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

MICHAEL J. BOST; LAURA POLLASTRINI; and SUSAN SWEENEY, Plaintiffs, v. THE ILLINOIS STATE BOARD OF ELECTIONS; and BERNADETTE MATTHEWS, in her capacity as the Executive Director of the Illinois State Board of Elections, Defendants.	No. 1:22-cv-02754 Hon. John F. Kness

DEMOCRATIC PARTY OF ILLINOIS' OPPOSED MOTION TO INTERVENE AS DEFENDANT

Pursuant to Federal Rule of Civil Procedure 24, the Democratic Party of Illinois ("DPI") moves to intervene as a defendant in the above-titled action. This motion is undeniably timely: the matter was only recently initiated, the named Defendants have not yet responded to the Complaint, and nothing of substance has occurred in the case. The initial status conference is not scheduled to take place until August 9, 2022, nearly two months from now. DPI is entitled to intervene as of right under Rule 24(a)(2) because it has an interest relating to the subject matter of the action that will be impaired should Plaintiffs be successful, and DPI's interests are not adequately represented by the existing parties to the action. In the alternative, DPI requests that the Court grant it permissive intervention under Rule 24(b).

In accordance with this Court's Updated Motions Policy, DPI sought the named parties' agreement to this motion. DPI has been advised that Plaintiffs oppose the motion to intervene, and

Defendants take no position. DPI is submitting, together with this motion, a separate statement setting forth the parties' competing proposed briefing schedules for this motion.

BACKGROUND

At issue in this litigation is 10 Ill. Comp. Stat. Ann. § 5/19-8(c) (the "Ballot Receipt Deadline"), a provision in Illinois law that ensures that ballots cast by lawful voters that are received in the mail by election officials in the 14 days after the election are counted, provided that: (1) they are postmarked on or before election day, or (2) if the U.S. Postal Service fails to postmark them, the ballot certification is dated on or before Election Day.[1] This has been the law in Illinois since 2015 and Illinois' acceptance of mail ballots received after Election Day goes back another decade. Without this law, the millions of Illinois voters who vote by mail risk disenfranchisement, despite timely casting their ballots, due to delayed mail delivery and inconsistent postmarking practices.[2] Illinois is far from alone in allowing for the counting of vote-by-mail ballots delivered after election day—17 other states, the District of Columbia, Puerto Rico, and the Virgin Islands also have extended ballot receipt deadlines.[3]

Nevertheless, Plaintiffs, Illinois voters and candidates for federal office, brought this lawsuit against the State Board of Elections and its Executive Director on May 25, 2022, claiming that Illinois's Ballot Receipt Deadline violates the U.S. Constitution and conflicts with Congress's

[1] The vote-by-mail process in Illinois requires a voter to seal their ballot in an envelope with a certification that the voter must date and sign under penalty of perjury. *See* 10 Ill. Comp. Stat. Ann. 5/29-10; Vote by Mail, Mclean County Government, https://www.mcleancountyil.gov/votebymail (last visited June 15, 2022).

[2] In the last federal election, one of every three votes in Illinois was cast via mail ballot. *See, e.g.*, Marie C. Dillon, *Lessons Learned from the November 2020 Election*, Better Gov't Association (Dec. 28, 2020), https://www.bettergov.org/news/lessons-from-the-november-2020-election/.

[3] Tbl. 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots, Nat'l Conference of State Legislatures (Mar. 15, 2022), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx.

command that election day take place on the "first Tuesday after the first Monday in November." Compl. ¶ 3. Specifically, Plaintiffs contend that "Illinois has expanded Election Day by extending by 14 days the date for receipt and counting of vote-by-mail ballots." Compl. ¶ 4. The Complaint includes three causes of action: (1) Count I alleges that the Ballot Receipt Deadline causes Plaintiffs' votes to be diluted in violation of the First and Fourteenth Amendments to the U.S. Constitution, *id.* ¶¶ 38–43; (2) Count II contends that by counting ballots received after Election Day, Defendants violate Plaintiffs' rights as candidates under the First and Fourteenth Amendments to the U.S. Constitution, *id.* ¶¶ 44-48; and (3) Count III claims that the Ballot Receipt Deadline violates the federal election day statutes, 2 U.S.C. § 7 and 3 U.S.C. § 1, *id.* ¶¶ 49-60. To remedy their purported injuries, Plaintiffs ask this Court to permanently enjoin Defendants from enforcing the Ballot Receipt Deadline, and instead require that in all future elections, all vote-by-mail ballots received after election day be rejected, regardless of whether the ballot was voted, dated, and timely mailed. *Id.* at 11.

This is not the first time that litigants have attempted this type of claim. In 2020, several courts considered nearly identical challenges to post-election day ballot receipt deadlines around the country, and all failed. *See, e.g.*, *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 353-54 (3d Cir. 2020), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508, 209 L. Ed. 2d 544 (2021) (finding federal law does not provide for when or how ballot counting occurs . . . and that the federal election day statutes "can, and indeed do, operate harmoniously" with state laws setting post-election day absentee ballot receipt deadlines); *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 359 (D.N.J. 2020) ("Although federal law prohibits New Jersey from canvassing ballots cast after Election Day, it is within New Jersey's discretion to choose its methods of determining the timeliness of ballots, so long as there is no appreciable risk

of canvassing untimely ballots"); *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1004 (D. Nev. 2020) (dismissing complaint challenging post-election day canvassing of vote-by-mail ballots for lack of standing finding, among other things, alleged vote-dilution was impermissibly speculative); *see also Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372 (Pa. 2020), *cert. denied sub nom. Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 209 L. Ed. 2d 164 (2021) (allowing a three day extension of the mail ballot receipt deadline to account for U.S. Postal Service delivery timelines and avoid disenfranchisement and noting that "Pennsylvania's election laws currently accommodate the receipt of certain ballots after Election Day, as it allows the tabulation of military and overseas ballots received up to seven days after Election Day").

DPI is entitled to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(2). Plaintiffs' challenge to the Ballot Receipt Deadline threatens to force DPI to divert significant resources to educating voters as to a crucial legal change shortly before a federal election, and further threatens disenfranchisement of DPI's members and constituents due to no fault of their own. Intervention is needed to protect DPI's substantial and distinct legal interests, which will otherwise be inadequately represented in this litigation. In the alternative, DPI requests permissive intervention under Rule 24(b). In accordance with Rule 24(c), Proposed Intervenor has also attached a Motion to Dismiss Plaintiffs' Complaint as Exhibit 1.

LEGAL STANDARD

Parties may intervene as of right under Rule 24(a)(2) when four requirements are met: "(1) timeliness, (2) an interest relating to the subject matter of the main action, (3) at least potential impairment of that interest if the action is resolved without the intervenor, and (4) lack of adequate representation by existing parties." *Zurich Cap. Markets Inc. v. Coglianese*, 236 F.R.D. 379, 383 (N.D. Ill. 2006) (quotation marks omitted). "Courts should construe Rule 24(a)(2) liberally and

should resolve doubts in favor of allowing intervention." *Michigan v. U.S. Army Corps of Eng'rs*, No. 10-CV-4457, 2010 WL 3324698, at *2 (N.D. Ill. Aug. 20, 2010). "In accordance with this liberal construction, courts must accept as true the non-conclusory allegations of the motion a proposed intervenor makes." *Elouarrak v. Firstsource Advantage, LLC*, No. 1:19-cv-03666, 2020 WL 291364, at *1 (N.D. Ill. Jan. 21, 2020) (quotation marks omitted). "[A] court should not deny a motion to intervene unless it is certain that the proposed intervenor cannot succeed in its case under any set of facts which could be proved under the complaint." *U.S. Army Corps of Eng'rs*, 2010 WL 3324698, at *2 (citing *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995)).

Under Rule 24(b), the Court may, "[o]n timely motion, . . . permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). "The purpose of the timeliness requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000). Permissive intervention should not be denied solely because a proposed intervenor failed to prove an element of intervention as of right. *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) (finding permissive intervention would have been appropriate even if requirements for intervention as of right had not been met); *see also City of Chi. v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 986 (7th Cir. 2011).

ARGUMENT

A. DPI satisfies Rule 24(a)'s requirements for intervention as a matter of right.

DPI satisfies each of the four requirements of Rule 24(a)(2). The Court should therefore grant its motion to intervene as of right.

1. The motion is timely.

The motion to intervene is timely. "The test for timeliness is essentially one of reasonableness: potential intervenors need to be reasonably diligent in learning of a suit that might affect their rights, and upon so learning they need to act reasonably promptly." *Reich*, 64 F.3d at 321 (quotation marks omitted). To determine timeliness, courts consider "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances." *Sokaogon Chippewa Cmty.*, 214 F.3d at 949.

Plaintiffs filed their Complaint on May 25, 2022. This motion follows only three weeks later, and before any substantive activity in the case. The State Defendants' response to the Complaint is not due until July 8, and nothing of substance has occurred in the case. The Court has scheduled an initial status conference for August 9—still nearly two months away. Simply put, there has been no delay, and there is no possible risk of prejudice to the other parties. *See id.* DPI acted promptly after it learned of this lawsuit and did not "drag[] its heels." *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994). DPI accordingly easily satisfies the first requirement for intervention.

2. The disposition of this case will impair DPI's and its members' and constituents' abilities to protect their interests.

DPI and its members have significant protectable interests in this lawsuit that might be impaired by Plaintiffs' causes of action. A "prospective intervenor's interest [in the lawsuit] must be direct, significant, and legally protectable." *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 391 (7th Cir. 2019). In assessing whether such an interest is sufficiently "impair[ed] or impede[d]," Fed. R. Civ. P. 24(a)(2), courts "look[] to the 'practical consequences' of denying intervention." *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977) (quoting *Nuesse*

v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967)). "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *U.S. Army Corps of Eng'rs*, 2010 WL 3324698, at *3 (quoting Fed. R. Civ. P. 24 advisory committee's note to 1966 amendment). The Seventh Circuit has "interpreted statements of the Supreme Court as encouraging liberality in the definition of an interest." *Lopez-Aguilar*, 924 F.3d at 392.

DPI easily satisfies this factor. If successful, Plaintiffs' challenge to established Illinois voting procedures would impair DPI's legally protected interests. DPI is a political organization dedicated to expanding the franchise and supporting the election of Democratic Party candidates. Injunction of the Ballot Receipt Deadline and the resulting rejection of timely-cast ballots of lawful voters would cause DPI serious and irreparable harm. These include direct injuries to DPI itself: the significant change in the law would force DPI to expend significant resources to educate the public to attempt to remediate the harm it would otherwise cause—resources that would have otherwise gone to persuading and turning out voters.

The Seventh Circuit has found precisely this type of injury sufficient to confer Article III standing on the Democratic Party in a voting rights lawsuit. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (concluding "new law injure[d] the Democratic Party by compelling the party to devote resources" that it would not have needed to devote absent new law), *aff'd*, 553 U.S. 181 (2008). Other courts around the country have come to similar conclusions. *See, e.g.*, *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz. 2018) (finding standing where law "require[d] Democratic organizations . . . to retool their [get-out-the-vote] strategies and divert [] resources"), *rev'd on other grounds sub nom. Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc).

Courts regularly grant intervention to political parties in cases like this one, which involve the rules under which elections are to be held. *See, e.g.*, *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299 (5th Cir. 2022) (holding that local and national political party committees should have been allowed to intervene as of right as defendants in challenge to state election laws); *Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *4 (E.D. Cal. June 10, 2020) (holding a political party has a "significant protectable interest" in intervening to defend its voters' interests in vote-by-mail and its own resources spent in support of vote-by-mail); *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365 (D. Nev. Apr. 28, 2020) (granting party committees intervention as of right as defendants in a challenge to mail-in voting procedures); *see also Cooper Techs. v. Dudas*, 247 F.R.D. 510, 514 (E.D. Va. 2007) ("[I]n cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. Civ. § 1908 (2d ed. 1986))).

Separate and apart from the injury that Plaintiffs' action threatens to cause DPI directly, DPI also has a significant protectable interest in this lawsuit because of the harm that it threatens DPI's members and constituents. Plaintiffs seek an injunction preventing Illinois from counting *any* mail-in ballots after "election day," regardless of when they are postmarked or dated. *See* Compl. ¶ 57 ("A qualified ballot for federal office is not a legal vote unless it is received by Election Day.") Such an injunction would subject the counting of mail-in ballots—including those of Democratic voters—to circumstances entirely outside the voter's control. It would condition the counting of votes upon the delivery timelines of the U.S. Postal Service, leading to the

disenfranchisement of many voters through no fault of their own.[4] Federal courts have repeatedly held that, where an action carries with it the prospect of disenfranchising a political party's members, the party has a cognizable interest at stake and may intervene to protect that interest. *See, e.g.*, *Crawford*, 472 F.3d at 951 ("The Democratic Party also has standing to assert the rights of those of its members who will be prevented from voting by the new law."); *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004) (holding the risk that some voters will be disenfranchised confers standing upon political parties and labor organizations).

Thus, DPI satisfies the second and third factors for intervention as of right, as well.

3. DPI's interests are not adequately represented in this case.

Finally, DPI satisfies the fourth factor for intervention as of right, because it cannot rely on the parties in the case to adequately represent its interests. This requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Lake Invs. Dev. Grp., Inc. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1261 (7th Cir. 1983) (citation omitted). "[T]he proposed intervenor should be treated as the best judge of whether the existing parties adequately represent his or her interests, and . . . any doubt regarding adequacy should be resolved in favor of the proposed intervenors." *U.S. Army Corps of Eng'rs*, 2010 WL 3324698, at *6 (noting that the applicant need only show

[4] *See* Brian Naylor, *The Postal Service is slowing the mail to save money. Critics say it's a death spiral*, NPR.org (Oct. 8, 2021), https://www.npr.org/2021/10/08/1044016873/postal-service-slow-mail-save-money; Geoff Bennett & Ryan Connelly Holmes, *Why the U.S. Postal Service is experiencing delays*, PBS News Hour (Jan. 26, 2022), https://www.pbs.org/newshour/show/why-the-u-s-postal-service-is-experiencing-delays; Sneha Day, *Postal delivery delays slammed at congressional field hearing in Chicago*, Chi. Sun-Times (Oct. 15, 2021), https://chicago.suntimes.com/politics/2021/10/15/22728928/postal-delivery-delays-mail-chicago; Sally Schulze, *Mail delays continue across Chicago area, Rep. Casten pushing for change*, FOX 32 Chicago (Jan. 31, 2022), https://www.fox32chicago.com/news/mail-delays-continue-across-chicago-area-rep-casten-pushing-for-change.

that representation of its interest may be inadequate, not that representation will in fact be inadequate) (quotation marks omitted).

While Defendants have an interest in defending the actions of state and local governments, DPI has a different interest: ensuring that every Democratic voter in Illinois has a meaningful opportunity to cast a ballot and have that ballot counted in the upcoming elections. Courts have "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003); *accord Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) ("[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'" (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009))); *U.S. Army Corps of Eng'rs*, 2010 WL 3324698, at *7 ("[T]he government only represents the citizen to the extent his interests coincide with the public interest. If the citizen stands to gain or lose from the litigation in a way different from the public at large, the *parens patriae* would not be expected to represent him." (quoting *Chiglo v. City of Preston*, 104 F.3d 185, 187–88 (8th Cir. 1997))).

That is the case here. DPI has specific interests and concerns—from its overall electoral prospects to the most efficient use of its limited resources to promote get-out-the-vote-efforts—that neither Defendants nor any other party in this lawsuit share. *See Paher*, 2020 WL 2042365, at *3 (granting intervention as of right where proposed intervenors "may present arguments about the need to safeguard Nevada[ns'] right to vote that are distinct from [state defendants'] arguments"). Recognizing this, courts have consistently permitted political parties to intervene in cases involving election administration even where government officials are named as defendants. *See, e.g.*, *Issa*, 2020 WL 3074351, at *4. Here, as in *Issa*:

> Although Defendants and the Proposed Intervenor[] fall on the same side of the dispute, Defendants' interests in the implementation of the [challenged law] differ from those of the Proposed Intervenor[]. While Defendants' arguments turn on their inherent authority as [government officials] and their responsibility to properly administer election laws, the Proposed Intervenor[is] concerned with ensuring [its] party members and the voters [it] represents have the opportunity to vote in the upcoming federal election, advancing [its] overall electoral prospects, and allocating [its] limited resources to inform voters about the election procedures. As a result, the parties' interests are neither "identical" nor "the same."

Id. at *3 (citation omitted); *see also U.S. Army Corps of Eng'rs*, 2010 WL 3324698, at *7 (granting intervention as of right where "[a]lthough Defendants are not directly adverse to the [proposed intervenors], their interests are not completely identical"). While Defendants might defend the Ballot Receipt Deadline as not in conflict with federal law, they cannot be expected to join DPI in promoting its more parochial interests. *See Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998) (granting motion to intervene as of right where private parties' interests diverged from government's interest in representation, and where "[t]he early presence of intervenors may serve to prevent errors from creeping into the proceedings, clarify some issues, and perhaps contribute to an amicable settlement"); *Ohio River Valley Env't. Coal., Inc. v. Salazar*, No. 3:09-0149, 2009 WL 1734420, at *1 (S.D.W. Va. June 18, 2009) (granting motion to intervene as of right where defendant and proposed intervenor had identical goals but "difference in degree of interest could motivate the [intervenor] to mount a more vigorous defense" and "[t]he possibility that this difference in vigor could unearth a meritorious argument overlooked by the current Defendant justifies the potential burden on having an additional party in litigation").

In short, because its interests are not shared by the current parties to the litigation, DPI cannot rely on Defendants or anyone else to provide adequate representation. It has thus satisfied the four requirements for intervention as of right under Rule 24(a)(2). *See Issa*, 2020 WL 3074351, at *3–4; *Paher*, 2020 WL 2042365, at *3.

B. Alternatively, DPI should be granted permissive intervention under Rule 24(b).

Even if this Court were to find DPI ineligible for intervention as of right, it easily satisfies the requirements for permissive intervention under Rule 24(b). "Rule 24(b)(2) states that permissive intervention may be allowed 'when an applicant's claim or defense and the main action have a question of law or fact in common' . . . . 'In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) (quoting Fed. R. Civ. P. 24(b)). Federal Courts across the country have granted permissive intervention to political parties in cases challenging voting laws. *See e.g.*, *Democratic Party of Va. v. Brink*, No. 3:21-cv-756-HEH, 2022 WL 330183, at *2 (E.D. Va. Feb. 3, 2022) ("[Intervenor] is one of Virginia's two major political parties, and it brings a unique perspective on the election laws being challenged and how those laws affect its candidates and voters. Courts often allow the permissive intervention of political parties in actions challenging voting laws for exactly this reason.") (citation omitted); *see also Mi Familia Vota v. Hobbs*, No. CV-21-01423-PHX-DWL, 2021 WL 5217875, at *2 (D. Ariz. Oct. 4, 2021); *Swenson v. Bostelman*, No. 20-cv-459-wmc, 2020 WL 8872099 (W.D. Wis. June 23, 2020).

As discussed above, Plaintiffs' challenge to Illinois law threatens DPI with injury sufficient to confer Article III standing and DPI's motion to intervene is timely. DPI has defenses to Plaintiffs' claims that share common questions of law and fact—for example, DPI maintains that Plaintiffs have failed to state a claim on which relief can be granted and lack standing to bring this suit. *See* Ex. 1. Most importantly, intervention will result in neither prejudice nor undue delay. DPI has an interest in a swift resolution of this action to ensure that every eligible Illinoisan is allowed to cast a ballot and have that ballot counted in the coming election. Recognizing this urgency, DPI

has already prepared and attached to this motion a Motion to Dismiss. *See* Ex. 1. DPI's Proposed Motion to Dismiss merely challenges the sufficiency of Plaintiffs' claims. It does not add any unrelated counterclaims or distract the Court from the main issues of the case. Given the fatal legal and factual shortcomings of Plaintiffs' claims, DPI's intervention in this case will help facilitate—and not hinder—the expeditious resolution of this litigation.

CONCLUSION

For the reasons stated above, Proposed Intervenor the Democratic Party of Illinois respectfully requests that the Court grant its motion to intervene as a matter of right under Rule 24(a)(2) or, in the alternative, permit it to intervene under Rule 24(b).

June 17, 2022

Respectfully Submitted,

JENNER & BLOCK LLP

By: s/ Coral A. Negron

Coral A. Negron
Jenner & Block LLP
1099 New York Avenue, NW
Washington, D.C. 20001
Telephone: (202) 639-6875
cnegron@jenner.com

Elisabeth C. Frost*
Maya Sequeira*
Richard A. Medina*
Elias Law Group LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490
Facsimile: (202) 968-4498
efrost@elias.law
msequeira@elias.law
rmedina@elias.law

Abha Khanna*
Elias Law Group LLP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101
Telephone: (206) 656-0177
Facsimile: (206) 656-0180
akhanna@elias.law

Attorneys for Proposed Intervenor-Defendant Democratic Party of Illinois

**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I, Coral A. Negron, certify that on June 17, 2022 I electronically filed the foregoing **MOTION TO INTERVENE AS DEFENDANT** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Coral A. Negron
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, D.C. 20001
Telephone: (202) 639-6875

EXHIBIT 1

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

MICHAEL J. BOST, LAURA POLLASTRINI, and SUSAN SWEENEY, Plaintiffs, v. THE ILLINOIS STATE BOARD OF ELECTIONS, and BERNADETTE MATTHEWS, in her capacity as the Executive Director of the Illinois State Board of Elections, Defendants.	No.: 1:22-cv-02754 Hon. John F. Kness

[PROPOSED] INTERVENOR-DEFENDANT'S MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), [Proposed] Intervenor-Defendant Democratic Party of Illinois ("DPI") moves to dismiss Plaintiffs' complaint in its entirety.

INTRODUCTION

Plaintiffs seek extraordinary relief. They ask this Court to declare that the manner in which Illinois—along with seventeen other states, DC, Puerto Rico, and the Virgin Islands—conducts its elections, conflicts with federal law and violates Plaintiffs' individual constitutional rights. Specifically, Plaintiffs allege that 2 U.S.C. §§ 1 & 7 and 3 U.S.C. § 1 (the "Election Day Statutes"), which set the Tuesday after the first Monday in November as the national election day, prohibit Illinois from counting mail-in ballots that were lawfully cast by eligible Illinois voters *on or before election day* but received by election officials in the two weeks after. The remedy that Plaintiffs seek from this Court is an injunction barring Defendants from counting *any* mail-in ballots received after election day, regardless of when they were mailed. Even a U.S. Postal Service

postmark showing the date the ballot was mailed, Plaintiffs claim, is not sufficient to rescue a ballot delivered the day after election day. In Plaintiffs' view, access to the franchise for those who vote by mail is dependent upon U.S. Postal Service practices, such that lawful voters who have done everything right may have their ballot rejected due to unanticipated mail delivery delays, entirely outside of the voter's control.

The Election Day Statutes do not require this absurd result. But the Court need not reach that question because Plaintiffs' claims fail at the threshold. Plaintiffs lack Article III standing because they allege nothing more than a generalized grievance and fail to identify a concrete and particularized injury caused by the challenged Illinois law. Plaintiffs' complaint should be dismissed with prejudice in its entirety because this Court lacks jurisdiction to consider their claims or, in the alternative, because Plaintiffs have failed to state a claim as a matter of law.

BACKGROUND

The Elections Clause of the U.S. Constitution grants to the states the power to set the "Times, Places and Manner of holding Elections for Senators and Representatives . . . but the Congress may at any time by Law make or alter such regulations." U.S. Const., Art. I, § 4, cl.1. Pursuant to this power, Congress enacted 2 U.S.C. §§ 1 & 7, which establish the time for the election of U.S. Senators and Representatives as "[t]he Tuesday next after the 1st Monday in November, in every even numbered year." Similarly, Article II, Section 1, Clause 4, provides that "Congress may determine the Time of chusing the [presidential] Electors, and the Day on which they shall give their Votes[.]" Pursuant to that authority, Congress passed 3 U.S.C. § 1, which sets the presidential election for "the Tuesday next after the first Monday in November, in every fourth year."

In accordance with these statutes, Illinois law requires all ballots, including mail-in ballots, to be cast by the federally mandated election day. When returning a mail-in ballot, Illinois voters

must sign and date a printed certification, under penalty of perjury, that they are eligible to vote in the relevant election and that they personally marked their enclosed ballots in secret. 10 Ill. Comp. Stat. Ann. § 5/19-5.[1] Only mail-in ballots that have been postmarked on or before election day, or, if not postmarked, have been certified and dated by the voter on or before election day, may be counted. 10 Ill. Comp. Stat. Ann. § 5/19-8(c); *see also id.* § 5/19-5. Such ballots must be counted as long as they are delivered by the postal service before the close of the period for counting provisional ballots cast in that election, which is 14 days after election day. *Id.*; 10 Ill. Comp. Stat. Ann. § 5/18A-15(a) ("The county clerk or board of election commissioners shall complete the validation and counting of provisional ballots within 14 calendar days of the day of the election."). For ease of reference, DPI refers to the challenged law as the Ballot Receipt Deadline throughout this brief. As noted, it is far from unique: Seventeen other states, the District of Columbia, Puerto Rico, and the Virgin Islands also have similar laws allowing ballots cast on or before election day but received after election day to be counted.[2]

Plaintiffs, who are Republican voters and candidates for federal office in Illinois, allege that the Ballot Receipt Deadline violates their individual rights because it conflicts with Congress's

---

[1] The printed certification, which is specified by 10 Ill. Comp. Stat. Ann. § 5/19-5, says: "I state that I am a resident of the …. precinct of the (1) *township of …. (2) *City of …. Or (3) *…. ward in the city of …. Residing at …. In such city or town in the county of .,… and State of Illinois, that I have lived at such address for …. Months last past; that I am lawfully entitled to vote in such precinct at the …. election to be held on ….

*fill in either (1), (2) or (3)

I further state that I personally marked the enclosed ballot in secret.

Under penalties of perjury as provided by law pursuant to Section 29-10 of the Election Code, the undersigned certifies that the statements set forth in this certification are true and correct.

[2] Tbl. 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots, Nat'l Conference of State Legislatures (Mar. 15, 2022), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx.

command that election day take place on the "Tuesday next after the first Monday in November." They contend that "Illinois has expanded Election Day by extending by 14 days the date for receipt and counting of vote-by-mail ballots." Compl. ¶ 4. Plaintiffs allege that, in the November 2020 general election for president and Congress, up to 266,417 vote-by-mail ballots—accounting for 4.4 percent of the total vote—were received after election day in Illinois. *Id.* ¶ 22.

According to Plaintiffs, none of these ballots should have been counted. Their Complaint asserts that federal law prohibits Illinois from counting *any* vote-by-mail ballots received after election day, regardless of when they were cast or mailed, or whether or when they were postmarked. *Id.* ¶¶ 23, 26, 29, 40, 45, 57. They seek a permanent injunction prohibiting Defendants from counting any mail-in ballots received after election day in all future congressional and presidential elections in Illinois, as well as a declaration that the Ballot Receipt Deadline deprives them of rights secured by the Constitution and Acts of Congress. Compl. at 11.

LEGAL STANDARD

"To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's complaint must allege facts which, when taken as true, 'plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level.'" *Access Living of Metro. Chi., Inc. v. City of Chicago*, 372 F. Supp. 3d 663, 667 (N.D. Ill. 2019) (quoting *Cochran v. Ill. State Toll Highway Auth.*, 828 F.3d 597, 599 (7th Cir. 2016)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Dismissal for failure to state a claim under Rule 12(b)(6) is proper 'when the allegations in a complaint, however true, could not raise a claim of entitlement to relief.'" *Bland v. Edward D. Jones & Co.*, 375 F. Supp. 3d 962, 971 (N.D. Ill. 2019) (quoting *Twombly*, 550 U.S. at 558).

Rule 12(b)(1) "provides for dismissal of a claim based on lack of subject matter

jurisdiction, including lack of standing." *Stubenfield v. Chi. Hous. Auth.*, 6 F. Supp. 3d 779, 782 (N.D. Ill. 2013) (citing *Retired Chi. Police Ass'n v. City of Chicago*, 76 F.3d 856, 862 (7th Cir. 1996)). "As a jurisdictional requirement, the plaintiff bears the burden of establishing standing." *Apex Digit., Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009). "[I]n evaluating whether a complaint adequately pleads the elements of standing, courts apply the same analysis used to review whether a complaint adequately states a claim." *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015).

ARGUMENT

Plaintiffs' claims fail at the threshold. Plaintiffs lack Article III standing to assert their causes of action, having alleged only generalized and speculative injuries. Their claims also fail as a matter of law. Their claims rest on a tortured reading of the Election Day Statutes that is at odds with the Statutes' text. Plaintiffs' complaint should be dismissed in its entirety.

A. Plaintiffs lack standing.

"[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). These requirements ensure that "the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Summer v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quotation marks omitted). "[P]laintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

An "injury in fact" for standing purposes is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or

hypothetical." *Lujan*, 504 U.S. at 560 (quotations and citations omitted). For an injury to be particularized, it "must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1. For an injury to be concrete, it must be "real, and not abstract." *Spokeo*, 136 S. Ct. at 1548 (quotation marks omitted). "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–74.

1. Vote dilution in this context is not an Article III injury.

In support of Count I of the Complaint, "Violation of the Right to Vote" under the First and Fourteenth Amendments, Plaintiffs allege that their "votes will be diluted by illegal ballots received in violation of the federal Election Day Statutes." Compl. ¶¶ 30, 41, 42. That is precisely the sort of "generalized grievance" that the Supreme Court has held is insufficient to state a concrete and particularized injury. Plaintiffs allege nothing more than a "right to have the Government act in accordance with law." *Allen v. Wright*, 468 U.S. 737, 754 (1984). If Plaintiffs are correct that their votes have been "diluted," then so, too, have the votes of every Illinois voter.

Courts have repeatedly rejected this theory of standing. *See Wood v. Raffensperger*, 981 F.3d 1307, 1314-15 (11th Cir. 2020) ("[N]o single voter is specifically disadvantaged if a vote is counted improperly, even if the error might have a mathematical impact on the final tally and thus on the proportional effect of every vote. Vote dilution in this context is a paradigmatic generalized grievance that cannot support standing." (quotation marks and citation omitted)). Several different plaintiff groups attempted to secure federal jurisdiction under this very theory in 2020, and over and over again, the theory was rejected, with the courts uniformly finding that this type of "vote dilution argument fell into the 'generalized grievance' category." *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020); *see also Moore v. Circosta*, 494 F. Supp. 3d

289, 313 (M.D.N.C. 2020) ("[T]he notion that a *single person's* vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing."); *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 999-1000 (D. Nev. 2020) ("As with other generally available grievances about the government, plaintiffs seek relief on behalf of their member voters that no more directly and tangibly benefits them than it does the public at large." (quotations and alterations omitted)); *Martel v. Condos*, 487 F. Supp. 3d 247, 252 (D. Vt. 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926-27 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); *see also Am. C.R. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution [is] speculative and, as such [is] more akin to a generalized grievance about the government than an injury in fact."); *Wood*, 981 F.3d at 1314-15. Courts within the Seventh Circuit came to the same conclusion, squarely rejecting the theory that "a single voter has standing to sue as a result of his vote being diluted by the possibility of unlawful or invalid ballots being counted." *Feehan*, 506 F. Supp. 3d at 608.[3]

Plaintiffs' Count I, which alleges a "violation of the right to vote" based on "diluting Plaintiffs' timely cast and received ballots," Compl. at 7-8, therefore fails to plead that the

[3] As the Eleventh Circuit explained, for vote dilution to be a basis for standing "requires a point of comparison." *Wood*, 981 F.3d at 1314. "For example, in the racial gerrymandering and malapportionment contexts, vote dilution occurs when voters are harmed compared to 'irrationally favored' voters from other districts." *Id.*

allegedly improper counting of ballots after election day affects them "in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. The harm that Plaintiffs allege is insufficiently particularized to satisfy Article III's injury in fact requirement and must be dismissed for lack of standing.

2. Plaintiffs lack standing to sue as candidates.

In Count II, Plaintiffs suggest that they have standing to sue in their capacities as candidates for office. But they do not allege that counting ballots received after election day is likely to threaten their electoral prospects. Instead, they base their standing as candidates upon an alleged diversion of resources caused by the Ballot Receipt Deadline. They allege that Defendants' purported violation of the First and Fourteenth Amendment has "forc[ed] Plaintiffs to spend money, devote time, and otherwise injuriously rely on unlawful provisions of state law in organizing, funding, and running their campaigns." Compl. ¶ 46. They also allege that they "rely on provisions of federal and state law in conducting their campaigns including, in particular, resources allocated to the post-election certification process." *Id.* ¶ 33.

These allegations are conclusory and fail to establish an injury-in-fact for Article III standing. "In order to survive dismissal for lack of standing, the plaintiffs' complaint must contain sufficient factual allegations of an injury resulting from the defendants' conduct, accepted as true, to state a claim for relief that is plausible on its face." *Diedrich v. Ocwen Loan Servicing, Inc.*, 839 F.3d 583, 589 (7th Cir. 2016). "Legal conclusions or bare and conclusory allegations" are insufficient to plead a concrete and particularized injury. *Id.*; *see also Crabtree v. Experian Info. Sols., Inc.*, 948 F.3d 872, 880 (7th Cir. 2020) (bare allegation of "reputational harm," which was "unsupported by any factual allegations," was insufficient to establish standing); *Colon v. Dynacast, LLC*, No. 19-cv-4561, 2019 WL 5536834, at *5 (N.D. Ill. Oct. 17, 2019) ("Plaintiff's conclusory statement that she suffered 'risks, harmful conditions, and violations of privacy' is insufficient to plead injury in fact on its own.").

Nowhere in the Complaint do Plaintiffs even attempt to allege what the Ballot Receipt Deadline causes them to "spend money" on, or "devote time" to. They do not explain what "resources" they have allocated to the post-election certification process. Nor do they explain how the Ballot Receipt Deadline has caused them to alter the allocation of their resources. And even if Plaintiffs could point to concrete expenditures that are fairly traceable to the Ballot Receipt Deadline, their alleged harm is speculative. "Any harm [Plaintiffs] sought to avoid in making those expenditures was not 'certainly impending'—[they] spent the money to avoid a speculative harm." *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 353-354 (3d Cir. 2020), *cert. granted, judgment vacated on other grounds sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021).

Although some courts have held that losing candidates may have standing to bring post-election claims alleging a failure to comply with election laws, that is not the posture here. *See Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020) (losing presidential candidate had alleged concrete and particularized harm stemming from "the allegedly unlawful manner by which Wisconsin appointed its electors"). Nor have Plaintiffs alleged that the counting of votes cast on or before election day but received in the days following will diminish their electoral prospects. Instead, they merely allege a generalized "entitle[ment] to have their elections results certified with votes received in compliance with the federal Election Day statutes." Compl. ¶ 46. But they do not explain how that entitlement "affects [them] in a particularized way when, in fact, all candidates in [Illinois] are subject to the same rules." *Bognet*, 980 F.3d at 351; *see also Hotze v. Hudspeth*, 16 F.4th 1121, 1124 n.2 (5th Cir. 2021) ("Just challenging the 'integrity' of the voting process is too general to suffice.").

In a similar challenge to the counting of mail-in ballots received after election day in Minnesota, a divided Eighth Circuit panel concluded that candidates for office had standing

because "[a]n inaccurate vote tally is a concrete and particularized injury to candidates." *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). Again, Plaintiffs have not alleged any threat to their electoral prospects resulting from the counting of ballots received after election day. But in any event, the majority opinion in *Carson* rests on flawed reasoning and has been rejected by courts outside the Eighth Circuit. As the dissenting judge in that case explained, the plaintiffs' "claimed injury—a potentially 'inaccurate vote tally' . . . —appears to be 'precisely the kind of undifferentiated, generalized grievance about the conduct of government' that the Supreme Court has long considered inadequate for standing." 978 F.3d at 1063 (Kelly, J., dissenting) (quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007)). And, as the Third Circuit observed in rejecting *Carson*'s reasoning, the decision "appears to have cited language from [*Bond v. United States*, 564 U.S. 211 (2011)] without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the *Carson* court cited none." *Bognet*, 980 F.3d at 351 n.6.

Absent non-conclusory factual allegations showing concrete and particularized injury, Plaintiffs have alleged nothing more than "a bare procedural violation, divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549. Because neither of the harms that Plaintiffs have alleged in their Complaint satisfy Article III's injury-in fact requirement, Plaintiffs lack standing, and this court lacks jurisdiction.

3. Violation of the Election Day Statutes is not an injury in fact.

In Count III, Plaintiffs allege that "Defendants have acted and will continue to act under color of state law to violate 2 U.S.C. § 7 and 3 U.S.C. § 1." Compl. ¶ 59. Plaintiffs do not allege how that statutory violation will harm them, however, beyond a conclusory allegation that they "will suffer serious and irreparable harm to their constitutional rights" unless the violation is

enjoined. *Id.* ¶ 60. For the reasons discussed above, each of the "harms" alleged elsewhere in the Complaint fails to satisfy Article III's injury-in-fact requirement. And a bare statutory violation is insufficient to establish concrete harm. *TransUnion*, 141 S. Ct. at 2205. "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *Id.* For standing purposes, "an injury in law is not an injury in fact." *Id.*

B. Plaintiffs fail to state a claim.

Even if Plaintiffs had standing, their complaint should be dismissed for failure to state a claim under Rule 12(b)(6). The crux of Plaintiffs' Complaint is that counting mail-in ballots received after "Election Day" violates the Federal Election Day Statutes. Their claims fail on the merits because the Ballot Receipt Deadline is consistent with the federal Election Day Statutes and Plaintiffs' interpretation of the Statutes is fundamentally flawed.

The Elections Clause of the U.S. Constitution grants to the states the power to set the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's power to "by Law make or alter such regulations." U.S. Const., Art. I, § 4, cl.1. "Thus, a state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot directly conflict with federal election laws on the subject." *Voting Integrity Project v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000). DPI agrees that votes in presidential and congressional elections must be cast on or before the Federal Election Day. But the Federal Election Day Statutes are silent as to how those votes should be counted. *See Bognet*, 980 F.3d at 353. And, as another court has recognized in the context of a similar challenge to New Jersey's ballot-counting procedures, "the Federal Election Day Statutes are silent on methods of determining the timeliness of ballots." *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 372 (D.N.J. 2020).

Absent a "direct[] conflict with federal election laws on the subject[,]" states have "discretion and flexibility" to establish the manner of counting ballots in federal elections. *Bomer*, 199 F.3d at 775. The Elections Clause grants the states "comprehensive . . . authority to provide a complete code for congressional elections, not only as to times and places, but in relation to . . . prevention of fraud and corrupt practices, counting of votes, [and] duties of inspectors and canvassers," unless Congress should "supplement these state regulations or . . . substitute its own." *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932). "Where Congress 'declines to preempt state legislative choices,' the Elections Clause vests the states with responsibility for the 'mechanics of congressional elections.'" *Way*, 492 F. Supp. 3d at 372 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)). Because the challenged Illinois law does not directly conflict with the Election Day Statutes, it is well within the Illinois legislature's authority to set the "time, place, and manner" of conducting federal elections.

Plaintiffs' contrary arguments rely on an impossibly broad reading of the statutory phrase "day for the election." 2. U.S.C. § 7. They contend that Illinois' practice of counting votes received after "Election Day" impermissibly extends the "day of the election" for 14 days. *E.g.*, Compl. ¶¶ 4, 5. The Supreme Court has clarified that "[w]hen the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder." *Foster*, 522 U.S. at 71. In *Foster*, the Supreme Court addressed a Louisiana "open primary" system under which the election of candidates for Congress could be concluded as a matter of law before the federally-designated "election day." *Id.* at 70. Under that system, the state conducted an "open primary" in which "all candidates, regardless of party, appear on the same ballot, and all voters, with like disregard of party, are entitled to vote." *Id.* If any candidate received a majority of the votes cast, then that candidate

would be "elected" without the need for a general election to be held on the federal election day. *Id.* The Supreme Court concluded that this system was inconsistent with the federal Election Day Statutes, but its ruling was narrow. It held "only that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 72 n.4.

Federal courts addressing similar challenges to early voting statutes have expressly rejected the argument that the Election Day Statutes require all votes to be cast and received on the specified day. Applying *Foster*, these courts have concluded that the Election Day Statutes require only that the election is "consummated" on the federal election day. *Voting Integrity Project v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001); *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001); *Bomer*, 199 F.3d at 777. Indeed, the Court in *Foster* "express[ly] disavow[ed] . . . that it was establishing any particular actions a State must perform on election day to comply with the federal statutes." *Millsaps*, 259 F.3d at 546. *Foster* requires only that the "combined actions of voters and officials meant to make a final selection of an officeholder" cannot be consummated *before* election day. 522 U.S. at 71. Plainly, *Foster* does not mean that all "combined actions of voters and officials meant to make a final selection of an officeholder" must take place on election day. It is commonplace that "official action to confirm or verify the results of the election extends well beyond federal election day." *Millsaps*, 259 F.3d at 546 n.5. Election officials must, for example, count, certify, and publicly announce the results. *Id.* at 546.

In any event, as far as voters are concerned, an election is "consummated" on election day under the Ballot Receipt Deadline. That law does nothing to change the fact that Illinois requires mail-in ballots to be completed and mailed on or before election day. After their ballot and attached certification have been completed and mailed, there is nothing more for voters to do. The delivery of the ballot is entirely up to the U.S. Postal Service and outside the voter's control. This system

therefore "does not foster either of the primary evils identified by Congress as reasons for passing the federal statutes: 'distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States, and . . . the burden on citizens forced to turn out on two different election days to make final selections of federal officers in presidential election years.'" *Bomer*, 199 F.3d at 777 (quoting *Foster*, 522 U.S. at 73).

Finally, declining to count ballots cast on or before election day, but received after election day, even when that delay is due to no fault of the voter, would disenfranchise large numbers of Illinoisans. Indeed, even Plaintiffs allege that hundreds of thousands of ballots were received after election day. Compl. ¶ 22. Plaintiffs make no credible allegations that these ballots are anything other than the ballots of lawful voters dutifully making their way to election officials after being voted and mailed by the voter by election day. The Court can take judicial notice of the fact that the U.S. Postal Service has experienced significant delays in Illinois and across the country. Indeed, the Postal Service even settled litigation stemming from delays in delivery of ballots. *See* Stipulation & Consent Order, *Democratic Party of Va. v. Veal*, No. 3:21-cv-671-MHL (E.D. Va. Oct. 28, 2021), ECF No. 27; *NAACP v. U.S. Postal Serv.*, No. 20-cv-2295 (EGS), 2020 WL 6469845 (D.D.C. Nov. 1, 2020) (ordering USPS to take steps to ensure the timely delivery of mail-in ballots). Even without these delays, it would be almost impossible for voters to be assured that their ballots will be delivered by election day unless they are mailed far in advance. As the Fifth Circuit said in rejecting a challenge to early voting under the Election Day Statutes, "we cannot conceive that Congress intended the federal Election Day Statutes to have the effect of impeding citizens in exercising their right to vote. The legislative history of the statutes reflects Congress's concern that citizens be able to exercise their right to vote." *Bomer*, 199 F.3d at 777 (citing Cong. Globe, 42d Cong., 2d Sess. 3407-08 (1872)).

CONCLUSION

For the foregoing reasons, DPI respectfully requests that this Court dismiss Plaintiffs' Complaint.

June 17, 2022

Respectfully Submitted,

JENNER & BLOCK LLP

By: s/ Coral A. Negron

Coral A. Negron
Jenner & Block LLP
1099 New York Avenue, NW
Washington, D.C. 20001
Telephone: (202) 639-6875
cnegron@jenner.com

Elisabeth C. Frost*
Maya Sequeira*
Richard A. Medina*
Elias Law Group LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490
efrost@elias.law
msequeira@elias.law
rmedina@elias.law

Abha Khanna*
Elias Law Group LLP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101
Telephone: (206) 656-0177
akhanna@elias.law

Attorneys for Intervenor-Defendant Democratic Party of Illinois

**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I, Coral A. Negron, certify that on June 17, 2022, I electronically filed the foregoing **MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Coral A. Negron
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, D.C. 20001
Telephone: (202) 639-6875