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 HONEST ELECTIONS PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the Honest Elections Project ("HEP"), a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, HEP defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. HEP supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, which implicates key concerns regarding election integrity, voter confidence, and the role of legislatures in setting the rules for elections.

As part of its mission, HEP seeks to defend the electoral process from practices that risk sowing distrust in outcomes, such as the challenged provisions of Illinois law here, 10 Ill. Comp. Stat. Ann. §§ 5/18A-15(a) and 5/19-8(c), which mandate the counting of absentee ballots that arrive up to fourteen days after Election Day so long as they are postmarked on or before Election Day.

HEP further believes that the validity of the Illinois post-election receipt deadline should be reviewable in federal court and therefore supports the right of Petitioners to challenge this provision. HEP respectfully submits this brief as *amicus curiae* in support of the Petitioners' challenge to those provisions.

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[1] Counsel for *amicus curiae* state that no counsel for a party authored this brief and that no person other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In any contest, the faith that participants and spectators alike place in the outcome necessarily depends on their ability to trust the procedures. American elections are no exception to this rule, which is precisely why Congress has—for nearly two centuries—recognized that the health of our constitutional republic relies upon a *single* candidate in each contest being declared the winner after a *single* nationwide Election Day.

Accordingly, Congress has exercised its powers under Article I, § 4, cl. 1 and Article II, § 1, cl. 4 to set the "day for the election" of members of Congress as "[t]he Tuesday next after the 1st Monday in November, in every even numbered year" ("Election Day"). 2 U.S.C. § 7. Moreover, 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." 3 U.S.C. § 1.

This Court, recognizing that "[t]he power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount,'" *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (citation omitted), has reaffirmed that Congress meant what it said in the federal Election Day statutes: all the "combined actions of voters and officials meant to make a final selection of an officeholder" must occur by the close of Election Day. *Foster* v. *Love*, 522 U.S. 67, 71 (1997).

Under the federal Election Day statutes and *Foster*, receipt of absentee ballots must therefore occur *before* the end of Election Day. Otherwise, the vote is

untimely. By definition, to count a ballot received *after* Election Day is to violate the rule that actions "meant to make a final selection of an officeholder" must be completed *before* Election Day ends. *Id.*

Illinois disagrees. Instead, the State believes that Election Day actually signifies Election *Weeks*. Specifically, Illinois has created a two-week period after Election Day, during which officials will still receive and count absentee ballots, so long as they are postmarked as being sent on or before Election Day. *See* 10 Ill. Comp. Stat. Ann. § 5/18A-15(a); *id.* § 5/19-8(c). If the mailed ballot has no postmark, the voter need only have signed and dated a certification accompanying the ballot within the same timeframe. *Id.* § 5/19-8(c). Any mail-in ballot that meets these requirements must be received by election authorities "before the close of the period for counting provisional ballots," *id.*, which is defined as fourteen calendar days from Election Day. *Id.* § 5/18A-15(a).

Petitioners are U.S. Congressman Michael J. Bost, who represents Illinois's twelfth congressional district, and Laura Pollastrini and Susan Sweeney, both former presidential electors. As candidates, each was uniquely harmed by Illinois's unlawful vote-counting scheme, which hurt their electoral prospects, caused them to incur costs for running their campaigns for an additional two weeks, and undermined their specific interests in an accurate tally of legal votes.

While the U.S. Courts of Appeals for the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, D.C., and—until recently—the Seventh Circuits would have (uncontroversially) found that Petitioners had Article III standing for at least one of these reasons

and permitted the case to be heard on its merits, the Seventh Circuit opted for a different approach in the decision below. Rejecting all relevant decisions from her sister circuits and misconstruing precedent from this Court, the panel majority denied any resolution on the merits, holding that Petitioners did not suffer a cognizable injury-in-fact. The Seventh Circuit's decision is incorrect for at least three reasons.

First, Petitioners have standing because late-arriving ballots may lower their margins of victory. Federal elections are quintessential zero-sum contests, wherein only one candidate can become an office-holder when all is said and done. Due to this reality, the theory of "competitor standing" empowers political candidates to challenge laws that harm their electoral prospects.

Second, Petitioners have standing due to the additional resources they are required to expend after Election Day to monitor the late-arriving ballots. Such monetary harm represents a textbook injury-in-fact, and the Seventh Circuit was incorrect to label this concrete monetary harm as too speculative, applying a standard that neither this Court nor other circuits require.

Third, Petitioners, as candidates, have a cognizable interest in the accurate tally of legally-cast votes, and suffer injury when that interest is undermined. The Seventh Circuit erred significantly when it held that this interest was little more than a generalized grievance, as this Court has already held that a dilution of votes is more than a generalized grievance for *voters*, let alone candidates.

Additionally, the Seventh Circuit's erroneous de-

cision is particularly egregious because it prevents Petitioners from seeking judicial review of Illinois's clearly unlawful statutes. Illinois's extended vote-counting scheme stands in stark contrast to the precedents of this Court, the plain text of the federal Election Day statutes, and the Framers' original understanding of federal elections, and Petitioners' challenge ought to be heard on the merits.

This Court should reverse.

ARGUMENT

I. Petitioners Have Article III Standing to Challenge Illinois's Unlawful Vote-Counting Scheme

In order to establish Article III standing, a party must establish the constitutional requirements of injury-in-fact, causation, and redressability. *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). As the Seventh Circuit noted in the decision below, "[t]his case hinges on whether [Petitioners] adequately allege a sufficient injury in fact," *Bost* v. *Ill. State Bd. of Elections*, 114 F.4th 634, 639 (7th Cir. 2024), which this Court has defined as "an invasion of a legally protected interest," which is (1) "concrete and particularized," and (2) "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations omitted); *see also Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 339 (2016) (citation omitted).

Petitioners, through their complaint and supporting affidavits, alleged that they suffered an injury-in-fact from Illinois's unlawful vote-counting scheme in at least three ways. First, Petitioners alleged that Illinois's vote-counting scheme created a competitive injury by counting untimely and unlawful votes, which

could cut into their margin of victory. *See* Pet.App.68a. Second, Petitioners alleged monetary injuries, in the form of the resource diversion caused by the illegal post-Election Day receipt period. *See* Pet.App.67a–69a. Third, Petitioners alleged that, because Illinois's law allowed untimely (and potentially illegitimate) votes to be counted, the law ran afoul of their cognizable interest as candidates in ensuring an accurate final vote tally. *See* Pet.App.87a–88a.

Each of these harms on their own would be sufficient to satisfy the injury-in-fact requirement in at least eight other circuits. Yet, the Seventh Circuit, in an act of aberrant jurisdictional reasoning, relied on novel legal standards to improperly conclude that Petitioners lacked Article III standing.

A. The Loss of Votes in a Zero-Sum Electoral Contest Is a Quintessential Injury-in-Fact

Despite the declining confidence in U.S. elections—in no small part due to laws that undermine electoral integrity, like Illinois's[2]—it remains a defining feature of federal elections that only *one* candidate may win. *See, e.g.*, *Foster*, 522 U.S. at 71 ("When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder."). Indeed, as this Court has noted, the dictionary definition of "election" is "the act

[2] *See, e.g.*, *State Scorecard: Illinois*, THE HERITAGE FOUND., https://www.heritage.org/electionscorecard/pages/states/il.html (last visited July 28, 2025) (ranking Illinois 41st in the nation in election integrity with a 12/21-point score for "Absentee Ballot Management").

of choosing a person to fill an office." *Id.* (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 433 (C. Goodrich & N. Porter eds. 1869)). Voters therefore mark their ballots for one candidate over the others, with a vote for candidate A inherently serving as a vote against candidate B.

As such, a candidate's entire purpose in being a candidate is to win, and to ascend to the position of officeholder. *Cf. Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 747 (2011) (noting the "end goal" of campaign spending is "to claim electoral victory over the opponent"). Achieving this goal is necessarily accomplished by receiving more votes than the opposing candidate(s), which makes elections quintessential zero-sum contests—that is, contests in which "the gains of some are invariably the losses of others," and "efforts and exchanges, rather than creating value, merely reallocate it."[3]

Due to the zero-sum nature of electoral contests, many courts explicitly recognize what the First Circuit has called "the theory of political competitor standing." *Castro* v. *Scanlan*, 86 F.4th 947, 955 (1st Cir. 2023). Under this theory, a "direct and current competitor" in the political context will have standing to sue if a regulation affects the "conduct of [the candidate's] campaign" or produces a similar effect. *Id.* at 954–55.

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[3] Nathan Nunn et al., *Zero-Sum Thinking and the Roots of U.S. Political Differences* 1 (NBER Working Paper No. 31688, 2023) (conditionally accepted at the *Am. Econ. Rev.*), https://socialeconomicslab.org/research/working-papers/zero-sum-thinking-and-the-roots-of-u-s-political-divides/.

In the First Circuit, for example, a candidate alleging a "diminution of votes" injury can successfully do so by "show[ing] that his status as a political candidate gave rise to the kind of injury" claimed, *i.e.*, that the candidate "was competing . . . for voters or contributors" in that race. *Id.* at 957; *see also Becker* v. *Fed. Election Comm'n*, 230 F.3d 381, 385–89 & n.5 (1st Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001) (candidate had standing because FEC regulations threatened the viability of his campaign and put him "at a competitive disadvantage in the presidential race"); *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26, 37 (1st Cir. 1993) (candidate had standing due to fundraising regulations that favored electoral opponent). Likewise, the Second Circuit has recognized the theory of "[c]ompetitor standing . . . in the election context," holding in several instances that the requirements of Article III standing were satisfied when "the competitor-plaintiff sought to challenge election-related action that allegedly had an obvious and direct negative impact on the plaintiffs' own political activities." *Citizens for Resp. & Ethics in Washington* v. *Trump*, 953 F.3d 178, 215 (2d Cir. 2019) (Walker, J., dissenting) (collecting cases), *cert. granted*, *judgment vacated as moot*, 141 S. Ct. 1262, 209 L. Ed. 2d 5 (2021).

Other circuits agree. The Ninth Circuit recognized competitive standing from electoral injuries as early as 1981 and continues to do so. *See Owen* v. *Mulligan*, 640 F.2d 1130 (9th Cir. 1981); *Drake* v. *Obama*, 664 F.3d 774, 778 (9th Cir. 2011); *Mecinas* v. *Hobbs*, 30 F.4th 890, 897–99 (9th Cir. 2022). As have the Eighth and Sixth Circuits, at least throughout the past decade. *See Pavek* v. *Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020) (per curiam) (political committees had standing to challenge Minnesota's

ballot order statute "insofar as it unequally favors supporters of other political parties"); *Green Party of Tenn.* v. *Hargett*, 767 F.3d 533, 544 (6th Cir. 2014) (political parties had standing to challenge ballot order statute because they were "subject to the ballot-ordering rule" and supported candidates "affected by" the law).

Additionally, while the Fourth Circuit expressly declined to definitively state whether they had adopted competitive standing, the Circuit held that a candidate had standing to challenge a ballot order statute because it was "extremely likely that the primacy effect would have a negative impact on [plaintiff's] vote tally." *Nelson* v. *Warner*, 12 F.4th 376, 385 & n.9 (4th Cir. 2021).

The reasoning behind competitor standing theory is "self-evident as a matter of logic," and stems from longstanding precedent from business and agency cases recognizing that, "where the government regulators are effectively choosing winners and losers in the marketplaces that they regulate, affording the plaintiff the presumption of injury, traceability, and redressability makes sense." *Citizens for Resp. & Ethics in Washington*, 953 F.3d at 214–15 (Walker, J., dissenting); *see also id.* at 214 ("The government's decision to act in a way that gives a boost to some players in that market or allows a new player to enter it, will, as a matter of *economic logic*, be to the detriment of others."). Indeed, as the D.C. Circuit has explained, "ample precedent" from this Court and others "supports standing" when "analogizing [candidates'] situation to business rivalry." *Shays* v. *FEC*, 414 F.3d 76, 87 (D.C. Cir. 2005). In other words, "when 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." *Id.*

Here, Petitioners alleged that Illinois law directly harmed their prospects of electoral victory. Specifically, Congressman Bost stated that his "margin of injury may be reduced by untimely and illegal ballots," such that those ballots could even "cause [him] to lose [his] election for federal office. Pet.App.68a.

For the reasons described above, these allegations would be more than sufficient to establish political competitor standing in essentially every other federal court. As these courts all recognize, to establish such an injury, a party need only show that there is a "realistic danger" that he or she will "sustain[] a direct injury" because of the challenged provision. *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Yet, the Seventh Circuit went in an entirely different direction, applying the uniquely onerous standard that the candidate must allege, without a shadow of a doubt, that the late arriving votes *will* break against the candidate. *See Bost*, 114 F.4th at 643 ("Plaintiffs do not (and cannot) allege that the majority of the votes that will be received and counted after Election Day will break against them, only highlighting the speculative nature of the purported harm.").

This is incorrect. Article III does not require an almost supernatural level of certainty about future injuries; rather, as this Court has stated numerous times, the actual standard for establishing risks of future injuries is a "substantial risk." *Clapper* v. *Am-*

nesty Int'l USA, 568 U.S. 398, 414 n.5 (2013). "[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 435 (2021); *accord Murthy* v. *Missouri*, 603 U.S. 43, 69 (2024) ("To obtain forward-looking relief, the plaintiffs must establish a substantial risk of future injury that is traceable to the Government defendants and likely to be redressed by an injunction against them."); *see also Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158 (2014) (in the threatened enforcement context, "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." (citing *Clapper*, 568 U.S. at 409, 414 n.5 (2013)).

In Congressman Bost's case, the tallying of late-arriving votes and the subsequent injury from votes cast for his electoral opponent were certainly imminent. While the decision below seems to suggest that Petitioner's harm is speculative unless he can conclusively show that he faces "election defeat" or that he would "lose the election," *Bost*, 114 F.4th at 642, that approach does not sit well with this Court's standing jurisprudence. This Court has only required plaintiffs to show injury, not that the injury be in the most catastrophic form possible—for example, a Takings Clause plaintiff need only show an alleged taking, not bankruptcy, and a First Amendment plaintiff need only show that the discouragement of speech has a chilling effect, not that he is unable to speak. *See, e.g.*, *DeVillier* v. *Texas*, 601 U.S. 285, 289 (2024) (noting that an allegation of government-caused flooding was sufficient to state a Takings Clause injury); *Laird* v.

Tatum, 408 U. S. 1, 11 (1972) ("Constitutional violations may arise from the deterrent, or chilling, effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." (internal quotation omitted)). Likewise, a candidate need only show that their electoral chances are "harm[ed]," not that the challenged regulations or laws lead them straight into the jaws of defeat. *Meese* v. *Keene*, 481 U.S. 465, 474 (1987).

Notably, this Court in related cases has clarified that the burden of proof for plausibly alleging "harm" to a candidate's electoral chances is not especially onerous. In *Meese*, for example, this Court held that a political candidate sufficiently alleged a cognizable injury because he explained that "his personal, political, and professional reputation would suffer and his ability to obtain re-election . . . would be impaired" if he were to exhibit three films that the Department of Justice classified as "political propaganda." *Id.* at 473–74 (internal quotation omitted).

To support this claim, the candidate did not need to prove that his planned exhibition would definitively cause his defeat, nor even attempt to quantify the potential impact on voters in his specific district. Instead, the Court credited "affidavits, including one describing the results of an opinion poll" that suggested a "*national* sample of adults" would be "*less inclined* to vote" for a hypothetical candidate who showed films classified as "political propaganda." *Id.* at 473 & n.7 (emphasis added). While far from certain in its conclusions regarding the potential impact on the candidate's actual race, this poll—along with an affidavit

"containing the views of an experienced political analyst" that suggested the same—was enough to support the existence of a cognizable injury. *Id.* at 474–75.

Here, by contrast, one does not need to read public opinion polls or consult a subject-matter expert to recognize that Petitioners' electoral prospects were at least "impaired" by Illinois's scheme. In fact, the Illinois State Board of Elections itself "advised that the number of ballots received after Election Day through November 17, 2020, could materially affect the unofficial election results," Pet.App.85a, noting that "it is likely that close races may see leads change." *Id.* (quoting *Media Advisory: Heavy Mail Voting Could Affect Unofficial Elections Results*, ILL. STATE BD. OF ELECTIONS (Nov. 2, 2020), as reprinted in Pet.App.85a n.2). As Congressman Bost declared in his affidavit (and as logic dictates), this phenomenon risked shrinking his margin of victory, if not causing him to lose his election altogether. *See* Pet.App.68a.

Put differently, Congressman Bost—like any candidate in his position—faced a "realistic danger" of concrete, particularized, and imminent injury to his electoral prospects due to Illinois's decision to count untimely and unlawful ballots. *Babbitt*, 442 U.S. at 298; *see also Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." (citations omitted)).

Accordingly, the Seventh Circuit was wrong to break with her sister circuits and create a novel legal standard that both they and this Court have soundly rejected.

B. The Seventh Circuit Improperly Disregarded the Resource Diversion Theory of Standing

All Petitioners have diverted resources after Election Day due to Illinois's election laws. Congressman Bost stated that his campaign "has spent, and will spend, money, time and resources to monitor and respond as need to ballots received by state election officials after the national Election Day." Pet.App.65a. Indeed, because the "monitoring of ballots has become significantly more difficult" after Illinois began permitting late-arriving ballots, Congressman Bost must "invest resources on 'Election Day' operations that last fourteen days rather than one day." Pet.App.66a. The same is true for Laura Pollastrini, who must find more volunteers to "invest time and energy on 'Election Day' operations that last fourteen days rather than one," Pet.App.72a, as well as Susan Sweeney, who finds it "more difficult to find volunteers because Illinois's Receipt Deadline requires monitoring of incoming ballots fourteen days after Election Day." Pet.App.77a–78a. As Judge Scudder correctly noted in his dissent, this creates "'a personal stake in th[is] dispute' and a basis to proceed in federal court." *Bost*, 114 F.4th at 644 (Scudder, J., dissenting) (quoting *FDA* v. *All. for Hippocratic Med.*, 602 U.S. 367, 379 (2024)).

Indeed, this Court has long considered monetary harms to be an injury-in-fact. "[M]onetary harms" qualify as one of the "most obvious" and "traditional" forms of injury, which "readily qualify as concrete injuries under Article III." *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 425 (2021); *see also United States* v. *Texas*, 599 U.S. 670, 676 (2023) ("Monetary costs are of course an injury."). Recently, this Court noted that

even more remote parties, who were not themselves regulated by the challenged actions, established a "straightforward" injury-in-fact by alleging increased monetary costs that "hurt[] their bottom line." *Diamond Alt. Energy, LLC* v. *EPA*, 145 S. Ct. 2121, 2135 (2025). After all, no one "dispute[s] that even one dollar's worth of harm is traditionally enough to 'qualify as concrete injur[y] under Article III.'" *Texas*, 599 U.S. at 688 (Gorsuch, J., concurring) (quoting *TransUnion LLC*, 594 U.S. at 425).

Accordingly, the Seventh Circuit had no choice but to acknowledge that Petitioners' allegations of monetary injury were sufficiently "concrete and particularized." *Bost*, 114 F.4th at 642 (quoting *Lujan*, 504 U.S. at 560). Instead, the Seventh Circuit could only reject Petitioners' standing by holding that the monetary injury was not "actual or imminent," and thus "too speculative for Article III purposes." *Id.* (quoting *Lujan*, 504 U.S. at 560, 564 n.2).

This is precisely what the Seventh Circuit did. Relying primarily on this Court's decision in *Clapper* v. *Amnesty International, USA*, 568 U.S. 398 (2013), the Seventh Circuit held that Petitioners' monetary injury was "too speculative" because "the Illinois ballot receipt procedure does not impose a 'certainly impending' injury on Plaintiffs. Rather, it was Plaintiffs' choice to expend resources to avoid a hypothetical future harm—an election defeat." *Bost*, 114 F.4th at 642.

As an initial matter, this reasoning is flawed because it ignores the practical realities of post-Election Day ballot-receipt periods. Candidates already need to devote substantial resources to secure the services of poll watchers, attorneys, and other individuals on

Election Day alone, and doing so is hardly "optional" for a candidate who wants to have a chance. The same applies for the period after Election Day, when candidates require those same services (and perhaps to an even greater degree, as scrutiny of the vote tally increases). Since the 1970s, the Federal Election Commission has recognized this exact phenomenon through various advisory opinions permitting campaigns to establish "recount funds." *See* AO 1978-92; AO 2006-24; AO 2010-14; AO 2019-02.

The Seventh Circuit's reasoning is also flawed because it improperly analogizes the asserted harm in *Clapper* to Petitioners' asserted harm. As Judge Scudder aptly observed in his dissent, "[i]n *Clapper*, the *only* reason the plaintiffs had for incurring costs was to guard against the specter of a surveillance action that may never come." *Bost*, 114 F.4th at 647 (Scudder, J., dissenting) (citation omitted). "Here, however, Congressman Bost's poll-monitoring efforts are not aimed at shielding against the speculative possibility of government action," as "the application of the challenged government restriction in this case is a near certainty." *Id.* Simply put, "[t]here *will* be an election this November, Congressman Bost *will* incur staffing costs to monitor the full and complete ballot count, and Illinois law *will* require that that count extend for an additional two weeks after Election Day." *Id.* (emphasis added).

Indeed, a better analogy comes from the Fifth Circuit's recent holding in precisely the same context. In *Republican National Committee* v. *Wetzel*, 120 F.4th 200 (5th Cir. 2024), the court heard a challenge to a Mississippi law that, like Illinois's, extended the ballot-receipt deadline. There, the court noted that the

Republican National Committee's resource diversion theory of standing was not even in dispute, as it "fit[] comfortably within [Fifth Circuit] precedents." *Id.* at 205 n.3 (citations omitted). Under those precedents, among other holdings, "[a]n organization suffers an injury in fact if a defendant's actions 'perceptibly impair[]' the organization's activities and consequently drain the organization's resources." *Vote.Org* v. *Callanen*, 89 F.4th 459, 470 (5th Cir. 2023) (quoting *El Paso Cnty.* v. *Trump*, 982 F.3d 332, 343 (5th Cir. 2020)); *see also OCA-Greater Houston* v. *Texas*, 867 F.3d 604, 610 (5th Cir. 2017).

Notably, the Fifth Circuit's decisions in *Wetzel*, *OCA-Greater Houston*, and *Vote.Org* concerned the application of the resource diversion theory of standing to *organizations*, as opposed to individuals like Petitioners. However, this distinction does not undermine Petitioners' claim for standing here but rather supports it. Indeed, this Court is more skeptical of organizational standing than individual standing, having rejected a general theory "that all the organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies." *FDA* v. *All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024). But this is not at all the case here, where Petitioners allege direct, personal monetary injuries.

Moreover, even when rejecting a general resource diversion theory for organizational standing, this Court noted that the diversion of resources *could* constitute an injury when a defendant's actions "directly affected and interfered with [plaintiff's] core business activities." *Id.* That is precisely the case here, where Illinois's unlawful ballot-receipt scheme interferes

with Petitioners' "core business" as candidates (winning elections), and causes them to divert resources to remedy such interference.

As such, it stands to reason that resource diversion by an individual should afford standing where, as here, the same injury by an organization would establish Article III standing even under the tightened standard from *Alliance for Hippocratic Medicine*. If an organization's resource diversion to protect its core activities is a cognizable injury-in-fact, then surely a federal candidate's resource diversion to protect his core activity—winning elections—is too.

C. Political Candidates Have a Cognizable Interest in an Accurate Vote Tally, and They Suffer a Cognizable Injury When Unlawful Votes Are Counted

In the decision below, the Seventh Circuit rejected Petitioners' argument that their Article III standing was also supported by their "interest in ensuring that the final official vote tally reflects only legally valid votes." *Bost*, 114 F.4th at 643. Specifically, the Seventh Circuit questioned Petitioners' reliance on *Carson* v. *Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020), which held that candidates have a "cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast," and referenced Judge Kelly's dissent in *Carson* to suggest that the decision was not, in fact, "consistent with [this Court's] holding in *Lance*." *Bost*, 114 F.4th at 643 (citing *Carson*, 978 F.3d at 1063 (Kelly, J., dissenting)).

This suggestion is incorrect. In *Lance* v. *Coffman*, 549 U.S. 437, 442 (2007), this Court held that it was insufficient for standing when the "only injury plaintiffs allege is that the law—specifically the Elections

Clause—has not been followed." The Court went on to specify that a not-following-the-law injury "is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." *Id.* (citing *Baker* v. *Carr*, 369 U.S. 186, 207–208 (1962)). However, in *Baker* v. *Carr*—the aforementioned example of a case where there *was* standing—the Court said: "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, *when such impairment resulted from dilution by a false tally*; or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box." 369 U.S. at 208 (internal citations omitted) (emphasis added).

This Court has thus *already* held that dilution via false tally is more than just a generalized grievance for *voters*. Where, as here, a *candidate* plausibly alleges that Respondents' receipt and counting of late-arriving ballots dilutes the value of his or her lawfully cast votes, *see* Pet.App.88a–89a, it stands to reason that the candidate ought to have standing as well.

Indeed, this is precisely why the Eighth Circuit properly recognized that candidates have a "cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast." *Carson*, 978 F.3d at 1058. And the Eighth Circuit is hardly alone in this conclusion: More recently, the D.C. Circuit found that a group of plaintiffs, which consisted of individual voters and several candidates, had suffered cognizable injuries when the "power of their ballots" was diluted. *Hall* v. *D.C. Bd. of Elections*, 2025 U.S. App. LEXIS 15191, at *10 (D.C. Cir. June 20, 2025). Far from being a generalized grievance, these

injuries turned "exclusively on their individual votes and the power attached to these votes in the D.C. local elections." *Id.* It would then follow that if a voter was found to be injured because the "power of their ballots" was decreased, a candidate's injury would be far greater. *See id.* This is because candidates, such as Congressman Bost, Susan Sweeney, and Laura Pollastrini are the direct beneficiaries of such a "power." And, as this Court has recognized in other contexts, non-speculative "downstream" injuries may be cognizable. *See All. for Hippocratic Med.*, 602 U.S. at 384–85 (2024) (collecting cases).

As Judge Scudder highlighted in his dissent, the Seventh Circuit has itself previously recognized that "[a]n inaccurate vote tally is a concrete and particularized injury to candidates," and even favorably quoted *Carson* when doing so. *Bost*, 114 F.4th at 645 (Scudder, J., dissenting) (quoting *Trump* v. *Wisconsin Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020) (quoting *Carson*, 978 F.3d at 1058)). Oddly enough, however, Judge Scudder's dissent contains the only reference to this holding in the decision below, which does not otherwise explain why a candidate—who has a direct interest in the lawful and accurate administration of his election contest and is perhaps the best plaintiff to challenge unfair elections laws—should not have standing to ensure that only legal votes are tallied. *Cf. Lujan*, 504 U.S. at 573–74 (defining a generalized grievance as one where the injured party is "claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him that it does the public at large").

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The Seventh Circuit's decision below was egregiously wrong. Not only did the panel majority break with her sister circuits in rejecting competitive political standing, it also ham-fistedly rejected Petitioner's straightforward theory of standing via monetary harm and resource diversion. The panel majority further erred in rejecting Petitioners' cognizable interest as candidates in an accurate vote tally.

Due to these errors, the Seventh Circuit essentially made it impossible for *anyone* to have standing to challenge unlawful election statutes—let alone candidates, who have the most acute interests in election administration. This Court should restate what is obvious to many other federal courts and reverse.

II. The Seventh Circuit's Errors Improperly Denied Review of Petitioners' Meritorious Challenge to Illinois's Unlawful Election Procedures

States like Illinois have brazenly chosen to disregard Congress's nearly two-century-long practice of having a uniform Election Day.[4] This disregard illustrates the unjust implications of the Seventh Circuit's

[4] More than a dozen other states count mail-in ballots that are received after Election Day, although they differ widely on the number of days after Election Day ballots received can be counted. Some states count late arriving mail-in ballots until 5 pm the following day, and others, like Illinois, have a much more fluid concept of Election Day. *See Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots (last updated June 16, 2025). Washington State even allows ballots to be received 21 days after a general election. *See* Wash. Rev. Code § 29A.60.190.

decision to foreclose Petitioners' efforts to challenge a legal scheme that openly contradicts federal law.

While this Court has addressed related issues in the past, it will eventually have to provide greater clarity again, as challenges to state laws beyond the challenge to Illinois's law here continue to percolate in the courts below. Indeed, an analysis of duly enacted federal legislation, this Court's precedents, and constitutional intent makes it abundantly clear that post-Election Day voting is impermissible in American federal elections.

A. Congress and this Court Have Already Decided the Underlying Merits of this Case

Congress set a single uniform day for federal elections: The "day for the election" for selecting members of the House of Representatives and Senate is the "Tuesday next after the 1st Monday in November." 2 U.S.C. § 7; *see id.* § 1. Likewise, 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." 3 U.S.C. § 1.

In *Foster*, this Court clearly explained what must occur under federal law by the end of Election Day for votes to be valid: the completion of the "combined actions of voters and officials meant to make a final selection of an officeholder." 522 U.S. at 71 (emphasis added); *accord id.* at 72 (Election Day is when "the final act of selection" must take place); *Voting Integrity Project, Inc.* v. *Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001) (noting that the Court in *Foster* held "that the word 'election' means a 'consummation' of the process of selecting an official"). Of course, *Foster* was not the first time this Court has addressed this issue. *See*

McPherson v. *Blacker*, 146 U.S. 1, 35 (1892) ("Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States.").

The *Foster* Court found that Louisiana's law, which provided for an open primary election that could result in a winner being chosen *before* the Election Day, violated federal law governing Election Day because, "if an election does take place, it may not be *consummated* prior to federal election day." 522 U.S. at 74 n.4 (emphasis added). Here, Illinois seeks to consummate its election process two weeks *after* Election Day. That is unlawful under *Foster*. While tabulation of ballots received by Election Day may occur after Election Day, *receipt* of a ballot by election officials is one of the official actions required for a voter to make their selection. Thus, if receipt occurs after Election Day, then the vote is untimely and invalid. *See e.g.*, *Wetzel*, 120 F.4th at 208.

As this Court articulated, "[b]y establishing a particular day as 'the day' on which these actions must take place, the statutes simply regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say." *Foster*, 522 U.S. at 71–72. In *Foster*, Louisiana errored by attempting to declare the election over *before* Election Day. Here, Illinois has attempted to extend the election until *after* Election Day. In both instances, the state violates federal law by ignoring "the day" Congress has set for consummating an election. It thus stands to reason, if a state may not consummate its election *before* Election Day, then it cannot consummate its election *after* Election Day.

B. It Is Clear and Unambiguous that Election Day Occurs on, Not After, the "Tuesday Next After the 1st Monday in November"

In *Foster*, this Court did not find it necessary to analyze congressional intent to understand the meaning of "Election Day," but this Court's judgment was "buttressed by an appreciation of Congress's object 'to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States.'" *Id.* at 73 (quoting *Ex parte Yarbrough*, 110 U.S. 651, 661 (1884)). The Court was correct not to find it necessary to analyze Congress's intent given the plain meaning of the statute; doing so here would illustrate the absurdity of having states disregard the clear meaning of Election Day.

Congress has also enacted limited exceptions on when the period of voting may be modified after Election Day. *See Wetzel*, 120 F.4th at 211–13 (illustrating that Congress understands how to make exceptions to alter the usual federal deadline). Under the *expressio unius* canon, when Congress explicitly enumerates exceptions to a general prohibition, additional exceptions should not be implied unless there is evidence of contrary legislative intent. *See Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980). Since Election Day was established, Congress has carefully enumerated when states or federal officials may deviate from "the day" chosen by Congress, and specifically when such deviations may occur post-Election Day. *See Wetzel*, 120 F.4th at 211–13.

Moreover, Congress has previously considered and subsequently rejected an amendment to 2 U.S.C. § 7 that would have permitted states to continue voting

after Election Day. *See Keisling*, 259 F.3d at 1173 n.42 (quoting Cong. Globe, 42d Cong., 2d Sess. 676 (1872)). This Court has long held that the *expressio unius* canon does not apply to every statutory grouping unless Congress excluded it deliberately. *See Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (*expressio unius* "does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence" (quoting *United States* v. *Vonn*, 535 U.S. 55, 65 (2002))).

Beyond a plain reading of the text, applying key tools of statutory construction makes it clear that continuing to allow Illinois to vote post-Election Day violates federal law.

C. The Framers Intended for Congress to Establish a Uniform Election Day

Congress's establishment of Election Day is aligned with the Framers' intended application of the Elections Clause. Like most provisions of the U.S. Constitution, the Elections Clause was subject to impassioned debates between the Federalists, who sought to expand the powers of the National Legislature, and the Anti-Federalists, who sought to restrain it. *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 340–48 (2016) (discussing arguments for and against the Elections Clause). The Elections Clause was carefully revised throughout the Constitutional Convention until the Framers ratified the current compromise language. Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause,* 96 WASH. L. REV. 997, 1005–06 (2021).

The compromise text vests significant authority regarding "[t]he Times, Places and Manner" of holding federal elections in the states, but it still allows Congress to "make or alter such Regulations." U.S. CONST. art. I, § 4, cl. 1. In *Federalist No. 61*, Alexander Hamilton emphasized the Framers' clear intent to establish a uniform date for elections to Congress; he cautioned that allowing each state to set its own election schedule would undermine national cohesion and permit the entrenchment of factional interests. *The Federalist No. 61*, at 375–76 (Clinton Rossiter ed., 1961). Thus, uniform federal election timing was not merely administrative, but a structural protection for the public good and the integrity of representative government. *See id.*

Hamilton's arguments were shared by other Framers during the ratification debates. For example, Thomas McKean, in the final stages of the Pennsylvania Ratifying Convention, defended Article I, § 4, arguing that "[elections] ought to be uniform, and the elections held on the same day throughout the United States to prevent corruption or undue influence." *Documentary History of the Ratification of the Constitution* 537 (Merrill Jensen et al. eds., 1976–present), *available in* U. Va. Rotunda Database.

The Framers were right. And that is why Congress used its constitutional authority to establish Election Day. This Court correctly decided *Foster* because the text of the Election Day statutes is clear, as is the Framers' intent to create a single, uniform voting date. The only thing that is unclear is why some states have recently departed from a nearly two-hundred-year common understanding of Election Day—and why the Seventh Circuit rejected the counsel of her

sister circuits and the precedents of this Court to deprive those harmed by such departures of the opportunity to seek judicial review.

CONCLUSION

For the forgoing reasons, this Court should reverse the decision of the Seventh Circuit.

Respectfully submitted,

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