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 THE NRCC AND THE NRSC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The **NRCC** (the National Republican Congressional Committee) is the principal national political party committee devoted to electing Republicans to the U.S. House of Representatives. It advocates for the reelection of Republican Members of the House, including Petitioner Michael J. Bost.

The **NRSC** (the National Republican Senatorial Committee) is the principal national political party committee focused on electing Republicans to the U.S. Senate. The NRSC represents all Republican Members of the Senate.

For the NRCC, the NRSC, and their candidates, reversal of the decision below is essential to ensure that the rules governing elections are clearly known in advance. Clear election rules, established well before the election occurs, promote confidence in the fairness of our election system. "This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). And post-election litigation is likewise undesirable, as it may put courts in the unenviable position of seeming to decide the election themselves or of potentially disenfranchising voters that have already cast their ballots. Post-election litigation hurts candidates too—among other things, it can weaken the

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

perceived political mandate of the election winner. All this suggests it is best to resolve disputes about election rules early, so the rules are clear to all in advance of the election and the vote-counting process.

The Seventh Circuit chose a different path. By denying the unique injury that unlawful election rules impose on candidates for public office, it reduced the likelihood that such rules can be litigated before the election begins. That result was not required by Article III, and this Court should discard it.

SUMMARY OF ARGUMENT

Candidates for public office—regardless of political affiliation—are squarely harmed by unlawful election rules that disadvantage them. That unremarkable proposition resolves this appeal. Article III injury can be doctrinally complex, but it boils down to a simple question: "'What's it to you?'" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). And unlawful election rules mean quite a lot to a candidate for public office.

"For standing purposes," this Court "accept[s] as valid the merits of [the plaintiff's] legal claims." *FEC v. Cruz*, 596 U.S. 289, 298 (2022). The Court "must assume," in other words, that the alleged illegality is in fact illegal. *Id.* Here, that means the Court must assume that the Illinois statute facilitates voting that is illegal under federal law. That harms Petitioners in multiple independent ways.

First, candidates have a concrete and particularized interest in official vote counts accurately reflect-

ing eligible votes cast under lawful election rules enacted by the legislature. That interest extends beyond winning the election—it applies even in noncompetitive races. If political candidates were polled on whether they would prefer to win with 51 percent of the vote or 99 percent, the results would not be mixed. The same is true for 55 percent versus 56 percent. Accuracy matters. It has real-world implications no matter how close the election is. There is a reason vote counting continues even after a race is called.

Second, counting ineligible votes cast under unlawful election rules can reduce a candidate's probability of winning the election. In the economic marketplace, competitor standing allows companies to challenge acts that could hurt their profits incrementally. In the political marketplace, unlawful election procedures risk entirely preventing a candidate's election. Competitor standing, therefore, should apply *a fortiori* in the electoral context.

Third, a candidate might suffer the pocketbook injury of the costs associated with additional monitoring, like Petitioner Bost did here. A state statute that potentially facilitates ineligible voting requires a rational candidate to expend resources to reduce that risk. Because the additional monitoring costs are an injury "resulting from" the "application or threatened application of an unlawful enactment," they are "fairly traceable to such application" even "if the injury could be described in some sense as willingly incurred." *Cruz*, 596 U.S. at 297.

An erroneous jurisdictional ruling here would have severe negative consequences. Federal elections

recur every two years. And unlawful election procedures subvert the political process. Leaving them insulated from judicial review would cement a structural entrenchment damaging to candidates across the political spectrum.

ARGUMENT

I. UNLAWFUL ELECTION PROCEDURES CREATE PER SE ARTICLE III INJURY

Lower courts have been "cavalierly dismissing legitimate claims of standing" to challenge election procedures, including by political candidates. Steven J. Mulroy, *Baby & Bathwater: Standing in Election Cases After 2020*, 126 Dick. L. Rev. 9, 13 (2021). But this Court historically has exercised jurisdiction without hesitation when candidates challenge allegedly unlawful election procedures. *See, e.g., Cruz*, 596 U.S. at 313 ("Cruz and the Committee have standing to challenge the threatened enforcement"); *Davis v. FEC*, 554 U.S. 724, 733 (2008) ("When Davis filed suit, he had already declared his 2006 candidacy"; "Davis possesses standing to challenge the disclosure requirements"); *Bush v. Gore*, 531 U.S. 98, 100 (2000) ("Governor Bush and Richard Cheney [are] Republican candidates for President and Vice President"); *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983) ("petitioner John Anderson … was an independent candidate for the office of President"); *Buckley v. Valeo*, 424 U.S. 1, 35 n.41 (1976) ("Appellant Buckley was a minor-party candidate … elected to the United States Senate"); *Moore v. Ogilvie*, 394 U.S. 814, 815 (1969) ("appellants … are independent candidates for the offices of electors").

That is for good reason. When unlawful state election procedures disadvantage a candidate for federal office, that candidate is *per se* injured under Article III. Here, the candidate's suit alleges that an Illinois statute allows state officials to count votes cast after the deadline set by federal law. Taken as true, that is injury-in-fact both because the statute unfavorably misrepresents the vote count and because it risks reducing the candidate's probability of winning the race. And if the candidate rationally incurs expenses to reduce the risk of illegal voting, that pocketbook injury *per se* satisfies Article III as well.

A. Unlawful Election Rules Misrepresent The Vote Count

The Seventh Circuit could only imagine one "hypothetical future harm" from votes cast under unlawful rules: "election defeat." Pet.App. 11a. That is wrong. As the Eighth Circuit has recognized, "[a]n inaccurate vote tally is a concrete and particularized injury to candidates." *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020); *see also Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020) (same).

Vote counts are not just about who wins and loses the election—the tally matters. This is one reason why election officials continue counting ballots even after one candidate has secured a decisive majority and the outcome is no longer in doubt. "[O]ne need only tap into common sense to know that [losing vote share] is harmful." *TransUnion*, 594 U.S. at 458 (Thomas, J., dissenting, joined by Breyer, Sotomayor, and Kagan, JJ.). And that intuition matters because, when analyzing Article III standing, "[j]udges are not

required to exhibit a naiveté from which ordinary citizens are free." *Diamond Alt. Energy, LLC v. EPA*, 145 S. Ct. 2121, 2140 (2025) (cleaned up).

Unlawful election rules can harm candidates of either party, but here, the Illinois statute virtually guarantees that the vote count will understate voters' support for NRCC and NRSC candidates. According to a Gallup Poll, 35 percent of Democrats voted by mail in 2024 versus only 17 percent of Republicans. *See* Jeffrey Jones, *More Than Half of U.S. Vote Likely Cast Before Election Day*, Gallup (Oct. 31, 2024), tinyurl.com/3h2w23yn. In 2020, 45 percent of Democrats voted by mail versus only 25 percent of Republicans. *Id.* If Petitioners are correct that votes received by mail after Election Day are invalid and therefore should not be counted (and, for purposes of assessing Article III standing, the Court must assume that they are), then the percentage of votes they received in an election will be chronically understated.

Journalists, party leadership, donors, potential primary challengers, advocacy groups, and candidates themselves all rely on publicly reported vote percentages to make strategic decisions. Journalists and candidates alike are more likely to portray a candidate as broadly popular and owning a mandate from the people the more votes the candidate receives. *See, e.g.*, Jim Drinkard, *Republicans Prepare to Take Control of Congress*, Associated Press (Nov. 10, 1994) ("Gingrich said the election outcome was a clear mandate for the national 'Contract With America' that more than 300 Republican House candidates signed."). Party leaders may be more likely to elevate a candidate who receives a greater share of the votes. Donors and advocacy groups may be more likely to

provide support. And potential challengers may be more likely to sit out the next election cycle the stronger the candidate's vote share. All these political realities reflect the "common view" that the size of a candidate's margin of victory "predicts the likelihood of him launching enduring changes in policy and politics." *See* John T. Woolley & Gerhard Peters, *Presidential Election Margin of Victory: J.Q. Adams to Trump II*, *in* The American Presidency Project at University of California Santa Barbara (Nov. 6, 2024), tinyurl.com/4e4s7rjb.

Each of these is an independent reason why state election procedures that facilitate ineligible voting matter to federal candidates, no matter who wins. Each is, in other words, a firm answer to the question "'What's it to you?'" *TransUnion*, 594 U.S. at 423.

B. Unlawful Election Rules Risk Reducing the Candidate's Probability of Winning

Ineligible voting risks reducing a candidate's chances of winning the race. Here, because mail-in votes tend to be cast in greater numbers by Democrats, a statute that facilitates the unlawful counting of too-late mail-in votes reduces a Republican candidate's probability of winning the race. That is an additional *per se* Article III injury. The primary objective of candidacy is electoral victory and attainment of public office. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates"); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 206 (1996) (recognizing "the State's compelling interest in winnowing down the candidates" "to the serious few who have a

realistic chance to win the election"). Any reduction in the likelihood of that outcome, therefore, sets back the purpose of the project.

This type of harm is more absolute than the competitive effects typically evaluated in the economic marketplace, where adverse impacts on rivals are often incremental and contingent. For instance, a company might suffer a decline in market share due to a competitor's conduct, but still operate profitably.

Yet courts have "routinely recognized" competitor standing in the economic marketplace. *Shays v. FEC*, 414 F.3d 76, 85–86 (D.C. Cir. 2005) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572–73 & nn. 7–8 (1992)). In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), for example, this Court had "no doubt" that the plaintiff suffered Article III injury because the alleged increased competition "might" entail "some future loss of profits." *Id.* at 152. Similarly, in *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court noted that it "routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy … Article III." *Id.* at 433 (cleaned up).

There is no logical reason why competitive injury in the political marketplace would not even more readily satisfy Article III given the political marketplace's zero-sum nature. Unlike a company suffering incremental lost profit, a candidate harmed in a way that diminishes his electoral prospects may suffer a total defeat, with no compensatory outcome.

The Seventh Circuit seemed to accept the doctrine of candidate competitor standing below but held that it did not apply here because the court doubted whether "the majority of the votes that will be received and counted after Election Day will break against [Petitioners]." Pet.App. 13a. That defies political reality—the suit alleged that state law would allow ballots to be cast by mail after the deadline set by federal law and, as discussed, the empirical evidence plainly shows that Democrats vote by mail at a rate approximately double that of Republicans. The Seventh Circuit's rejection of Petitioners' competitor standing simply does not hold water. The decision is also bad policy, because it risks delaying litigation until after votes have been cast, when "there can be no 'do-over' or redress" for voters who were duped by the State. *See Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016).

The Seventh Circuit also emphasized that it was not "certain[]" that Petitioners would lose their elections, Pet.App. 10a, but that is not the standard for injury. Competitive injury is sufficient for Article III when the competitor "might" be injured by the illegality. *Ass'n of Data Processing Serv. Organizations, Inc.*, 397 U.S. at 152; *see also City of New York*, 524 U.S. at 432 ("sufficient likelihood"). The increased risk of losing the election clearly meets that standard.

C. Unlawful Election Rules Force Rational Candidates To Expend Additional Monitoring Costs

When faced with a state statute that raises a material possibility that ballots will be cast in violation of federal law, rational candidates will exercise their

right to monitor the voting process to reduce the number of ineligible votes. The associated expense is a classic pocketbook injury that *per se* satisfies Article III injury-in-fact. *See, e.g.*, *Cruz*, 596 U.S. at 296 (candidate's "pocketbook harm" was Article III injury). Here, for example, Petitioner Bost's rational decision to monitor votes "increase[d] [his] campaign costs," and that gives him a "concrete stake in the resolution of this lawsuit." Pet.App. 16a (Scudder, J., dissenting).

Poll monitoring is a campaign's legal prerogative, regardless how competitive a race is. "Every U.S. state" has election laws giving candidates "the ability to appoint poll observers" to monitor and observe voting inside polling places and the processing of ballots after the polls close. Hans A. von Spakovsky, *Poll Observers Are Essential To Honest Elections*, Heritage Foundation (Nov. 9. 2022), tinyurl.com/3bj3uz32. In Pennsylvania, for example, "[e]ach candidate … at any election shall be entitled to appoint two watchers for each election district in which such candidate is voted for." 25 Penn. Stat. § 2687. In Illinois, the law authorizes candidates and political parties to appoint pollwatchers in order to build confidence in the electoral process. 10 Ill. Comp. Stat. 5/17-23(1)–(2) (authorizing parties and candidates to "appoint two pollwatchers per precinct"); *id*. 5/7-34(1)–(2) (same for primary elections); *id*. 5/19-10 (same for observing early voting procedures and vote by mail processing and counting); *id*. 5/19A-60 (same for early in-person voting). Poll watching "has become commonplace among major candidates." Pet.App. 19a (Scudder, J., dissenting).

Candidates incur monitoring expenses not only to maximize their probability of winning the election but also to maximize the probability that the vote tally will accurately reflect their electoral support. The Seventh Circuit believed that Bost might win with "seventy-five percent of the vote," Pet.App. 11a, and that this somehow rendered monitoring useless. But a candidate who receives 76 percent of the lawful vote should be recorded as receiving 76 percent of the vote, not 75 percent. And candidates have a legal right to monitor votes toward that end. *See* Pet.App. 19a (Scudder, J., dissenting) ("Even if Congressman Bost had won reelection by 99% in 2022, he would have been more than justified in monitoring the count after Election Day.").

As noted, this Court has made clear that a "degree of risk" can suffice to satisfy Article III. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 343 (2016). Indeed, the case the Seventh Circuit relied on—*Clapper v. Amnesty International USA*—observed that this Court has "found standing based on a 'substantial risk' that the harm will occur." 568 U.S. 398, 414 n.5 (2013); *see also Murthy v. Missouri*, 603 U.S. 43, 49 (2024) ("substantial risk").

As *Clapper* explains, the substantial-risk standard applies at minimum when the risk of harm "prompt[s] plaintiffs to reasonably incur costs to mitigate or avoid that harm." 568 U.S. at 414 n.5; *see also* Pet.App. 20a (Scudder, J., dissenting) ("Plaintiffs who take precautionary measures to avoid speculative harms are ubiquitous in federal courts."). That is exactly what is alleged here. The exercise of a candidate's legal right to monitor imposes cognizable burdens regardless of how competitive a race is. *See*

Pet.App. 17a (Scudder, J., dissenting) (Petitioner Bost faced "guaranteed prospect of higher campaign costs"). While Illinois didn't mandate monitoring, the Illinois law created an environment in which failing to monitor posed a material risk to the candidate's interest. That converts a supposedly voluntary expense into a foreseeable, law-induced burden.

II. THE SEVENTH CIRCUIT'S HOLDING WOULD CREATE PERVERSE INCENTIVES AND INSULATE ELECTION MALFEASANCE

Judicial review of unlawful election procedures should occur well in advance of an election rather than during the chaotic period shortly before and after the election. Latebreaking changes often result in "judicially created confusion." *Republican Nat'l Comm.*, 589 U.S. at 425 (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). "Unclear rules" threaten to "sow confusion and ultimately dampen confidence in the integrity and fairness of elections." *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from denial of certiorari). So, "[w]hen an election is close at hand, the rules of the road should be clear and settled." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J.) (concurring in denial of application to vacate stay) (citing "the *Purcell* principle").

"[R]unning a statewide election is a complicated endeavor." *Id.* Legislatures "initially must make a host of difficult decisions" about "how best to structure and conduct the election." *Id.* Then, state and local election administration officials and volunteers must participate in a "massive coordinated effort to

implement the lawmakers' policy choices on the ground before and during the election, and again in counting the votes afterwards." *Id.* And at every step, state and local officials must "communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting." *Id.*

For these reasons, judicially altering election procedures near an election creates severe administrative problems. When that happens, election administrators "must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes." *Id.* Resisting eleventh-hour judicial changes "protects the State's interest in running an orderly, efficient election." *Id.*

For mail-in ballots in particular, tallying "tends to be … labor intensive, involves a high degree of subjective judgment (e.g., verifying signatures), and typically leads to a far higher rate of ballot challenges and rejections." *Degraffenreid*, 141 S. Ct. at 736 (Thomas, J.). Litigation over these ballots "can require substantial discovery and labor-intensive fact review." *Id.* In some cases, it requires "sifting through hundreds of thousands or millions of ballots" and involves "subjective judgment calls about the validity of thousands of ballots." *Id.*

The Seventh Circuit's ruling creates a catch-22 in which a candidate suing well in advance of the election purportedly has only "speculative" harm,

Pet.App. 11a, while a candidate suing near the election loses under the *Purcell* doctrine. Under *Purcell*, "lower federal courts should ordinarily not alter the election rules on the eve of an election" because that could confuse voters and complicate election administration. *See Republican Nat'l Comm.*, 589 U.S. at 424 (citing *Purcell*, 549 U.S. 1). To avoid the *Purcell* bar, therefore, a candidate plaintiff must sue early. But according to the Seventh Circuit, a plaintiff suing early has no Article III standing because the election's outcome is uncertain. In conjunction with *Purcell*, that ruling is doctrinally unworkable.

Judicial alteration of the rules *after* the election is perhaps even worse than changing them shortly before. Postelection litigation "forces courts to make policy decisions that they have no business making." *Degraffenreid*, 141 S. Ct. at 736 (Thomas, J.). When an election procedure is unlawful but voters relied on the procedure when casting their ballots, courts are stuck between either "disenfranchising a subset of voters" or "enforcing the [unlawful] election provisions." *Id.* "Settling rules well in advance of an election rather than relying on postelection litigation ensures that courts are not put in that untenable position." *Id.* at 737. In part for these reasons, there is a "general consensus" among scholars and judges that litigants "should seek curative injunctive relief before the election and not afterward." Mulroy, *Baby & Bathwater*, 126 Dick. L. Rev. at 20 (citing Justice Antonin Scalia, Professor Richard L. Hasen, and Professor Daniel P. Tokaji).

In addition to the importance of adjudicating these lawsuits early, it is also important to adjudicate them correctly. "Confidence in the integrity of our electoral

processes is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. Our elections must give citizens, "including the losing candidates and their supporters," "confidence in the fairness of the election." *Wisconsin State Legislature*, 141 S. Ct. at 31 (Kavanaugh, J.).

When state election procedures violate federal law and create a possibility that ineligible votes will be cast, that "undermine[s] public confidence in the fairness of elections and the perceived legitimacy of the announced decision." *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 672 (2021). Indeed, recent polls show substantial declines in confidence in American elections. A full 40 percent of American voters doubt the trustworthiness of our elections. *See* Pew Res. Ctr., *Sharp Divisions on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct: Voters' evaluations of the 2020 election process*, (Nov. 20, 2020), tinyurl.com/2bkdn7up; R. Michael Alvarez et al., *Voter Confidence in the 2020 Presidential Election: Nationwide Survey Results*, Cal. Inst. Tech. 3 (Nov. 19, 2020), tinyurl.com/bdhd2nzu; Katherine Ognyanova et al., *The COVID States Project: A 50-State COVID-19 Survey*, Report #29: Election Fairness and Trust in Institutions (Dec. 2020), tinyurl.com/yc4unxfe.

Real-world consequences, therefore, point in the same direction as fidelity to text and history: candidates have Article III standing to challenge unlawful and disadvantageous election rules prior to an election.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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