-person team to the late hospital voter with the ballot.[86] However, no similar exception exists for confined voters, a fact that resulted in the following suit brought on behalf of disenfranchised, confined voters by a nonprofit organization.[87]

B. Fair Elections Ohio v. Husted *at the District Court Level*

The Plaintiff in *Fair Elections Ohio v. Husted* was a nonprofit organization (AMOS, or Plaintiffs) that brought suit on behalf of confined voters. They argued that confined voters should be treated

80. *Id.* (noting that the boards of elections sends the same types of teams to nursing homes up to a month before Election Day, but it seems practical to wait to send teams to jails because of the high turnover for low-level offenses).

81. *Id.*

82. *Id.* The practical outcome of this current framework means that confined-voter procedure is unavailable for a voter who is arrested after 6:00 p.m. on the Friday before Election Day. A registered voter who has not voted early and who falls within such window would not be able to vote unless released in time to vote in person on Election Day.

83. *Id.*

84. *Id.* at 610*;* OHIO REV. CODE ANN. § 3509.08(B) (LexisNexis 2016).

85. *Fair Elections Ohio*, 47 F. Supp. 3d at 610.

86. *Id.* It is surprising the board of elections would entrust a third party, even if it is a family member, to deliver an absentee ballot, demonstrating the great lengths this provisions proscribes to accommodate late hospital voters.

87. *Id.*

similarly to late hospital voters in terms of opportunities to submit an absentee ballot application.[88] The State of Ohio's main counterargument was that Plaintiffs lacked standing to bring the suit, "contending that [Plaintiffs], an association of religious congregations in the Cincinnati area, cannot establish independent standing or organizational standing."[89] The issue came before Judge Spiegel of the Southern District of Ohio on cross-motions for summary judgment.[90] The Plaintiffs presented evidence that at least 400 late-jailed voters throughout Ohio were "impeded from voting in the 2012 election" due to the confined-voter procedures.[91] As a prime example, Plaintiffs presented testimony of a late-jailed voter who testified that "he preferred going to the polls in person" on Election Day instead of voting absentee, but was prevented from doing so by the confined-voter procedures after an unexpected arrest.[92]

The court proceeded to find for the Plaintiffs, and based its decision on the Plaintiffs' diversion-of-resources theory.[93] The court was persuaded by Plaintiffs' argument that it learned of the confined-voter provision just prior to the election, and did not have enough time to amend their printed placards and retrain their volunteers to put voters in high-arrest areas on notice.[94] It concluded that Plaintiffs had standing to sue because the evidence proved the elements of a direct Article III injury, showing that they had been (1) directly harmed by the confined-voter provision, (2) that the matter was connected to the State of Ohio's (Defendant's) conduct, and that (3) the issue was redressable through injunctive relief.[95]

After finding standing, the court reached the merits, where it found for Plaintiffs as a matter of law.[96] Judge Spiegel concluded that "late-

88. *Id.* at 610–11 ("Plaintiffs contend these voters, who are 'late-jailed electors,' that is, taken into custody after 6:00 P.M. on the Friday before election day and held through election day, should be treated similarly to 'late-hospitalized electors,' to whom the Boards of Elections send out staff to assist with voting pursuant to Ohio Rev. Code § 3509.08(B)(1).").

89. *Id.* at 610–11, 613 ("Defendants further argue that the Boards of Elections essentially have too much to do in administering the elections to be able to send out staff to jails to accommodate late-jailed electors. Defendants further contend those in jail are more difficult to access than those in hospitals. Finally Defendants argue that burden on late-jailed electors, who could have voted early under Ohio law, is minimal.").

90. *Id.* at 609.

91. *Fair Elections Ohio*, 47 F. Supp. 3d at 611.

92. *Id.*

93. *Id.* at 613 (citing Fla. State Conference of NAACP. v. Browning, 522 F.3d 1153, 1165–66 (11th Cir. 2008).

94. *Id.* ("The evidence shows AMOS learned of the disenfranchisement of late-jailed voters late in the game, and therefore weren't able to modify voting rights placards or print new supplemental materials.").

95. *Id.* at 613.

96. *Id.* at 611 ("Plaintiffs have moved for summary judgment under federal constitutional

jailed electors are similarly-situated to late-hospitalized electors whom the boards of election already accommodate," and used this reasoning to strike down the provision on equal protection grounds.[97] Important for the court was that any additional burden put on the boards of elections in accommodating confined voters was slight when balanced against stripping away confined voters' fundamental right to vote.[98] In addition to striking down the provision on equal protection grounds, Judge Spiegel proceeded to find in favor of the Plaintiffs on due process grounds and a violation of the Voting Rights Act.[99]

C. Fair Elections Ohio v. Husted *on Appeal*

Less than two months after the district court's opinion, the case was heard on appeal at the Sixth Circuit Court of Appeals. After providing an overview of the factual determinations made by the district court, the Sixth Circuit concluded that the Plaintiffs lacked standing.[100]

Key to the court's decision was that evidence of faulty placards and other publication materials were not causally connected to the defendant's conduct, but to the Plaintiffs' ignorance of the law.[101] Additionally, the court concluded that retraining election volunteers about confined-voting procedures did not rise to the level of a concrete injury where the Plaintiffs had already trained them for the purpose of providing voter information.[102] The court also noted that, even if it were an injury, the court could not provide a proper remedy because providing injunctive relief would merely create new procedures that

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theories and the Voting Rights Act. Plaintiffs contend the state law that threats them differently than late-hospitalized electors affects their fundamental right to vote and violates equal protection."). The court found for the Plaintiff on Equal Protection grounds, procedural and substantive due process violations, under Section 2 of the Voting Rights Act, and under the Seventeenth Amendment to the United States Constitution. *Id.*at 613–18.

97. *Fair Elections Ohio*, 47 F. Supp. 3d at 615 ("The Court further finds late-jailed electors are similarly-situated to late-hospitalized electors whom the boards of election already accommodate. The boards of election teams should have no trouble locating late-jailed electors, as they literally have a captive audience. The Court finds Defendants' concerns regarding security simply overblown. Jail staff are competent to assist in the efficient voting of those within their custody.").

98. *Id.* ("The Court cannot find the balance to weigh in favor of Defendants where Plaintiffs' fundamental voting right is simply stripped away, and where whatever additional burden in accommodating late-jailed electors appears minimal at best.").

99. *Id.* at 615–18.

100. Fair Elections Ohio v. Husted, 770 F.3d 456, 459 (6th Cir. 2014) (noting that "the district court's constitutional analysis does not appear sufficient to warrant [an] injunction").

101. *Id.* at 459–60 ("That AMOS's placards and supplemental materials failed to contain a full and accurate description of the years-old late-jailed electors issue is not an Article III injury, and even if it were, it is not fairly traceable to the State, only to AMOS's ignorance of the law.").

102. *Id.* ("Further, it is not an injury to instruct election volunteers about absentee voting procedures when the volunteers are being trained in voting procedures already, as AMOS Executive Paul Graham conceded that the training was part of a single regularly scheduled meeting.").

would cause AMOS to have to once again retrain its volunteers.[103]

The court spent a majority of its time addressing the Plaintiffs' diversion-of-resources theory.[104] The majority concluded that it could not find enough specific facts that demonstrated a concrete injury related to diversion of resources, finding them to be closer to "mere allegations" than a palpable injury-in-fact.[105] Moreover, the court noted, "[P]laintiff's [arguments] rest solely on the conclusions reached by the district court . . . [which] do not amount to a diversion of resources and do not constitute Article III injuries."[106]

Next, the court distinguished two cases the Plaintiffs presented in support of their diversion-of-resources theory.[107] In the first case, *Crawford v. Marion County Election Board*,[108] the Seventh Circuit found that the Democratic Party had standing to challenge a state voter ID law.[109] In the second case, *Florida State Conference of the NAACP v. Browning*,[110] the Eleventh Circuit found that the NAACP had standing to challenge a Florida law requiring voter registration to match information in state databases.[111] The court distinguished these cases by pointing out that they involved large organizations who claimed voting laws would injure thousands of members.[112] Compared to this, the court saw Plaintiffs' claim as only a "social interest" in maximizing voter turnout rather than claiming injury to its membership.[113] In dicta, the court also noted that even if the Plaintiffs demonstrated an Article III injury, AMOS did not have a close enough relationship with its members to raise claims under a theory of third-party associational standing.[114]

The divide between the district court and appellate court opinions reveal how fluidly standing criteria can be applied. While the district

103. *Id.* ("And even if this instruction were an injury, any likely redress by this court would simply substitute a different procedure which AMOS must teach its volunteers instead.").

104. *Id.*

105. *Id.* at 459–60 (noting that "plaintiffs have not supported this argument with specific facts apart from the two evidentiary showings") (citing to Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).

106. *Fair Elections Ohio*, 770 F.3d at 459–60.

107. *Id.* at 460–61 ("The cases cited by the Plaintiffs in support of their diversion of resources theory of standing are accordingly distinguishable.").

108. Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007).

109. *Fair Elections Ohio*, 770 F.3d at 460–61.

110. Fla. State Conference of the NAACP v. Browning, 522 F.3d 1153, 1175 (11th Cir. 2008).

111. *Fair Elections Ohio*, 770 F.3d at 460–61.

112. *Id.* at 461.

113. *Id.* ("Unlike in Crawford and Browning, there is simply no indication that any of AMOS's members will be a voter affected by the challenged law.").

114. *Id.* ("Even if AMOS were to demonstrate it has Article III standing, it would confront the additional barrier of the long-recognized limit on plaintiffs asserting the rights of third-parties.").

court found a diversion of resources theory compelling enough to satisfy the criteria for a direct Article III injury, the appellate court's analysis was much narrower. It framed the Plaintiffs' argument as "mere allegations," and dismissed its diversion-of-resources theory. As the following section shows, this fluidity makes it nearly impossible for a nonprofit organization like AMOS to bring suit on behalf of its underprivileged members.

IV. DISCUSSION

Section A discusses how the *Fair Elections Ohio v. Husted* decision presents an example of how overly stringent standing criteria stifles efforts of organizations to bring claims on behalf of underprivileged voters. In doing so, it compares application of a law-declaration model to a dispute-resolution model, and demonstrates which approach the Supreme Court adopts. Next, Section B further discusses why current standing jurisprudence frustrates the efforts of nonprofit organizations. As a solution to these issues, Section C suggests applying principles of overbreadth standing in situations where a plaintiff is presenting a challenge to voting laws that may be infringing upon individuals' fundamental right to vote. Section C will also promote the use of the law-declaration model in situations where an individual's fundamental right to vote is on the line.

A. Fair Elections Ohio Is a Quintessential Example of How Current Standing Philosophies Are Insulating Election Law Claims

1. The District Court's Law-Declarative Approach Is Not a Correct Application of Current Standing Precedent

In looking at AMOS's case, it was questionable whether the plaintiffs could prove a direct Article III injury independent of their members' legal rights, or alternatively rely on their members' rights and push for associational standing. Although AMOS made a case for a direct injury-in-fact through their diversion-of-resources theory, it was never clear whether they could satisfy the causation prong of the judicial test.[115] Their associational standing case also had weaknesses where it was, at most, "speculative" that at least one of the organization's members could prove they would be imminently harmed by the confined-voter provision.

The district court judge, Judge S. Arthur Spiegel, likely faced a

115. Mank, *supra* note 19, at 220.

situation where he wanted to reach the merits of the Plaintiffs' claim, but had to find a way to get around constitutional and prudential standing barriers.[116] Although AMOS presented a borderline case, Judge Spiegel found their diversion of resources theory compelling enough to find a direct injury-in-fact.[117] In doing so, the district court implicitly applied a law-declaration approach, as it was likely Judge Spiegel's primary concern to declare the confined-voter provision unconstitutional rather than rigorously apply standing paradigms. This exemplifies how a court adopting a law-declarative approach may relax the standing criteria in situations where it wishes to reach the merits in order to consider a law that may abridge voting rights.[118] While commendable for trying to reach the merits, Judge Spiegel's applied his standing analysis too liberally to be in line with current standing precedent.[119]

2. Sixth Circuit's Dispute-Resolution Approach Embodies the Narrow State of Standing Law Today

The key flaw in the district court's opinion, as pointed out by the Sixth Circuit, was the lack of a causal connection between AMOS's diverted-resources theory and the defendant's conduct.[120] AMOS's diversion-of-resources theory was not causally connected to the State of Ohio because the law existed before the get-out-the-vote (GOTV) campaign began.[121] Had the confined-voter provision been passed after AMOS took significant steps to begin their GOTV campaign, it seems the court could have found a causal connection between the diversion of resources and the state's conduct. Nonetheless, the majority opinion

116. The author is making this assumption based on Judge Spiegel's opinion, which found independent Article III standing for when Plaintiff presented a "weak" standing case. The remainder of the opinion unequivocally finds that Ohio Revised Code section 3509.08 is unconstitutional on multiple theories. This led the author to believe that Judge Spiegel was pushing the boundaries of Article III standing in order to reach the merits.

117. Fair Elections Ohio v. Husted , 47 F. Supp. 3d 607, 613 (S.D. Ohio 2014).

118. Farrakhan v. Gergoire, 590 F.3d 989, 1000–1001 (9th Cir. 2010) (liberally applying the judicial test for standing to an action challenging a state disenfranchisement statute); Lerman v. Board of Elections, 232 F.3d 135, 141–45 (2d Cir. 2000) (finding that plaintiffs had standing to challenge a state ballot procedures on its face under the overbreadth doctrine).

119. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

120. *Fair Elections Ohio*, 47 F. Supp. 3d at 613 (finding that AMOS has standing "based on the allegation that it was forced to divert its limited resources from its get-out-the-vote efforts to providing additional training for canvassers regarding the effects of arrest, increasing efforts in neighborhoods with higher arrest rates, and informing voters in at-risk areas that if they don't vote early and are subject to arrest, they could be unable to vote"); Fair Elections Ohio v. Husted, 770 F.3d 456, 459–60 (6th Cir. 2014) (noting that the claimed injury "is not fairly traceable to the State, only to AMOS's ignorance of the law").

121. *Fair Elections Ohio*, 770 F.3d at 459–60.

was justified in pointing out that the harm was causally connected to AMOS's failure to thoroughly review all relevant election law before devoting its monetary resources and manpower to their GOTV campaign.[122]

After finding that AMOS did not demonstrate a direct Article III injury, the Sixth Circuit addressed associational standing in dicta.[123] Although the court mistakenly distinguished diversion-of-resources theory cases when analyzing associational standing, it was ultimately correct in distinguishing them.[124] Both cases involved nationwide organizations, each with a much larger membership base than AMOS.[125] This made it easy for the court to distinguish AMOS's membership base from those of the Democratic Party and NAACP, because a larger membership base made it imminent, rather than hypothetical or conjectural, that at least one member would be harmed by the state's voting requirements.[126] Without one of its members having a cognizable injury-in-fact, AMOS could not move forward on a theory of associational standing.[127]

The district court and Sixth Circuit opinions demonstrate how application of a dispute-resolution model or a law-declaration model can be dispositive in borderline standing cases. In terms of standing jurisprudence, the Sixth Circuit applied correct precedent even though its application of the judicial test for independent standing and for associational standing can be described as "narrow."[128] This is likely because the Supreme Court's current approach to standing has taken on a dispute-resolution attitude by signaling for a more "narrow" and unforgiving application of standing paradigms.[129] The justifications for

122. *Id.* (describing AMOS's argument that "placards and supplemental materials failed to contain a full and accurate description of the years-old later-jailed electors issue" and that "it is not an injury to instruct election volunteers about absentee voting procedures when the volunteers are being trained in voting procedures already").

123. *Id.* at 460–61, 461 n.2, 463 (Cole, J. Dissenting).

124. *Id.*

125. Crawford v. Marion Cty Election Bd., 472 F.3d 949, 950–51 (7th Cir. 2007); Fla. State Conference of the NAACP v. Browning, 522 F.3d 1153, 1158 (11th Cir. 2008).

126. *Fair Elections Ohio*, 770 F.3d at 461 (finding that "there is simply no indication that any of AMOS's members will be a voter affected by the challenged law").

127. *Id.*

128. Lujan v. Defenders of Wildlife, 504 U.S. 555, 563–64, 576; David E. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of* Marbury v. Madison, 57 ALA. L. REV. 1041, 1068 (2006).

129. *Lujan*, 504 U.S. at 563–64, 576 ("Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch . . . . Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive"); Marion, *supra* note 128, at 1068 (noting that the Supreme Court endorsed "a strict interpretation of the rules of standing" in *Lujan*).

standing also weigh in favor of a dispute-resolution approach as they seek to err on the side of deference to the legislature rather than judicial declaration of the law.[130] Nevertheless, these justifications—and for that matter, a dispute-resolution approach—may not be proper in cases where statutory enactment will likely infringe upon a constitutional right. More specifically, in situations where a statute threatens an individual's constitutionally protected right to vote, the traditional justifications for arduous application of standing paradigms should be questioned.

B. Flaws in Applying Traditional Standing Paradigms to Voting-Rights Claims

As noted above, the justifications for standing call on the plaintiff to prove the justiciability of his case before federal courts can exercise jurisdiction.[131] While an important principle, it is not applicable where a state or federal legislature has violated an individual's constitutionally protected right to vote. In scenarios like these, it is confusing to determine who the proper plaintiff is for standing purposes.[132] Nonprofit organizations exist for the benefit of their members and promotion of their cause. They work as a collective group because combining resources can be a more effective means of accomplishing their goals.[133] In this instance, one of AMOS's goals was to encourage their membership base—inner-city residents of a lower socioeconomic class—to vote in elections through an informative GOTV campaign.[134] Yet, the Sixth Circuit was correct in denying AMOS's direct-injury claim because, in the eyes of standing jurisprudence, AMOS was not harmed by the confined-voter provision. AMOS's only alternative was to claim associational standing. Again, the court was correct in finding

130. *See* Mank, *supra* note 20, at 78–79; Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179, 186-87 (2011) ("Standing doctrine, based in Article III's limitation of the federal courts to cases and controversies, and devised and developed by the Supreme Court, is seen to protect two general sets of interests: promoting effective adjudication and ensuring separation of powers.").

131. *See* Mank, *supra* note 20, at 78–79 (describing the justifications for constitutional standing).

132. Ala. Legis. Black Caucus v. Alabama, 988 F.Supp. 2d 1285, 1299–1304 (M.D. Ala. 2013) (finding that plaintiffs challenging a legislative redistricting provision that will be adopted in the next legislative session as non- justiciable); Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 809–13 (S.D. Ind. 2006) (finding that some voters challenging a voter ID law were harmed while others were not). The previous cases provide examples of where it seems a proper plaintiff is bringing suit, but is struck down for lack of standing. If the voters themselves are not harmed by voting provisions, and also cannot rely solely on their caucuses, political parties, or other nonprofit groups as representatives of their rights, it is unclear what messages standing principles are sending to voters.

133. Heilman, *supra* note 46, at 252–53.

134. Fair Elections Ohio v. Husted, 47 F. Supp. 3d 607, 613 (S.D. Ohio 2014); Fair Elections Ohio v. Husted, 770 F.3d 456, 459–61 (6th Cir. 2014).

against them because it was too speculative that at least one of AMOS's members would be arrested and harmed by the challenged law.[135]

The difficulties exposed by the *Fair Elections Ohio v. Husted* opinions are inherent in many voting-rights claims.[136] Courts have great difficulty applying voting-rights claims to traditional standing paradigms because it can be difficult to preemptively identify those who will be harmed prior to the election.[137] In other words, current standing tests do not adequately identify who is the best plaintiff to bring suit.[138] In some circumstances, courts can wait and see if a "better suited" plaintiff comes along, but in the voting rights context, this is not plausible because elections cannot be recreated or cured by judicial remedies.[139] Courts also tend to become overly cautious around voting-rights claims because they resemble "generalized grievances"—claims involving harms to the electorate as a whole—causing courts to promptly defer to the political process for resolution.[140]

In an attempt to alleviate these difficulties, some courts have applied the doctrine of probabilistic standing in the election law context.[141] This doctrine allows courts to find an injury-in-fact in situations where the harm has yet to materialize, but inevitably will occur.[142] While this allows federal courts to hear more voting-rights claims, it does not cure the problem in situations where there are inherent difficulties in demonstrating that a person inevitably will be harmed.[143]

All of these factors tend to disrupt review of voting-rights claims in federal court. While the justifications for standing are grounded in sound principle, they act as insulators against judicial review of these types of claims. Some founders exhibited a "distrust of state governments," evidenced by their adoption of the Supremacy Clause to facilitate a judicial model capable of thwarting states' attempts to infringe on constitutionally protected rights.[144] Based on these

135. *Fair Elections Ohio*, 770 F.3d at 461.

136. Zipkin, *supra* note 130, at 203–204 (a threshold hurdle in a number of recent election administration claims is that the identity of those who will be harmed by the challenged practice is unknown prior to the election).

137. *Id.*

138. *See id.*

139. *Id.* (noting that "due to remedial constraints, we cannot wait to see who is injured by these practices before allowing suit").

140. *Id.* at 190–91 (because election claims often involve harms to the electorate as whole, the willingness to consider such generalized grievances can significantly influence the outcome of the standing analysis).

141. *Id.* at 204–205.

142. Zipkin, *supra* note 130, at 204–205 (citing to Sandusky Cty. Democratic Party v. Blackwell, 387 F.3d 565, 574 (6th Cir. 2004)).

143. *See, e.g.*, Fair Elections Ohio v. Husted, 770 F.3d 456, 458–60 (6th Cir. 2014).

144. *See* Zipkin, *supra* note 130, at 234–35 ("Historians have detailed Madison's (and other

background principles, federal courts should provide more protections where it is alleged that a state has infringed on its citizens' right to vote.[145] These strong constitutional inhibitions also serve as evidence that the traditional justifications for standing are not as significant in the voting rights context.[146] Thankfully, there is a solution, and it already exists among standing doctrines.

C. Solution: Apply Principles of Overbreadth Standing to Voting-Rights Claims

To avoid the hurdles of Article III standing and prudential barriers, federal courts should extend the doctrine of overbreadth standing to claims alleging infringement of voting rights through statutory enactments. The overbreadth exception was developed to protect free speech by allowing third parties to bring claims absent proof that their personal, constitutionally protected rights were harmed by an overbroad statute.[147] In essence, plaintiffs do not have to demonstrate harm to themselves under a direct injury theory—or, in the case of an organization, harm to one of its members under a theory of associational standing—before a federal court could exercise jurisdiction. The doctrine's existence is premised on courts' fear that overbroad statutes could potentially prohibit constitutionally protected conduct outside of the statute's primary regulatory purpose.[148] While only applied within the First Amendment context, many of the rationales behind the creation of the overbreadth doctrine apply analogously to statutes that encroach on a person's fundamental right to vote.

Furthermore, while free speech is not constitutionally synonymous with the right to vote, there is a logical connection between both rights. Among types of speech protected by the First Amendment, the Supreme Court considers political speech to be the "purest" form of speech, and, as a result, subjects state and federal statutes infringing on political speech to strict scrutiny.[149] Hypothetically speaking, if voting rights

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Founders') distrust of state governments, highlighted by the Constitutional Convention's consideration of a federal "negative" on state legislation. Significantly, this provision for legislative monitoring of state legislation was rejected in favor or a judicial model, based on the Supremacy Clause. The evolution of a constitutional law of elections reflects the continuing development of this ideal, relying on the federal judiciary to protect the states' practice of democracy.").

145. *Id.*

146. *See* Adman Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 332–34, 337 (1993).

147. Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1972).

148. *Id.*

149. Citizens United v. FEC, 558 U.S. 310, 310–16 (2010); Winkler, *supra* note 146, at 334–35 ("If voting is expression protected by the first amendment, we need only ask what type of speech it is—commercial, violence-inciting, obscene, political, etc.—and subsequently what standard of review the jurisprudence requires one to apply to determine the constitutionally of laws restricting the right.").

were protected under the First Amendment, they would undeniably be seen as a subsidiary of political speech.[150] Consequently, voting rights would receive "the utmost constitutional protection" through application of strict scrutiny.[151] Moreover, it does not stretch the judicial imagination to consider casting a ballot for a political party or candidate to be a form of expression analogous to donating money to a super PAC or individual candidate, both of which are actions protected as political speech under the First Amendment and may be challenged under the overbreadth doctrine.[152] Yet, under current standing jurisprudence, individuals must be "harmed" before they can challenge a statute that prevents them from voting for their candidate of choice. This counterintuitive example exists because federal courts apply the overbreadth doctrine in the First Amendment context, but have not extended the exception to voting-rights claims. As voting is the ultimate form of political expression, it seems that, at a minimum, voting-rights claims should be treated as a form of political expression in the eyes of standing jurisprudence.

Extending the overbreadth doctrine to voting-rights claims not only cures the flaws associated with applying traditional standing paradigms, but also affords the right to vote the level of judicial oversight it deserves. Plaintiffs would be able to bring voting-rights claims in federal court while avoiding the hurdles of imminent injury-in-fact and causation that are inapplicable when the harm is threatened by a statute's mere existence. Under this approach, a plaintiff, like AMOS, could bring a claim in federal court to fight statutes like the confined-voter provision under a "prediction or assumption that the statute's very existence may cause others not before the court to refrain" from voting, a theory that drove the court's original creation of the overbreadth doctrine in *Broadrick v. Oklahoma*.[153]

The threat of chilling effects—a major concern of courts in the First Amendment context—also exists in the voting rights context. The existence of statutes like the Ohio confined-voter provision may have a chilling effect on voting because merely having the ability to vote is a right by which many acquiesce to societal rule and gain a feeling of membership in the community.[154] If certain members of society, such as

150. Winkler, *supra* note 146, at 334–35 (noting that if voting is "conceptualized under the constitutional doctrine of free speech, voting would be paradigmatic of political speech").

151. *Id.* ("Under current first amendment jurisprudence, voting, as political speech, would gain the utmost constitutional protection: application of the strict scrutiny standard of review.").

152. *Id.* at 338 (noting that "voting is but a muted and limited form of speech"); *see, e.g.*, *Citizens United*, 558 U.S. at 310–16.

153. *Broadrick*, 413 U.S. at 611–12.

154. Winkler, *supra* note 146, at 331 (noting that "voting is a meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their

confined voters, feel that they have had this fundamental right arbitrarily stripped away because of their status, they may feel cast from society with no avenue to vent their frustrations. This feeling can undoubtedly lead to recidivism and criminalization. Where voting carries such importance to our democratic society, federal courts should have a doctrine that is equally as conscious of the chilling effects in the voting rights context as they are with the First Amendment.

The Supreme Court also created the overbreadth doctrine for use in situations where plaintiffs—who may be more statistically threatened by an overly broad statue—do not have the time, motivation, or financial resources to challenge the statute in federal court.[155] This clearly should apply to cases where nonprofit organizations bring suit on behalf of members who are more likely to be harmed by overzealous statutes, but less likely to bring claims against them. Although extending this exception could flood the courts with voting-rights claims, federal courts have already shown they would bear such a risk when a right is so fundamental to American values that even the threat of infringement is a cause for relinquishment of standing requirements. In fact, more judicial oversight of voting rights is necessary because without its availability to all citizens, the democratic process may become threatened because those who cannot vote "cannot turn to the political process for relief" from their perils.[156] The alternative may be self-help and questioning the rule of law, two characteristics that threaten a healthy democracy.

It must be noted that this approach does not call for federal courts to consider every voting-rights claim. It merely advocates for courts to adopt a law-declaration approach towards claims alleging that statutory enactments are infringing upon the citizenry's right to vote. As shown, the First Amendment and voting promote and foster similar societal goals, and as a result, should be afforded similar judicial oversight through relaxed standing paradigms and a law-declaration attitude that allows federal courts to reach the merits if they so choose. Without change, laws that potentially infringe on a person's constitutionally protected right to vote may continue to be insulated from review.

V. CONCLUSION

While the Ohio confined-voter provision is not a disenfranchising

identities both as individuals and as part of a greater collectivity").

155. Re, *supra* note 61, at 1226 ("If those other potential plaintiffs possessed a strong stake in filing suit, then there would be no need for a special First Amendment standing rule.").

156. Zipkin, *supra* note 130, at 212–13 (discussing the pros and cons of judicial involvement in the democratic process).

statute, its purpose and effect is to sacrifice the voting rights of arrestees before any other class of citizens. It is unclear why citizens who are merely subject to arrest but not yet convicted are treated categorically differently in the voting context, but it is undoubtedly related to our nation's attitude towards convicted felons.[157] Without the ability to rely on pro bono legal services or nonprofit funding, these laws will continue to exist because their targeted population does not have the time or resources to bring a legal claim.

Allowing claims challenging laws like the confined-voter provision will afford confined citizens a voice in the legal process. This can only be done through application of the overbreadth doctrine to voting-rights claims premised off statutes allegedly infringing upon the fundamental right to vote. Judicial oversight of voting procedures has a foundation in our nation's history, and this gives courts firm ground to justify extending more judicial involvement in the voting rights context.[158] It is also noteworthy that courts have already extended such judicial protections within the First Amendment context, showing a willingness to provide oversight to high-priority constitutionally protected rights. All this points to the solution that federal courts should allow voting-rights claims against infringing statutes under the overbreadth doctrine. Without doing so, statutes such as the Ohio confined-voter provision, and others that infringe upon a class of citizen's right to vote, will continue to be insulated from judicial review due to arbitrary standing tests.

157. Karlan, *supra* note 1, at 1363–64 (noting that the Court has distinguished disenfranchising individuals convicted of crimes from other limitations on the right to vote).

158. Zipkin, *supra* note 130, at 234–35.