No. 24-568

IN THE
Supreme Court of the United States

MICHAEL J. BOST, *ET AL.*, *Petitioners*,
v.
ILLINOIS STATE BOARD OF ELECTIONS, and BERNADETTE MATTHEWS, in her official capacity as the Executive Director of the Illinois State Board of Elections, *Respondents*.

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

Brief *Amicus Curiae* of America's Future, Gun Owners of America, Gun Owners Foundation, U.S. Constitutional Rights Legal Def. Fund, Citizens United, Citizens United Foundation, The Presidential Coalition, LLC, and Conservative Legal Def. and Education Fund in Support of Petitioners

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Gun Owners of America, Gun Owners Foundation, U.S. Constitutional Rights Legal Defense Fund, Citizens United, Citizens United Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. The Presidential Coalition, LLC is a political committee. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

Three former and prospective candidates for federal office challenged Illinois' "Ballot Receipt Deadline Statute," which permits mail-in ballots 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." *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720, 725-26 (N.D. Ill. 2023) ("*Bost I*"). The lead plaintiff is Congressman Mike

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Bost (R-IL-12), who has represented southern Illinois in the House since 2015 and serves as Chairman of the House Committee on Veterans' Affairs.

Plaintiffs alleged that Illinois' law violates federal law, including, *inter alia,* 2 U.S.C. § 7, which states: "[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 ... [to] Congress." Plaintiffs also raised constitutional claims 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." *Bost I* at 726. Defendant Illinois Board of Elections moved to dismiss, arguing that the plaintiffs lacked standing, and that state sovereign immunity under the Eleventh Amendment barred the claim. *Id.* at 725.

The district court ruled that the alleged violation of federal law is not a "specific, personal" injury, but "the kind of generalized grievance that is insufficient to confer standing." *Id.* at 730. The court asserted that "voter dilution" claims were limited to redistricting cases, asserting: "a vote dilution claim under the Equal Protection Clause is about votes being weighted differently to the disadvantage of an identifiable group.... [S]uch claims typically arise in the context of redistricting disputes." *Id.* at 732. Thus, the court "declined to apply the doctrine of vote dilution to voter fraud allegations." *Id.*

Plaintiff Bost also alleged that the Illinois law requires him to "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." *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634, 642 (7th Cir. 2024) ("*Bost II*").

The district court ruled that "the alleged injury is not particularized to Congressman Bost" since it "affects all federal candidates equally." *Bost I* at 733. In addition, the court ruled that Bost's allegations that he would "be forced to spend money to avoid the alleged speculative harm that more ballots will be cast for his opponents" was too speculative to confer standing. *Id.*

On appeal, the Seventh Circuit affirmed on the same standing grounds, without reaching the Eleventh Amendment issue. *Bost II* at 644.

Dissenting in part, Judge Scudder argued that the alleged costs to the campaign of monitoring vote counting and ballot receipt after the election was in fact a concrete and particularized injury, sufficient to obtain standing for Bost. Judge Scudder noted that Bost had in fact incurred costs for after-election monitoring since the Ballot Receipt Deadline Statute's passage in 2013, and had sufficiently established the likelihood of needing to do so again after Election Day 2024. *Id.* at 645.

SUMMARY OF ARGUMENT

The Seventh Circuit concluded that Petitioners did not have standing to challenge state election laws which appear on their face to conflict with federal law. The panel erroneously considered the need of a candidate for Congress to raise and expend funds to cover post-election day ballot security measures to be optional and speculative. In dismissing Mr. Bost's diversion of funds argument, the court has followed a dangerous trend to elevate the requirements for standing as applied to challenges to election rules that has crept into the law since the 2020 Presidential Election. The result is the creation of a circuit split with many cases decided prior to 2020.

In the last four years, courts have elevated the test for standing to a point where even candidates may not challenge the manner of administration of state elections for federal office. Unless this Court steps in, abuses of election law will go unreviewed and unremedied, and elections will cease to reflect the will of the voters.

Additionally, should the panel's decision be left undisturbed, and replicated in other courts, abuses of the election process can be expected to continue, and worsen, as they will be conducted in full confidence that violations of the rules by which elections are conducted are essentially unreviewable. In the end, ours will cease to be a nation of laws and of free and fair elections, and become a corrupt game played by partisans.

ARGUMENT

I. DIVERSION OF RESOURCES IS REGULARLY FOUND TO CONSTITUTE INJURY IN ELECTION CASES.

The circuit court was dismissive of the financial harm suffered by Mr. Bost arising from his asserted need to raise money to "continue to fund his campaign for two additional weeks after Election Day to contest any objectionable ballots." *Bost II* at 642. The panel called his need to "expend resources to avoid ... election defeat" a mere "hypothetical future harm." *Id.* The circuit court said plaintiffs "cannot manufacture standing by choosing to spend money to mitigate such conjectural risks." *Id.* The panel blithely stated "it was Plaintiffs' choice to expend resources to avoid a hypothetical future harm — an election defeat." *Id.* No person with any exposure to American elections would ever characterize the risk of election irregularities as merely "conjectural" or "hypothetical," for if that were true, every serious American political campaign for Congress being waged would be foolishly misspending contributions on ballot security for no reason.

This Court has long recognized that an organization has standing to bring a claim based on injury arising from a "diversion of resources." *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). A "diversion of resources" injury has been deemed sufficient in numerous cases when raised by a political party or committee in an election-related case. *See, e.g.*, *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341

(11th Cir. 2014); *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008); *Democratic Party of Va. v. Brink*, 599 F. Supp. 3d 346, 355 (E.D.Va. 2022); *Democratic Cong. Comm. v. Kosinski*, 614 F. Supp. 3d 20 (S.D.N.Y. 2022). This doctrine was applied in a case brought by a political committee challenging the rejection of mail-in ballots. *See Democratic Party of Ga. v. Crittenden*, 347 F. Supp. 3d 1324, 1337 (N.D.Ga. 2018). The same rule should be applicable in this case involving a challenge to the acceptance of mail-in ballots.

If a political party or committee, can demonstrate a concrete, imminent injury through a diversion of its resources in response to a defendant's action, certainly a candidate should be able to make the same showing. And, diversion of resources is not the only normally accepted basis for standing in cases brought by candidates. In *Gallagher v. N.Y. St. Bd. of Elections*, 477 F. Supp. 3d 19 (S.D.N.Y. 2020), the district court believed standing was demonstrated by its "diversion-of-resources" as well as the long-standing rule that:

> [c]andidates ... have an informational interest in an **accurate count** in their races. Whether counting additional ballots would increase the margin, strengthening the candidate's political hand, or decreases it, communicating to the candidate that she must make a more vigorous effort to win over the electorate, a candidate has a **legally protected interest** in ensuring that all valid ballots in her election are accounted for. [*Id*. at 36 (emphasis added).]

II. FEDERAL COURTS HAVE A DUTY TO DECIDE BONA FIDE ELECTION CONDUCT DISPUTES TO PRESERVE THE INTEGRITY OF OUR CONSTITUTIONAL REPUBLIC.

Most opinions on standing issues do not even give a nod to the complete Article III text, but rather begin much as did the Seventh Circuit's opinion, pulling only two words from the text, and those out of their context: "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." *Bost II* at 639 (emphasis added). In context, the "Cases" and "Controversies" provision in Article III, Sec. 2 does not provide support for the high bar for standing established by the circuit court[2]:

> The judicial Power shall extend to **all Cases**, in Law and Equity, **arising under this Constitution, the Laws of the United States**, and Treaties made, or which shall be made, under their Authority;-...--to **Controversies** to which the **United States shall be a Party**.... [Art. III, Sec. 2 (emphasis added).]

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[2] One reason that courts do not discuss these two constitutional terms in context may be that it would be difficult to explain why the substance of the Congressman's claim based on the doctrine of federal preemption and a claimed inconsistency between a state law and federal law does not present a "Case[] ... arising under this Constitution [or] the Laws of the United States...."

Laying aside the copious case law on standing for a moment to examine the text, initial focus should be placed on who is bringing the challenge (a candidate), and what is being challenged (the lawfulness of the process by which the election in which that candidate is running is being administered). Although questions may be raised about some voters bringing suit, a candidate should always be presumed to have a "concrete and particularized" interest in the lawfulness of how the election is conducted. *See Gallagher*, *supra.*

The question here is whether a candidate for office (and also a Member of the House of Representatives) may challenge an Illinois state law which allows votes to be received and counted during an "**election fortnight**" and whether that law is at odds with the requirements of federal law where two federal statutes envision an "**election day**."

- With respect to the House of Representatives, 2 U.S.C. § 7 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." (Emphasis added.)

- And, with respect to the Presidency, 3 U.S.C. § 1 follows the same pattern, and establishes 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**." (Emphasis added.)

The Seventh Circuit approved the district court's dismissal based on standing, believing that it had no authority whatsoever to address and resolve the important issue put to the court. The district court did not decline to decide based on any prudential notions of standing, but believed that it had no constitutional judicial authority whatsoever. That opinion raises the practical question, if the federal courts have no authority to ensure federal law is followed by the states, where should the Plaintiff Congressman go to obtain relief? Should this not be one of the central responsibilities of the federal judiciary? These *amici* agree with Congressman Bost that he had established standing by any legitimate test, and his case should have been addressed on the merits.

In reaching its decision, the Seventh Circuit set aside consideration of the actual constitutional text in favor of an elaborate, atextual, collection of judge-made law — the law of standing. That body of law was reasonably clear in the election context until the last four years, when it has come entirely unmoored from the previously established constitutional limitations on the exercise of judicial power.

Today, some believe the law of standing is sometimes selectively invoked to allow federal judges to evade their duty to decide "cases" and "controversies" which could embroil the judiciary in politics.[3] However, politics is the method by which

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[3] L. Whitehurst, "Courts could see a wave of election lawsuits, but experts say the bar to change the outcome is high," *AP* (Oct. 8, 2024) ("America's court system has no formal role in the election

Americans govern themselves, and refusing to decide cases involving politics demonstrates that the federal courts have abdicated their judicial duty. Here, it is an abdication of the duty to ensure elections are conducted in accordance with law, fairly and accurately. To defer to the political branches on such issues is an error of the first order. It leaves the decisions on the legality of elections to the political branches, which are composed exclusively by persons who were elected under the laws being challenged.

Contrary to the trend to elevate standing requirements for election cases since 2020 that was noted by Petitioners (*see* Petition for Certiorari ("Pet. Cert.") at 2; discussed in Section III, *infra*), the court's obligation should not be lessened in election cases — but rather, it should be heightened. As John Adams warned us, "If an election ... can be procured by a party through artifice or corruption, the Government may be the choice of a party for its own ends, not of the nation for the national good."[4]

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process, and judges generally try not to get involved because they don't want to be seen as interfering or shaping a partisan outcome, said Paul Schiff Berman, a professor at George Washington University Law School."). *See generally* Z. Smith, "Supreme Court's Decision Not to Hear Elections Cases Could Have Serious Repercussions," *Heritage Foundation* (Feb. 24, 2021); "What role do courts and judges play in democracy?" *Brookings* (Aug. 29, 2024).

[4] John Adams, Inaugural Address in the City of Philadelphia (Mar. 4, 1797), reprinted in Inaugural Addresses of the Presidents of the United States at 10 (1989).

Additionally, this abdication by the lower courts violates the basic duty of the federal courts articulated by Chief Justice Marshall:

> We have no more right to **decline** the exercise of jurisdiction which is given, than to **usurp** that which is not given. The one or the other would be **treason** to the constitution. [*Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (emphasis added).]

Almost a half-century ago, in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), this Court adhered to Marshall's wise counsel, and described the judiciary's duty to hear and decide cases within its jurisdiction as "virtually unflagging." *Id.* at 817. The court had made clear in *Cohens*: "[w]e cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, **we must decide it, if it be brought before us**.... Questions may occur which we would gladly avoid; but we cannot avoid them." *Cohens* at 404 (emphasis added).

Again seeking the guidance of Chief Justice Marshall, note his use of the word "duty": "It is emphatically the province and **duty** of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (emphasis added). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 163. *Accord, Baker v. Carr*, 369 U.S. 186, 208 (1962). Here, a state law is at odds with, and injuring, a

Congressman in his campaign. It deserves to be addressed.

The preservation of an honest electoral process is fundamental to the very existence of a government of, by, and for the people. "[V]oting is of the most fundamental significance under our constitutional structure." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). As this Court has noted, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

When the very process by which the people choose candidates to serve in the legislative and executive branches is tainted, the duty of the judiciary to uphold the integrity of that process when challenged. As the Wisconsin Supreme Court correctly noted in 2022, "If the right to vote is to have any meaning at all, elections must be conducted according to law.... The right to vote presupposes the rule of law governs elections. If elections are conducted outside of the law, the people have not conferred their consent on the government. Such elections are unlawful and their results are illegitimate." *Teigen v. Wis. Elections Comm'n*, 976 N.W.2d 519, 529-30 (Wisc. 2022)

(overruled by *Priorities USA v. Wis. Elections Comm'n*, 8 N.W.3d 429 (Wisc. 2024)).[5]

In the past, this Court has recognized that heightened need to consider election related challenges in the case of *FEC v. Akins*, 524 U.S. 11 (1998). There, the Federal Elections Commission ("FEC") had failed to classify the American Israel Public Affairs Committee ("AIPAC") as a political committee which would be subject to campaign finance disclosure requirements. A group of voters brought suit to compel the FEC to classify AIPAC as a PAC and to impose the attendant disclosure requirements on AIPAC. This Court rightly determined that, because "the informational injury at issue here, **directly related to voting, the most basic of political rights**," the alleged injury was "**sufficiently concrete and specific**" to support standing despite

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[5] The reversal of the Wisconsin Supreme Court on the use of drop boxes came as its composition changed to a Democrat majority. "The liberal majority Wisconsin Supreme Court Friday overruled its own 2022 decision — handed down from the then-conservative leaning court — that prohibited municipal clerks from setting up secure drop boxes for the return of absentee ballots." B. Wang, "Ballot Drop Boxes Allowed in Wisconsin After Court Reversal," *Bloomberg* (July 5, 2024). It was another victory for the Elias Law Group LLP, which has obtained many changes in state election law which facilitate election fraud. "The court's conservative bloc ... dissented, saying... 'An unattended cardboard box on the clerk's driveway? An unsecured sack sitting outside the local library or on a college campus? Door-to-door retrieval from voters' homes or dorm rooms? Under the majority's logic, because the statute doesn't expressly forbid such methods of ballot delivery, they are perfectly lawful,' Bradley wrote in her dissent." *Id*.

"the fact that it is widely shared" among a wide swath of other voters. *Id.* at 24-25 (emphasis added). *Akins* applied to voter standing, not candidate, standing. If the voters in *Akins* had standing despite the injury being shared by thousands of other voters, certainly Congressman Bost, as a candidate, has shown particularized injury, despite the Seventh Circuit's mention that some number of "other federal candidates" share the same injury. The signal importance of elections in a republic heightens, rather than decreases, the importance of judicial review.

III. THE RADICAL CHANGES TO THE LAW OF STANDING APPLICABLE TO ELECTION CHALLENGES SINCE 2020 SHOULD BE REVERSED.

Petitioners have correctly described that which all those litigating election challenges in recent years have realized: the law of standing changed radically in 2020. It summarized:

> For over 130 years, this Court has heard claims brought by federal candidates challenging state time, place, or manner regulations affecting their federal elections. **Until recently, it was axiomatic that candidates had standing** to challenge these regulations. Indeed, "it's hard to imagine anyone who has a more particularized injury than the candidate has."....
>
> In the **aftermath of the 2020 elections**, however, for a variety of reasons, **courts have limited candidates' ability to challenge**

> the electoral rules governing their campaigns. This case presents the latest — and an extreme — example of this trend. [Pet. Cert. at 2 (citation omitted) (emphasis added).]

Although Petitioners do not address the "variety of reasons" that 2020 was the dividing line, these *amici* offer their theory as to what caused this radical escalation of the standards for standing as it applies to election challenges. These *amici* believe that the lower courts have taken a signal from this Court, which it may never have meant to send. That signal came when this Court dismissed the original action brought by the State of Texas against the Commonwealth of Pennsylvania — a case brought to require Pennsylvania to conduct its elections accordingly to laws enacted by its legislature, in accord with Article I, Sec. 4, cl. 1, not decrees of Pennsylvania courts modifying the legislature's rules in ways which generally facilitated election fraud.[6]

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[6] Texas had alleged it suffered serious injury when Pennsylvania conducted its presidential election according to judicial decree rather than rules established by the state legislature, as required by the Framers, who had good reason for that decision. *See* Brief *Amicus Curiae* of Citizens United, *et al.* in *Texas v. Pennsylvania*, No. 155, Original (Dec. 11, 2020) ("The Framers of the Constitution vested the exclusive authority to determine the manner of selecting electors to the state legislatures because that was the body that they believed could be best trusted to avoid corruption and foreign interference in the selection of our nation's Chief Executive.")

It was not until June 27, 2023 that this Court addressed and resolved this issue, determining that the provision in Article I, sec. 4, cl. 1 clearly empowering "the Legislature" of each state to prescribe the rules governing federal elections did not mean what

In fact, it is possible that the triggering event for this sea change in election challenge standing can be found in this Court's one-sentence order of December 11, 2020, refusing to entertain the Texas bill of complaint invoking this Court's original jurisdiction in *Texas v. Pennsylvania*, 2020 U.S. LEXIS 5994 (2020). In a one sentence opinion, this Court ruled: "Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections."[7] Irrespective of why the seven justices who declined to hear the challenge took that position, a clear message was received: "stay out of the challenges to the 2020 election." Since that date, the lower federal courts and state courts — with a shocking degree of uniformity — have refused to grant standing in election challenge cases based on new, heightened rules of standing.

Dissenting from the denial of consideration, Justice Alito stated: "[i]n my view, **we do not have discretion to deny** the filing of a bill of complaint in a case that falls within our original jurisdiction."

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it appeared to say — as state courts could override the rules established by the legislature. *See Moore v. Harper*, 600 U.S. 1 (2023). *See also* Brief *Amicus Curiae* of America's Future, Inc., *Moore v. Harper*, No 21-1271 (Sept. 6, 2022).

[7] Earlier this year, this Court had another opportunity to address the merits of an election challenge, and there adopted the opposite position, *sub silentio*, now agreeing that: "in a Presidential election 'the impact of the votes cast in each State is affected by the votes cast' ... 'for the various candidates in other States.'" *Trump v. Anderson*, 601 U.S. 100, 116 (2024) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983)).

(Emphasis added.) Justice Alito then cited Justice Thomas' prior dissent in *Arizona v. California*, 140 S. Ct. 684 (2020), involving the Court's original jurisdiction, citing *Cohens v. Virginia.*

In its effort to avoid reaching the merits of the case and potentially risk appearing to interfere in a hotly contested election, this Court changed the law of standing, making challenges to election regulations almost impossible. Particularly if it was this Court that inadvertently created this problem of lower courts refusing to decide legitimate election process challenges, a course correction is now desperately needed to ensure elections are conducted in accordance with law.

In 2021, the Democrat District Attorney of Shelby County, Tennessee, and former University of Memphis law professor Steven J. Mulroy surveyed how the law of standing had changed abruptly due to the politics surrounding the hotly contested Biden-Trump election of 2020:

> **[T]he courts in these cases seemed eager to decisively repudiate these election challenges** which not only lacked merit or even advanced frivolous claims, but which also had the effect (if not the intent) of disrupting the orderly completion of the electoral process, undermining public confidence in the electoral system, and stoking baseless conspiracy theories among an already alarmingly aroused segment of the population. While this impulse was understandable, it may have resulted in

> **courts too cavalierly dismissing legitimate claims of standing**, confusing standing questions with merits questions, or both. These judicial misfires risk setting **bad precedent for future cases**.[8]

The case now before the court is one of those "future cases" where bad precedents have caused relief to be denied based not on the merits, but due to a dramatic shift in the law of standing brought on by the politics of the 2020 Presidential election. It is time for this Court to restore order by returning to the time, correctly described by Petitioners, when "it was axiomatic that candidates had standing to challenge [election] regulations."

IV. PLAINTIFFS SHOULD NOT BE REQUIRED TO PROVE THEIR CASE AT THE PLEADING STAGE.

In essence, the circuit court has carved out an "election challenges only" exception to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and it is not alone. Just last year, the district court for the District of Arizona ruled that, in order to even have standing, a candidate plaintiff must show that "the manipulation ... change[d] the outcome of the election." *Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1028 (D. Ariz. 2022). On appeal, the Ninth Circuit adopted the district court's insurmountable standard verbatim. *See Lake v. Fontes*, 83 F.4th 1199, 1204 (2023).

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[8] S. Mulroy, "Baby & Bathwater: Standing in Election Cases After 2020," 126 DICKINSON L. REV. 9, 13 (Fall 2021) (emphasis added).

Below, the Seventh Circuit appeared to adopt the same "outcome-determinative" requirement to prove standing. "[W]hether the counting of ballots received after Election Day would cause [Plaintiffs] to lose the election is speculative at best. Indeed, Congressman Bost, for example, won the last election with seventy-five percent of the vote." *Bost II* at 642. Since Mr. Bost was re-elected, the Seventh Circuit denied he suffered any injury.

According to this approach, even if a plaintiff can show that election regulations were violated and that the illegal votes were likely cast or legal votes likely not counted, unless the plaintiff can affirmatively prove that the illegality was outcome-determinative in the election, there is no injury and no standing.

This Court has never even suggested such a carveout from the federal pleading rules just for election-related cases. *Twombly* made clear that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests....'" *Twombly* at 555. Under that standard:

> a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions.... Factual allegations must be enough to raise a right to relief above the speculative level.... [T]he pleading must contain something more ... than ... a statement of facts that merely creates a

> suspicion [of] a legally cognizable right of action.") [*Id.*]

However, this Court does not "require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face" to push claims "across the line from conceivable to plausible." *Id.* at 570. And "[a] claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

Plausibility of damage to a candidate's electoral prospects, not proof of outcome-determinative results, is the *Twombly* standard. This novel carveout apparently adopted by the Seventh and Ninth Circuits does violence to this Court's precedents and risks leaving election interference and vote dilution challenges unreviewable.

V. THE CIRCUIT SPLIT CREATED BY THE PANEL DECISION IS EXTENSIVE.

Petitioners explain how the Seventh Circuit decision has created a conflict among the circuits. *See* Pet. Cert. at 27-30. Here, these *amici* address the financial aspect of the conflict with other circuit court decisions that the decision below creates.

Two First Circuit decisions found standing when plaintiff candidates were required to reshuffle campaign finances due to the illegal government actions. Unlike the decision below, the First Circuit

decisions did not require financial injuries to be established with certainty to avoid the court deeming them "speculative." In 2000, the First Circuit ruled that presidential candidate Ralph Nader had standing to challenge two FEC regulations which permitted corporate money to be used to sponsor presidential debates (in which Nader was not included) even though the Federal Election Campaign Act barred expenditure of corporate money generally. Nader claimed that the FEC regulations put him at a competitive disadvantage to the candidates receiving free advertising from the corporate-sponsored debates, forcing him to spend more money on advertising to catch up. The First Circuit properly recognized that, at the pleading stage, to meet the *Twombly* standard, presidential candidate Ralph Nader could not be required to prove conclusively the degree to which a challenged statute will cause injury. In concluding that Nader had standing, the court followed its decision in *Vote Choice, Inc. v. DeStefano*, 4 F.3d 26, 36 (1st Cir. 1993), observing:

> We ... granted credence in *Vote Choice* to plaintiff Leonard's claim that she had to **adjust her campaign** to account for the possibility of facing a publicly funded opponent, even though in the end that possibility did not materialize.... **To probe any further into these situations would require the clairvoyance** of campaign consultants or political pundits — guises that members of the apolitical branch should be especially hesitant to assume. [*Becker v. FEC*, 230 F.3d 381, 387 (1st Cir. 2000) (superseded

by statute on other grounds) (emphasis added).]

Here, the circuit court found no financial burden on the campaign despite Congressman Bost's affidavit which explained that he would be required to spend campaign resources on vote monitoring for the two weeks that ballots are accepted post-election. The court in part relied on the fact that Mr. Bost's margins of victory were large, and therefore, apparently, assumed that he would win each election without working to ensure the vote count was fair. Therefore, the court deemed his expenditures "speculative," even though Mr. Bost has incurred those same monitoring costs every election since the statute allowing for ballots to be counted long after election day was passed. What was actually speculative was that since the Congressman Plaintiff had won several elections by a wide margin, he would always do so. As the dissent explains, this factor is wholly irrelevant. *Bost II* at 645 (Scudder, J., dissenting).

Multiple other circuits have also found that financial injury alone is sufficient to imbue a candidate with standing. In 2003, the Third Circuit ruled, "we reject the Commonwealth's argument that a candidate challenging a mandatory filing fee must establish that payment of the fee would result in the complete depletion of personal or campaign funds in order to demonstrate injury to a protected interest." *Belitskus v. Pizzingrilli*, 343 F.3d 632, 640 (3d Cir. 2003). The Third Circuit held that filing fees of $100 and $200 were sufficient to impart standing. *Id.* at 637.

The Eleventh Circuit is in accord. In 1998, the Eleventh Circuit considered a challenge to a $10,020 congressional filing fee. The Eleventh Circuit did not question standing, noting that during proceedings below, "[t]he magistrate judge first addressed ripeness, mootness, and standing concerns and held [the plaintiff]'s claims justiciable. The Secretary of State did not cross-appeal." *Green v. Mortham*, 155 F.3d 1332, 1334 n. 8 (11th Cir. 1998).

Six years previously, the Eleventh Circuit also adjudicated a ballot access case involving a $5,631.20 fee charged to independent presidential candidate Lenora Fulani. The court adjudicated her claim without questioning her standing, on grounds very similar to the First Circuit in *VoteChoice*, noting that "Fulani was required to pay the signature-verification fee after asserting that it would impose an undue burden by diverting funds from her party's attempt to identify, reach, and communicate with potential supporters." *Fulani v. Krivanek*, 973 F.2d 1539, 1544 (11th Cir. 1992).

The dissent also pointed out the inconsistency of the panel's decision to disregard Petitioner Bost's need to incur additional fees for election monitoring as self-imposed and speculative, even though similar expenditures have been deemed sufficient for standing in other contexts. The dissent explained that prospective gun owners, who do not even yet own a firearm, have been granted standing to challenge firearms restrictions to guard against a speculative risk:

> 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.... 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. [*Bost II* at 647 (Scudder, J., dissenting) (citations omitted) (emphasis added).]

The disparity between the courts' treatment of firearms cases versus election cases is difficult to explain other than as a desire to "gladly avoid" dealing with the attendant controversy. *Cohens* at 404.

Thus, the approach taken by the Seventh Circuit creates a new and astonishingly high bar for election challenges which would never be applied to other challenges. The approach of the First, Third, and Eleventh Circuits was correct, and the decision below creates a real conflict in the circuits.

CONCLUSION

The decision of the Seventh Circuit should be reversed and the case returned to the district court for consideration on the merits.

Respectfully submitted,

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