No. 24-568

In the Supreme Court of the United States

MICHAEL J. BOST, ET AL.,
Petitioners,
v.
ILLINOIS STATE BOARD OF ELECTIONS, ET AL.
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 10 OTHER STATES IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Election integrity comes in many shapes and forms. It might be seen in state laws that ensure votes are cast and counted accurately and timely. It might arise through the candidates' own efforts to police the process. Or it might be ensured through lawsuits that make sure everything is done straight up and square. But no matter the form, States—and our society—have "a compelling interest in preserving the integrity of [our] election process[es]." *Eu* v. *S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

The decision below minimized that interest. Representative Michael Bost (alongside two Republican presidential electors) sought to challenge an Illinois election law that directly affected him—one that greenlit the state to count mail-in votes received long after Election Day. He sued. But the Seventh Circuit turned him away, somehow reasoning that a candidate actively running for election—and spending substantial funds on the same—had no standing to challenge the rules that govern that same election. The lower court deemed his claimed injuries "speculative," Pet.App.15a, holding, among other things, that the extended poll-watching efforts that Illinois's law compelled Representative Bost to undertake weren't necessary at all, *id.* at 11a.

The Seventh Circuit erred by shrinking the window of election-related standing to a pinhole. By prognosticating on the usefulness of Representative Bost's poll-watching efforts, the court recast itself as a political strategist. It was also wrong in its assessment—on-the-ground experience shows that poll-watching matters. And by reducing a candidate's interest in elections to a mere win-

or-lose proposition, the Seventh Circuit lost sight of how candidates care about fair elections for reasons beyond just winning. Even a runaway winner like Representative Bost has an interest in seeing every electoral rule is scrupulously followed, in part because "the fairness of elections" drives "the perceived legitimacy of the announced outcome." *Brnovich* v. *Democratic Nat'l Comm.*, 594 U.S. 647, 672 (2021).

Make no mistake: *Amici* States care about standing, and its requirements still matter in election cases. Cf. Miriam Seifter & Adam B. Sopko, *Standing for Elections in State Courts*, 2024 U. ILL. L. REV. 1571, 1575 (2024) (describing careful balancing that must be undertaken in evaluating standing in election cases); but see Richard L. Hasen, *The Untimely Death of* Bush *v.* Gore, 60 STAN. L. REV. 1, 37 (2007) (suggesting that courts should "encourage litigation well before elections" to prevent more problematic post-election litigation). The States aren't arguing "that the concrete-harm requirement be ditched altogether." *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 429 (2021).

But rigorously imposing a standing requirement is not the same as using the concept as a cover for opting out of the business of evaluating the lawfulness of elections altogether. "Unnecessarily aggressive application of standing doctrines makes it harder for courts to grant relief when election officials do not go far enough to address election [problems]." Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, 80 WASH. & LEE L. REV. 359, 423 (2023). And it can "disable[] courts from serving as a check to ensure both the validity of election officials' acts and equitable treatment for all members of the electorate." *Id.* The States have no interest in seeing that happen. So while courts need not

blind themselves to the "proliferation of pre-election litigation," and should "repair[] to state legislative intent" to stem that tide, *Wise* v. *Circosta*, 978 F.3d 93, 105 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting), they should also not twist standing rules in their haste to dispense with election suits.

The Court should thus reverse, as the Seventh Circuit did some twisting here. In rectifying that error, the Court should speak directly to those courts that have more recently been "too cavalierly dismissing legitimate claims of standing, confusing standing questions with merits questions, or both." Steven J. Mulroy, *Baby & Bathwater: Standing in Election Cases After 2020*, 126 DICK. L. REV. 9, 13 (2021). Now is the time to turn that trend back—and remind courts that election cases don't merit special hostility when it comes to standing.

SUMMARY OF ARGUMENT

I. Pocketbook injury is a classic basis for standing. That rule should apply here. Because of Illinois's law, Representative Bost was forced to spend more money on poll-watching. In rejecting that expenditure, the majority below inappropriately imposed its own ideas of what comprises a proper political campaign. And it wrongly imposed a second-order requirement that candidates must show they would have suffered an election loss if they didn't spend the money.

II. Candidate standing should also support lawsuits like these. Lower courts have already recognized competitive injuries can support election suits. And a competitive injury can be more than an outright election loss. Votes matter in all kinds of ways, even if they don't end up changing the bottom-line result. Candidates have a cognizable interest in accurate vote tallies.

ARGUMENT

"If standing doctrine and election law were people, they would not be friends." Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179, 180 (2011). That strained relationship might be because standing law tends to focus on individualized injuries, while election law often turns on more disparate ones. *Id.*

This disconnect has perhaps all too often led to confused decisions in federal courts. Sometimes, courts stretch the standing doctrine too far. Other times (and perhaps more often recently), the pendulum swings the other way: courts construe standing so narrowly as to make it very nearly impossible to bring an election-related claim. The latter happened here.

The Court can use this case to bring a measure of peace to the forced marriage between standing and election law. It can do so in a couple ways. *First*, by clarifying that an election law cognizably injures a candidate when the law makes the election costlier for candidates, as Illinois's law did here for Representative Bost. See *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 671 (2019) (reserving question). And *second*, by clarifying that an election law cognizably injures a candidate when it competitively injures him or her—even if it can't be shown that the law would swing the election. Both rules would still impose real limits on standing while also leaving room for appropriate challenges to be brought.

I. Representative Bost was injured when he was forced to spend more on poll-watching.

A. Representative Bost has asserted standing based on the classic legal injury: a monetary one. "[P]ocketbook injury is a prototypical form of injury in fact." *Collins* v.

Yellen, 594 U.S. 220, 243 (2021). "[A] loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski* v. *Jevic Holding Corp.*, 580 U.S. 451, 464 (2017). Even a dollar can do. See *Uzuegbunam* v. *Preczewski*, 592 U.S. 279, 292 (2021).

Representative Bost would incur costs because of Illinois's law extending receipt and tallying of votes past Election Day. For example, candidates must keep running get-out-the-vote programs for mail-in ballots through Election Day, rather than ending them a little while before and shifting attention elsewhere. But perhaps of more interest to the States, "Representative Bost [also] ha[s] to recruit, train, assign, and coordinate poll watchers" in all 34 counties in his district "and keep his headquarters open an additional two weeks." Pet.App.16a (Scudder, J., dissenting). He has explained that "many of the[] late-arriving ballots have discrepancies (e.g. insufficient information, missing signatures, dates, or postmarks) that need to be resolved." *Id.* at 20a. Poll-watching helps resolve these problems.

The majority below thought it wasn't Illinois law that led to Representative Bost's poll-watching costs, but rather his own "choice to expend resources to avoid a hypothetical future … electoral defeat." Pet.App.11a. And the majority reasoned that Representative Bost hadn't shown any real prospect of a loss considering how he had won past elections by substantial margins, so his money was being spent in support of an unsubstantiated fear. *Id.* That view ignores, of course, how Representative Bost's poll-watching in past years might have helped produce his big margins. No matter. The harm was said to be speculative anyway. *Id.*

B. But Representative Bost had more reason than a potential election loss to invest in poll-watching and keep

his campaign rolling post-Election Day. *Every* vote serves an important function for candidates—no matter what the ultimate outcome might be.

For winning candidates, more votes might mean a stronger mandate to implement the candidate's preferred agenda, better positioning in elections down the road, less opposition, positive media coverage, and perhaps even down-ballot sway. See, *e.g.*, Craig J. Herbst, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 HOFSTRA L. REV. 217, 231 (2012) (describing how higher margins of victory can provide "candidate legitimacy as well as political capital," along with the appearance of "general acceptance"). More votes might also head off a post-election litigation challenge. See Peter N. Salib & Guha Krishnamurthi, *Post-Election Litigation and the Paradox of Voting*, 3/10/2021 U. CHI. L. REV. ONLINE 1, 8 (2021). Perhaps because of some or all of these effects, higher margins of victory can even cause substantive shifts in policy, as has been documented in the foreign-policy realm. See Philip B.K. Potter, *Electoral Margins and American Foreign Policy*, 57 INT'L STUD. Q. 505, 505 (2013), https://tinyurl.com/3z9pvzhw.

For losing candidates, more votes might mean more credibility and viability in future elections, more influence within the party, greater strength and legitimacy for the party itself (especially for third-party candidates), issue amplification, and moral victory. See, *e.g.*, Kaleigh Rogers, *Even A Losing Presidential Campaign Can Have Benefits*, ABC NEWS (Feb. 15, 2024, 2:53 PM), https://tinyurl.com/ycryfh9p. A tighter margin might put a broader recount effort within reach. And an unexpectedly strong showing—even in a losing effort—

might be enough to run off a political rival (as often happens, for instance, in presidential primaries).

Either way, the relevant risk here is not the risk of an outright election loss. Rather, the pivotal risk—the one that supports standing—is the risk of a miscast vote and the resultant loss of the value it carries.

That risk is real, especially considering Representative Bost's observations on the higher rate of "deficiencies" among late-breaking ballots. So it's no wonder that candidates would spend funds to ensure that each one is properly recorded. That reasonable effort should be enough to find standing. Cf. *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 154 (2010) (finding standing based on efforts to "minimize the likelihood of potential" harm, even if that harm never came to fruition). It's certainly enough to distinguish this case from one like *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 415 (2013), contra Pet.App.10a-11a, where the claimed harm was "based on something that may not even have happened to some or all of the plaintiffs," *Remijas* v. *Neiman Marcus Grp., LLC*, 794 F.3d 688, 694 (7th Cir. 2015).

C. Real-world facts confirm poll-watching and ballot challenging is a reasonable effort to address a genuine risk.

"Virtually all states have election observation [and poll-watching] statutes, and though rules differ on who is allowed to see what, all share the same motivation: to provide an avenue of transparency in the process to ensure that candidates and the public accept the result." Rebecca Green, *Election Observation Post-2020*, 90 FORDHAM L. REV. 467, 468–69 (2021). For candidates, poll-watching ensures that disputes about votes on the

fringes get resolved in the right way. See Rebecca Green, *Adversarial Election Administration*, 101 N.C. L. REV. 1077, 1112 (2023). Watchers act as "the eyes and ears of the candidates and the campaigns in each individual polling place." Peter Biello, *Poll Watcher vs. Poll Observer: What's the Difference?*, GA. PUB. BROAD. (Oct. 24, 2024, 4:33 PM), https://tinyurl.com/3pjtx5yt.

Reasons like these explain why "[p]oll watching is a longstanding, crucial," and "routine part of U.S. elections." Matt Cohen, *Poll Watching Is a Crucial Part of Elections—How Did It Become Controversial?*, DEMOCRACY DOCKET (Oct. 18, 2024), https://tinyurl.com/mryvvuvx. Candidates and parties most always include them as part of their strategy; "[f]or example, President Trump's campaign emphasized the importance of recruiting poll watchers to ensure that the election was conducted fairly." Geoffrey Sheagley & Mollie J. Cohen, *Watchers at the Polls*, MIT ELECTION DATA + SCI. LAB (Aug. 31, 2021), https://tinyurl.com/53a3j96f. "[W]ell-organized political campaigns" "recruit[]" these watchers—"often lawyers"—and provide "some form of campaign-sponsored training on the state's election laws and procedures." Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 217 (2015).

Representative Bost's campaign employs these routine measures through the extended vote-casting period, but the Seventh Circuit declared his efforts needless unless he showed a close race was likely. It saw no such likelihood here because Representative Bost had won by wide spreads in past elections. But that view embraces two serious errors in judgment. For one, it assumes that election prognostication is a science, not an art. Guessing that a poll-watcher might not make any electoral

difference merely because elections have been runaways in the past ignores how seats can swing quickly and unexpectedly. See, *e.g.*, Alexander Burns & Jonathan Martin, *Once a Long Shot, Democrat Doug Jones Wins Alabama Senate Race*, N.Y. TIMES (Dec. 12, 2017), https://tinyurl.com/4wtncr49 (describing how a Democrat won an Alabama Senate seat that had been previously won by a Republican who won with more than 97% of the vote); see also Cntr.For.Elec.Confidence.Amicus.Br.14 (collecting similar examples). "[P]ast is not prologue for political candidates." Pet. App.19a (Scudder, J., dissenting). For another, the lower court recast itself as a political strategist, dismissing evidence in the record in favor of its own instincts about what is and is not necessary spending in a political campaign. But as Judge Scudder said below, "federal courts should be wary of labelling such practices speculative, particularly when included in the longstanding and successful election of a sitting member of Congress." *Id.* And as the First Circuit has recognized, "[t]o probe" into a candidate's assertion that he or she "ha[s] to adjust [his or] her campaign to account" for an expected consequence of a challenged election law "would require the clairvoyance of campaign consultants or political pundits." *Becker* v. *FEC*, 230 F.3d 381, 387 (1st Cir. 2000).

The opinion below also bespeaks hostility to election integrity measures unless they've been shown to be *absolutely* necessary. But that's wrong. "Preserving the integrity of the electoral process, preventing corruption, and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 788-89, (1978). As President Trump has recognized, "elections must be honest and worthy of the public trust." Exec.

Order No. 14248, *Preserving and Protecting the Integrity of American Elections*, 90 Fed. Reg. 14,005, 14,006 (Mar. 25, 2025). And ensuring that honesty requires methods and measures "that protect Americans' voting rights and guard against dilution by illegal voting, discrimination, fraud, and other forms of malfeasance and error." *Id.* at 14,005. So federal courts should not be so quick to dismiss election-integrity measures as meaningless, self-inflicted, and costly measures. They are vital.

Representative Bost's spending on additional poll-watching necessitated by the Illinois statute should give him standing to challenge the law.

II. Representative Bost is injured when he is forced to run in an election with an inaccurate vote tally.

The Seventh Circuit was also too quick to dismiss another basis for standing—a candidate's interest in participating in a fair election. In the usual case, "[e]lectoral interests" mean "[c]andidates … achieve standing without difficulty." 13A EDWARD H. COOPER, FED. PRAC. & PROC. JURIS. § 3531.4 (3d ed. 2025); cf. *Republican Nat'l Comm.* v. *Wetzel*, 120 F.4th 200, 205 n.3 (5th Cir. 2024) (noting how no party had questioned a political party's standing to challenge a similar law allowing mail-in votes received after election day to be counted, "presumably because th[e] case fit[] comfortably within [the Fifth Circuit's standing] precedents"). The Seventh Circuit wrongly thought otherwise here.

A. Representative Bost is injured when Illinois allegedly counts votes that should not be counted under federal law. Counting invalid votes makes the vote tally inaccurate. And "[a]n inaccurate vote tally is a concrete and particularized injury to candidates." *Carson* v.

Simon, 978 F.3d 1051, 1058 (8th Cir. 2020). Even the Seventh Circuit had effectively recognized as much before, as when it found that "a candidate for elected office" was personally affected by "the allegedly unlawful manner by which [a state] appointed its electors." *Trump* v. *Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020). Again: that's because of the interests embodied in each vote (and elector). See *supra* Part I.B. Votes have signaling value and more beyond the final win-or-lose call. An inaccurate vote tally could deprive the candidate of a "clear mandate," weaken "the candidate's political hand," or deprive the candidate of the "information interest" inherent in each vote. *Gallagher* v. *N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 36 (S.D.N.Y. 2020).

This idea—that candidates have standing in elections cases—is merely a logical extension of the notion that competitors in a field have the right to challenge unlawful rules governing that field. "[W]hen regulations illegally structure a competitive environment—whether an agency proceeding, a market, or a reelection race—parties defending concrete interests (e.g., retention of elected office) in that environment suffer legal harm under Article III." *Shays* v. *FEC*, 414 F.3d 76, 87 (D.C. Cir. 2005). So a "direct and current competitor" will have standing if a rule affects the "'conduct of [the candidate's] campaign.'" *Castro* v. *Scanlan*, 86 F.4th 947, 954-55 (1st Cir. 2023); see also, *e.g.*, *Mecinas* v. *Hobbs*, 30 F.4th 890, 898 (9th Cir. 2022) ("If an allegedly unlawful election regulation makes the competitive landscape worse for a candidate … than it would otherwise be if the regulation were declared unlawful, those injured parties have the requisite concrete, non-generalized harm to confer standing."). Of course, that's exactly what Representative Bost says has happened here.

B. The Seventh Circuit mistakenly relied on a single inapplicable case—*Lance* v. *Coffman*, 549 U.S. 437 (2007)—to dismiss Representative Bost's interest. *Lance* involved a claim by four voters that Colorado was not complying with the U.S. Constitution's Elections Clause. *Id.* at 441. The Court characterized this complaint as an "undifferentiated, generalized grievance about the conduct of government." *Id.* at 442. A harm is rightly labelled "generalized" when it affects "every citizen's interest." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 573 (1992).

But the differences between this case and *Lance* should be obvious enough. Unlike voters, candidates constitute a small pool of identifiable individuals whose behavior and choices are directly shaped by their elections' rules. Their injuries are not "common to all members of the public." *Ex parte Levitt*, 302 U.S. 633, 636 (1937); see also *Carney* v. *Adams*, 592 U.S. 53, 60 (2020) (explaining that a plaintiff had only a "'generalized grievance'" where his claimed injury was common to "all citizens of Delaware"). "The candidate who pours money and sweat into a campaign, who spends time away from her job and family to traverse the campaign trail, and who puts her name on a ballot has an undeniably different—and more particularized—interest in the lawfulness of the election" and the accuracy of the count "as compared to the interests of some random voter." *Hotze* v. *Hudspeth*, 16 F.4th 1121, 1126 (5th Cir. 2021) (Oldham, J., dissenting). And indeed, Representative Bost has detailed specific ways in which Illinois's law has affected his behavior (for the worse). Beyond that, a win would benefit him more "directly and tangibly … than it [would] the public at large." *Lujan*, 504 U.S. at 574. In contrast, the Colorado voters were a vast group of people who are affected only indirectly and disparately by Colorado's choice to use courts to draw

congressional districts. See, *e.g.*, *League of United Latin Am. Citizens, Dist. 19* v. *City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011) (contrasting *Lance* with a case where voters' actual rights, actions, and options were affected). Blood, sweat, and tears were absent for them.

The Seventh Circuit was particularly wrong to think that an inaccurate vote tally was too "speculative" because Representative Bost's election was months away. Pet.App.15a. That's an odd approach given the *Purcell* principle that "the rules of the road must be clear and settled" by the time "an election is close at hand." *Merrill* v. *Milligan*, 142 S. Ct. 879, 881-82 (2022) (Kavanaugh, J., concurring in grant of application for stays) (characterizing *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006)). Early election suits should be encouraged, not punished. The Seventh Circuit seems to think just the opposite—trapping candidates between filing too early (dismissal for lack of standing) and too late (no relief given *Purcell*).

But even setting that incongruence aside, the Seventh Circuit could deem this suit "speculative" only by confusing the injury again. The injury is not the prospect of a "inaccurate vote tally" in the sense that votes are simply mistabulated somehow (although Representative Bost did present evidence about an increased error rate about the post-Election-Day ballots, Pet.App.20a (Scudder, J., dissenting)). Rather, the "inaccurate vote tally" *will* arise if Illinois is tallying votes after Election Day when federal law says it can't. Assuming the rightness of Representative Bost's position, the only two ways an accurate vote tally could occur would be if (a) Illinois unliterally changed its law or (b) no ballot was received after Election Day. It's those two scenarios that are "speculative," not Representative Bost's.

C. In the end, standing's complexities reduce to one straightforward idea: "plaintiffs must answer a basic question—'What's it to you?'" *Diamond Alt. Energy, LLC* v. *EPA*, 145 S. Ct. 2121, 2133 (2025). In throwing his hat into the ring, Representative Bost made himself more than a "bystander." *Id.* "Candidates for office spend money, devote time, and otherwise injuriously rely on provisions of the Election Code in organizing, funding, and running their campaigns." *Hotze*, 16 F.4th at 1125 (Oldham, J., dissenting). So their sweat-equity investment in the electoral system should give them standing to question the rules of that same system. Anything else risks an abdication of the judicial role—for if candidates who invest so much in a race still have no chance to question its rules' compliance with federal law, then it's hard to imagine who else might.

CONCLUSION

The Court should reverse and remand with instructions to consider the merits of Plaintiffs' claims.

Respectfully submitted.

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