No. 24-568

IN THE

Supreme Court of the United States

MICHAEL J. BOST, et al.,

Petitioners,

v.

ILLINOIS STATE BOARD OF ELECTIONS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PROFESSOR MICHAEL T. MORLEY AND FLORIDA STATE UNIVERSITY ELECTION LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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July 29, 2025

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INTEREST OF *AMICI CURIAE*[1]

Professor Michael T. Morley is Sheila M. McDevitt Professor of Law at the Florida State University College of Law and Faculty Director of the FSU Election Law Center. He teaches and writes in the areas of federal courts, remedies, and election law, and has an interest in the sound development of these fields. His work was cited by this Court in *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025).

The FSU Election Law Center was established by the Florida Legislature to "[c]onduct and promote rigorous, objective, nonpartisan, evidence-based research concerning important constitutional, statutory, and regulatory issues relating to election law." Fla. Stat. § 1004.421(2)(a) (2025). It is empowered to "[p]rovide formal or informal assistance . . . to governmental entities or officials at the federal, state, or county levels, concerning elections or election law, including, but not limited to, research, reports, public comments, testimony, or briefs." *Id*. § 1004.421(3)(e). The Election Law Center operates pursuant to academic freedom protections. *Id*. § 1004.421(7). Accordingly, the Center's arguments and positions should not be attributed to Florida State University, the FSU College of Law, or either school's administration.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Seventh Circuit erred by holding that the Petitioner candidates lack Article III standing to bring a pre-election challenge to the rules governing the elections in which they will be participating.

1. As a threshold matter, this Court has held that justiciability doctrine does not necessarily apply with full force in the context of election law disputes.

In general, a moot case may remain justiciable under the "capable of repetition, yet evading review" doctrine if, among other things, "the ***same*** complaining party would be subject to the same [challenged] action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (emphasis added); *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). In election-related cases, however, this Court has held that an otherwise moot case may remain justiciable so long as the challenged legal provision will continue to apply to ***any*** candidates or voters in future elections, regardless of whether the plaintiffs will ever again be subject to it. *See Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *see also Anderson v. Celebrezze*, 460 U.S. 780, 784 n.3 (1983); *Mandel v. Bradley*, 432 U.S. 173, 175 n.1 (1977) (per curiam); *Am. Party of Texas v. White*, 415 U.S. 767, 770 n.1 (1974); *cf. Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973). Justices Scalia and O'Connor recognized that some "election law decisions differ from the body of our mootness jurisprudence . . . in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large without ever

reaching us." *Honig v. Doe*, 484 U.S. 305, 335 (1988) (Scalia, J., dissenting).

This Court should apply similar flexibility concerning justiciability in election-related cases to the injury-in-fact requirement of standing doctrine. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). In both cases, this Court would be facilitating challenges to election-related legal provisions to prevent the government from burdening, manipulating, or unpredictability impacting the electoral process through unconstitutional or otherwise invalid rules. *Cf. Moore*, 394 U.S. at 815; *Storer*, 414 U.S. at 737 n.7.

2. Even under traditional justiciability principles, each candidate has a concrete, particularized interest in having elections in which he participates comply with all valid laws and regulations. *Shays v. FEC*, 414 F.3d 76, 84 (D.C. Cir. 2005). Accordingly, candidates suffer judicially cognizable injuries when election officials require them to "compete for office in contests tainted by [statutorily]-banned practices." *Id.* at 85. Candidates may challenge allegedly invalid electoral rules "without 'establishing with any certainty' that the challenged rules will disadvantage their . . . campaigns." *Id.* at 91 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)).

Allowing candidates to bring pre-election challenges to allegedly invalid election-related legal provisions protects them from the "irreparable harm" of having a "cloud" cast over their potential victory. *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring in grant of stay). Compelling candidates to instead pursue such challenges after their elections

are held places courts in the difficult position of either nullifying illegal votes that were cast in accordance with the rules as they existed at the time of the election, or upholding an election's results even though a dispositive number of votes were determined to have been cast illegally. It would be far preferable for a court to instead ensure an election is conducted in accordance with federal law in the first place.

Relegating candidates to post-election litigation may also require them to determine and reveal how certain people voted, violating ballot secrecy. Limiting candidates to such post-election suits will also undermine federal courts' laches doctrine, which has generally required election-related challenges to be brought, whenever possible, in advance of an election precisely to avoid the need for courts to set aside election results. *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 926 (7th Cir. 2020); *see also Soules v. Kuauians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1182 (9th Cir. 2005); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983)

3. Alternatively, a candidate should have standing to challenge an election-related legal provision when it authorizes the acceptance of allegedly illegal votes, creating a risk that such votes will change the election's outcome. Courts of appeals "have generally recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes." *Baur v. Veneman*, 352 F.3d 625, 633 (2d Cir. 2003); *see also Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568 (6th Cir. 2005); *Johnson v. Allsteel, Inc.*, 259 F.3d 885, 888 (7th Cir. 2001); *Mtn. States Legal Found. v. Glickman*,

92 F.3d 1228, 1234-35 (D.C. Cir. 1996). A plaintiff candidate has standing to challenge a state's policy of accepting and counting allegedly untimely and invalid votes because that policy creates an increased risk that the candidate will suffer the harm of losing the election due to such improper votes.

4. Finally, Petitioners have standing to challenge Illinois's deadline in their capacity as voters. Each eligible voter's constitutional right to vote is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). This right is violated when the weight of a person's vote is diluted by the acceptance and tallying of fraudulent, illegal, or otherwise invalid votes. *Id*. at 555; *see also Baker v. Carr*, 369 U.S. 186, 208 (1962); *Anderson v. United States*, 417 U.S. 211, 226-27 (1974). Under these principles, "[t]he right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured . . . ." *Anderson*, 417 U.S. at 226-27 (alteration in original; quotation marks and citation omitted). The fact that most or all eligible voters in an election suffer the same harm to their respective personal rights to vote does not transform their individualized injuries into a single collective grievance. *FEC v. Akins*, 524 U.S. 11, 24 (1998).

Accordingly, individual voters have standing to challenge the inclusion of additional voters within their congressional or legislative districts. *Wesberry v. Sanders*, 376 U.S. 1, 5-6 (1964); *Baker*, 369 U.S. at 207. Voters should similarly have standing to challenge the inclusion of additional voters—

specifically, people who cast allegedly untimely or otherwise invalid votes—in their elections.

ARGUMENT

"Over the course of nearly seventy years, Congress established a uniform Election Day [in federal elections] to combat election fraud by preventing double voting, reduce burdens on voters, and prevent results from states with early elections from influencing voters in other jurisdictions." Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 215 (2020) [hereinafter, "Morley, *Postponing*"]. When states previously held their federal elections on different dates, political parties engaged in "pipelaying": sending groups of men to travel among various states or counties to cast ballots in multiple elections. *Id*. at 184 (citing CONG. GLOBE 28th Cong., 1st Sess. 350 (1844) (statement of Rep. Duncan)); *see also id*. at 199 (discussing concerns about "'colonization and repeating among the large central states' which held their congressional elections at different times" (quoting CONG. GLOBE 42nd Cong., 2nd Sess. 112 (1871) (statement of Rep. Butler))).

The Petitioner candidates in this case contend that Illinois's laws governing the return of mail ballots, 10 ILCS §§ 5/19-1, 5/19-8(c), violates these federal Election Day statutes, 2 U.S.C. § 7 (Election Day for U.S. Representatives); 3 U.S.C. § 1 (Election Day for presidential electors); *see also* 2 U.S.C. § 1 (Election Day for U.S. Senators). The U.S. Court of Appeals for the Seventh Circuit dismissed their case for lack of Article III standing due to the absence of an

injury-in-fact. *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634, 644 (7th Cir. 2024).

This Court need not determine the validity of Illinois's statutory scheme at this time. Rather, the only issue currently presented is whether the Petitioner candidates for U.S. House and presidential elector, *see id*. at 639, may challenge the validity of Illinois's rules without actually having to lose an election due to allegedly untimely, and therefore invalid, ballots. The answer is yes: candidates have a concrete, particularized interest in having the elections in which they participate be validly conducted in accordance with all applicable constitutional provisions, as well as all valid federal and state laws, regulations, and other policies. Where a federal statute establishes rules governing an election, Article III should not prohibit federal candidates from enforcing them in federal court.

I. THIS COURT HAS HELD THAT ORDINARY JUSTICIABILITY PRINCIPLES MAY NOT FULLY APPLY TO ELECTION-RELATED CASES

As a threshold matter, this Court should address whether standard justiciability doctrine applies with full force to election-related cases. This Court has previously created an exception to mootness doctrine to facilitate continued litigation of election-related disputes. This exception allows challenges concerning election-related legal provisions to remain justiciable after an election has concluded, even though the plaintiff neither possesses Article III standing to challenge that provision in future elections nor satisfies the usual requirements for the "capable of

repetition, yet evading review" doctrine. If this Court is willing to adjust mootness doctrine to accommodate the special context of election-related litigation, it would be reasonable to apply a comparable approval to standing doctrine.

1. Standing and mootness are both justiciability doctrines. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Typically, a moot case is non-justiciable. *See Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013). An otherwise moot case may remain justiciable, however, if the matter is "capable of repetition, yet evading review." *See S. Pac. Term. Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). As its name implies, this exception to the mootness doctrine is generally "limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that ***the same complaining party*** would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (emphasis added). Thus, this exception usually "applies only in exceptional situations . . . where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

In election-related cases, however, this Court has applied the capable-of-repetition exception to the mootness doctrine without regard to whether the same plaintiffs would ever again be subject to the challenged legal provisions. For example, in *Moore v. Ogilvie*, 394 U.S. 814, 815 (1969), the petitioners were independent candidates for the office of presidential

elector from the State of Illinois. They argued that the State had unconstitutionally rejected their petition to appear on the ballot in the 1968 election. Although the petition contained enough total signatures, it did not include at least "200 qualified voters from each of at least 50 counties." *Id.* (quotation marks and citation omitted). After the 1968 election had concluded, the state election board moved to dismiss on the grounds that there was no longer any "possibility of granting any relief." *Id.* at 816.

This Court nevertheless concluded the case remained justiciable. It explained that, "while the 1968 election is over, the burden" which the challenged signature requirement "placed on the nomination of candidates for statewide offices remains and controls future elections . . . . The problem is therefore 'capable of repetition, yet evading review.'" *Id.* (quoting *S. Pac. Term. Co.*, 219 U.S. at 515). The Court continued, "The need for its resolution thus reflects a continuing controversy in the federal-state area where our 'one man, one vote' decisions have thrust." *Id.*

Unlike a standard application of the capable-of-repetition exception to mootness doctrine, the Court did not assess whether the plaintiffs in the suit would ever again be subject to the challenged statute. Indeed, the dissenting Justices specifically pointed out "the absence of any assertion that the appellants intend to participate as candidates in any future election." *Id.* at 819 (Stewart, J., dissenting). Nevertheless, the majority held that the case remained justiciable solely because the challenged

legal provision would remain generally applicable in future elections. *See id.* at 816 (majority op.).

The Court applied the same reasoning in *Storer v. Brown*, 415 U.S. 724, 727 (1974). The plaintiffs there challenged certain restrictions on ballot access for independent candidates. By the time the Court ruled, the election had already occurred. It held that the case nevertheless remained justiciable, explaining:

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is capable of repetition, yet evading review.

Id. at 737 n.8 (quotation marks omitted). Again, this Court did not assess whether any of the plaintiffs had expressed an intent to ever run for office again.[2]

Justices Scalia and O'Connor recognized that some "election law decisions differ from the body of our

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[2] *See also Anderson v. Celebrezze*, 460 U.S. 780, 784 n.3 (1983); *Mandel v. Bradley*, 432 U.S. 173, 175 n.1 (1977) (per curiam); *Am. Party of Texas v. White*, 415 U.S. 767, 770 n.1 (1974); *cf. Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973) (stating, in a class action case, "[a]lthough the June primary has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is 'capable of repetition, yet evading review'").

mootness jurisprudence . . . in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large without ever reaching us." *Honig v. Doe*, 484 U.S. 305, 335 (1988) (Scalia, J., dissenting).

2. A deep and longstanding circuit split exists over whether this line of authority remains valid. The Courts of Appeals disagree over whether election law cases constitute an exception to the same-plaintiff requirement of the "capable of repetition" exception to mootness doctrine.

Numerous circuits treat election law cases differently from other types of cases for mootness purposes in this respect. For example, the Fifth Circuit "'dispens[es] with the same-party requirement' in election law cases, and 'focus[es] instead upon the great likelihood that the issue will recur between the defendant and other members of the public at large.'" *Catholic Leadership Coalition of Texas v. Reisman*, 764 F.3d 409, 424 (5th Cir. 2014) (quoting *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 165 (5th Cir. 2009)). Accordingly, the Fifth Circuit allows a plaintiff in an election-law case to invoke the capable-of-repetition exception to mootness "where (1) the state plans on continuing to enforce the challenged provision, and (2) that provision will affect ***other members*** of the public." *Id.* (emphasis added).

The Sixth Circuit similarly declared, "Even if the court could not reasonably expect that the controversy would recur with respect to [the plaintiffs], the fact that the controversy almost invariably will recur with

respect to some future potential candidate or voter in Ohio is sufficient" to satisfy the capable-of-repetition requirement "because it is somewhat relaxed in election cases." *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005). The "capable of repetition" exception to mootness applies in "challenges to election laws even when the nature of the law made it clear that the plaintiff would not suffer the same harm in the future." *Id.* Exempting election-related cases from the same-plaintiff requirement helps ensure that the government cannot "repeatedly apply" a challenged provision to "different candidates"—or voters, parties, and PACs, for that matter—"none of whom could ever challenge it in court." *Corrigan v. City of Newaygo*, 55 F.3d 1211, 1214 (6th Cir. 1995); *see also Caruso v. Yamhill Cnty.*, 422 F.3d 848, 853-54 (9th Cir. 2005) (holding that the "capable of repetition" exception to the mootness doctrine applied in an election-related case, even though "there is no evidence in the record" that the plaintiff would be subject to the challenged statute again); *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003) ("[T]he courts, perhaps to avoid complicating lawsuits with incessant interruptions to assure the continued existence of a live controversy, do not interpret the requirement literally, at least in . . . election cases . . . .").

Other circuits, in contrast, reject the notion that the "same complaining party requirement" is inapplicable "in the context of election cases." *Hall v. Sec'y, State of Alabama*, 902 F.3d 1294, 1299-1300 (11th Cir. 2018); *see also Barr v. Galvin*, 626 F.3d 99, 105-06 (1st Cir. 2010) (choosing to "abide by the 'same complaining party' requirement"); *Van Wie v. Pataki*, 267 F.3d 109, 114-15 (2d Cir. 2001); *Van Bergen v.*

Minnesota, 59 F.3d 1541, 1546 (8th Cir. 1995); *cf. Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 135 (3d Cir. 2022) (applying the same-plaintiff requirement in an election-related case without considering whether an exception applies). Thus, mootness doctrine in election cases remains somewhat unsettled.

3. Standing doctrine is closely related to mootness. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) ("The Constitution's case-or-controversy limitation on federal judicial authority underpins both our standing and our mootness jurisprudence . . . ." (internal citation omitted)); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 753-54 (1976). "Mootness has been described as 'the doctrine of standing in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)).

If this Court continues to apply a modified form of mootness doctrine to cases involving challenges to, or alleged failures to enforce, election-related rules, the same considerations would support similarly broadening standing doctrine in that context, as well. A candidate participating in an election should have standing to challenge the rules governing that election without the need to demonstrate any further injury-in-fact arising from those rules. This balanced approach to standing doctrine in the electoral context helps ensure the government cannot burden, manipulate, or even just affect in unpredictable ways

the electoral process with unconstitutional or otherwise invalid rules or requirements. *Cf. Moore*, 394 U.S. at 815; *Storer*, 414 U.S. at 737 n.7; *Honig*, 484 U.S. at 335 (Scalia, J., dissenting).

This broadened approach to standing would also be responsive to the inherently uncertain nature of the electoral process, where it is difficult to predict—or sometimes even retroactively determine—the precise consequences of many constitutional or statutory violations. *Cf. Corrigan*, 55 F.3d at 1214 (discussing the need to avoid applying justiciability doctrine in a way that makes it impossible to bring election-related challenges in court); *Joyner v. Molford*, 706 F.2d 1523, 1527 (9th Cir. 1983) (declining to apply the same-plaintiff requirement in the "capable of repetition" analysis in election-related cases because doing so could mean that "many constitutionally suspect election laws . . . could never reach appellate review").

Applying justiciability doctrine more flexibly in cases involving challenges to, or alleged failures to enforce, election-related legal provisions also makes sense because many of those provisions are "designed to prevent the systematic skewing of elections." Daniel P. Tokaji, *Public and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 154 (2010). Accordingly, the harms plaintiffs allege often may "only be understood through their aggregate effect on voters and, more broadly, on the electoral system as a whole." *Id.* at 154; *see also* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 645 (1998) (discussing "the difficulty in resting standing to sue on

traditional, individualistic conceptions of harm" in election cases). Finally, a broader approach to justiciability allows private plaintiffs to "provide a check on potential partisanship by DOJ, as well as state and local election officials." Tokaji, *supra* at 157.

Accordingly, just as this Court has been willing to apply the "capable of repetition" exception to mootness doctrine flexibly to enable election-related litigation, so too should it apply the "injury in fact" requirement for standing doctrine with similar flexibility to facilitate such cases. *Cf.* Michael T. Morley, *The Scope of Election Litigation*, 81 WASH. & LEE L. REV. 1153, 1181 (2024) (urging courts to adopt an approach to standing doctrine in election cases that "help[s] keep cases manageable; reduce[s] the time, burden, expense, and complexity of such litigation; and eliminate[s] the need for case-by-case adjudication of challenging yet tangential justiciability issues").

II. CANDIDATES SHOULD HAVE STANDING TO CHALLENGE AN ELECTION OFFICIAL'S FAILURE TO PROPERLY APPLY THE LEGAL RULES GOVERNING AN ELECTION

Even under a traditional approach to standing doctrine, Petitioners have standing as candidates to challenge Illinois' alleged failure to follow the federal Election Day statutes for two independent reasons. First, a candidate suffers a concrete, particularized injury-in-fact under Article III when the government conducts an election in which he participates pursuant to invalid rules. Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, 80 WASH.

& LEE L. REV. 359, 422 (2023) [hereinafter, "Morley, *Pandemic*"] ("[C]ourts should recognize that political candidates . . . have standing to ensure that the elections in which they participate are conducted according to the law."). Second, a candidate suffers injury-in-fact from the government's failure to properly apply rules adopted to reduce the risk of election fraud, mistake, or irregularity.

A. A Candidate Has Standing to Sue to Enforce the Right to a Legally Conducted Election

1. Most basically, a candidate has a concrete, particularized right to have the election in which he is participating be "compliant" with all valid laws. *Shays v. FEC*, 414 F.3d 76, 84 (D.C. Cir. 2005). Accordingly, candidates suffer judicially cognizable injury when election officials require them to "compete for office in contests tainted by [statutorily]-banned practices." *Id.* at 85; *see also id.* (reiterating that candidates "suffer legal injury" when government officials "set the rules of the game in violation of statutory directives"). Justiciable harm arises when a candidate "must anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow." *Id.* at 86.

Moreover, "when adverse use of illegally granted opportunities appears inevitable, affected parties may challenge the government's authorization of those opportunities without waiting for specific competitors to seize them." *Id.* at 90. Candidates may pursue such claims "without 'establishing with any certainty' that the challenged rules will disadvantage their . . . campaigns." *Id.* at 91 (quoting *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 572 n.7 (1992)). As the U.S. Court of Appeals for the District of Columbia cogently explained, "[G]iven the multiplicity of factors bearing on elections and the extreme political sensitivity of judgments about what caused particular candidates to win, requiring candidates to establish that but for certain campaign finance rules they could have won an election [is not] reasonable." *Id.*; *see also LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011) (holding a candidate "has no obligation to demonstrate definitively that he has less chance of victory" under an allegedly invalid election rule to have Article III standing to challenge that rule).

This logic applies equally whether, as in *Shays*, executive officials adopt regulations which allegedly fail to adequately enforce a federal law or, as here, a state law allows conduct (i.e., the ostensibly belated return, acceptance, and counting of mail ballots) that federal law allegedly prohibits. Accordingly, a candidate who seeks election or reelection in contests governed by certain legal provisions should have Article III standing to challenge their validity. *Shays*, 414 U.S. at 88.

Here, the Petitioner candidates allege the electoral environment which Illinois law establishes violates federal law because it permits the belated return of mail-in ballots. Based on past elections, it is "inevitable" some voters will take advantage of Illinois's deadline and ballots will be counted pursuant to it. Petitioners accordingly have a judicially cognizable interest in litigating the validity of that deadline, regardless of the likelihood it will

cause them to either lose the election or adjust their campaign spending in response to it.

2. Recognizing candidates' judicially enforceable right to ensure that the elections in which they run are conducted according to legally valid rules prevents their potential victories from being tarnished by claims of illegitimacy or illegality. Following the 2000 presidential election, this Court stayed Florida's recount pending its ruling on whether the rules governing the recount were constitutionally valid. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (order).

Justice Scalia's concurrence noted that the Court would be deciding whether the ballots being recounted had been "legally cast." *Id.* at 1047 (Scalia, J., concurring). He explained:

> The counting of votes that are of questionable legality . . . threaten[s] irreparable harm to petitioner, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election. Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires.

Id.; *accord Carson v. Simon*, 978 F.3d 1051, 1061 (8th Cir. 2020).

Candidates require standing to bring pre-election challenges to the rules governing the electoral process in order to avoid the "irreparable harm" of having a "cloud" cast over their potential victory. *Bush*, 531 U.S. at 1047 (Scalia, J., concurring). Denying standing here would prevent a candidate from

challenging Illinois's deadline for mail ballots until an opponent wins in part based on allegedly untimely votes of "questionable" validity. *Id.* Should a plaintiff candidate prevail in court at that point and obtain a judicial order overturning the election's results, it could "cast[] a cloud" upon the "legitimacy" of his victory, making "public acceptance" unnecessarily more difficult and controversial. *Id.* This Court's finding of injury in the context of extraordinary relief should inform its approach to injury in the Article III context.

3. Compelling pragmatic considerations support applying justiciability doctrine to allow candidates to challenge the conduct of an election before it occurs whenever possible. First, as Professor Rick Hasen explains:

> A court asked to decide a question of statutory or constitutional law that affects the outcome of an already held election is injected in the worst way into the political thicket. . . . Putting judges in the position of deciding election law questions when the winner and loser of its decision will be obvious can undermine the legitimacy of the courts.

Richard L. Hasen, *Beyond the Margin for Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 993 (2005). This is especially true when control of a chamber of Congress or even the Presidency hinges on a case's outcome.

Second, post-election litigation may require courts to reject ballots that were cast in accordance with the

rules in place at the time the election was conducted, impacting the constitutional right to vote of the people who cast them. Alternatively, a court may determine that a dispositive number of votes were illegally accepted but refuse to set them aside for equitable reasons, thereby clouding the legitimacy of the prevailing candidate's victory. Both of these alternatives carry significant drawbacks. A far preferable option would be to enable courts to ensure elections are validly conducted in the first place.

Third, post-election litigation in presidential elections in particular is subject to strict deadlines due to constitutional provisions and federal statutes concerning the Electoral College and the constitutionally mandated inauguration date. Morley, *Postponing*, *supra* at 193-98. Accordingly, post-election challenges to the rules governing a presidential election will be unnecessarily rushed, harried, conducted on an expedited emergency basis, and subject to intense public scrutiny and criticism.

Fourth, if candidates must demonstrate prejudice to establish standing and obtain relief in post-election litigation, it may require determining and revealing how particular people voted, undermining the ubiquitous state-law right to a secret ballot. *See* Joshua A. Douglas, *The Power of the Electorate Under State Constitutions*, 76 FLA. L. REV. 1679, 1704 (2024) ("Forty-four state constitutions require a secret ballot (while the remaining six provide for secret balloting via legislation).").

Finally, federal courts have strictly enforced the laches defense to dismiss post-election federal lawsuits challenging election results. For example,

the Seventh Circuit rejected one of President Trump's attempts to challenge the results of the 2020 presidential election in Wisconsin primarily on laches grounds. It explained, "The President had a full opportunity before the election to press the very challenges to Wisconsin law underlying his present claims. Having foregone that opportunity, he cannot now—after the election results have been certified as final—seek to bring those challenges." *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 926 (7th Cir. 2020); *see also Soules v. Kuauians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1182 (9th Cir. 2005) (holding that laches barred post-election equal protection claim); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) ("Courts have imposed a duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible.").

Denying candidates standing to bring pre-election challenges will likely call much of this laches doctrine into question. At worst, it will create a Catch-22 where pre-election suits are dismissed for lack of standing and post-election suits are rejected due to laches. For these reasons, the legal system should "encourag[e] preventing harm in elections that would prove difficult to undo after the fact." Hasen, *supra* at 994.

B. Federal Courts Have Recognized Plaintiffs' Standing to Pursue Claims Based on Risks of Potential Harms

Alternatively, the Petitioner candidates have adequately pled standing because the challenged Illinois deadline creates a risk that they may lose an

election based on allegedly untimely, and therefore invalid, votes. Losing an election based on votes that are invalid under Federal law would constitute a concrete, particularized injury-in-fact to a candidate. And there is no question that at least some Illinois voters will take advantage of the state's statutory deadline by mailing their ballots on, or shortly before, Election Day. A candidate should not have to wait until the risk of losing due to such allegedly untimely votes comes to pass before challenging the deadline's validity.

A plaintiff may establish Article III standing by showing that it is either suffering an "immediate" injury or instead faces a "threatened" injury "resulting from [a] putatively illegal action." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)); *accord Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 99 (1979). "Although [this] Court has yet to speak directly on this issue, the courts of appeals have generally recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes." *Baur v. Veneman*, 352 F.3d 625, 633 (2d Cir. 2003). That is, a plaintiff candidate wishing to challenge a state's policy of accepting and counting allegedly untimely and invalid votes need not wait until such votes have actually cost him an election. Rather, a candidate has standing to challenge that policy because it creates an increased risk that the candidate will suffer the harm of losing due to such allegedly untimely and invalid votes.

Courts of appeals have applied this principle in a variety of contexts. *See, e.g.*, *Baur*, 352 F.3d at 633 (holding that, where "exposure to a potentially dangerous food product" occurs, the resulting "enhanced risk of disease transmission may constitute injury-in-fact"); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568 (6th Cir. 2005) (holding a plaintiff had suffered an injury-in-fact from a medical device because it created "an increased risk of harm"); *Johnson v. Allsteel, Inc.*, 259 F.3d 885, 888 (7th Cir. 2001) (holding that an amendment to a pension plan which increased the plan administrator's discretion over its interpretation constituted "injury in fact" to the plan's beneficiaries, "whether or not the administrator ever exercises its discretion adversely against the insured; the increased risk is itself an injury"); *Mtn. States Legal Found. v. Glickman*, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996) (holding that the plaintiffs had standing to challenge the Government's tree-harvesting plan on the grounds it increased the risk of forest fires in places they hiked and camped).

In this case, in contrast, the Seventh Circuit dismissed the risk that the plaintiff candidates could lose an election due to allegedly untimely and invalid votes as "speculative at best." *Bost*, 114 F.4th at 642. It based this conclusion primarily on this Court's ruling in *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 416 (2013). *Clapper*, however, held that the plaintiffs' claims arose from "a highly attenuated chain of possibilities," each step of which was purely "speculative." *Id*. at 410. Here, in contrast, there is no serious question that Illinois election officials will receive mail-in ballots after Election Day that were either postmarked by that day or contain a signed

certification from the voter. This creates an unavoidable risk that election officials may receive a dispositive number of such ballots. The lengthy, convoluted chain of assumptions upon which *Clapper* rested is absent here. Thus, this Court should conclude the candidate plaintiffs have standing to challenge Illinois's deadline because such ballots pose a risk of impacting the election's outcome.

III. THE RIGHT TO AN UNDILUTED VOTE IS AN INDIVIDUALIZED RIGHT WHICH VOTERS HAVE STANDING TO ENFORCE

The candidate Petitioners are also registered Illinois voters. *See Bost*, 111 F.4th at 640 (explaining that the plaintiffs argued they were injured "both as voters in Illinois and as political candidates"). They independently have standing to attempt to demonstrate that their legally valid votes are at risk of dilution from allegedly untimely, and therefore invalid, ballots.

1. Individual voters suffer concrete, particularized injury-in-fact from legal provisions, policies, or other governmental actions that may cause or allow their legally cast votes to be diluted by allowing invalid or illegal votes to be accepted and counted.

This Court has recognized that all eligible voters have the "constitutional right to vote and to have their votes counted." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). This right is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). It "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Id. at 555 Accordingly, a person's right to vote may not be "denied outright, nor destroyed by alteration of ballots, ***nor diluted by ballot-box stuffing***." *Id*. (citations omitted and emphasis added); *accord Wesberry*, 376 U.S. at 17; *see also Baker v. Carr*, 369 U.S. 186, 208 (1962) ("A citizen's right to vote free of arbitrary impairment of state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from ***dilution by a false tally***, or by a refusal to count votes from arbitrarily selected precincts, ***or by a stuffing of the ballot box***." (citations omitted and emphasis added)); *Anderson v. United States*, 417 U.S. 211, 226-27 (1974).[3]

Under these principles, "[t]he right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured . . . ." *Anderson*, 417 U.S. at 226-27 (alteration in original; quotation marks and citation omitted). An "honest count" necessarily includes only legally valid votes.

A voter may enforce these components of their right to vote, even though many or all other voters in the jurisdiction share the same alleged injury to that right. For example, this Court has permitted individuals to challenge an expansion to municipal boundaries because it "enlarge[d] the city's number of eligible voters," which in turn "dilute[d] the weight of the votes of the voters to whom the franchise was

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[3] *See also Gaffney v. Cummings*, 412 U.S. 735, 744, 748 (1973); *Georgia v. United States*, 411 U.S. 526, 532-33 (1973); *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).

limited before the annexation." *Perkins v. Matthews*, 400 U.S. 379, 388 (1971); *see also Port Arthur v. United States*, 459 U.S. 159, 165 (1982). Though this ruling did not expressly address standing, this Court recognized that each individual voter would be harmed by the allegedly improper inclusion and counting of additional ballots in their elections. The State of Illinois's inclusion of allegedly untimely and invalid ballots in its vote tallies is a similar harm.

Likewise, individuals have standing to challenge their congressional and legislative districts on the grounds they are too populous, thereby diluting the weight of each vote in those districts relative to votes cast in other, less populated districts in the state. *Baker*, 369 U.S. at 207 (holding that plaintiff voters had standing to challenge legislative districts on the grounds they caused "arbitrary impairment" of the weight of their votes); *Wesberry v. Sanders*, 376 U.S. 1, 5-6 (1964) (holding that plaintiff voters had standing to challenge "congressional apportionment laws which debase a citizen's right to vote" due to the "power of courts to protect the constitutional rights of individuals from legislative destruction"); *see also Reynolds*, 377 U.S. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen.").

In one sense, the inclusion of allegedly untimely, and therefore invalid ballots in vote tallies debases the weight of ballots from all voters who cast timely, valid ballots in the election. Consider a simplified example of an election with the following results:

Candidate A timely & valid votes:	20
Candidate A untimely votes:	2
Candidate B timely & valid votes:	16
Candidate B untimely votes:	8
Candidate C timely & valid votes:	4
Candidate C untimely votes:	0

A total of forty (40) timely votes were cast, meaning each voter's ballot carried 1/40 of the power to determine the election's outcome. With the inclusion of allegedly untimely votes, however, a total of fifty (50) ballots are deemed cast, meaning each voter's influence over the election's outcome is diluted to 1/50. Just as annexing more voters into a municipality or drawing more populous districts dilutes the weight of each person's vote, so too would the acceptance of allegedly untimely and invalid ballots.

Counting such votes also dilutes the weight of the votes of people who cast valid ballots for candidates who wind up losing as a result of those additional votes in an additional sense. If only timely votes are counted, a total of either sixteen (16) or seventeen (17) votes are necessary to prevail, making the votes of Candidate A's twenty (20) supporters more than enough to win. If allegedly untimely and invalid ballots are also included in the tallies, however, then a total of either twenty-four (24) or twenty-five (25) votes are necessary to win. The votes of Candidate A's twenty (20) supporters are no longer sufficient to secure victory; the efficacy of each such person's vote has been thereby diluted. Accordingly, this Court

should recognize that voters have Article III standing to challenge alleged violations of the right to vote through improper dilution by the acceptance and tallying of allegedly invalid ballots.

2. The Court of Appeals erred by dismissing the voters' claims as nonjusticiable "generalized grievances." *See Bost*, 114 F.4th at 640. This is not a case where citizens, *Lujan*, 504 U.S. at 573-74, or taxpayers, *Flast*, 392 U.S. at 106, assert only an undifferentiated general interest in having government officials obey the law. Nor is this a case where the plaintiffs claim an interest "held in common by all members of the public." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974); *accord* Ex Parte *Levitt*, 302 U.S. 633, 633 (1937) (per curiam). Rather, the injury at issue is limited to the rights of eligible voters who choose to cast timely votes in elections in which officials will accept and count certain allegedly late ballots in potential violation of federal law.

"[A] person's right to vote is 'individual and personal in nature.'" *Gill v. Whitford*, 585 U.S. 48, 66 (2018) (quoting *Reynolds*, 377 U.S. at 561). The fact that many, or even all, eligible voters in an election suffer the same harm to their respective personal rights to vote does not transform those individualized injuries into a single collective grievance. *FEC v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found injury in fact." (quotation marks omitted)); *see also Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) ("That these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome

of this litigation."). Indeed, *Akins* expressly declared that Article III standing may exist even where "large numbers of voters suffer interference with voting rights." *Akins*, 524 U.S. at 24. "[B]road application of the generalized grievance doctrine . . . disables courts from serving as a check to ensure both the validity of election officials' acts and equitable treatment for all members of the electorate." Morley, *Pandemic*, *supra* at 423.

If a State attempted to cancel a regularly scheduled election for its U.S. Senator and extend its current Senator's term to eight years, the right to vote of each voter in the state would be denied in exactly the same way. Even apart from the U.S. Senate's power to exclude an incumbent past the expiration of their term, *see* U.S. Const. art. I, § 5, cl. 1, each voter within that state would have standing to sue for violation of their fundamental constitutional right to vote for U.S. Senate. *See id.* amend. XIV, § 1; *id.* amend. XVII, § 1. Accordingly, widespread harm to all of a jurisdiction's voters, whether through vote denial or vote dilution, can give rise to a justiciable dispute.

CONCLUSION

The Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

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July 29, 2025