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 OF *AMICI CURIAE* PHYLLIS SCHLAFLY EAGLES AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae Phyllis Schlafly Eagles was founded in 2016 as an association to carry on the work of its namesake in advocacy and educational work on numerous issues, including election integrity. For many years Phyllis Schlafly and then Phyllis Schlafly Eagles urged a return to one-day national elections, with the results reported that evening or as soon as possible thereafter without delay.

Amicus Curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") was founded in 1981 by Phyllis Schlafly, to advance conservative educational and legal goals. Eagle Forum ELDF has filed amicus curiae briefs in dozens of cases in this Court and in other appellate courts, and its advocacy has included opposing changes to election procedures that depart from same-day voting and tabulating of ballots.

Amici thereby have strong interests in establishing standing by a congressman to challenge an extended 14-day period for receiving and counting ballots after Election Day in Illinois, particularly in national elections selecting congressmen and the president.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than these *amici curiae*, their members, and their counsel – contributed monetarily to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Illinois law requires the counting of ballots for 14 days after an election, which is contrary to federal law mandating that the national election for Congress and the President occur on one and only one day: the Tuesday after the first Monday in November:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established ***as the day for the election***, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

2 U.S.C. § 7 (emphasis added). *See also* 3 U.S.C. § 1 ("The electors of President and Vice President shall be appointed, in each State, ***on election day*** ….") (emphasis added). Illinois' allowance of its prolonged 14-day post-election period is contrary to the foregoing requirement of one "day for the election" of congressmen. Although this case is presented as an exceedingly simple issue of standing, no further factual development is necessary to hold that Illinois' extended post-election period is contrary to federal law.

The Seventh Circuit erred in denying standing to Congressman Mike Bost to challenge Illinois's 14-day period, by finding that the injury to him is not "personal and individual" as the lower court perceived this Court to require. *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634, 640 (7th Cir. 2024) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016), quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). But the fact that many people other than Congressman

Bost are injured by this extended 14-day period for accepting ballots does not negate the standing of the congressman to challenge this. The dissent below correctly observed that Rep. Bost has standing because of the additional costs imposed on his campaign to monitor ballot counting long after Election Day, and he also has standing on voter-dilution grounds. Rep. Bost has waived his arguments on the latter ground, but this Court is not bound by a party's waiver and should reverse that erroneous holding below too.

Overly narrow views of legal standing in the context of election integrity are misguided. Injury to others from potential election fraud should not undermine the standing of a candidate who is also injured. The judiciary is the proper branch of government to address illegality in election procedures. Narrowing legal standing is justified to avoid encroachment on another branch of government, but no such concerns exist here in objecting to a lack in election integrity in a novel voting procedure. This Court should jettison the requirement of showing a unique particularized injury by a party challenging the legality of an overly permissive voting procedure.

ARGUMENT

I. The 14-Day Ballot Collection Period Mandated by Illinois Is Contrary to Federal Law.

Illinois permits the fraudulent voting practice of casting a ballot after Election Day while dating it as of Election Day, and mailing it in a manner that evades

a legibly dated postmark.[2] The Illinois law at issue here requires counting that ballot, and in a close election such ballots could tip the balance of victory from one side to the other. A candidate plainly has sufficient injury, and thus standing, to challenge the legality of a 14-day post-election acceptance of mailed-in ballots.

This is not a redistricting case, and does not have any legal similarities to redistricting litigation in which standing has sometimes (not always) been narrowed. The panel majority below misplaced reliance on this Court's denial of standing in an unusual challenge to redistricting, which casted doubt about standing while remanding the issue for further consideration. *See Gill v. Whitford*, 585 U.S. 48 (2018). The Seventh Circuit panel misapplied *Gill* to deny standing entirely below:

> That case involved a challenge to a redistricting plan in Wisconsin. In determining that the plaintiffs lacked standing, the Supreme Court distinguished the allegations in *Baker* [*v. Carr*], 369 U.S. 186 [(1962)], and *Reynolds v. Sims*, 377 U.S. 533, 561 (1964), noting that "the injuries

[2] The United States Postal Service does not postmark every piece of mail, because the cancellation purpose of a postmark is unnecessary on many types of letters, including those with prepaid reply postage as mail-in ballots typically are. *See, e.g.*, Ray Preston, "Postal Service appears to be a weak link in elections," *Juneau Empire* (Alaska) (Feb. 2, 2022) ("the postal service here did not have the type of equipment that would postmark business reply mail, nor did they anticipate obtaining that equipment any time soon," and 300 returned ballots (3.5% of the total) lacked a postmark).

> giving rise to those claims were individual and personal in nature, because the claims were brought by voters who alleged facts showing disadvantage to themselves as individuals." *Gill*, 585 U.S. at 67. Just as in *Gill*, Plaintiffs here only claim a generalized grievance affecting all Illinois voters; therefore, they have not alleged a sufficiently concrete and particularized injury in fact to support Article III standing.

Bost, 114 F.4th at 641 (citation trimmed).

The Seventh Circuit panel majority simply overread *Gill*, and then overapplied it. Unlike here, *Gill* concerned "group political interests" rather than "individual legal rights" such as those held by a congressional candidate. *Gill*, 585 U.S. at 72. The holding by this Court in *Gill* was that:

> this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.

Id. The challenge in *Gill* was to partisan gerrymander, and "the effect that a gerrymander has on the fortunes of political parties." *Id.* Even then, this Court did not dismiss *Gill* based on a lack of standing, but merely remanded it for further consideration of this issue.

Unlike *Gill*, the challenge at issue here is not one based on partisan political preferences, about which this Court is understandably cautious, but is instead a congressman challenging an improper extension of a federally mandated Election Day long past the election itself. In this lawsuit here against an election procedure, the caution about standing expressed by

this Court in *Gill* is lacking the force that it has in a redistricting case.

Here, there is a conflict between Illinois and federal law, and the Petitioner's job is at stake. Rep. Bost is not a mere voter to whom the Supreme Court denied standing because voters "assert no particularized stake in the litigation." *Lance v. Coffman*, 549 U.S. 437, 442 (2007). The biennial federal election in Illinois decides whether Rep. Bost will be employed on Capitol Hill the following January, and this is an injury particularized enough to establish standing.

II. Standing Exists Here for a Congressman under the Reasoning of *FEC v. Ted Cruz for Senate*.

Standing exists here as it did for Senator Ted Cruz in *FEC v. Ted Cruz for Senate*, 596 U.S. 289 (2022). While the substantive issue in that case differed from this one, the threshold question of standing is legally indistinguishable and the reasoning by this Court in that precedent is controlling here. It is puzzling why the panel majority below omitted any mention of this relatively recent teaching by this Court.

The panel majority relied heavily on *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), without acknowledging that this Court clarified its holding in *Clapper* by its decision in *FEC v. Cruz*. As explained by the dissent below and left unrebutted by the panel majority, *FEC v. Cruz* clarified "that the problem that *Clapper* addressed was that the plaintiffs could not show that they had been or were likely to be subjected to the policy in any event." *Bost*, 114 F.4th at 647 (Scudder, J., dissenting, quoting *Clapper*, cleaned up). In contrast, the application of the

challenged law here "is a near certainty," as Rep. Bost is compelled to incur costs to monitor ballot-counting "for an additional two weeks after Election Day." *Id.*

Rep. Bost has an actual injury from Illinois law, not merely a speculative one. While the amount of his injury may be debatable, its existence is undeniable and that is all that is needed to satisfy standing. "'[A]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.'" *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (quoting Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613 (1968), and also citing K. Davis, Administrative Law Treatise §§ 22.09-5, 22.09-6 (Supp. 1970)).

III. Limiting Challenges to Permissive Voting Procedures Is Misguided.

Standing is generally an undemanding threshold requirement. *See, e.g.*, *N. Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991) ("a probabilistic benefit from winning a suit is enough 'injury in fact' to confer standing in the undemanding Article III sense") (collecting authorities). The traditionally low threshold for Article III standing is particularly warranted in the context of challenging permissive voting procedures susceptible to fraud.

The 14-day ballot post-Election Day counting procedure in Illinois is just that. Under the panel decision below, Illinois could extend its post-Election Day ballot collection period even longer, and virtually no one would have standing to challenge it. Judicial review would be thwarted for an election procedure

that allows people to cast a ballot days or even more than a week after Election Day, in the hope or knowledge that it would not a bear a postmark that anyone would notice to disqualify the ballot.

Recently many challenges to enforce the National Voter Registration Act (NVRA) requirement to clean their election rolls of invalid voters have been dismissed based on an overly restrictive view of standing. See *Mussi v. Fontes*, No. CV-24-01310-PHX-DWL, 2024 U.S. Dist. LEXIS 220142, at *12 (D. Ariz. Dec. 5, 2024) ("[T]he Court concludes that Plaintiffs lack standing here because they have not alleged a concrete and particularized injury that is actual and imminent."); *Republican Nat. Comm'n v. Benson*, 754 F. Supp. 3d 773, 2024 U.S. Dist. LEXIS 192714, 2024 WL 4539309, *7-12 (W.D. Mich. 2024); *Republican Nat. Comm'n v. Aguilar*, 2024 U.S. Dist. LEXIS 189613, 2024 WL 4529358, *3-8 (D. Nev. 2024); *Child v. Delaware Cnty.*, 2024 U.S. Dist. LEXIS 197843, 2024 WL 4643966, *4 (E.D. Pa. 2024); *Judicial Watch, Inc. v. Illinois Family Action, Breakthrough Ideas*, 2024 U.S. Dist. LEXIS 203147, 2024 WL 4721512, *5-7 (N.D. Ill. 2024). *See also Drouillard v. Roberts*, 2024 U.S. Dist. LEXIS 200298, 2024 WL 4667163, *4 (N.D. Cal. 2024) (denying a TRO request as part of an NVRA voter-roll maintenance claim, due to lack of standing).

Multiple justifications for narrowing legal standing do not exist in this type of challenge to a porous election procedure that permissively allows the counting of ballots long after Election Day. Separation of powers doctrine, for example, is one rationale for narrowing legal standing, to ensure that the judiciary does not overreach into the legislative realm. *See, e.g.*, A. Scalia, "The Doctrine of Standing as an Essential

Element of the Separation of Powers," 17 Suffolk U. L. Rev. 881, 882 (1983) (quoted in *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 379 (2024)); J. Roberts, "Article III Limits on Statutory Standing," 42 Duke L. J. 1219, 1220 (1993) (The standing requirement protects "the Framers' concept of the proper—and properly limited—role of the courts in a democratic society.") (inner quotation marks omitted). The standing requirement prevents federal courts from deciding some disputes because '[o]ur system of government leaves many crucial decisions to the political processes.'" *All. for Hippocratic Med.*, 602 U.S. at 380 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

Here, this lawsuit challenges a state law that undermines federal elections in Illinois by allowing votes to be cast after Election Day, without airtight verification that all of these ballots were mailed by Election Day. Yet the theory of standing by the panel majority below forecloses any judicial review of this Illinois law. There is no one else who would have standing to challenge this, if Rep. Bost lacks standing.

Finally, Petitioners expressly waived appealing the ruling against them based on their claim of voter dilution. (Pet. 31 n.13) But this Court is not bound by such a waiver. Given the significance of the issue of permissive state laws that potentially undermine federal elections, the Court should take this opportunity to establish that a candidate has standing based on voter dilution to challenge a state election procedure that is susceptible to fraud.

CONCLUSION

For the above reasons and those presented by Petitioners, the Court should reverse the decision below.

Respectfully submitted,

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