

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

MICHAEL J. BOST; LAURA)	
POLLASTRINI; and SUSAN SWEENEY,)	
)	
Plaintiffs,)	
)	Case No. 22-cv-2754
v.)	
)	Honorable John F. Kness
THE ILLINOIS STATE BOARD OF)	
ELECTIONS and BERNADETTE)	
MATTHEWS, in her capacity as the)	
Executive Director of the Illinois State)	
Board of Elections,)	
)	
Defendants.)	

**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ STATEMENT OF MATERIAL FACTS
IN SUPPORT OF PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendants, the Illinois State Board of Elections and Bernadette Matthews, as the only Defendants named in this action, by their attorney, Kwame Raoul, Attorney General of the State of Illinois, hereby respond to Plaintiffs’ Statement of Material Facts in Support of Plaintiffs’ Motions for Partial Summary Judgment. In responding to Plaintiffs’ statements, Defendants do not concede that they are material for purposes of summary judgment.

1. The United States Congress is authorized to establish the Time for conducting federal elections. Art. I, § 4 cl.1 and Art. II, § 1 cl. 4; *see also Foster v. Love*, 522 U.S. 67, 68-70 (1997).

RESPONSE: Undisputed that Art. I, § 4, Cl. 1 and Art. II, § 1, Cl. 4 of the Constitution authorize Congress to establish the time for conducting federal elections. Disputed to the extent the paragraph relies on *Foster v. Love*, 522 U.S. 67 (1997); citations to case law are legal argument and not an undisputed material fact for purposes of a Local Rule 56.1

Statement of Material Facts. *See Bordelon v. Chicago School Sch. Reform Bd. of Trustees,*

233 F.3d 524, 528-29 (7th Cir. 2000) (the purpose of a statement of material facts is defeated if the court is required to “wade through improper denials and legal argument in search of a genuinely disputed fact”); *see also Miller v. Ameritech Corp.*, No. 02-cv-2286, 2005 U.S. Dist. LEXIS 20266, *5 (N.D. Ill. Sep. 14, 2005) (“It is also improper to include legal argument or legal conclusions in the Local Rule 56.1 statements of material facts and responses thereto.”).

2. With respect to Congressional elections, U.S. Const., Article I, § 4 provides that: “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed by each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.”

RESPONSE: Undisputed.

3. With respect to presidential elections, Article II, § 1, Cl. 4 provides: “The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”

RESPONSE: Undisputed.

4. These two clauses give “Congress ‘the power to override state regulations’ by establishing uniform rules for federal elections, binding on the States.” *Foster*, 522 U.S. at 69 (citing *U.S. Term Limits v. Thornton*, 514 U.S. 779, 832-833 (1995)).

RESPONSE: Disputed to the extent the paragraph relies on *Foster v. Love*, 522 U.S. 67 (1997) or other case law; citations to case law are legal arguments and not an undisputed material fact for purposes of a Local Rule 56.1 Statement of Material Facts and, therefore, should not be considered. *See Bordelon v. Chicago School Sch. Reform Bd. of Trustees*, 233 F.3d 524, 528-29 (7th Cir. 2000) (the purpose of a statement of material facts is defeated if

the court is required to “wade through improper denials and legal argument in search of a genuinely disputed fact”); *see also Miller v. Ameritech Corp.*, No. 02-cv-2286, 2005 U.S. Dist. LEXIS 20266, *5 (N.D. Ill. Sep. 14, 2005) (“It is also improper to include legal argument or legal conclusions in the Local Rule 56.1 statements of material facts and responses thereto.”).

5. In January 1845, Congress passed the “Presidential Election Day Act,” which is now codified as 3 U.S.C. § 1. 28 Cong. Ch. 1, 5 Stat. 721. That provision currently provides: “The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.” 3 U.S.C. § 1.

RESPONSE: Undisputed.

6. In 1872, Congress passed what is now 2 U.S.C. § 7, which established that same day as the uniform Election Day for congressional elections. *Foster*, 522 U.S. at 69. That provision currently provides: “The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.” 2 U.S.C. § 7.

RESPONSE: Undisputed; however, any reliance on *Foster v. Love*, 522 U.S. 69 (1997) outside of statutory history is a legal argument and not an undisputed material fact for purposes of a Local Rule 56.1 Statement of Material Facts and, therefore, should not be considered. *See Bordelon v. Chicago School Sch. Reform Bd. of Trustees*, 233 F.3d 524, 528-29 (7th Cir. 2000) (the purpose of a statement of material facts is defeated if the court is required to “wade through improper denials and legal argument in search of a genuinely

disputed fact”); *see also Miller v. Ameritech Corp.*, No. 02-cv-2286, 2005 U.S. Dist. LEXIS 20266, *5 (N.D. Ill. Sep. 14, 2005) (“It is also improper to include legal argument or legal conclusions in the Local Rule 56.1 statements of material facts and responses thereto.”).

7. After adopting the Seventeenth Amendment, Congress passed what is now 2 U.S.C. § 1 in 1914, aligning popular Senate elections with biennial House elections. *Foster*, 522 U.S. at 69-70; *see also* Senators’ Election Act of 1866, 14 Stat. 243 (establishing Election Day for senators prior to the Seventeenth Amendment).

RESPONSE: Undisputed; however, any reliance on *Foster v. Love*, 522 U.S. 69 (1997) outside of statutory history is a legal argument and not an undisputed material fact for purposes of a Local Rule 56.1 Statement of Material Facts and, therefore, should not be considered. *See Bordelon v. Chicago School Sch. Reform Bd. of Trustees*, 233 F.3d 524, 528-29 (7th Cir. 2000) (the purpose of a statement of material facts is defeated if the court is required to “wade through improper denials and legal argument in search of a genuinely disputed fact”); *see also Miller v. Ameritech Corp.*, No. 02-cv-2286, 2005 U.S. Dist. LEXIS 20266, *5 (N.D. Ill. Sep. 14, 2005) (“It is also improper to include legal argument or legal conclusions in the Local Rule 56.1 statements of material facts and responses thereto.”).

8. The date remains the single, national “day for the election” for electing members of Congress and choosing presidential and vice-presidential electors. 2 U.S.C. § 1; 2 U.S.C. § 7; and 3 U.S.C. § 1.

RESPONSE: Disputed. This statement is a legal argument and not an undisputed material fact for purposes of a Local Rule 56.1 Statement of Material Facts and, therefore, should not be considered. *See Bordelon v. Chicago School Sch. Reform Bd. of Trustees*, 233 F.3d 524, 528-29 (7th Cir. 2000) (the purpose of a statement of material facts is defeated if the

court is required to “wade through improper denials and legal argument in search of a genuinely disputed fact”); *see also Miller v. Ameritech Corp.*, No. 02-cv-2286, 2005 U.S. Dist. LEXIS 20266, *5 (N.D. Ill. Sep. 14, 2005) (“It is also improper to include legal argument or legal conclusions in the Local Rule 56.1 statements of material facts and responses thereto.”).

9. “By establishing a particular day as ‘the day’ on which these actions must take place, the statutes simply regulate the time of the election[.]” *Foster*, 522 U.S. at 71-72.

RESPONSE: Disputed; the citation to *Foster v. Love*, 522 U.S. 67 (1997) is a legal argument and not an undisputed material fact for purposes of a Local Rule 56.1 Statement of Material Facts and, therefore, should not be considered. *See Bordelon v. Chicago School Sch. Reform Bd. of Trustees*, 233 F.3d 524, 528-29 (7th Cir. 2000) (the purpose of a statement of material facts is defeated if the court is required to “wade through improper denials and legal argument in search of a genuinely disputed fact”); *see also Miller v. Ameritech Corp.*, No. 02-cv-2286, 2005 U.S. Dist. LEXIS 20266, *5 (N.D. Ill. Sep. 14, 2005) (“It is also improper to include legal argument or legal conclusions in the Local Rule 56.1 statements of material facts and responses thereto.”).

10. Prior to 2005, 10 ILCS 5/19-8 required that absentee ballots be received by state election officials on or before Election Day. 2005 Ill. Laws 557 (P.A. 94-557).

RESPONSE: Undisputed.

11. In 2005, 10 ILCS 5/19-8 was amended to allow absentee ballots received “after the close of the polls on election day” but before “the close of the period for counting provisions ballots” to be counted as if cast and received on or before Election Day. *See* 10 ILCS 5/19-8(c); and 2005 Ill. Laws 557 (P.A. 98-1171).

RESPONSE: Undisputed.

12. In 2013, Illinois again amended 10 ILCS 5/19-8(c) when Illinois adopted its version of vote by mail (“VBM”). 2013 Ill. Laws 1171 (P.A. 98-1171).

RESPONSE: Undisputed.

13. 10 ILCS 5/18A-15(a) provides that state election officials shall complete the “the validation and counting of provisions ballots within 14 calendar days of the day of the election.”

RESPONSE: Undisputed, except that the word “provisions” should read “provisional.”

14. Read together, 10 ILCS 5/18A-15(a) and 10 ILCS 5/19-8(c) mean that VBM ballots received up to 14 calendar days after Election Day shall be counted as if cast and received on or before Election Day.

RESPONSE: Disputed to the extent that this implies that all ballots received by election officials after the national Election Day will necessarily be counted. 10 ILCS 5/19-8(c) provides that ballots received after Election Day but before the close of the period for counting provisional ballots shall be counted if the ballot was postmarked no later than election day, or the ballot certification is completed on or before Election Day. A ballot received after Election Day but before the close of the period for counting provisional ballots should not be counted if the ballot was postmarked after Election Day, or the ballot certification was completed after Election Day. See 10 ILCS 5/19-8(c).

15. The practice of accepting ballots received up to 14 days after the election was in effect for the November 3, 2020 federal election. 10 ILCS § 5/19-8(c).

RESPONSE: Undisputed that the provision of 10 ILCS 5/19-8(c) was in effect during the November 3, 2020, federal election. Disputed to the extent that this implies that all ballots received by election officials after Election Day will necessarily be counted. See 10 ILCS

5/19-8(c) (requiring that ballots received after Election Day but before the close of the period for counting provisional ballots shall be counted if the ballot was postmarked no later than election day, or the ballot certification is completed on or before Election Day).

16. Prior to that election, on November 2, 2020, Defendant State Board issued a press advisory warning that it was “likely” the results for some races would change as ballots were received after Election Day. “*Media Advisory: Heavy Mail Voting Could Affect Unofficial Election Results*,” Illinois State Board of Elections, Nov. 2, 2020, <https://bit.ly/3y9qCWU>, (last visited May 2, 2022), attached as Exhibit 2. Accordingly, public statements by Defendant State Board show it believed that the number of VBM ballots received after Election Day in 2020 could materially affect the final outcome of the election.

RESPONSE: Disputed as the cited source does not support the statement that the State Board issued an advisory “warning” that it was “likely” the results for some races would change as ballots were received after Election Day or that the State Board accordingly believed that the number of VBM ballots received after Election Day in 2020 could materially affect the final outcome of the election.

17. In that same press release, Defendant State Board announced it had received approximately 1,759,245 mailed ballots prior to Election Day. *Id.*

RESPONSE: Defendants dispute that the State Board of Elections is the entity that receives mailed ballots. Rather, such ballots are received by the local election authorities, which then transmit to the Board of Elections certain information set forth by statute. See 10 ILCS 5/19-20.

18. In its December 4, 2020, press release announcing certified results from the November 3, 2020 election, the State Board announced that there had been a total of 6,098,729

votes in the 2020 election, of which 2,025,662 were VBM ballots. “*Record Number of Votes Cast, Turnout tops 2016 as Board of Elections Certifies 2020 General Election Results*,” Illinois State Board of Elections, Dec. 4, 2020, <https://bit.ly/3y9tumE> (last visited May 2, 2022), attached to as Exhibit 3.

RESPONSE: Undisputed that the cited source is consistent with this statement.

19. Read together, these releases indicate that Illinois received 266,417 ballots during the period of November 3-17, 2020. *Id.* These totals indicate that as many as 4.37% of the 6,098,729 votes casts during the 2020 federal election were received after Election Day.

RESPONSE: Undisputed that cited sources are consistent with this statement.

20. November 8, 2022 is federal Election Day on which Illinois voters will choose the State’s next congressional delegation. 2 U.S.C. § 7.

RESPONSE: Undisputed that the next congressional election is November 8, 2022.

21. Illinois practice of counting VBM ballots received by election officials after the national Election Day will be in force and effect during the upcoming November 8, 2022, congressional elections. 10 ILCS 5/19-8(c).

RESPONSE: Undisputed that 10 ILCS 5/19-8(c) will be in force and effect during the upcoming November 8, 2022, congressional elections; further undisputed that pursuant to 10 ILCS 5/19-8(c), ballots received after Election Day but before the close of the period for counting provisional ballots shall be counted if the ballot was postmarked no later than election day, or the ballot certification is completed on or before Election Day. Disputed to the extent that this paragraph implies that all ballots received by election officials after the national Election Day will necessarily be counted; a ballot received after Election Day but before the close of the period for counting provisional ballots should not be counted if the

ballot was postmarked after Election Day, or the ballot certification was completed after Election Day. *See* 10 ILCS 5/19-8(c).

22. Ballots received by election officials after Election Day but before November 23, 2022, will be canvassed and included in the certified results. 10 ILCS 5/19-8(c).

RESPONSE: Undisputed that pursuant to 10 ILCS 5/19-8(c), ballots received after Election Day but before the close of the period for counting provisional ballots shall be counted if the ballot was postmarked no later than election day, or the ballot certification is completed on or before Election Day. Disputed to the extent that this paragraph implies that all ballots received by election officials after the national Election Day will necessarily be counted; a ballot received after Election Day but before the close of the period for counting provisional ballots should not be counted if the ballot was postmarked after election day, or the ballot certification was completed after Election Day. *See* 10 ILCS 5/19-8(c).

23. All Plaintiffs are Illinois registered voters, who voted in the November 3, 2022, federal election and intend to vote during the November 8, 2022, federal election. Bost Decl., ¶ 2; Pollastrini Decl., ¶ 2; Sweeney Decl., ¶ 2.

RESPONSE: Undisputed.

24. Plaintiff Congressman Michael Bost is currently a member of the United States House of Representatives and represents Illinois' 12th Congressional District. Bost Decl., ¶ 3. He successfully ran for re-election in the November 3, 2020 general federal election. *Id.* at & 4.

RESPONSE: Undisputed.

25. As a Congressional candidate in the November 3, 2020 general federal election, Plaintiff Bost spent money, time, and resources to monitor and respond as needed to ballots

received by state election officials after the national Election Day, and otherwise relied on 10 ILCS 5/19-8(c) and other relevant provisions of the Illinois Election Code in organizing, funding, and running his campaign. Bost Decl., ¶¶ 9-19.

RESPONSE: Undisputed that Plaintiff Bost's Declaration is consistent with this statement.

26. Some of the ballots received after the November 3, 2020 Election Day were received in Plaintiff Bost's election for Illinois' 12th Congressional District. Bost Decl., at ¶ 21.

RESPONSE: Undisputed that Plaintiff Bost's Declaration is consistent with this statement.

27. On June 28, 2022, Plaintiff Bost was again nominated by Republican voters as the party's candidate for the November 8, 2022 election for Illinois' 12th Congressional District. Bost Decl., ¶ 5.

RESPONSE: Undisputed.

28. Before the recent redistricting, the 12th District included 12 Illinois Counties, in whole or in part. *Id.* Following the recent redistricting, the 12th District now includes 34 counties, in whole or in part. *Id.*

RESPONSE: Undisputed.

29. Ballots received by election officials after Election Day on November 8, 2022, but before November 23, 2022, will be included in the certified results related to Congressman Bost's 12th Congressional District in Illinois. 10 ILCS 5/19-8(c).

REPOSENSE: Undisputed that pursuant to 10 ILCS 5/19-8(c), ballots received after Election Day but before the close of the period for counting provisional ballots shall be counted if the ballot was postmarked no later than election day, or the ballot certification is completed on or before Election Day. Disputed to the extent that this paragraph implies that all ballots received by election officials after the national Election Day will necessarily

be counted; a ballot received after Election Day but before the close of the period for counting provisional ballots should not be counted if the ballot was postmarked after Election Day, or the ballot certification was completed after Election Day. See 10 ILCS 5/19-8(c).

30. Plaintiff Pollastrini intends to vote in the 2022 and 2024 federal elections. Pollastrini Decl., at ¶ 19.

RESPONSE: Undisputed that Plaintiff Pollastrini's Declaration is consistent with this statement.

31. Plaintiff Pollastrini is currently the Illinois Republican State Central Committeeperson for the 14th Congressional District, and was appointed by the Illinois State GOP Chairman as Chairwoman for the Illinois Republican Party's Presidential Electors Committee. Pollastrini Decl., at ¶ 7.

RESPONSE: Undisputed that Plaintiff Pollastrini's Declaration is consistent with this statement.

32. During the 2020 federal general election, Plaintiff Pollastrini served as a Republican nominee for presidential and vice-presidential elector for Illinois. Pollastrini Decl., ¶ 4.

RESPONSE: Undisputed that Plaintiff Pollastrini's Declaration is consistent with this statement.

33. Plaintiff Pollastrini is seeking election as the Illinois Republican State Central Committeeperson for the 11th Congressional District, in July 2022. Pollastrini Decl., ¶ 20.

RESPONSE: Undisputed that Plaintiff Pollastrini's Declaration is consistent with this statement.

34. Plaintiff Pollastrini intends to seek reappointment as the Chairwoman for the Illinois Republican's Presidential Electors Committee in 2024, and reappointment as an at-large Illinois presidential elector for the November 5, 2024, presidential election. Pollastrini Decl., ¶ 21.

RESPONSE: Undisputed that Plaintiff Pollastrini's Declaration is consistent with this statement.

35. Plaintiff Sweeney is a resident of Cook County, Illinois, and a registered Illinois voter who voted in the 2020 congressional and presidential elections. Sweeney Decl., ¶ 16.

RESPONSE: Undisputed that Plaintiff Sweeney's Declaration is consistent with this statement in Paragraphs 2 and 16.

36. Plaintiff Sweeney intends to vote in the 2022 congressional election as well as the 2024 presidential and congressional elections. Sweeney Decl., ¶ 2. Plaintiff Sweeney was a Republican presidential elector during the 2020 presidential election. She intends to seek reappointment as an Illinois presidential elector for the November 5, 2024, presidential election.

RESPONSE: Defendants object to this statement of facts because it violates Local Rule 56.1(a)(2) by containing more than one statement of fact. See, e.g., *Malec v. Sanford*, 191 F.R.D. 581, 583 (N.D. Ill. 2000) (noting that the numbered paragraphs "should contain only one or two individual allegations"). Undisputed that Plaintiff Sweeney's Declaration states that she intends to vote in the 2022 congressional election as well as the 2024 presidential and congressional elections. Disputed that Plaintiff Sweeney was a Republican presidential elector during the 2020 presidential election and that she intends to seek reappointment as an Illinois presidential elector for the November 5, 2024, presidential election as these statements are not supported by Plaintiff Sweeney's Declaration.

37. Defendant Illinois State Board of Elections is an independent state agency created under the laws of the State of Illinois. 10 ILCS 5/1A-1. Defendant State Board is responsible for supervising the administration of election laws throughout Illinois. 10 ILCS 5/1A-8.

RESPONSE: Undisputed.

38. Defendant Bernadette Matthews is the Executive Director of the Illinois State Board of Elections and the Chief State Election Official of the State of Illinois. 26 Ill. Adm. Code § 216.100(b)-(c); 52 U.S.C. § 20509.

RESPONSE: Undisputed.

39. Defendants are state actors and have acted, and will continue to act, under color of state law so that ballots received by state election officials after the November 8, 2022, national Election Day will be included in the state's certified election results.

RESPONSE: Undisputed.

August 22, 2022

Respectfully submitted,

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