No. 24-568

IN THE
Supreme Court of the United States

MICHAEL J. BOST, et al.,
Petitioners,

v.

ILLINOIS STATE BOARD OF ELECTIONS, et al.,
Respondents.

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

BRIEF OF AMICI CURIAE RESTORING INTEGRITY AND TRUST IN ELECTIONS AND HONEST ELECTIONS PROJECT IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Federal law sets the first Tuesday after the first Monday in November as the federal Election Day. 2 U.S.C. §§ 1 and 7; and 3 U.S.C. § 1. Several states, including Illinois, have enacted state laws that allow ballots cast in federal elections to be received and counted after Election Day.

Petitioners contend these state laws are preempted under the Elections and Electors Clauses. Petitioners sued to enjoin Illinois' law allowing ballots to be received up to fourteen days after Election Day.

The sole question presented here is whether Petitioners, as federal candidates, have pleaded sufficient factual allegations to show Article III standing to challenge state time, place, and manner regulations concerning their federal elections.

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INTEREST OF AMICI

Restoring Integrity and Trust in Elections ("RITE") is a 501(c)(4) nonprofit organization with the mission of protecting the rule of law in elections in the United States. RITE is a nonpartisan, public-interest organization dedicated to protecting elections as the democratic voice of the people.

The Honest Elections Project (the "Project") is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, which implicates the state legislature's preeminent role in setting the rules for elections.

As part of their missions, RITE and the Project seek to defend the electoral process from practices that risk sowing distrust in outcomes, such as the challenged provisions of Illinois law here, 10 Ill. Comp. Stat. Ann. §§ 5/18A-15(a), 5/19-8(c), which mandate the counting of absentee ballots that arrive up to 14 days *after* election day so long as they are post-marked on or before election day.

RITE and the Project further believe that the validity of the Illinois post-election receipt deadline should be reviewable in federal court and therefore support the right of Petitioners to challenge this provision.

RITE and the Project respectfully submit this brief as Amici Curiae in support of the Plaintiffs' challenge to those provisions.[1]

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[1] Pursuant to Rule 37.6, counsel for Amici Curiae certifies that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than Amici contributed money to fund the brief's preparation or submission.

Pursuant to Rule 37.2, counsel of record for all parties received notice at least 10 days prior to the deadline of Amici's intent to file this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The strength of any democracy depends on voters trusting electoral outcomes. Voter confidence in election integrity is essential to effective democracies, whose legitimacy and ability to govern necessarily depend on voter trust.

Congress, knowing this, has for nearly two centuries sought to promote that necessary trust and consistency by setting a single nationwide Election Day. Pursuant to Article I, § 4, cl. 1 and Article II, § 1 cl. 4, Congress has set a single day for federal elections: The "day for the election" for selecting members of the House of Representatives is the "Tuesday next after the 1st Monday in November, in every even numbered year" ("Election Day"). 2 U.S.C. § 7. Likewise, 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.

This Court, for its part, has made crystal clear what Congress's single-election-day mandate means: By the close of that Election Day, all the "combined actions of voters and officials *meant to make a final selection* of an officeholder" must occur. *Foster v. Love*, 522 U.S. 67, 71 (1997) (emphasis added).

Under *Foster*, *receipt* of mail-in ballots is one of the required "final act[s] of selection" to cast a ballot by Election Day. Receipt is the sine qua non of a mail-in vote. A vote is not valid unless and until it is received by election officials. No one disputes this. A fully completed absentee ballot sitting on a kitchen table is not a vote because it has not been received.

Illinois, however, is not content to abide by Congress's mandate that all requisite actions needed to make a "final act of selection" occur by Election Day. *Id.* at 72. Instead, the State has created a two-week period after Election Day during which Illinois receives and counts ballots postmarked or certified as being sent on or before Election Day. Specifically, Illinois law allows voters to cast their ballots by mail in any election so long as the ballot is postmarked on or before Election Day. 10 Ill. Comp. Stat. Ann. §§ 5/19-1; 5/19-8(c). And if the mailed ballot has no postmark, the voter need only have signed and dated a certification accompanying the ballot on or before Election Day to have their ballot counted. *Id.* § 5/19-8(c). Any mail-in ballot that satisfies 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 after the election date. *Id.* § 5/18A-15(a).

Under the federal Election Day statutes and *Foster*, however, *receipt* of absentee ballots must occur

before the end of Election Day or else the vote is untimely. Under *Foster*, when a ballot is received after Election Day, the vote was not cast by Election Day and thus may not be counted.

Illinois law expressly violates this congressional constraint and this Court's decision in *Foster*, permitting ballots that are received up to fourteen days *after* Election Day to be counted as long as they are postmarked by election day. This engenders all sorts of mischief and problems, not the least of which is sowing further mistrust in our election system when mistrust is already far too prevalent.

The Seventh Circuit never reached the merits of this obvious violation of Congress's Election Day statutes and *Foster*, however. Instead, a split panel held that petitioners lacked Article III standing even to raise these issues.

That decision was plainly wrong and splits with the decisions of multiple circuits on multiple different grounds. By holding that Petitioner (and Congressman) Bost does not suffer cognizable competitive injury when votes are unlawfully cast and counted for his electoral opponents, the Seventh Circuit directly split with decisions of the D.C., First, and Second Circuits. By holding that Congressman Bost's additional expenditures occasioned by Illinois's Post-Election Receipt Deadline did not constitute

cognizable injury, the court of appeals opened yet another split, this time with the Fifth Circuit. And by holding that Congressman Bost did not possess a "cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast," *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020), *see* App.14a, the Seventh Circuit created yet another square split with the Eighth Circuit.

This Court's review is particularly warranted because the merits issues that the Seventh Circuit evaded by its erroneous standing holdings will themselves eventually merit this Court's review. More than a dozen other States, like Illinois, count mail-in ballots that are received after Election Day.[2] Those states differ widely as to exactly how many days after Election Day ballots can be received and counted—from 5pm the next day to Illinois's remarkable 14 days.[3] And the lags occasioned by these drawn-out deadlines contribute to the absurd delays in counting ballots that persist in many States, which are essentially unseen in any other developed country in the world. In turn, these protracted delays greatly, needlessly, and *illegally* contribute to

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[2] See Nat'l Conf. of State Legislatures, *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, *available at* https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots (last checked Dec. 18, 2024).

[3] *Id.*

diminished confidence in elections that undermine our democracy.

The patchwork created by these unlawful deadlines are precisely the sort of mishmash that the Elections Clause and this Court were created to prevent. Under the Seventh Circuit's flawed approach, however, it is doubtful that *anyone* has standing to challenge these manifestly unlawful extra-innings votes. As a result, this wanton and unlawful threat to the voters' trust in our elections could well go unreviewed should the decision below go uncorrected.

This Court should thus grant review and reverse.

ARGUMENT

I. The Seventh Circuit's standing holding creates multiple circuit splits that warrant review

While the Seventh Circuit's jurisdictional reasoning has little to recommend it, the splits occasioned by it are truly remarkable. The decision below impressively contradicts the holdings or approaches of at least *five other Circuits on three distinct standing theories*. Had the Seventh Circuit followed the reasoning of her sister circuits on even *one* of those three standing grounds, Petitioners would have had standing and the need for this Court's

review on jurisdictional issues would have been obviated entirely. Only by splitting with *virtually everything* her sister circuits have ever held on each of the standing theories at issue did the Seventh Circuit produce the aberrant outcome below.

Considering the importance of clarity and uniformity in our election laws—with special consideration to the concerns many voters have had in recent years over the integrity of our elections—this divergence in the Circuits and resulting patchwork is untenable. This Court should grant certiorari to revolve the manifest and multitudinous splits that the Seventh Circuit's standing holding needlessly created here.

A. A zero-sum loss of votes is a quintessential electoral injury in fact, and would have sufficed for standing in the D.C., First, and Second Circuits

For nearly 200 years, a bedrock feature of federal elections is that they produce only *one* winner for each race. Each vote that is counted goes for just one candidate. By its nature, that vote does not go for another candidate. Put simply, a vote for one candidate is a vote *against* the other candidate(s).

The whole point of being a candidate is to win the election to become an officeholder, so a decreased

chance of that outcome is the most direct harm imaginable to a candidate. This is far more zero-sum than, for example, competitive impacts in the antitrust context, where the effect on competitors might be a matter of degree and therefore more indeterminate; yet competitive standing is well-established for antitrust cases. The same result should obtain for federal candidate elections that, by their very nature, are even more inherently zero-sum-game affairs.

"[C]ourts have routinely recognized this type of injury—i.e., illegal structuring of a competitive environment—as sufficient to support Article III standing." *Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005). For example, the First Circuit has multiple precedents drawing on "the theory of political competitor standing." *See Castro v. Scanlan*, 86 F.4th 947, 955 (1st Cir. 2023). Under this theory, a "direct and current competitor" in the political context will have standing to sue if a regulation affects the "conduct of [the candidate's] campaign" or produces similar effect. *Id*. In the First Circuit, a candidate alleging a "diminution of votes" injury "must show that his status as a political candidate gave rise to the kind of injury" claimed, i.e., that the candidate "was competing … for voters" in the race in question. *Id.* at 957.

The Second Circuit has similarly found standing for a political actor when a State rule "siphoned votes away from" the competitor plaintiff. *CREW v. Trump*, 953 F.3d 178, 215 (2d Cir. 2019). In other words, the "electoral injury," *id.*, was established by decreased electoral prospects produced by a "resulting loss of votes." *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994).

The D.C. Circuit has drawn from the Second Circuit's rule that the plaintiff need only "show that he personally competes in the same arena with the same party to whom the government has bestowed the assertedly illegal benefit." *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998) (quoting *In re U.S. Catholic Conf.*, 885 F.2d 1020, 1029 (2d Cir. 1989)). In *Shays*, the D.C. Circuit concluded its precedent "embod[ies] a principle that supports [candidates'] standing: that when regulations illegally structure a competitive environment—whether an agency proceeding, a market, or a reelection race—parties defending concrete interests (e.g., retention of elected office) in that environment suffer legal harm under Article III." *Shays*, 414 F.3d at 87.

So it is here: Illinois's rules allowing the counting of late-arriving votes create an illegal vote-counting structure in the quintessential competitive environment of an election, and Congressman Bost suffers competitive harm as a result. That's legal

harm that would suffice in the D.C., First, and Second Circuits. But not in the Seventh.

Invalid votes that are unlawfully counted directly affect Congressman Bost in the competitive, zero-sum environment of Congressional elections. Where, as here, a candidate has plausibly alleged a substantial risk that illegal votes will be counted against him, he has competitive injury that establishes Article III standing.

The court of appeals gave only a perfunctory "to-be-sure" nod to this split, *see* Pet.App.13a (citing *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990), but faulted these plaintiffs for failing to allege that the "majority of the votes that will be received and counted after Election Day will break against them." Pet.App.14a. That cursory attempt at distinction is wrong twice over, particularly given the motion-to-dismiss posture. To begin, the court of appeals simply failed to "'presume that general allegations embrace those specific facts that are necessary to support the claim,'" as it was required to do. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (alteration and citation omitted). Petitioner Bost specifically alleged that he "risk[ed] injury because my margin of victory in my election may be reduced by untimely and illegal ballots." Pet.App.68a. Under *Lujan*, that was enough.

The court of appeals compounded that error by applying an overly onerous standard: that the candidate must allege without a shadow of a doubt that a majority of the late-arriving votes *will* break against the candidate. But that's a standard that requires litigants to be certain about what injuries the future will bring.

Article III requires no such supernatural powers of precognition. Rather, the *actual* standard for establishing standing based on risks of future injury from a law like Illinois's requires only "substantial risk": "[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 435 (2021); *accord Murthy v. Missouri*, 603 U.S. 43, 69 (2024) ("To obtain forward-looking relief, the plaintiffs must establish a *substantial risk* of future injury that is traceable to the Government defendants and likely to be redressed by an injunction against them." (emphasis added)); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (in the threatened enforcement context, "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' *or there is a 'substantial risk' that the harm will occur*." (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414, n.5 (2013) (emphasis added))).

The counting of late-arriving votes was something certainly imminent for Petitioner Bost, and there was a "substantial risk" the votes would cut against him. In the political competitor standing context, where injury is based on counting votes, the zero-sum nature of vote-counting makes this risk non-speculative. After all, *every* vote counted for one candidate is a vote not counted for his opponent, decreasing the electoral chances of the second candidate. The quintessential nature of a winner-take-all election necessarily meant that Bost's margin of victory was at risk of decrease due to Illinois's challenged law.

Finally, the decision below seems to suggest that a harm is speculative unless the plaintiff candidate can show he faces an "election defeat" or that he would "lose the election." Pet.App.12a. But that approach does not sit well with this Court's standing jurisprudence, which requires plaintiffs only to show *injury*—not that the harm has manifested in its most catastrophic form possible. A Takings Clause plaintiff, for example, need only show economic loss to have standing to challenge the alleged taking, not bankruptcy. A First Amendment plaintiff need only show that his speech has been chilled—not that he has been outright silenced. And an electoral harm for a candidate occurs when the candidate's electoral chances are decreased—whether or not that causes outright defeat.

B. Congressman Bost, like any candidate dealing with time, place, and manner laws like Illinois's, faces diversionary costs and a costlier election campaign

In dissent, Judge Scudder correctly recounted the facts as plausibly alleged and construed in the plaintiff's favor: "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." Pet.App.22a. Those three "wills" alone (not "mights") establish standing here. The only way to reject standing, as the panel majority did, is to either (1) refuse to credit Congressman Bost's well-pleaded allegations as to the staffing cost; or (2) reject the resource diversion theory of standing in its entirety.

The Seventh Circuit appears to have adopted the latter approach. In doing so, its rejection of the resource diversion theory of standing directly contradicts the Fifth Circuit's conclusion in this very same post-election-day-ballot-receipt context that diversion-of-resources standing "fits comfortably within [Fifth Circuit] precedents." *RNC v. Wetzel*, 120 F.4th 200, 205 n.3 (5th Cir. 2024) (citing *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017); *Vote.Org v. Callanen*, 89 F.4th 459, 471 (5th Cir. 2023)). In the Fifth Circuit, Congressman Bost's

resource diversions almost certainly would have sufficed for standing.

True, the two cited cases and *RNC v. Wetzel* itself concern *organizational* standing for diversion-of-resources. But that the injury here is directly felt by an individual plaintiff, rather than an organization, only supports standing, rather than undermining it. Indeed, Congressman Bost's harms are classic pocketbook injuries, which as "monetary harms" qualify as one of the "most obvious" and "traditional" forms of injury, which "readily qualify as concrete injuries under Article III." *TransUnion*, 594 U.S. at 425.

This Court is more skeptical of organizational standing than individual standing. *See generally FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367 (2024). There, this Court rejected a general theory that "standing exists when an organization diverts its resources in response to a defendant's actions"; but even so, this Court recognized that diversion of resources *could* constitute an injury when a defendant's actions "*directly affected* and interfered with [plaintiff's] *core business activities*." *Id.* at 395 (emphases added).

That is just so here. The "core business" of a candidate for elected office is winning elections. And counting votes for his opponent incontestably

"directly affect[s] and interfere[s]" with that core mission. *Id.*

Resource diversion by an individual should *a fortiori* afford standing where, as here, the same injury by an organization would establish Article III standing even under the tightened standard from *Alliance for Hippocratic Medicine*. If an organization's resource diversion to protect its core activities is a cognizable injury in fact, then surely a federal candidate's resource diversion to protect his core activity—winning elections—is too.

Second, the money that candidate Bost would expend on post-election ballot chase operations is the *committee's* money. In other words, for purposes of this case—and similar cases—the organizational standing of the candidate committee is indistinguishable from the individual standing of the candidate him- or herself. The Fifth Circuit has reasoned as much for *parties*, holding in one election case that the Texas Democratic Party had "direct standing because [the opposing candidate's] replacement would cause [the party] economic loss. … the [party] would suffer an injury in fact because it 'would need to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame.'" *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006).

The application of resource diversion theory to a candidate's campaign spending fits well within this Court's basic standing jurisprudence. It also triggers a perfect opportunity for this Court to resolve a question it has now twice reserved for future determination: Whether "harms centered on costlier or more difficult election campaigns are cognizable." *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 671 (2019) (citing *Wittman v. Personhuballah*, 578 U.S. 539, 545 (2016)).

The confusion of the lower courts that has persisted since *Bethune-Hill* and *Wittman* is good reason for this Court to now answer that question in the affirmative: *i.e.*, hold that where a State's time, place, or manner regulation could plausibly trigger "costlier or more difficult election campaigns," *Bethune-Hill*, 587 U.S. at 671, the affected candidates have standing to challenge them.

This Court has not imposed a minimum threshold of cost or difficulty for Article III, and no one "dispute[s] that even one dollar's worth of harm is traditionally enough to qualify as concrete injury under Article III." *United States v. Texas*, 599 U.S. 670, 688 (2023) (Gorsuch, J., concurring) (cleaned up). This principle, straightforwardly applied, quickly shows the decision below to be in error. As Judge Scudder accurately recounted, Illinois *was* going to (and did) extend Election Day, and Congressman Bost

was going to spend the money to make sure volunteers were present at the various canvassing locations. Those were things that were simply going to happen as a matter of fact—not speculation. Accordingly, Congressman Bost was faced with a "costlier … election campaign[]," which this Court should now recognize as a run-of-the-mill injury-in-fact.

As a result of the divergent approaches by the Fifth and Seventh Circuits, resource diversion as the grounds to challenge time, place, and manner regulations is welcomed in the former and shunned in the latter. This Court should grant certiorari to resolve that split.

C. *Carson v. Simon* was correct on the law, consistent with this Court's *Lance* case, and contradictory to *Bost*

Petitioners aptly describe how *Bost* created a split with the Eighth Circuit's *Carson v. Simon* decision. *See* Pet.27-28.

The panel majority again offered only a cursory distinction to downplay the significance of the split it was creating. It thus gestured at the fact that in *Carson*, "one million voters had already requested mail-in ballots for the presidential election" as the allegedly dispositive distinguishing factor. *See*

Pet.App.14a-15a. But Article III standing does not depend on whether the number of requested mail-in ballots has reached seven-digit figures. Instead, as the Eighth Circuit properly recognized, candidates have a "cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast," *Carson*, 978 F.3d at 1058. And Illinois's Post-Election Receipt Deadline transgresses that "cognizable interest," *id.*, particularly as "[f]or standing purposes, [federal courts] accept as valid the merits of appellees' legal claims." *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 298 (2022).

Rather, the majority's true critique of *Carson* is that the Eighth Circuit is "[in]consistent with the Supreme Court's holding in *Lance*." Pet.App.14a. That is not an actual distinction, but rather the sort of square disagreement between circuits that this Court exists to resolve. It is also wrong: *Carson* correctly held that ""[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson*, 978 F.3d at 1058.

Indirectly confirming the square circuit split that it was creating, the decision below favorably cites Judge Kelly's *Carson* dissent, which asserted 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." *Id.* at 1063

(Kelly, J., dissenting) (quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007)). But expressly siding with a *dissent* in the Eighth Circuit merely corroborates the circuit split that the Seventh Circuit has created, rather than offering any persuasive denial of its existence.

In any event, even a cursory glance at *Lance* belies the reasoning of the panel majority (and Judge Kelly's dissent): this Court there identified the problem that the "only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed." *Lance,* 549 U.S. at 442. This Court went on to specify that a not-following-the-law injury "is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 207–208 (1962)). The *Baker* Court in turn said the following: "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, *when such impairment resulted from dilution by a false tally*; or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box." *Baker*, 369 U.S. at 208 (emphasis added) (citations omitted).

This Court has thus *already* held that dilution via false tally is more than just a generalized grievance. Petitioners here plausibly alleged that Illinois's

receipt and counting of late-arriving ballots dilutes the value of Petitioners' lawfully cast votes. Pet.App.88a-89a. More than that and for the same reason, the same receipt and counting of late-arriving ballots dilutes the margin of victory of federal candidates. As the *Carson* court recognized, candidates as much as voters have a constitutional interest in an accurate vote tally. 978 F.3d at 1058.

This final split with the Eighth Circuit merits this Court's review too.

* * *

Whether under the political competitor theory of standing, the resource diversion theory, or the interest in obtaining accurate tallies, Petitioners have shown a cognizable injury that establishes Article III standing. On each of those bases, too, the decision below either directly splits with or works in contravention to decisions by other Circuits. For those reasons alone, this Court should grant certiorari on the important standing issues presented here. In addition, certiorari is particularly appropriate because the merits issues being ducked by the Seventh Circuit's standing errors are exceptionally important and will likely merit this Court's review in due course.

II. The merits highlight that this case should not escape this Court's review.

The merits issues presented in this case are extraordinarily important: they cut to the heart of the trust that Americans have in our electoral process, particularly where the illegality of the relevant votes being counted is clear-cut. The impact of the Seventh Circuit's errors is thus particularly acute, which further militates in favor of granting certiorari.

A. Federal law—particularly under this Court's decision in *Foster*—precludes counting mail-in ballots that arrive after Election Day

Foster makes this a simple case on the merits. It clearly and squarely held what must occur under federal law by the end of the federal Election Day for votes to be valid: the completion of the "combined actions of voters and officials *meant to make a final selection* of an officeholder." 522 U.S. at 71 (emphasis added). *Accord id.* at 72 (Election Day is when "the final act of selection" must take place); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001) (noting that the Supreme Court in *Foster* held "that the word 'election' means a 'consummation' of the process of selecting an official.").

Illinois, however, pushes the deadline for the necessary completion of the combined actions to choose a candidate until up to two weeks after Election Day. That is unlawful under *Foster*: since official ballot receipt is one of the official actions required for a voter to make their selection, if it occurs after Election Day then the vote is untimely and invalid.

A voter voting in person usually marks the ballot, inserts it into the tabulator, and waits for the tabulator to indicate the ballot has been accepted. Only once the machine accepts the ballot is the full action of voting completed. If (as does happen) the voter walks out without confirming acceptance of the ballot, and the machine rejects the ballot, the vote goes uncompleted and cannot be counted. Nor could that voter, consistent with federal law, come back the day after the election and resubmit their ballot for acceptance.

Mail-in ballots cannot work differently. If the ballot is lost, stolen, or irreparably damaged through the mail, or just arrives late for any reason—even through no fault of the voter—a vote has not been cast, even though the ballot has been marked. Official receipt of the ballot is perhaps the most critical official act that makes up the "combined actions … to make a final selection" that define the Election Day under the relevant precedent. *Foster*, 522 U.S. at 71–72. Until

that action occurs, there is no vote, because the process of selecting an official has not been consummated. "[A] ballot is 'cast' when the State takes custody of it." *Wetzel*, 120 F.4th at 207.

The Election Day Statutes control over contrary state law, and under them consummation of the voting process must occur before the end of Election Day. State laws like Illinois's that seek to extend the date of consummation (i.e., receipt) are unlawful and preempted. And allowing them to remain in force for one election cycle after the next is directly contrary to the uniformity that Congress's Elections Clause powers are designed to ensure.

Receipt is not administrative post-vote action like tabulation. Receipt is part of the *vote itself*. It is therefore different from tabulation and certification, which may permissibly take place after Election Day because they are ministerial acts of the government to ascertain the intent of the voter, rather than the voters' actual selection of a candidate. "The election is … consummated because officials know there are X ballots to count, and they know there are X ballots to count because the proverbial ballot box is closed. In short, *counting* ballots is one of the various post-election 'administrative actions' that can and do occur after Election Day." *Id.* at 209 (citation omitted).

Congress set Election Day as Election Day. It even previously considered *and rejected* an amendment to 2 U.S.C. § 7 that would have permitted States to continue voting after Election Day. *See Keisling*, 259 F.3d at 1173 n.42 (quoting Cong. Globe, 42nd Cong., 2d Sess. 676 (1872)). The statutes *as written* make clear: Congress wanted the consummation of votes to be totally finished by the end of the first Tuesday after the first Monday in November.

B. The decision below and others like it will continue to foster significant mischief and distrust in our elections if this Court does not act

Congress had good reason for making this choice. A single Election Day creates consistency and bolsters trust. Instead, the opposite is happening. And it will keep happening if preempted regulations like the one in Illinois continue to escape judicial review.

The logic as espoused by the district court and left uncorrected by the Seventh Circuit has no logical endpoint. Illinois currently requires a postmark (or a signed certification) that is on Election Day or earlier, but what if it didn't? If receipt is not among the combined actions finalizing an election as of Election Day, States would be free to accept ballots under their own rules theoretically with no end in sight. Perhaps certification? Or the swearing in of candidates? Later

than that? This is the exact kind of confusion Congress wished to avoid by setting a clear nationwide Election Day.

The Pennsylvania Supreme Court now-infamously mandated that some ballots received *after* election day without any postmark be presumed to be timely cast unless "a preponderance of the evidence demonstrates that it was mailed after Election Day." *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 371–72 n.26 (Pa. 2020). Combine that holding with the one left uncorrected below and the potential mischief is manifest. Surely it cannot be the case that Congress, in setting an Election Day, wanted ballots without a postmark arriving two weeks after Election Day to be counted. Yet that is precisely where we may be headed.

Notably, Nevada accepts mail-in ballots received up until the fourth day *after* Election Day. NRS § 293.269921(1)(b)(2). As a result, the very close 2024 Senate election was plagued with delays, with Secretary of State Cisco Aguilar specifically laying blame on the influx of late-arriving mail-in ballots.[4] The same situation had played out in the 2022 Senate election. This glut of ballots received after Election

[4] See News 3 Staff, *Delays in Nevada Vote Counting Frustrates Both Parties*, KSNV (Nov. 7, 2024), https://news3lv.com/news/local/delays-in-nevada-vote-counting-frustrates-both-parties (last accessed Dec. 19, 2024).

Day thus caused bipartisan and needless frustration that could have been prevented through simple compliance with federal law.

California, meanwhile, featured one U.S. House race that was not called until the first week *December*—a *month* after election day. One significant reason why: California counts mail ballots received up to one week after Election Day. Cal. Elec. Code § 3020(b).

Millions of Americans now lack trust in our election system. It is thus essential for both the courts and the elected branches to foster trust in what our election officials are doing. But permitting clear-cut and pervasive violations of federal law to fester indefinitely due to erroneous standing holdings does the opposite. This needless threat to voter confidence is thus another reason why certiorari is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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