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 *Amicus Curiae* of America's Future, Gun Owners of America, Gun Owners Fdn., Gun Owners of Calif., Citizens United, Citizens United Fdn., The Presidential Coalition, LLC, U.S. Constitutional Rights Legal Def. Fund, and Conservative Legal Def. and Education Fund in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Citizens United, Citizens United Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. The Presidential Coalition, LLC is a political committee. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. These *amici* filed an *amicus* brief in support of the Petition for Certiorari filed by Petitioners Bost, *et al.* *See* Brief *Amicus Curiae* of America's Future, *et al.* (filed Dec. 23, 2024).

STATEMENT OF THE CASE

In May 2022, six months before the 2022 general election, a Congressman running for re-election and two Republican Presidential Electors brought a challenge to Illinois' "Ballot Receipt Deadline Statute" which permits mail-in ballots to be "received and counted for up to 14 days after Election Day, so long as the ballot was postmarked or certified on or before

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Election Day." *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720, 726 (N.D. Ill. 2023) ("*Bost I*"). The lead plaintiff was Congressman Mike Bost (R-IL-12), who has represented southern Illinois in the House since 2015 and serves as Chairman of the House Committee on Veterans' Affairs.

Petitioners alleged that the Illinois law allowing ballots to be received after Election Day conflicts with and is preempted by 2 U.S.C. § 7, which prescribes a specific day as "**the day for the election**, in each of the States and Territories of the United States, of Representatives ... [to] Congress," as well as 3 U.S.C. § 1, which states that electors would be appointed "on **election day**, in accordance with the laws of the State enacted prior to election day." (Emphasis added.) Petitioners also raised constitutional claims that the statute "deprives them of their rights as candidates under the First and Fourteenth Amendments by forcing them to spend time and money to organize, fund, and run their campaign after Election Day." *Bost I* at 726.

Respondent Illinois Board of Elections moved to dismiss, arguing that the Petitioners lacked standing both as voters and as candidates, and that state sovereign immunity under the Eleventh Amendment barred the claim. *Id.* at 725. Fourteen months later, the district court adopted Respondent's view and ruled that Petitioners did not have standing to pursue any of their theories.

First, the district court assessed Petitioners' standing to challenge the Illinois "Ballot Receipt

Deadline Statute" establishing a period for receipt of mail-in ballots well after Election Day as inconsistent with federal laws providing for one election day. *See Bost I* at Section III.A.1. Relying on *Lance v. Coffman*, 549 U.S. 437 (2007), which addressed the standing of voters (not candidates), the district court concluded Petitioners had alleged no more than a "generalized grievance," and thereby limited its holding to Petitioners' claims as voters. Further indicating its holding was limited to voters, the district court said Petitioners' claim was the "general interest that every citizen shares" (*Bost I* at 730). The court never explained why Petitioners as candidates who alleged "harm[] in a concrete and particularized way" (*id.*) did not have standing to ensure an accurate count apart from any diversion of resources showing, thereby ignoring that claim.

Second, the district court declined to apply the doctrine of vote dilution to voter fraud allegations, because "a vote dilution claim under the Equal Protection Clause is about votes being weighted differently to the disadvantage of an identifiable group.... [S]uch claims typically arise in the context of redistricting disputes." *Id.* at 732.

Of relevance here, the court considered Bost's allegations that, as a candidate, he would "be forced to spend money to avoid the alleged speculative harm that more ballots will be cast for his opponents." *Id.* at 733. It ruled that this "financial injury is not concrete and particularized and is speculative." *Id.* at 734. It based its ruling that Bost's claim was only generalized because it "affects all federal candidates equally," on

the outlier and now-vacated case of *Bognet v. Sec'y Pennsylvania*, 980 F.3d 336, 351 (3d Cir. 2020), for the proposition that "candidate-plaintiff did not have standing when his objection to state election rules applied to all candidates." *Bost I* at 733. It based its ruling that a candidate's spending of money on ballot security after Election Day was speculative and entirely optional, constituting a self-inflicted harm under *Clapper v. Amnesty Int'l USA,* 568 U.S. 398 (2013). *Bost I* at 733-35.

The Seventh Circuit affirmed on standing, without reaching the Eleventh Amendment issue. *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634, 644 (7th Cir. 2024) ("*Bost II*"). In disregarding candidate Bost's asserted need to spend substantial sums on post-election ballot security, the circuit court also relied on *Clapper*, stating "it was Plaintiffs' choice to expend resources to avoid a hypothetical future harm — an election defeat." *Id*. at 642. Judge Scudder dissented, taking the position that the cost to the campaign of monitoring vote counting and ballot receipt after the election was in fact a concrete and particularized injury, sufficient to obtain standing for Bost. Judge Scudder noted that Bost had in fact incurred costs for after-election monitoring since the Ballot Receipt Deadline Statute's passage, and had sufficiently established the likelihood of needing to do so again after Election Day 2024. *Id*. at 645.

STATEMENT

The issue 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." Brief for Petitioners ("Pet. Br.") at i. Federal courts routinely have recognized that candidates have the greatest stake in determining that "the final vote tally accurately reflects the legally valid votes cast," being best able to assert a concrete and particularized interest sufficient to challenge state laws setting time, place, and manner rules for federal elections, and the causal-connection and redressability requirements are obviously met. *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020).

Demonstrating that Madison was correct in observing that men are not angels (Federalist No. 51), state laws governing the conduct of elections have been known to be tailored to put a political thumb on the electoral scale in order to assist candidates of the same party that controls the state legislature. Some of those state laws have created new opportunities for ballot tampering in the name of increasing access to voters. The Seventh Circuit believes that candidates do not have standing to challenge unconstitutional or unlawful state time, place, and manner rules, but if not them, who? The courts below never addressed that issue, implicitly disavowing any duty of federal courts to address the lawfulness of state election laws.

SUMMARY OF ARGUMENT

The standing of a candidate to bring a challenge in federal court to the lawfulness of state regulations governing the "time, place and manner" of elections has been long acknowledged, and the decision of the Seventh Circuit is an outlier that needs correction. A candidate who challenges state election laws based on a conflict with federal law or violation of the U.S. Constitution, which threatens the accuracy of the vote count or requires the diversion of resources from other campaign activities, presents a genuine "case" or "controversy" requiring resolution by an Article III court.

Under rules established by this Court, standing is said to require that a claim is not "generalized" by being shared by all persons equally, but who could have a more "individualized" interest than a candidate whose name is on the ballot? Standing is said to require a "concrete and particularized" injury, but a candidate who loses, or even risks losing, under unlawful rules suffers both. Standing is said to require a person suffer an "injury in fact," which a candidate experiences by having invested his person, his time, and his treasure campaigning. Challenges brought to election regulations during a campaign period seek to prevent an injury that is "actual or imminent" because it will occur on or around a fixed date — Election Day.

Once a proper case is presented, the federal courts have a duty to decide the matter, as stated by Chief Justice Marshall. More recently, this Court described

that duty as"virtually unflagging." There may be no issue more vital to the preservation of our Republic than preserving the integrity of our elections. Unfortunately, the dispute over the 2020 presidential election, and this Court's refusal to entertain Texas' original bill challenging manipulation of the Pennsylvania election laws in ways that facilitated fraud, have persuaded many lower courts to raise the bar for standing for election-related cases.

As one law professor explained, in 2020, the courts "seemed eager to decisively repudiate [Biden-Trump] election challenges" to avoid "undermining public confidence in the electoral system" thus creating a "bad precedent for future cases." Today, courts undermine public confidence in the electoral system in a different way — by elevating the rules of standing to avoid addressing the merits of election-related challenges, as happened below. Here, the Seventh Circuit denied that a Congressman seeking re-election could suffer individualized harm from an unlawful election and dismissed harm based on "diversion of resources." The Seventh Circuit also incorrectly required proof that the challenge is "outcome determinative." These *amici* urge the Court to move expeditiously to repudiate the deeply flawed approach to standing used below.

ARGUMENT

I. DIVERSION OF CAMPAIGN RESOURCES IS REGULARLY FOUND TO CONSTITUTE INJURY IN ELECTION CASES.

The circuit court was dismissive of the financial harm suffered by Mr. Bost arising from his asserted need to raise money to "continue to fund his campaign for two additional weeks after Election Day to contest any objectionable ballots." *Bost II* at 642. The panel called his need to "expend resources to avoid ... election defeat" a mere "hypothetical future harm." *Id.* The circuit court said that Petitioners "cannot manufacture standing by choosing to spend money to mitigate such conjectural risks." *Id.* The panel blithely stated, "it was Plaintiffs' choice to expend resources to avoid a hypothetical future harm — an election defeat." *Id.* No person with any exposure to American elections would ever characterize the need for ballot security as merely "conjectural" or "hypothetical," for if that were true, every serious American political campaign for Congress would be foolishly misspending contributions on ballot security for no reason.

This Court has long recognized that an organization has standing to bring a claim based on injury arising from a "diversion of resources." *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). A "diversion of resources" injury has been deemed sufficient in numerous cases when raised by a political party or committee in an election-related case. *See, e.g.*, *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014); *Fla. State Conf. of the NAACP v. Browning*, 522

F.3d 1153, 1166 (11th Cir. 2008); *Democratic Party of Va. v. Brink*, 599 F. Supp. 3d 346, 355 (E.D.Va. 2022); *Democratic Cong. Comm. v. Kosinski*, 614 F. Supp. 3d 20, 44-45 (S.D.N.Y. 2022). This doctrine was applied in a case brought by a political committee challenging the rejection of mail-in ballots. *See Democratic Party of Ga. v. Crittenden*, 347 F. Supp. 3d 1324, 1337 (N.D.Ga. 2018). The same rule should be applicable in this case involving a challenge to the acceptance of mail-in ballots.

If a political party or committee can demonstrate a concrete, imminent injury through a diversion of its resources in response to a defendant's action, certainly a candidate should be able to make the same showing. And, diversion of resources is not the only normally accepted basis for standing in cases brought by candidates. In *Gallagher v. N.Y. St. Bd. of Elections*, 477 F. Supp. 3d 19 (S.D.N.Y. 2020), the district court believed standing also was demonstrated by the long-standing rule that was ignored by both lower courts that:

> [c]andidates ... have an informational interest in an **accurate count** in their races. Whether counting additional ballots would increase the margin, strengthening the candidate's political hand, or decreases it, communicating to the candidate that she must make a more vigorous effort to win over the electorate, a candidate has a **legally protected interest** in ensuring that all valid ballots in her election are accounted for. [*Id.* at 36 (emphasis added).]

Both the district and circuit courts relied heavily on *Clapper v. Amnesty International* to establish that candidate Bost's expenditures for ballot security after Election Day constituted self-inflicted harm on which standing could not be predicated. *See Bost I* at 729, 733; *Bost II* at 642-43. In *Clapper*, this Court explained why the harm being guarded against was remote. First, the plaintiffs could not show "the Government will imminently target communications to which respondents are parties." *Clapper* at 411. Second, the plaintiffs had "no actual knowledge of the Government's ... targeting practices...." *Id*. Third, the plaintiffs could "only speculate as to whether the Government will seek to use ... authorized surveillance...." *Id*. at 412. Fourth, the plaintiffs could "only speculate as to whether [the FISC] will authorize such surveillance." *Id*. at 413. Fifth, "even if the Government were to obtain the FISC's approval to target respondents' foreign contacts ... it is unclear whether the Government would succeed in acquiring the communications." *Id.* at 414. And sixth, speculation was required as to "whether *their own communications* with their foreign contacts would be incidentally acquired." *Id*. No speculation is required here. In every election, it is a certainty that votes will be counted, giving rise to the possibility of error or mischief. The candidates are highly motivated to monitor the counting to ensure a fair and accurate count. As a result, ballot security is a vital component of all modern campaigns. The two types of expenditures could not be more different, and the reliance on *Clapper* by the courts below is entirely misplaced.

II. FEDERAL COURTS HAVE A DUTY TO DECIDE BONA FIDE ELECTION RULES CASES TO PRESERVE THE INTEGRITY OF OUR CONSTITUTIONAL REPUBLIC.

Most opinions on standing issues do not even give a nod to the complete Article III text, but rather begin much as did the Seventh Circuit's opinion, pulling only two words from the text, and those out of their context: "Because the Constitution gives federal courts the power only to resolve '**Cases**' and '**Controversies**,' our initial inquiry is whether Plaintiffs have standing to challenge the ballot receipt procedure." *Bost II* at 639 (emphasis added). In context, the "Cases" and "Controversies" provision in Article III, Sec. 2 does not provide support for the high bar for standing established by the circuit court[2]:

> The judicial Power shall extend to **all Cases**, in Law and Equity, **arising under this Constitution, the Laws of the United States**, and Treaties made, or which shall be made, under their Authority; ... to **Controversies** to which the **United States shall be a Party**.... [Art. III, Sec. 2 (emphasis added).]

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[2] One reason that courts do not discuss these two constitutional terms in context may be that it would be difficult to explain why the substance of the Congressman's claim based on the doctrine of federal preemption and a claimed inconsistency between a state statute and federal law does not present a well-pled "Case[] ... arising under this Constitution [or] the Laws of the United States...."

The question here is whether a candidate for office (who is also a Member of the U.S. House of Representatives) may challenge an Illinois state law which allows votes to be received and counted during an **election fortnight** to determine if that state law is at odds with the requirements of two federal statutes which require an "**election day**."

- With respect to the House of Representatives, 2 U.S.C. § 7 establishes the "**day of the election**" for selecting members of the House of Representatives as the "**Tuesday** next after the 1st Monday in November, in every even numbered year." (Emphasis added.)

- And, with respect to the Presidency, 3 U.S.C. § 1 follows the same pattern, and establishes that electors of the President and Vice President are to be "appointed, in each state, on **election day**, in accordance with the laws of the State enacted prior to **election day**." (Emphasis added.)

Laying aside the copious case law on standing for a moment to examine the text, initial focus should be placed on who is bringing the challenge (a candidate), and what is being challenged (the lawfulness of the process by which the election in which that candidate is running is being administered). Although questions may be raised about some voters bringing suit, a candidate should always be presumed to have a "concrete and particularized" interest in the lawfulness of how the election is conducted. *See, e.g., Gallagher*, *supra.*

The Seventh Circuit approved the district court's dismissal, believing that it had no authority whatsoever to address and resolve the important issue put to the court. The district court did not decline to decide based on any prudential notions of standing, but believed that it had no constitutional judicial authority whatsoever. That opinion raises the practical question, if the federal courts have no authority to ensure federal law is followed by the states, where should the Plaintiff Congressman go to obtain relief? Should this not be one of the central responsibilities of the federal judiciary? These *amici* agree with Congressman Bost that he had established standing by any legitimate test, and his case should have been addressed on the merits.

In reaching its decision, the Seventh Circuit set aside consideration of the actual constitutional text in favor of an elaborate, atextual, collection of judge-made law — the law of standing. That body of law was reasonably clear in the election context until the last five years, when it has come entirely unmoored from the previously established constitutional limitations on the exercise of judicial power.

Today, some believe the law of standing is sometimes selectively invoked to allow federal judges to evade their duty to decide "cases" and "controversies" which could embroil the judiciary in politics.[3] However, politics, campaigns, and elections

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[3] L. Whitehurst, "Courts could see a wave of election lawsuits, but experts say the bar to change the outcome is high," *AP* (Oct. 8, 2024) ("America's court system has no formal role in the election

are how Americans govern themselves, and refusing to decide cases involving politics demonstrates that the federal courts have abdicated their judicial duty. Here, it is an abdication of the duty to ensure elections are conducted **in accordance with law**. To defer to the political branches on such issues is an error of the first order. It leaves the decisions on the legality of elections to the political branches, which are composed exclusively by persons who were elected under the laws being challenged.

Contrary to the trend to elevate standing requirements for election cases since 2020 that was noted by Petitioners (*see* Petition for Certiorari ("Pet. Cert.") at 2; discussed in Section III, *infra*), the court's obligation should not be lessened in election cases — but rather, it should be heightened. As John Adams warned us, "If an election ... can be procured by a party through artifice or corruption, the Government may be the choice of a party for its own ends, not of the nation for the national good."[4]

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process, and judges generally try not to get involved because they don't want to be seen as interfering or shaping a partisan outcome, said Paul Schiff Berman, a professor at George Washington University Law School."). *See generally* Z. Smith and H. vonSpakovsky, "Supreme Court's Decision Not to Hear Elections Cases Could Have Serious Repercussions," *Heritage Foundation* (Feb. 24, 2021); "What role do courts and judges play in democracy?" *Brookings* (Aug. 29, 2024).

[4] John Adams, Inaugural Address in the City of Philadelphia (Mar. 4, 1797), reprinted in Inaugural Addresses of the Presidents of the United States at 10 (1989).

Additionally, this abdication by the lower courts violates the basic duty of the federal courts articulated by Chief Justice Marshall:

> We have no more right to **decline** the exercise of jurisdiction which is given, than to **usurp** that which is not given. The one or the other would be **treason** to the constitution. [*Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (emphasis added).]

Almost a half-century ago, in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), this Court adhered to Marshall's wise counsel, and described the judiciary's duty to hear and decide cases within its jurisdiction as "virtually unflagging." *Id.* at 817. The Court had made clear in *Cohens*: "[w]e cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, **we must decide it, if it be brought before us**.... Questions may occur which we would gladly avoid; but we cannot avoid them." *Cohens* at 404 (emphasis added).

Again seeking the guidance of Chief Justice Marshall, note his use of the word "duty": "It is emphatically the province and **duty** of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (emphasis added). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 163. *Accord, Baker v. Carr*, 369 U.S. 186, 208 (1962). Here, a state law is at odds with, and injuring, a

Congressman in his campaign. It deserves to be addressed.

The preservation of an honest electoral process is fundamental to the very existence of a government of, by, and for the people. "[V]oting is of the most fundamental significance under our constitutional structure." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). As this Court has noted, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

When the very process by which the people choose candidates to serve in the legislative and executive branches is tainted, it is the duty of the judiciary to review the integrity of that process when challenged. As the Wisconsin Supreme Court correctly noted in 2022, "If the right to vote is to have any meaning at all, elections must be conducted according to law.... The right to vote presupposes the rule of law governs elections. If elections are conducted outside of the law, the people have not conferred their consent on the government. Such elections are unlawful and their results are illegitimate." *Teigen v. Wis. Elections Comm'n*, 976 N.W.2d 519, 529-30 (Wisc. 2022)

(overruled by *Priorities USA v. Wis. Elections Comm'n*, 8 N.W.3d 429 (Wisc. 2024)).[5]

In the past, this Court has recognized that heightened need to consider election related challenges in the case of *FEC v. Akins*, 524 U.S. 11 (1998). There, the Federal Elections Commission ("FEC") had failed to classify the American Israel Public Affairs Committee ("AIPAC") as a political committee which would be subject to campaign finance disclosure requirements. A group of voters brought suit to compel the FEC to classify AIPAC as a political action committee and to impose the attendant disclosure requirements on AIPAC. This Court rightly determined that, because "the informational injury at issue here, **directly related to voting, the most basic of political rights**," the alleged injury was "**sufficiently concrete and specific**" to support

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[5] The reversal of the Wisconsin Supreme Court on the use of drop boxes came when its composition changed to a Democrat majority. "The liberal majority Wisconsin Supreme Court Friday overruled its own 2022 decision — handed down from the then-conservative leaning court — that prohibited municipal clerks from setting up secure drop boxes for the return of absentee ballots." B. Wang, "Ballot Drop Boxes Allowed in Wisconsin After Court Reversal," *Bloomberg* (July 5, 2024). It was another victory for the Elias Law Group LLP, which has obtained many changes in state election law which facilitate election fraud. "The court's conservative bloc ... dissented, saying... 'An unattended cardboard box on the clerk's driveway? An unsecured sack sitting outside the local library or on a college campus? Door-to-door retrieval from voters' homes or dorm rooms? Under the majority's logic, because the statute doesn't expressly forbid such methods of ballot delivery, they are perfectly lawful,' Bradley wrote in her dissent." *Id.*

standing despite "the fact that it is widely shared" among a wide swath of other voters. *Id.* at 24-25 (emphasis added). *Akins* applied to voter standing, not candidate standing. If the voters in *Akins* had standing despite the injury being shared by thousands of other voters, certainly Congressman Bost, as a candidate, has shown particularized injury, despite the Seventh Circuit's assertion that "other federal candidates" share the same injury. The signal importance of elections in a republic heightens, rather than decreases, the importance of judicial review.

III. THE RADICAL CHANGES TO THE LAW OF STANDING APPLICABLE TO ELECTION CHALLENGES SINCE 2020 SHOULD BE REVERSED.

Petitioners previously explained that which all those litigating election challenges in recent years have realized: the law of standing changed radically in 2020:

> For over 130 years, this Court has heard claims brought by federal candidates challenging state time, place, or manner regulations affecting their federal elections. **Until recently, it was axiomatic that candidates had standing** to challenge these regulations. Indeed, "it's hard to imagine anyone who has a more particularized injury than the candidate has."....
>
> In the **aftermath of the 2020 elections**, however, for a variety of reasons, **courts have limited candidates' ability to challenge**

> the electoral rules governing their campaigns. This case presents the latest — and an extreme — example of this trend. [Pet. Cert. at 2 (citation omitted) (emphasis added).]

Although Petitioners did not address the "variety of reasons" that 2020 was the dividing line, these *amici* offer their theory as to what caused this escalation of the standards for standing as it applies to election challenges. These *amici* believe that the lower courts have taken a signal from this Court, which it may never have meant to send. That signal came when this Court dismissed the original action brought by the State of Texas against the Commonwealth of Pennsylvania — a case brought to require Pennsylvania to conduct its elections accordingly to laws enacted by its legislature, in accord with Article I, Sec. 4, cl. 1, not decrees of Pennsylvania courts modifying the legislature's rules in ways which generally facilitated election fraud.[6]

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[6] Texas had alleged it suffered serious injury when Pennsylvania conducted its presidential election according to judicial decree rather than rules established by the state legislature, as required by the Framers, who had good reason for that decision. *See* Brief *Amicus Curiae* of Citizens United, *et al.* in *Texas v. Pennsylvania*, No. 155, Original (Dec. 11, 2020) ("The Framers of the Constitution vested the exclusive authority to determine the manner of selecting electors to the state legislatures because that was the body that they believed could be best trusted to avoid corruption and foreign interference in the selection of our nation's Chief Executive.") *Id*. at 2.

It was not until June 27, 2023 that this Court ruled that the provision in Article I, Sec. 4, cl. 1 clearly empowering "the Legislature" of each state to prescribe the rules governing federal elections did not mean what it appeared to say — as state courts

In fact, it is possible that the triggering event for this sea change in election challenge standing can be found in this Court's one-sentence order of December 11, 2020, refusing to entertain the Texas bill of complaint invoking this Court's original jurisdiction in *Texas v. Pennsylvania*, 2020 U.S. LEXIS 5994 (2020). In a one sentence opinion, this Court ruled: "Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections."[7] Although it was not clear why the seven justices who declined to hear the challenge took that position, a clear message was received: "stay out of the challenges to the 2020 election." Since that date, the lower federal courts and state courts — with a shocking degree of uniformity — have refused to grant standing in election challenge cases based on new, heightened rules of standing.

Dissenting from the denial of consideration, Justice Alito stated: "[i]n my view, **we do not have discretion to deny** the filing of a bill of complaint in a case that falls within our original jurisdiction."

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could override the rules established by the legislature. *See Moore v. Harper*, 600 U.S. 1 (2023). *See also* Brief *Amicus Curiae* of America's Future, Inc., *Moore v. Harper*, No 21-1271 (Sept. 6, 2022).

[7] Last year, this Court had another opportunity to address the merits of an election challenge, and there adopted the opposite position, *sub silentio*, now agreeing that: "in a Presidential election 'the impact of the votes cast in each State is affected by the votes cast' ... 'for the various candidates in other States.'" *Trump v. Anderson*, 601 U.S. 100, 116 (2024) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983)).

(Emphasis added.) Justice Alito then cited Justice Thomas' prior dissent in *Arizona v. California*, 140 S. Ct. 684 (2020), involving the Court's original jurisdiction, citing *Cohens v. Virginia.*

In its effort to avoid reaching the merits of the case and potentially risk appearing to interfere in a hotly contested election, this Court materially changed the law of standing applicable to challenges to election regulations. Particularly if it was this Court that inadvertently created this problem of lower courts refusing to decide legitimate election process challenges, a course correction is now desperately needed to ensure elections are conducted in accordance with law.

In 2021, the Democrat District Attorney of Shelby County, Tennessee, and former University of Memphis law professor Steven J. Mulroy surveyed how the law of standing had changed abruptly due to the politics surrounding the hotly contested Biden-Trump election of 2020:

> **[T]he courts in these cases seemed eager to decisively repudiate these election challenges** which not only lacked merit or even advanced frivolous claims, but which also had the effect (if not the intent) of disrupting the orderly completion of the electoral process, undermining public confidence in the electoral system, and stoking baseless conspiracy theories among an already alarmingly aroused segment of the population. While this impulse was understandable, it may have resulted in

> **courts too cavalierly dismissing legitimate claims of standing**, confusing standing questions with merits questions, or both. These judicial misfires risk setting **bad precedent for future cases**.[8]

The case now before the Court is one of those "future cases" where bad precedents have caused relief to be denied due to a dramatic shift in the law of standing brought on by the politics of the 2020 Presidential election. It is time for this Court to return us to the time, described by Petitioners, when "it was axiomatic that candidates had standing to challenge [election] regulations." Pet. Cert. at 2.

IV. PLAINTIFFS SHOULD NOT BE REQUIRED TO PROVE THE CHALLENGE WOULD CHANGE THE OUTCOME OF THE ELECTION.

The Seventh Circuit appeared to adopt an "outcome-determinative" requirement to prove standing. "[W]hether the counting of ballots received after Election Day would cause [Plaintiffs] to lose the election is speculative at best. Indeed, Congressman Bost, for example, won the last election with seventy-five percent of the vote." *Bost II* at 642. Since Mr. Bost was re-elected, the Seventh Circuit denied he suffered any injury.

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[8] S. Mulroy, "Baby & Bathwater: Standing in Election Cases After 2020," 126 DICKINSON L. REV. 9, 13 (Fall 2021) (emphasis added).

The case repeatedly relied on by the district court below, was *Bognet v. Secretary, Commonwealth of Pennsylvania*, 980 F.3d 336 (3d Cir. 2020), cert. granted, judgment vacated as moot by *Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021). Pennsylvania allowed "no-excuse" absentee voting for all Pennsylvania voters due to the exigencies of the COVID-19 pandemic. The Third Circuit denied candidate Bognet standing, stating "for Bognet to have standing to enjoin the counting of ballots arriving after Election Day, such votes would have to be a sufficient in number to change the outcome of the election to Bognet's detriment." *Bognet v. Secretary* at 351-52. The notion that standing should be limited to races where electoral rules are outcome determinative is criticized in Pet. Br. at 25-27.

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.

The district court for the District of Arizona ruled that, in order to have standing, a candidate plaintiff must show that "the manipulation ... change[d] the outcome of the election." *Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1028 (D. Ariz. 2022). On appeal, the Ninth Circuit adopted the district court's insurmountable standard verbatim. *See Lake v. Fontes*, 83 F.4th 1199, 1204 (9th Cir. 2023). There should be no such requirement for Article III standing.

V. THE SEVENTH CIRCUIT DEEMED CHALLENGES BROUGHT BY CANDIDATES TO BE SPECULATIVE, UNLIKE THE RULE APPLICABLE TO CHALLENGES TO OTHER STATE LAWS.

Judge Scudder's dissent points out the inconsistency of the panel's decision to disregard Petitioner Bost's need to incur additional fees for election monitoring as self-imposed and speculative, even though similar expenditures have been deemed sufficient for standing in other contexts. The dissent explained that prospective gun owners, who do not even yet own a firearm, have been granted standing to challenge firearms restrictions to guard against a speculative risk:

> Plaintiffs who take **precautionary measures to avoid speculative harms** are ubiquitous in federal courts. Consider, for instance, people seeking to purchase a firearm for self-defense. By doing so, they seek to take a precautionary measure to **mitigate a risk of harm** (an act of violence). That risk is entirely **speculative** and may never materialize. But even so, courts have overwhelmingly held that **prospective gun owners have standing** to challenge government policies that prevent, restrict, or otherwise tax the preventative measure they seek to take.... By dismissing Bost's expected campaign costs as a **self-imposed, preventative measure** designed to avoid a speculative harm, the Panel fails to see this as a straightforward

> application of settled principles of standing. [*Bost II* at 646 (Scudder, J., dissenting) (citations omitted) (emphasis added).]

The disparity between the courts' treatment of firearms cases versus election cases is difficult to explain other than as a desire to "gladly avoid" dealing with the attendant controversy. *Cohens* at 404.

VI. THIS COURT NEEDS TO ACT EXPEDITIOUSLY TO REAFFIRM THE STANDING OF CANDIDATES IN ORDER TO PROTECT THE INTEGRITY OF FEDERAL ELECTIONS.

The complaint was filed on May 25, 2022, but the district court did not rule that Petitioner Bost lacked standing until July 26, 2023, after the case had been pending for 14 months. The Seventh Circuit did not affirm the district court's ruling on standing until 13 months later, August 21, 2024. Delays have continued in this Court. Petitioners filed their Petition for Certiorari on November 19, 2024, and Respondents waived their right to respond, after which five *amicus* briefs were filed supporting the Petition, including one by these *amici*. The Court requested a Response by February 3, 2025, but extended this at Illinois' request three times, to March 5, 2025, then to April 4, 2025, and then to April 14. Petitioners reply was timely filed on April 25, 2025, after which the Petition was granted on June 2, 2025. Petitioners obtained a five-day extension to file their merits brief, which was filed July 22, 2025. Respondents brief is now due August

26, 2025. If and when the case is remanded, it likely will take additional months to resolve.

Accordingly, these *amici* urge that no further extensions be granted to either party. It is not just Petitioner's rights that are at stake and those in Illinois, Indiana, and Wisconsin, as the *Bost* decision could discourage meritorious challenges to unlawful state election laws elsewhere.

CONCLUSION

The decision of the Seventh Circuit should be reversed.

Respectfully submitted,

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