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 *AMICUS CURIAE* ELECTION INTEGRITY PROJECT CALIFORNIA, INC. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Election Integrity Project California, Inc. (EIPCa) is a non-partisan California nonprofit public benefit corporation recognized by the Internal Revenue Service as a tax-exempt Public Charity under Internal Revenue Code Section 501(c)(3). I.R.C. § 501(c)(3). Comprised of citizen volunteers, EIPCa works to defend the integrity of California's electoral process. EIPCa fulfills its mission by researching county and state voter rolls to assess accuracy and compliance with state and federal election laws and educating poll workers, poll observers, and ballot processing observers. EIPCa collects and analyzes voter registration and voting data, as well as county policies and procedures for election management and ballot processing.

EIPCa's motto is "Every Lawfully Cast Vote Accurately Counted." Affirming a candidate's right to challenge laws that undermine elections will help to ensure that elections are secure.

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Curiae submits this brief to emphasize three points: (1) Petitioners have suffered a competitive injury because Illinois's ballot collection procedures obligate them to expend resources after Election Day; (2) the Seventh Circuit's decision discounts a long string of Supreme Court decisions recognizing candidate standing; and (3) Permitting the receipt of ballots after Election Day undermines confidence in the outcome of elections.

Political candidates, more than political parties and even more than the voters themselves, are most likely to be directly harmed when a state legislature enacts an improper voting law. Candidates commit limited financial resources, personnel, and time to win their respective elections. When they seek elective office in a competitive environment shaped by improper regulatory actions or state laws that contravene the Constitution and federal law, they are obliged to expend additional capital and time to secure their success. Expending resources, personnel, and time satisfies the injury-in-fact prong of the Court's three-part test for Article III standing.

Next, denying Petitioners the opportunity to challenge the Illinois ballot collection procedures runs counter to the Court's long history of recognizing that candidates and office holders are well situated to adequately allege the elements of standing in election related cases. Since the late 1800s, the Court has acknowledged the right of candidates to challenge an allegedly improper law. And in none of these cases has the Court required a candidate to show diminished electoral outcomes. Candidates who

reside in states where these laws are in place should have a fair opportunity to challenge those actions.

Finally, imposing a new and burdensome requirement on candidates to satisfy standing increases the likelihood that laws permitting ballot collection after elections will remain in effect. These types of laws often open state electoral systems to a host of dangers that create uncertainty among the electorate and undermine confidence in the integrity of the voting process.

The Court should reverse the lower court's decision and hold that Petitioners have standing to challenge the Illinois ballot collection procedures.

ARGUMENT

A. Petitioners suffered a competitive injury because the Illinois ballot collection procedure improperly obligates them to expend limited resources after Election Day.

In the words of one scholar, "election cases are uniquely important to the health of our democracy . . . . [E]lection and voting rights cases by their very nature determine our ability to influence policymaking in all other areas of the law." Steven J. Mulroy, *Baby and Bathwater: Standing in Election Cases After 2020*, 126 Dick. L. Rev. 9, 14 (2021). It is therefore imperative that courts apply the proper analysis when determining whether a candidate has standing. Candidates' investments of their own time and financial resources serve as a basis for satisfying Article III's injury-in-fact prong. The lower court distinguishes this case from past precedents in

that the Illinois ballot collection law does not "impos[e] a direct affirmative obligation on the candidate[.]" Pet. App. 13a. The lower court is mistaken. Illinois's ballot collection procedures extend the election cycle for weeks after Election Day, obligating candidates to continue to compete to ensure the fair administration of vote tabulation longer than they otherwise would have. While the Illinois ballot procedures may not specifically require the expensive, time-consuming proposition of extending a campaign, that is the direct outcome of the statutory scheme. The Seventh Circuit's conclusion that a "direct affirmative obligation" must be spelled out to be real and meaningful for Petitioners is out of step with traditional injury-in-fact test. *Id.*

Having rejected the relevance of Petitioners' relied-upon precedents, the lower court advances their own standard. "The problem [with respect to standing] 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." Pet. App. 13a. But this is an impossible standard. Candidates cannot look into the future to discern whether post-election votes will break against them. Neither can they challenge the election procedures after the votes are counted. And any challenge filed after an election may involve a drastic remedy—the overturning of an election—that courts are loathe to grant. This forecloses any opportunities for candidates to challenge improper election laws that place them at a competitive disadvantage without affirmatively requiring anything of them. This cannot be the case. Petitioners evidently respect courts' extreme caution towards appearing to influence election results after votes have been cast, which is precisely why they filed this challenge

so far in advance of the election. Rejecting competitive injury claims for lack of injury-in-fact before an election and rejecting them for mootness after an election, improperly shuts candidates out of ever defending their legally protected interests in court.

Under the long-recognized theory of competitive standing: "[I]f the allegedly illegal voting or electoral rules make the competitive environment worse for the candidate, that is a sufficiently concrete, non-generalized harm to confer standing." *Mulroy*, *supra* at 22. In short, a candidate suffers a competitive injury when he is "forced to compete in an illegally structured [campaign] environment . . . ." *LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011).

The lower court's conclusion disregards holdings in other circuits. For example, the First Circuit upheld a candidate's standing to challenge Federal Election Commission (FEC) regulations that allegedly violated the Federal Election Campaign Act (FECA). *Becker v. FEC*, 230 F.3d 381, 385 (1st Cir. 2000). And the Second Circuit applied the doctrine of competitive standing in concluding that a political party adversely affected by the improper placement of a rival political party on the ballot satisfied Article III's injury-in-fact prong. *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994).

The competitive injury doctrine recognizes that parties have a right to seek remedies within competitive environments. "[I]t is well-settled that an economic actor may challenge the government's bestowal of an economic benefit on a competitor." *Buchanan v. FEC*, 112 F. Supp. 2d 58, 63 (D.D.C. 2000). For example, when the government

grants an application allowing for a new producer of a controlled substance, existing manufacturers of the same drug may challenge the application. Standing is satisfied in such a scenario since "increased competition represents a cognizable Article III injury." *MD Pharm., Inc. v. DEA*, 133 F.3d 8, 11 (D.C. Cir. 1998) (quoting *Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697, 701 (D.C. Cir. 1994)). And courts "have expanded the competitor standing doctrine to the political arena, recognizing that political actors may bring suit when they are competitively disadvantaged by government action." *Buchanan*, 112 F. Supp. 2d at 63. Expending resources to compete in an environment created by improper regulations or laws amounts to an injury-in-fact, whether it be in an economic or political environment.

On point, the D.C. Circuit, in *Shays v. FEC*, recognized that a candidate suffers a legal harm sufficient to satisfy Article III standing when election regulations illegally structure a competitive environment. *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). Thus, a candidate need not show a diminished chance of victory to suffer a concrete and particularized injury.

The lower court's conclusion that Petitioners needed to show they would have received fewer votes is incorrect. It ignores the harms, financial and otherwise, endured by Petitioners who are obligated to retain their same position in the competitive environment of elections. In other words, the prospect of Petitioners receiving the same amount of votes regardless of whether the ballot collection procedures are in place is insufficient to deny standing. Although *Shays* involved challenges to an allegedly improper series of federal regulations, and the instant

case involves a challenge to an improper state election law, the principles regarding competitor standing addressed in *Shays* apply. Application of *Shays* is also appropriate in that both cases involve candidates for federal office.

Intensified competition resulting from a new federal regulation satisfies standing. *Id.* at 86. *Shays* involved a challenge to several FEC regulations that allegedly violated the Bipartisan Campaign Reform Act (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002). The regulations obligated candidates to "anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow." *Shays*, 414 F.3d at 86. For example, under one of the challenged rules, "rival candidates may have supporters finance issue ads more than 120 days before the election[.]" *Id.* The parties alleged that this regulation violated the provisions of the BCRA. *Id.* Accounting for these rivals and the need to "account for additional *practices*" such as additional campaign activity constituted an injury-in- fact supporting Article III standing. *Id.*

LaRoque v. Holder is also instructive. In *LaRoque*, the D.C. Circuit once again recognized that a candidate suffered a competitive injury when he had to spend "significant amounts of time, money, personnel, and energy" conducting a campaign under an earlier legal regime that placed his candidacy at risk of suffering a "concrete and particularized injury." *LaRoque v. Holder*, 650 F.3d 777, 786 (D.C. Cir. 2011) (internal citations omitted). In that case, the candidate alleged that § 5 of the Voting Rights Act's requirements subjecting his city to preclearance of a voting referendum violated the Constitution. *Id.* 5 U.S.C. § 10304. Relying on its decision in

Shays, the D.C. Circuit concluded that political candidates "may have standing to challenge 'illegally structured' campaign environments even if 'the multiplicity of factors bearing on elections' prevents them from establishing 'with any certainty that the challenged rules will disadvantage their . . . campaigns.'" *Id.* at 787 (quoting *Shays*, 414 F.3d at 90-91). The court explained that a candidate "has *no obligation to demonstrate definitively* that he has less chance of victory under the partisan than the nonpartisan system." *Id.* (emphasis added).

Similarly, Petitioners allege that the Illinois ballot receipt procedure runs afoul of federal law setting the first Tuesday after the first Monday in November in even years as the federal Election Day. (2 U.S.C. § 7 and 3 U.S.C. § 1). The state's fourteen-day post-election period allows the counting of "untimely" submitted ballots and obligates Petitioners to spend more funds and time operating their campaign past Election Day. Pet. App. 65a-68a. Illinois's improper ballot receipt procedures thus "fundamentally alter the environment in which rival parties defend their concrete interests . . . ." *Shays*, 414 F.3d at 86. Petitioners need to budget and plan for activities beyond Election Day. Pet. App. 65a-66a. They need to allocate resources to deploy election monitors to watch ballot operations. Pet. App. 65a-67a. Petitioners have alleged an injury—competition intensified by an Illinois ballot receipt procedure that violates federal law—and they "face an equivalent need to adjust their campaign strategy . . . ." *Shays*, 414 F.3d at 87. Thus, Petitioners "suffer harm to their legally protected interests." *Id.*

Thus, regulations that "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.* Petitioners in the instant case suffer harms similar to those in *Shays v. FEC* and *LaRoque v. Holder*.

The lower court's terse dismissal of Petitioners' claims neglects to consider the fact that Petitioners are obligated to expend resources after Election Day to continue to protect their interests. Combating a competitive disadvantage caused by a state action satisfies Article III's injury-in-fact requirement.

B. Denying Petitioners the opportunity to challenge Illinois's ballot collection procedures runs counter to the Court's history of permitting candidate challenges to improper voting laws or procedures.

"[T]he Supreme Court frequently has upheld the standing of candidates for office to challenge impediments to their candidacy." Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 Ohio St. L.J. 773, 784 (1988). And for good reason:

> The candidate who pours money and sweat into a campaign, who spends time away from her job and family to traverse the campaign trail, and who puts her name on a ballot has an undeniably different—and more particularized—interest in the lawfulness of the election as compared to the interests of some random voter.

Hotze v. Hudspeth, 16 F.4th 1121, 1126 (5th Cir. 2021) (Oldham, J., dissenting). Judge Oldham also emphasized,

"[i]n fact, it's hard to imagine anyone who has a more particularized injury than the candidate has." *Id.*

As early as the late 1800s, the Court recognized challenges to state election laws. *McPherson v. Blacker*, 146 U.S. 1 (1892). In *McPherson v. Blacker*, Petitioners, state electors of Michigan, sued seeking to void a state law relating to presidential and vice-presidential electors. While the Court affirmed a state's power to decide the mode of appointing electors, it understood that state electors could raise a legal challenge. The Court stated, "we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own." *McPherson*, 146 U.S. at 24.

Decades later, the Court affirmed a candidate's challenge to an Illinois state law requiring candidates to fill a quota of 25,000 voter nominating petitions—with 200 of the signatures of qualified voters from each of at least fifty of Illinois's 102 counties. Ill. Rev. Stat., c. 46, § 10-3 (1967). In overturning a lower court's dismissal, the Court concluded that the Illinois election law discriminated against the more populous counties. *Moore v. Ogilvie*, 394 U.S. 814 (1969).

In the 1980s, a candidate and voters challenged Ohio's early filing deadline for independent candidates running for President. *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The Court held that Ohio's early deadline burdened independent voters by restricting their selected candidate to only those who had declared by the statutorily imposed March deadline. *Id.* Relying on earlier precedent, the

Court dismissed arguments that the case was moot—noting that even though the 1980 election had already occurred, review was necessary to avoid a repetition of exclusion. *Id.* at 784 n.3 (citing *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974)).

In other, more recent cases, the Court has also recognized a candidate's right to challenge election laws. In 2000, in *Bush v. Gore*, the Court found that Florida's recount scheme violated the Equal Protection Clause because the counties did not apply uniform rules. *Bush v. Gore*, 531 U.S. 98 (2000). The increased risk that votes would be improperly discounted was enough to entertain a challenge to the Florida law. *Id.* at 104-105. Also in 2000, a federal congressional candidate sued to enjoin Missouri from implementing a state constitutional amendment concerning term limits for federal office. *Cook v. Gralike*, 531 U.S. 510 (2001). Assuming jurisdiction, the Court upheld the candidate's argument that the Missouri law violated the Elections Clause. *Id.*

As recently as 2008, the Court upheld a candidate's challenge to provisions in the BCRA alleging violations of the First Amendment. *Davis v. FEC*, 554 U.S. 724 (2008). Noting that the injury "need not be actualized[,]" the Court stated that "[a] party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Id.* at 734 (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102-103 (1983)).

In these cases, the Court understood the importance of challenging a prospective injury. Nowhere in these cases does the Court require a party to show diminished outcome as a prerequisite to standing. Rather, the Court recognizes that candidates have an interest in challenging allegedly improper election laws or rules.

C. The Illinois law permitting ballot collection after Election Day creates uncertainty and undermines the public's confidence in the integrity of the election process.

Affirming the Seventh Circuit's errant standard about candidate standing prevents judicial review for a host of voting legislation. This is because, as previously discussed, the standard disempowers those most harmed when election procedures structure an unfair environment. The lower court's decision is aberrant among circuits and inconsistent with the Court's precedents. But while Petitioners' Article III arguments prevail on legal grounds, they are also bolstered by positive policy implications for election security and public confidence in our republic.

"Late-arriving ballots open up one of the greatest risks of what might, in our era of hyperpolarized political parties and existential politics, destabilize the election result. If the apparent winner the morning after the election ends up losing due to late-arriving ballots, charges of a rigged election could explode." Richard A. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. Chi. L. Rev. Online (June 26, 2020), https://lawreview.uchicago.edu/online-archive/how-accommodate-massive-surge-absentee-voting. In such a scenario, voters lose

faith in the integrity of the voting process. Additionally, collection procedures allowing the receipt of ballots after Election Day can result in unexpected delays. And such delays in deciding elections induce distrust and loss of faith in the electoral system. Mackenzie Lockhart, et al., *Voters Distrust Delayed Election Results, but a Prebunking Message Inoculates Against Distrust*, PNAS Nexus (Oct. 15, 2024), https://academic.oup.com/pnasnexus/article/3/10/pgae414/7815439.

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Justice Kavanaugh has noted that most states "require absentee ballots to be received by election day, not just mailed by election day." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). He continues, "[t]hose States want to avoid the chaos and suspicions of impropriety that can ensue if thousands of absentee ballots flow in after election day and potentially flip the results of an election." *Id.* Illinois's procedures, however, open the state's electoral system to the dangers Justice Kavanaugh warns about.

California serves as an example of the problems that arise when states allow ballot collection after Election Day. California counts mail ballots received up to one week after Election Day. Cal. Elec. Code § 3020(b) (Deering 2025). In 2024, California did not complete counting votes until weeks after the election. A U.S. House race in California was not decided until the first week of December—a month after Election Day. Laura J. Nelson & Melissa Gomez, *Democrats Flip Seat in California's Central Valley in*

Nation's Final Outstanding House Race, Los Angeles Times (Dec. 4, 2024), https://www.latimes.com/california/story/2024-12-03/democrat-adam-gray-ousts-republican-john-duarte-ca13-central-valley-congressional-race.

And those delays are not limited to the 2024 election. In 2022, half of California's "votes were counted after Election Day." Maya Sweedler, *Many Uncalled House Races are in California. This is Why it Takes the State Weeks to Count Votes*, NBC 7 San Diego (Nov. 12, 2024), https://www.nbcsandiego.com/news/politics/many-uncalled-house-races-are-in-california-this-is-why-it-takes-the-state-weeks-to-count-votes/3674146/.

It is critical that candidates challenge the legality of state laws that undermine the integrity of the electoral system and run counter to federal law. Clarifying the validity of these laws outside the immediacy of an election ensures that a state's election systems operate in a fair and open manner. When a state removes certain protections and implements laws similar to Illinois's ballot collection procedures, that state's electoral system is vulnerable to malfeasance.

Affording candidates the opportunity to test the propriety of suspect state actions decreases the likelihood that improper laws will be implemented. And this, in turn, protects the integrity of the electoral system.

CONCLUSION

For these reasons, the Court should reverse the judgment of the lower court.

Respectfully submitted,

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