No. 24-568

# In the Supreme Court of the United States

MICHAEL J. BOST, ET AL.,

*Petitioners*,

*v.*

ILLINOIS STATE BOARD OF ELECTIONS and BERNADETTE MATTHEWS, in her official capacity as the Executive Director of the Illinois State Board of Elections,

*Respondents.*

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

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

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## REASONS FOR GRANTING THE PETITION

A sitting member of the U.S. House of Representatives seeks to challenge a state electoral regulation affecting his reelection. He has successfully run for federal office in Illinois for three decades. He alleges that the regulation allows the receipt of ballots in a manner contrary to federal law. And he alleges (and there is no reasonable way to deny) that the regulation increases the costs associated with his longstanding campaign and post-election practices. He has now been denied the opportunity to have this challenge heard over the course of two reelection campaigns. He is no mere bystander. Pet.App.23a (Scudder, J. dissenting). "He

is an active stakeholder who ought to be permitted to raise his claim in federal court." *Id*.

Under the law of the Eighth Circuit, Petitioners would have had standing based on the injury to their interests as candidates in an accurate tally of lawfully received ballots. Under the law of the Fifth Circuit, Petitioners would have had standing based on the additional costs inflicted on their campaigns by the challenged regulation. The dismissal in this case for lack of standing, affirmed by a divided Panel of the Seventh Circuit, conflicts with the law of those circuits. Respondents attempt to alter the meaning of the relevant circuit decisions by referring, not to the rulings themselves, but to filings submitted in those cases. As set forth below, this effort fails. Respondents' efforts to portray the Panel's decision as "factbound" and a "poor vehicle" for review are hollow. The circuit splits arising from the Panel's ruling, on an important and recurring matter of electoral law, warrant the Court's review.

## I. The Opinion Below Conflicts with Decisions from Other Circuit Courts Regarding the Important Matter of Candidate Standing.

The Panel's opinion directly conflicts with decisions from other circuits regarding the jurisdiction of federal courts to hear challenges by federal candidates to state time, place, and manner regulations under the Election and Electors Clauses. Petitioners have alleged candidate-based injuries recognized by other circuits, including an injury to a candidate's interest in an accurate vote tally, and

monetary and resource injuries. *See* 7th Cir. Doc. 6 at 16-17, 21. The live circuit splits arising from the Panel's opinion are certain to recur given the number and frequency of federal elections.[1] It is important to grant certiorari to address the lack of uniform jurisdictional standards among the federal courts on this important question.

### A. The Panel Opinion Directly Conflicts with the Eighth Circuit's Decision in *Carson v. Simon* Regarding Candidates' Interest in an Accurate Vote Tally.

*Carson v. Simon*, 978 F.3d 1051, 1057-58 (8th Cir. 2020), concerned a challenge by two federal elector candidates to a state consent decree extending the state's ballot receipt deadline until after Election Day. The Eighth Circuit held that they had stated an Article III injury: "As candidates, the Electors argue that they have a cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast. An inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Id*. at 1058 (footnote omitted). The court did not further qualify this interest or impose additional requirements. *See id*. (referring to "the injury" simply as "an inaccurate vote tally").

In their brief in opposition, Respondents argue that "there is no conflict between the opinion below

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[1] For example, Congressman Issa recently filed a challenge to California's ballot receipt deadline. *Issa v. Weber*, No. 3:25-cv-598-AGS-JLB (S.D. Cal. March 13, 2025).

and *Carson*." B.I.O.19.[2] The basis of this claim is Respondents' contention that *Carson* requires a plaintiff to allege "that the challenged policy might materially affect their likelihood of prevailing in an election." B.I.O.20.[3] There is nothing in the decision itself mandating this. But Respondents claim to locate this requirement in two declarations submitted in support of the *Carson* plaintiffs' motion for preliminary relief. B.I.O.19. "To be sure," Respondents admit, "the Eighth Circuit used broad language to describe its holding[.]" B.I.O.20. But they conclude that, because the *Carson* court was "cognizant of the plaintiffs' allegation" in these declarations "that the 'vote tally' at issue might have meant the difference" between winning and losing, the court must have incorporated a requirement to make that allegation into its ruling. *Id.*

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[2] This claim is, at a minimum, in some tension with the Panel's suggestion that *Carson* was wrongly decided. *See* Pet.App.14a (citing *Carson*'s dissent to "question whether the Eighth Circuit's brief treatment of this issue without citation to any authority is consistent" with *Lance v. Coffman*, 549 U.S. 437 (2007)). The Panel also distinguished *Carson* on the ground that early voting had begun in Minnesota, while elections in Illinois were "months away." Pet.App.14a-15a. This distinction is hollow, as pointed out in the Petition. Pet.28. In any case Respondents fail to discuss it.

[3] Petitioners previously expounded on how any requirement to establish political viability would be judicially unmanageable. Pet.19-20; Pet.App.19a ("past is not prologue for political candidates … In no way is any outcome guaranteed in November") (Scudder, J., dissenting); *cf. Bartlett v. Strickland*, 556 U.S. 1, 17 (2009) (rejecting Voting Rights Act standard requiring the judiciary "to make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term").

This argument is badly flawed. The relevant law is, of course, stated by the Court of Appeals for the Eighth Circuit, and not by any declarations submitted in cases before it. Simply put, what matters is what the court says, not what parties surmise it was "cognizant of." And nothing in *Carson* limited the interest in accurate vote tallies to elections candidates allege they will lose. Indeed, even the dissent in *Carson* did not claim this, or otherwise assert that the majority recognized a qualified or limited interest in an accurate tally. To the contrary, the dissent used the same "broad language" the Respondents discount here. *Carson*, 978 F.3d. at 1063 (Kelly, J., dissenting) (describing the "claimed injury" simply as "a potentially 'inaccurate vote tally'").[4]

There is a live circuit split over whether the prospect of a final tally that does not accurately reflect the legally valid votes cast in an election is an injury conferring standing on federal candidates who

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[4] Because the *Carson* holding speaks for itself, this Court need not examine its evidentiary basis, but it is worth noting the respondents misconstrue the record. *See* B.I.O.19. The quote from the Declaration of James Carson, *Carson v. Simon*, No. 20-cv-2030 (D. Minn. Sept. 24, 2020), Doc. 15 at 3 (¶ 16), regarding circumstances that would "prevent" him from "participating in the Electoral College," refers to the previous paragraph, which expresses the concern that Congress may refuse to certify the state's results—not that Mr. Carson might lose his election. *Id.* ¶ 15. Likewise, the statement pulled from the Declaration of Eric Lucero, *Carson v. Simon*, No. 20-cv-2030 (D. Minn. Sept. 24, 2020), Doc. 16 at 2 (¶ 11), merely states that he is "among" the candidates voters "will choose to elect or not elect," and not that he might lose his election.

challenge electoral regulations.[5] The Panel's decision plainly conflicts with the holding in *Carson*.

### B. There Is a Circuit Split Over Candidate Resource Injuries.

The Panel's decision regarding economic and resource injuries conflicts with rulings from the Fifth Circuit. Pet.29-30. The Fifth Circuit has found that direct economic loss in response to a challenged electoral regulation was a cognizable injury. *See id.*; *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006). *See also Republican National Committee v. Wetzel*, 120 F.4th 200 (5th Cir. 2024), *reh'g en banc denied*, 132 F.4th 775 (5th Cir. 2025), *aff'g in part, rev'g on other grds. Republican Nat'l Comm. v. Wetzel*, 742 F. Supp. 3d 587, 595-96 (S.D. Miss. 2024) (finding standing based both on "economic injury as well as diversion of resources"). The

[5] Other appellate courts have considered whether an inaccurate tally is a cognizable injury conferring standing. S*ee Bognet v. Sec'y of Pa.*, 980 F.3d 336, 351 fn. 6 (3d Cir. 2020) *vacated and remanded with instructions to dismiss as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021) (mem.) ("Our conclusion departs from" *Carson*); *Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919 (7th Cir. 2020) (finding that, "[a]s a candidate for elected office, the President's alleged injury" is concrete and particular, citing *Carson*); *see also Wood v. Raffensperger*, 981 F.3d 1307, 1316 (11th Cir. 2020) (observing that "perhaps a candidate or political party would have standing to challenge the settlement agreement" that allegedly violated state election law).

Respondents' arguments to the contrary are unavailing.[6]

Respondents' discussion of *Benkiser* is wholly unpersuasive. B.I.O.22. In *Benkiser*, the Fifth Circuit held that the Texas Democratic Party ("TDP") had several cognizable injuries conferring standing. *See* 459 F.3d at 586. The first injury was that the challenged practice would cause it to spend more money and, thus, it had direct standing because an economic injury is the "quintessential injury upon which to base standing." *Id.* (citations omitted).

The injury here called for "a straightforward application of settled principles of standing." Pet.App.21a. Rather than apply those principles, the Panel invented a new standard, providing that resource injuries are only cognizable if they arise from regulations that impose a "direct affirmative obligation on the candidates or political parties." Pet.App.13a. This standard was clearly not applied in *Benkiser*, however, where there was no requirement that any such "direct affirmative obligation" exist. Rather, the TDP challenged a candidate's removal from the ballot under a state law that allowed the Republican Party to effect this removal based on its *own* finding that he was ineligible. Thus, the TDP did not challenge a statute *as it applied to them*, but as it applied to, and was applied by, the Republican Party of Texas. 459 F.3d at 585. But the *Benkiser* court still

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[6] Respondents characterize Petitioners' economic and resource injuries as "resource diversion." B.I.O.10, 11, 16. Petitioners' resource injuries are also framed as direct economic losses of the kind discussed in *Benkiser*, 459 F.3d at 586. *See* Pet.App. 65a (¶ 10), 66a (¶¶ 12-14), 67a (¶¶ 16, 18), 68a (¶ 20).

held that "the TDP has direct standing because [the candidate's] replacement would cause it economic loss." *Id.* at 586 (citation omitted). Although no law compelled those expenditures, they were deemed sufficient to confer standing.

Unlike the Panel, the Fifth Circuit did not reject the resource injuries in *Benkiser* merely because the TDP "elected to undertake expenditures" in the electoral context. Pet.App.13a; *see also* Pet.24-27 (discussing cognizable injuries that are "willingly incurred," citing *FEC v. Ted Cruz for Senate*, 596 U.S. 289 (2022)). The resource injuries in *Benkiser* were every bit as "elective" as the resource injuries rejected by the Panel. Yet the plaintiffs had standing in *Benkiser*, while they were denied standing in this case. That is enough to show a circuit split over the standards governing candidate standing based on economic and resource injuries.

Respondents attempt to distinguish *Benkiser* by arguing that "the panel held that the party had standing for the separate reason that the conduct it was challenging might reduce its 'chances of victory.'" B.I.O.22, citing *Benkiser*, 459 F.3d at 586. But that alternate holding has no effect on the court's finding that, "[f]irst, the TDP has direct standing" based on "economic loss." *Id*. Only then did the court find that a "second basis for the TDP's direct standing is harm to its election prospects" because its "chances of victory would be reduced." *Id*. The *Benkiser* court never held that alleging reduced "chances of victory"

was necessary to establish candidate standing based on an *economic* loss.[7]

Finally, Respondents argue that *Wetzel* can be distinguished, again on the ground that the complaints in that action—rather than the written opinions of the appellate and district courts—showed that the plaintiffs there pleaded competitive injuries B.I.O.23. Again, the law is stated by the courts, not by the complaints. In any case, while it is true that the plaintiffs there did plead multiple bases for standing, including their interest in accurate vote tallies, economic injuries, vote dilution, and competitive injuries, they might be forgiven for doing so given the parlous state of the law concerning candidate standing. *See*, *e.g.*, Complaint, *Libertarian Party of Miss. v. Wetzel*, No. 1:24-cv-37 (S.D. Miss. Feb. 5, 2024), Doc. 1, ¶¶ 35-54.

The treatment of economic injuries in this case by the Seventh Circuit conflicts with the law of the Fifth Circuit.

## II. Respondents' Other Arguments Are Without Merit.

a. The "antecedent procedural question" referenced by Respondents is illusory. B.I.O.11-12. Petitioners previously described how Respondents waived any objection to Petitioners' declarations already in the record by failing to raise them before

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[7] Indeed, this argument was expressly rejected in *Wetzel*, 742 F. Supp. 3d at 592 n.3 ("Defendants argue that *Benkiser* is inapplicable because it pertained to competitive standing … But competitive standing was an alternative finding in *Benkiser*, separate from its finding of economic loss." (citations omitted)).

the district court. 7th Cir. Doc. 34 at 3-4. The declarations were discussed extensively both in filings and during oral argument before the district court. *See* Doc.74 at 24-27, *Bost v. ISBE*, No. 1:22-cv-2754 (N.D. Ill. Dec. 7, 2022) (transcript from Dec. 7, 2022, argument on motion to dismiss). Because Respondents waited until filing their opposition in the Seventh Circuit, any procedural question has long since been waived.

b. Perhaps based on the purported "antecedent procedural question," many of Respondents' arguments fail to acknowledge allegations contained in Petitioners' declarations. Pet. App.64a-79a. In particular, Respondents' arguments regarding competitive injuries do not account for the full record. They contend Petitioners "failed to plead any actual competitive injury." B.I.O.9. This fails to account for allegations in the complaint citing Respondents' public warning that election leads may change because of late-arriving ballots. Pet.App.85a (¶19). And Congressman Bost's declaration included a statement that "[b]ecause Section 19-8(c) does not comply with federal Election Day statutes, I risk injury if untimely and illegal ballots cause me to lose my election for federal office." Pet.App.68a (¶23).

c. For nearly 130 years federal courts routinely heard claims brought by federal candidates challenging state time, place, and manner regulations. *See* Pet.14-15 (collecting cases). Petitioners' reference to this longstanding practice is not to suggest, as Respondents claim, that candidate standing is "automatic," B.I.O.4, 8, 10, or that that candidates do not have to otherwise satisfy Article III

under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Rather, it illustrates that candidates have long been recognized to have cognizable interests in the rules governing their elections. One 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." *Hotze v. Hudspeth*, 16 F.4th 1121, 1126 (5th Cir. 2021) (Oldham, J., dissenting). Where, as here, a federal court concludes an incumbent candidate lacks a cognizable interest, it may be that the court "fail[ed] to see this as a straightforward application of settled principles of standing." *See* Pet. App. 21a (Scudder, J. dissenting).

Respondents dismiss this history and recent jurisdictional rulings discussed by Petitioners. B.I.O.12-13 (noting Petitioners identified nine cases); *see also* Pet.13-17. Rather than evidence of the need to grant certiorari, Respondents contend these cases simply involve "different claims brought by different plaintiffs regarding different state election laws." B.I.O.12. While that might explain inconsistent *merit* rulings, it does not explain inconsistent jurisdictional rulings, especially where a candidate alleges that a statewide practice, such as counting late-arriving ballots, threatens his or her interest in ensuring that the vote tally accurately reflects only valid votes.

Respondents argue that the questions raised in the petition are not important because many of the listed cases involve "ballot access measures undertaken during the Covid-19 pandemic, further

underscoring *the limited utility of granting certiorari to review any aspect of their reasoning*." B.I.O.13 (emphasis added). Petitioners agree that those rulings, many of which involved truncated proceedings and requests for extraordinary relief, have limited utility. In practice, however, the reasoning from those cases is still being used today to challenge candidate (and party) standing all over the country. *See* Doc. 88, *RNC v. Burgess*, No. 3:24-cv-198-MMD-CLB (D. Nev. July 17, 2024) (dismissing RNC's claims citing reasoning from 2020 rulings). Even Respondents argued in these proceedings that the reasoning from the vacated *Bognet* ruling was persuasive. *See* 7th Cir. Doc. 18 at 12, fn. 4; *see Id*. at iii (citing *Bognet* as "passim"). The "unjustifiably strict view of standing as applied to both voters and candidates" in those cases continues to bedevil plaintiffs seeking to bring otherwise valid claims. *See* Steven J. Mulroy, *Baby & Bathwater: Standing in Election Cases After 2020*, 126 DICK. L. REV. 9, 12-13 (Fall 2021).

* * * * *

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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