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

AMICI CURIAE BRIEF OF PA FAIR ELECTIONS, MICHIGAN FAIR ELECTIONS INSTITUTE, AND WISCONSIN VOTER ALLIANCE IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICI CURIAE[1]

Three groups in the states of Pennsylvania, Michigan, and Wisconsin are amici curiae supporting Congressional candidate standing.

First, Pennsylvania Fair Elections (PAFE) is an association of Pennsylvania voters dedicated to election integrity and election official legal compliance. PAFE is led by a committee of Pennsylvania volunteers. PAFE members regularly meet to discuss election matters and train its members to serve in various roles in the election process. PAFE members have coordinated statewide efforts to restore confidence in Pennsylvania elections. PAFE has sponsored reports on election official legal compliance. PAFE has been involved in litigation seeking election official legal compliance and government transparency.

Second, Michigan Fair Elections Institute (MFEI) is an educational non-profit organization and Patrice Johnson is its Chairperson. Since the organization's founding in 2022, MFEI volunteers have formed local chapters and task forces in more than half the State of Michigan's 83 counties. MFEI operates according to two pillars, election oversight and educational outreach, and it strives to protect

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[1] Pursuant to Sup. Ct. Rule 37.6, no counsel for any party authorized this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel made any monetary contribution to its preparation or submission.

voter rights, government transparency, checks and balances, and ethics in elections. MFEI is a nonpartisan organization that welcomes all who support election integrity and the U.S. and Michigan Constitutions.

Third, Wisconsin Voter Alliance (WVA) is a Wisconsin non-profit corporation. Ron Heuer is its President. WVA's vision statement is "[t]o facilitate and coordinate restoration of voting integrity in the State of Wisconsin." WVA's mission statement is "to effect change to law and policies surrounding elections. We will accomplish this goal by creating multi-faceted objectives to restore voter confidence, and integrity in the election process." WVA uses the following means to accomplish its goals: educating the public and elected officials; working to establish best election practices; identifying and encouraging debate on election policy and law; and encouraging fairness during elections.

PAFE, MFEI, and WVA have an interest in the policy and legal implications regarding federal candidate standing as implicated in the Petitioners' questions presented and as amici curie, file this brief on behalf of Petitioners.

SUMMARY OF THE ARGUMENT

The amici curiae assert that the doctrine of competitor standing applies to Congressional candidate Michael Bost. Bost has a concrete and particularized interest in ensuring that the final vote tally of an election contest accurately reflects the legally valid votes cast. State laws and election officials' policies that fail to exclude untimely, and thus invalid cast ballots present an actual harm to the Congressional candidate's legally protected interest from injury resulting from an inaccurate vote tally due to an illegally structured competitive environment established under state law. Illinois's extension of ballot receiving and counting ballots after the Election Day violating federal law has injured candidates as competitors. Candidates are injured when a state law violates a federal law to overextend the game clock into forced overtime while setting a rule that favors one party over the other.

Likewise, enforcing federal Election Day deadlines as a baseline rule for ballot receipt does not disenfranchise our military voters under the UOCAVA Act. This amici curiae brief in support of the Petitioners and the idea that federal candidates have standing in federal court to enforce federal elections laws when state laws and election officials' policies fail to exclude invalidly cast ballots.

ARGUMENT

The amici curiae PAFE, MFEI, and WVA urge the Court to determine that federal candidates have standing as competitors with a particularized competitive injury when state election officials are violating federal election law resulting in invalid ballots being counted in the final tally.

I. Michael Bost, as a federal candidate, claimed a competitive injury-in-fact based on Illinois election officials creating an illegally-structured competitive environment but the Seventh Circuit erred in rejecting Bost's claim as "speculative."

Michael Bost was a candidate for political office in 2024 and is a multiterm member of the United States House of Representatives. In May 2022, Congressman Bost along with the other Petitioners filed this suit against the Illinois State Board of Elections ("Board") and Bernadette Matthews in her official capacity as the Executive Director of the Board (collectively "Board"). The Petitioners alleged that the Illinois ballot receipt procedure impermissibly extends Election Day and thereby violates the "Election Day Statutes," which include 2 U.S.C. § 7 (establishing the uniform day for the federal elections) and 3 U.S.C. § 1 ("electors... shall be appointed, in each state on election day….).

The Petitioners' theory of the case was that the 14-day post-election period for the receipt and counting of mail-in ballots increases the number of total votes cast in Illinois by counting untimely

ballots. *Bost v. Illinois State Board of Elections*, 114 F.4th 634, 639 (7th Cir. 2024). Bost argued standing on several bases, including the competitor standing doctrine, which is this amici curiae brief's central focus.

The Seventh Circuit rejected Bost's competitor standing doctrine argument. However, the court misframed Bost's injury. The court opined that Bost could only speculate as to which candidates would benefit from invalid, untimely ballots cast:

> Plaintiffs also argue that the ballot receipt procedure imposes an intangible "competitive injury." This theory posits that allowing votes to be received and counted after Election Day could decrease their margin of victory, which, in turn, could impact their reputations and decrease their fundraising… The problem is that 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.

Bost, 114 F.4th at 643. The court's conclusion is inconsistent. On one hand it framed "competitive injury" as speculative, while on the other it acknowledged they had recognized similar injuries to competing politicians in the past: "We have recognized similar types of injuries involving politicians in other circumstances." *Id.* (citing and quoting *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) "(holding

that a third party and its candidates faced the injury of "increased competition" when the defendants allegedly improperly placed major-party candidates on the ballot)").

In rejecting Bost's competitor standing argument, the Seventh Circuit failed to acknowledge the actual nature of the injury that the counting of untimely (and thus invalid) ballots has a direct effect on the outcome of any election.

Illinois' post-election contest procedures never reveal for whom invalid, untimely ballots were cast. *See, e.g.*, 10 ILCS 5/Art. 23. In Illinois, post-election procedures generally involve and only allow for *recounting* the ballots already counted:

> *Election contest - Statewide - Procedures for recount and initial hearing.* In all cases for which the Supreme Court finds it appropriate that there be conducted a recount or partial recount of ballots cast in any election jurisdiction, or a hearing regarding the conduct of the election within any election jurisdiction, the Supreme Court shall, in consultation with the Chief Judge of the Judicial Circuit in which each such election jurisdiction is located, assign a Circuit Judge of that Judicial circuit to preside over the recount or hearing.

10 ILCS 5/Art. 23, Sec. 23-1.8a (italics added). So, after the election, because timely and untimely ballots are comingled as votes counted, little opportunity exists for Bost to challenge untimely ballots being

counted in court or otherwise. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). Hence, for all intents and purposes, there is no post-election procedure to remedy the Illinois election officials illegally accepting untimely ballots and counting them in the final tally.

Consequently, a federal candidate, including Bost, after the election, is left without remedy to correct untimely ballots being counted. So, the Seventh Circuit statement, "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," applies post-election as well. Because the count of timely ballots as of Election Day is different than the vote tally that includes untimely-received ballots after the Day, any difference in number is an injury because the outcome is different. In Illinois, federal candidates may never know after the election which candidate was favored by the counting of untimely received ballots versus timely ballots counted after the Day. For this reason, the injury from the invalid, untimely ballots being counted at all is not "speculative" as the Seventh Circuit held. Rather, the alleged injury is certain to occur so long as the practice continues.

Further, the Seventh Circuit erred in failing to recognize that the competitor standing doctrine turns on whether there is an illegally-structured competitive environment. Bost, as a federal candidate, alleged an illegally-structured competitive environment causes a change in the federal candidates' final vote tallies, based on the Board's acceptance of untimely, and thus invalid, ballots in violation of the Election Day statutes, 2 U.S.C. § 7 and 3 U.S.C. § 1. This description

of the federal candidate's injury-in-fact is not speculative. The time to challenge unfair, unlawfully-structured election competition rules is, as Bost has, while heads are cool, between election contests and seasons.

II. Competitor standing doctrine should be recognized to apply to federal candidates by this Court.

The competitor standing doctrine provides a frame to examine the Petitioners' alleged standing injury.[2] The competitor standing doctrine is a legal principle applied (typically) in economic situations. It allows a direct market competitor to sue in federal court to challenge an agency's decision if the decision could negatively impact the competitor's business. *See* 2 Am. Jur. 2d Administrative Law § 38. Competitor standing doctrine is "well-established." Comment, *Mendoza v. Perez,* 754 F.3d 1002 (D.C. Cir), *reh'g denied*, No. 13-5118 (D.C. Cir. 2014). This Court first

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[2] The Court's well-known standard for article III standing sets forth an "irreducible constitutional minimum" of three elements that a plaintiff must satisfy: (1) "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court[,]" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations omitted); *Manuel v. NRA Group LLC*, 722 Fed. Appx. 141 (3rd Cir. 2018).

recognized the modern competitor standing doctrine in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970). In that case, the Court had "no doubt" that the plaintiff suffered "injury in fact" because the alleged increased competition "might entail some future loss of profits." *Id.* Of course, when evaluating any form of standing, one must not "confus[e] weakness on the merits with absence of Article III standing." *Davis v. United States,* 564 U.S. 226, 249, n.10 (2011). *See Warth v. Seldin,* 422 U.S. 490, 500 (1975) (standing "often turns on the nature and source of the claim asserted," but it "in no way depends on the merits" of the claim); *Arizona State Legislature v. Arizona Independent Redistricting Com'n*, 576 U.S. 787, 800 (U.S. 2015).

The competitor standing doctrine can apply to more than commercial competition types of rivalry, including athletes and as this brief argues, federal candidates. *Humane Soc'y of the United States v. United States Dept. Agric.*, 41 F.4th 564, 568 (D.C. Cir. 2022) (applying competitor standing to athletic competition); *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 87 (D.C. Cir. 2005) (applying competitor standing to candidates for political office).

Notably, the competitor standing doctrine specifically recognizes injuries that result from being forced to participate in an "illegally structure[d] competitive environment," *Shays*, 414 F.3d at 87, is a type of harm that the federal courts have identified in a variety of different contexts, *see, e.g., City of Los Angeles v. Barr*, 929 F.3d 1163, 1173 (9th Cir. 2019) ("[The] inability to compete on an even playing field

constitutes a concrete and particularized injury."); *Preston v. Heckler*, 734 F.2d 1359, 1365 (9th Cir. 1984) ("[W]hen challenged agency conduct allegedly renders a person unable to fairly compete for some benefit, that person has suffered a sufficient 'injury in fact' and has standing ....").

As an example, the competitor standing doctrine was explained and applied to politicians who were candidates in *Shays*. In *Shays*, the D.C. Circuit held that members of the United States House of Representatives fell within the "zone of interests" protected by Bipartisan Campaign Reform Act (BCRA). The *Shays* Congressional representatives had constitutional standing to challenge Federal Election Commission (FEC) regulations implementing the BCRA: Members alleged that they suffered injury to their competitive interests, protected by BCRA, in seeking reelection through contests untainted by BCRA-banned practices. The court found their injury was fairly traceable to the FEC regulations allowing what BCRA prohibited, and that their injuries could be redressed through favorable decision invalidating the regulations. *Shays*, 414 F.3d at 87; U.S. Const. Art. 3, § 2, cl. 1; Bipartisan Campaign Reform Act of 2002, § 1 et seq., 116 Stat. 81. In its *Shays* ruling, the D.C. Circuit explained the competitor standing doctrine as an illegal structure in a competitive environment when a law seeks to protect a completive interest:

> Likewise indicating that illegal structuring of a competitive environment injures those who are regulated in that environment, longstanding precedent

> establishes that when a statute "reflect[s] a legislative purpose to protect a competitive interest, [an] injured competitor has standing to require compliance with that provision."

Shays, 414 F.3d at 85–86 (quoting *Hardin v. Ky. Utils. Co.,* 390 U.S. 1, 6 (1968)). Based on competitor standing, the Congressional members eventually prevailed on their claims. *Shays,* 414 F.3d at 115.

Federal law establishes Election Day—a law that protects the competitive interests of all candidates on a level playing field. Thus, state election officials failing to exclude invalidly cast ballots cause an actual, imminent invasion of Bost as a Congressional candidate's legally protected interest. An inaccurate vote tally is a concrete and particularized injury to a federal candidate. *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). Essentially, if an allegedly unlawful election regulation makes the competitor landscape illegal for a candidate, and it would otherwise be legal if the regulation were declared unlawful, those injured parties have the requisite, concrete, non-generalized harm to confer standing. *Mecinas v. Hobbs*, 30 F.4th 890, 898 (9th Cir. 2022).

a. Bost suffered competitive injury from Illinois's illegally structured election rules that give an advantage to Bost's competitors.

There are similarities between athletic competitive injuries and federal candidate competitive injuries that should award Article III standing in

federal court. Colloquial use of the English language reflects the parallel between sports and federal elections. For example, those writing about elections often refer to multiple candidates as a "field" of candidates and call the competition between candidates a "race." *See e.g.*, Denise-Marie Ordway, *'Horse race' reporting of elections can harm voters, candidates, new outlets; what the research says*, THE JOURNALIST'S RESOURCE (Oct. 23, 2023),[3] (rounding-up research about news stories related to framing elections as competitive games, and specifically, using horse racing analogies).

The D.C. Circuit recently found a concrete, pecuniary injury for the Humane Society members challenging U.S. Department of Agriculture rule changes which eliminated protections to horses such that trainers who desired to continue not to "sore" their horses were "unable to compete with trainers who sore their horses with impunity." *Humane Soc'y of the United States v. United States Dept. Agric.*, 41 F.4th 564 (D.C. Cir. 2022). In that case, the Department of Agriculture changed a rule that created an unfair advantage for those that were willing to (in the Humane Society's view) abuse their horses in a way others objected to. *See id.* Theoretically, the humane society trainers could have chosen to violate their beliefs in order to have the same advantage as those trainers who would sore their horses. But, the D.C. Circuit nevertheless acknowledged that the changed rule was a direct

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[3] https://journalistsresource.org/politics-and-government/horse-race-reporting-election/#:~:text=It's%20a%20common%20strategy%20for,other%20parts%20of%20the%20globe

cause and non-speculative link of the Humane Society trainer's disadvantage.

Candidates running for federal office are certainly competitors who like athletes in competitive games or races, and market competitors compete against each other to win the votes of their prospective constituents in the election.

Applying competitor standing to election candidates lends to a common-sense parallel analysis through the competition frame. Like companies in the economic marketplace, or athletes competing in a sport, election candidates are competing for points in the election game, that is, legitimate votes from the people they are competing to represent. Candidates have a particular interest in the rules of elections being fair, and level across the election playing field, which requires adherence first with federal law, which preempts state law and election administration. A company would be competitively injured if the government put forth a regulation that targeted one company for enforcement over another. An athlete would be injured if the local division rules violated the overarching baseline rules for the sport by requiring athletes competing in one city to play overtime when the baseline rules do not allow overtime play or extra innings. A runner would be competitively injured if she trained for a 100-meter race as dictated by a national runners' governing board if the state-level board extended that same "100-meter" race to actually require 125 meters. Here, Illinois's extension of ballot receipt has injured candidates as competitors in the same ways as such companies or athletes. Candidates are injured when a state law violates a federal law to

overextend the game clock into forced overtime while setting a rule that favors one party over the other.

A number of circuit courts (notably, the Fourth, Sixth, and Eighth) have also come to the conclusion that federal candidates and other election participants have competitor standing when forced to compete in an illegally-structured competitive environment. *See Carson*, 978 F.3d at 1058; *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 suffered a qualifying injury-in-fact for standing to challenge a ballot order statute because they were "subject to the ballot-ordering rule" and the parties supported candidates "affected by" the law); *see also Nelson v. Warner*, 12 F.4th 376, 384 (4th Cir. 2021) (candidate had standing to challenge ballot order statute that "allegedly injure[d] his chances of being elected").

Particularly, in *Carson,* 978 F.3d at 1057, the Eighth Circuit recognized that the federal candidates, specifically presidential electors (much like Bost's fellow petitioners in the present case, Laura Pollastrini and Susan Sweeny), had a cognizable interest in ensuring that the final vote tally accurately reflect[ed] the legally valid votes cast. *Id.* An inaccurate vote tally is a concrete and particularized injury to federal candidates. *Id.* Indeed, federal candidates like Bost rely upon an accurate vote tally to achieve at least a claim to hold the federal office they seek. A count of votes that includes invalid ballots

is a particularized harm to the federal candidate. Of note, because no post-election process or procedure exists to identify and remove invalid tallied ballots, the harm cannot be undone in a post-election challenge.

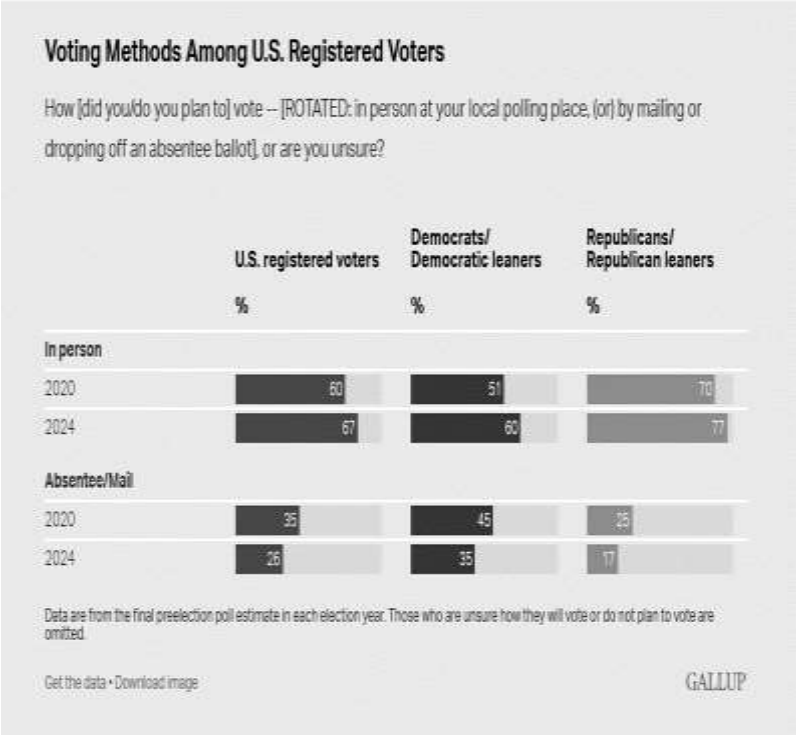
Due to the invalid and untimely counting of ballots, Michael Bost, as a federal candidate, was forced to operate in an illegally-structured competitive environment. Under the doctrine of competitor standing, federal candidate Michael Bost has a concrete and particularized interest in ensuring that the final vote tally accurately reflects the legally valid votes cast.

In this case, Congressional candidate Michael Bost's alleged inaccurate final vote tally injury flows directly from the Board's violations of 3 U.S.C. § 1. The Congressional candidate's inaccurate final vote tally is caused by the Board's 14-day post-election period for the receipt and counting of mail-in ballots increasing the number of total votes cast in Illinois by counting "untimely" ballots in violation of 3 U.S.C. § 1. The Seventh Circuit held that such action did not cause Article III injury because the harm was of a "speculative nature." *Bost*, 114 F.4th at 643. But, the Seventh Circuit erred in its conclusion the injury was of "speculative nature."

b. Bost suffered economic, "pocketbook" competitive injury as a direct result of Illinois' extension of Election Day receipt and counting of ballots.

The Candidate as a competitor bears the costs differently than the general public because the

competitor has a specific interest in the election that is not shared even by his individual supporters. Bost's pocketbook (economic) injury-in-fact claims include that the unlawful extension of Election Day forces him to expend significant resources after that day is likewise, not of a speculative nature because, as one report concluded, Democrats in the 2020 election voted by mail-in ballot more frequently than Republicans. According to the Gallup Poll, in 2024, 35% of Democrats voted by mail, but only 17% of Republicans did. In 2020, 45% of Democrats voted by mail, but only 25% of Republicans did. It is public knowledge that Democrats disproportionately vote by mail over Republicans, thus, extending the deadline for receipt of ballots by mail past Election Day favors Democrat candidates over Republican candidates.



See Jeffrey M. Jones, More than Half of U.S. Votes Likely Cast Before Election Day, GALLUP (Oct. 31, 2024), https://news.gallup.com/poll/652853/half-votes-likely-cast-election-day.aspx. Just as the Humane Society horse-racers had the option to "sore" their horses when the competitive rules changed, Bost could theoretically have the option not to spend money on post-Election Day poll-watching to identify post Election Day deadline receiving and counting of untimely ballots. But, knowing there is a competitive discrepancy in preferred voting methods between different segments of voters, it would be obviously foolish for a candidate to neglect to continue to watch the polls.

The Seventh Circuit failed to recognize the impact of untimely mail-in ballots—a preferred method of voting by a section of voters—over that of voters abiding by Election Day Deadlines. On that basis, Congressional candidate Michael Bost was injured by the election officials' illegal acceptance of untimely mail-in ballots.

The Seventh Circuit, unlike the Eighth Circuit, claims that the federal candidates must prove, prior to the election, that the election officials' misconduct injures them in a specific way. But, the Seventh Circuit errs because the rules of fair competition requires Illinois to follow all the preemptive federal rules and the laws of elections. Federal election law sets the baseline rules of fair competition, it is necessary that officials disregard invalid ballots and count all valid ballots. The injury to the federal candidates, here Congressional candidate Bost, flows from the election officials counting the untimely, invalid ballots and including the invalid ballots in the final vote tally to determine the election's winner. The extension directly led to Bost expending more money and personnel resources than he otherwise would have, depleting his pocketbook. Thus Bost's injuries flowing from Illinois' extension of the ballot receipt deadline include economic pocketbook injuries that he would not incur but-for Illinois extension in contravention of the federal baseline rules of election play.

c. Bost's competitive injuries are traceable and redressable by the courts.

Additionally, Congressional candidate Bost meets the causal-connection requirement because his injury is directly traceable to the respondents' actions in extending the Election Day deadlines. "A causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560-61. Further, Bost's alleged injury is not to a third party. The injury is to candidate Bost himself.

In *Carson*, the Eighth Circuit found a causal connection based on a state court's consent decree (conduct attributed to Minnesota Secretary of State Steve Simon) extending the deadline for counting absentee ballots beyond Election Day:

> Next, the Electors meet the causal-connection requirement because the injury flows from the challenged conduct (the Secretary's policy).

Carson, 978 F.3d at 1058.

Also, the Congressional candidate Michael Bost's inaccurate final vote tally injury flows from the Board's violations of the Election Day statutes in 2 U.S.C. § 7 and 3 U.S.C. § 1. The Congressional candidate's inaccurate final vote tally is "fairly traceable" to the Board's 14-day post-election period for the receipt and counting of mail-in ballots

increasing the number of total votes cast in Illinois by counting "untimely" ballots in violation of 2 U.S.C. § 7 and 3 U.S.C. § 1.

Finally, a favorable court decision for Bost will redress his injury because only valid votes will be counted in the Congressional candidate's final vote tally, making the election's results accurately reflect the legally valid votes cast. A court injunction, as a redressable remedy, will resolve the Congressional candidates' injuries. *See Carson*, 978 F.3d at 1058.

III. Federal rules of fair competition for elections preempt and bar election official illegalities casting doubt on or changing election outcomes by counting untimely ballots.

Playwright Tom Stoppard wrote, "It's not the voting that's democracy; it's the counting." Tom Stoppard, *Jumpers* (1972). This line emphasizes that the essence of a true democracy rests not just in voting but in the fair and accurate counting of those valid votes. This principle of election integrity seeks to ensure every individual's voice is heard and represented and indicates the significance of transparency and procedural integrity in a democratic system. In a true democratic election, officials counting valid votes follow rules of fair competition.

The election officials' rules to disregard invalid ballots and accurately count valid ballots are consistent with the rules of fair competition applied to elections.

Fair competition law in the commercial sphere is a set of rules that prohibit business practices that

restrict free trade and competition and promote transparency. These rules include prohibitions against false claims; improper interference; price fixing; illegal boycotting; misuse of market power; predatory practices; exchanging confidential information; inducing employees to disclose information. Fair competition rules also include requirements to follow competition and consumer protection law; report suspected violations; and, report suspected violations of competition and consumer protection laws. Federal laws that ensure fair competition include the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Robinson-Patman Act.

Of course, where lawfully-enacted federal law and state law or policy conflict, the federal law is supreme and preempts the state law. This Court has held that "[i]t is apparent that this Clause creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance thereof,' as 'the supreme Law of the Land.' They must not give effect to state laws that conflict with federal laws." *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324 (2015), quoting *Gibbons v. Ogden*, 210, 6 L.Ed. 23 (1824).

Similarly, federal and state laws exist in the election sphere, to ensure fair competition in elections—including deterring election official misconduct. For example, the Help America Vote Act, 52 U.S.C. §§ 20901–21145 requires states to establish a procedure for voters to lodge complaints against election officials concerning the voting process. Specifically, states receiving HAVA funds must

establish administrative procedures so that "…any person who believes that there is a violation of any provision of Title III (including a violation which has occurred, is occurring, or is about to occur) may file a complaint."

Consistently, Georgia and Arizona have state post-election contest laws authorizing a new election if election officials' counting of the votes cast doubt or change a close election result. Georgia's post-election contest law provides that an election result may be contested on election officials' misconduct, fraud or irregularities: "A result of a primary or election may be contested on one or more of the following grounds: (1) Misconduct, fraud, or irregularity by any primary or election official or officials sufficient to change or place in doubt the result…" Ga. Code § 21-2-522. Arizona's post-election contest law provides that any elector of the state may contest the election of any person, that is, an election result may be contested on election officials', including election board misconduct. Ariz. R. Stat. § 16-672. Wisconsin likewise provides post-election administrative review for any election official action "contrary to law," which if appropriate, may include treating the matter as a contested case hearing. Wis. Stat. § 5.06.

The Elections Clause's specification of who makes the laws regulating federal elections is an example of a rule of fair competition. The U.S. Constitution's Elections Clause delineates that the state legislatures regulate times, places and manner of federal election subject to Congressional enactments:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const., Art. IV, sec. 1. The Election Clause's delineation of who makes the laws regulating federal elections is an example of a rule of fair competition.[4] The Election Clause's text guards against executive encroachments on Congress's and the state legislatures' law-making authority to regulate federal elections. Where there are executive encroachments on the legislative powers of Congress and the state legislatures, there is violation of the rule of fair competition codified in the Elections Clause.

Three cases from this court illustrate that the Election Clause is a rule of fair competition for elections. In each of these cases, the Court has been careful to delineate the legislative powers for regulating federal elections and the limitations that apply. First, in *Moore v. Harper*, 600 U.S. 1 (2023), the Court held that the federal Elections Clause does not vest exclusive and independent authority in state legislatures to enact laws regarding federal elections. Therefore, this Court concluded that the North Carolina Supreme Court was not barred from

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[4] Recall that some laws ensuring fair competition are not codified while others are codified such as the Sherman Act, 15 U.S.C. §§ 1-7, the Clayton Act, 15 U.S.C. §§ 12-27, the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, and the Robinson-Patman Act, 15 U.S.C. § 13.

reviewing that state's legislature's Congressional districting plans for compliance with North Carolina law. Consistently, in so doing, this Court recognized that the state legislature's "particular authority" under the Electors Clause is subject to state constitutional limitations (e.g., Governor's veto) and federal and state judicial authority.

Second, in *Smiley v. Holm,* 285 U.S. 355 (1932), the Court confirmed the function of a state legislature in prescribing the times, places, and manner of holding elections for representatives in Congress under the U.S. Constitution, article. I, § 4. The state legislature performs in a lawmaking function in which the veto power of the state governor participates, if the governor has that authority under the state constitution.

Third, in the other 1932 case, *Koenig v. Flynn*, 285 U.S. 375(1932), this Court held that a concurrent resolution of New York's bicameral legislative body redistricting state not submitted to and approved by Governor was legally ineffective. This case is consistent with the *Moore* decision that there are state constitutional limits on the state legislature's law-making authority under the Elections Clause. In *Koenig,* the state constitutional limitation on the state legislative authority upheld was the presentation of the legislatively-passed bill to the Governor for approval (signature) or veto.

In these cases, this Court consistently recognized the Elections Clause's constitutional importance. The Elections Clause is a rule for federal election law-making to ensure a fair competition

among federal candidates. When the Elections Clause is violated, the rule of fair competition is violated. And, the affected federal candidate suffers an injury-in-fact. The affected federal candidate in this case is Michael Bost. His claim is that the Illinois election officials' acceptance of untimely ballots violated 2 U.S.C. § 7 and 3 U.S.C. § 1 which the Illinois election officials cannot do under the Elections Clause's rule of fair competition. Therefore, in this case, this Court should declare that there is competitor standing for federal candidates to bring claims against state election officials to ensure the rules of fair competition apply in federal elections, including the Elections Clause which specifies who enacts the laws regulating federal elections.

IV. Neither members of the U.S. Military voting under UOCAVA, nor those voting with HAVA provisional ballots are disenfranchised by enforcing federal fair competition rules for Election Day ballot receipt deadlines.

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the subsequent Military and Overseas Voter Empowerment (MOVE) Act are examples of Congress setting baseline rules that uniformly govern how federal elections play out in the states. *See* 52 U.S.C § 20301–11 (codifying substantial portions of both UOCAVA and MOVE). Ensuring American servicemembers overseas are not disenfranchised in federal elections is related to the fair rules of competition and the Petitioners' injury in this case. *See, e.g.*, Oral Argument, *Michael Bost v. Illinois Board of Elections*, (No. 23-2644) (March 28, 2024) (discussing concerns regarding receipt of

UOCAVA ballots with multiple parties). Thus, acknowledging competitor standing for a candidate and later finding Bost's competitive injuries from an illegally structured extension of Election Day would inflict no injury on UOCAVA voters.

Even as Congress does not completely control the field of election law nor completely dictate the minutiae of federal elections to the states, the UOCAV and MOVE acts demonstrate Congressional intent to require states to receive their ballots by Election Day. Elections Clause, U.S. Const., Art. IV, sec. 1; 2 U.S.C. § 7 ("The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election," establishing the uniform day for the federal elections) and 3 U.S.C. § 1 ("electors... shall be appointed, in each state on election day…."); *see, e.g.*, *Murphy v. National Collegiate Athletic Association*, 584 U.S. 453, 477–78 (2018) (discussing the three different types of federal preemption of state law, "conflict," "express," and "field.") When any state, including Illinois extends its ballot receipt past Election Day, that state bypasses the baseline election rules that Congress mandated in the elections statute.

The UOCAVA in 52 U.S.C. § 20304 establishes procedures for collection and delivery for filled-out UOCAVA ballots. The text mandates those marked ballots to be collected and transmitted to the U.S. Postal Service on the seventh day preceding the scheduled general federal election. *Id.* at § 20304(A). The exception to the seventh-day-preceding requirement does not contemplate later ballot transmittal but rather requires an earlier deadline for

collection of voted (marked) UOCAVA ballots if location remoteness or something else would interfere with "timely delivery of the ballot." *Id.* at § 20304(B)

All UOCAVA voters, including both the military voter and their family, and the civilian overseas voter (nonmilitary) have been granted by Congress the privilege of early ballot receipt. In fact, when the federal MOVE ACT was initially discussed and post-Election Day receipt of UOCAVA ballots was proposed, Congress debated the issue and then passed legislation instructing all states to transmit UOCAVA ballots at least 45 days before an election if the ballot was requested before that early date. 156 Cong. Rec. No. 82, S4513 (May 27, 2010)[5]; 52 U.S.C. § 20302(a)(8).

Congress rejected a version of the UOCAV Act that would have required states to accept UOCAVA ballots received after Election Day. Legislative history records discussion of a post-Election Day receipt deadline, but that idea was rejected through an amendment that "removed language from the original version of the bill which would have required States to accept and count absentee ballots received up to 55 days after the date on which an absentee ballot was transmitted or the date on which the State certified an election, whichever was later." 156 Cong. Rec. No. 82, S4513 (May 27, 2010) . So, despite debating the proposal of a later post-Election Day receipt, Congress rejected that idea. *Id.* Congress did not add any days after an election, and thus, considered 45 days sufficient time for return by Election Day. Congress

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[5] https://www.congress.gov/111/crec/2010/05/27/CREC-2010-05-27-pt1-PgS4513-2.pdf

opted to require states to transmit requested UOCAVA ballots 45-days prior to Election Day rather than extending the receipt deadline beyond Election Day. *Id.*; 52 U.S.C. § 20302(a)(8).

The Congressional records reflect that Election Day is the UOCAVA ballot receipt deadline. As Under Secretary for Personnel and Readiness for the Department of Defense Gail McGinn testified in a hearing about the MOVE act, the "45 days between the ballot mailing date and the date the ballots are *due*," 156 Cong. Rec. No. 82, S4514 (May 27, 2010) (emphasis added), necessarily indicates that the absentee UOCAVA ballots are understood as "due" on Election Day.

In addition to the uniform 45-day mandate, the statute also uniformly requires states to transmit UOCAVA ballots instantly over email(if requested by the applicant) to allow ample time for voters to receive, vote and return the ballots. 52 U.S.C. § 20302. Therefore, enforcing the uniform UOCAVA Election Day return for all UOCAVA ballots also helps to alleviate potential confusion among military and oversea voters. *See id.*

Given the context set by the Congressional record, it would be a blatant misinterpretation of the statute to argue that the statutory "deadline for receipt of the State absentee ballot under State law," 52 U.S.C. §§ 20303(b)(3) and (e)(2) somehow nullifies the Election Day deadline. The statute in 52 U.S.C. § 20303(b)(3) states that a Federal write-in absentee ballot shall not be counted "if a State absentee ballot of the absent uniformed services voter or overseas

voter is received by the appropriate State election official not later than the deadline for receipt of the State absentee ballot under State law." Given the Election Day receipt deadline intent expressed in the Congressional record, it makes more sense that any allowance to accommodate a deadline for an "absentee ballot under State law" was intended to address variations in state laws regarding the ballot receipt deadlines given variation in minutiae, such as varying poll closing times, as well as differing time zones across the country. Further, UOCAVA additionally applies to federal primary elections, which states hold on different dates. Because states have differing Primary Election Days, the ballot receipt deadline for those primaries will have a different date and a different deadline in various states.

In its 2020 survey, the Election Assistance Commission (EAC) suggested one of the primary benefits of greater uniformity in state-level UOCAVA rules is that it could help UOCAVA voters: "Among the challenges UOCAVA sought to address was the wide variability in rules and procedures governing registration and voting across states which made it difficult for the uniformed service members and overseas citizens to navigate the voting process." Election Administration and Voting Survey 2020 Comprehensive Report, U.S. Election Asst. Comm'n, 173 (2021).

It is a common misconception that UOCAVA laws primarily benefit members of the military and military families. That is not the case. Data from the EAC's Election Administration and Voting Survey

reveals that in the 2024 election, only 28% of all UOCAVA ballots were cast by members of the military and their family members.[6] Over 71% of the UOCAVA ballots returned were from non-military US citizens who were overseas including study-abroad students, vacation travelers and US citizens who have permanently moved overseas. Congress provided extra time before the election for these eligible voters.

As Judge Andrew S. Oldham of the Fifth Circuit Court of Appeals opined in his March 2025 concurrence to denial of the rehearing en banc in *Republican National Committee v. Wetzel* (upholding the Fifth Circuit's decision reported at 120 F.4th 200 (5th Cir. 2024)) there is a distinction between ballots submitted under a state's general mail-in-ballot procedure and absentee ballots submitted and governed by UOCAVA. *Republican Nat'l Comm. V. Wetzel*, 132 F. 4th 775, 778 (5th Cir. 2025), reh'g en banc denied (Oldham, concurring). The Fifth Circuit explained the extent of UOCAVA's post-Election Day ballot receipt through remedial measures in appropriate instances: "UOCAVA also permits post-Election Day balloting, but it does so through its statutory text. UOCAVA's remedial provisions authorize the Attorney General to bring civil action in federal court for declaratory or injunctive relief to enforce the Act 52 U.S.C. §20307(a). And the Attorney General has done so" to remedy states' lack of compliance with the federal law, namely the federal 2010 MOVE Act requiring mailing of UOCAVA ballots

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[6] https://www.eac.gov/sites/default/files/2025-06/2024_EAVS_Report_508c.pdf

45 days before federal elections. *Republican Nat'l Comm.*, 120 F.4th at 213.

It is also true that an additional baseline federal law governing elections, the Help America Vote Act (HAVA), allows for provisional ballots that may be cured and later counted after Election Day proper as votes if a questionably eligible voter is determined to be entitled to cast a vote. 52 U.S.C. § 21802; *Republican Nat'l Comm. v. Wetzel*, 120 F.4th 200, 212 (5th Cir. 2024). However, a HAVA provisional ballot allowance is not an exception to receipt of the ballot by Election Day. And indeed, as the Fifth Circuit concluded that "a ballot is 'cast' when the State takes custody of it." *Id.* at 207.

Even if UOCAVA permits states to count UOCAVA ballots received after Election Day to be counted only in cases of remedial action, and while HAVA allows provisional ballots to be cured, those specific, narrow allowances do not extend to mail-in ballot receipt deadlines or UOCAVA ballot receipt deadlines, generally. Nor do the narrow allowances negate the Petitioners' claimed competitive injuries-in-fact to pocketbook, time, and effort from wide-scale 14-day all-out mail-in-ballot receipt extension in which the votes received after the appointed Election Day are known to tend in favor of one party over the other.

Given the law, states that extend UOCAVA ballot deadlines after Election Day are preempted by federal law, except in the narrow carveout of federally directed remediation (through statutory procedures) for failed timely ballot mailouts, cause predictable

injury to some federal candidates for elections while benefitting others. When illegal ballots are counted, this creates an incorrect vote tally, which causes a competitive injury for Bost, and other federal candidates because the competitive playing field is tilted when federal election laws are not enforced.

CONCLUSION

The Court's decision in resolving federal candidate standing has far-reaching consequences. The Court's resolution of the question presented should take into account the doctrine of competitor standing, which is well-established in the Court and the courts of appeal. Now, the Court should apply the doctrine of competitor standing to federal candidates. By doing so, the Court would provide a necessary federal forum for federal candidate claims against states election officials who create an illegally-structured competitive environment for federal candidates.

Respectfully submitted,

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