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.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether petitioners, as federal candidates, have pleaded sufficient factual allegations to show Article III standing to challenge state time, place, and manner regulations concerning their federal elections.

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INTEREST OF THE UNITED STATES

Federal law sets a single day for federal elections. 2 U.S.C. 1, 7; 3 U.S.C. 1, 21(1). The State of Illinois mandates the counting of mail-in ballots received up to two weeks after that election day, if they are postmarked or contain a certificate date that is on or before election day. 10 Ill. Comp. Stat. 5/19-8(c) (2025). This case concerns whether federal candidates have standing to challenge Illinois's decision to count mail-in ballots received after the day of the election established by federal law. The United States has a substantial interest in ensuring both that proper parties can sue to enforce federal election law and that improper parties cannot invoke the jurisdiction of federal courts.

INTRODUCTION

As this Court recently admonished, "[c]ourts should not make standing law more complicated than it needs to be." *Diamond Alt. Energy, LLC* v. *EPA*, 145 S. Ct. 2121, 2141 (2025) (quotation marks omitted). In this case, the standing analysis is "straightforward" under well-established principles. *Id.* at 2135.

Illinois requires the counting of mail-in ballots received up to two weeks after election day if they were mailed by election day. Petitioner Bost, a candidate for federal office, seeks prospective relief barring the State from counting such ballots, claiming that ballots in federal elections must be received by election day under federal law. "For standing purposes," this Court "must assume" that claim is correct. *FEC* v. *Ted Cruz for Senate*, 596 U.S. 289, 298 (2022). Bost alleges that counting the additional invalid ballots creates a risk he would lose the election and causes his campaign to incur additional costs in monitoring the count and objecting to ballots that are also deficient on other grounds. See Pet. App. 65a-69a, 87a-89a. Because Bost claims that the State will unlawfully count untimely votes in *his* election, he is hardly an "unaffected bystander[]." *Diamond Alt. Energy*, 145 S. Ct. at 2142. He has an easy answer to the "basic question" of Article III standing: "What's it to you?" *Id.* at 2133.

The court of appeals nevertheless held that Bost lacks standing. The Seventh Circuit reasoned that it was too "speculative" whether counting the late ballots would cause Bost to lose the election, and that his campaign's expenditure of resources to monitor the counting of those ballots would be a self-inflicted "choice." Pet. App. 11a. But that reasoning disregarded that Bost "is himself an object of the action * * * at issue."

Lujan v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Where the government regulates third parties, this Court has held that a plaintiff can neither speculate that he would suffer injury through indirect harms nor manufacture injury by incurring costs to mitigate speculative harms. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414-416 (2013). By contrast, where the plaintiff is a *direct object* of a government regulation that *immediately imposes* on him a "substantial risk" of harm, this Court has treated that risk itself as both a judicially cognizable injury and a justification for incurring costs to mitigate the risk. See *id.* at 414 n.5.

In the electoral context, although candidates' own conduct is not directly regulated by vote-counting rules, it is a "commonsense [political] realit[y]" that the candidates themselves are still a direct object of such rules, which "target" votes being cast *for or against them*. See *Diamond Alt. Energy*, 145 S. Ct. at 2136. And the risk to a candidate's electoral prospects from an unlawful vote-counting rule is significant, even if it may be small in many cases. For instance, it should be obvious that a candidate would have standing to sue if a State were threatening to discard timely votes. The same goes where the State is instead threatening to count untimely votes, especially when extending the ballot-receipt period increases the campaign's costs in monitoring ballot counting.

For elections, "the rules of the road should be clear and settled," *Democratic Nat'l Comm.* v. *Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay), *before* the election takes place, see *Purcell* v. *Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). The Seventh Circuit's holding, however, would perversely force litigation

over vote-counting rules to be brought, if at all, only *after* the election, during the post-election period when the effects become known. That would be a poor outcome for candidates, voters, and courts alike.

This Court can avoid that result by hewing to settled Article III principles that establish a clear rule for standing to litigate disputes over election laws: candidates have standing to seek prospective relief challenging a rule governing the validity of ballots so long as there is a risk that the ballots at issue could affect the outcome of their election.

STATEMENT

A. Legal Background

1. The Constitution gives States "responsibility for the mechanics" of federal elections, "but only so far as Congress declines to pre-empt state legislative choices." *Foster* v. *Love*, 522 U.S. 67, 69 (1997). In particular, while the Elections Clause, U.S. Const. Art. I, § 4, Cl. 1, imposes "[u]pon the States * * * the duty * * * to prescribe the time, place, and manner of electing Representatives and Senators," it also confers "upon Congress * * * the power to alter those regulations or supplant them altogether." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). Similarly, the States may "appoint [presidential electors], in such Manner as [their] Legislature[s] * * * direct," but Congress may dictate "the Time of chusing the Electors." U.S. Const. Art. II, § 1, Cls. 2, 4.

Exercising those authorities, Congress mandated that "elections for Congress and the Presidency" must occur "on a single day throughout the Union." *Foster*, 522 U.S. at 70. Under federal law, "the day for the election" is "[t]he Tuesday next after the 1st Monday in November" in election years. 2 U.S.C. 7 (House elections);

see 2 U.S.C. 1 (same for Senate elections); 3 U.S.C. 1, 21(1) (same for presidential elections).

2. Illinois accordingly designates "the first Tuesday after the first Monday of November" as election day for federal elections. 10 Ill. Comp. Stat. 5/2A-1.1(a) (2025). In-person votes are collected on or before election day. See, *e.g.*, *id.* 5/17-12, 5/19A-50. Mail-in ballots, however, are counted either if they are received "before the closing of the polls on election day" *or* if they are postmarked or certified "no later than election day" and "received * * * before the close of the period for counting provisional ballots," *id.* 5/19-8(b) and (c)—*i.e.*, "within 14 calendar days of the election," *id.* 5/18A-15(a).

Over time, Illinois has expanded who may vote by mail and have their ballots accepted after election day. In 2005, the State initially allowed this for absentee voters. See Pet. App. 65a. Then, in 2013, the State more generally authorized a vote-by-mail program. See *ibid.* According to petitioners, "[f]ollowing that change, the number of ballots arriving after Election Day has substantially increased almost every year." *Id.* at 66a. In the 2020 election, for example, over two million people voted by mail in Illinois. *Id.* at 85a. And over 266,000 of them submitted mail-in ballots received within two weeks of election day—which means that as many as 4.4% of the total votes cast were received after election day. *Id.* at 86a. Indeed, the State Board of Elections issued a press release in November 2020 alerting the public that "[a]s mail ballots arrive in the days after Nov. 3, it is likely that close races may see leads change." *Id.* at 85a.

B. Procedural Background

1. On May 25, 2022, petitioners filed suit, seeking prospective relief against enforcement of the Illinois

law allowing the counting of mail-in ballots received after election day. Pet. App. 81a, 92a. Respondents are the Illinois agency that supervises elections and the agency's director. *Id.* at 83a-84a.

Petitioner Bost "is a multi-term member of the United States House of Representatives" who was running for reelection at the time of filing. Pet. App. 82a. He has been reelected (and is seeking reelection again). See Pet. Br. 8. The other two petitioners, Pollastrini and Sweeney, were Republican nominees for presidential electors in 2020 and intended to seek appointment as presidential electors in 2024. Pet. App. 82a-83a.

Petitioners contend that, by setting an election day, federal law prohibits Illinois from counting mail-in ballots received up to fourteen days after election day. Pet. App. 81a. As relevant here, petitioners allege that the State's counting of late ballots harms them as candidates. The complaint alleges that petitioners possess an interest in "hav[ing] their election results certified with votes received in compliance with" federal law. *Id.* at 87a. And it further alleges that petitioners are harmed by being "forc[ed] * * * to spend money, devote time, and otherwise injuriously rely on unlawful provisions of state law in organizing, funding, and running their campaigns." *Id.* at 89a; see *id.* at 87a-88a.

2. After filing their complaint, petitioners moved for partial summary judgment and provided supporting declarations. D. Ct. Docs. 31-33 (July 15, 2022). Bost's declaration supplies additional details about his harms as a candidate from the State's decision to count mail-in ballots received after election day.

Bost emphasized that he "risk[s] injury if untimely and illegal ballots cause [him] to lose [his] election." Pet. App. 68a. And he noted the large and increasing

volume of mail-in ballots received during past elections within the two-week period after election day. See *id.* at 66a, 68a.

Moreover, Bost explained that "[l]ate-arriving * * * ballots exacerbate the expenses [his] campaign incurs." Pet. App. 67a. In particular, his "campaign needs to both monitor and evaluate whether to object to the counting of deficient ballots," which "costs [his] campaign time, money, volunteers[,] and other resources." *Ibid.* He thus "ha[s] had to organize, fundraise, and run [his] campaign for fourteen additional days in order to monitor and respond as needed to ballots received after the national Election Day." *Id.* at 66a. And that is especially so "because many of these late-arriving ballots have discrepancies (e.g., insufficient information, missing signatures, dates, or postmarks) that need to be resolved." *Ibid.*

In addition, Bost asserted a more generic interest in "hav[ing] election results certified with votes received in compliance with" federal law. Pet. App. 68a. For instance, even if he were to prevail despite the counting of the late ballots, he expressed concern about the accuracy of his "margin of victory." *Ibid.*

3. The District Court for the Northern District of Illinois dismissed the suit for lack of standing, among other grounds. Pet. App. 27a, 34a-47a.

As relevant here, the court deemed Bost's "financial injury" to be "speculative," reasoning that it "is mere conjecture that, if [he] does not spend the time and resources to confer with his staff and watch the results roll in, his risk of losing the election will increase." Pet. App. 45a. And the court further concluded that Bost's harms as a candidate are "not particularized to [him]," on the ground that he "does not allege that the ballots

cast after Election Day are more likely to be cast for his opponent." *Id.* at 44a-45a.

4. A divided panel of the Court of Appeals for the Seventh Circuit affirmed, solely on standing grounds. Pet. App. 1a-15a.

As relevant here, Judge Lee, joined by Judge Brennan, held that Bost lacks standing as a candidate. Pet. App. 9a-15a. The court of appeals emphasized that it is "speculative at best" "whether the counting of ballots received after Election Day would cause [Bost] to lose the election." *Id.* at 11a. It observed that he "won the last election with seventy-five percent of the vote," and that he "d[id] not (and cannot) allege that the majority of the votes that will be received and counted after Election Day will break against [him]," let alone be decisive. *Id.* at 11a, 13a. The court thus concluded that Bost could not assert a "competitive injury" from the counting of the late ballots, *id.* at 13a, and that he "cannot manufacture standing by choosing to spend money to mitigate such conjectural risks," *id.* at 11a-12a. For the same reason, the court rejected Bost's asserted interest "in ensuring that the final official vote tally reflects only legally valid votes," *id.* at 13a; see *id.* at 15a, while also suggesting that this interest was the type of "generalized grievance" that cannot support standing under Article III, *id.* at 14a.

Judge Scudder dissented in part, reasoning that Bost has standing "[b]ecause Illinois's extended deadline for receiving mail-in ballots will increase Bost's campaign costs." Pet. App. 16a; see *id.* at 16a-23a. Judge Scudder began by noting that campaign expenses are "concrete" and "particularized," and that Bost had established an "imminent" and "certainly impending" increase in expenses attributable to the additional re-

sources the campaign would incur to monitor an extra two weeks' worth of mail-in ballots. *Id.* at 17a. He deemed those added expenses to be "fairly traceable" to the challenged law because Bost "had no need for such extended operations" but for Illinois's decision "to accept and count such ballots." *Id.* at 18a.

Judge Scudder faulted the majority for treating these costs as "entirely self-inflicted" and as "an overreaction to a hypothetical possibility" of electoral defeat. Pet. App. 18a. Regardless of the relative probability that late ballots would swing the election, Bost is "more than justified in monitoring the count after Election Day." See *id.* at 19a. Judge Scudder emphasized that this is not like cases where standing was rejected because the plaintiff incurred costs to "shield[] against the speculative possibility of government action" being taken against him at all. See *id.* at 22a. Rather, here, the application of the challenged law to Bost was "a near certainty," as he would be a candidate in the upcoming election and at least some ballots in his race would almost certainly be received after Election Day. See *ibid.* Accordingly, Bost had standing to seek relief barring those ballots from being counted in order to avoid the extra costs his campaign would otherwise need to incur to monitor those additional ballots for other deficiencies. See *id.* at 22a-23a.

SUMMARY OF ARGUMENT

Candidates have standing to seek prospective relief challenging a rule governing the validity of ballots so long as there is a risk that the ballots at issue could affect the outcome of their election. That clear and straightforward application of Article III principles resolves this case.

A. Article III standing doctrine limits the jurisdiction of federal courts to preserve the separation of powers. To plead standing, a plaintiff must plausibly allege an injury in fact that likely was or will be caused by the defendant (and likely would be redressed by the requested relief). The injury must be actual or imminent, and it must be fairly traceable to the challenged conduct, which turns in part on whether the plaintiff is a direct "object" of that conduct or instead is claiming indirect harm from the regulation of third parties. These requirements weed out speculative harms and ensure that the plaintiff has a personal stake in the legal question at issue.

B. The State of Illinois's counting of certain mail-in ballots received after election day—which Petitioner Bost claims is unlawful—injures Bost by creating a risk that he will lose his election. This Court has treated a substantial risk of harm as an Article III injury. It typically has done so where the risk is direct (in the sense that the plaintiff is an object of the conduct creating the risk) and immediate (in the sense that the threatened harm is not contingent on additional acts by independent third parties).

The State's law imposes such a risk on Bost. Before the election is held, it is necessarily the case that the State's decision to count these contested ballots in Bost's own election could potentially result in him losing a race he otherwise would have won. That is a substantial risk of harm in the sense recognized by precedents of this Court and the courts of appeals, including in the electoral context.

The Seventh Circuit erred in dismissing the electoral risk as too speculative. While the precise probability of the contested ballots becoming the decisive votes

against Bost is of course uncertain, it is indisputable that there is at least some possibility of that happening. And under both caselaw and commonsense, a plaintiff who is being directly subjected to an immediate risk of harm by the defendant's conduct has standing to sue even if the probability of harm is relatively small. The contrary conclusion would have particularly perverse consequences in the electoral context. It would force disputes over vote-counting rules into post-election litigation only once the adverse effect of those rules becomes clear. But for familiar reasons, litigation in that posture would be worse for candidates, voters, and courts.

C. The State's counting of late ballots further injures Bost by increasing his campaign costs to monitor vote counting. Because the State is extending the period for receiving mail-in ballots by two weeks after the election, and given the risk that those ballots could prove decisive to the outcome, Bost's campaign must expend additional money, time, and resources to monitor the counting of those late ballots to determine if there are any other objectionable deficiencies. That alone is sufficient to support Bost's standing, because this Court has held that monetary or other costs that a plaintiff reasonably incurs to mitigate an injurious risk imposed by the defendant's conduct are fairly traceable to that conduct.

The Seventh Circuit erred in dismissing the increased campaign costs as Bost's self-inflicted choice. It is true that a plaintiff who has not suffered a concrete injury caused by the defendant's action cannot manufacture standing by spending money in response to that action. But that principle applies where the defendant has not taken action against the plaintiff at all, and the plaintiff nevertheless chooses to spend money to protect

against speculative harms indirectly flowing from the defendant's treatment of third parties. By contrast, here, the State is directly and immediately imposing a risk of electoral harm on Bost through a ballot-receipt rule governing his own election. His reasonable campaign expenditures to mitigate that risk are thus fairly traceable to the State's ballot-receipt rule.

D. This Court should not adopt Bost's broader standing theories. Absent a risk of electoral defeat, a candidate does not suffer a concrete and particularized injury merely because vote totals will be inaccurate. And time, place, and manner rules for elections do not categorically pose a risk of cognizable injury to candidates.

ARGUMENT

A. To Plead Article III Standing, A Plaintiff Must Plausibly Allege An Actual Or Imminent Injury That Is Fairly Traceable To The Defendant's Challenged Conduct

1. "Article III of the Constitution confines the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Diamond Alt. Energy, LLC* v. *EPA*, 145 S. Ct. 2121, 2133 (2025). That limit is "fundamental to the judiciary's proper role in our system of government" and embodies "separation-of-powers principles." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "Federal courts do not possess a roving commission to publicly opine on every legal question," and they "do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities" or state governments. *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 423-424 (2021). Instead, federal courts are confined to adjudicating disputes between parties "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

An "essential" aspect of Article III's case-or-controversy requirement "is the doctrine of standing," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), which "focuses on whether the plaintiff is the proper party to bring th[e] suit," *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997). "To establish standing, * * * a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief." *FDA* v. *Alliance for Hippocratic Med.*, 602 U.S. 367, 380 (2024). Satisfying these elements ensures that plaintiffs "possess a personal stake in the dispute" and thus "are not mere bystanders" with only an academic interest in a legal question. *Diamond Alt. Energy*, 145 S. Ct. at 2133 (quotation marks omitted).

The injury element is satisfied by "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent." *Defenders of Wildlife*, 504 U.S. at 560 (quotations, citations, and footnote omitted). A "particularized" injury is a harm that "affect[s] the plaintiff in a personal and individual way," as opposed to a "generalized grievance" shared by the public at large. *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 339 & n.7 (2016). A "concrete" injury is a harm that is "'real,' and not 'abstract,'" and of the type "that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 340-341. And an "actual or imminent" injury is a harm that is "*certainly impending*" rather than "too speculative." *Clapper*, 568 U.S. at 409.

The causation element is satisfied when the injury is "fairly traceable" to the challenged action. *Clapper*, 568 U.S. at 409, 416. "Importantly, if a plaintiff is an object

of the action (or foregone action) at issue, then there is ordinarily little question that the action or inaction has caused him injury." *Diamond Alt. Energy*, 145 S. Ct. at 2134 (quotation marks omitted). By contrast, if "the plaintiff is not the object of a government regulation," whether he will be indirectly injured "depend[s] on how regulated third parties not before the court will act in response." *Ibid.* That requires courts to distinguish "predictable" effects from "speculative" ones. *Ibid.*

The redressability and causation elements are usually "flip sides of the same coin," because "[i]f a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury." *Alliance for Hippocratic Med.*, 602 U.S. at 380-381. Redressability is an "additional" bar, though, when there is a remedial mismatch between the injury suffered and the judicial relief requested (*e.g.*, seeking an injunction after the harmful conduct has ceased or can no longer be undone). See *Diamond Alt. Energy*, 145 S. Ct. at 2133.

The standing elements must be satisfied "with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561. So where, as here, the case is only "[a]t the pleading stage, general factual allegations of injury * * * may suffice," *ibid.*, because the plausibility standard requires drawing "reasonable inference[s]" in the plaintiff's favor and "does not require detailed factual allegations," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted). Indeed, supplemental "declarations * * * submitted in response to [a] motion to dismiss" may be considered in assessing the plausibility of the complaint's standing allegations. See *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 121 (2007).

2. Here, Petitioner Bost has plausibly pleaded standing as a candidate to challenge Illinois's law requiring the counting of certain ballots received after election day. That law causes him a cognizable injury because the additional late votes pose a risk of making him lose his election. See Pt. B, *infra*; Pet. Br. 23-33, 35-37. Moreover, the law further injures him by causing his campaign to incur additional costs for monitoring the counting of the extra ballots to mitigate the risk they pose. See Pt. C, *infra*; Pet. Br. 33-34, 37-43.

Bost is incorrect, however, in more broadly arguing (Pet. Br. 18-19, 27-28, 35) that he has a judicially cognizable interest in preventing a legally inaccurate vote count even if that will have no effect on his electoral prospects. That is not a concrete and particularized injury. See Pt. D, *infra*. And for the same reason, this Court should decline Bost's invitation (Pet. Br. 16-22) to adopt a categorical rule that candidates always have standing to challenge any time, place, or manner rule governing their election, regardless of whether the rule poses any risk to their electoral prospects.[*]

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[*] Because this Court can answer the question presented by holding that Petitioner Bost has standing as a candidate, it need not decide whether Petitioners Pollastrini and Sweeney do too. See *Uzuegbunam* v. *Preczewski*, 592 U.S. 279, 293 n.* (2021). Addressing their standing would require deciding the separate question whether and how party nominees for presidential electors should be treated as political candidates for standing purposes. The Court should leave that question for the lower courts to address on remand. *Ibid.*

B. The State's Counting Of Mail-In Ballots Received After Election Day Injures Bost By Creating A Risk That He Will Lose His Election

A candidate's loss of an elected job is unquestionably an Article III injury. See *Raines*, 521 U.S. at 820-821. So if Bost's election were held, and the ballots received after election day ended up causing him to lose his race, he plainly would have standing to challenge the counting of those ballots at that time. But of course, before the election is run, there is only a *risk* that such ballots will end up having that effect.

In some cases, this Court has treated a substantial risk of injury as sufficient for Article III standing. It typically has done so where the challenged conduct directly imposes on the plaintiff an immediate risk of future harm. Especially given the electoral context, this Court should hold that candidates like Bost face imminent injury when the State will count (or fail to count) contested ballots that could cause them to lose their election. The Seventh Circuit erred in dismissing that risk as too speculative in this case.

1. This Court has treated the direct imposition of an immediate risk of future harm as an imminent injury

Although this Court has emphasized that an imminent injury "must be *certainly impending*," *Clapper*, 568 U.S. at 409, it also has cautioned that this "do[es] not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about," *id.* at 414 n.5. The ultimate inquiry is whether the alleged injury is "too speculative for Article III purposes." *Id.* at 409. And so, "[i]n some instances," this Court "ha[s] found standing based on a 'substantial risk' that the [identified] harm will occur." *Id.* at 414 n.5;

accord Susan B. Anthony List v. *Driehaus*, 573 U.S. 149, 158 (2014) (*SBA List*).

The "substantial risk" standard likely "cannot be defined so as to make [its] application * * * a mechanical exercise," but it has "gained considerable definition from developing case law." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). In particular, this Court has typically treated a risk as an imminent injury when the plaintiff is a *direct object* of the challenged conduct and that conduct creates an *immediate risk* not contingent on the independent actions of third parties. See *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) ("A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct.").

A "recurring" example of such cases is where a regulated party brings a pre-enforcement suit against a law's "threatened enforcement." *SBA List*, 573 U.S. at 158. In assessing whether there is an imminent injury, this Court has deemed it sufficient that there is a "credible threat" of enforcement. *Id.* at 159; see *id.* at 159-161 (citing *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 298 (1979), *Virginia* v. *American Booksellers Ass'n,* 484 U.S. 383, 393 (1988), and *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 15 (2010)). In such cases, the risk of injury is direct because both the challenged law and its threatened enforcement operate on the regulated parties themselves; and the risk of injury is immediate because the only contingency is whether the defendant officials will exercise their discretion not to pursue enforcement action. In these circumstances, the credible threat of imminent injury justifies pre-enforcement standing because such parties "should not be required to await" enforcement proceedings "as the sole means of seeking relief." *Id.* at 161.

Likewise, in *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), this Court held that an association of landlords had standing to challenge the enforcement of a municipal rent-control ordinance that allowed tenants to ask hearing officers to limit rent increases "constitut[ing] an unreasonably severe financial or economic hardship." *Id.* at 6; see *id.* at 5-8. The City objected that the association lacked standing because it failed to "specifically allege that [its members] have been or will be aggrieved by the determination of a hearing officer that a certain proposed rent increase is unreasonable on the ground of tenant hardship." *Id.* at 6. But this Court concluded that, because the association's members were "subject to" the ordinance and had "many hardship tenants," there was "a realistic danger" that their "rent[s] will be reduced" because of it. *Id.* at 7-8.

By contrast, in *Clapper*, this Court held that plaintiffs challenging a surveillance law could not establish a "substantial risk" of injury because they themselves were not direct objects of the law. 568 U.S. at 414 n.5. The plaintiffs were "U. S. persons," whom the law "expressly provide[d] * * * cannot be targeted for surveillance." *Id.* at 411. They were thus forced to assert a "speculative chain of possibilities" that their communications with "foreign contacts would be *incidentally* acquired." *Id.* at 414 (emphasis added); see *id.* at 411-414, 414 n.5. In short, the *Clapper* plaintiffs "could not show that they had been or were likely to be subjected to" surveillance under the challenged law at all. *FEC* v. *Ted Cruz for Senate*, 596 U.S. 289, 297 (2022). Allowing such "hypothesized, nonimminent injuries [to] be dressed up as increased risk of future injury" would "eviscerate" standing requirements. *Public Citizen, Inc.* v. *National*

Highway Traffic Safety Admin., 489 F.3d 1279, 1294 (D.C. Cir. 2007) (Kavanaugh, J.).

Moreover, in *TransUnion*, this Court held that the plaintiffs failed to "establish a sufficient risk of future harm," even though they were direct objects of the risk-creating conduct, because the risk was not sufficiently immediate. 594 U.S. at 437-438. There, the class members objected that a credit reporting company was "maintain[ing]" misleading credit files on them, "expos[ing] them to a material risk that the information would be disseminated in the future to third parties and thereby cause them harm." *Id.* at 434-435. But this Court concluded that "the plaintiffs did not demonstrate a sufficient likelihood that their individual credit information would be requested by third-party businesses" or otherwise provided to them. *Id.* at 438. In other words, the risk "was too speculative," *ibid.*, because it "rel[ied] on speculation about the unfettered choices *made by independent actors not before the courts*," *Alliance for Hippocratic Med.*, 602 U.S. at 383 (emphasis added).

That said, even when the challenged conduct does not directly and immediately impose a risk on the plaintiff, this Court has sometimes upheld standing because the risk of significant harm to the plaintiff flowing from the conduct is sufficiently likely to materialize. For example, in *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139 (2010), conventional alfalfa farms challenged the government's decision to deregulate a particular brand of genetically modified alfalfa. *Id.* at 153. They demonstrated a "substantial risk" that their own "crops w[ould] be infected" with the engineered gene, providing evidence of the proximity between the crops and the natural range of cross-pollination. *Id.* at 153 & n.3.

In sum, there is no categorical rule governing when a "risk" is sufficiently "substantial" to constitute imminent Article III injury. Based on factors such as the directness and immediacy of the risk, the ultimate question is whether the threatened harm is "too speculative," *Clapper*, 568 U.S. at 409, to confer "a personal stake in the dispute," *Diamond Alt. Energy*, 145 S. Ct. at 2133 (quotation marks omitted).

2. The State's counting of mail-in ballots received after election day directly imposes on Bost an immediate risk that he will lose his election

As Bost has asserted, he "risk[s] injury if untimely and illegal ballots cause [him] to lose [his] election." Pet. App. 68a. In the last election before this litigation began, up to 4.4% of mail-in ballots in Illinois were received after election day. *Id.* at 85a-86a. The State itself warned the public that "it is likely that close races may see leads change." *Id.* at 85a. And the number of mail-in ballots received after election day has been increasing over time. *Id.* at 66a.

The risk of electoral defeat created by these late ballots is directly and immediately imposed on Bost. As Judge Scudder observed, it "is a near certainty" that the State's law will be applied to Bost. Pet. App. 22a. After all, he is an incumbent running for reelection; the law requires counting mail-in ballots received within two weeks after election day; and there will surely be at least some such ballots in his race. In other words, Bost is no "mere bystander" to the counting of votes in his own reelection race, and there are no contingencies that require "speculation" about how "third parties" will act. *Alliance for Hippocratic Med.*, 602 U.S. at 379, 383.

While it is unknowable before the election whether the ballots at issue will be decisive, it is inescapable that

counting them could potentially result in Bost losing a race he otherwise would have won. That "risk" to Bost's electoral prospects is sufficiently "significant" that he has standing to sue to avoid it. *Monsanto*, 561 U.S. at 155; see *Defenders of Wildlife*, 504 U.S. at 572 n.7 (explaining that a plaintiff has standing to challenge a "procedural" violation that affects his "concrete interests" "even though he cannot establish with any certainty" that eliminating the violation will cause a more favorable result).

Importantly, Bost is "*an* object of the [State's law]," *Diamond Alt. Energy*, 145 S. Ct. at 2134 (emphasis added), even though that law does not "require or forbid some action by [him]," *Alliance for Hippocratic Med.*, 602 U.S. at 382. As a candidate in Illinois, he is subject to the "framework" for how the State runs elections, which of course includes which votes are counted. *Ted Cruz for Senate*, 596 U.S. at 298. While the ballot-receipt law directly regulates the conduct of state election officials and voters, the candidates themselves are also a direct object of that law. As a matter of "commonsense [political] realit[y]," *Diamond Alt. Energy*, 145 S. Ct. at 2136, the law's purpose is to determine which votes to count in order to decide *which candidate* wins the election. Because votes for or against candidates are "target[ed]" by the law, the candidates themselves are direct objects of the law, see *ibid*, and thus "there is ordinarily little question that the [law] has caused [them] injury, and that [prospective relief] will redress it," *id.* at 2134. So long as the ballots at issue may be material to Bost's electoral success, he has an obvious "personal stake" in whether or not they are counted, and the question "What's it to you?" answers itself. *Id.* at 2133.

Caselaw confirms the commonsense proposition that a law can be "aimed directly at" a plaintiff as a targeted object, *American Booksellers Ass'n*, 484 U.S. at 392, even if it does not directly regulate his actions. For example, "[w]hen the government prohibits or impedes Company A from using Company B's product," there are circumstances where "both Company A and Company B might be deemed objects of the government action." *Diamond Alt. Energy*, 145 S. Ct. at 2135 (citing, *inter alia*, *CBS, Inc.* v. *United States*, 316 U.S. 407, 423 (1942)). Similarly, as a matter of "basic economic logic," *United Transp. Union* v. *ICC*, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989), cert. denied, 497 U.S. 1024 (1990), when the government removes a regulatory restriction on some companies and allows them to compete against other market participants, that will "predictabl[y]" cause "economic injuries" to the "competitors," even though those companies' own conduct is not being regulated, *Alliance for Hippocratic Med.*, 602 U.S. at 384-385 (citing, *inter alia*, *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152 (1970)).

The same goes for elections. Relying on competitor-standing cases, the D.C. Circuit has held that candidates "suffer legal harm under Article III" when "regulations illegally structure [the] competitive environment" in which they are "defending [their] concrete interests" in gaining "elected office." *Shays* v. *FEC*, 414 F.3d 76, 87 (D.C. Cir. 2005). Likewise, the Ninth Circuit has held that "the 'potential loss of an election' [is] an injury-in-fact sufficient to give a local candidate * * * standing" to sue the Postal Service for unlawfully "giving his rival a preferential mailing rate." *Drake* v. *Obama*, 664 F.3d 774, 783 (9th Cir. 2011) (quoting *Owen* v. *Mulligan*, 640 F.2d 1130, 1132-1133 (9th Cir.

1981)), cert. denied, 567 U.S. 906 (2012). This Court has even held that an elected official suffered a "cognizable injury" from conduct that caused "a substantial detriment to [his] reputation and candidacy" notwithstanding that the conduct was unrelated to the election. *Meese* v. *Keene*, 481 U.S. 465, 473-475 (1987). In *Meese*, after the federal government designated certain movies as foreign "political propaganda," a state official who wished to exhibit the movies challenged the designation. This Court upheld his standing based on evidence that "his ability to obtain re-election * * * would be impaired" because his "reputation" would be "adversely affect[ed]." *Id.* at 473-474. Compared to such cases, Bost is far more directly injured by the counting of invalid votes that pose some risk that he could lose an election that he would otherwise win.

3. The court of appeals erred in deeming the electoral risk to be too speculative

The Seventh Circuit dismissed as "speculative at best" the risk that "the counting of ballots received after Election Day would cause [Bost] to lose the election." Pet. App. 11a. To be clear, the court did not and could not dispute that, before the election is held, there is *some* risk of that happening. The court just did not deem that risk *likely* to materialize, emphasizing that Bost "won the last election"—*i.e.*, the one that was pending when he filed suit—"with seventy-five percent of the vote." *Ibid.*; but see Pet. Br. 9 (noting that the margins in Bost's prior, pre-suit elections were closer).

This Court, however, has not required plaintiffs who are being directly subjected to an immediate risk of harm to meet a strict probability threshold for standing to sue. To the contrary, in pre-enforcement cases, it has required only a "credible threat" of enforcement. *SBA*

List, 573 U.S. at 159. Indeed, this Court has described that standard as satisfied so long as the enforcement threat is "not 'imaginary or wholly speculative.'" *Id.* at 160 (quoting *United Farm Workers*, 442 U.S. at 302)). Similarly, in rejecting the objection that a candidate's "potential loss of an election" was "too remote" and "speculative," the Ninth Circuit did not try to quantify the likely impact of the "unfair advantage" conferred on the candidate's rival. *Owen*, 640 F.2d at 1132-1133.

Put differently, even a small probability of harm can be a "substantial risk" for Article III purposes, *Clapper*, 568 U.S. at 414 n.5, where the threatened harm immediately flows from conduct where the plaintiff is a direct object. For example, if a sheriff threatened to force an individual to play one round of Russian roulette using a gun with a 20-round magazine, he could not plausibly oppose standing by noting that the chance of a deadly shot was "only" 5%. Similarly, if a bank threatened to randomly redistribute funds among its account holders, they all would have standing to sue despite the uncertainty whether a given individual would be harmed or benefited. Being directly subjected to the unlawful gamble would be injury enough.

The same principle applies *a fortiori* to candidates subjected to unlawful vote-counting rules, because calculating the level of risk would be impossible. It would "require[] a degree of * * * political clairvoyance that is difficult for a court to maintain." *Diamond Alt. Energy*, 145 S. Ct. at 2140; see Larry J. Sabato, *Oops! They Weren't Supposed to Win*, Politico Magazine (May/June 2014), https://www.politico.com/magazine/story/2014/09/oops-they-werent-supposed-to-win-110977/ (listing 30 surprising electoral results, the majority of which involved conditions outside of the candidate's control).

Accordingly, the Seventh Circuit's "contrary holding would place courts and candidates in an untenable position." *LaRoque* v. *Holder*, 650 F.3d 777, 788 (D.C. Cir. 2011) (quotation marks omitted), cert. denied, 568 U.S. 1010 (2012). If pre-election challenges to vote-counting rules are too "speculative," then the validity of such rules could only be resolved, if at all, in post-election disputes where it has become clear that the contested ballots are decisive. But as petitioners cogently explain, that would be worse for all involved: for candidates, who would have to run their campaigns under rules that could change after the votes were cast; for voters, who could be disenfranchised if their votes were set aside after the fact; and for courts, who would be forced to resolve election disputes under compressed schedules and with the partisan effects of their rulings magnified. See Pet. Br. 43-47.

Article III does not compel federal courts to flout the "basic tenet[s] of election law" that "the rules of the road should be clear and settled" and that courts "ordinarily should not alter [those rules] in the period close to an election." *Democratic Nat'l Comm.* v. *Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (citing *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) (per curiam)). Under established standing principles, candidates "should not be required to await" post-election litigation "as the sole means of seeking relief" from unlawful rules concerning the validity of ballots. *Holder*, 561 U.S. at 15. The risk to a candidate's electoral prospects from such rules is itself an imminent injury that supports a pre-enforcement suit.

C. The State's Counting Of Mail-In Ballots Received After Election Day Further Injures Bost By Increasing His Campaign Costs To Monitor Vote Counting

The standing analysis here is particularly "straightforward," *Diamond Alt. Energy*, 145 S. Ct. at 2135, because the electoral risk to Bost also causes financial harm to his campaign. Extending the period for receiving mail-in ballots by two weeks increases the costs incurred to monitor the counting of those ballots, which is necessary precisely because of the risk that the ballots could be decisive. "Those monetary costs are of course an injury." *Ibid.* (quotation marks omitted).

This Court has repeatedly held that monetary or other costs reasonably incurred to mitigate an injurious risk imposed by the challenged conduct are fairly traceable to that conduct (and would be redressed by halting that conduct). The Seventh Circuit erred in dismissing those costs as Bost's self-inflicted choice.

1. This Court has treated costs reasonably incurred to mitigate an injurious risk as fairly traceable to the conduct causing that risk

As Bost explained, "[l]ate-arriving * * * ballots exacerbate the expenses [his] campaign incurs." Pet. App. 67a. Wholly apart from the timing, some of these ballots will "have discrepancies (e.g., insufficient information, missing signatures, dates, or postmarks) that need to be resolved." *Id.* at 66a. Bost's "campaign needs to both monitor and evaluate whether to object to the counting of deficient ballots," which "costs [his] campaign time, money, volunteers[,] and other resources." *Id.* at 67a. Bost "ha[s] had to organize, fundraise, and run [his] campaign for fourteen additional days in order to monitor and respond as needed to ballots received after the national Election Day." *Id.* at 66a.

As Judge Scudder emphasized, Bost is "more than justified in monitoring the count after Election Day" due to "the risk of ballot irregularities." Pet. App. 19a. "In recent years, poll watching has become commonplace among major candidates, with all 50 states permitting campaign representatives to monitor vote tallies." *Ibid.*

Accordingly, Bost's claim is governed by this Court's precedents that "have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Clapper*, 568 U.S. at 414 n.5. For example, in *American Booksellers Ass'n*, the plaintiffs' pre-enforcement standing was based in part on the fact that they would have had "to take significant and costly compliance measures" to avoid the "risk" of enforcement. 484 U.S. at 392. Likewise, the "substantial risk of gene flow injure[d]" the conventional alfalfa farms in *Monsanto* in part because the farms would need "to conduct testing" of whether their crops had been contaminated and "to take certain measures" for protection against contamination. 561 U.S. at 153-154.

Once again, this principle also has been applied in the electoral context. As the D.C. Circuit has explained, the "illegal structuring of a competitive environment" requires candidates to "anticipate and respond to" a different "range of competitive tactics" than the "law would otherwise allow." *Shays*, 414 F.3d at 85-86; see *Texas Democratic Party* v. *Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (holding that the campaign costs a political party would need to incur if the opposing party were allowed to belatedly change its candidate supported standing to challenge the change). Here, Bost must either incur the increased costs of monitoring the late

ballots to identify objectionable deficiencies or take the risk that those ballots may cost him the election—a risk that would be increased if his opponent monitors the counting and objects to deficient ballots that are more likely to be votes for Bost. "[B]ecause being put to the choice of either [monitoring late ballots] or suffering disadvantage in [his] campaign[] is itself a predicament" that Bost claims federal law "spares [him], having to make that choice constitutes Article III injury." *Shays*, 414 F.3d at 89.

2. The court of appeals erred in deeming the increased campaign costs to be a self-inflicted choice

The Seventh Circuit held that Bost's increased costs for ballot monitoring are "not 'fairly traceable' to the Illinois ballot receipt procedure." Pet. App. 13a (quoting *Clapper*, 568 U.S. at 416). The court of appeals observed that Bost is "not spending resources to comply with the Illinois ballot receipt procedure or to satisfy some obligation it imposes on [him]." *Ibid.* The court objected that, instead, Bost is "choosing to spend money to mitigate [the] conjectural risk[]" that "the counting of ballots received after Election Day would cause [him] to lose the election." *Id.* at 11a-12a. The court thus concluded that Bost's increased campaign costs are self-inflicted harms that could not support Article III standing under *Clapper*. *Id.* at 10a-11a.

The Seventh Circuit misread *Clapper*. Again, the plaintiffs there were "not the object of [the challenged] government regulation." *Diamond Alt. Energy*, 145 S. Ct. at 2134. As *Clapper* itself explained, the surveillance "risk" that the plaintiffs took measures to protect against was too "attenuated" because it rested on a "speculative chain of possibilities" that their own communications "would be *incidentally* acquired" if the

government happened to surveil *third-party* foreigners with whom they were in contact. 568 U.S. at 414 & n.5 (emphasis added). Or as this Court said more recently, the *Clapper* plaintiffs' "problem * * * was that they could not show that they had been or were likely to be subjected to [the surveillance law] in any event." *Ted Cruz for Senate*, 596 U.S. at 297. That being so, they could not "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that [was] not certainly impending." *Clapper*, 568 U.S. at 416. In other words, *Clapper* is an application of the important principle, recently reaffirmed in *Alliance for Hippocratic Medicine*, that a plaintiff who "has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money" in response to that action. 602 U.S. at 394.

Clapper is thus inapposite here. As Judge Scudder observed, "[i]n direct contrast to *Clapper*, the application of the challenged government restriction [to Bost] in this case is a near certainty." Pet. App. 22a. While the State's law does not directly regulate Bost's conduct, he is still a direct object of the law because it governs the counting of votes in his own election. See Pt. B.2, *supra*. And regardless, in *Monsanto*, the conventional alfalfa farms were not directly regulated by the government's decision to deregulate another company's genetically modified crop, but this Court still held that the anti-contamination measures they would need to take were "concrete" "harms" that were "readily attributable to [the government's] deregulation decision." 561 U.S. at 155. Although the risk to Bost's electoral prospects from the late ballots may be less likely than the contamination risk in *Monsanto*, it is not too

speculative and is sufficiently substantial to constitute an imminent Article III injury. See Pt. B.3, *supra*. Accordingly, Bost's increased campaign costs "to mitigate" that risk are "reasonably incur[red]" and fairly traceable to the State's law requiring that the ballots be counted. *Clapper*, 568 U.S. at 414 n.5.

D. This Court Should Not Adopt Bost's More Sweeping Theories Of Candidate Standing

While Bost has standing for the foregoing reasons—as he emphasizes, Pet. Br. 23-43—he nevertheless also advances much broader theories of candidate standing. This Court need not reach those arguments, but if it does, it should not accept them.

Bost contends that candidates have an interest "'in ensuring that the final vote tally accurately reflects the legally valid votes cast,'" which he insists is "distinct" from any risk of "electoral disadvantage." Pet. Br. 18 (quoting *Carson* v. *Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020) (per curiam)). But as the court of appeals panel unanimously recognized (Pet. App. 14a, 16a), if the risk to Bost's own electoral prospects is set aside, then his objection to an inaccurate vote tally is simply a "generalized grievance" that "the law * * * has not been followed," which is not a judicially cognizable injury under Article III. *Lance* v. *Coffman*, 549 U.S. 437, 442 (2007) (per curiam).

Attempting to particularize his asserted interest in accuracy for its own sake, Bost emphasizes that candidates care about their "margin of victory." Pet. Br. 27; see *id.* at 35. But Bost's desire to run up the score is not a "concrete" interest that "history and tradition" shows can support standing to sue over vote totals. *TransUnion*, 594 U.S. at 424. The State runs elections and certifies the results to determine who shall hold public

office, not to sponsor a public opinion poll for candidates. Moreover, Bost's position would lead to the untenable result that a candidate would have standing to bring *post-election* litigation challenging the validity of votes that were *concededly immaterial* to the outcome. A candidate could thus invoke an "abstract" interest in accuracy as a pretext to obtain an "advisory opinion[]" about a legal issue related to the rules governing those votes. *Contra id.* at 423-424. Article III bars such misuse of the federal courts. Where the risk of electoral defeat posed by an unlawful voting rule "does *not* materialize," that is "cause for celebration, not a lawsuit," because the candidate can no longer "establish a concrete harm sufficient for standing." *Id.* at 436-437.

Finally, for similar reasons, this Court should not adopt Bost's request for a categorical rule that candidates *always* "have standing to challenge the rules that govern their elections." Pet. Br. 22; see *id.* at 16-22. To be sure, Bost "is not without force" in arguing that many time, place, and manner rules governing elections will pose an electoral risk to candidates, thus supporting their standing to challenge those rules. Cf. *Diamond Alt. Energy*, 145 S. Ct. at 2136. But that is not true as a categorical matter, because at least some election-related rules may not have any direct and immediate connection to electoral outcomes. This Court "ultimately need not further consider that [issue] in this case because, regardless, [Bost] ha[s] readily demonstrated [his] standing" under the narrower rule that both he and the United States urge. *Ibid.* To repeat, candidates have standing to seek prospective relief challenging a rule governing the validity of ballots so long as there is a risk that the ballots at issue could affect the outcome of their election.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

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