No. 23-2644

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL J. BOST, et al.,
Plaintiffs-Appellants,

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-Appellees.

Appeal From the United States District Court
for the Northern District of Illinois, Eastern Division,
No. 1:22-cv-02754
The Honorable Judge John F. Kness

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AMICUS CURIAE BRIEF OF THE DEMOCRATIC PARTY OF ILLINOIS SUPPORTING DEFENDANTS-APPELLEES FOR AFFIRMANCE

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Appellate Court No: 23-2644

Short Caption: Bost v. Illinois State Board of Elections

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Attorney's Printed Name: Abha Khanna

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INTEREST OF AMICUS CURIAE[1]

The Democratic Party of Illinois ("DPI") participated as amicus curiae below and has a vital interest in ensuring that lawful ballots cast by eligible Illinois voters are counted in the State's elections. The challenge brought by Congressman Bost and his co-plaintiffs (hereinafter, collectively "Bost") to 10 Ill. Comp. Stat. Ann. § 5/19-8(c) (the "Receipt Deadline") directly threatens that interest.

For decades, the Receipt Deadline has ensured that mail ballots from lawful voters that are shown to be timely cast by either the postmark or a statement signed under penalty of perjury on the ballot certificate are counted, if delivered to election officials within 14 days of the election. Bost seeks a federal court order that would now *require* Illinois to reject all mail ballots received after election day, even if they were timely voted and even where delivery delays are outside of the voter's control. The consequences for Illinois voters and DPI would be widespread and severe. Illinoisians' ability to successfully use mail ballots to exercise their fundamental right to vote would largely depend on the ability of the postal service to timely deliver them—a troubling proposition in a time when significant delivery delays are common. DPI would have to fundamentally change how it educates voters on how to successfully vote in Illinois, as well as how it runs its get-out-the-vote efforts, to try to ameliorate the broad disenfranchising effects of any such court order. As a result, DPI has a unique interest in this litigation.[2]

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[1] All parties have consented to the filing of this amicus curiae brief. *See* Fed. R. App. P. 29(a)(2). No party's counsel authored this brief in whole or in part; no party, party's counsel, nor any other person or entity—other than the amicus curiae, its members, or its counsel—contributed money toward the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

[2] This Court affirmed the district court's denial of DPI's motion to intervene, but recognized that DPI's interests in this case are "direct, significant and legally protectable" and indicated that participation as amicus curiae would be appropriate. *Bost v. Ill. State Bd. of Elections*, 75 F.4th 682, 687, 691 (7th Cir. 2023) (quotation marks omitted).

Except where necessary for context, DPI has aimed to avoid repetition with the brief of the Illinois State Board Defendants (the "State"), instead providing further support and addressing issues that brief does not—including specifically to respond to arguments made by other amici.

INTRODUCTION

Bost seeks a federal court order prohibiting Illinois from enforcing its own duly-enacted statute that has long allowed for the counting of timely voted mail ballots cast by eligible Illinois voters. This has been the law and practice in Illinois for decades. Although the Receipt Deadline in its current form was enacted in 2015, Illinois' acceptance of ballots mailed before but received after election day goes back at least another decade. *See* 2014 Ill. Legis. Serv. P.A. 98-1171 (S.B. 172) (enacting in 2015 10 Ill. Comp. Stat. Ann. § 5/19-8(c) in its current form); *see also* 2009 Ill. Legis. Serv. P.A. 96-553 (S.B. 2022) (expanding mail voting to all Illinois voters); 2005 Ill. Legis. Serv. P.A. 94-557 (H.B. 115) (enacting 10 Ill. Comp. Stat. Ann. § 5/19-8(c)); 2003 Ill. Legis. Serv. P.A. 93-574 (S.B. 428) (enacting 10 Ill. Comp. Stat. Ann. § 5/18A-15(a)).

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Bost has disclaimed any argument that any of the ballots that have been counted pursuant to the Receipt Deadline are fraudulent and has never alleged that the existing safeguards are insufficient to ensure that the ballots at issue are in fact cast by election day. *See* Bost Br. at 3 ("To be clear, Plaintiffs do not allege voter fraud; nor do they allege that ballots were mailed after Election Day contrary to Illinois law."). Instead, Bost's argument is both simple and absolute: he contends that accepting *any* ballots that arrive in the mail after election day directly conflicts with federal law and violates the plaintiffs' constitutional rights, and that federal law requires the rejection of *all* of these ballots. A7–A11.[3]

[3] Entries on the district court's docket are cited as "Dkt. [#]," the short appendix is cited as "A[#]," and the briefs of the parties and other amici in this appeal are cited as "ECF No. [#]."

Bost's standing contentions similarly all turn on the claim that Illinois' law allowing for the counting of any ballots that arrive post-election day are illegal under federal law, not that they cause him, his supporters, or his constituents any separate injury, such as impacting Bost's electoral prospects as a candidate or making it harder for any qualified voter to exercise their right to vote. Nor could Bost make such a claim: the Receipt Deadline guards against the disenfranchisement of all qualified voters, including Bost's constituents and supporters.

By Bost's own admission, if the relief that he seeks in this action were the law in 2020, when the pandemic led to many more voters casting mail ballots, many not received by election officials until after election day due to mail delays, hundreds of thousands of ballots cast by qualified voters would have been rejected. *See* A5. The relief that Bost requests would also disenfranchise voters whose ballots are delayed due to no fault of their own, as well as overseas and military voters who, but for the Receipt Deadline, may have precious little time to receive and return their ballots in time to be counted. *See, e.g.*, Dkt. 47 at 9–12 (United States' Statement of Interest); Dkt. 74 at 34–35 (Tr. of Proceedings).

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As the State notes, post-election receipt deadlines are commonplace across the country. State Br. at 5 n.2. States that do not have extended receipt deadlines often find themselves sued by the Department of Justice when routine election administration or mail delays create unrealistically short windows for overseas and military voters to return their ballots. *See, e.g.*, ECF No. 21 ("U.S. Br.") at 26-28.

Illinois' decision to allow ample time to ensure that such delays do not disenfranchise its voters is a policy choice that it is entirely free to make; neither the federal statutes that Bost identifies nor the Constitution prohibit it from doing so. There is no conflict between the Receipt Deadline and the federal election day statutes as interpreted by the U.S. Supreme Court in *Foster*

v. Love, 522 U.S. 67 (1997). Federal law says nothing about the counting of mail ballots, nor does it set a deadline by which such ballots must be received. And the Receipt Deadline requires all votes to be cast by the federal election day; it simply ensures that ballots that are voted and mailed by election day but arrive within the ensuing 14 days are counted. Nor does the Receipt Deadline burden anyone's constitutional rights. This Court should affirm.

ARGUMENT

I. The district court lacked jurisdiction.

The plaintiffs raise several theories of standing, but none satisfies Article III. *First*, they claim standing as voters, but that argument is based on a theory of "vote dilution" that has been rejected by at least a dozen federal courts around the country. *Second*, while DPI agrees that candidates have standing to challenge election laws that threaten them with electoral harm or could make it harder for their supporters to participate in elections, Bost carefully avoids making either of these claims. He instead relies on a bizarre reputational harm argument that is not only waived, but has no support in precedent. *Third*, Bost attempts to invoke a diversion of resources theory, but it fails for the same reason—Bost has not alleged that the challenged law threatens harm to his campaign's mission, which is to re-elect him.

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A. Bost's alleged "vote dilution" injury relies on a distortion of the term, thoroughly rejected by federal courts as a basis for standing.

Bost does not allege that the Receipt Deadline denies or abridges his right or the rights of the other voter plaintiffs to cast their own votes. Instead, he contends the statute *dilutes the value of* their votes by allowing for the counting of votes cast by other Illinois voters. Bost Br. at 21-26. In what one court described as a "veritable tsunami of decisions," federal courts across the country have uniformly rejected this theory of injury as insufficiently particularized. *O'Rourke v.*

Dominion Voting Sys. Inc., No. 20-cv-37847-NRN, 2021 WL 1662742, at *6–9 (D. Colo. Apr. 28, 2021) (collecting cases). The Eleventh Circuit explained why:

> [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.

Wood v. Raffensperger, 981 F.3d 1307, 1314–15 (11th Cir. 2020) (quotation omitted).

Bost attempts to distinguish all these cases by emphasizing that, here, there are no allegations that the later-arriving ballots are fraudulent; his contention is that those ballots are *legally invalid* under his federal statutory and constitutional theories. Bost Br. at 25. But that is a distinction without a difference. The core of Bost's alleged injury is that his and his co-plaintiffs' votes will be "diluted" by "improperly" counted votes. *See Wood*, 981 F.3d at 1314. The *reason* why those votes are "improper" does not alter the conclusion that "no single voter is specifically disadvantaged if a vote is counted improperly." *Id.* (quotation omitted).

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Bost's reliance on redistricting cases that have recognized "vote dilution" as a cognizable constitutional harm, Bost Br. at 26, only proves the point. As recognized in those cases, "vote dilution" is suffered when a law *minimizes* a voter's or a group of voters' voting strength or ability to access the political process *as compared to other voters*. *E.g.*, *Baker v. Carr*, 369 U.S. 186, 207–08 (1962). That is distinct from the mathematical dilution Bost alleges here. As the Eleventh Circuit explained: "To be sure, vote dilution can be a basis for standing. But it requires a point of comparison. For example, in the racial gerrymandering and malapportionment contexts, vote dilution occurs when voters are harmed compared to 'irrationally favored' voters from other districts." *Wood*, 981 F.3d at 1314 (quoting *Baker,* 369 U.S. at 207–08). No such allegations are made here.

Bost also relies on *Foster v. Love*, 522 U.S. 67 (1997), but that decision contains no standing analysis, and there is no indication that question was ever presented to the Court. The Supreme Court has repeatedly warned that "drive-by jurisdictional rulings" should be given "no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (quotations omitted).

B. Bost has failed to establish he has standing as a political candidate.

Below, the Plaintiffs argued that Bost and the former Republican electors Pollastrini and Sweeney each separately had standing as a political candidates or potential future presidential electors. Dkt. 43 at 9 & n.10. On appeal, their candidate standing argument is focused solely on Congressman Bost, who argues he has standing as a candidate for Congress. While DPI agrees that candidates often have standing in election cases, it is generally based on some allegation of threatened harm to their electoral prospects or to their supporters' voting rights. Here, Bost alleges neither. Instead, he largely focuses on a claim that he has suffered an "intangible" injury based on a speculative possibility that his "margin of victory" may be reduced because of the Receipt Deadline and his reputation in terms of his perceived job performance by his constituents may be negatively impacted. These are not cognizable injuries that satisfy Article III.

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1. Bost has not alleged an electoral harm.

A candidate for office may have standing to challenge a rule of election administration that affects the candidate in a particularized way—such as by giving his opponent an "unfair advantage." *Mecinas v. Hobbs*, 30 F.4th 890, 897 (9th Cir. 2022); *see also Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) ("increased competition" in an election is a sufficient injury for standing). But Bost has failed to allege—either in the Complaint or in his declaration—that the Receipt Deadline unfairly advantages his opponents or causes him any competitive harm.

Instead, Bost principally contends that he has standing because he speculates that his margin of victory "may" be reduced by improperly counted votes. Bost Br. at 20–21. As a threshold matter, this argument is waived. It was alleged nowhere in the Complaint and was mentioned only briefly in a footnote in Bost's opposition to the State's Motion to Dismiss. Dkt. 43 at 9 n.6; *see Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). And Bost has not offered any argument why this Court should apply plain error review to his forfeited theory of injury. *Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020) (explaining that this Court may review forfeited arguments in civil cases for plain error only in "exceptional circumstances"). As such, this Court should not reach the argument.

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That said, even now, Bost noticeably avoids any contention that the Receipt Deadline threatens to cause him any competitive injury, or that it threatens to harm the voters who support him (beyond the thoroughly discredited "vote dilution" theory discussed above). It would be a different case, indeed, if he alleged either. Instead, Bost complains that a lower margin of victory could impact perception about how his constituents view his job performance. Bost Br. at 20. This argument is bizarre on many levels. Chief among them is that *Bost does not argue that late-arriving ballots are cast by anyone other than his constituents*—i.e., qualified Illinois voters in his district. So even if these ballots could be rejected under operation of law, they still accurately reflect how those constituents feel about Bost being re-elected.

In other words, the harm that Bost complains of is a ballot count that truthfully reflects his constituents' views. This is not a cognizable injury. Nor does Bost argue that the law is likely to make it harder for his constituents or supporters to vote—for good reason. The statute *<u>protects</u> all* Illinois voters—including Bost's supporters—from having their timely-voted ballots rejected if

they arrive within the receipt deadline. A law that enfranchises Bost's own voters can hardly be said to injure them or him.

2. Bost's reliance on *Carson v. Simon* is misplaced.

Bost also claims an "intangible interest in ensuring that the final vote tally accurately reflects the legally valid votes cast." Bost Br. at 21 (quoting *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020)). But this is no different than claiming an injury "based solely on an allegation 'that the law . . . has not been followed,'" which the Supreme Court has held, "amounts to an 'undifferentiated, generalized grievance about the conduct of government' insufficient to establish standing." *Hotze v. Hudspeth*, 16 F.4th 1121, 1124 n.2 (5th Cir. 2021) (quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam)).

To the extent that a divided Eighth Circuit panel concluded otherwise in *Carson*, that decision rested on flawed reasoning and has been rejected by a growing number of federal courts. 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 v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 351 n.6 (3d Cir. 2020), *vacated as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (Mem.) (2021); *see also Carson*, 978 F.3d at 1063 (Kelly, J., dissenting) (dissenting judge explaining that 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." (quoting *Lance*, 549 U.S. at 442)); *King v. Whitmer*, 505 F. Supp. 3d 720, 736 (E.D. Mich. 2020) ("This Court . . . is as unconvinced about the majority's holding in *Carson* as the dissent."); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp.

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3d 596, 612 (E.D. Wis. 2020) ("Judge Kelly's reasoning is the more persuasive."); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 710–11 (D. Ariz. 2020) (joining other courts in repudiating *Carson*'s reasoning).

Trump v. Wisconsin Elections Commission, 983 F.3d 919, 924 (7th Cir. 2020), presented a markedly different situation. President Donald Trump's standing in that case did not rely on an entirely speculative risk of future injury. He claimed a very concrete injury: the loss of the Wisconsin presidential election. And the relief he sought—a declaration voiding the results of the 2020 presidential election in Wisconsin—as extreme and unprecedented a request that was, would have redressed that injury. *Id.* at 924–25. This case is very different.

3. Bost cannot proceed on a diversion of resources theory.

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That leaves the "tangible" injuries that Bost allegedly suffers as a result of the Receipt Deadline—specifically, the "additional expenditures his campaign must incur because the time to receive ballots has been extended." Bost Br. at 16. That argument fails for the same reasons as his purported "intangible" harms. This Court has held that "a voting law can injure an organization enough to give it standing by compelling it to devote resources to combatting the effects of that law *that are harmful to the organization's mission*." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 950 (7th Cir. 2019) (quotation marks and alteration omitted) (emphasis added). But, as explained above, Bost has failed to allege that the Receipt Deadline threatens to impede his campaign's mission, which is to re-elect him to Congress. Consequently, he has also failed to establish—as he must to proceed on a diversion of resources theory—that diversion of any resources is necessary to protect against harm to that mission. Moreover, any resources that Congressman Bost must expend to "monitor" the counting of mail ballots are resources he would presumably expend anyway to "monitor" the counting of provisional ballots, which under Illinois law may be counted up to the same 14-day deadline. *See* 10 Ill. Comp. Stat. Ann. § 5/18A-15(a).

II. Bost failed to state a claim on which relief can be granted.

Even if standing were not an issue, the district court correctly concluded that Bost failed to state a claim. Both Bost's statutory and constitutional claims rest on a single legal question—whether the Receipt Deadline conflicts with 2 U.S.C. § 7 and 3 U.S.C. § 1 (the "Election Day Statutes"). It does not.[4]

A. The Receipt Deadline does not violate the Election Day Statutes.

The U.S. Constitution grants "comprehensive . . . authority to" the states to "provide a complete code for congressional elections . . . in relation to . . . *counting of votes*," unless Congress should "supplement these state regulations or . . . substitute its own." *Smiley v. Holm*, 285 U.S. 355, 366–67 (1932) (emphasis added). Under the well-established standards that apply to federal preemption claims under the Elections Clause, a state law governing how ballots are counted is only preempted by federal law if it "*directly* conflict[s]" with federal election laws on the subject. *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) (emphasis added). There is no conflict between the Receipt Deadline and the Election Day Statutes, let alone the "direct[]" conflict required to find that the law is preempted. *Id.* at 775.

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1. The Receipt Deadline does not extend the "day of the election."

That Illinois accepts and counts mail ballots received within 14 days of election day—but cast no later than election day—does not extend the "day of the election." 2 U.S.C. § 7. Election day remains the "Tuesday next after the 1st Monday in November, in every even numbered year."

[4] Although two amicus briefs were filed in support of Plaintiffs—one by the Republican National Committee and the National Republican Congressional Committee (together, the "RNC"), ECF No. 9, and another by Restoring Integrity and Trust in Elections ("RITE"), ECF No. 10—only RITE makes a meaningful attempt to defend the Plaintiffs' case on the merits; the RNC's substantive argument is focused on the district court's standing decision. As for RITE's arguments on the merits, they are even further afield than Bost's, and should similarly be rejected, for the reasons discussed below.

Id.; *accord* 10 Ill. Comp. Stat. Ann. § 5/2A-1.1(a) ("in even-numbered years, the general election shall be held on the first Tuesday after the first Monday of November"); *see also* 3 U.S.C. 1 (providing that "electors of President and Vice President shall be appointed, in each State, on election day"). The Receipt Deadline does nothing to alter this date. Instead, it provides a set of rules that establishes the date by which ballots cast "no later than election day" must be delivered to election officials by the postal service in order to be *counted*. 10 Ill. Comp. Stat. Ann. § 5/19-8(c).

"Federal law does not provide for *when* or *how* ballot counting occurs," *Bognet*, 980 F.3d at 353, and the 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). Because Congress has not codified a competing receipt deadline, "compliance with both [the Receipt Deadline] and the federal election day statutes does not present 'a physical impossibility,'" and no preemption has occurred. *Millsaps v. Thompson*, 259 F.3d 535, 549 (6th Cir. 2001) (citation omitted) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)); *see also United States v. Gradwell*, 243 U.S. 476, 485 (1917) (observing that whenever Congress "has assumed to regulate such elections it has done so by positive and clear statutes"); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 370 (Pa. 2020) (recognizing that "the determination of th[e] balance" between allowing time for voters to request mail ballots and "building enough flexibility into the election timeline to guarantee that ballot has time to travel through the USPS delivery system to ensure that the completed ballot can be counted" "is fully enshrined within the authority granted to the [state] Legislature"). Because there is no direct conflict, the Election Day Statutes do not preempt the Receipt Deadline.

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2. *Foster v. Love* does not support Plaintiffs.

The only Supreme Court decision interpreting the Election Day Statutes—*Foster v. Love,* 522 U.S. 67 (1997)—offers no support to Bost's position. In *Foster*, the Court held that Louisiana's "open primary system conflict[ed] with 2 U.S.C. § 7," *id.* at 73, because it permitted an election for federal office to be entirely consummated *before* Election Day with "no further act [to be] done on federal election day to fill the office," 522 U.S. at 70. In doing so, however, the Court narrowly cabined its holding and expressly declined to interpret the Election Day Statutes beyond the limited issue before it. *See id.* at 72 ("[O]ur decision does not turn on any nicety in isolating precisely what acts a State must cause to be done on federal election day (and not before it) in order to satisfy the statute."). It held "*only*" that the "combined actions of voters and officials meant to make a final selection of an officeholder" "may not be consummated *prior* to federal election day." *Id.* at 71, 72 n.4 (emphases added).

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Unlike the Louisiana open primary statute, the Receipt Deadline does not "consummate" an election "prior to federal election day" or set a competing date on which "a contested selection of candidates for a [federal] office[] is concluded as a matter of law." *Id.* at 72. To the contrary, it mandates that ballots be cast by election day. *Foster*'s narrow holding therefore provides no support for Plaintiffs' position.

The Receipt Deadline is also consistent with the *Foster* Court's statement 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." *Id.* at 71 (referencing 2 U.S.C. § 7). *Foster* and its progeny explained that the Election Day Statutes were enacted "to prevent States that voted early from unduly influencing those voting later, to combat fraud by minimizing the opportunity for voters to cast ballots in more than one election, and to

remove the burden of voting in multiple elections in a single year." *Millsaps*, 259 F.3d at 541 (6th Cir. 2001); *see Foster*, 522 U.S. at 73–74.

Voters make their "final selection" on election day under Illinois law because the voter's mail ballot and certification must be deposited in the mail and postmarked "no later than election day." 10 Ill. Comp. Stat. Ann. § 5/19-8(c). After the ballot and attached certification have been completed and mailed—in other words, removed from the voter's custody and control—the voter has made their "final selection" and can neither alter nor withdraw the ballot.[5] And once that has happened, the purposes of the Election Day Statutes as described in *Foster* are fulfilled.

It is, of course, 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; *see also Bush v. Gore*, 531 U.S. 98, 116 (2000) (Rehnquist, C.J., Scalia & Thomas, JJ., concurring) (cataloguing administrative actions occurring in Florida after election day to conclude the election process). Bost seemingly understands that *some* actions must take place after election day. Bost Br. at 30–31; Dkt. 33 at 7 n.7. But he offers no justification for his arbitrary selection of "receipt" as the point at which "final selection" occurs. *See Millsaps*, 259 F.3d at 545–46, ("With so many administrative actions necessary under [state] law to finalize the voters' preference for a candidate, the plaintiffs' focus on the single act of receiving a ballot from a voter presents an unnatural and stilted conception of the actions taken by officials under [the state's] election laws and loses sight of the fact that an official's mere receipt of a ballot without more is not an act meant to make a final selection.").

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[5] That simple fact distinguishes *mailed* ballots from a "ballot sitting on a kitchen table." Bost Br. at 30–31.

Bost's position is thus inconsistent not only with the *Foster* Court's "refusal to give a hyper-technical meaning to 'election,'" but also with common sense and "universal, longstanding practice" of post-election day ballot processing. *Bomer*, 199 F.3d at 776.

3. Bost's interpretation of the Election Day Statutes would be disenfranchising.

As one post-*Foster* appellate court concluded, "we cannot conceive that Congress intended the federal Election Day Statutes to have the effect of impeding citizens in exercising their right to vote." *Bomer*, 199 F.3d at 777 (citing Cong. Globe, 42d Cong., 2d Sess. 3407–08 (1872)); *accord Millsaps*, 259 F.3d at 545 ("[A]ll courts that have considered the issue have viewed statutes that facilitate the exercise of the fundamental right of voting as compatible with the federal statutes."). The Receipt Deadline facilitates Illinoisans' right to vote by ensuring that all votes cast by the election day prescribed by Congress will be counted.

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In stark contrast, Bost's position would disenfranchise potentially hundreds of thousands of eligible Illinois voters who cast otherwise lawful ballots on or before election day. *See* A5. By ensuring that voters who cast their ballots by election day are not arbitrarily disenfranchised including for no other reason than because the postal system fails to deliver ballots in a timely manner, the Receipt Deadline "further[s] the important federal objective of reducing the burden on citizens to exercise their right to vote . . . without thwarting other federal concerns." *Bomer*, 199 F.3d at 777.

Bost's position would also have substantial negative ramifications for overseas and military voters. *See* U.S. Br. at 23-28. As Bost acknowledges, courts frequently extend ballot receipt deadlines to remedy violations of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Bost. Br. at 37. But as Bost also argues, "UOCAVA does not expressly authorize post-election receipt of UOCAVA ballots." Bost. Br. at 37. If Bost's reading of the Election Day

Statutes were correct, then extending ballot receipt deadlines for military voters would run afoul of the Election Day Statutes without any specific authorization elsewhere in federal law. *Cf. Perkins v. City of Chi. Heights*, 47 F.3d 212, 217–18 & n.4 (7th Cir. 1995) (recognizing that judicially-imposed consent decree must both remedy a violation of *and comply with federal law*) (emphasis added).[6] That cannot be so, and Bost's counsel conceded as much at oral argument before the district court.[7]

4. The remaining arguments on the merits fail.

Aside from the plain text of the Election Day Statutes and their over-reliance on *Foster*, Bost and amicus RITE cobble together a motley assortment of arguments based on misinterpreted history, misapplied interpretive methodology, and misguided policy preferences. Each should be rejected.

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First, Bost relies on two brief references to state court cases to argue that "[a] ballot is neither 'cast' nor a 'vote' when it is deposited in the mail." Bost Br. at 30. But neither of these

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[6] Similarly, when a federal district court in Wisconsin extended Wisconsin's ballot receipt deadline for the 2020 primary election because of delays due to the COVID-19 pandemic, a three-judge panel of this Court declined to stay that order. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1539 & 20-1545, 2020 WL 3619499 (7th Cir. Apr. 3, 2020) (unpublished disposition). And though a later panel stayed a similar order for the general election, it did so on the ground that the order was entered too close to the election. *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020). The RNC intervened in that case and argued to obtain that stay. There was never any suggestion that the district court's order ran afoul of the Election Day Statutes. Although obviously not precedential, it is also worth noting that in that earlier case, Chief Justice Roberts, in his concurrence in the denial of an application to vacate that stay, emphasized that federal court alteration of state law ballot receipt deadlines is a "federal intrusion on state lawmaking processes." *Democratic Nat'l Comm. v. Wis. State Leg.*, 141 S. Ct. 28 (Mem.) (Roberts, C.J., concurring in denial of application to vacate stay). Illinois, like many other states, have properly exercised that lawmaking process to allow for the counting of ballots that are voted prior to election day, but arrive in the mail sometime after.

[7] "There are certain provisions . . . that provide options where a State has failed to comply with UOCAVA, and yes, we don't have any express carve outs, but . . . Federal Courts still have the authority to extend the receipt process when there is shown to be a Federal violation." Dkt. 74 at 34–35 (Tr. of Proceedings).

cases provide any support to his claim. *Maddox v. Board of State Canvassers* held only that, as a matter of decades-old *Montana* law, "voting is done not merely by marking the ballot but by having it delivered to the election officials and deposited in the ballot box before the closing of the polls on election day." 149 P.2d 112, 115 (Mont. 1944). Similarly, *Bloome v. Hograeff*, 61 N.E. 1071 (Ill. 1901), only addressed the counting of what were effectively provisional ballots. *Id.* at 1072.

Next, Bost provides a lengthy historical argument in support of the contention that "the 'final act of selection' means ballot receipt." Bost Br. at 32–35. But the Receipt Deadline is entirely consistent with the various historical definitions that Bost cites. Election day is indeed "the day of a public choice of officers," *Id.* at 32–33 (quoting 19th Century dictionaries), as it is the day by which the public must make its choice.

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Amicus RITE's attempts to bolster Bost's arguments are similarly unpersuasive. RITE argues that the Receipt Deadline is akin to leaving "polling locations open for two weeks after Election Day . . . so long as [voters] can establish . . . that they had made up their minds before the close of Election Day." ECF No. 10 ("RITE Br.") at 4–5. This analogy is inapt because, unlike RITE's hypothetical ballots, a mail ballot completed, mailed, and postmarked before the close of election day is final and cannot be changed, without any "further act [to be] done" by the voter. *Foster*, 522 U.S. at 70.

RITE also severely overstates the weight the district court placed on its brief recognition that Congress has not intervened to alter the ballot receipt rules in Illinois or other states. RITE Br. at 11. But more importantly, RITE confuses congressional *inaction* on particular legislation with congressional *acquiescence* in a longstanding interpretation of an existing statute. The latter, though not dispositive, can be a useful interpretive tool. *United States v. Sanapaw*, 366 F.3d 492, 495 (7th Cir. 2004); *see also Wis. Cent., Ltd. v. Shannon*, 539 F.3d 751, 765 (7th Cir. 2008)

("not[ing] that for fifteen years, the Sixth Circuit's opinion has persisted without meriting a response by Congress"). And as the district court explained, many states have for many years had similar receipt deadlines and "Congress has never stepped in and altered the rules." A25.

Oddly enough, immediately after arguing that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," RITE Br. at 12 (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002)), RITE cites Congress's rejection of an amendment that would have permitted voters to *cast* ballots—that is, mark and mail them—after election day. RITE Br. at 12–13. But even if the Court were to give weight to the rejection of that proposal, it says little about the Receipt Deadline, which requires votes to be marked and mailed by election day. *See supra* Section II.A.1.

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Finally, RITE spends several pages denouncing forthcoming "[s]ignificant [m]ischief" and the "Pandora's Box" opened by the Receipt Deadline. *See* RITE Br. at 16–22. But the statute is nearly twenty years old, and twenty other jurisdictions have similar laws. In all that time, and across all of these jurisdictions, this "Pandora's Box" has proved entirely uneventful. RITE's suggestion that affirming the decision below will cause states to take unspecified "greater liberties," *id.* at 21, is both speculative and irrelevant.

B. The Receipt Deadline does not burden the Plaintiffs' constitutional rights.

Bost's claims that the Receipt Deadline violates both the Plaintiffs' right to vote and Bost's right to stand for office protected by the First and Fourteenth Amendments are without merit, because nothing about the law makes it harder to cast a vote or harder to run for office. Alleged violations of the right to vote and right to stand for office are reviewed under the *Anderson-Burdick* test. *See Tully v. Okeson*, 977 F.3d 608, 615 (7th Cir. 2020); *Gill v. Scholz*, 962 F3d 360, 366–67 (7th Cir. 2020). The first step in the analysis is to determine whether the right to vote has been

impacted at all. *See Tully,* 977 F.3d at 616. Laws that do not make it harder to vote, do not implicate the right to vote. *Id.* at 611, 616. The same is true of laws that do not impede a candidate's ability to stand for office.

Far from making it harder for anyone to cast a ballot, the Receipt Deadline ensures that qualified voters are not disenfranchised merely because their timely-cast and mailed ballot is not delivered to election officials until shortly after election day. It accordingly *protects* the right to vote; it will only be if Bost *succeeds* in his challenge that the right to vote will be impeded. Similarly, Bost has thoroughly failed to allege any cognizable basis for finding that the Receipt Deadline injures him as a candidate at all, much less that it makes it harder for him to run for office.

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Bost does not contend otherwise. Instead, he largely repeats his standing arguments based on vote dilution and resource diversion to argue that the Receipt Deadline burdens his constitutional rights or impedes his right to stand for office. But for the reasons already explained, those allegations are insufficient to establish the minimum injury required by Article III—let alone a "severe burden" on Plaintiffs' rights, as Bost claims. Moreover, his vote dilution argument hinges entirely on whether ballots received after election day are "unlawful." For the reasons just explained, they are not. And his resource diversion argument is misplaced, as well as incomplete, for the reasons already discussed. *See supra* Section I.B.3.

On the other side of the ledger, Illinois has strong interests in ensuring that qualified voters who have already cast their votes can have those votes counted, and in avoiding the extensive voter confusion that would follow if the law was suddenly changed to now require rejection of all ballots received by election officials in the mail after election day, regardless of whether they were timely

cast and mailed.[8] "These state interests constitute the very backbone of our constitutional scheme—the right of the people to cast a meaningful ballot." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1084 (10th Cir. 2018); *see also Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944, 949 (7th Cir. 2019) (recognizing that states have an interest in "orderly and fair elections"); *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991) ("Avoiding voter confusion is also a compelling State interest.").

The Receipt Deadline sets a clear, predictable rule for voters to know when they must mail their ballot to ensure that it is counted, allowing them to vote with as much information as possible and without having to project whether they may encounter significant mail delays.[9] Where the rule has been in place for nearly two decades, Bost's requested relief would surely defeat both voters' expectations and the State's interest in orderly administration of elections.

Even if the Receipt Deadline could be evaluated within the *Anderson-Burdick* framework—any burden would be "slight" for the same reasons just discussed. *Acevedo*, 935 F.3d at 948. And the Receipt Deadline clearly advances the State's interests in guarding against the disenfranchisement of lawful voters and avoiding voter confusion. It is therefore easily justified by Illinois' "need for orderly and fair elections." *Id.* (quotation marks omitted).

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CONCLUSION

The Court should affirm.

[8] Notably, the Receipt Deadline and the federal Election Day Statutes share common purposes in *expanding* the franchise and *protecting* the right to vote. *See supra* Section II.A.3.

[9] In 2020, mail delivery issues in Illinois left some in Chicago without mail delivery for up to two weeks. *See* Aug. 6, 2020 Letter from U.S. Reps. to Postmaster General DeJoy, available at https://www.durbin.senate.gov/imo/media/doc/Letter%20to%20PMG%20DeJoy%20Mail%20Delays%20Final.pdf (last visited Dec. 5, 2023).

Dated: December 8, 2023

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(c) because, according to the word count function of Microsoft Office Word 365, this brief contains 6,509 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 12 point Times New Roman for the main text and footnotes.

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Dated: December 8, 2023

/s/ Elisabeth C. Frost
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CERTIFICATE OF SERVICE

I, Elisabeth C. Frost, an attorney, hereby certify that on December 8, 2023, I caused the **Amicus Brief of the Democratic Party of Illinois Supporting Defendant-Appellees** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (i)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause fifteen copies of the above cited brief to be transmitted to the Court via UPS overnight delivery, delivery charge prepaid within seven days of that notice date.

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