No. 24-568

In the

Supreme Court of the United States

MICHAEL J. BOST, et al.,

Petitioners,

v.

ILLINOIS STATE BOARD OF ELECTIONS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Federal law sets the first Tuesday after the first Monday in November as the federal Election Day. 2 U.S.C. §§1, 7; 3 U.S.C. §1. Several states, including Illinois, have enacted state laws that allow ballots to be received and counted after Election Day. Petitioners contend that these state laws are preempted under the Elections and Electors Clauses. Petitioners sued to enjoin the Illinois' law allowing ballots to be received up to 14 days after Election Day.

The question presented is:

Whether Petitioners, as federal candidates, have pleaded sufficient factual allegations to show Article III standing to challenge state time, place, and manner regulations concerning their federal elections.

PARTIES TO THE PROCEEDING

Petitioners, who were Plaintiffs-Appellants below, are United States Congressman Michael J. Bost and Republican Presidential Elector Nominees Laura Pollastrini and Susan Sweeney.

Respondents, who were Defendants-Appellees below, are the Illinois State Board of Elections and Bernadette Matthews, in her capacity as the Executive Director of the Illinois State Board of Elections.

CORPORATE DISCLOSURE STATEMENT

Petitioners Michael J. Bost, Laura Pollastrini, and Susan Sweeney are individuals.

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INTRODUCTION

When it comes to elections, candidates running for office plainly have the most at stake. They put their lives on hold and spend countless hours and millions of dollars organizing and running campaigns. Their campaigns and elections are governed by a welter of federal, state, and local laws, dictating everything from how much can be spent and received, to how long elections will last, to when and how the votes will be counted. And when the dust settles, the candidates either win or lose, with months of effort and untold expenditures either vindicated or forever lost.

Given those stakes, this should have been a straightforward case for standing. When they filed this suit, Petitioners Michael Bost, Laura Pollastrini, and Susan Sweeney were prospective candidates for federal office and appointment as Presidential Electors. They filed their suit long before the stress and chaos of Election Day, giving the courts ample time to resolve their challenge to an Illinois statute that permits the counting of mail-in ballots received up to 14 days after the federally specified Election Day. Some courts have invalidated comparable provisions. *See Republican Nat'l Comm. v. Wetzel*, 120 F.4th 200 (5th Cir. 2024). But petitioners' suit was stopped at the jurisdictional threshold on the counterintuitive ground that they lacked standing to challenge the rules that dictated how long their campaigns would last and how the votes would be counted.

That decision is flatly wrong. After all, no one has more of a concrete and particularized interest in the

rules governing an election than the candidates running in it. That is especially so here, where petitioners allege that Illinois' extension of the mail-in-ballot deadline harms their chances for election and costs them money by requiring them to extend their campaigns and get-out-the-vote efforts and to send representatives to oversee the counting of late-arriving ballots. Those are classic injuries-in-fact directly traceable to the Illinois law and fully redressable by a decision invalidating that law.

The Seventh Circuit had other thoughts. As for petitioners' competitive injuries, it held that petitioners brought their lawsuit so early that any question about how the law would impact their electoral prospects would amount to undue speculation. As for petitioners' pocketbook injuries, the panel majority dismissed them as "self-inflicted," because Congressman Bost's sizable margin of victory in his most recent election made any claim that extending the mail-in deadline would "cause [him] to lose the election" entirely "conjectural." Pet.App.11a-12a, 18a.

That decision is flawed from top to bottom. Under the Seventh Circuit's approach, candidates who challenge election rules well before the crush and chaos of Election Day lack standing because their injuries are too "speculative." But candidates who sue as Election Day approaches (when potential injury is more certain) cannot get relief either. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). The upshot of the Seventh Circuit's approach is to channel disputes over election rules to the post-election context where schedules are compressed and the judicial role

is most fraught. To the extent the Seventh Circuit might have allowed Congressman Bost's suit to proceed if it perceived his race as a toss-up, that only makes matters worse. That approach would concentrate litigation in the political races that are most divided and contentious, while leaving minor-party candidates on the sidelines. It would also skew the playing field, making it easier to challenge rules that tighten voting requirements than those that relax them, as voters will always have standing to challenge the former but not necessarily the latter. Candidates have the most straightforward case for standing to challenge the latter, yet the Seventh Circuit's decision blocks their suits at the threshold. None of that is workable in the electoral context where the rules of standing should be politically neutral as to minor- and major-party candidates and as to rules that tighten and relax voting requirements.

Nothing in standing doctrine demands, or even permits, the Seventh Circuit's approach. Candidates have an obvious interest in the lawfulness and fairness of the rules that govern the elections into which they pour their time and resources. They also have an obvious interest "in ensuring that the final vote tally accurately reflects the legally valid votes cast." *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). Laws that disadvantage candidates competitively and distort the accuracy of results impose an obvious and distinct injury-in-fact on candidates. At a bare minimum, when the candidate alleges that a law extending the length of campaigns requires the expenditure of additional campaign resources, there is a pocketbook injury that provides an open-and-shut case for standing. That rule

complies with bedrock Article III principles and ensures that disputes over election rules can be resolved at a safe remove from the tumult of a particularly close and contested race. This Court should reverse the decision below.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 114 F.4th 634 and reproduced at Pet.App.1a-23a. The district court's opinion is reported at 684 F.Supp.3d 720 and reproduced at Pet.App.26a-58a.

JURISDICTION

The Seventh Circuit issued its opinion on August 21, 2024. Pet.App.1a-25a. The petition for certiorari was timely filed on November 19, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in Pet.App.61a-63a.

STATEMENT OF THE CASE

A. Legal Background

1. The Constitution invests state legislatures with the initial "responsibility" to set "the mechanics" of elections to federal offices. *See Foster v. Love*, 522 U.S. 67, 69 (1997). But that initial responsibility is generally subject to congressional supervision and override. The Constitution "grants" Congress the ultimate authority over federal elections, including the "power to override" most state election regulations and provide for uniform federal rules for federal elections. *Id.*

Articles I and II set out that framework. Article I addresses congressional elections, while Article II addresses presidential ones. Article I's Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, §4, cl. 1. Article II's Electors Clause provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" to vote for President and Vice President. *Id.* art. II, §1, cl. 2; *see id.* art. II, §1, cl. 1; *id.* amend. XII. But "[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." *Id.* art. II, §1, cl. 4.

For the first decades after the Founding, "Congress left the actual conduct of federal elections to the diversity of state arrangements." *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1171 (9th Cir. 2001). But that approach ultimately proved unworkable. Some states adopted multi-day voting periods for presidential electors, leading to "election fraud, delay, and other problems." *Wetzel*, 120 F.4th at 204. And states set "varying times" for "congressional elections," which "provid[ed] some States with an 'undue advantage' of 'indicating to the country the first sentiment on great political questions.'" *Id.*

Congress eventually set some "uniform" national "rules" for federal elections. *See Foster*, 522 U.S. at 69-

70. In 1845, Congress mandated that in presidential election years "the electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in the month of November." Act of Jan. 23, 1845, ch. 1, 5 Stat. 721. After the Civil War, Congress extended the rule to the House of Representatives by providing that "the Tuesday next after the first Monday in November, in every second year … is hereby fixed and established as the day for the election." Act of Feb. 2, 1872, ch. 11, §3, 17 Stat. 28. And after ratification of the Seventeenth Amendment, Congress included Senators in the uniform Election Day too. *See* Act of June 4, 1914, ch. 103, §1, 38 Stat. 384.

2. Elections in the early years of the Republic were conducted on a single day, and votes were cast and received in person. *See Wetzel*, 120 F.4th at 209. Absentee voting regimes only began to develop during the Civil War, primarily to permit members of the military to cast ballots from their battlefield units and have them counted back home. *Id.* Over time, states expanded access to absentee ballots, allowing civilians to use them too. *Id.* at 210. But even as states expanded the availability of absentee ballots, "early absentee voting laws universally foreclosed the possibility of accepting and counting ballots received *after* Election Day." *Id.* By 1977, for example, only two states with absentee voting counted ballots received after Election Day. *See Overseas Absentee Voting: Hearing on S. 703 Before the S. Comm. on Rules and Admin.*, 95th Cong. 33-34 (1977). In recent decades, a number of states have begun to count absentee ballots received by election officials after Election Day, but most still require ballots to be

received by Election Day to count. *See* U.S. Election Assistance Comm'n, *Election Administration and Voting Survey: 2024 Comprehensive Report* 75 (June 2025) (noting that as of June 2025, 21 states count absentee and mail-in ballots received after Election Day).

3. Illinois is one of the states that has changed its practices in recent years to accept mail-in ballots received after Election Day. In 2005, it amended its laws to count mail-in ballots "received by the election authority" within "14 calendar days" of the election, so long as the ballot is "postmarked no later than election day" or accompanied by a signed certification dated on or before Election Day. 10 Ill. Comp. Stat. Ann. §§5/19-8(c), 5/18A-15(a).

Following that change and subsequent changes in 2013 expanding mail-in voting, the "volume of votes arriving after Election Day" grew significantly. Pet.App.66a. The volume of mail-in ballots peaked in 2020 during the COVID-19 pandemic, when over 2 million voters in Illinois cast ballots by mail. Pet.App.85a. Shortly before the November 2020 election, the State Board of Elections issued a media advisory warning that "the number of ballots received after Election Day through November 17, 2020, could materially affect the unofficial election results." Pet.App.85a. The Board admonished: "As mail ballots arrive in the days after Nov. 3, it is likely that close races may see leads change as results are reported. Reporters should check with local election authorities for updated vote counts and make readers, viewers and listeners aware of why these numbers are changing." Pet.App.85a.

B. Procedural Background

Petitioners are U.S. Congressman Michael J. Bost and Republican Presidential Elector Nominees Laura Pollastrini and Susan Sweeney. In May 2022, petitioners sued respondents in federal district court, alleging that Illinois' ballot-receipt deadline governing their respective elections conflicts with, and is thus preempted by, 2 U.S.C. §7 and 3 U.S.C. §1, and is unconstitutional under the First and Fourteenth Amendments to boot. Petitioners sought a declaratory judgment and a permanent injunction, such that their upcoming elections would be free from the unlawful extended deadline.

In July 2023, the district court dismissed the complaint. As relevant here, the district court held that petitioners lacked Article III standing. The court refused to credit Congressman Bost's allegations that the extended ballot receipt deadline injured him competitively, either by diminishing his margin of victory (which would result in adverse competitive and fundraising consequences in future election cycles) or by causing him to lose the election outright. "By its terms," the court reasoned, "the Ballot Receipt Deadline Statute affects all federal candidates equally." Pet.App.44a. And "Congressman Bost does not allege how his right to stand for office is particularly affected compared to his opponents." *Id.* The court likewise rejected Congressman Bost's argument that he suffered a cognizable pocketbook injury because the extended ballot-receipt deadline required him to expend additional campaign resources to maintain his election staff and monitor the vote for two additional weeks after Election Day. The court

dismissed those pocketbook injuries on the ground that the additional expenditures would be undertaken to avoid a purely speculative harm, namely the conjectural possibility that failing to spend money on monitoring will result in "more ballots … cast for his opponents." Pet.App.45a.

Petitioners appealed, and the Seventh Circuit affirmed in a split decision. Pet.App.1a-15a. Like the district court, the panel majority dismissed Congressman Bost's pocketbook injuries. The majority did not dispute that Congressman Bost suffered a prototypical pocketbook injury by having to pay his campaign staff for an extra two weeks. It just deemed that injury not traceable to the state's decision to extend the deadline for receiving mail-in ballots. According to the majority, that injury was entirely self-inflicted because it was incurred in an effort "to avoid a hypothetical future harm—an election defeat." Pet.App.11a. Even though courts are supposed to assess standing at the time the lawsuit was filed (here, May 2022), *Davis v. FEC*, 554 U.S. 724, 734 (2008), the majority took judicial notice of Congressman Bost's November 2022 election results. Because the Congressman won that "election with seventy five percent of the vote," whether "the counting of ballots received after Election Day would cause [Congressman Bost] to lose the [upcoming 2024] election is speculative at best." Pet.App.11a. The majority conveniently took no judicial notice of his much closer November 2020 and November 2018 election results, where he won 60% and 52% of the vote respectively. *See* Ill. State Bd. of Elections, *Election Results*, *2020 General Election*, https://tinyurl.com/5nxv5knx; Ill. State Bd. of

Elections, *Election Results*, *2018 General Election*, https://tinyurl.com/5nxv5knx. Because plaintiffs "cannot manufacture standing by choosing to spend money to mitigate such conjectural risks," the majority rejected Congressman Bost's pocketbook injury. Pet.App.11a-12a (citing *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398 (2013)).

Turning to the petitioners' alleged competitive injuries, the panel appeared to agree that such injuries are cognizable under Article III. Pet.App.13a. It held, however, that petitioners "do not (and cannot) allege that the majority of the votes that will be received and counted after Election Day will break against them, only highlighting the speculative nature of the purported harm." *Id*. And while it did not deny that "[a]n inaccurate vote tally is a concrete and particularized injury to candidates" not shared by voters or the general public, Pet.App.14a, it determined that it was unduly speculative that extending the ballot-receipt deadline for mail-in ballots would produce a less accurate tally. Even though the Seventh Circuit issued its decision on August 21, 2024 (less than three months before Election Day and roughly one month before early voting), the court insisted that the election "is months away and the voting process has not even started, making any threat of an inaccurate vote tally … speculative." Pet.App.15a.

Judge Scudder dissented as to the pocketbook injury. In his view, "the costs Congressman Bost will incur to monitor ballots after Election Day gives him 'a personal stake in this dispute' and a basis to proceed in federal court." Pet.App.17a. Because the Illinois

law extends the ballot-receipt deadline until 14 days after Election Day, Congressman Bost "had to recruit, train, assign and coordinate poll watchers and keep his headquarters open for an additional two weeks" to "ensure that all mail-in ballots were accurately tallied," which would cost "substantial time, money and resources." Pet.App.16a-17a. Those costs are "concrete," "particularized," and "imminent," as Congressman Bost had definitively declared his intention to keep his election headquarters operative and to send poll watchers to monitor the vote during the extended ballot-receipt period, creating a "guaranteed prospect" of heightened campaign expenditures. Pet.App.17a. Congressman Bost's injuries were "'fairly traceable' to Illinois' ballot-receipt procedure" because his expenditure decisions are a "direct response to Illinois' decision to extend its deadline for mail-in ballots." Pet.App.18a. Indeed, the extended deadline is "[t]he *only* reason he continues to monitor polls after Election Day." Pet.App.18a (emphasis added).

Judge Scudder rejected the majority's characterization of Congressman Bost's injuries as "self-inflicted." In his view, "the Panel goes too far in saying that the risk of ballots swaying the upcoming District 12 election after Election Day is only speculative." Pet.App.19a. With respect to Congressman Bost's past electoral margins, he noted that "past is not prologue for political candidates, including an incumbent like Congressman Bost." *Id.* "In no way is any outcome guaranteed in November." *Id.* Judge Scudder also recognized that ballot monitoring should not be treated as a voluntary or self-inflicted expense because candidates should not

be expected to forgo this critical and ubiquitous campaign function. "Even if Congressman Bost had won reelection by 99% in 2022, he would have been more than justified in monitoring the count after Election Day" until the last ballot is counted. *Id.* Congressman Bost, moreover, "is far from alone in believing that the risk of ballot irregularities justifies funding poll-watching operations." *Id.* "In recent years, poll watching has become commonplace among major candidates, with all 50 states permitting campaign representatives to monitor vote tallies." *Id.* "In light of this reality, federal courts should be wary of labelling such practices speculative." *Id.*

Judge Scudder pointed out that, in concluding that Congressman Bost's injuries were speculative, the panel erred by failing to credit Congressman Bost's factual allegations at the motion-to-dismiss stage. Pet.App.20a. The panel ignored, for instance, the allegations that the number of ballots received after Election Day has been steadily increasing, and that many of these ballots contain "discrepancies … that need to be resolved." *Id.* But even setting that aside, it is commonplace for courts to recognize standing in cases where plaintiffs take concrete and costly precautionary measures to avoid uncertain harms. Pet.App.20a-21a.

Finally, Judge Scudder explained that the panel misapplied *Clapper*. In *Clapper*, "the very application of a challenged government restriction" to the plaintiffs and their clients—in that case, certain provisions of the Foreign Intelligence Surveillance Act authorizing surveillance of phone calls with persons outside the United States—was "uncertain, [so]

preventative measures taken to avoid that application cannot create standing." Pet.App.22a. In Congressman Bost's case, however, "the application of the challenged government restriction," the ballot-receipt deadline, "is a near certainty": the election *would* happen, Illinois *would* count ballots received up to two weeks after Election Day, and accordingly, Congressman Bost *would* spend resources to continue monitoring ballots. *Id*. "What is speculative in Bost's case is not the application of the challenged statute but a risk unrelated to its enforcement: the risk of ballot irregularities swaying an election. But *Clapper* is fully consistent with accepting at face value a plaintiff's judgment that the risk of some external harm unrelated to enforcement warrants mitigation." Pet.App.22a-23a.

SUMMARY OF ARGUMENT

Petitioners have Article III standing to challenge the state's extended deadline for receiving and counting mail-in ballots. Candidates for office have an obvious, particularized, and concrete interest in the rules that govern their elections. Candidates pour enormous resources into running for election and have an obvious interest in the rules that dictate how long their races will last and how the ballots will be counted. They also have a distinct interest "in ensuring that the final vote tally accurately reflects the legally valid votes cast." *Carson*, 978 F.3d at 1058. While some standing questions are hard, the standing question in the electoral context need not be. Candidates "spend[] time away from [their] job and family to traverse the campaign trail," and "pour[] money and sweat into a campaign," giving them an

interest in the accuracy of the outcome and rules of the game that is "undeniably different—and more particularized" than anyone else's. *Hotze v. Hudspeth*, 16 F.4th 1121, 1126 (5th Cir. 2021) (Oldham, J., dissenting).

Even apart from these more general principles, petitioners plainly have standing to challenge the Illinois ballot-receipt deadline in this case. Petitioners plausibly alleged a substantial risk that counting mail-in ballots received after Election Day will harm their election prospects. That is more than sufficient for purposes of Article III. Harm to a candidate's electoral prospects is a cognizable injury under Article III. And when it comes to allegations of future injury, this Court has made clear that the plaintiff need only demonstrate a "substantial risk" that the injury will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). There is no question that there is a "substantial risk" that counting mail-in ballots that arrive after Election Day will harm petitioners' electoral prospects. Petitioners' allegations that extending the mail-in deadlines will work to their electoral disadvantage is backed by evidence from recent elections and buttressed by the positions taken in numerous cases across the country where the dueling major parties line up on opposite sides.

At a bare minimum, petitioners have standing because they plausibly alleged a classic pocketbook injury. As a result of the state law extending the deadline for receiving mail-in ballots by 14 days, petitioners must expend campaign resources to keep their campaigns running for two additional weeks, longer than campaigns in states that require mail-in

ballots to be received by Election Day. And because Illinois law effectively allows mail-in ballots to be mailed as late as Election Day, petitioners must extend their get-out-the-vote efforts targeted to likely mail-in voters to the last day. All that costs money. Those quintessential pocketbook injuries are directly traceable to the challenged law, and they would be redressed by the law's invalidation. Article III requires nothing more.

The Seventh Circuit, by contrast, did demand more, and its decision is both plainly wrong and practically disastrous. The Seventh Circuit dismissed petitioners' competitive injuries on the theory that they "do not (and cannot) allege that the majority of the votes that will be received and counted after Election Day will break against them." Pet.App.13a. But Article III does not demand a crystal ball or require petitioners to allege that votes from late-arriving ballots will be certain to break against them. The Seventh Circuit dismissed petitioners' pocketbook injuries as self-inflicted to "avoid a hypothetical future harm—an election defeat." Pet.App.11a. But as Judge Scudder explained, that reasoning misreads this Court's decisions, ignores the allegations in the complaint, and defies common sense.

If left uncorrected, the decision below would have serious practical repercussions. Under the Seventh Circuit's approach, candidates who file their lawsuits early enough to give the courts time to resolve them outside the crush and chaos of the election are dismissed as speculative. But candidates who file closer to the election when there is a more certain injury will have relief blocked under the *Purcell*

doctrine. That perversely funnels election litigation to the worst possible context, i.e., the immediate wake of a disputed election where the judicial decision will be widely perceived as the last ballot cast. Ordinary rules of standing obviate such extraordinary consequences and allow this suit to proceed. The decision below should be reversed.

ARGUMENT

I. Petitioners Have Article III Standing.

A. Candidates for Office Have Standing To Challenge the Rules That Govern Their Elections.

"Courts sometimes make standing law more complicated than it needs to be." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 547 (2020). Article III standing should not be complicated here. Candidates have an obvious interest in the rules that govern their elections. Running for federal office is an enormous undertaking; the investment in terms of time, money, and emotional energy is staggering. The financial numbers bear this out. In the last cycle, the average Senate race cost $49,624,634 in campaign expenditures, and the average House race cost $4,412,132 in campaign expenditures. *See* Fed. Election Comm'n, *Spending: By the Numbers*, https://tinyurl.com/5fe7xx2p (last visited July 21, 2025). Those financial expenditures are just the tip of the iceberg. Challengers "spend[] time away from [their] job and family to traverse the campaign trail," and "pour[] money and sweat into a campaign." *Hotze*, 16 F.4th at 1126 (Oldham, J., dissenting). Incumbents must balance their responsibilities to constituents

with their election efforts and must dedicate all their non-government time to the latter.

Given the candidates' unique and substantial personal investment in their own elections, they have an obvious interest in the rules that govern the election that is "undeniably different—and more particularized" than that of their fellow citizens and voters. *Id.*; *see also Lance v. Coffman*, 549 U.S. 437, 441-42 (2007). That is beyond obvious when it comes to the rules that regulate the candidates directly. For example, no one doubts the standing of candidates to challenge rules that dictate how much they can spend on their campaigns or how much their campaigns can receive or when and how they must register as candidates. But candidates also have a distinct, particularized, and concrete interest in the rules that govern their elections, even when those rules do not operate directly on the candidate, but purport to regulate when and where the election will be held and when and how votes will be counted. While voters and political parties may also have standing to challenge some of those laws, candidates have both an obvious interest in, and Article III standing to challenge, the rules that govern the elections into which they pour their time and treasure.

That seems particularly obvious in a case like this where the challenged law extends the effective length of the campaign by two additional weeks. Almost by definition, a longer campaign will be more costly and require a longer detour from the balance of a candidate's life. In practical terms, any serious candidate will need to maintain her campaign headquarters and pay her campaign staff until all the

ballots are received and counted. That is true even of minor-party candidates and major-party candidates running in districts where they have little practical chance of winning a majority of votes.

Candidates have a distinct interest in ensuring that the rules that govern their elections are lawful, and an obvious incentive to challenge rules that the candidates believe will work to their electoral disadvantage. *See Hotze*, 16 F.4th at 1126 (Oldham, J., dissenting). Candidates also have an obvious and distinct interest "in ensuring that the final vote tally accurately reflects the legally valid votes cast." *Carson*, 978 F.3d at 1058; *see also FEC v. Ted Cruz for Senate*, 596 U.S. 289, 298 (2022) ("For standing purposes, we accept as valid the merits of [the plaintiffs'] legal claims."). An inaccurate vote count leads to all sorts of concrete and particularized harm for the candidate. At worst, it "cause[s] [the candidate] to lose [the] election." Pet.App.68a. But even when the inaccuracy is not outcome determinative, it can still lead to a diminished margin, "lead[ing] to the public perception that [her] constituents have concerns about [her] job performance" and undermining her reputation with "future voters, Congressional leadership, donors, and potential political opponents." Pet.App.68a-69a.

And wholly apart from its impact on the final margin, there is a distinct injury both to winning and losing candidates from inaccurate vote counts. There are few things more delegitimizing for winning candidates than the reality or perception that their victory was produced by an inaccurate tally. "The counting of votes that are of questionable

legality … cast[s] a cloud upon what [the candidate] claims to be the legitimacy of his election." *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring in grant of stay). And nothing is more discouraging for losing candidates than the perception that they did not get the benefit of a fair count. Even "losing candidates and their supporters" should have "confidence in the fairness of the election." *Democratic Nat'l Comm. v. Wis. Legislature*, 141 S.Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). If a state adopted a new counting system for a House race that was concededly only 95% as accurate as the status quo ante, the candidates would clearly have standing to challenge the change, without regard to their standing in the polls the day they filed suit. While the effect on the vote-count accuracy of most rules will not be conceded, all candidates benefit from rules that improve accuracy, even if they disagree about which rules do.

Whether the candidate ultimately wins big, small, or does not win at all, the candidate has a "personal stake" in the rules of the election—including rules about how long elections last and which votes count. *Baker v. Carr*, 369 U.S. 186, 204 (1962). And even apart from their interest in ensuring an accurate count, candidates plainly have an interest in the rules that may ultimately benefit their opponents instead of them. In a zero-sum election, virtually every rule governing the length of campaigns and which votes count will benefit one candidate or the other. That is a mathematical reality. A rule allowing felons to vote will almost certainly benefit one candidate and harm the other. So too a rule requiring witness attestations for mail-in ballots or extending the mail-in ballot

receipt deadline. One candidate may benefit from higher turnout, another from a shorter campaign.

It is precisely because of that dynamic that candidates and political parties fight so vigorously about these rules. In recent years, this Court has seen challenges to everything from voter identification laws to witness requirements to rules about ballot harvesting and out-of-precinct voting. *See, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647 (2021); *Andino v. Middleton*, 141 S.Ct. 9 (2020); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). Indeed, this Court has seen multiple disputes about deadlines for receiving mail and absentee ballots. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423 (2020) (per curiam); *Wis. Legislature*, 141 S.Ct. 28; *Republican Party of Pa. v. Degraffenreid*, 141 S.Ct. 732 (2021). Some of those cases were brought by candidates and some by political parties closely aligned with candidates, but none was a feigned controversy or lacked parties with real skin in the game.

Given that undeniable reality, this Court should resist making "standing law more complicated than it needs to be," *Thole*, 590 U.S. at 547, and clarify that candidates have an obvious, particularized, and concrete interest in the legality and fairness of the rules that govern the elections into which they pour their time and treasure. Standing should not be limited to candidates in races the pundits have declared toss-ups or lawsuits brought in the midst of contested outcomes. This Court has repeatedly made clear that the "injury required for standing need not be actualized." *Davis*, 554 U.S. at 734. And given the

scarcity of campaign funds, candidates have no incentive to waste resources on pointless lawsuits or to challenge rules that have no realistic likelihood of impacting the outcome or fairness of the election. But they have an obvious incentive (and corresponding injury-in-fact) to challenge rules that they reasonably believe will cost them votes or undermine the accuracy of the final tally. Of course, this Court has also made clear that threatened harm cannot be too "'conjectural' or 'hypothetical,'" and that plaintiffs alleging future injury must demonstrate a "'substantial risk that the harm will occur.'" *Susan B. Anthony List*, 573 U.S. at 158 (quoting *Clapper*, 568 U.S. at 414 n.5). But those problems largely take care of themselves in this context. If an election rule does not have a realistic chance of impacting the outcome, or at least the accuracy of the vote, the candidate will almost certainly spend her money on another campaign advertisement rather than another lawsuit. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 526 (2007); *Diamond Alternative Energy, LLC v. EPA*, 145 S.Ct. 2121, 2137 (2025).

To be sure, in many election law cases, the candidates could probably articulate their injury in terms of a pocketbook injury. Rules that elongate elections, cost a candidate votes, or make vote counts less accurate typically necessitate additional campaign staff and additional expenditures. And in other cases, candidates may be able to allege with more detail that a specific rule will harm their chances for election. But it would not make sense to require candidates to allege those injuries in every case, as the process of converting the distinctly electoral injuries of candidates into dollars and cents and non-

speculative risk of electoral harm is an artificial enterprise. It also risks inadvertently skewing the playing field against certain kinds of candidates. If there is one thing that the rules for candidate standing to challenge election rules should be, it is politically "evenhanded[]." *Diamond Alternative Energy*, 145 S.Ct. at 2141. The rules of standing should be neutral between Republicans and Democrats, major-party and minor-party candidates, elections perceived to be landslides and those predicted to be too close to call. But a rule that demands pocketbook injury may preclude standing by a minor-party candidate with no paid campaign staff. A rule that demands a non-speculative possibility that the challenged rule will be outcome determinative could preclude standing by a candidate with a prohibitive lead in the polls or a minor-party candidate with no realistic chance to prevail. A rule that limits standing to voters would make it difficult to challenge rules that expand voting options even if those rules have a disproportionate impact on candidates from one party or the other, as it is not obvious that a voter suffers concrete and particularized harm from expanded options. The most politically neutral rule is also the most straightforward: Candidates have standing to challenge the rules that govern their elections.

B. At the Very Least, Congressman Bost Has Standing To Challenge the Illinois Law Here.

Even apart from the general proposition that all three petitioners have standing to challenge the rules that govern their respective elections, it is clear beyond cavil that Congressman Bost has standing to

challenge the Illinois ballot-receipt deadline here.[1] Congressman Bost plausibly alleged a substantial risk that counting mail-in ballots received after Election Day will harm both his electoral prospects and his pocketbook. The court of appeals' decision to deny him standing nonetheless is flawed from top to bottom and should be reversed.

1. Congressman Bost plausibly alleged a substantial risk that counting mail-in ballots received after Election Day will harm his electoral prospects.

At the very least, a candidate has standing to challenge a rule that governs the election in which he has declared his candidacy if the candidate plausibly alleges that the rule will harm his electoral prospects. Congressman Bost did just that.

1. Whether a candidate is a heavy favorite or a consensus longshot, harm to a candidate's electoral prospects is plainly a cognizable injury for purposes of Article III. *Meese v. Keene*, 481 U.S. 465 (1987), illustrates the point. There, the Court held that a political candidate had standing to challenge a federal law that would have designated as "political propaganda" certain films that the candidate wished to show. *Id.* at 467. The Court explained that the designation of the films caused the political candidate "cognizable injury" because "if he were to exhibit the

[1] While the arguments in the previous section apply equally to all three petitioners, the argument below focuses on Congressman Bost. But since all three petitioners challenge the same rule on the same grounds, a single plaintiff with Article III standing suffices. *See Brnovich*, 594 U.S. at 665.

films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." *Id.* at 473. Simply put, the candidate had standing because the challenged government action threatened to "substantially harm his chances for reelection" and "adversely affect his reputation in the community." *Id.* at 474.

Meese hardly stands alone. In *Davis*, the Court held that a political candidate had standing to challenge a campaign finance law that relaxed individual contribution limits for the candidate's opponent if the candidate spent more than $350,000 in personal funds to finance his own campaign. 554 U.S. at 734. Needless to say, Davis, the plaintiff-candidate, was not inclined to contribute to his political opponent, and thus was not the direct object of the contribution limit. Moreover, no would-be contributor to Davis' opponent could bring suit because the limit was relaxed. Nonetheless, this Court had no difficulty recognizing that Davis could sue because the challenged provision "produce[d] fundraising advantages" for his opponent "in the competitive context of electoral politics." *Id.* at 739. By "allowing his opponent to receive contributions on more favorable terms," the law plainly imposed a distinct and concrete injury on Davis. *Id.* at 734.

Likewise, in *New York State Board of Elections v. López Torres*, 552 U.S. 196 (2008), the Court did not even question the standing of political candidates to challenge New York's system of selecting candidates for state judgeships via party convention. The

candidates' "real complaint," the Court explained, was "not that they cannot vote in the election for delegates, nor even that they cannot run in that election, but that the convention process that follows the delegate election does not give them a realistic chance to secure the party's nomination." *Id.* at 204-05. While the Court rejected the candidates' arguments on the merits, it did not question their *standing* to challenge a law that harmed their "chance[s] to secure the party's nomination." *Id.* at 205.

Unsurprisingly, the federal courts of appeals have uniformly held that a diminution in election prospects is a cognizable injury for Article III purposes. In *Owen v. Mulligan*, 640 F.2d 1130 (9th Cir. 1981), for example, a candidate sued the U.S. Postal Service for giving an opponent a cheaper mailing rate in violation of its own regulations. The Postal Service argued that the "potential loss of an election" was "too remote, speculative and unredressable to confer standing." *Id.* at 1132. The Ninth Circuit rejected that argument, recognizing the candidate's standing to sue "to prevent [her] opponent from gaining an unfair advantage in the election process through abuses of mail preferences which arguably promote his electoral prospects." *Id.* at 1133; *see also LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011); *Becker v. FEC*, 230 F.3d 381, 385-89 & n.5 (1st Cir. 2000); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir. 1989); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990).

Importantly, candidates need not demonstrate that the challenged government action will "cause

them to *lose* the election" to have standing to sue. Pet.App.11a (emphasis added). In *Meese*, for example, the Court did not ask whether the government's decision to label the films as "political propaganda" would have caused the candidate to lose his election. There was no requirement that the diminution in electoral prospects be outcome determinative. It sufficed to show that the government action "harm[ed] his *chances*." 481 U.S. at 474 (emphasis added). Similarly, in *Davis*, the Court did not require the candidate to show that the asymmetrical individual contribution limits would tip the election. It was sufficient to show that the campaign finance restriction gave his opponent an allegedly unlawful advantage. 554 U.S. at 734-35. In *López Torres*, the Court did not even think to ask whether New York's convention system would foreclose the plaintiffs' election; instead, it was enough that the system harmed their "*chance[s]* to secure the party's nomination." 552 U.S. at 205 (emphasis added); *see also Clements v. Fashing*, 457 U.S. 957, 962 (1982) (explaining that candidates need only show that the challenged law was an "obstacle to [their] candidacy" to have Article III standing).

All that makes good sense. Election rules that have the effect of diminishing the candidate's electoral prospects, yet stop short of causing the candidate to lose, still impose concrete and particularized harms on the candidate. Any sense that a candidate's prospects have been artificially dimmed will cause immediate harms in terms of diminished fundraising opportunities and increased campaign efforts and expenditures to make up for the artificial handicap imposed by the allegedly unlawful law. What is more,

courts have no judicially manageable tools to assess how much diminution of electoral prospects is enough to make a difference in the midst of an ever-changing campaign. That inquiry is fraught with difficulty even for political veterans—and is fraught with danger for an Article III court. *See Rucho v. Common Cause*, 588 U.S. 684, 712 (2019); *Bartlett v. Strickland*, 556 U.S. 1, 17 (2009) (plurality op.); *Vieth v. Jubelirer*, 541 U.S. 267, 287 n.8 (2004). Worse still, it would make little sense to limit Article III standing to candidates in close elections where the electoral rules are likely to prove outcome determinative. Not only would such a rule have Article III courts intervening only in the most politically charged races, but it would leave most minor-party candidates on the sidelines.

Moreover, even in races that end up with sizable margins of victory, the candidate has a concrete and particularized interest in the size of the margin. An artificially "diminished margin of victory will lead to the public perception that [the candidate's] constituents have concerns about [the candidate's] job performance," which can harm the candidate's standing with "future voters, Congressional leadership, donors, and potential political opponents." Pet.App.68a-69a. A diminished margin of victory can cause a successful candidate to draw a more serious or well-financed challenger in the next campaign. *Compare* L. Boyce, et al., *Tracking the House's Most Competitive Races*, N.Y. Times (Nov. 1, 2024), https://tinyurl.com/mdtaabvz, *with House Races With the Most Money Spent 2024*, Open Secrets, https://tinyurl.com/yc4ajcye (last visited July 21, 2025). And for incumbents, the tighter the election, the more time and resources they will need to devote

to campaigning instead of working on behalf of constituents.

An approach that demands only diminished prospects—and not a likely outcome determinative difference—is consistent with how this Court has approached standing in other contexts. In the equal protection context, for example, this Court has squarely held that, "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Ne. Fla. Chapters of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Especially given the difficulties of judicial inquiries into electoral prospects and the problems with sidelining minor-party candidates, there is every reason to apply the same approach in the electoral context. Any other rule would require a "degree of … political clairvoyance that is difficult for a court to maintain." *Diamond Alternative Energy*, 145 S.Ct. at 2140.

Nor must candidates allege that an election rule has already harmed their electoral prospects or that electoral harm is an absolute certainty. While the threatened harm cannot be wholly conjectural or hypothetical, Article III does not require a plaintiff to show that the threatened harm is "literally certain" to occur. *Clapper*, 568 U.S. at 414 n.5. Plaintiffs who sue to prevent threatened future injury satisfy Article III so long as "there is a 'substantial risk that the harm

will occur.'" *Susan B. Anthony List*, 573 U.S. at 158 (quoting *Clapper*, 568 U.S. at 414 n.5). In assessing whether a substantial risk exists, courts may look to the "predictable effect of Government action," *Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019), as well as "commonsense inferences," *Diamond Alternative Energy*, 145 S.Ct. at 2136.

This Court's decision in *Department of Commerce* is instructive. There, the Court concluded that a group of states with a disproportionate share of noncitizens had standing to challenge the inclusion of a citizenship question in the census. 588 U.S. at 767. Although the states' harm "depend[ed] on the independent action of third parties"—the noncitizens living in those states—it was "predictable" that noncitizens would be "reluctan[t] to answer a citizenship question" and thus potentially not respond at all. *Id.* at 767-768. The depressed population count, in turn, could result in a diversion of resources from the state challengers. *Id.* at 767. The Court accepted that predictable chain of events based on common sense and historical practice. *Id.* at 768. It did not require the challengers to gather, for example, affidavits from noncitizens asserting that they would not respond to a census survey that included a citizenship question.

This Court applied similar reasoning in *Diamond Alternative Energy*. There, the Court determined that fuel producers had standing to challenge regulations that force automakers to manufacture more electric vehicles and fewer gasoline-powered vehicles. 145 S.Ct. at 2137. The Court rejected the government's argument that the new vehicle market had developed

in a way that even if the California regulations were invalidated, automakers would not likely manufacture or sell more gasoline-powered cars than they do now. *Id.* The Court relied on "commonsense inferences" and a "predictable chain of events" to conclude that invalidating the regulations likely "would make a difference for fuel producers because automakers would likely manufacture more vehicles that run on gasoline and other liquid fuels." *Id.* at 2136-37, 2139. The Court even looked to the fact that the government was defending the rule in court to buttress its standing holding, explaining that "EPA and California are presumably defending the regulations because they think that the regulations still make a difference in the market." *Id.* at 2137. The Court did not require the plaintiffs to produce any evidence on that point. *Id.* at 2140.

2. Applying those principles, Congressman Bost has standing because he plausibly alleged that, at the time he filed his lawsuit in May 2022, there was a substantial risk that counting mail-in ballots received after Election Day would harm his electoral prospects—including by diminishing his margin of victory. Congressman Bost explained that he "risk[s] injury if untimely and illegal ballots cause [him] to lose [his] election for federal office." Pet.App.68a. He likewise explained that he "risk[s] injury" as a result of the ballot-receipt deadline "because [his] margin of victory in [his] election may be reduced by untimely and illegal ballots." *Id.*

Those are hardly implausible allegations. "[C]ommonsense," *Diamond Alternative Energy*, 145 S.Ct. at 2136, and "historical[]" practice, *Dep't of Com.*,

588 U.S. at 768, confirm as much. In a zero-sum election, it is a near-mathematical certainty that late-arriving absentee ballots will benefit one candidate to the detriment of the other. And Congressman Bost had every reason to believe based on his prior experience that it was not just "predictable," but highly likely that late-arriving ballots would benefit his opponent in 2022 and beyond. After all, Democrats were far more likely to utilize mail ballots in previous elections, both nationally and in Illinois. *See* C. Stewart III, MIT Election Data & Sci. Lab, *How We Voted In 2020*, at 9 (Mar. 2021), https://tinyurl.com/2vjccbu7; NBC News, *Illinois Election Results 2020* (Nov. 3, 2020), https://tinyurl.com/mu73vsm2. Moreover, as Congressman Bost alleged, the State Board of Elections warned in 2020 that "the number of ballots received after Election Day through November 17, 2020 could materially affect the unofficial election results." Pet.App.85a. It explained: "As mail ballots arrive in the days after Nov. 3, it is likely that close races may see leads change as results are reported." *Id*. Of course, COVID-19 presented unique challenges during the 2020 election that made voting by mail more prevalent. But even before 2020, "[t]he volume of votes arriving after Election Day ha[d] grown significantly" and had "increased almost every year." Pet.App.66a. And it was at the very least "predictable" that the popularity of mail-in voting would continue in future elections as voters became more familiar with it after 2020.

It is precisely because of those realities that candidates and political parties fight so vigorously about deadlines for receiving mail and absentee

ballots. In just the last few years, this Court has seen a slew of cases brought by candidates and political parties challenging deadlines for casting and counting mail-in ballots, with the Republican Party and its candidates seeking shorter deadlines, and the Democratic Party and its candidates seeking longer ones. *See, e.g.*, *Republican Nat'l Comm.*, 589 U.S. 423; *Wis. Legislature*, 141 S.Ct. 28; *Republican Party of Pa. v. Boockvar*, 141 S.Ct. 1 (2020); *Degraffenreid*, 141 S.Ct. 732. And only a sliver of those suits find their way to this Court. Those cases buttress what recent historical practice has made clear: Congressman Bost was not engaged in undue speculation in alleging that Illinois' permissive approach to counting mail-in ballots would dim his electoral prospects.

Just as the parties' litigating positions reinforced the plaintiffs' standing in *Diamond Alternative Energy*, 145 S.Ct. at 2146-47, they do so here. Indeed, it is hard to find a more commonsense reaffirmation of the reasonableness of Congressman Bost's assessment that the Illinois law diminished his electoral prospects than the decision of the Democratic Party of Illinois to try to intervene to defend the Illinois law. *See* D.Ct.Dkt.13. The Republican National Committee, in turn, filed an amicus brief in support of Congressman Bost's challenge. *See* CA7.Dkt.9. The candidates and political parties are not lining up to contest mail-in ballot deadlines in case after case as either sport or speculation. They "would presumably not bother with such efforts" if they thought those deadlines would have "no discernable impact." *Massachusetts*, 549 U.S. at 526; *Diamond Alternative Energy*, 145 S.Ct. at 2139-40. It would thus blink reality to deny Congressman Bost standing or ignore the "significant

risk" that late-arriving ballots will harm his election prospects. "Judges are not required to exhibit a naivete from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.).

2. Congressman Bost plausibly alleged a classic pocketbook injury.

At a bare minimum, Congressman Bost has standing because he plausibly alleged a pocketbook injury. Because Illinois law allows election officials to count mail-in ballots received up to 14 days after Election Day, Congressman Bost understandably must keep his campaign running for two more weeks than he otherwise would. Before Illinois extended the deadline for receiving mail-in ballots in 2005, Congressman Bost could wrap up his campaign operations and the attendant expenditures on Election Day. Pet.App.65a-66a. But now he must "run [his] campaign for fourteen additional days." Pet.App.66a.

That "costs [his] campaign time, money, volunteers and other resources." Pet.App.67a. Congressman Bost elaborated that the extended deadline requires him to deploy additional campaign resources for at least two reasons. First, the extended deadline requires him to deploy campaign resources to monitor late-arriving ballots (and the officials who count them) for two extra weeks. That is no simple or cheap undertaking. Many late-arriving ballots "have discrepancies (e.g., insufficient information, missing signatures, dates, or postmarks) that need to be resolved," which "takes time" and "diverts volunteer and staff resources from [his] campaign."

Pet.App.66a-67a. Second, because the extended ballot-receipt deadline effectively gives voters who wish to vote by mail additional time to cast their ballots (since voters can wait up to Election Day to put their ballots in the mail), Congressman Bost must extend his "get-out-the-vote efforts" targeted to such voters for additional days, which requires money and resources too. Pet.App.68a.

As Judge Scudder explained, "the costs Congressman Bost will incur" give him "a personal stake in th[is] dispute and a basis to proceed in federal court." Pet.App.17a. Those costs are "classic pocketbook injur[ies]" sufficient to confer standing. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 636 (2023). And they are "fairly"—indeed, directly—"trace[able] to the challenged action of the defendant." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The "only reason" Congressman Bost must keep his campaign running "is because Illinois law allows ballots to be received and counted" after Election Day. Pet.App.18a. Congressman Bost was explicit about this direct connection. "Before Illinois decided to accept and count such ballots, he had no need for such extended operations." Pet.App.18a. Congressman Bost's "decision to continue running his campaign for two weeks after Election Day is" therefore a pocketbook and resource injury and "a direct response to Illinois' decision to extend its deadline for mail-in ballots." *Id.* Article III requires nothing more.

II. The Seventh Circuit's Decision Is Wrong, And Will Make Inherently Contentious Election Litigation Even More Fraught.

A. The Seventh Circuit's Decision Is Seriously Flawed.

1. The Seventh Circuit's contrary conclusion is flawed from top to bottom. The court suggested that petitioners' interest in "ensuring that the final vote tally accurately reflects the legally valid votes cast," *Carson*, 978 F.3d at 1058, might be an "undifferentiated, generalized grievance about the conduct of government" that this Court has "long considered inadequate for standing." Pet.App.14a (citing *Lance*, 549 U.S. at 442). But as Judge Oldham has cogently explained, that suggestion is incorrect. *Lance* was about whether *voters* had standing to bring an Election Clause claim. "It said nothing about *candidates*, who clearly have different (and more particularized) interests." *Hotze*, 16 F.4th at 1126 (Oldham, J., dissenting) (emphasis original). An injury is a "generalized grievance," moreover, "if the injured party is 'claiming only harm to his *and every citizen's* interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him tha[n] it does the public at large.'" *Id.* (quoting *Lujan*, 504 U.S. at 573-75) (emphasis in original). But the injury suffered by the candidate is plainly not common to all members of the public, or something that all citizens share. It is "something only candidates experience." *Id.*

2. As for petitioners' competitive injuries, the Seventh Circuit agreed that harm to a candidate's electoral prospects is a cognizable injury for purposes

of Article III. And it agreed that a diminished margin of victory is a cognizable injury too. It just held that petitioners did not plausibly allege standing because they "do not (and cannot) allege that the majority of the votes that will be received and counted after Election Day will break against them." Pet.App.13a.

But as explained above, *supra* 28-30, plaintiffs do not have a crystal ball, and Article III does not require petitioners to allege that late-arriving mail ballots in an upcoming election "*will* break against them." Pet.App.13a. When it comes to future threatened harm, there is no need to allege that such future harm is "literally certain" to occur. *Clapper*, 568 U.S. at 414 n.5. Instead, this Court has repeatedly made clear that future injury can suffice if "there is a substantial risk that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158 (quoting *Clapper*, 568 U.S. at 414 n.5); *see also Dep't of Com.*, 588 U.S. at 767. And in alleging such harm, plaintiffs can rely on historical practice and common sense. *See Diamond Alternative Energy*, 145 S.Ct. at 2136-37, 2140.

Petitioners cleared that bar here with room to spare. *See supra* 30-33. Given the zero-sum nature of elections and their inherent uncertainty, there is virtually always a "substantial risk" that an election rule (especially one that has been hotly litigated between the political parties and their candidates, *see supra* 32-33) will harm the candidate bringing the lawsuit. And given the nature of campaigns and the countless other ways a candidate can spend campaign funds during an election, there is little reason to second guess the candidate's judgment about the impact of an election rule she has gone to the time and

expense of challenging. *See Massachusetts*, 549 U.S. at 526; *Diamond Alternative Energy*, 145 S.Ct. at 2139-40.

3. The Seventh Circuit's analysis of petitioners' pocketbook injury is even less persuasive, as Judge Scudder emphasized in dissent. The court did not dispute that Congressman Bost suffered a prototypical pocketbook injury when he kept his campaign running for two extra weeks as a result of Illinois' extended deadline. Instead, it denied that the injury was traceable to the state's decision to extend the deadline for receiving mail-in ballots. Relying on *Clapper*, 568 U.S. at 416, the panel majority asserted that despite the direct connection between extending the deadline 14 days and extending the Congressman's campaign operations and expenditures by 14 days, his injury was nonetheless self-inflicted because it was incurred in an effort "to avoid a hypothetical future harm—an election defeat." Pet.App.11a. In particular, because the Congressman "won [his] last election with seventy-five percent of the vote," whether "the counting of ballots received after Election Day would cause [Congressman Bost] to lose the election is speculative at best." *Id*. And because plaintiffs "cannot manufacture standing by choosing to spend money to mitigate such conjectural risks," Congressman Bost's pocketbook injuries do not suffice for standing here. Pet.App.11a-12a. That logic fails on multiple levels.

First, it misreads *Clapper*, as Judge Scudder explained below. Pet.App.21a-23a. *Clapper* involved a group of attorneys and human rights, labor, legal, and media organizations that challenged provisions of

the Foreign Intelligence Surveillance Act allowing the government to monitor communications to and from persons in foreign countries in certain circumstances. 568 U.S. at 401, 406. The Court concluded that the plaintiffs lacked standing because they had no reason to believe that the government would "imminently" target their clients or their phone conversations with their clients under the Act. *Id.* at 411-12. Because any risk of the law's application to their clients was purely speculative, the Court concluded that the preventative measures the plaintiffs had undertaken to avoid potential surveillance did not constitute an injury in fact that was "fairly traceable" to the Act. *Id.* at 415-16.

As the Court explained in *Cruz*, the "problem" in *Clapper* was that the plaintiffs "could not show that they had been or were likely to be subjected to" the challenged surveillance "policy." 596 U.S. at 297. In that scenario, *Clapper* makes clear that a plaintiff cannot "manufacture standing" by spending money to avoid injury from a challenged action that may never occur. 568 U.S. at 416. But as *Cruz* emphasized, this Court has "never recognized" an "exception to traceability for injuries that a party purposely incurs." 596 U.S. at 296-97. Instead, it has "made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred." *Id.* at 297.

The Court has repeatedly recognized that there is a difference between incurring costs to avoid injury from a challenged action that may never occur, and

taking "reasonable[] … measures" in response to challenged action that will unquestionably occur. *Clapper*, 568 U.S. at 419. Indeed, *Clapper* expressly distinguished *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), where the Court held that environmental groups had standing to challenge a company's continuous discharge of pollutants in a river because the discharge caused nearby residents (who were members of the organizational plaintiffs) "to curtail their recreational use of that waterway." *Id.* at 184. While the injury (curtailing use of the waterway) could in some sense be characterized as self-inflicted, the Court held that the plaintiffs had standing anyway because the decision of their member residents reflected "reasonable concerns about the effects of those discharges." *Id.* at 183-84.

This case is nothing like *Clapper* and far more like *Laidlaw*. Congressman Bost is not trying to "manufacture standing" by incurring costs to avoid injury from a challenged action that may never occur. Rather, he is taking "reasonable[] … measures" in response to challenged action that will "concededly" happen. *Clapper*, 568 U.S. at 419 (citing *Laidlaw*, 528 U.S. at 183-84). *Clapper* would be more relevant had Congressman Bost incurred campaign costs based on pure speculation about *whether* there would be any late-arriving ballots or *whether* Illinois would count them. If that were the case, one might doubt the traceability of the injury-in-fact (14 days of additional campaign costs) to the extension of a deadline that might have no effect on any ballot of interest to the Congressman. *See Clapper*, 568 U.S. at 415-16. But, here, "the application of the challenged government

restriction … is a near certainty." Pet.App.22a. No one disputes that there *will* be late-arriving mail-in ballots in the Congressman's election and that Illinois *will* count them. *Id.*

The question is therefore whether Congressman Bost's decision to extend his get-out-the-vote and ballot monitoring operations is a "reasonable" response to the state's extended ballot-receipt deadline. *Laidlaw*, 528 U.S. at 184-85. That question answers itself. Extending campaign operations and expenditures by 14 days to monitor the counting of ballots is the height of reasonableness. And continuing get-out-the-vote efforts to likely mail-in voters until the last day they can vote by mail is equally reasonable.

That is especially true because there are many reasons why campaigns utilize poll watchers that have little to do with preventing the "hypothetical future harm" of "an election defeat." Pet.App.11a. More broadly, poll watchers promote transparency and confidence in the results of elections. "When monitors are unable to perform th[eir] function, there is no way to assess whether the election has been free and fair—or conducted in accordance with preestablished rules." Am. Law Inst., *Principles of the Law: Election Administration* §202 cmt. a, at 88 (2019) ("*Election Administration*"). That is why it is "essential … that designated observers representing political parties (and independent candidates) be able" to "observe the vote-counting process." *Id.* §202 cmt. b, at 89. It is also presumably why Illinois (like most states) permits candidates to use poll watchers to monitor their elections. 10 Ill. Comp. Stat. Ann. §5/17-23. As

Judge Scudder recognized, "poll watching has become commonplace among major candidates, with all 50 states permitting campaign representatives to monitor vote tallies." Pet.App.19a.

Indeed, it is especially important that "representatives of candidates and political parties … observe and participate in the process by which the absentee-ballot-counting board determines the validity of voted absentee ballots, as well as the process by which the board counts absentee ballots." *Election Administration*, *supra* §110(i), at 56. Because mail-in voting occurs outside the direct supervision of election officials, mail-in ballots often have "discrepancies," including "insufficient information, missing signatures, dates, or postmarks." *See* Pet.App.66a; 10 Ill. Comp. Stat. Ann. §5/19-5. Poll observers can identify discrepancies so that voters can cure the error. 10 Ill. Comp. Stat. Ann. §5/19-8(g-5) (providing opportunity to cure). And poll observers ensure that standards for evaluating mail-in ballots are applied consistently across ballots and precincts, which is particularly important because poll observers from other candidates or parties might have an incentive to challenge ballots from precincts that favor the candidate and the party. *See Election Administration*, *supra* §110 cmt. a, at 57 ("Consistency in processing absentee ballots is essential."); *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

To be sure, money spent (1) getting out the vote and (2) monitoring the count can in some sense be characterized as self-inflicted or an effort to prevent "election defeat." Pet.App.11a. But so too could everything else the campaign does. After all, avoiding

"defeat" and winning the election is the entire point. Under the Seventh Circuit's logic, virtually everything the campaign does in response to an election rule "could be described in some sense as willingly incurred," *Cruz*, 596 U.S. at 297, since everything a campaign does is ultimately for the purpose of avoiding "defeat" and winning the election.

In all events, the Seventh Circuit's analysis is flawed even under its own terms. To begin, the Seventh Circuit mischaracterized the nature of the "future harm" in its analysis of petitioners' resource-based injuries. The Seventh Circuit focused exclusively on whether counting ballots after Election Day would cause Congressman Bost "*to lose the election*." Pet.App.11a (emphasis added). But that is not the only harm that petitioners alleged. As the Seventh Circuit acknowledged elsewhere in its opinion, even if counting ballots after Election Day does not cause Congressman Bost to *lose* the election, it might cause him to win by a *diminished margin*. Pet.App.13a. As explained above, that is itself a cognizable harm. *Supra* 23-28. And there is nothing "speculative" about that harm, as it is entirely predictable (even likely) that late-arriving mail-in ballots will benefit Congressman Bost's opponent rather than him. *Supra* 31-32.

Even if the Court were to focus on the risk of "election defeat," that would not matter either. Pet.11a. Congressman Bost specifically alleged that he "risk[s] injury if untimely and illegal ballots cause [him] to lose [his] election." Pet.App.68a. And there was no basis for the court of appeals to second guess that allegation, particularly at the motion to dismiss

stage. The court took judicial notice that Congressman Bost won his election with 75% of the vote in November 2022, and concluded from there that it was "speculative" that he might lose in 2024. But it is bedrock law that standing is assessed at the time "when the suit was filed," *Davis*, 554 U.S. at 734—here, May 2022. The November 2022 election results should therefore never have factored into the picture. (To the extent past election results should matter at all—and they should not—the November 2020 and November 2018 elections are far more relevant because they pre-date the complaint. Congressman Bost won a much smaller percentage of the vote in both, 60% and 52% respectively. *See supra* 9). But more to the point, the Seventh Circuit had no basis for second-guessing Congressman Bost in the first place. *See supra* 11-12. "[P]ast is not prologue for political candidates, including an incumbent like Congressman Bost." Pet.App.19a. "In no way is any outcome guaranteed." *Id*. After all, "[t]he only thing certain about elections is that they are uncertain." *Martin v. Atl. Coast Line R.R. Co.*, 289 F.2d 414, 416 (5th Cir. 1961). Which is why forecasts about who will win an election are often wrong. *See Vieth*, 541 U.S. at 287 n.8.

B. The Seventh Circuit's Decision Creates Enormous Practical Problems.

The Seventh Circuit's decision, if allowed to stand, would pose tremendous practical problems in election litigation. While election litigation is often fraught, the Seventh Circuit's approach would make it several orders of magnitude worse. Under the Seventh Circuit's rationale, a candidate who files his

lawsuit well before the election lacks standing because it is generally too early to predict with any certainty whether the rule will have an outcome-determinative effect on the election. Pet.App.15a. The only exception would be in the most closely contested toss-up races. But if the candidate waits until she has a clear sense that the challenged rule could turn the election, courts are powerless to grant relief in time for the election. *See Purcell*, 549 U.S. at 4-6.

The upshot of the Seventh Circuit's approach is to channel many disputes about key election rules into post-election litigation, as well as to artificially confine them to the most contested contests. But the "Judiciary is ill equipped to address problems … through post-election litigation." *Degraffenreid*, 141 S.Ct. at 735 (Thomas, J., dissenting from denial of certiorari). The last thing that anyone wants is for courts to have to weigh in on questions where the court will redress the injury by dictating the outcome of an election that has already occurred. It is hard to imagine many things that could inflict greater harm to public confidence in our elections (and our courts) than the perception (fair or not) that judges are overturning the results of elections. "Setting aside an election is a drastic remedy." *Rodriguez v. Bexar Cnty.*, 385 F.3d 853, 859 n.2 (5th Cir. 2004). The Seventh Circuit's approach exacerbates the risk that courts will need to do so.

Waiting until after the election to resolve disputes about key election rules presents other practical problems. When it comes to elections for presidential electors, "postelection litigation is truncated by firm timelines." *Degraffenreid*, 141 S.Ct. at 735 (Thomas,

J., dissenting); *see* 3 U.S.C. §5. "For factually complex cases, compressing discovery, testimony, and appeals into this timeline is virtually impossible." *Id.* The predictable result of such litigation, with "expedited briefing and little opportunity for the adversarial testing of evidence," will be "rushed, high-stakes, low information decisions" in matters of national and historic importance. *See Dep't of Homeland Sec. v. New York*, 140 S.Ct. 599, 600 (2020) (Gorsuch, J., concurring).

That time frame imposes "especially daunting constraints when combined with the expanding use of mail-in ballots," as "litigation about mail-in ballots is substantially more complicated." *Degraffenreid*, 141 S.Ct. at 735 (Thomas, J., dissenting). Many states (including Illinois) require voters to return ballots in signed, dated secrecy envelopes. Many require the voter's signature to match state records. Some require witness or notary signatures. And states (like Illinois) that count votes received after Election Day often require proof that the ballot was mailed by Election Day, whether through a postmark or something else. Because of all those requirements, "[t]allying these ballots tends to be more labor intensive, involves a high degree of subjective judgment (e.g., verifying signatures), and typically leads to a far higher rate of ballot challenges and rejections." *Id.* at 736; *see also* Pet.App.66a (explaining that many "late-arriving ballots have discrepancies" such as "insufficient information, missing signatures, dates, or postmarks"). "Litigation over these ballots can require substantial discovery and labor-intensive fact review," including "sifting through hundreds of thousands or millions of ballots" and making "subjective judgment

calls about the[ir] validity." *Degraffenreid*, 141 S.Ct. at 736 (Thomas, J., dissenting).

What is more, deciding these questions in a post-election context forces courts to make all sorts of choices that are fraught with danger. For example, if this lawsuit were to arise in the post-election context after voters had already relied on the state's extended receipt-deadline for mail-in ballots, courts would be forced to choose between disenfranchising voters (by invalidating their ballots) or enforcing the law. *See id.* That is what happened in *Andino v. Middleton*, 141 S.Ct. 9 (2020), when this Court reinstated South Carolina's witness requirement for absentee ballots, but declined to apply the requirement to ballots already cast in reliance on a lower court decision invalidating the rule. *See id.* at 10.

Finally, to the extent the Seventh Circuit limits standing in pre-election litigation to situations where candidates can show the challenged rule is likely to be outcome determinative, the problems only multiply. As noted, such a rule would concentrate election-related litigation in the most contentious districts and states. It would also make it almost impossible for minor-party candidates to challenge election rules. In some contexts, like the rules at issue here, the possibility of voter challenges will make it far easier to challenge rules restricting mail-in voting than to challenge rules expanding it. That dynamic will "close the courthouse doors to many … challenges to" unconstitutional rules on the books, *Diamond Alternative Energy*, 145 S.Ct. at 2139, while creating the perception that the deck is stacked in ways that favor one major party over the other. Moreover, once

cases move beyond the pleading stage, the Seventh Circuit approach creates the prospect of Article III judges weighing the expert testimony of whether an upcoming election is enough of a toss-up to make campaign expenditures reasonable and allow the suit to proceed. *See Rucho*, 588 U.S. at 712; *Bartlett*, 556 U.S. at 17 (plurality op.); *Vieth*, 541 U.S. at 287 n.8.

There is a better way. This Court can resolve this case, and reverse the Seventh Circuit, by holding that Congressman Bost's pocketbook injury is directly traceable to the Illinois statute he challenged, or that he adequately alleged a competitive injury. But the Court would do the lower courts a favor if it adopted a cleaner rule recognizing the obvious standing of candidates to challenge allegedly unlawful rules governing the elections into which they are pouring untold resources.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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