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 FOR RESPONDENTS

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QUESTION PRESENTED

Since 2005, Illinois law has required election officials to count mail-in ballots that are sent on or before Election Day but arrive during the State's 14-day window for counting provisional ballots.

The question presented is:

Whether petitioners, who are candidates for political office, lack Article III standing to challenge Illinois's ballot-receipt deadline given that they repeatedly waived any argument that the deadline makes it more likely they will lose an election, did not identify any other concrete electoral consequence the deadline might have, and did not connect their alleged pocketbook injuries to a legally cognizable injury that their resource expenditures were intended to mitigate.

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BRIEF FOR RESPONDENTS

INTRODUCTION

Illinois, like many States, has chosen to allow voters to cast mail-in ballots in federal and state elections, and provided that such ballots will be counted as long as they are mailed by Election Day and arrive during the 14-day window in which the State counts provisional ballots. This rule descends from a historical tradition of permitting active-duty military members to cast ballots while serving far from home, and today similar rules have been embraced by dozens of States across the Nation. Like Illinois, these States

choose to allow individuals to cast ballots by mail up to and including Election Day to minimize the burdens placed on exercising the right to vote.

Petitioners are three Illinois political candidates who oppose Illinois's ballot-receipt deadline and seek to have it declared unlawful. They filed a complaint claiming that the deadline violates federal law and seeking declaratory and injunctive relief. Petitioners alleged primarily an abstract entitlement to a vote tally that is "complian[t]" with federal law. Pet. App. 87a (¶32). When respondents challenged petitioners' standing, petitioners submitted a declaration stating that petitioner Michael Bost expends campaign resources to "chase" mail-in ballots and to monitor those ballots that arrive after Election Day—costs that petitioners asserted constituted an injury traceable to the challenged law. *Id.* at 68a (¶20). The declaration also stated that Bost "risk[ed] injury" if later-arriving ballots caused him to lose his election or reduced his margin of victory. *Id.* at 68a (¶¶23-24). But petitioners subsequently told the Seventh Circuit that Bost's "stated injury is not based on a risk of losing the election," Pet. C.A. Br. 19, or other interference with his "practical, electoral prospects," Pet. C.A. Reply Br. 8.

The Seventh Circuit held that petitioners lacked standing, reasoning that they had identified no injury to their electoral prospects, that their purported entitlement to an accurate vote tally was too abstract, and that they had failed to explain why their resource expenditures were necessary to mitigate a substantial risk of any injury cognizable under Article III.

Before this Court, petitioners renew their contention that they have standing to challenge the ballot-receipt deadline based on their interest in an accurate vote tally, or avoiding a reduced margin of victory, as well as their alleged expenditure of resources. Petitioners also add a new, more sweeping argument—that *all* political candidates have standing to challenge *all* rules regulating their elections. This Court should reject each of petitioners' standing theories and affirm the decision below.

A political candidate, like any other plaintiff seeking to invoke Article III jurisdiction, must demonstrate a concrete and particularized injury traceable to a challenged election rule, not merely voice objection to that rule. Petitioners failed to do so. They did not allege—indeed, they expressly waived any argument—that the ballot-receipt deadline might affect the outcomes of their elections. They did not assert that any change in the vote tallies attributable to the deadline would disadvantage them in a concrete way. And their resource-diversion theory cannot support standing because they failed to identify any cognizable injury that their expenses were intended to mitigate. Affirming the decision below will not, as petitioners suggest, impede candidates' access to the courts or push election litigation to the days and weeks surrounding Election Day; it will simply ensure that all plaintiffs, candidates or not, adhere to the same standards in invoking federal jurisdiction. Petitioners failed to do so.

STATEMENT OF THE CASE

A. Statutory Scheme

The Constitution "'imposes' on state legislatures the 'duty' to prescribe rules governing federal elections," while simultaneously permitting Congress to alter the rules that States enact. *Moore v. Harper*, 600 U.S. 1, 10 (2023) (quoting *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013)); see U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. Pursuant to this duty, the States have exercised sweeping "responsibility for the mechanics" of federal elections, *Inter Tribal Council*, 570 U.S. at 9, in areas ranging from voter registration to ballot access to mail-in voting.

Illinois has enacted a comprehensive election code governing federal and state elections. See 10 ILCS 5/1-1 *et seq.* Like many States, Illinois provides voters with alternatives to waiting in line to vote on Election Day. In the weeks prior to Election Day, for example, voters may vote in person at early voting sites. *Id.* § 5/19A-5. Or voters may choose to skip poll lines altogether by requesting mail-in ballots. *Id.* § 5/19-2. A voter who chooses to vote by mail must sign and date a certification on the ballot envelope attesting under penalty of perjury that she is eligible to vote in the election. *Id.* §§ 5/19-5, 19-6. Voters can return their mail-in ballots in several ways. They may take their completed ballots to designated drop-off locations, authorize someone else to do so, or return them via mail. *Id.* § 5/19-6. Regardless of whether voters choose to drop off their ballots or mail them, they must do so no later than Election Day. *Id.* § 5/19-8(b)-(c).

Because some ballots that are mailed by Election Day may not be received for some time afterward, Illinois ensures that such ballots will be counted if they arrive "before the close of the period for counting provisional ballots"—*i.e.*, within 14 days of Election Day. *Id.* § 5/19-8(c); see *id.* § 5/18A-15(a). Election authorities will count a ballot received by mail during this period only if it is postmarked on or before Election Day, or, where the postmark is missing, if the voter's ballot certification is dated on or before Election Day. *Id.* § 5/19-8(c).

This system is not unusual. Over half of the States require the counting of at least some ballots that are sent on or before Election Day but arrive after. D.C. Br. 6-9, *Watson v. Republican Nat'l Comm.*, No. 24-1260 (U.S.). These laws have deep roots. During the Civil War, many States allowed soldiers fighting away from home to vote absentee, and their ballots were often received after the day designated as Election Day. See Josiah Henry Benton, *Voting in the Field* 30-31, 239-41, 317-18 (1915).[1] Today, the States that have chosen to count mail-in ballots that are cast on or before Election Day but are received after Election Day do so for many reasons, including easing the burdens on active-duty service members and their families, who often cannot cast ballots in person. See Joseph Clark, *Researchers Set Out to Tackle Voting Challenges of Military Members*, U.S. Dep't of Def. (Feb. 12, 2024).[2] Laws like Illinois's allow these individuals and others to ensure that their

[1] https://bit.ly/3UFpcO9.

[2] http://bit.ly/40KOnSS.

votes will be counted, and their voices heard, in federal elections.

B. Proceedings Below

Petitioners are three Illinois political candidates: Bost, who has served since 2015 in the U.S. House of Representatives, and Laura Pollastrini and Susan Sweeney, who sought appointment as presidential electors in 2020. Pet. App. 4a.

Petitioners disagree with Illinois's choice to count mail-in ballots that are cast on or before, but received after, Election Day, and filed suit to challenge the State's ballot-receipt deadline. *Ibid.* Petitioners contend principally that Illinois's deadline is preempted by two federal statutes setting the Tuesday after the first Monday in November of even-numbered years as Election Day. See *ibid.*; 2 U.S.C. § 7; 3 U.S.C. § 1. Petitioners believe that Illinois has unlawfully decided to count "'untimely' ballots" in violation of these statutes. Pet. App. 4a.

In their complaint, petitioners did not allege that Illinois's ballot-receipt deadline made it more difficult for them to seek or obtain elected office in any race in which they had competed or would subsequently compete. Rather, petitioners alleged two bases for standing as candidates.[3] First, petitioners contended that they were "entitled to have their election[] results

[3] Petitioners also asserted standing as voters, contending that Illinois's ballot-receipt deadline "diluted" their votes. Pet. App. 6a-9a. The Seventh Circuit rejected this argument, *ibid.*, and petitioners do not challenge that aspect of its decision, Pet. 31 n.13.

certified with votes received in compliance with the federal Election Day statutes," and so were automatically entitled to challenge any state election rule interfering with that interest. *Id.* at 87a (¶32). Second, petitioners alleged that they "rel[ied] on provisions of federal and state law in conducting their campaigns including, in particular, resources allocated to the post-election certification process." *Id.* at 87a-88a (¶33).

Respondents moved to dismiss, arguing that petitioners lacked standing and that their claims failed on the merits. *Id.* at 4a-5a. Shortly thereafter, petitioners moved for partial summary judgment, attaching three declarations that, they argued, established their standing. See *id.* at 4a-5a, 64a-79a. In their declarations, petitioners did not identify a substantial risk that the ballot-receipt deadline would affect their ability to seek or obtain federal office. Bost stated only that he "risk[ed] injury *if*" mail-in ballots received after Election Day "cause[d] [him] to lose [his] election for federal office," *id.* at 68a (¶23) (emphasis added), and "because [his] margin of victory *may* be reduced" by such ballots, *id.* at 68a (¶24) (emphasis added). As to the latter, Bost added that "[a] diminished margin of victory will lead to the public perception that [his] constituents have concerns about [his] job performance," which in turn could "influence . . . third parties," such as "voters, Congressional leadership, donors, and potential political opponents." *Id.* at 68a-69a (¶24).

Bost's declaration also expanded upon his allegation that he was injured because he expended campaign resources on "the post-election certification

process." *Id.* at 88a (¶33). Specifically, he stated, his campaign "has spent, and will spend, money, time, and resources to monitor and respond as needed to ballots received by state election officials" after Election Day. *Id.* at 65a (¶10); see *id.* at 66a-67a (¶¶15-19) (describing these expenses). Bost also stated that his campaign maintains a "ballot chase program . . . to evaluate [its] get-out-the-vote efforts," a program that he asserted he must "keep . . . active [for] fourteen additional days" after Election Day due to the ballot-receipt deadline. *Id.* at 68a (¶20). But Bost did not state that these expenditures were necessary to abate any specific risks, electoral or otherwise.

The district court granted respondents' motion to dismiss, holding that petitioners lacked standing and their claims failed on the merits. *Id.* at 27a. Petitioners appealed.

At the Seventh Circuit, respondents defended the district court's decision on standing and the merits. Respondents explained that, although petitioners asserted a competitive injury, in that they maintained that Illinois's ballot-receipt deadline interfered with their entitlement to an accurate vote tally, they had never alleged that the deadline "in [any] way affect[ed] their electoral prospects." Resp. C.A. Br. 23. And, respondents argued, petitioners' resource-diversion theory failed because they had not adequately alleged any concrete harm that their expenditure of resources would mitigate. *Id.* at 21. For their part, petitioners agreed that Bost's "stated injury [was] not based on a risk of losing the election" or any other "change to his electoral fortunes." Pet. C.A. Br. 19;

accord Pet. C.A. Reply Br. 7-8 (reiterating that petitioners had not alleged an injury based on interference with their "practical, electoral prospects").

The Seventh Circuit affirmed, holding that petitioners had failed to demonstrate standing. Pet. App. 2a. The court held that petitioners had failed to plead a "competitive injury" because they "d[id] not . . . allege that the majority of votes that [would] be received and counted after Election Day [would] break against them." *Id.* at 13a. The court also rejected petitioners' reliance on their asserted interest in "ensuring that the final official vote tally reflects only legally valid votes," explaining that any such interest was too abstract and generalized to give rise to standing. *Id.* at 13a-15a. Finally, the court held that petitioners had not established standing based on their alleged expenditures on post-election ballot monitoring. *Id.* at 10a. That was so, the court reasoned, because petitioners failed to explain why the mail-in ballots arriving after Election Day might affect their likelihood of winning their elections—or otherwise inflict injury on them. *Id.* at 11a.

Judge Scudder dissented in part. *Id.* at 16a. Although he agreed that petitioners had failed to allege a cognizable competitive injury, he would have held that Bost's expenditure of resources on monitoring ballots that arrived after Election Day gave rise to standing. *Ibid.*

SUMMARY OF ARGUMENT

Petitioners advance a wide and expanding range of theories to support standing, but all are seriously flawed. Each either reduces to an argument that

candidates always have standing to challenge election rules or requires the Court to consider information or arguments that petitioners declined to present to the courts below. The Court should affirm the Seventh Circuit's judgment that petitioners lack standing.

First, petitioners argue that *all* candidates have standing to challenge *any* rule that governs their elections. But this remarkable argument flies in the face of separation-of-powers principles and the settled rule that Article III's case-or-controversy requirement applies equally to all litigants.

Second, petitioners argue that Bost has standing because he alleged an injury to his "electoral prospects." But Bost did no such thing. In fact, he repeatedly told the Seventh Circuit that "a risk of losing the election" was *not* a basis for standing in this case. Petitioners' argument that Bost alleged an electoral injury thus rests on their view that political candidates have a legally cognizable "interest in the size of the margin," and so the risk of a "diminished margin of victory," by even one vote, confers standing. But that argument conflicts with history and tradition and, at bottom, reproduces petitioners' flawed request for a blanket candidate-standing rule.

Under the correct standard, petitioners failed to establish an injury to Bost's electoral prospects. The statements in his declaration are wholly speculative, resting on carefully worded "ifs" and "mays." Petitioners seek to overcome these deficiencies by asking this Court to examine extra-record materials, but those materials were never provided to the courts below and should not now be considered for the first

time. Regardless, they do not establish Bost's standing.

Petitioners next invoke a "pocketbook" theory of standing, pointing to statements in Bost's declaration about his alleged expenditures of campaign resources on chasing mail-in ballots and monitoring ballot counting. But this theory rests on a misreading of Illinois law and so is not plausible; it is not fairly traceable to the ballot-receipt deadline, which does not require Bost to do, or not do, anything; and it ignores the requirement that Bost's expenditures must have been necessary to mitigate the risk of an injury that would itself give rise to standing.

Finally, petitioners turn to policy arguments, asserting that a more capacious understanding of candidate standing would promote more efficient litigation over election rules. But policy concerns of this kind are irrelevant to the Article III inquiry, and, regardless, petitioners are wrong that applying ordinary standing rules in this context will push challenges to election rules past Election Day or otherwise encumber candidates or courts tasked with adjudicating such disputes.

ARGUMENT

I. Article III Requires A Plaintiff To Establish A Concrete, Particularized Injury Traceable To A Challenged Statute.

a. "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 rests on "separation-of-powers principles." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). At all times, the burden of establishing standing remains with the plaintiff, "the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). To meet this burden, a candidate challenging an election rule, no less than any other plaintiff, must demonstrate "that he has suffered a concrete and particularized injury that is fairly traceable to the challenged [rule], and is likely to be redressed by a favorable judicial decision." *Carney v. Adams*, 592 U.S. 53, 58 (2020).

To begin, a "concrete" injury is one that is "real, and not abstract," *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021), while a "particularized" injury "affect[s] the plaintiff in a personal and individual way," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). A bare allegation "that the law . . . has not been followed" is not "particularized" because it is an "undifferentiated, generalized grievance about the conduct of government." *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam). And allegations of future harm must satisfy the requirement that an injury be "actual or imminent, not conjectural or hypothetical." *Spokeo*, 578 U.S. at 339. They do so only "if the threatened injury is 'certainly impending,' or there is a "'substantial risk" that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 414 n.5).

Next, an injury is "fairly traceable to the challenged conduct," *Carney*, 592 U.S. at 58, if it is caused by the conduct and the "links in the chain of

causation" are not "too speculative or too attenuated," *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024). When a plaintiff is "the object of" the challenged statute—that is, when the statute "require[s] [or] forbid[s] [some] action" by the plaintiff—traceability is usually straightforward. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). But traceability is "ordinarily substantially more difficult to establish" when a plaintiff instead "challenges the government's unlawful regulation (or lack of regulation) of *someone else*." *All. for Hippocratic Med.*, 602 U.S. at 382 (cleaned up).

Importantly, a plaintiff cannot bypass Article III's requirements "by choosing to make expenditures based on hypothetical future harm that is not certainly impending"—that is, to protect against an injury that would not itself give rise to standing. *Clapper*, 568 U.S. at 402. Such expenditures, the Court has explained, even if otherwise cognizable under Article III, are not "fairly traceable" to the defendant's conduct, in that they are essentially "self-inflicted." *Id.* at 418; accord *All. for Hippocratic Med.*, 602 U.S. at 394-95 ("[A]n organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money" or "divert[ing] its resources in response to a defendant's actions."). This is true even if a plaintiff's decision to expend those resources can in some sense be understood as a "reasonable reaction to a risk of harm." *Clapper*, 568 U.S. at 416. Indeed, the Court in *Clapper* rejected a test that would have "allowed respondents to establish standing by asserting that they suffer present costs and burdens that are

based on a fear [of future injury], so long as that fear is not 'fanciful, paranoid, or otherwise unreasonable.'" *Ibid.*

Finally, a plaintiff must establish that her injury is "likely to be redressed by the requested relief." *Haaland v. Brackeen*, 599 U.S. 255, 292 (2023). This analysis generally is straightforward given that traceability and redressability "are often flip sides of the same coin." *All. for Hippocratic Med.*, 602 U.S. at 380 (cleaned up). If the plaintiff's injury is traceable to the challenged action of the defendant, then "enjoining the action or awarding damages for the action will typically redress that injury." *Id.* at 381.

Through these requirements, courts ensure that legal questions are resolved "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* at 379. And, by mandating "that the plaintiff possess a personal stake" in the case, standing doctrine "protect[s] the autonomy of those who are most directly affected so that they can decide whether and how to challenge the defendant's action." *Id.* at 379-80 (cleaned up).

b. Plaintiffs "bear the burden of demonstrating that they have standing" and must do so "with the manner and degree of evidence required at the successive stages of the litigation." *TransUnion*, 594 U.S. at 430-31. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [a court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561

(1992) (cleaned up). But "[t]hreadbare recitals" of Article III's requirements "supported by mere conclusory statements" are insufficient to establish standing at any stage. *Ashcroft v. Iqbal*, 556 U.S. 663, 678 (2009). Rather, a complaint must contain "well-pleaded facts" that permit the court to infer that it is "plausible"—not merely "possib[le]"—that the plaintiff has standing. *Id.* at 679.

When a plaintiff fails to "clearly allege facts demonstrating each element" of standing in her complaint, the general rule is that a court must dismiss the case. *Spokeo*, 578 U.S. at 338 (cleaned up). If a plaintiff believes that she can fix the problem by pointing to additional facts, the appropriate course is to amend the complaint. See Fed. R. Civ. P. 15. Notwithstanding this rule, a court may allow "the plaintiff to supply . . . by affidavits[] further particularized allegations of fact deemed supportive of [her] standing." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

But a plaintiff's choice to forgo filing an amended complaint and submit a declaration has consequences. For one, such declarations are record evidence, not pleadings, and therefore are not entitled to the presumption that any "general allegations" in those documents "embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. Likewise, if a court affords a plaintiff a chance to submit such declarations in support of standing, that plaintiff is entitled to no further grace: "If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth*, 422 U.S. at 501-502.

Finally, if a plaintiff's complaint and declaration omit facts that would be within her knowledge and would strongly indicate standing if included, the plaintiff may not argue that the court should infer that those absent facts would support standing. See *TransUnion*, 594 U.S. at 439 ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.").

II. Petitioners Failed To Demonstrate Standing.

Petitioners filed a threadbare complaint in which they alleged primarily a generalized entitlement to have votes in their elections counted in accordance with law. When pressed, petitioners submitted declarations that, they argued, supported a second standing theory: that Bost had standing because he expends resources to chase and monitor mail-in ballots. Petitioners also asserted that Bost risked injury if later-arriving ballots caused him to lose an election or reduced his margin of victory. But petitioners subsequently waived any argument that Bost had standing based on the risk of a lost election. In this Court, petitioners add yet another theory—arguing that all candidates have standing to challenge all rules governing their elections. The Court should reject each of petitioners' theories, apply the same rules of standing that govern every other plaintiff, and affirm the decision below.

A. The Court Should Reject Petitioners' Proposed Blanket Candidate-Standing Rule.

Petitioners begin with the sweeping request for a blanket rule that "[c]andidates have standing to challenge the rules that govern their elections." Pet. Br. 22. That proposal is antithetical to the separation of powers, and the Court should reject it.

1. Article III standing rests on "separation-of-powers principles." *Clapper*, 568 U.S. at 408; see also *supra* pp 11-12. Under Article III, federal courts "do not possess a roving commission to publicly opine on every legal question," and "do not issue advisory opinions." *TransUnion*, 594 U.S. at 423-24.

Consistent with these principles, this Court has repeatedly rejected efforts to soften or eliminate the standing requirements for certain categories of plaintiffs. Most obviously, the Court has declined to craft an exception for cases in which "no one would have standing." *All. for Hippocratic Med.*, 602 U.S. at 396; accord, *e.g.*, *Clapper*, 568 U.S. at 420. It has refused to relax standing rules for members of particular professions, observing that "there would be no principled way to cabin" such carveouts. *All. for Hippocratic Med.*, 602 U.S. at 391-92 ("[T]here is no . . . doctrine of 'doctor standing' . . . ."); *Lujan*, 504 U.S. at 566 (rejecting standing theory "under which anyone with a professional interest in [endangered] animals can sue"). And it has rejected a rule that would allow any business standing to sue "whenever a competitor benefits from something allegedly unlawful," noting that it has "never accepted such a boundless theory of

standing." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013). Instead, the "specific standing requirements constitute 'an essential and unchanging part of the case-or-controversy requirement of Article III.'" *All. for Hippocratic Med.*, 602 U.S. at 380 (quoting *Lujan*, 504 U.S. at 560).

Candidates have received the same treatment. In *McConnell v. FEC*, for example, this Court held that a sitting senator who planned to run advertisements critical of his opponents in future campaigns lacked standing to challenge a broadcast regulation because his alleged injury was "too remote temporally to satisfy Article III standing." 540 U.S. 93, 225-26 (2003), *overruled, in unrelated part, by Citizens United v. FEC*, 558 U.S. 310 (2010). And in *Wittman v. Personhuballah*, 578 U.S. 539, 545 (2016), the Court held that legislators lacked standing to challenge a redistricting plan despite their allegation that it would harm their reelection chances because, even assuming such harm was "legally cognizable," they offered no "record evidence establishing their alleged harm." The Court, in other words, has held candidates to the same standards as all other litigants.

2. Ignoring all this, petitioners ask this Court to adopt a blanket exception that would allow candidates to bring lawsuits challenging any rule governing their elections, even rules that "do not operate directly on the candidate," Pet. Br. 17, regardless of whether the rule impacts their electoral chances or pocketbooks, *id.* at 22. The Court should reject that request, which is flawed on multiple levels.

To start, petitioners suggest that candidates satisfy Article III en masse because they invest "time, money, and emotional energy" into their campaigns. *Id.* at 16. But "time" and "emotional energy" are not enough for standing—a plaintiff "may not establish standing simply based on the 'intensity of [her] interest'" in the subject of the litigation. *All. for Hippocratic Med.*, 602 U.S. at 394 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982)). And although pocketbook injuries can be legally cognizable, petitioners are not suggesting that the Court recognize the standing of candidates who can show that they have incurred costs traceable to the defendants' conduct; rather, they ask the Court to recognize the standing of candidates who *cannot* do so. See Pet. Br. 21-22 (arguing that it does "not make sense to require candidates to allege those injuries in every case"). That would erase candidates' burden of establishing injury or causation, giving them roving license to challenge any election law they do not like. Standing is not dispensed "in gross," *TransUnion*, 594 U.S. at 431, but that is just what petitioners request here.

Petitioners' argument that candidates have a cognizable interest in "ensuring that the rules that govern their elections are lawful" and that "'the final vote tally accurately reflects the legally valid votes cast,'" Pet. Br. 18 (quoting *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020)), fares no better. Ensuring that elections comply with the law is a classic generalized grievance insufficient to confer standing, as this Court has repeatedly emphasized.

Lance, for example, rejected several voters' constitutional challenge to Colorado's method of drawing congressional districts, explaining that their sole alleged injury—"that the law . . . ha[d] not been followed"—was "precisely the kind of undifferentiated, generalized grievance about the conduct of government that [the Court had] refused to countenance in the past." 549 U.S. at 442. Similarly, in *Carney*, this Court held that an attorney suffered only a "generalized grievance" in his challenge to Delaware's rules governing judicial appointments, even if lawyers, more so than the general public, "feel sincerely and strongly that Delaware's laws should comply with the Federal Constitution." 592 U.S. at 60. Petitioners' request for an all-candidates, all-laws rule fares no better than the requests rejected in these cases, as even petitioners' amici recognize. See, *e.g.*, U.S. Br. 30-31; LWV Br. 19 n.5.

Nevertheless, petitioners argue, without free rein to bring federal lawsuits challenging election rules, winning candidates might face the "perception that their victory was produced by an inaccurate tally" and losing candidates may hold the "perception that they did not get the benefit of a fair count." Pet. Br. 18-19. Although reputational harms can be legally cognizable, see *TransUnion*, 594 U.S. at 425, petitioners' exception—under which *all* political candidates are automatically granted standing to contest "the rules that govern their elections," Pet. Br. 18—is intentionally drawn to sweep in even those candidates who cannot plausibly allege such harms. Petitioners' proposal, in other words, would grant standing to candidates who can identify no more than the kind of "fear[]

of hypothetical future harm" that cannot confer standing. *Clapper*, 568 U.S. at 416; accord *TransUnion*, 594 U.S. at 438 (deeming similar suggestion "too speculative").

Petitioners also posit that, because elections are "zero-sum," "virtually every rule governing the length of campaigns and which votes count will benefit one candidate or the other," Pet. Br. 19, automatically entitling any candidate to challenge any such rule. But the Court rejected an analogous argument in *Already,* holding that one business did not have standing to challenge the validity of another's trademark "simply because [they] both compete in the [same] market." 568 U.S. at 99. Characterizing the plaintiff's theory as recognizing standing whenever a business's "competitor benefits from something allegedly unlawful," the Court refused to adopt that "remarkable proposition." *Ibid.* Like the business in *Already*, petitioners ask this Court to assume that any benefit one candidate may derive from an allegedly illegal election rule necessarily injures his competitor. But this Court has "never accepted such a boundless theory of standing," and it should not now. *Ibid.*[4]

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[4] Petitioners' "zero-sum" theory is not only doctrinally problematic, it also is incorrect. Election laws are designed to ensure that elections are fairly conducted, which reassures all candidates that the outcome is reliable. See, *e.g.*, 10 ILCS 5/29-1, 29-7 (prohibiting vote buying and election machine tampering). And statutory deadlines give all candidates certainty when organizing their campaigns and anticipating the finalization of results. See, *e.g.*, *id.* §§ 5/10-6, 22-7 (setting deadlines for submitting nomination papers and for officials to canvass votes). Election rules thus promote fair, open, and honest competition

The same reasoning defeats the argument—pressed by petitioners' amici—that candidates always have standing to challenge rules governing their elections because a candidate's mere participation in an "illegally structure[d]" election is a cognizable injury. RNC Br. 4; accord EIPC Br. 6; HEP Br. 8-10; Morley Br. 3; W. Va. Br. 11. On the contrary, consistent with *Already*, courts require candidates to show that the challenged rule gives their direct and current opponents an unfair advantage that in turn risks harming the candidate's electoral chances. See *Castro v. Scanlan*, 86 F.4th 947, 959 (1st Cir. 2023) (candidate must "show a 'plausible' chance of being competitively affected by the conditions that they challenged"); *Mecinas v. Hobbs*, 30 F.4th 890, 898-99 (9th Cir. 2022) (an "illegally structure[d] competitive environment" may be an injury-in-fact if it leads to "potential loss of an election"); *Nader v. FEC*, 725 F.3d 226, 228 (D.C. Cir. 2013) (standing based on "illegally structured campaign environment" must "diminish the candidate's chances of victory").[5] This Court should not

among candidates, which benefits the entire field rather than favoring some candidates over others.

[5] Indeed, cases in which courts found "political competitor" standing, RNC Br. 5, emphasize this requirement. See, *e.g.*, *Shays v. FEC*, 414 F.3d 76, 86, 92 (D.C. Cir. 2005) (candidates established standing "based on the distinct risk, documented in their affidavits, that political rivals will exploit the challenged rules to their disadvantage" (cleaned up)); *LaRoque v. Holder*, 650 F.3d 777, 786 (D.C. Cir. 2011) (candidate had standing to challenge rules "providing a competitive advantage to his . . . opponents"); *Owen v. Mulligan*, 640 F.2d 1130, 1131 (9th Cir. 1981) (candidate sought to prevent "opponent from gaining an unfair advantage in the election process through abuses of mail preferences which arguably promote[d] his electoral prospects"

adopt a rule that excuses political candidates—unique among plaintiffs—from explaining how alleged illegality affects *them*.

Petitioners invoke policy reasons to support their blanket candidate-standing rule, Pet. Br. 22, but, rather than encouraging fair and efficient elections, petitioners' rule would promote a litigation free-for-all in which any candidate could sue over any election rule applicable to her race, see D.C. Br. pt. II. Nor is petitioners' proposed limiting principle—that candidates will *choose* not to bring lawsuits "that have no realistic likelihood of impacting the outcome or fairness of the election"—a meaningful one. Pet. Br. 21. After all, many elections include candidates who have no realistic chance of winning, but who seek to advocate certain issues or disrupt the status quo. See, *e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979). Under petitioners' proposal, these candidates would be free to bring lawsuits to challenge any election rule on the books for purely ideological reasons—turning federal courts into fora for airing "generalized grievances" about election law. *Valley Forge*, 454 U.S. at 483. And it would cause state and local governments to divert energy and resources away from administering elections and toward litigating ideological lawsuits.

(cleaned up)); see also *Nelson v. Warner*, 12 F.4th 376, 384 (4th Cir. 2021) (candidate had standing to challenge ballot order statute that "allegedly injure[d] his chances of being elected").

Finally, contrary to petitioners' suggestion, Pet. Br. 20, their proposal is unnecessary to ensure that candidates with an "obvious, particularized, and concrete interest" in a challenged election rule have access to the federal courts. Where an election law directly requires or forbids some action by a candidate—for example, ballot access regulations, *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)—standing is usually "easy" to establish, *All. for Hippocratic Med.*, 602 U.S. at 382. And while standing is "ordinarily substantially more difficult to establish" when the challenged election law regulates (or fails to regulate) third parties, *ibid.*, it will be established so long as Article III's requirements are met. At bottom, then, petitioners' proposed blanket standing rule is a solution to a nonexistent problem. The Court should reject it.

B. Bost Did Not Demonstrate Standing Based On The Ballot-Receipt Deadline's Electoral Consequences.

Petitioners next argue that Bost established standing based on "harm [to] his electoral prospects." Pet. Br. 23.[6] Bost did no such thing. On the contrary, he repeatedly disclaimed any need to show "a risk of losing the election" or other interference with his "practical, electoral prospects." *Supra* pp. 8-9. Petitioners' view that Bost nevertheless demonstrated standing rests on the premise that candidates have a

[6] Petitioners do not argue that Pollastrini or Sweeney has standing on this basis, or any basis other than their proposed blanket candidate-standing rule. Pet. Br. 23 n.1. If the Court rejects that rule, it should hold that Pollastrini and Sweeney lack standing.

legally cognizable "interest in the size of the margin," and so the risk of a "diminished margin of victory," by even a single vote, confers standing. Pet. Br. 27. But that argument reproduces petitioners' blanket-standing proposal, and it fails for the same reasons and more. Ordinary standing principles should apply and, on the record petitioners developed, Bost did not establish standing based on the ballot-receipt deadline's electoral consequences.

1. A bare change in vote margin is not a cognizable injury.

a. A candidate challenging an election rule, like any other plaintiff, must plausibly allege "that he has suffered a concrete and particularized injury that is fairly traceable to the challenged [rule], and is likely to be redressed by a favorable judicial decision." *Carney*, 592 U.S. at 58; see *supra* pp. 11-16. A candidate will sometimes be able to satisfy these requirements based on the rule's likely electoral consequences. But the possibility that an election rule will reduce the final vote margin, by even one vote and without any concrete injury to the plaintiff, is not an adequate basis for standing.

A cognizable injury based on a rule's likely electoral effects could take several forms. Most obviously, a candidate might allege a substantial risk that enforcement of the challenged rule will cause her to lose her race, cf. *Raines v Byrd*, 521 U.S. 811, 821 (1997) (noting elected officials' cognizable interest in positions); or to fail to achieve some other legally significant vote threshold, such as a minimum percentage to obtain public financing or ensure future ballot access,

see *Principles of the Law: Election Administration* § 210 cmt. a (Am. L. Inst. 2019) (discussing legally significant thresholds potentially warranting recount). Other forms of injury may also be relevant. A candidate may have standing if she demonstrates that an election rule disadvantages her relative to a competitor. *Supra* pp. 22-23, 22 n.5. And, of course, a candidate would have standing if she could plausibly link the electoral effects of the challenged rule to some other traditionally recognized harm, such as monetary or reputational injury, and show that a judgment in her favor would likely redress the injury. See *TransUnion*, 594 U.S. at 425.

b. But, while various types of injuries may be cognizable in this context, petitioners' view that a candidate can establish standing simply by asserting that an election rule may "diminish[] [her] margin of victory," Pet. Br. 27, is untenable. Since virtually any election rule could plausibly change a race's final margin by at least one vote, this theory reprises petitioners' argument for candidate standing en masse, and fails for the same reasons. *Supra* pp. 17-24. Petitioners' related suggestion that any reduction in margin necessarily will carry concrete financial and reputational consequences, Pet. Br. 27-28, is equally incorrect. A single-vote change could not realistically "harm the candidate's standing with future voters . . . [or] donors." *Id.* at 27 (cleaned up). And whether any larger shift would plausibly affect a candidate's finances or reputation would depend on the surrounding circumstances.

The Nation's historical tradition buttresses the conclusion that a possible change in vote margin,

without more, does not establish standing. See *TransUnion*, 594 U.S. at 424-25 (courts should examine whether asserted injury "has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts" (cleaned up)). Early cases held that a party seeking an election recount was required to plead facts that, taken as true, "would render it the duty of the Court either to entirely vacate the election, or to declare that another person, and not the party [originally declared the winner], was duly elected." *Skerrett's Case*, 2 Parsons 509, 514 (Pa. Ct. Com. Pl. 1845); accord, *e.g.*, *Augustin v. Eggleston*, 12 La. Ann. 366, 367 (1857); *Loomis v. Jackson*, 6 W. Va. 613, 692-93 (1873). Several States passed statutes to the same effect. See, *e.g.*, *Ruh v. Frambach*, 47 N.J.L. 85, 87 (1885) (discussing statute allowing recount if poll worker error "changed" "the result"); *Dobyns v. Weadon*, 50 Ind. 298, 302 (1875) (similar). And a contemporary treatise endorsed this approach. Geo. W. McCrary, *A Treatise on the American Law of Elections* §§ 397, 402, 404 (3d ed. 1887) ("There is no doubt as to the soundness of th[e] ruling [in *Skerrett's Case*].").[7] History thus confirms that a winning candidate's "desire to run up the score is not a 'concrete' interest that . . . can support

[7] http://bit.ly/45IQjwF. Today, virtually every State's election laws reflect a limited purpose of ensuring that the correct winner is certified—for instance, by specifying that only a defeated candidate may seek a recount, *e.g.*, Minn. Stat. § 204C.35, subdiv. 1(a)(2) & (b)(2); allowing recounts only in sufficiently close races, *e.g.*, Va. Code Ann. § 24.2-800(B); or requiring a candidate who requests a recount to bear the cost if the winner does not change, *e.g.*, Cal. Elec. Code § 15624.

standing." U.S. Br. 30 (quoting *TransUnion*, 594 U.S. at 424).

c. Unsurprisingly, then, none of petitioners' authorities support their vote-margin theory. *Davis v. FEC*, 554 U.S. 724, 734 (2008), involved a statute that penalized the plaintiff candidate, Davis, for self-funding his campaign by allowing his "opponent to receive [campaign] contributions on more favorable terms" than those available to Davis. The Court thus found standing because this disparate treatment burdened Davis's First Amendment rights—not because of any effect on vote margins. See *id.* at 734-35. *Meese v. Keene*, 481 U.S. 465, 467 (1987), concerned a statute that designated certain films as "political propaganda." This Court held that a politician who wished to exhibit some of those films had standing to challenge the statute not because the films' designation might alter the margin in his next race but because he had shown, through "detailed affidavits," public polling, and expert evidence, that "exhibition of [the] films . . . would substantially harm his chances for reelection and would adversely affect his reputation in the community." *Id.* at 473-74. *New York State Board of Elections v. López Torres*, 552 U.S. 196, 201-02 (2008), did not discuss standing, and, in any event, was a challenge to the party-convention process by which judicial candidates in New York could access the general election ballot, rendering petitioners' vote-margin theory inapposite. See also *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (recognizing injury where statute deterred potential candidates from running for office by stripping them of their current office on declaration of candidacy). Nor do any of the

court of appeals decisions petitioners collect, Pet. Br. 25, adopt their position: instead, those cases involved election rules that allegedly created a competitive advantage for the plaintiffs' opponents that worked to the plaintiffs' disadvantage. See, *e.g.*, *LaRoque*, 650 F.3d at 786; *Owen*, 640 F.2d at 1131; see also *supra* pp. 22-23, 22 n.5.

As petitioners' amici explain, the States "run[] elections and certif[y] the results to determine who shall hold public office, not to sponsor a public opinion poll for candidates." U.S. Br. 30-31. A diminished vote margin, without more, thus is not a legally cognizable injury.

2. Bost did not demonstrate standing based on harm to his "electoral prospects."

Applying ordinary standing principles to the "particular record" that petitioners submitted below, *Carney*, 592 U.S. at 65, Bost has not demonstrated standing. His declaration—which conspicuously omits facts that, had they existed, would have been within his personal knowledge—cannot make up for the deficiencies in petitioners' threadbare complaint. And petitioners' effort in this Court to fill the gaps with new data and "common sense" lacks merit.

a. Bost's declaration is insufficient to establish a cognizable injury, much less one that was caused by the ballot-receipt deadline.

To demonstrate harm to Bost's "electoral prospects," Pet. 23, petitioners primarily rely on two

statements from Bost's declaration. Neither demonstrates a concrete and particularized injury, and both fail to show that any injury would be traceable to the deadline or redressable by a judgment enjoining its enforcement.

i. Petitioners point first to Bost's assertion that he "risk[s] injury if untimely and illegal ballots cause [him] to lose [his] election." Pet. Br. 30 (alterations in original) (quoting Pet. App. 68a (¶23)). This gets petitioners nowhere because it says nothing about how likely that risk is to materialize. All plaintiffs "risk injury *if*" an injury occurs. Pet. App. 68a (¶23) (emphasis added). But the risk of injury supports standing only if it is "imminent and substantial." *TransUnion*, 594 U.S. at 435. For example, the plaintiffs in *Murthy v. Missouri*, 603 U.S. 43, 49-50 (2024)—who challenged government censorship—"risk[ed] injury if," Pet. App. 68a, that censorship occurred, but because there was no imminent and substantial risk that it would, they lacked standing. So too here. Because Bost's declaration does not identify a substantial risk that he might lose an election if the ballot-receipt deadline is enforced, it does not confer standing.

Indeed, petitioners implicitly acknowledge as much. They dedicate a significant portion of their opening brief to arguing that a candidate need not allege a substantial risk that a challenged election rule will be outcome determinative. Pet. Br. 16-22, 25-28. And, before the Seventh Circuit, they did not claim that the ballot-receipt deadline posed a substantial risk to Bost's likelihood of re-election. Instead, they told that court that "Bost's stated injury is not based

on a risk of losing the election," Pet. C.A. Br. 19, and, when pressed, they doubled down, insisting that their standing argument "did not depend on [Bost's] practical, electoral prospects," Pet. C.A. Reply Br. 8. Petitioners thus waived the risk-of-defeat theory of standing. See *Wood v. Milyard*, 566 U.S. 463, 474 (2012).

Surprisingly, the United States adopts this theory as its primary argument for standing. U.S. Br. 16-25. And it attempts to fill the gaps in Bost's declaration by asserting that he is "an object of" the ballot-receipt deadline, and thus "ordinarily" would have standing to challenge it. *Id.* at 21 (cleaned up). But there is no object-of-regulation exception to Article III. As the Court has explained, if a plaintiff is "an object of [a challenged statute]," then "there is ordinarily little question" about causation because a plaintiff directly regulated by a statute will usually have little trouble tracing any resulting injury to that statute. *Lujan*, 504 U.S. at 561-62. But object or not, the plaintiff must still satisfy the requirements that there be a concrete and particularized injury, causation, and redressability—and will lack standing if he cannot do so. See *California v. Texas*, 593 U.S. 659, 671 (2021) (plaintiffs lacked standing to challenge statute that required them to obtain health insurance but imposed no penalty for failure to do so). The risk-of-defeat theory of standing thus fails for the reasons discussed regardless of whether Bost is in some sense the object of the ballot-receipt deadline.

Regardless, Bost is not an object of the ballot-receipt deadline, as even petitioners seem to recognize. See Pet. Br. 17 (distinguishing between "rules that regulate the candidates directly" and rules that "do

not operate directly on the candidate, but purport to regulate . . . when and how votes will be counted"). The challenged statute does not "govern . . . [his] conduct" or "require [or] forbid any action on [his] part," and it is impossible for him to violate it. *Summers*, 555 U.S. at 493; accord *All. for Hippocratic Med.*, 602 U.S. at 382. In arguing otherwise, the United States appears to assert that, because the statute regulates elections and the results of those elections ultimately affect or are important to candidates, candidates must be the object of the statute. U.S. Br. 21. But it cites no case adopting this sweeping approach, and its reliance on *Diamond Alternative Energy* is misplaced: that decision suggested in dicta—without deciding—that a business might be the object of a regulation that, in practice, limited the scope of its activities by preventing potential customers from obtaining its products. 145 S. Ct. at 2135-36. The ballot-receipt deadline imposes no such de facto restriction on Bost; it does not constrain his conduct either in law or in practice.

ii. The second statement on which petitioners rely—Bost's assertion that he "risk[s] injury because [his] margin of victory . . . may be reduced by untimely and illegal ballots," Pet. Br. 30 (quoting Pet. App. 68a (¶24))—fares no better. It simply restates petitioners' vote-margin theory, which, as discussed, *supra* pp. 25-29, does not amount to a concrete harm.

Bost's reference to reputational and fundraising considerations associated with a reduced margin of victory changes nothing. See Pet. App. 68a-69a (¶24). Although changes to a candidate's reputation or finances may be a cognizable injury, *supra* p. 26, Bost

did not identify a substantial risk of suffering either. His declaration merely speculates that his "margin of victory . . . *may* be reduced," Pet. App. 68a (¶24) (emphasis added), while providing no reasonable basis to infer that ballots received after Election Day are likely to break for his opponent. That deficiency is particularly striking because Bost has run for Congress in every election cycle since 2014 and purports to have "monitor[ed] . . . ballots received" after Election Day during that time. *Id.* at 64a-65a (¶¶4, 10). He thus was well positioned to attest in his declaration that he was likely to suffer such consequences as a result of the ballot-receipt deadline, but declined to do so. Bost's "production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse." *TransUnion*, 594 U.S. at 439.

Nor can petitioners work around this problem by asserting that, "[i]n a zero-sum election, it is a near-mathematical certainty that late-arriving absentee ballots will benefit one candidate to the detriment of the other." Pet. Br. 31. Their burden is not to show that *someone* has standing, but that *Bost* does. See, *e.g.*, *All. for Hippocratic Med.*, 602 U.S. at 379-80. The speculative possibility of a reduced victory margin does not satisfy that burden.[8]

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[8] Petitioners also reference a November 2020 statement by the Illinois State Board of Elections warning that "[a]s mail ballots arrive in the days after [Election Day 2020], close races may see lead changes." Pet Br. 31 (quoting Pet. App. 85a (¶19). But petitioners do not allege that any such lead change actually occurred in Bost's race.

The failure to identify a cognizable injury defeats petitioners' claim to standing based on harm to Bost's "electoral prospects." But this claim independently fails because petitioners have not shown that any injury would be traceable to the deadline or redressable by a judgment in their favor. See *All. for Hippocratic Med.*, 602 U.S. at 380. Petitioners could satisfy these requirements only by demonstrating that the deadline *caused* voters to cast ballots against Bost that they otherwise would not have, and that those voters would likely respond to the deadline's invalidation by declining to vote at all, rather than by simply meeting the new deadline.

Petitioners did not make either showing. The closest they come is Bost's assertion that "[t]he volume of votes arriving after Election Day has grown significantly" since Illinois's enactment of the ballot-receipt deadline and no-excuse mail voting. Pet. App. 66a (¶15). That statement does not, however, establish that the voters casting those ballots for Bost's opponents had previously abstained from voting and would do so again were the deadline invalidated. And petitioners' decision to supply declarations rather than re-pleading means that the evidence is not entitled to the presumption that "general allegations" "embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561; see *supra* p. 15. In any event, Bost's statement as readily suggests that voters conform their behavior to current law, such that, were the deadline to shift to Election Day, they would mail their ballots sooner or drop them off on or before Election Day. See *Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are

merely consistent with a [plaintiff's theory], it stops short of the line between possibility and plausibility . . . ." (cleaned up)). Petitioners' "guesswork as to how [these] independent decisionmakers will exercise their judgment" is too shaky a foundation for standing. *Murthy*, 603 U.S. at 57.

b. Petitioners cannot fill the gap with references to extra-record data and "common sense."

Apparently recognizing the deficiencies in Bost's declaration, petitioners ask the Court to gap-fill with extra-record information and "common sense." The Court should decline that request, both because petitioners have forfeited reliance on this information and because it affirmatively undermines Bost's assertion of electoral injuries.

i. First, petitioners seek to supplement the record with data purportedly showing that "Democrats were far more likely to utilize mail ballots in [the 2020 election], both nationally and in Illinois." Pet. Br. 31 (citing Charles Stewart III, MIT Election Data & Sci. Lab, *How We Voted in 2020*, at 9 (2021);[9] *Illinois Election Results 2020*, NBC News (Dec. 3, 2020)[10]). This attempt fails for at least four reasons.

First, it comes too late. Petitioners did not allege facts of this sort in the complaint, did not describe them in their declarations, and did not present them to the Seventh Circuit—a point that court

[9] http://bit.ly/45Kb2QP.

[10] http://bit.ly/4lQD0k8.

emphasized. Pet. App. 13a ("[Petitioners] do not (and cannot) allege that the majority of the votes that will be received and counted after Election Day will break against them[.]"). Petitioners have thus forfeited this argument. See *United States v. Jones*, 565 U.S. 400, 413 (2012).

Second, neither source petitioners cite is subject to judicial notice. See Fed. R. Evid. 201(b). Their source concerning national mail-voting trends relies on a privately conducted survey. See Stewart, *supra*, at 9. And the Illinois-specific data they cite was "modeled by" a private firm based on "multiple commercial sources." *Illinois Election Results 2020*, *supra*. Thus, neither dataset is beyond "reasonable dispute," Fed. R. Evid. 201(b), as other sources establish, see, *e.g.*, CREW Br. pt. III (collecting studies showing that vote-by-mail "does not have a discernable partisan impact").

Third, the new data does not support a reasonable inference that later-arriving mail-in ballots *in Bost's district* would favor his opponent. For example, the Illinois-specific source asserts that 54% of mail-in ballots returned statewide in 2020 were submitted by Democrats. *Illinois Election Results 2020*, *supra*. But that is hardly surprising in a State in which the Democratic presidential candidate won 57.5% of the vote. *Ibid.* And it does not suggest that mail-in ballots in Bost's district—which is more heavily Republican than Illinois as a whole—exhibited a similar tilt. In the one county in Bost's district that separately reported mail-in voting results in 2020, Bost won the mail-in vote by nearly a 2-to-1 margin. See *Illinois Election Results: 12th Congressional District*, N.Y.

Times (Jan. 26, 2021).[11] Extra-record data thus undercut, rather than bolster, Bost's argument that later-arriving mail ballots threaten his electoral prospects.

Fourth, even if the sources established a cognizable injury, Bost's standing would founder on causation and redressability for the same reasons discussed above: petitioners have not shown that the ballot-receipt deadline caused voters to cast ballots against Bost that they otherwise would not have, or that they would not meet a new deadline if the current deadline were enjoined. *Supra* pp. 34-35. Petitioners' belated information does not salvage their standing.

ii. As a final fallback, petitioners assert that Bost has standing based on "common sense." Pet. Br. 29, 32-33. Although courts may consider "commonsense economic realities," such as the law of supply and demand, in evaluating standing, *Diamond Alt. Energy*, 145 S. Ct. at 2136-37 (recognizing that regulations requiring decreased production of gasoline-powered cars would likely reduce demand for gasoline), no similar principle dictates that mail-in ballots that arrive after Election Day in Bost's district are likely to favor his opponents; indeed, as discussed, past results suggest the opposite.

Further, petitioners mischaracterize several of this Court's precedents. Pet. Br. 29-30. Petitioners contend, for example, that the Court found standing in *Department of Commerce v. New York*, 588 U.S. 752 (2019), "based on common sense and historical

[11] http://bit.ly/4mZejTx.

practice" without requiring detailed evidence. Pet. Br. 29. In reality, the Court relied on the district court's factual findings, issued after a bench trial at which both sides presented expert testimony. See 588 U.S. at 765-68; *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 578-81 (S.D.N.Y. 2019), *aff'd in part & rev'd in part*, 588 U.S. 752. And the Court emphasized that the plaintiffs' theory of standing was consistent with the defendants' interpretation of the data. See 588 U.S. at 768. Similarly, while petitioners imply that *Diamond Alternative Energy* held that the plaintiffs had standing based solely on deductions from abstract economic principles, Pet. Br. 29-30, the Court in fact drew on an extensive record, including declarations from the plaintiff fuel producers detailing how the challenged environmental regulations had "historically harmed [them] by causing a decrease in [fuel] purchases" and statements from the defendants acknowledging the regulations' adverse effects on the plaintiffs, 145 S. Ct. at 2137-38.

Last, neither the Illinois Democratic Party's attempt to intervene as a defendant in this case, the Republican National Committee's filing an amicus brief supporting petitioners, nor petitioners' observation that Democrats and Republicans often disagree about election rules renders Bost's standing a matter of "common sense." Contra Pet. Br. 31-33. Finding standing any time competing political parties disagree about an election rule would eviscerate Article III's case-or-controversy requirement. See *All. for Hippocratic Med.*, 602 U.S. at 381 ("policy objection[s] to . . . government action[s]" do not confer standing); *cf. Diamond Alt. Energy*, 145 S. Ct. at 2137 (finding

standing based on "record evidence" while noting parties' litigating positions). And nothing suggests that the political parties sought to involve themselves in this case because of the ballot-receipt deadline's effect on Bost specifically, rather than their desires to see the deadline upheld or invalidated because of its perceived importance in other races, to develop favorable precedent for challenges to similar laws in other States, or to advance their policy preferences. Petitioners' invocation of general partisan interests cannot compensate for their failure to demonstrate standing.

C. Bost Did Not Demonstrate Standing Based On A "Pocketbook Injury."

Finally, petitioners renew their argument that Bost plausibly alleged a "pocketbook injury" sufficient for standing. Pet. Br. 33-34. Specifically, petitioners assert that Illinois's ballot-receipt deadline requires Bost to devote more campaign resources to (1) "get-out-the-vote efforts" before Election Day; and (2) efforts to "monitor" the counting of mail-in ballots that arrive after Election Day but before the deadline. *Ibid.* But petitioners failed to show that these alleged expenditures were traceable to the ballot-receipt deadline (or redressable by a court order enjoining the deadline) because they did not identify any cognizable injury that the expenditures were intended to "mitigate or avoid." *Clapper*, 568 U.S. at 414 n.5.

1. Bost did not show that any "get-out-the-vote" activities his campaign conducts are traceable to the challenged statute.

Petitioners' "get-out-the-vote" theory of pocketbook injury, Pet. 34, fails for multiple reasons, including that it contravenes both the record and Illinois law.

To begin, this argument rests on a single paragraph in Bost's declaration: his campaign operates a "ballot chase program . . . to evaluate [its] get-out-the-vote efforts," a program that he must "keep . . . active [for] fourteen additional days longer than it would have" absent the ballot-receipt deadline. Pet. App. 68a (¶20). That assertion is incorrect on its face. Illinois law requires mail-in ballots to be sent on or before Election Day. 10 ILCS 5/19-8(c). Thus, it would be a legal impossibility for Bost to "chase" ballots—that is, to encourage voters to mail them—*after* Election Day.

Perhaps recognizing the challenges with the declaration's text, petitioners attempt to refashion Bost's reference to a post-election "ballot chase program" into a claim that "the extended ballot-receipt deadline effectively gives voters who wish to vote by mail additional time to cast their ballots (since voters can wait up to Election Day to put their ballots in the mail)." Pet. Br. 34. As a result, petitioners say, "Bost must extend his get-out-the-vote efforts targeted to such voters for additional days, which requires money and resources." *Ibid.* (cleaned up). But petitioners included no such assertion in the complaint or the

declaration, and they never advanced this argument before the Seventh Circuit. See, *e.g.*, Pet. C.A. Br. 16-20 (referencing only purported post-Election Day expenses). The Court should disregard it. See *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 546 (2020) (declining to consider standing theory where complaint did not "plausibly and clearly" include relevant allegation); *Jones*, 565 U.S. at 413 (finding forfeiture where litigant failed to present argument to court of appeals).

In any event, petitioners' new theory fails because it also rests on a misreading of Illinois law. Petitioners appear to contend that, but for the ballot-receipt deadline, voters on the mail-in ballot rolls would be required to mail their ballots well *before* Election Day for them to be received *by* Election Day (and thus counted). But Illinois law affords multiple opportunities for voters on the mail-in ballot rolls to cast their votes on Election Day. Voters can drop off their ballots at an election authority, 10 ILCS 5/19-6, authorize others to do so, *ibid.*, or cast their votes in person, *id.* §§ 5/17-9, 18A-5(a)(6). It is thus untrue that, absent the ballot-receipt deadline, candidates seeking to promote turnout would halt their efforts before Election Day.

Bost's "get-out-the-vote" injuries are therefore implausible, see *Iqbal*, 556 U.S. at 678, or, at minimum, are neither traceable to Illinois's ballot-receipt deadline nor redressable by a court order enjoining the deadline. To be sure, Bost's campaign could decide to stop reaching out to voters on the mail-in ballot rolls at some point before Election Day, as petitioners now say they would prefer to do. Pet. Br. 34. But the challenged statute is irrelevant to that decision because

Illinois law protects voters' ability to "wait up to Election Day" to vote, *ibid.*, regardless of the State's deadline for receiving mail-in ballots. For the same reasons, striking down the ballot-receipt deadline would not redress Bost's alleged pocketbook injury because it would not provide him with "legally enforceable protection from the allegedly imminent harm" of having to campaign to such voters up to Election Day. *Haaland*, 599 U.S. at 293.

2. Bost did not show that his election-monitoring activities are traceable to the challenged statute.

Petitioners' remaining "pocketbook" argument is that the ballot-receipt deadline "requires [Bost] to deploy campaign resources to monitor late-arriving ballots (and the officials who count them) for two extra weeks." Pet. Br. 33. But Bost failed to allege that his decision to monitor ballots after Election Day is necessary to mitigate or avoid a "risk of harm [that] is sufficiently imminent and substantial"—that is, a risk of a harm that is itself cognizable. *TransUnion*, 594 U.S. at 435; see *supra* pp. 13-14. That means these expenditures are not traceable to the ballot-receipt deadline and thus are insufficient to give rise to standing.

a. To begin, Bost must show not only that he suffered a monetary injury in the form of post-election monitoring expenses, but also that those expenses were traceable to the challenged statute—*i.e.*, that there is a "predictable chain of events leading from the government action to the asserted injury." *All. for Hippocratic Med.*, 602 U.S. at 385. Of course, no one

claims that the ballot-receipt deadline (or any other Illinois law) obligates Bost to conduct post-election monitoring activities. To the contrary, Illinois maintains extensive safeguards to ensure the accuracy of mail-in voting, including requiring bipartisan panels of election judges to preside over every ballot challenge, whether or not candidates choose to observe the count. See, *e.g.*, 10 ILCS 5/19-8(g-5).

Bost is thus not required to expend resources on post-election monitoring; rather, he chooses to do so to mitigate risks that he believes might arise if he did not. This Court's precedents accept that risk-mitigation measures can constitute an injury if they are fairly traceable to the defendant's conduct. See, *e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-55 (2010). But a plaintiff "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm" or even "as a reasonable reaction to a risk of harm." *Clapper*, 568 U.S. at 402, 416; accord *All. for Hippocratic Med.*, 602 U.S. at 394. Rather, the plaintiff must show that there is a "substantial risk" of some legally cognizable harm that prompts him "to reasonably incur costs to mitigate or avoid that harm." *Clapper*, 568 U.S. at 414 n.5; see also, *e.g.*, *City of South Miami v. Governor*, 65 F.4th 631, 638-39 (11th Cir. 2023) (a plaintiff alleging resource-diversion standing "must prove *both* that it has diverted its resources *and* that the injury" the resources are meant to address "is itself a legally cognizable Article III injury").

In *Clapper*, this Court held that the "present costs and burdens" that the plaintiffs incurred to avoid government surveillance of their sensitive

communications with foreign persons were insufficient to establish standing to challenge the statute authorizing the surveillance program because the plaintiffs had not shown that the harmful surveillance was "certainly impending" or that there was a "substantial risk" of such harm. 568 U.S. at 414 n.5, 416. This was so even though the lower court concluded that the plaintiffs incurred these expenses based on "a reasonable fear" of future harm. *Id.* at 416. In fact, the Court expressly rejected the lower court's conclusion that risk-mitigation expenditures were sufficient for standing so long as the risk of future injury to the plaintiffs was not "fanciful, paranoid, or otherwise unreasonable." *Ibid.*

As discussed, *supra* pp. 24-39, petitioners did not establish a cognizable injury based on the ballot-receipt deadline's electoral consequences. As a result, petitioners have not shown that Bost's ballot-monitoring expenses are necessary to "mitigate or avoid" a substantial risk of such injury. *Clapper*, 568 U.S. at 414 n.5. Thus, Bost is no different from the plaintiffs in *Alliance for Hippocratic Medicine*, who "divert[ed] [their] resources" without evidence of a "concrete injury" that the expenditures might alleviate. 602 U.S. at 394-95.

To be sure, Bost states that some mail-in ballots arrive with "discrepancies," such as missing dates or signatures, that "need to be resolved." Pet. App. 66a (¶15). But Bost did not link these "flawed" ballots to any nonspeculative harm to him. He did not assert, for example, that there were enough flawed ballots to affect his race, or that there might be a correlation between flawed ballots and candidate or party

preference that disadvantages him. To the extent that petitioners argue that Bost's monitoring costs are necessary to prevent *any* flawed ballot from being mistakenly counted, that is indistinguishable from their unsuccessful argument that Bost has standing based on the possibility of a change to the final vote tally. *Supra* pp. 25-29. Thus, "allowing [petitioners] to bring this action based on costs they incurred in response to [this noncognizable harm] would be tantamount to accepting a repackaged version of [petitioners'] first failed theory of standing." *Clapper*, 568 U.S. at 416.

b. Petitioners' counterarguments disregard both the law and the record.

First, petitioners assert that the Seventh Circuit "misread[] *Clapper*" by requiring Bost to allege that his monitoring expenses were prompted by a substantial risk of future harm. Pet. Br. 37. They appear to contend that *Clapper* is distinguishable because the plaintiffs there did not allege a substantial risk that the challenged statute (which authorized surveillance of foreign communications) would ever actually be applied to them, whereas here "[n]o one disputes that there *will* be late-arriving mail-in ballots" and "Illinois *will* count them." Pet. Br. 40.

But petitioners misunderstand *Clapper*. The plaintiffs there asserted standing based on resources they expended to mitigate the risk of an injury that, if it occurred, would plainly be cognizable—government surveillance of their confidential conversations. See 568 U.S. at 410. This Court rejected that argument because it viewed the injury the plaintiffs

"s[ought] to avoid" as insufficiently likely to occur, even absent their expenditures. *Id.* at 416. Here, while it is true that "there *will* be" ballots that arrive after Election Day in Bost's race due to the ballot-receipt deadline, Pet. Br. 40, petitioners have identified no cognizable injury associated with those ballots that Bost's expenditure of resources is intended to "mitigate or avoid," *Clapper*, 568 U.S. at 414 n.5. That is, the fact that later-arriving ballots will arrive and be counted does not answer the "basic" standing question: "What's it to [Bost]?" *All. for Hippocratic Med.*, 602 U.S. at 379.

This case thus is akin to *Alliance for Hippocratic Medicine*, where the Court unanimously rejected standing premised in part on an alleged diversion of resources prompted by the defendant's actions. See 602 U.S. at 394-95. There, too, there was no doubt that the challenged policy *did* expand access to mifepristone, and that the plaintiffs *had*, as a result, expended resources to inform the public of mifepristone's asserted risks. *Id.* at 394. But the Court concluded the plaintiffs lacked standing because their expenditures were not linked to a "concrete harm" traceable to that policy. *Id.* at 394-95.

For similar reasons, this case is distinguishable from *FEC v. Cruz*, 596 U.S. 289 (2022), which does not call into question *Clapper*'s traceability standard. Contra Pet. Br. 38. *Cruz*—which involved a campaign's present inability, under the challenged law, to repay a candidate's loan—did not involve allegations of future harm or risk-mitigation expenses, and merely reiterated that there is no "exception to traceability for injuries that a party purposely incurs." 596

U.S. at 296; see *id.* at 297 (distinguishing *Clapper* because it involved plaintiffs who "could not show that they had been or were likely to be subjected to [the government surveillance] policy"). The issue here is that Bost's expenditures are not traceable to the ballot-receipt deadline, not that they are "purposely incur[red]."

Perhaps recognizing the problem, petitioners argue that Bost's alleged expenditures were "reasonable" for one or more reasons. Pet. Br. 40-43. But this Court rejected the same argument in *Clapper*. There, the plaintiffs argued that an expenditure did not need to be linked to a substantial risk of injury if it was "reasonable"—an argument the lower court accepted. 568 U.S. at 416. But this Court disagreed, describing the argument "that [plaintiffs] have standing because they incurred certain costs as a reasonable reaction to a risk of harm" as "unavailing." *Ibid.*

Petitioners suggest that *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), supports a "reasonable[ness]" standard, Pet. Br. 39-40, but *Laidlaw* did not consider a "pocketbook injury" at all; indeed, it principally involved allegations that the plaintiffs, who challenged a corporation's discharge of pollutants into a river, "use[d] the affected area" and were "persons for whom the aesthetic and recreational values of the area w[ould] be lessened by the challenged activity." 528 U.S. at 183 (cleaned up); see also *Summers*, 555 U.S. at 494 (threatened interference with individuals' "recreational interests in the national forests" is cognizable injury). Although the Court agreed that the plaintiffs' decision to forebear from using the river in

question was a "reasonable" one given their allegations, *Laidlaw*, 528 U.S. at 184-85, that hardly means *any* "reasonable" response to a defendant's conduct can itself give rise to standing—otherwise, this Court simply would have asked in *Alliance for Hippocratic Medicine* whether the plaintiffs' expenditures on patient education were "reasonable" in light of the challenged policy. Contra 602 U.S. at 394-95.

Petitioners' amici similarly argue that petitioners were not required to show that Bost's alleged expenditures were prompted by a substantial risk of a legally cognizable harm, but they cannot align on why that might be.

Some suggest that this showing is unnecessary where the challenged activity affects the plaintiff's "pre-existing core activities." LWV Br. 3; accord HEP Br. 17-18; RITE Br. 7; see also *All. for Hippocratic Med.*, 602 U.S. at 395 (noting that in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the defendant's actions "directly affected and interfered with [the plaintiff's] core business activities"). But Bost has never advanced such a theory, and the Court should not consider it now. See *Thole*, 590 U.S. at 546 (declining to address standing theory that petitioners had "not assert[ed]").

And the record would not support this theory, in any event. Even before *Alliance for Hippocratic Medicine*, lower courts applying *Havens* declined to find standing based on alleged resource expenditures without a showing that the expenditures were necessary to counteract harm to the plaintiff's "mission." *E.g.*, *ASPCA v. Feld Ent., Inc.*, 659 F.3d 13, 25 (D.C.

Cir. 2011); *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). As petitioners appear to recognize, a candidate's "mission" is winning the election. See Pet. Br. 41-42 ("After all, avoiding defeat and winning the election is the entire point."). But petitioners waived the argument that the ballot-receipt deadline "directly . . . interfere[s] with," *All. for Hippocratic Med.*, 602 U.S. at 395, Bost's ability to win any election, *supra* pp. 8-9, 30-31, and they did not supply any other explanation for why Bost's "core activities" or "mission" as a candidate might include running a ballot-chase program or monitoring mail-in ballots.

The United States, for its part, renews its argument that Bost is a "direct object" of the ballot-receipt deadline, and contends that, as a result, *any* risk, no matter now remote, that ballots arriving after Election Day may cost him the election justifies his expenditures. U.S. Br. 29; *id.* at 24 ("[E]ven a small probability of harm can be a substantial risk for Article III purposes where the threatened harm immediately flows from conduct where the plaintiff is a direct object." (cleaned up)). But, as noted, petitioners have never advanced this argument, and they appear to concede that Bost is *not* directly regulated by the deadline. *Supra* p. 31. The Court thus should disregard the United States' argument, see *Thole*, 590 U.S. at 546, which, in any event, is incorrect, *supra* pp. 31-32.

Petitioners ultimately argue that, even if they must show that their resource expenditures are necessary to mitigate a substantial risk of a legally cognizable harm, Bost did exactly that. Pet. Br. 42

(reprising diminished-vote-margin theory). But petitioners' arguments on this score merely recycle their assertion of an injury to Bost's "electoral prospects," and they fail for the same reasons. *Supra* pp. 24-39. The Seventh Circuit thus correctly concluded that Bost's purported "pocketbook injury" did not give rise to standing.

III. Petitioners' Policy Arguments Do Not Alter The Analysis.

Petitioners finally turn to policy arguments, identifying various reasons why it would supposedly be convenient or useful to have a court adopt a more expansive view of standing. *E.g.*, Pet. Br. 43-47. These arguments fail for multiple reasons.

At the threshold, policy arguments are irrelevant to standing. Article III is not a "nuisance[] that may be dispensed with when [it] become[s] [an] obstacle" to hearing a particular claim. *Valley Forge*, 454 U.S. at 489. Rather, its requirements are "essential and unchanging." *All. for Hippocratic Med.*, 602 U.S. at 380. Petitioners cannot proceed without standing, no matter how much "cleaner" that approach would be. Pet. Br. 47.

In any event, petitioners vastly overstate the consequences of applying ordinary standing principles in election cases. They largely attack a strawman by focusing on isolated passages in the Seventh Circuit's opinion, suggesting that the opinion below would require candidates to "predict" with "certainty" whether an election rule would "have an outcome-determinative effect" on elections—a rule they contend would present a variety of "practical problems." *Id.* at 43-44

(citing Pet. App. 15a); accord *id.* at 36 (citing Pet. App. 13a); *id.* at 42 (citing Pet. App. 11a). But the passing observations on which petitioners rely are not the holdings of the opinion below. See *Brown v. Davenport*, 596 U.S. 118, 141 (2022) (litigants should not "parse[]" the text of judicial opinions as if "dealing with [the] language of a statute"). And, regardless, respondents have never proposed a rule of the kind petitioners critique, under which a candidate must be "'literally certain,'" Pet. Br. 36, about an election's "outcome," *id.* at 44, to allege standing.

Instead, respondents have consistently recognized the "substantial risk" standard, *supra* p. 12, and that candidates can allege a wide range of injuries cognizable under Article III, including competitive, fundraising, and reputational harms, *supra* pp. 25-26. This readily answers the concerns petitioners raise.

For starters, enforcing ordinary standing requirements will not require "political clairvoyance," Pet. Br. 28 (quoting *Diamond Alt. Energy*, 145 S. Ct. at 2140), from courts or litigants. Candidates' standing often will not depend on election results—for example, where they challenge rules that directly injure them financially, see, *e.g.*, *Cruz*, 596 U.S. at 296, or favor their direct opponents to their detriment, see, *e.g.*, *Davis*, 554 U.S. at 734. And even where a candidate does claim injury based on election results, evaluating standing does not require "certainty," Pet. Br. 44, but only a determination that "there is a substantial risk that . . . harm will occur," *Susan B. Anthony List*, 573 U.S. at 158 (cleaned up). So petitioners are simply wrong to say that rejecting Bost's standing will push litigation over election rules into the days and

weeks after elections occur, Pet. Br. 44-46; rather, it will allow candidates to challenge such rules before elections as long as they allege a concrete injury—of any kind—traceable to the rule at issue.

For similar reasons, applying settled Article III principles will not leave minor-party candidates out in the cold. Contra Pet. Br. 27-28. Those candidates will have standing to challenge rules that that give their opponents an unfair advantage that risks harming the candidates' electoral chances or inflicts some other cognizable injury. *Supra* pp. 22-23, 22 n.5. Nor will it limit standing for candidates challenging rules applicable to projected landslide elections or that facilitate, rather than restrict, voter participation. Contra Pet. Br. 22. If a candidate can allege a substantial risk that an election rule will cause a cognizable injury—including an injury short of an electoral loss—the candidate will have standing. *Supra* pp. 12, 25-26.

Here, though, petitioners failed to provide *any* meaningful allegations to support their theories of injury and, when challenged, they followed up with declarations that did nothing to fill the gaps. This "highly fact-specific case," *Carney*, 592 U.S. at 63, says nothing about how much difficulty other candidates will encounter in establishing standing.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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