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 CENTER FOR ELECTION CONFIDENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

BRADLEY A. BENBROOK
Counsel of Record
STEPHEN M. DUVERNAY
Benbrook Law Group, PC
701 University Ave., Ste. 106
Sacramento, California 95825
(916) 447-4900
brad@benbrooklawgroup.com
Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Center for Election Confidence, Inc. (CEC) is a non-profit organization that promotes ethics, integrity, and professionalism in the electoral process. CEC works to ensure that all eligible citizens can vote freely within an election system of reasonable procedures that promote election integrity, prevent vote dilution and disenfranchisement, and instill public confidence in election systems and outcomes. To accomplish these objectives, CEC conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. CEC is a resource for lawyers, journalists, policymakers, courts, and others interested in the electoral process. CEC also periodically engages in public-interest litigation to uphold the rule of law and election integrity and files amicus briefs in cases where its background, expertise, and national perspective may illuminate the issues under consideration. CEC's *amicus* brief analyzes deficiencies in the standard for candidate standing in the decision below.

SUMMARY OF ARGUMENT

The panel here concocted a new and dangerous standing test for candidates bringing challenges to election regulations. Petitioners alleged that one of

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[1] 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 its preparation or submission. *See* Sup. Ct. R. 37.6.

their injuries was having to devote additional campaign resources to post-election monitoring of the count of late-arriving mail-in ballots. The panel characterized that as a "choice to expend resources to avoid a hypothetical future harm—an election defeat." *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634, 642 (7th Cir. 2024). And "whether the counting of ballots received after Election Day would cause them to lose the election is speculative at best," the panel concluded. *Id.* The panel went on to take judicial notice that Petitioner Bost blew away his competitor in the last election so, essentially, what's the big deal?

The big deal, as discussed below in Section I, is that requiring candidates to show they would lose the election were it not for the challenged regulation is a wholly unworkable standard. The panel essentially incorporated the substantive test for election contests into standing. The "avoiding defeat" standard would have multiple harmful side-effects, including making it impossible for longshot challengers and minority party candidates to bring claims.

The panel also rejected the candidates' argument "that they have an interest in ensuring that the final official vote tally reflects only legally valid votes." 114 F.4th at 643. This harm, according to the panel, was not "certainly impending" under *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), since the election was "months away." 114 F.4th at 643–44.

Section II explains why the interest in ensuring electoral integrity must confer standing for candi-

dates to challenge voting regulations, like Illinois' ballot-receipt law, that govern their elections. Recognizing standing is particularly important given the critical issues raised by the relevantly recent phenomenon of widespread mail-in voting and extended ballot receipt deadlines. The Seventh Circuit's approach thwarted Petitioners' ability to secure judicial review on a question central to protecting the integrity and reliability of the electoral process.

Finally, Section III discusses how the decision below imperils political parties' ability to challenge election rules and procedures that impact their candidates and, by extension, their members and the voters who support their candidates. "[T]he ability of citizens to band together in promoting among the electorate candidates who espouse their political views," *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000), is "among our [Nation's] most precious freedoms," *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The Seventh Circuit's decision threatens political parties' ability to bring suits directly and on behalf of their members. Just like candidates, political parties expend funds and allocate resources to support the candidates they prefer (and oppose the ones they don't) throughout the election calendar. The Court should reaffirm that parties have standing to sue over election laws that impact their ability to place candidates on the ballot and harm their electoral prospects.

ARGUMENT

I. The "Avoiding Election Defeat" Standard Concocted By The Panel Has No Place In Standing Analysis For Election Litigation.

Lower courts have responded to the increase in election litigation since the chaotic Covid election experience by using a variety of devices to restrict candidate standing. *See generally* S. Mulroy, *Baby & Bathwater: Standing in Election Cases After 2020*, 126 DICK. L. REV. 9, 24–35 (Fall 2021). Here, the panel joined other lower courts by using *Clapper* to block Petitioners from asserting claims. *See*, *e.g.*, *Bognet v. Sec'y Commw. of Pa.*, 980 F.3d 336, 351–52 (3d Cir. 2020), *vacated as moot,* 141 S. Ct. 2508 (mem.).

Petitioners explain well why *Clapper* does not apply to allegations about pocketbook and other injuries that will be incurred when a state allows late-arriving mail-in ballots to be counted. Pet. 37–41. Among other things, there is no question that the law *will* be applied and therefore late-arriving ballots *will* be counted, whereas in *Clapper* it was entirely speculative whether the FISA process would be used against plaintiffs. 568 U.S. at 411–13. As a result, the pocketbook injury alleged by Bost here is not just plausible, it is certain: poll watching is now a routine (and material) expense for campaigns.

These concepts eluded the panel. Instead of applying conventional standing analysis, it alchemized petitioner's actual allegation of injury (spending resources on poll watchers after the election) into a different one (avoiding defeat), and concluded that

"whether the counting of ballots received after Election Day would cause [Bost] to lose the election is speculative at best." 114 F.4th at 642. Similarly, it decided that Petitioners had no standing to allege that counting late-arriving mail-in ballots imposed a "competitive injury" because he could not allege that those votes "will break against them." *Id*. at 643.

In doing so, the panel essentially smuggled into its standing test the substantive standard for post-election contests. After an election, a candidate generally cannot contest the provisional results unless she can point to a number of ballots in dispute that exceed the margin of victory. In *Bush v. Gore*, 531 U.S. 98 (2000), for example, Florida law provided that "receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election" constituted grounds for a contest. *Id.* at 101 (citing Fla. Stat. Ann. § 102.168(3)(c)). Much like the panel did below, the Third Circuit took an election-contest-oriented approach to standing in *Bognet*. 980 F.3d at 351–52 ("for Bognet to have standing to enjoin the counting of ballots arriving after Election Day, such votes would have to be sufficient in number to change the outcome of the election"). This trend must be halted.

The panel's test is riddled with practical problems, violates basic standing principles, and has dangerous implications for future election litigation.

A. The Avoiding Defeat Standard Is A Totally Unworkable Gatekeeping Tool.

If the panel's standard is to be taken seriously as a way to evaluate standing in future election litigation, it is worth considering how cases like this could possibly be litigated. To unpack even the first layers of the decision's implications is to demonstrate its unworkability.

1. To start, what exactly must a candidate allege to avoid being dismissed for speculating too much? How can candidates possibly overcome the panel's observation that it's "speculative at best" whether the operation of an election law statute "would cause them to lose the election"? *Bost*, 114 F.4th at 642. In nearly every case this is a truism: there are endless *potential* causes of election losses. Indeed, many of these potential causes can be catalogued in advance—for example, whether the get-out-the-vote operation will work, whether fundraising will meet forecasts, whether the economy will hold up, and on and on. And there are many potential causes of defeat that cannot possibly be identified in advance—"October surprises" sometimes come out of left field.

As a result, it is entirely unclear how precise a candidate could *plausibly* be in alleging that a particular election regulation would be the actual cause of defeat. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Or, indeed, if a court allowed "[g]eneral allegations of injury [to] suffice at the pleading stage," it is unclear how a candidate could establish "'specific facts' to

support their claims" to standing under this test at the summary judgment stage. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 198 (2000) (Scalia, J., dissenting). Among other issues, how many votes would need to be attributable to the challenged regulation, and what margin of error is acceptable? Polling has existed as a multi-billion-dollar industry for many decades, yet the defining characteristic of most pollsters is their *inability* to forecast elections accurately. It is ludicrous even to think about predicting exactly how many votes a particular regulation would sway, and even more so that such predictions should determine whether a plaintiff has standing.

As Petitioners note, the panel's purported rule ignores *Clapper*'s acknowledgement that a threatened harm need not be "literally certain" to occur. Pet. 28 (citing *Clapper*, 568 U.S. at 414 n.5). Rather, the Court has "found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs reasonably to incur costs to mitigate or avoid the harm." 568 U.S. at 414 n.5 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153–54 (2010)). The panel does not account for this.

2. Even if candidates put the magic words into a complaint and allege that a particular regulation *will* be the cause of their defeat, the panel teaches other courts that they need not credit those allegations. To support its reasoning, the panel took the radical step of venturing outside Petitioners' allegations; it cited Illinois' 2022 election results and observed that Petitioner Bost's allegations must be speculative

because he "won the last election with seventy-five percent of the vote." 114 F.4th at 642. This step ignores the Court's instruction that courts "take the facts in the complaint as true" as to standing, *Tyler v. Hennepin Cty., Minn.*, 598 U.S. 631, 636 (2023), and that "[a]t this initial stage of the case, [a plaintiff] need not definitely prove her injury or disprove" defenses against standing, *id.* at 637.

The panel's reasoning also ignores reality. In politics, a lop-sided victory in the last election is no guarantee as to what will happen in the next election. In 2012, for example, House Majority Leader Eric Cantor cruised to victory in the Republican primary with 79.4% of the vote and handily defeated his Democrat opponent by 17 points in the general election. Virgina Dep't of Elections, *Historical Elections Database, 2012 U.S. House Republican Primary*, District 7, https://perma.cc/4CGP-L9WJ. Two years later, however, Majority Leader Cantor lost in the primary by 11 points in a shocking upset. Virgina Dep't of Elections, *Historical Elections Database, 2014 U.S. House Republican Primary*, District 7, https://perma.cc/8GH2-VW2S.

Or take the example of former Congressman Joe Crowley of New York's 14th district. In 2016, he ran unopposed and won over 82% of the vote in the general election. Fed. Elections Comm'n, *Federal Elections 2016, Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives* 152 (Dec. 2017), https://perma.cc/SXQ4-S5XP. In 2018, upstart Alexandria Ocasio-Cortez trounced him by 13.5 points in the primary election. Fed. Elections

Comm'n, *Federal Elections 2018, Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives* 99 (Oct. 2019), https://perma.cc/Q7V8-G69H.

By the panel's reasoning, if Congressmen Cantor and Crowley had tried to challenge one of their state's election laws, their suit could never have gotten off the ground.

3. The panel's approach also raises intractable timing questions and difficulties. The Petitioners describe (Pet. 43–47) the dilemma posed by the panel's determination that it was too early here to say whether the regulation would cause Congressman Bost to lose. But if the challenge were raised close to the election, it would be dismissed under *Purcell v. Gonzalez*, 549 U.S. 1 (2006). And the chaotic post-election window, with a crush of other litigation and certification deadlines looming, gives courts no time to reflect on substantive claims, let alone a weighty Elections Clause claim like this one. *See*, *e.g.*, *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 735 (2021) (Thomas, J., dissenting from denial of certiorari).

Litigation in advance of the 2026 cycle will soon kick into gear. It is important for the Court to promptly instruct that the panel was wrong.

B. The Panel's Standard Would Yield Disastrous Consequences.

If candidates must now establish that relief will allow them to "avoid defeat" as their standing burden,

many if not most of them will be foreclosed from bringing challenges to election regulations for the many practical reasons set out above. Minor party and longshot challengers, however, will be completely blocked from the courts, since they cannot plausibly claim that avoiding the regulations or practices at issue would cause them to avoid defeat: they were never viable candidates to begin with.

This would mark a radical sea change in election litigation, as minority party candidates have long satisfied traditional standing doctrine to assert claims. *See*, *e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Lubin v. Panish*, 415 U.S. 709 (1974); *Stein v. Alabama Sec'y of State*, 774 F.3d 689 (11th Cir. 2014); *Fulani v. Hogsett*, 917 F.2d 1028 (7th Cir. 1990); *Libertarian Party of Michigan v. Johnson*, 714 F.3d 929 (6th Cir. 2013).

Standing must not be used to entrench incumbents, who already have ample built-in advantages. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 31 n.33 (1976) ("Although some incumbents are defeated in every congressional election, it is axiomatic that an incumbent usually begins the race with significant advantages."); *cf. Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (election regulations must not "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage" relative to incumbents).

Moreover, to the extent the counting of late-arriving mail ballots enhances opportunities for

fraud, *see* Section II below, foreclosing civil litigation over the practice will only encourage more of it.

Finally, because parties in power are incentivized to modify election rules to maintain their power, it is no answer to say that disputes over such rules should play out only in the political halls of government or in a state's electoral processes and not in the courts. Elections (and voters' confidence in their processes and outcomes) demand fair, transparent, and impartial arbitration of law, rules, and regulations. Voters' confidence in elections cannot abide unchecked arbitration solely by political operators incentivized to mold the rules for the benefit of their own electoral success. As such, and particularly for constitutional claims such as the one here, the judicial system must be open to resolve legitimate disputes and safeguard election integrity.

II. The Strong Interest In Maintaining Election Integrity Must Confer Standing, Regardless Of The Likelihood Of Victory.

The Seventh Circuit's decision prevented the review of a critical issue concerning the integrity of the electoral process. Widespread mail-in voting is a recent phenomenon, and extended ballot receipt deadlines are an even newer innovation. These extended deadlines threaten election mechanics and integrity. Simply put, rules governing absentee ballots pose acute risk of injury to candidates. And allowing late-arriving ballots only magnifies this risk.

The essence of the panel's approach is to use standing doctrine to say that election fraud or irregularities

must be tolerated unless a candidate can demonstrate that his opponent will benefit more from the challenged practice. That effectively puts a candidate to the extraordinary burden of proving their case at the outset. *See Davis v. United States*, 564 U.S. 229, 249, n.10 (2011) ("standing does not depend on the merits of a claim" (internal quotation marks and alterations omitted)). And that task is especially fraught in the election context: "[v]oter intimidation and election fraud are successful precisely because they are difficult to detect." *Burson v. Freeman*, 504 U.S. 191, 208 (1992). By insulating Illinois' ballot-receipt scheme from review, the court below disregarded the public's interest in uniform, consistent, and accurate election administration.

A. Mail-In Voting Is A Recent Innovation With Widely Recognized Risks.

The widespread mail-in voting that has characterized recent elections is historically unique. For well over a century after the Founding, States required voters to cast their ballots in person. By 1911, only two States (Vermont and Kansas) had laws permitting civilians to vote absentee under certain limited circumstances. J. Fortier & N. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J. L. REFORM 483, 502 (2003). Two additional States followed in quick succession during the Progressive Era (Missouri and North Dakota adopted laws in 1913), and by 1917 half of the Nation's 48 States had adopted some method of civilian absentee voting. *Id.* at 502–506. In the 1936 election, "only

about 2% of 45 million votes were being cast by absentee ballot," and "[b]y 1960, it was estimated that less than 5% of voters had cast absentee ballots in any election." D. Palmer, *Absentee and Mail Ballots in America: Improving the Integrity of the Absentee and Mail Balloting* 6 Lawyers Democracy Fund (Jan. 2019), https://perma.cc/VSC4-TF8E.[2] "In the 1980s, California became the first state to allow eligible voters to request absentee ballots for any reason at all, including their convenience." *Id.* By 2020, 32% of Americans cast a mail-in ballot. MIT Election Data & Science Lab, *Voting by Mail and Absentee Voting* (Feb. 28, 2024), https://perma.cc/4R83-NMDQ. And in 2022, over 85% of voters in Washington, Oregon, Colorado, Hawaii, and Utah cast an absentee ballot. *Id.* Mail-in voting carries significantly higher potential for fraud, human error, and inaccuracy.

Mail-in voting creates more links in the chain between a ballot being created and a ballot being cast, received, adjudicated, and tabulated. This creates more opportunities for honest mistakes and for political chicanery. It also creates opportunities for fraud. This Court has recognized that "[f]raud is a real risk that accompanies mail-in voting," which "has had serious consequences in [the] States." *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 686 (2021)*; see also id.* at 685 ("'[A]bsentee balloting is vulnerable to abuse in several ways: … Citizens who vote at home, at nursing homes, at the workplace, or in church are

[2] Lawyers Democracy Fund is now amicus Center for Election Confidence.

more susceptible to pressure, overt and subtle, or to intimidation.'" (quoting Report of the Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 46 (Sept. 2005)). And as Judge Posner explained, historically "[v]oting fraud [has been] a serious problem in U.S. elections generally," sometimes "facilitated" by mail-in voting. *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004). "[E]ven many scholars who argue that [election] fraud is generally rare agree that fraud with [vote-by-mail] voting seems to be more frequent than with in-person voting." MIT Election Data & Science Lab, *Voting by Mail and Absentee Voting*, *supra*. Plus, mail-in voters "are more prone to cast invalid ballots than voters who, being present at the polling place, may be able to get assistance from the election judges if they have a problem with the ballot." *Griffin*, 385 F.3d at 1131.

For example, in the 2018 race for the North Carolina's Ninth Congressional District, the State Board of Elections refused to certify the election and ordered a new election "after an investigation into an absentee ballot operation on [the Republican candidate's] behalf suggested that" ballots had been "improperly collected and possibly tampered with" by a political operative. R. Gonzales, North Carolina *GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR (July 30, 2019), https://perma.cc/VU86-6G8J. In an Arizona example, the former Democrat Mayor of San Luis, Guillermina Fuentes, pleaded guilty in 2022 to ballot harvesting charges. B. Christie, *Former San Luis Mayor Pleads Guilty to Illegally Collecting Early Ballots in 2020 Primary*, AZCentral (June 2, 2022),

https://perma.cc/ML8R-P6EW. Fuentes was a political figure in her community and worked as a political consultant. The Heritage Foundation, *Voter Fraud Report – Guillermina Fuentes*, https://perma.cc/3DLB-HMS4. Using that influence, Fuentes persuaded voters to allow her to collect their ballots and, in some instances, fill out ballots on behalf of the voters. *Id.* In short, mail-in voting lacks a historical pedigree and carries unique risks to the election process. Guardrails around mail-in voting are especially important to minimize these risks.

As this Court has recognized, there is "a compelling interest in preserving the integrity of [the] election process," *Purcell*, 549 U.S. at 4, so that "an individual's right to vote is not undermined by fraud in the election process," *Burson*, 504 U.S. at 199 (1992). Protecting the integrity of the election also instills public confidence, which "encourages citizen participation in the democratic process." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008).

B. Receiving Votes After Election Day Is A Newer Development With Greater Risks.

Allowing mail-in votes to be received after Election Day was largely unknown until recent decades, and these newfound state policies may be especially hazardous to fair elections. Late ballot receipt poses many problems for election administration—problems that implicate election integrity and thus citizen confidence in elections. "During the [COVID] pandemic, with the significant increase in absentee/mail voting,

seven states plus D.C. chose to give more time for ballots to be received." National Conference of State Legislatures, *The Evolution of Absentee/Mail Voting Laws, 2020–22* tbl. 6 (Oct. 26, 2023), https://perma.cc/JW72-PBP6; *see also* U.S. Election Assistance Commission, *Mail Ballot Deadlines, 2012–2022*, https://perma.cc/P6KQ-RG5L. Now, about 14 States plus D.C. broadly count mail-in ballots that are received after Election Day—anywhere from 5:00 p.m. the next day to 2 weeks later. National Conference of State Legislatures, *Receipt and Postmark Deadlines for Absentee/Mail Ballots* tbl. 11 (June 16, 2025), https://perma.cc/9VVZ-GYSA. About 47% of the voting-age population lives in these places. Movement Advancement Project, *Mail Ballot Receipt Deadlines* (July 1, 2025), https://perma.cc/Q6QF-A39P.

This regime is in tension with Congress' decision to set uniform dates for the biennial elections for federal offices, which take place "[t]he Tuesday next after the 1st Monday in November, in every even numbered year." 2 U.S.C. § 7 (setting the time of election for Representatives); 2 U.S.C. § 1 (setting the time of election for Senators by reference to date set for election of Representatives); 3 U.S.C. § 1 (setting time for appointing Presidential Electors). Taken together, these statutes "mandate[] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster v. Love*, 522 U.S. 67, 70 (1997).

Protracted delays and other election administration problems associated with late receipt of mail-in ballots contribute to diminished confidence in elections. First and most obviously, late receipt of mail-in

ballots necessarily means that ballot counting and resolution of any disputes will be delayed. A uniform Election Day receipt deadline "avoid[s] the chaos and suspicions of impropriety that can ensue if thousands of [mail-in] ballots flow in after election day and potentially flip the results of an election." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). As Professor Pildes explained, "[l]ate-arriving ballots open up one of the greatest risks of what might, in our era of hyperpolarized political parties and existential politics, destabilize the election result. If the apparent winner the morning after the election ends up losing due to late-arriving ballots, charges of a rigged election could explode." *Ibid.* (quoting R. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020)). "[D]efinitively announc[ing] the results of the election on election night, or as soon as possible thereafter" avoids these risks, and promotes prompt, trustworthy outcomes. *Id.*

These administrative dangers are not hypothetical. Nevada accepts mail-in ballots received until the fourth day after Election Day. Nev. Rev. Stat. Ann. § 293.269921(1)(b)(2). As a result, the close 2024 Senate election was plagued by delays, and the Secretary of State laid blame on the "influx" of late-arriving mail-in ballots. KSNV, *Delays in Nevada Vote Counting Frustrates Both Parties* (Nov. 7, 2024), https://tinyurl.com/36kkdsdn. A similar situation played out in the prior election. N. Korecki, *Nevada Results to be Delayed by Clark County Ballot Processing*, NBC

News (Nov. 8, 2022), https://perma.cc/U6PX-CXHS. The glut of ballots received after Election Day caused bipartisan and needless frustration that could have been prevented through simple compliance with federal law.

California, meanwhile, featured a 2024 U.S. House race that was not called until the first week of December—a month after election day. B. Bowman & S. Wong, *Democrats Flip Final House Seat of the 2024 Elections, Narrowing Republicans' Majority*, NBC News (Dec. 4, 2024), https://perma.cc/MCE4-22FK. One key reason why: California counts mail ballots received up to one week after Election Day. Cal. Elec. Code § 3020(b); *see* A. Zavala, *Why Does California's Vote Count Take So Long? Secretary of State Explains Delay*, KCRA (Nov. 14, 2024), https://perma.cc/488R-R7YW. Indeed, "in the 2022 midterm elections," half of California's "votes were counted after Election Day." *Id.*

Such delays in certifying results of a federal election to the House or the Senate threaten Congress's ability to convene a full membership and to legislate with that membership. This threat is exactly what the limited Elections Clause failsafe was designed to prevent: a State's failure "to provide for the election of representatives to the Federal Congress." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). As Hamilton put it in Federalist No. 59, "every government ought to contain in itself the means of its own preservation," and "an exclusive power of regulating elections for the national government, in the hands of

the State legislatures, would leave the existence of the Union entirely at their mercy."

Late ballot receipt also risks treating voters differently and fostering confusion in the process. "Elections must end sometime, a single deadline supplies clear notice, and requiring ballots be in by election day puts all voters on the same footing." *Democratic Nat'l Comm.*, 141 S. Ct. at 28 (Gorsuch, J., concurring in denial of application to vacate stay). What's more, a postmark is not always included on returned ballot envelopes. In one New York primary, a court found "uncontroverted evidence that thousands of [mail-in] ballots … were not postmarked" at all. *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 30 (S.D.N.Y. 2020); *see id.* at 49 (finding "arbitrary postmarking of [mail-in] ballots").

A recent Postal Service audit report confirmed that this is a widespread problem, but USPS said that it merely "tries to ensure that every return ballot . . . receives a postmark" but would not change its postmark operations "to accommodate" state voting laws. Office of Inspector General, U.S. Postal Service, *Election Mail Readiness for the 2024 General Election, Report Number 24-016-R24* 11–12 (July 30, 2024), https://perma.cc/RL3L-7T87. USPS officials have also said "that [mail-in] ballots placed in a USPS mailbox on Election Day after the last pick-up time would not be postmarked" that day. *Gallagher*, 477 F. Supp. 3d at 29. States not adhering to the Election Day deadline essentially outsource to the Postal Service (or other entities) procedures for ensuring proof that vot-

ers timely mail ballots, but the Postal Service disclaims that responsibility. All this heightens the risk for disputes about whether a mail-in ballot received after Election Day was properly cast.

Similarly, eliminating the postmark requirement—as Illinois has done in some cases, 10 Ill. Comp. Stat. Ann. 5/19-8(c)—raises the risk of voting occurring after Election Day. The Pennsylvania Supreme Court infamously mandated that some ballots received after Election Day without any postmark be presumed to be timely cast unless "a preponderance of the evidence demonstrates that it was mailed after Election Day." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 371–72 n.26 (Pa. 2020). Under this standard, the potential risks of election disruption are manifest.

Last, a prompt receipt of ballots enables States to give voters "an adequate opportunity to cure any inadvertent defects, such as failing to sign the ballot envelope." Pildes, *supra*. "The earlier the ballots are [received and] processed, the more time there is for voters to do so." *Ibid.*

In short, ballot receipt after Election Day is thus a serious—and new—problem facing American elections. And Illinois' regime is incompatible with Congress's goal of establishing a uniform federal election day through its pre-emptive power under the Elections Clause. *See Foster*, 522 U.S. at 69–70. The underlying question Petitioners sought to prevent therefore deserves review, particularly because the lawfulness of mail-in ballot receipt rules has divided courts.

III. The Panel's Avoiding Defeat Standard Threatens Political Party Standing.

If the Court fails to correct the Seventh Circuit, the consequences will reverberate far beyond limiting just candidates' ability to bring claims. If allowed to stand, the standing rule adopted by the court below would imperil political parties' ability to challenge election rules and procedures that impact their candidates and, by extension, their members and the voters who support their candidates.

This Court has long recognized that political parties have standing to vindicate the rights of their members, as well as the party's preferred candidates and the voters who support them. All of this flows naturally from the First Amendment's right of association, which "protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). "[T]he ability of citizens to band together in promoting among the electorate candidates who espouse their political views," *Cal. Democratic Party*, 530 U.S. at 574, is "among our [Nation's] most precious freedoms," *Williams*, 393 U.S. at 30. Put simply, "[r]epresentative democracy … is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Cal. Democratic Party*, 530 U.S. at 574–75; *see generally Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214–15 (1986).

The Seventh Circuit's decision threatens political parties' ability to bring suits directly and on behalf of their candidates and members. When suing on their own behalf, political parties have standing "'to sue on their own behalf for injuries they have sustained.'" *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 369 (2024) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982)). Accordingly, this Court has recognized political parties' standing to sue over election regulations that impact their ability to place candidates on the ballot and harm their electoral prospects. *See, e.g.*, *Tashjian*, 479 U.S. at 213–17; *Cal. Democratic Party*, 520 U.S. at 572–76; *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183–84 (1979).

Political parties, of course, expend funds and allocate resources to support the candidates they prefer (and oppose the ones they don't) throughout the election calendar. Ballot-receipt laws like the one at issue here naturally impact parties' allocation of their time and money because they dictate that calendar. The Seventh Circuit's approach leads to the unusual result where a political party's standing to sue over the lawfulness of an election regulation that imposes the same burden in each contest and inflicts an across-the-board injury to the party (by requiring it to allocate resources differently and make additional expenditures) nevertheless turns on the party's ability to show a competitive burden in a particular race.

Beyond that, the Seventh Circuit's approach threatens political parties' ability to assert claims on

behalf of their candidates. Like other organizations, political parties "may have standing" to represent their members even if they have not been directly injured. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). All associations need is a member who would "otherwise have standing to sue in [his or her] own right." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *see Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199–201 (2023). By shutting the door to candidate standing, the decision below calls into question parties' ability to sue on behalf of their preferred candidates as well as the parties' members and the voters who support them. This is inconsistent with the Court's longstanding recognition that candidates and voters have standing to challenge election regulations that have a particular impact on their First Amendment rights. *See, e.g.*, *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733–35 (2008) (holding that candidate had suffered an injury in the form of increased campaign expenditures from a law that would "allow[ ] his opponents to receive contributions on more favorable terms"); *Gill v. Whitford*, 585 U.S. 48, 49 (2018) (reiterating that "'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage" (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)).

The Court should reverse the Seventh Circuit and adopt an approach that ensures political parties have standing to vindicate their own interests and can protect the rights of their members, preferred candidates, and the voters who support them.

CONCLUSION

The panel's standing analysis was not just wrong. It is wholly unworkable and creates intolerable risks for blocking access to the courts for all manner of legitimate claims by candidates and parties. The Court should reverse.

Respectfully submitted,

BRADLEY A. BENBROOK
Counsel of Record
STEPHEN M. DUVERNAY
Benbrook Law Group, PC
701 University Ave., Ste. 106
Sacramento, California 95825
(916) 447-4900
brad@benbrooklawgroup.com

Counsel for Amicus Curiae

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