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1       IN THE SUPREME COURT OF THE UNITED STATES  
2       - - - - -  
3       MICHAEL J. BOST, ET AL.,                                 )  
4                                 Petitioners,                         )  
5                                 v.                                 ) No. 24-568  
6       ILLINOIS STATE BOARD OF ELECTIONS,                     )  
7       ET AL.,   )  
8                                 Respondents.                         )  
9       - - - - -

10  
11                                 Washington, D.C.  
12                                 Wednesday, October 8, 2025  
13

14                 The above-entitled matter came on for  
15         oral argument before the Supreme Court of the  
16         United States at 10:04 a.m.  
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1 APPEARANCES:

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3 behalf of the Petitioners.

4 MICHAEL TALENT, Assistant to the Solicitor General,  
5 Department of Justice, Washington, D.C.; for the  
6 United States, as amicus curiae, supporting the  
7 Petitioners.

8 JANE E. NOTZ, Solicitor General, Chicago, Illinois; on  
9 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 24-568,  
5 Bost versus the Illinois State Board of  
6 Elections.

7 Mr. Clement.

8 ORAL ARGUMENT OF PAUL D. CLEMENT

9 ON BEHALF OF THE PETITIONERS

10 MR. CLEMENT: Mr. Chief Justice, and  
11 may it please the Court:

12 Illinois counts mail-in ballots  
13 received up to two weeks after Election Day.  
14 Petitioners contend that under controlling  
15 federal law, that is two weeks too long. As a  
16 result, if the Petitioners' merits theory is  
17 credited, which it must be for evaluating  
18 standing, then Illinois is counting unlawful  
19 ballots. Those unlawful ballots could cost  
20 Congressman Bost the election or at least  
21 reduce his margin of victory, and he has to pay  
22 his campaign staff for two extra weeks.

23 All of that means that Congressman  
24 Bost has standing three times over. The court  
25 below lost sight of that straightforward

1 conclusion only by misreading this Court's  
2 precedents and misperceiving candidates who  
3 pour untold time and treasure into the election  
4 and are the ones whose names are actually on  
5 the ballot as mere bystanders with a  
6 generalized grievance.

7           That decision is not only wrong but  
8 dangerous. It needlessly injects federal  
9 courts into the role of political  
10 prognosticators. It risks denying judicial  
11 access to minor party candidates, and it  
12 shuffles election disputes into the closest  
13 races and the worst possible context: Election  
14 disputes after the election where federal  
15 courts are in the uncomfortable position of  
16 having to pick the political winners.

17           There is a better way, and it simply  
18 requires acknowledging that candidates have a  
19 unique, concrete, and particularized interest  
20 in the rules of the electoral road, especially  
21 those that address which ballots are going to  
22 be counted and when. At a bare minimum, a  
23 longer campaign is a more expensive campaign,  
24 and that classic pocketbook injury is  
25 sufficient to give Congressman Bost standing.

1     There is no need to make the standing inquiry  
2     here any more complicated than that.

3             I welcome the Court's questions.

4             JUSTICE THOMAS:  Mr. Clement, how do  
5     we know that Petitioner has -- will suffer a  
6     risk of competitive harm?

7             MR. CLEMENT:  So, in some respects, we  
8     know that from the very fact that he is a  
9     candidate in the election.  I mean, obviously,  
10    he's put that in a declaration as well, but I  
11    think this is something where every candidate  
12    cares very deeply and uniquely about the  
13    outcome of the -- the -- the election but also  
14    their vote tally and the margin of victory or  
15    the margin of defeat.

16            And this idea that, like, all a  
17    candidate can care about is the ultimate win or  
18    loss, I just don't think that maps on to the  
19    way elections actually operate or people think  
20    about them.

21            JUSTICE THOMAS:  Well, I think you  
22    could argue that he will actually benefit from  
23    the additional time.

24            MR. CLEMENT:  So, I mean, I --

25            JUSTICE THOMAS:  Well, someone has to

1 benefit or there wouldn't be a risk of -- of  
2 competitive harm.

3 MR. CLEMENT: I suppose anytime the  
4 government changes the rules for any highly  
5 regulated activity, it may be that some of the  
6 people that are affected by the new regulations  
7 are actually going to be better off. They may  
8 be better off -- better able to sort of incur  
9 the costs or they may be better able to take  
10 advantage of that additional time.

11 Here, Congressman Bost has alleged  
12 that, no, this is going to hurt his sort of  
13 margin for victory. But I also think, as a  
14 general matter, I'm not even sure you need to  
15 get to that level, which is to say, if this  
16 were just a simply regulated industry, if the  
17 SEC promulgated new rules for registered  
18 broker-dealers, you'd expect the  
19 broker-dealers, some of them, to come and sue  
20 about those new rules. I think you wouldn't be  
21 that worried that broker-dealers were coming in  
22 and actually suing for rules that helped them.  
23 The market sort of shifts --

24 JUSTICE SOTOMAYOR: That's the point,  
25 though --



1 MR. CLEMENT: -- takes care of that.

2 JUSTICE SOTOMAYOR: -- that this  
3 regulation is not of a broker-dealer. It's not  
4 of a candidate. It's of voters. So it's not a  
5 direct regulation.

6 But going back to your margin of  
7 victory, in the case where we decided that a  
8 campaign ad had standing, in that case, there  
9 were affidavits that said these ads increased  
10 the amount of revenue we receive or can  
11 decrease it. So there was an affidavit that  
12 said that.

13 Here, you don't even say that the  
14 margin of error is going to affect -- you don't  
15 have anybody saying anything close to that.  
16 You're just saying the margin of error could  
17 have a reflection on me. That's a generalized  
18 statement with no support.

19 MR. CLEMENT: So two things, Your  
20 Honor. First, just on the first point, if the  
21 new broker-dealer regulations from the SEC  
22 regulated the terms at which the customers  
23 could deal with the broker-dealers, I think the  
24 broker-dealers would still have standing to  
25 challenge that.

1 JUSTICE SOTOMAYOR: But this is not  
2 how they're dealing with the candidates.  
3 They're still voting for the candidate.  
4 They're not being deprived of their right to  
5 get their voters to vote.

6 MR. CLEMENT: Well, but --

7 JUSTICE SOTOMAYOR: So I'm not sure --  
8 the analogy doesn't work for me, Mr. Clement.

9 MR. CLEMENT: Well, I --

10 JUSTICE SOTOMAYOR: But let's go back  
11 to my point that I'm not sure that someone who  
12 says to the court below that his "injury" is  
13 not based on the risk of losing the election.  
14 Seems to me that he's forgone that argument  
15 here, as he did below, and that the question  
16 becomes whether this margin of victory issue is  
17 enough.

18 MR. CLEMENT: So two things, Your  
19 Honor. One, as we point out in our reply  
20 brief -- and I would urge you to read the  
21 Seventh Circuit briefing on this -- the  
22 statement that my friend on the other side says  
23 is where we waived this electoral outcome  
24 argument was simply responding to their  
25 argument that pocketbook injuries don't matter

1 if, in fact, you don't -- can't show that there  
2 is this electoral outcome injury.

3 And what we said in response and what  
4 we say in our reply brief here and remains  
5 correct and waives nothing is that's actually  
6 not right. The pocketbook injury is separate  
7 from any electoral outcome. So there's no  
8 waiver of any of this.

9 There was a declaration here. The  
10 declaration does say that we risk -- that  
11 Congressman Bost risks losing the election, but  
12 it also then says but it's certainly going to  
13 affect the margin of victory. And he also  
14 alleges in his declaration that that margin of  
15 victory is not just an abstract injury, but  
16 that translates rather directly into  
17 reputational injuries and financial  
18 industries -- injuries.

19 And I think that corresponds with the  
20 general sort of common sense of the matter. If  
21 you ask -- if you ask candidates would you like  
22 to win this election by 60 percent of the vote  
23 or 51 percent of the vote, I think a  
24 hundred percent of the candidates are going to  
25 say I'll take the 60 percent.

1 JUSTICE JACKSON: Yeah, but that's not  
2 how we ordinarily think about harm, and harm is  
3 what you need in order to establish standing,  
4 not preference for 60 percent or 59 percent or  
5 whatever.

6 And so what I guess I'm a little  
7 concerned about in your argument is the idea  
8 that a candidate who wins and who wins by some  
9 margin is harmed by a regulation of this nature  
10 because of the potential decrease in his margin  
11 of victory. I don't understand the harm that  
12 necessarily comes from that.

13 MR. CLEMENT: So, if you start with  
14 the premise that every candidate would prefer  
15 to win 60 percent rather than 51 percent, and  
16 then you challenge --

17 JUSTICE JACKSON: But why -- why do we  
18 start with preference? That's what I -- I'm  
19 saying that the -- the relevant metric for  
20 standing is harm. So, yes, fine, you -- you  
21 might be disappointed, but that's usually not  
22 what we look at when we're determining whether  
23 or not someone is actually harmed.

24 MR. CLEMENT: Well, I would say that  
25 if a law improperly denies somebody their

1 preference, that is a harm. But, in all  
2 events, I don't think you need to make it that  
3 abstract. If the abstraction is what's  
4 bothering you, he alleges in his declaration  
5 that that is accompanied by reputational and  
6 financial harms as well.

7 JUSTICE JACKSON: Isn't that  
8 speculative? I mean, couldn't we also  
9 speculate that a candidate who decreases the  
10 margin of error or, excuse me, the margin of  
11 victory, who wins by a smaller amount, people  
12 would actually want to contribute more the next  
13 time, as opposed to them not having  
14 contributors?

15 I -- I don't necessarily see a  
16 financial harm that comes from a smaller margin  
17 of victory.

18 MR. CLEMENT: Well, on this -- I mean,  
19 you know, I think, this is the kind of issue  
20 that at this stage of the case, where you have  
21 a complaint and you have a declaration, you  
22 haven't had any evidence, if -- if the other  
23 side wants to come in and put on an expert that  
24 says: Actually, Congressman Bost, who's run  
25 successfully in Illinois, like, a dozen times,

1 doesn't know what he's talking about --

2 JUSTICE JACKSON: No, no. I'm just  
3 saying --

4 MR. CLEMENT: -- and actually --

5 JUSTICE JACKSON: -- I'm saying it's  
6 your burden. You're the Petitioner, and you  
7 have to establish standing. You're the  
8 plaintiff. So you have to show that you have a  
9 non-speculative risk of harm here. And I just  
10 don't understand how saying: Well, I would  
11 prefer to win by more actually counts,  
12 especially when you're winning by -- you know,  
13 more or less is sort of speculative in this  
14 context.

15 MR. CLEMENT: Well, with respect,  
16 I think, if you're going to allow people to  
17 challenge election rules at the beginning of  
18 the election, which I actually think is  
19 something that the standing doctrine should not  
20 get in the way of because it avoids having  
21 these disputes litigated at the worst possible  
22 times, you're going to have to allow some room  
23 for a little bit of speculation, I mean,  
24 because the election hasn't happened yet.

25 But the way that this Court's cases

1 have generally dealt with that is you have to  
2 show that there's a substantial risk of  
3 something.

4 And, here, there's no question in my  
5 mind that at this stage of the litigation,  
6 between the allegations in the declarations,  
7 he's done enough for the motion to dismiss  
8 stage.

9 Again, you know, we all know that  
10 standing law has to be sort of addressed at the  
11 level of substantiality for every stage of the  
12 litigation. And so, if they want to continue  
13 to contest this, I suppose, at the summary  
14 judgment stage, we could have competing experts  
15 on some of this stuff.

16 But, frankly, I think that is a pretty  
17 good advertisement for a broader, simpler rule  
18 that simply says candidates have standing to  
19 challenge the rules that govern the election.

20 JUSTICE KAVANAUGH: If it were --

21 JUSTICE BARRETT: Mr. Clement --

22 JUSTICE KAVANAUGH: -- if it were  
23 after the election, how would that play out?

24 MR. CLEMENT: So I think --

25 JUSTICE KAVANAUGH: In other words,

1 if the litigation over issues like this were  
2 funneled to post-election?

3 MR. CLEMENT: Well, I mean, there's --  
4 there's a couple ways to think about that.

5 One analytical way to think about that  
6 is I would say no matter what the margin of  
7 victory is, if there are ballots that, under  
8 Congressman Bost's theory, were illegally  
9 counted --

10 JUSTICE KAVANAUGH: Yeah.

11 MR. CLEMENT: -- I think he would have  
12 standing to bring the challenge.

13 Now the courts might want to apply in  
14 the post-election context a --

15 JUSTICE KAVANAUGH: What do you --  
16 what's the remedy? Do -- does the Court  
17 there -- and this is -- I think blends into  
18 your concern about post-election, but I just  
19 want to play it out.

20 So let's say the losing candidate  
21 sues, challenging this rule, and let's say  
22 the Court finds it -- post-election, finds it  
23 illegal. Do you -- and we faced this in 2020  
24 in some of our many cases pre-election.

25 What -- what's the remedy?



1 MR. CLEMENT: Well, I -- I --

2 JUSTICE KAVANAUGH: Do you throw out  
3 those votes? Because, if you do, some of those  
4 voters might say: Oh, I actually would have  
5 voted earlier if I had known.

6 I'm just trying to figure out how that  
7 would play out.

8 MR. CLEMENT: So I think that would be  
9 the right remedy. And I think that's kind of a  
10 nightmare scenario for exactly the reason that  
11 you point out.

12 And I don't think there's any reason  
13 for the standing rules to basically say that  
14 you have to decide all these issues in those  
15 nightmare scenarios or even in the very closest  
16 districts.

17 And the point I was trying to make is,  
18 like, if you think about this case proceeding  
19 past the pleading standard, the idea that you  
20 would have, like, competing experts come in and  
21 say: You know, Congressman Bost is kind of a  
22 lousy candidate, so this one's going to be  
23 pretty close.

24 And that would be my expert because  
25 I'd have to show that the election is close in

1 order to have standing.

2 And then they'd come in and their  
3 expert would say: No, Congressman Bost is the  
4 best candidate there's ever been. He's going  
5 to win this thing in a landslide.

6 JUSTICE KAGAN: But would you agree to  
7 a rule like this one, which sort of makes this  
8 question of do you have to show you would win  
9 or do you have to show margin of victory a  
10 little bit irrelevant, that what you have to  
11 show -- you have to show something. It's not  
12 enough to just walk in and say: Hi, I'm a  
13 candidate and I'm suing.

14 But what you have to show is some kind  
15 of substantial risk or substantial likelihood,  
16 whatever the phrase may be from our standing  
17 doctrine, that the new rule puts you at an  
18 electoral disadvantage relative to the old rule  
19 so that, you know, if the new rule has -- says  
20 more mail-in ballots, then you just have to  
21 plead that that's a kind of rule that puts  
22 you to an electoral disadvantage and say  
23 something -- not a lot -- but something to  
24 suggest that that's right.

25 MR. CLEMENT: So I could live with

1     that rule. I don't know that it's the ideal  
2     rule. I mean, I'm not coming in here asking  
3     for a broad rule because I'd like to win this  
4     case in the hardest possible way.

5             I'm asking for that because I actually  
6     see advantages to it, namely, that even under  
7     your view, you still, in theory, would have  
8     at the summary judgment stage this, like,  
9     debate in Article III courts about whether  
10    late-arriving ballots help Republican  
11    candidates or Democratic candidates.

12            And that makes me sufficiently  
13    uncomfortable that I actually would prefer a  
14    rule that says: No, Congressman Bost is coming  
15    in and he's saying there are going to be  
16    unlawful votes cast and they'll be ballots with  
17    his name on it in his election.

18            That's enough. We're done. None of  
19    these --

20            JUSTICE KAGAN: I mean, your rule  
21    really does just take out the injury  
22    requirement entirely. It just says you should  
23    assume that if a candidate is there before the  
24    court, the candidate has good reasons for being  
25    there before the court.

1           And for the most part, I think we have  
2     rejected that view of standing. I mean, for  
3     example, we said there's no such thing as  
4     doctor standing just a couple of years ago.

5           So too here it seems quite  
6     inconsistent with our standing law to say: Oh,  
7     we just have, like, an automatic rule for  
8     candidate standing.

9           On the other hand, I'm sort of in  
10    sympathy with the view that this bar should not  
11    be all that high and that the bar shouldn't  
12    have to -- like, you shouldn't have to say:  
13    Here are the polls that show I could lose as a  
14    result of this rule.

15          It's like all you have to do is come  
16    in and say why it is that the rule puts you at  
17    a disadvantage relative to what's come before.

18          MR. CLEMENT: So, Justice Kagan, I  
19    don't think that much separates us, and so I  
20    don't want to sort of die on any particular  
21    hill here.

22          The reason that I'm hedging a little  
23    bit, I'll say two things in response.

24          One is I don't think it's we're saying  
25    get rid of the standing -- I mean the injury in

1 fact requirement. We're just saying unlawful  
2 ballots being counted in your election is an  
3 injury in fact. It's a little abstract, sure,  
4 but it is an injury in fact, and then  
5 everything else follows.

6 And then you don't even have to  
7 get into the -- what I still think is an  
8 uncomfortable prospect of competing expert  
9 affidavits where one party says that, actually,  
10 late -- late-breaking votes can actually be  
11 good for Congressman Bost because people like  
12 candidates with a B in their name --

13 JUSTICE GORSUCH: Well --

14 MR. CLEMENT: -- or something, and  
15 then the other side says, no, they're actually  
16 good for the Republicans.

17 JUSTICE GORSUCH: -- Mr. Clement,  
18 though, if you could just answer whether you  
19 could satisfy Justice Kagan's standard, I --  
20 I -- I'd be grateful and whether you -- and it  
21 doesn't require a competitive -- as I  
22 understand the question, it doesn't require a  
23 competitive disadvantage. It just says:  
24 Compared to the law, what I understand the law  
25 to have been, I am at a disadvantage.

1           MR. CLEMENT: Yes, we can satisfy  
2     that.

3           JUSTICE GORSUCH: Would you -- can you  
4     spin that out?

5           MR. CLEMENT: Sure. I mean, we can  
6     satisfy it in sort of two ways.

7           I mean, one, Congressman Bost, in his  
8     declaration, has made clear that he thinks that  
9     this rule will hurt his margin for victory.

10          And then the second thing he said, and  
11     he maybe said this, frankly, more clearly, is  
12     because he's -- you know, we have kind of the  
13     unique benefit here of a candidate who was a  
14     candidate under the old rules, and he has said  
15     that this change in the rules has increased the  
16     cost of running his campaign.

17          JUSTICE GORSUCH: Yeah.

18          MR. CLEMENT: So, on both those  
19     two kind of classic injuries, I think the  
20     declarations here are sufficient. Obviously,  
21     we're just at the motion to dismiss stage, so  
22     there --

23          JUSTICE GORSUCH: Thank you.

24          MR. CLEMENT: -- there could be more,  
25     but I think they are satisfied.

1 JUSTICE BARRETT: Mr. Clement, when  
2 you say these two classic injuries, how does --  
3 how, if at all, does TransUnion affect this?

4 Do you have to show that there is some  
5 sort of history and tradition that this is the  
6 kind of injury, either the vote margin or the  
7 risk of electoral loss that counts as a  
8 cognizable injury?

9 MR. CLEMENT: So two thoughts on that.

10 I mean, one, if we have to, then I  
11 think the pocketbook injury just makes it easy  
12 because that's classic, go back, Blackacre,  
13 White -- you know, whatever --

14 JUSTICE BARRETT: Yeah.

15 MR. CLEMENT: -- that's the classic  
16 old-school injury.

17 The second thing I would say, though,  
18 is I do think there's some artificiality in  
19 some of these contexts to force everything to  
20 be run through the pocketbook injury.

21 I mean, the -- Congressman Bost is  
22 injured in the pocketbook, but that's because  
23 he's a candidate in an election with a ballot  
24 with his name on it. And I think, if you go  
25 back to the relevant history here, I don't know

1 if 133 years counts, but I'd take you back to  
2 McPherson v. Blacker.

3 And that was a case brought by  
4 presidential electors challenging Michigan's  
5 change of the rules for the presidential  
6 electors. Michigan went from statewide to a  
7 district-by-district way of having presidential  
8 electors.

9 This Court thought a lot about  
10 justiciability in that opinion, didn't bat an  
11 eye about standing. Of course, the  
12 presidential electors are the right people to  
13 challenge a change in the rules for  
14 presidential electors.

15 And then I would also take the Court  
16 back, not ancient history, but Crawford against  
17 Indiana in the voter ID case. There was a  
18 question about the standing of the Indiana  
19 Democratic Party.

20 Justice Stevens, in Footnote 7,  
21 dispatches it in two sentences. Of course, the  
22 Indiana Democratic Party has challenge -- has  
23 standing to challenge a voter ID law that they  
24 think is going to be bad for Democratic  
25 candidates.



1                   And Justice Souter agreed with that,  
2           so there's at least five votes for the  
3           proposition that -- and his footnote was just  
4           as short.

5                   It's just common sense that in these  
6           contexts, the candidates who are the ones, as  
7           Judge Oldham said in his opinion, they take  
8           time off from the elections, their names are on  
9           the ballot.

10                   CHIEF JUSTICE ROBERTS: Thank you,  
11           counsel.

12                   You've answered a lot of  
13           hypotheticals. I just want to make sure I  
14           understand what your opening submission is. It  
15           is: Hi, I'm a candidate. These rules apply to  
16           me, and I'm suing. Right?

17                   MR. CLEMENT: And if that's not enough  
18           for you --

19                   CHIEF JUSTICE ROBERTS: No, but  
20           that -- that is the opening pitch, right? That  
21           he's the one that's affected by the -- well,  
22           that's the question, I guess, whether is it --  
23           is it enough to simply say, hi, I'm the  
24           candidate and I'm suing?

25                   MR. CLEMENT: So I want you to believe

1     that it is.  If it's not enough, I have my two  
2     fallback arguments, but I think the reason it  
3     is enough is because, in every one of these  
4     cases -- I mean, you can run it one step  
5     further, which is what I tried to do with  
6     Justice Kagan, and you could say it's not just  
7     that I'm a candidate; I'm a candidate here and  
8     I have an injury in fact, which is I think  
9     there are going to be unlawful ballots counted  
10    in my campaign.

11               CHIEF JUSTICE ROBERTS:  Okay.

12               Justice Thomas?

13               JUSTICE THOMAS:  When we had Lujan  
14     some years ago, this Footnote 7 made a similar  
15     point.  Are you making the same point, that a  
16     procedural right doesn't have the same  
17     requirement for immediacy or redressability?

18               MR. CLEMENT:  I think it's a related  
19     point.  I don't know that I would draw quite  
20     the same sort of procedural/substantive  
21     distinction.

22               JUSTICE THOMAS:  Mm-hmm.

23               MR. CLEMENT:  To me, you know, I sort  
24     of think -- and, obviously, Justice Sotomayor  
25     and I had a colloquy about the limits of

1     this --

2                   JUSTICE THOMAS:   Yeah.

3                   MR. CLEMENT:   -- but I sort of think  
4     there is this kind of common-sense principle  
5     that if you are in a highly regulated  
6     enterprise and the government changes the  
7     regulations and you think it hurts you, like,  
8     you go in and you say -- like, even if it's  
9     something that seems trivial to an outsider, if  
10    a broker-dealer now has to do everything on  
11    blue paper and it's going to change the way  
12    they operate, I think they ought to have  
13    standing to say it's arbitrary and capricious  
14    for you to say everything has to be on blue  
15    paper.

16                  So I -- and I don't know why there  
17    would be a special rule that makes it more  
18    difficult in the electoral context.  I mean,  
19    you certainly don't have to worry about  
20    generalized grievances here when there are only  
21    going to be a handful of candidates in a  
22    particular election.

23                  CHIEF JUSTICE ROBERTS:  Justice Alito?

24                  JUSTICE ALITO:  You have several  
25    arguments, and I don't want to get into most of

1     them right now. But, on the issue of  
2     competitive injury, it's not clear to me why  
3     you couldn't have done a lot better than you  
4     did in your complaint and alleged what I think  
5     a lot of people believe to be true, which is  
6     that loosening the rules for counting votes  
7     like this generally hurts Republican  
8     candidates, generally helps Democratic  
9     candidates. Why didn't you pursue that? Why  
10    didn't you try to do something with that?

11           MR. CLEMENT: So, Justice Alito, in  
12    some respects, the answer is, when you plead a  
13    case in district court, you don't expect to be  
14    in the Supreme Court defending every pleading  
15    that was sufficient under standing. And we  
16    certainly thought when we pled this pleading  
17    pocketbook injury, competitive injury, albeit  
18    briefly, and that we're the candidate, why is  
19    this so difficult, and relying on cases like  
20    McPherson, we didn't really think we would have  
21    to sort of plead more. And even when the  
22    complaint was challenged, we sort of thought  
23    that we'd done enough.

24           And then all I can say in response to  
25    that is, of course, we could say that and we

1     said it all in our briefs in front of this  
2     Court. So we could have said more, but, boy,  
3     that's a weird inquiry to then think it's going  
4     to stick around in the case.

5             That's the thing. It's like, if you  
6     think about this only as, well, this is just  
7     what you need to plead and then we're done with  
8     standing forever, these cases, you know, seem  
9     cleaner. But -- but that issue sticks -- stays  
10    in the case.

11            JUSTICE ALITO: Okay. I -- I  
12    understand. One final question, and I -- I  
13    should have researched this myself beforehand.  
14    When was this rule, new rule, enacted? And do  
15    we know what the partisan breakdown in -- on  
16    voting for the rule was? And could we take  
17    judicial notice of that?

18            MR. CLEMENT: So I -- this rule was  
19    2005. And I don't think there is robust data  
20    that would allow you to -- you could take  
21    judicial notice of this.

22            JUSTICE ALITO: Okay. All right.  
23    Thank you.

24            MR. CLEMENT: And, you know, it's --  
25    we said in the reply brief, like, you know, my

1 friend tries to make something of one data  
2 point for one county in one election. We don't  
3 even know what the kind of comparator is. So  
4 I --

5 JUSTICE ALITO: Got you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Sotomayor?

8 JUSTICE SOTOMAYOR: Mr. Clement, we  
9 now have a whole body of law developing on the  
10 fact that we're not going to give relief to  
11 more than one plaintiff at a time so that the  
12 relief should be tailored to the needs of the  
13 plaintiff at issue.

14 Assume that you have a district -- and  
15 there are some like this, maybe not your  
16 clients', but that goes to the failure of  
17 pleading in this case -- that there are some  
18 districts where the Republican registered  
19 parties are 98 percent, the Democrats are 2.

20 Your rule would say that that  
21 candidate who has not just an insubstantial but  
22 a statistically almost impossible chance of  
23 winning -- of losing, that that candidate can  
24 come in and seek a change of that rule.  
25 Correct? That's your position?

1                   MR. CLEMENT: That's correct. And, I  
2    mean --

3                   JUSTICE SOTOMAYOR: All right.

4                   MR. CLEMENT: -- and I think --

5                   JUSTICE SOTOMAYOR: Doesn't the  
6    absurdity of that -- generally, we have said  
7    that suits should be brought by people for whom  
8    the harm is concrete in some meaningful way.  
9    Losing, let's say, by 1 percent more or less  
10   can't be meaningful on any scale.

11                  So, as Justice Alito said, there are a  
12   lot more things you could have said. You could  
13   have even said, instead of saying I risk injury  
14   if untimely and illegal ballots cause me to  
15   lose my election, you didn't even say I risk  
16   substantial injury, which is our standard,  
17   substantial harm. So you didn't even track our  
18   legal language. You didn't put in any facts,  
19   as Justice Alito pointed out, about what the  
20   turnout is, what your district is like, nothing  
21   from which any plausible argument could be  
22   drawn.

23                  I'm also not sure what the battle of  
24   the experts is about. This is on pleadings.  
25   We have to give your expert, absent some

1     facially -- facial deficiency, take the  
2     allegations in your favor. So I -- I'm -- I'm  
3     not sure where this battle of the experts is  
4     going to come in.

5             MR. CLEMENT: So I'll take the last  
6     part first. The battle of the expert comes at  
7     summary judgment. Just because we have  
8     sufficient allegations doesn't mean we're done.  
9     And all of the things that you talked about --

10            JUSTICE SOTOMAYOR: But this was  
11     dismissed on a motion to dismiss, no?

12            MR. CLEMENT: This case is. But, if  
13     we win because we allege all those details  
14     about Republicans and Democrats and voting  
15     patterns, that doesn't go away in the case.  
16     That's still there at the summary judgment  
17     stage, and that's where the battle of the  
18     experts are.

19            But, as to the 2 percent voter, I'm  
20     going to stand with the 2 percent candidate  
21     and, you know, I stand in locked shoulder with  
22     the Socialist Workers Party and however many  
23     percentage votes John Anderson got, and they  
24     were able to --

25            JUSTICE SOTOMAYOR: Those are



1 interesting bedfellows you're taking.

2 MR. CLEMENT: But I'm delighted to  
3 have those bedfellows because that's the way we  
4 think about elections in this country. We  
5 don't think just give me the bottom-line  
6 result, give me the binary result, winner or  
7 loser.

8 JUSTICE SOTOMAYOR: Well, the problem  
9 is, Mr. -- Mr. Clement, that our -- that our  
10 case law and our standing law requires some  
11 form of substantial harm that can be  
12 articulated and shown. And what you're talking  
13 about is a desire to implement the law with a  
14 generalized grievance because it doesn't really  
15 particularly harm you.

16 MR. CLEMENT: So, for the Socialist  
17 Worker Parties, the difference between  
18 2 percent and 2.5 percent might be not the  
19 difference between getting some, like, on the  
20 ballot the next time or federal, it might be  
21 the difference between getting taken seriously  
22 and, in the next election, getting to 3 percent  
23 or 5 percent. I mean, you know, eventually, we  
24 got rid of the Whig party. It takes a long  
25 time, but those small differences do make a

1 difference.

2           And then the second thing I would say  
3 is, just as a general matter, this is not a  
4 generalized grievance. This is almost the  
5 opposite. Like, when you have voters here with  
6 standing, like, in a case like Lance, you worry  
7 about generalized grievance because everybody's  
8 a voter just like everybody's a taxpayer. But,  
9 when you're talking about whether candidates  
10 have standing, like, you've already limited the  
11 universe to, like, a handful of people. And so  
12 just like you limit the universe, there aren't  
13 that many broker-dealers in the world. So  
14 you're not going to flood the courthouse with  
15 those suits and you've already limited this to  
16 people that have a much more particularized  
17 interest in the issues.

18           CHIEF JUSTICE ROBERTS: Justice Kagan?

19           JUSTICE KAGAN: So I'm curious,  
20 Mr. Clement -- and I am going to actually limit  
21 this to Democrats and Republicans to -- for  
22 purposes of this question.

23           I mean, in a lot of these suits, it's  
24 the parties that sue, right? The RNC sues or  
25 the DNC sues. And, as Justice Alito suggested,

1     it's usually fairly predictable what rules the  
2     RNC is going to sue on and what rules the DNC  
3     is going to sue on, and both have their  
4     favorite rules and their disfavored rules.

5             And -- and, usually, we don't think  
6     about standing in that area. But I'm wondering  
7     whether you think, like, I would think that the  
8     same standard should basically apply, that  
9     whether we think about it or not, what we're  
10    really asking is, is this the kind of rule that  
11    is likely to put your candidate at a  
12    disadvantage relative to where he was before?

13            And, I mean, do you think that there's  
14    some separate inquiry for individuals, for  
15    candidates, as opposed to parties when they sue  
16    for these rules?

17            MR. CLEMENT: No. I mean, if  
18    anything, I think the candidates are more  
19    obvious, but I don't think it's a radically  
20    different proposition.

21            But here's what I do want to say.  
22    Usually, in these cases, when the party sues,  
23    they often couple themselves with a candidate  
24    or voters.

25            And one of the things that I think is

1 particularly problematic is -- you said it  
2 yourself -- like, there are certain of these  
3 rules that the Democrats don't like and certain  
4 of these rules --

5 JUSTICE KAGAN: No question.

6 MR. CLEMENT: -- that the Republicans  
7 don't like.

8 Well, the rules that the Democrats  
9 don't like tend to operate negatively directly  
10 on voters. And so, when the -- when the  
11 Democrats come in, they can marry up with a  
12 couple of voters and the Court can say the  
13 voters have standing, so we're done, we don't  
14 even have to think about the party or the  
15 candidate.

16 The Republicans in a lot of these  
17 cases are challenging rules that allow you to  
18 keep counting ballots forever, keep the voting  
19 place open forever.

20 JUSTICE KAGAN: Right. But that  
21 doesn't prevent the Republicans from getting  
22 into court and making their claim. It never  
23 has. You know, the RNC challenges most of  
24 these kinds of rules and, as far as I know,  
25 nobody has ever kicked it out of court on

1 standing grounds.

2 MR. CLEMENT: I don't know if that's  
3 true or not, but it's a lot harder for the  
4 Republicans in some of these contexts because  
5 they can't just marry themselves up with a  
6 voter.

7 The other thing I would say is we  
8 actually don't have that much history on any of  
9 this because, until relatively recently,  
10 everybody kind of just thought it was the most  
11 obvious thing in the world that Crawford, I  
12 mean, like I said, Justice Stevens spent two  
13 sentences saying, of course, the Indiana  
14 Democrats don't like voter ID laws, so they  
15 have standing.

16 But it wasn't like a here's the injury  
17 in fact, here's redressability, here's  
18 traceability. And I -- I think, you know,  
19 in -- in -- in a spate of recent cases, some  
20 have been post-election, some have been  
21 pre-election, like, all of a sudden standing's  
22 gotten really complicated and created a circuit  
23 split.

24 I'm here to urge let's return to  
25 simplicity, let's return to McPherson v.

1     Blacker, you're a candidate, you're a party, of  
2     course, you have standing.

3             JUSTICE KAGAN: Thank you.

4             CHIEF JUSTICE ROBERTS: Justice  
5     Gorsuch?

6             JUSTICE GORSUCH: I want to turn to  
7     your colloquy with Justice Sotomayor for a  
8     minute because it does seem to me that whatever  
9     is required, it can't be a showing that you  
10    would have won or lost the election as the  
11    candidate. You pointed to Illinois, Socialist  
12    Workers case. Boy, they had zero chance of  
13    winning the election, zero chance. So that  
14    can't be the injury that's required, it seems  
15    to me.

16            Likewise, FEC versus Davis, funding,  
17    how much can your opponent get versus how much  
18    you can spend, no allegation that the outcome  
19    would have been different or number of margin  
20    of victory would have been different. We  
21    didn't require anything like that in those  
22    kinds of cases.

23            Thoughts?

24            MR. CLEMENT: I -- I mean, I -- I -- I  
25    certainly agree that you didn't require that.

1 I think there are multiple reasons for doing  
2 that. I think, ultimately, it comes down to  
3 just the common-sense intuition that, of  
4 course, the candidate has the -- the standing  
5 to challenge the rules that provide the  
6 framework for the election.

7 I mean, I'll add to your list of cases  
8 that in, you know, the -- the -- the Ted Cruz  
9 for Senate case, this Court went out of its way  
10 to say he probably could have brought this as a  
11 prospective challenge. He didn't have to wait  
12 until after the election and the money was,  
13 like, \$10,000 short.

14 So this Court, I think, has always  
15 said, like, this is pretty straightforward.  
16 And I think there's another good practical  
17 reason just to put on the table, which is it's  
18 almost a little cruel to make candidates make  
19 allegations that are going to be used against  
20 them in the campaign.

21 And if Congressman Bost has to come in  
22 and say, you know, there's a material change,  
23 I'm going to lose this for this election.

24 JUSTICE GORSUCH: And, similarly, like  
25 government contracting cases, I -- I think of

1     and as you point out, administrative cases, a  
2     procedural -- you -- you change the rules in  
3     government contracting, I don't know whether  
4     that fellow's going to win or lose the bid, but  
5     you're changing the rules of the game on him.  
6     We find standing in those cases all the time.

7             MR. CLEMENT:   You do find standing in  
8     those cases all the time.  If you're sort of  
9     treated poorly by the -- the rules of the road,  
10    you don't have to show that you'll win the  
11    contract.  You don't have to show that you'll  
12    get into the law school of your choice.

13            And I'd add again one more to that,  
14    which is, you know, we have all these cases  
15    where voters have standing.  Nobody says that  
16    the voter has to come in and say:  I'm going to  
17    cast the decisive ballot.

18            JUSTICE GORSUCH:  Right.  On the other  
19    hand, let -- let's suppose that the change in  
20    regulation was, instead of ballots on white  
21    paper, they have to be on cream paper.  Then  
22    it's harder to see an injury, right?  So what  
23    do we do about that?

24            MR. CLEMENT:   So my recommendation to  
25    you on that is to realize:  Ah, that's a



1     theoretical problem, but we're not going going  
2     to have to lose a lot of sleep over that  
3     because --

4             JUSTICE GORSUCH:   Because nobody will  
5     ever bring those cases.

6             MR. CLEMENT:   -- nobody will bring  
7     that challenge.

8             JUSTICE GORSUCH:   Yeah.

9             MR. CLEMENT:   And I think, if you  
10    go -- I don't need to tell you that if you go  
11    through the federal regulations, there are lots  
12    of silly provisions in there that have never  
13    been challenged, but somebody had standing.

14            JUSTICE GORSUCH:   Well, I'd -- I'd --  
15    I'd be happy to go through those with you  
16    someday, Mr. Clement, but thank you.

17            (Laughter.)

18            CHIEF JUSTICE ROBERTS:   Justice  
19    Kavanaugh?

20            JUSTICE KAVANAUGH:   I think your  
21    answers and colloquy with the Chief Justice and  
22    Justice Gorsuch reveal that you're considering  
23    this case in the bucket that the candidates are  
24    objects, in essence, of the regulation, is that  
25    right?  And, thus, we have said repeatedly that

1     when you're the object of the regulation, you  
2     don't need to say much more than you're the  
3     object of the regulation.

4             And -- and we've said in cases like  
5     the fuel producers last year, the -- the  
6     schools in Pierce, the broadcasting network at  
7     CBS, none of those were actually directly  
8     regulated, but we still said, in essence, they  
9     were the object.

10            Is that -- is that the analogy that  
11     you're using in your answer to the Chief?

12            MR. CLEMENT:  It is, except I might  
13     add one word just to avoid a quibble --

14            JUSTICE KAVANAUGH:  Okay.

15            MR. CLEMENT:  -- which is I think  
16     they're the objects of the regulatory regime.  
17     Like, I think there's a fair argument and I  
18     think Justice Sotomayor sort of baked it into  
19     one of her questions that the object of the  
20     ballot deadline might be thought of as being  
21     the voter who gets the extra 14 days and not  
22     the candidate.  So it's not that the candidate  
23     is the direct object --

24            JUSTICE KAVANAUGH:  It's not the only  
25     object.

1           MR. CLEMENT: Not the only. But  
2       probably, you know, you --

3           JUSTICE KAVANAUGH: Yeah. It's like  
4       the cars --

5           MR. CLEMENT: Look, if it helps me to  
6       say they're the direct object, I'll say it.  
7       But I do kind of think it's a --

8           JUSTICE KAVANAUGH: They're an -- an  
9       object.

10          JUSTICE KAGAN: It might help you with  
11       some people and not with other people.

12          MR. CLEMENT: Yeah.

13          (Laughter.)

14          JUSTICE KAVANAUGH: An -- an object.

15          MR. CLEMENT: But -- but -- but  
16       where -- but what I -- like, I'm making --

17          JUSTICE KAVANAUGH: There's the fuel  
18       producers and the car makers last year --

19          MR. CLEMENT: Yeah. No, I --

20          JUSTICE KAVANAUGH: -- in Diamond or  
21       the --

22          MR. CLEMENT: Like, obviously, but --  
23       but I'm making a slightly different point,  
24       which is I think they are the object of the  
25       whole regulatory regime.

1 JUSTICE KAVANAUGH: Yeah.

2 MR. CLEMENT: And they regulate some  
3 other people incidentally, but it's all really  
4 about the electoral process and who's going to  
5 win the election and what their vote total is  
6 going to be. And, again, like, Illinois  
7 doesn't just certify a winner. They -- after  
8 the 14 days, they certify the vote total. So  
9 they care about those late-arriving ballots.  
10 We care about those late-arriving ballots. We  
11 think they're unlawful ballots. Right there, I  
12 think that's enough of an injury.

13 JUSTICE KAVANAUGH: Then your --  
14 your -- made a strong case that we need to  
15 decide this connected to the real world of how  
16 elections actually operate and not some  
17 theoretical way. So, on your monetary injury  
18 point, can you kind of play out how a campaign  
19 operates and -- and how the monetary injury's  
20 going to come to pass in a situation with this  
21 particular regulation?

22 MR. CLEMENT: Sure. And what I would  
23 say is, in some ways, it's -- you know, you  
24 don't have to have any political  
25 sophistication. It's just, if the -- if -- if

1 the campaign is going to be two weeks longer,  
2 you've got to keep the campaign staff together  
3 for two weeks longer, and that's going to be  
4 more expensive.

5 And, you know, I think it's telling  
6 that what -- what you'd be paying for in using  
7 your volunteer resources for in that last two  
8 weeks is the -- the -- the -- the -- the ballot  
9 monitoring and the rest and the poll watching  
10 as they count these late-arriving ballots, and,  
11 you know, no less an authority than the League  
12 of Women Voters at page 20 of their amicus  
13 briefs says it would be political malpractice  
14 not to do this.

15 So they're real expenses, and they're  
16 essentially completely reasonable to use kind  
17 of like the formulation in Clapper. But one  
18 other kind of practical point I want to make is  
19 the distortion of this kind of thing starts  
20 much earlier because, you -- you know, you  
21 don't just say: Well, oh, it didn't occur to  
22 me that there would be late arriving ballots,  
23 so now, in the last two weeks, I have to spend  
24 some money.

25 If the election ends at Election Day,

1     you're going to spend your money throughout the  
2     process differently. You're going to spend  
3     less money at the margins, you're going to  
4     spend less money directed at likely mail-in  
5     voters. You're going to spend a little more  
6     money at the margin on your voters who you  
7     think are actually going to go to the polls.

8             I mean, the analogy I was thinking of  
9     is, like, you know, if you have, like, a mile  
10    race instead of a half-mile race, that doesn't  
11    just change the last half mile. It changes the  
12    way you run the first half mile.

13            So these election regulations, all of  
14    them, have -- you know, this one has, like, the  
15    most direct effect possible because it's like  
16    an election that runs an extra two weeks is  
17    going to cost more than one that ends earlier.

18            But I think almost all of these end up  
19    having pocketbook injuries. And you could  
20    trace it all to the pocketbook injury, but I  
21    think it's a little artificial because the  
22    reason the candidate has a pocketbook injury is  
23    because he's a candidate or she's a candidate.

24            JUSTICE KAVANAUGH: Thank you.

25            CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: So you make a lot of  
3 practical arguments that I think have force.  
4 What do you think -- what effect, if any, do  
5 you think that adopting your theory would have  
6 in other areas of standing law?

7 Because we've been pretty careful  
8 about procedural injury. You know, an  
9 excellent lawyer who argued TransUnion  
10 convinced us to do that.

11 What do you think this -- you're  
12 asking for something, as Justice -- Justice  
13 Kagan points out, we don't fashion bespoke  
14 rules for standing in particular contexts. So  
15 what spillover effects would -- would we be  
16 worried about in writing an opinion in your  
17 favor if you win?

18 MR. CLEMENT: So I don't think we're  
19 asking for a bespoke rule. I think, you know,  
20 obviously, the parties fight about this in the  
21 briefs, but I think what we're asking for is  
22 the application of the ordinary standing rules  
23 that would be second nature in the context of a  
24 regulatory -- a regulated industry to just  
25 apply in the electoral context in the same way.

1           And, you know, you don't -- like, when  
2   a company is, like, in a particular area of  
3   regulation and the regulations change, you  
4   know, you don't even think hard that, of  
5   course, they have a basis to challenge the --  
6   the change of the rules that they're going to  
7   be operating under.

8           JUSTICE BARRETT:  It's mostly because  
9   of money.  I mean, in Diamond Alternative, it  
10  was too.

11          MR. CLEMENT:  Yeah, but --

12          JUSTICE BARRETT:  It was pocketbook.

13          MR. CLEMENT:  But -- but, even if it's  
14  just massive inconvenience and it, like,  
15  doesn't translate, I mean, you know, I think,  
16  like -- and you can imagine a situation where,  
17  like, the SEC forces broker-dealers to shut  
18  their doors at 4:00.  It might -- you know,  
19  like, it's anybody's guess whether they're  
20  going to save more in wages than they're going  
21  to lose for the people that they send home  
22  early, than they're going to make in terms of  
23  additional customers that come in in the last  
24  hour of the day.

25          I don't think you need affidavits to



1     that.  You'd say, look, we've been operating  
2     our brokerage this way for a hundred years and  
3     we close at 5.  And now the heavy thumb of the  
4     government's coming in and saying we have to  
5     close at 4.  I don't -- I'm sure you're right  
6     that you could translate that into a pocketbook  
7     injury, but I don't think you've ever had to.  
8     And I don't think we're asking for anything  
9     different here.

10           Now, like, if you're worried about  
11     that, there are obviously off-ramps to rule  
12     more narrowly, but I do think the one that is  
13     going to be the simplest rule in the long run  
14     that is going to eliminate the circuit split  
15     between the Eighth Circuit and the Seventh  
16     Circuit is to say candidates have standing to  
17     challenge the rules of the electoral road.  It  
18     really is kind of that simple.

19           CHIEF JUSTICE ROBERTS:  Justice  
20     Jackson?

21           JUSTICE JACKSON:  So your broadest  
22     theory, the one that you just articulated, does  
23     really seem to be motivated by the idea that  
24     the candidates are the object in the way that  
25     Justice Kavanaugh explored with you.  And I

1     guess -- I guess I wonder if -- if the response  
2     or the reply to that is really, when you're  
3     talking about an election, it's not the  
4     candidates who are the object; it is the  
5     voters, that really what an election is is the  
6     opportunity for the people to decide who are  
7     going to govern them.

8             And so, in that context, one could  
9     argue that the voters would be able to make the  
10    same kind of grievance that you say is  
11    particular to the candidate here, right? You  
12    say your grievance is that unlawful ballots are  
13    being filed in this election.

14            And I wonder why that's particularized  
15    to the candidate when, on my theory, the  
16    election is really about the voters, and voters  
17    could make that same argument, and why  
18    shouldn't they be -- be able to? And if they  
19    could, haven't we undermined your idea that  
20    this is particularized to candidates in the way  
21    that you're articulating?

22            MR. CLEMENT: So what I would say is  
23    there are already, under your current doctrine,  
24    lots of ways for voters to sue. And I -- you  
25    know, I don't actually know -- if -- if -- if

1 Illinois decides we're going to reverse this  
2 and we're going to close all the polls early  
3 and we're going to get rid of mail-in voting, I  
4 think any voter who comes in with a declaration  
5 and says I want to vote by mail, I voted for  
6 mail --

7 JUSTICE JACKSON: Right. But that's a  
8 different hypothetical. What I'd like to do is  
9 focus on your standing argument, which we've  
10 said you have to have a particularized  
11 grievance, not a generalized grievance.

12 And so my question is, why isn't  
13 unlawful ballots are being counted in this  
14 election a generalized grievance?

15 MR. CLEMENT: Well, here -- can I try  
16 to answer it this way --

17 JUSTICE JACKSON: Yeah.

18 MR. CLEMENT: -- which is to say just  
19 because a lot of people share a concern doesn't  
20 mean somebody whose ox is specifically gored by  
21 that concern is raising a generalized  
22 grievance.

23 JUSTICE JACKSON: But --

24 MR. CLEMENT: Like, right? Like, I --

25 JUSTICE JACKSON: -- but isn't the

1 function of identifying who is specifically  
2 gored the harm requirement? Isn't the function  
3 of making a candidate say, with all of these  
4 extra unlawful ballots counted, I'm at risk of  
5 losing, that's what gives him the particular  
6 harm that then I would argue would entitle him  
7 to bring a suit, as opposed to the generalized  
8 grievance of there's an unlawful thing  
9 happening with respect to this activity.

10 I mean, that's why it makes sense.  
11 Your second theory to me makes perfect sense.  
12 I'm not saying he wins. I'm not looking at the  
13 record. I'm just saying, in terms of a theory  
14 of why a candidate could say I'm harmed, it's  
15 like the sort of Clapper idea that there's a  
16 risk of injury to me in a real way and I'm  
17 showing you where that is. To me, that doesn't  
18 exist in the first theory, in the world where  
19 you're just saying there's unlawful conduct  
20 going on. That does not identify or  
21 particularize him.

22 Can I -- can I direct you to the third  
23 theory, the pocketbook theory? In a context,  
24 assuming that the injury of a potential  
25 election defeat, which I see as a real injury,

1 assuming that's not imminent, I don't  
2 understand why additional polling costs isn't a  
3 self-inflicted harm.

4 So, if you take Justice Sotomayor's  
5 example where you have a candidate who has a  
6 98 percent chance of winning based on  
7 everything we know, based on all the polls,  
8 whatever else, if he decides that he's going to  
9 spend money for the two extra weeks of, you  
10 know, counting, I don't understand why that's  
11 not on him. There's really no risk of harm to  
12 him to have that counting happen. And we've  
13 talked about self-inflicted injuries in  
14 Clapper, for example, as not being sufficient.

15 MR. CLEMENT: So I'd like to just  
16 briefly talk about the first point and then get  
17 to the --

18 JUSTICE JACKSON: Yes.

19 MR. CLEMENT: -- third theory.

20 Just on the first point, I -- I -- I  
21 still say, you know, harm, injury, yes, we  
22 think we've identified a specific injury  
23 that -- that visits on the candidate  
24 specifically. The fact that everybody cares  
25 about the votes being accurate, I mean, I'd

1     like to think everybody cares about the  
2     environment, but we let the person who's  
3     directly downstream from the pollution -- we  
4     say they're the ones that have standing to  
5     bring the suit even though everybody might  
6     care, everybody might be offended at some level  
7     by the pollution that's in violation of the  
8     law.

9             It's the same here. Everybody would  
10    like the elections to be conducted lawfully and  
11    in compliance with federal law, including the  
12    voters, but the injury is visited more  
13    specifically on the candidate. They're the  
14    ones that --

15            JUSTICE JACKSON: Even though the  
16    voter says my vote is diluted by all of these  
17    other unlawful votes, right? Don't they have  
18    a -- the same kind of injury you're talking  
19    about --

20            MR. CLEMENT: Well --

21            JUSTICE JACKSON: -- by the extra  
22    votes that come in?

23            MR. CLEMENT: -- I mean, ironically,  
24    the -- the Petitioners here tried to make a  
25    voting standing argument below as well, and

1       that was rejected. And we didn't --

2               JUSTICE JACKSON: Right. And so,  
3       similarly --

4               MR. CLEMENT: -- we didn't --

5               JUSTICE JACKSON: -- shouldn't this  
6       one be rejected on that same basis?

7               MR. CLEMENT: No, no. And what I  
8       would say is the -- the candidate's different.  
9       His or her name is on the ballot. Right there,  
10      that just tells you there's something just  
11      obviously different about it.

12              But then the other thing is, you know,  
13      I think the reason that in a case like Lance  
14      you're worried about voter standing is because  
15      there almost as many voters as taxpayers.

16              JUSTICE JACKSON: Can you speak to the  
17      pocketbook injury?

18              MR. CLEMENT: The second?

19              JUSTICE JACKSON: Yes.

20              MR. CLEMENT: Yes, I'd be delighted  
21      to. So, on the pocketbook injury, I do think  
22      it is a mistake to think that -- and this is  
23      really -- you know, Judge Scudder's dissent  
24      handled this issue quite well, I think, and I  
25      think it really gets down to the issue of is

1     this like Clapper.

2                   And when it's -- when -- when the  
3     injury itself isn't speculative, but the  
4     government is going to do something and it is  
5     going to happen, late-arriving ballots will be  
6     counted, at that point, the only remaining  
7     question, is the expenditure of resources  
8     reasonable?

9                   JUSTICE JACKSON:   Yes.   But the harm  
10    in Clapper wasn't imminent because the rule  
11    wouldn't necessarily apply.   Here, the harm  
12    isn't imminent because, even though the rule  
13    will apply, he may not lose as a result.  
14    There's still not a risk of him losing even  
15    though this rule applies to him.   They're  
16    indistinguishable in that way.

17                  MR. CLEMENT:   With respect, I think  
18    the reason the injury was so speculative in  
19    Clapper is because the rule would never apply  
20    to the Petitioners, the U.S. citizens.   It was  
21    a moral certainty it wasn't going to apply  
22    directly to them.   And then it was entirely  
23    speculative as to whether it would implicate  
24    their foreign clients at all.

25                  Here, the -- what -- what is prompting



1 us to spend money is going to happen. Illinois  
2 will count late-arriving ballots.

3 JUSTICE JACKSON: But, if you're a  
4 98 percent candidate, what difference does that  
5 make? I mean, it only harms you if you could  
6 lose as a result of the new ballots being  
7 counted, right?

8 MR. CLEMENT: So, with respect, as a  
9 practical matter, the 98 percent candidate's  
10 not going to bring the case, but the 70 percent  
11 candidate, the 60 percent candidate, the  
12 56 percent candidate, or even the 43 percent  
13 candidate might bring the case, and those  
14 margins of difference make a difference.

15 And we -- the whole election system  
16 operates on the premise that we care about more  
17 than the binary final outcome.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Mr. Talent.

22 ORAL ARGUMENT OF MICHAEL TALENT

23 FOR THE UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE PETITIONERS

25 MR. TALENT: Mr. Chief Justice, and

1     may it please the Court:

2                 Candidates have standing to challenge  
3     laws governing the -- the validity of ballots  
4     cast in their election so long as there is a  
5     risk that the ballots at issue could affect the  
6     election's outcome for two but only two  
7     reasons.

8                 First, the risk of loss suffices  
9     because candidates are not mere bystanders to  
10    ballot-counting laws. Those laws determine  
11    which candidate wins his race. They are aimed  
12    at candidates' concrete interest in winning  
13    office. And so the question what's it to you  
14    answers itself.

15                Second, candidates have standing based  
16    on reasonable costs they incur to mitigate the  
17    risk posed by ballot-counting rules. This  
18    narrow rule resolves this case and comports  
19    with basic tenets of election law by ensuring  
20    that the validity of ballot-counting rules can  
21    be determined well in -- well in advance of an  
22    election.

23                Furthermore, it does not require  
24    courts to prognosticate about whether a race  
25    will be close or effectively limit standing to

1 major parties.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Would there be a  
4 difference if a race is a tight race? Because  
5 it seems as though the problem we're having  
6 here is that there's an argument that there was  
7 no risk that this candidate would lose.

8 MR. TALENT: Justice Thomas, we do not  
9 think it would matter if it's a tight race. If  
10 a candidate -- in our -- in this scenario, the  
11 candidate is a direct object of the -- of the  
12 ballot-counting rules.

13 And what this Court's precedents teach  
14 is that when a candidate is a direct object, a  
15 small probability of risk is deemed to be -- is  
16 deemed to be a substantial risk.

17 And the example we use in our brief is  
18 the example of a Russian roulette hypothetical.  
19 Even if the risk that the round in the chamber  
20 is live, the very fact that in that context,  
21 that the direct object of the -- of the game is  
22 being forced to engage in that game means he  
23 has a concrete interest, means he has standing  
24 to -- to prevent that risk from happening.

25 CHIEF JUSTICE ROBERTS: Well, but when

1     you put it that way, it seems to me that you  
2     are kind of buying into the -- what risk does  
3     the candidate really have? I mean, in Russian  
4     roulette, you've got a one out of six or  
5     whatever it is risk.

6             But, if you're looking at risk and  
7     it's, you know, 85 percent margin of victory,  
8     I mean, is that your argument?

9             MR. TALENT: Our argument is that  
10    the -- the substantial risk test in this  
11    Court's precedents goes to the question of  
12    whether a risk is speculative or not.

13            So, in the context of ballot-counting  
14    laws, we know that the law is going to be  
15    applied to the candidate. We know that the  
16    law's purpose is -- is to determine which  
17    candidate wins, so it's targeting the  
18    candidate's concrete interest in winning --  
19    winning his election. And so, therefore, there  
20    is an actual risk that those ballots could sway  
21    the outcome of the election, and a candidate --

22            CHIEF JUSTICE ROBERTS: Well, what if  
23    there -- I mean, what if there isn't such a  
24    risk? You know, he's won 10 elections in a row  
25    by 85 percent. Maybe you can even tell from

1 the turnout before the mail -- mail -- mailing  
2 in. I mean, does that make a difference under  
3 your theory?

4 MR. TALENT: It would not make a  
5 difference, Chief Justice Roberts. The -- we  
6 pull this test, it -- it -- it comes from  
7 this -- this Court's pre-enforcement standing  
8 context.

9 In that context, this Court has deemed  
10 a risk to be substantial even if there is  
11 something like a credible threat of enforcement  
12 or if the threat of enforcement is not  
13 imaginary or wholly speculative. It's -- the  
14 Court's never put a probability threshold on  
15 the -- on -- on standing.

16 CHIEF JUSTICE ROBERTS: Yeah, but I  
17 would say in my hypothetical none of those  
18 adjectives fit it. There isn't a credible  
19 threat that the guy is going to lose.

20 MR. TALENT: But it's still -- I mean,  
21 it's part of the -- part of the issue is past  
22 results don't guarantee future outcomes. So,  
23 even in the Russian roulette hypothetical, even  
24 if it's a one-in-a-hundred chance, the fact of  
25 the matter is a person is forced to engage in

1     that gamble, and the concrete interest in the  
2     what's-it-to-you answer is avoiding the gamble  
3     that implicates that person's concrete risk.

4             A candidate is in a similar situation  
5     because ex ante this -- ballot-counting rules  
6     force them to take the risk that those ballots  
7     will sway the outcome of their election.

8             JUSTICE KAVANAUGH: Can you -- I'm  
9     sorry, are you done?

10            Can you address from the government's  
11     perspective, if there isn't standing for these  
12     kinds of challenges to ballot-receipt deadlines  
13     for U.S. House elections in their standing  
14     pre-election and they're all forced  
15     post-election, what it looks like next November  
16     or December?

17            MR. TALENT: I mean, I think that it's  
18     opening -- it's -- it's every -- it's all the  
19     concerns Mr. Clement raised, that there's  
20     going -- these elect -- these -- if there needs  
21     to be a likelihood or if the test is the  
22     ballots actually did make a difference, it's  
23     going to force a lot of -- it's going to force  
24     this litigation into the post-election context.  
25     It's going to require -- and it's going to

1 force it into the post-election context for  
2 hotly contested cases and will have -- I think  
3 the practical effect of ensuring that only  
4 major parties would be able to sue to  
5 vindicate -- to protect their interests against  
6 unlawfully counted ballots.

7 JUSTICE KAVANAUGH: And if the  
8 deadlines were found to be unlawful, what --  
9 what -- have you thought ahead to what the  
10 remedy would be in a post-election context if  
11 the deadlines were found to be unlawful, how  
12 that would play out?

13 Because, if we're not thinking ahead  
14 to that, we're going to walk into something.

15 MR. TALENT: I mean, I -- I can't --  
16 I can't imagine it would be easy or good to  
17 determine.

18 All the things I think you -- you --  
19 you talked about with -- with Petitioner,  
20 questions about remedy, questions about whether  
21 voters are going to be disenfranchised because  
22 they relied on -- on rules of the road, it's  
23 simply a Gord- -- you know, it's a -- it's a  
24 thicket that the Court doesn't need to get into  
25 if it recognizes that candidates are direct

1 objects of these regulations.

2 And what this Court's precedents  
3 indicate is that when a candidate is -- or when  
4 a plaintiff is a direct object of the  
5 regulation and the harm immediately flows from  
6 the challenge being conduct -- being  
7 challenged, then that is a substantial risk of  
8 harm.

9 JUSTICE KAVANAUGH: I might quibble  
10 with "the direct" and just "an" -- "an  
11 object" --

12 MR. TALENT: "An direct," yes, yes.

13 JUSTICE KAVANAUGH: -- or analogous to  
14 an object just so we're --

15 MR. TALENT: The indefinite article,  
16 yes.

17 JUSTICE KAVANAUGH: Yeah.

18 JUSTICE SOTOMAYOR: Counsel, what --  
19 you -- your entire presentation, as did Mr.  
20 Clement, takes out our regular articulation of  
21 standing.

22 In Meese versus Keene, we said a  
23 candidate has standing when the defendant's  
24 conduct would substantially harm his chances  
25 for re- election.



1                   So we -- in Clapper, we said  
2           substantial risk of harm.

3                   In Murthy, we said substantial risk  
4           that in the near future the plaintiff will  
5           suffer an injury.

6                   Both of you are sort of ignoring that  
7           language because you're saying -- you're almost  
8           arguing in a circle. It's always a substantial  
9           risk because it might happen, which is --  
10          plausibility is never what we've accepted.

11                   Maybe Justice Kagan is right.

12                   Let's talk about what the electoral  
13          disadvantage is here.

14                   What do you see if we use something  
15          like -- that accounts for the cases that  
16          Mr. Clement argued, like whether or not I will  
17          have to pay a greater amount or accept a lesser  
18          amount. That's electoral disadvantage.  
19          Someone else might pay less and I might pay  
20          more.

21                   But where is the electoral  
22          disadvantage here?

23                   MR. TALENT: So --

24                   JUSTICE SOTOMAYOR: Meaning all the  
25          voters, Democrat and Republicans, get the same

1 chance to have their vote counted. So it's not  
2 a harm to either side that the people voting  
3 for them are going to be equally treated.

4 MR. TALENT: So I just want to push  
5 back on -- on the premise. We're not saying  
6 just because a risk may happen, there's a  
7 substantial risk. The plaintiff has to be a  
8 direct object, and the harm has to immediately  
9 flow from --

10 JUSTICE SOTOMAYOR: That's where we go  
11 back to is it -- is he or she the direct  
12 object.

13 MR. TALENT: So --

14 JUSTICE SOTOMAYOR: We're going to  
15 have to now change our standing to say indirect  
16 objects or people who are part of the scheme  
17 in any way.

18 But, even in Diamond, the fuel  
19 manufacturers were not part of the regulatory  
20 scheme.

21 MR. TALENT: But, in -- in the  
22 electoral context, and I think the electoral  
23 context is -- and especially rules governing  
24 the validity of ballots is unique in this sense  
25 because the purpose of those rules -- almost

1 the only purpose for a rule saying this ballot  
2 counts but this ballot doesn't is to -- is to  
3 determine which candidate wins the election.

4 So it is targeting the candidate's  
5 concrete interest.

6 JUSTICE SOTOMAYOR: So can you answer  
7 the question, what's the electoral disadvantage  
8 in this case --

9 MR. TALENT: Well --

10 JUSTICE SOTOMAYOR: -- given the  
11 allegations of the complaint? Let's deal with  
12 that.

13 MR. TALENT: The --

14 JUSTICE SOTOMAYOR: What can you show  
15 me in the complaint that articulates electoral  
16 disadvantage?

17 MR. TALENT: So the -- our rule  
18 doesn't turn on electoral disadvantage partly  
19 because vote counting rules ex ante, it -- it's  
20 impossible to know which way they will break or  
21 often it's unknown which way they will break.  
22 So this --

23 JUSTICE SOTOMAYOR: Justice Alito said  
24 you could. You could have a long history of --  
25 you have proof since 2005 of where these things

1 have broken, and you could have alleged that.

2 MR. TALENT: Our rule is not -- our  
3 rule doesn't exclude standing based on  
4 electoral advantage.

5 I -- I think one of the things our  
6 rule gets at, to the extent electoral advantage  
7 feeds into our rule, part of the gamble -- so  
8 two answers.

9 Part of the gamble or -- or part of  
10 the reason it's a concrete particularized harm  
11 to candidates is, if they don't expend  
12 resources to mitigate the cost of -- of this  
13 substantial risk, then they are getting a  
14 potential electoral disadvantage.

15 JUSTICE SOTOMAYOR: Thank you,  
16 counsel.

17 CHIEF JUSTICE ROBERTS: Thank you.

18 Justice Thomas?

19 Justice Alito?

20 JUSTICE ALITO: How would candidates  
21 for very minor parties fare under your rule  
22 where they have no chance whatsoever of  
23 winning?

24 MR. TALENT: Because they are direct  
25 objects and the harm immediately flows to them,

1       they would have standing.

2                   JUSTICE ALITO:   Thank you.

3                   CHIEF JUSTICE ROBERTS:   Justice  
4       Sotomayor?

5                   Justice Kagan?

6                   JUSTICE KAGAN:   Mr. Talent, I have a  
7       sense that this whole suit is a little bit of  
8       a -- it's, like, in search of a problem.  I  
9       mean, in fact, we all the time allow suits  
10      pre-election to challenge election laws.  I --  
11     I -- I mean, there's hardly an election rule  
12     that gets passed in any battleground state that  
13     isn't challenged.  It's usually by a party.

14                  And we've, you know, I think, always  
15     allowed those kinds of suits because the party  
16     has suggested in plain English, and it's not so  
17     hard to do, why it is that the new rule will  
18     harm them, why it is that, you know, they'll --  
19     they would prefer the old rules in terms of  
20     their electoral status.

21                  So why isn't the same thing true here?  
22     I mean, I guess I just sort of think, like,  
23     what's the problem here?

24                  MR. TALENT:   The -- the problem here  
25     and what our rule gets to is the fact that

1 candidates are forced to gamble that these  
2 ballots are going to affect the outcome of  
3 their -- their election.

4 JUSTICE KAGAN: I don't think we've  
5 ever actually asked the RNC or the DNC to do  
6 anything like that. What we've asked the --  
7 the parties to do is to -- and this is why you  
8 don't get these cases thrown out on standing  
9 grounds, because there are perfectly easy ways  
10 for a party to say why a new rule is going to  
11 harm them in the electoral game.

12 You know, when -- when Sunday  
13 ballot -- when Sunday voting is shut down, the  
14 Democratic Party rolls into court and says this  
15 is going to harm us and the suit goes forward,  
16 and similarly for the Republican side on  
17 different kinds of rules.

18 I mean, I feel as though you're asking  
19 to create a whole new set of rules when  
20 everything has been proceeding just fine, that  
21 everybody who actually is harmed or is likely  
22 going to be harmed by a new election rule has  
23 had the chance to sue.

24 MR. TALENT: So we -- we -- our rule  
25 addresses a situation where a candidate is

1 coming in and ex ante they're being forced to  
2 gamble on whether or not a --

3 JUSTICE KAGAN: All of these suits are  
4 ex ante. I mean, every time we have an  
5 election, I mean, every battleground state, we  
6 get -- we get to see how litigation plays out,  
7 mostly brought by the RNC and the DNC prior to  
8 the election, asserting that a new rule is  
9 invalid for some reason or other, and those  
10 suits are never tossed because of standing  
11 because -- because there are easy assertions to  
12 make in a complaint about why a new rule is --  
13 is going to hurt you in the electoral process.

14 MR. TALENT: I think a candidate can  
15 make those allegations here with a -- with a --  
16 based on the fact that these -- these rules  
17 govern the counting of votes in their election.  
18 They're forced to gamble that these rules are  
19 not going to affect the outcome.

20 So whether -- you know, as to the  
21 competitive injury, just to kind of make an  
22 example, you know, even though it may benefit  
23 them, they still have to put on the line their  
24 concrete risk at winning because it may not  
25 benefit them.

1           It's different for the RNC and DNC  
2       because I don't think they as neatly fit into  
3       the paradigm of -- of being a direct object of  
4       these rules. It's really the candidates --

5           JUSTICE KAGAN: Thank you.

6           MR. TALENT: -- because these rules  
7       are targeted at their electoral success.

8           CHIEF JUSTICE ROBERTS: Justice  
9       Gorsuch?

10          Justice Kavanaugh?

11          JUSTICE KAVANAUGH: Just are you not  
12       seeing a candidate different from a party, I  
13       gather?

14          MR. TALENT: I think we are. A  
15       candidate is definitely a direct object of a --  
16       of a rule governing --

17          JUSTICE KAVANAUGH: Well --

18          MR. TALENT: -- the counting of  
19       ballots in an election.

20          JUSTICE KAVANAUGH: -- I guess you're  
21       saying then, if a party has standing, a  
22       fortiori, a candidate should have standing for  
23       similar reasons. Is that what you're saying in  
24       response to Justice Kagan?

25          MR. TALENT: What I'm saying in



1 response to Justice Kagan is that the reason we  
2 need the narrow rule we have now is to deal  
3 with candidates who want to challenge these  
4 rules. In this case, the RNC, for whatever  
5 reason, did not become a party plaintiff.

6 But the reason a candidate has  
7 standing in this context is because they are a  
8 direct object and because they're forced to  
9 take that gamble. Whether the RNC comes in and  
10 alleges competitive standing, that may be a  
11 separate theory of standing in that case, but  
12 in this case, the reason really is the  
13 candidate is being forced to gamble that the  
14 rule is not going to cost him his election.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Barrett?

18 Justice Jackson?

19 JUSTICE JACKSON: I guess I don't  
20 understand the gamble/harm theory at all. I  
21 mean, in every election, there -- candidates --  
22 candidates voluntarily put themselves up for  
23 election and there's a risk that they will win  
24 or lose, right?

25 MR. TALENT: Yes. But the -- the

1     gamble here is that an allegedly unlawful law  
2     is going to put at -- put at risk their odds of  
3     winning or losing. They have -- they have --

4             JUSTICE JACKSON: So why don't they  
5     have to establish as a part of that harm that  
6     they actually have a risk of winning or losing  
7     or losing as a result of this? That's the part  
8     that's -- your rule sort of said so long as  
9     there's a risk that the extra ballots could  
10    make a difference. And I said, aha, okay,  
11    that's exactly what we're saying needs to be  
12    established. And yet you're saying, no, it  
13    doesn't if you're a direct object of the  
14    regulation.

15            So you've sort of taken away the very  
16    thing that you're now saying is necessary to  
17    show harm in this situation.

18            MR. TALENT: Well, so two answers to  
19    that. On a -- the doctrinal answer is that  
20    when a -- when a plaintiff is a direct object  
21    of the harm, like -- like in the  
22    pre-enforcement cases, this Court hasn't  
23    required them to meet some type of strict  
24    probability threshold. It's a fact that there  
25    is a threat of harm that immediately flows from

1 the challenged conduct.

2 In the context of elections, ex ante  
3 it may not be possible to know how a rule will  
4 affect the outcome of -- of the race. So our  
5 rule -- this harm -- our rule harmonizes or  
6 comports with the basic tenet of election law,  
7 which is you don't want to --

8 JUSTICE JACKSON: And so we don't have  
9 to -- we don't have to -- you're saying we  
10 don't have to assess the realistic nature or  
11 the plausibility of the threat?

12 MR. TALENT: I'm saying the fact there  
13 are --

14 JUSTICE JACKSON: In any particular  
15 candidate's situation, we don't have to care  
16 that there really isn't a risk for the  
17 98 percent candidate? We still just -- the  
18 theory, the fact that there could be for some  
19 candidate the ability to lose as a result of  
20 this is enough to give the 98 percent  
21 candidate --

22 MR. TALENT: It's a factor that --  
23 it's -- it's -- it's that Russian roulette  
24 hypothetical, even if the bullet --

25 JUSTICE JACKSON: Got it. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Ms. Notz.

4 ORAL ARGUMENT OF JANE E. NOTZ  
5 ON BEHALF OF THE RESPONDENTS

6 MS. NOTZ: Mr. Chief Justice, and may  
7 it please the Court:

8 Rather than address the record the  
9 parties developed below, Petitioners first  
10 argue that candidates always have standing to  
11 challenge the rules that govern their elections  
12 because any election rule can cause a single  
13 vote change in the final tally. Petitioners'  
14 blanket candidate standing rule would cause  
15 chaos for election officials while saddling  
16 federal courts with resolving abstract policy  
17 disputes. This Court should hold candidates to  
18 the same standing requirements as every other  
19 plaintiff.

20 And when those requirements are  
21 applied to this record, Congressman Bost  
22 doesn't come close to showing standing. His  
23 invocation of the possibility of a -- of a  
24 reduced margin of victory fails at the start.  
25 As the United States put it in its brief,

1 Bost's desire to run up the score is not a  
2 concrete injury that history and tradition  
3 shows can support standing to sue.

4 And Petitioners' reliance on harms  
5 that are legally cognizable fares no better.  
6 Petitioners repeatedly told the Seventh Circuit  
7 that Bost is not at risk of losing an election.  
8 And this concession to one side, in his  
9 declaration, Bost used the words "if" and "may"  
10 without any explanation when referring to the  
11 possibility of an election loss or reputational  
12 harm. These conclusory and incomplete  
13 statements describe the mere theoretical  
14 possibility of injury. They are not evidence  
15 of a substantial risk of harm.

16 Finally, as for Petitioners'  
17 pocketbook theory, while the cost of  
18 precautions may be an Article III injury, this  
19 Court has recognized standing on this theory  
20 only when the underlying harm sought to be  
21 avoided is itself legally cognizable. Any  
22 other rule would water down Article III's  
23 requirements in cases alleging future injury.  
24 And because Petitioners identified no legally  
25 cognizable future harm, their efforts to

1     repackage that failed theory into a present  
2     injury theory should be rejected.

3             I welcome the Court's questions.

4             JUSTICE THOMAS:   How close would an  
5     election have to be in order for there to be a  
6     sufficient substantial risk of harm?

7             MS. NOTZ:   Sure.   I -- I think it's  
8     always -- it would always be easier in cases  
9     where elections are close, but I would also  
10    point out that this Court has never attached a  
11    metric to substantial harm, and I don't think  
12    the Court needs to do so in this case because I  
13    think, under any metric, the assertions in this  
14    declaration fail because they don't show any  
15    risk of harm at all.   They simply describe the  
16    mere theoretical possibility of harm.

17            And this Court has said in cases like  
18    Summers that standing is not an exercise in  
19    what is merely conceivable.   It requires a  
20    showing of substantial risk of harm, and the  
21    burdens is on --

22            CHIEF JUSTICE ROBERTS:   Well --

23            JUSTICE THOMAS:   Yeah.

24            CHIEF JUSTICE ROBERTS:   I'm sorry.

25    Look, the -- what you're sketching out for us

1     is a potential disaster. In other words,  
2     you're saying, if the candidate's going to win  
3     by 65 percent, no standing. But, if the  
4     candidate, you know, hopes to win by a dozen  
5     votes -- and there are places in the country  
6     where that happens over and over again -- then  
7     he has standing. But we're not going to know  
8     that until we get very close to the election,  
9     right?

10           And so it's going to be in the middle,  
11     the most fraught time for the Court to get  
12     involved in electoral politics. That's when  
13     you say we should jump in, as opposed to the  
14     more general, broad rule, Mr. Clement's  
15     broadest rule, I guess, is, look, he's a  
16     candidate. He's challenging a rule in the  
17     election. You know, isn't -- isn't that  
18     enough?

19           And one reason, as I say, we'll be  
20     deciding that case then, you know, six months,  
21     nine months, maybe two years before the  
22     election as opposed to the day after the votes  
23     have been counted.

24           MS. NOTZ: So I -- I -- I don't think  
25     that is an accurate description of our position

1     for a couple of reasons. I don't think that  
2     there is a concern that standing will only be  
3     available right before an election and only in  
4     close cases, and that's for two reasons.

5             The first is that the evidence that  
6     a -- a candidate plaintiff could use to show  
7     standing isn't simply sort of limited to -- to  
8     polling data. I think Meese versus Keene is  
9     very helpful on this point.

10            In Meese versus Keene, the Court  
11     described two types of information that the  
12     candidate used to establish standing. One was  
13     polling data. One was, you know, the expertise  
14     of a political advisor. But I don't even think  
15     that those things are necessary in a case like  
16     this one, where we are dealing with a very  
17     experienced and successful candidate.

18            Congressman Bost has been successfully  
19     running for election for 30 years. At the  
20     time --

21            JUSTICE GORSUCH: Well, I --

22            JUSTICE KAVANAUGH: You know, when  
23     they -- when you run for election for 30 years  
24     and win, sometimes, you know, you get -- you --  
25     you act as if you have no risk of losing. And



1     you know what happens then? You lose. A  
2     candidate who acts as if there's no risk of  
3     losing often -- often loses.

4             I don't know -- and then you say rely  
5     on polling data. Are polls always reliable?

6             MS. NOTZ: My point is simply that in  
7     response to the Chief Justice's question, I  
8     think that there's a lot of information  
9     Congressman Bost could have brought to the  
10    table. I don't think it's limited to polling  
11    data.

12            JUSTICE KAVANAUGH: But -- okay. I --  
13    respectfully, bring the table, okay, so we  
14    bring to the table polling data that shows  
15    you're down 20. Candidates that are down 20  
16    sometimes make late -- late breaks for it and  
17    win. Happens all the time.

18            And -- and -- and you said expertise  
19    of campaign advisors. I respect them as much  
20    as anyone, but they can be wrong and they don't  
21    have perfect crystal balls either.

22            I don't understand a standing rule  
23    that therefore depends on prognostication, is  
24    my only point, and so you can respond to that  
25    as you think best.

1 MS. NOTZ: Yeah. Thank you, Your  
2 Honor.

3 I -- I think that in -- in any  
4 standing case where a plaintiff is alleging  
5 future injury, courts are required to make some  
6 sort of prediction. Now, but, of course, the  
7 prediction is a substantial risk of harm. It's  
8 not certainty of harm.

9 And my point is merely that there is a  
10 lot of information that was available to  
11 Congressman Bost. He wouldn't even need to  
12 turn to the type of information that the Court  
13 credited in Meese versus Keene. He could have  
14 relied on, you know, the eight election cycles  
15 that he had participated --

16 CHIEF JUSTICE ROBERTS: Well, there  
17 was a lot of --

18 JUSTICE GORSUCH: You've --

19 CHIEF JUSTICE ROBERTS: -- there was a  
20 lot of information for, you know, Tom Dewey and  
21 Charles Evans Hughes, and, you know, they both  
22 went to bed thinking they were -- were  
23 President. And it just seems to me that the  
24 ability to predict has -- is -- is not -- has  
25 not been proven to be infallible.

1                   And yet you're going to tell somebody  
2           two weeks before the election, no, you -- you  
3           won last time by whatever margin, by -- what  
4           margin are you looking for?

5                   MS. NOTZ:   Again --

6                   CHIEF JUSTICE ROBERTS:   Prior races he  
7           won by what and then that's enough to get  
8           standing?

9                   MS. NOTZ:   So, again, this Court has  
10          not attached a metric.   It uses the substantial  
11          risk test across the mine-run of standing  
12          cases.   It has never attached a metric.

13                  What it has said is that you look --  
14          you know, the burden is on the plaintiff and  
15          you look at the facts --

16                  CHIEF JUSTICE ROBERTS:   Yeah.   No,  
17          that's --

18                  MS. NOTZ:   -- in the record, which is  
19          why I called the Court's attention to the  
20          declaration.

21                  CHIEF JUSTICE ROBERTS:   No, that's  
22          right, but it depends on what sort of things  
23          you're talking about, the risk that the -- you  
24          know, the car is going to explode or whatever.  
25          But, if it's a risk of elections and all that

1 counts is the -- the number you get, it does  
2 seem to me that it would fall upon the court to  
3 give some idea.

4 MS. NOTZ: Again, I do think that when  
5 he submitted this declaration, he had  
6 successfully participated in eight election  
7 cycles under the ballot receipt deadline.

8 JUSTICE GORSUCH: Ms. Notz, you -- you  
9 keep going back --

10 MS. NOTZ: Yeah.

11 JUSTICE GORSUCH: -- to the facts of  
12 this case and I appreciate -- appreciate why.

13 MS. NOTZ: Mm-hmm.

14 JUSTICE GORSUCH: I would too.

15 But I think what the Chief Justice is  
16 getting at and what would help me, certainly,  
17 is, okay, if a probability of -- of loss needs  
18 to be shown to secure standing, what's that  
19 probability? Is it 50 percent? Is it  
20 60 percent?

21 You've resisted giving us a number,  
22 and I -- I -- I would just ask you if you  
23 could, what you think that threshold should be.  
24 And then, along the way, is there something  
25 unseemly about federal courts making

1 prognostications about a candidate's chance of  
2 success immediately before an election that  
3 itself might influence the election? Thoughts?

4 MS. NOTZ: Yes. So -- so I -- I --  
5 I hear maybe two -- two questions in there.  
6 And I am resisting giving a number because that  
7 is consistent with this Court's cases. The  
8 Court has said --

9 JUSTICE GORSUCH: Okay. So no number.  
10 You're not going to give us a number. How  
11 about the second part of the question?

12 MS. NOTZ: Sure. And -- and maybe  
13 could you repeat that for one to --

14 JUSTICE GORSUCH: Yeah. Is there  
15 something unseemly about a federal court in the  
16 middle of an election saying you don't have  
17 standing because you're going to win or you do  
18 have standing because you're going -- you might  
19 lose and that that itself might influence the  
20 electoral process?

21 MS. NOTZ: So, again, I don't -- I --  
22 I -- I think it is common across all of the  
23 Court's cases -- we're just asking for the same  
24 election rule --

25 JUSTICE GORSUCH: And I'm talking

1 about in this context. And I'm sorry to  
2 interrupt.

3 MS. NOTZ: Yeah.

4 JUSTICE GORSUCH: But, in the election  
5 context, is there something particularly  
6 potentially unseemly about that, or are you not  
7 concerned about that?

8 MS. NOTZ: I don't think it's more  
9 unseemly than in other cases where a plaintiff  
10 seeks to -- to establish standing based on a  
11 substantial --

12 JUSTICE GORSUCH: All right.

13 MS. NOTZ: -- risk of a future harm.

14 JUSTICE KAGAN: I mean, Ms. Notz --

15 JUSTICE GORSUCH: Then I -- then I  
16 just want to run a couple of hypotheticals by  
17 you if I might before I let you go and I'll let  
18 you go quickly, I promise.

19 But imagine a law like the one in  
20 Janus or Illinois Socialist Workers where a  
21 state requires, you know, a lot of signatures  
22 to get on the ballot, minor party candidate has  
23 no chance of winning. Standing, you think?

24 MS. NOTZ: I mean, yes, because, I  
25 mean, that case as I hear it describes a direct

1 regulation of the candidate. And this Court  
2 has long distinguished, you know, decades of  
3 cases between --

4 JUSTICE GORSUCH: We've never looked  
5 to the probability of success in those kinds of  
6 cases, have we?

7 MS. NOTZ: No, no, the Court has not.  
8 It's -- it's in cases like this one where the  
9 challenged law doesn't directly regulate the  
10 plaintiff, it regulates third parties. And in  
11 cases like these, the Court has held that the  
12 plaintiff needs to show a substantial risk of  
13 harm.

14 JUSTICE GORSUCH: Okay, okay. So  
15 let's take an example that meets that, I think.

16 Say the election officials decide to  
17 count only a hundred votes from each precinct  
18 and declare the winner based on that, and  
19 assume the candidates don't know which side  
20 that random sample will benefit. Standing?  
21 Doesn't regulate them directly. It's just a  
22 rule about counting ballots.

23 MS. NOTZ: So, as I understand the  
24 hypothetical, the election authority has  
25 announced in advance they're only going to

1 count a small number of ballots. They're going  
2 to just disregard all the other ones?

3 JUSTICE GORSUCH: Yep.

4 MS. NOTZ: So I think actually, in  
5 Meese versus Keene, the Court, in addition to  
6 talking about loss of an election as a  
7 cognizable harm for candidates, also talked  
8 about damage to the candidate's reputation in  
9 the community.

10 And I think the circumstance you're  
11 describing, like a pre-election announcement  
12 that we are just not going to count all the  
13 ballots, is the type of extreme circumstance  
14 where a candidate could say, if I win in that  
15 circumstance, my -- my victory is completely  
16 illegitimate.

17 JUSTICE GORSUCH: Well, why? Or -- or  
18 say -- say -- say we're going to count ballots  
19 for three months after the election, and you  
20 don't know who -- who that's going to benefit?  
21 I can't prove that I'm going to win or lose, or  
22 I'm going to count them for a year. Standing?

23 MS. NOTZ: So I -- I -- so that -- I  
24 mean, that probably would kind of run -- run  
25 into other Illinois laws and -- and federal



1 laws that would --

2 JUSTICE GORSUCH: Oh. Well, that's  
3 the allegation here, is that this runs into  
4 other laws, the practice here. And so I'm  
5 giving you other examples, undercounting,  
6 overcounting, whatever -- however you want to  
7 phrase it, in which you don't know how it's  
8 going to affect the candidate, but, you know,  
9 it -- one wonders.

10 MS. NOTZ: So I do think, in that type  
11 of circumstance, to me, that probably isn't the  
12 type of extreme circumstance where a candidate  
13 could claim, you know, reputational harm.

14 JUSTICE GORSUCH: Okay. Thank you.

15 JUSTICE KAVANAUGH: What's  
16 reputation -- I mean --

17 MS. NOTZ: Yeah.

18 JUSTICE KAVANAUGH: -- you're  
19 referring to reputational harm. I'm trying to  
20 figure out, what's the reputational harm that  
21 distinguishes the sampling hypothetical that  
22 Justice Gorsuch asked from this case, where the  
23 allegation is that illegally cast ballots will  
24 be counted? How is that different?

25 MS. NOTZ: So --

1 JUSTICE KAVANAUGH: That's the  
2 allegation.

3 MS. NOTZ: So, to me, there's a -- a  
4 distinction and -- between a situation where a  
5 candidate could perhaps plausibly allege that  
6 even if he were elected, you know, under this  
7 process, the election would be so illegitimate  
8 that nobody would credit him as the successful  
9 candidate.

10 And I don't think this circumstance  
11 meets that standard because, of course,  
12 Candidate Bost has successfully run for  
13 election now 10 times under the ballot receipt  
14 deadline, and I don't understand him ever to  
15 have suggested that he somehow was  
16 illegitimately elected.

17 And the reputational harm component, I  
18 do think, comes from Meese versus Keene, which  
19 is a candidate standing case in which the Court  
20 described, you know, two types of injuries a  
21 candidate could have, and one was the risk of  
22 an election loss and the other was the  
23 possibility of, you know, adverse impact on  
24 their reputation in the community.

25 JUSTICE ALITO: I mean, I --

1 JUSTICE KAGAN: Suppose that --

2 JUSTICE ALITO: Go ahead.

3 I don't want to create a bespoke  
4 standing rule. However, this case involves the  
5 question of injury in a particular context,  
6 which is different from other contexts. And  
7 that is injury in a competition.

8 So along those lines, let me give you  
9 a hypothetical. Suppose that eight runners  
10 qualify for the U.S. finals to go to the  
11 Olympics in the 100-meter dash. And when they  
12 show up for the competition, they find that  
13 actually they're going to have to run 105  
14 meters.

15 Does anybody have -- does -- does --  
16 do any -- can any of them show injury in fact?

17 MS. NOTZ: So I think in that  
18 circumstance, you know, if this Court were, you  
19 know, to apply the competitive standing cases,  
20 the Court would, you know, ask was, you know,  
21 any -- any potential plaintiff, as compared to  
22 a direct competitor, were they substantially  
23 disadvantaged by that? And so, yes, they would  
24 need to show some sort of harm.

25 JUSTICE ALITO: So they would have to

1 -- an individual runner would have to show  
2 videotapes of other races and show I start to  
3 lose steam at the, you know, the 97th meter, so  
4 making me go 105 yards is going to hurt me in  
5 relation to others?

6 MS. NOTZ: I mean, I think the  
7 standard is one of plausibility. And I don't  
8 know that one would need to present that type  
9 of evidence --

10 JUSTICE ALITO: Well, then what --

11 MS. NOTZ: -- to make the --

12 JUSTICE ALITO: -- then -- well, then  
13 --

14 MS. NOTZ: -- assertion plausible.

15 JUSTICE ALITO: -- are any of them  
16 going to be able to challenge this?

17 MS. NOTZ: I -- I think actually it  
18 probably could be fairly easy to challenge.  
19 They could --

20 JUSTICE ALITO: How?

21 MS. NOTZ: They could say --

22 JUSTICE ALITO: How could they  
23 challenge?

24 MS. NOTZ: I mean, presumably, I could  
25 imagine a plausible assertion that, you know, I

1 have, you know, trained for a 100-meter race  
2 and 105-meter race makes some sort of  
3 difference that puts me at a substantial  
4 disadvantage.

5 But I guess I -- I -- you know, and I  
6 know the Court is resisting going back to the  
7 declaration, but standing cases are  
8 fact-specific.

9 JUSTICE ALITO: Well, this is -- in  
10 this specific situation, what would be wrong  
11 with a rule that says four competitors in a  
12 competition where there's going to be a winner  
13 and there's going to be one or more losers,  
14 when the rules of competition are changed in a  
15 way that produces a risk that can't readily be  
16 measured, then all the competitors have  
17 standing?

18 MS. NOTZ: So --

19 JUSTICE ALITO: Doesn't that --  
20 doesn't that make sense?

21 MS. NOTZ: So I don't think that it  
22 makes sense to adopt a blanket standing rule  
23 for candidates because I think it would create  
24 two problems.

25 First, it would create chaos for

1 election officials. It is very easy to be a  
2 candidate. Any self-declared candidate could  
3 challenge any election rule that they happen to  
4 have a policy disagreement with, even if that  
5 rule were entirely harmless. And election  
6 officials who are tasked with actually running  
7 elections would have to divert their time and  
8 energy and litigate, you know, these  
9 policy-based disputes. And then federal  
10 courts, in turn, would be put in the position  
11 of -- of resolving these, you know, disputes  
12 via advisory opinions, which is exactly what  
13 this Court's standing cases have dictated  
14 should not happen.

15 JUSTICE KAGAN: So suppose that there  
16 was some change in rule that had a very high  
17 probability of cutting into a candidate's vote  
18 total by a fairly small amount, so let's say  
19 very high probability that this will cut into  
20 your vote total by 2 percent. Standing?

21 MS. NOTZ: So I think in that case the  
22 candidate would have to be able to plausibly  
23 allege that that sort of 2 percent change in  
24 the margin harms him in some way. So --

25 JUSTICE KAGAN: Okay. So that seems

1 -- that seems not right to me, that, you know,  
2 then you're going to force people to come into  
3 court and show a bunch of polls and how that  
4 2 percent margin might or might not make a  
5 difference in the end, when what you have is  
6 quite clear. What you have is a voting rule  
7 that harms somebody relative to what's come  
8 before.

9 And that is a usual standing inquiry.  
10 And, you know, it's not a bespoke anything.  
11 It's like this is a new rule. It's going to  
12 harm me relative to what's come before. I have  
13 a right to complain about it. Why isn't just  
14 that's enough?

15 MS. NOTZ: I actually don't think we  
16 would have any problem at all with that rule.  
17 I think the problem is, is that Congressman  
18 Bost can't show standing based on that rule  
19 because then I would go back to the  
20 declaration --

21 JUSTICE KAGAN: I think he could show  
22 standing. Whether he did show standing is  
23 another thing entirely, right? That this is a  
24 -- is a complaint that sort of seems a little  
25 bit to be created in order to test "I don't

1 have to show injury at all" theory.

2 But -- but it would be very easy for  
3 Congressman Bost to write a complaint that  
4 satisfied my rule.

5 MS. NOTZ: I mean, I don't disagree  
6 with you and, I guess, maybe appreciate you  
7 sort of re- -- appropriately reframing. My  
8 point is that what he wrote at page 68 and 69  
9 of his declaration does not satisfy that rule,  
10 because when asked about electoral loss, he  
11 used the word "if." He -- that -- that's a  
12 mere theoretical possibility of harm. He  
13 provides no explanation why he thinks he  
14 plausibly could lose his election. And when  
15 asked about a diminished margin of victory, he  
16 uses the word "may," which suffers from the  
17 same problem.

18 He had a wealth of information  
19 available to him. I know I keep going back to  
20 the fact that he's an experienced candidate but  
21 it matters. He had lived through, at the time  
22 he prepared this declaration, eight elections  
23 under the ballot receipt deadline. He said in  
24 his declaration, I send poll watchers every  
25 single time. So he would have known at the end



1 of the day on Election Day how many votes were  
2 cast on the --

3 JUSTICE KAGAN: What you're saying to  
4 me -- you know, I think that what you are  
5 saying to me is a little bit different than  
6 from what you said to the Chief Justice,  
7 because what you're -- because I agree with the  
8 Chief Justice. You do not want candidates to  
9 have to walk into federal court and show that  
10 they're -- you know, they're up in the polls by  
11 X amount or that they've won the last five  
12 elections by X amount.

13 You're just saying he didn't say  
14 anything to show that he's going to be harmed  
15 at all by the new rule.

16 MS. NOTZ: That -- that's exactly our  
17 position. And the burden is on the plaintiff  
18 and -- and standing is fact-specific and you  
19 look at the record that the --

20 JUSTICE KAVANAUGH: You're walking  
21 away from a lot of your brief there.

22 JUSTICE JACKSON: Yes, you are.

23 JUSTICE KAVANAUGH: You're walking  
24 away from your brief with that answer, which is  
25 -- that's your choice.

1           You've mentioned the word "chaos" a  
2   few times. I guess I'm worried about the chaos  
3   of post-election litigation and how would that  
4   play out in a circumstance like a challenge to  
5   this particular ballot-counting rule. In  
6   particular, let's suppose post-election  
7   challenge; therefore, no real issue of standing  
8   in a real close election. And the rule is  
9   found invalid. Have you thought about what the  
10  remedy would be in that circumstance?

11           MS. NOTZ: So I --

12           JUSTICE KAVANAUGH: And it presumably  
13  comes to this Court.

14           MS. NOTZ: Yeah.

15           JUSTICE KAVANAUGH: Maybe that House  
16  elections ride on it, so we know -- we know  
17  which way we rule, what the impact will be,  
18  which is never a good position.

19           MS. NOTZ: So I guess I would push  
20  back on the idea that there -- it necessarily  
21  would have to be resolved post-election. I'd  
22  go back to the point, it's -- it's only  
23  substantial risk.

24           There -- there is no need for  
25  certainty. He would simply, you know, have to

1 show a substantial risk of some legally  
2 cognizable harm that could include losing the  
3 election. It could also, according to Meese,  
4 you know, include, you know, harms that rise to  
5 the level of a reputational --

6 JUSTICE KAVANAUGH: You --

7 MS. NOTZ: -- harm. And I don't --  
8 I'm sorry.

9 JUSTICE KAVANAUGH: Keep going.  
10 Sorry.

11 MS. NOTZ: I just wanted to point the  
12 Court's attention, as the Court is probably  
13 aware, to the Watson case out of the Fifth  
14 Circuit that challenges a very similar law.  
15 You know, in that case, the political party was  
16 found to have standing. It did include, you  
17 know, different allegations, better  
18 allegations. So, for example, it included an  
19 allegation that if Mississippi's ballot receipt  
20 deadline was enforced, that would impair the  
21 party's ability to elect their Republican  
22 candidates.

23 So I -- I do think that it is --  
24 standing is not hard to establish. I just  
25 think that this candidate did not establish it

1 based on these -- the statements in the  
2 declaration.

3 JUSTICE KAVANAUGH: And the two things  
4 --

5 JUSTICE ALITO: What about --

6 JUSTICE KAVANAUGH: -- I think --  
7 sorry.

8 JUSTICE ALITO: Go ahead.

9 JUSTICE KAVANAUGH: The two things I  
10 think you've relied on are how close the  
11 election might be -- you did say polling data  
12 earlier -- and candidate -- expert candidates,  
13 and you've relied on how experienced the  
14 candidate is or how many terms. If a candidate  
15 has been elected twice, does that candidate  
16 have -- in a better position for standing?

17 MS. NOTZ: So, I mean, I think that  
18 candidate -- I -- I think that experience is  
19 relevant here just because Congressman Bost had  
20 so much personal knowledge about how the ballot  
21 receipt deadline works or doesn't work in his  
22 favor, about, you know, what these  
23 late-arriving ballots look like, and whether  
24 they harm him or not.

25 I think a -- a newer candidate may not

1 have that wealth of information, but they could  
2 certainly, I think, you know, rely on other  
3 information. Again, Meese talked about the  
4 experience of political advisors, of polling.  
5 I -- I really --

6 JUSTICE ALITO: Are you seriously  
7 arguing that whether or not the allegations  
8 here are sufficient requires an analysis of the  
9 particular background and experience of the  
10 candidate who files the complaint?

11 MS. NOTZ: No, I'm not --

12 JUSTICE ALITO: This case would come  
13 out differently if this was somebody who had  
14 never run before?

15 MS. NOTZ: My -- my point is simply,  
16 Congressman Bost had a lot of information  
17 available to him that he could have used to  
18 explain.

19 He could have said, for example, you  
20 know, I've been through eight election cycles  
21 under this deadline. This is --

22 JUSTICE ALITO: Well, then you are --  
23 I mean, then you are referring to the  
24 particulars of his situation.

25 In any event, let me talk -- ask you

1 about the pocketbook injury.

2 Why isn't that straightforward?

3 Mr. Clement says, look, it's -- it's political  
4 malpractice not to continue poll watching and  
5 related activities until the final bell  
6 actually tolls. That costs money. If you  
7 extend the period, it costs me more money.  
8 That's a pocketbook injury.

9 And your answer is, well, he didn't  
10 have to spend that, right? That's your answer?

11 MS. NOTZ: So, I mean, our answer  
12 is that when this Court has found standing  
13 basically based on an expenditure of resources,  
14 that's, you know, his position.

15 The Court has required the plaintiff  
16 to demonstrate that that resource expenditure  
17 was undertaken to avoid a risk of harm that is  
18 itself legally cognizable.

19 And I think that that rule makes good  
20 sense, because if I think -- if the rule were  
21 otherwise, the plaintiff could simply take a  
22 failed future injury theory of harm where they  
23 couldn't show a --

24 JUSTICE ALITO: Wait --

25 MS. NOTZ: -- substantial risk of harm

1 and --

2 JUSTICE ALITO: -- you think -- you  
3 think the risk of losing the election is not  
4 legally cognizable?

5 MS. NOTZ: Well, of course,  
6 Congressman Bost has not established a  
7 substantial risk he might lose an election.  
8 And, in fact, he told the Seventh Circuit  
9 multiple times that he is not at risk of losing  
10 an election.

11 I do think had he adequately  
12 established, you know, a substantial risk of  
13 losing an election, then certainly the  
14 pocketbook injury would be viable.

15 JUSTICE ALITO: So it turns on the  
16 risk of losing the election, not the risk of  
17 a -- a less favorable result, less -- a smaller  
18 margin?

19 MS. NOTZ: I think it turns on a --  
20 a -- a substantial risk of a legally cognizable  
21 harm, and I don't think that a diminished  
22 margin of victory in and of itself is a legally  
23 cognizable harm.

24 JUSTICE ALITO: Well, we're talking  
25 about injury in fact. Isn't a smaller margin

1 of victory an injury in fact?

2 MS. NOTZ: I don't think so, because  
3 unless it's coupled with something else, a  
4 smaller margin of victory has no real-world  
5 consequences.

6 JUSTICE ALITO: It has no real-world  
7 consequences? Really?

8 MS. NOTZ: I mean, unless a candidate  
9 could plausibly --

10 JUSTICE ALITO: It makes no difference  
11 if you win by 50.00000 percent versus  
12 80 percent? No, it doesn't matter, a win is  
13 a win?

14 MS. NOTZ: I think, under those  
15 circumstances, a candidate probably could  
16 plausibly establish that a diminished margin  
17 of victory, you know, has a reputational or  
18 other competitive consequence that matters.  
19 But I don't think that under circumstances  
20 where the change in the margin is a vote or  
21 a handful of votes, that that's a legally  
22 cognizable harm.

23 And I think that's also consistent  
24 with the historical cases. I mean, if you look  
25 at the historical circumstances under which a



1 candidate could obtain an election recount,  
2 those were always circumstances where the  
3 recount was likely to change the outcome.

4 JUSTICE KAVANAUGH: The question  
5 Justice Alito started with was monetary injury.  
6 And I -- I thought that the likelihood of  
7 winning the election was really irrelevant to  
8 that.

9 You have to hire staff for an extra  
10 two weeks. And a good campaign is going to try  
11 to end up on Election Day with close to zero  
12 left in the bank to leave it all on the field.  
13 If you have to extend it two weeks, you're  
14 going to be reallocating your resources and  
15 potentially have to raise more money.

16 But at a minimum you're going to have  
17 to spend more money, which is just obvious  
18 standing, isn't it, without getting into all  
19 this other stuff? That's just obvious  
20 standing.

21 You have to -- you have to spend  
22 more money to staff an extra two weeks.

23 MS. NOTZ: So -- So I -- I don't think  
24 so. I think what this Court's cases stand  
25 for -- and this is cases like Clapper and

1 Alliance versus Hippocratic Medicine -- is the  
2 proposition that if a plaintiff is going to  
3 rely on the expenditure of resources to  
4 establish standing, the plaintiff needs to show  
5 that that expenditure was necessary to avoid a  
6 substantial risk of an injury that is itself  
7 legally cognizable.

8 And I think that makes sense, because  
9 I think that if the rule were otherwise, the  
10 requirements for showing standing on a future  
11 injury theory would be watered down.

12 JUSTICE KAVANAUGH: I thought that --

13 JUSTICE JACKSON: Can we just be --  
14 oh, sorry.

15 JUSTICE KAVANAUGH: Just one  
16 follow-up.

17 I thought the test was -- is a part of  
18 your core activities, your ordinary activities,  
19 if the expenditure is part of that.

20 And I would think for a campaign,  
21 as -- as the amicus brief, the ACLU and the  
22 League of Women Voters was quoted before, and  
23 I had it too, political malpractice not -- not  
24 to be ready for that, to staff that.

25 MS. NOTZ: So I think that -- so

1     Petitioners here have not sort of proceeded  
2     under that organizational standing theory, but  
3     I think if you applied that theory here, we  
4     would still prevail because I think that  
5     Congressman Bost's core mission is to win  
6     elections. He's -- he's never told us that  
7     he has another -- I mean, maybe some other  
8     candidate would have some other core mission.  
9     A minor party candidate's core mission might  
10    be, you know, to bring attention to its  
11    message.

12                 But because he's never --

13                 JUSTICE KAVANAUGH: Well --

14                 MS. NOTZ: -- proceeded under this  
15    theory --

16                 JUSTICE KAVANAUGH: Oh, one more,  
17    sorry.

18                 Spending money to get out the vote,  
19    monitor the polls, have staff that does all  
20    that, which is going to be necessary for an  
21    additional two weeks is --

22                 JUSTICE JACKSON: But just to be --

23                 JUSTICE KAVANAUGH: -- part of the  
24    campaign.

25                 JUSTICE JACKSON: I guess that was my

1 clarifying question.

2 Because with respect to this  
3 regulation, it's not the campaign that is  
4 extended for two weeks; is that correct?

5 I mean, I understood what is happening  
6 in this regulation is that it's just the  
7 counting of the votes that have been post- --  
8 that come in postmarked, but the campaign is  
9 not continuing, right?

10 MS. NOTZ: So, I mean, all this  
11 regulation means, and it doesn't even actually  
12 extend the time period for counting votes,  
13 because we would be -- the State would be  
14 counting provisional ballots during that 14-day  
15 period.

16 JUSTICE JACKSON: There's already  
17 counting going on. So the costs are really  
18 reduced.

19 I mean, as I understand this  
20 regulation, what is happening is that the State  
21 has decided that it's going to count ballots  
22 that it receives in the mail that are  
23 postmarked as of Election Day for the next  
24 two weeks.

25 So really, what is the expenditure

1     that is happening here? I guess Mr. Bost is  
2     saying I have to have people to continue to  
3     monitor the counting. But you say counting is  
4     happening anyway because of the provisional  
5     ballots. So I don't understand this great big  
6     cost that is suddenly happening.

7             MS. NOTZ: I mean, I -- I -- I -- I --  
8     I mean, I don't mean to fight the question.  
9     That's probably a question for the Congressman.  
10    I mean, we did, you know, for purposes of this  
11    point in the proceeding, you know, take at his  
12    word that he has, you know, engaged, you know,  
13    additional resources to engage in further -- or  
14    in monitoring the counting.

15            But I do agree with Your Honor's  
16    observation that the time period for the  
17    counting is not extended at all.

18            And if I could, I see I am short on  
19    time, but I would like to, you know, briefly  
20    address, I think, Justice Kavanaugh, you know,  
21    raised the legal malpractice point, that sort  
22    of colorful phrase.

23            I do think that Clapper is helpful on  
24    this point, because in Clapper, you know, there  
25    was no question that the lawyers there had

1 diverted resources. They were traveling  
2 overseas to meet with their clients. And they  
3 were doing that because they wanted to avoid  
4 the risk of unlawful surveillance associated  
5 with the challenged federal law.

6 I don't think there was any question  
7 those decisions were reasonable, because  
8 there -- if you look at the Second Circuit's  
9 decision, there was an affidavit submitted by a  
10 legal ethicist, and the ethicist explained that  
11 if the lawyers didn't take precautions like  
12 these, they actually would be violating their  
13 duties as attorneys, essentially --

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 MS. NOTZ: -- committing --

17 CHIEF JUSTICE ROBERTS: Justice  
18 Thomas, anything further?

19 Justice Alito?

20 JUSTICE ALITO: You think that  
21 monitoring the counting of paper ballots is  
22 either not important or doesn't require the  
23 expenditure of resources?

24 MS. NOTZ: No. That's not our  
25 position. Of course Congressman Bost is free

1 to monitor countering -- you know, counting,  
2 you know, consistent with Illinois law.

3 Our position is simply that when a  
4 plaintiff has -- seeks to establish standing  
5 based on a resource-expenditure theory, the  
6 question isn't whether that decision was  
7 reasonable. The question isn't whether it  
8 was prudent.

9 The question is whether -- were those  
10 resources expended to avoid a substantial risk  
11 of harm that is itself legally cognizable.

12 And as I mentioned, I think the  
13 rule makes sense, because if the rule were  
14 otherwise, a plaintiff could simply take a  
15 failed future-injury theory of standing where  
16 they couldn't show a substantial risk of harm  
17 and repackage it as a -- as a present-injury  
18 theory of standing based on resource  
19 expenditures.

20 JUSTICE ALITO: All right. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Sotomayor?

23 Justice Kagan?

24 Justice Gorsuch?

25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: Just one question.  
2 Justice Scalia once wrote -- and I  
3 know you're going to say that this case doesn't  
4 implicate this, but I just want to understand  
5 if you agree with the principle that he said,  
6 which was: Count first and rule upon legality  
7 afterwards is not a recipe for producing  
8 election results that have the public  
9 acceptance democratic stability requires,  
10 end quote.

11 Do you agree with that?

12 MS. NOTZ: I think -- theoretically,  
13 I think it -- it makes sense, you know, not  
14 to -- if I understood the statement, I -- I  
15 think that post-election challenges are  
16 probably not ideal.

17 Did I understand the statement  
18 correctly?

19 But I don't think that our position,  
20 which, again, is how the Court treats standing  
21 across all cases requires that, because the  
22 test is simply substantial risk.

23 And Congressman Bost's declaration  
24 simply doesn't show substantial risk by any  
25 metric.



1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett?

4 Justice Jackson?

5 JUSTICE JACKSON: So I'm a little bit  
6 worried about your concession to Justice Kagan  
7 that the -- that you'd be okay with a rule that  
8 says that if the harm -- if it harms -- the  
9 challenged regulation harms someone relative to  
10 what had come before, that would be enough.

11 And the reason I think is because that  
12 would implicate situations like even the one  
13 Justice Kagan posited, which is a person who  
14 has lost the election significantly but who  
15 claims something about the two-week period  
16 would change their margin, or -- lost or won,  
17 say, change their margin, would be harmed by  
18 that.

19 And I guess I don't understand that.  
20 It seems to me that it might -- that the extra  
21 counting of ballots might change your position,  
22 but it only harms you if it would make a  
23 difference in the election. And I thought that  
24 was your bottom line. I thought it was sort of  
25 what the government was saying -- the -- the --

1 the SG was saying a little bit.

2 But it seems to me crucial to uphold  
3 this idea that harm is required for standing  
4 purposes. And I worry a little bit practically  
5 if we accept that kind of thought, the idea  
6 that a candidate is harmed if their margin of  
7 error changes even if it doesn't make a  
8 difference in the election, that we're actually  
9 opening up avenues for a lot of post-election  
10 challenges that we wouldn't otherwise have.  
11 People who have lost the election but they want  
12 their margin of defeat to be different or they  
13 think it might have been, and so now we have  
14 litigation over the counting as a result of  
15 that.

16 Can you --

17 MS. NOTZ: Yeah.

18 JUSTICE JACKSON: --respond?

19 MS. NOTZ: So I appreciate the  
20 question. Thank you.

21 I certainly did not mean to suggest,  
22 if I did, that a diminished margin of victory  
23 by itself in our view is a legally cognizable  
24 harm. So maybe it would kind of be, you know,  
25 helpful just to describe what we think our

1     legally cognizable harms for candidates. And I  
2     think they come from history, and I think they  
3     come from Meese versus Keene.

4             The easy one is the risk, the  
5     substantial risk of losing an election. Then  
6     there are other concrete electoral consequences  
7     that are probably more available to minority  
8     party candidates, but that would be like a  
9     substantial risk of not getting on the ballot,  
10    a substantial risk of not qualifying for public  
11    fund -- public fund -- public funding or maybe  
12    sort of other fund-raising injuries.

13            And then there is the statement in  
14    Meese versus Keene which talks about  
15    reputational harms. And I think that in  
16    extreme circumstances, a candidate could  
17    plausibly allege in advance of an election  
18    that, even if I win, I know I'm going to win,  
19    even if I win, under this election scheme, my  
20    victory will be so illegitimate that -- that my  
21    reputation --

22            JUSTICE JACKSON: And so, to  
23    summarize, those are the kinds of harms --

24            MS. NOTZ: Exactly.

25            JUSTICE JACKSON: -- that Justice

1 Kagan says have been routinely alleged and  
2 courts have accepted and are pretty easy to  
3 make, and so then you get on -- then you go on  
4 with your lawsuit, right?

5 MS. NOTZ: Yes. Thank you.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Rebuttal, Mr. Clement?

10 REBUTTAL ARGUMENT OF PAUL D. CLEMENT  
11 ON BEHALF OF THE PETITIONERS

12 MR. CLEMENT: Thank you, Mr. Chief  
13 Justice. Just a few points in rebuttal.

14 First, I just want to make the point  
15 that I don't think you should just contract all  
16 this out to the RNC and the DNC. There are  
17 cases where the RNC has lost on standing. On  
18 page -- page 16 of our petition, RNC against  
19 Burgess is one. But I also don't think you  
20 want to put the candidate in the position that  
21 they have to convince the national committee to  
22 support their challenge if they actually think  
23 they're being harmed either by the pocketbook  
24 or their electoral prospects or that unlawful  
25 ballots are going to be counted.

1           Second, I think it's important when  
2   you look at this complaint -- and people are  
3   complaining about the threadbare nature of the  
4   complaint -- keep in mind one of the things  
5   that is the complaint, and this is at 85a of  
6   the Petition Appendix, is the State's own  
7   statement before the previous election that  
8   said, hey, reporters, don't get too excited  
9   about Election Day results because the  
10   late-arriving ballots can change the results.  
11   So stay tuned, essentially for 14 days.

12           Now, the State didn't say, oh, but  
13   don't worry about Congressman Bost's district.  
14   That one is different. That's a state seat.  
15   And, of course, the State would never say that  
16   because that would put state election officials  
17   in a ridiculous position of, before the  
18   election, deciding that certain seats are safe  
19   seats and certain states -- seats are tossups.  
20   But yet, the State wants to put the federal  
21   courts in the same position. They want you to  
22   look at this declaration and say, well, you  
23   know, he's a ten-time incumbent, so he's got a  
24   higher standard of showing how these ballots  
25   are going to hurt him. Or maybe it's easier

1 for different -- for a different incumbent.

2 That way lies madness, with all due  
3 respect. I mean, they're asking for  
4 essentially an Article III determination that  
5 Congressman Bost is in a safe seat. And the  
6 Article III equivalent of the Cook Report seems  
7 like something that should be avoided at all  
8 costs.

9 Now, let me just finish on one point,  
10 which is part of the debate here is who's  
11 asking for a special rule of standing. And  
12 with respect, I think it's the State that's  
13 asking for a special rule of standing to the  
14 effect that only an electoral disadvantage that  
15 can threaten your win or loss at the end of the  
16 day counts and maybe some stuff that I'm -- I'm  
17 frankly confused about, about Meese and one or  
18 two things. But it's really like you got to go  
19 in there and say this is going to be outcome  
20 determinative in the election.

21 That is a special rule for elections.  
22 They say pocketbook injuries don't count in  
23 this context. That -- that's not the law. I  
24 mean, if the government says to me, Clement,  
25 give me 500 bucks, that's a pocketbook injury.

1 I don't have to point to some other injury that  
2 complements the pocketbook injury.

3 Now, there are certain cases where  
4 there's a very speculative primary injury, and  
5 then this Court has said, well, you can't spend  
6 yourself into standing. But that's not this  
7 case. It's perfectly reasonable to spend this  
8 money on these -- poll watching. Political  
9 malpractice not to do it.

10 Let me finish with one thought. It's  
11 seems like we have three different standard --  
12 tests here, three different theories, but they  
13 come down to a simple commonsense proposition.  
14 A candidate is not a bystander in his or her  
15 own election. Their name's on the ballot.  
16 They put their lives on hold. So they have a  
17 special interest in what's on the ballot.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 The case is submitted.

22 (Whereupon, at 11:48 a.m., the case  
23 was submitted.)

24

25

## Official - Subject to Final Review

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