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 Seventh Circuit Court of Appeals

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

Amicus Curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Trump v. Anderson*, 601 U.S. 100 (2024) (unanimously holding that states have no power under the U.S. Constitution to enforce Section Three of the Fourteenth Amendment with respect to federal offices); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); or as *amicus*, *e.g.*, *Republican National Committee v. Genser*, No. 24A408 (2024); *Trump v. United States*, No. 23-939 (2024); *Fischer v. United States*, 603 U.S. 480 (2024); and *Bush v. Gore*, 531 U.S. 98 (2000). The ACLJ has a fundamental interest in defending the uniformity of federal elections and in promoting election security and confidence.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision erects an unprecedented and impossible barrier to candidate standing. By requiring Congressman Bost to allege in some fashion that Illinois's extended ballot receipt deadline would cause him to "lose the election," the court below fundamentally misunderstood both the nature of Article III standing and decades of established precedent governing election law challenges.

This Court has long recognized that political candidates occupy a unique position to challenge election laws that directly affect them. Candidates at this Court successfully brought constitutional challenges to election regulations without any requirement to demonstrate that the challenged law would be outcome-determinative of their electoral success – as if they or anyone else could know. The standing inquiry focuses on concrete injury—not electoral odds. A candidate must spend additional money or resources due to allegedly unconstitutional election laws. Those laws illegally distort the playing field for federal elections and inherently, regardless of outcome, cause the precise type of concrete, particularized injury that Article III demands.

The Seventh Circuit's "lose the election" standard finds no support in precedent and creates an unworkable Catch-22. Under this reasoning, successful candidates like Congressman Bost lack standing because they won their elections, while

unsuccessful candidates face the risk of lacking standing because they were not serious competitors. All candidates are forced to show, not just that the electoral process has been improperly altered but that those changes provably affect their electoral chances.

Congressman Bost's allegations easily satisfy traditional standing requirements. Illinois's law requiring ballot receipt up to fourteen days after Election Day forced him to extend his poll monitoring operations, recruit additional watchers, and keep campaign headquarters open for two extra weeks. These are concrete, monetary injuries that flow directly from the challenged regulation. The electoral playing field was changed, harming him by altering the electoral process. The fact that Congressman Bost ultimately prevailed in his election is irrelevant to the standing analysis—Article III requires injury, not electoral defeat.

This case concerns whether states may extend federal election deadlines beyond the congressionally mandated Election Day. If the Seventh Circuit's decision stands, no candidate may have standing to challenge state election laws despite the fact that those laws impose concrete costs and burdens. The Court should reverse and clarify that candidates need only demonstrate concrete injury from allegedly unconstitutional election laws—not prove that such laws might cost them the election.

ARGUMENT

I. THE SEVENTH CIRCUIT'S "LOSE THE ELECTION" STANDARD CONTRADICTS ESTABLISHED PRECEDENT AND CREATES AN IMPOSSIBLE BARRIER TO CONSTITUTIONAL CHALLENGES.

The Seventh Circuit's decision represents a dangerous departure from established precedent that threatens to immunize state election laws from constitutional challenge. By requiring Congressman Bost to allege and later prove that Illinois's extended ballot receipt deadline might cause him to "lose the election," the court below erected an impossible evidentiary standard. This unprecedented requirement transforms standing doctrine from a threshold inquiry into whether a plaintiff has suffered concrete injury into a prediction exercise about electoral outcomes.

The decision below not only contradicts decades of precedent recognizing that political candidates are uniquely positioned to challenge election laws, but also creates an unworkable Catch-22 where successful candidates lack standing because they won anyway, while unsuccessful candidates have to lose their elections in order to even bring their cases. This Court should reverse and clarify that candidates need only demonstrate concrete injury from allegedly unconstitutional election laws—not electoral defeat. A candidate's likelihood of success in his or her election is irrelevant to whether that candidate has been harmed by a state's illegal change to the electoral playing field.

A. This Court has long recognized that candidates are uniquely positioned to challenge election laws.

Article III's "Cases" or "Controversies" prerequisite requires a "concrete and particularized" injury in fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). This Court has long recognized that candidates for political office are well positioned, and in fact are often those who are best positioned, to bring legal challenges to potential violations of election law after suffering such a concrete injury. From *Bush v. Gore*, 531 U.S. 98 (2000) and *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000), where this Court reviewed election challenges through the mechanism of the petitions of then-presidential candidate George W. Bush, to *McPherson v. Blacker*, 146 U.S. 1 (1892), where this Court reviewed an election challenge brought by nominees for presidential electors, this Court has always recognized that it is political candidates and nominees that are best positioned to bring election challenges, and are most likely to have standing to challenge allegedly unconstitutional election laws.

A candidate is no undifferentiated citizen, but instead, has been uniquely and particularly affected by an unconstitutional law. As Justice Kennedy noted, "[a]ctions such as the present one challenging ballot provisions have in most instances been brought by the candidates themselves, and no one questions the standing of respondents Gralike and Harmon to raise a First Amendment challenge to such laws." *Cook v. Gralike*, 531 U.S. 510, 531 (2001) (Kennedy,

J., concurring).

First order principles of standing teach that an injury is a "generalized grievance" 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 that it does the public at large." *Lujan*, 504 U.S. at 573-74 (emphasis added). By contrast, a candidate's injury isn't everyone's injury. When an election law costs him money or ballot access, that is his particular harm—not some abstract constitutional concern shared by all citizens. Just like illegal or unconstitutional changes to college admissions policies harm *applicants* to college, illegal or unconstitutional changes to election laws harm political *candidates* by changing the rules of the game, the process whereby they are seeking election. Political candidates thus do not suffer an undifferentiated injury; their injury is not something "all citizens share." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974). Nor is the injury suffered by a candidate for office in any sense "common to all members of the public." *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam).

Again and again, the landmark cases from this Court setting the parameters of constitutional election laws have done so in the context of candidate challenges. In each, candidates challenged election laws that affected them directly. The Court did not ask whether they would win their elections, only whether the laws imposed concrete burdens on the candidates. In some cases, the standing of a political candidate was a given and not even in dispute. But in others, this Court emphasized directly the importance

and necessity of candidate standing. *Moore v. Ogilvie*, 394 U.S. 814 (1969), for example, concerned whether independent candidates for the offices of electors in a claim related to their ballot access in the 1968 election had standing when the election completed. The appellees, who as here were representatives of the government of Illinois, argued that the case should be dismissed because the election had been held. *Id.* at 816. This Court rejected the argument, emphasizing that "the burden . . . placed on the nomination of candidates for statewide offices remains and controls future elections." *Id.* This Court emphasized the "need for its resolution thus reflects a continuing controversy in the federal-state area where our 'one man, one vote' decisions have thrust." *Id.* Other cases likewise emphasized that a case is not moot, merely because an election is over. *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.3 (1983); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) ("[T]his case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections.").

Importantly, this Court's analysis was *never* grounded in a political candidate or party's likelihood of electoral victory. Electoral success is irrelevant to standing. The question is injury, not odds. Simply being a candidate, adversely affected by allegedly unlawful legislation, was enough to provide the appropriate vehicle to bring an election challenge. In *Cook v. Gralike*, 531 U.S. 510, 516 (2001), for example, this Court reviewed a candidate to the United States House of Representatives' challenge to a state requirement that a ballot include the candidate's position on term limits. This Court never suggested

that that candidate had to prove that he would be likely to prevail on said ballot or even discussed the candidate's likelihood of winning the election. Simply being a candidate was sufficient. A candidate or party need only be subject to election law requirements in order to have standing to challenge them. *See, e.g., Storer*, 415 U.S. 724 (independent presidential and vice-presidential candidates had standing, even though they had not filed any petitions to be placed on the ballot); *Buckley v. Valeo*, 424 U.S. 1, 11-12 (1976) (determining that at least some of the persons and groups, which included political parties, had a sufficient personal stake in determining the constitutional validity of various provisions of the Federal Election Campaign Act to present a real and substantial controversy).

Under this long-standing precedent, as a candidate, Congressman Bost has suffered injury because of a potentially preempted or otherwise unconstitutional law. Illinois has distorted the election landscape, and candidates are the ones directly affected. The standing question is not difficult; a candidate is required to expend funds under an allegedly unconstitutional law and he faces a different electoral process, an altered playing field. That's injury enough. Article III demands no more.

> Congressman Bost has asserted injuries sufficient to confer Article III standing by alleging that his longstanding election-monitoring efforts will incur extra financial costs this November due to Illinois's extended ballot-receipt deadline. As a sitting member of Congress in the midst of an ongoing reelection

> campaign, he is nothing close to a 'mere bystander' to the upcoming election or the allegation at the heart of this lawsuit.

Pet. App. 23a (Scudder, J., dissenting). And forcing a candidate to campaign under illegal rules is an injury as well, just as would be forcing a would-be employee to apply for a government job where the rules imposed illegal conditions for applicants.

B. Requiring candidates to prove electoral defeat to establish standing is unprecedented and unworkable.

This case is simple. Illinois changed its election law and the parameters for federal elections. Congressman Bost was a candidate who experienced that new process, had to spend more money monitoring votes, and had the playing field whereby he sought election altered. That is injury enough for Article III. As the Eighth Circuit aptly noted, "[a]n inaccurate vote tally is a concrete and particularized injury to candidates." *Carson v. Simon,* 978 F.3d 1051, 1058 (8th Cir. 2020). "Because Illinois's extended deadline for receiving mail-in ballots will increase Bost's campaign costs this November—a fact that gives Bost a concrete stake in the resolution of this lawsuit," Pet. App. 16a (Scudder, J., dissenting), he should have standing to challenge that deadline.

A political candidate facing unconstitutional laws that increase his campaign costs faces tangible and discrete monetary injuries. Money spent because of a law is injury, the kind that is "traditionally recognized as providing a basis for a lawsuit in American courts."

TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021). Guaranteed future expenditures, necessary in order to monitor vote processing and counting, is a real and certainly impending injury. "The only reason he continues to monitor polls after Election Day is because Illinois law allows ballots to be received and counted. Before Illinois decided to accept and count such ballots, he had no need for such extended operations." Pet. App 18a (Scudder, J., dissenting). Likewise, subjecting a candidate to unlawful election parameters injures the candidate just as distorting an athletic competition's rules would injure the competitors. To hold otherwise would be to say that a candidate suffers no injury even if the deadline for incoming votes were extended, not just for two weeks (as here) but for two months or even longer.

The Seventh Circuit evaded this long-standing rule and straightforward conclusion. It did so by erecting an impossible evidentiary standard for election challenges: after taking judicial notice of the official election results from the Illinois State Board of Elections website, Pet. App. 11a n.3, the court concluded that

> the Illinois ballot receipt procedure does not impose a 'certainly impending' injury on Plaintiffs. . . . [W]hether the counting of ballots received after Election Day would cause them to *lose the election* is speculative at best. Indeed, Congressman Bost, for example, won the last election with seventy-five percent of the vote.

Pet. App. 11a.

By this language, the Seventh Circuit explicitly

invented a new rule: candidates must allege, somehow, and ultimately prove that the challenged law "would cause them to lose the election." *Id.* This onerous standard requires candidates to demonstrate, in other words, that an allegedly unlawful act related to the election is not just unlawful and does not just cause them harm, but is in fact determinative of the results the next election.

Since Congressman Bost was re-elected, the Seventh Circuit denied he suffered any injury. According to this approach, even if a plaintiff can show that election regulations were violated and that the illegal votes were likely cast or legal votes likely not counted, unless the plaintiff can affirmatively prove that the illegality was outcome-determinative in the election, there is no injury and no standing. No precedent supports such a notion.

The Seventh Circuit cited no precedent for its "lose the election" standard. There is a reason: it was manufactured. Under this Court's precedent, federal candidates have a cognizable interest in the integrity of the federal election timeline. Candidates have never been required affirmatively to demonstrate that the law challenge determines the election result. Even the Seventh Circuit itself has previously recognized this basic principle. *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2019) ("As a candidate for elected office, the President's alleged injury is one that affects him in a personal and individual way." (quotation marks omitted) (quoting *Lujan*, 504 U.S. at 560 n.1, and citing *Carson*, 978 F.3d at 1058)); *see also Smith v. Boyle*, 144 F.3d 1060, 1061-62 (7th Cir. 1998) (holding Illinois Republican Party and its chairman had standing to challenge Illinois Constitution's

method for selecting state supreme court justices that "denie[d] [its] members . . . a fair opportunity to elect candidates of their choice").

The Seventh Circuit's onerous standard is not only unsupportable by precedent. It is completely unworkable. It requires and applies a standard no candidate can satisfy: that the candidate must allege that "the counting of ballots received after Election Day would cause them to lose the election", Pet. App. 11a, *i.e.*, that a sufficient majority of the disputed votes will break against the candidate. But that is a standard that requires litigants to be certain about what injuries the future will bring, to know with certainty how people who have yet to vote will vote. Article III requires no such prophetic insight. Rather, the correct standard for establishing standing requires only the tangible and direct injuries that Congressman Bost faces. For the Seventh Circuit, a candidate does not have standing to challenge an election regulation if he is too good at persuading voters to vote for him. Such an outcome is absurd.

In practice, the Seventh Circuit's rule would mean that those most affected by election laws, the candidates themselves, would never have standing. The only circumstance a candidate can ever have standing is if he or she can prove that the particular election law that is challenged will determine the election's outcome. And this has to be shown at the Motion to Dismiss stage, where the court is required to take factual allegations as true and draw reasonable inferences in the favor of the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("The complainant must allege an injury to himself that is

distinct and palpable.") (internal citations omitted). Under the Seventh Circuit's new rule, a plaintiff must somehow manage to allege, without the benefit of any discovery, that the particular unlawful regulation being challenged will determine or have determined the election's outcome.

As Judge Scudder explained in his dissent, the Seventh Circuit's standard, in practice, ultimately "fails to accept his factual allegations as true for purposes of evaluating standing at the motion-to-dismiss phase." Pet. App. 20a (Scudder, J., dissenting). Congressman Bost pointed to specific, identifiable reasons for standing, such as ballot monitoring and the costs that ensue after election day, but the Seventh Circuit ignored these facts to still conclude that his alleged injury was speculative. The Seventh Circuit grounded standing not in the tangible injuries a political candidate received or the inherent harm of a change to the electoral playing field, but in how likely that that candidate is to win his or her next election. Such a crystal-ball standard is simply unsustainable.

Article III's "judicial Power" has meant the same thing since 1789: courts decide cases where someone claims their legal rights were violated. The founders did not invent standing doctrine or Article III to keep people out of court. They used it to keep cases in. As Chief Justice Marshall emphasized,

> This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial

> power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.

Osborn v. President, Directors & Co. of Bank, 22 U.S. 738, 819 (1824).[2]

The Seventh Circuit's decision has the ultimate effect of immunizing state election codes from legal challenge. The standing analysis instead should be much simpler. Illinois's law directed state officials to count any mail-in ballot received up to fourteen days after the election. "To ensure that all mail-in ballots were accurately tallied, Congressman Bost had to recruit, train, assign, and coordinate poll watchers and keep his headquarters open for an additional two weeks. This took substantial time, money, and resources[.]" Pet. App. 16a-17a (Scudder, J., dissenting). As a candidate, the process whereby he

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[2] Congressman Bost should prevail under this Court's traditional rubric. But the Seventh Circuit's erroneous ruling illustrates why this Court should restore the historical conception of standing. "The historical restrictions on standing provide a simpler framework." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 547 (2020) (Thomas, J., concurring) (discussing 3 William Blackstone, Commentaries *2); *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1135-36 (11th Cir. 2021) (Newsom, J., concurring); *Hanes v. Merrill*, 384 So. 3d 616, 623 (Ala. 2023) (Parker, C.J., concurring). Under that framework, "where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party" because "[e]very violation of a right imports some damage." *Whittemore v. Cutter*, 29 F. Cas. 1120, 1121, F. Cas. No. 17600 (Story, Circuit Justice, C.C.D. Mass. 1813).

was elected changed, the grounds rules for the election altered. This concrete, individualized injury suffices under this Court's jurisprudence.

II. This Court's Analysis of Standing Should Be Guided By the Importance of Uniformity of the Underlying Merits Question.

While this Court's analysis concerns standing and not the ultimate merits, those merits are still relevant to this question. This case concerns a core question related to the administration of federal elections, and the uniform answer to that question is crucial for the necessary stability and uniformity of elections.

This case concerns an election to the House of Representatives. The Constitution provides, in the Elections Clause of the Constitution, U.S. Const. Art. I, § 4, cl. 1, that "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." The Elections Clause grants Congress "the power to override state regulations" by establishing uniform rules for federal elections, binding on the States. *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 832-33 (1995). "The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ex parte Siebold*, 100 U.S. 371, 384 (1880).

Congress has adopted a rule related to elections to the House of Representatives that "sets the date of the biennial election for federal offices." *Foster v. Love*,

522 U.S. 67, 69 (1997). Congress has scheduled the House elections to occur on the presidential election day. 2 U.S.C. § 7. In order to ensure uniformity, federal statutes "mandate[] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster*, 522 U.S. at 70. As to both the President and the House of Representatives, it is by that day and that day only that the federal election may be decided. The law provides clearly, "[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election." 2 U.S.C. § 7. For a state to hold elections any time other than election day is contrary to this express obligation.

Foster struck down a Louisiana law that had the effect of concluding an election prior to the federally prescribed election day. That case involved Louisiana's open primary system. 522 U.S. at 70. The State held congressional primary elections in which all candidates appeared on one ballot, and all voters could cast their votes. *Id.* If a candidate won a majority of votes, however, the election concluded—*before* the federal Election Day. *Id.* This Court struck down the Louisiana law, and did so unanimously, because of this conflict. The exact same principle applies to any law concluding elections *after* the federal election day.

Accordingly, the Fifth Circuit recently held that the "day for the election" is the day by which ballots must be both cast and received. *Republican Nat'l Comm. v. Wetzel*, 120 F.4th 200, 204 (5th Cir. 2024). That Court concluded that Mississippi's statute, which allowed ballot receipt up to five days after the federal election day, is preempted by federal law.

There is a "singular day established by federal law as the time for choosing members of Congress and presidential electors." *Id.* The court emphasized that

> while election officials are still receiving ballots, the election is ongoing: The result is not yet fixed, because live ballots are still being received. Although a single voter has made his final selection upon marking his ballot, the entire polity must do so for the overall election to conclude. So the election concludes when the final ballots are received . . . .

Id.

The merits of the Fifth Circuit's conclusion are not yet before this Court. But the implications are inescapable; federal law demands a uniform Election Day. State variations undermine that command. This Court in *Foster* emphasized Congress's authority to establish "uniform rules for federal elections, binding on the States." *Foster*, 522 U.S. at 69. This Court highlighted Congress's authority to establish "a particular day" for the election. *Id.* at 71. The voters should know, within a reasonable time of the election, who has been elected. Extended deadlines erode voter confidence, undermine uniformity, and invite unnecessary litigation and confusion.

If the Seventh Circuit's ruling stands, there will be no one left who has standing to challenge these crucial laws setting election deadlines in the Seventh Circuit. Accordingly, there would be irreconcilable decisions between circuits on a crucial question the voters face every election, its timing. Elections in at least one circuit, the Fifth, would be mandated to

comply with the Election Day requirement, while in the Seventh Circuit, no one would have standing to challenge the issue one way or another. The Constitution and federal law establish one Election Day for good reason. When courts refuse to hear challenges to laws that undermine that uniformity, it will disappear.

In fact, the Seventh Circuit's standing reasoning would mean that, should this Court address the merits of this case in the future and agree with the Fifth Circuit in its analysis of those merits, there still would be inconsistent application of that ruling. While the determination on the merits may have been decided, there would be no one with standing in the Seventh Circuit to challenge specific election laws under that ruling within that jurisdiction. Accordingly, regardless of this Court's ultimate view of the merits, the decision below would create a patchwork of state practices that undermine federal election integrity.

CONCLUSION

For these reasons, amicus respectfully urges this Court to reverse the judgment below.

Respectfully submitted,

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