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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 23-2644

MICHAEL J. BOST, *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:22-cv-02754 — **John F. Kness**, *Judge*.

ARGUED MARCH 28, 2024 – DECIDED AUGUST 21, 2024

Before BRENNAN, SCUDDER, and LEE, *Circuit Judges*.

LEE, *Circuit Judge*. In Illinois, voters can cast their ballots by mail in any election. And election

officials can receive and count these ballots for up to two weeks after the date of the election so long as the ballots are postmarked or certified by that date. Plaintiffs, comprised of Illinois voters and political candidates, challenged this procedure, arguing that it impermissibly expands the time in which residents can vote. The district court dismissed their claims, ruling that Plaintiffs lacked standing to sue. The court also rejected the claims on the merits for good measure. Because Plaintiffs have not alleged an adequate injury, we agree that they lack standing to bring this suit and affirm the district court's dismissal of the case on jurisdictional grounds.

I. Background

A. Legal Background

James Madison observed that the regulation of elections in the United States is "a task of peculiar delicacy" that requires involvement from both Congress and state legislatures. 5 Documentary History of the Constitution of the United States of America 441–43 (1905). The Elections Clause of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1.

This clause is a "default provision," meaning it "invests the States with the responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997). As long as a state's election procedures do not conflict with

federal provisions, states "are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress." *United States v. Classic*, 313 U.S. 299, 311 (1941).

Two federal statutes are relevant here. The first establishes the "day of the election" for selecting members of the House of Representatives as the "Tuesday next after the 1st Monday in November, in every even numbered year" ("Election Day"). 2 U.S.C. § 7. The second provides that electors of the President and Vice President are to "be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day." 3 U.S.C. § 1.

Illinois has enacted a statutory scheme that governs its federal and state elections. *See* 10 ILCS 5/1-1 *et seq*. Relevant here, Illinois allows voters to cast their ballots by mail in any election held in the state if the ballot is postmarked on or be- fore the day of the election. *Id*. §§ 5/19-1; 5/19-8(c). If the mailed ballot bears no postmark, the voter must have signed and dated a certification accompanying the ballot within the same timeframe. *Id*. § 5/19-8(c). Moreover, any mail-in ballot that meets these requirements must be received by election authorities "before the close of the period for counting provisional ballots," *id*., which is defined as fourteen calendar days from the election date. *Id*. § 5/18A-15(a).[1] These provisions create a two-week period after Election Day where Illinois officials can receive and count valid ballots

[1] For convenience's sake, we will refer to these statutes collectively as the Illinois "ballot receipt procedure."

that are postmarked or certified on or before Election Day.

B. Procedural History

Each Plaintiff in this case is a registered voter in Illinois and a candidate for political office. Michael Bost is a multi-term member of the United States House of Representatives. Laura Pollatrini and Susan Sweeney are political activists who served as presidential electors during the 2020 election. In May 2022, they filed this suit against the Illinois State Board of Elections ("Board") and Bernadette Matthews in her official capacity as the Executive Director of the Board (collectively, "Defendants").

Plaintiffs allege that the Illinois ballot receipt procedure impermissibly extends Election Day, violating 2 U.S.C. § 7 and 3 U.S.C. § 1. As they see it, the fourteen-day post-election period for the receipt and counting of mail-in ballots increases the number of total votes cast in Illinois by counting "untimely" ballots. This in turn, Plaintiffs assert, dilutes their own votes in violation of the First and Fourteenth Amendments to the Constitution. Plaintiffs also claim that the ballot receipt procedure forces them to spend additional time and money operating their campaign organizations beyond Election Day (for example, to oversee the counting of mail-in ballots), which impermissibly impairs their constitutionally protected right to run for office.

Defendants filed a motion, asking the district court to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). They argued, among other things, that Plaintiffs lacked Article III standing to challenge the Illinois ballot receipt

procedure, that Plaintiffs failed to adequately state a violation of federal law or the Constitution, and that the Board was entitled to sovereign immunity under the Eleventh Amendment. Plaintiffs subsequently moved for partial summary judgment under Rule 56 on the claims that the ballot receipt procedure violated their rights to vote and stand for office. In the end, the district court granted Defendants' motion to dismiss, concluding that Plaintiffs lacked standing. The court also determined that Plaintiffs had failed to state a legally viable claim. This appeal followed.

II. Analysis

Because the Constitution gives federal courts the power only to resolve "Cases" and "Controversies," our initial inquiry is whether Plaintiffs have standing to challenge the ballot receipt procedure. U.S. Const. art. III, § 2. We review de novo the district court's ruling that they did not. *See Perry v. Sheahan*, 222 F.3d 309, 313 (7th Cir. 2000).

To establish the "irreducible constitutional minimum" of standing, a plaintiff must allege she suffered (1) an injury in fact, (2) that is fairly traceable to the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). At the pleading stage, a plaintiff must allege facts demonstrating each of these elements. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). We take these factual allegations as true and draw reasonable inferences in the favor of the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

This case hinges on whether Plaintiffs adequately allege a sufficient injury in fact. An injury in fact is

one that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. To be considered "concrete," an injury must be "real, and not abstract," meaning it "must actually exist." *Spokeo*, 578 U.S. at 340. A concrete harm is usually physical or monetary but can also include various intangible harms. *See TransUnion v. Ramirez*, 594 U.S. 413, 425 (2021).

For an injury to be "particularized," it must affect the plaintiff "in a personal and individual way." *Spokeo*, 578 U.S. at 339. As the Supreme Court has explained, such an injury must be personal, individual, and distinct, not general and undifferentiated. *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("The complainant must allege an injury to himself that is distinct and palpable.") (internal citations omitted); *United States v. Richardson*, 418 U.S. 166, 176–78 (1974) (declining to find standing for a "generalized grievance" when it is "plainly undifferentiated and common to all members of the public") (internal citations omitted).

Plaintiffs argue they were injured by the Illinois ballot receipt procedure both as voters in Illinois and as political candidates. We consider each of these propositions in turn.

A. Standing as Voters

Plaintiffs first assert that the strength of their votes will be diluted in the upcoming election by the many purportedly "untimely" mail-in ballots that state election officials will receive and count after Election Day. In their view, the late-arriving ballots will diminish the extent to which their ballots help choose the victor in the election. They recount that, in

2020, approximately 4.4% of the ballots cast in Illinois were received after Election Day, which diluted the value of their own votes.

But, even if we were to accept Plaintiffs' premise that inclusion of these ballots would cause vote dilution, their votes would be diluted in the same way that every other vote cast in Illinois prior to Election Day would be diluted. Thus, to the extent Plaintiffs would suffer any injury, it would be in a generalized manner and not "personal and individual" to Plaintiffs, as the Supreme Court requires. *Spokeo*, 578 U.S. at 339 ("For an injury to be particularized, it must affect the plaintiff in a personal and individual way.") (internal quotation and citation omitted); *see also Lujan*, 504 U.S. at 575 (noting that a generalized grievance is one that is "undifferentiated and common to all members of the public"). Indeed, at its core, Plaintiffs' complaint is that Illinois is disobeying federal election law. But an injury to an individual's right to have the government follow the law, without more, is a generalized grievance that cannot support standing "no matter how sincere." *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013); *see Lance v. Coffman*, 549 U.S. 437, 442 (2007) (noting that injury alleged by plaintiffs, who claim that Colorado constitutional provision violated the Election Clause, "is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past").

By way of contrast, consider racial gerrymandering cases. There, the Supreme Court has held that voters in a racially gerrymandered district have standing because they are "personally subject to a racial classification." *Ala. Legis. Black Caucus v.*

Alabama, 575 U.S. 254, 263 (2015) (cleaned up). Because these voters have the strength of their votes diminished compared to voters of another race, the harm is sufficiently individualized.

Malapportionment cases are another example. There, voters have standing to challenge the apportionment of congressional seats because their votes are diminished compared to voters in other congressional districts. *See Baker v. Carr*, 369 U.S. 186, 206 (1962). As the Supreme Court observed, the plaintiffs in *Baker* were "in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored" groups. *Id*. at 207–08. Here, Plaintiffs have not and will not suffer the same kind of unequal treatment recognized in *Baker* and *Alabama Legislative Black Caucus*.

The Eleventh Circuit arrived at the same conclusion in a similar case involving statewide voting procedures. In *Wood v. Raffensperger*, the plaintiff challenged Georgia's recount procedures, contending that they diluted his vote by allowing "unlawful" ballots. 981 F.3d 1307, 1314 (11th Cir. 2020). But the claimant had no standing, the Eleventh Circuit concluded, because "vote dilution in this context is a paradigmatic generalized grievance that cannot support standing." *Id*. (cleaned up).

This rationale also informed the Supreme Court's holding in *Gill v. Whitford*, 585 U.S. 48, 64 (2018). That case involved a challenge to a redistricting plan in Wisconsin. In determining that the plaintiffs lacked standing, the Supreme Court distinguished the allegations in *Baker*, 369 U.S. 186, and *Reynolds v. Sims*, 377 U.S. 533, 561 (1964), noting that "the

injuries giving rise to those claims were individual and personal in nature, because the claims were brought by voters who alleged facts showing disadvantage to themselves as individuals." *Gill*, 585 U.S. at 67. Just as in *Gill*, Plaintiffs here only claim a generalized grievance affecting all Illinois voters; therefore, they have not alleged a sufficiently concrete and particularized injury in fact to support Article III standing.

B. Standing as Candidates

Plaintiffs next contend that they suffered tangible and intangible harms as political candidates. As an initial matter, the parties dispute whether, in reviewing the district court's grant of Defendants' motion to dismiss, we can consider the affidavits Plaintiffs filed detailing the harms they purportedly suffered due to the ballot receipt procedure. Plaintiffs believe we can, relying on *United States ex rel. Hanna v. City of Chicago*, 834 F.3d 775, 779 (7th Cir. 2016). There, we remarked that "[t]he party defending the adequacy of a complaint may point to facts in a brief or affidavit 'in order to show that there is a state of facts within the scope of the complaint that if proved (a matter for trial) would entitle him to judgment.'" *Id*. (quoting *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992)). But *Hanna* and *Early* dealt with motions under Rule 12(b)(6) for failure to state a claim. Here, we are considering jurisdiction under Rule 12(b)(1), and the Supreme Court has unequivocally held that "[w]here, as here, a case is at the pleading stage, the plaintiff," as the party invoking federal jurisdiction, bears the burden to "clearly allege facts demonstrating each element" of standing. *Spokeo*, 578 U.S. at 338 (cleaned up).

Be that as it may, even with their affidavits, Plaintiffs cannot establish the injury in fact necessary for Article III standing. Plaintiffs say that the challenged policy imposed tangible monetary harms by forcing them to use resources to contest ballots that arrived after Election Day. For example, Congressman Bost attests that he must continue to fund his campaign for two additional weeks after Election Day to contest any objectionable ballots. Furthermore, he needs to send poll watchers to each of the thirty-four counties in his district to monitor the counting of the votes after Election Day to ensure that any discrepancies are cured. In Plaintiffs' view, the money and organization required to facilitate this operation is a tangible harm sufficient to confer standing.

We disagree. Recall that, to confer Article III standing, a plaintiff's injury must not only be "concrete and particularized" but also "actual or imminent." *Lujan*, 504 U.S. at 560. The latter requirement for standing "ensure[s] that the alleged injury is not too speculative for Article III purposes." *Id*. at 564 n.2. Thus, when a claimant premises standing on a future harm, the harm must be more than just "possible"—the allegedly threatened injury must be "certainly impending." *Whitmore*, 495 U.S. at 158.

The Supreme Court's holding in *Clapper v. Amnesty International, USA*, 568 U.S. 398 (2013), is instructive. There, the plaintiffs challenged certain amendments to the Foreign Intelligence Surveillance Act that allowed government surveillance of communications to and from persons in foreign countries under certain circumstances. To establish

standing, the plaintiffs argued that the law required them to undertake costly measures to ensure the confidentiality of legitimate communications with persons abroad to avoid detection. The Court was unconvinced, finding such injuries too speculative:

> Respondents' contention that they have standing because they incurred certain costs as a rea- sonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.

Id. at 416.

In much the same way, the Illinois ballot receipt procedure does not impose a "certainly impending" injury on Plaintiffs. Rather, it was Plaintiffs' choice to expend resources to avoid a hypothetical future harm—an election defeat. But whether the counting of ballots received after Election Day would cause them to lose the election is speculative at best. Indeed, Congressman Bost, for example, won the last election with seventy-five percent of the vote. *See* Ill. State Bd. of Elections, *Election Results, 2022 General Election*, https://www.elections.il.gov/electionoperations/ElectionVoteTotals.aspx.[2] And Plaintiffs cannot

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[2] We take judicial notice of the official election results from the Illinois State Board of Elections website. *See* Fed. R. Evid. 201(b)(2), (d) (explaining that courts may take judicial notice, "at any stage of the proceeding," of a fact "not subject to reasonable

manufacture standing by choosing to spend money to mitigate such conjectural risks.

Resisting this conclusion, Plaintiffs contend that being compelled to expend resources as a result of the Illinois ballot receipt procedures is in itself sufficient for Article III standing. For this proposition, they cite two cases—*Krislov v. Renour*, 226 F.3d 851 (7th Cir. 2000), and *Libertarian Party of Ill. v. Scholz*, 872 F.3d 518 (7th Cir. 2017). Neither is helpful.

In *Krislov*, we considered a challenge to an Illinois law that required candidates to collect a certain number of signatures to appear on the ballot. 226 F.3d at 856. This regulation mandated that the signatures had to be collected by voters who lived in the district where the election took place. *Id*. We determined that a candidate had standing to challenge the constitutionality of the law when he used significant campaign resources to collect the requisite number of signatures after some of the signatures were initially collected by individuals who lived outside of the district. *Id*. at 857–58.

In *Scholz*, we held that a political party had standing to challenge a law that required the party to field candidates for every office in the political subdivision in which the party wished to compete. 872 F.3d at 523. In doing so, we observed that the law imposed a "burdensome condition" on the Libertarian

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dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *see, e.g., Mont. Green Party v. Jacobsen*, 17 F.4th 919, 927 (9th Cir. 2021) (taking judicial notice of official election results from the Montana Department of State website).

Party and that the full-slate requirement stood as an "ongoing obstacle" to ballot access. *Id.* at 522–23.

Both cases are readily distinguishable—the laws at issue there imposed a direct affirmative obligation on the candidates or political parties. By contrast, here, Plaintiffs are not spending resources to comply with the Illinois ballot receipt procedure or to satisfy some obligation it imposes on them. Rather, they are electing to undertake expenditures to insure against a result that may or may not come. Such expenditures are not "fairly traceable" to the Illinois ballot receipt procedure. *Clapper*, 568 U.S. at 416.

Undeterred, Plaintiffs also argue that the ballot receipt procedure imposes an intangible "competitive injury." This theory posits that allowing votes to be received and counted after Election Day could decrease their margin of victory, which, in turn, could impact their reputations and decrease their fundraising. We have recognized similar types of injuries involving politicians in other circumstances. *See, e.g., Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (holding that a third party and its candidates faced the injury of "increased competition" when the defendants allegedly improperly placed major-party candidates on the ballot). The problem is that Plaintiffs do not (and cannot) allege that the majority of the votes that will be received and counted after Election Day will break against them, only highlighting the speculative nature of the purported harm.

Finally, Plaintiffs contend that they have an interest in ensuring that the final official vote tally reflects only legally valid votes. In support, they cite

Carson v. Simon, 978 F.3d 1051, 1056 (8th Cir. 2020). There, the plaintiffs, who had been nominated as electors in the 2020 presidential election, challenged a state court consent decree that required the Minnesota Secretary of State to receive and count for up to five days after Election Day absentee ballots that were postmarked on or before election day. The Eighth Circuit heard the appeal six days before the presidential election and well after voters had begun receiving their absentee ballots. The court found that the two electors had standing to sue, reasoning that "[a]n inaccurate vote tally is a concrete and particularized injury to candidates." *Id*. at 1058.

Upon first blush, we question whether the Eighth Circuit's brief treatment of this issue without citation to any authority is consistent with the Supreme Court's holding in *Lance*. *See Carson*, 978 F.3d at 1063 (Kelly, J., dissenting) (noting that the claimed injury "appears to be 'precisely the kind of undifferentiated, generalized grievance about the conduct of government' that the Supreme Court has long considered inadequate for standing") (quoting *Lance*, 549 U.S. at 442). But, even if consistent with *Lance*, we find the facts in *Carson* markedly different from those here.

In *Carson*, over one million voters had already requested mail-in ballots for the presidential election as of September 29, 2020. 978 F.3d at 1056. Given that there were only 3,588,299 preregistered voters in Minnesota at the time, whether and how the absentee ballots were counted would likely have had a material effect in "ensuring that the final vote tally accurately reflects the legally valid votes cast." *Id*. at 1058; *see* Fed. R. Evid. 201(b)(2), (d); Off. of the Minn. Sec. of

State, 2020 Election Statistics, https://www.sos.state.mn.us/elections-voting/election-results/2020/2020-general-election-results/2020-election-statistics. By contrast, here, the election is months away and the voting process has not even started, making any threat of an inaccurate vote tally far more speculative than in *Carson*. So again, Plaintiffs have failed to allege a certainly impending injury.

III. Conclusion

Because Plaintiffs do not have standing to challenge the Illinois ballot receipt procedure, we AFFIRM the district court's dismissal of the case for lack of jurisdiction.

SCUDDER, *Circuit Judge*, dissenting in part. I join my colleagues in rejecting the plaintiffs' voter-dilution and competitive-injury theories of standing. I also agree that plaintiffs Laura Pollatrini and Susan Sweeney have failed to adequately explain how Illinois's ballot-receipt procedure would tangibly harm them as candidates. In my view, however, the same cannot be said for Congressman Michael Bost. Because Illinois's extended deadline for receiving mail-in ballots will increase Bost's campaign costs this November—a fact that gives Bost a concrete stake in the resolution of this lawsuit—I respectfully dissent.

I

Michael Bost has run successfully in 15 electoral races in Illinois—first as a longstanding member of the Illinois House of Representatives and then as a U.S. Representative of House District 12. Like many candidates, Congressman Bost dispatches poll watchers on Election Day to monitor the counting of ballots at each precinct in his district and report any irregularities. Bost has used watchers in past elections and intends to do the same in 2024.

In 2013 Illinois extended its deadline before which mail-in ballots must be received. The new law directed state officials to count any mail-in ballot postmarked by Election Day and received up to fourteen days later. This change in law had an immediate impact on candidates' election-monitoring operations. To ensure that all mail-in ballots were accurately tallied, Congressman Bost had to recruit, train, assign, and coordinate poll watchers and keep his headquarters open for an additional two weeks.

This took substantial time, money, and resources, as Bost explained in his complaint and sworn declaration.

In my view, the costs Congressman Bost will incur to monitor ballots after Election Day gives him "a personal stake in th[is] dispute" and a basis to proceed in federal court. *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 379 (2024) (internal quotation marks omitted). Campaign expenses readily qualify as both "concrete" and "particularized"—the first two prongs of Article III standing. See *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424–25 (2021) (emphasizing that tangible monetary harms are quintessential "concrete injuries"); M*ack v. Re- surgent Cap. Servs., L.P.*, 70 F.4th 395, 406 (7th Cir. 2023) ("[M]oney damages are almost always found to be concrete harm."); see also *Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020) ("An inaccurate vote tally is a concrete and particularized injury to candidates." (quoting *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020))).

The monitoring costs are also "imminent." Congressman Bost has declared, in no uncertain terms, that he will send poll watchers to monitor vote processing and counting for two weeks after Election Day this November. As night follows day, he will incur campaign expenses to do so. Political campaigns cost money, including in the form of staffing; none of this is free. The guaranteed prospect of higher campaign costs is more than just a "possible future injury." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013) (cleaned up). Such costs are "certainly impending." *Id.*

Congressman Bost's increased monitoring expenses are also "fairly traceable" to Illinois's ballot-receipt procedure and "redressable by a favorable ruling." See *Monsanto Co. Geerston Seed Farms*, 561 U.S. 139, 149 (2010); see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The only reason he continues to monitor polls after Election Day is because Illinois law allows ballots to be received and counted. Before Illinois decided to accept and count such ballots, he had no need for such extended operations. Bost's decision to continue running his campaign for two weeks after Election Day is thus a direct response to Illinois's decision to extend its deadline for mail-in ballots. We should not hesitate to hold that Congressman Bost meets all the requirements of Article III standing.

II

Resisting this conclusion, the Panel majority describes Bost's costs as somehow entirely self-inflicted. Nothing in Illinois law, the Panel emphasizes, forces Bost to monitor the ballot count after Election Day. According to the Panel, Bost's protracted poll watching is not a strategic necessity but instead an overreaction to a hypothetical possibility that is "speculative at best": electoral defeat due to ballots received after Election Day that were improperly counted. Op. at 11. Such conjectural risks, in the majority's view, are not sufficiently "imminent" to confer standing. See *Clapper*, 568 U.S. at 409. Nor, the Panel reasons, are the expected costs of precautionary measures taken to avoid those risks. See Op. at 11–12.

I disagree. For starters, the Panel goes too far in saying that the risk of ballots swaying the upcoming District 12 election after Election Day is only speculative. Nothing in Congressman Bost's complaint or sworn declaration supports that view. Perhaps realizing the shortfall in its reasoning, the majority opinion resorts to taking judicial notice of the fact that Congressman Bost won reelection last cycle by a vast margin. See Op. 11 & n.3. But past is not prologue for political candidates, including an incumbent like Congressman Bost. In no way is any outcome guaranteed in November.

Regardless, a candidate's past margin of victory says nothing about the relative weight of mail-in ballots received after Election Day—and thus the strategic importance of extended poll-watching operations. Even if Congressman Bost had won reelection by 99% in 2022, he would have been more than justified in monitoring the count after Election Day if a significant enough portion of ballots remained outstanding at that point. He is far from alone in believing that the risk of ballot irregularities justifies funding poll-watching operations. In recent years, poll watching has become commonplace among major candidates, with all 50 states permitting campaign representatives to monitor vote tallies. See National Conference of State Legislatures, Poll Watchers and Challengers (May 28, 2024). In light of this reality, federal courts should be wary of labelling such practices speculative, particularly when included in the longstanding and successful election strategy of a sitting member of Congress.

In characterizing Congressman Bost's poll-watching strategy as anchored in speculation, the

Panel also fails to accept his factual allegations as true for purposes of evaluating standing at the motion-to-dismiss phase. See *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 668–69 (1993). The Panel acknowledges this principle in theory, asserting that Bost would lack standing even if all the claims in his complaint and sworn affidavit were true. See Op. at 5, 10. In practice, however, the Panel disregards several claims made by Bost that directly undermine its conclusions. Congressman Bost has asserted, for instance, that the number of ballots received after Election Day has increased consistently every election, and that "many of these late-arriving ballots have discrepancies (e.g., insufficient information, missing signatures, dates, or postmarks) that need to be resolved." Those statements undercut the Panel's view that the need for extended monitoring is purely speculative. At this phase of litigation, we must credit the former.

The Panel decision also suffers from a deeper flaw. Even if we assume that Congressman Bost's concern about delayed ballots altering the course of his election is speculative, that alone should not bar his lawsuit. Plaintiffs who take precautionary measures to avoid speculative harms are ubiquitous in federal courts. Consider, for instance, people seeking to purchase a firearm for self-defense. By doing so, they seek to take a precautionary measure to mitigate a risk of harm (an act of violence). That risk is entirely speculative and may never materialize. But even so, courts have overwhelmingly held that prospective gun owners have standing to challenge government policies that prevent, restrict, or otherwise tax the

preventative measure they seek to take. See*, e.g.*, *Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007), *aff'd sub nom., District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that it is "not a new proposition" that a plaintiff had standing to challenge the denial of a gun licensing permit). By dismissing Bost's expected campaign costs as a self-imposed, preventative measure designed to avoid a speculative harm, the Panel fails to see this as a straightforward application of settled principles of standing.

Where the majority opinion most misses the mark is in viewing this case as on all-fours with Supreme Court's 2013 decision in *Clapper v. Amnesty International*, 568 U.S. 398. There the Court declined to enjoin provisions of the Foreign Intelligence Surveillance Act authorizing the surveillance of phone conversations with persons outside the United States. See *id*. at 401–02. The Court concluded that the plaintiffs (attorneys, human-rights advocates, and NGOs) lacked standing because they had no reason to believe that the government would "imminently" target their specific phone conversations under the Act. See *id*. at 412. Because any risk of enforcement was purely speculative, the Court concluded that the preventative costs that the plaintiffs had undertaken to avoid potential surveillance did not constitute an "injury in fact" that was "fairly traceable" to the Act. See *id*. at 410–12. Plaintiffs, the Court concluded, "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Id*. at 402.

The majority concludes that Bost is seeking to do what *Clapper* prohibited: transform a purely

speculative injury into an actual one by taking costly measures in an attempt to prevent it. *Clapper* and its progeny teach that when the very application of a challenged government restriction to the plaintiffs is uncertain, preventative measures taken to avoid that application cannot create standing. See *id*. at 402; see also *Murthy v. Missouri*, 144 S. Ct. 1972, 1994–96 (2024) (holding that plaintiffs lacked standing to challenge government actions that allegedly encouraged social-media censorship because it was "no more than conjecture" that the plaintiffs would be subject to government-induced content moderation (internal quotation marks omitted)).

But Congressman Bost's claim is distinct. In *Clapper*, the only reason the plaintiffs had for incurring costs was to guard against the specter of a surveillance action that may never come. See *FEC v. Cruz*, 596 U.S. 289, 297 (2022) (clarifying that the "problem" that *Clapper* addressed "was that the [plaintiffs] could not show that they had been or were likely to be subjected to th[e] policy in any event"). Here, however, Congressman Bost's poll-monitoring efforts are not aimed at shielding against the speculative possibility of government action. In direct contrast to *Clapper*, the application of the challenged government restriction in this case is a near certainty. There will be an election this November, Congressman Bost will incur staffing costs to monitor the full and complete ballot count, and Illinois law will require that that count extend for an additional two weeks after Election Day.

What is speculative in Bost's case is not the application of the challenged statute but a risk unrelated to its enforcement: the risk of ballot

irregularities swaying an election. But *Clapper* is fully consistent with accepting at face value a plaintiff's judgment that the risk of some external harm unrelated to enforcement warrants mitigation. When the government creates obstacles to such mitigation efforts—here, as in the gun example and countless others—plaintiffs have standing to challenge them in federal court.

Congressman Bost has asserted injuries sufficient to confer Article III standing by alleging that his longstanding election-monitoring efforts will incur extra financial costs this November due to Illinois's extended ballot-receipt deadline. As a sitting member of Congress in the midst of an ongoing reelection campaign, he is nothing close to a "mere bystander" to the upcoming election or the allegation at the heart of this lawsuit. See *Alliance for Hippocratic Medicine*, 602 U.S. at 379. He is an active stakeholder who ought to be permitted to raise his claim in federal court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

August 21, 2024

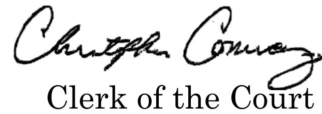
Before

MICHAEL B. BRENNAN, *Circuit Judge*
MICHAEL Y. SCUDDER, *Circuit Judge*
JOHN Z. LEE, *Circuit Judge*

No. 23-2644	MICHAEL J. BOST, et al., Plaintiffs – Appellants v. ILLINOIS STATE BOARD OF ELECTIONS and BERNADETTE MATTHEWS, in her capacity as the Executive Director of the Illinois State Board of Elections, Defendants – Appellees

Originating Case Information:
District Court No : 1 :22-cv-02754 Northern District of Illinois, Eastern Division District Judge John F. Kness

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.



Clerk of the Court

form name: **c7_FinalJudgment** (form ID: **132**)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MICHAEL J. BOST *et al.*, Plaintiffs, v. THE ILLINOIS STATE BOARD OF ELECTIONS *et al.*, Defendants.	No. 22-cv-02754 Judge John F. Kness

MEMORANDUM OPINION & ORDER

This case challenges an Illinois election statute that governs the time for counting ballots received after the nationally-uniform day set for federal elections ("Election Day"). That Illinois law (the "Ballot Receipt Deadline Statute" or "Statute") allows ballots to be received and counted for up to 14 days after Election Day. Plaintiffs are former and prospective candidates for federal office (and registered voters) who allege that the Ballot Receipt Deadline Statute, contrary to federal law, dilutes their votes and forces them to spend money and time campaigning after Election Day. To realize their claims, Plaintiffs have sued the Illinois State Board of Elections, which supervises the administration of

Illinois's election laws, and its director, Bernadette Matthews. Plaintiffs seek a declaratory judgment that the Statute deprives them of their constitutional and statutory rights; they also seek a permanent injunction prohibiting Defendants from enforcing the Statute.

As explained more fully below, because Plaintiffs fail to plead sufficiently concrete, particularized, and imminent injuries sufficient to meet the requirement of standing under Article III of the United States Constitution, the Court lacks the power to hear this case. And even if standing existed, the Eleventh Amendment serves as an independent bar to this suit. In any event, Plaintiffs have not plausibly alleged that the Ballot Receipt Deadline Statute conflicts with federal law. As a result, and on the motion of Defendants, the case is dismissed without prejudice.

I. BACKGROUND

Since the founding of our country, the law governing voting in federal elections has been a peculiarly federated affair. Under the United States Constitution, it is up to the legislatures of the states to prescribe the "Times, Places and Manner" of holding elections for U.S. senators and representatives. U.S. Const. art. I, § 4, cl. 1. But the Congress may also "at any time by Law make or alter such Regulations . . . ." U.S. Const. art. I, § 1, cl. 1. For choosing the Electors who actually elect the President, the Constitution states that "Congress may determine the Time of ch[oo]sing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II, § 1, cl. 4. But the power to

appoint electors and the mode of their appointment belongs exclusively to the states. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

Congress has since exercised its Constitutionally-conferred legislative power to set what has become one "Election Day" for the entire country. 3 U.S.C. §§ 1, 21(1); 2 U.S.C. §§ 1, 7. But despite that national standard, the states retain significant discretion—frequently exercised—to prescribe the times, places, and manner of conducting elections. For better or worse, with the advent of technology and changing voter habits and preferences, gone are the days in which all votes were cast (and counted) on one Election Day. Numerous states now allow votes to be cast by mail; those ballots are often transmitted to election authorities (by mail or other means) before or on Election Day. And to accommodate the potential for delayed deliveries of otherwise-timely votes, a substantial number of states that permit voting by mail now also allow mailed votes to be counted for some time past Election Day.

This evolution in voting habits has, perhaps predictably, led to occasional uncertainty in the administration of elections. Under the power conferred by Congress, state legislatures are permitted to set rules for ballots received by mail. Because of the possibility that validly cast ballots will not be received or counted by election officials before Election Day is over, many state legislatures have ballot receipt statutes that set a timeframe within which a mail-in ballot may be received post-Election Day yet still counted toward the final tally. Illinois is one of those states, and that choice has led to the dispute currently before this Court.

In Illinois, the time for counting ballots received after the date of a federal election is governed by statute (10 Ill. Comp. Stat. Ann. § 5/19-8(c)). (Dkt. 1 ¶ 14.) That law allows ballots cast in federal elections to be received and counted for up to 14 days after Election Day, so long as the ballot was postmarked or certified on or before Election Day. (*Id.* ¶ 15.) Under this statutory scheme, these mail-in ballots have the same weight and force that a ballot cast at the polls on Election Day would have. (*Id.* ¶ 16.)

Plaintiffs in this case are registered voters, as well as former and prospective candidates for both federal office and appointment as Presidential Electors. Plaintiffs allege that the Ballot Receipt Deadline Statute violates the Constitution and federal statutory law, including 2 U.S.C. § 1, 2 U.S.C. § 7, and 3 U.S.C. § 1. (Dkt. 1.) More specifically, Plaintiffs allege that the Statute violates 2 U.S.C. § 7 and 3 U.S.C. § 1 by authorizing Illinois election officials to count untimely votes, thus diluting the value of their timely ballots. Plaintiffs also allege that the Statute deprives them of their rights as candidates under the First and Fourteenth Amendments by forcing them to spend time and money to organize, fund, and run their campaign after Election Day. Plaintiffs say that, because ballots are being counted up to two weeks after Election Day, they must continue to campaign and to incur inevitable campaign-related expenses. Plaintiffs allege that the Statute violates 2 U.S.C. § 7 and 3 U.S.C. § 1 and is thus facially invalid.

In an effort to realize these Constitutional and statutory claims, Plaintiffs have sued the Illinois State Board of Elections ("State Board")—which is

responsible for supervising the administration of election laws in Illinois—and its Executive Director, Bernadette Matthews (in her official capacity). Plaintiffs seek a declaratory judgment that the Ballot Receipt Deadline Statute deprives them of their Constitutional rights and injunctive relief to permanently enjoin enforcement of the Statute. (Dkt. 1 at 11.)

Now before the Court is Defendants' motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted.[1] (Dkt. 25.)

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[1] On November 8, 2022, the Democratic Party of Illinois ("DPI") filed a notice of appeal of the Court's order denying DPI's motion to intervene. (Dkt. 59.) At first glance, that pending appeal might suggest that this Court must wait for the Court of Appeals to resolve the appeal before adjudicating Defendants' motions. But a notice of appeal does not completely divest this Court of its jurisdiction over the case. As the Supreme Court held in *Griggs v. Provident Consumer Disc. Co.*, the filing of a notice of appeal "divests the district court of its control over those aspects of the case involved in the appeal." 459 U.S. 56, 58 (1982). If the appeal does not concern the underlying merits of the case, the district court is not divested of its jurisdiction over the merits. *See Kilty v. Weyerhaeuser Co.*, 758 F. App'x 530, 532–533 (7th Cir. 2019). DPI's interlocutory appeal concerned only its effort to intervene, not the underlying merits. Accordingly, this Court retains jurisdiction to address the motion to dismiss. To be sure, the Court presumes it possesses the discretion to await resolution of the pending appeal before proceeding to the merits. But imposing an ersatz stay would be imprudent for several reasons: *first*, no party has asked for a stay; *second*, the relief set forth in this ruling is aligned with the stated interests of DPI as amicus curiae and putative intervenor (*see, e.g.,* Dkt. 13, 56); *third*, the Court is now prepared to issue this substantive ruling and to enter a judgment of dismissal; and *fourth*, the parties' substantive motions have already been pending for a substantial period. Accordingly, the Court will proceed to the merits despite the pending appeal of nonparty DPI.

In their motion, Defendants contend that the Court lacks jurisdiction because the Plaintiffs, having suffered no particularized or concrete injury, do not have standing to bring this suit. Defendants also argue that Plaintiffs' claims are barred by the Eleventh Amendment to the United States Constitution. Defendants assert finally that Plaintiffs' suit should be dismissed because Plaintiffs fail to allege plausible claims under 2 U.S.C. § 7, 3 U.S.C. § 1, and the First and Fourteenth Amendments to the Constitution. (Dkt. 25 at 11; 14.)

Plaintiffs disagree and contend that, because state laws in conflict with federal election laws inflict the judicially-cognizable injury of endangering the right to vote, they do indeed have standing. (Dkt. 43 at 4.) Plaintiffs also argue that their candidacy-related injuries are independently sufficient to confer Article III standing, as the unnecessary expenditure of campaign money is both concrete and particularized. As for the Eleventh Amendment, Plaintiffs maintain that the "plan of the Convention" doctrine renders the Eleventh Amendment inapplicable. Finally, Plaintiffs insist that they have pleaded a viable claim based on Illinois law permitting voting beyond Election Day in violation of federal election law. These arguments are addressed in turn.

II. STANDARD OF REVIEW

A. Standing

It is a truism that Article III of the Constitution requires an actual case or controversy between the parties. *Deveraux v. City of Chicago*, 14 F.3d 328, 331 (7th Cir. 1994). As part of that requirement, plaintiffs

seeking to have a case heard in federal court must demonstrate that they have standing to sue. In particular, plaintiffs must show (1) that they suffered a concrete and particularized injury in fact; (2) a causal connection between the injury and the challenged conduct of the defendant; and (3) that the injury will be likely redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Because "[s]tanding is an essential component of Article III's case-or-controversy requirement," defendants may seek the dismissal of nonjusticiable claims through a Rule 12(b)(1) motion for lack of subject matter jurisdiction. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009) (quoting *Lujan*, 504 U.S. at 561).

A Rule 12(b)(1) motion challenges the Court's subject matter jurisdiction over the case. Fed. R. Civ. P. 12(b)(1); *Meyer v. St. John's Hosp. of the Hosp. Sisters of the Third Order of Sta. Francis*, 164 F. Supp. 3d 1083, 1085 (C.D. Ill. 2016). Rule 12(b)(1) "provides for dismissal of a claim based on lack of subject matter jurisdiction, including lack of standing." *Stubenfield v. Chicago Housing Authority*, 6 F. Supp. 3d 779, 782 (N.D. Ill. 2013) (citing *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856 (7th Cir. 1996)).

B. The Eleventh Amendment

Under the Eleventh Amendment to the Constitution, states (and their officers) are generally protected from suit. As a "general rule," private individuals "are unable to sue a state in federal court absent the state's consent." *McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1049 (7th Cir. 2013). That

protection extends to state agencies and state officials acting in their official capacities. *Indiana Prot. & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 370 (7th Cir. 2010).

An exception to the Eleventh Amendment's general bar on suits against states and their agencies can be found under the "plan of the Convention" doctrine. *Alden v. Maine*, 527 U.S. 706, 729–30 (1999) (quoting *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 323–24 (1934)). Under that doctrine, the sovereign immunity afforded to States by the Eleventh Amendment will cease where a "fundamental postulate[] implicit in the constitutional design" begins. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2258 (2021). Because the Eleventh Amendment confirmed, rather than established, sovereign immunity, the scope of the States' immunity from suit is not demarcated by the text of the Eleventh Amendment itself but rather by fundamental postulates implicit in the design of the Constitution. *Alden*, 527 U.S. at 729–30. In other words, the federal government "is invested with full and complete power to execute and carry out [the Constitution's] purposes," and if a state interferes with that power, that state may not assert sovereign immunity from suit in federal court. *PennEast*, 141 S. Ct. at 2259.

C. Motion to Dismiss for Failure to State a Claim

A motion under Rule 12(b)(6) "challenges the sufficiency of the complaint to state a claim upon which relief may be granted." *Hallinan v. Fraternal Ord. of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820

(7th Cir. 2009). Each complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). These allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Put another way, the complaint must present a "short, plain, and plausible factual narrative that conveys a story that holds together." *Kaminski v. Elite Staffing, Inc.*, 23 F.4th 774, 777 (7th Cir. 2022) (cleaned up). In evaluating a motion to dismiss, the Court must accept as true the complaint's factual allegations and draw reasonable inferences in the plaintiff's favor. *Iqbal*, 556 U.S. at 678. But even though factual allegations are entitled to the assumption of truth, mere legal conclusions are not. *Id*. at 678–79.

III. DISCUSSION

A. Plaintiffs Lack Standing to Bring This Suit

To bring a suit in federal court, the party suing must establish that it has standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To establish standing, a plaintiff must prove that he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Of these three elements, injury in fact is often the most significant hurdle for a plaintiff to clear in the standing analysis. To show injury in fact, Plaintiffs must establish three sub-elements: first,

the "invasion of a legally protected interest"; second, that the injury is both "concrete and particularized"; and third, that the injury is "actual or imminent, not conjectural or hypothetical." *Spokeo*, 578 U.S. at 339. The first sub-element—invasion of a legally protected interest—is largely self-explanatory. The second and third, however, require more discussion. For an injury in fact to be "concrete and particularized," it must affect the plaintiff in a personal and individual way. *Lujan*, 504 U.S. at 560 n.1. For an injury in fact to be actual or imminent, a plaintiff must show that an alleged future injury is "certainly impending," not merely possible. *Clapper v. Amnesty Int'l. USA*, 568 U.S. 398, 409 (2013).

Plaintiffs present three harms that they allege are sufficient to confer standing: the Ballot Receipt Deadline Statute's alleged facial conflict with federal law, vote dilution, and Congressman Bost's injuries as a candidate. Each of these alleged harms and whether they are sufficient to confer Article III standing are addressed in turn.

1. Alleging Conflict with the Elections Clause Is not a Concrete and Particularized Injury.

Defendants first argue that Plaintiffs do not have standing because the asserted injuries are not sufficiently concrete and particularized. (Dkt. 26 at 5.) Defendants state that Plaintiffs merely assert a disagreement with the Ballot Receipt Deadline Statute and fail to explain why it harms them specifically in a way that differs from Illinois voters generally. (Dkt. 26 at 5, 7.) Plaintiffs respond that their alleged vote dilution injury is sufficiently

concrete and particularized. (Dkt. 43 at 5– 8.) Plaintiffs also assert that, even if the Plaintiffs' facial challenge to the statute and vote dilution injuries are insufficiently concrete and particularized, they still have standing based on the Congressman Bost's injury. Congressman Bost's campaign- resource injury is, they argue, concrete and particularized because it is specific to Congressman Bost as a candidate. (*Id*. at 8–9.)

To adequately plead an injury in fact sufficient for Article III standing, the alleged injury must be "concrete and particularized." A "generalized grievance" is insufficient to confer standing. If a party's injury is a "grievance shared . . . by all or a large class of citizens," it is generalized and insufficient for standing. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

A plaintiff cannot show a concrete and particularized injury sufficient for standing by showing a mere "general interest common to all members of the public." *Ex parte Levitt*, 302 U.S. 633, 634 (1937). As the Supreme Court explained nearly 50 years ago, an allegation relating to the general conduct of government is not generally concrete and particularized enough to satisfy the injury in fact requirement. *United States v. Richardson*, 418 U.S. 166, 174 (1974); *see also Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 349 (3d Cir. 2020) ("[P]rivate plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause."). If a plaintiff offers only a generally available grievance about government, claiming only "harm to his and every citizen's interest in proper application of the

Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—[the plaintiff] does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–74.

One component of Plaintiffs' standing theory is that the Ballot Receipt Deadline Statute conflicts with 2 U.S.C. § 7 and 3 U.S.C. § 1. Plaintiffs' allegations on this score amount to a "general grievance about governance" that is insufficient to confer standing. Plaintiffs do not specify how they, individually, are or will be harmed in a concrete and particularized way by the Statute's alleged facial conflict with the Elections Clause. Instead, they generally allege that the Statute violates the Elections Clause. (Dkt. 1 at 9–10.) Rather than plead specific, personal harms, Plaintiffs merely state that they "have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing 10 Ill. Comp. Stat. Ann. § 5/19-8." (Dkt. 1 at 10.)

Courts faced with similar allegations have rejected plaintiffs' claims that they possessed standing. This type of injury is the kind of generalized grievance that is insufficient to confer standing. In *Lance v. Coffman*, for example, the Supreme Court considered the challenge of four Colorado voters to the redistricting provision of the Colorado Constitution. Those Plaintiffs alleged that the provision conflicted with the Elections Clause of the United States Constitution. 549 U.S. 437, 441–42 (2007). But the Supreme Court disagreed and explained that a bare allegation that the Elections Clause has not been

followed is "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past[;] . . . plaintiffs assert no particularized stake in the litigation." *Id*. at 442.

Plaintiffs' complaint echoes the allegations in *Lance*. Plaintiffs' Elections Clause claims allege a general interest that every citizen shares in the proper application of the Constitution and the laws of the United States. *Lujan*, 504 U.S. at 560–61. Seeking relief for this grievance no more "directly and tangibly benefits [Plaintiffs] than it does the public at large" and thus "does not state an Article III case or controversy." *Id*. at 573–74. Put differently, were Plaintiffs (acting as voters) to succeed in making Illinois voting laws comply with federal law, that benefit would redound benefit equally to all voters—not merely to Plaintiffs specifically.

Plaintiffs cite a variety of cases in support of their standing argument (Dkt. 43), but those cases do not squarely address the issue of standing. *See, e.g., Foster v. Love*, 533 U.S. 67 (1997).[2] In particular, Plaintiffs cite *Judge v. Quinn*, which Plaintiffs contend is analogous to this case. Plaintiffs assert that the injuries they allege are "consistent with the injuries that led this Court in 2009 to find that different voters had standing to challenge a special election date chosen to fill the Senate seat vacated by

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[2] Although those courts reached the merits, thus implying standing to sue in those cases, the Supreme Court has "often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

then-President-elect Obama." (Dkt. 43 at 6) (citing *Judge v. Quinn*, 623 F. Supp. 2d 933, 934 n.3 (N.D. Ill. 2009)). But the court in *Judge* did not undergo an extensive standing analysis—standing was instead relegated to a single footnote in which the court said it "concur[red] with the parties' apparent agreement that plaintiffs have standing." *Id.* This brief acknowledgment of standing is the exact kind of drive-by jurisdictional ruling that the Supreme Court has cautioned courts to avoid treating as precedential. *Citizens for a Better Env't*, 523 U.S. at 91. Accordingly, *Judge* does not show that Plaintiffs have standing.

Plaintiffs' claims are, in any event, distinguishable from those in *Judge*. Those plaintiffs challenged then-Governor Quinn's decision to allow Roland Burris, who was specially appointed to fill a vacancy in the United States Senate, to remain in office until the next regular election rather than conducting a special election to elect a replacement senator. *Id.* at 934. As *Judge* reflects, the plaintiffs were concerned about being denied entirely the right to vote for their representative in the Senate—not that their votes in a federal election were being diluted. Further, the plaintiffs did not allege any sort of vote fraud. Because the *Judge* plaintiffs were challenging the outright denial of their right to vote, rather than bringing a claim that their votes were diluted by the allegedly fraudulent votes of others, *Judge* is distinguishable.

Plaintiffs' contention that the Ballot Receipt Deadline Statute inflicts an injury sufficient to confer Article III standing fails because it is not specific to Plaintiffs. The alleged conflict with the Elections Clause is same kind of injury that the Supreme Court

found too undifferentiated to confer standing in *Lance*. Further, the cases Plaintiffs cite to support a finding of standing do not engage in a standing analysis and are factually distinguishable. For all of these reasons, therefore Plaintiffs fail to allege a particularized injury.

2. Plaintiffs' Vote Dilution Claim is Insufficient to Confer Standing.

Plaintiffs also allege that the Ballot Receipt Deadline Statue dilutes their votes and state that this alleged harm is sufficient to confer standing. Plaintiffs contend that by counting ballots received after Election Day, their ballots, presumably cast on or before Election Day and received on or before Election Day, are diluted. In contrast, Defendants state that the vote dilution claim is not concrete and particularized enough to meet Article III's requirements.

Plaintiffs' vote dilution claim is similar to the vote dilution claim at issue in *Feehan v. Wisconsin Election Commission*. 506 F. Supp. 3d 596 (E.D. Wis. 2020). In *Feehan*, the Plaintiff alleged that Wisconsin's election policies diluted his vote in violation of the Constitution. More specifically, the plaintiff alleged "massive election fraud" in violation of the Election, Electors, and Equal Protection Clauses of the Constitution. *Id*. at 601. The plaintiffs sought a declaratory judgment that Wisconsin's signature verification violated the Constitution and that mail-in and absentee ballot fraud occurred in the 2020 election. *Id*. at 602. They also sought a permanent injunction prohibiting the Wisconsin governor and secretary of state from transmitting the certified

election results to the Electoral College. *Id*. *Feehan's* plaintiffs thus maintained that their alleged vote dilution injury was sufficient for Article III standing. But the *Feehan* court disagreed and held that the injuries claimed were "too speculative and generalized" because they were "injuries that any Wisconsin voter suffers." *Id*. at 609.

Courts outside this Circuit have agreed that claims of vote dilution based on the existence of unlawful ballots fail to establish standing. For example, the district court for the Middle District of North Carolina held that in "vote dilution cases arising out of the possibility of unlawful or invalid ballots being counted," the harm alleged "is unduly speculative and impermissibly generalized because all voters in a state are affected." *Moore v. Circosta*, 949 F. Supp. 3d 289, 312–13 (M.D.N.C. 2020). Although *Moore* did not go so far as to say that no statewide election law could ever be challenged "simply because it affects all voters," *Moore* explained that "the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not the concrete and particularized injury [that is] necessary for Article III standing." *Id*. Unlike gerrymandering claims, "in which the injury is specific to a group of voters based on their racial identity or the district in which they live," all voters would suffer from the vote dilution injury alleged. *Id*. As a result, *Moore* found that the plaintiff had no standing to bring the vote dilution claim.

Plaintiffs' vote dilution claim is effectively the same as the vote dilution claims in *Feehan* and *Moore*. In Count I of the complaint, Plaintiffs allege that "[u]ntimely and illegal ballots received and counted

after Election Day pursuant to 10 Ill. Comp. Stat. Ann. § 5/19-8 dilute the value of timely ballots cast and received on or before Election Day, including Plaintiffs' timely cast and received ballots." (Dkt. 1 ¶ 41.) Plaintiffs suggest the dilution posed by the Ballot Receipt Deadline Statute violates the Elections Clause, but, as in *Moore* and *Feehan*, Plaintiffs do not allege an injury beyond the general grievance that all Illinois voters would share if that were the case.

To be sure, the plaintiffs in *Feehan*, unlike here, sought to decertify election results, and thus Plaintiffs argue that their claim is distinct from the underlying claim in *Feehan*. (Dkt. 43 at 11–12). But that is a distinction without a difference, as both the claims here and in *Feehan* are the same on a legal level: they both allege that the election process is "riddled with illegality," thus diluting their right to vote. *Feehan*, 506 F. Supp. 3d at 609.

More broadly, Plaintiffs assert that a ruling for Defendants on the standing issue would give rise to an untenable situation in which voters will never have standing to challenge gross abuses of state power. Plaintiffs compare this case to a situation in which "Illinois granted citizens of France the right to vote in its federal elections." (Dkt. 43 at n.6.) In Plaintiffs' example, were Defendants' reasoning to prevail, the result would be that "no private citizen would have standing to challenge the French ballots." (*Id.*)

Although Plaintiffs' hypothetical concerning illegitimate French voters raises a sincere question about the limits of the doctrine of standing, it ultimately strays too far from the context of this case

to be genuinely illustrative. Contrary to Plaintiffs' conceptualization, a vote dilution claim under the Equal Protection Clause is about votes being weighted differently to the disadvantage of an identifiable group. *Bognet*, 980 F.3d at 355. That is, a vote dilution claim is about certain votes being given less value than others, and such claims typically arise in the context of redistricting disputes. Federal courts have thus declined to apply the doctrine of vote dilution to voter fraud allegations, *e.g., Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711 (D. Ariz. Dec. 9, 2020), because an increase in the pool of voters generally does not constitute vote dilution. Absent any suggestion that our hypothetical, carpetbagging French voters diluted the votes of another identifiable group of legitimate voters, current standing doctrine does not support Plaintiffs' claims. Further, Plaintiffs' hypothetical depends on evidence of illegal votes actually being cast. (Dkt. 43 at 6 n.1.) But Plaintiffs do not allege that any illegal ballots were cast in any election—they merely suggest the possibility of such votes being counted. The lack of any such allegation distinguishes Plaintiffs' allegations from the French voter hypothetical. Put another way, to the extent there is an outer boundary at which the counting of wholly illegal ballots cast by noncitizens amounts to a cognizable claim of vote dilution for which standing would exist, Plaintiffs' claims here do not come close to reaching it.

As in *Feehan* and *Moore*, Plaintiffs' claims here are too speculative and generalized to constitute an injury in fact for the purposes of Article III standing. Accordingly, Plaintiffs lack standing based on their vote dilution theory.

3. Congressman Bost's Stated Financial Injuries Are Too Speculative to Confer Standing.

In addition to Plaintiffs' vote dilution claims, Congressman Bost alleges that Defendants are depriving him of his right to stand for office by enforcing the Ballot Receipt Deadline Statute. (Dkt. 1 ¶¶ 44–48.) Congressman Bost argues that because he is forced to spend significant resources running his campaign for an additional two weeks after Election Day, his injury, unlike the other injuries alleged in the complaint, is necessarily concrete and particularized. (Dkt. 43 at 8.) Defendants counter that Congressman Bost's injury, although perhaps concrete, is not particularized because all federal candidates in Illinois are affected by the Statute in the same way. (Dkt. 26 at 9.) Defendants also argue that Congressman Bost's claim is speculative because the claimed effect of the Statute on his ability to win re-election is based on a "chain of possibilities." (*Id*. at 10.)

By its terms, the Ballot Receipt Deadline Statute affects all federal candidates equally. All candidates in Illinois, including Congressman Bost's opponent, are subject to the same Illinois election rules. *See Bognet*, 980 F.3d at 351 (candidate- plaintiff did not have standing when his objection to state election rules applied to all candidates). Congressman Bost does not allege how his right to stand for office is particularly affected compared to his opponents. *Id*. For example, Congressman Bost does not allege that the ballots cast after Election Day are more likely to be cast for his opponent. Because the alleged injury is

not particularized to Congressman Bost, it is insufficient to confer standing.

But even if Congressman Bost's financial injury is concrete and particularized, his claim is still speculative. An injury in fact, in addition to being concrete and particularized, must be "actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). In practice, that means that a threatened injury must be "certainly impending" to constitute an injury in fact, not merely "possible." *Id*. For example, a plaintiff cannot "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Id*. at 416.

Congressman Bost's harm—spending more resources on the election—is not certainly impending. Congressman Bost asserts that he will be forced to spend money to avoid the alleged speculative harm that more ballots will be cast for his opponents. There is, however, no reason to believe that these alleged future expenditures are anything but speculative. *See Bognet*, 980 F. 3d at 352. ("The same can be said for Bognet's alleged wrongfully incurred expenditures and future expenditures. Any harm Bognet sought to avoid in making those expenditures was not 'certainly impending'—he spent the money to avoid a speculative harm."); *see also Donald J. Trump for Pres., Inc. v. Boockvar*, 493 F. Supp. 3d 331, 380–81 (W.D. Pa. 2020). It is mere conjecture that, if Congressman Bost does not spend the time and resources to confer with his staff and watch the results roll in, his risk of losing the election will increase. Under the letter of Illinois law, all votes must be cast by Election Day, so Congressman Bost's

electoral fate is sealed at midnight on Election Day, regardless of the resources he expends after the fact.

Plaintiffs cite to *Carson v. Simon* to support their argument that Congressman Bost has standing. (Dkt. 43 at 9) (citing *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020)). In *Carson*, Minnesota presidential electors challenged a decree issued by the Minnesota Secretary of State that unilaterally rendered the statutorily-mandated absentee ballot receipt deadline inoperative. *Carson*, 978 F.3d at 1054. The district court found that the electors lacked standing, but the Eighth Circuit reversed. *Id*. at 1059.

Carson is distinguishable. Its elector-plaintiffs challenged a consent decree that contradicted state law; they did not (as Plaintiffs do here) seek to challenge a statute passed by the state legislature and signed into law by the governor. *Carson's* electors were concerned that ballots cast in direct conflict with state law would be counted as legitimate votes. Plaintiffs here acknowledge that ballots received up to fourteen days after Election Day are valid under Illinois state law. In any event, *Carson* was decided over a dissent, which argued the plaintiffs' claims concerning an " 'inaccurate vote tally' . . . appear[ed] to be precisely the kind of undifferentiated, generalized grievance about the conduct of government that the Supreme Court has long considered inadequate for standing." *Carson*, 978 F.3d at 1063 (Kelly, J., dissenting) (cleaned up). That concern over an undifferentiated grievance based on an inaccurate vote tally rings true here as well. Accordingly, the Court declines to follow *Carson*.

In short, Congressman Bost's alleged financial injury is not concrete and particularized and is speculative. Accordingly, it insufficient to demonstrate standing under Article III.

B. The Eleventh Amendment Separately Bars Plaintiffs' Suit

Apart from standing, Defendants also argue that the Eleventh Amendment bars Plaintiffs' various claims. (Dkt. 26 at 11.) Under the Eleventh Amendment, a state that does not consent to suit in federal court is immune from most claims, unless Congress has abrogated its immunity. *Carmody v. Bd. of Trs. of Univ. of Ill.*, 893 F. 3d 397, 403 (7th Cir. 2018). Such immunity, however, does not exist if "the State consents to the suit or Congress has abrogated their immunity." *Tucker v. Williams*, 682 F. 3d 654, 658 (7th Cir. 2017). Eleventh Amendment immunity from suit in federal court extends to "arms of the state"—meaning state agencies. *Joseph v. Bd. of Regents of Univ. of Wis. Sys.*, 432 F.3d 746, 748 (7th Cir. 2005). Under this broad immunity, states and their arms are not generally "persons" subject to suit under 42 U.S.C. § 1983. Defendants thus argue that Plaintiffs cannot sue the Illinois State Board of Elections because it is an arm of the State of Illinois (Dkt. 26 at 11.)

Plaintiffs respond that courts in this District have previously rejected immunity arguments in Elections Clause suits because the Elections Clause falls under the "plan of Convention" exception to Eleventh Amendment immunity. (Dkt. 43 at 13.) Under the "plan of Convention" doctrine, Eleventh Amendment immunity ceases where a "fundamental postulate

implicit in the constitutional design" is at issue. *PennEast Pipeline Company, LLC v. New Jersey*, 141 S. Ct. 2244, 2258 (2021). In practice, this means that the federal government has "full and complete power" to carry out the Constitution, and when a state interferes with the exercise of that power, the sovereign immunity defense is not available. *Id.* at 2259.

Plaintiff argues that the Ballot Receipt Deadline Statute directly contradicts Article I, Section 4 of the Constitution. That section establishes that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Nothing on the face of the Statute runs afoul of this constitutional provision. By implementing the Statute, Illinois is following the constitutional command that states determine the time, place, and manner of elections. In addition, the Statute further does not conflict with the federal mandate that Election Day be held on the Tuesday after the first Monday in November. By counting only mail-in ballots postmarked on or before Election Day, the Statute does not extend the day for casting votes in a federal election. Because the Statute does not conflict with a constitutional provision, it does not fall under the plan of Convention doctrine.

Plaintiffs' cited authority applying the plan of Convention doctrine is distinguishable. *Public Interest Legal Found. v. Matthews*, No. 20-3190, 2022 U.S. Dist. LEXIS 40640 (C.D. Ill. March 8, 2022) and *Illinois Conservative Union et al. v. Illinois et al.*, No. 20-cv-05542, 2021 WL 2206159 (N.D. Ill. Sept. 28, 2021) both center on the National Voter Registration

Act (NVRA). In those cases, the courts found that the plan of Convention doctrine applied because, by passing the NVRA, Congress "act[ed] pursuant to its power under the Elections Clause." *Public Interest Legal Found.*, 2022 U.S. Dist. LEXIS 40640 at *4; *see also Ill. Conservative Union et al.*, 2021 WL 2206159, at *6. By acting under this power, Congress superseded all conflicting state laws. Unlike those cases, though, here there is no intervening federal law showing that the Ballot Receipt Deadline Statute conflicts with the Elections Clause. Those cases, therefore, do not govern the outcome here.

Because the Ballot Receipt Deadline Statute does not fall under the plan of Convention doctrine, Plaintiffs' argument that their claims are exempted from Eleventh Amendment immunity fail. Plaintiffs do not contest that the Illinois State Board of Elections is an arm of the state covered by the Eleventh Amendment and do not argue that any other Eleventh Amendment exception applies. Accordingly, and apart from the issue of standing, the Eleventh Amendment independently bars Plaintiffs' suit.

C. Plaintiffs Separately Fail to State a Claim Upon Which Relief Can Be Granted

1. Plaintiffs Do Not Allege Plausible Claims Under 2 U.S.C. § 7 or 3 U.S.C. § 1.

Assuming Plaintiffs had standing to bring their 2 U.S.C. § 7 and 3 U.S.C. § 1 claims, and further assuming Defendants were not immune under the Eleventh Amendment, Plaintiffs still must state a claim upon which relief can be granted. In their motion to dismiss, Defendants argue that Plaintiffs

have failed to do so. Specifically, Defendants contend that, because the Ballot Receipt Deadline Statute does not conflict with either 2 U.S.C. § 7 or 3 U.S.C. § 1, Plaintiffs have not brought a claim upon which this Court can grant relief.

States have wide discretion to establish the time, place, and manner of electing their federal representatives. *United States v. Classic*, 313 U.S. 219, 311 (1941). This broad discretion is subject only to one limitation: the state's system for electing its federal representatives cannot directly conflict with federal election laws on the subject. *Voting Integrity Project, Inc. v. Bomer*, 199 F. 3d 773, 775 (5th Cir. 2000). Under 2 U.S.C. § 7, the date for the election of federal representatives is "[t]he Tuesday next after the 1st Monday in November, in every even numbered year." Under 3 U.S.C. § 1, the date for appointing electors is "the Tuesday next after the first Monday in November." Together, these statutes create the federal parameters for state ballot receipt deadlines in federal elections.

Plaintiffs allege that the Ballot Receipt Deadline Statute violates 2 U.S.C. § 7 and 3 U.S.C. § 1 by allowing the state to count votes that are received after Election Day, even if they are postmarked on or before the date of the election or certified before Election Day. (Dkt. 1 at 10.) But the Statute does not contradict 2 U.S.C. § 7 and 3 U.S.C. § 1. As the statute says, all mail-in ballots must be "postmarked no later than election day." 10 Ill. Comp. Stat. Ann. § 5/19-8(c). If a ballot is not postmarked, it must be certified on or before Election Day to be counted. *Id*. Nowhere in the text does the Statute allow ballots postmarked or certified after Election Day to be counted. The

question, then, is whether ballots that are postmarked or certified on or before Election Day, but are not received by Election Day, should be disregarded as untimely under federal law.

There is a notable lack of federal law governing the timeliness of mail-in ballots. *See Bognet*, 980 F.3d at 353. In general, the Elections Clause delegates the authority to prescribe procedural rules for federal elections to the states. *See U.S. Terms Limits, Inc. v. Thorton*, 514 U.S. 779, 832–35 (1995). If the states' regulations operate harmoniously with federal statutes, Congress typically does not exercise its power to alter state election regulations. *Bognet*, 980 F. 3d at 353.

In this Court's view, and with due respect to Plaintiffs' contrary view, the Ballot Receipt Deadline Statute operates harmoniously with the federal statutes that set the timing for federal elections. Many states have post-Election Day absentee ballot receipt deadlines, and at least two states other than Illinois allow mail-in ballots postmarked on or before Election Day to be counted if they are received within two weeks of Election Day. *See* West's RCWA 29A.40.091 (Washington–no receipt deadline for ballots postmarked on or before Election Day); *see also* Utah Code Ann. § 20A-3a-204 (seven to 14 days after the election if postmarked the day before the election). Other states will accept mail-in ballots received seven to 10 days after Election Day. *See* AS § 15.20.081(e) & (h) (Alaska–10 days after Election Day if postmarked on or before Election Day); DC ST § 1-1001.05(a)(10A) (District of Columbia–seven days after the election if postmarked on or before Election Day); NV Rev Stat § 293.317 (Nevada–by 5:00 P.M. on the seventh day

after Election Day if postmarked by Election Day); R.C. § 3509.05 (Ohio–10 days after the election if postmarked by the day before Election Day). Despite these ballot receipt deadline statutes being in place for many years in many states, Congress has never stepped in and altered the rules. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14 (2013) ("There is good reason for treating Elections Clause legislation differently: The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision, which empowers Congress to 'make or alter' state election regulations.").

Moreover, the Ballot Receipt Deadline Statute is facially compatible with the relevant federal statutes. By counting only these ballots that are postmarked no later than Election Day, the Statute complies with federal law that set the date for Election Day. As the United States notes in its statement of interest in this case (Dkt. 47), even federal laws governing elections allow ballots received after Election Day to be counted. (Dkt. 47 at 1.) For example, the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), 52 U.S.C. §§ 20301–20311, sets out various requirements for states to ensure that military voters overseas can cast ballots in federal elections. And the United States Attorney General often seeks court-ordered extensions of ballot receipt deadlines to ensure that military voters are not disenfranchised. (*Id.* at 12.) These longstanding efforts by Congress and the executive branch to ensure that ballots cast by Americans living overseas are counted, so long as they are cast by Election Day, strongly suggest that statutes like the one at issue

here are compatible with the Elections Clause. (*Id*. at 10.) Because the Statute does not facially conflict with the federal election law, Plaintiffs have failed to state a viable facial challenge to the Statute based on federal law.

2. Plaintiffs Do Not Allege a Plausible Violation of Their First or Fourteenth Amendment Rights

Plaintiffs also allege that their First Amendment right to vote and right to stand for office is violated by the Ballot Receipt Deadline Statute. (Dkt. 1 at 8–9.) Even accepting all of Plaintiffs' allegations as true, which the Court must do, Plaintiffs fail to allege a plausible claim that the Statute affects their rights to vote and stand for office.[3]

a. Plaintiffs fail to state a vote dilution claim upon which relief can be granted.

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[3] Both parties dedicate significant argument to discussing whether the *Anderson-Burdick* standard should apply to this case, and if so, what the outcome should be under that test. *Anderson-Burdick* applies when a facially valid law placing restrictions on voting impermissibly burdens the right to vote. *Serv. Emps. Int'l Union, Loc. 1 v. Husted*, 906 F. Supp. 2d 745, 750 (S.D. Ohio 2012) ("[W]hen the state places a 'substantial' burden on the right to vote—one that is greater than a 'reasonable, nondiscriminatory restriction' but less than a 'severe burden'—courts apply the Anderson/Burdick test."). Because the Ballot Receipt Deadline Statute does not restrict the right to vote, the *Anderson-Burdick* test does not apply here.

As explained above, Plaintiffs' vote dilution claim rests on a theory that, if mail-in ballots received after Election Day are counted, then Plaintiffs' votes, presumably cast on or before Election Day, are diluted by the late and invalid votes. (Dkt. 43 at 20.) Counting the votes of others, however, does not infringe on Plaintiffs' right to vote.

Under the Equal Protection Clause of the Constitution, the right to vote is protected in two ways. First, a state violates the Equal Protection Clause when it, having "once granted the right to vote on equal terms," through "later arbitrary and disparate treatment, value[s] one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05 (2000). Second, the Equal Protection Clause requires states to ensure that no class of voters receives preferential treatment. *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963). To prove a violation of the Equal Protection Clause under the second theory, a plaintiff must show that there is "arbitrary and disparate treatment." *Bush*, 531 U.S. at 105.

Plaintiffs do not plausibly allege an Equal Protection Clause violation under either theory. If ballots cast by mail and postmarked by Election Day are counted, no single voter "is specifically disadvantaged," even if the votes counted in compliance with the Ballot Receipt Deadline Statute have a "mathematical impact on the final tally and thus on the proportional effect of every vote." *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020). Plaintiffs' votes are no more diluted than they would be if "get-out-the-vote" efforts were particularly successful and more people than anticipated voted in person at the polls. Another voter exercising his or her

constitutional right to vote does not affect the value of a different voter's ballot. A voter is not guaranteed to have their vote be decisive or to have their vote be for the ultimate winner of an election. On the contrary, a voter has a right to cast a lawful ballot and have that lawfully cast ballot counted. Nothing in the Statute infringes on that right, and Plaintiffs do not allege any facts that suggest their ability to cast a lawful ballot is negatively affected by the Statute. Unlike the facts in other vote dilution cases in which plaintiffs were harmed because the voting process was marred by overt fraudulent practices like ballot stuffing, Plaintiffs' votes here are not diluted by other valid, lawfully cast votes. *See, e.g., United States v. Saylor*, 322 U.S. 385, 386 (1944).

Plaintiffs also do not allege the presence of arbitrary and disparate treatment. Plaintiffs bring only a facial challenge to the Ballot Receipt Deadline Statute. Put differently, for Plaintiffs' as-pleaded theory to be plausible, it would have to be possible for the statute, as it is written, to allow Illinois election officials to count mail-in ballots that are cast after Election Day. But the text of the Statute does not permit that result. All ballots cast by Election Day are treated the same under the Statute's plain text. Untimely ballots, i.e., those not cast on or by Election Day, are not counted.

More broadly, Plaintiffs consistently—and wrongly—conflate "voting" with "counting votes." The word "voting" as used in this case is a gerund; that is, a word derived from a verb that functions as a noun. As a derivative of the verb "to vote," "voting" refers to a specific act: casting a vote. Under the Ballot Receipt Deadline Statute, the voting deadline is

unambiguous: the act of voting must take place on or before Election Day. 10 ILCS § 5/19-8(c). *Counting* those votes, however, may take place up to 14 days after Election Day. *Id*. Voting (as an act) and counting votes (as a separate act) are not the same thing, and the Statute allows counting alone—not voting—to continue after Election Day.

It is, of course, possible that election officials could be improperly applying the Ballot Receipt Deadline Statute and improperly counting late votes. But Plaintiffs do not allege this in their complaint. If Plaintiffs came to believe that election officials, in applying the Statute, were illegally counting invalid votes, then Plaintiffs might have a separate claim (and one that could likely be presented to an Illinois state court). But Plaintiffs do not allege fraudulent vote counting; they allege only that the Statute facially allows "late votes" to be counted. As explained above, nothing in the text of the Statute supports that conclusion. Plaintiffs thus fail to state a vote dilution claim upon which relief can be granted.

b. Plaintiffs do not plausibly allege that the Ballot Receipt Deadline Statute impinges on the right to stand for office.

Finally, Plaintiffs allege that the Ballot Receipt Deadline Statute impinges on the right to stand for office. As the Seventh Circuit has explained, the right to stand for office "is to some extent derivative of the right of the people to express their opinions by voting." *Nader v. Keith*, 385 F.3d 729, 737 (7th Cir. 2004). But the right to stand for office is not absolute, and the Constitution gives states the "broad authority

to regulate the conduct of elections." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 1997). If a state is regulating the "Times, Places, and Manner of holding Elections for Senators and Representatives" under Article I, Section 4, clause 1 of the Constitution, that regulation cannot be said to infringe on the right to stand for office. *See generally Tripp v. Scholz*, 872 F.3d 857, 862–863 (7th Cir. 2017).

Plaintiffs allege that the Ballot Receipt Deadline Statute forces Congressman Bost and other candidates "to spend money, devote time, and otherwise injuriously rely on unlawful provisions of state law in organizing, funding, and running their campaigns." (Dkt. 1 ¶ 46.) Plaintiffs do not, in connection with their right to stand for office claim, explain why the Statute constitutes an invalid regulation of the times, places, and manner of federal elections. Instead, Plaintiffs merely set forth their reasons why the Statute could make standing for federal office in Illinois more challenging.

These allegations do not assert a plausible claim that the Ballot Receipt Deadline Statute impairs the right to stand for office. Spending time and money on campaigning is an inevitable feature of running for office, and Plaintiffs do not contend that the extra time and money they might have to spend due to the Statute prevents them from standing for office at all. For these reasons, Plaintiffs' "right to stand for office" claim is unavailing.

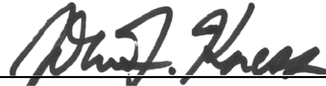
IV. CONCLUSION

Plaintiffs lack standing to sue, the Eleventh Amendment is a bar to suit, and the Complaint fails to state a claim upon which relief can be granted.

Defendants' motion to dismiss is therefore granted, and the case is dismissed. Because the principal basis for dismissal is a lack of jurisdiction based on standing, this dismissal is without prejudice. *See McHugh v. Ill. Dep't of Transp.*, 55 F.4th 529, 533 (7th Cir. 2022) (dismissals based on lack of subject matter jurisdiction and Eleventh Amendment immunity must be without prejudice).

SO ORDERED in No. 22-cv-02754.

Date: July 26, 2023



JOHN F. KNESS
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MICHAEL J. BOST, LAURA POLLASTRINI, and SUSAN SWEENEY,	
Plaintiffs,	No. 22-cv-02754
v.	Judge John F. Kness
THE ILLINOIS STATE BOARD OF ELECTIONS, and BERNADETTE MATTHEWS, in her capacity as the Executive Director of the Illinois State Board of Elections	
Defendants.	

<u>JUDGMENT IN A CIVIL CASE</u>

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff

which ☐ includes pre-judgment interest.
☐ does not include pre-judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Case dismissed without prejudice
based on lack of jurisdiction.

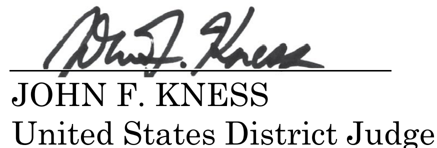
This action was *(check one):*

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.

☐ tried by Judge without a jury and the above decision was reached.

☒ decided by Judge John F. Kness on an order granting Defendants' motion (Dkt. 25) to dismiss.

Date: July 26, 2023



JOHN F. KNESS
United States District Judge

APPENDIX E

1. Elections Clause, U.S. Const. Art. I, Sec. 4, Cl. 1 provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

2. Electors Clause, U.S. Const. Art. II, Sec. 1, Cl. 4 provides:

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

3. 2 U.S.C. 7 provides:

Time of election

The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

4. 3 U.S.C. 1 provides:

Time of appointing electors

The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.

5. 2 U.S.C. 1 provides:

Time for election of Senators

At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

6. 3 U.SC. 21 provides, in part:

Definitions

As used in this chapter the term—
(1) "election day" means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, if the State modifies the period of voting, as necessitated by force majeure events that are extraordinary and

catastrophic, as provided under laws of the State enacted prior to such day, "election day" shall include the modified period of voting.

7. 10 ILCS. 5/19-8(c) provides, in part:

Each vote by mail voter's ballot that is mailed to an election authority and postmarked no later than election day, but that is received by the election authority after the polls close on election day and before the close of the period for counting provisional ballots cast at that election, shall be endorsed by the receiving authority with the day and hour of receipt and shall be counted at the central ballot counting location of the election authority during the period for counting provisional ballots.

8. 10 ILCS 5/18A-15(a) provides, in part:

The county clerk or board of election commissioners shall complete the validation and counting of provisional ballots within 14 calendar days of the day of the election. The county clerk or board of election commissioners shall have 7 calendar days from the completion of the validation and counting of provisional ballots to conduct its final canvass. The State Board of Elections shall complete within 31 calendar days of the election or sooner if all the returns are received, its final canvass of the vote for all public offices.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL J. BOST, et al., Plaintiffs, v. THE ILLINOIS STATE BOARD OF ELECTIONS, et al., Defendants.	Civil Action No. 1:22-cv-02754

DECLARATION OF MICHAEL J. BOST

I, Michael J. Bost, declare as follows:

1. I am a resident of Jackson County, Illinois and a plaintiff in this lawsuit.

2. I am registered to vote in Jackson County and voted in the county in the 2020 general federal election.

3. I am currently a member of the United States House of Representatives and represent Illinois' 12th Congressional District.

4. I was first elected to represent Illinois' 12th Congressional District in 2014. I ran for reelection in 2016, 2018, and 2020.

5. Before the recent redistricting, the 12th District included 12 Illinois counties, in whole or part.

Following the recent redistricting, the 12th District now includes 34 counties, in whole or part.

6. On June 28, 2022, I was renominated by Republican voters, and I am again a candidate to represent Illinois' 12th Congressional District in the upcoming November 8, 2022, general federal election.

7. Prior to running for Congress, I was a member of the Illinois' House of Representatives. I was first elected to the Illinois House of Representatives in 1994.

8. I have been a candidate for elected office both under Illinois' previous ballot receipt deadline (on or before Election Day) and following the 2005 amendment to 10 ILCS 5/19-8, which initially held absentee voting open fourteen days after Election Day. 2005 Ill. Laws 557 (P.A. 94-557).

9. I have also been a candidate for office after Illinois again amended Section 19-8(c). 2013 Ill. Laws 1171 (P.A. 98-1171). Following that change, Illinois expanded from holding voting open fourteen days after Election Day only for absentee ballots to holding voting open for its vote- by-mail ("VBM") program. The inclusion of ballots from the VBM program dramatically increased the number of ballots received during the fourteen days following Election Day.

10. My congressional campaign has spent, and will spend, money, time, and resources to monitor and respond as needed to ballots received by state election officials after the national Election Day.

11. Before the 2005 amendment to Section 19-8(c), it was much easier for my campaign to organize Election Day activities. Back then, campaigns

typically only needed volunteers for early voting and Election Day. Sometimes volunteers would be needed to monitor canvassing activities the day after Election Day if canvassing took too long on Election Day evening, but generally my campaign ended on Election Day evening.

12. However, the monitoring of ballots has become significantly more difficult since 2005. Previously, my campaign needed to focus its efforts on observing ballots on or before "Election Day." Now, it must invest resources on "Election Day" operations that last fourteen days rather than one day.

13. Since Illinois amended its election code to hold voting open fourteen days after Election Day, I have had to organize, fundraise, and run my campaign for fourteen additional days in order to monitor and respond as needed to ballots received after the national Election Day.

14. Since the 2005 changes, it has become significantly more difficult to find "Election Day" volunteers, especially those willing volunteer during the fourteen-day period after Election Day.

15. The volume of votes arriving after Election Day has grown significantly, especially after Illinois replaced limited absentee voting with vote-by-mail ("VBM") in 2013. Following that change, the number of ballots arriving after Election Day has substantially increased almost every year. The volume of "Election Day" resources needed has become even greater because many of these late-arriving ballots have discrepancies (e.g., insufficient information, missing signatures, dates, or postmarks) that need to be resolved.

16. Each resolution of these discrepancies takes time, assuming county election staff even go through the trouble, rather than just accepting possibly deficient ballots in bulk. This resolution process diverts volunteer and staff resources from my campaign. Moreover, my campaign needs to both monitor and evaluate whether to object to the counting of deficient ballots. This costs my campaign time, money, volunteers and other resources.

17. For example, my campaign organizes and sends poll watchers to each county courthouse in my district. That means this election my campaign will make every effort to be at the courthouses in every county in the 12th District. Because of the number of counties, this potentially means my campaign will invest hundreds of volunteer and campaign staff to monitor late arriving ballots during the two weeks after Election Day. In some instances, my poll watchers may be the only Republican poll watchers at a courthouse. If an irregularity is observed by a poll watcher during this fourteen-day period, my campaign will need to consult with campaign staff or lawyers to determine the appropriate action, if any.

18. My campaign is made up of a mix of both paid and volunteer poll watchers, lawyers, and other campaign staff. The campaign relies on both paid and volunteer staff during this fourteen-day period, which depletes its volunteer and financial resources. Before Illinois extended its receipt deadline, my campaign would have avoided such depletion.

19. Late-arriving, deficient ballots exacerbate the expenses my campaign incurs as a result of Section 19-8(c).

20. Another example involves my campaign's ballot chase program. This program is used to evaluate my campaign's get-out-the-vote efforts and other concerns. Because Section 19- 8(c) holds voting open an additional fourteen days, my campaign has to keep this program active fourteen additional days longer than it would have prior to the 2005 amendment.

21. For November 3, 2020, the State Board of Elections reported 266,417 vote-by- mail ballots statewide were received during the period from November 3rd through November 17th. Some of the late-arriving ballots reported by the State involved my race for the Illinois' 12th Congressional District.

22. As a representative and candidate for federal office, I am entitled to have election results certified with votes received in compliance with the federal Election Day statutes. I am also entitled to rely on provisions of federal law in conducting my campaign, including in particular, resources allocated to the post-election certification process.

23. Because Section 19-8(c) does not comply with federal Election Day statutes, I risk injury if untimely and illegal ballots cause me to lose my election for federal office.

24. Because Section 19-8(c) does not comply with federal Election Day statutes, I risk injury because my margin of victory in my election may be reduced by untimely and illegal ballots. Election results are the best measure for my constituents and me to evaluate the public's opinion about my effectiveness as Congressman for the 12th Congressional District. A diminished margin of victory will lead to the public

perception that my constituents have concerns about my job performance as the representative for the 12th Congressional District. Negative and positive perceptions about my effectiveness influence numerous third parties, such as future voters, Congressional leadership, donors, and potential political opponents.

25. By counting untimely votes and those received in violation of the federal Election Day deadline, the state of Illinois substantially increases the pool of total votes cast and dilutes the weight of my timely cast vote. More votes will be counted than the law allows to be counted, resulting in dilution of my vote.

26. Because Illinois' receipt deadline holds voting open two additional weeks after Election Day, I am concerned that it gives bad actors, regardless of their political affiliation, more time to better target and affect close elections, including my election.

27. For all of these reasons, I am harmed by the provisions of Illinois law that hold voting open fourteen days after federal Election Day.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

Dated: July 15, 2022

MICHAEL J. BOST

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MICHAEL J. BOST, et al., Plaintiffs, v. THE ILLINOIS STATE BOARD OF ELECTIONS, et al., Defendants.	Civil Action No. 1:22-cv-2754

DECLARATION OF LAURA POLLASTRINI

I, Laura Pollastrini, declare as follows:

1. I am a resident of Kane County, Illinois and a plaintiff in this lawsuit.

2. I am registered to vote in Kane County and have voted regularly in federal elections since 2016. Prior to moving to Kane County in 2016, I was registered to vote in DuPage County and have voted regularly in federal elections in Illinois since first registering to vote in 1986.

3. I am active in the Illinois Republican Party, Republican organizations, and Republican campaigns.

4. During the 2020 federal general election, I served as a Republican nominee for presidential and vice-presidential elector at-large for Illinois.

5. In the 2020 general federal election, I voted in person during Early Voting.

6. In 2020, I was a Precinct Committeeman and active member of the Kane County Republican Central Committee. In that role, I was one of a number of people responsible for helping to recruit volunteers to serve as either election judges or party poll watchers, including those needed to observe voting during the fourteen days following Election Day.

7. I am currently the Illinois Republican State Central Committeeperson for the 14th Congressional District. I was appointed by the Illinois State GOP Chairman as Chairwoman for the Illinois Republican Party's Presidential Electors Committee.

8. I have been active in federal and state campaigns in Illinois since 1990. I have worked or volunteered during elections in various capacities during that time. For example, I previously worked as campaign staff, campaign manager, President of the DuPage County Young Republicans, Republican Precinct Committeeman, Republican Township Chairman, Township Republican Women's Chairman, Illinois Republican State Central Committeeman, Illinois Deputy Republican State Central Committeeman, Delegate to the Republican National Convention, and Vice Chairman of the Kane County Republican Party.

9. Because my involvement in Illinois elections began in 1990, I have worked and volunteered in elections both before and after the Illinois General Assembly amended the Election Code in 2005, holding

absentee voting open fourteen days after Election Day.

10. Before the 2005 change, it was much easier to organize Election Day activities. Pre-2005, campaigns typically only needed volunteers for early voting and Election Day. Sometimes volunteers would be needed to monitor canvassing activities the day after Election Day if canvassing took too long on Election Day night and continued through the next morning.

11. However, the monitoring of canvassing has become significantly more difficult since 2005. Pre-2005, we needed to focus our efforts on observing ballots on or before "Election Day." Now, we need to invest time and energy on "Election Day" operations that last fourteen days rather than one.

12. For example, since the 2005 changes, it has become significantly more difficult to find "Election Day" volunteers, especially those willing to volunteer during the fourteen-day period after Election Day.

13. In addition, the volume of votes arriving after Election Day has grown significantly, especially after the state of Illinois replaced limited absentee voting with vote-by-mail ("VBM") in 2013. Following that change, the number of ballots arriving after Election Day has increased substantially almost every year. The volume of "Election Day" resources needed has greatly increased because many of these late-arriving ballots have discrepancies (e.g., insufficient information, missing signatures, date, or postmark) that need to be resolved. Each resolution takes time, assuming county election staff even go through the trouble, rather than just accepting possibly deficient ballots in bulk. This resolution process consumes the

volunteer and staff resources that I help organize, making my efforts to find volunteers even more difficult.

14. Of course, this assumes volunteers that I help to organize are even allowed to observe the activities during the fourteen-day period. On some occasions during federal elections, county election officials have prevented or sought to limit our ability to simply observe the post- Election Day processing of ballots.

15. My experience is that some county election officials simply do not want our volunteers at poll sites, especially a week after Election Day when ballots are still arriving. Some election officials make it very difficult for our volunteers to monitor by either refusing to tell us when they will process late arriving ballots or by affirmatively refusing to allow us to observe the processing of late arriving ballots.

16. As a result, there is a noticeable trend of more ballots arriving after Election Day, but even less opportunity to observe the ballot counting process. Stated differently, since 2005 there is more voting, but less transparency after Election Day in Illinois.

17. For the 2022 federal election, I am working to train and find volunteers to serve as poll watchers and election judges. Even this year, despite polls showing renewed interest in Republican candidates in Illinois, it is becoming increasingly harder for me to find volunteers needed to ensure transparency during the fourteen-day period after Election Day.

18. By counting untimely votes and those received in violation of the federal Election Day deadline, the state of Illinois substantially increases

the pool of total votes cast and dilutes the weight of my timely cast vote. More votes will be counted than the law allows to be counted, resulting in dilution of my vote.

19. I intend to vote in the November 8, 2022 and the November 5, 2024 federal elections.

20. I am seeking election as the Illinois Republican State Central Committeeperson for the new 11th Congressional District.

21. I intend to seek reappointment as the Chairwoman for the Illinois Republican's Presidential Electors Committee in 2024, and as an at-large Illinois presidential elector for the November 5, 2024, presidential election.

22. The counting of unlawful ballots increases the likelihood of fraudulent activity which discourages my intended participation as both a voter and a presidential elector in upcoming elections for federal office in Illinois. It also discourages volunteers from devoting time and energy to observing and participating in the post-Election Day canvassing of absentee ballots.

23. Because Illinois' receipt deadline holds voting open two additional weeks after Election Day, I am concerned that it gives bad actors, regardless of their political affiliation, more time to better target and affect close elections, including the election for the appointment of presidential and vice-presidential electors.

24. For all of these reasons, I am harmed by the provisions of Illinois law that allow the canvassing of vote-by-mail ballots received after Election Day.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

Dated: July 15, 2022

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL J. BOST, et al., Plaintiffs, v. THE ILLINOIS STATE BOARD OF ELECTIONS, et al., Defendants.	Civil Action No. 1:22-cv-2754

<u>DECLARATION OF SUSAN SWEENEY</u>

I, Susan Sweeney, declare as follows:

1. I am a resident of Cook County, Illinois and a plaintiff in this lawsuit.

2. I am registered to vote in Cook County and have voted regularly in federal elections since 2004. I intend to vote in the November 8, 2022 and November 5, 2024 federal elections.

3. I am active in Republican elections, the Illinois Republican Party, Republican organizations and campaigns.

4. During the 2020 federal general election, I served as a Republican nominee for presidential and vice-presidential elector at-large for I11inois.

5. As a volunteer, I have assisted the Illinois Republican Party and its federal and state candidates both before and after Election Day.

6. I am serving as a Precinct Captain for the Republican Party of Maine Township, Illinois during the November 8, 2022, congressional elections.

7. As Precinct Captain, I will act as a poll watcher both before, during, and after Election Day. Among other things, I will monitor the canvassing of ballots and look for any abnormalities, which I may report to election attorneys for the Republican Party or campaigns.

8. I have previously volunteered in other ways. For example, from 2014 to 2018, I was the Deputy Committeeman for the Illinois Republican State Central Committee for the 9th Congressional District. One of my duties in that capacity included selecting committees for the state convention, including the at-large delegates and presidential and vice-presidential electors. After each Election Day, I monitored daily canvassing reports posted by the Cook County Board of Elections.

9. Additionally, I previously served as Republican Deputy Committeeman for Maine Township, Illinois. As Deputy Committeeman for the Township, I was part of a team that recruited and trained different election volunteers (*e.g.*, precinct captains) and organized our election reporting operations. This work required many hours of work and funding. I helped plan and host fundraisers that funded our Election Day activities. We also worked to find other volunteers. It has gotten more difficult to find volunteers because Illinois' Receipt Deadline

requires monitoring of incoming ballots fourteen days after Election Day.

10. As part of these Election Day activities, we tracked and monitored incoming vote counts for local and federal campaigns, including vote counts during the fourteen days following Election Day. During this time, I also fielded calls from poll watchers about possible irregularities and anomalies at poll sites.

11. I also served as President of Illinois Republican Women of Park Ridge from 2014-

2018. Among other things, my job as president included overseeing our organization's efforts to support candidates either financially or by providing volunteers.

12. During the November 3, 2020, federal election, I volunteered with the Illinois Republican Party monitoring post-election activities. In the two weeks following Election Day, I monitored daily reports regarding late-arriving ballots. I fielded numerous concerns regarding possible irregularities or anomalies. My work during this time often involved talking to election staff, poll watchers, and people involved with the post-election activities. The information I compiled from those reports was passed on to the Illinois Republican Party and campaigns.

13. I even attempted to watch the post-election canvassing inside the Cook County Board of Elections facility in Cicero, Illinois during the 2020 election. But poll watching during the canvass, including watching the processing of late-arriving ballots, was very restricted.

14. In 2020, I was also a Republican nominee for presidential and vice-presidential elector at-large for Illinois. In my role as an elector nominee, I campaigned and monitored Election Day activities on behalf of my own candidacy in that federal election.

15. I plan to be similarly involved during the November 8, 2022, congressional elections.

16. During the November 3, 2020, federal election, I voted in person on Election Day.

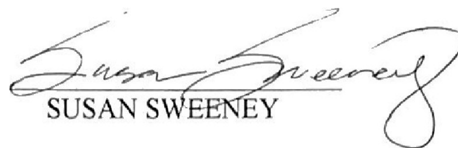
17. By counting untimely votes and those received in violation of the federal Election Day deadline, Illinois substantially increases the pool of total votes cast and dilutes the weight of my timely casted vote. More votes will be counted than the law allows to be counted, resulting in dilution of my vote.

18. Because Illinois' receipt deadline holds voting open two additional weeks after Election Day, I am concerned that it gives bad actors, regardless of their political affiliation, more time to better target and affect close elections, including the election for the appointment of presidential and vice-presidential electors.

19. For all of these reasons, I am harmed by the provisions of Illinois law that allow the canvassing of vote-by-mail ballots received after Election Day.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

Dated: July 15, 2022



SUSAN SWEENEY

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

<table>
<tr><td>MICHAEL J. BOST; LAURA POLLASTRINI; and SUSAN SWEENEY,

Plaintiffs,

v.

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

Defendants.</td><td>Civil Action No. _____</td></tr>
</table>

COMPLAINT

Plaintiffs Congressman Michael J. Bost, Laura Pollastrini, and Susan Sweeney ("Plaintiffs"), by and through counsel, file this Complaint against the Illinois State Board of Elections and its Executive Director Bernadette Matthews, and allege as follows:

1. Plaintiffs are former and prospective federal candidates and registered Illinois voters, all of whom

seek declaratory and injunctive relief to enjoin parts of the Illinois election code.

2. The United States Congress is authorized under Art. I, § 4 cl. 1 and Art. II, § 1 cl. 4 to establish the Time for conducting federal elections. Congress exercised this authority in 1845 when it enacted the first of a trio of statutes that established a uniform national election day for all federal elections.

3. Under federal law, the first Tuesday after the first Monday in November of every even-numbered year is election day ("Election Day") for federal elections. *See* 2 U.S.C. § 1; 2 U.S.C. § 7; and 3 U.S.C. § 1.

4. Despite Congress' clear statement regarding a single national Election Day, Illinois has expanded Election Day by extending by 14 days the date for receipt and counting of vote-by-mail ballots. *See* 10 Ill. Comp. Stat. Ann. §§ 5/18A-15(a) & 5/19-8(c).

5. Plaintiffs allege that Illinois' extension of Election Day violates federal law and their rights.

6. Plaintiffs seek a judgment declaring Illinois' extension of Election Day to be unlawful and seek an injunction enjoining the extension.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, and 2201, because the matters in controversy arise under the Constitution and laws of the United States, because they concern the deprivation, under color of State law, of rights secured to Plaintiffs by the Constitution of the United States and by Acts of

Congress, and because they are proper subjects for a declaratory judgment.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because one or more Defendants resides in this district and all Defendants are residents of Illinois, and because a substantial part of the events and omissions giving rise to the claims herein occurred in this district; or, in the alternative, because one or more Defendants is subject to the Court's personal jurisdiction in this district with respect to this action.

PARTIES

9. Plaintiff Michael J. Bost is a resident of Jackson County, Illinois and a registered Illinois voter who voted in the 2020 congressional and presidential elections. He intends to vote in the 2022 congressional election as well as the 2024 presidential and congressional elections. He also is a multi-term member of the United States House of Representatives and represents Illinois' 12th Congressional District. Congressman Bost successfully ran for re-election in the November 3, 2020 federal election and currently is a candidate for United States Representative for Illinois' 12th Congressional District during the November 8, 2022 federal election.

10. Plaintiff Laura Pollastrini is a resident of Kane County, Illinois, and a registered Illinois voter who voted in the 2020 congressional and presidential elections. She intends to vote in the 2022 congressional election as well as the 2024 presidential and congressional elections. Ms. Pollastrini is currently the Illinois Republican State Central

Committeeperson for the 14th Congressional District. Ms. Pollastrini was appointed by the Illinois State Republican Chairman both as Chairwoman for the Illinois Republican's Presidential Electors Committee and as Republican presidential and vice-presidential elector at-large for Illinois during the 2020 presidential election. As the Illinois Republican State Central Committeeperson for the 14th Congressional District during the 2020 general election, Ms. Pollastrini herself appointed a Republican presidential and vice-presidential elector for the 14th Congressional District. Following redistricting, Ms. Pollastrini intends to seek election as the Illinois Republican State Central Committeeperson for the new 11th Congressional District. Ms. Pollastrini also intends to seek reappointment as the Chairwoman for the Illinois Republican's Presidential Electors Committee in 2024. Ms. Pollastrini further intends to seek reappointment as an at-large presidential and vice-presidential elector for the November 5, 2024, presidential election.

11. Plaintiff Susan Sweeney is a resident of Cook County, Illinois, and a registered Illinois voter who voted in the 2020 congressional and presidential elections. She intends to vote in the 2022 congressional election as well as the 2024 presidential and congressional elections. Ms. Sweeney was a Republican presidential elector during the 2020 presidential election. Ms. Sweeney intends to seek reappointment as an Illinois presidential elector for the November 5, 2024, presidential election.

12. Defendant Illinois State Board of Elections (the "State Board") is an independent state agency created under the laws of the State of Illinois.

Defendant State Board is responsible for supervising the administration of election laws throughout Illinois.

13. Defendant Bernadette Matthews is the Executive Director of the Illinois State Board of Elections and the Chief State Election Official of the State of Illinois. 26 Ill. Adm. Code § 216.100(b)-(c); 52 U.S.C. § 20509. She is sued in her official capacity.

FACTS

14. The Illinois election code authorizes voting by mail and further provides that vote-by-mail ballots received "after the polls close on election day" but before "the close of the period for counting provisional ballots" shall be counted as if cast and received on or before Election Day. *See* 10 Ill. Comp. Stat. Ann. § 5/19-8(c).

15. In Illinois, election officials shall complete "the validation and counting of provisional ballots within 14 calendar days of the day of the election." 10 Ill. Comp. Stat. Ann. § 5/18A-15(a).

16. Read together, these two provisions mean that vote-by-mail ballots received up to 14 calendar days after the day of the election shall be counted as if cast and received on or before Election Day.

17. Even vote-by-mail ballots without postmarks shall be counted if received up to 14 calendar days after Election Day if the ballots are dated on or before election day. *See* 10 Ill. Comp. Stat. Ann. § 5/19-8(c).

18. For example, although Election Day for the 2020 federal elections was November 3, 2020, Illinois law authorized the counting of vote-by-mail ballots

received on or before November 17, 2020, even if those ballots were not postmarked by Election Day.

19. On November 2, 2020, the State Board of Elections issued a media advisory stating it had received approximately 1,759,245 mailed ballots prior to Election Day.[1] The Board further advised that the number of ballots received after Election Day through November 17, 2020, could materially affect the unofficial election results. Specifically, the State Board explained:

> As mail ballots arrive in the days after Nov. 3, it is likely that close races may see leads change as results are reported. Reporters should check with local election authorities for updated vote counts and make readers, viewers and listeners aware of why these numbers are changing.

Id.

20. In its December 4, 2020, press release announcing certified results from the November 3, 2020 election, the State Board announced that there had been a total of 6,098,729 votes in the 2020 election, of which 2,025,662 were vote-by-mail ballots.[2]

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[1] "*Media Advisory: Heavy Mail Voting Could Affect Unofficial Elections Results*," Illinois State Board of Elections, Nov. 2, 2020, https://bit.ly/3y9qCWU, (last visited May 24, 2022).

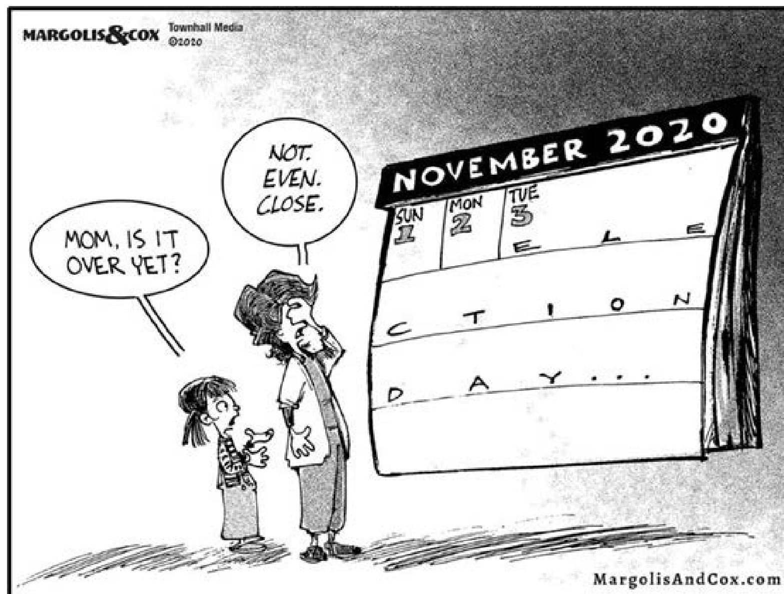
[2] "*Record Number of Votes Cast, Turnout tops 2016 as Board of Elections Certifies 2020 General Election Results*," Illinois State Board of Elections, Dec. 4, 2020, https://bit.ly/3y9tumE (last visited May 24,2022).

21. Read together, the November 2nd and December 4th press releases indicate that Illinois received 266,417 vote-by-mail ballots statewide during the period from November 3rd through November 17th.

22. Upon information and belief, most of the 266,417 vote-by-mail ballots were received after Election Day, which would mean that as many as 4.4% of votes cast in 2020 were received *after* Election Day.

23. Illinois is not allowed to hold open voting for congressional and presidential beyond the single Election Day.

24. One editorialist recently satirized the abandonment of a single national Election Day as follows:



25. The next federal election in Illinois will be held on Tuesday, November 8, 2022, at which time Illinois will elect a new Congressional delegation. Under Illinois law's extended ballot receipt deadline, vote-by-mail ballots shall be counted if received on or before November 22, 2022.

26. Accordingly, Illinois will illegally hold voting open beyond Election Day on November 8, 2022.

27. Another federal election will be held in Illinois on Tuesday, November 5, 2024, at which time Illinois will elect its next slate of presidential and vice-presidential electors as well as a new Congressional delegation. Under Illinois law's extended ballot receipt deadline, vote-by-mail ballots shall be counted if received on or before November 19, 2024.

28. Accordingly, Illinois will hold voting open beyond Election Day on November 5, 2024.

29. Counting ballots received after Election Day harms Plaintiffs.

30. Among other harms, Plaintiffs votes will be diluted by illegal ballots received in violation of the federal Election Day statutes.

31. All Plaintiffs intend to vote and conduct their prospective campaigns in accordance with federal law.

32. Plaintiffs are entitled to have their elections results certified with votes received in compliance with the federal Election Day statutes.

33. Plaintiffs rely on provisions of federal and state law in conducting their campaigns including, in

particular, resources allocated to the post-election certification process.

34. Counting untimely votes and those received in violation of federal law substantially increases the pool of total votes cast and dilutes the weight of Plaintiffs' votes. More votes will be counted than the law allows to be counted, resulting in dilution.

35. Likewise, untimely votes will be counted after the federal Election Day deadline, defined as "the combined actions of voters and officials meant to make a final selection of an officeholder."

36. Plaintiffs will be subject to harms beyond even these above-stated harms.

37. These harms are severe and irreparable.

COUNT I

Violation of the Right to Vote (42 U.S.C. § 1983)

38. Plaintiffs incorporate all their prior allegations.

39. 10 Ill. Comp. Stat. Ann. § 5/19-8 requires counties to hold open voting and count ballots received after Election Day, in violation of 2 U.S.C. § 7 and 3 U.S.C. § 1.

40. Because counting ballots received after Election Day violates 2 U.S.C. § 7 and 3 U.S.C. § 1, any such ballots are untimely and therefore illegal under 2 U.S.C. § 7 and 3 U.S.C. § 1.

41. Untimely and illegal ballots received and counted after Election Day pursuant to 10 Ill. Comp. Stat. Ann. § 5/19-8 dilute the value of timely ballots

cast and received on or before Election Day, including Plaintiffs' timely cast and received ballots.

42. By counting untimely and illegal ballots received after Election Day and diluting Plaintiffs' timely cast and received ballots, Defendants, acting under color of Illinois law, have deprived and are depriving Plaintiffs of rights protected under the First Amendment and 14th Amendment to the U.S. Constitution in violation of 42 U.S.C. § 1983.

43. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing 10 Ill. Comp. Stat. Ann. § 5/19-8.

COUNT II

Violation of the Right to Stand for Office (42 U.S.C. § 1983)

44. Plaintiffs incorporate all their prior allegations.

45. 10 Ill. Comp. Stat. Ann. § 5/19-8 requires counties to hold open voting and count ballots received after Election Day, including those without postmarks.

46. Defendants, acting under color of Illinois law, have deprived and are depriving Plaintiffs of rights protected under the First and Fourteenth Amendment to the U.S. Constitution in violation of 42 U.S.C. § 1983 by, inter alia, forcing Plaintiffs to spend money, devote time, and otherwise injuriously rely on unlawful provisions of state law in organizing, funding, and running their campaigns.

47. Defendants, acting under color of Illinois law, have deprived and are depriving Plaintiffs of rights protected under the First Amendment and 14th Amendment to the U.S. Constitution in violation of 42 U.S.C. § 1983.

48. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing 10 Ill. Comp. Stat. Ann. § 5/19-8.

COUNT III

Violation of 2 U.S.C. § 7 and 3 U.S.C. §1

49. Plaintiffs incorporate all their prior allegations.

50. 2 U.S.C. §7 provides that "[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter."

51. 3 U.S.C. §1 provides that "[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."

52. By its terms 2 U.S.C. § 7 requires that the 2022 general election for Representatives to the Congress be consummated on Election Day, November 8, 2022 and Election Day, November 5, 2024.

53. Under Illinois law's extended ballot receipt deadline, vote-by-mail ballots shall be counted if received on or before November 22, 2022, in violation of 2 U.S.C. § 7's Election Day mandate.

54. By its terms 3 U.S.C. § 1 requires that the 2024 general election for Presidential electors be consummated on Election Day, November 5, 2024.

55. Under Illinois law's extended ballot receipt deadline, vote-by-mail ballots shall be counted if received on or before November 19, 2024, in violation of 3 U.S.C. § 1's Election Day mandate.

56. Illinois law permitting vote-by-mail ballots, including those without postmarks, to be counted if they are received fourteen days after Election Day violates 2 U.S.C. § 7 and 3 U.S.C. § 1.

57. A qualified ballot for federal office is not a legal vote unless it is received by Election Day.

58. State law or practice that holds open voting 14 after Election Day is invalid and void as superseded under 2 U.S.C. § 7 and 3 U.S.C. § 1.

59. Defendants have acted and will continue to act under color of state law to violate 2 U.S.C. § 7 and 3 U.S.C. § 1.

60. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing 10 Ill. Comp. Stat. Ann. § 5/19-8.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for entry of a judgment granting:

a. A declaratory judgment that the relevant parts of 10 Ill. Comp. Stat. Ann. § 5/19-8 identified herein deprive Plaintiffs, under color of State law, of rights secured by the Constitution of the United States and by Acts of Congress;

b. A permanent injunction prohibiting Defendants from enforcing the relevant parts of Illinois law, including 10 Ill. Comp. Stat. Ann. § 5/19-8, as identified herein;

c. Plaintiffs' reasonable costs and expenses, including attorneys' fees; and

d. All other relief that Plaintiffs are entitled to, and that the Court deems just and proper.

May 25, 2022

s/ Christine Svenson
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* *Application for admission pro hac vice forthcoming*