No.

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.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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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 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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PARTIES TO THE PROCEEDINGS

Petitioners, who were Plaintiffs-Appellants below, are United States Congressman Michael J. Bost and Republican Presidential Elector Nominees Laura Pollastrini and Susan Sweeney.

Respondents, who were Defendants-Appellees below, are the Illinois State Board of Elections and Bernadette Matthews, in her capacity as the Executive Director of the Illinois State Board of Elections

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United States Court of Appeals (7th Cir.):

Bost, et al., v. Ill. State Bd. Of Elections, et al., No. 23-2644 (Aug. 21, 2024)

United States District Court (N.D. Ill):

Bost, et al., v. Ill. State Bd. Of Elections, et al., No. 22-cv-2754 (July 26, 2023)

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PETITION FOR A WRIT OF CERTIORARI

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United States Congressman Michael J. Bost and Republican Presidential Elector Nominees Laura Pollastrini and Susan Sweeney, through counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-23a) is not reported but is available at 2024 U.S. App. LEXIS 21142 (7th Cir. Aug. 21, 2024). The opinion and order of the district court (Pet.App.26a-58a) is reported as *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720 (N.D. Ill. 2023).

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The merits of Petitioners' claims involve federal preemption under the Elections and Electors Clauses. The pertinent constitutional and statutory provisions are reproduced at Pet.App.61a-63a.

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STATEMENT OF THE CASE

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." *Hotze v. Hudspeth*, 16 F.4th 1121, 1126 (5th Cir. 2021) (Oldham, J., dissenting). That is because a candidate who "pours money and sweat into a campaign, who spends time away from her job and family to traverse the campaign trail, and who puts her name on a ballot has an undeniably different—and more particularized—interest in the lawfulness of the election" than "some random voter." *Id.*

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.

Petitioners are a sitting multi-term Congressman and two federal electors. They challenged an Illinois law (the "Receipt Deadline") that allows absentee ballots to be received and counted after the day specified in federal statutes for holding federal elections ("Election Day"). They contend that Illinois' Receipt Deadline is preempted by the federal Election Day statutes. They asserted Article III standing on a number of grounds, including that they incur costs to run their campaigns for an additional two weeks to monitor ballot receipt and counting. They also claimed a particular interest, as candidates, in an accurate tally of validly received ballots.

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A divided panel of the Seventh Circuit affirmed the district court's dismissal of the case for lack of standing. The majority held that Petitioners had not pleaded an injury in fact because, in the court's opinion, they did not need to conduct post-election monitoring of late arriving ballots in 2022 and, thus, any expenses incurred from monitoring were self-inflicted. The Court also declined to find standing because the 2024 election was (then) two months away. Until this ruling, the only non-vacated circuit authorities to confront the question of candidate standing had held that candidates do have standing to contest violations of federal election law affecting their campaigns.

Petitioners respectfully submit that it is important for the Court to correct the serious errors infecting the Seventh Circuit's ruling, especially those tending to foster an arbitrary approach to jurisdictional issues involving federal candidates. It is also important that lower courts, potential

litigants, and the public know that federal courts are open to hear timely, well-pleaded challenges to state time, place, and manner regulations. Federal court rulings on the merits, regardless of outcome, promote public confidence that federal elections are being conducted fairly, with integrity, and in accordance with the law. This petition presents an opportunity for the Court to provide lower courts and litigants much needed guidance on candidate standing, outside of the high-stakes, emergency, post-election litigation where these issues commonly arise. Petitioners respectfully request that the Court grant certiorari and review this deeply erroneous decision.

A. Statutory Background

Congress is authorized under U.S. Const. art. I, § 4 cl. 1 ("Elections Clause") and art. II, § 1 cl. 4 ("Electors Clause") to establish the time for conducting federal elections. Pet.App.61a. Though state Legislatures have the power to regulate the times, places, and manner of holding Congressional elections, that power ceases when Congress "at any time by Law make[s] or alter[s] such Regulations[.]" *Id.*; *see Smiley v. Holm*, 285 U.S. 355, 366 (1932) (discussing Congress' art. I, § 4 powers).

Congress exercised this power when it enacted a trio of Election Day statutes setting the time for federal elections.[1] *See Foster v. Love*, 522 U.S. 67, 70 (1997). No otherwise valid state regulation can limit or abridge a valid exercise of this federal power. *Id.* at 71-72.

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[1] 2 U.S.C. § 1; 2 U.S.C. § 7; and 3 U.S.C. § 1 (together, "Election Day" statutes.

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Congress first exercised its timing power in 1845 when it passed the "Presidential Election Day Act," which established a uniform national Election Day for presidential elections. 28 Cong. Ch. 1. Originally codified as 5 Stat. 721, non-material wording changes occurred over the years before it was recodified as 3 U.S.C. § 1. Pet.App.62a. Twenty-seven years later, Congress passed what is now 2 U.S.C. § 7, establishing the same day for congressional elections.[2] Pet.App.62a. The national Election Day is now the first Tuesday after the first Monday in November in even-numbered years. *Id.*

In 2022, Congress enacted the Electoral Count Reform Act ("ECRA"). 136 Stat. 5233, 525 (enacted as Div. P., Title I, § 102(b) of the Consolidated Appropriations Act, 2023, 117 Pub. L. No. 328, Dec. 29, 2022). Relevant here, ECRA revised Title 3 dealing with Presidential elections, adding new 3 U.S.C. § 21(1), which allows states to modify the day of election in narrow "force majeure events that are extraordinary and catastrophic." Pet.App.62a-63a. This new *force majeure* exception provides the only grounds on which states can modify Election Day in presidential elections. *Id.*

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B. Illinois' Ballot Receipt Statutes

Prior to 2005, Illinois law required that absentee ballots must be postmarked the day preceding Election Day and received by state election officials on or before Election Day. 2005 Ill. Laws 557 (P.A. 94-

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[2] In 1914, Congress enacted 2 U.S.C. § 1, which aligned Senate elections with Election Day. That statute was not at issue below.

557). In 2005, Illinois' Receipt Deadline was amended to allow absentee ballots that are received "after the polls close on election day" but "before the close of the period for counting provisional ballots" to be counted as if cast and received on or before Election Day. Pet.App.63a; 2005 Ill. Laws 557 (P.A. 94-557). These ballots need only be postmarked on or before Election Day or, if they bear no postmark, the voter must have signed and dated a certification accompanying the ballot within the same timeframe. *Id.*; and 10 ILCS 5/19-8(c). Election officials are directed to complete the "the validation and counting of provisional ballots within 14 calendar days of the day of the election." 10 ILCS 5/18A-15(a); Pet.App.63a. Read together, these two provisions mean that an absentee ballot received up to 14 calendar days after Election Day shall be counted as if it were cast and received by election officials on or before Election Day.

In 2013, Illinois adopted statewide vote-by-mail practices, which expanded the category of acceptable absentee ballots. 10 ILCS 5/1-3.5 (P.A. 98-1171). In effect, this new practice expanded the universe of ballots received after Election Day. Pet.App.66a-67a.

C. Petitioners' Suit

Petitioners Congressman Michael J. Bost and Republican Presidential Elector Nominees Pollastrini and Susan Sweeney filed suit challenging state time, place, and manner regulations applicable to both the 2022 and 2024 federal elections. Pet.App.26a-27a. Congressman Bost is a multi-term incumbent representing Illinois' 12th Congressional District in the U.S. House of Representatives. *Id.* at 16a. He was a successful federal candidate in the 2016, 2018,

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2020, 2022, and 2024 federal elections. *Id.* at 4a, 64a. Petitioners Pollastrini and Sweeney were Republican Presidential Elector Nominees for president and vice president during both the 2020 and 2024 federal elections.[3] *Id.* at 70a, 76a-77a, 82a-83a, 89a-91a. Petitioners are also registered voters who voted in 2020, 2022, and 2024. *Id.* at 4a, 16a, 64a, 70a, 76a.

Petitioners' sued Respondents Illinois State Board of Elections and its Executive Di-rector Bernadette Matthews, in her official capacity, (together "Respondents") seeking to enjoin Illinois' Receipt Deadline on the grounds that it conflicted with, and was preempted by, federal Election Day statutes. *Id.* at 27a. Petitioners sought declaratory relief with respect to the November 8, 2022 (2 U.S.C. § 7) and November 5, 2024 (2 U.S.C. § 7 and 3 U.S.C. § 1). Pet.App.88a-92a.

Petitioners' complaint set forth three claims. First, they claim Respondents' receipt and counting of late-arriving ballots dilutes the value of Petitioners' lawfully cast votes, thereby infringing on their right to vote under the First and Fourteenth Amendments in violation of 42 U.S.C. § 1983. *Id.* at 88a-89a (Count I). Second, Petitioners claim the Receipt Deadline injures them as federal candidates, infringing on their right to stand for office under the First and Fourteenth Amendments in violation of 42 U.S.C. § 1983. *Id.* at 89a-90a (Count II). Third, Petitioners claim the Receipt Deadline violates their federal

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[3] *See* 10 ILCS 5/21-1 (describing the manner of electing presidential electors).

statutory rights under 2 U.S.C. § 7 and 3 U.S.C. § 1. *Id.* at 90a-91a (Count III).

D. Proceedings Below

1. Petitioners filed suit on May 25, 2022.[4] Pet.App.92a. The parties promptly filed cross dispositive motions prior to discovery. Pet.App.29a-31a. Respondents moved to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *Id.* Respondents argued that Petitioners lacked Article III standing, that some claims were barred by the Eleventh Amendment, and that all claims lacked merit.[5] Petitioners moved for partial summary judgment under Fed. R. Civ. P. 56 on Counts I and II (violations of their right to vote and stand for office) with respect to the 2022 federal election. The motions were fully briefed and submitted on September 14, 2022. The district court heard arguments on the Motion to Dismiss on December 7, 2022. At the conclusion of the hearing, the district court indicated it was "going to issue a ruling soon." Dkt. 74 at 4.

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2. On July 26, 2023, the district court granted Respondents' Motion to Dismiss, dismissing all three claims without prejudice. Pet.App.58a. The dismissal was "principal[ly]" based on its finding that Petitioners failed to allege an injury in fact and, thus, lacked standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Pet.App.34-47a, 58a.

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[4] The Democratic Party of Illinois ("DPI") moved to intervene, which the district court denied and the Seventh Circuit affirmed. *Bost v. Ill. State Bd. of Elections*, 75 F.4th 682 (7th Cir. 2023).

[5] Respondents did not move under the Eleventh Amendment to dismiss claims against Respondent Matthews. *See Ex parte Young*, 209 U.S. 123 (1908).

The district court concluded that Petitioners' alleged injuries stemmed from what it characterized as statutory "conflicts" that were "general grievance[s] about governance" and that any post-election expenses incurred by Petitioners' campaigns were "speculative." Pet.App.35a-47a. The district court opinion relied heavily on *Bognet v. Sec'y of Pa.*, 980 F.3d 336 (3d Cir. 2020), *vacated and remanded with instructions to dismiss as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021) (mem.) and *Lance v. Coffman*, 549 U.S. 437, 441–42 (2007). Pet.App.36a-38a, 40a, 44a-45a, and 51a. It also relied, in part, on *Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020). Pet.App.54a. The district court did not address Petitioners' competitive injuries. The court similarly rejected Petitioners' dilution injuries as too speculative and generalized to constitute an injury in fact. *Id.* at 40a-43a.

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The dismissal was without prejudice under Rule 12(b)1 because the "principal basis for dismissal" was that Petitioners lacked standing. Pet.App.57a-58a.

3. Petitioners appealed. After briefing and argument, a divided panel of the Seventh Circuit Court of Appeals affirmed the district court's dismissal on August 21, 2024. Pet.App.1a-24a. The majority's sole finding was that Petitioners failed to adequately plead an injury in fact and, therefore, lacked standing under Article III. *Id.* at 5a-15a. It did not address any of the other errors raised on appeal.

a. The sharply divided 2-1 majority rejected Petitioners' candidate injuries. Pet.App.9a-15a. First, the Panel held that Petitioners' alleged

campaign expenditures to monitor late-arriving ballots arriving under Illinois' Receipt Deadline were not "actual or imminent," nor "certainly impending."[6] *Id.* at 10a-12a. The Panel reached this conclusion because, in its view, late-arriving ballots in 2022 were unlikely to cause Congressman Bost an "election defeat" due to his electoral success in the district that year. *Id.* at 11a-12a. To reach this conclusion, the Panel, *sue sponte*, took judicial notice that, six months after Petitioners' filed suit, Congressman Bost won his election in 2022 by a large margin. *Id.* at 11a. Ultimately, the Panel concluded that it was "speculative at best" that late arriving ballots would cause him to lose his election in 2022. Pet.App.11a-12a. The Panel did not describe how, in pre-election lawsuits, courts or litigants are supposed to determine (with any reasonable degree of certainty) whether electoral prospects are sufficiently at risk to trigger Article III. The Panel did not address Respondents' public warnings that late-arriving ballots may change electoral outcomes in the days after Election Day.[7] Pet.App.84a-85a. Nor did it address the electoral results in Congressman Bost's many previous elections. *See also* Pet.App.19a, 65a-70a.

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The Panel distinguished seemingly binding precedent recognizing Petitioners' injuries. *Id.* at 12-13a (comparing Petitioners' injuries to those in *Krislov v. Renour*, 226 F.3d 851 (7th Cir. 2000) and

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[6] Candidates have a right to monitor their elections in Illinois. 10 ILCS 5/17-23.

[7] "*Media Advisory: Heavy Mail Voting Could Affect Unofficial Elections Results*," Illinois State Board of Elections, Nov. 2, 2020, https://bit.ly/3C6Jjid, (last visited October 31, 2024).

Libertarian Party of Ill. v. Scholz, 872 F.3d 518 (7th Cir. 2017)). According to the Panel, the challenged time, place, and manner regulations in *Krislov* and *Scholz* involved "a direct obligation on candidates" whereas Petitioners "are electing to undertake such expenditures to insure against a result that may or may not come." Pet.App.13a.

With respect to Petitioners' competitive injuries, the Panel noted that the Seventh Circuit previously recognized such injuries. Pet.App.13a. The Panel still rejected Petitioners' concerns about margins of victory and the potential impact illegal ballots on Petitioners' reputations and fundraising. *Id.* at 13a. The Panel found that Petitioners are unable to show how the late-arriving ballots "will break against them" and, therefore, the allegations are speculative.

The Panel next addressed federal candidates' interest in ensuring the final official vote tally in their elections reflects only legally valid votes. Pet.App.14a. The Seventh Circuit had previously recognized an injury to this interest in *Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020), but the Panel majority did not mention it. Instead, citing to the dissent in an Eighth Circuit ruling recognizing such an interest and injury, the Panel questioned whether any injury to that interest was consistent with *Lance*, 549 U.S. at 442. Pet.App.14a (discussing *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020)). In doing so, the Panel created a circuit split between the Seventh and Eighth Circuits. Pet.App.14a. The Panel also characterized Petitioners' injuries as "far more speculative" than those in *Carson* because the 2024 federal election was

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"months away and the voting process has not even started yet." Pet.App.15a.

b. Judge Scudder dissented. Pet.App.16a-23a. "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." *Id.* at 21. "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." *Id.* at 23a.

Judge Scudder noted that, "[a]s a sitting member of Congress in the midst of an ongoing reelection campaign," Congressman Bost "is nothing close to a 'mere bystander' to the upcoming election or the allegation at the heart of this lawsuit." Pet.App.23a. "He is an active stakeholder who ought to be permitted to raise his claim in federal court."

c. The Panel also rejected Petitioners' dilution injuries. Petitioners' complaint alleged that their timely ballots were diluted by late-arriving ballots by 4.4% during the 2020. Pet.App.7a, 87a-89a. These late-arriving ballots would be illegal *if* Illinois Receipt Deadline was preempted by the Election Day statutes. *Id.* Like the district court, the Panel rejected this claim as a generalized grievance, citing *Wood* and *Lance*. Pet.App.7a. It concluded that that Petitioners' dilution injuries were a "generalized grievance affecting all Illinois voters" and, therefore, not concrete and particularized. *Id.* at 9a.

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REASONS FOR GRANTING THE PETITION

To Petitioners' knowledge, the decision below is the only non-vacated circuit ruling holding that federal candidates do not have standing to challenge state time, place, and manner regulations governing their federal elections. The Panel's ruling is infected with a number of errors and conflicts with precedent from this Court, from other circuits, and from previous rulings in the Seventh Circuit. The Court's guidance is urgently needed.

I. THE QUESTIONS PRESENTED ARE IMPORTANT.

A. The Recent Decline of Candidate Standing.

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The Panel held that Petitioner candidates for federal office, including a multi-term congressman, lacked standing to challenge a state law extending the state ballot receipt deadline an additional fourteen days beyond Election Day. Pet.App.9a-15a. The Panel made this ruling notwithstanding the candidates' undisputed testimony that they had expended and would continue to expend additional campaign resources during those fourteen days, in every election in which that law was or is applied. Pet.App.66a-68a, 72a-73a, 77a-78a. The ability of candidates and parties to sue over state laws affecting their campaigns has been narrowed again, and, indeed, may never have been so restricted.

This is a very recent trend. For over 130 years, this Court has heard claims brought by federal candidates challenging state time, place, or manner

regulations affecting their federal elections. *See, e.g.*, *McPherson v. Blacker*, 146 U.S. 1, 23-24 (1892); *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000); *Cook v. Gralike*, 531 U.S. 510 (2001); *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

The Panel opinion and dissent, however, illustrate how lower courts have struggled recently with the question of candidate standing. This struggle flared in the leadup to the 2020 election. *See, e.g., Carson*, 978 F.3d at 1058; *Donald J. Trump for President, Inc. v. Way*, Civil No. 20-10753 (MAS) (ZNQ), 2020 U.S. Dist. LEXIS 196911 (D.N.J. Oct. 22, 2020); *Donald J. Trump for President v. Cegavske*, 488 F. Supp. 3d 993 (D. Nev. 2020). It erupted immediately afterward. *See, e.g.*, *Trump*, 983 F.3d. at 924-25; *Bognet*, 980 F.3d at 342; *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596 (E.D. Wis. 2020). These cases often involved truncated proceedings with "expedited briefing and little opportunity for the adversarial testing of evidence," forcing courts to make "rushed, high-stakes, low information decisions." *Dep't of Homeland Security v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). All of these cases arose in the hothouse atmosphere surrounding the 2020 federal elections. *See Feehan*, 506 F. Supp. 3d at 600 ("The election that preceded this lawsuit was emotional and often divisive. The pleadings … are passionate and urgent.").

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In consequence, as a scholarly review of the period concluded, "in many" of these cases "courts took an unjustifiably strict view of standing as applied to both voters and candidates." Steven J. Mulroy, *Baby & Bathwater: Standing in Election Cases After 2020*, 126 DICK. L. REV. 9, 12-13 (Fall 2021). Unmeritorious challenges and a desire for an orderly electoral process, among other factors, "may have resulted in courts too cavalierly dismissing legitimate claims of standing, confusing standing questions with merits questions, or both." *Id.* at 13. But "getting standing right is particularly important in the election law arena," where election cases "will undoubtedly recur after every election." *Id.*

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The question of candidate standing ultimately reached three Courts of Appeals in 2020. The Seventh and Eighth Circuits both ruled that federal candidates had standing. *See Carson*, 978 F.3d at 1058; *Trump*, 983 F.3d at 925 (holding that state electoral regulation injured candidates in a concrete and particularized way). The final circuit to consider such a question ruled that federal candidates did not have standing. *See Bognet*, 980 F.3d at 352. This Court never reviewed *Bognet*, though three justices agreed that the issues raised in a companion case "call[ed] out for review by this Court." *Republican Party v. Boockvar*, 141 S. Ct. 1, 2 (2020). Later, just weeks before the Court vacated *Bognet*, and in yet another companion case, Justice Thomas wrote that the issues presented were "sufficiently meritorious to warrant review." *Republican Party v. Degraffenreid*,

141 S. Ct. 732, 737 (2021) (Thomas, J., dissenting); *see also id*. at 738 (Alito, J., dissenting).[8]

Though vacated, *Bognet* continues to permeate lower court rulings, including the one dismissing Petitioners' claims here. Pet.App.36a, 43a-45a, 51a; *see also Republican Nat'l Comm. v. Burgess*, No. 3:24-cv-00198-MMD-CLB, 2024 U.S. Dist. LEXIS 126371, at *12 (D. Nev. July 17, 2024); *Reschenthaler v. Schmidt*, No. 1:24-CV-1671, 2024 U.S. Dist. LEXIS 195920, at *25 (M.D. Pa. Oct. 29, 2024). While the Panel's decision did not directly cite *Bognet*, it cited portions of *Wood* that relied on *Bognet*.[9] Pet.App.8a and 54a-55a.

Bognet is not the only decision that has been misapplied to narrow candidate standing. This Court's decision in *Lance* has been misread in a number of cases following the 2020 elections—as it was misread by the Panel here. Pet.App.14a; 37a. *Lance* involved a challenge by Colorado voters to a congressional redistricting plan ordered by a Colorado state court. 549 U.S. at 438. The plaintiffs

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[8] If a civil case becomes "moot while on its way" to the Court, it "reverse[s] or vacate[s] the judgment" and "remand[s] with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. … [T]he rights of all parties are preserved; none is prejudiced by a decision which … was only preliminary." *Id.* at 40.

[9] Notably, the Eleventh Circuit observed in *Wood* that if the plaintiff "were a political candidate harmed by the recount, he would satisfy this requirement [of a particularized injury] because he could assert a personal, distinct injury." 981 F.3d at 1314.

claimed the order violated the Elections Clause's "legislature thereof" provision, but did not identify any injury other than "that the law—specifically the Elections Clause—has not been followed." *Id*. at 442. In denying standing, the Court analogized the plaintiff's claim of injury to one asserting taxpayer standing. *Id*. *Lance* patently has nothing to do with the particular interests of candidates who spend time and money running for public office. But lower courts, including the Panel, continue to misapply its analysis to candidates' injuries. *See Bognet*, 980 F.3d at 349; *Carson*, 978 F.3d at 1063 (Kelly, J., dissenting) (arguing that elector-candidate injuries are "precisely" like those rejected in *Lance*).

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The Court's guidance is needed to correct the unwarranted narrowing of candidates' ability to challenge electoral regulations.

B. It is Vitally Important that the Court Clarify the Questions About Candidate Standing Raised by the Seventh Circuit's Ruling.

It is important that courts hear and resolve well-pleaded challenges by federal candidates to state time, place, and manner regulations affecting their elections. Aside from the interests of the litigants, it is important that the public conclude that elections are run in an orderly, not arbitrary, fashion. *See Crawford v. Marion Cnty. El. Bd.*, 553 U.S. 181, 197 (2008) ("public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process"); *see* Mulroy, *supra*, 126 DICK. L. REV. at 14 ("election cases are uniquely important to

the health of our democracy"). Accordingly, this Court frequently considers such challenges. *See, e.g., Crawford*, 553 U.S. at 185; *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 660 (2021) (considering "how §2 [of the Voting Rights Act] applies to generally applicable time, place, or manner voting rules"); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (establishing general framework for constitutional challenges to electoral rules).

The Court has particularly observed, moreover, that where regulations "unfairly or unnecessarily burden either a minority party's or an individual candidate's … interest in the continued availability of political opportunity," the "interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance." *Lubin v. Panish*, 415 U.S. 709, 716 (1974) (invalidating candidate filing fee); *see Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters").

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The stringent limits imposed on candidate standing by the Panel slight the Petitioners' real, out-of-pocket, tangible injuries, while implicating all of the foregoing concerns. The Court's intervention is justified on these bases alone. But more is involved here than the "broad interest" (*Lubin*, 415 U.S. at 716) that is always involved when state electoral rules burden federal candidates. Specific holdings in this

case will tend to make the next electoral cycle as fraught as 2020.

The Panel noted Congressman Bost's allegations that he lost resources "contest[ing] ballots that arrived after Election Day" and "send[ing] 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." Pet.App.10a. But it rejected these costs as a basis for standing, observing that harm must be "actual and imminent" and "certainly impending." *Id.* (citations omitted). The Court held that "it was Plaintiffs' choice to expend resources to avoid a hypothetical future harm—an election defeat." *Id.* at 11a. Taking judicial notice of the fact that Congressman Bost won his last election with 75% of the vote, the Court characterized his out-of-pocket losses as "manufactur[ing] standing by choosing to spend money to mitigate … conjectural risks. *Id.* at 11a-12a.

Petitioners respectfully submit that the Panel committed a major error by treating candidates' likely *electoral prospects* as relevant to the standing analysis, where a challenged statute inflicted real costs on their campaigns. How the Panel erred is discussed *infra* in section II.B. But consider here what such an analysis requires courts to do. Apparently, judges in pre-election cases must now try to predict electoral outcomes. They must dive into polls and politics, Rasmussen and the Cook Report, political betting markets, and perhaps Sunday-morning talk shows. Note also that standing must always exist, from the time a case is filed until it is

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finally resolved. But electoral prospects fluctuate, often wildly, and even the experts get it wrong. As Judge Scudder noted in dissent, "past is not prologue for political candidates … In no way is any outcome guaranteed in November." Pet.App.19a. Applying the Panel's approach, a candidate might have standing one day only to lose it the next on account of recent debates, scandals, or gaffes. Popular incumbents, moreover, could rarely claim standing to challenge *any* electoral law. This approach is, to put it mildly, unworkable. If rigorously applied, it would guarantee more or less arbitrary outcomes whenever courts ruled on candidate standing. The Court should intervene to foreclose this result.

Compounding these practical problems, the Panel also noted, when issuing its ruling on August 21, 2024, that the 2024 "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." Pet.App.15a. The notion that standing is diminished when a federal election is about two months away conflicts as a practical matter with the settled principle that courts ordinarily should not alter election rules on the eve of an election. *See Riley v. Kennedy*, 553 U.S. 406, 426 (2008) ("practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges" (citing *Purcell v. Gonzalez*, 549 U. S. 1, 5-6 (2006)). One such consideration is to discourage "last-minute litigation and instead encourage[] litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process." *Democratic Nat'l Comm. v. Wis. State*

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Legis., 141 S. Ct. 28, 31 (2020) (Kavanaugh, J. concurring in denial of application to vacate stay).

Petitioners did just that here. They filed suit well before the 2022 and 2024 federal elections. Pet.App.92a. Rather than instituting emergency or expedited procedures, Petitioners pursued their claims through a pre-election challenge that followed the ordinary litigation process. But if courts follow the Panel, and use such actions *against* plaintiffs as grounds to find that candidates' injuries were not impending, then candidates would be better advised file complaints close to an election and pursue expedited emergency relief. This incentive is contrary to the one established by *Purcell* and its progeny. The Court should intervene to overturn this perverse incentive.

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II. THE DECISION BELOW IS INCORRECT AND CONTRARY TO SUPREME COURT PRECEDENT.

The Panel's decision contains serious legal errors. It ignores crucial allegations, even where bolstered by sworn statements. Pet.App.20a (Panel "fails to accept his factual allegations as true"). It requires courts to consider a candidate's electoral prospects when determining whether additional expenses incurred by that candidate are "conjectural," without citing any decision that supports this approach. It overreads *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398 (2013) and *Lance*, while ignoring this Court's holding in *FEC v. Ted Cruz for Senate*, 596 U.S. 289 (2022). As Judge Scudder noted, the Panel "fail[ed] to see this" as it ought to have, "as a straightforward application of settled principles of standing." Pet.App.21a.

A. The Bases of Petitioners' Standing as Candidates.

To demonstrate Article III standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (citing *Lujan*, 504 U.S. at 560-61). To establish injury in fact, Petitioners must show "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (citation omitted). And to satisfy the second prong of the standing test, Petitioners must demonstrate that their claimed injuries are "fairly traceable" to the Illinois Receipt Deadline. *Haaland v. Brackeen*, 599 U.S. 255, 291-92 (2023); *see California v. Texas*, 593 U.S. 659, 668-69 (2021) (citations omitted). Petitioners' unrebutted allegations of tangible and intangible injuries were set forth in the complaint and in their individual declarations. Pet.App. 64a-79a, 80a-93a; *see Spokeo, Inc.*, 578 U.S. at 340-41 (describing tangible and intangible injuries).

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Congressman Bost was first elected to represent House District 12 ten years ago, in 2014. Pet.App.64a. Before that, he served as a member of the Illinois House of Representatives for 20 years, beginning in 1994. *Id.* at 65a. He averred that "[s]ince Illinois amended its election code … 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." *Id.* at 66a. It is "significantly more difficult" to find volunteers willing to work after Election Day. *Id.* Further, in the wake of the 2013 Illinois law allowing voting by mail, the number of ballots received after Election Day has "substantially increased almost every year." *Id.* The resources expended as a result are "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." *Id.* at 66a-67a. Congressman Bost's campaign "needs to both monitor and evaluate whether to object to the counting of deficient ballots. This costs … time, money, volunteers and other resources." *Id.* at 67a. He "organizes and sends poll watchers to each county courthouse" in each of the 34 counties in his district. *Id.* at 65a, 67a. It naturally costs more money to do this for two more weeks. *Id.* at 67a. "If an irregularity is observed by a poll watcher," the campaign then needs "to consult with campaign staff or lawyers to determine the appropriate action, if any." *Id.* His campaign also runs a "ballot chase program" to evaluate its "get-out-the-vote efforts and other concerns." *Id.* at 68a. Illinois' Receipt Deadline compels him to keep that particular program active for 14 additional days. *Id.* These activities inflict real, out-of-pocket monetary losses and otherwise deplete campaign resources.

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Congressman Bost also alleged competitive injuries based on the prospect that illegal votes could diminish his margin of victory. *Id.* at 68a-69a. He testifies that this "will lead to the public perception that my constituents have concerns about my job

performance," which in turn "influence[s] numerous third parties, such as future voters, Congressional leadership, donors, and potential political opponents." *Id*.

Petitioners Pollastrini and Sweeney were Republican nominees in 2020 and 2024 for presidential and vice-presidential electors at-large for Illinois. *Id*. at 70a, 74a. In 2020, Pollastrini was "a Precinct Committeeman and active member of the Kane County Republican Central Committee." *Id*. at 71a. In 2022, Sweeney was "a Precinct Captain for the Republican Party of Maine Township, Illinois." *Id*. at 77a. Both attest to the need to expend additional resources to deal with ballots arriving after Election Day. *Id*. at 72a-74a, 78a-79a.

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B. The Panel Erred in Several Ways and Ignored This Court's Decision in *FEC v. Ted Cruz for Senate.*

The Panel's approach to candidate standing, set forth *supra* in section I.B, which expressly considers candidates' electoral prospects, is unworkable and unmanageable. The Panel also erred in a number of other ways.

It simply ignored Congressman Bost's factual testimony that he has been incurring costs under Illinois' ballot receipt law since the law was changed in 2005, 19 years ago. Pet.App.65a-67a. It also ignored his crucial testimony that his resource losses increased dramatically after a 2013 change in the law, 11 years ago, *and have increased almost every year*. *Id*. at 65a-66a. Given these facts, there is simply no way his expected monetary losses in future elections

can be characterized as "conjectural." As Judge Scudder observed, "[i]n practice … the Panel disregards several claims made by Bost that directly undermine its conclusions," including "that the number of ballots received after Election Day has increased consistently." *Id.* at 20a. For similar reasons, Judge Scudder argued that the Panel's discussion of *Clapper* "most misses the mark." *Id*. at 21a. "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." *Id*. at 22a (citing *Cruz*, 596 U.S. at 297). By contrast, "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." *Id*.

The Panel also erred in that it provided no legal basis for requiring *any* consideration of candidates' electoral prospects, given that the state law inflicted tangible, monetary costs on the plaintiffs. *See TransUnion*, 594 U.S. at 425 (2021) ("certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms").

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The Panel's decision also put federal courts, rather than federal candidates (in this case a U.S. Congressman with over 30 years of experience in winning elections) in the position of determining whether campaign resources were appropriately allocated. There is no reason to believe that federal judges are suited, let alone better suited, to evaluate what a federal candidate's campaign needs to do. As

Judge Scudder points out, the Panel "goes too far" in evaluating Congressman Bost's expenditures: "[F]ederal 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." Pet.App.19a. Indeed, even if he "had won reelection by 99% in 2022," Congressman Bost 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." *Id.* With due respect, Petitioners submit that a multi-term Congressman, not the federal judiciary, has better insight into whether post-election monitoring of late arriving ballots is appropriate. Certainly, such monitoring was reasonable, given Respondents' prior public warnings about the effects late-arriving ballots would have on outcomes. *Id.* at 85a-86a.

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Finally, the Panel erred by ignoring this Court's decision in *Cruz*. That case involved a challenge to a campaign finance regulation triggered after Senator Cruz made personal loans to his campaign. 596 U.S. at 293-95. The federal government argued that Senator Cruz lacked standing to challenge the campaign finance regulation because he "knowingly triggered" it. *Id.* at 296. Thus, it argued, Senator Cruz was injured not by the regulation but by his own decision. *Id.* at 296-97. Rejecting this argument, the Court explained that it has "never recognized a rule of this kind under Article III." *Id.* at 297. "To the contrary, we have made clear that an injury resulting from the application or threatened application of an

unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred." *Id.* (citations omitted).

By characterizing Petitioners' expenses as "manufactur[ing] standing by choosing to spend money," the Panel failed to acknowledge or follow *Cruz*. Pet.App.12a.; *see also id.* at 20a-21a (Scudder, J., dissenting in part) (taking precautionary measures to avoid speculative risks does not mean those actions can never support standing).

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III. THE DECISION BELOW CREATES INTER- AND INTRA-CIRCUIT SPLITS.

The Panel's ruling also reveals an important and recurring split amongst courts of appeals over candidate standing. This split concerns whether candidates have an interest in ensuring that the final vote tally is accurate, and whether additional costs inflicted on political campaigns constitute an injury in fact. This petition presents an opportunity to address these conflicts in the ordinary course of litigation rather than in emergency proceedings on the eve of an election.

In *Carson v. Simon*, the Court of Appeals for the Eighth Circuit recognized that federal candidates have a "cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast." 978 F.3d at 1058. *Carson* arose after Minnesota's Secretary of State entered a consent decree extending the state's ballot receipt deadline until after Election Day. *Id.* at 1057-58. Two elector nominees sued on the ground that such an action

required legislative approval under the "legislature thereof" provision in the Electors Clause. *Id.* The Eighth Circuit agreed, holding that "the extension of the deadline" for ballot receipt "likely violates Article II, Section 1 of the Constitution because the Secretary" acted "without legislative authorization." *Id*. at 1054. The court held that "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Id.* at 1058.

The Panel disagreed. It "question[ed] 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*," and then cited the dissent in *Carson* who argued it was not. Pet.App.14a.[10] The Panel added that "even if" it was consistent with *Lance*, the facts in *Carson* were "markedly different" because early voting had already started. *Id*. But this fact is irrelevant. Whether voting has started or is two months away, candidates will have the same interest in having "the final vote tally accurately reflect[] the legally valid votes cast." Stated differently, in either case that interest will entitle them to challenge a law that authorizes the *illegal* casting of ballots. In refusing to follow *Carson*, the Panel was also refusing to follow a previous Seventh Circuit ruling—as Judge Scudder noticed and pointed out. Pet.App.17a; *see Trump*, 983 F.3d at 924 ("An inaccurate vote tally is a concrete and particularized injury to candidates." (quoting *Carson*)). The Court should intervene to resolve this conflict between the Seventh and the Eight Circuits.

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[10] As discussed *supra* in point I.A, *Lance* is easily distinguishable because the plaintiff there was not a candidate.

The Panel's decision also conflicts with precedent from other circuits regarding whether additional campaign expenditures support candidate standing. Petitioners had cited two Seventh Circuit decisions to support their case. In *Krislov*, 226 F.3d at 856, the plaintiffs challenged a statute requiring circulators to be registered voters in the political subdivision where a candidate was seeking office. Among the bases for standing was the fact that candidates had to "allocate additional campaign resources to gather signatures." *Id*. at 857. And in *Scholz*, 872 F.3d at 522-23, standing was based on a "full slate" requirement that "raise[d] the cost of ballot access to … the Libertarian Party and is a continuing burden on its ability to field candidates."[11]

But the Panel rejected Petitioners' argument that "being compelled to expend resources as a result of the Illinois ballot receipt procedures is in itself sufficient for Article III standing." Pet.App.12a. It distinguished *Krislov* and *Scholz* on the ground that 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 satisfy some obligation [the law] imposes on them." Pet.App.13a.

The claim that expenditures only justify candidate standing when compelled by law is an innovation with no prior support in the case law. It is also an inherently dubious claim, as it depends entirely on what is meant by "compelled." After all,

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[11] Note that in neither *Krislov* nor *Scholz* did the Seventh Circuit tie standing to the candidates' electoral prospects, which were, in fact, minimal. *See* discussion *supra* in point I.B.

the individuals subject to the expenditures in *Krislov* and *Scholz* did not *have* to run for office.

More to the point here, the Panel's innovation conflicts with Fifth Circuit precedent. In *Tex. Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006), the Texas Democratic Party (TDP) challenged a candidate's removal from the ballot pursuant to a state law allowing such a removal based on a party finding of ineligibility. The court held that "the TDP has direct standing because [the candidate's] replacement would cause it economic loss. … the TDP 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.'" *Id.* at 586 (citation omitted). Although no law compelled those expenditures, they were deemed sufficient to confer standing.[12] The Court should grant the petition and resolve the split of authority between the Seventh Circuit and Fifth Circuits over this issue.

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[12] A similar result was reached in *Republican Nat'l Comm., et al., v. Wetzel, et al.*, No. 24-60395, 2024 U.S. App. LEXIS 27203 (5th Cir. Oct. 25, 2024), which involved nearly identical claims and injuries as those alleged here. In that case, the Republican National Committee, the Libertarian Party of Mississippi, and others challenged Mississippi's ballot receipt deadline that allowed ballots to be received and counted up to five business days after Election Day. *Id.* at *6-7. The Fifth Circuit noted that the parties had not disputed "plaintiffs' standing before this court … presumably because this case fits comfortably within our precedents." *Id.* at *7 n.3 (citations omitted). The same kinds of additional campaign expenditures alleged here had been successfully alleged in the district court. *See Republican Nat'l Comm. v. Wetzel*, Nos. 24cv25, 24cv37, 2024 U.S. Dist. LEXIS 132777, at *15-*16 (S.D. Miss. July 28, 2024).

IV. THIS CASE IS AN IDEAL VEHICLE.

This case presents an ideal vehicle to review the question presented. It arises out of a motion to dismiss. It is limited to the four corners of the complaint and three affidavits respecting standing that were considered by the district court and the Seventh Circuit. There is no lengthy factual record that would follow any trial. While the district court ruled on standing, the merits, and the defense of sovereign immunity, the Seventh Circuit ruled entirely based on standing. Other arguments asserted below are not on appeal.[13] The only issue presented here is candidate standing. As set forth above, the need to have that issue resolved, and outside of emergency litigation, is great.

Finally, because the dismissal was jurisdictional, the merits of Petitioners' claims remain unresolved. Since the dismissal, the strength of these claims has improved. The Fifth Circuit, the only court of appeals to consider the merits of claims like Petitioners', recently ruled that a Mississippi law allowing ballots to be received and counted after Election Day was preempted. *Wetzel,* No. 24-60395, 2024 U.S. App. LEXIS 27203. Certiorari and remand would allow the lower courts to consider the merits of the important questions raised by Petitioners' claims.

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[13] Petitioners do not seek certiorari review of their arguments below that vote dilution constitutes an independent injury conferring jurisdiction under Article III and *Lujan*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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